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T-1030-13

Citation: 2015 FC 366

Ottawa, Ontario, March 23, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

Docket: T-1043-13

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

MUNSEE-DELAWARE NATION
AND CRYSTAL FLEWELLING

Respondents

Docket: T-1030-13

AND BETWEEN:

CRYSTAL FLEWELLING

Applicant

and

MUNSEE-DELAWARE NATION
THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF ONTARIO

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] These two related cases, heard together, stem from a long and rather bitter labour dispute between the Respondent, Munsee-Delaware Nation (the Nation), and the Applicant, Crystal Flewelling. Ms Flewelling claims her employment was unjustly terminated by the Nation. She filed a complaint for unjust dismissal under section 240 of the *Canada Labour Code*, RSC 1985, c. L-2 (the Code) resulting in an adjudicator being appointed under section 242 of the Code (the Adjudicator).

[2] On May 10, 2013, when the six-year long proceedings before the Adjudicator were near completion, the Adjudicator, in the wake of the Supreme Court of Canada decision in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union,* 2010 SCC 45, [2010] 2 SCR 696 (*NIL/TU,O*), ruled that he had no jurisdiction to consider Ms Flewelling's complaint on the ground that her employment was provincially regulated.

[3] The issue brought before this Court, by both Ms Flewelling and the Attorney General of Canada, is whether the Adjudicator erred in concluding as he did. For the reasons that follow, I find that the Code applies to Ms Flewelling's complaint and that, as a result, both the Attorney General and Ms Flewelling's judicial review applications shall be granted.

II. Background

A. *Ms Flewelling's Complaint*

[4] Ms Flewelling is a member of the Nation. She was hired by the Nation in September 2001 to work in its Administration offices. This was at the time Co-Management had been imposed by the Department of Aboriginal Affairs and Northern Development Canada as a result of the Nation's failure to meet its obligations regarding the management of its financial affairs. Over time, her duties evolved from those of a data entry/file clerk to those of a housing/finance clerk. Her employment was terminated in the spring of 2006.

[5] The Nation is an Indian Band as defined under the *Indian Act*, RSC 1985, c I-5. Reserve lands, located in southern Ontario, were set apart by the Crown for its use and benefit. The Nation's population consists of approximately 600 people, with a little less than 200 members living on the reserve. It is governed by a Chief and Council elected in accordance with the Nation's Custom Election Code.

[6] In May 2006, Ms Flewelling filed a complaint of unjust dismissal under the Code. At the outset of the complaint process, the Nation took the position that it was an Indian Band recognised under the *Indian Act* and that its labour relations with its employees were governed by the Code. As the complaint could not be settled by an inspector appointed under section 241(2) of the Code, the matter was referred to the Adjudicator.

[7] On January 28, 2008, the Adjudicator issued an award dismissing two preliminary non-constitutional, jurisdictional objections, raised by the Nation. The proceedings before the Adjudicator were then at a standstill for three years as the parties were awaiting the resolution of related criminal charges laid against Ms Flewelling. The adjudication proceedings resumed in the fall of 2011, at which point the Nation advised that it was no longer asserting cause for Ms Flewelling's dismissal. As a result, the amount of damages payable to Ms Flewelling remained the only issue to be determined.

[8] In the fall of 2012, when the hearings on this issue were well under way, the Nation asserted that Ms Flewelling's employment was regulated by the labour laws of Ontario rather than the Code and that, as a result, the Adjudicator had no jurisdiction to hear and determine her complaint for unjust dismissal.

B. ***The Adjudicator's Decision***

[9] On May 10, 2013, the Adjudicator ruled in favour of the Nation. He first noted that although the presumption, in Canada, is that employment relationships are regulated by the provinces, it had been widely accepted, as evidenced by the Nation's position at the outset of the complaint proceedings, that the employment relationships of employees of First Nations were regulated by the Federal government, given Parliament's authority over "Indians and Lands reserved for Indians" under subsection 91(24) of the *Constitution Act, 1867*.

