Federal Court  Cour fédérale

Date: 20160927

Docket: T-1673-15

Citation: 2016 FC 1090

Vancouver, British Columbia, September 27, 2016

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

TREATY 8 TRIBAL ASSOCIATION

Applicant

and

ANNA BARLEY

Respondent

REASONS AND JUDGMENT

I. Nature of the Matter

[1] This is an application for judicial review pursuant to section 18.1 of the Federal Courts Act, R.S.C., 1985, c. F-7 of a decision rendered by a federal adjudicator. The adjudicator concluded that the applicant, Treaty 8 Tribal Association, was a federal undertaking for the purpose of the application of the Canada Labour Code, R.S.C., 1985, c. L-2 [the Code].

II. Facts

[2] The applicant was registered as an incorporated society in British Columbia pursuant to the *Society Act*, RSBC 1996, c 433 on January 18, 1982. Its constitution states that its purpose is:

> a) To provide educational materials and resources to the Indian Bands in North Eastern British Columbia;
>
> b) To assist the Indian Bands in North Eastern British Columbia to improve their social, economic and cultural position;
>
> c) To assist the Indian Bands in North Eastern British Columbia to practice their Indian government;
>
> d) To co-ordinate the Indian people's activities towards protecting the traditional resources of their committees;
>
> e) To train members of the communities in various forms of Indian government; and
>
> f) To protect the treaty and aboriginal rights of the Indian Bands in North Eastern British Columbia.

[3] The applicant's offices are located in the City of Fort St. John. Its members consist of Treaty 8 First Nations, but membership fluctuates depending on the year. Customarily, the applicant's Directors are the Chiefs of the First Nations maintaining a membership in the association. In 2014, the applicant drew its revenues from federal funding (36%), provincial

funding (almost 25%) and internally-raised money derived principally from a trust related to agreements with the provincial government (40%).

[4] In July 2014, preparations for the annual financial audit resulted in the discoveries of financial irregularities involving the respondent, including repeated use of the organization's corporate credit card for personal use. Because the respondent was employed as Director of Administration and Economic Development and oversaw the management and finances of the applicant, the applicant considered that it had just cause to terminate her employment without notice or pay in lieu of notice.

[5] Following her dismissal, the respondent filed a complaint for unjust dismissal with Human Resources and Skills Development Canada. An adjudicator was appointed by the Minister of Labour on May 12, 2015.

[6] Following a preliminary objection raised by the applicant, the adjudicator agreed to make a determination on the issue of whether the applicant constituted a federal undertaking based on the parties' written submissions before hearing the case on the merits.

III. Decision

[7] The adjudicator accepted that the applicant was a provincially incorporated society, that it did not specifically direct or manage the activities of the respective First Nations members and that its purpose was as laid out in its constitution. She also noted that labour relations are *prima facie* the responsibility of the provinces.

[8] She found that she did not necessarily need to find that the operation itself was a federal entity, but that the question was whether the essential operational nature of the organization was such that it was integral to the First Nations members' functions. She applied the test in *Gibson-Peron v Berens River First Nation*, 2015 FC 614 to determine if the services provided to the federal entity were performed by a functionally discrete unit that could be constitutionally characterized separately from the related organization.

[9] The adjudicator found that the case at hand corresponded to the two contexts in which derivative jurisdiction could be established. First, the services provided to a federal undertaking – the First Nations members – formed the exclusive (or principal) part of the related work's activities of the applicant. The applicant was created for the sole purpose of service to its members and devoted 100% of its time providing support to Treaty 8 bands, which are clearly federal undertakings by way of subsection 91(24) of the *Constitution Act*, 1867, [Constitution Act]. Second, the operations and functions of the applicant were such that their activities have a direct impact on the economic, cultural and political influence of the First Nations members. Therefore, it was integral to the First Nations members' functions. In fact, the adjudicator concluded that the applicant was created to 'promote Indianness'.

