PRACTICE MADE PERFECT CLE BC

EMPLOYMENT LAW CONFERENCE—2010 (DAY 2)
PAPER 6.1

Employment Law in the First Nations Context: First Nations Governments as Employers

These materials were prepared by Eamon Murphy, J. Berry Hykin, and Leah Mack, with research and editing assistance from student Steve Parr, all of Woodward & Company Lawyers, Victoria, BC, for the Continuing Legal Education Society of British Columbia, May 2010.

EMPLOYMENT LAW IN THE FIRST NATIONS CONTEXT: FIRST NATIONS GOVERNMENTS AS EMPLOYERS

I. Introduction

Aboriginal employment cases present unique challenges to legal counsel working for either the employer or employee. Complex legal issues can arise in this context that may be unfamiliar to employment law counsel who do not regularly work for First Nations people and governments.

This paper canvasses some of the key issues that can arise in this context, including: determining the appropriate jurisdiction; the contractual authority of bands; and practical considerations affecting remedies in wrongful dismissal claims. Our intent is to provide the reader not only with both a grasp of the relevant principles and case law, but also an appreciation for the strategic considerations and unique cultural and social realities relevant to aboriginal employment law in order to facilitate appropriate planning measures.

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

A. Introduction

There is a substantial body of aboriginal employment case law from provincial superior courts, as well as federal courts, addressing claims of wrongful dismissal and other employment matters. The facts of these cases are often similar. Why, then, is one forum chosen over the other?

B. Constitutional Divide

The source of the jurisdictional divergence can be traced to ss. 91 and 92 of the *Constitution Act, 1867*. On the one hand, provinces have jurisdiction over "property and civil rights" under s. 92(13). On the other, the federal government has jurisdiction over "Indians, and Lands reserved for Indians" under s. 91(24). The analysis of what falls within these heads of power is, at times, challenging.

The basic rule is that provincial laws of general application apply to Indians and Indian lands 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).

1. Exceptions to Provincial Jurisdiction

One of the exceptions to the basic rule of provincial jurisdiction is found in the realm of labour relations (i.e., employee-employer issues). Within the realm of labour relations there are two general categories of provincial exclusion.

a. Indianness

The first exclusion is to provincial laws which impact the "core of Indianness" (see *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 ("*Canadian Western Bank*"), at para. 50; *Four B*, at 1047-48; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (QL) ("*Delgamuukw*"), at para. 171).

The meaning of "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 factors 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).

Judicial treatment of the "core of Indianness" with respect to determining labour relations jurisdiction is a hotly contested subject. The two leading cases, *NIL/TU,O Child & Family Services Society v. B.C.G.E.U.*, 2008 BCCA 333 ("*NIL/TU,O*") and *Native Child and Family Services of Toronto v. Communication, Energy, and Paperworkers Union of Canada*, 2008 FCA 338 ("*Native Child*"), have recently been granted leave to appeal to the Supreme Court of Canada. A brief description of these cases highlights the debate about the "core of Indianness."

In *NIL/TU,O*, the Beecher Bay, Pacheedaht, Pauquachin, Songhees, Sooke, Tsartlip and Tsawout First Nations operated a child welfare agency pursuant to federal policy which encouraged the administration of child welfare services by First Nations. However, the agency was incorporated under British Columbia statute and was governed by the provincial *Child, Family and Community Services Act*, R.S.B.C. 1996, c. 46. The agency's funding was 75% federal and 25% provincial. The organization's services were partially focused on serving an aboriginal clientele. Almost all of NIL/TU,O's employees were First Nations practitioners. However, only a fraction of the organization's standards and procedures were geared towards aboriginal children (at para. 11). At issue was whether employees could be unionized under provincial legislation. At the trial level, 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 B.C.S.C. found that all of the children served by the agency were registered 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). That finding was overturned by the BC Court of Appeal.

The B.C.C.A. described two lines of authority that have evolved in determining the jurisdiction of First Nations labour relations. 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 *Canada Labour Code*" (*NIL/TU,O*, at para. 33). This line of authority relies upon 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.); 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 Indian traditions, and specifically Indian language and culture, the labour relations in question came within federal jurisdiction (at para. 34).

The second line derives from provincial courts and focuses on the activities of an operation, as opposed to who the employer or employees are. In this regard, the B.C.C.A. cited *Southeast Resource Development Council v. United Food and Commercial Workers Union Local No. 832*, 2004 MBQB 35 as the leading authority. In that case, an enterprise that provided transportation, accommodation and interpretation services to status Indians was controlled by nine Indian Band Councils. The court, however, found that the issue of band 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).

The B.C.C.A. also relied on its prior decision in *Westbank First Nation v. British Columbia (Labour Relations Board)*, 2000 BCCA 163 ("*Westbank*"). In *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). The Court of Appeal in *NIL/TU,O* affirmed this, describing the test as

"whether the operations of the Society touch upon the 'core of Indianness'" (at para. 57). On the basis of that focus, the B.C.C.A. held that *NIL/TU,O*'s activities were not sufficiently aboriginal to trench on the "core of Indianness" and accordingly held that the appropriate jurisdiction was provincial.