[10] However, he agreed with the Nation's assertion that the Supreme Court of Canada decision in *NIL/TU,O* changed the legal landscape in that regard by holding that the presumption

that employment relationships are regulated by the provinces applied even when the employer was a First Nation. This meant, according to the Adjudicator, that when determining which of the provincial or federal labour laws apply to a given employment relationship, the fundamental nature of the inquiry was the same for First Nation employers as for any other federal heads of power.

[11] The Adjudicator then proceeded with the first step of that inquiry, the "functional test", and considered the nature, operations and habitual activities of the Nation in order to determine whether the Nation qualified as a "federal undertaking" under the Code. He held in this regard that the Nation's activities were mostly concerned with policing, welfare, health, education and bingo and that those activities were all provincially regulated. Turning to the work performed by Ms Flewelling, the Adjudicator found that she was doing internal accounting and kept the Nation's financial records for all its operations, including for the policing, welfare, health, education and bingo hall functions. He concluded that there was nothing in the work that Ms Flewelling was performing that was federally regulated.

[12] Having found that the work performed by Nation's employees in general, and by Ms Flewelling in particular, was of a type which is generally seen as provincially regulated, the Adjudicator concluded he had no jurisdiction to determine Ms Flewelling complaint. As a result, he held that there was no need to proceed with the second stage of the inquiry and consider whether provincial regulation of the Nation's labour relations would impair the core of the federal head of power over "Indians and Lands reserved for Indians."

C. *The Complaint's Statutory Framework*

[13] The complaint filed by Ms Flewelling was brought under Part III of the Code which applies, according to section 167 of the Code, to "employment in or in connection with the operation of any federal work, undertaking or business". Section 2 of the Code defines "federal work, undertaking or business" as, *inter alia*, "any work, undertaking or business that is within the legislative authority of Parliament."

[14] As indicated previously, the authority to legislate over "Indians and Lands reserved for Indians" belongs to Parliament.

III. Issue and Standard of Review

[15] The issue to be decided is whether the Adjudicator erred in concluding that the employment relationship between Ms Flewelling and the Nation is governed by provincial law rather than the Code.

[16] The appropriate standard of review applicable to constitutional questions relating, as is the case here, to division of powers issues is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 58). The parties do not dispute this although the Nation contends, correctly in my view, that the Adjudicator's findings regarding the underlying facts to the issue at hand, such as the characterization of the employment, are owed deference and are to be reviewed, as a result, on the standard of reasonableness (*Commissionaires (Great Lakes) v*

Dawson, 2011 FC 717, 391 FTR 216; *Fox Lake Cree Nation v Anderson*, 2013 FC 1276, at para 23).

IV. Analysis

A. *Constitutional Jurisdiction over Labour Relations*

[17] The *Constitution Act, 1867* is silent as to whether the provincial legislatures or Parliament has jurisdiction over labour relations. However, Canadian courts have, historically, recognized that labour relations are presumptively of provincial jurisdiction - as a matter falling within the provinces' Property and Civil Rights head of power - and that the federal government has jurisdiction over that subject matter only by way of exception. That is, when the entity for which labour relations are at issue is a "federal work, undertaking or business" (*Toronto Electric Commissioners v Snider*, [1925] AC 396, [1925] JCJ No. 1 (QL); *Northern Telecom Ltd. v Communications Workers of Canada*, [1980] 1 SCR 115; *Four B Manufacturing Limited v Union Garment Workers of America*, [1980] 1 SCR 1031 (*Four B*); *Consolidated Fastfrate Inc. v Western Canada Council of Teamsters*, [2009] 3 SCR 407, 2009 SCC 53; *NIL/TU*,O, above).

