Two Too Many Solitudes: First Nations Employment Law and the Unintended Effects of *Wilson* on Indigenous Employers

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ABSTRACT

Disputes over legal jurisdiction in Canada predate its own Constitution. Even after the 1982 repatriation of the Constitution, First Nations governance remains entangled in a jurisdictional divide. In the spirit of Indigenous self-determination, this article argues the impracticality of First Nations regulating themselves according to federal employment standards under the *Canada Labour Code*[1] in preference of provincial or territorial standards. A review of jurisprudence since *NIL/TU,O* underscores the inconsistency of trial division and appellate courts across Canada in determining the appropriate jurisdiction for employment-law issues in First Nations communities. This incoherence leaves First Nations communities in a precarious position in regulating employment. An employer's ability to consistently depend on the provincial and territorial regimes is imperative given the innumerable barriers already facing First Nations communities, particularly in an area of law where federal regulation is increasingly

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1 *Canada Labour Code*, RSC 1985, c L-2

convoluted, demonstrated for example, by the judgment of the Supreme Court of Canada in *Wilson*. Counter-intuitive as it may seem, the otherwise far more generous federal employment standards have the effect of eroding the autonomy necessary for First Nations' self-determination.

KEYWORDS: *employment law; First Nations, Canada Labour Code; Indigenous; self-determination; employment jurisdiction; NIL/TU,O; Wilson*

I. INTRODUCTION

Contention between provincial and federal jurisdiction has plagued Aboriginal law since the inception of the *Indian Act*[2] itself. Perhaps the most notorious example, at least recently, arose in the development of Jordan's Principle, where jurisdictional dispute and institutionalized delay led to the unnecessary death of a First Nations child in medical care. The public's eventual awareness and Indigenous-led advocacy led to legislative changes enshrined today in Jordan's Principle.[3] While Jordan's Principle cast a shadow on jurisdictional disputes concerning First Nations communities, questions over applicable jurisdiction exist well beyond the health sector. This article examines the lesser-known jurisdictional disputes concerning employment regulation and argues that they create negative impacts on the self-determination of First Nations communities.

II. FEDERALISM AND FIRST NATIONS EMPLOYMENT

Employment law in First Nations communities is an especially divisive area of the law. Many assume matters in First Nations communities – at least

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2 RSC 1985, c I-5.

3 The law enunciated the simple idea that whoever first receives the request for a First Nations child's healthcare services, whether the province or the federal department overseeing Aboriginal affairs in Canada is responsible for paying for their service. The issue of whose jurisdiction ultimately foots the bill is resolved thereafter, effectively taking accountability for the First Nations child's healthcare first. (see, e.g. *Caring Society of Canada et al v Attorney General of Canada (for the. Minister of Indian and Northern Affairs Canada)* 2016 CHRT 2, a Canadian Human Rights Tribunal decision finding inadequate implementation, describing Jordan's Principle at paras 183 and 351.)

those communities governed under the *Indian Act*[4] – are under federal jurisdiction.[5] However, the evolution of Canadian federalism and judicial interpretation of the *Indian Act* has brought some legal matters under provincial jurisdiction.[6] This bifurcation of jurisdiction exists because of Canada's constitutional division of powers, or cooperative federalism. Many provincial laws of general application apply on reserves or to "Indians" of their own force or by virtue of s. 88 of the *Indian Act*.[7]

Although employment law is not explicitly enumerated under the constitutional division of powers, it is considered to be encompassed under the provincial heads of power. Section 92(13) of the Constitution provides that provinces govern their own land and the civil and property rights within them.[8] However, where the province's laws encroach on federal responsibilities, such as First Nations lands, the provincial laws must yield to the federal laws. The jurisdiction of First Nations employers is complicated by this legal crossroads despite the volume of case law from all levels of courts and federally-appointed arbitration. Concerningly, Aboriginal law practitioners have characterized the state of recent case law concerning First Nations employment as being especially inconsistent.[9]

The dispute over this jurisdictional intersection has onerous implications for First Nations as employers and the organizations they create. Federal employment legislation targets federally-regulated industries, for example banks, airlines, and Crown corporations. Comparatively, First Nations are substantially smaller employers and lack the resources of federally-regulated industries. First Nations employers become the

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4 *Supra* note 2.

