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Employment Law in the First Nations Context: Another Look at First Nations Governments as Employers

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EMPLOYMENT LAW IN THE FIRST NATIONS CONTEXT: ANOTHER LOOK AT FIRST NATIONS GOVERNMENTS AS EMPLOYERS

I. Introduction

Employment cases in the First Nations context can present unique challenges to legal counsel, raising issues that may be unfamiliar to general employment law practitioners. This paper canvasses some key issues that can arise in this context. In the first section, we provide an update to the question of how to determine jurisdiction, as previously discussed in our paper prepared by Eamon Murphy, J. Berry Hykin, & Leah Mack, "Employment Law in the First Nations Context: First Nations Governments as Employers" in *Employment Law Conference – 2010 (Day 2)* (Victoria: Continuing Legal Education Society of British Columbia, 2010). Next, we discuss common issues that we deal with in our practice and our recommendations for addressing them. Lastly, we highlight human rights issues that arise specifically with respect to First Nations employers.

II. Jurisdictional Issues: Canada Labour Code or Employment Standards Act?

A. Introduction

Legal counsel working on behalf of First Nations employers and employees will inevitably be faced with the challenge of determining which jurisdiction a particular employment scenario falls under. In some cases, the employment relationship will be governed by the *Canada Labour Code*, R.S.C., 1985, c. L-2 (the "*Code*"), and in others, the provincial labour statute (in BC, the *Employment Standards Act*, R.S.B.C. 1996, c. 113 ("*ESA*")). The default position has traditionally been that where the employer is a First Nation government or organization, federal jurisdiction applies. However, the recent Supreme Court of Canada ("SCC") decisions in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] S.C.J. No. 45 ("*NIL/TU,O*") and *Native Child and Family Services of Toronto v. Communication, Energy, and Paperworkers Union of Canada*, [2010] S.C.J. No. 46 ("*Native Child*"), a concurrent decision to NIL/TU,O not discussed in detail in this paper) have turned this assumption on its head, with the result that the determination requires a much more complex and nuanced analysis than previously.

B. Why Jurisdiction Matters

Likely, the jurisdiction question will only arise in relation to employment matters if the employee, or the employer, has a good reason to argue one jurisdiction over the other. There are four key differences between the *Code* and the *ESA* respecting employment matters that might affect the decision to argue jurisdiction:

1. The *Code* allows an adjudicator appointed under the *Code* to reinstate the employee to their employment (s. 242(4)(b)). This is a powerful tool and a favoured remedy. In our experience, it can be challenging to prove to the adjudicator that reinstatement is inappropriate in many cases, even where the employment relationship has been severely broken (more discussion on this topic below in Practical Considerations). This reinstatement provision favours the employee.
2. The *Code's* unjust dismissal provisions exclude managers (s. 167(3)) from making allegations of unjust dismissal under the *Code*. Thus, a manager's only recourse would be a claim of wrongful dismissal under the common law. Since court processes are generally more time consuming and costly than the layperson-friendly complaints system under the *Code*, this provision favours the employer.
3. Complaints under the *Code* must be made within 90 days of the date of dismissal (s. 240(2)). An employer would clearly wish to have its claim characterized as falling within federal jurisdiction in a scenario where an employee files his/her claim outside of the 90 day time period. Keep in mind, however, that the *Code* does not exclude common law claims of wrongful dismissal in provincial superior courts. To avoid provincial jurisdiction, an employer would have to argue that the claim falls within one of the exceptions discussed later in this paper.

4. The *Code* also excludes adjudicators from considering complaints where the dismissal was as a result of lack of work or discontinuance of function. This is markedly different from the *ESA* which provides the employer no similar defence. Under the common law, the employer cannot rely on economic reasons to justify a dismissal (see Canadian Encyclopedic Digest Employment Law II.1.(e).(iv) (Western)). This provision favours the employer.

When acting for employers where a manager alleges unjust dismissal, where 90 days have elapsed, or where the termination is for lack of work or discontinuance of function, legal counsel would likely want to argue that the *Code* applies and thereby exclude the application of provincial law. Counsel for an employee, on the other hand, would want to seek to have the *Code* apply where the employee wishes to be reinstated to his/her position.

When weighing whether to argue for one jurisdiction to apply over the other, legal counsel advising the employer should always consider the implications of that choice for the entire organization, as opposed to just the impact it will have in a single instance, since the employer cannot change jurisdiction at will.

We have not highlighted the differences between provincial and federal labour relations statutes in this paper, but note that much of the caselaw dealing with jurisdictional issues arises in the context of labour relations rather than employment matters (i.e., employees wanting certification as a union). For the most part in the labour relations cases, employees tend to argue for provincial jurisdiction and the employers to argue for federal jurisdiction.

C. Constitutional Divide

Under the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 ("*Constitution Act*"), provinces have jurisdiction over "property and civil rights." The federal government has jurisdiction over "Indians, and Lands reserved for Indians" under s. 91(24).

The jurisdictional issue arises because on the one hand, First Nations governments and, sometimes, organizations, fall under federal jurisdiction by virtue of s. 91(24); on the other hand, labour relations are presumptively provincial matters under s. 92(13) such that federal jurisdiction only applies by way of exception (*Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 (P.C.)). The basic rule is that provincial laws of general application apply to Indians through referential incorporation under s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5, as amended ("*Indian Act*") unless they are prevented from doing so by one of a handful of exemptions (Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2008), at 28.2(c)). This is true on reserve as well as off reserve, since reserves are not enclaves which exclude provincial legislation (*Four B Manufacturing v. United Garment Workers of America*, [1980] 1 S.C.R. 1031 (QL), ("*Four B*")). Further, even provincial undertakings that would normally fall within federal jurisdiction may, in some cases, be referentially incorporated through s. 88 of the *Indian Act* (however, this latter point is not considered in a substantive way within this paper).

There are three main exceptions to provincial jurisdiction over employment matters that may apply in the case of First Nations:

1. the employer is a self-governing First Nation;
2. provincial jurisdiction over the employment relationship would affect the "core of Indianness"; and
3. the employer is a federal work, undertaking or business as defined under the *Code*, s. 2.

