Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

United Food and Commercial Workers Canada Union, Local 864,

applicant,

and

Waycobah First Nation,

employer.

Board File: 30457-C
Neutral Citation: 2015 CIRB **792**
October 2, 2015

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Richard Brabander and Norman Rivard, Members. A hearing was held on October 21–23, 2014, in Halifax, Nova Scotia. Final argument took place by way of videoconference on November 10, 2014. The parties filed supplemental legal submissions in April, 2015.

Appearances

Mr. David C. Wallbridge and Ms. Kelly McMillan, for the United Food and Commercial Workers Canada Union, Local 864;
Ms. Bryna Fraser Hatt and Mr. Richard Dunlop, for Waycobah First Nation.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I. Nature of the Application

[1] On May 20, 2014, the Board received a certification application from the United Food and Commercial Workers Canada Union, Local 864 (UFCW) seeking to represent the following bargaining unit:

> All employees including, deckhands, Captains and Mates employed by Waycobah First Nation on fishing vessels, excluding office staff and managers.

[2] In its June 3, 2014 letter, the UFCW clarified that its proposed bargaining unit included elver fishers:

> In light of this, the Union asks to amend the proposed bargaining unit description to more clearly include the Elver Fishers. The proposed unit should be as follows:
>
> > All employees of Waycobah First Nation working as shore based fishers and deck hands, Captains and Mates on fishing vessels, excluding office staff and managers.

[3] The respondent employer, Waycobah First Nation (Waycobah), contested this Board's jurisdiction on three grounds: i) the *Code* did not apply to its fishing activities; ii) even if a First Nations Band can be a federal undertaking, Waycobah's Fishery was neither vital nor essential to it; and iii) Waycobah's fishing activities had no connection to any of its established treaty rights, which are still being negotiated.

[4] For the reasons which follow, the Board has concluded that Nova Scotia has jurisdiction over the labour relations at Waycobah's Fishery.

II. Facts

[5] The Board heard three days of oral evidence in Halifax from October 21–23, 2014. That evidence described the significant growth in Waycobah's Fishery, an expansion which increased after the Supreme Court of Canada's (SCC) decisions in the two *Marshall* cases, *infra*. The Board heard final argument via videoconference on November 10, 2014.

[6] During the Board's deliberations, it advised the parties that it would temporarily hold off finalizing its decision in anticipation of receiving the Federal Court of Appeal's judicial review decision of the Board's decision in *Nishnawbe-Aski Police Services Board*, 2013 CIRB 701 (FCA file no. A-432-13). Argument for that judicial review had taken place in September, 2014. However, since the Federal Court of Appeal's decision still remains pending, the Board ultimately decided it was preferable to issue its decision based on the case law submitted to it by the parties.

[7] In the spring of 2015, the UFCW advised the Board of the Federal Court of Canada's decision in *Canada (Attorney General)* v. *Munsee-Delaware Nation*, 2015 FC 366 (*Munsee*), a

decision which overturned one of the cases submitted to the Board. Each party provided supplemental legal submissions on the implications of *Munsee*.

A. Waycobah

1. Fishing Operations Overview

[8] Waycobah is a Mi'kmaq community located on Cape Breton Island in Nova Scotia. It has approximately 943 band members.

[9] In the 1990's, Waycobah had a limited involvement in fishing. Starting in or about 2001, Waycobah's fishing activities increased significantly. Waycobah's website at the time of the Board's hearing described its Fishery *(*Ex-1; Tab 7):

