

First Nations and Employment Law Jurisdiction: Federal or Provincial?

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Presentation for AFOA Saskatchewan

- Historically was a master/servant relationship under the common law.
- Viewed as a bargain struck between two people, but not purely a contract.
- The *Master Servant Act 1867*, was adopted by Canada.
- Courts determine employment issues using both statutes and common law

Employment Law

- The *Constitution Act, 1867* (formally the *British North America Act, 1867*)
- There is a federal and provincial division of power.
- S.92(10) “local works and undertakings..”
- S.91(24) Indians, and lands reserved for Indians

Canadian Constitution

- Part I – Industrial Relations
- Part II – Occupational Health & Safety
- Part III – Standard hours, wages, vacations and holidays

The Canada Labour Code

- Part II – Employment standards, hours of work, minimum wage, overtime, holidays etc.
- Part III & V – Occupational Health & Safety
- Part VI – Labour Relations

The Employment Act (Sask)

- 90% of employment relations are provincially regulated.
- 10% of these employment relationships are a federal work, undertaking or business within the legislative authority of the federal government.
- Determined in 2 steps:
 - Operations and habitual activities of the workplace
 - Would the provincial laws impair the core of the federal power?

Federal or Provincial Jurisdiction

- Differences depend on your employer and the industry they are in.
- The difference is outlined in the constitution
- Is it federal importance or cross-provincial borders?
 - Telecommunications
 - Shipping, trucking
 - immigration

Federal or Provincial

- Why does jurisdiction matter?
 - Statutory obligations under labour standards
 - Occupational health and safety
 - Human rights legislation
 - Labour relations
 - Regulatory fines and costly labour relations issues.

Federal or Provincial Jurisdiction

- Canada Labour Code

- Employment Standards differ
- Actions under the code are heard by an adjudicator
- There is no need to go to court to contest a dismissal

Federal or Provincial Jurisdiction

- Historically :
- Courts would determine based on these questions:
 - Is the operations on reserve?
 - Do the operations target First Nation customers?
 - Is there a first nation focus of any kind?

First Nation Employers

- If the answer is yes to the questions then employment was federal.
- Or if the employer dealt generally with First Nation governance.
- s. 91 (24) of the *Constitution* and the language of Indians and lands reserved for the Indians, the employment was federally regulated.

First Nation Employers

- Rule:
 - The federal government has jurisdiction over First Nation employee/employer relationships unless it falls within provincial jurisdiction.
 - This exception was narrowly interpreted

First Nation Employers

- Four B Manufacturing v. United Garment Workers (1980) SCC
 - First Nation owned business
 - Employees were First Nation
 - Operations were on reserve.

SCC held that it was under provincial jurisdiction because the primary purpose of the business was the sale of goods which was a provincial matter

Exceptions

- Nishnawbe Aski Police Service Board v. Public Service Alliance of Canada
 - First Nations police service on reserve
 - Police service did assist in the First Nation Governance
 - Held: The primary service the provided was policing which was provincial jurisdiction.

Exceptions

- Despite First Nations being federally regulated and federally funded and primary function was First Nation Governance, employees can be regulated provincially:
 - Raiche v. Pic Mobert First Nation- employment counsellor
 - Marsden v. Alderville First Nation – school bus driver
 - Fox Lake Cree Nation v. Anderson – negotiations office worker

Exceptions

- Supreme Court of Canada 2010
- Employers are presumed to be regulated by provincial laws even if the employer is First Nations.
- Functional test: Nature, operations and habitual activities of the First Nation; if deemed federal, then:
 - Does the nature of the entity's operations impair the "core" of a federal head of power? If yes, then its federal.

**NIL/TU, O Child and Family
Services Society v. BC Government
and Service Employees' Union**

- First Nation employers are not automatically covered by federal employment and labour laws by virtue of s. 91(24) of the *Constitution*.
- The presumption is that all employers, even First Nations, are under provincial employment laws.
- There can be dual jurisdiction depending on the test set out in NIL/TU,O

Conclusion

Questions?