TD 5/ 86 Decision rendered September 24, 1986

THE CANADIAN HUMAN RIGHTS ACT (S. C. 1976- 77, c. 33 as amended)

HUMAN RIGHTS TRIBUNAL

BEFORE: MARSHALL ROTHSTEIN, Q. C.

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA, Complainant, - and

QU'APPELLE INDIAN RESIDENTIAL SCHOOL COUNCIL, Respondent.

DECISION OF TRIBUNAL

APPEARANCES:

ANDREW RAVEN: Counsel for the Public Service Alliance of Canada.

RUSSELL JURIANSZ: Counsel for the Canadian Human Rights Commission.

NEIL HALFORD: Counsel for the Qu'Appelle Indian Residential School Council.

DATE OF HEARING: August 11, 1986. >

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A. INTRODUCTION

This is a decision of a Human Rights Tribunal appointed pursuant to Section 39 (1.1) of the Canadian Human Rights Act, S. C. 1976- 77, c. 33, as amended (" Act").

On April 21, 1986, I was appointed by the President of the Human Rights Tribunal Panel to inquire into the complaint of the Public Service Alliance of Canada, dated September 9, 1981, against the Qu'Appelle Indian Residential School Council, alleging that the Council engaged in discrimination on the ground of sex under Section 11 of the Act. Prior to the inquiry into the merits of the complaint, the jurisdiction of this Tribunal was challenged by the Respondent.

Section 40 (1) of the Act places upon a Tribunal the requirement to give notice of its inquiry and hearing to the parties. Notice was forwarded to counsel prescribing August 11, 1986, at The Federal Court of Canada at Winnipeg, for hearing the preliminary matter as to the jurisdiction of the Tribunal to hear the complaint in question. The hearing was completed on August 11, 1986.

> - 2 THE FACTS An Agreed Statement of Facts was filed stipulating certain facts. In addition, during the course of the hearing, all counsel agreed to certain other facts.

1. The Complainant: The Public Service Alliance of Canada is a bargaining agent representing all employees of the Qu'Appelle Indian Residential School Council, excluding the Residence Administrator.

2. The Canadian Human Rights Commission: The Canadian Human Rights Commission (" Commission") is a statutory body created by section 21 of the Act. The Commission participated in the hearing along with the Complainant and the Respondent.

3. The Respondent: The Qu'Appelle Indian Residential School Council (" Council") is a body corporate, incorporated under the provisions of the Societies Act of Saskatchewan, on August 23, 1972. The by- laws governing the Respondent at the

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- 3 material time were those adopted November 22, 1974 and effective November 18, 1974. The Council operates the Qu'Appelle Indian Residential School (" School") in the District of Lebret, Saskatchewan.

4. The School: The School provides both elementary and high school education and residential care to Indian Children from the Touchwood - File Hills Qu'Appelle District and the Yorkton District of Indian Reserves, as defined by the Minister of Indian and Northern Affairs, Canada. The greater part of these Districts is located in Saskatchewan, though a small portion thereof is located in Manitoba.

When the School was first established, sometime in the 1880's, it was run by the Oblate Fathers and funded by the Minister in the Government of Canada with responsibility for Indians. In or around 1968, the Minister, or his delegates, assumed the operational functions and appointed

members to the School Board. In 1973, the Council, composed of concerned Indian band members who were consulted by, and gave advice to, the School Board, became responsible for the administration of the School's residences. In 1981, the Minister turned over responsibility for the administration of the School to the Council. At the present time, the Council

> - 4 is composed of the Band Chiefs of the 24 Bands that constitute the Touchwood - File Hills - Qu'Appelle District and the Yorkton District.

The teachers of the School are paid on the same scale as the teachers employed by the Saskatchewan Department of Education. There is no formal contract between the teachers and the Council. The School's Program is identical to the programme set up by the Saskatchewan Department of Education except that the School has additional courses in the Cree language and in Indian culture. However, the School is not regulated in any way by the Department of Education of the Province of Saskatchewan.

The School is fully funded by Her Majesty the Queen in Right of Canada, pursuant to annual agreements executed by the Minister for Canada responsible for Indians.

> - 5 C. THE ISSUE The jurisdiction of the Tribunal to conduct an inquiry is derived from the Act. The provisions of the Act extend only to those activities falling within the legislative competence of the Federal Government. Section 2 of the Act provides:

2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada ...

(underlining mine).

Accordingly, the issue that is to be determined is a constitutional one. There is no dispute as to the constitutional validity of the statutory provisions of the Act. Rather, the issue is whether the statutory provisions relied upon by the Complainant extend so as to cover the conduct of the Respondent.

> - 6 D. APPLICABLE LAW Section 11(1) of the Canadian Human Rights Act states: 11(1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

The constitutional application of section 11 is determined by the principles applicable to legislative jurisdiction in respect of employer- employee relations. In C. H. R. C. v. Haynes (1983), 46 N. R. 381 at 383, Le Dain, J. stated:

Section 11 of the Canadian Human Rights Act deals with discrimination in employment. It provides that it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment or performing work of equal value.... I agree with counsel that section 11 relates to employer and

employee relations and that its constitutional application is therefore to be determined by the principles applicable to legislative jurisdiction in respect of that matter. (underlining mine).

The powers of Parliament with respect to labour relations were delineated by Estey, J. in Reference re Validity of Indust. Rel. and Disputes Investigation Act (Can.) (" the Stevedoring case"), [1955] S. C. R. 529 att 624, as follows:

> - 7 These authorities establish that there is a jurisdiction in the Parliament of Canada to legislate with respect to labour and labour relations, even though these relations are classified under Property and Civil Rights within the meaning of s. 92(13) of the B. N. A. Act and, therefore, subject to provincial legislation. This jurisdiction of Parliament to so legislate includes those situations in which labour and labour relations are (a) an integral part of or necessarily incidental to the headings enumerated under s. 91; (b) in respect to Dominion Government employees; (c) in respect to works and undertakings under ss. 91(29) and 92(10); (d) in respect of works, undertakings or businesses in Canada but outside of any province."

Counsel for the Complainant and the Commission argued that the activities in question fall under federal jurisdiction by virtue of s. 91 (24). Counsel for the Respondent argued that the activities in question fall under provincial jurisdiction by virtue of s. 93. The relevant sections are as follows:

91. .... the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

24. Indians, and Lands reserved for the Indians. 92. In each Province, the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,

13. Property and Civil Rights in the Province. 93. In and for each Province, the Legislature may exclusively make Laws in relation to Education...

> - 8 In my opinion, it is not necessary to argue that the labour relations in issue fall under provincial jurisdiction by virtue of section 93. The Stevedoring case makes it clear that labour relations prima facie fall within provincial jurisdiction by virtue of s. 92(13). The Parliament of Canada acquires jurisdiction over labour relations only in the four instances listed by Estey, J., and unless Counsel for the Complainant is able to bring the facts of the case within one of those four exceptions, the labour relations in question remain under sole provincial jurisdiction. In my view, therefore, the issue is whether the labour or labour relations in this case are an integral part of, or necessarily incidental to, federal jurisdiction over Indians or Lands reserved for the Indians.

The principles governing legislative jurisdiction in respect of labour relations have been enunciated in numerous cases (Toronto Elec. Commr. v. Snider, [1925] A. C. 396 (P. C.); the Stevedoring case, supra; Commission du Salaire Minimum v. Bell Telephone Co. of Canada, [1966] S. C. R. 767; C. L. R. B., P. S. A. C. v. City of Yellowknife, [1977] 2 S. C. R. 729;

Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S. C. R. 754; Four B Manufacturing v. United Garment Workers, [1980] 1 S. C. R. 1031). In the last>

- 9 mentioned case, Beetz J., commencing at page 1045, summarized the test to be applied as follows:

In my view the established principles relevant to this issue can be summarized very briefly. With respect to labour relations, exclusive provincial 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... (underlining mine)

. . . The functional test is a particular method of applying a more general rule namely, that exclusive 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: the Stevedoring case.

Given this general rule, and assuming for the sake of argument that the functional test is not conclusive for the purposes of this case, the first question which must be answered in order to deal with the appellant's submission is whether the power to regulate the labour relations in issue forms an integral part of primary federal jurisdiction over Indians and Lands reserved for Indians. The second question is whether Parliament has occupied the field by the provisions of the Canada Labour Code.

In the Yellowknife case, Pigeon J. pointed out: In considering this question, one has to bear in mind that it is well settled that jurisdiction over labour matters depends on legislative authority over the operation, not over the person of the employer.

> - 10 It is apparent from the excerpts quoted above that jurisdiction over labour matters (and therefore the applicability of s. 11 of the Canadian Human Rights Act) depends on legislative authority over the operation and not over the person of the employer. Thus, the focus is on the nature of the operation and its normal activities.

While no cases were cited directly on point, Counsel referred to a number of decisions which are useful in identifying the approaches and factors taken into account by the courts in considering the nature of an operation.

In the Four B case, supra, Four B was an Ontario corporation, carrying on the business of sewing shoe uppers under contract for a shoe manufacturing company, the business of the company being conducted on an Indian reserve populated by a band of Indians. All of the corporation's issued shares were held by four brothers, all being members of the Band. The company was in no way owned or controlled by the Band Council which had no share in its profits. At issue in the Supreme Court of Canada was the jurisdiction of the Ontario Labour Relations Board to certify a

bargaining agent with respect to employees of the company's plant on the reserve and to make another order directing the company to re- instate four of its employees.

> - 11 In his judgement, Beetz, J., stated the governing test quoted earlier and then continued at page 1046:

There is nothing about the business or operation of Four B which might allow it to be considered as a Federal business: the sewing of uppers on sport shoes is an ordinary industrial activity which clearly comes under provincial legislative authority for the purposes of labour relations.

Neither the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal

permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. By the traditional and functional test, therefore, the Labour Relations Act applies to the facts of this case, and the Board has jurisdiction.

. . . 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 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

> - 12 regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians. Whether Parliament could regulate them in the exercise of its ancillary powers is a question we do not have to resolve any more than it is desirable to determine in the abstract the ultimate reach of potential federal paramountcy.

In Francis v. Canada Labour Relations Board, [1981] 1 F. C. 225 (C. A.), reversed on other grounds, [1982] S. C. R. 72, the applicants made application for judicial review to set aside a certification order of the C. L. R. B. Heald, J. wrote for himself, but his views on jurisdiction were concurred in by the other two judges. After citing Beetz' views in Four B, supra, he wrote at page 237:

It is accordingly necessary, in my view, applying the functional test adopted by Beetz, J. to determine the nature of the work being performed by the unit of the employees in question. ... these employees are engaged in education administration, the administration of Indian lands and estates, the administration of welfare, the administration of housing, school administration, public works, the administration of an old age home, maintenance of roads, maintenance of schools, maintenance of water and sanitation services, garbage collection, etc. Thus bus drivers, garbage collectors, teachers, carpenters, stenographers, housing clerks, janitors, and road crews comprised, inter alia, the unit of employees in question. In my view, it is correct to characterize the function of this unit generally as being almost entirely concerned with the

administration of the St. Regis Band of Indians and to say that its entire function is governmental in nature and comes under the jurisdiction of the Act.

. . . Based on the powers given to the Band and its Council in the Indian Act as detailed supra and the evidence before us of the exercise of those powers

> - 13 by this Band and its Council, I am satisfied that subject unit of employees is very directly involved in activities closely related to Indian status. At page 1048. of his reasons in the Four B case supra, Mr. Justice Beetz gives examples of the kind of rights which, in his view, would have to be considered as being closely connected with Indian status. ... In my view, these examples relate directly to band administration, having regard to the powers given to the band and council under the Act, and, in my view, fall into the same category as the powers exercised by this Band and its Council as set out supra. However, the factual situation in the Four B case (supra) is completely different from the case at bar. In Four B, four reserve Indians were conducting a commercial business on an Indian reserve. The status and rights of the unit of employees as Indians and as members of the Band were not affected in any way. In the case at bar, the unit of employees in question were directly and continuously concerned with the election of councillors and chiefs, the matter of right to possession of reserve lands, the right of Indians on the reserve to have their children educated in schools on the reserve, the right to welfare when circumstances warrant it, the right to the facilities of the old age home in proper circumstances, etc. The total administration of the Band is continuously concerned with the status and the rights and privileges of the Band Indians. I am thus firmly of the opinion that the labour relations in issue here are "an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians", thus establishing federal legislative competence pursuant to the provisions of subsection 91(24) of The British North America Act, ...

The C. L. R. B. cases of Syndicat des travailleurs de l'enseignment de Louis - Hemon v. Conseil des montagnais du Lac St. Jean, [1985] 1 C. N. L. R. 179, and Manitoba Teachers Society v. Chief, Fort Alexander Reserve (August 23, 1984), affirmed [1984] 1 F. C. 1111, both held that the provisions of

> - 14 the Indian Act are valid and determinative of the jurisdictional issues contained therein. However, while the facts of the two cases are similiar to those of the case at bar, the issue before the Boards was one of jurisdiction as between the federal government and the Band Councils, and not as between the federal and provincial governments. Therefore, I find the cases to be of little assistance to me here.

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E. DECISION The case law is clear that the test to be applied in an issue of this kind is a functional one requiring the Tribunal to determine the nature of the operation of the employer.

An indication of the nature of the operation in this case is found in the list of objects included in the Application for Incorporation of the Respondent. The document states:

1. The objects for which the Society is incorporated are: . . . (c) To accept, administer and control, financially and otherwise all

matters pertaining to the operation of the Qu'Appelle Indian Residential School.

(d) To construct, hold, accept, operate and direct the Qu'Appelle Indian Residential School.

. . . (f) To foster and promote all Indian literature history and arts and to

foster and promote the finest cultural elements and traditions, including language, religion, folk music, dancing, handicrafts, and generally all Indian traditions and make necessary recommendations to the Government of Canada, so that the said cultural elements may be incorporated into the curriculum of the Qu'Appelle Indian Residential School.

> - 16 (g) To manage and control all matters, financial and otherwise,

pertaining to education. . . . Those objects are reiterated in Article 2 of the Council's Constitution. Thus, the Council oversees all aspects of the operation of the School. The School is an Indian residential school. The curriculum of the School is uniquely Indian in that it includes courses in Cree language and in Indian culture.

Since its inception in the 1880's, the school has provided education and residential care to Indian children and Indian children only. In particular, the Council, pursuant to its 1981- 82 financing agreement, was obliged to admit acceptable Indian children living on reserves located in the two Districts previously named. The Districts in question included areas in both Manitoba and Saskatchewan. The Council had discretion to admit other students, but they had to be Indian children, and their admission could not prejudice the admission of Indian children from the named Districts.

In addition to education, the Council provided residence accommodation for the Indian students. Again pursuant to the 1981- 82 financing agreement, the Council was

> - 17 obliged to provide nutrition, accommodation and child care services, such services meeting government standards for these Indian students.

These features distinguish this case from the facts in Four B. We are not here concerned with an ordinary manufacturing business carried on on an Indian reserve. Rather, the School in question

is engaged in the provision of an education system designed to meet the needs of its Indian beneficiaries.

Heald, J., in Francis, supra, found that with respect to the employees in question, their function was concerned with the administration of the Indian band and was governmental in nature, and therefore the labor relations in question fell under federal jurisdiction. He found that the administration of the band was "continuously concerned with the status and the rights and the privileges of the band Indians". An important component of that administration was education administration. Indeed, it is my opinion that education administration is even more concerned with rights and status and privileges of Indians than a number of the other operations referred to by Heald, J., such as transit and garbage collection systems.

The fact that in this case the Council's function is limited to education administration and that it is a

> - 18 provincially incorporated charitable society and not a band, does not make its function any less concerned with Indian rights, status or privileges. In fact, the constitution and by- laws of the Council provide that "the rights of membership shall be exercised through the band council.... Membership shall be in the band name or in the name of the Regina Indian Society, and the nominee shall be the representative of the band or the Regina Indian Society". This makes it clear that the Council has been established as a form of Indian self- government in the field of education.

The fact that the School is designed and operated for Indians, governed solely by Indians, that its enrollment is limited to Indians, that the stated objects are to promote Indian tradition and that the curriculum includes Indian language and culture all serve to identify the very "Indianness" of the operation and link it to Indian rights, status and privileges.

Applying the test formulated in Four B, supra, I am of the opinion that the function of the Council and School falls within s. 91(24) of the Constitution Act, 1867. Thus, the power to regulate the labor relations between the Council and its employees forms an integral part of primary federal jurisdiction over Indians. Because the constitutional ambit of s. 11 of The Human Rights Act is determined by jurisdiction

> - 19 over the labor relations at issue, per Le Dain in C. H. R. C. v. Haynes, supra, I am of the opinion that this Tribunal has jurisdiction to hear and determine the complaint of the P. S. A. C.

> - 20 F. SUPPLEMENTARY MOTION At the conclusion of his submission, counsel for the Commission moved that, should this Tribunal find that it has jurisdiction to hear the matter in question, that the Tribunal exercise its discretion under s. 40(1) of the Act to give notice to the Minister for Indian Affairs of this proceeding with the right to appear and make submissions as an interested party on the merits of the case. Counsel for both the Complainant and the Respondent did not object to the motion. In as much as the Minister of Indian Affairs funds the School, I find that he may have an interest in these proceedings. Accordingly, the motion will be granted.

DATED this 11 day of September, A. D. 1986.