

ABORIGINAL FINANCIAL OFFICERS ASSOCIATION OF SASKATCHEWAN

HUMAN RESOURCES WORKSHOP

UNDERSTANDING JURISDICTIONAL DIFFERENCES

Are First Nation Employers Federally or
Provincially Regulated?

Leah Schatz, Q.C.

FIRST THINGS FIRST...

As customary law is specific to each First Nation, it will not be the focus of today's presentation. Instead, we will focus on an analysis of federal and provincial jurisdiction, and why it matters to you and your organization.

WHY DOES IT MATTER?



For First Nation employers, the question of jurisdiction is often complex...

In addition to incorporating the Nation's applicable customary laws, whether or not a First Nation employer is provincially or federally regulated can make a significant difference to an employer's obligations under various legislation, including but not limited to, labour standards, occupational health and safety, human rights and labour relations.

FOR INSTANCE...

In *Wilson v Atomic Energy of Canada Ltd.*, the Supreme Court of Canada concluded that non-unionized federal employees can not be dismissed without cause under the *Canada Labour Code* and that a severance package, no matter how generous, is not an adequate replacement for the full remedial package granted to federal employees under the “unjust dismissal” scheme found at sections 240 and 246 of the *Canada Labour Code*.

In Alberta, there are three potential sources of labour and employment law:

Customary Laws
(sometimes in
the form of
bylaws);

The *Canada
Labour Code*;
and

The Alberta
*Employment
Standards
Code*.

The content and application of customary laws is context specific and unique to each First Nation.

The application of the *Canada Labour Code* or the *Employment Standards Code* will depend on the nature of the employer.

SO HOW DO YOU KNOW WHICH LAWS APPLY?

STEP:1

DETERMINE WHICH LEVEL OF
GOVERNMENT HAS PRIMARY
LEGISLATIVE AUTHORITY

Constitution Act, 1867

Section 91

Federal

Section 92

Provincial

Whether or not a workplace is governed by federal or provincial labour legislation depends on which level of government has primary legislative authority over the activity in question.

Primary legislative authority is governed by sections 91 and 92 of the *Constitution Act, 1867*



Section 92(13),
Constitution Act,
1987



*Toronto Electric
Commissioners
v Snider*

Section 92(13) of the *Constitution Act, 1867* gives the provinces the power to make laws governing “Property and Civil Rights in the Province”.

This includes a general power granted to the Province to govern labour relations and employment.



Thus, typically, an entity's labour regulations will fall under provincial jurisdiction.



90% of the Canadian workforce is governed by provincial or territorial labour legislation.



Only 10% of employees are regulated under the *Canada Labour Code*.



Section 91,
Constitution Act,
1987

*Re Industrial
Relations and
Disputes
Investigation Act*

However, section 91 of the *Constitution Act, 1867* grants the federal government exclusive legislative authority over certain matters.

Parliament has the power to legislate in relation to “employment upon or in connection with” any activity enumerated in section 91.

FEDERAL LEGISLATIVE COMPETENCE:

Numerous decisions from the Supreme Court of Canada have established that when an undertaking, service or business operates within a field of federal legislative competence, the regulation of labour relations is removed from provincial jurisdiction and is regarded as a matter of exclusive federal legislative competence.



WHAT ABOUT THE *INDIAN ACT*?

Under section 88 of the *Indian Act*, provincial laws of general application – including labour laws – apply to “Indians and lands reserved for Indians”, except to the extent those laws are inconsistent with the *Indian Act*.

This is consistent with the Supreme Court of Canada ruling in *Bell Canada v Quebec*, which held that “works, things and persons who fall within exclusive federal jurisdiction are still subject to provincial statutes that are general in their application, provided that the application of these laws does not interfere with what makes them specifically of federal jurisdiction”.

STEP:2

APPLY THE *NIL/TU, O* TEST

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

In *NIL/TU, O*, the Supreme Court of Canada created a distinct two-part process for determining whether the labour relations of a specific undertaking or entity are governed by provincial or federal regulation.