> Waycobah's Fisheries consists of two divisions: the commercial and the "Food, Social, and Ceremonial" fisheries.
>
> Since the Marshall Decision, Waycobah First Nation has seen a steady growth in its commercial assets. The community now has two lobster licenses, shrimp trap and trawl licenses, three crab quotas, groundfish quotas, and an active elver fishery. We also have inactive licenses for tuna, whelk, urchin, mackerel, and herring. The result of this has seen significant economic benefits to the community. As well, the long term goal is to provide the necessary training and experience to allow community members to take over the vessels as Captains and First Mates. In the near future, Waycobah First Nation will strive to divest itself of the distant fishery access such as groundfish and use the monies received to acquire near shore enterprises such as lobster and crab. This rearrangement will, in the long term, provide more jobs at a higher skill level for Waycobah Community members.
>
> Waycobah First Nation now employs approximately 35 community members in the commercial fishery. Also, three individuals work in the guardian program helping the community access its rights under the Food, Social, and Ceremonial agreements.
>
> [*sic*]

[10] The parties agreed that Waycobah itself employed the fishers. Moreover, Waycobah was the contracting party with the Crown for all important transactions. Waycobah owned the assets the Crown would later transfer to it under various agreements.

[11] Waycobah's Chief, Mr. Rod Googoo, testified that the Fishery brought in revenue for the Band's use. Certain departments, such as those for Social Development and Education, which were not commercial businesses, lost money. Waycobah's Fishery and its revenues helped offset those losses.

[12] While Waycobah suggested that a separate unincorporated “Fisheries Department” operated its commercial fishery, the evidence of any real separation from the Band itself was unconvincing. All of Waycobah’s internal documents, as well as its external agreements, indicated that Waycobah itself was the sole contracting party when it came to its commercial Fishery.

[13] The evidence showed that the Chief and Council made the ultimate decisions for the Fishery. This factual finding in no way downplays the evident expertise certain Waycobah managers have in managing the Fishery. Almost any organization relies on managers to run operations on a day-to-day basis. But that does not make the managers the actual contracting parties or create a separate operating entity.

[14] Ultimately, the Board’s conclusion on jurisdiction would not change whether Waycobah operated the Fishery directly, or used a separate entity to carry out the activity, *infra*.

[15] Waycobah is clearly a Band which exercises certain powers granted to it under the *Indian Act*, R.S.C., 1985, c. I-5 (*Indian act*). Band members elect Waycobah’s Chief and Councillors.

[16] The Band includes the Fishery’s assets in its financial statements; they have been used on occasion as security for loans. The Band’s Finance Department works with the Director of Fisheries, Mr. Phil Drinnan, to assist with the Fishery budget. Mr. Drinnan, who reports to the CEO, Mr. Reg Hurst, is just one member of the senior management team at Waycobah.

[17] The Fishery’s office is found in the same building as the Band’s office.

[18] The fishers who live on the reserve are subject to the same human resources policy which applies to other Band employees. Waycobah insisted that its Drug Testing Policy apply to these fishers, even when they might be working with another commercial fishing entity as part of a joint arrangement.

[19] Waycobah recently adopted a Governance Policy, which was designed to separate politics from the hard decisions administrators must make when operating various Band departments. The Board accepts the UFCW’s characterization that there is no clear division in the Governance Policy between “governance” and “commercial” activities, despite Waycobah’s witness’ suggestions otherwise.

[20] Indeed, while it was suggested that Chief and Council were really a "Board of Directors" for the Fishery, such a situation found no support in the Governance Policy. The evidence confirmed instead that, while Waycobah allows its administrators to do their jobs, no major decision involving its legal obligations could be made without the approval of Chief and Council.

[21] The Minutes produced from various Chief and Council meetings further supported this characterization.

[22] All the key contracts and agreements filed in evidence were signed by Waycobah, as opposed to by the "Fishery" or any Waycobah managers. Waycobah has signed numerous agreements with the Crown which provided for a significant transfer of commercial fishing assets, *infra*.

[23] A brief historical review provides context for the expansion of Waycobah's Fishery.

2. The *Marshall* Decisions

[24] Waycobah's Fishery expanded significantly following the SCC's two decisions concerning Mr. Donald Marshall's treaty-based fishing rights.

a. *Marshall #1*

[25] The SCC's majority decision in *R.* v. *Marshall*, [1999] 3 SCR 456 (*Marshall #1*) acquitted Mr. Marshall, who had been charged with the following three offences:

> Application to the Facts of this Case
>
> [62] The appellant is charged with three offences: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. These acts took place at Pomquet Harbour, Antigonish County. For Marshall to have satisfied the regulations, he was required to secure a licence under either the *Fishery (General) Regulations*, SOR/93-53, the *Maritime Provinces Fishery Regulations*, SOR/93-55, or the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332.