5 This assumption would be because of the federal power over "Indian and Lands reserved for Indians" in s. 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict, c. 3 [*Constitution Act, 1867*].

6 Given the scope of the article, a review of the applicability of provincial laws on-reserve is not provided. For more information on this area of law, see the *Indian Act*, *supra* note 2, s 88 providing for the applicability of provincial laws of general application, as discussed in *R v Kruger*, [1977] 1 SCR 104 and *Four B Manufacturing Ltd v United Garment Workers*, [1980] 1 SCR 1031 [*Four B*].

7 *Supra* note 2, s 88.

8 This applies more or less equally to the territories where federal statutes have over time devolved province-like powers to the territories.

9 Lorraine Land and Matt MacPherson, *Aboriginal Law Handbook*, 5th ed (Thomson Reuters, 2018), at 499.

proverbial unintended bystander in the fray of employment regulation meant for those industries. For this reason, First Nations' ability to regulate themselves according to provincial or territorial laws would be more appropriate given the relative size, localized needs, and human-resource capacity of First Nations.

For simplicity alone, provincial or territorial regulation for First Nations would also create greater coherence in the law while decreasing the need for judicial intervention and frustration among First Nations employers. Provincial and territorial employment legislation captures a far larger number of employers and is thus inherently geared toward a diversity of employment relations. Ultimately, the benefit of provincial or territorial regulation is it enables a greater degree of First Nations autonomy on their local matters, whereas any benefits derived by employees under the federal regulation can be addressed on a case-by-case basis (discussed in detail further on). Ironically, the "employer-friendly" provincial and territorial standards bring First Nations closer to self-determination than federal standards.

III. THE BENEFITS OF FEDERAL VERSUS PROVINCIAL OR TERRITORIAL EMPLOYMENT REGULATION

The distinction between employment regulation under either provincial or territorial and federal law is critical. Essentially, provincial and territorial regulation of employment provides for greater flexibility for First Nations employers than federal regulation. Federally-regulated employment falls under the *Canada Labour Code* (*CLC*). Provincial and territorial regulation fall under their jurisdiction's respective legislation, usually entitled *Employment Standards Act* or a variant thereof.[10]

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[10] *Employment Standards Act*, 2000, SO 2000, c 41 (Ontario); *Employment Standards Act*, RSBC 1996, c 113 (British Columbia); *Employment Standards Code*, RSA 2000, c E-9 (Alberta); *Employment Standards Act*, SNB 1982, c E-7.2 (New Brunswick); *The Employment Standards Code*, CCSM c E110 (Manitoba); *Employment Standards Act*, SNWT 2007, c 13 (NWT); *Employment Standards Act*, RSY 2002, c 72 (Yukon); *Employment Standards Act*, RSPEI 1988, c E-6.2 (PEI); *The Saskatchewan Employment Act*, SS 2013, c S-15.1; *Labour Standards Act*, RSNWT (Nu) 1988, c L-1 (Nunavut); *Act respecting labour standards*, CQLR c N-1.1 (Quebec); *Labour Standards Code*, RSNS 1989, c 246 (Nova Scotia); *Labour Standards Act*, RSNL 1990, c L-2 (Newfoundland and Labrador)

IV. Federal Regulation under the Canada Labour Code

The *CLC* is the statutory regime for employment law for federally-regulated employees. The crux of the *CLC*'s difference from provincial and territorial laws, insofar as it affects First Nations, is its provisions for employee dismissal. On its face, the *CLC* provides for dismissal with termination notice and severance.[11] However, the Supreme Court of Canada in 2016 interpreted the *CLC* to permit employee dismissal only under a heightened standard of "just cause".

In *Wilson v. Atomic Energy of Canada Ltd.* ("*Wilson*") the SCC found that dismissal of a federally-regulated employee requires "just cause".[12] This standard carries with it the burden of an employer providing an evidentiary foundation for dismissal, effectively "justifying the cause" of the employee's dismissal.[13] The threshold for justifying cause across Canada is an extremely high threshold.[14] A federally-regulated employee can also independently trigger adjudication under the Canadian Industrial Relations Board (CIRB) for unjust dismissal. The remedies for employees are expansive under the *CLC*[15]; for example, employees can be reinstated by the CIRB.

The SCC interpreted *CLC*'s provisions for unjust dismissal to provide non-unionized federal employees with protection functionally comparable to unionized employees. "[T]he entire purpose of the statutory scheme was to ensure that non-unionized federal employees would be entitled to protection from being dismissed without cause under Part III of the Code".[16] The implication of *Wilson* is that federal employees are now *de facto* unionized employees.[17]

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11 *Supra* note 1 at s-ss 230(1) & 235(1).

12 *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, [*Wilson*].

13 *Ibid* at paras 51-54. Note however Abella J. incorporates in her decision a word of caution toward being "mindful of the varying employment contexts under the *Code*, so that arbitral jurisprudence is not rigidly applied". (*Ibid* at para 56)

14 See e.g. *Baker v Weyerhaeuser Company Ltd.*, 2020 ABQB 808; *Dr. Paula Winsor-Lee Inc (Re)*, 2019 BCEST 63; *Mack v Universal Dental Laboratories Ltd*, 2020 ABQB 738; and *Nagy v William L. Rutherford (BC) Limited*, 2021 BCCA 62.

15 *Supra* note 1 at ss. 240-246.

16 *Supra* note 12 at para 39.

17 *Supra* note 12 at para 49.

V. PROVINCIAL AND TERRITORIAL REGULATIONS

Provincial and territorial employment regimes provide for employee termination (or "dismissal" in some jurisdictions) equivalent to termination notice and severance pay. This means, broadly speaking, that should a provincially or territorially-regulated employer decide to terminate an employee, it can either do so either for just cause, or by providing the employee with the statutorily-required notice and severance pay. For example, under most provincial employment statutes, an employer would have to provide a person employed for over 90 days with two weeks of termination notice or pay in lieu thereof (generally in increments as the duration of employment increases) and severance pay (for most provinces determined at common law). After *Wilson*, this option no longer exists for federally-regulated employers.

From an employer perspective, particularly in First Nations, the sole option for termination – under the standard of just cause – represents a high burden of proof. For example, termination for just cause at a minimum generally requires rigorous fact-finding meetings, a high level of documentation and corresponding human resource management-trained employees, and mandatory arbitration. Accordingly, termination for just cause under either the *CLC* (and not merely with statutory notice and severance as permitted by provincial and territorial regimes) engenders a high degree of administrative and financial burden on already strained First Nations. [18]

[18] Federal and provincial differences in employment laws vary from province to province, but the most onerous difference lies in termination provisions. A concerning implication for First Nations employers is the inconsistency of findings for jurisprudence and, where provincial jurisdiction is found, between provincial employment standards themselves. Note of course provinces may legislate termination standards that mirror the *CLC* such as Quebec (see e.g. para 65 of *Wilson*). For the purposes of this paper, the most concerning inconsistency for First Nations arise from termination.

VI. Determining Employers' Jurisdiction in First Nations: NIL/TU,O a decade later

The leading case on the jurisdiction of employment laws in First Nations communities remains *NIL/TU,O*.[19] This case sets out the "functional test" [20] and provides for the presumption in favour of provincial jurisdiction in First Nations' employment matters. However, federal jurisdiction remains where employment falls directly under a federal head of power such as First Nations band governance.

The inquiry into jurisdiction, or "functional test", analyzes whether the activities of an employee in the normal course of business[21] function under explicit federal jurisdiction or are derivative thereof such that those activities are vital to a federal undertaking. If the determination is that the activities do not fall squarely into federal jurisdiction, the employment remains under provincial or territorial regulation. The SCC delineates examples of on-reserve employment; for example, "commercial mainstream" and most social-service agencies are subject to provincial employment law.[22] Notably, the majority calls for the functional approach to encourage cooperative federalism. Instead, the result is counter-intuitively an unpredictable legal landscape for First Nations employers.

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19 *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45.

Although a bit beyond the scope of this paper, the history of the functional test began with Four B (*supra* note 6). This was the leading case on provincial versus federal jurisdiction for employment relations on-reserve for several decades. In this case, the SCC approached jurisdiction of on-reserve labour relations using the functional approach, finding that provincial legislation to generally be the default scheme for First Nations employment. The functional approach analyzes whether the business and its operations are federal in nature. For federal jurisdiction to apply, labour relations must be shown to form "an integral part of primary federal jurisdiction over some other federal object" (at p. 1047). In this case, the Court determined the CLC did not apply. The functional test employed by the SCC in Four B remains largely intact in the current leading case, NIL/TU'O Child and Family Services Society v. B.C. Government and Service Employees' Union.

21 This analysis requires "an inquiry into the nature, habitual activities and daily operations" (at para 3)

22 Note however federally-regulated industries include First Nations self-government institutions per sections 2 and subsection 167(1) of the *CLC, supra* note 1 (in Parts I and III, respectively).

In application, federal and provincial courts since *NIL/TU,O* are increasingly disparate in their approach to the functional test. Case law inconsistently reconciles various aspects of on-reserve employment relations, in some cases contrary to *NIL/TU,O*, such as the source of employers' funding, the recipients of employers' services, and the status of employers' incorporation.

VII. EMERGING INCONSISTENCIES IN CASE LAW

The functional test continues to reverberate in jurisprudence on First Nations employment. Courts have heeded the functional approach in matters ranging from healthcare and emergency services to educational and childcare settings. The application of the test, however, has generated more confusion than clarity on employment jurisdiction in First Nations.

The Federal Court of Appeal in recent years has come to differing conclusions on jurisdiction for various regulated services in First Nations communities. In *Canada v. Northern Inter-Tribal Health Authority Inc.*,[23] the jurisdiction of health care workers' pension plans was in issue. The Court found that despite the healthcare of certain Indigenous groups falling under federal jurisdiction, the administration – or function – of healthcare falls under the provinces. In other words, "[t]he provision of federal funding by itself does not convert an otherwise provincial undertaking into a federal one".[24] Funding itself has nothing to do with the "undertaking", nor the function of that funding.[25] This reasoning is consistent with arbitral and lower-court decisions including *Webster v. Little Red River Board of Education*[26] and *Siksika Health Services v. HSAA*27.

But in the same year as *Northern Inter-Tribal Health Authority Inc.*, the Federal Court of Appeal came to the opposite conclusion with strikingly similar facts. In *Québec (Procureure générale) c. Picard*[28], a unanimous Court

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23 *Canada v Northern Inter-Tribal Health Authority Inc*, 2020 FCA 63 [*Northern Inter-Tribal Health Authority Inc*].

24 *Ibid* at para 29.

25 *Ibid* at para 32.

26 *Webster v Little Red River Board of Education*, 2019 CLAD No 79.

27 *Siksika Health Services v HSAA*, 2018 ABQB 591.

28 *Québec (Procureure générale) c Picard*, 2020 FCA 74, [*Picard*]. Leave to appeal to SCC refused, 2020 CarswellNat 5089.

determined the employer of Special Constables for an Indigenous police service was the Band Council and therefore under federal jurisdiction. The Court reasoned that this case differed from *Northern Inter-Tribal Health Authority Inc.* because the company employing the healthcare workers there adhered to provincial regulations and was separately incorporated, despite operating under a tri-partite agreement with the federal government.[29] Instead, federal jurisdiction was found for the Special Constables – and thus the administration of their pension plans – because it was the Band that employed the Special Constables. In contrast to *Northern Inter-Tribal Health Authority Inc.* however, the Court did not reconcile their finding for federal jurisdiction with the function of the employees' work (i.e. provincially-regulated police services) because in this case solely the Band was the employer[30], despite no funding coming directly from the Band.31

The Court in *Picard* gave no recognition to the power imbalance confronting First Nations (with the Assembly of First Nations themselves being interveners) yet lamented the "implementation difficulties" that would be faced by Parliament in the event of provincial jurisdiction.[32] The Court alluded to the potential impracticality for federal employers despite the implementation difficulties that do indeed arise for First Nations' employers in the post-*Wilson* era. This dynamic creates what may justifiably be considered – although not stated explicitly by the appellants – a double-standard for First Nations communities.[33]

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29 *Picard, ibid* at para 38.

30 *Ibid* at para 61.

31 *Ibid* at para 46. It may also be worth noting this decision references its vast similarities to a pre-Wilson ruling on First Nations employment despite coming to the opposite conclusion (see e.g. at para 46-49): The case was *Nishnawbe-Aski Police Service Board v Public Service Alliance of Canada*, 2015 FCA 211 [*Nishawbe-Aski*]. The factual matrix in *Nishawbe-Aski* was distinguished only by virtue of the police services falling entirely under the Band in *Picard*. In *Nishawbe-Aski*, provincial jurisdiction was found for the Band's police officers because they were employed via a First Nations police governing authority. See "*Nishnawbe-Aski Police Service*" at paras 14-15; see also paras 33-35). As in *Picard*, the officers remained subject to the duties and regulations they carried as provincially-trained police officers with the additional responsibility of enforcing First Nations laws.

32 *Picard, ibid* at para 60.

33 *Ibid* at paras 51-52.

The *Picard* decision also contrasts with an earlier decision, *OPSEU v. Chippewas of Rama First Nation*.[34] Here, the issue over jurisdiction concerned paramedics. The decision also turned on the distinction between authority over the employees and the regulation of their profession. While the Chippewas of Rama First Nation had authority over the human resourcing of the paramedics (including hiring and termination), their operations and habitual activities were provincially regulated (e.g. paramedics) regardless of whether they were serving primarily Indigenous persons.[35]

VIII. JURISDICTION OF EMPLOYMENT IN FIRST NATIONS' SCHOOLS AND DAYCARES

The jurisdictional divide in case law extends to decisions concerning educational and childcare settings in First Nations communities.

The decision *Charlie and Sts'ailes Indian Band* concerned employment jurisdiction for an early-childhood educator working on-reserve.[36] The employees there were employed by the Band. Applying the functional test, the arbitrator engaged in a lengthy examination of the facts including the licensing of the daycare, the clients, and focus on Aboriginal language[37]. Regardless of not being separately incorporated from the Band[38], the arbitrator found on the whole that the provincial presumption was maintained in the Band's employment of early-childhood educators.[39]

A similar set of facts arose in the decision *Southeast Collegiate Inc. v. Laroque*[40]. Upon judicial review, the adjudicator's finding for federal jurisdiction was overturned in favour of provincial jurisdiction. The Court

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34 *OPSEU v Chippewas of Rama First Nation*, 2019 CarswellOnt 274 OLRB.

35 *Ibid* at para 78.

36 *Charlie and Sts'ailes Indian Band (Constitutional Objection to Jurisdiction), Re*, 2019 CarswellNat 5847 [*Charlie*].

37 *Ibid* at paras 45-56.

38 *Ibid* at para 54

39 Note this arbitrator refuted an appellate decision that found the contrary, for example *Assoc des employés du Nord québécois et Conseil de la Nation Innu Matimekush-Lac John, Re* 2016 CIRB 843. The decision in this earlier case was upheld by the Federal Court of Appeal in 2017. See *Conseil de la Nation Innu Matimekush-Lac John v Association of Employees of Northern Quebec (CSQ)*, 2017 FCA 212 [*Conseil de la Nation Innu Matimekush-Lac John* (FCA)].

40 *Southeast Collegiate Inc v Laroque*, 2020 FC 820; [*Laroque*].

considered the school's status as a separately-incorporated entity operating under the provincial curriculum in supporting that the *CLC* did not apply.[41]

Yet, despite their recency, both *Charlie* and *Laroque* curiously do not follow the earlier precedent set in the appellate decision *Association des employés du Nord québécois et Conseil de la Nation Innu Matimekush-Lac John, Re.*[42]. This case on the one hand affirmed the application of the functional test to all matters concerning jurisdiction of employment relations in First Nations communities.[43] On the other hand however, the Federal Court of Appeal came to a differing conclusion respecting the jurisdiction of employment relations for a First Nations school. The distinction drawn by the Court in comparison to *Charlie* and *Laroque* was that the school was not connected to any school board, nor was it a private (i.e. separately incorporated) school.[44] The *Indian Act* was found to govern the school because it was on-reserve, and thus federal jurisdiction applied.[45]

The Federal Court again applied the functional test in finding for federal jurisdiction in *Temagami First Nation v. Presseault*.[46] The issue of jurisdiction was over a daycare on reserve. The Court there expressly distinguished *Charlie*, above, finding for federal regulation on the basis that "each of these cases turns on their own particular facts", surprisingly without further exploring how these cases differ beyond that statement[47].

Another case, *Piapot First Nation and Kaiswantu, Re.*, also distinguished the facts related to on-reserve education from cases that found for provincial

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41 It is also worth noting as well the inconsistency among adjudicators of the understanding of the presumption of jurisdiction for First Nations employers. As recently as November 2021, the Federal Court overturned an adjudicator's erroneous finding in favour of federal jurisdiction, having assumed their starting point in the analysis was federal jurisdiction. See *Anishinaabeg of Kabapikotawangag Resource Council Inc v Macleod*, 2021 FC 1173, at para 12.

42 *Conseil de la Nation Innu Matimekush-Lac John* (FCA), *supra* note 40.

43 *Ibid* at para 47.

44 *Ibid* at para 51.

45 *Ibid* at para 52.

46 *Temagami First Nation v Presseault*, 2020 FC 933.

47 *Ibid* at para 28, One might infer the judge is deferring to the adjudicator's analysis of the facts, having provided that the adjudicator in their decision had identified the proper test (the functional test) in its application to the factual matrix at hand (at para 32), concluding that the daycare was sufficiently incorporated in the "general administration and governance of the [Band]" (at para 33).

jurisdiction.[48] In this case, the employer sought judicial review of a finding for federal jurisdiction at a First Nations' school. The Court distinguished this case from earlier cases that found for provincial labour relations, referring to the province's degree of oversight in First Nations' education.[49] This Court found that the school "voluntarily" used the province's curriculum and practices, but this was not sufficient to bring the employer under the province's jurisdiction, despite the presumption for provincial regulation.[50]

IX. HUMAN-RIGHTS JURISDICTION AND FIRST NATIONS' EMPLOYMENT

Another lens through which the issue of employment law jurisdiction can be viewed is through human rights legislation. The issue of human rights regimes applicable to First Nations employers is analogous to jurisdiction with respect to employment law, given that the latter jurisdiction dictates the proper venue for a human rights complaint at work.

For example, *Jacobs v. Delaware Nation (Moravian of the Thames)*[51] discusses the applicable jurisdiction for First Nations employees' human rights complaints. Here, the *NIL/TU,O* functional test was applied in employment-related human rights cases involving First Nations employees. The Tribunal expands on *Four B* finding that even businesses owned by a First Nations council, and not merely community members, fall under provincial jurisdiction: "the council's ownership does not change the operational nature of the business".[52] The Tribunal found that, as with other employment matters, provincial jurisdiction is presumed and federal legislation applies only by way of exception.[53]

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48 *Piapot First Nation and Kaiswantu, Re*, 2020 CarswellNat 2008.

49 *Ibid* at para 18.

50 The Court however referred to *Charlie* above, with approval of the adjudicator's notion that each case "does not turn on technical, legal niceties", despite coming to the opposite conclusion as that adjudicator. See *Ibid* at para 30.

51 *Jacobs v Delaware Nation (Moravian of the Thames),* 2020 HRTO 1023.

52 *Ibid* at para 2.

53 *Ibid* at para 16. Also, the Tribunal distinguishes a line of case law from the past decade where federal jurisdiction was found to apply. The Tribunal states: "[those labour relations] were an integral part of the governance of the Indigenous Bands (office

By contrast, the Federal Court has provided obiter to the contrary. In an interlocutory motion brought by a First Nations in *Sioux Valley Dakota Nation v. Tacan*[54], the judge indicated a trend toward federal jurisdiction for employee relations in First Nations communities, contrary to SCC jurisprudence:

> I. For the purposes of deciding this motion, I need not decide this constitutional issue. I note, however, that the Federal Court of Appeal held that, in spite of O, employees of a First Nation, as opposed to those of a separate legal entity providing services to Indigenous persons, presumptively fall under federal jurisdiction.[55]

The jurisprudential trend in First Nations employment law is increasingly divided even in the post-*Wilson* era.[56] Although case law generally agrees that the presumptive jurisdiction is provincial, exceptions carved out in Federal Court have rendered a decisively incoherent state of law for First Nations as employers – and for those organizations created by them to deliver various services.

X. The Dilemma Before First Nations Employers and Governments

Case law from the latter half of the preceding decade points to a trend of reversing the presumption in favour of provincial and territorial jurisdiction of employment relations. First Nations employers and moreover First Nations governments seeking to create their own laws must guess between governing provincial and federal employment laws. A First Nations employer or government is thus faced with the issue of effectively taking a

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administration, healthcare, education, policing, etc.). While the applicant in this case was employed by the Band Council, the Tribunal has been presented with no evidence that could lead to a finding that the sale of groceries, gas, and coffee is an integral part of the governance of the Delaware Nation." (Ibid at para 26)

54 *Sioux Valley Dakota Nation v Tacan*, 2020 FC 874.

55 *Ibid* at para 6.

56 Although it might be tempting to argue relative unanimity in areas such as unjust dismissal (see para 60, of *Wilson*, *supra* note 12), the reality is not so clearcut in the intervening years since *Wilson*. By the very fact of having differing employment standards across provinces concurrent to a uniform federal standard creates inconsistent alignment with employment standards and confusion for First Nations.

gamble in its employment policies including dismissal, and choosing the appropriate regime to govern employment in a given organization or matter.

Although the presumption for provincial regulation seemed all but certain following *NIL/TU,O*, the risk remains that courts will nonetheless find in favour of federal jurisdiction. The challenge to employers and governments then becomes risk mitigation should they instead choose to govern themselves according to provincial or territorial employment regimes. On the other hand, employing the federal regime (i.e. the *CLC*) for all employment issues is more favourable to employees and may avoid findings for litigious employees, but makes dismissal disproportionately arduous to already under-resourced[57] First Nations communities.[58]

XI. RECOMMENDATIONS TOWARDS MORE PRACTICAL GOVERNANCE OF EMPLOYMENT IN FIRST NATIONS

The ambiguity of the state of law in the post-*Wilson* era leaves few practical options for employers in First Nations communities. The *de facto* unionized status of federal employees creates a unique set of challenges for these employers. The ability to ascertain the jurisdiction of employees is thus more than merely an academic exercise, having real-world implications in all aspects of employment regulation. Furthermore, there are few legal options to assist First Nations employers in protecting themselves from the inconsistency of judicial and arbitral rulings.

Some say the most practical route for First Nations employers is to mirror the provisions set out in the CLC. This is because the CLC sets out the higher standard for employee labour rights. In other words, it is advisable for First Nations to err on the side of being "more generous".59

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57 As relatively small-size employers compared to the workforce generally employed under federally-regulated employers, the standard of just-cause in the *CLC* is disproportionately onerous and costly for First Nations employers. See *Report on the Employment Standards Act*, British Columbia Law Institute, 2018 CanLIIDocs 10529, <https://canlii.ca/t/sg1n> at 37.

58 Another issue raised in *Charlie* with broad federal jurisdiction across all First Nations is the unconscious bias it may propagate. Provincial and territorial legislation can account for the nuances of more local matters and the integration of employment laws in the regional circumstances of First Nations communities, whether urban, rural, isolated, etc. (discussed in *Charlie, supra* 37 at para 38).

59 *Supra* note 9 at 498.

If First Nations govern themselves according to the more generous standard set out in the CLC, the employer could thereby attenuate the risk of a litigious employee.[60] This higher standard however, still creates a high administrate burden on the employer in terms of meeting the requirements to terminate an employee for just cause. For this reason, others may argue for provincial or territorial jurisdiction given it ought to apply, in theory, in most cases, and given that these regimes are easier to manage.

A less practical route but with greater long-term practicality is through the legislature. Parliamentary intervention by way of new legislation for First Nations communities could choose to align their employment standards with provincial and territorial standards. Employment law is not assigned to either head of power under the Constitution, however given that Indians, and Lands reserved for the Indians are exclusively federal,[61] the ability for Parliament to generate legislation governing labour on reserve remains in tact.[62] The federal government could either defer to the provincial and territorial regimes in all cases, or altogether overhaul the labour laws to provide for a separate regime tailored to, and in consultation with, First Nations. Any potential advantages gleaned from the federal regime could additionally be incorporated by First Nations employers on their own accord.

A potential constitutional argument could perhaps be raised by virtue of the statutory exemption provided to First Nations employers in the territories, which is not provided to the provinces. Paragraph 167(1)(a) of the *CLC* provides that aspects of employment including standard hours and wages apply "(a) to employment in or in connection with the operation of any federal work, undertaking or business other than [added emphasis] a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut [...]".

Although there is limited case law on the interpretation of this provision, there is some indication that this provision enables greater

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60 Although Wilkins notes "the burden of proof is on the party seeking to invoke federal, and to preclude provincial, legislative authority over a given employer's labour relations." Kerry Wilkins, *Essentials of Canadian Aboriginal Law* (Thomson Reuters, 2018) at para 976.

61 *Constitution Act, 1867*, *supra* note **Error! Bookmark not defined.**, s-s 91(24).

62 Indeed, this possibility is stated by the Supreme Court of Canada in *NIL/TU,O*; *supra* note 19 at para 2.

latitude to employers in the territories than the provinces. In *Bangerter and Qikiqtani Industry Ltd., Re*[63], a decision dealing with the interpretation of para 167(1)(a) the employer – a mining company – successfully argued territorial jurisdiction for its mining operations in Nunavut despite being owned and operated mainly by Inuit.[64]

Bangerter refers to Parliament's intent, in particular the section of the *CLC* (s. 167(1)(a))[65] dealing with the exception for works of a local or private nature in the territories. The CIRB found the "Code [CLC] demonstrates a clear intent to allow the territories to deal with employment standards issues relating to local or private businesses within their territories."[66] An argument that could be raised is that this distinction arbitrarily impedes First Nations employers in the provinces. This would be because in contrast to provincial First Nations, those in the territories are being held to a less ambiguous, and easier standard than the common law functional test in jurisdictional disputes between provincial and federal regimes (i.e. Yukon and NWT[67]).

A final possibility for some services is the incorporation of First Nations employers. Jurisdiction is somewhat more ascertainable in the case law where a business or organization is incorporated. An employer ostensibly working under a Band council (which constitutes a federal undertaking – or when otherwise funded by a Band Council favours federal jurisdiction) could incorporate itself.

Incorporation however remains but one factor in determining jurisdiction; consequently, incorporation is a strategic choice, but not a panacea to the federal regime, as demonstrated in appellate decisions like *Picard*. As such, incorporation would support the case for rendering an otherwise First Nations enterprise under provincial regulation, and therefore provincial employment laws. The barrier to First Nations employers once again though, is the practicality and resource-intensiveness

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63 *Bangerter and Qikiqtani Industry Ltd, Re*, 2021 CIRB 970, [*Bangerter*].

64 *Ibid* para 29.

65 *Supra* note 1.

66 *Charlie, supra* note 36 at para 21.

67 Although there are no First Nations in Nunavut, practitioners foresee a similar interpretation in Nunavut : "[i]n Nunavut, the territorial laws should apply." See *supra* note 7 at 499.

of incorporation. This endeavour would place the burden squarely on the Band, further straining administrative capacity.

Finally, it is worth noting that as of 2019, the jurisdiction of unjust dismissals under the *CLC*[68] is decided by the Canadian Industrial Relations Board (CIRB), and not adjudicators. This may have implications for the cohesion of decision-making on jurisdictional issues for First Nations employers. In *Charlie*, above, the adjudicator suggests this much:

> Perhaps the recent transfer of administrative, oversight and adjudicative jurisdiction to the Canada Industrial Relations Board will generate more cohesive decision making and leadership in making determinations about jurisdiction less onerous for complaining employees and employers. (at para 67)

However aspirational the consistency of future decisions may be, the status quo would require a decisive shift from recent jurisprudence.

XII. Closing

Debate over jurisdiction of First Nations governance across Canada has a history as long as colonialism in the Canadian state itself. More recently in the era of Jordan's Principle, disparities between Indigenous and non-Indigenous communities have never been more at the forefront of the Canadian collective conscience. In the shadow of federalism, First Nations continue to be failed by jurisdictional uncertainty contributing to the perpetual undermining of First Nations' self-determination. Ten years after NIL/TU,O, employment law in First Nations communities remains unsettled. Reconciliation demands that the courts and Parliament shed light on the legal issues at the heart of self-determination across all areas of the Canadian legal system.

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68 *Supra* note 1 at Division XIV, s 240 onward.