

CASE COMMENT

***NIL/TU,O Child and Family Services Society
v. B.C. Government and Service Employees' Union
and
Communication Energy and Paperworkers of Canada
v. Native Child and Family Services of Toronto***

MAGGIE WENTE*

I	Introduction	134
	Summary of Case Decisions	135
II	Raising Jurisdictional Barriers—Culture and Identity	137
	Resistance to Imposition of Identity	137
	Defining Their Own Identities	138
	Cultural Organizations	140
III	Implications and a Look to the Future	142

* Maggie Wente is Anishnabe, a member of Serpent River First Nation and a partner at Olthuis Kleer Townshend LLP in Toronto, Ontario. The views expressed in this case comment, and any errors, are my own. Thanks to Judith Rae for her participating in helpful discussions about these cases, and to the editors of the ILJ for their insightful and useful editorial comments.

I Introduction

The question of whether labour relations and human rights regulation over Aboriginal organizations is within federal or provincial jurisdiction has been the subject of considerable disagreement in the jurisprudence of courts, labour boards, and human rights tribunals, with two distinct lines of cases having emerged. The federal courts have favoured dispositions that Aboriginal organizations are federally regulated, whereas provincial courts have favoured provincial jurisdiction. The Supreme Court, in the cases *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*¹, and *Communication Energy and Paperworkers of Canada v. Native Child and Family Services of Toronto*² has settled the matter, at least with respect to child welfare agencies, in its 2010 decisions in these two cases. In the cases, one agency operated by a group of First Nations (NIL/TU,O) took the position that the agency ought to be federally regulated. In *NCFST*, the agency Native Child took the position that it ought to be provincially regulated. Both argued that the unions in question had attempted to certify in the wrong jurisdiction, hence the appeals.

The question of the appropriate analysis to undertake has been determined by the Supreme Court in these cases. However, the questions of why these cases went to the Supreme Court, and why there is a substantial body of case law where First Nations have raised objections to unionization, remain in the minds of some observers. For instance, I have often heard questions relating to these cases such as: Why did one Aboriginal group want to be federally regulated, and the other insisted it was provincially regulated? Why does either group care about whether their labour relations are provincially or federally regulated? Aren't these kinds of jurisdictional arguments really just ways to avoid unionization, anyway?

In the two cases there were different Aboriginal parties: In *NIL/TU,O* the Aboriginal organization was a child and family services agency serving the needs of on-reserve First Nations people, which was constituted by a group of First Nations. Native Child is an urban child and family services agency serving off-reserve Aboriginal people located in Toronto.

Certainly while avoidance of unionization might be a motivation for taking these cases to the Supreme Court of Canada, I suggest that the rationale behind challenging the jurisdictions selected by the unions in these workplaces is more complex than that of your garden-variety employer seeking to avoid the headaches of collective bargaining. One should not be so quick to jump to judgment of Aboriginal organizations that raise jurisdictional arguments as

1 2010 SCC 45 [*"NIL/TU,O"*].

2 2010 SCC 46 [*"NCFST"*].

taking advantage of jurisprudential murkiness in order to “union-bust”. After all, it is inevitable, given prior cases about whether unionization infringes constitutionally protected s. 35 Aboriginal rights, that unionization will occur in one jurisdiction or another. As much was admitted by both *NIL/TU,O* and *Native Child* in their respective factums.³ This still leaves the question, however, about why these employers raise jurisdictional barriers to unionization attempts.

While the author does not purport to speak for either of the Aboriginal employers involved, or to speak to their management’s motivations for pursuing arguments about their jurisdiction for labour relations purposes to the Supreme Court, the author’s experience in representing First Nations and Aboriginal organizations has provided some useful contextual information that might begin to answer some of these questions, when examining the arguments made by the Aboriginal parties in their submissions to the Supreme Court.

