SUPREME COURT OF CANADA

CITATION: NIL/TU,O Child and Family Services Society *v.* B.C. Government and Service Employees' Union, 2010 SCC 45

DATE: 20101104
DOCKET: 32862

BETWEEN:

NIL/TU,O Child and Family Services Society
Appellant
and
B.C. Government and Service Employees' Union
Respondent
- and -
Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan, British Columbia Labour Relations Board, Canadian Human Rights Commission, Kwumut Lelum Child and Family Services Society, Mohawk Council of Akwesasne, Assembly of First Nations of Quebec and Labrador, First Nations of Quebec and Labrador Health and Social Services Commission, First Nations Summit and Te'Mexw Nations
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 47)	Abella J. (LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. concurring)
JOINT CONCURRING REASONS: (paras. 48 to 82)	McLachlin C.J. and Fish J. (Binnie J. concurring)

NIL/TU,O Child and Family Services Society *Appellant*

v.

B.C. Government and Service Employees' Union *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan, British Columbia Labour Relations Board, Canadian Human Rights Commission, Kwumut Lelum Child and Family Services Society, Mohawk Council of Akwesasne, Assembly of First Nations of Quebec and Labrador, First Nations of Quebec and Labrador Health and Social Services Commission, First Nations Summit and Te'Mexw Nations *Interveners*

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2010 SCC 45

File No.: 32862.

2009: December 8; 2010: November 4.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Division of powers — Labour relations — Aboriginal peoples — Child welfare agency providing services to Aboriginal children and families in British Columbia — Union applying to B.C. Labour Relations Board for certification as bargaining agent for child welfare agency's employees — Agency arguing its labour relations within exclusive federal authority over Indians — Whether agency constitutes a federal undertaking based on its nature, operations and habitual activities — Whether Aboriginal aspects of agency's operations and service delivery displace presumption of provincial jurisdiction over labour relations — Constitution Act, 1867, s. 91(24).

NIL/TU,O Child and Family Services Society provides child welfare services to the children and families of seven First Nations in British Columbia. It has a unique institutional structure, combining provincial accountability, federal funding, and a measure of operational independence. In 2005, the Union applied to the B.C. Labour Relations Board to be certified as the bargaining agent for NIL/TU,O's employees. NIL/TU,O objected, arguing that its labour relations fell within federal jurisdiction over "Indians" under s. 91(24) of the *Constitution Act, 1867*, because its services are designed for First Nations children and families. The Board dismissed NIL/TU,O's objection and certified the Union. On judicial review, the Supreme Court of British Columbia

overturned the Board's certification order, finding that even though NIL/TU,O's operations served provincial ends, they did so by uniquely Aboriginal means. The British Columbia Court of Appeal allowed the Union's appeal, concluding that NIL/TU,O's operations — and therefore its labour relations — fell under provincial jurisdiction.

Held: The appeal should be dismissed.

Per LeBel, Deschamps, **Abella**, Charron, Rothstein and Cromwell JJ.: An application of the well-established legal framework for determining the jurisdiction of labour relations on federalism grounds clearly and conclusively confirms that NIL/TU,O is a provincial undertaking. Its labour relations therefore fall under provincial jurisdiction and are subject to the B.C. *Labour Relations Code*. Canadian courts have long recognized that labour relations are presumptively a provincial matter. To displace that presumption, a court must conduct an inquiry having two distinct steps, the first being the "functional test", which examines the nature, operations and habitual activities of the entity to determine whether it constitutes a federal undertaking. Only when this first test is inconclusive, should a court proceed to the second step, which is to ask whether the provincial regulation of that entity's labour relations would impair the "core" of the federal head of power at issue. There is no reason why the jurisdiction of an entity's labour relations should be approached differently when dealing with s. 91(24) of the *Constitution Act, 1867*. The fundamental nature of the inquiry is — and should be — the same.

The essential nature of NIL/TU,O's operation is to provide child and family services, a matter within the provincial sphere. It is regulated exclusively by the province, and its employees

exercise exclusively provincial delegated authority. The identity of the designated beneficiaries may and undoubtedly should affect how those services are delivered, but they do not change the fact that the delivery of child welfare services, a provincial undertaking, is what NIL/TU,O essentially does. The presumption in favour of provincial jurisdiction over labour relations remains operative in this case. Since the question of whether an entity's activities or operations lie at the "core" of a federal undertaking or head of power is not part of the functional test, and since the functional test is conclusive, an inquiry into the "core of Indianness" is not required.

Per **McLachlin** C.J. and **Fish** and Binnie JJ.: The central question in this case is whether the operation falls within the protected "core of Indianness" under s. 91(24), defined as matters that go to the status and rights of Indians. The proposition that the "core of Indianness" should be considered only if the functional test is inconclusive does not withstand scrutiny because the essence of the functional test is whether the operation falls within the core of the federal power. The two-stage test would mean that labour jurisdiction would be determined in many cases before consideration of the power under s. 91(24) is reached. Deciding labour jurisdiction in a case such as this without scrutiny of the federal power hollows out the functional test. Conversely, to deem any Aboriginal aspect sufficient to trigger federal jurisdiction would threaten to swallow the presumption that labour relations fall under provincial jurisdiction. The proper approach is simply to ask, as the cases consistently have, whether the Indian operation at issue, viewed functionally in terms of its normal and habitual activities, falls within the core of s. 91(24). The functional analysis of the operation's activities is not a preliminary step; rather it provides the answer to whether the activity falls within the protected core.

In the labour relations context, only if the operation's normal and habitual activities relate directly to what makes Indians federal persons by virtue of their status or rights, can the presumption that provincial labour legislation applies be ousted. This is a narrow test. It recognizes that Indians are members of the broader population and, in their day-to-day activities, they are subject to provincial laws of general application. Only where the activity is so integrally related to what makes Indians and lands reserved for Indians a fundamental federal responsibility does it become an intrinsic part of the exclusive federal jurisdiction, such that provincial legislative power is excluded. In this case, the function or operation of NIL/TU,O is the provision of child welfare services under the umbrella of the province-wide network of agencies providing similar services. The fact that NIL/TU,O employs Indians and works for the welfare of Indian children in a culturally sensitive way that seeks to enhance Aboriginal identity and preserve Aboriginal values does not alter that essential function. Moreover, NIL/TU,O's ordinary and habitual activities do not touch on issues of Indian status or rights. As such, the child welfare services cannot be considered federal activities. This conclusion is not negated by the fact that the federal government has entered into an intergovernmental agreement with the province of British Columbia and NIL/TU,O, or because it agreed to partially fund the delivery of child welfare services on reserves. NIL/TU,O, as the deliverer of those services, is therefore bound by the applicable provincial legislation.

Cases Cited

By Abella J.