[18] To determine whether a work, undertaking or business' labour relations is federally or provincially regulated involves the following two-step inquiry:

a. The first step – also called the "functional test" - requires the Court to inquire into the nature, habitual activities and daily operations of the entity in question in order to determine whether it constitutes a federal work, undertaking or business; and

b. If the functional test is inconclusive, then the Court must inquire into whether provincial regulation of that entity's labour relations would impair the core of the federal head of power (*Four B*, above at p. 1045; *NIL/TU,*O, at para 6).

[19] This approach, which is distinct from the one used to determine whether a particular piece of legislation falls within the legislative authority of Parliament or the provinces (*NIL/TU,O* at para 12), has, for the last 85 years, been "consistently endorsed and applied" by the Supreme Court of Canada (*NIL/TU*,O, at para 3).

B. ***The Position of the Parties***

[20] The Attorney General claims the Federal Court of Appeal's decision in *Francis v Canada Labour Relations Board* [1981] 1 FC 225 (FCA), rev'd *P.S.A. (Can) v Francis* [1982] 2 SCR 71 (*Francis*) is dispositive of the matter and was binding on the Adjudicator. It contends that *Francis* establishes that Indian bands and band councils, as they derive their governance authority from the *Indian Act* and other federal legislation, such as the *First Nation Fiscal Management Act* (SC 2005, c 9), are federal undertakings for the purposes of labour relations when they are engaged in their governance function and in the general administration of band affairs and reserves, including their financial affairs.

[21] The Attorney General further contends that *Francis* is distinguishable from cases like *NIL/TU,O* where the employer or entity in question is not an Indian band but rather a distinct and

separate legal entity, or from cases where the entity, although not, legally speaking, a separately incorporated body, is a separate and distinct operation from the Indian Band or Council.

[22] Ms Flewelling adopts a similar view and stresses the fact that, contrary to *NIL/TU,O*, the Nation is not (i) a provincially incorporated body; (ii) a provincial corporation whose sole purpose is to provide child welfare services; (iii) a corporation subject to provincial legislation; (iv) a corporation whose operations are regulated exclusively by the province; or (v) an entity over which the province retains ultimate control regarding decision-making over its activities.

[23] She claims that the essential function of the Nation's Band Council is not to support police work, health care services, education, and employment in the Bingo Hall or to administer the welfare program. Rather, it is to protect the status, rights and privileges of First Nation's persons, which is an integral part of federal jurisdiction over Indians and Lands reserved for Indians. She says that her work with the Nation was not specific to any particular discrete program but was rather related to the Nation's financial affairs and to the management of housing on the Nation's land. All her work, according to her, was ultimately under the control of the Nation's Chief and Council and allowed the Nation to carry out its governance mandate and to comply with its obligations under the *Indian Act* and other related federal legislation.

[24] The Nation disagrees. It claims that *NIL/TU,O* does not distinguish between an employer which is a First Nation and one which is a corporation formed by one or more First Nations nor does it hold that a First Nation's activities can only be federal in nature. Rather, it contends that *NIL/TU,O* confirms that First Nations, like any other employers, should have its labour relations

characterized under the functional test and not some other test. According to the Nation, this test is about what work activity is involved, not about who performs the work or for whom it is performed. It submits that, to the extent *Francis* applied some other test, it has been overruled by *NIL/TU,O*.

[25] The Nation further claims that, as a First Nation, it has an inherent authority to govern, recognized within the Canadian Constitution. It says in this regard that it is governed by a Chief and a Council which are elected in accordance with the Nation's Custom Code and which are not organized or regulated by the *Indian Act* or its regulations. It is no longer correct, according to the Nation, to describe a First Nation as a creature of statute and First Nation Councils as creatures of the *Indian Act*. The Nation contends that even if First Nations were organized under the *Indian Act*, they would be so organized subject to section 88 of that Act which extends the application of provincial laws of general application, like provincial labour relations laws, to Aboriginal people and their lands.