This test is to be used in any situation where there is a dispute over the jurisdiction of an organization's labour relations.

1

FUNCTIONAL TEST

- First, you must “examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking.”

➔

IS THIS CONCLUSIVE?

- If **INCONCLUSIVE**, move to Step 2.

2

“CORE” OF POWER

- Does “the provincial regulation of the entity’s labour relations...impair the core of the federal head of power at issue?”

The application of this two-part test is highly fact specific. The courts or decision making bodies, such as the Canada Labour Relations Board, must apply the facts of every case in order to determine which level of government has jurisdiction over a particular undertaking or entity.

To date, the provincial and federal court, and various tribunals, have applied the *NIL/TU, O* test in the context of First Nations employers or employees. In doing so, the courts have commonly considered several factors...

Are the activities of the organization typically governed by provincial legislation?

Are the employees members of a First Nation?

Is the organization incorporated by a number of First Nations?

Does the organization provide the majority of its services to registered Indians?

Does the organization operate under provincially legislated standards?

Is the organization's office and/or operations on a reserve?

What level of government primarily funds the organization?

Does the provincial or federal government play a role in the regulation or governance of the organization?

CONCLUSION



Decision makers, such as the courts, labour arbitrators and human rights commissions have to engage in a highly fact specific inquest when applying the two-part test set out in *NIL/TU, O*.

As a result, it can be tricky to determine whether or not a First Nation organization is federally or provincially regulated for the purposes of employment and labour relations.

For organizations where the question of jurisdiction has NOT been definitively answered, the safest course of action may be to attempt to comply with both federal and provincial legislation; however, this can be cost and time prohibitive.

Organizations can seek a legal opinion, weigh the risks and be prepared to defend its position if necessary.

Q & A

PRINCIPLES OF TERMINATION AND CONSTRUCTIVE DISMISSAL

Leah Schatz, Q.C.

AGENDA

Wrongful Dismissal Update

1. Overview of termination principles
2. New constructive dismissal test
3. Developments in just cause



Overview of Termination Principles

INTRODUCTION

Many ways for employment relationship to end:

- Retirement/resignation
- Mutual agreement
- Frustration
- Termination without cause
- Termination for just cause
- “Constructive dismissal”



TERMINATION WITHOUT CAUSE

- Employers may terminate employees for any (non-discriminatory) reason.
- Employees terminated without cause may claim:
 - (a) statutory notice or pay in lieu as required by *The Saskatchewan Employment Act*, s. 2-60;
 - (b) notice as required under the employment contract; and/or
 - (c) reasonable notice as required at common law.

TERMINATIONS WITHOUT CAUSE IN THE FEDERAL REALM

- Unjust dismissals under the *Canada Labour Code*
 - Section 240 of the *Code*
- Remedies:
 - Pay the dismissed employee an equivalent of what that employee would have earned had they not been dismissed;
 - Reinstate the dismissed employee; and/or
 - Do any other like thing that the adjudicator considers equitable to remedy any consequence of the dismissal.

TERMINATIONS WITHOUT CAUSE IN THE FEDERAL REALM

Wilson v Atomic Energy of Canada Ltd.

- Exceptions
 - Managerial employees
 - Non-unionized employees with less than 12 months consecutive service
 - Employees laid off for lack of work

STATUTORY NOTICE

- Statutory notice periods are based on length of service:

Length of Service	Notice Entitlement
13 weeks to 1 year	1 week of notice
1 year to 3 years	2 weeks of notice
3 years to 5 years	4 weeks of notice
5 years to 10 years	6 weeks of notice
Over 10 years	8 weeks of notice

- Notice entitlements may be enforced in court or through Saskatchewan Employment Standards.

STATUTORY NOTICE – *CANADA LABOUR CODE*

Federally regulated employees have different entitlements under the *Canada Labour Code*.