[26] The SCC's majority decision concluded that the fishing prohibitions were inconsistent with Mr. Marshall's treaty rights:

> Disposition
>
> [67] The constitutional question stated by the Chief Justice on February 9, 1998, as follows:
>
> > Are the prohibitions on catching and retaining fish without a licence, on fishing during the close time, and on the unlicensed sale of fish, contained in ss. 4(1)(*a*)

> and 20 of the *Maritime Provinces Fishery Regulations* and s. 35(2) of the *Fishery (General) Regulations*, inconsistent with the treaty rights of the appellant contained in the Mi'kmaq Treaties of 1760-61 and therefore of no force or effect or application to him, by virtue of ss. 35(1) and 52 of the *Constitution Act, 1982*?
>
> should be answered in the affirmative. I would therefore allow the appeal and order an acquittal on all charges.

[27] The SCC concluded the licensing system interfered with Mr. Marshall's treaty right to fish:

> [64] Cory J. in *Badger*, *supra*, at para. 79, found that the test for infringement under s. 35(1) of the *Constitution Act, 1982* was the same for both aboriginal and treaty rights, and thus the words of Lamer C.J. in *Adams*, although in relation to the infringement of aboriginal rights, are equally applicable here. There was nothing at that time which provided the Crown officials with the "sufficient directives" necessary to ensure that the appellant's treaty rights would be respected. To paraphrase *Adams*, at para. 51, under the applicable regulatory regime, the appellant's exercise of his treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Mi'kmaq treaty rights were not accommodated in the Regulations because, presumably, the Crown's position was, and continues to be, that no such treaty rights existed. In the circumstances, the purported regulatory prohibitions against fishing without a licence (*Maritime Provinces Fishery Regulations*, s. 4(1)(*a*)) and of selling eels without a licence (*Fishery (General) Regulations*, s. 35(2)) do *prima facie* infringe the appellant's treaty rights under the Treaties of 1760-61 and are inoperative against the appellant unless justified under the *Badger* test.
>
> [65] Further, the appellant was charged with fishing during the close season with improper nets, contrary to s. 20 of the *Maritime Provinces Fishery Regulations.* Such a regulation is also a *prima facie* infringement, as noted by Cory J. in *Badger*, *supra*, at para. 90: "This Court has held on numerous occasions that there can be no limitation on the method, timing and extent of Indian hunting under a Treaty", apart, I would add, from a treaty limitation to that effect.
>
> [66] **The appellant caught and sold the eels to support himself and his wife. Accordingly, the close season and the imposition of a discretionary licensing system would, if enforced, interfere with the appellant's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance.** In the absence of any justification of the regulatory prohibitions, the appellant is entitled to an acquittal.
>
> (emphasis added)

b. *Marshall #2*

[28] In *R.* v. *Marshall*, [1999] 3 SCR 533 (*Marshall #2*), the SCC heard a motion for a rehearing. It summarized the findings in its previous decision in *Marshall #1*:

> [4] In its majority judgment, the Court acquitted the appellant of charges arising out of catching 463 pounds of eel and selling them for $787.10. The acquittal was based on a treaty made with the British in 1760, and more particularly, on the oral terms reflected in documents made by the British at the time of the negotiations but recorded incompletely in the "truckhouse" clause of the written treaty. **The treaty right permits the Mi'kmaq**

community to work for a living through continuing access to fish and wildlife to trade for "necessaries", which a majority of the Court interpreted as "food, clothing and housing, supplemented by a few amenities".