The question of why two Aboriginal organizations took different positions with respect to whether they should be provincially or federally regulated can be answered in its simplest iteration by stating that not all Aboriginal people think the same way. The answer appears to be more complex than that—in my view, the cases demonstrate a resistance to definition of Aboriginal identity and aspirations by outside parties which are founded on the Aboriginal parties’ own views about their places in Canadian federalism, and, I posit, a possible scepticism of settler dispute resolution mechanisms.

In the end, these two decisions may not create the kind of legal clarity about jurisdiction that the Supreme Court may have hoped to create. In particular, because of the different ways that First Nations organize themselves in order to provide services to their members, the analysis put forward in these cases may at times lead to absurd results. Accordingly, it is unlikely that these two cases will put an end to cases questioning the correct labour relations jurisdiction for First Nations, Aboriginal parties, and their organizations.

Summary of Case Decisions

In both cases, the SCC found that Aboriginal child welfare agencies are provincially regulated for labour relations purposes. *NIL/TU,O*, the main case which was decided in this pair of cases, had a dissent which, although disagreeing with the majority’s analysis, agreed with its disposition of the case.

3 Native Child SCC Factum, at para. 9, online: <http://www.scc-csc.gc.ca/factums-memoires/32908/FM020_Respondent_Native-Child-and-Family-Services-of-Toronto.pdf> and Factum of the Appellant, *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, online: <http://www.scc-csc.gc.ca/factums-memoires/32862/FM010_Appellant_NIL-TUO-Child-and-Family-Services-Society.pdf> (“*NIL/TU,O SCC Factum*”), at para. 33.

Both the majority and the minority in *NIL/TU, O* reached the same result, but for different reasons. Both started from the premise that there is a presumption about the provincial nature of labour relations. In so doing, the majority offered a two-part inquiry, whereas the minority preferred a single step inquiry. The majority reasoning in *NIL/TU, O* determined that the matter could be decided without having to wade into the waters of the “core of Indianness”, and suggested that the function of the organizations was the delivery of child welfare services and not the internal regulation of families and children within Aboriginal communities.

The majority took the view that the analysis in the 1980 Supreme Court case *Four B Manufacturing v. United Garment Workers*,⁴ required a two-step inquiry. The first step is to determine whether the operation in question is a federal work or undertaking, by examining the organization’s “nature, operations, and habitual activities”.⁵ Only where the answer to this question was inconclusive should the inquiry move to the second part of the test, which is whether the regulation of the organization’s labour relations impairs the core of the head of the federal power under s. 91(24) of the Constitution.

On this preliminary question, the fact that the child welfare organizations in question were designed to, and did, carry out the function of child protection and child and family well-being in a manner that appropriately served the distinct needs of Aboriginal families and children did not disrupt the presumption in law that regulation of labour relations is provincial in nature. The determining factor relied on the characterization of the organization as delivering child welfare services, which lead the majority to the conclusion that the organization is provincial in nature. No amount of Aboriginal-specific delivery of such services would disrupt the provincial presumption, in the court’s view, as the inquiry is focused on the activities, as opposed to the objects, of the organization in question.

The second step of the test, whether the regulation of the organization’s labour relations impairs the core of the head of the federal power under s. 91(24) of the Constitution, should only be examined if the answer to the first question was inconclusive. In the majority’s view, the inquiry in the *NIL/TU, O* case was answered in step one and the majority did not decide whether the provision of child welfare services lies at the “core” of the s. 91(24) power.

Chief Justice McLachlin, Fish J. and Binnie J. in concurring reasons, opted for a one-step test, which requires an inquiry of the extent of the core of the federal power in question, and whether the operation at issue is at the core of that power.⁶ To be at the core of Indianness, said the minority, the “rights and

4 [1980] 1 S.C.R. 1031 (“*Four B*”).

5 *NIL/TU, O*, *supra* note 1, at para. 18.

6 *Ibid.* at para. 61.

status” of Indians must be at the centre of what the organization does.⁷ What it means to be at the core of Indianness, according to the minority, is to affect “core aspects of Indian status” or be part of delegated federal authority.⁸ While the minority cited examples of things that have been found by courts to be at the core of Indianness, including “relationships within Indian families and reserve communities”, *per Canadian Western Bank*,⁹ the minority nonetheless concluded that the activities of the organization were strictly about child welfare services, and therefore strictly provincial.

