

Federal Court of Appeal



Cour d'appel fédérale

Date: 20151002

Docket: A-432-13

Citation: 2015 FCA 211

**CORAM: PELLETIER J.A.
STRATAS J.A.
WEBB J.A.**

BETWEEN:

THE NISHNAWBE-ASKI POLICE SERVICE BOARD

Applicant

and

THE PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

and

THE ATTORNEY GENERAL OF ONTARIO

Intervener

Heard at Toronto, Ontario, on September 9, 2014.

Judgment delivered at Ottawa, Ontario, on October 2, 2015.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

PELLETIER J.A.

WEBB J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] In 2005, the Canada Industrial Relations Board (“CIRB”), acting under the federal *Canada Labour Code*, R.S.C. 1985, c. L-2, certified the respondent, the Public Service Alliance of Canada, as the bargaining agent for two bargaining units of employees employed by the Nishnawbe-Aski Police Services Board. The certification orders were based upon, among other things, the view that the labour relations of the Nishnawbe-Aski Police Service—a police service for certain areas of the Nishnawbe-Aski Nation—are federally regulated.

[2] A few years later, the Supreme Court released two cases: *NIL/TU, O Child and Family Services v. B.C. Government and Service Employees’ Union*, 2010 SCC 45, [2010] 2 S.C.R. 696; *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46, [2010] 2 S.C.R. 737. In *NIL/TU, O* and *Native Child*, the Supreme Court held that the labour relations of employees of agencies that provide services to Aboriginal families and children were provincially regulated.

[3] After the release of *NIL/TU, O* and *Native Child*, the Nishnawbe-Aski Police Services Board thought that the labour relations of the Nishnawbe-Aski Police Service might be provincially regulated. So it applied to the CIRB for an order setting aside the certification orders.

[4] In a decision dated November 25, 2013, the CIRB upheld the certification orders it had made and dismissed the application: 2013 CIRB 701. The CIRB found that the labour relations of the Nishnawbe-Aski Police Service are federally regulated and so it had the authority to make the certification orders it did.

[5] Dissatisfied, the Nishnawbe-Aski Police Services Board now applies to this Court for judicial review of the CIRB's decision. It submits that the labour relations of the Nishnawbe-Aski Police Service are provincially regulated, not federally regulated, and so the Board should have revoked the certification orders it made. The Attorney General intervenes, supporting the position of the Nishnawbe-Aski Police Services Board. The Public Service Alliance of Canada opposes.

[6] All of the parties agree that we must review the Board's decision on the standard of correctness because it turns upon an issue of constitutional law. I agree: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 58. It is for this Court to determine whether the labour relations of the Nishnawbe-Aski Police Service are federally regulated or provincially regulated, without any deference to the decision of the CIRB.

[7] In my view, the labour relations of the Nishnawbe-Aski Police Service are provincially regulated and so the CIRB did not have the authority to make the certification orders it did. Accordingly, I would grant the application for judicial review, set aside the decision of the CIRB and direct it to grant the application of the Nishnawbe-Aski Police Services Board and set aside the certification orders.

A. Background facts

[8] The following is a distillation of many of the facts recounted in the reasons of the CIRB and in an agreed statement of facts filed with the CIRB. I will also refer to certain legislative facts.

[9] The Nishnawbe-Aski Nation is comprised of 49 First Nations communities who agreed to either Treaty No. 5 (1875) or Treaty No. 9 (1905). The Nation covers a broad area, roughly two-thirds of the Province of Ontario, stretching from the Manitoba border in the west to the Quebec border in the east and to James Bay in the north.

[10] The history of the policing of the Nishnawbe-Aski area goes back to 1873. At that time, the Royal Canadian Mounted Police began to supply policing services to the area. However, starting in the 1960's, the RCMP gradually withdrew. As the RCMP withdrew, the Ontario Provincial Police took over.

[11] Around this same time, Band employees started to serve as Band Constables. At the direction of Band Chiefs and Councils, these Constables provided front-line policing of Band by-laws and other local matters. However, they were not police officers within the meaning of the *Police Services Act*, R.S.O. 1990, c. P.15. Instead, they referred cases involving the *Criminal Code*, R.S.C. 1985, c. C-46 and other provincial or federal legislation to the OPP.