[26] Here, it claims that Ms Flewelling's habitual work activities – accounting and bookkeeping – are provincially regulated and only have, in any event, an insignificant portion of federal content. It submits that the fact that these activities were performed on behalf of a First Nation or for the benefit of Aboriginal people is irrelevant. It says that the Adjudicator was therefore correct in finding that the labour relations over these activities were provincially regulated and that he was without jurisdiction to entertain Ms Flewelling's complaint under the Code.

C. *Francis is still good law and was binding on the Adjudicator*

[27] This issue in this case turns on whether *Frances* is still good law in light of *NIL/TU,O*. If it is, then it is binding on both the Adjudicator and this Court, with the result that the Adjudicator's ruling that he is without jurisdiction to consider Ms Flewelling's complaint under the Code must be set aside. If it is no longer good law, then that ruling must stand.

[28] *Francis* dealt with the certification, under the Code, of the Public Service Alliance of Canada as the bargaining agent for a group of employees of the St-Regis Indian Band (the Employees) engaged, for the most part, in "education administration, the administration of Indian lands and estate, the administration of welfare, the administration of housing, school administration, public works, the administration of an old age home, maintenance of roads, maintenance of schools, maintenance of water and sanitation services, and garbage collection" (*Francis*, at para 17).

[29] Applying the teachings of *Four B*, Justice Heald (Justice Le Dain concurring on that point) characterized the function of the Employees generally as being "almost entirely concerned with the administration of the St-Regis Band of Indians", as being "governmental in nature" and as coming under "the jurisdiction of the *Indian Act*" (*Francis*, at para 17).

[30] Justice Heald then proceeded to a detailed analysis of the provisions of the *Indian Act* relating to the involvement of an Indian Band and its Council to which that Act applies in the administration of the affairs of the Band. It is useful here to reproduce that analysis:

(…) It is also instructive to peruse the various provisions of the Indian Act to determine the extent to which an Indian band and its council are involved in the administration of the affairs of an Indian band to which, as is the case here, the Indian Act applies. Section 20 states that no Indian is lawfully in possession of land in a reserve unless such possession is allotted to him by the band council and then approved by the Minister. Section 24 enables an Indian lawfully in possession of reserve lands to transfer that right to possession to another band member or to the band itself with the Minister's approval. Section 25 provides that, in certain circumstances, an Indian's right to possession of reserve lands shall revert to the band. Section 34 imposes a duty upon a band to maintain the roads, bridges, ditches and fences within the reserve occupied by that band. Section 37 provides that reserve lands shall not be sold, alienated, leased or otherwise disposed of unless they have been surrendered to the Crown by the band. Section 39 details the procedure to be followed by a band in making such surrender. Section 58 enables the Minister, with the consent of the band council, to improve, cultivate or lease uncultivated or unused reserve lands. Under this section, the Minister is empowered, with the consent of the band council, to dispose of sand, gravel, clay and other non-metallic substances upon or under reserve lands. Section 59 empowers the Minister, with the consent of the band council, to reduce or adjust the amount payable to the Crown in respect of the sale, lease or other disposition of surrendered reserve lands and furthermore, to reduce or adjust the amount payable to the band by an Indian in respect of a loan made to the Indian from band funds. Section 60 empowers the Governor in Council to grand to a band, at the request of that band, the right to exercise such control and management over reserve lands as the Governor in Council considers desirable. Counsel advised us that no such Order in Council subsists with respect to the St. Regis Indian Band. Sections 61 to 69 inclusive of the Act deal with the management of Indian moneys. Section 64 empowers the Minister, with the consent of the band council, to expend capital moneys of the band for various purposes: to distribute per capita to band members portions of the proceeds of sale of surrendered lands; for the construction and maintenance of roads, bridges, ditches, water courses and outer boundary fences; to purchase land for use by the band as a reserve or an addition to a reserve; to purchase for the band the interest of a band member in reserve lands; to purchase livestock and farm machinery for the band; to construct and maintain permanent improvements on the reserve; to make loans to band members; to meet expenses necessarily incidental to the management of reserve lands and band property; to construct houses for band members and to make loans to band members for