II Raising Jurisdictional Barriers—Culture and Identity

It is likely disappointing for many First Nations groups to hear that the minority decision found that the provision of child welfare services do not fall within the “core of Indianness”. Certainly, it is safe to say that for both of the Aboriginal organizations in these cases the importance of children to their particular Aboriginal cultures remains central. The fact that the majority of the Supreme Court did not definitively rule on the matter of whether children, families and child welfare are at the “core” of the s. 91(24) power is good news for Aboriginal people who hold this view, as the minority in *NIL/TU,O* suggests that it would not have found this area to be at the “core”.

But curiously to some, the exclusion of child and welfare services from the “core” is exactly the position advocated by Native Child in its submissions to the Supreme Court of Canada.¹⁰ Why did one Aboriginal organization (*NIL/TU,O*) advance a vision of child welfare at the “core”, while Native Child did not?

Resistance to Imposition of Identity

The positions taken by Native Child in its argument to the Supreme Court demonstrate clear resistance to the non-Aboriginal third party, the Communications, Energy, and Paperworkers Union (CEP) purporting to define the aspects that are at the core of Aboriginal people’s identities and aspirations, and specifically attempting to define for the Court the purposes and aspirations of Native Child as an agency. It is obvious to most people familiar with Aboriginal peoples that the attempted imposition of identity and aspirations

7 *Ibid.* at para. 66.

8 *Ibid.* at para. 68.

9 *Canadian Western Bank v. Alberta*, 2007 SCC 22.

10 Factum of the Respondent, *CEP v. Native Child and Family Services of Toronto*, online: <http://www.scc-csc.gc.ca/factums-memoires/32908/FM020_Respondent_Native-Child-and-Family-Services-of-Toronto.pdf> [“Native Child SCC Factum”] at paras. 49-61.

by a non-Aboriginal party strikes at the heart of the modern political struggles of Aboriginal peoples for self-determination in a “post-colonial” world.¹¹

And yet, CEP did attempt to impose its version of Native Child’s identity in CEP’s arguments in the Native Child case. CEP made arguments, for instance, about content of the “core of Indianness”¹² generally, and specifically about what was the “essence” of Native Child’s operations. CEP concluded that Native Child’s operations must be at the “core of Indianness”,¹³ in CEP’s defence of its certification attempt under federal legislation.

For Native Child’s part, it rejected CEP’s attempted imposition definition of Native Child’s operations lying at the “core of Indianness”. Native Child suggested in its submissions that CEP had no place in defining Native Child’s operations or essence, stating that there was no evidence of CEP, or its staff involved in Native Child’s bargaining unit, “having any Native or aboriginal pedigree...[or] aboriginal background”.¹⁴ Native Child went on to say that CEP “presumes to opine, without speaking on behalf of Native Peoples *per se*”, that child and family services are at the core of Indianness.¹⁵

NIL/TU,O also resisted CUPE’s definition of its operations. CUPE suggested, in advancing the argument in favour of provincial jurisdiction over NIL/TU,O’s operations, that the agency is just like those of any other child and family services organization. In that case, the matter of identity and the core of Indianness was also prominent in the agency’s factum. However, NIL/TU,O took a different view than Native Child did. NIL/TU,O spoke in its factum about its “inherent Indianness” which could not be masked by the fact that it delivered a provincially regulated service (para. 92) with a strong cultural focus based in tradition, culture, and the premise of cultural survival (para. 74).

Defining Their Own Identities

Also revealed in the factums submitted by the Aboriginal parties in these two cases are their very different views on their respective relationships to the larger Canadian federal structure. In my view, each organization’s position is informed by its locations, their client bases, and also by whether their clients and staff are registered Indians under the *Indian Act*. The complex identi-

11 The author uses the expression “post-colonial” in quotations, and leaves the question of whether contemporary Canada is a post-colonial world for another day.