[12] Later, the OPP also started a Special Constable program as an alternative to the Band Constable system. In this program, Aboriginal officers were hired, trained and then assigned to a specific First Nation community. These Special Constables were employed by the OPP, not any Band.

[13] In the late 1980's, the federal government reviewed policing in Aboriginal communities and developed a First Nations Policing Policy. This policy was to be applied to all First Nations in Canada. Under this policy, a First Nation or Band council was to establish a First Nation police service, usually through a police commission.

[14] Consistent with this policy, in 1992 Canada, Ontario, the Nishnawbe-Aski Nation and other First Nations signed an agreement known as the Ontario First Nations Policing Agreement. This Agreement enshrined and implemented the principle that First Nations in Ontario should decide the policing arrangements that are best suited to their communities. Among other things, the Agreement set out certain options for the delivery of police services, such as First Nations entering into an agreement with municipal or regional police services or the OPP for police services, First Nations establishing their own police service, or First Nations creating a regional police service controlled by a First Nation police governing authority operating in a group of First Nation territories.

[15] The Nishnawbe-Aski Nation chose this last-mentioned option. It decided to establish the Nishnawbe-Aski Police Service under the management of the Nishnawbe-Aski Police Services

Board. The Nishnawbe-Aski Police Service was to provide effective, efficient and culturally-appropriate police services for the people of the Nishnawbe-Aski area.

[16] To this end, Ontario, the Nishnawbe-Aski Nation and Canada signed the Nishnawbe-Aski Police Services Agreement. It took effect April 1, 1994. Subsequent agreements to similar effect have been signed. The 1994 Nishnawbe-Aski Police Services Agreement set out the composition of the Nishnawbe-Aski Police Services Board and a schedule for the transfer of all policing responsibilities for the Nishnawbe-Aski Nation communities from the OPP to the Nishnawbe-Aski Police Service. When the Nishnawbe-Aski Police Service first came into being, all of its officers were transferred from the OPP. The OPP's labour relations are provincially regulated.

[17] The Nishnawbe-Aski Police Service did not assume any policing functions from a federal agency or a federal police service. The officers transferred to the Nishnawbe-Aski Police Service perform essentially the same functions they performed when they were employees of the OPP, but are obligated to do so in a culturally-sensitive manner.

[18] The Nishnawbe-Aski Police Services Agreement also set out funding arrangements. Core funding was provided 48% from Ontario and 52% from Canada. Ontario has given additional funding for the purposes of recruitment, the province's anti-violence strategy and community policing.

[19] The Nishnawbe-Aski Police Service is responsible for most policing services within a portion of the Nishnawbe-Aski area. The portion is that occupied by 35 participating First Nations.

[20] The Nishnawbe-Aski Police Services Board has entered into operational agreements with the OPP. Section 4 of one such agreement sets out clearly the responsibilities of the Nishnawbe-Aski Police Service:

4. (1) The Nishnawbe-Aski Police Service has the primary responsibility for the enforcement of all laws and shall be involved in all police operations on its First Nation Territories described in Section 3.

4. (2) The Nishnawbe-Aski Police Service will be responsible for, as applicable, the enforcement of First Nations laws, the Criminal Code of Canada, Ontario Provincial Statutes, and other Federal Statutes within the Nishnawbe-Aski Police Service Area. The Nishnawbe-Aski Police Service will be involved in all police operations that occur on the Nishnawbe-Aski First Nation communities.

[21] The Nishnawbe-Aski Police Service has roughly 150 officers and 38 civilian employees, both First Nations citizens and non-First Nations citizens. Of the 188 employees, 66 work off-reserve at either the General Headquarters in Thunder Bay, Ontario or the Northwest Region Headquarters located in Sioux Lookout and Cochrane, Ontario.

[22] The human resources department for the Nishnawbe-Aski Police Service is located in Thunder Bay, Ontario. Among other things, it recruits police officers, using criteria similar to those used by municipal police services and the OPP.

[23] Recruitment is pretty much independent of the involvement of the Nishnawbe-Aski First Nations. Although Chiefs and Councils may provide letters of reference for individual candidates, the Nishnawbe-Aski First Nations have no formal role in the selection process. Candidates recommended for hiring are sent to the Chief or Deputy Chief of the Nishnawbe-Aski Police Service for assessment. Once selected, recruits, like all other recruits across the province, are required to complete training at the Ontario Police College.