Notice Requirements	Severance Requirements
A 3+ month employee is entitled to 2 weeks written notice OR Two weeks pay in lieu of notice	A 12+ month employee is entitled the <u>greater of</u> : 2 days wages at the employee's regular wage rate for each completed year of employment AND 5 days wages at the employee's regular rate of wages for his/her regular hours of work

EMPLOYMENT CONTRACT

- Employee may have an employment contract which sets out how much notice (or pay in lieu) must be provided.
- Can be enforced in court.



COMMON LAW NOTICE

- Final and usually most significant basis for a claim: reasonable notice at common law.
- Arises pursuant to an implied obligation for the employer to provide reasonable notice to terminate the employment relationship.
- Factors that influence what constitutes reasonable notice (*Bardal v Globe & Mail Ltd.*):
 - Age
 - Length of service
 - Nature of work completed
 - Character of employment
 - Availability of similar employment
- Non-exhaustive.

COMMON LAW NOTICE

- No “rule of thumb” (one month notice per year of service)
 - *Minott v O’Shanter Development Co.*
 - In Saskatchewan, notice entitlement usually no more than 18 months.
- Damages may include more than salary (may include benefits/bonuses).
- Employee’s duty to mitigate.



TERMINATION FOR JUST CAUSE

- No obligation for employer to give notice or pay in lieu.
- If challenged in court, employer must prove just cause for termination existed.
- Relevant factors include:
 - Years of service
 - Background of employee
 - History of employment and discipline
 - Trust of employee and their authority
 - Expectations of position



TERMINATION FOR JUST CAUSE

- No single definition of “just cause”.
 - *Radio CJVR Ltd. v Schutte* (SKCA)
- Generally requires a single significant incident, or series of minor incidents.
- Clear warnings to employee for less serious misconduct are crucial.
- Employees suing for wrongful dismissal can seek:
 - Statutory, contractual, and common law notice period pay
 - Aggravated damages
 - Punitive damages

CONSTRUCTIVE DISMISSAL

- Employer unilaterally changes fundamental aspect of employment relationship.
- Employee has multiple options:
 - Accept changes; or
 - Reject the changes within a reasonable time period
- Examples include:
 - Fundamental change in duties
 - Demotion
 - Duties removed
 - Reduction in compensation or hours
 - Unfair treatment
 - Improper punishment/probation/mandatory leave



New Constructive Dismissal Test



NEW TEST FOR CONSTRUCTIVE DISMISSAL

- *Potter v New Brunswick Legal Aid Services Commission* (SCC)
 - David Potter, Executive Director of New Brunswick Legal Aid Services Commission
 - 7-year term
 - After 4 years, Potter took medical leave
 - Leave was to be for 1 month but was later extended

NEW TEST FOR CONSTRUCTIVE DISMISSAL

- *Potter v New Brunswick Legal Aid Services Commission* (SCC)
 - Potter and Commission discussed resignation and severance pay
 - Commission instructed Potter not to return to work until instructed to do so
 - Potter's lawyer requested clarification and got the same answer
 - Commission delegated Potter's duties to another
 - 8 weeks later, Potter sued for constructive dismissal
 - Commission argued Potter's lawsuit was a resignation

NEW TEST FOR CONSTRUCTIVE DISMISSAL

- Two branch legal test:
 - 1. where the employer unilaterally changes the terms of the employment contract, the action for constructive dismissal will be successful if:
 - a. the unilateral change is a breach of the employment contract; and
 - b. that breach substantially alters an essential term of the contract.

OR

- 2. where a reasonable person would conclude that the employer's conduct suggests that they no longer feel bound by the contract, the action for constructive dismissal will be successful.

NEW TEST FOR CONSTRUCTIVE DISMISSAL

- In this case, the Supreme Court of Canada decided:
 - No right to suspend under Potter's contract – unilateral act
 - Commission failed to show that the administrative leave was reasonable and justified
 - Administrative leave was a unilateral act that breached the contract
 - This breach substantially changed an essential term of the employment contract

NEW TEST FOR CONSTRUCTIVE DISMISSAL

- Court awarded 25 weeks' pay, vacation pay and retirement pay.
- Takeaways:
 - Employers should be aware of the “constructive dismissal” concept.
 - Be cautious of unilateral changes to employment duties or details.
 - While employers need to stay flexible and competitive, workplace changes may result in constructive dismissal claims if not planned carefully.
 - Employer conduct is highly relevant in constructive dismissal actions.



Developments in Just Cause



ATOMIC ENERGY OF CANADA LTD.

- Important case for federally regulated employers.

Mr. Wilson → terminated without notice, but offered six months' pay as severance (far in excess of the 18 days he was entitled to under the *Code*), in exchange for Mr. Wilson releasing all claims he had against his employer.

Background:

- Prevailing cases - employees could not be terminated without cause because that was be an "unjust" dismissal.
- Federal Court of Appeal in *Wilson* – *Canada Labour Code* is meant to "live together" with the common law.

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Issue before the Supreme Court of Canada

- *Is a dismissal without cause “unjust” under the Canada Labour Code?*

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- Supreme Court settles the issue
- Non-unionized federal employees cannot be dismissed without cause under the *Code*
- A severance package is not an adequate replacement for the remedies available to federal employees under the *Code's* unjust dismissal scheme.
 - Adjudicators have a broad range of authority to grant a remedy, including monetary compensation or reinstatement of the employee

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- The *Code* provides “expansive protections” to the dismissal rights of non-unionized employees much like those available to employees covered by a collective agreement
- Supreme Court → a federal non-union employee can no longer be terminated without cause and with common law severance paid to avoid reinstatement under a section 240 hearing

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- Six months' severance was an unreasonable option offered by the employer
- The common law severance package was not equivalent to the wider remedial options Mr. Wilson might receive under the *Code*.

GOULIQUER V BIG GRASSY RIVER FIRST NATION

- Section 240 of the *Code* was not meant to guarantee permanent employment for federally regulated employees
- The intent behind section 240 is to ensure that dismissals are for just cause

GOULIQUER V BIG GRASSY RIVER FIRST NATION

Remedies:

- Not going to speculate about what the future may have held for the dismissed employee
- Contemplated applying the common law in determining his award
- Decided against applying the common law because the employee earned more in subsequent job
- Adjudicator turned to the policy - the 10+ year employee was awarded 100% of the salary that she would have been entitled to as a severance package

MCLEOD V PEEPEEKISIS CREE NATION

- Adjudicator applies *Wm. Scott & Co.* to determine whether the employer had just cause to terminate the employment of a payroll clerk
- Adjudicator → *Atomic Energy* conferred rights akin to those enjoyed by unionized employees, which made the *Wm. Scott* test appropriate in the circumstances

MCLEOD V PEEPEEKISIS CREE NATION

Wm. Scott test

- How serious was the offence giving rise to discharge?
- Was the employee's conduct premeditated, or repetitive?
- Does the employee have a record of long service with a relatively free disciplinary history?
- Has the employer attempted earlier and more moderate forms of corrective discipline?
- Is the discharge in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment?

MCLEOD V PEEPEEKISIS CREE NATION

- Did the employer have just cause to terminate the employment of a payroll clerk?
 - The employee failed to make required deductions – without first getting clearance from the employer
 - Did not follow lawful instructions to attend work
- **The Adjudicator**
 - Refusing to perform assigned duties is a serious act of misconduct, going to the root of the employment contract
 - Employer could not rely upon the employee to perform assigned duties and to follow lawful instructions → the employment relationship was destroyed.

IBM CANADA LIMITED

- Senior sales employee for IBM
 - Earned about \$200,000 per year
 - “Teleworked” from home
- IBM Business Conduct Guideline
 - Cannot assist competitors
 - Cannot compete against IBM
 - Cannot work in a non-competing business on “IBM time”
 - Cannot use IBM equipment or resources for non-IBM work
- Employee was aware of the Guideline



IBM CANADA LIMITED

- Employee and wife operated residential storage component business.
- At time of hiring, Employee said wife would take over.
- Employee cancelled a weekly telephone meeting with his supervisor.
 - “Double-booked”
 - “Feeling overwhelmed”

IBM CANADA LIMITED

- Ross “pocket dialed” supervisor 2 times in 5 minutes same day of cancelled meeting.
- Supervisor heard Ross discussing his business.
 - Ross admitted spending 3 hours per week on his business.
 - Long-distance calls from IBM account, minor use of equipment.