(emphasis added)

[29] The SCC commented that its decision in *Marshall #1* affirmed that the federal government could regulate a treaty right:

> [21] The fact the Crown elected not to try to justify a closed season on the eel fishery at issue in this case cannot be generalized, as the Coalition's question implies, to a conclusion that closed seasons can never be imposed as part of the government's regulation of the Mi'kmaq limited commercial "right to fish". A "closed season" is clearly a potentially available management tool, but its application to treaty rights will have to be justified for conservation or other purposes. In the absence of such justification, an accused who establishes a treaty right is ordinarily allowed to exercise it. As suggested in the expert evidence filed on this motion by the Union of New Brunswick Indians, the establishment of a closed season may raise very different conservation and other issues in the eel fishery than it does in relation to other species such as salmon, crab, cod or lobster, or for that matter, to moose and other wildlife. The complexities and techniques of fish and wildlife management vary from species to species and restrictions will likely have to be justified on a species-by-species basis. Evidence supporting closure of the wild salmon fishery is not necessarily transferable to justify closure of an eel fishery.
>
> [22] Resource conservation and management and allocation of the permissible catch inevitably raise matters of considerable complexity both for Mi'kmaq peoples who seek to work for a living under the protection of the treaty right, and for governments who seek to justify the regulation of that treaty right. The factual context, as this case shows, is of great importance, and the merits of the government's justification may vary from resource to resource, species to species, community to community and time to time. As this and other courts have pointed out on many occasions, the process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation. La Forest J. emphasized in *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 (a case cited in the September 17, 1999 majority decision), at para. 207:
>
> > On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.
>
> [23] The various governmental, aboriginal and other interests are not, of course, obliged to reach an agreement. In the absence of a mutually satisfactory solution, the courts will resolve the points of conflict as they arise case by case. The decision in this particular prosecution is authority only for the matters adjudicated upon. The acquittal ought not to be set aside to allow the Coalition to address new issues that were neither raised by the parties nor determined by the Court in the September 17, 1999 majority judgment.

3. *Marshall* Response Initiative

[30] As a result of the *Marshall* decisions, the Crown implemented the *Marshall* Response Initiative (MRI) (Ex-1; Tab 17) and noted that its goal was to improve fishery access for First Nations:

> The Supreme Court of Canada (SCC), in the September 17, 1999 *R.* v. *Marshall* Decision, affirmed a Treaty right to hunt, fish and gather in pursuit of a moderate livelihood, stemming from Peace and Friendship Treaties of 1760 and 1761. The Decision affected 34 Mi'kmaq and Maliseet First Nations in New Brunswick, Prince Edward Island, Nova Scotia, and the Gaspé region of Quebec.
>
> **In response to the SCC Decision, Fisheries and Oceans Canada (DFO) implemented the Initial *Marshall* Response Initiative. This was a one-year program approved on January 25, 2000 in the amount of $159.6M to negotiate Interim Fisheries Agreements (IFAs) that provided increased First Nations (FNs) access to the commercial fishery on an immediate basis.** In 2001, DFO introduced the Longer-term *Marshall* Response Initiative (LT-MRI) to build upon the Initial *Marshall* Response Initiative. Funding of $430.2M was approved to negotiate Fisheries Agreements until March 31, 2004. In January 2004, DFO received approval for a two-year extension to the original timeframe (April 2001 to March 2004) to March 2006 providing the Department with additional time to fulfill commitments made in the Fisheries Agreements. This initiative was subsequently extended to March 31, 2007. There was no additional funding provided with these extensions.
>
> (emphasis added)

[31] The Board heard evidence of First Nations' continuing concerns whether the MRI had any connection with, or otherwise impacted, their treaty rights as described in *Marshall*. The relevance of this point from the parties' perspective in the instant case is that fishing conducted pursuant to those treaty rights would fall under this Board's jurisdiction.