Native Child also concerned a children's aid agency, where the issue at hand was the validity of the respondent's union certification by the Canadian Industrial Relations Board (C.I.R.B.). The services provided were exclusively in Toronto (off-reserve). 100% of their clients self-identified as status Indians. The majority of the agency's employees and directors were aboriginal. The organization received a minor amount of federal funding. Native Child's services took into account aboriginal values and family models, and required its employees to take training in aboriginal culture. Further, Native Child held itself out to be "under direct control and management of the native community."

In holding that the agency's labour relations should be regulated provincially, the Federal Court emphasized that provincial laws should not apply to Indians only where the laws actually *impair* the "core of Indianness" (at para. 39) (following *Canadian Western Bank*). To prove that Native Child's operations should not be provincially regulated, the respondent union needed to satisfy the interjurisdictional immunity test by establishing that the activities of an aboriginal children's aid society would impair the core of the federal legislative power over Indians and lands reserved for Indians (at para. 23). This is significant because it is unlikely that the activities of many aboriginal service providers would actually impair the "core of Indianness," thereby narrowing the range of aboriginal enterprises falling under federal jurisdiction.

Ultimately, the respondent union was unable to meet this stringent test. The determinative factors were that Native Child had no significant federal involvement, that it operated entirely off-reserve, and that it did not have any relationship with any federal programs or agreements (at para. 40).

The result in *Native Child* is consistent with many of the cases involving aboriginal corporations, which primarily find that these entities fall within the realm of provincial jurisdiction, particularly those involving human rights and collective bargaining (see *Celtic Shipyards(1988) Ltd. v. Marine Workers' & Boilmakers' Industrial Union, Local 1* (1994), [1995] 3 C.N.L.R. 41 (B.C.L.R.B.) (QL), *Four B* and *Westbank* as above; *Saskatchewan Indian Gaming Authority Inc. (SIGA) v. CAW-Canada*, [2000] 3 C.N.L.R. 349 (Sask. Q.B.), aff'd 2000 SKCA 138 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 46. Still, there are exceptions to this, such as *Burns Lake Native Logging Ltd. v. IWA-Canada, Local 1-424*, [2006] 2 C.N.L.R. 1 (QL), where a band owned logging company was found to be under federal jurisdiction. The Court distinguished the logging operation from the manufacturing business in *Four B* which fell under provincial jurisdiction on two grounds. First, Native Logging was owned and operated by the band council, whereas Four B was merely owned by band members (at para. 33). Second, while the objective of Four B was purely commercial, Native Logging aimed to promote community economic development, and also provided gifts of wood to elders and low-income band members (at para. 36).

Both *NIL/TU,O* and *Native Child* are headed to the Supreme Court of Canada, which hopefully will yield a clearer sense of the scope and meaning of "core of Indianness."

b. Federal Work, Undertaking or Business

The second, and less litigated, exception is that any employment which can be characterized as a "federal work, undertaking or business" would be excepted from the basic rule (see the *Code*, s. 4 and s. 2 definition of "federal work, undertaking or business," subsection (i)). If the employer is the band or band council, the operations probably fall within the *Code* as a "federal work, undertaking or business" (see *Sagkeeng Alcohol Rehab Centre v. Abraham*, [1995] 1 C.N.L.R. 184 (Fed. T.D.) ("*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.).

In *Sagkeeng*, an alcohol treatment centre was found to be a federal business or undertaking to which federal law applied. The key factors (at para. 190) were that:

(a) the centre was organized and operated primarily for Indians,

(b) the centre was governed solely by Indians,

(c) its services were intended primarily for Indians,

(d) its staff received First Nations training and

(e) its programs were designed for Indians.

There are other factors that can be determinative of the jurisdictional question that do not have to do with Indianness. For example, a band-owned corporation that operates a cruise ship terminal would be a federal business since shipping is considered a federal undertaking under the *Code*.

The reverse is that if the employment is not a "federal work, undertaking or business," provincial law applies. As set out below, it may be advantageous for the aboriginal employer to argue that federal legislation does not apply.

c. Self-Governance

Some First Nations have entered the jurisdictional fray by passing their own labour relations codes, but such codes do not replace the jurisdiction of the federal or provincial Crown. To that end, there has been one unsuccessful attempt to have the management of labour relations found to be a constitutionally protected aboriginal or treaty right (see *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 (C.A.) (QL)).

C. So, Which Jurisdiction?

Both the *Code* and the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "*ESA*") have provisions that address various aspects of dismissal such as minimum notice periods. However, there are four significant differences which should be considered.

First, 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 aboriginal employers subject to the *Code* must carefully consider this possibility when terminating an employee, particularly where that termination can be said to be "unjust" (see *Wally v. Carcross/Tagish First Nation*i ,[2003] No. 598).

Second, the *Code* excludes managers (s. 167(3)) from making allegations of unjust dismissal under the *Code*. Thus, a manager's only recourse would be the common law.

Third, the *Code* sets a tight timeline for complaints: they must be made within 90 days from the date of the termination (s. 240(2)). An employer would clearly wish to have their claim characterized as that falling within federal jurisdiction in a scenario where an employee files their 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 outlined above.

Fourth, a person laid off for lack of work or discontinuance of function has no right to apply for an order of unjust dismissal under the *Code*.

Therefore, when acting for employers where a manager alleges unjust dismissal, or where 90 days have elapsed, or where the termination is for lack of work or discontinuance of function, one would likely want to argue that the *Code* applies and try and exclude the application of provincial law as above. An employee, on the other hand, would want to seek to have the *Code* apply where they wish to return to work.

