Date: 20081031

Docket: A-583-07

Citation: 2008 FCA 338

CORAM: **DÉCARY J.A.**
SEXTON J.A.
SHARLOW J.A.

BETWEEN:

NATIVE CHILD AND FAMILY SERVICES OF TORONTO

Applicant

and

COMMUNICATION, ENERGY, AND PAPERWORKERS UNION OF CANADA

Respondent

and

THE ATTORNEY GENERAL OF ONTATIO

Intervener

Heard at Toronto, Ontario, on September 30, 2008.

Judgment delivered at Ottawa, Ontario, on October 31, 2008.

REASONS FOR JUDGMENT BY: SEXTON J.A.

CONCURRED IN BY: DÉCARY J.A.
SHARLOW J.A.

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REASONS FOR JUDGMENT

SEXTON J.A.

[1] This case is about whether a federal or a provincial board has jurisdiction to govern the labour relations of the applicant ("Native Child"), a provincial children's aid society. If it is the latter, then the Canadian Industrial Relations Board (CIRB) acted without jurisdiction in issuing a certificate to the respondent union. For the reasons that follow, I conclude that Native Child's labour relations are subject to provincial jurisdiction.

[2] It is common ground that Native Child is a children's aid society established pursuant to the Ontario *Child and Family Services Act*. While apparently not obliged by statute to do so, Native Child focuses on providing child protection and family support services to members of Toronto's aboriginal community. It strives to do so in a way that takes into account aboriginal culture and models of the family.

[3] Native Child provides its services entirely within the city of Toronto (i.e. all services are off-reserve), and to clients who self-identify as aboriginal. Approximately 70% of its clients are status Indians, and the remaining 30% are of mixed ancestry or Métis. The agency shares its jurisdiction with the Children's Aid Society of Toronto, the Catholic Children's Aid Society of Toronto, and the Jewish Children's Aid Society. Aboriginal persons living in Toronto, including status Indians, may use any service they wish; they are not required to use Native Child.

[4] To date, the federal government has had no role in the regulation or governance of Native Child. There are no applicable instruments in place between the federal and provincial governments concerning the society. There is also no formal band involvement in the society's governance. In practice the majority of Native Child's directors have been aboriginal persons, and a majority of its employees are also aboriginal.

[5] There was some dispute at the hearing as to whether any of Native Child's funding was provided by the federal government, complicated by the fact that both parties relied largely on

findings of fact from a 1995 hearing of the Ontario Labour Relations Board. There was some suggestion that the federal government provided some funds to the province, which were in turn used to fund particular programs provided by Native Child. However, the respondent conceded in its written submissions that nothing turns on this fact.

[6] In 1995, the Ontario Labour Relations Board (OLRB) certified the Canadian Union of Public Employees (CUPE) as the bargaining agent for Native Child's employees (*Canadian Union of Public Employees v. Native Child and Family Services of Toronto,* [1995] O.L.R.D. No. 4298). That certification was later revoked, for reasons not germane to this appeal. In its decision, the OLRB concluded that Native Child's labour relations were subject to provincial jurisdiction. At that time, the employer contested the OLRB's jurisdiction, arguing that Native Child's labour relations were federal, the opposite position it now takes before this court.

[7] I mention the employer's changed position to underscore that this is fundamentally a case about labour relations, and whether a provincial or federal labour board will have jurisdiction to certify a bargaining unit for Native Child. There is no suggestion that aboriginal rights or culture will be affected in any practical way by whether its labour relations are governed by the federal board or the provincial board. Indeed, as will be discussed in greater detail below, this is not the relevant legal question. It is settled law that labour relations themselves are not a matter impairing the status or capacity of Indians (*Four B Manufacturing Ltd. v. United Garment Workers of America,* [1980] 1 S.C.R. 1031).

[8] In the present case, the respondent filed a complaint with the CIRB against Native Child, alleging unfair labour practices related to the organizing of its employees, on January 5, 2007. It later filed an application to be certified as a bargaining agent for Native Child's employees on March 28, 2007. The Attorney General of Ontario intervened in the proceeding. The Board did not hold an oral hearing, as is its right, and rendered its decision on the basis of written submissions by the parties and the intervener. By its order dated November 23, 2007, the Board certified the respondent as the unit's bargaining agent. In doing so, it concluded that it had constitutional jurisdiction over Native Child's labour relations.