[32] A March 28, 2001 letter from the then Minister of Fisheries and Oceans, Mr. Herb Dhaliwal (Ex-5; Tab 22), responded to the First Nations' concerns:

> The press conference of February 9, 2001, that Minister Nault and I attended did not state that Mr. MacKenzie had the mandate to negotiate rights-based fisheries access in the short-term. That press conference recognized that the Treaty issues, including rights-based access to natural resources, would fall under the mandate of Minister Nault's Department. **Given that the negotiations surrounding the Treaty issues typically take a longer period of time, we want to ensure that First Nations are able to benefit from increased access immediately. James Mackenzie will, therefore, negotiate immediate practical access to the fishery in order to provide fishing opportunities to First Nations.**
>
> The meeting held in Truro between Mr. Mackenzie and Chief Paul of the Millbrook Band on February 23, 2001, could not centre on rights-based fishing access as this mandate falls under the larger Treaty negotiation process through the Department of Indian Affairs and Northern Development. **What Mr. Mackenzie is attempting to negotiate is incremental fishing access to the Bands. He has a three-year mandate, while the large scale Treaty**

> **negotiations take place.** I understand your desire to proceed in negotiations regarding rights-based natural resource issues, but that process is not part of the mandate of Fisheries and Oceans Canada (DFO).
>
> (emphasis added)

[33] In 2007, a Framework Agreement called the "Made-in-Nova Scotia Process," came into existence. That 2007 Framework Agreement, a process which continues today, involves negotiations about many First Nations' matters, including–it was suggested–fishing rights. The Board heard evidence of First Nations' continued concern on whether the expansion in commercial fishing opportunities had any impact on their treaty rights. MRI contracts negotiated between the Crown and Waycobah expressly addressed these concerns about treaty rights.

[34] In order to implement the MRI's goal of increasing First Nations access to the fishery, the Crown purchased commercial fishing assets, such as fishing licences, boats and equipment, from private individuals and businesses already working in the commercial fishery. This process ensured that the overall fishing conservation targets remained in place, while providing assets and access to First Nations like Waycobah.

[35] Under the MRI, the Crown, as represented by the Department of Fisheries and Oceans Canada (DFO), executed various agreements with First Nations to transfer the purchased assets. For example, DFO and Waycobah executed a July 31, 2001 Fisheries Agreement (Ex-1; Tab 22) to improve access to the fishery.

[36] The introductory clauses, as well as the Agreement's purpose and intention, demonstrate that the goal was to improve Waycobah's access to the fishery and to assist with "capacity building":

> **WHEREAS DFO continues to be committed to providing access to fisheries resources for the Band**;
>
> AND WHEREAS the Parties remain committed to a relationship based on mutual respect and understanding and accept that this Agreement is the extension of an existing process;
>
> AND WHEREAS the Parties acknowledge the importance of conservation and protection of the fisheries resources;
>
> NOW THEREFORE the Parties agree as follows:

Purpose and Intention

1(1) In light of the Supreme Court of Canada's decision in *R.* v. *Marshall* and other case law and considerations, the purpose of this Agreement is to continue the process established by DFO for providing increased access to fisheries resources by the Band.

1(2) **Under this Agreement, DFO shall provide the Band with access to fisheries and assistance in capacity building.**

(emphasis added)

[37] The Agreement contained significant "without prejudice" language regarding the issue of treaty rights, as illustrated by article 3:

Legal Interpretations

3(1) This Agreement is intended, during the period it is in force and effect, to be binding upon the Parties in respect of the matters dealt with in this Agreement and is without prejudice to the positions of the Parties with respect to Aboriginal or treaty rights.

3(2) For greater certainty, the Parties agree that this Agreement is not and shall not be interpreted to be an extinguishment of a treaty or Aboriginal right.

3(3) **This Agreement shall not serve to define Aboriginal or treaty rights, nor shall it be interpreted as evidence of the nature or extent of such rights. This Agreement is made without prejudice to the positions of the Parties with respect to Aboriginal or treaty rights, or to the positions of either Party in any future negotiations. For greater certainty, nothing in this Agreement precludes a party from taking positions in future negotiations which differ from the terms of this Agreement.**

3(4) This Agreement is not intended and shall not be construed or interpreted to be an agreement or a treaty within the meaning of section 35 of the *Constitution Act*, *1982*.