[24] After the completion of training at the Ontario Police College, the Commissioner of the OPP can appoint the recruit as a First Nations Constable under section 54 of the *Police Services Act*. Once appointed by the Commissioner of the OPP, First Nations Constables have all the powers of a “police officer” under the Act: subsection 54(3). This means, among other things, that they can enforce laws throughout Ontario and this is reflected in the operational agreement with the OPP set out above. All Nishnawbe-Aski Police Service officers are First Nations Constables holding appointments from the OPP Commissioner under section 54 and all can enforce laws throughout Ontario.

[25] This is confirmed by the latest Nishnawbe-Aski Police Services Agreement (2009-2012) in the record before us, which defines a First Nations Constable as “a person appointed pursuant to Section 54 of the *Police Services Act*, R.S.O. 1990, c. P-15, who exercises the powers of a police officer throughout Ontario for the purpose of carrying out his or her duties.”

[26] As employees of the Nishnawbe-Aski Police Service, First Nations Constables serve both First Nations and non-First Nations citizens in the areas covered by the Nishnawbe-Aski Police Services Agreement and enforce Ontario and federal laws and Band by-laws in those areas.

[27] As they perform their duties in Nishnawbe-Aski areas, Nishnawbe-Aski officers are subject to various provisions of the *Police Services Act* and various regulations made under the Act: see, e.g., O. Reg. 268/10 (“General”), R.R.O. 1990, Reg. 926 (“Equipment and Use of Force”), and O. Reg. 550/96 (“Violent Crime Linkage Analysis System Reports”). Nishnawbe-Aski officers are ultimately responsible to the OPP Commissioner and the Ontario Civilian Policing Commission, both of whom can suspend or terminate their appointment: *Police Services Act*, subsections 54(5) and 54(6).

B. The decision of the CIRB

[28] The CIRB recognized that the decisions of the Supreme Court in *NIL/TU,O* and *Native Child* controlled the outcome of its decision. Of the two, *NIL/TU,O* contains the operative principles and *Native Child* is an application of those principles.

[29] The CIRB correctly noted that the Supreme Court reaffirmed in *NIL/TU,O* that labour relations are presumptively provincially regulated. In order to determine whether that presumption is rebutted, a two-step inquiry must be followed.

[30] First, the CIRB stated that it must follow a functional test to examine the nature, operations and habitual activities of the entity to determine whether it constitutes a federal undertaking. If the CIRB were inconclusive on that, it would have to proceed to the second step.

[31] The CIRB stated that under the second step, it must ask whether provincial regulation of the entity's labour relations would impair the "core" of the federal head of power.

[32] Having charged itself correctly as to the applicable law, in my view the CIRB then proceeded not to follow it.

[33] For one thing, the CIRB did not begin with the presumption in favour of provincial regulation of labour relations. Rather, it went right into the first step of the *NIL/TU,O* test.

[34] And here—rather than conducting a functional examination of the nature, operations and habitual activities of the Nishnawbe-Aski Police Service to determine whether it constitutes a federal undertaking, as it was supposed to do—it focused almost exclusively on the more abstract question of whether policing was federally or provincially-regulated (at paragraphs 32-33). On that abstract question, it concluded that policing is not subject to the exclusive jurisdiction of either Canada or the provinces because policing is "a governance function that flows from the need of organized societies to maintain peace and social order within their communities" (at paragraph 33).

[35] Still purportedly following the first step in *NIL/TU,O*, the CIRB went on to focus upon the statutory authority of a First Nation to establish a police commission and a police service. At best, this bore upon only a small part of the factually-suffused functional approach prescribed in *NIL/TU,O*.

[36] On this, the CIRB found that a First Nation's policing authority stemmed from the federal *Indian Act*, R.S.C. 1985, c. I-5, not provincial legislation. In particular, the CIRB found that the Nishnawbe-Aski Police Service's authority did not stem at all from Ontario's *Police Services Act* (at paragraphs 34-37). Further, in its view, section 54 of the *Police Services Act* permitted the OPP Commissioner to grant certain powers to First Nations Constables, nothing more.

[37] I disagree with the CIRB's conclusions on this point. In my view, the *Police Services Act* affects the nature, operations and habitual activities of the Nishnawbe-Aski Police Service in a far more significant way than the CIRB found. I shall return to this later.