The first of these exemptions has not been utilized with any success to date. While some First Nations have passed their own labour relations laws, such laws do not oust the jurisdiction of the federal or provincial Crown. Thus, an attempt by Mississaugas of Scugog Island First Nation to have the management of labour relations declared a constitutionally protected aboriginal or treaty right under

s. 35 of the *Constitution Act*, 1867 was unsuccessful (*Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* (CAW-Canada), Local 444, [2007] 88 O.R. (3d) 583 (Ont. C.A.) (QL)).

The latter two exemptions have been examined at length in divergent and conflicting lines of authority.

1. Core of Indianness

The "core of Indianness" has been defined as "the centre of what Indians do and what they are" (*Dick v. The Queen*, [1985] 2 S.C.R. 309 (QL), at para. 19) and includes such considerations as:

- *Indian status (Natural Parents v. Superintendent of Child Services*, [1976] 2 S.C.R. 751 (QL));
- Aboriginal rights such as logging (*Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55);
- Title to reserve land (*Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 (QL); *Paul v. Paul*, [1986] 1 S.C.R. 306 (QL)); and
- Other practices, customs or traditions protected by s. 35(1) of the *Constitution Act, 1982* (*Delgamuukw* at para. 171).

There are two lines of authority that have evolved in determining jurisdiction over labour relations in respect of the "core of Indianness." The first line, derived from Federal courts, holds that "where an enterprise is important to a First Nation or its members, or operates in a manner influenced by First Nations culture, labour relations will be regulated by the *Code* (*NIL/TU,O Child and Family Services Society v. British Columbia Government and Service Employees' Union*, [2008] 4 C.N.L.R. 57 (B.C.C.A.) ("*NIL/TU,O BCCA*") at para. 33). This line of authority relies on the following cases: *Qu'Appelle Indian Residential School Council v. Canada*, [1988] 2 F.C. 226 (T.D.); *Tobique Band Council v. Sappier* (1988), 87 N.R. 1 (F.C.A.) (QL); *Sagkeeng Alcohol Rehabilitation Centre Inc. v. Abraham*, [1994] 3 F.C. 449 (T.D.) ("*Sagkeeng*"); and *Shubenacadie Indian Band v. Canada (Canadian Human Rights Commission)* (2000), 187 D.L.R. (4th) 741 (F.C.A.) (QL). For example, in *Qu'Appelle*, the Court found that because the school's objects were to promote First Nation traditions, and specifically First Nation language and culture, the labour relations in question came within federal jurisdiction (at para. 34).

The second line of cases from the provincial courts looked more narrowly at the activities of an operation, as opposed to who the employer or employees are. In *Southeast Resource Development Council v. United Food and Commercial Workers Union Local No. 832*, 2004 MBQB 35, an enterprise that provided transportation, accommodation and interpretation services to status Indians was controlled by nine First Nation Councils. The Court, however, found that the fact of First Nation Council ownership was irrelevant, and wrote "the focus of concern should not be on the employer or employees, but on the activities of the operation" (at para. 38). In *Westbank First Nation v. British Columbia (Labour Relations Board)*, 2000 BCCA 163 ("*Westbank*"), the Court characterized the appropriate test as a distinction between the "means" and the "ends" of the business or service. To be considered within the core of Indianness, the "means" of an organization must be distinctively Aboriginal; it is not enough that the intended beneficiaries of an organization's products or services are themselves Aboriginal (at para. 55).

2. Federal Work, Undertaking or Business

The *Code* applies "in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers" (*Code*, s. 4). Therefore, any employment that can be characterized as a "federal work, undertaking or business" would be expected from the presumptive

rule that provincial jurisdiction applies. A "federal work, undertaking or business" is defined in s. 2 of the *Code* and includes "a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces" (*Code,* s. 2(i)).

Earlier cases have found that generally, if the employer is the First Nation or First Nation Council, the operations generally fell within the *Code* as a "federal work, undertaking or business" (see *Sagkeeng*; *Francis v. Canada (Labour Relations Board)*, [1982] 2 S.C.R. 72; see also *Nisga'a Valley Health Board v. B.C.G.S.E.U.* (1995), 27 C.L.R.B.R. (2d) 301 (B.C.) (QL); *O.P.S.E.U. v. Wikwemikong Unceded Indian Reserve No. 26*, [2002] O.L.R.B. Rep. 761 (L.R.B.); and *Westbank First Nation v. British Columbia (Labour Relations Board)* (1997), 39 C.L.R.B.R. (2d) 227 (B.C.S.C.)).

Many courts looking at whether an employer was a "federal work, undertaking or business," have incorporated into their analysis a review of the "Indianness" of the employer. In some respects, given that federal jurisdiction is, in fact, dependent on whether the organization falls within s. 91(24), this analysis makes sense. How else do you identify an organization that is not clearly defined in s. 2 of the *Code* except by looking at the characteristics that make it federal in some way? (i.e., under. s. 2(i)). In *Sagkeeng*, an alcohol treatment centre operated by a non-profit corporation was found to be a federal business or undertaking to which federal law applied on the basis of a number of factors, including, at para. 190:

> (a) the centre was organized and operated primarily for First Nations,
>
> (b) the centre was governed solely by First Nations,
>
> (c) its services were intended primarily for First Nations,
>
> (d) its staff received First Nations training, and
>
> (e) its programs were designed for First Nations.

The analysis in the *Sagkeeng* case appears to blend the two different exemptions of a "federal, work, undertaking, or business" and "core of Indianness." As we shall see, this is not uncommon. Most recently, in *NIL/TU,O*, the SCC has weighed in to provide the latest take on jurisdictional analysis in relation to First Nations and labour relations. However, the close five to four decision of the SCC in *NIL/TU,O*, and the cases decided since, demonstrate that the question of jurisdiction remains a murky and complicated threshold issue.

D. And Along Came NIL/TU,O

The NIL/TU,O Child and Family Services Society (the "Society") provides child welfare services to the children and families of the Beecher Bay, Pacheedaht, Pauquachin, Songhees, Sooke, Tsartlip and Tsawout First Nations. The Society operates pursuant to federal policy encouraging the administration of child welfare services by First Nations. The Society is incorporated under BC statute and is governed by the provincial *Child, Family and Community Services Act*, R.S.B.C. 1996, c. 46 ("*CFCSA*"). Its funding is 75% federal and 25% provincial, and its services are partially focused on serving a First Nation clientele. Almost all of the Society's employees were First Nations practitioners although only a fraction of the organization's standards and procedures were geared towards First Nations children.