[9] The Board concluded that Native Child's labour relations were federal, since its activities "related to and are at the core of Indianness", within the meaning of s. 91(24) of the *Constitution Act, 1867*. In its reasons, the Board stressed repeatedly that the services provided by Native Child were specifically intended to meet the unique needs of Toronto's aboriginal community, by taking into account aboriginal values and models of the family. It also noted that employees were required to have training in aboriginal culture, and that Native Child held itself out, through its website, to be "under the direct control and management of the native community". Borrowing a phrase from *Sioux Lookout Meno-ya-Win Health Centre*, [2005] C.I.R.B. No. 326, the Board concluded that "in these circumstances, 'Indianness assumes *such significance* that this aspect of the service alone causes it to be viewed as an integral part of the federal jurisdiction over Indians'" [emphasis in original].

[10] Native Child now seeks judicial review of the Board's decision before this court.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

[11] Section 91(24) of the *Constitution Act, 1867*, & 31 Victoria, c. 3. (U.K.) states:

91. … the exclusive Legislative authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, … 24. Indians, and lands reserved for the Indians.	91. […] l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir: […] Les Indiens et les terres réservées pour les Indiens.

[12] Section 92(13) of the Constitution states:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, … 13. Property and civil rights in the Province.	92. Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir: […] 13. La propriété et les droits civils dans la province;

[13] Section 88 of the *Indian Act*, R.S.C. 1985, c. I-5, enables provincial laws of general application to apply to "Indians" (that is, status Indians, as defined elsewhere in the Act), unless they conflict with the *Indian Act:*

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal and Statistical Management	88. Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la

Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.	présente loi ou la Loi sur la gestion financière et statistique des premières nations ou quelque arrêté, ordonnance, règle, règlement ou texte législatif d'une bande pris sous leur régime, et sauf dans la mesure où ces lois provinciales contiennent des dispositions sur toute question prévue par la présente loi ou la Loi sur la gestion financière et statistique des premières nations ou sous leur régime.

[14] Section 1 of the *Child and Family Services Act,* R.S.O. 1990, c. 11, sets out the overarching purposes of the Act:

1. (1) The paramount purpose of this Act is to promote the best interests, protection and well being of children.	1. (1) L'objet primordial de la présente loi est de promouvoir l'intérêt véritable de l'enfant, sa protection et son bien-être.
(2) The additional purposes of this Act, so long as they are consistent with the best interests, protection and well being of children, are:	(2) Dans la mesure où ils sont compatibles avec l'intérêt véritable de l'enfant, sa protection et son bien-être, les objets additionnels de la présente loi sont les suivants :
1. To recognize that while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent.	1. Reconnaître que même si les parents peuvent avoir besoin d'aide pour s'occuper de leurs enfants, cette aide devrait favoriser l'autonomie et l'intégrité de la cellule familiale et, dans la mesure du possible, être accordée par consentement mutuel.
2. To recognize that the least disruptive course of action that is available and is appropriate in a particular case to help a child should be considered.	2. Reconnaître que devrait être envisagé le plan d'action le moins perturbateur qui est disponible et qui convient dans un cas particulier pour aider un enfant.
3. To recognize that children's services should be provided in a manner that,	3. Reconnaître que les services à l'enfance devraient être fournis d'une façon qui, à la fois :
i. respects a child's need for continuity of care and for stable relationships within a family and cultural environment,	i. respecte les besoins de l'enfant en ce qui concerne la continuité des soins et des relations stables au sein d'une famille et d'un environnement culturel,
ii. takes into account physical, cultural, emotional, spiritual, mental and developmental needs and differences	

among children,

iii. provides early assessment, planning and decision-making to achieve permanent plans for children in accordance with their best interests, and

iv. includes the participation of a child, his or her parents and relatives and the members of the child's extended family and community, where appropriate.

4. To recognize that, wherever possible, services to children and their families should be provided in a manner that respects cultural, religious and regional differences.

5. To recognize that Indian and native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family. [Emphasis added.]

ii. tient compte des besoins des enfants sur le plan physique, culturel, affectif, spirituel et mental et sur le plan du développement ainsi que des différences qui existent entre les enfants à cet égard,

iii. prévoit une évaluation, une planification et une prise de décision précoces en vue d'arriver à des plans permanents pour les enfants qui soient dans leur intérêt véritable,

iv. inclut la participation de l'enfant, de son père, de sa mère, de ses parents et des membres de sa famille élargie et de sa communauté, si cela est approprié.

4. Reconnaître que, dans la mesure du possible, les services fournis à l'enfance et à la famille devraient l'être d'une façon qui respecte les différences culturelles, religieuses et régionales.

5. Reconnaître que les populations indiennes et autochtones devraient avoir le droit de fournir, dans la mesure du possible, leurs propres services à l'enfance et à la famille, et que tous les services fournis aux familles et aux enfants indiens et autochtones devraient l'être d'une façon qui tient compte de leur culture, de leur patrimoine, de leurs traditions et du concept de la famille élargie.

[Je souligne]

[15] Subsection 15(2) of the Act provides the authority for the province to establish a children's aid society:

15. (2) The Minister [of Child and Family Services] may designate an approved agency as a children's aid society for a specified territorial jurisdiction and for any or all of the functions set out in subsection (3), may impose terms and conditions on

15. (2) Le ministre peut désigner une agence agréée comme société d'aide à l'enfance dans un territoire précisé et il peut déterminer l'ensemble ou une partie des fonctions précisées au paragraphe (3) que cette société exercera. Il peut imposer des conditions dans l'acte de désignation et

a designation and may vary, remove or amend the terms and conditions or impose new terms and conditions at any time, and may at any time amend a designation to provide that the society is no longer designated for a particular function set out in subsection (3) or to alter the society's territorial jurisdiction.	les modifier, les annuler ou en imposer de nouvelles. Il peut modifier l'acte de désignation afin de préciser que la société n'est plus désignée pour exercer une fonction particulière précisée au paragraphe (3) ou que le territoire sur lequel elle exerce sa compétence n'est plus le même.

[16] Sections 141.2(1) and 213 of the Act set out certain duties on the part of children's aid societies to consult aboriginal communities, including a requirement that a band or community be given notice when an aboriginal child is placed for adoption. These duties are in accordance with the overarching purposes of the Act, set out in s. 1, that a child's culture, including in particular aboriginal culture, be taken into account in the provision of services under the Act:

141.2 (1) If a society intends to begin planning for the adoption of a child who is an Indian or native person, the society shall give written notice of its intention to a representative chosen by the child's band or native community.	141.2 (1)Si elle a l'intention de commencer à planifier l'adoption d'un enfant indien ou autochtone, la société donne un avis écrit de son intention à un représentant choisi par la bande de l'enfant ou sa communauté autochtone.
…	[…]
213. A society or agency that provides services or exercises powers under this Act with respect to Indian or native children shall regularly consult with their bands or native communities about the provision of the services or the exercise of the powers and about matters affecting the children, including, (*a*) the apprehension of children and the placement of children in residential care; (*b*) the placement of homemakers and the provision of other family support services;	213. La société ou l'agence qui fournit des services ou exerce des pouvoirs en vertu de la présente loi relativement à des enfants indiens ou autochtones entretient régulièrement des consultations avec les bandes ou les communautés autochtones sur la fourniture de ces services ou l'exercice de ces pouvoirs et sur des questions qui touchent les enfants, y compris notamment : *a*) l'appréhension d'enfants et la fourniture de soins en établissement;

(*c*) the preparation of plans for the care of children;

(*d*) status reviews under Part III (Child Protection);

(*e*) temporary care and special needs agreements under Part II (Voluntary Access to Services);

(*f*) adoption placements;

(*g*) the establishment of emergency houses; and

(*h*) any other matter that is prescribed.

b) le placement d'aides familiales et la fourniture d'autres services d'appoint à la famille;

c) l'élaboration de programmes relativement aux soins à fournir aux enfants;

d) les révisions de statut en vertu de la partie III (Protection de l'enfance);

e) les ententes relatives aux soins temporaires et aux besoins particuliers conclues en vertu de la partie II (Accès volontaire aux services);

f) les placements en vue d'adoption;

g) la création de foyers d'urgence;

h) d'autres questions prescrites.

ISSUE

[17] There is one issue in this application for judicial review: did the Board have the jurisdiction to issue a certificate to the respondent union? That is, are the labour relations of Native Child, a provincial children's aid society that provides services in manner cognizant of aboriginal culture, properly subject to provincial or federal jurisdiction?

ANALYSIS

[18] There is no dispute that correctness is the appropriate standard of review for this constitutional question (see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 58).

[19] In *Four B, supra,* the Supreme Court held that provincial jurisdiction over labour relations is the rule, with federal jurisdiction being an exception in circumstances where the employer's normal activities can be characterized as federal undertakings, services, or businesses. Justice Beetz wrote (at 1045):

> With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services, and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services, or businesses.

[20] The court went on to explain (at 1047), "the functional test is a particular method of applying a more general rule namely, that exclusive federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal jurisdiction over some other federal object."

[21] Thus, Native Child's labour relations will be provincial unless it can be shown that its regular activities form an integral part of exclusive federal jurisdiction over some other subject matter.

[22] The first step of the analysis is to determine which level of government has primary legislative authority over the undertaking. Currently, Native Child is entirely regulated by the province of Ontario, pursuant to the *Child and Family Services Act,* which suggests at first glance that the province has primary jurisdiction.

[23] The constitutionality of the *Child and Family Services Act* as a whole is not in issue. It is well-established that the provinces have legislative competence over child services, and the statute does not purport to deal with "Indians *qua* Indians". The Act is provincial legislation of general application. In order to establish that Native Child's operations are actually federal, the union must rely on the doctrine of interjurisdictional immunity. This concept requires the respondent to establish that while the province's legislation is otherwise valid, the activities of an aboriginal children's aid society would impair the core of the federal legislative power over Indians and lands reserved for Indians (s. 91(24) of the Constitution), and therefore that the Act is simply inapplicable insofar as it purports to establish and regulate an aboriginal children's aid society. This core is often referred to as "the core of Indianness".

[24] The respondent insists that it is not bringing into question the power of the province to establish and regulate Native Child in any aspect aside from its labour relations. Its position is that by engaging in activities with a direct impact on relationships within aboriginal families, and in turn aboriginal culture, Native Child is operating at the so-called "core of Indianness", and that therefore its labour relations are properly subject to federal jurisdiction. However, it follows logically that if Native Child's operations are at the "core of Indianness", then provincial legislation authorizing and regulating those activities must be an attempt to legislate that core. To determine which level of government has primary legislative authority over the undertaking, it is necessary to consider whether the *Child and Family Services Act* is immunized from application to aboriginal families.

[25] Section 88 of the *Indian Act* allows even provincial laws that strike at the "core of Indianness" to apply to Indians through the vehicle of referential incorporation into federal law. Thus, even if aspects of the *Child and Family Services Act* could be found to impair the "core of Indianness", it is possible that s. 88 would prevent provincial regulation of Native Child from being threatened. However, as I conclude that neither the Act, nor the society's activities, impair the "core of Indianness", the Act applies to Indians of its own force (*proprio vigore*). It is therefore unnecessary to consider the application of s. 88 of the *Indian Act*.

[26] The Supreme Court has recently changed the law of interjurisdictional immunity. In *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 50, the court made clear that provincial laws would not be immunized from operation unless they impair the "basic, minimum, and unassailable content" of a federal head of power; it is not sufficient for the provincial law to merely affect such subject matter, which was the previous test. Justices Binnie and LeBel, writing for an eight-member majority, framed the distinction as follows (at para. 48):

> The difference between "affects" and "impairs" is that the former does not imply any adverse consequence whereas the latter does…It is when the adverse impact of a law adopted by one level of government increases in severity from "affecting" to "impairing" (without necessarily "sterilizing" or "paralyzing") that the "core" competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before.

[27] It should also be noted that in *Canadian Western Bank*, the majority urged a limited application of the interjurisdictional immunity doctrine, urging that it be "applied with restraint" (at para. 67). I have approached the instant problem with this framework in mind.

[28] The previous test was established in *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 at 859-860, where the Supreme Court held that interjurisdictional immunity would apply where a law enacted by one level of government had an effect on a core competence of the other level of government. Justice Beetz, writing for the majority, expressly rejected the proposition that impairment was necessary:

> In order for the inapplicability of provincial legislation rule to be given effect, it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it. [Emphasis added.]