[38] Having found as it did, the CIRB concluded that "the [Nishnawbe-Aski Police Service] situation is distinguishable from that which existed in [the *NIL/TU,O* case]" (at paragraph 38). In its view, *NIL/TU,O* concerned the provision of child and family services, a matter within provincial jurisdiction (at paragraph 39). Here, it was concerned with policing and policing is not exclusively federal or provincial. In its view, the police are concerned with "polic[ing] Indians and lands reserved for Indians" (at paragraph 40). Reiterating some of its earlier conclusions, the CIRB added (at paragraph 41):

As noted earlier, policing is an aspect of governance. The basis for the existence of the [Nishnawbe-Aski Police Service] is found in the *Indian Act*, federal

legislation enacted pursuant to Parliament's exclusive jurisdiction over Indians and lands reserved for the Indians. Consequently, with respect to aboriginal policing generally, and police service created pursuant to the [Nishnawbe-Aski Police Services Agreement] specifically, the [CIRB] concludes that the operations of the [Nishnawbe-Aski Police Service] are a matter of federal jurisdiction pursuant to section 91(24) of the *Constitution Act, 1867*.

[39] As this passage shows, the CIRB did not examine whether the presumption that labour relations is provincially regulated is displaced by the particular functions of the police service before it. Rather than analyzing in detail the function of the Nishnawbe-Aski Police Service—a factually-suffused matter—it very much restricted its analysis to legal matters such as the legal provenance of the policing power.

[40] The CIRB went on to the second step in the in *NIL/TU,O* inquiry, namely whether provincial regulation of the Nishnawbe-Aski Police Service's labour relations would impair the “core” of the federal head of power, here “Indians” under subsection 91(24) of the *Constitution Act, 1867*. This requires a granular, factual examination.

[41] Here the CIRB rested upon general assertions. It asserted in the abstract that labour laws affect a vital part of the management and operation of any undertaking and here the undertaking was policing which is part of Aboriginal self-government, something being discussed between the federal government and many First Nations. Thus, in the CIRB's view, it followed that Aboriginal policing had to be federally regulated.

[42] The CIRB's analysis on this point appears at paragraph 42 of its decision:

Furthermore, the Board is of the opinion that provincial regulation of the [Nishnawbe-Aski Police Service's] labour relations would impair the "core" of the federal authority over Indians and lands reserved for the Indians. As noted above, the federal government is actively engaged in self-government negotiations with many First Nations. By definition, these negotiations go to the heart of governance functions, including policing. Labour laws affect a vital part of the management and operation of an undertaking (see *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749). It would be inconsistent with federal responsibility over Indians and lands reserved for the Indians if provincial labour legislation were to apply to the instruments of aboriginal governance such as policing.

[43] Overall, the CIRB concluded that "jurisdiction over the [Nishnawbe-Aski Police Service] rests with the federal government, and [so] the [federal *Canada Labour Code*] applies to its relations with its employees" (at paragraph 43).

[44] It dismissed the application of the Nishnawbe-Aski Police Services Board challenging the certification of the respondent, the Public Service Alliance of Canada.

[45] The Nishnawbe-Aski Police Services Board now applies for judicial review of the CIRB's decision.

[46] Although the CIRB's decision suffers from a number of flaws, it does not logically follow that its conclusion is wrong. This Court must still answer the central question: are the labour relations of the Nishnawbe-Aski Police Service federally regulated or provincially regulated?

C. Analysis

[47] Relatively recently, the Supreme Court has set out a useful and comprehensive methodology for determining whether particular legislative subject-matters fall within federal or provincial authority: *Canadian Western Bank v. Alberta*, 2007 SCC 22. [2007] 2 S.C.R. 3.

[48] That methodology, however, does not apply here. For reasons that escape me, the area of labour law is regarded as special area with special rules that must be followed. As the Supreme Court put it in *NIL/TU, O*, above at paragraph 12, to determine whether an entity's labour relations are federally or provincially regulated one must follow a "distinct approach," one entailing "a completely different analysis from that used to determine whether a particular statute is *intra* or *ultra vires* the constitutional authority of the enabling government."

[49] The *Constitution Act, 1867* does not explicitly assign the subject-matter of labour law to provincial legislatures or the federal Parliament. However, ever since 1925, Canadian law has recognized that labour law is presumptively a matter for the provincial legislatures calling under subsection 92(13) ("Property and Civil Rights") and subsection 92(16) ("Matters of a merely local or private Nature in the Province") of the *Constitution Act, 1867*: *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 (P.C.). "Exclusive provincial competence is the rule": *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 at page 132.