[10] She also found that the fact that the applicant's lack of involvement in policy development or the implementation of policies at band level was not a determining factor. The applicant's core functions clearly related to cultural or Indian status or rights because it had no other purpose than serve its First Nations members.

IV. Issues

[11] This matter raises the following issues:

1. What is the applicable standard of review?

2. Did the adjudicator err in concluding that the applicant was a federal undertaking for the purposes of applying the *Canada Labour Code*?

V. Analysis

A. *What is the applicable standard of review?*

[12] The applicable standard of review is correctness. Questions of true jurisdiction and constitutional questions involving the division of powers are necessarily subject to the correctness review because of the unique role of the Court as interpreters of the Constitution (*Dunsmuir v New Brunswick*, 2008 SCC 9, paras 58-59). When applying the correctness standard, the Court will not show deference to the decision-maker's reasoning process; it will rather undertake its own analysis of the question. If the Court does not agree with the decision, it will substitute its own view and provide the correct answer (*Dunsmuir*, para 50).

B. *Did the adjudicator err in concluding that the applicant was a federal undertaking for the purposes of applying the Canada Labour Code?*

[13] The applicant submits that the adjudicator collapsed the two steps of the bifurcated test over labour relations into a single one, transforming the traditional labour relation test into a test used for determining whether a statute is inapplicable. She did not begin with the functional test,

but skipped right to the derivative jurisdiction while overlooking whether the nature, operations and habitual activities of the applicant related to federal jurisdiction. She ignored that none of the applicant's services fall under the *Indian Act*, RSC 1985, c. I-5, [Indian Act], nor within the realm of First Nations governance or lands reserved for Indians, and therefore not within the primary competence of the federal government over Indians and lands reserved for Indians. I agree for the following reasons.

[14] Since 1925, it has been well-established that labour and employment presumptively fall under provincial jurisdiction and only exceptionally under federal jurisdiction. The Canada Labour Code only applies to "employees who are employed on or in connection with the operation of any federal work, undertaking or business" (s 4) and defines "federal work, undertaking or business" as "any work, undertaking or business that is within the legislative authority of Parliament" (s 2).

[15] The Supreme Court of Canada developed a test to determine whether an organization fell under federal or provincial jurisdiction**.** In *Tessier Ltée v Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23 at para 17, Justice Abella explained that the federal government has jurisdiction to regulate employment in two circumstances, namely when the employment related to a work, undertaking or business within the legislative authority of Parliament, or when it is an integral part of a federally regulated undertaking. She described the test to be applied as follows:

> [18] In the case of direct federal labour jurisdiction, we assess whether the work, business or undertaking's essential operational nature brings it within a federal head of power. In the case of derivative jurisdiction, we assess whether that essential operational

> nature renders the work integral to a federal undertaking. In either case, we determine which level of government has labour relations authority by assessing the work's essential operational nature.
>
> [19] In this functional inquiry, the court analyzes the enterprise as a going concern and considers only its ongoing character: Commission du salaire minimum v. Bell Telephone Co. of Canada. The exceptional aspects of an enterprise do not determine its essential operational nature. […]

[16] If the functional test is conclusive, there is no need to proceed to the derivative jurisdiction analysis (*Four B Manufacturing v. United Garment Workers*, [1980] 1 S.C.R. 1031, p. 1047 [*Four B*]; *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, para 16 [*NIL/TU, O*]). If inconclusive, then the jurisdiction is determined by exploring whether provincial regulation of an entity would impair the "core" of the federal head of power at issue.

[17] In *NIL/TU,O*, the Supreme Court recognized that a divergent approach had emerged in dealing with labour relations in the context of subsection 91(24) of the Constitution Act, but expressly rejected it at para 20. The divergent approach proceeded directly to the question of whether the "core" of the head of power is impaired, without applying the functional test first. It also examined whether the nature of the entity's operations lay at the "core" and therefore displaced the presumption that labour relations are provincially regulated instead of considering whether the core of the federal power was impaired.

[18] It is the approach that the adjudicator appears to have followed. She wrote:

> In the application of the case law to the facts as presented by the Employer by way of affidavit, I do not necessarily need to find that

> the operation itself is a federal entity, however the question is whether the essential operational nature of T8TA is such that it is integral to the First Nations members' functions.

[19] She later considered that "[the applicant's] core functions clearly relate to the cultural and Indian status or rights."

[20] The adjudicator should have applied the functional test to determine whether the nature, operations and habitual activities of the applicant fell under the federal head of power of "Indians, and Lands reserved for the Indians". Only where the activity is so integrally related to what makes Indians and lands reserved for the Indians a fundamental federal responsibility does it become an intrinsic part of the exclusive federal jurisdiction (*NIL/TU,O*, para 73).

[21] Subsection 91(24) of the Constitution Act is concerned with the "core of Indian-ness". In *Fox Lake Cree Nation v Anderson*, 2013 FC 1276 [*Fox Lake*], Justice Zinn summarized what the jurisprudence considered part of the core of Indian-ness:

> [43] […] Relationships within Indian families and reserve communities; rights that are necessarily incidental to Indian status such as registrability, membership in a band, the right to participate in elections of Chiefs and Band Councils, and reserve privileges; the right to possession of lands on a reserve and the division of family property on reserve lands; sustenance hunting pursuant to Aboriginal and treaty rights; the right to advance a claim for the existence or extent of Aboriginal rights or title in respect of a contested resource or lands; and the operation of constitutional and federal rules respecting Aboriginal rights.

[22] In light of this description, it is clear that the applicant's activities are not part of the "core" of subsection 91(24) of the Constitution Act. The applicant provides services and advice

to First Nations, including services related to economic development, education and culture of the British Columbia Treaty 8 First Nations. It is not directly involved in policy development or the implementation of policies at the community level. The individual First Nations members remain responsible for developing their own policy and maintain full autonomy and decision-making powers. In addition to advisory services to Bands, the applicant provides administrative, technical, research, archival, training, negotiation and advocacy services to its members and research and archival support to other First Nations in British Columbia and Alberta. It also facilitated a collaborative economic development corporation to create opportunities from major developments in the territories of Treaty 8 Nations and to invest back in the communities and played a coordinating role for the First Nations in the negotiation of a suite of agreements with the provincial government. None of these services fall under the Indian Act, nor within the realm of First Nations governance or lands reserved for the Indians. Had the adjudicator proceeded to do the functional analysis, she would have conclusively concluded that the applicant's activities did not fall under subsection 91(24) and declined jurisdiction.

[23] The adjudicator's failure to apply the functional test is sufficient to decide the issue of this judicial review in favour of the applicant.

[24] I will however note that, in going through the derivative jurisdiction analysis the adjudicator committed an additional error by focusing on the identity of the applicant's clients (*Fox* Lake, para 31). As contemplated above, the nature of the habitual activities undertaken by the applicant do not fall under subsection 91(24) of the Constitution Act because it merely provides assistance to First Members nations in the exercise of their powers under subsection

91(24) of the Constitution Act. Similarly to the situation in *Fox Lake*, in this case, while the beneficiaries of the applicant's work are First Nations, its main purpose is to offer advisory services in the conduct of Band business. As the applicant points out, a law firm specializing in the same would not ever be considered a federal undertaking only for that reason. Had the adjudicator applied the functional test and found it inconclusive, her analysis of the derivative jurisdiction would not have stood up under scrutiny.

VI. Conclusions

[25] In light of the above, the decision is quashed. The Court declares that the applicant is a provincial entity. The Code does not apply to the respondent's complaint of alleged unjust dismissal. No costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the adjudicator's decision is quashed. The Court declares that the applicant is a provincial entity and that the Canada Labour Code does not apply to the respondent's complaint of alleged unjust dismissal. No costs.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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