3(5) This Agreement is not intended to, and shall not be construed or interpreted to, affect any Aboriginal or treaty rights of any other Aboriginal group.

(emphasis added)

[38] DFO provided significant resources to Waycobah as part of the MRI program. The Agreement referenced a fishery for food, social and ceremonial purposes, as well as a commercial fishery :

Fisheries Access

4(1) **DFO shall provide the Band with access to fisheries resources for food, social and ceremonial purposes through a communal fishing licence in respect of the species, stocks and quantities, and upon the terms and conditions, specified in Scheduled A.**

4(2) **DFO shall provide the Band with access to fisheries resources for the purpose of a commercial fishery through a communal fishing licence in respect of the species, stocks and quantities, and upon the terms and conditions specified in Schedule B.**

4(3) The Band agrees that during the term of this Agreement, fisheries access for the Band is limited to the access described in Schedules A and B.

(emphasis added)

[39] Pursuant to article 5 of the Agreement, DFO agreed to provide multi-year funding and confirmed that all assets it provided became the property of Waycobah:

Vessels, Gear and Capacity Building

5(1) In an effort to assist the Band in capacity building in the fishery, DFO agrees to provide multi-year funding, in accordance with Schedule C for:

(a) facilitating the provision of fishing vessels, as described in Appendix 2 of Schedule C;

(b) the construction of a multi-purpose fishing vessel, as described in Appendix 3 of Schedule C;

(c) the construction of a Marine Fisheries Service Centre, as described in Appendix 3 of Schedule C;

(d) training in navigation and in the fishery, as described in Appendix 3 of Schedule C;

(e) enhancement of on-reserve docking facilities, as described in Appendix 3 of Schedule C; and

(f) a science/eel research program, as described in Appendix 3 of Schedule C; and

(g) habitat enhancement and other projects and activities, as described in Appendix 3 to Schedule C.

5(2) **Any fishing vessels or gear provided under this Agreement are to be the property of the Band.**

5(3) The band is responsible for any costs associated with maintenance, repair and replacement of fishing vessels, gear and other assets provided under this Agreement.

(emphasis added)

[40] During the MRI's timeframe, Waycobah received a significant number of fishing licences and other assets.

[41] In a table entitled "Commercial Communal Licence Holdings" (Ex-1; Tab 25), Waycobah listed its licences. In the 1995–1998 period predating the SCC's *Marshall* decisions, Waycobah had obtained four fishing licences from DFO: two for sea urchin, one for snow crab and the other for shrimp.

[42] In the 2001–2003 period, in what the table described as the "Licences Provided by DFO through the Marshall Response Initiative", Waycobah acquired another nine licences for species such as lobster, snow crab, ground fish and shrimp. The table also included a handwritten annotation for a 2011 Lobster Licence.

[43] Waycobah's fishing licences are quite similar to those used in the commercial fishing industry. For example, regular commercial fishing licences define the quota, the season and the fishing area. Waycobah's licences, on the other hand, do have some unique features, as illustrated by its 2014 Lobster Licence (Ex-2; Tab 37).

[44] That Lobster Licence is issued under the authority of the *Fisheries Act*, R.S.C., 1985 c. F-14 and section 4(1) of the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332. This legislation required either the Band or the Minister to designate the native fishers who would fish under the Lobster Licence:

Designated fishers
Individuals fishing under the authority of this licence shall have proof of designation. Designations are personal and non-transferable.

[45] The MRI ended in 2007. A DFO document described the program's impact (Ex-1; Tab 15):

September 17, 2009, marks the 10th anniversary of the Supreme Court of Canada's (SCC) *Marshall* decision, which affirmed a treaty right to hunt, fish and gather in pursuit of a "moderate livelihood" arising out of Peace and Friendship Treaties of 1760 and 1761. In the ten years since the decision, Fisheries and Oceans Canada (DFO) has negotiated fishing agreements and undertaken a variety of initiatives to support the participation of the 34 affected Mi'kmaq and Maliseet First Nations in the Maritimes and the Gaspé region of Quebec in commercial fisheries.

