Federal or provincial? Understanding employment and labour law jurisdiction for First Nations employers

January 19, 2016

One of the most complicated legal questions for employers is whether their operations are regulated by federal or provincial workplace rules. The answer to this question can have broad implications for employers, as the requirements of provincial workplace laws can differ considerably from their federal counterparts. The confusion over jurisdiction stems from Canada's division of powers between its varying levels of government. While the **Constitution Act, 1867** (the "Constitution") does provide a helpful list of federal and provincial powers it is far from complete.

First Nations employers in Canada have had a particularly tough time on the jurisdictional front. At first glance, the Constitution provides the federal government power over "Indians, and Lands reserved for the Indians." But at the same time, the Constitution is silent on which level of government is responsible for labour and employment issues. Had the founding fathers of Confederation been clearer on this point, it would have spared lawyers and employers a lot of future pain.

Since Confederation, the Courts have sought to develop a framework to more clearly determine which workplace laws apply. Above all, the most important principle is this:

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**. [emphasis added]
NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union ("NIL/TU,O"), 2010 SCC 45 at para 11.

Thus, for First Nations employers, the question boils down to whether their particular organization falls into an exception. Historically, a rather broad brush was painted by and for First Nations employers. If operations were on a reserve, or targeted First Nations customers, or had a First Nations focus of any kind, such employers often considered themselves as federally regulated due to the Constitution's language around "Indians, and Lands reserved for the Indians".

Over time, however, the Courts have moved away from this broad brush approach. Instead, First Nations employers are directed to consider the functional purpose of their organization (i.e. its nature, habitual activities and daily operations). If the functional purpose of the organization is part and parcel with a federal power, such as First Nations governance, then an exemption is made out. If not, provincial law applies.

The above is a rather gross simplification of a complicated legal analysis. That said, the trend line in Canadian case law is clear. Most First Nations employers are properly subject to **provincial**, rather than federal law.

Consider the following few examples:

1. **Four B Manufacturing v. United Garmet Workers**, [1980] 1 SCR 1031 – Here the Supreme Court found that a **shoe-manufacturing business** owned by First Nations shareholders, employing First Nations workers, and operating on-reserve was provincially regulated. Its functional purpose was the manufacture and sale of goods, an area of provincial concern.
2. The case of **NIL/TU,O** – involved a **child and family services society** that provided child welfare services to First Nations children and families. Its functional purpose was held to be the

provision of child and welfare services, which is a matter of provincial jurisdiction. As such, provincial workplace laws applied.

3. **Nishnawbe-Aski Police Service Board v. Public Service Alliance of Canada**, 2015 FCA 211 – In this case the dispute concerned the regulation of labour relations for a **First Nations police service** in Northern Ontario. While the police service did help to support First Nations governance, the Federal Court of Appeal held its functional purpose was policing, a matter of provincial jurisdiction. Provincial workplace laws were therefore held to apply.

First Nations governments are also not immune from a finding that some of their staff are properly subject to provincial regulation. While most First Nations governments and their workers will likely be federally regulated (due to the exception that applies to organizations whose function is the provision of Aboriginal governance) discreet sub-units of their operations may prove to fall outside of this rule.

By way of example, despite working for a First Nations government a bus driver for an educational unit, an employment counsellor with an Ontario Works unit and a worker from a negotiation office were all found to have their employment governed by provincial laws.

All First Nations employers should ensure a clear understanding of the employment and labour laws that apply to their operations. Failure to do so may result in costly legal fights and potential liability as a result of failure to comply with the correct law. Accordingly, if you are a First Nations employer or employee, and unsure whether federal or provincial law applies to you, seek the assistance of an employment lawyer before a dispute arises.

Note the term "First Nations employers" is used very broadly in this article. Its purpose here is to refer to any employer that has or considers itself to have a focus on First Nations peoples, whether in terms of its own employees, services or customer base.

Vey Willetts LLP