Federal Court of Appeal | Cour d'appel fédérale

Date: 20200317

Docket: A-417-18

Citation: 2020 FCA 63

CORAM: **STRATAS J.A.**
DE MONTIGNY J.A.
LASKIN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

NORTHERN INTER-TRIBAL HEALTH AUTHORITY INC. and PETER BALLANTYNE CREE NATION HEALTH SERVICES INCORPORATED

Respondents

Heard at Saskatoon, Saskatchewan, on March 9, 2020.

Judgment delivered at Ottawa, Ontario, on March 17, 2020.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LASKIN J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200317

Docket: A-417-18

Citation: 2020 FCA 63

CORAM: **STRATAS J.A.**
DE MONTIGNY J.A.
LASKIN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

NORTHERN INTER-TRIBAL HEALTH AUTHORITY INC. and PETER BALLANTYNE CREE NATION HEALTH SERVICES INCORPORATED

Respondents

REASONS FOR JUDGMENT

STRATAS J.A.

[1] The federal Superintendent of Financial Institutions decided that the respondents' pension plans were provincially regulated. Thus, he refused to regulate them any further. The Superintendent based these decisions on the Supreme Court's controlling authority of *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.

[2] The respondents challenged the Superintendent's decisions by way of a joint application for judicial review in the Federal Court.

[3] The Federal Court (*per* Mandamin J.) held that the Superintendent erred. In the Federal Court's view, the pension plans were federally regulated. Key to the Federal Court's decision were Treaties 6, 8 and 10, all of which contain promises made by the Crown regarding health care for Indigenous peoples. Thus, the Federal Court granted the application for judicial review and quashed the Superintendent's decisions: 2018 FC 1180, 47 Admin. L.R. (6th) 165. The Attorney General now appeals.

[4] I would allow the appeal. The function of the works or undertakings must be the focus of analysis: *NIL/TU,O* at paras. 3, 13-18. Here, the function of the respondents' undertakings is to provide health care, a provincially regulated matter. It follows that the pension rights and obligations concerning those undertakings are also provincially regulated: *NIL/TU,O* at para. 11. While the Treaties obligate the Crown to provide health care, they have no bearing on the function of the health care undertakings themselves, which remain provincially regulated.

A. The legislative framework

[5] Before the *NIL/TU,O* decision and before the Superintendent's decisions, the federal *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) regulated the respondents' pension plans. *The Pension Benefits Act, 1992*, S.S. 1992, c. P-6.001, a provincial statute, did not apply.

[6] The federal *Pension Benefits Standards Act, 1985* applies to the pension plans of employees in "included employment". "Included employment" is "employment…on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada": *Pension Benefits Standards Act, 1985*, s. 4(4). The "legislative authority of the Parliament of Canada" is determined by examining sections 91-95 of the *Constitution Act, 1867* (in Part VI, "Distribution of Legislative Powers") and any controlling authorities interpreting those sections. If the undertaking in which the employees work is within the legislative authority of the Parliament of Canada, the federal *Pension Benefits Standards Act, 1985* applies.

B. The nature of the Superintendent's decision

[7] When determining an application for judicial review in complicated cases, a reviewing court should identify with precision the true nature of the administrative decision being reviewed: *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at paras. 18, 26-

28; *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 474 N.R. 121 at para. 36; *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 300, [2017] 3 F.C.R. 263 at para. 8.

[8] Here, the Superintendent was acting under subsection 4(4) of the federal *Pension Benefits Standards Act, 1985*. But the Superintendent did not have to interpret that subsection: it is perfectly clear. And no one has alleged that the Superintendent misinterpreted it. The real dispute in the Federal Court and this Court is how the Superintendent went about applying the subsection.

[9] In applying the subsection, the Superintendent had to assess whether the respondents' undertakings were within the legislative authority of the Parliament of Canada. In this particular case, the assessment involved three separate steps: (1) interpreting the constitutional jurisprudence concerning the legislative authority of the Parliament of Canada, (2) making findings of fact about the nature of the respondents' undertakings, and (3) applying the constitutional jurisprudence to the findings of fact.

[10] The respondents do not take issue with the Superintendent's findings of fact. The real issue they raise is whether the Superintendent properly interpreted and applied the constitutional jurisprudence concerning the legislative authority of the Parliament of Canada. Within that broad issue lies a more particular issue: do the Treaties affect the constitutional analysis?

C. The standard of review

[11] We are to assess whether the Federal Court adopted the proper standard of review—in other words, conduct the analysis ourselves—and then assess whether the Federal Court applied the proper standard of review correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47.

[12] This Court has regularly conducted correctness review of administrative decisions regarding whether labour relations and closely associated matters are regulated federally or provincially under the *Constitution Act, 1867*: *Syndicat des agents de sécurité Garda, Section CPI-CSN v. Garda Canada Security Corporation*, 2011 FCA 302, 430 N.R. 84 at para. 29; *Nishnawbe-Aski Police Service Board v. Public Service Alliance of Canada*, 2015 FCA 211, [2016] 2 F.C.R. 351 at para. 6; *Telecon Inc. v. International Brotherhood of Electrical Workers, Local Union No. 213*, 2019 FCA 244 at para. 16. This past jurisprudence suggests that the standard of review for the issues on which this case turns (identified in paragraph 10, above) is correctness.

[13] But now we are to start with *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 59 Admin. L.R. (6th) 1, not our earlier jurisprudence: see *Vavilov* at paras. 129-132. *Vavilov* tells us that "constitutional questions" or "constitutional matters" are reviewable on a standard of correctness: *Vavilov* at paras. 53, 55. The issues on which this case turns fall into the category of "constitutional questions". Thus, the standard of review is correctness.

D. The parties' positions

[14] For the purposes of this case, the Attorney General accepts that the federal Crown is obligated under the Treaties to provide health care to the relevant Indigenous peoples.

[15] For the purposes of this case, the parties also accept that the federal Crown is discharging its responsibility by funding the respondents in accordance with certain agreements.

[16] In this case, the parties agree that the provision of health care is a provincial matter. But the respondents point to the fact that the Crown is obligated by the Treaties to ensure health care is provided to Indigenous peoples. In their view, this transforms the situation, rendering the respondents' undertakings federal because they fall within the federal legislative authority concerning Indigenous peoples and First Nations: *Constitution Act, 1867*, s. 91(24). The Attorney General disagrees, citing the Supreme Court's decision in *NIL/TU,O*.

E. Analysis

[17] The respondents' submission is basically the same as that advanced by the unsuccessful parties in the Supreme Court's decision in *NIL/TU,O*. The Supreme Court rejected this submission. In this case, the Superintendent was right to reject it too.

[18] The Superintendent correctly identified *NIL/TU,O* as the controlling authority. This Court has applied *NIL/TU,O* in three cases: *Telecon*, *Nishnawbe-Aski* and *Conseil de la Nation Innu*

Matimekush-Lac John v. Association of Employees of Northern Quebec (CSQ), 2017 FCA 212. As will be discussed below, the reasoning in these cases suggests that the pension plans of the respondents are provincially regulated. The respondents have not submitted that these cases are manifestly wrong or should not be followed. Nor do they disagree with the reasoning in them.

[19] In *NIL/TU,O*, the Supreme Court considered whether the labour relations of an agency providing child welfare services to the children and families of seven First Nations were federally regulated or provincially regulated. The Supreme Court concluded that they were provincially regulated.

[20] It reached that conclusion by applying a double-barrelled legal test:

> …in determining whether an entity's labour relations will be federally regulated, thereby displacing the operative presumption of provincial jurisdiction,… a court [must] first apply the functional test, that is, examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking. If so, its labour relations will be federally regulated. Only if this inquiry is inconclusive should a court proceed to an examination of whether provincial regulation of the entity's *labour relations* would impair the core of the federal head of power at issue.

(*NIL/TU,O* at para. 18; see also *Northern Telecom v. Communications Workers*, [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1.)

[21] Under the first branch of the *NIL/TU,O* test, the functional examination of "the nature of the operation" requires us to look at "the normal or habitual activities of the business" as "a going concern" and "without regard for exceptional or casual factors": *Northern Telecom* at p.

132, cited in *NIL/TU,O* at para. 14; see also *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754 at p. 769, 93 D.L.R. (3d) 641.