From 2000 to 2007, following the SCC decision, DFO invested almost $600 million in the *Marshall* Response Initiative (MRI) and reached agreements with 32 of the 34 eligible First Nations. This initiative, which ended March 31, 2007, provided significant support for increased commercial fisheries access (including vessels and gear, and commercial fisheries infrastructure) and internal governance development, and has become a significant driver for economic development in these communities.

As a result of the MRI, the Mi'kmaq and Maliseet First Nations:

- hold approximately 1,300 communal commercial fishing licences and constituting 520 fishing enterprises.
- are provided with a potential economic return that exceeds $45 million annually – a significant increase over the estimated $15 million generated in 2000.
- have more than 1,000 community members earning income from fishing.
- have had an estimated 2,000 First Nations community members receive training or mentoring that covers a broad range of practical fishing skills, including safety at sea, basic seamanship, watch-keeping duties, other harvest-related tasks, vessel maintenance and winterization.

(emphasis added)

4. Atlantic Integrated Commercial Fishing Initiative

[46] After the MRI ended in 2007, the Crown implemented the Atlantic Integrated Commercial Fishing Initiative (AICFI) in order to sustain the MRI's substantial investments. DFO described AICFI and its goal of sustaining the commercial fishery built under the MRI (Ex-1; Tab 18):

1.1 Program Background

The Atlantic Integrated Commercial Fisheries Initiative (AICFI or the Initiative) was launched in 2007 as an important Department of Fisheries and Oceans Canada (DFO or the Department) Transfer Payment program to sustain the substantive public investment made to the Mi'kmaq and Maliseet First Nations (MMFNs) commercial fishery through the Marshall Response Initiative (MRI), and to work with MMFNs to continue to build their capacity to manage successful commercial fishing enterprises and participate in the co-management of the integrated commercial fisheries along with other commercial harvesters. The Initiative affects 34 MMFNs in Nova Scotia, New Brunswick, Prince Edward Island and the Gaspé Region of Quebec. The program is designed to run for five fiscal years from 2007/08 to 2011/12 and has a total budget of $55.1 million.

(emphasis added)

[47] Waycobah, just as it had with the MRI, participated in AICFI. AICFI, among other things, provided substantial financial resources to support Waycobah's fishery. The UFCW referred the Board to various AICFI Agreements between Waycobah and DFO (Ex 2; Tabs 44–49).

[48] For example, a September, 2011 Agreement (Ex-2; Tab 44) provided Waycobah with funding of $119,656 to assist its “Commercial Fishing Enterprise (CFE)”:

> 1. Purpose
>
> 1.1 **The purpose of this Agreement is to**:
>
> (a) **to develop sound Fisheries Management practices as an integral part of developing a successful Commercial Fishing Enterprise (CFE) for Atlantic First Nations in Nova Scotia, New Brunswick, Prince Edward Island and the Gaspé Region of Québec**; and
>
> (b) set out the arrangements by which DFO will contribute funding to the RECIPIENT to support the RECIPIENT in carrying out the Activities.

(emphasis added)

[49] Just as in the MRI Agreements, the parties included language about Aboriginal treaty rights:

> 2. Interpretation
>
> 2.1. **The Parties agree that this Agreement**:
>
> **(a) does not, and is not intended to, define or extinguish any Aboriginal or treaty rights and is not evidence of the nature or extent of any Aboriginal or treaty rights;**
>
> **(b) is made without prejudice to the positions taken by either Party with respect to Aboriginal or treaty rights;**
>
> **(c) is not a land claims agreement or treaty within the meaning of section 35 of the *Constitution Act, 1982*; and**
>
> **(d) does not affect any Aboriginal or treaty rights of any other Aboriginal group.**

(emphasis added)

[50] Article 5 of the Agreement sets out DFO’s financial contribution amount:

> 5. Contribution Amount
>
> 5.1 The RECIPIENT will act as administrator of the Contribution.
>
> 5.2 DFO will contribute to the RECIPENT an amount of up to ONE HUNDRED NINETEEN THOUSAND SIX HUNDRED AND FIFTY-SIX dollars ($119,656.00) in Fiscal Year 2011-12 on the condition that these funds will be used in accordance with the terms and conditions of this Agreement.