[50] The federal Parliament has jurisdiction over labour relations only by way of exceptions: *NIL/TU, O*, above at paragraph 11; *Consolidated Fastfrate Inc. v. Western Canada Council of*

Teamsters, 2009 SCC 53, [2009] 3 S.C.R. 407 at paragraphs 27-28. These exceptions have “always been narrowly interpreted”: *NIL/TU, O*, above at paragraph 11.

[51] Supreme Court jurisprudence suggests that the exceptions fall in two categories and if a case falls into either of them, federal authority is established. The two categories are as follows:

- Matters that are “related to an integral part of the operation of the undertaking, service or business” are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a “federal one.” Whether an undertaking is federal “depends on the nature of its operation” and this is determined by “the normal or habitual activities of the business as these of “a going concern”, without regard for exceptional or casual factors.” This is a “functional, practical one about the factual character of the ongoing undertaking.”
- Matters that are “an integral part of [Parliament’s] primary competence over some other single federal subject.”

(See *Northern Telecom*, above at pages 132-33 *per* Dickson J. (as he then was); see also *Construction Montcalm Inc. v. Minimum Wage Commission* (1978), [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641.)

[52] Soon after the seminal case of *Northern Telecom*, the Supreme Court had to consider whether these exceptions applied to a shoe manufacturer that was owned by four Aboriginal band members, operated on a reserve under a federal permit and employed mainly band members: *Four B Manufacturing v. United Garment Workers* (1979), [1980] 1 S.C.R. 1031, 102 D.L.R. (3d) 385. The Aboriginal context did not make a difference: the presumption in favour of provincial jurisdiction remained, rebutted only if the case fell into one of the two categories of exception.

[53] Thus, in *Four B*, the Supreme Court conducted an inquiry into whether the presumption of provincial jurisdiction was rebutted, *i.e.*, whether the case fell into one of the two categories of exception. As in *Northern Telecom* and *Construction Montcalm*, both above, the inquiry in *Four B* consisted of two questions (at pages 1045-47):

- Functionally speaking, was the nature of the manufacturer's business and its normal activities a federal undertaking? In particular, did the ownership of the business by Indian shareholders, the employment by that business of a majority of Indian employees, the carrying on of that business on an Indian reserve under a federal permit, or certain federal loan and subsidies received by the business, taken separately or together, have any effect on the operational or functional nature of that business?
- If the answer to that question is inconclusive, did the power to regulate the labour relations of the manufacturer form an integral part of primary federal jurisdiction over "Indians and Lands reserved for the Indians" under subsection 91(24) of the *Constitution Act, 1867*?

[54] In *Four B*, the Supreme Court answered the first question in the negative and held that the general presumption of provincial jurisdiction over labour relations stood unrebutted. It held that the manufacturer's labour relations were provincially regulated.

[55] In its most recent foray into this area of law—*NIL/TU,O* and the companion case of *Native Child*—the Supreme Court has preserved this idea of two categories of exceptional federal jurisdiction.

[56] Thus, as in the former cases, the inquiry remains the same. We start with the presumption that labour relations are provincially regulated. Then, in order to see whether that presumption is rebutted, we must conduct an inquiry into the same two questions. In short, we must conduct:

... an inquiry into the nature, habitual activities and daily operations of the entity in question to determine whether it constitutes a federal undertaking. This inquiry is known as the “functional test”. Only if this test is inconclusive as to whether a particular undertaking is “federal”, does the court go on to consider whether provincial regulation of that entity’s labour relations would impair the “core” of the federal head of power.

(*NIL/TU, O*, above at paragraph 3.)

[57] The majority of the Supreme Court in *NIL/TU, O* takes great pains to stress that the two questions are separate: the functional question must proceed first, and the second question about whether the “core” has been impaired proceeds only if the answer to the first question is inconclusive.

[58] In stressing this point, the Supreme Court specifically disapproved of a contrary approach followed in certain cases involving the federal power over “Indians” in subsection 91(24) of the *Constitution Act, 1867* (at paragraph 19). In its view, “[t]here is no reason why, as a matter of principle, the jurisdiction of an entity’s labour relations should be approached differently when s. 91(24) is at issue” (at paragraph 20). Aboriginal cases do not call for a different approach.