IBM CANADA LIMITED

- Alberta Court of Queen's Bench upheld termination.
 - 3 hours of company time a week on personal interests significant breach of employment relationship.
 - Worked from home on "honour system" but repeatedly breached obligations.
 - Policy clearly prohibited working for business on company time, advised discipline (including dismissal) could follow.
- IBM benefited from specific policy on use of company time and equipment (and luck!).

POINT GREY GOLF & COUNTRY CLUB

- Accountant employee at Country Club for over 16 years.
- Employee incessantly raised concerns about property tax and his professional obligations.
- Club took genuine, good faith steps to address concerns.
- This scenario repeated several times, but employee never satisfied with outcome.

POINT GREY GOLF & COUNTRY CLUB

- Club told employee to stop raising the issue, and highlighted time and expense to respond to him.
- Employee agreed with Club's final position, but contacted external accountants and auditors, alleging club was "defrauding the Government".
- Upon discovery, Club terminated employee.
- Employee sued for wrongful dismissal.

POINT GREY GOLF & COUNTRY CLUB

- Court did not get into property tax issue.
- Court looked at how the employee brought up the issue.
- Employee's concerns, even on ethical issues, were pursued in unreasonable way.
- Employee breached confidentiality and ignored good faith attempts to address the issues.
- Just cause established.

MARSH LAKE SOLID WASTE MANAGEMENT

- Difficult employee at waste management facility.
- Employer terminated her, alleging a variety of reasons:
 - Interpersonal difficulties with other workers
 - Failure to show up for work
 - Changing timesheets without permission
 - Safety concerns (failure to wear hard-hat in certain areas)
 - Smoking in a non-smoking office area



MARSH LAKE SOLID WASTE MANAGEMENT

- Employee sued for wrongful dismissal.
- Court found Employee created “atmosphere of uncertainty” about workplace policies (sought out second, third opinions about hard-hat policy to get different answers).
- Court rejected Employee evidence that she did not smoke in no-smoking areas.
- Dismissal was unjust based on lack of clear set of rules.

MARSH LAKE SOLID WASTE MANAGEMENT

- Essential to clearly articulate and communicate policies, remind employees of policies when violated or at risk of being violated, and maintain documentation of violations.
- Employer bears the burden of demonstrating just cause for termination.
- Even if just cause exists, it must be provable in court.
 - Documentation is key, especially given that trials may be years after the fact.



OXFORD HOUSE FIRST NATION

- Employee was principal of high school.
- Terminated during second term position as principal.
 - Failure to follow directions.
 - Not reporting to Board appropriately or in timely manner.
 - Failure to enforce Board policies as directed.



OXFORD HOUSE FIRST NATION

- Pattern of disregard for policies:
 - Brought suspended student on class trip in violation of school's policy.
 - Held a raffle fundraiser without the Board's permission, having purchased a vehicle to use as the prize by misrepresenting to the Band Council that he had permission to do so.
 - Delayed suspension of a student found with drug paraphernalia
 - Student was suspended the day after, despite clear wording of the policy that suspension was to be "immediate".

OXFORD HOUSE FIRST NATION

- After Employee's termination, Board found fabrication resume.
- Termination was found to be justified.
- Court awarded costs against employee for litigious nature (self-represented plaintiff).



OXFORD HOUSE FIRST NATION

- Despite obvious just cause, costly and complicated legal proceedings resulted.
- Risk that an employee may drag employer through litigation.



CALGARY JEWISH ACADEMY

- Principal of Calgary Jewish Academy.
- Good evaluation from first 5 year contract with the Academy.
 - Dedicated, hard worker
 - Excelled at collaborating with Academy Board as position required
 - Attended all board meetings, gave report at each, worked with Board to solve problems.
 - Practice was that “the Board benefit from the Principal’s experience and understand the Principal’s point of view on issues facing the school”.

CALGARY JEWISH ACADEMY

- Terminated during second 5 year contract.
 - Many issues alleged, relating to:
 - A particular Grade 4 class
 - Communication style
 - The Academy's Principal Improvement Plan
 - Technology use
 - Denial of enrolment
 - Unprofessional staff behavior and teacher websites
 - Failing to conduct exit interviews
 - Scheduling of own vacation time
 - Paint colors in Academy hallways
 - "Willfully disobeying reasonable demands by Board with respect to important issues facing the Academy"
- Sued Academy for wrongful dismissal.

CALGARY JEWISH ACADEMY

- Change of opinion on Principal
 - New President of the Board and high Board turnover
 - President and Principal confrontational regarding hallway paint

- After disagreement, President made significant changes to working relationship between Board and Principal
 - Evaluation session which (for the first time ever) excluded Principal
 - In the session, misrepresented comments made by Principal as threat to resign (no opportunity for Principal to refute)

CALGARY JEWISH ACADEMY

- President received legal advice that Principal could only be terminated for cause.
- Relationship deteriorated further:
 - Surreptitiously recorded a later meeting with Principal.
 - President “turned” Board members against Principal.
- Various steps taken to get rid of the Principal for cause.

CALGARY JEWISH ACADEMY

- Termination of the Principal was found to be unjustified.
 - “...in my view, no person fully informed could come to the conclusion that [the Academy] had just cause to dismiss Mr. Karmel. Far from being willfully disobedient, Mr. Karmel made numerous good faith attempts to resolve the issues that plagued [the Academy’s] governance. Unfortunately, and through no fault of his own, individuals who sought his termination rejected his efforts.”
- President was “papering a path to...termination” to avoid paying balance of Principal’s salary.
- “Wrongful dismissal carried out in bad faith”.
 - \$670,000 in damages for remaining salary and benefits.
 - \$200,000 for aggravated damages.
 - Court prepared to award further punitive damages but speculated that Principal would not wish school to bear expense.

CALGARY JEWISH ACADEMY

- A concerted effort to “create” just cause for termination can backfire significantly.
- Although employee conduct is the central issue in cases about just cause for dismissal, employer conduct is also highly relevant.



JUST CAUSE TERMINATION – WORTH IT?

- Risks and benefits vary significantly
- Generally, benefits of just cause terminations include:
 - No notice or pay in lieu required.
 - Denouncing unacceptable workplace conduct to other employees.
 - Best case scenario: if unchallenged, low cost removal from workplace.
- Generally, risks include:
 - Costly and time-consuming litigation may result.
 - Inability of employer to meet burden of proof and significant damages that could follow.

TERMINATION WITHOUT CAUSE

- Benefits and risks depend on the circumstances

Federally regulated employers cannot terminate employees with 12+ service without cause

- Take a hard look at workplace (including workplace policies and how those policies are managed) and ask – Do changes need to be made?
- **New hires** - increase monitoring of employees who have not yet crossed the 12 month threshold
 - If the employee is not a good fit an employer can sever the relationship before the employee has obtained "union-like" status

TERMINATION WITHOUT CAUSE

- **Non-federally regulated employers**
- Benefits include:
 - Termination for almost any reason, or no reason (subject to exceptions).
 - Disputes less complicated and less costly.
 - Easy for employer to ascertain potential liability from certain contracts.
- Risks include:
 - Must provide working notice or pay in lieu, notwithstanding performance issues.
 - Without certainty in contract, common law reasonable notice can be significant.

WITH OR WITHOUT CAUSE?

- Which type of termination is appropriate is highly dependent on the circumstances, including:
 - Length of service
 - Contents of contract
 - Conduct/misconduct of employee
 - Evidence of misconduct
- Legal advice may be of assistance in making a sound and defensible decision.



Q & A

**THANK YOU FOR
ATTENDING!**

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