> building purposes; and generally, for any other purpose for the benefit of the band, in the opinion of the Minister. Section 66 empowers the Minister, with the consent of the band council to expend revenue moneys of the band for a number of purposes. Section 69 empowers the Governor in Council to allow a band to control, manage and expend in whole or in part its revenue moneys. Regulations pursuant to section 69 have been passed by the Governor in Council and apply to the St. Regis Indian Band4. These Regulations empower this Band, along with a large number of other bands in Canada to control, manage and expend its revenue moneys in whole or in part subject to the detailed provisions of the Regulations providing for bank accounts, signing officers, appointment of auditors, etc. Sections 74 to 80 inclusive provide for the elections of chiefs and band councils.
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> Sections 81 to 86 inclusive set out the powers of the band council. Section 81 empowers a band council to make by-laws for a large number of purposes: for the health of reserve residents; traffic regulation; observance of law and order; establishment of animal pounds; construction and maintenance of water courses, roads, bridges, ditches, fences and other local works; regulation of types of business to be carried on; building restrictions; allotment of reserve lands to members; noxious weed control; regulating and controlling water supplies; regulating and controlling sports, races, athletic contests and other amusements; and regulation of hawkers and peddlers, etc.
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> (*Francis*, at paras 17-18)

[31] Based on the powers conferred on the Band and its Council in the *Indian Act* and the evidence of the exercise of these powers by the Band and its Council, Justice Heald was satisfied that, contrary to *Four B*, which was concerned with the labour relations of four aboriginal individuals conducting a commercial business on an Indian reserve, the Employees were "directly involved in activities related to Indian status" and that "the total administration of the Band [was] continuously concerned with the status and the rights and privileges of the Band Indians" (*St-Régis*, at para 20). Paraphrasing the majority's reasons in *Four B*, he concluded that the labour relations in issue were "an integral part of primary federal jurisdiction over Indians or

Lands reserved for the Indians" and were, as a result, coming under federal legislative competence pursuant to section 91(24) of the *Constitution Act 1867* (*St-Régis*, at para 20).

[32] As the activities engaged in by the Employees and the Band were being discharged under the authority of the *Indian Act*, Justice Heald was then satisfied that the administration of the St-Regis Band was a federal "work, undertaking or business" within the meaning of section 108(1) of the Code, that Parliament had therefore occupied the field respecting the Band's labour relations, and that the Public Service Alliance of Canada was, as a result, constitutionally entitled to seek certification as a bargaining agent for the Employees under the Code (*Francis*, at para 22).

[33] However, Justice Heald held that the St-Regis Band was not an "employer" within the meaning of the Code - that is a "person who employs one or more employees" - as it was not a "person" under either the Code or the *Indian Act*. As a result, he concluded that the Canada Labour Relations Board had acted without jurisdiction in purporting to certify the Alliance. Chief Justice Thurlow, who did not come to a final conclusion on the issue of the constitutional applicability of the Code to the Employees and the St-Regis Band, concurred with Justice Heald on that point. Justice Le Dain dissented.

[34] Two years later, the Supreme Court of Canada overturned Justices Heald and Thurlow's finding and held that the St-Regis Band Council could properly be considered an employer within the meaning of the Code on the ground that Band Councils were creatures of the *Indian Act*, that they were given power to enact by-laws for many specific purposes which are similar to

those covered by the by-laws of a municipality and that they did, in fact, engage and pay employees to do work for them (*Public Service Alliance of Canada v St-Regis Indian Band*, [1982] 2 SCR 72).

[35] The judgment of the Federal Court of Appeal in *St Regis* was rendered in the wake of – and in line with the analysis framework dictated by - *Four B* which clearly rejected the notion that the functional test is "inappropriate and ought to be disregarded where legislative competence is conferred not in terms of physical objects, things or systems, but to persons or groups of persons such as Indians or aliens" (*Four B*, at page 1045). As a result**,** the Federal Court of Appeal proceeded with its constitutional applicability analysis on the basis of the functional test and, as required by that test, directed its attention to the nature of the work being performed by the unit of employees in question and to the nature of the "business" or operation of a Band Council to which the *Indian Act* applies (*St Regis*, para 17).

[36] *Four B* is the predecessor of *NIL/TU,O* when establishing whether labour relations in a First Nation employment context are to be governed by provincial or federal laws. In this regard, nothing in *NIL/TU,O* points to the *Four B*'s principles being discarded, disregarded or discredited. To the contrary, the majority in *NIL/TU,O* often refers to the test of *Four B* as the one that should be followed and applied (*NIL/TU*,O, at para 3, 15, 18, 23 and 40). It also refers to *Four B* as being the case, together with *Northern Telecom*, above, which sets out "most comprehensively" the legal test for determining the jurisdiction of labour relations on federalism grounds (*NIL/TU*,O, at para 3).

[37] *NIL/TU,O* reiterated that this legal test had to be used regardless of the specific head of federal power engaged in a particular case, including, as stated in *Four* B, the power over "Indians and Lands reserved for Indians" (*NIL/TU,O*, at para 3). Applying the *Four B* test to the circumstances of that case (*NIL/TU,O*, at para 23) – a certification case like *Francis* - the Supreme Court found that the labour relations of the group of employees at issue fell under provincial jurisdiction.

[38] However, these circumstances were somewhat different to those in *Francis*. From the outset, Madam Justice Abella, writing for the majority, underlined the "unique institutional structure" of the employer (*NIL/TU,O*, at para 1). This employer was a society - the NIL/TU,O Child and Family Services Society (the Society) – incorporated under British Columbia's *Society Act* by a number of First Nations located in that province, to establish a child welfare agency that would provide "culturally sensitive" services to the children and families of those communities. The Society was regulated exclusively by the province and its employees exercised exclusively provincial delegated authority under British Columbia's *Child, Family and Community Service Act* (*NIL/TU,O*, at para 36). It was funded by both the province and the federal government. This funding was the federal government's sole involvement in the Society's activities (*NIL/TU,O*, at para 34 and 40).

[39] Madam Justice Abella found that the Society's distinctiveness as a child welfare organization for Aboriginal communities did not take away "from its essential character as a child welfare agency that is in all respects regulated by the province" and concluded that its function was "unquestionably a provincial one" (*NIL/TU,O*, at para 39).

[40] To borrow the terms used by Madam Justice Abella in *NIL/TU,O*, I do not think it can be said, in the present case, that the employer is an agency "that is in all respects regulated by the province", that its function is "unquestionably a provincial one" and that Ms Flewelling exercised "exclusively provincial delegated authority" under a provincial legislation. Here, the employer is a Band Council to which the *Indian Act* applies and Ms Flewelling was engaged in the general administration of the band's affairs, including on-reserve housing and matters concerning Indian reserve lands. Her work activities were described by the Adjudicator as follows:

> The Complainant worked in the Employer's finance department in the Nation's office. She was the only employee in that department and so she did all the usual accounting duties. She maintained the Employer's financial records, including accounts payable, accounts receivable, payroll, bank deposits and bank reconciliation.
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> (Emphasis added)

[41] The evidence before the Court shows that Ms Flewelling's salary was paid out of federal monies received by the Nation; monies which consisted of the main share of the Nation's funding.

[42] 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.

[43] I agree with the Attorney General that the Adjudicator's analysis is devoid of any consideration of the core functions of Indian bands and Band Councils that formed part of the analysis in *Francis*. His sole reliance on *NIL/TU,O*, which was concerned with the labour relations of a separately incorporated and provincially regulated child welfare service and which had nothing to do with the day-to-day administrative functions integral to running -the affairs of an Indian Band, is a reviewable error.

[44] As in this case, the St-Regis Band was engaged in education administration, in the administration of welfare and in the delivery of healthcare in the form of the administration of an old age home. The Adjudicator ruled that these activities were provincially regulated and that, therefore, nothing in the work performed by Ms Flewelling was of the type which would normally be federally regulated. The fundamental nature of the "business" or operation of a Band and a Band Council, to which the *Indian Act* applies, as depicted by the Federal Court of Appeal in *Francis*, is completely lost in that analysis.

[45] I am not prepared to say that *Francis* was overruled by *NIL/TU,O*. The absence of any consideration of this crucial factor, is, in my view, fatal to the Adjudicator's ruling. In other words, based on *Francis*, the functional test is conclusive that the administration of the Nation's Band is a federal undertaking within the meaning of the Code.

[46] The Nation claims that *NIL/TU,O* implicitly overrules *Francis*:

> Notwithstanding this Court's long-standing approach, a different line of authority has uniquely emerged when courts are dealing with s. 91(24) (see Sappier v. Tobique Indian Band (Council) (1988), 87 N.R. 1 (F.C.A.); Qu'Appelle Indian Residential School

> Council v. Canada (Canadian Human Rights Tribunal), [1988] 2 F.C. 226 (T.D.), at p. 239; Sagkeeng Alcohol Rehab Centre Inc. v. Abraham, [1994] 3 F.C. 449 (T.D.), at pp. 459-60). This divergent analysis proceeds, contrary to Four B, directly to the question of whether the "core" of the head of power is impaired, without applying the functional test first. (…) [Madame Justice Abella, para 19]

[47] In my view, *Francis* is not listed as part of that "different line of authority" for a reason and that reason is that the functional test, as set out in *Four B*, was central to the Federal Court of Appeal's approach and analysis to the question of the Code's constitutional applicability to the labour relations issue at play.

[48] The case of *Communications, Energy and Paperworkers Union of Canada v Native Child and Family Services of Toronto*, 2010 SCC 46, [2010] 2 SCR 737, which was decided by the Supreme Court of Canada on the same day as *NIL/TU,O*, is not helpful to the Nation either. This case involved a very similar set of facts as *NIL/TU,O* as the employer in that case was an aboriginal children's aid society that delivered services primarily to Indian and Metis families pursuant to Ontario's *Child and Family Services Act* and an agreement with the Ontario government. The Supreme Court essentially endorsed its decision in *NIL/TU,O* and affirmed the Federal Court of Appeal decision where that Court found the links to federal jurisdiction over Indians in that case were even thinner than those in *NIL/TU,O* (*Native Child and Family Services of Toronto v Communication, Energy and Paper workers Union of Canada*, 2008 FCA 338, at para 40). Nowhere in these two decisions is there any indication that *Francis* is no longer good law.

[49] Neither is the decision of my colleague, Justice Russel Zinn in *Fox Lake Cree Nation v Anderson*, 2013 FC 1276, an unjust dismissal matter - as in the present case - an indication that *Francis* has lost its precedential value, as contended by the Nation. First, in accordance with the *stare decisis* principle, only the Supreme Court of Canada or the Federal Court of Appeal itself can overrule that decision (*R. v Henry*, 2005 SCC 76, [2005] 3 SCR 609; *Canada v Craig*, 2012 SCC 43, [2012] 2 SCR 489; *Martin v Canada (Attorney General)*, 2013 FCA 15, [2014] 3 FCR 117, at para 104). This has not occurred. Second, the First Nation in that case, also an Indian Band under the *Indian Act*, had set up a Negotiation Office which has as a "central purpose" the "negotiation of sophisticated commercial arrangements with other parties" (*Fox Lake Cree Nation*, at para 31). The First Nation was challenging the Code's constitutional applicability to the unjust dismissal complaint filed by an employee of the Negotiation Office. The First Nation took the position that the Negotiation Office was a separate and distinct operation from the Band's general administration and that the employee in question was not an employee of the First Nation generally, but of the Negotiation Office as a discrete unit. That position prevailed. In grating the First Nation's judicial review application, Justice Zinn held that the Negotiation Office was not vital or integral to the First Nation's operations as an Indian Band (*Fox Lake Cree Nation*, at para 36-38). Therefore, contrary to *Francis* and to the situation in the present case, *Fox Lake Cree Nation* was concerned with a discrete unit separate and distinct from the Band's general administration and central governance function and is, as a result, distinguishable.

[50] Finally, I do not believe that the Nation's assertion that it has an inherent authority to govern recognized by section 35 of the *Constitution Act 1982* and that, as a result, it is not subject to the regulation of federal laws such as the *Indian Act*, has any bearing on the outcome

of this case. As both the Attorney General and Ms Flewelling correctly point out, such a right to self-government, in order to be legally enforceable, needs to emanate from either a negotiated self-government agreement with the government of Canada or a judicial declaration. When it is asserted in litigation, it needs, as any other kind of Aboriginal right, to be characterized in context and with sufficient specificity to allow a court to identify a practice, custom or tradition that is integral to the distinctive culture of the First Nation asserting that right (*R v Van der Peet*, [1996] 2 SCR 507, at para 46; *R v Pamajewon*, [1996] 2 SCR 821, at para 24).

[51] Here, the Nation adduced no evidence that could support a finding of such an inherent right to govern and certainly no evidence that its claim in this respect meets the test established in *Van der Peet*, above. Although First Nations do not owe their existence to the *Indian Act* or any other statute and that an Indian Band is more than a creature of statute, they nevertheless constitute entities that, as Bands and Councils, are regulated by the *Indian Act* and exercise powers in accordance with that Act (*Perron v Canada (Attorney General)*, [2003] 3 CNLR 198 at para 22; Jack Woodward, Q.C., *Native Law*, vol 1, looseleaf, Toronto, Carswell, 2007 at 1-420).

[52] It is trite law that Bands have statutory obligations under the *Indian Act* that ensure their political and financial accountability, both to their members and to the federal government (*Ardoch Algonquin First Nation & Allies v Ontario*, [1997] OJ No 2313 (QL), at para 7; *Cynthia Kynebush v Pheasant Rump Nakota First Nation et al*, 2014 FC 1247 at para 44). It is also clear that the *Indian Act* applies whether the Band Council is elected through the process prescribed by it pursuant to section 74 or through customary elections which are recognized by that Act (see the

definition of "council of the band" in subsection 2(1) of the *Indian Act*; *Mohawk of Kanesatake v Mohawk of Kanesatake (Council)*, [2003] 4 FC 1133, 227 FTR 161, at para 13). This is no different whether the Band Council seldomly uses its authority to pass by-laws. It remains an entity deriving its authority from the *Indian Act*.

[53] There is no doubt that the aboriginal right to self-government, as recognized by the Constitution, can be asserted - but not in this case. It has neither been established nor asserted before the Adjudicator. Therefore, the Nation's argument that its governance authority is not delegated from Parliament but rather, stems from its constitutionally protected right to self-govern must fail.

[54] In sum, *Francis* is still good law. It was binding on the Adjudicator as it is on this Court. As it is dispositive of the present matter, the Attorney General and Ms Flewelling's judicial review applications are granted and costs are awarded against the Nation in both cases. The present Judgment and Reasons will be filed in both dockets T-1030-13 and T-1043-13.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision of the Adjudicator dated May 10, 2013, is quashed.

3. The matter is referred back to the Adjudicator for determination of the unjust dismissal complaint filed by the Applicant in Court docket T-1030-13.

4. Costs are awarded against the Respondent.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1043-13
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v MUNSEE-DELAWARE NATION, CRYSTAL FLEWELLING
AND DOCKET:	T-1030-13
STYLE OF CAUSE:	CRYSTAL FLEWELLING v MUNSEE-DELAWARE NATION, THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ONTARIO
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 23, 2014
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	MARCH 23, 2015

APPEARANCES:

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Brian Daly	FOR THE RESPONDENT Munsee-Delaware Nation

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