[59] In light of the above authorities, our first task is to examine the essential nature or function of the Nishnawbe-Aski Police Service, focusing upon its normal or habitual activities as a going concern without regard for exceptional or casual factors.

[60] The decided cases offer some guidance on the approach to be followed. They show that the approach is very much a factual one. But not exclusively so. As we examine the facts, we

must assess whether they point to the undertaking, organization or business being provincial or federal in nature.

[61] *NIL/TU,O* shows us that we must examine the services provided and the functions performed by the entity under scrutiny, as influenced by the statutory context and foundational agreements (paragraphs 25-33), the source of funding (paragraph 35), and whether the regulation of the entity's activities, ultimate decision-making power and "essential nature" is federal or provincial (paragraphs 36-38 and 40). In *NIL/TU,O*, the Supreme Court also examined whether "federal operational involvement [was] necessary" such that the entity must be regarded as federal (at paragraph 40). After examining the nature and functions of the entity, the Supreme Court found that its "essential nature" and function was "to provide child and family services," a "matter within the provincial sphere" (at paragraph 45).

[62] In *Native Child*, the Supreme Court identified and examined the nature and functions of the Native Child agency and who exercised ultimate decision-making power over it. Then it assessed whether the agency should be regarded as a federal or provincial undertaking (at paragraphs 5-7). The Supreme Court also considered agreements that the Native Child agency entered into with the province and funding arrangements (at paragraphs 7 and 9). It concluded that functionally the agency was a provincial undertaking, and so the presumption in favour of provincial jurisdiction was not rebutted.

[63] In *Four B*, the Supreme Court considered similar matters. It focused on the nature and function of the shoe-manufacturing business itself. It also examined regulatory matters such as

whether there were significant federal permits or other forms of federal involvement important to the function of the business. It concluded that the business was a provincial undertaking. As we shall see later, the Supreme Court also offered important comments on whether the Aboriginal nature of the business mattered.

[64] With the guidance of these cases front of mind, I start with the presumption that the Nishnawbe-Aski Police Service's labour relations are provincially regulated. In considering whether that presumption is rebutted, I must first examine the essential nature and function of the Nishnawbe-Aski Police Service. I find that its essential nature and function is to provide policing services just like other provincial and municipal police forces in Ontario, a matter within the provincial sphere. The presumption that its labour relations are provincial has not been rebutted.

[65] Many of the adjudicative and legislative facts supporting this conclusion are in paragraphs 9-27, above. But I would summarize them as follows:

- Ontario has the constitutional authority to establish and regulate provincial and municipal police services and to regulate officers under subsection 92(8) ("Municipal Institutions in the Province") and subsection 92(16) ("Matters of a merely local or private Nature in the Province") of the *Constitution Act, 1867*. Since 1895, these heads of power have been interpreted to include policing powers: *Re Provincial Jurisdiction to pass Prohibitory Liquor Laws* (1895), 24 S.C.R. 170; *De Iorio v. Montreal (City)* (1976), [1978] 1 S.C.R. 152; *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591, 45 D.L.R. (4th) 527. It has done so, primarily through the *Police Services Act*.
- As the analysis at paragraphs 24-25, above, shows, the statutory source for the appointment of First Nations Constables is the provincial *Police Services Act*. The Supreme Court itself has confirmed this in *R. v. Decorte*, 2005 SCC 9, [2005] 1 S.C.R. 133 at paragraph 24. The Court of Appeal for Ontario has also confirmed this, declaring that "the status of being a First Nations Constable flows directly from the provisions governing First

Nations Constables in the *Police Services Act*”: *R. v. Stephens* (1995), 26 O.R. (3d) 417, [1996] 1 C.N.L.R. 200.