At issue was whether employees could be unionized under provincial legislation. At the trial level (*NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2007] B.C.J. No. 1609), the BC Supreme Court adopted a broad conception of "Indianness" and found that the Society's labour relations fell under federal jurisdiction (at para. 22), thereby preventing the employees from unionizing. The BCSC found that all of the children served by the agency were registered status Indians, most work occurred on reserve, and crucially, the agency's services dealt with "issues arising out of the discrete First Nations experience" (at para. 81). The trial judge's ruling was overturned by the BC Court of Appeal and the case proceeded to the SCC.

The SCC unanimously held that that the Society's labour relations fell under provincial jurisdiction, but split five to four on what test to apply. The majority confirmed the functional approach to labour relations first set out in *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 ("*Northern Telecom*") and *Four B*, saying that the legal test to be applied in determining jurisdiction of labour relations is the same, "regardless of the specific head of federal power engaged in a particular case" (*NIL/TU,O* at para. 3). In other words, there is nothing unique about the s. 91(24) head of federal power that would require a different analysis or special consideration. The analysis endorsed by the majority in *NIL/TU,O* is a two-step test:

> Step 1: The court must first examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking.
>
> a. If yes = federally regulated.
>
> b. *Only* if no, or if inconclusive = proceed to step 2.
>
> Step 2: The court must examine whether provincial regulation of the entity's *labour relations* would impair the core of the federal head of power at issue.

The majority in *NIL/TU,O* held that the *Sagkeeng* line of cases took the wrong approach. Instead of properly examining whether provincial regulation of *labour relations* would impair the "core" of a federal head of power, the courts in these decisions have looked instead at the nature of the entity's *operations*. Abella J., writing for the majority, held that this approach was collapsing what should be a two-step analysis into a single inquiry more akin to the traditional interjurisdictional immunity doctrine than labour relations (*NIL/TU,O* at para. 20).

Chief Justice McLachlin and Justice Fish, writing for the minority, stated 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" (*NIL/TU,O* at para. 58). They went on to say, at paras. 59 – 61:

> 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.
>
> 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*.
>
> 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 these circumstances, following the template advanced by Dickson J. 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 [emphasis in original].

In contrast, Abella J. is explicit that the core of a federal head of power is not a consideration in the functional test (at paras. 21 – 22):

> 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 132).
>
> 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 ... 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 [emphasis in original].

This division between the majority and the minority in *NIL/TU,O* has been consistently reflected in subsequent cases. Interestingly, even where a decision-maker has purported to follow the majority ruling in *NIL/TU,O*, more often than not, they appear to be incorporating the minority's approach.

For example, in *TurnAround Couriers Inc. v. Canadian Union of Postal Workers*, [2012] F.C.J. No. 172 (QL) ("*TurnAround Couriers*"), the Federal Court of Appeal, purporting to apply the majority decision in *NIL/TU'O*, found that if the activities of the employer, TurnAround Couriers Inc., fell within the meaning of s. 91(5) of the *Constitution Act*, then its labour relations would be subject to federal law. But the Court then indicated that the interpretation of s. 91(5) would be determinative of whether TurnAround Couriers Inc. was a federal undertaking. This approach, arguably, was more in line with the minority in *NIL/TU,O* and brings us back to the question of what is at the "core" of the federal head of power; which is something that the majority in *NIL/TU,O* states should not be done unless you are in the second stage of the analysis. It seems that despite Abella J.'s very clear direction, decision-makers are struggling with how to identify what is a federal undertaking, if not by looking at the core of the federal head of power. Examples are set out below (in no particular order):

1. A Provincially Incorporated Society Providing Employment Assistance Services is Federally Regulated

In *Nelson v. Lower Stl'atl'imx Tribal Council*, [2011] C.L.A.D. No. 90, a claim for unjust dismissal was brought against the Lower Stl'atl'imx Tribal Council ("LSTC"), a provincially incorporated society providing employment assistance services to four specific First Nations. The LSTC's operating budget was provided by the Department of Indian Affairs and Northern Development and Human Resources Development Canada. The adjudicator distinguished this case from *NIL/TU,O* on the basis that the LSTC was not involved in providing welfare or social assistance directly to its members; rather those services were provided by the individual bands. Further, at para. 22, the adjudicator, citing the functional test from *NIL/TU,O* found, that "all of the activities of the LSTC were matters within Federal jurisdiction, namely, the provision of services to aboriginal members created by the obligations of the Government of Canada pursuant to section 91(24)." The adjudicator appears to have given significant weight to the identity of the beneficiaries of the LSTC's program (First Nation people), which is inconsistent with the holding in *NIL/TU,O* that the identity of a program's beneficiaries does not change the nature of what the program does.

2. A Provincially Incorporated Entity Providing Health Services on Reserve is Provincially Regulated

In *Duke v. Dakota Oyate Lodge Inc.*, [2012] C.L.A.D. No. 53, the respondent, Dakota Oyate Lodge ("DOL"), was a provincially incorporated entity operating an elder care home on reserve. In response to a claim for unjust dismissal under the *Code*, DOL argued that it was provincially regulated. The

adjudicator agreed, although instead of going through the steps of the functional test, the adjudicator relied heavily on previous decisions where the functional test was applied and it was conclusively determined that the labour relations of emergency and other health care services on reserve is within provincial jurisdiction (at para. 10).

3. A First Nation's Government Department is Part of the Functions of that Government and is Federally Regulated

The complainant in *Scodane v. Albright*, [2011] B.C.H.R.T.D. No. 366, was employed by the Nisga'a Nation as the Social Development Advisor in the Programs and Services Department of the government. The tribunal applied the functional test and concluded that it did not have jurisdiction "over the Nation or institutions established under the Nisga'a Final Agreement" as the "functions of the Nation may be properly characterized as forming an integral part of primary federal jurisdiction over 'Indians and lands reserved for Indians'" (para. 12).

4. Where an Undertaking is an "Identifiable and Severable Subsidiary of the Employer's Other Operations," it may Fall under a Different Jurisdiction than the Employer

The employer in *Canadian Corps of Commissionaires (North Saskatchewan) Inc.* (Re), [2012] S.L.R.B.D. No. 3 was engaged in providing employment opportunities for military and police veterans, which is de facto provincially regulated. Several of its employees were providing security services to the Saskatoon airport, and there was no dispute that the federal government has exclusive jurisdiction over aviation. The Saskatchewan Labour Relations Board found that the employees providing security services were "an identifiable and severable subsidiary of the Employer's other operations," that they were not integrated with other employees, and that the airport workplace provided identifiable boundaries (at para. 41). The Board further found that the employees were functionally integrated in the ongoing operation of the airport such that, on application of the functional test, they were federally regulated.

5. It is Not Appropriate to Divide up Components of a Cable Network in Order to Identify Parts that have No Extra-Provincial Reach (Consider the Analogy to the Health Department of a First Nation)

XL Digital Services Inc. (c.o.b. Dependable HomeTech) v. Communications, Energy and Paperworkers Union of Canada, [2011] F.C.J. No. 1235 (F.C.A.) dealt with an application for judicial review of the Canada Industrial Relations Board decision to certify the Communications, Energy and Paperworkers union as bargaining agent for a unit of HomeTech's employees. HomeTech argued that the work performed by the employees was distinct and separate from the federal undertaking (Rogers Cable providing cable, telephone and internet services), as it was only involved in installation of these services and that the equipment connecting the network was not part of the network. The Court did not apply the functional test from *NIL/TU,O*, relying instead on the four-pronged test established in *Northern Telecom*: (i) the general nature of HomeTech's operations as a going concern; (ii) the nature of the corporate relationship between HomeTech and Rogers; (iii) the importance of the work done by HomeTech for Rogers as compared with its other customers; and (iv) the extent of the involvement of HomeTech's employees in the operation of Rogers' core federal undertaking (para. 27). The Court noted that courts "have consistently refused to divide up the components of a cable network in order to identify parts that have no extra-provincial reach." The Court held that the HomeTech employees were highly integrated into the operation of Rogers' core federal undertaking and therefore their labour relations were federally regulated.

6. An On-Reserve Health Clinic Operated by the First Nation Government is Provincially Regulated

In *Norway House Cree Nation (Re)*, [2011] M.L.B.D. No. 26, the Norway House Cree Nation ("NHCN") Nurses Union (the "Union") filed two applications for certification with the Manitoba Labour Board (the "Board"). The Union sought certification for: a) all nurses employed by NHCN in its on-reserve community health clinic'; and b) all nurses employed by Pinaow Wachi Inc., a provincially incorporated non-profit corporation providing residential care for elderly persons on reserve. The Board found that both operations were, by nature, the provision of health services, and applying the functional test, that their labour relations were provincially operated. In the case of NHCN, the Board expressly stated that the operation of the health clinic by the First Nation and the First Nation's power to make by-laws respecting health under s. 81 of the *Indian Act* did not have any effect on the "operational nature of the business" (at para. 27(b)).

7. An On-Reserve Health Clinic Operated by the First Nation Government is Federally Regulated

The complainant in *Pierre v. Bertrand*, [2011] B.C.H.R.T.D. No. 284, was employed by the Tl'azt'en Health Center, an on-reserve clinic providing health services exclusively to the Tl'azt'en First Nation's ("TFN") members, carried out on behalf of TFN and at its Council's direction. The Tribunal cited the functional test from *NIL/TU,O*, and held that it did not have jurisdiction to hear the complaint as the health clinic was federally regulated. The Tribunal identified TFN's status as a band under the *Indian Act*, the fact that delivery of health services on reserve may be governed by s. 81(1)(a) of the *Indian Act*, and the identity of the beneficiaries (primarily TFN members) of the service as key factors in making its decision. This is contrary to the majority ruling in *NIL/TU,O*.

8. An Emergency Medical Services Provider Based on Reserve is Provincially Regulated

In *Oneida of the Thames Emergency Medical Services* (Re), [2011] C.I.R.B.D. No. 1, the Oneida Emergency Medical Service (the "employer") brought an application to rescind a previous decision of the Board on the grounds that the employer's activities properly fell within provincial jurisdiction for the purposes of labour relations. The employer was a land ambulance service based on the Oneida of the Thames settlement and providing emergency medical services to First Nation and non-First Nation citizens in the region. The employer reported to the Oneida Nation pursuant to an agreement between the Oneida Nation and the Ontario government. The Board stated that, "Regardless of whether one adopts the analytical framework established by the majority or the minority ... in *NIL/TU,O* ... it is clear that, on the facts regarding the Oneida EMS operations as now presented to the Board, the nature, operations and habitual activities of this entity are subject to provincial jurisdiction over labour relations." The activities of the Oneida EMS do not fall within the protected "core of Indianness" under s. 91(24) of the *Constitution Act, 1867*" (para. 25). The Board seemed to accept the submissions of the employer that "its ordinary and habitual activity" was the running of a land ambulance service and therefore fell under provincial jurisdiction (para. 22, 25). However, while seemingly relying on the majority approach from *NIL/TU,O* and the first step of the functional test to determine the issue, the Board also made several references to the "core of Indianness" protected under s. 91(24) which suggests at least some application of the minority approach.

9. A First Nation's Health Department, whether a Non-Profit Corporation Owned and Operated by the First Nation, or Simply a Department within the Administration Providing Health Services, is Provincially Regulated

The United Nurses of Alberta in *United Nurses of Alberta (Re)*, [2011] A.L.R.B.D. No. 26, sought to represent all employees of two separate independently structured health departments that operated exclusively on reserve for the purposes of delivering emergency and other health services primarily to band members. The Blood Tribe Health Department was a federally registered non-profit corporation wholly owned and operated by the First Nation, exclusively providing health services to First Nation members and funded through federal funding agreements. The AAKOM-KIYII Health Services was the health department of the Piikani Nation, providing health services to its members directly through the health department. All funding was from the Piikani Nation's budget and funding agreements with Health Canada, and all the employees were paid by Piikani Nation. The Board stated that the SCC decisions in *NIL/TU,O* and *Native Child* narrowing the federal power over First Nations labour relations, had conclusively decided that provision of health care delivery on reserve was clearly within provincial constitutional competence (at para. 25). In applying the functional test, the Board emphasized that it is not how an agency provides its services that matters, but what the agency does. The Board held that the labour relations of the health departments were provincially regulated.

10. The Interpretation of the Relevant Constitutional Section Identifying the Federal Head of Power is Determinative of Whether an Entity is a Federal Undertaking

The issue in *TurnAround Couriers* (*supra*) was whether a bicycle and pedestrian courier company was providing "postal service" within the meaning of s. 91(5) of the *Constitution Act* such that its labour relations were subject to the *Code* (para. 1). The Court applied the functional test and determined that the "habitual activities and daily operations" of TurnAround were "so local and limited in nature as to suggest that TurnAround is not a federal undertaking" (para. 25). However, the Court then went into a thorough analysis of the interpretation of s. 91(5), saying that this would be determinative of whether TurnAround was a federal undertaking. The Court concluded that the "postal service" in s. 91(5) refers to the national delivery system which has certain characteristics that TurnAround had none of. In doing so, it seemed like the Court was defining the core of s. 91(5) and then determining that TurnAround did not infringe upon that core.

As these cases demonstrate, it is extremely difficult for a decision-maker to apply the first step of the functional test without first conducting an examination of what lies at the core of the federal head of power. They appear, frequently, to be saying that this is the way to determine whether the "nature, operations and habitual activities of the entity" bring it within the federal head of power sufficient to make it a federal undertaking. Although the majority in *NIL/TU,O* attempts to clarify the difference between the "core" of a federal power, and "whether the undertaking, service or business is a federal one," this distinction is a fine one and difficult to apply in practice.

Given the strict application of the functional test required by the majority in *NIL/TU,O*, assessment of jurisdiction in many cases may well come down to how the "nature, operations and habitual activities of the entity" are characterized. For example, the health department of a First Nations government might well be described as a health service provider in its operations and habitual activities, and this may take precedence over the nature of the health department, which is that it is a branch of the government. In this respect, arguably, it would fall under provincial jurisdiction, as held in *United Nurses of Alberta* and *Norway House Cree Nation*.

This raises significant issues in terms of First Nations sovereignty and governance. A First Nation government is a distinct entity subject to federal jurisdiction by virtue of s. 91(24) of the *Constitution Act, 1867*. This is somewhat different than federal jurisdiction over radio broadcasting or the postal service, which are powers that do not by their nature involve the regulation of a distinct, and arguably

sovereign, body. Perhaps, in this sense, the majority in *NIL/TU,O* is wrong, and the specific federal head of power is relevant to the analytical approach. If the effect of the functional test is that the Province can exert regulatory authority over the labour relations of one part of a First Nation *government*, then arguably, this analysis results in an infringement of that government's sovereign power.

Unfortunately, the *NIL/TU,O* case does not provide any real guidance in this regard and, as subsequent cases have shown, the results of its application are unpredictable and, in some cases, do result in provincial regulation over the labour relations of First Nation governmental departments (most particularly, health departments).

For practitioners faced with such circumstances, it may be prudent to follow the approach of the Ontario Labour Relations Board in *Nipissing First Nation*, [2011] O.L.R.D. No. 1053 ("*Nippissing*"). In that case, the Ontario Labour Relations Board established that the functional test should be applied to the individual components of the operation as follows (at para. 7):

> 1. Is the First Nation of which the department is a part a federal undertaking? Apply the functional test from *NIL/TU,O* to assess.
>
> 2. If the First Nation is federally regulated, is the department at issue a separate undertaking? Following *IWA – Canada, Local 700 v. Supply Chain Express Inc.*, [2001] O.L.R.B. Rep. 1450, this depends on the degree to which the operations of the department are integrated with the First Nation in a functional or business sense. *It is not a matter of the type of work that is done* [emphasis in original].
>
> 3. If the department is a separate undertaking, is it a federal undertaking? Apply the functional test from *NIL/TU,O* to assess.

Using this approach, where a First Nation's Health Department is fully integrated within the larger umbrella organization of the First Nations government itself, then the entity whose nature, operations and habitual activities governs jurisdiction is the First Nation government as a whole, not the specific department.

In our respectful view, the problem with the majority decision in *NIL/TU,O* is that it tries too hard to come up with a cut and dried test that separates out the question of jurisdiction from the interpretation of the federal head of power. This results in a false dichotomy, which the minority was quick to point out, and which the Federal Court of Appeal clarified in *TurnAround Couriers.*

If the first question is to look at the "nature, habitual activities and everyday operations" of the entity to determine whether the entity is a federal undertaking, that analysis cannot be so narrow as to exclude the content of the core federal power. However, that, it seems, is what the majority in *NIL/TU,O* has called for, and while some subsequent caselaw has adhered strictly to this approach, the minority decision, more often than not, seems to influence the outcome. We will have to wait, therefore, to see whether the majority decision will hold over time, or whether another case will come before the SCC, giving them an opportunity to provide further clarity on this complicated topic.

E. Determining Jurisdiction After NIL/TU,O

As discussed in the previous section, the determination of jurisdiction after the *NIL/TU,O* decision is no more clear than it was before. In fact, it may be less certain. Practitioners advising First Nation employers, or employees of First Nation employers, will have to undertake a carefully considered analysis of all the facts before making their best guess as to which jurisdiction the employer falls under.

Nevertheless, there are still some few small rules of thumb that might be relied on. The first is that if the employer is clearly the First Nation government, there is a strong argument to be made that the employer is a federal undertaking. Some caution is recommended in making this assumption—clearly when the health department is involved, the result of the analysis before an adjudicator or court will be uncertain.

The Canada Labour Board ("CLB") has a mandate to consider all complaints, and that the first stage of their consideration is to do a jurisdictional analysis. In our experience, so far, there does not appear to have been much practical change in how the CLB handles complaints since *NIL/TU,O* was decided; which is to say, if an employee of a First Nation brings a complaint, the CLB assumes jurisdiction unless otherwise challenged.

III. Practical Considerations: Common Issues

In this section, we will review a number of common issues that we see in our practice working primarily for First Nations employers and our recommendations for how to address them.

A. Employer Not Following Own Policies

We frequently come across situations where the employer has gone to the effort of putting personnel policies in place, but then fail to enforce them consistently, or at all. While this is not unique to First Nation organizations (certainly, there are many employers who fall into this mistake), there are some considerations that arise in the First Nations context that are unique to First Nation employers. For example, certain employees might be treated differently under the policies (or exempted from them entirely) because they are members of the First Nation, are related to someone on Council, or hold Council positions.

The case of *Tl'azt'en Nation v. Sam*, [2011] C.LA.D. No. 403 [*Tl'azt'en Nation*] is an example of what can happen when a First Nation employer fails to follow its policies and favours a Councillor employee over a non-member employee. In this case, the complainant was the Public Works Manager for the Tl'azt'en Nation. Two months after he left work on a medical/stress leave following an e. coli breakout in the community, he was dismissed for violating the Tl'azt'en Nation Policies and Procedures by failing to attend a full's day work and thereby abandoning his position. The facts of this case showed that while the Tl'azt'en Nation had policies in place for sick leave, they were not consistently followed or enforced. In this case, the complainant, Mr. Sam, had notified the Chief that he would be on sick leave. A Councillor, Mr. Felix, who also worked in the same department as Mr. Sam had also gone on sick leave and had notified the nation in the exact same manner as the complainant—although neither had followed the Tl'azt'en Nation policies. The adjudicator found that Mr. Sam had been unjustly dismissed and that the employer's actions in deeming Mr. Sam to have abandoned his employment were inconsistent with what transpired when Councillor Felix subsequently did the same thing.

We commonly recommend to our clients that if they have policies and procedures, they should review them frequently, and that if they find that the policies and procedure no longer apply to their organization, that they move to amend them immediately.

B. Council Elections and Terminations

The election of a chief and councillors can be held in one of three ways:

- by following the steps outlined in the *Indian Act* and the Indian Band Election Regulations;
- by following the First Nation's own leadership selection process under a community or custom election code;
- pursuant to a community's constitution contained in a self-government agreement.

Currently, of the 617 First Nations in Canada, 240 hold elections under the *Indian Act* and the Indian Band Election Regulations, 341 select their leadership according to their own community or custom election codes and 36 are self-governing [http://www.aadnc-aandc.gc.ca/eng/1323193986817].

First Nations who operate under the *Indian Act* election provisions will hold Chief and Council elections every two years. This, in itself, is often the primary reason for First Nations choosing to develop their custom election codes so that they can provide for longer tenure as Chief and Council, often three to four years.

When there is a significant change in the government of a First Nation (i.e., Council is made up of primarily new members, as opposed to incumbents), one of the first steps commonly taken by the newly elected Chief and Council is to make employment decisions about the administration they inherit when they assume office. Sometimes these decisions are made without regard to any existing employment contracts and will usually affect top level positions, such as the Band Manager, or Directors/Managers of departments.

If legal counsel is consulted prior to the new Council making any sweeping changes, this is a great opportunity to clarify for new Council that, while the make-up of Council may have changed, the First Nation as employer is still the same entity; new Council is not now a new employer. Newly elected Chief and Council are, in fact, still bound by any existing employment contracts and that failure to properly terminate employees, according to the existing contract, or under relevant employment legislation will very likely result in claims of wrongful or unjust dismissals.

Notwithstanding the above, Chief and Council, as the elected representatives of the First Nation, make decisions as the employer and are entitled to staff their administration as they see fit—within the bounds of legal limitations. Legal counsel's task is to help Council to avoid claims of unjust dismissal and breach of contract by advising on correct steps to follow. Thus, the first steps when advising newly elected Council are to review with the new Council the First Nation's policies and procedures (if they have any) and the existing employment contracts (written and unwritten) of the current employees. We strongly encourage all employers to seek legal advice before effecting any changes, such as terminations, demotions or progressive discipline. For counsel working on the side of the employee, it is worth noting that if an employee has been terminated in haste during a change of administration, it may be easiest on all parties to aim to resolve any unjust or wrongful dismissal claim through negotiations, particularly during new Council's adaptation period.

C. Written Contracts—Advising the Employer

When advising employers on termination options, it is not uncommon for us to see the contract after the nation has decided to terminate the employee. Unfortunately, at that point it is too late to make any changes to the contract. We frequently see contracts, or letters of offer, that the employer has drafted on its own, or has copied and pasted from an outdated template prepared for another position within the organization. These contracts are routinely filled with errors, and may not properly reflect the agreement the parties thought they were making at the time the employee was hired. Nevertheless, these contracts will govern the relationship unless the employer can show strong extrinsic evidence that the relationship has been changed by party conduct over time.

Legal counsel working for employers should strive to work with the employers to develop good employment contract templates that the First Nation can use for lower level positions, and should advise that the First Nation seek legal advice when drafting contracts for all senior level positions in the organization. Key provisions that we recommend always be included in any First Nation's employment contract are:

- Clear probationary period provisions, to ensure fit with the organization and community. The small size of most First Nation communities, and the fact that the family and culture of a First Nation are so important to continued good working relationships makes having a probationary period highly important. We frequently see cases where a new hire is simply not a good fit for the community for any number of reasons—and this is easily recognizable within the three month probationary period;

- Severance provisions that are consistent with both federal and provincial legislation and common law, but that do not unnecessarily increase the employer's liability. We have seen severance provisions that appear to have been an attempt at importing the notice provisions from statute, but where the formula actually provides for notice well beyond what the legislation prescribes, putting an unnecessary financial burden on the employer. We have also seen severance provisions limiting severance to amounts below the minimum standards of the statutes which, of course, is unenforceable and leaves the employer open to liability for increased notice periods calculated under the common law.

D. Written Contracts—Advising the Employee

In our experience, employees do not often seek legal advice before entering into an employment contract. If legal counsel is given the opportunity to review the employment contract before it is signed, we recommend:

- ensuring that any early termination provisions are as favourable as possible to the client;
- clarifying job duties, salary, benefits, vacation, etc.;
- confirming whether the employer's policies and procedures form part of the contract; and
- if the employee is relocating for the position, including provisions that take into account the cost of relocation.

E. Conflicts of Interest

Perhaps the most common issue we see arise in unjust dismissal complaints made against a First Nation is that of favouritism or nepotism by people making hiring decisions, whether it is Chief and Council or administrators/managers. Ideally, the First Nation will have policies that deal with these conflicts of interests, and how to avoid them. For example, one policy that we developed included these provisions:

> "**Immediate Family**" shall include spouse, common-law, sons, daughters, step-sons, step-daughters, brothers, sisters, parents, father-in-law, mother-in-law and grandparents. This may also include other relatives permanently living in the employee's household or with whom the employee permanently resided at one time for a period of more than one (1) year.
>
> "**Selection Committee**" means the person or persons delegated by Chief and Council through the Director of Operations to hire an employee, and will generally include the department manager that supervises the employee. The composition of the Selection Committee will vary depending on the employment position and department, and may at times be made up of one person. The Director of Operations may be involved on the Selection Committee, at his/her discretion.
>
> <u>Selection of Employees</u>
>
> Hiring for management positions reporting to the Director of Operations shall be done by the Director of Operations who may strike a Selection Committee at his or her discretions.
>
> Members of the Selection Committee who are deemed an Immediate Family member of the applicant cannot participate in the decision related to that applicant nor vote on that candidate's acceptance or rejection.

If the First Nation does not have policies in place to address conflicts of interest, legal counsel should strongly encourage that these policies be developed. Where a complaint of unjust dismissal has been brought on the basis of conflict of interest allegations, the employer will need to be able to provide persuasive evidence to defend its conduct in order to refute the allegation (see also the section, below, on human rights). In our experience, adjudicators and courts tend to regard the employer's evidence with some skepticism in these cases.

F. Reinstatement

As discussed in brief above, under s. 242(4) of the *Code*, once an adjudicator finds that there has been an unjust dismissal, the adjudicator may require the employer to:

> (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
>
> (b) reinstate the person in his employ; and
>
> (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal [*Canada Labour Code*, s. 242(4)].

The remedy of reinstatement is unique to the *Code* and is a remedy strongly favoured by many adjudicators. In *Peters v. Elsipogtog First Nation Band Council*, [2011] C.L.A.D. No. 43 ("*Peters*"), the adjudicator found that Ms. Peters had been unjustly dismissed. In assessing whether reinstatement was an appropriate remedy, the adjudicator considered *Graham v. Bison Diversified Inc*. (11 October 1991), Man. Ref. No. 1451, which listed circumstances under which reinstatement might not be warranted, including:

> 1. the deterioration of the personal relationship between the complainant and management and other employees; and
>
> 2. the disappearance of a relationship of trust which must exist, in particular when the complainant is high up in the company hierarchy.

In *Peters*, the complainant was the Coordinator of Commercial Fisheries for the Elsipogtog First Nation Band and was also related to the Chief who had terminated her (cousins). The Band had initially argued that Ms. Peters was a manager, and therefore excluded from the unjust dismissal provisions of the *Code*. This argument was rejected and the complaint was heard.

Given the deterioration of the relationship between Ms. Peters and the Chief and Council, the adjudicator found that Ms. Peters's case was not an appropriate case for reinstatement and instead awarded her 18 months pay based on her annual salary, plus 18 months of employer contributions to her pension account.

In our experience, we have only very rarely come across circumstances where both parties readily agreed that reinstatement would be a workable solution. Employers are hesitant to reinstate employees after a termination, especially if discussions about reinstatement are occurring soon after the termination when emotions may be running high. In addition, because most First Nations communities are so small and close-knit, it is next to impossible to keep information about a termination completely confidential, and thus there can be legitimate concern about loss of face and setting precedents for other employees. However, particularly when the dismissed employee is a member of the community, an employer may be willing to take steps to repair the relationship, such as publishing an agreed upon statement in the community newsletter or considering ways in which the employee could return to work for the First Nation at a later date or in another context.

G. Small/Remote Communities

The importance of what an employer tells an employee about the reasons for termination, and maintaining a good relationship with that employee during and after termination is magnified when dealing with smaller communities. News of an employee's termination travels quickly both within the employer's community and to other neighbouring First Nation communities, which can result in difficulty for an employee seeking new employment, and liability for the employer. Therefore, it is extremely important that a First Nation employer exercise the utmost caution to ensure that the facts surrounding any termination are kept confidential as between the employee and the employer.

Many remote communities offer only one source of employment—the First Nation administration. Further, often one or two families will make up Chief and Council and many of the staff. As mentioned above, in *Peters*, the complainant, the Coordinator of Commercial Fisheries was the first cousin of the Chief during her employment. The nature of a small community is such that many people will know who is employed by the nation and information about employees' conduct on and off the job is commonly known. This can lead to community members informing First Nation employers about off-duty conduct, which may result in the First Nation making employment decisions based on hearsay and information that is usually not privy to employers in more urban settings.

Such was the case in *Loonskin-Auger v. Little Red River Cree Nation Child and Family Services*, 2011 C.L.A.D. No. 298. The complainant, Ms. Loonskin-Auger, was terminated with cause after her sister, who was also employed by the Little Red River Cree Nation Child and Family Services, removed the keys to a company truck that Ms. Loonskin-Auger had in her purse and drove the truck (while intoxicated) without permission from Ms. Loonskin-Auger or the employer. The incident was reported by a member of the nation to a staff member who then reported it to the Director of the Little Red River Cree Nation Child and Family Services at 4:00 a.m. on the morning that it occurred, and both sisters were terminated with cause later that morning. During the adjudication, Ms. Loonskin-Auger gave evidence about her strained relationship with her sister, who suffered from substance abuse issues. On the night of the driving incident, Ms. Loonskin-Auger said that she had been in bed, and did not know her sister had removed the keys to the company vehicle without her permission. The employer argued grounds to terminate based on two propositions:

1. Ms. Loonskin-Auger was in fact partying in the vehicle, as alleged; and in the alternative,
2. if she was not involved, she was nonetheless negligent in allowing her sister to access the vehicle after she had been drinking.

The adjudicator concluded that the employer lacked just cause to terminate Ms. Loonskin-Auger and found that she had been unjustly dismissed. At that time, Ms. Loonskin-Auger had already secured alternative employment with the Little Red River Cree Nation and reinstatement was not considered. On the issue of mitigation, the adjudicator accepted that Ms. Loonskin-Auger had taken what limited steps she could given the size and remoteness of the community.

IV. Human Rights and Preferential Hiring

Because First Nations governments are federally regulated employers (the earlier discussion of jurisdiction over labour relations notwithstanding), human rights matters involving them are governed by the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("*CHRA*"). The recent repeal of s. 67 of the *CHRA*, a provision that granted paramountcy to the *Indian Act* and its regulations, may expand the possibilities for human rights complaints against First Nations employers.

Section 3 of the *CHRA* prohibits discrimination based on several specified grounds:

> 3(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

Sections 5 – 14 of the *CHRA* set out the practices that constitute discrimination, including refusing to employ someone or continuing to employ someone based on a prohibited ground of discrimination (s. 7(a)), or treating an employee differently from or worse than other employees on the basis of a prohibited ground (s. 7(b)).

Sections 15 and 16 list certain exceptions that permit an otherwise discriminatory practice to escape censure under the *CHRA*. Most relevant from the employment law perspective are:

- an employer may engage in a discriminatory practice if that employer can show that "any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is ... based on a *bona fide* occupational requirement." (s. 15(1)(a)), where *bona fide* occupational requirement is defined in s. 15(2) as requiring that accommodation of the needs of a person affected "would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost";
- a practice is not discriminatory if it is deemed to be reasonable under the guidelines issued by the Canadian Human Rights Commission (the "Commission") (s. 15(1)(e)); and
- it is not a discriminatory practice to engage in special programs, such as preferential hiring, where that practice is designed to prevent, reduce or eliminate disadvantages that are, or may be, suffered by any group of individuals based on or related to a prohibited ground of discrimination (s. 16(1)).

The Commission has issued the Aboriginal Employment Preference Policy (the "AEPP", online: http://www.chrc-ccdp.ca/legislation_policies/aboriginal_employment-eng.aspx). Under the AEPP, "[it] is not a discriminatory practice for an employer to give preferential treatment to Aboriginal persons in hiring, promotion or other aspects of employment, when the primary purpose of the employer is to serve the needs of Aboriginal people." Generally, therefore, a First Nations government, whose primary, if not sole purpose, is to serve the needs of its members, should be well within its rights to establish a preferential hiring policy giving priority to First Nations people. However, the existence of the AEPP is not a carte blanche permission to employers that preferential hiring practices may be employed without first developing their own policies. Nor does the preferential hiring policy in the AEPP extend so far as to permit a First Nation to give priority in hiring to its own members over other non-member First Nation applicants. In fact, the AEPP clearly specifies:

The Commission will not accept Aboriginal preference as a defense against an allegation of discrimination if it is convinced that the employer's defense is pretextual, in other words that there is reason to believe that at the time of the impugned employment action, the employer had no clear policy or intent to hire on a preferential basis, and that the defense is being used to avoid liability.

Employers can require job applicants to have knowledge and/or experience with the language, culture, history and customs of a particular First Nation, band or tribe when such requirements are directly related to the job requirements. *However, the policy does not allow for preference to be given to members of a particular First Nation, band or tribe* [emphasis added].

In addition, the AEPP sets out specific expectations in regards to the treatment of non-Aboriginal employees and job applicants to ensure that they are treated "fairly and reasonably."

In order to avoid the risk that a decision-maker would find such a policy to be pretextual, as contemplated by the AEPP, if an employer wishes to establish a preferential hiring program, the employer should first establish clear policies setting out its employment preferences and ensure that all employees are aware of and have acknowledged the policies. If there are job requirements that provide *bona fide* justification for differential treatment, these should also be clearly set out for the same reasons.

The ability to engage in preferential hiring does not automatically protect an employer from complaints of discrimination on other grounds, such as age, or family status. Interestingly, it also may not protect an employer from complaints of discrimination based on race, national or ethnic origin.

The AEPP contemplates that knowledge and/or experience specific to a First Nation can be a factor in hiring so long as it is directly related to the job requirements. This is not authority for a First Nation to categorically give preference in hiring to its own members, but it can be authority to give preference to those First Nations members where, by virtue of their membership, they will have specialized knowledge vital to the job. Some examples of where this might arise are when a First Nation is engaged in conducting traditional use studies, community projects involving specialized knowledge of that First Nation's culture, and aspects of consultation with the Crown.

- *Deschambeault v. Cumberland House Cree Nation*, [2009] 2 C.N.L.R. 80 (C.H.R.T.): The complainant, a Métis woman, applied for a position with the First Nation. Although she was the most qualified of all the candidates, the First Nation chose to hire a less qualified band member instead. The complainant alleged discrimination on the basis of national or ethnic origin because she was not a member of the band. The Tribunal stated that, "[it] makes no difference that, unlike race, it is possible to gain or lose band membership status throughout one's lifetime. Adverse differential treatment of individuals based on their national or ethnic origin constitutes a discriminatory practice ... [the argument that Métis and Indians both fall within the meaning of 'Aboriginal peoples of Canada' under s. 35 of the *Constitution Act, 1982*] ignores the fact that Aboriginal peoples are comprised of many nations or ethnic groups and suggests that adversely differentiating on the basis of these national or ethnic origins should be treated differently than differentiation between European national origins, which is patently absurd." The Tribunal found for the complainant.
- *Bignell-Malcolm v. Ebb and Flow Indian Band*, [2008] C.N.L.R. 15 (C.H.R.T.): The complainant was of Cree descent. She had married into, and ultimately became a member of, the Ebb and Flow Indian Band, where the majority of members were Ojibway. She applied for and was denied a position as Director of Education, while a much less qualified Objibway person was hired. The Tribunal held that this constituted discrimination on the basis of race, national or ethnic origin, and further found that "language is not coincident with and [sic] race, ethnic or national origin" and therefore "[f]luency in a particular language cannot, without more, be a *bona fide* occupational requirement ..."

As these two cases show, anytime a First Nation wishes to implement preferential hiring practices in relation to its own members, it will have to tread extremely carefully to ensure that those practices conform to the narrow parameters outlined in the AEPP. Counsel acting for a potential complainant should consider both whether the employer's hiring practice fits within the AEPP and whether the discriminatory practice constitutes a *bona fide* job requirement sufficient to justify the discrimination. Additional assistance may be found in the Commission's *Human Rights Handbook for First Nations* (2011) (online: http://doyouknowyourrights.ca/nai-ina/publications/hrhandbook_guidedp/toc_tdm-eng.aspx).