12 Factum of the Appellant, CEP v. Native Child and Family Services of Toronto, online: <http://www.scc-csc.gc.ca/factums-memoires/32908/FM010_Appellant_Communications-Energy-and-Paperworkers-Union-of-Canada.pdf> [“CEP SCC Factum”], at para. 81.

13 *Ibid.*, at para. 92.

14 Native Child SCC Factum, *supra* note 10, at para. 7.

15 *Ibid.*, at para. 54.

ties of Aboriginal peoples relating to their possession of “Indian Status”¹⁶ and their on- or off-reserve client base and location is not the subject of this case comment, however in my view it is evident from their arguments that each Aboriginal party’s position in relation to these issues is infused into their respective arguments.

The placement of NIL/TU,O, the First Nation-based organization, as within the federal realm coincides with my experience of many First Nations governments and their leadership. Many chiefs, elders and leadership in First Nations have deeply held views about their relationships with the Canadian state, and particularly which Crown that relationship is with. In my experience, many First Nations members and leaders take umbrage at the suggestion that the provinces have anything to say about anything that concerns them; in their view, their relationship is with the federal Crown, and the provincial Crown has no say in their affairs.

NIL/TU,O places itself squarely as a part of the federal government’s structure. NIL/TU,O argued, citing case law, that one factor that should be considered in determining the question of jurisdiction is the fact that it was a creature of a number of First Nation Band Councils, and as such, was operating as a link to the First Nations governments that had created it. Those constituting First Nations governments are, argued NIL/TU,O, carrying out authority delegated to them by the federal government.¹⁷ It went on to argue that its client base is almost exclusively Status Indians under the *Indian Act*, and its services are designed and delivered on-reserve. Finally, NIL/TU,O argued that the delegation of authority that it had received from the province of British Columbia was a “stepping stone” to First Nation self-government and self-determination.

The same may not necessarily be said for people who have, either through choice or by operation of the *Indian Act* and other colonial instruments, found themselves located off-reserve, or without Indian Status, unaffiliated with a First Nation, or without a connection to a reserve base.¹⁸ These differences of the organizations’ own conceptions of their identities and placement in the federal structure are suggested by the very different arguments that the two organizations made in order to advance their preferred jurisdictions in these cases.

16 In this paper, I use the term “Indian Status” to refer to registration under section 6 of the *Indian Act*, and “Status Indian” to refer to those people who are registered, or entitled to be registered, under section 6 of the *Indian Act*.

17 NIL/TU,O SCC Factum, *supra* note 3, at para. 85.

18 I acknowledge that this characterization of the “urban Aboriginal” population is simplistic and stereotypical, as many urban Aboriginal people may have any or all of these connections, at various points in their lives. However, these instances are cited by way of examples of the factors that Native Child cited as reasons why it ought not to be federally regulated.

To counter suggestions that there were federal elements of Native Child's operations, Native Child argued that it did not operate on a reserve and was thus not at all related to "lands reserved for Indians" (one of the subjects under the federal head of power in s. 91(24) of the *Constitution Act*). Native Child also argued that it is not affiliated with a "Band, Tribe or aboriginal council", and does not serve a predominately Status Indian client base.¹⁹ Native Child also made reference to its relationship, or rather, lack thereof, with the federal government, in its submissions. Native Child had no agreement with the federal government for its operation. Native Child highlighted the fact that the federal government had not been involved at all in the appeal at the courts below and was not attempting to assert a federal jurisdiction in the case, despite its fiduciary duties to Status Indians.²⁰ These elements make it clear that Native Child's position is that the federal government had nothing to do with Native Child, and accordingly the federal government's legislation should not govern Native Child's operations.

The Aboriginal parties, in resisting the definition of their operations by others, both asserted their own definition of their identities in a federal or provincial context as informed by their relationships to the Canadian federal structure, the governments in question, their Indian Status client base and their location on or off reserves.