[51] Other AICFI Agreements between Waycobah and DFO found at Ex-2; Tabs 45–49 note futher financial contributions to Waycobah's Fishery in ensuing years in varying amounts: i) $95,130; ii) $19,905; iii) $215,271; iv) $14,400 and v) $50,000.

5. Waycobah's Agreements with other Commercial Fishing Entities

[52] The UFCW noted that Waycobah could contract out its fishing licence quotas to third parties. Waycobah's CEO, Mr. Hurst, explained that this sometimes occurred if the Fishery did not have the expertise to fish certain of the licences itself.

[53] The Chief and Council Minutes (Ex-3; Tabs 54–56) provide several examples of contracting out fishing licences. For example, in 2012, Waycobah entered into an agreement with a third party to "work the elvers' license". The third party agreed to hire between 4 and 10 Band members to help with the work. Council approved the negotiation of a similar, but partial, agreement covering the elvers fishery on March 20, 2014.

[54] Waycobah passed a resolution and entered into a 2014 agreement (Premium Agreement) with Premium Seafoods (Premium). Premium leased one of Waycobah's boats, the M/V Pielaw, and helped fish Waycobah's three snow crab quotas (Ex-5; Tab 19). A boat is not limited to fishing just one licence.

[55] The Premium Agreement included a provision providing up to four employment opportunities for Waycobah native fishers. Those individuals would remain Waycobah employees, even though Premium paid them. The crew would be composed of both Waycobah and non-native fishers.

[56] Premium further agreed to cooperate with Waycobah's enforcement of its Drug Testing Policy (article 35).

[57] Premium provided the captain for the leased vessel. Premium is subject to provincial laws. Fishers are excluded from certain provincial employment standards provisions due to the irregular hours of their work.

6. Waycobah Commercial Fishery Development Strategy (Ex-7; Tab 1)

[58] In working copies of Waycobah's Strategic Operating and Development Plan 2014–2015, it described its plans for the Fishery:

> **Waycobah First Nation has embarked on an ambitious program to expand its economic base. We anticipate significant expansion of our businesses in the areas of fisheries, tourism and service industries in the Cape Breton area over the next few years.** Our plan of action is based on developing capacity within the community, with skill development through training programs, on the job training and partnership with other businesses in these industry sectors. This plan has proved successful to date where we've created over 70 new jobs for our community.
>
> (page 3; emphasis added)

[59] One of the Fishery's goals involved job creation and people development:

> (2) Commercial fisheries
>
> At present Waycobah First Nation is close to maximizing its fishing opportunities with its high value commercial fisheries access, i.e. Snow Crab and Shrimp. There are exceptions and challenges to maximizing our other fisheries and a need to expand access in other fisheries. **Waycobah First Nation has chosen a middle road on fisheries development with a combined emphasis on profit and job creation and people development. As can be seen from our vision statement (attached) we are committed to the development of our people as much as development of income potential.** For that reason and because most high value fisheries are fully subscribed with inhibitory initial investment levels, Waycobah would like to focus on a number of small scale fisheries over the next few years as they can provide an attractive training and development opportunity for our fishers while still adding to the economic base of the community. …
>
> (emphasis added)

III. Issues

[60] The Board must determine three issues arising from the above constitutional facts:

> a) Is the Fishery a federal undertaking?;
>
> b) In the alternative, is the Fishery vital, essential or integral to Waycobah's federal undertaking?; and
>
> c) In the further alternative, are Waycobah's fishing activities subject to the *Code* as a result of treaty rights?

IV. Parties' