BRITISH COLUMBIA LABOUR RELATIONS BOARD

NIL/TU,O CHILD AND FAMILY SERVICES SOCIETY

(the "Employer" or the "Society")

-and-

B.C. GOVERNMENT AND SERVICE EMPLOYEES' UNION

(the "Union")

PANEL:	Jan O'Brien, Vice-Chair
APPEARANCES:	Walter Rilkoff, for the Employer Ken Curry, for the Union
CASE NO.:	53968
DATE OF DECISION:	March 23, 2006

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Union applies under Section 18 of the *Labour Relations Code* (the "Code") to represent the Society's employees.

2 The Employer objects to the Union's application on the basis that the Board does not have jurisdiction to issue a certification. The Employer contends that, as the Society delivers services to children and families on reserve, labour relations matters fall within federal jurisdiction under Section 91(24) of the *Constitution Act,* 1867 (the "division of power argument") or alternatively under the aboriginal right to self-government (the "aboriginal right argument").

3 The Employer gave notice to the Attorney Generals of Canada and British Columbia that it was raising a constitutional issue. Both declined to make submissions.

4 After reviewing the written submissions and attached documents provided by the parties, I am able to decide the Employer's objections without the need of an oral hearing.

5 A representation vote conducted on October 19, 2005 was sealed pending resolution of the Society's objections to the Board's jurisdiction.

II. ISSUES

6 This decision deals with the Employer's two arguments for objecting to the Board's jurisdiction to hear the Union's application for certification.

7 The parties agreed that I should first decide the division of power argument, i.e., whether the Employer's labour relations matters falls under provincial or federal jurisdiction. I dismissed this aspect of the Employer's objections to the Union's application on February 15, 2006 with reasons to follow. This decision provides those reasons.

8 In addition, for the reasons set out below, this decision dismisses the Employer's objection based on the aboriginal right argument.

III. BACKGROUND

9 The Society is incorporated under provincial legislation, the *Society Act*, R.S.B.C. 1996, c. 433. It was created to develop, implement, and maintain a child welfare and

family service agency for the Esquimalt, Pacheedaht, Pauquachin, Songhees, Sooke, Tseycum, Tsartlip and Tsawout First Nations (together, the "Collective First Nations"). Each of the Collective First Nations may appoint two representatives to the Society's board of directors.

10 The Society provides services to children "under the age of 19, registered as an Indian under the *Indian Act* ... who has at least one parent on a Reserve of one of the Collective Nations". Services provided by the Society include:

- after school programs aimed at increasing children's appreciation of First Nations' culture such as traditional art, music, language, and visits to sacred sites;
- Rediscovery Camp where youth learn traditional fishing methods, traditional food and medical plant gathering, making drums, cedar bark weaving, cultural songs, healing and self-exploration at sweatlodge ceremonies;
- youth justice initiatives which pair troubled youth with mentors and Elders who counsel on traditional discipline and adolescent upbringing as well as involvement in community cultural activities and services such as providing care to Elders; and
- school support which provides mentors to children encountering racism and discrimination to build pride in First Nations' heritage.

11 The Society's office is located on the Tsawout federal reserve land and 90 per cent of its services are provided on reserve land. The Society currently employs 21 First Nations individuals. Only one employee is not First Nations. Most of the employees are social workers and family support workers.

12 The bylaws of the Society provide that membership is limited to members of the Collective First Nations. The bylaws state that rather than using Robert's Rules of Orders, meetings of directors and members of the Society are to be conducted in "a more First Nation's traditional approach i.e., 'consensus'". In addition to the representatives from the Collective First Nations, the Society's board of directors may also include members of the Elder Council and Youth Council. The bylaws may only be amended by resolutions of the Band Councils of the Collective First Nations.

13 The Tsawout, Tsartlip, Pauquachin, Songhees and Beecher Bay First Nations entered into Delegation Agreements with the Government of Canada and Province of British Columbia on March 5, 1999 and April 1, 2004 respecting the delegation of authority to the Collective First Nations to assume authority over their children and family services. The April 1, 2004 Delegation Confirmation Agreement (the "Delegation Agreement") replaced the agreement dated March 5, 1999.

14 The Delegation Agreement recognizes that the Province of British Columbia has legislative authority in respect to the welfare of children pursuant to Section 92(13) and

92(16) of the *Constitution Act,* 1867. The Society agrees to provide services set out in the *Child, Family and Community Service Act,* R.S.B.C. 1996, c. 46 (the "*CFCS Act*"). Pursuant to the *CFCS Act*, the Minister of Children and Families designates a Director responsible for aboriginal child and family services agencies.

15 The Delegation Agreement recognizes the Society's assertion of its right to care for and protect NIL/TU,O children and to preserve their connection to their culture and heritage through the delivery of culturally appropriate services.

16 Section 93(1)(g)(iii) of the *CFCS Act* permits the Director to make an agreement with a legal entity representing an aboriginal community such as the Society for the delegation of his powers, duties and functions. Appendix A to the Delegation Agreement defines the specific qualifications and criteria for delegation. There are five levels of delegation authority: level 11 to level 15.

17 Most of the Society's employees have been granted delegation authority at level 12. Some have a level 13 delegation authority. Employees with level 12 authority provide support services for families, deal with voluntary care agreements and special needs agreements, and establish residential resources for children in care. Level 13 encompasses all of the authority in level 12 as well as the responsibility for guardianship of children and youth in continuing custody.

18 Before the delegation of duties to the Society's employees, provincial government employees in the Ministry of Children and Families (the "Ministry") performed this work. Ministry employees continue to perform level 13 to 15 duties for the families and children in the geographic area serviced by the Employer, including children under the care of the Society.

19 Child protection workers operating at delegation level 15 have full authority for child protection including apprehension of children. New child protection workers operate at level 14 under the supervision of a fully-qualified practitioner. None of the Society's employees have level 14 or 15 delegation authority. When there is a situation requiring the apprehension of a child under the care of the Society, a Ministry social worker in conjunction with a Society social worker carries out the apprehension.

20 The Delegation Agreement recognizes that the Director has the right to intervene in any case in a manner that he deems necessary to comply with applicable provincial legislation. The Director is to make every effort to contact the Society's Executive Director before intervening. Where there is a conflict between the Director and the Society concerning the safety, placement or services to a child or family the Director has the final decision.

21 The Delegation Agreement recognizes the dual accountability of delegated staff to their Employer and to the Director. Delegated staff of the Society are subject to the direction of the Director with regard to their specific delegated authority.

22 All information the Society obtains under the authority of the *CFCS Act* is in the custody and control of the Director. The Society agrees to adhere to the provincial

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 and to develop an interface to share information electronically with the Ministry. The Society agrees to transfer closed files to the Ministry. Audits of the services provided by the Society will take place as required by the Director and pursuant to provincial legislation.

23 The Society receives about 65 per cent of its income from the Government of Canada under Federal Program Directives 20-1 in accordance with a comprehensive funding arrangement with the Government of Canada as represented by the Department of Indian Affairs and Northern Development ("DIAND"). The Province of British Columbia provides funds for services not covered by Directive 20-1. This amounts to about 27 per cent of the Society's income.

24 Directive 20-1 sets out the DIAND policy regarding the administration of the First Nations Child and Family Services Program. Directive 20-1 sets out five principles including the expansion of First Nations Child and Family Services on reserves to a level comparable to the services provided off reserve; the creation of First Nations designed, controlled and managed services; the development of First Nations' standards for those services; and the gradual expansion of services as funds become available and First Nations are prepared to take over services. Directive 20-1 recognizes that "[p]rovincial child and family services legislation is applicable on reserves and will form the basis for this expansion. It is the intention of the department to include the provinces in the process and as party to agreements".

25 In March 1996, the Province of British Columbia and the Government of Canada signed a Memorandum of Understanding for the funding of child protection services for First Nations children. British Columbia agreed to administer the *CFCS Act* for the benefit of First Nations persons under the age of 19 and the Government of Canada agreed to reimburse the Province of British Columbia for the cost of child protection services for any eligible child.

26 As a result of the Delegation Agreement, the Society now receives funding that previously went to the Province of British Columbia to provide child protection services to children of the Collective First Nations.

IV. POSITIONS OF THE PARTIES

27 The Employer submits that the application for certification should be dismissed as the delivery and provision of services to children and families of the Collective First Nations on reserve, including labour relations matters respecting employees delivering these services, is within federal jurisdiction under Section 91(24) of the *Constitution Act,* 1867. The Employer argues that the Society's activities fall under federal jurisdiction because its core functions relate to "Indianness". The Employer further supports the Collective First Nations' right to claim self-government over labour relations on reserve and submits that the Board therefore has no jurisdiction to hear the certification application.

28 In its initial submission, the Employer pursued only its division of powers argument. In its reply submission, the Employer developed its argument with respect to aboriginal self-government. The Employer argues that the Collective First Nations have an inherent right to self-governing authority with respect to children and families on reserve. They claim that these matters are subject to neither federal nor provincial laws including labour relations law. The Employer takes the position that regulation of the relationship between the Society and its employees under the Code infringes on the right of self-government of the Collective First Nations contrary to the Douglas Treaties, the customary laws of aboriginal peoples and international law.

29 The Union contends that the Employer does not fall within any of the exceptions to provincial jurisdiction over labour relations. The Union submits that the Employer is not a federal undertaking as it is a provincially incorporated society delivering services to children and families pursuant to the *CFCS Act.* The Union further submits that the Code does not affect the status or capacity of Indians.

30 The Union submits that the Employer's claim that the Code does not apply to their employees as a result of an aboriginal right to self-government is a thinly veiled attempt to avoid unionization.

V. ANALYSIS AND DECISION

A. Division of Powers

31 In *Reference re: Industrial Relations and Disputes Investigation Act,* [1955] S.C.R. 529, the Supreme Court of Canada held that labour relations, *prima facie*, falls within provincial jurisdiction by virtue of Section 92(13) of the *Constitution Act,* 1867. The Supreme Court of Canada specified exceptions to this general rule. In *Four B Manufacturing Ltd. v. United Garment Workers of America et al.*, 102 D.L.R. (3d) 576 ("*Four B*"), the Supreme Court of Canada summarized the principles to be applied when determining if a labour relations matter is within federal jurisdiction as follows:

> ... With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses...
>
> The functional test is a particular method of applying a more general rule, namely, that exclusive federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal jurisdiction over some other federal object... (pp. 395-396)

32 Under Section 91(24) of the *Constitution Act,* 1867, the federal government has responsibility for Indians and lands reserved for Indians. When a labour relations matter involves Indians, consideration must be given to whether the primary focus of the normal and habitual activities of the operation in question is in respect to the status of Indians, referred to in the jurisprudence as "Indianness", and whether the provincial law impairs the status or capacity of Indians. As Peter Hogg notes in *Constitutional Law,* vol. 1 (Toronto: Thomson-Carswell, Loose-leaf Edition) at 27-11:

> The second exception to the general rule that provincial laws apply to Indians and lands reserved for the Indians is "Indianness". A provincial law that affects "an integral part of primary federal jurisdiction over Indians and lands reserved for the Indians" will be inapplicable to Indians and lands reserved for the Indians, even though the law is one of general application that is otherwise within provincial competence. This vague exception, which has been framed as precluding laws that impair the "status or capacity" of Indians, or that affect "Indianness", has its analogy in the immunity from provincial laws that affect a vital part of undertakings within federal jurisdiction.

33 In *Four B,* the majority of the Supreme Court determined that the provincial labour relations statutes applied and grappled with the concept of "Indianness" in the following way:

> I think it is an oversimplification to say that the matter which falls to be regulated in the case at bar is the civil rights of Indians. The matter is broader and more complex: it involves the rights of Indians and non-Indians to associate with one another for labour relations purposes, purposes which are not related to "Indianness"; it involves their relationship with the United Garment Workers of America or some other trade union about which there is nothing inherently Indian; it finally involves their collective bargaining with an employer who happens to be an Ontario corporation, privately owned by Indians, but about which there is nothing specifically Indian either, the operation of which the band has expressly refused to assume and from which it has elected to withdraw its name.
>
> But even if the situation is considered from the sole point of view of Indian employees and as if the employer were an Indian, neither Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of chiefs and band councils, reserve privileges, etc. For this reason, I come to the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or lands reserved for the Indians. ... (p. 397)

34 In *Nisga'a Valley Health Board*, BCLRB No. B289/95 (Leave for Reconsideration of Certification Order dated January 10, 1995), 27 CLRBR (2d) 301 ("*Nisga'a*") and *Westbank Indian Band Development Company Limited,* BCLRB No. B314/95, 37 CLRBR (2d) 272 ("*Westbank*"), the Board adopted the functional approach set out in *Four B* and subsequent Federal Court decisions. In *Nisga'a,* the Board concluded that where the federal minister retained general responsibility for health services transferred from the Government of Canada to the Nisga'a Health Board, the functional test established that the character or nature of the activity was federal. In *Westbank,* the Board concluded that although a commercial long-term care operation was run and owned by the Band Council, it did not otherwise satisfy the test for "Indianness".

35 The parties take different approaches to the test to be applied in this case. The Employer submits that if I find that the core function of the Society relates to "Indianness" then the Board does not have jurisdiction. In the Employer's view a finding of "Indianness" means that the Society's labour relations are an integral part of primary federal jurisdiction over Indians or lands reserved for the Indians. The Employer relies on *Nisga'a* and other cases cited within that decision.

36 The Union submits that the test proposed by the Employer confuses two concepts. The Union notes that following *Four B,* the Supreme Court of Canada elaborated on the notion of "Indianness" in *Dick v. Regina,* [1986] 1 W.W.R. ("*Dick*"). In *Dick,* Beetz J. concluded that "a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are, on the other hand, provincial laws which cannot apply to Indians without regulating them *qua* Indians" (p. 16). The Union submits that while "Indianness" has its analogy in the immunity from provincial laws that affect a vital part of a federal undertaking they are distinct concepts which should not be mixed together.

37 The parties point to two cases close to the facts before me, where the Federal Court and the Ontario Labour Relations Board (the "OLRB") reached opposite conclusions on whether provincial labour laws applied to an agency delivering social services to First Nations peoples.

38 In *Tobique Band Council,* [1988] F.C.J. No. 435 ("*Tobique*"), which is cited with approval in *Nisga'a* and relied upon by the Employer, the Federal Court of Appeal found that a welfare agency providing services to children on reserve was captured by the primary federal jurisdiction over Indians. As in this case, a group of bands signed a tri-partite agreement with the federal government and New Brunswick provincial government to provide social services to children living on the reserve. The Federal Court reasoned by analogy to medical and health services that social services fall under the *Indian Act,* R.S.C. 1985, c. I-5:

> ...At page 1048 of his reasons in the *Four B* case, referred to above, Mr. Justice Beetz gives illustrations of the kind of rights that should be regarded as necessary incidents to the Indian status. He mentions "registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, Reserve

> privileges, etc." The *Indian Act* specifically provides for services to the Indians akin to social services, namely medical and health services (subsection 18(2) and paragraphs 73(1)(g) and 81(1)(a)). Section 114 of the Act provides for agreements with the provinces "for the education in accordance with this Act of Indian children" (my emphasis). The same technique of federal provincial agreements can of course be extended to social services for Indian children and families, provided funds are made available by Parliament. The social services delivered by the Agency relate to the welfare of Indians of the Tobique Band in the same way as medical services or education. They deal with Indians qua Indians. They are related to "Indianness" (per Beetz J. in *Four B*, *supra*, at 1047). The Agency is concerned not only with the welfare of the children but more specifically with the welfare of the Indian children: see section 5 of the Agreement. Both the physical and cultural integrity of the youngsters are taken into consideration. For that reason, the social services form an integrated part of the primary federal jurisdiction over Indians (subsection 91(24) of the Constitution Act, 1867). The labour relations of the Agency follow the same course since the Agency is a creature under the authority of the Band Council devoted exclusively to Indians and Indian welfare on the reserve. This notwithstanding the fact that the Agency may, by delegation, carry out all or some responsibilities of the Minister of Social Services under the *Child and Family Services and Family Relations Act* (*P.E.I. Potato Marketing Board v. Willis,* [1952] 2 S.C.R. 392; *Coughlin v. The Ontario Highway Transport Board*, [1968] S.C.R. 569; *The Queen v. Smith*, [1972] S.C.R. 359). (p. 5, emphasis in original)

39 In *Native Child and Family Services of Toronto,* [1995] O.L.R.D. No. 4298 ("*Native Child*"), a case relied on by the Union, the OLRB found that Native Child, a social service agency dedicated to the needs of the urban native community in Toronto, fell within provincial jurisdiction. The OLRB agreed that Native Child should be considered an Indian organization. However, the OLRB found that the presence of Indianness does not automatically attract federal legislative control or make the agency incidental to federal power. It is only where Indianness is affected by provincial legislation or where the legislation impairs the status or capacity of Indians that the provincial power will be invalid. The OLRB noted that in *Natural Parents* v. *Superintendent of Child Welfare et al.,* [1975] 60 D.L.R. (3d) 148 (S.C.C.) ("*Natural Parents*"), "even where a provincial statute concerned adoption and the notions of family integral to that, the Supreme Court of Canada found the provincial statute was valid and effective except where it affected Indian status under the *Indian Act* per se" (para. 32). The OLRB commented:

> The facts of this case in our view disclose no reason to conclude that the *Labour Relations Act* is enacted in relation to Indians, or that it affects the Indianness of Native Child, its members or programs in any way. There is nothing about the operations of Native Child, to paraphrase the Court in *Four B* in the quote set out above, to indicate that Indian status or rights so

> closely connected with Indian status are at stake that they should be considered as necessary incidents of status. Even taking Indianness in the broadest cultural sense of the word, as opposed to its legislative and constitutional meaning, there was nothing before the Board to indicate that provincial regulation of its labour relations would impact on the operations of Native Child in relation to Indianness. It is our view that the Ontario *Labour Relations Act* touches the Indians involved with Native Child as ordinary persons in a way that does not intrude on their Indian character, identity or relationships. See *Natural Parents*, cited above at p. 763. (para. 34)

40 The OLRB then distinguished *Sagkeeng Alcohol Rehab Centre Inc.,* [1994] F.C.J. No. 640, a Federal Court of Canada case as follows:

> In our view there is little support in the jurisprudence for the notion that Indian content, without some connection to the exercise of federal legislative power, makes an organization necessarily incidental to the federal power, attracting federal jurisdiction over labour relations. In all the cases to which we were referred, save *Sagkeeng Alcohol Rehab Centre Inc.*, cited above, to which we will return, the finding of federal jurisdiction was in a factual context that included a fairly direct connection with the exercise of federal power in relation to Indians, for example, the operation of a Band or a reserve defined by the federal government pursuant to the *Indian Act*, (see *Francis v. Canada Labour Relations Board*, [1981] 1 F.C. 225 (C.A.), reversed on other grounds [1982] S.C.R. 12, or the operation of a school pursuant to provisions of the *Indian Act* (*Qu'appelle Indians Residential School Council*, cited above). *Sagkeeng Alcohol Rehab Centre Inc.*, cited above, is an exception to this to the extent that the only federal presence appears to be funding and training. However, the Court made a link to Indian status because of the admission criteria, and to this extent, perhaps it is not to be considered an exception. As well it was located on a reserve, and there is mention of Indian health projects on reserves in the *Indian Act*, sections 18(2), 73(1)(g), and 81(1)(a). To the extent that it is an exception, however, the requirement of a connection to the exercise of federal legislative power is a concept which is in our view supported by higher authority as indicated in the decisions of the Supreme Court of Canada in *Four B, Natural Parents* and *Pioneer Management*, cited above. (para. 35)

41 The OLRB noted that it was clear that the federal government's involvement in Native Child was limited to evaluating a program for which it provided funding. The OLRB concluded that Native Child is not a federal undertaking, service or business by any act of the federal Parliament. The OLRB then considered whether the *Indian Act* covered Native Child and reached the following conclusions:

> ... The employer argues that the Indianness of the organization means that it is subject to the *Indian Act*. However, there is no portion of the *Indian Act* referred to, or of which we are aware,

> which deals with anything to which the operations of Native Child are integrally related. The *Indian Act* does not purport to regulate or exert control over all operations involving Indian people or their culture. Its provisions deal with several broad areas such as registration as an Indian, rights to reside on reserves, the estates of deceased and mentally incompetent Indians, elections of Chiefs and Band Councils and their By-law powers, taxation and schools on reserves. It does not deal even indirectly with labour relations, off-reserve child and family welfare or cultural organizations. Nor is it suggested that there is any conflict between the *Labour Relations Act* and the *Indian Act*.
>
> We have reviewed the facts thoroughly for connections to the federal head of power over Indians and do not find support for the idea that the operations of Native Child are integral to the federal power. For example, in our view, the fact that the agency may occasionally deal with the effects of loss of status on an individual is not sufficient to make it integral to the federal power. The overall focus of the agency is on matters of child and family welfare, albeit permeated with Indian culture. The responding party acknowledged that there was no federal legislation in respect of family and child welfare. Although the federal-provincial cost sharing agreement referred to above is some evidence of federal financial responsibility for some of the persons served by Native Child, it is limited to persons with recent connection to a reserve. As made clear in *Four B*, cited above the fact of federal funding is not sufficient to warrant federal control over labour relations. Further, the services of Native Child are not on a reserve, or integrally related to any reserve or native level of government. That personnel consult regularly with Indians on reserves, or that some of its members and directors may commute to reserves, does not impact on the constitutional question in our view, because these facts do not engage, in an integral functional sense any incident of federal legislative power. Indeed, similar consultation is required by the provincial *Child and Family Services Act*, at section 196. As we indicated at the outset its validity is not impugned before us. In considering whether Native Child's operations are integral to the federal power, we find that there is insufficient factual basis to warrant that conclusion, whether or not the *Indian Act* is exhaustive of federal jurisdiction in this area. (paras. 36-37)

42 The Employer argues that *Native Child* can be distinguished on the facts as unlike the Society, the Native Child agency does not operate on reserve, is not required to employ a First Nations director, and its services are not limited to First Nations children. The Employer also submits that *Native Child* is at variance with the Board's approach in *Nisga'a*.

43 In *Nisga'a,* the Board had no difficulty finding that the labour relations of the Health Board in question formed an integral part of primary federal jurisdiction over Indians and lands reserved for Indians. The Board reasoned as follows:

> The Health Board's purpose is the provision of health services on reserves. This purpose clearly falls within the functions and normal activities of Indian Band administration under Section 81(1)(a) of the *Indian Act.* This activity constitutes the normal operations of the Health Board and its employees as a going concern. Although we agree with the Union that the Band Council resolutions in 1987 and 1993 do not constitute bylaws for the purposes of Section 81(1)(a) of the *Indian Act,* the resolutions do constitute authority from the members of the four Village Band Councils for the transfer negotiations leading up to the execution of the Transfer Agreements. Those agreements transfer control of health services from Her Majesty in Right of Canada to the Health Board.
>
> At the same time, the federal Minister retains general responsibility for the overall federal Indian health program and related funding, retains authority to intervene in the operation of the Health Board in emergency situations, and is obliged to provide continued access to the Health Board's employees to Medical Service Branch training programs for health workers. Additionally, pursuant to the Minister's retained responsibility for the overall federal Indian health program, the Health Board must provide annual audited financial and performance reports of the health program and must report annually to the community members and the Minister.
>
> Further, the Health Board continues to provide essentially the same programs as those previously provided by the Band Councils and federal representatives. The Health Board's brochure lists the programs it offers; consistent with the purposes of the Health Board as enunciated in its Constitution and Bylaws, and in particular Section 2(g) (see para. 20), the brochure refers to "traditional holistic medicine, past, present and future". Moreover, the Health Board provides two new programs designed specifically for First Nations people. Although there is no priority to natives with respect to access to the Health Board's services, six programs offered by the Health Board are not available to non-native residents in the Nass Valley. The Transfer Agreement further ensures that new initiatives undertaken by the Minister or the Health Board for the enrichment of existing programs and services as they may "affect the provision of health services to *aboriginal peoples*" (emphasis added) during the term of the Transfer Agreement, may be the subject of negotiated amendments to the Transfer Agreement.
>
> In our view, the Health Board has functionally stepped into the shoes of the Band Councils and the federal Minister's

> representative for the provision of health services primarily to the Nisga'a people in the Nass Valley and its operations continue to be tied to, primarily funded by, and regulated by the federal Minister responsible for the overall Indian health program. (paras. 24-27)

44 As the above passages indicate, the Board found that activities that had formerly been under federal jurisdiction remained under federal jurisdiction with the creation of the Health Board. Thus, the labour relations of the Health Board fell under the *Canada Labour Code*. The case before me is quite different. There is no suggestion that the Society is federally regulated. Further, the Society is not carrying out functions and normal administrative activities of Indian Bands under Section 81 of the *Indian Act.*

45 It is notable that in *Tobique*, the Federal Court of Appeal found that the social services provided by that Agency fell within the normal functions of an Indian Band by drawing an analogy to health and education services included in the *Indian Act.* After noting the "Indianness" of the Agency, the Federal Court of Appeal concluded "[t]he labour relations of the Agency follow the same course since the Agency is a creature under the authority of the Band Council devoted exclusively to Indians and Indian welfare on the reserve".

46 In my view, the approach taken by the OLRB in *Native Child* is more comprehensive. In *Native Child,* the OLRB points out that the requirement of a connection to the exercise of federal legislative power is a concept which is supported by higher authority as indicated in the decisions of the Supreme Court of Canada including *Four B* and *Natural Parents.* After reviewing the jurisprudence, I agree with the OLRB that "there is little support ... for the notion that Indian content, without some connection to the exercise of federal legislative power, makes an organization necessarily incidental to the federal power, attracting federal jurisdiction over labour relations".

47 The case before me involves a social service agency operated by a Society created by eight Indian Bands. The Society primarily operates on reserve land and employs First Nations employees who deliver the service exclusively to First Nations children. On the basis of these facts, I find that Society is clearly an "Indian" organization. However, "Indian" content without some kind of connection to the exercise of federal legislative power does not necessarily attract federal jurisdiction over labour relations. Here, the Society does not derive its authority to deliver child welfare services to the Collective First Nations from the *Indian Act.* There is nothing in the *Indian Act* related to child welfare or cultural organizations. Rather the Society is established as a result of an agreement with the Province of British Columbia and the Government of Canada pursuant to provincial legislation, the *CFCS Act.*

48 Child welfare is a provincial responsibility under the *Constitution Act,* 1867. The Society carries out its mandate in accordance with provincial legislation, the *CFCS Act.* Under the *CFCS Act*, a director is appointed who has the authority to intervene in the Society and its actions. As a result, the Society's employees have a dual accountability to the Director and to the Employer. The Society's employees are unable to carry out child apprehension duties without being accompanied by an employee from the

provincial Ministry. The federal government's role is limited to providing funds for the Society's activities and, as noted in *Four B*, federal funding is not enough to warrant federal control over labour relations.

49 Further, there is no evidence that there is any conflict between the provincial regulation of labour relations of the Society and its function as a First Nations organization providing social services to First Nations children on reserve. As noted in *Four B*, the association of First Nations persons with one another and others for labour relations purposes does not affect "Indian" status. In my view, the Code touches the First Nations persons involved with the Society as ordinary employees and employers in a way that does not intrude on their First Nations' character, identity or relationships. When provincial legislation only affects Indian organizations and the Indian persons associated with the organization in this way, the labour relations of the organization remains within provincial jurisdiction: *Four B, Dick and Natural Parents.*

50 Accordingly, I dismiss the Employer's objection based on its division of powers argument. I conclude that the Employer's labour relations matters fall within provincial jurisdiction.

B. Aboriginal Rights

51 With the exception of the Pacheedaht Indian Band, the Collective First Nations are all party to the Douglas Treaties which came into effect between 1850 and 1854. The Douglas Treaties read as follows:

> Swengwhung Tribe – Victoria Peninsula, South of Colquitz
>
> Know all men, we, the chiefs and people of the family of Swengwhung, who have signed our names and made our marks to *this* deed on the thirtieth day of April, one thousand eight hundred and fifty, do consent to surrender, entirely and for ever, to James Douglas, the agent of the Hudson's Bay Company in Vancouver Island, that is to say, for the Governor, Deputy Governor, and Committee of the same, the whole of the lands situate and lying between the Island of the Dead, in the Arm or Inlet of Camoson, where the Kosampsom lands terminate, extending east to the Fountain Ridge, and following it to its termination on the Straits of De Fuca, in the Bay immediately east of Clover Point, including all the country between the line and the inlet of Camoson.
>
> The condition of or understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow [after] us; and the land shall be properly surveyed, hereafter. It is [understood], however, the land itself, with these small exceptions, becomes the entire [property] of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

52 The Employer relies on Section 35(1) of the *Constitution Act,* 1982 which provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" and argues that as a result of the Douglas Treaties, the Collective First Nations have a right to self-government on reserve lands. The crux of the Employer's argument is as follows:

> NIL/TU'O submits that, pursuant to the Douglas Treaties, the Collective First Nations have the right to self-government on reserve lands including the right to care for and protect their children in accordance with their culture and traditions. The evidence of this right is largely in the form of oral histories passed down through the generations which should be applied in conjunction with the principle of treaty interpretation that "*the treaty should be given an fair, large and liberal construction in favour of the Indians*". The right to preserve lands for the use of "*our children and those who follow after us*" must include the right to organize the Collective First Nations' affairs in such a way that best preserves the existence and identity of those children without the interference of external laws. We say that labour legislation is one of those external laws. (emphasis in original)

53 The purpose of Section 35(1) is "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *R.* v. *Van der Peet,* [1996] 2 S.C.R. 507 ("*Van der Peet*"). In *Mitchell v. Canada (Minister of National Revenue – MNR),* [2001] 1 S.C.R. 911, the Supreme Court of Canada described the test for establishing an aboriginal right:

> ...Since s. 35(1) is aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown's assertion of sovereignty, the test for establishing an aboriginal right focuses on identifying the integral, defining features of those societies. Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet*, supra, at paras. 54-59 (emphasis in original)). This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.
>
> Once an aboriginal right is established, the issue is whether the act which gave rise to the case at bar is an expression of that right. Aboriginal rights are not frozen in their pre-contact form:

> ancestral rights may find modern expression. The question is whether the impugned act represents the modern exercise of an ancestral practice, custom or tradition. (paras. 12 and 13)

54 The Supreme Court of Canada makes it clear that rights to aboriginal self-government cannot be framed in excessively general terms: *R v. Pamajewon,* [1996] 2 S.C.R. 821 (*"Pamajewon"*). The Supreme Court of Canada emphasizes the need to precisely characterize the right claimed. In *Van der Peet,* the majority listed three factors to guide the characterization of a claimed aboriginal right: (1) the nature of the action which is claimed to be the expression of the right; (2) the nature of the governmental legislation or action which conflicts with the right; and (3) the ancestral traditions and practices relied upon to establish the right.