III. Effective Employment Policies—Confidentiality and Conflicts of Interest

The overlap between employer and employee can be significant in small First Nation communities. This makes for some interesting challenges in the administration and management of a band or band entity. The small populations of many First Nations and their often remote location mean that it is common for band councilors to also serve as directors of band corporations, to be employed by the band in some capacity, or both. Confidentiality and conflict of interest issues frequently arise. There are also challenges with enforcing policies where employer and employee overlap.

Common problems that arise in the employment context of aboriginal communities include:

1. Employees that are related to chief and council;
2. An employee of the band or band corporation being elected as a chief or council member;
3. Chief/council member applying for a job or contract with the band or a band corporation;
4. Ensuring confidentiality of sensitive employment matters.

A review of cases dealing with the impact of these issues on damages appears in the final section of this paper. The following section deals with some of the practical approaches to managing conflict and confidentiality within an aboriginal employer organization.

A. Duty to Avoid Conflict

The first three issues noted above raise conflicts of interest in one form or another. As far as conflicts of interest within aboriginal communities, numerous cases have held that band council members are in a position of trust and owe a fiduciary duty to band members and also have a fiduciary obligation to manage band assets in the best interests of the band membership (see, for example, *Basil v. Lower Nicola Indian Band*, 2009 FC 741 at para. 95; *Eli v. Royal Bank*, [1985] B.C.J. No. 3014 (S.C.)).

This fiduciary duty is interwoven with the standard conflict of interest rules (see *Sumas Indian Band v. Ned*, [2002] 4 C.N.L.R. 280 (B.C.S.C.) (QL); *Annapolis Valley First Nations Band v. Toney*, [2005] 2 C.N.L.R. 1 (F.C.) (QL)):

- Band chiefs/councillors must carefully avoid conflicts between personal interests and their duties to the Band;
- Band chiefs/councillors should not participate in band council discussions or votes regarding any transaction in which he or she has an interest;
- Any interest a chief/councillor has should be fully disclosed to the band council at a duly convened meeting of the band council.

Courts have recognized, however, that it is difficult for the chief and council of small bands to avoid a conflict, or the appearance of a conflict, of interest. Most bands in Canada have fewer than 1,000 members and there are many bands with less than 100 members, which means that decisions about band employees will invariably affect relatives or friends. The legal standard for bias and conflict of interest has been modified in the context of a small aboriginal community (see, for example, *Sparvier v. Cowessess Indian Band No.* 73 (1993), [1994] 1 C.N.L.R. 182 (Fed. T.D.) (QL); *Wewayakai Indian Band v. Chickite* (1998) [1999] 1 C.N.L.R. 14 (B.C.S.C.) (QL), at para. 53).

Practically speaking, this means that all bands, whether big or small, urban or remote, should have conflict of interest provisions as part of a comprehensive employment policy, addressing, at minimum, the avoidance of conflicts of interest, the participation (or non-participation) in votes and discussions about matters in which the individual has an interest and the requirement for full disclosure of any interest.

Where employees are elected, or where a chief or councilor also holds a job with the band or band entity, further consideration should be given to including policies which address confidentiality and conflict in those circumstances. Some First Nations prohibit newly elected council members from continuing to work for the band or band entity because of the potential for conflict.

Ideally, an employee elected to council should be provided with a leave of absence for the length of that position so that band members are not discouraged from running for office. The economic reality is that many councils only receive honorariums for meetings, not full salaries, which means that an employee cannot afford to take a leave of absence. Poor economic conditions in aboriginal communities often cause council members to take paying jobs within the band. Smaller, more remote, aboriginal communities often have difficulty finding qualified persons to fill vacancies, which further leads to council members holding office and employment positions within the band. The effective administration and management of the band or band entity requires carefully drafted policies to suit the particular needs of that community.

B. Confidentiality

Issues of confidentiality sometimes arise in the employment context where an employee is related to a council member, particularly where sensitive employee matters such as salaries or discipline are being discussed. Further complications arise where a band council is put in the position of having to address employee matters relating to an individual that also serves on council.

From a practical perspective, it is worthwhile to have all employees and council members sign an oath of confidentiality. At minimum, this will cause the employee or council member to turn their mind to the issue. There should also be sanctions in place for a breach of confidentiality.

However, it is one thing to have a policy in place. It is quite another to try and enforce that policy, particularly where the employee also serves on council. It is often politically unpalatable to discipline (or fire) a fellow council member from their position of employment, as the resulting tension can make council meetings very strained. Further, it can be difficult to pinpoint a breach of confidentiality in a community where many of the band members and council members are interrelated.

IV. Authority to Bind the Band

A claim for wrongful dismissal is brought as an action for breach of contract. Therefore, in order for an employee's claim to be successful, there must first be a valid contract of employment between the band as employer and the employee. While an employee will argue that there is an existing and valid contract, the employer band may wish to seek to avoid obligations under the purported contract on the basis that it was not validly made with the band. As this section will set out, the law on this point is evolving and complex. There are currently two main lines of authority with very different treatment of the effect of the *Indian Act*, R.S.C. 1985, c. I-5, as amended ("*Indian Act*") on a band's ability to enter into binding contracts. Legal counsel advising band employers or employees need to understand the impact of the *Indian Act* on the authority of band councils to contract on behalf of the band and the extent to which basic contract law principles may or may not apply.