- The CIRB held that the statutory authority for the Nishnawbe-Aski Police Service is paragraph 81(1)(c) of the *Indian Act*, which provides that a band council may pass a bylaw for the purpose of the “observance of law and order.” I disagree. Paragraph 81(1)(c) gives a band council the power to make by-laws maintaining law and order, nothing more. One of the duties of the Nishnawbe-Aski Police Service is to enforce bylaws enacted under paragraph 81(1)(c) of the *Indian Act* but its overall function is to provide police services that are authorized by the *Police Services Act*. As both the Supreme Court and the Court of Appeal for Ontario have found, the status of being a First Nations Constable flows directly from the *Police Services Act*, not any federal law.
- Section 54 of the *Police Services Act* vests the Nishnawbe-Aski’s constables with the powers of a police officer for the purposes of carrying out their duties. These powers include the power to detain, arrest and, where necessary, to use force.
- Section 54 of the *Police Services Act* also regulates some aspects of labour relations within the Nishnawbe-Aski Police Service. Section 54 allows the OPP Commissioner to suspend or terminate a First Nations Constable and sets out the procedure for doing so.
- The First Nations Constables employed by the Nishnawbe-Aski Police Services Board are regulated under several provisions of the *Police Services Act* and several regulations thereunder. They are subject to the same regulatory bodies as are officers in other police services in Ontario.
- The essential nature of the Nishnawbe-Aski Police Service is to provide policing services to all persons, Aboriginal or non-Aboriginal, who are in the Nishnawbe-Aski area. Its First Nations Constables are required to enforce the law against all persons. This is the same as all police officers in Ontario.
- The appointment of Nishnawbe-Aski First Nations Constables under section 54 of the *Police Services Act* allows them to exercise policing authority anywhere in Ontario, but not outside of Ontario. Section 7.1 of the 1998 agreement reflects this, empowering Nishnawbe-Aski First Nations Constables to enforce “all laws, primarily within the Nishnawbe-Aski area and elsewhere in the Province of Ontario, as required.”
- The Nishnawbe-Aski Police Service is not limited to policing on reserves. Roughly one-third of its staff is located off-reserve.

- Recruits for the Nishnawbe-Aski Police Service must receive training at the Ontario Police College, like all other police officers regulated by the province.
- When the Nishnawbe-Aski Police Service was created, all of its officers were transferred from the OPP. Nishnawbe-Aski officers continue to perform essentially the same functions they performed as OPP officers.
- The Nishnawbe-Aski Police Service is functionally integrated in many ways with other police services in Ontario such as the OPP. For example, the Nishnawbe-Aski Police Service often makes use of provincial and municipal facilities to detain offenders. The Nishnawbe-Aski Police Service and the OPP enlist each other's assistance when transporting offenders. The Nishnawbe-Aski Police Service has protocols to ask for the OPP's assistance in certain circumstances. When pursuing an offender, the Nishnawbe-Aski Police Service is directed by the OPP. Nishnawbe-Aski police supervisors are subject to standardized provincial testing. Lastly, the Nishnawbe-Aski Police Service and the OPP have an unofficial reciprocal agreement allowing each to assist the other in certain circumstances.
- The Nishnawbe-Aski Police Service is funded 48% by Ontario and 52% by Canada but under certain programs, Ontario provides more funding.
- The Nishnawbe-Aski Police Service is independent and autonomous from the Nishnawbe-Aski Nation and its First Nations band members.
- Section 2 of the *Police Services Act* excludes from the definition of "police officer" a First Nations Officer. This means that many of the general provisions in the Act applying to police officers throughout Ontario do not apply to First Nations Constables. The practical effect of this is to allow First Nations communities, in consultation with Canada and Ontario, to develop tripartite policing agreements, such as the Nishnawbe-Aski Police Services Agreement, to specify the type of police services that are suitable for Aboriginal communities. Thus, any special features of the Nishnawbe-Aski Police Service that make it suitable for policing the Nishnawbe-Aski area are permitted by the provincial *Police Services Act*. In no way do they stem from the federal power over "Indians" under subsection 91(24) of the *Constitution Act, 1867*.

[66] As I have mentioned, the Nishnawbe-Aski Police Service must deliver its policing services primarily to Aboriginal peoples, in a culturally sensitive way. It must occasionally apply

and enforce Band by-laws. Do these matters rebut the presumption that the labour relations of the Nishnawbe-Aski Police Service are provincially regulated? I think not.

[67] In the *NIL/TU, O* case, the agency in question operated within an Aboriginal community. Its services were directed at the welfare of families, something at the very centre of Aboriginal life and culture. It was obligated to provide its services in a culturally sensitive way. But the Supreme Court held that these factors did not displace the provincial nature of its activities. Functionally speaking, the Supreme Court found that “[t]he community for whom *NIL/TU, O* operates as a child welfare agency does not change *what* it does, namely deliver child welfare services,” a provincial undertaking (at paragraph 45).

[68] Similarly, in the *Native Child* case, after examining the function of the agency, the Supreme Court concluded that it too was a provincial undertaking. Although it had to deliver its services in an effective, culturally appropriate way to the Aboriginal community and although it did so operating on-reserve, this did not alter the essential nature of what the agency did. In the words of the Supreme Court, “[while] the identity of Native Child’s clients undoubtedly has, and should have, an impact on the way the agency delivers services, it does not alter the essential nature of what Native Child does” (at paragraph 11).

[69] Similarly, in *Four B*, the fact that the shoe-manufacturing concern was owned by Aboriginal shareholders, employed Aboriginal workers, and carried on business on-reserve did not affect the functional nature of the business, which was provincial (at page 1046):

There is nothing about the business or operation of Four B which might allow it to be considered as a federal business: the sewing of uppers on sport shoes is an

ordinary industrial activity which clearly comes under provincial legislative authority for the purposes of labour relations.

Again, the focus must be on what the entity does, not the community for whom it operates.

[70] The fact that the Nishnawbe-Aski Police Service has a distinct character as a police service for Aboriginal communities does not take away from its essential character as a police service that is in all respects regulated by the province. The following words of the Supreme Court in *NIL/TU, O*, above at paragraph 39 are equally apposite to the Nishnawbe-Aski Police Service:

Neither the cultural identity of *NIL/TU, O*'s clients and employees, nor its mandate to provide culturally-appropriate services to Aboriginal clients, displaces the operating presumption that labour relations are provincially regulated. As the Court of Appeal pointed out, social services must, in order to be effective, be geared to the target clientele. This attempt to provide meaningful services to a particular community, however, cannot oust primary provincial jurisdiction over the service providers' labour relations. *NIL/TU, O*'s function is unquestionable a provincial one.

[71] It is true that Nishnawbe-Aski police officers enforce, among other things, bylaws passed by Bands, though this constitutes only a small part of the officers' task: *Nishnawbe-Aski Police Services Board Annual Report 2011-2012* (only 0.6% of total incidents in the operational year).

It is true that the enforcement of Band bylaws might assist the Nishnawbe-Aski Nation in its governance of Nishnawbe-Aski areas. It is true that an important objective of the Nishnawbe-Aski Police Service is to further and assist Aboriginal self-governance. But these things have nothing to do with the factual character of what the Nishnawbe-Aski Police Service actually does. Like the child welfare agencies in issue in *NIL/TU, O* and *Native Child*, the functions and

activities of the Nishnawbe-Aski Police Service can only be characterized on this record as provincial in nature, tailored to serve its particular community, nothing more.

[72] As mentioned above, only if the result of the first inquiry—the nature, habitual activities and daily operations of the entity in question—is inconclusive need we proceed to the next inquiry, which is whether provincial regulation of the entity in question would impair the “core” of a federal head of power. In this case, the result of the first inquiry is conclusive. The nature, habitual activities and daily operations of the Nishnawbe-Aski Police Service are provincial in nature. Therefore, it is unnecessary to proceed further.

[73] As a result of the foregoing, the labour relations of the Nishnawbe-Aski Police Service are provincially regulated, not federally regulated. Therefore, the CIRB did not have the authority to make the orders it did, certifying the Public Service Alliance of Canada as the bargaining agent for two bargaining units of employees employed by the Nishnawbe-Aski Police Services Board. The CIRB should have granted the application of the Nishnawbe-Aski Police Services Board to set aside the certification orders.

D. Proposed disposition

[74] For the foregoing reasons, I would grant the application for judicial review, set aside the decision dated November 25, 2013 of the Canada Industrial Relations Board in Board file 29211-C, and direct the Board to grant the application of the Nishnawbe-Aski Police Services Board to set aside the certification orders. I would grant the Nishnawbe-Aski Police Services Board its costs of the application.

“David Stratas”

J.A.

“I agree

J.D. Denis Pelletier J.A.”

“I agree

Wyman W. Webb J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-432-13

AN APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE CANADA INDUSTRIAL RELATIONS BOARD DATED NOVEMBER 25, 2013

STYLE OF CAUSE: THE NISHNAWBE-ASKI POLICE SERVICE BOARD v. THE PUBLIC SERVICE ALLIANCE OF CANADA AND THE ATTORNEY GENERAL OF ONTARIO

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 9, 2014

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: PELLETIER J.A.
WEBB J.A.

DATED: OCTOBER 2, 2015

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