55 Turning to the first *Van der Peet* factor, the Collective First Nations have created the Employer (i.e., the Society) to care for and protect children in accordance with culture and traditions. In its submissions, the Employer states that evidence of the Collective First Nations' right to care for and protect their children in accordance with their culture and traditions is largely in the form of oral histories passed down through generations. The Employer notes that the Delegation Agreement recognizes the Society's assertion of its right to care for and protect NIL/TU,O children and to preserve their connection to their culture and heritage through the delivery of culturally appropriate services. The Employer states that the Collective First Nations retain the right to self-government through customary Aboriginal law and that the Collective First Nations' right to self-government is enshrined in international treaties such as the International Covenant on Civil and Political Rights that provides that "[a]ll peoples have the right to self-determination". The Employer concludes:

> ...the Board does not have jurisdiction over the [Union's] application for certification of the [Society's] employees. To take jurisdiction would be to derogate from the rights of the Collective First Nations enshrined in Section 35(1) of the *Constitution Act, 1982* in violation of the validly enacted Douglas Treaty. In addition, it would violate the right to self-government established through aboriginal customary law and binding international covenants.

56 The Employer states it is asserting on behalf of the Collective First Nations "the right to self-government on reserve lands including the right to care for and protect their children in accordance with their culture and traditions".

57 In its final reply, the Employer states that the right being asserted is not the right to regulate the labour relations of the Employer, "although that is part of the right". In the Employer's words, the Collective First Nations which make up the Society are asserting a right "to raise their children without interference from the laws of Canada or British Columbia except where they cede or delegate authority to those laws". The Collective First Nations and the Society "assert the right to control labour relations within its territories and lands to the extent that those acts impinge on preservation, development and identity of aboriginal children".

58 With respect to the second *Van der Peet* factor, the Employer claims that the government legislation which conflicts with the aboriginal right they are claiming is labour legislation, i.e., the Code.

59 The third *Van der Peet* factor requires the Employer to establish that the aboriginal right claimed is an element of a practice, custom or tradition integral to the distinctive culture of the Collective First Nations. It is necessary for the Employer to provide conclusive evidence from pre-contact times about the practices, customs and traditions of the community to establish that they are of central significance to the Collective First Nations' community. In this case, the Employer asserts that oral histories and customary aboriginal law will establish an aboriginal right to care for and protect children in accordance with culture and traditions. The Employer points to the Society's activities related to traditional arts, music, and language and traditional cultural activities such as fishing, food gathering, drum making, cedar barking weaving and sweatlodges as examples of culture and traditions integral to the Collective First Nations.

60 In its final reply submission, the Employer states that it is "self-evident ... that these First Nations addressed the manner and customs in which they raised their children, the way in which they inculcate values into their children and the way, they, and other societies used these particular customs and traditions to preserve their unique ancestral practices, customs and traditions in ways significantly different from European customs". The Employer states "[t]hese practices, customs and traditions [were] clearly integral to these Bands in pre-contact society, in the same way that practices, customs and traditions of different societies are integral to the preservation of any particular society and mark it as distinctive". The Employer states that the fact that the Society is attempting to use ancestral practices to protect and care for children in today's society proves that there is continuity between the pre-contact practice and the contemporary claim.

61 For purposes of this decision and without deciding the issue, I accept the Society's claim that the Collective First Nations have an aboriginal self-government right to care for and protect their children on reserve in accordance with their culture and traditions. I further accept that the Society was established in order for the Collective First Nations to exercise their right to use ancestral traditions and practices in caring for and protecting their children. However, I do not accept the claim that applying the Code to the Society conflicts with this claimed right of aboriginal self-government.

62 To use the language of *Van der Peet*, even if I accept for purposes of this decision that the first and third factors are made out, I find that the second factor is not. There is no evidence before me to suggest that allowing the employees of the Society access to the right to join the Union under the Code would infringe or interfere with the Society's ability to care for and protect First Nations children *in accordance with their culture and traditions*. There is no evidence that the employees' right to bargain collectively their terms and conditions of employment with their employer would have any impact on the employees', or the Society's, ability to use traditional arts, music or language or traditional activities such as fishing, drum making, sweatlodges, in the care and protection of the Collective First Nations children.

63 The Code does not regulate the manner in which the Society delivers its services to the Collective First Nations children – that is, whether the services are delivered in a manner consistent with traditional ancestral practices or not. There is no reason to suppose that the Society's employees would use their rights under the Code to undermine the Society's purpose of delivering social services in a manner consistent with the Collective First Nations' culture and traditions, and the Society does not argue that such a supposition should be made. The fact that employees are "empowered" under the Code to bargain their terms and conditions of employment is not, in my view, a reason to think that such empowerment threatens or conflicts with the Society's objective of providing services in a manner consistent with ancestral traditions and practices.