This paper focuses primarily on the legal effect of s. 2(3)(b) of the *Indian Act* as it relates to the authority of the band council, as the elected representatives of the band, to enter into binding contracts on behalf of the band. It is important, however, to note that not all First Nation governments operate under the statutory framework of the *Indian Act*. Some First Nations operate under their own traditions, customs and government which may involve a "custom" band council or a leadership structure established under customary law (a "Custom Band"). While it is beyond the scope of this paper to deal with how to identify the appropriate contracting body for Custom Bands, legal counsel should be aware that anyone purporting to make an agreement on behalf of a Custom Band must be able to source their authority to the traditions, customs and government of that Custom Band.

A. The Effect of the Indian Act on Validity of Contracts

The authority of an Indian band to enter into a contract with a private party, including employment contracts, derives from s. 2(3)(b) of the *Indian Act*:

> 2(3) Unless the context otherwise requires or this Act otherwise provides,
>
> (a) A power conferred upon a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and
>
> (b) A power conferred upon the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councilors of the band present at a meeting of the council duly convened.

The general rule is that unless there is a band by-law or custom that says otherwise, the authority to enter into a contract on behalf of the band lies with chief and council. The proper exercise of the band council's authority under s. 2(3)(b) requires that a band council resolution (a "BCR") be passed at a duly convened meeting of the chief and council. The formal requirements for conduct of Chief and Council meetings are set out in the *Indian Act* and the Indian Band Council Procedure Regulations, C.R.C. 1978, c. 950 (the "Regulation"). Custom Bands are not subject to the Regulation or to those parts of the *Indian Act* relevant to band governance structures. If a meeting has been duly convened (i.e., notice has been provided and a quorum of council is in attendance), a formal BCR (i.e., made in writing) may not be necessary. Written minutes of the meeting may stand in place of a BCR to reflect the intent of council.

There are two lines of cases dealing with the validity of contract and the legal effect of s. 2(3)(b). The first holds to a strict interpretation of s. 2(3)(b) that a valid contract requires a valid BCR approving or authorizing the contract itself. This strict interpretation of the s. 2(3)(b) requirements has been followed in cases for breach of contract for services (*Heron Seismic Services Ltd. v. Muscowpetung Indian Band*, [1991] 2 C.N.L.R. 52 (QL) ("*Heron Seismic Services*")), and in the employment context (*Vollant v. Sioui*, [2007] 2 C.N.L.R. 375 (QL) ("*Vollant*")). In both *Heron Seismic Services* and *Vollant*, the courts relied heavily on the principle that an Indian band is a creature of statute akin to a municipality (see also *Leonard v. Gottfriedson*, [1980] B.C.J. 551 [[1982] 1 C.N.L.R. 60] (S.C.)). The statutory provisions set-out a mandatory decision-making process to ensure that the decisions of the band council are made in the best interests of the community members. In *Vollant*, the Federal Court held at para. 44 that, "the formal procedures set out in the Indian Act are a *sine qua non* condition of a contract's validity, and the notion of apparent authority cannot be applied where a governmental authority is involved."

However, another line of cases suggest that a BCR authorizing or approving the contract itself is not necessary if there is a BCR or course of conduct authorizing someone to negotiate and conclude the contract on the band's behalf. In *Basque v. Woodstock Indian Band*, [1996] N.B.J. No. 170 (N.B.C.A.) (QL) ("*Basque*"), a contractor sought to enforce an oral contract with the band. The Court found that there was an enforceable contract on the basis that the band council had voted to give authority to the chief to negotiate the contract. *Basque* was followed more recently by the Nova Scotia Supreme Court in *Maloney v. Eskasoni*, [2009] 3 C.N.L.R. 176 (N.S.S.C.) (QL) ("*Maloney*"), where Moir J. noted at para. 218 that previous cases had not taken "a hard look at interpretation of s. 2(3)(b)." Indeed, the Court in *Maloney* may stand alone in undertaking a detailed contextual analysis of the meaning of s. 2(3)(b). In so doing, Moir J. held at para. 226, that "the statute does not expressly deal with the general laws of contract and it does not expressly authorize band councils to enter into contracts. It leaves unanswered the question of whether a contract must carry the authority of bands or band councils. It leaves that to inference."

In *Maloney*, the Court found that an employment contract does not need to be confirmed by a BCR if a course of conduct indicates that a chief has been given authority to enter into a binding agreement. Subsequent to a meeting of the entire band, at which the chief had been given a mandate to address drug and alcohol problems in the band's commercial fishery, the plaintiff had been hired by the chief

to develop and implement a drug-testing program. The band council had also had several meetings and two councillors testified that the chief had authority but was expected to report back to council. The Court found that the chief had actual authority to hire the plaintiff based on the mandate from the band membership, as well as from subsequent conduct of the band council (at paras. 244-50).