[22] In *NIL/TU,O* the Supreme Court did not proceed beyond the first branch of the legal test. It found that the function of the agency was to provide welfare services to children and families, a provincially regulated activity. The Supreme Court acknowledged that the agency provided its welfare services to Indigenous peoples, sensitively tailoring its programs to them. But that counted for naught. The Supreme Court did not need to consider the second branch of the *NIL/TU,O* test.

[23] In the case at bar, the respondents submit that their functions have a distinct and substantial Indigenous component that affects the analysis under the first branch. This was the very submission rejected in *NIL/TU,O*. There, NIL/TU,O argued, based on the record filed with the Court, that the "distinctly Aboriginal component of its service delivery methodology alters the nature of its operations and activities such that it is a federal undertaking" for labour relations purposes: *NIL/TU,O* at para. 37. The Supreme Court accepted that the record established "the cultural identity of NIL/TU,O's clients and employees" and "its mandate to provide culturally-appropriate services to Aboriginal clients" but "[n]either…displaces the operating presumption that labour relations are provincially regulated": *NIL/TU,O* at para. 39.

[24] This Court's decision in *Nishnawbe-Aski*, like *NIL/TU,O*, is strong authority for the proposition that an undertaking, usually provincially regulated, does not become federally regulated just because it is tailored sensitively to serve the needs of a local Indigenous

population. The undertaking in *Nishnawbe-Aski*, a police services board, was very much comprised of Indigenous people, took some direction from the local Indigenous community and played a very significant role in it, yet functionally it remained a police services undertaking regulated by the province.

[25] Even if the respondents' view of the law were correct, their submission fails for another reason: the Superintendent failed to find a substantial Indigenous component in the respondents' functions. We must defer to this factual assessment. Perhaps recognizing the inadequacy of the evidentiary record on this point, counsel for the respondents attempted to offer us new evidence in the course of his oral submissions. But, of course, this is not normally permitted: see, *e.g.*, *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 and *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189 (fresh evidence adduced in the reviewing court); see also *Butterfield v. Canada (Attorney General)*, 2005 FC 396, 280 F.T.R. 101 (counsel giving evidence).

[26] In this case, the Superintendent focused on the question of "legislative authority" under subsection 4(4) of the federal *Pension Benefits Standards Act, 1985*, identified *NIL/TU,O* as the controlling authority, applied that authority, and concluded that the respondents' undertakings were functionally health care undertakings. The Superintendent based this conclusion on facts that are undisputed and explained it to the respondents in two decision letters: see Appeal Book at pp. 470, 2221. From there, the Superintendent's analysis was purely legal and led to the

conclusion that the respondents' undertakings were under the legislative authority of the province.

[27] The Superintendent was correct. The legislative authority to regulate health care undertakings lies with the province: *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, [2011] 3 S.C.R. 134 at paras. 66-68; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 at para. 24; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 at paras. 18, 23. And the labour relations of employees in provincial undertakings, including their pensions, are presumptively subject to provincial regulation: *Tessier Ltée v. Quebec*, 2012 SCC 23, [2012] 2 S.C.R. 3 at para. 11; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 at paras 27-30; *NIL/TU,O* at para. 11. On the undisputed facts, the respondents' undertakings are under the legislative authority of the province.

[28] In its analysis, the Federal Court went astray. Rather than focusing on which level of government has the legislative authority to regulate the respondents' undertakings and rather than strictly following the controlling authority of *NIL/TU,O,* the Federal Court concentrated on the terms of the Treaties, the importance and solemnity of the Treaties, and section 35 of the *Constitution Act, 1982*, which recognizes and affirms treaty rights. By doing that, the Federal Court diverted itself from the task *NIL/TU,O* required it to do—to engage in a functional examination of the nature, operations and habitual activities of the respondents' undertakings as going concerns without regard for exceptional or casual factors. This was an error of law.

[29] The content of the Treaties and section 35 of the *Constitution Act, 1982* are not controversial in this case. All parties accept for the purposes of this case that the federal government can discharge its obligation under the Treaties by providing funding for Indigenous health care. However, the provision of federal funding by itself does not convert an otherwise provincial undertaking into a federal one: *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 567, 83 D.L.R. (4th) 297; *Chaoulli* at para. 16. The Treaties simply do not have the legal relevance or materiality that the Federal Court attached to them in this case.

[30] The Treaties and the rights in them did not change the question that the Superintendent had to answer under subsection 4(4) of the *Pension Benefits Standards Act, 1985*: who has the "legislative authority" to regulate these undertakings? The answer to that question is found only in the assignment and distribution of exclusive legislative authority in sections 91 to 95 of the *Constitution Act, 1867*, as interpreted in this context by the Supreme Court in *NIL/TU,O*.

[31] Without doubt, section 35 of the *Constitution Act, 1982* recognizes and affirms treaty rights and, thus, is an important part of the Constitution of Canada, the supreme law within the territory of Canada. So treaty rights are important. Also without doubt, section 35 can limit the legislative power of the federal Parliament and the provincial Legislatures: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385. But, as the Supreme Court has unanimously held, section 35 of the *Constitution Act, 1982* does not somehow displace or amend the grant and distribution of exclusive legislative power between the federal Parliament and the provincial Legislatures under sections 91 to 95 of the *Constitution Act, 1867*: *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257 at paras. 135-142; see also *Siksika Health Services v. Health*

Sciences Association of Alberta, 2019 ABCA 494 at para. 30. This is just one facet of a more fundamental, bedrock principle in our Constitution: one part of the Constitution cannot displace or amend another part of the Constitution: *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 at para. 24; *Adler v. Ontario*, [1996] 3 S.C.R. 609, 140 D.L.R. (4th) 385; *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238 at para. 14; and many others. When the task is to decide who has legislative authority over a subject-matter, we must look to sections 91 to 95 of the *Constitution Act, 1867* and any controlling authorities concerning them— here, the Supreme Court's decision in *NIL/TU,O*.

[32] At a more granular level, the Treaties obligate the federal government to ensure that health care is provided to the relevant Indigenous peoples. The parties agree for the purposes of this case that this obligation can be discharged by the federal government providing funding. But an obligation to provide funding to an undertaking has nothing to do with its function, which is the primary focus of the first branch of the test in *NIL/TU,O*. In this case, the undertakings' functions remain the provision of health care, which is provincially regulated, as are the respondents' pension plans.

[33] As the first branch of the *NIL/TU,O* test is determinative of the question before us, there is no need to consider the second branch of that test.

[34] It follows that the Superintendent was correct in deciding that the respondents' pension plans were provincially regulated. The Federal Court should not have quashed the Superintendent's decisions.

[35] For good measure, the Superintendent's reasons for the decisions are a model of clear, brief and economical expression and offer more than enough justification.

F. Postscript

[36] The original appellants in this appeal were the Attorney General and the Minister of Finance. This was because they were the unsuccessful respondents to the application for judicial review in the Federal Court.

[37] In a direction issued before the hearing of this appeal, the Court raised the question whether this was proper. At the hearing, the parties agreed that it was not. They are correct. Under Rule 303 of the *Federal Courts Rules*, S.O.R./98-106 the Attorney General was the only proper respondent in the Federal Court. Thus, the Attorney General is the only proper appellant in this Court.

[38] While the incorrect inclusion of the Minister of Finance in this case caused no problem, sometimes it can. A party, once named, might start to participate when, in fact, the party has no right to do so. Whenever a party is incorrectly named, parties should register an objection or the Registry should act under Rule 72 at an early stage in the proceedings.

G. Proposed disposition

[39] I would amend the style of cause, removing the Minister of Finance as an appellant. I would make both the style of cause on this document and the judgment reflect the amendment.

[40] I would allow the appeal, set aside the judgment dated November 28, 2018 of the Federal Court in file T-1315-17, and dismiss the respondents' application for judicial review. The parties agree that all should bear their own costs. Thus, I would make no order as to costs.

"David Stratas"
J.A.

"I agree
Yves de Montigny J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-417-18
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE MANDAMIN DATED NOVEMBER 28, 2018, NO. T-1315-17	
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. NORTHERN INTER-TRIBAL HEALTH AUTHORITY INC. *et al.*
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	MARCH 9, 2020
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LASKIN J.A.
DATED:	MARCH 17, 2020

APPEARANCES:

Marlon Miller Cailen Brust	FOR THE APPELLANT
Carl M. Nahachewsky	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE APPELLANT
Nahachewsky Law Office Prince Albert, Saskatchewan	FOR THE RESPONDENTS