Applied: *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1

S.C.R. 115; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; **referred to**: *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407; *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396; *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529; *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248; *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767; *Agence Maritime Inc. v. Conseil canadien des relations ouvrières*, [1969] S.C.R. 851; *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178; *Canada Labour Relations Board v. City of Yellowknife*, [1977] 2 S.C.R. 729; *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327; *Sappier v. Tobique Indian Band (Council)* (1988), 87 N.R. 1; *Qu'Appelle Indian Residential School Council v. Canada (Canadian Human Rights Tribunal)*, [1988] 2 F.C. 226; *Sagkeeng Alcohol Rehab Centre Inc. v. Abraham*, [1994] 3 F.C. 449; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Reference re Firearms Act*, 2000 SCC 31, [2000] 1 S.C.R. 783; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292.

By McLachlin C.J. and Fish J.

Referred to: *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1

S.C.R. 754; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Sagkeeng Alcohol Rehab Centre Inc. v. Abraham*, [1994] 3 F.C. 449; *Shubenacadie Band Council v. Canada (Human Rights Commission)* (2000), 37 C.H.R.R. D/466; *Sappier v. Tobique Indian Band (Council)* (1988), 87 N.R. 1; *Qu'Appelle Indian Residential School Council v. Canada (Canadian Human Rights Tribunal)*, [1988] 2 F.C. 226; *Westbank First Nation v. British Columbia (Labour Relations Board)* (1997), 39 C.L.R.B.R. (2d) 227; *Commission de transport de la Communauté urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 S.C.R. 838; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Paul v. Paul*, [1986] 1 S.C.R. 306; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146.

Statutes and Regulations Cited

Canada Labour Code, R.S.C. 1985, c. L-2.

Child, Family and Community Service Act, R.S.B.C. 1996, c. 46, ss. 2, 3, 4, 71(3), 91, 93(1)(g)(iii).

Constitution Act, 1867, ss. 91, 92, 93.

Indian Act, R.S.C. 1985, c. I-5, s. 88.

Labour Relations Code, R.S.B.C. 1996, c. 244.

Society Act, R.S.B.C. 1996, c. 433.

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Frankel and Groberman JJ.A.), 2008 BCCA 333, 81 B.C.L.R. (4th) 318, 258 B.C.A.C. 244, 434 W.A.C. 244, 296 D.L.R. (4th) 364, 155 C.L.R.B.R. (2d) 1, 80 Admin. L.R. (4th) 282, [2008] 10 W.W.R. 388, 2009 C.L.L.C. 220-011, [2008] 4 C.N.L.R. 57, [2008] B.C.J. No. 1611 (QL), 2008 CarswellBC 1773, reversing a decision of Cullen J., 2007 BCSC 1080, 76 B.C.L.R. (4th) 322, 284 D.L.R. (4th) 42, 147 C.L.R.B.R. (2d) 289, [2008] 4 W.W.R. 287, 2007 C.L.L.C. 220-044, [2007] B.C.J. No. 1609 (QL), 2007 CarswellBC 1671. Appeal dismissed.

Walter G. Rilkoff, Lisa A. Peters and *Nicole K. Skuggedal*, for the appellant.

Kenneth R. Curry and *Catherine Ann Sullivan*, for the respondent.

Peter Southey and *Sean Gaudet*, for the intervener the Attorney General of Canada.

Sean Hanley and *Bruce Ellis*, for the intervener the Attorney General of Ontario.

Sylvain Leboeuf and *Monique Rousseau*, for the intervener the Attorney General of Quebec.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Cynthia Devine, for the intervener the Attorney General of Manitoba.

Paul E. Yearwood, for the intervener the Attorney General of British Columbia.

R. James Fyfe, for the intervener the Attorney General for Saskatchewan.

Elena Miller, for the intervener the British Columbia Labour Relations Board.

Philippe Dufresne and *Valerie Phillips*, for the intervener the Canadian Human Rights Commission.

John W. Gailus and *Christopher G. Devlin*, for the intervener the Kwumut Lelum Child and Family Services Society.

Jacques E. Emond and *Colleen Dunlop*, for the intervener the Mohawk Council of Akwesasne.

David Schulze and *Barbara Cuber*, for the interveners the Assembly of First Nations of Quebec and Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission.

Arthur C. Pape and *Richard B. Salter*, for the intervener the First Nations Summit.

Robert J. M. Janes and *Karey M. Brooks*, for the intervener the Te'Mexw Nations.

The judgment of LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

ABELLA J. —

[1] NIL/TU,O Child and Family Services Society ("NIL/TU,O") provides child welfare services to certain First Nations children and families in British Columbia. It has a unique institutional structure, combining provincial accountability, federal funding, and a measure of operational independence.

[2] None of the parties dispute that child welfare is a matter within provincial legislative competence under the *Constitution Act, 1867*. NIL/TU,O does not challenge the constitutional validity of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, as it applies to Aboriginal people. Nor is the issue whether the federal government can enact labour relations legislation dealing with "Indians". It clearly can. The issue in this appeal is whether NIL/TU,O's labour relations nonetheless fall within federal jurisdiction over Indians under s. 91(24) because its services are designed for First Nations children and families.

[3] For the last 85 years, this Court has consistently endorsed and applied a distinct legal test for determining the jurisdiction of labour relations on federalism grounds. This legal framework, set out most comprehensively in *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 and *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, and applied most recently in *Consolidated Fastfrate Inc. v. Western*

Canada Council of Teamsters, 2009 SCC 53, [2009] 3 S.C.R. 407, is used regardless of the specific head of federal power engaged in a particular case. It calls for 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.

[4] The "core" of whatever federal head of power happens to be at issue in a particular labour relations case has never been used by this Court to determine whether an entity is a "federal undertaking" for the purposes of triggering the jurisdiction of the *Canada Labour Code*, R.S.C. 1985, c. L-2. Since in my view the functional test conclusively establishes that NIL/TU,O is a provincial undertaking, I do not see this case as being the first to require an examination of the "core" of s. 91(24).

Background

[5] In 1997, seven First Nations collectively incorporated NIL/TU,O under British Columbia's *Society Act*, R.S.B.C. 1996, c. 433, to establish a child welfare agency that would provide "culturally appropriate" services to their children and families. NIL/TU,O operates out of offices on the Tsawout reserve and provides its services to the members of the "Collective First Nations", currently comprised of the Beecher Bay, Pacheedaht, Pauquachin, Songhees, T'Sou-ke, Tsartlip and Tsawout First Nations.

[6] In 2005, the British Columbia Government and Service Employees' Union applied to the British Columbia Labour Relations Board to be certified as the bargaining agent for all employees of NIL/TU,O, excluding the executive director. NIL/TU,O objected, arguing that its labour relations fell under federal jurisdiction.

[7] The Board dismissed NIL/TU,O's objection. NIL/TU,O was, in the Board's view, an "'Indian' organization" ((2006), 122 C.L.R.B.R. (2d) 174, at para. 47). However, without some connection to the exercise of federal legislative power, that "'Indian' content" did not attract federal jurisdiction over labour relations (para. 47). The Board accordingly certified the Union under the B.C. *Labour Relations Code*, R.S.B.C. 1996, c. 244. A three-member panel of the Board subsequently dismissed NIL/TU,O's request for reconsideration ((2006), 127 C.L.R.B.R. (2d) 137).

[8] On judicial review, Cullen J. of the Supreme Court of British Columbia granted the application on the grounds that NIL/TU,O's labour relations fell under federal jurisdiction and were therefore not within the Board's authority (2007 BCSC 1080, 76 B.C.L.R. (4th) 322). He found that NIL/TU,O's operations and activities had a federal dimension and, even though those operations served provincial ends, they did so by uniquely Aboriginal means. Cullen J. accordingly overturned the Board's certification order.

[9] The Union then sought and obtained certification from the Canada Industrial Relations

Board under the *Canada Labour Code*. Despite its federal certification, the Union appealed Cullen J.'s decision to the British Columbia Court of Appeal where Groberman J.A., writing for a unanimous court, concluded that NIL/TU,O's operations — and therefore its labour relations — fell under provincial jurisdiction (2008 BCCA 333, 81 B.C.L.R. (4th) 318). In his view, nothing in the *Child, Family and Community Service Act*, the design of NIL/TU,O's operations or the nature of NIL/TU,O's services took NIL/TU,O outside provincial jurisdiction. Primary provincial jurisdiction over labour relations was not "ousted" simply because NIL/TU,O's operations "engage[d] the interests of [A]boriginal groups" or because NIL/TU,O provided services in a "culturally sensitive" manner (para. 62).

[10] For somewhat different reasons, I agree with the conclusion of the British Columbia Court of Appeal and the British Columbia Labour Relations Board that NIL/TU,O's labour relations fall under provincial jurisdiction and are therefore subject to the British Columbia *Labour Relations Code*. I would therefore dismiss the appeal.

Analysis

[11] Jurisdiction over labour relations is not delegated to either the provincial or federal governments under s. 91 or s. 92 of the *Constitution Act, 1867*. But since *Toronto Electric Commissioners v. Snider* [1925] A.C. 396 (P.C.), Canadian courts have recognized that labour relations are presumptively a provincial matter , and that the federal government has jurisdiction over labour relations only by way of exception. This exception has always been narrowly

interpreted (*Snider*; *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (the "*Stevedoring* case"); *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248; *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767; *Agence Maritime Inc. v. Conseil canadien des relations ouvrières*, [1969] S.C.R. 851; *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178; *Canada Labour Relations Board v. City of Yellowknife*, [1977] 2 S.C.R. 729; *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754; *Northern Telecom*; *Four B*; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327; *Consolidated Fastfrate*, at paras. 27-28).

[12] The approach to determining whether an entity's labour relations are federally or provincially regulated is a distinct one and, notably, entails 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. Because the regulation of labour relations falls presumptively within the jurisdiction of the provinces, the narrow question when dealing with cases raising the jurisdiction of labour relations is whether a particular entity is a "federal work, undertaking or business" for purposes of triggering the jurisdiction of the *Canada Labour Code*.

[13] The principles underpinning this Court's well-established approach to labour relations jurisdiction are set out by Dickson J., writing for a unanimous Court, in *Northern Telecom*. The case dealt with the jurisdiction of the labour relations of a subsidiary of a telecommunications company which was itself unquestionably a federal "work, undertaking or business" under s.

92(10)(*a*) of the *Constitution Act, 1867*. Adopting Beetz J.'s majority judgment in *Construction Montcalm*, Dickson J. described the relationship between the division of powers and labour relations as follows:

> (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
>
> (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
>
> (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
>
> (4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being 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. [p.132]

[14] He then set out a "functional test" for determining whether an entity is "federal" for purposes of triggering federal labour relations jurisdiction. Significantly, the "core" of the telecommunications head of power was not used to determine, as part of the functional analysis, the nature of the subsidiary's operations:

> (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
>
> (6) In order to determine the nature of the operation, <u>one must look at the normal or habitual activities of the business</u> as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity. [Emphasis added; p. 132.]

[15] *Four B*, decided the same year as *Northern Telecom*, also adopted the principles from *Construction Montcalm*, and again found the functional test, which examined the "normal or habitual activities" of the entity, to be determinative. The issue in *Four B* was whether provincial labour legislation applied to a provincially incorporated manufacturing operation that was owned by four Aboriginal band members, employed mostly band members, and operated on reserve land pursuant to a federal permit. Beetz J., for the majority, set out the governing principles and concluded that the "operational nature" of the business was provincial:

> In my view the established principles relevant to this issue can be summarized very briefly. With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses.
>
> 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. Neither the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. By the traditional and functional test, therefore, *The Labour Relations Act* applies to the facts of this case, and the *Board* has jurisdiction. [Emphasis added; pp. 1045- 46.]

Beetz J. was satisfied that the functional test was conclusive and that Four B was a provincial undertaking.

[16] At no point, in discussing the functional test, does Beetz J. mention the "core" of s. 91(24) or its content. In fact, he makes it clear that only if the functional test is inconclusive as to whether a particular undertaking is "federal", should a court consider whether provincial regulation of labour relations would impair the "core" of whatever federal regulation governed the entity.

[17] He went on to discuss, in *obiter*, whether this conclusion would have been different if the functional test had been inconclusive:

> The functional test is a particular method of applying a more general rule namely, that exclusive federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal jurisdiction over some other federal object: the *Stevedoring* case.
>
> Given this general rule, and assuming for the sake of argument that the functional test is not conclusive for the purposes of this case, the first question which must be answered . . . is whether the power to regulate the labour relations in issue forms an integral part of primary federal jurisdiction over Indians and Lands reserved for the Indians. The second question is whether Parliament has occupied the field by the provisions of the *Canada Labour Code*. [Emphasis added; p. 1047.]

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

[19] 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. Moreover, rather than considering whether the regulation of the entity's *labour relations* would impair the "core" of a federal head of power, these decisions have examined instead whether the nature of the entity's *operations* lay at the "core" and therefore displaced the presumption that labour relations are provincially regulated.

[20] There 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. The fundamental nature of the inquiry is — and should be — the same as for any other head of power. It is an inquiry with two distinct steps, the first being the functional test. A court should proceed to the second step only when this first test is inconclusive. If it is, the question is not whether the entity's *operations* lie at the "core" of the federal head of power; it is whether the provincial regulation of that entity's *labour relations* would impair the "core" of that head of power. Collapsing the two steps into a single inquiry, as the trial judge and the Court of Appeal did, and as the Chief Justice and Fish J. do in their concurring reasons, transforms the traditional labour relations test into a different test: the one used for determining whether a statute is "inapplicable" under the traditional interjurisdictional immunity

doctrine. The two-step inquiry preserves the integrity of the unique labour relations test; the single-step approach extinguishes it.

[21] With great respect, therefore, to the contrary views of the Chief Justice and Fish J., I do not agree that consideration of the "core" of a federal head of power is part of the functional test, the first step of the analysis. Whether an activity lies at the "core" of a federal undertaking or head of power is an analysis carried out in the narrow confines of interjurisdictional immunity: see *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3. The functional test is not an alternate method of determining whether an activity lies at the "core"; rather, the functional test looks to whether the "undertaking, service or business is a federal one" (*Northern Telecom*, at p. 132).

[22] The difference between these two approaches is significant. The "core" of a federal head of power might not capture the scope or potential reach of federal legislative jurisdiction, as the Court held in *Western Bank*. Additionally, it is possible for an entity to be federally regulated in part and provincially regulated in part. To the extent that the functional test is inconclusive as to jurisdiction over the labour relations of an entity, the presumption of provincial jurisdiction will apply in such a case *unless* the core of the federal head of power would be impaired by provincial regulation of the entity's labour relations. It is only in this circumstance of an inconclusive finding about the application of the functional test that this narrow analysis of the "core" of the federal power will be engaged.

[23] This brings us to the application of the *Four B* test to the circumstances of this case. The delivery of child welfare services in British Columbia is governed by the *Child, Family and*

Community Service Act. The Act sets out a detailed child protection regime for the province that is administered by "directors" appointed by the Minister for Child and Family Development (s. 91).

[24] The province of British Columbia (represented by a director appointed under the Act), the federal government (represented by the Minister of Indian Affairs) and NIL/TU,O (representing the Collective First Nations) are parties to a tripartite delegation agreement, first signed in 1999 and later confirmed in 2004 ("2004 Agreement"). Under this agreement, the provincial government, as the keeper of constitutional authority over child welfare, delegated some of its statutory powers and responsibilities over the delivery of child welfare services to the Collective First Nations to NIL/TU,O. This delegation is anticipated by s. 93(1)(g)(iii) of the Act, which permits a provincial director to make agreements for the delivery of statutory child welfare services with legal entities representing Aboriginal communities. The federal government's role in the arrangement is limited to financing NIL/TU,O's provision of certain services to certain children.

[25] The 2004 Agreement established NIL/TU,O's responsibility for delivering services provided for in the Act to the Collective First Nations' children and their families and confirmed the rights of those children to be connected to their culture and to receive "culturally appropriate" services from NIL/TU,O (arts. 2.1(a) and (d)). It provides that the province of British Columbia has legislative authority in respect of child welfare and that the director is responsible for administering the Act (Preamble, art. D). The 2004 Agreement also provides, however, that NIL/TU,O has the right to "care for and protect NIL/TU,O Children and to preserve their connection to their culture and heritage through the delivery of culturally appropriate Services" (Preamble, art. G).

[26] When providing delegated statutory services, NIL/TU,O's employees are always accountable

to the directors appointed under the Act (2004 Agreement, arts. 5.1 and 5.2), and NIL/TU,O is required, at all times, to deliver its delegated services in accordance with the Act (2004 Agreement, arts. 3.1 and 4.2). In providing these statutory services, NIL/TU,O must uphold the Act's paramount considerations, namely, the safety and well-being of children, and must comply with the following principles (s. 2):

> (a) children are entitled to be protected from abuse, neglect and harm or threat of harm;
>
> (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the child protection of children rests primarily with the parents;
>
> (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
>
> (d) a child's views should be taken into account when decisions relating to a child are made;
>
> (e) kinship ties and a child's attachment to the extended family should be preserved if possible;
>
> (f) the cultural identity of [A]boriginal children should be preserved;
>
> (g) decisions relating to children should be made and implemented in a timely manner.

[27] NIL/TU,O must also provide its statutory services in accordance with the service delivery principles listed in s. 3 of the Act:

> (a) families and children should be informed of the services available to them and encouraged to participate in decisions that affect them;
>
> (b) [A]boriginal people should be involved in the planning and delivery of services to [A]boriginal families and their children;
>
> (c) services should be planned and provided in ways that are sensitive to the

needs and the cultural, racial and religious heritage of those receiving the services;

(d) services should be integrated, wherever possible and appropriate, with services provided by government ministries, community agencies and Community Living British Columbia established under the *Community Living Authority Act*;

(e) the community should be involved, wherever possible and appropriate, in the planning and delivery of services, including preventive and support services to families and children.

[28] In addition, NIL/TU,O is bound by the factors that, according to the Act, define the "best interests of a child", namely the child's safety, physical and emotional needs, level of development, cultural, racial, linguistic and religious heritage; the importance of continuity in the child's care; the quality of the relationship between the child and his or her parent or other person; the effect of maintaining that relationship; the child's views; and the effect on the child in the event of a delayed decision (s. 4(1)). If a child is Aboriginal, the importance of preserving the child's cultural identity must also be considered when determining what is in his or her best interests (s. 4(2)). It is of note that under s. 71(3) of the Act, when an Aboriginal child is in care, priority must be given to placing the child with the child's extended family, a family within the child's Aboriginal cultural community, or another Aboriginal family. Alternative placement options are considered only if these parameters cannot be met.

[29] The specific statutory powers delegated to NIL/TU,O by the province are set out in a "Delegation Matrix" appended to the 2004 Agreement. There are several categories of delegated authority. Most of the NIL/TU,O employees exercising delegated authority operate at the lower category, category 12, which means that they can provide support services for families, administer voluntary care and special needs agreements, and establish residential resources for children in care. Some employees have category 13 authority, which gives them the responsibility for guardianship

of children and youth in continuing custody in addition to the lower category powers.

[30] None of NIL/TU,O's employees have category 14 or 15 authority, which are the highest levels contemplated by the regime. Practitioners with category 15 authority are the only ones who are authorized to provide the full range of child protection services set out in the Act, including the apprehension of children in need of protection. Category 14 is reserved for new child protection workers who operate under the supervision of a category 15 practitioner. Therefore, when a child in NIL/TU,O's care is in need of protection, an issue that exists in approximately 20 to 30 percent of NIL/TU,O's files, NIL/TU,O employees have no authority to provide the necessary services.

[31] In all cases, a director under the Act can intervene to ensure NIL/TU,O's compliance with the Act (2004 Agreement, art. 4.3). When a director and NIL/TU,O disagree as to a child's safety or placement or as to the provision of services, the director's decision is paramount (2004 Agreement, art. 14.2). The director is also empowered to revoke, unilaterally, NIL/TU,O's delegated authority upon written notice (2004 Agreement, art. 18.5).

[32] The 2004 Agreement requires that, in addition to delivering delegated services in accordance with the Act, NIL/TU,O must comply with the Aboriginal Operational and Practice Standards and Indicators ("AOPSI") (2004 Agreement, arts. 4.2 and 4.5). The AOPSI were developed collaboratively by the Executive Directors of Aboriginal child and family service agencies, the Department of Indian Affairs and Northern Development, British Columbia's Ministry for Children and Families, and the Caring for First Nations Children Society. They prescribe the "readiness criteria" that must be met before an Aboriginal child and family services agency receives delegated authority under the Act, and set out practice standards that govern the provision of services by

Aboriginal agencies, some of which address the unique circumstances of Aboriginal children (see standards 4, 11 and 15).

[33] In addition to its delegated powers, NIL/TU,O's goals include the delivery of services that are not provided for in the Act. These non-statutory services include after-school programs designed to increase children's appreciation of First Nations' culture, a camp where youth learn traditional practices, youth justice initiatives that pair troubled youth with mentors and elders, and school support programs that provide mentors to children who encounter racism and discrimination. The record does not, as the Court of Appeal pointed out, establish the extent to which these activities form part of NIL/TU,O's day-to-day operations.

[34] NIL/TU,O receives both provincial and federal funding. Before the province delegated to NIL/TU,O some of its authority to provide child welfare services to the Collective First Nations, the federal funds now paid to NIL/TU,O were allocated to the province pursuant to a memorandum of understanding between the federal and provincial governments. The memorandum did not, as the Chief Justice and Fish J. suggest, delegate regulatory or legislative power from the federal to provincial government. Rather, it simply confirmed that the province is responsible for administering the Act for the benefit of "Indian" children under nineteen, and affirmed the parties' understanding that the federal government would reimburse the province for the cost of providing certain services to certain "Indian" children (Memorandum of Understanding, arts. 1.1 and 4.1). The province currently pays NIL/TU,O for those services that are ineligible for federal funding (2004 Agreement, art. 15.6).

[35] Indeed, 65 percent of NIL/TU,O's funding now comes directly from the federal government.

Pursuant to federal Program Directives 20-1, the federal government pays for the statutory services NIL/TU,O provides to eligible children in accordance with the following principles:

> 6.1 The [Department of Indian Affairs] is committed to the expansion of First Nations Child and Family Services on reserve to a level comparable to the services provided off reserve in similar circumstances. . .
>
> 6.2 The department will support the creation of Indian designed, controlled and managed services.
>
> 6.3 The department will support the development of Indian standards for those services, and will work with Indian organizations to encourage their adoption by provinces/ territor[ies].
>
> 6.4 The expansion of First Nations Child and Family Services (FNCPS) will be gradual as funds become available and First Nations are prepared to negotiate the establishment of new services or the takeover of existing services.
>
> 6.5 Provincial child and family services legislation is applicable on reserves and will form the basis for this expansion. It is the intention of the department to include the provinces in the process and as party to agreements. [Emphasis added.]

[36] What, then, does all this tell us about the nature of NIL/TU,O's operations? Clearly NIL/TU,O is regulated exclusively by the province, and its employees exercise exclusively provincial delegated authority. This complex operational scheme was undoubtedly created for the benefit of the Collective First Nations. The child welfare services that NIL/TU,O offers are provided primarily by Aboriginal employees to Aboriginal clients and are designed to protect, preserve and benefit the distinct cultural, physical and emotional needs of the children and families of the Collective First Nations. NIL/TU,O serves as the child welfare agency for this community.

[37] NIL/TU,O argues that this distinctively Aboriginal component of its service delivery methodology alters the nature of its operations and activities such that it is a federal undertaking,

service or business for the purpose of allocating labour relations jurisdiction. In my view, it does not.

[38] Provincial competence over child welfare is exercised in British Columbia through the *Child, Family and Community Service Act*, and NIL/TU,O's operations are wholly regulated by it. NIL/TU,O is a fully integrated part of this provincial regulatory regime, pursuant to authority that is delegated, circumscribed and supervised by provincial officials. As an organization, it is directly subject to the province's oversight, and NIL/TU,O's employees are directly accountable to the provincial directors, who are empowered to intervene when necessary to ensure statutory compliance. Provincial child welfare workers are, in fact, required to step in when one of NIL/TU,O's cases involves child protection issues since NIL/TU,O's employees are not authorized to provide protection services. Moreover, NIL/TU,O's Constitution and the 2004 Agreement recognize the Act as the statutory authority governing the Society's primary task, namely providing statutory child welfare services. When fulfilling this task, NIL/TU,O must always operate with the Act's two paramount considerations in mind — the safety and well-being of children — and must always comply with the Act as a whole. The province, therefore, retains ultimate decision-making control over NIL/TU,O's operations.

[39] None of this detracts from NIL/TU,O's distinct character as a child welfare organization for Aboriginal communities. But the fact that it serves these communities cannot take away from its essential character as a child welfare agency that is in all respects regulated by the province. 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 unquestionably a provincial one.

[40] And while it is true that NIL/TU,O receives federal funds pursuant to a federal funding directive, an intergovernmental memorandum of understanding and the 2004 Agreement, this does not rise to the level of federal operational involvement necessary to demonstrate that NIL/TU,O is a federal undertaking, service or business. As in *Four B*, where the Court found that federal loans and subsidies did not convert the shoe manufacturing business into a federal activity, federal funding in this case does not change the nature of NIL/TU,O's operations from provincial to federal hands.

[41] In my view, British Columbia's *Child, Family and Community Service Act*, by expressly recognizing, affirming and giving practical meaning to the unique rights and status of Aboriginal people in the child welfare context, and by expressly respecting Aboriginal culture and heritage, represents a commendable, constitutionally mandated exercise of legislative power. The very fact that the delivery of child welfare services is delegated to First Nations agencies marks, significantly and positively, public recognition of the particular needs of Aboriginal children and families. It seems to me that this is a development to be encouraged in the provincial sphere, not obstructed.

[42] Today's constitutional landscape is painted with the brush of co-operative federalism (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 162, *per* Iacobucci J.; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Reference re Firearms Act*, 2000 SCC 31, [2000] 1 S.C.R. 783; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Fédération des producteurs de volailles du Québec*

v. Pelland, 2005 SCC 20, [2005] 1 S.C.R. 292; *Canadian Western Bank*, at paras. 21-24; *Consolidated Fastfrate*, at paras. 29-30). A co-operative approach accepts the inevitability of overlap between the exercise of federal and provincial competencies.

[43] NIL/TU,O's operational features are painted with the same co-operative brush. The agency exists because of a sophisticated and collaborative effort by the Collective First Nations, the government of British Columbia and the federal government to respond to the particular needs of the Collective First Nations' children and families. This effort has resulted in a detailed and integrated operational matrix comprised of NIL/TU,O's Constitution and by-laws, a tripartite delegation agreement, an inter-governmental memorandum of understanding, a set of Aboriginal practice standards, a federal funding directive and provincial legislation, all of which govern the provision of child welfare services by NIL/TU,O in a manner that respects and protects the Collective First Nations' traditional values.

[44] By virtue of the memorandum of understanding and the tripartite agreement, the federal government actively endorsed the province's oversight of the delivery of child welfare services to Aboriginal children in the province, including those services provided by NIL/TU,O to the Collective First Nations. I see this neither as an abdication of regulatory responsibility by the federal government nor an inappropriate usurpation by the provincial one. It is, instead, an example of flexible and co-operative federalism at work and at its best.

[45] The essential nature of NIL/TU,O's operation is to provide child and family services, a matter within the provincial sphere. Neither the presence of federal funding, nor the fact that NIL/TU,O's services are provided in a culturally sensitive manner, in my respectful view, displaces

the overridingly provincial nature of this entity. The community for whom NIL/TU,O operates as a child welfare agency does not change *what* it does, namely, deliver child welfare services. The designated beneficiaries may and undoubtedly should affect how those services are delivered, but they do not change the fact that the delivery of child welfare services, a provincial undertaking, is what it essentially does.

[46] And neither the nature of NIL/TU,O's operation nor the jurisprudence calls for an inquiry into the "core of Indianness" in this appeal. The *Northern Telecom/Four B* principles clearly and conclusively confirm that NIL/TU,O is a provincial undertaking. The past eighty-five years of labour jurisprudence confirms that no further or alternate analysis is required. The presumption in favour of provincial jurisdiction over labour relations, therefore, remains operative in this case.

[47] I would therefore dismiss the appeal with costs.

The reasons of McLachlin C.J. and Binnie and Fish JJ. were delivered by

THE CHIEF JUSTICE AND FISH J. —

[48] The appellant provides child welfare services to Aboriginal children and families in British Columbia. The issue before the Court is whether the labour relations of the society are governed by provincial or federal labour legislation. Normally the provinces have jurisdiction over labour relations under s. 92(16) of the *Constitution Act, 1867*. However, the federal government has jurisdiction over matters relating to Indians and lands reserved for Indians under s. 91(24).

[49] The courts and the Labour Relations Board below disagreed on whether the Indian content of NIL/TU,O's operations attracted federal jurisdiction over labour relations. The British Columbia Labour Relations Board found that it did not ((2006), 122 C.L.R.B.R. (2d) 174), certifying the British Columbia Government and Service Exployees' Union as the bargaining agent of NIL/TU,O under the *Labour Relations Code*, R.S.B.C. 1996, c. 244. Upon review, the Supreme Court of British Columbia found that it did (2007 BCSC 1080, 76 B.C.L.R. (4th) 322). On appeal, the British Columbia Court of Appeal concluded that nothing in the design of NIL/TU,O's operation, services, or constitutive legislation ousted the provincial jurisdiction over labour relations (2008 BCCA 333, 81 B.C.L.R. (4th) 318). It therefore resolved the jurisdictional conflict in favour of the province.

[50] We agree with Justice Abella that provincial labour law applies to the appellant and that the appeal should be dismissed. However, we arrive at this conclusion by a somewhat different route.

[51] The starting point is the general rule that "Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule": *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, *per* Beetz J., at p. 768.

[52] To this general rule there is an exception for operations that are "an integral part of [the federal government's] primary competence over some other single federal subject": *Construction Montcalm*, at p. 768.

[53] Justice Beetz in *Construction Montcalm* explained that one approaches the question of

a possible exception from provincial jurisdiction by asking whether "the normal or habitual activities of the [operation] as ... 'a going concern'" fall within the primary competence of the federal government over a particular matter (p. 769). This is called the functional test.

[54] The purpose of the functional test is thus to determine whether the federal government has exclusive labour relations jurisdiction over a specific activity. As the Court explained in *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, at p. 1047:

> The functional test is a particular method of applying a more general rule namely, that exclusive federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal jurisdiction over some other federal object.

When the test looks at the "normal or habitual" activities of an entity, it looks to whether those activities implicate the protected core of a federal head of power under the *Constitution Act, 1867*. As Dickson J. (as he was then) stated in *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115, at p. 133, the focus is on the "practical and functional relationship of [the activity] to the core federal undertaking".

[55] There is no dispute the power over Indians under s. 91(24) has been held to contain a protected core of federal competency that provincial legislation cannot touch: see *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, and *Dick v. The Queen*, [1985] 2 S.C.R. 309. As Lamer C.J. wrote for the majority in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 181:

> . . . as I mentioned earlier, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on "Indianness" or the "core of Indianness" (*Dick*, *supra*, at pp. 326 and 315; also see *Four B*, *supra*, at p. 1047 and *Francis*, *supra*, at pp. 1028-29).

[56] Unlike Abella J., we conclude the central question is whether the operation at issue falls within the protected "core of Indianness" under s. 91(24) of the *Constitution Act, 1867*, and hence under federal jurisdiction. The starting point is the general rule that labour issues fall within provincial jurisdiction. The only question is whether this case falls within the exception to this rule, i.e., whether applying a functional test, the activity falls within the core of a federal power that is protected from provincial legislation. As Dickson J. summarized the matter in *Northern Telecom*, at p. 133:

> . . . the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation ... to look at the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.

[57] In *Four B Manufacturing*, the Court, *per* Justice Beetz, affirmed that the functional test is merely a particular method of applying the more general rule that "exclusive federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal jurisdiction over some other federal object" (p. 1047). However, Beetz J.'s reasons in another passage suggest that the functional test might be a preliminary step to determining whether the activity forms an integral part of primary federal jurisdiction:

> Given this general rule, and assuming for the sake of argument that the functional test is not conclusive for the purposes of this case, the first question which must be answered in order to deal with appellant's submissions is whether the power to regulate the labour relations in issue forms an integral part of primary federal jurisdiction over Indians and Lands reserved for the Indians. [p. 1047]

In application, however, Beetz J. went directly to a discussion of the scope of the "core of Indianness" and whether the activity at issue fell within that core. He concluded that it did not. He stated that "it is an oversimplification to say that the matter . . . is the civil rights of Indians". He went on: "[N]either Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status" (pp. 1047-48).

[58] Reading *Construction Montcalm* (1979), *Northern Telecom* (1980), *Four B Manufacturing* (1980), and *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, (2009), together, we see no reason to depart from the view that the central question is whether the operation, viewed functionally in terms of its normal and habitual activities, falls within the core of a federal head of power, in this case s. 91(24) of the *Constitution Act, 1867*.

[59] In our view, the alternative does not withstand scrutiny. Justice Abella concludes that the core of Indianness should be considered only if the functional test is inconclusive. But the essence of the functional test, described by the authorities since *Construction Montcalm*, is whether the function falls within the core of a federal power; only this can displace the presumption of provincial jurisdiction in labour matters. The two-stage test proposed by our colleague would mean that labour jurisdiction would be determined in many cases before consideration of the power under

s. 91(24) is reached. With respect, deciding labour jurisdiction in a case such as this without scrutiny of the federal power hollows out the functional test as conceived on the authorities. If a court were satisfied that the operation's normal activities *look provincial* on their face, it would not need to go further.

[60] To exclude consideration of s. 91(24) would negate the federal power. Conversely, to deem any Aboriginal aspect sufficient to trigger federal jurisdiction would threaten to swallow the presumption that labour relations fall under provincial jurisdiction. The proper approach is simply to ask, as the cases consistently have, whether the Indian operation at issue, viewed functionally in terms of its normal and habitual activities, falls within the core of s. 91(24) of the *Constitution Act, 1867*.

[61] The functional analysis of the operation's activities is not a preliminary step; rather it provides the answer to whether the activity falls within the protected core. Although the Court in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, cautioned against getting mired in "a rather abstract discussion of 'cores' and 'vital and essential' parts" where to do so would be "to little practical effect", the Court nevertheless pointed out that such a discussion might prove necessary "for situations already covered by precedent" and, in particular, in relation to "those heads of power that deal with federal things, persons or undertakings" (paras. 76-77). In these circumstances, following the template advanced by Justice Dickson, in *Northern Telecom*, the first step is to determine the extent of the core federal undertaking or power. Having done this, one asks whether, viewed functionally, the operation's activities fall within that power.

I. Scope of the Core of Section 91(24)

[62] Following the framework proposed by Dickson J. in *Northern Telecom*, the first issue is the scope of the protected core federal power implicated. In this case, it is the federal power over Indians under s. 91(24) of the *Constitution Act, 1867*.

[63] The basic test has been set out in a number of authorities. The essential question is whether the undertaking, service or enterprise to which the provincial labour legislation would apply is a federal one, viewed functionally in terms of the nature of the operation: *Northern Telecom.*

[64] In *Four B*, this Court held that the Indian operation of a business and its economic impact on the community was insufficient to characterize the operation as a federal business and bring it within the protected core of s. 91(24). The majority held that for federal labour law to apply the operations must be "so closely connected with Indian status that they should be regarded as necessary incidents of status" (p. 1048). Applying this test — which may be referred to as the "status" test — the majority of the Court rejected the view that a shoe uppers manufacturer owned and operated by Indians on a reserve constituted a federal business falling within the core of s. 91(24), so as to displace the presumption that provincial labour law applies. Beetz J. wrote for the majority:

> 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. Neither the ownership of the business by Indian

> shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. By the traditional and functional test, therefore, *The Labour Relations Act* [of Ontario] applies to the facts of this case, and the [Ontario Labour Relations] *Board* has jurisdiction.
>
> . . .
>
> Section 108 of the [*Canada Labour*] Code, by its language, is directed at federal activities, operations or functions and not at the position of individuals [such as Indians], who might be considered to be "federal" persons or at their relationships.
>
> . . .
>
> ... neither Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc. For this reason, I come to the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians. [Emphasis added; pp. 1046-51]

In emphasizing the operational nature and function of the business, Beetz J. went on to explicitly exclude a number of considerations as determinative: Aboriginal ownership; the ratio of Aboriginal to non-Aboriginal employees; the location of the business on reserve lands; operation pursuant to federal permit; and federal loans or subsidies.

[65] The appellant argues that the test in *Four B* has been displaced by this Court's decision in *Delgamuukw*. We do not agree. Nothing said in *Delgamuukw* negates the application of the functional test based on the federal nature of the undertaking, service, or enterprise. Citing both the positive and negative descriptions of s. 91(24)'s core, Lamer C.J., for the majority in *Delgamuukw*, wrote:

> The core of Indianness at the heart of s. 91(24) has been defined in both negative and positive terms. Negatively, it has been held to not include labour relations (*Four B*) and the driving of motor vehicles (*Francis*). The only positive formulation of Indianness was offered in *Dick*. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply *proprio vigore* to the members of an Indian band to hunt and because those activities were "at the centre of what they do and what they are" [*Dick*](at p. 320). [Emphasis added; para. 181.]

The reference to *Four B* in this passage is simply a factual statement about the conclusion reached *in that case*. It is not an assertion that Indian undertakings or businesses can never be federal matters governed by federal labour law.

[66] This returns us to the "status" test proposed in *Four B.* On this test, for an operation, judged by its normal and habitual activities, to fall within the core of s. 91(24) so as to oust provincial labour law, the activity or operation must go to the status and rights of Indians. It must be "at the centre of what they do and what they are".

[67] On its face, this test appears straightforward. However, some cases have taken a broader interpretation, viewing the "normal or habitual" activities of the operation in terms of their cultural impact on Indians as the test for what falls within the protected core of Indianness in s. 91(24). For example, in *Sagkeeng Alcohol Rehab Centre Inc. v. Abraham*, [1994] 3 F.C. 449 (T.D.), the court asked whether the nature of the operation had "inherent 'Indianness'" (p. 460). In *Shubenacadie Band Council v. Canada (Human Rights Commission)* (2000), 37 C.H.R.R. D/466 (F.C.A.), at para. 60, it was enough to "promote Indianness" or enhance the status of Indian people and their families; as was the case in *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.), and *Westbank First Nation v. British Columbia (Labour Relations Board)* (1997), 39 C.L.R.B.R. (2d) 227 (B.C.S.C.).

[68] Thus, in the court below, Groberman J.A. described two distinct lines of authority on the question of when Indian operations are governed by federal labour legislation. The first line, consisting almost entirely of cases decided by the federal courts, holds that where an enterprise is important to a First Nation or its members, or its operations are influenced by First Nations culture, its labour relations fall within federal jurisdiction. The second line, mainly from provincial superior courts, takes a more restrictive approach, confining protected federal jurisdiction to cases where the ordinary and habitual activities of the operation affect core aspects of Indian status, or are conducted pursuant to federal delegated authority.

[69] We prefer the narrower view of when operations are federal and fall within the core so as to attract federal labour legislation. First, this view more accurately reflects the test in *Four B*. Second, it best comports to broader jurisprudence on what aspects of Indianness warrant federal exclusivity. In dealing with labour issues, it is desirable to stay within the historic parameters of Indianness, as suggested in *Canadian Western Bank*, at para. 61. In defining these parameters, the words of Justice Gonthier in *Commission de transport de la Communauté urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 S.C.R. 838, at p. 853, are helpful:

> It is the fundamental federal responsibility for a thing or person that determines its specifically federal aspects, those which form an integral part of the exclusive federal jurisdiction over that thing or person. For example, the specifically federal nature of Indians has been described by the expressions "Indianness" or "status and rights of Indians", which reflect the fundamental federal responsibility for Indians in the Canadian constitutional and historical context. For example, a provincial statute on

> hunting cannot apply to Indians to the extent that it affects their status as Indians, whereas provincial labour relations law may apply to Indians in so far as it does not affect Indianness. [Emphasis added.]

[70] We may therefore conclude that the core, or "basic, minimum and unassailable content" of the federal power over "Indians" in s. 91(24) is defined as matters that go to the status and rights of Indians. Where their status and rights are concerned, Indians are federal "persons", regulated by federal law: see *Canadian Western Bank*, at para. 60.

[71] It follows that a provincial law of general application will extend to Indian undertakings, businesses or enterprises, whether on or off a reserve, *ex proprio vigore* and by virtue of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5, *except* when the law impairs those functions of the enterprise which are intimately bound up with the status and rights of Indians. The cases illustrate matters that may go to the status and rights of Indians. These include, *inter alia*:

- Indian status: *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, *per* Laskin C.J., writing for himself and three other Justices, at pp. 760-61, and *per* Beetz J., writing for himself and Pigeon J., at p. 787;

- The "relationships within Indian families and reserve communities": *Canadian Western Bank*, at para. 61;

- "[R]ights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership

in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc.": *Four B*, at p. 1048;

- The disposition of the matrimonial home on a reserve: *Paul v. Paul*, [1986] 1 S.C.R. 306;

- The right to possession of lands on a reserve and, therefore, the division of family property on reserve lands: *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, at p. 296;

- Sustenance hunting pursuant to Aboriginal and treaty rights, such as the killing of deer for food: *Dick*;

- The right to advance a claim for the existence or extent of Aboriginal rights or title in respect of a contested resource or lands: *Delgamuukw* and *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; and

- The operation of constitutional and federal rules respecting Aboriginal rights: *Paul v. British Columbia*, among others.

[72] These examples make it clear that the focus of the analysis rests squarely on whether the

nature of the operation and its normal activities, as distinguished from the people who are involved in running it or the cultural identity of those who may be affected by it, relate to what makes Indians federal persons as defined by what they do and what they are: *Dick*; *Delgamuukw*.

[73] The scope of the core of s. 91(24) is admittedly narrow. That, however, is as it should be. A narrow test for when activities fall within the core of Indianness reserved to the federal government is consistent with the dominant tenor of jurisprudence since *Four B*, as well as the restrained approach to interjurisdictional immunity adopted by this Court in recent cases. It recognizes that Indians are members of the broader population and, therefore, in their day-to-day activities, they are subject to provincial laws of general application: *Canadian Western Bank*, at para. 61. Only where the activity is so integrally related to what makes Indians and lands reserved for Indians a fundamental federal responsibility does it become an intrinsic part of the exclusive federal jurisdiction, such that provincial legislative power is excluded.

II. The Normal or Habitual Activities of NIL/TU,O

[74] The question is whether the normal and habitual activities of the Indian operation at issue go to the status and rights of Indians, which reflect the fundamental federal responsibility for Indians in the Canadian constitutional and historical context. Only if the operation's normal and habitual activities relate directly to what makes Indians federal persons by virtue of their status or rights can provincial labour legislation be ousted, provided the impact of the provincial legislation would be to impair this essentially federal undertaking.

[75] Here, the question is whether the appellant's child welfare services operation, viewed in terms of its normal and habitual activities, lies at the center of the status and rights of Indians, so as to bring it within the federal core power over Indians. If the operation's normal and habitual activities are not intimately bound up with the essential capacities and rights inherent in Indian status, Aboriginal and treaty rights, or a delegated federal power over Indians, it remains subject to provincial jurisdiction, notwithstanding that it impacts on Indians, their culture and their values.

[76] The function of NIL/TU,O is the provision of child welfare services under the umbrella of the province-wide network of agencies providing similar services. The ordinary and habitual activities of NIL/TU,O do not touch on issues of Indian status or rights. The child welfare services therefore cannot be considered federal activities.

[77] This conclusion is not negated by the fact that the federal government has entered into an intergovernmental agreement with the province of British Columbia and NIL/TU,O, which requires the province, in exchange for funding and reimbursement and acting through NIL/TU,O, to extend child welfare services on reserves. The federal government has ceded its responsibility for the provision of child welfare services on reserve to the province and has agreed to partially fund their delivery, provided that they would be subject to provincial law. NIL/TU,O, as the deliverer of those services, is therefore bound by the applicable provincial legislation.

[78] In the absence of NIL/TU,O's services touching on any of the facets of Indianness which

might draw it within federal jurisdiction, NIL/TU,O's operations cannot be said to be federal operations. The fact that NIL/TU,O's services are delivered in a way that is culturally sensitive to Aboriginal identity and values does not change the basic functions of the enterprise. In this, we agree with Justice Abella.

[79] It is argued that because the appellant's services are directed at preserving the cultural identity of Indian children and confirming their Aboriginal traditions and values, the operations go to the core of what it is to be Indian, and that *Four B*, where the activity was making leather shoe uppers, is distinguishable on this basis. However, this is to look at the incidental effect of the activity instead of the operational nature of the business itself. *Four B* is clear that one looks not to the purpose or effects of the enterprise, but to the activity it carries out.

[80] The fact that NIL/TU,O employs Indians and works for the welfare of Indian children in a culturally sensitive way that seeks to enhance Aboriginal identity and preserve Aboriginal values does not alter its essential function — the provision of child welfare services. As stated by Justice Abella, the organization is subject to provincial oversight, regulation, funding and governance. The provision of child welfare services constitutes its normal and principal operation. The rule that Indian operations within a province are subject to generally applicable provincial law is not displaced by the doctrine of interjurisdictional immunity because the operations, viewed from a functional perspective, do not fall within the protected core of s. 91(24).

[81] Nor does the fact that NIL/TU,O's services impact on the Aboriginal family relationship

make its operations a federal matter. *Natural Parents*, which is relied on for this proposition, dealt with provincial adoption legislation that had the potential to strip Indian children of their Indian status. It finds no application here, as Indian status is not affected by NIL/TU,O's operations.

III. Conclusion

[82] We would affirm the judgment of the British Columbia Court of Appeal and dismiss the appeal.

Appeal dismissed with costs.

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