B. Can there be a Valid Contract Without a BCR?

In the case where there is a purported contract, but no BCR authorizing a contract, or authorizing someone to negotiate the contract on the band's behalf, it may still be difficult for an employer band to avoid obligations under that contract. The implications of s. 2(3)(b) notwithstanding, the summary of the law set out in *Maloney* indicates that the basic principles of contract law still apply. As Lord Denning said in *Storer v. Manchester City Council*, [1974] 3 All E.R. 824, "In contracts you do not look into the actual intent in a man's mind. You look at what he said and did." Therefore, the band's course of conduct, or usual practices, may be considered in determining the validity of an employment contract, whether it be a written or oral agreement. Where a course of conduct indicates that the chief has been given authority to negotiate a contract, a court may find that a BCR is not required.

In *McDonough v. Maliseet First Nation at Tobique*, [2001] 4 C.N.L.R. 190 (N.B.Q.B.) (QL) ("*McDonough*"), the New Brunswick Court of Queen's Bench considered the validity of a contract for services and found for the plaintiff. The band council had authorized the chief to negotiate contracts with the plaintiff. The council was aware both of the existence of the contract and its terms and had paid the plaintiff, in part, in accordance with the terms of the contract. Further, because the band did not habitually pass BCRs to authorize contracts, the Court found that it could not now rely on s. 2(3)(b) as a defence to a contract it had clearly entered.

Another key factor that can come into play in determining whether a contract exists between the band and an employee, or the nature of the contract in existence, is the conduct of the band subsequent to the alleged contract. Where there is no BCR authorizing someone to negotiate the contract on the band's behalf, or authorizing the contract itself, the band's conduct in relation to the alleged contract becomes a determinative factor. The course of conduct of the band can retroactively ratify a contract even if it was made without authority. In *Basque*, the Court found that the conduct of the band council during the life of the contract demonstrated that they had accepted the terms and conditions of the disputed contract, including any subsequent amendments, and awarded damages to the plaintiff contractor.

C. Delegated Authority

A band council can expressly delegate authority for hiring and firing to other agencies and thereby delegate the authority to bind the band in contract. An example of express delegated authority is found in *Isaac v. Bonspille*, [2009] 2 C.N.L.R. 171 (Que. Sup. Ct.) (QL) ("*Isaac*"). In this case, the Mohawk Council of Kanesatake had entered into a tripartite agreement with the federal government and Quebec for policing on the reserve which created the Kanesatake Police Commission. Under the terms of the agreement, the Police Commission was to operate as an autonomous entity independent from the band and it had the power to make all hiring and dismissal decisions. The band council would be responsible for payroll and the "recruitment and selection" of officers. After eight new officers signed fixed-term contracts, the Police Commission advised that the band council would not authorize the contracts. The officers claimed for breach of contract and the band council argued that the contracts were not valid without the authorization of chief and council. The Court held that the band council had legally delegated its power to the Police Commission to sign employment agreements with new police officers and found for the plaintiffs.

First Nation governments range from relatively simple to very complex organizations. In many cases, the chief and council do not hold direct responsibility for human resource management. The responsibility is often delegated to the band administrator, or to the person who is charged with the

management of a specific band department, such as education, lands or economic development. Often, the band will have various agencies that function as band-empowered entities, such as an economic development corporation, a police authority, or an educational council. These agencies may or may not have express delegated authority for hiring and firing and it is not always clear whether it is the agency or the band itself who is the employer.

In *Lesperance c. Waswanipi Development Corp.* (1998), REJB 1998-09967, 1998 CarswellQue 3770 (Que. C.A.) ("*Lesperance*"), the band council terminated an employee without notice, but the employment contract had actually been made with the band's development corporation. At trial, the band successfully argued that there was no liability on the band because there was no contract between the band and the plaintiff. The Court of Appeal overturned this decision, holding that both the band and the development corporation were liable for damages.

D. Ostensible Authority

The principle of apparent, or ostensible authority can be a significant factor in determining the validity of the employment contract and the caselaw is conflicting on whether it applies in respect of Indian bands. In *Vollant*, the Court was very clear that apparent authority cannot apply to a government authority. However, this position was based in the court's interpretation of s. 2(3)(b) as being absolutely necessary to the validity of a contract. As the *Maloney* case suggests, the courts may be moving away from this interpretation of s. 2(3)(b) to a more contextual interpretation and a heavier reliance on common law principles of contract. The result will ultimately turn on the facts of the specific case.

In an earlier case, *Chartrand v. Pine Creek First Nation*, 2003 MBQB 112, [2003] M.J. No. 168 (QL) ("*Chartrand*"), the Court found that the band's Education Authority could have ostensible authority. In *Chartrand*, the power to hire the plaintiff was shared between the Education Authority and the band council. Although the hiring of the plaintiff had not been approved by the band council, they did nothing subsequent to the hiring to indicate that the Education Authority had not had the authority to hire the plaintiff. In fact, band council's conduct was to treat the plaintiff as an employee which amounted to a tacit approval of the Education Authority's hiring power. *Chartrand* is part of an emerging body of case law that stands for the proposition that an Indian band may be bound by ostensible authority. The Court in *Maloney* followed this line of authority, noting at para. 260 that, "unless it is [expressly stated] in the Indian Act, the courts should not be finding that First Nations governments are excepted from the common law of ostensible authority. I find nothing to that effect in the statute." For more on this issue, see *Barren Lands Band v. Northlands Band*, 2003 MBQB 145: the band's construction company had ostensible authority to make an assignment to the band; *Solomon v. Alexis Creek Indian Band*, 2007 BCSC 459: the band manager had ostensible authority to approve a salary increase for an employee; *Chartrand v. Kwakiutl Indian Band*, 2003 BCSC 1490: chief had ostensible authority to hire employee.

If the decisions in *Maloney* and *Chartrand* are indicative of the current direction of the courts, an employee could likely successfully argue that a person in a management position has the ostensible authority to bind the band in contract if that person represents that he or she had authority to act on behalf of the band and the employee relied on that representation in deciding to enter into a contract with the band. This may be the case despite the person with ostensible authority not holding expressly delegated authority in accordance with the *Indian Act*.

V. Damages and Wrongful/Unjust Dismissals in Aboriginal Communities

In addition to general damages considerations awarded outside of the Aboriginal context a dismissal in a First Nations community gives rise to certain *sui generis* considerations that can affect the conduct of a wrongful dismissal action and its outcome. As has been noted throughout this paper, many First Nations communities are very small and feature extensive familial or other personal connections

between their members. These strong connections also exist between band employees and the employer band's representatives (administrators or band council members). The intimate nature of the small community results in a greater likelihood that a dismissal will affect an employee's reputation and ability to obtain other work. Further, the majority of First Nation reserves are located in remote areas. Their remote locations inherently limit the size and capacity of the hiring pool, and the available employment opportunities for people in the area. Often, the biggest, or only, employer of First Nation members in the area is the First Nation government itself. These governments operate in an atmosphere of institutionalized and highly politicized instability (elections under the *Indian Act* take place every two years making it difficult, if not impossible, to develop stability and continuity within the band's administration). All of these factors can affect the amount of notice to which an employee is entitled and are particularly important in the context of cases that fall under the *Code*, where the preferred remedy is often reinstatement. The ability to manage relationships and resolve conflict between the parties is a vital skill for legal counsel working on behalf of either the employee or the employer band.

The following case summaries highlight some of the issues that can arise in the context of wrongful dismissal cases involving First Nations and the extent to which they may or may not affect the course of a wrongful dismissal action.

A. Cultural, Social and Political Factors in Employment Relations

1. Culture and Cultural Values

It is important for legal counsel to try to get a sense of the culture of the First Nations to which their clients belong. This can assist in understanding how a conflict has arisen and in achieving a just resolution. Counsel may be faced with arguments based on cultural values where the cultural values actually reflect customary practices of the band. It can be challenging to differentiate between the two and even more challenging to educate the court or adjudicator about the significance of these issues. Different cultural values between employer and employee can result in miscommunications, hard feelings, and highly contentious situations.

In *Ramsdin v. United Chiefs and Councils of Manitoulin, West Bay*, [1996] C.L.A.D. No. 1132 ("*Ramsdin*"), the cultural value of respect was an issue of great importance for both parties to the dispute. In this case, the complainant was dismissed from her employment with the United Chiefs and Councils of Manitoulin (the "UCCM") after a verbal dispute with the chief of her home band, Sucker Creek First Nation. The chief was also a board member of the UCCM and had complained to the board about Ms Ramsdin's disrespectful conduct during a band meeting that had taken place during work hours. Although Ms Ramsdin understood that she would be given the opportunity to tell her side of the story before a decision was made about her employment, this did not happen and she consequently brought a complaint of unjust dismissal.

In *Ramsdin*, many witnesses testified at length about the importance of respect and, in particular, traditions of respect within their culture. Witnesses described how Sucker Creek members were taught from any early age to respect their Elders and how respect was held up as an important traditional value. The witnesses for the employer said that a direct confrontation with a chief would be disrespectful and inappropriate. The UCCM pointed to its policy manual which, it said, codified the cultural values of the community. The UCCM argued that Ms Ramsdin had demonstrated a fundamental lack of respect for the chief and that this breach of cultural protocol and policy was particularly and fatally damaging to the employment relationship.

However, despite the relatively fulsome evidence from the employer about the importance of respect as a cultural value, the adjudicator found for the employee. Although it was clear that respect was an important cultural value, the adjudicator determined that it applied to all parties equally. In fact, the adjudicator held that the employer's conduct had been high-handed and disrespectful to Ms Ramsdin and called for her to be reinstated to her position.

2. Interpersonal Conflict and Family Relations

The Supreme Court of Canada has highlighted the important roles employment play in generating a sense of identity, self-worth and well-being (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 91). This emphasis on the psycho-social components of employment is particularly salient in the First Nations context. First Nations employers and employees face additional employment challenges such as working with family members and other closely-knit community members. Conflicts at work or in the community can become indistinguishable, which can complicate claims for unjust dismissal.

The case of *Papequash v. Key Indian Band*, [2003] C.L.A.D. No. 142 ("*Papequash*") is a good illustration of the interpersonal and political complexities that can arise in aboriginal employment cases. In *Papequash*, the complainant, Sharon Papequash was sister-in-law to Chief Carey O'Soup. Additionally, Papequash's sister, uncle, cousin, sister-in-law and common law husband all held senior positions in the band's administration.

This interweaving of family and office life was further complicated by a political rivalry between band members and family members employed with the band. Chief O'Soup, who terminated Papequash, was a political rival of Papequash's spouse, Felix Keshane. When asked by the adjudicator why he had terminated Papequash, Chief O'Soup replied that the fact of Keshane and Papequash living together was a factor in the decision to terminate Papequash because everything at the band is political. Significantly, the triggering incident that led to Papequash's termination was a verbal exchange relating to personal affairs between Papequash and her sister—Chief O'Soup's wife (at para. 191).

3. Political Misfeasance

In *Beardy v. Lake St. Martin First Nation*, [2008] C.L.A.D. No. 359 ("*Beardy*"), the complainant, Brenda Beardy, was terminated following the defeat of her brother's bid for election as chief to the incumbent Chief Peter Ross. Her letter of termination was signed by Chief Ross and three of his relatives (at para. 45). Her dismissal appeared to be politically motivated.

Beardy serves as a cautionary tale for employers when terminating employers for reasons outside their job performance. The arbitrator determined that the actions of the band were deliberately designed to impose emotional and mental hardship upon the complainant. She was awarded both aggravated and punitive damages, signaling that the adjudicator wished to deter similar misconduct in the future.

4. The Practice of the Band

When considering the facts of an aboriginal employment matter, either from the employer or employee perspective, legal counsel must also consider band practices in addition to the relevant statutory and common law. In *Papequash*, the adjudicator was mindful of Band practices with respect to employee issues. In that case, a band councillor testified that the usual practice was that problem employees would meet with the chief and council and be given a chance to defend themselves. Only where warnings were given to the employee and ignored would the employee be terminated (at para. 197). However in *Papequash*, the complainant was immediately fired without adhering to this established practice. This breach of established practice was noted by the adjudicator in the award (at para. 228).

B. Special Considerations on Damages

1. Remote Communities

Due to the remote locations of many First Nation communities and the lack of economic opportunities in these areas, the band is often the largest or only employer. Employees dismissed from employment with a band are thus often left without other viable job prospects. News of a dismissal

spreads quickly within small communities and a sudden dismissal may cloud an employee's reputation (*Leonard and Kamloops Indian Band No. 668*, [1996] C.L.A.D. No. 1121; *Collins v. Driftpile*, [2002] C.L.A.D. No. 428). Many band members have no wish or ability to move and seek employment elsewhere. For these reasons, a wrongfully dismissed employee may seek increased severance to cope with the heightened impacts of dismissal.

For most people, work is one of the defining features of their lives and accordingly, any change in a person's employment status is bound to have far-reaching repercussions. In a First Nations community, there is also a greater potential for the loss of a sense of belonging in the community and of the benefits of living in that community. Many First Nations members residing on reserve have little or no intention of ever leaving that land. In *Beardy*, the complainant testified that she had lived on the Lake St. Martin reserve most of her life. Her parents were from that reserve, and her roots went back to her great-grandfather in that area.

2. Mental Distress

In addition to the difficulty of finding alternative employment in First Nations' communities, wrongfully dismissed employees may experience mental distress as a result of ongoing interaction with their former employers and colleagues. But perhaps more importantly, for many band employees, their place of work is also their home community where they turn for familial, cultural and spiritual well-being. Tensions and conflict arising out of an employment relationship that has turned sour can have far-reaching and devastating effect on an employee's sense of self and his or her sense of place in the community. Such circumstances can lead to increased damages (either as increased notice or as direct compensation) and should also be considered in determining the practical application of the reinstatement remedy.

In *Ramsdin*, the complainant testified about the impact of the dismissal on her, advising that she had been unable to find other work after her dismissal and had gone on welfare (at para. 15). Significantly, the dismissal negatively affected her position in the community and the way community members viewed her. In *Papequash*, the complainant was nervous and apprehensive about being out in the community or attending the band office. She had no means of income, so she had to apply for welfare, which was awkward because it was only offered through the band office, where her former employer and brother-in-law, Chief O'Soup worked. The termination also had a major impact on her relationship with her children. The children's Uncle Carey O'Soup, the Chief had fired their mother. The children blamed their mother and said it was her fault she was fired and felt compelled to take sides (at para. 113). The arbitrator awarded Papequash $3,500 for her mental distress (at para. 229). In *Grey Eyes vs. Ahtahkakoop Cree Nation* (2003) C.L.A.D. No. 205, the complainant was compensated for suffering harm as a result of her dismissal, including humiliation, injury to her personal dignity and feeling estranged from her community.

It should be noted that the Supreme Court's recent decision in *Honda Canada Inc. v. Keays*, 2008 SCC 39 ("*Honda*") may change the outlook for damages in aboriginal wrongful dismissal claims. *Honda* changed employment law remedies in two important respects. First, the SCC held that where a wrongfully dismissed employee suffers mental distress as a result of a harsh or bad faith dismissal, they should be compensated directly for such mental distress rather than through a *Wallace* "bump-up." Second, the SCC held that contrary to earlier lower court decisions, discrimination by an employer against an employee could not be an independent actionable wrong for which punitive damages could be awarded in a wrongful dismissal action. Thus, legal counsel in aboriginal wrongful dismissal claims should be aware that additional damages may be awarded due to the mental distress suffered as a consequence of being unjustly dismissed in a First Nations community.

3. "Political Bullying" and Damages

A First Nation's chief and council have significant power to affect the lives of all band members. A band council has a fiduciary duty to act in the best interests of the band members, and while generally, band councils do their utmost to uphold this duty, there are unfortunate examples where this responsibility was not carried over to interpersonal relationships between council members and band employees.

On a practical level, the council can restrict certain privileges and benefits of band members by *fiat*. For instance, in *Beardy*, the complainant's home garbage pick-up service was cancelled after she was terminated from her employment. The garbage truck driver was the chief's nephew (at para. 53). In such cases of "political bullying," a complainant may seek additional damages based on the *Wallace* principles (See *Sioux Valley Dakota Nation v. Henderson*, [2007] C.L.A.D. No. 47 ("*Sioux Valley*"); *Papequash*; and *Beardy*). In *Sioux Valley*, the complainant unsuccessfully argued that the chief's actions amounted to a gross abuse of power, bad faith and political bullying and should be deterred (at para. 46).

In contrast, the complainant in *Beardy* argued successfully that the chief and council on an aboriginal reserve have enormous power, and that in this case they had used that power to deliberately inflict mistreatment upon the complainant. The purpose of those acts was to coerce her into abandoning her claim, to punish her for having questioned the integrity of the chief and some council members, and to indirectly retaliate against her family for running against the chief in the recent election. The complainant argued further that this was not a situation in which there was any balance of power between the parties. Instead, the chief and council had all of the power, and had chosen to exercise that power directly against the complainant. In this case, punitive and exemplary damages were ordered against the band.

4. Enticement

Another factor that can affect the determination of appropriate notice and severance is the issue of enticement. According to *Wallace*, many courts have sought to compensate the reliance and expectation interests of terminated employees by increasing the period of reasonable notice where the employer has induced an employee to "quit a secure, well-paying job ... on the strength of promises of career advancement and greater responsibility, security and compensation with the new organization." (at paras. 83-85).

Enticement may be less applicable in situations where an Aboriginal employee has been enticed to leave the reserve for employment, especially if it can be shown that the employee intended to return to the reserve to reside and work in future (*Beardy* at para. 118). It can, however, be a significant factor affecting damages when a non-member employee has been enticed to relocate to a remote First Nation from another location where that non-member employee had secure employment. Such scenarios arise more frequently in respect of upper management and administrative positions or for jobs requiring specialized skills, such as a fisheries biologist or an economic development officer. The need to import talent is an unfortunate result of the lack of capacity within many First Nation communities. Where a band hires outside the community and the new employee relocates to the First Nation community, that employee may be entitled to increased notice periods upon dismissal because of the enticement.

5. Reinstatement and Alternative Dispute Resolution

Usually, by the time legal counsel has been retained, the matter has escalated to a point where it is often difficult to contemplate reinstatement into the work place. However, for many of the reasons explained above (lack of alternative employment in the area/on reserve, employee's desire to stay in the community, etc.), reinstatement may ultimately be the most appropriate remedy for dismissal cases

in the First Nations context. The need to avoid further damaging the complex relationships between employer/employee, elected representative/member, employee/community, and even family member/family member means that legal counsel should be encouraged to look for creative solutions to resolve employment disputes.

It is important to bear in mind that s. 242(4) of the *Code* empowers an adjudicator, in addition to or in substitution for, compensation and reinstatement, to require the employer to "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." The statute does not mandate reinstatement or compensation if an alternative but similar remedy would be appropriate.

The authorities are consistent, primarily at the level of adjudicators' decisions, that reinstatement is the preferred remedy unless there is substantial evidence that it would be inappropriate in a particular case (*Wally v. Carcross/Tagish First Nation*, [2003] C.L.A.D. No. 598 ("*Wally*")). Often, a public apology from the band council to the wrongfully terminated employee will suffice to resolve the issue and allow the parties to move forward. These situations support the notion that reinstatement is a more practical remedy for unjust dismissals in First Nation community. In *Wally*, while no public apology was offered, the adjudicator relied on *Sheikholeslami v. Atomic Energy of Canada Ltd.*, [1998] F.C.J. No. 250 (F.C.A.) (QL); leave to appeal denied ([1998] S.C.C.A. No. 196), which stipulated that the employer has a duty to diffuse conflicts that it contributed to, especially where the conflict was exacerbated by the manner of termination.

Where appropriate, various other approaches to resolving unjust dismissals may be considered, such as mediation, requiring reference letters or receiving public or private apologies.

6. Recommendations

The unique challenges faced by First Nation communities tend to exacerbate the consequences of disputes for both employers and employees. Heading off potential conflict is thus very important. Legal counsel for employer First Nations may want to assist their clients to adhere to the following recommendations in order to reduce potential future liability:

- Wherever possible, policies regarding personal and political disputes, conflicts of interest, and other issues germane to each particular community should be formalized in writing.
- Involve employees in policy development to encourage adherence to expected standards for conduct and professionalism. Some communities have enjoyed improved workplace environments as a result of holding workshops to that effect (*Vincent v. Waterhen Lake First Nation*, [2003] C.L.A.D. No. 134 at para. 12).
- Hiring strong human resources managers and taking the time to educate them in the culture of the relevant First Nation community.

VI. Conclusion

Aboriginal employment law continues to evolve in step with the increasing complexity of band governance arrangements. While all employment disputes are frequently contentious, the high degree of legal uncertainty and the serious challenges faced by many First Nation communities can generate complex litigation. Legal counsel will be assisted by remaining apprised and attending to these particularities.