[29] This was how the law stood until 2007, when the Supreme Court adopted the "impairment" standard in *Canadian Western Bank.* While the Supreme Court, in *Kitkatla Band v. British Columbia*, 2002 SCC 31 at para. 70, in passing, used the phrase "impairing the status or capacity of Indians" in speaking of a law, it did not purport to change the test from "affects" to "impairs". Indeed, the phrase had appeared in older cases, before the Supreme Court laid down the "affects" standard in *Bell Canada* (see *Dick v. The Queen,* [1985] 2 S.C.R. 309 and *Kruger and Manuel v. The Queen*, [1978] 1 S.C.R. 104). However, it is important to point out that the significance attaching to this usage was not made clear until *Canadian Western Bank*, when the court expressly adopted the "impairment" standard and rejected the "affects" standard.

[30] The respondent has relied on several cases decided between 1988 and 2007, including *Tobique Band v. Sappier*, [1988] F.C.J. No. 435 (C.A.), *Sagkeeng Alcohol Rehab Centre Inc. v. Abraham*, [1994] 3 F.C. 449 (T.D.), *Brown v. New Brunswick Aboriginal Peoples Council*, 2003 FC 1181, and *Przbyszewski v. Métis Nation of Ontario*, 2004 FC 977.

[31] Most of these cases, on my reading, directed themselves at the question of whether the quality of "Indianness" was affected so as to attract federal jurisdiction. However, as they were decided prior to the Supreme Court's decision in *Canadian Western Bank*, those courts did not have to consider whether the "core of Indianness" was actually impaired by the operations of the agencies in question. I do not suggest that these cases were wrongly decided; however, this court must apply the doctrinal framework most recently enunciated by the Supreme Court in *Canadian Western Bank.*

[32] Applying the principle from that decision to the instant case, the respondent must establish that Native Child's activities, and provincial legislation enabling them, impair the so-called "core of Indianness". If it cannot, the Ontario law is not immunized, and it is clear that the province has primary jurisdiction over Native Child's operations.

[33] In *Canadian Western Bank*, Justices Binnie and LeBel wrote that "interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent" (at para. 77). Unfortunately, there is little clear guidance in the jurisprudence as to what constitutes "the core of Indianness". The only positive formulation by the Supreme Court was given in *Dick, supra* at para. 19, where the court held it would include activities "at the centre of what [Indians] do and what they are". In the aboriginal law context, the doctrine of interjurisdictional immunity has been applied to such things as Indian status (see *Natural Parents v. Superintendent of Child Services*, [1976] 2 S.C.R. 751), aboriginal rights (see *Paul v. British*

Columbia (Forest Appeals Commission), 2003 SCC 55), and reserve lands (see *Derrickson v. Derrickson,* [1986] 1 S.C.R. 285 and *Paul v. Paul,* [1986] 1 S.C.R. 306). The Supreme Court relatively recently held, in *Kitkatla, supra,* that a provincial law that would permit the province to order the destruction of aboriginal cultural artifacts would not impair the "core of Indianness".

[34] It is unclear from the jurisprudence whether relationships within aboriginal families fall within "the core of Indianness". On one hand, this proposition was rejected by the majority of the Supreme Court in *Natural Parents, supra,* which held that a provincial adoption law allowing aboriginal children to be adopted by non-aboriginal parents did not impair the status or capacity of Indians except to the extent the child would be stripped of its Indian status, and that the provincial law therefore applied of its own force. The practical conclusion of that case, that aboriginal children may be adopted by non-aboriginal families, but retain their Indian status following adoption, continues to be the law today, as affirmed recently by *Algonquins of Pikwakanagan First Nation v. Children's Aid Society of Toronto* (2004), 238 D.L.R. (4th) 745 at para. 45 (Ont. Sup. Ct.).

[35] On the other hand, the majority of the Supreme Court, in *Canadian Western Bank, supra* at para. 61, referred to Chief Justice Laskin's minority judgment in *Natural Parents:*

> …Thus, in *Natural Parents*, Laskin C.J. held the provincial *Adoption Act* to be inapplicable to Indian children on a reserve because to compel the surrender of Indian children to non-Indian parents "would be to touch 'Indianness', to strike at a relationship integral to a matter outside of provincial competence". Similarly, in *Derrickson*, the Court held that the provisions of the British Columbia *Family Relations Act* dealing with the division of family property were not applicable to lands reserved for Indians because "[t]he right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24) of the *Constitution Act, 1867*". In *Paul v. Paul*, our Court held that provincial family law could not govern disposition of the matrimonial home on a

> reserve. In these cases, what was at issue was relationships within Indian families and reserve communities, matters that could be considered absolutely indispensable and essential to their cultural survival.

[36] This statement appears to be *obiter dicta.* However, it suggests that the court may now be tending to prefer Chief Justice Laskin's judgment in *Natural Parents,* although he was dissenting on this point.

[37] In the present case, I do not believe it is necessary for this court to decide whether aboriginal family relationships fall within the "core of Indianness", because I find that even if they do, those relationships are in no way impaired by the *Child and Family Services Act,* nor the actual operations of Native Child. Indeed, both the Act and the society's own mission statement make clear that Native Child has as one of its major purposes to foster and protect relationships within aboriginal families, aboriginal models of the family, and aboriginal culture more broadly. The respondent did not adduce any evidence to suggest that aboriginal family relationships will be impaired, and the Board below did not make any finding of impairment. I am therefore satisfied that even if aboriginal family relationships were found to fall within the "core of Indianness", there would be no impairment, and interjurisdictional immunity does not apply.

[38] I have also considered the recent decision of the British Columbia Court of Appeal in *NIL/TU,O Child and Family Services Society v. BCGEU,* 2008 BCCA 333, in which that court found, on similar facts, that the labour relations of an aboriginal child and family services society were properly subject to provincial jurisdiction. In doing so, it specifically rejected the proposition

that the mere provision of social services in a manner sensitive to aboriginal culture trenches upon the "core of Indianness" (at paragraphs 60-61).

[39] I am not comfortable with the court's statement (at paragraph 33) that two distinct lines of authority have emerged since *Four B* regarding regulation of labour relations involving aboriginal organizations, one provincial and one federal. Rather, federal and provincial courts have reached different conclusions on jurisdiction on the basis whether "the core of Indianness" was "affected". Obviously, that test was less precise than the "impairment" test. Subject to that qualification, I agree with the B.C. Court of Appeal's analysis on the interjurisdictional immunity issue. While it did not specifically mention *Canadian Western Bank*, it stated clearly that "there is no matter that is integral to aboriginal or treaty rights, aboriginal culture or Indian status that is impaired or affected by the statute or by the way in which the Society exercises its delegated authority under the *Child, Family and Community Service Act*" (at paragraph 59, emphasis added). I believe that the court applied the appropriate doctrinal framework, and reached the correct result.

[40] I would also add that the facts of the instant case disclose even fewer links to federal jurisdiction over Indians than those in *NIL/TU,O*; Native Child operates entirely off-reserve, and it does not have any relationship to any federal directive, program, or intergovernmental agreement. On the other hand, aside from possibly some minor indirect funding, there is absolutely no federal involvement in Native Child's operations or regulation.

CONCLUSION

[41] As I have determined that the doctrine of interjurisdictional immunity does not apply to immunize provincial legislative competence over Native Child, it is clear that its normal activities do not form an integral part of federal jurisdiction over Indians. It is not necessary to consider s. 88 of the *Indian Act.* This is clearly a provincial undertaking. Therefore, following *Four B, supra*, its labour relations are properly subject to provincial jurisdiction. The Board acted without constitutional jurisdiction in issuing a certificate to the respondent.

[42] For the foregoing reasons, I would grant this application and set aside the order of the Canadian Industrial Relations Board that certified the respondent as bargaining agent for the applicant's employees.

[43] I would grant the applicant its costs of this application. I would award no costs to or against the intervener, the Attorney General of Ontario.

"J. Edgar Sexton"
J.A.

"I agree
Robert Décary J.A."

"I agree
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-583-07

APPEAL FROM A DECISION OF THE CANADA INDUSTRIAL RELATIONS BOARD BEARING BOARD FILE NO. 26208-C DATED NOVEMBER 23, 2007.

STYLE OF CAUSE:	*NATIVE CHILD AND FAMILY SERVICES OF TORONTO v. COMMUNICATION, ENERGY AND PAPERWORKERS UNION OF CANADA*
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 30, 2008
REASONS FOR JUDGMENT BY:	Sexton J.A.
CONCURRED IN BY:	Décary, Sharlow JJ.A.
DATED:	OCTOBER 31, 2008

APPEARANCES:

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