64 The Code does regulate the labour relations of the Society and its employees. In that sense, the Society is affected by the Union's application under the Code in the same way any employer would be affected by an application for certification of its employees. I find the Code's regulation of the Society in its role as employer does not impinge upon or conflict with its function as the expression of a claimed right of aboriginal self-government to care for and protect First Nations children in accordance with ancestral culture and traditions.

65 I find that in claiming that the Code infringes its aboriginal right to self-government the Employer is claiming an aboriginal right to self-government with respect to labour relations. Such a claim is different from a claim to an aboriginal right to care for and protect First Nations children in accordance with ancestral culture and traditions. While the Employer argues that a right to self-government over labour relations is a "part" of the claimed right to self-government with respect to the care and protection if children, I find the two claims are clearly distinct. A right to self-government over labour relations could only be a "part" of a right to self-government in respect to the care and protection of children if it were claimed that the ancestral practices and traditions on which the latter right is based had a labour relations aspect to them. I find no such claim has been made here.

66 As stated in *Pamajewon*: "Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right" (para. 27). The Employer concedes that the Douglas Treaties do not deal with labour relations. The only traditional practice the Employer cites that could conceivably be characterized as being a practice with respect to labour relations is "developing consensus". However, the Employer provides no particulars as to how a consensus-based approach to decision-making or dispute resolution, which is said to be "traditional among native communities", constitutes a "defining feature of the culture in question": *Van der Peet*, (para. 59). Nor does the Employer provide particulars to show how the alleged consensus development approach was used in respect to labour relations issues, assuming such issues existed as part of the traditional culture of the Collective First Nations. I find that the broad right to self-government over labour relations is excessively general.

67 In *Great Blue Heron Gaming Co.*, [2004] O.L.R.D. No. 4907 ("*Great Blue Heron*"), the OLRB rejected a similar assertion of an aboriginal right of self-government over labour relations based on a claim that labour was organized consensually. The OLRB held that, even if the notion of labour relations was cast at a high level of generality, "there is nothing in the evidence and information provided by the First Nation to suggest that there was a practice of organized relationships delineating responsibilities and obligations as between those who would perform labour, and those who would have labour performed" (para. 80). The same is true here. The OLRB found that there was no basis for concluding that there was an ancestral practice, custom or tradition which could support the claimed right to the regulation of labour relations on the territory of the First Nation (para. 81), and again I find the same is true here.

68 In *Great Blue Heron*, the OLRB stated the following, which I find to be equally applicable to the case before me:

> The real difficulty in this case is similar to that dealt with by the Supreme Court in *Pamajewon* - that there is nothing about the right being asserted which is in any way distinctive to the First Nations society historically unless the right itself is cast as broadly as the general right of "self-government". Even if one took a broader notion of the characterization of aboriginal rights as reflected in the dissent by Madame Justice L'Heureux-Dubé in *Pamajewon*, there is nothing in the record upon which one could find that there were ancestral practices that managed labour in any particular distinct way.
>
> The rights being advanced here by the First Nation - the right to self-government and the right to organize and direct labour are really universal and are in no way characteristic of the particular culture of the First Nation. In *Van der Peet,* the Court rejected the idea that this formulation of aboriginal rights was consistent with section 35(1). At paragraph 56, the Court stated:
>
> > The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive) nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1). (paras. 83 – 84)

69 Thus, even if I accept, for purposes of this decision, that developing consensus is a traditional culture and practice of the Collective First Nations that practice on its own does not establish that the management and regulation of labour relations is a part of the traditional culture of the Collective First Nations. Accordingly, the Employer has not

established the basis of a claimed aboriginal right to self-government with respect to labour relations.

70 The Employer submits that Code provisions concerning such matters as collective agreements, strikes and lockouts are "alien concepts" to the Collective First Nations. It asserts that adversarial and confrontational conduct is in conflict with the development of consensus. However, I find that the fundamental principles of the Code are not inconsistent with a consensus-based approach to decision-making and dispute resolution, should the Employer wish to follow such an approach. Indeed, such an approach would be consistent with Code principles: see, for examples, Sections 2(d), (e), (f) and (h), as well as specific provisions such as Section 53, 54 and 55.

71 Even provisions such as Section 6 which prohibits unfair labour practices, Section 9 which prohibits coercion and intimidation by any persons (including both unions and employers), and Section 11 which requires bargaining in good faith, can be seen as setting up a framework which allows labour relations to take place in a consensual or consensus-based manner, should the Employer wish. Accordingly, I find that, even if an aboriginal right to self-government over labour relations could somehow be based on the claimed traditional practice of developing consensus, the Code does not conflict or interfere with a right of that nature.

72 For all of the above reasons, I dismiss the Employer's jurisdictional objection based on its aboriginal rights argument.

VI. CONCLUSION

73 I dismiss the Employer's two arguments that the Board has no jurisdiction to hear and decide the Union's application under Section 18 of the Code to be certified to represent the Society's employees. I find the Board does have jurisdiction to hear and decide the Union's application.

74 As there were no other objections to the Union's application, I order that the representation vote be counted, upon resolution of the issue of the one ballot challenged at the vote. The parties are directed to attempt to resolve that issue with the help of an Industrial Relations Officer. I retain jurisdiction to adjudicate the challenged ballot if the parties are unable to resolve the issue.

LABOUR RELATIONS BOARD

"JAN O'BRIEN"

JAN O'BRIEN
VICE-CHAIR