Cultural Organizations

There may indeed be some resistance to the concept of unionization that underlies the motivations for raising jurisdictional arguments. This may be founded on the scepticism of settler-imposed methods of alternative dispute resolution in the workplace. This opinion is formed on the basis of my experience dealing with Aboriginal organizations and First Nations, and is not explicitly stated in the cases or the arguments of the Aboriginal parties before the Court. However, it is an argument that has been advanced in the courts with respect to other Aboriginal employers, where the Aboriginal (First Nations) employer asserts that the imposition of labour regulation schemes infringes the First Nation's right to self-government protected by s. 35 of the *Constitution Act*. These kinds of factors were advanced recently in *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*.²¹ This argument was also initially advanced by NIL/TU,O at the labour board level, but not pursued on appeal.²²

19 Native Child SCC Factum, *supra* note 10, at paras. 15-16.

20 *Ibid.*, at para. 14.

21 2007 ONCA 814, leave to appeal denied at 2008 CanLII 18945 [*Mississaugas of Scugog*].

22 NIL/TU,O *Child and Family Services Society v. B.C. Government and Service Employees' Union*, BCLRB No. B72/2006.

Many, if not most, of the entities in the cases where Aboriginal organizations raise jurisdictional barriers in the unionization process are Aboriginal organizations that employ primarily Aboriginal people with the aim of serving Aboriginal clients. This was the case for both Aboriginal parties in these cases. In my experience, the management staff and boards of directors of Aboriginal-controlled organizations often take great steps to govern and manage these organizations in a distinct way—with cultural components built into workplace rules and governance that are designed with the workforce in mind. This fact was stated by NIL/TU,O in its arguments to the Court. NIL/TU,O explicitly advanced the method of the agency’s governance, in accordance with Aboriginal “culture, traditions and teachings” as a factor that should be taken into account in the Court’s determination of NIL/TU,O as a federally regulated organization, on the application of the SCC’s functional test.²³

In my experience, these organizations take very seriously the proposition that, to be an Aboriginal organization, the organization must be “Aboriginal” not only in terms of the composition of its workforce or clients, but also in its governance, structure and operation. This is what, for some organizations at least, is at the essence of what it means to be an Aboriginal organization.

In my experience, most (non-unionized) Aboriginal organizations have dispute resolution mechanisms built into their workplace policies that provide for appeals of workplace disputes through traditional means, sometimes drawing on the knowledge and experience of community Elders to resolve disputes. Such mechanisms do not necessarily accord with the methods and models used in the collective bargaining and grievance arbitration processes. Management of such organizations can be loathe to see carefully thought out workplace policies usurped by traditional union-based conventions of “workplace democracy”—even though the organization’s own workforce has sought out unionization. So, while there may be a motivation to avoid—or postpone—unionization, it is important to recognize that the reasons why an organization’s management want to avoid unionization may be informed by a reluctance to accept a different culture’s accepted norms of workplace regulation and dispute resolution.

The rejection of settler imposed methods of dispute resolution and labour regulation is apparent in the cases where labour legislation is challenged as infringing asserted self-government rights protected by s. 35 of the *Constitution Act*. So far, assertions that labour legislation infringes constitutionally protected Aboriginal rights to self-govern have not succeeded. It does not seem that this will be the end of the story, however. The fact that no Aboriginal party has

23 *Ibid.*, at para. 100(a).

yet met the tests enunciated in *R. v. Van Der Peet*²⁴ and *R. v. Pamajewon*²⁵ for proving a s. 35 right to self-govern does not mean that all First Nations will accept the court's findings in *Mississaugas of Scugog*. The Court of Appeal for Ontario found in that case that even if the ability to regulate labour and work activities is an iteration of a self-government right, it would not meet the *Van Der Peet* test of being something that is "integral to the distinctive culture" of a First Nation.

So, in my view, the resistance to settler methods of labour regulation should not cast Aboriginal parties' unionization as being "union-busters" in a country that affords constitutional protection to bargain collectively,²⁶ but is another example of the clash of cultures that Aboriginal people find themselves in. The imposition of settler ideas, values and norms into Aboriginal life will continue to be unacceptable to some Aboriginal people. As long as this lack of acceptance remains, there will be resistance to it.

III Implications and a Look to the Future

These cases will not necessarily clean up the jurisdictional patchwork that has existed with respect to labour and human rights regulation for Aboriginal parties, and particularly for First Nations and their service delivery organizations. That fact alone indicates that there is likely to be future litigation on this matter.

There are myriad other kinds of Aboriginal organizations that will not fit into the neatly defined box of "unquestionably provincial" activities defined by the Supreme Court in these cases. For instance, it is not clear how, for example, First Nations-controlled organizations that provide technical advisory services (likely provincial in nature) to First Nations reserve communities (likely federal in nature) about resource development (likely federal in nature) that occurs on lands subject to treaty (while the lands are provincial in nature, developments may affect Aboriginal and Treaty rights, which are federal in nature) will fit neatly into either box after the functional test is carried out.

These cases, taken to their logical conclusions with respect to jurisdiction of human rights regulation, could lead to absurd and impractical results. While some First Nations organize all of their service provision under the umbrella of the First Nation administration, others choose to incorporate not-for-profit corporations such as health and education authorities to manage and delivery those particular aspects of First Nation services. In reality, it seems the result may be that the same First Nation's employment relations could be

24 [1996] 2 S.C.R. 507 [*Van Der Peet*].

25 [1996] 2 S.C.R. 821 [*Pamajewon*].

26 *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27.

provincially regulated for some branches of their operations, while remaining federally regulated for others. NIL/TU,O, in its argument to the Court, pointed out this absurdity.²⁷

In addition to the awkward result for First Nations who separately incorporate some service delivery functions having to provide different entitlements for employees of their corporations, as opposed to of the First Nation itself, the SCC's decision may, when extended to issues of human rights jurisdiction, deprive First Nations of certain kinds of substantive statutory rights designed to protect their cultures and traditions in the workplace and service delivery.

The repeal of s. 67 of the *Canadian Human Rights Act*, and the protections for the culture, traditions and laws of First Nations afforded by that repeal, will not be available to the separately incorporated bodies if this is the functional analysis that is carried over to the human rights regulation realm. Also, First Nations operating under separately incorporated entities, if provincially regulated, would not be able to benefit from the Aboriginal Employment Preferences Policy issued by the Canadian Human Rights Commission, which states as a matter of policy that First Nations may prefer Aboriginal candidates for employment.²⁸

On the other hand, those First Nations who have chosen to operate all services under the First Nation's umbrella, without separately incorporating various bodies, will continue to be able to use such tools for all parts of their organizations. One might expect that such a result will cause backlash from First Nations, when they have just been provided with the interpretive provision under the *Canadian Human Rights Act* as of June 2011, only to see it pre-emptively removed by the Supreme Court of Canada through operation of this decision, merely because of a different corporate service delivery structure. Given these practical complications, it is also reasonable to expect that Aboriginal organizations will continue to resist labour regulation as an infringement of section 35 of the *Constitution Act*, as they have done in the past.

Likewise, despite the end of this chapter of whether child and family welfare is at the "core of Indianness" is settled with respect to labour relations, it is unlikely that the minority's views about the place of child and family services and the well-being of children and family's being outside the "core" of Indianness will end the story altogether. With ever-increasing attention to Aboriginal child welfare matters in the courts and in the public eye, it is safe

27 NIL/TU,O SCC Factum, *supra* note 3 at para. 102.

28 The recent amendments to the Canadian Human Rights Act to provide for First Nations to raise their customs, laws and traditions in certain cases, and the Aboriginal Employment Preferences Policy of the Canadian Human Rights Commission, in their own ways recognize the unique circumstances, customs and traditions of First Nations.

to assume that the question is likely to be raised again outside of the labour relations realm.

The stakes involved in these questions are too high to have these cases be the final word on such important matters.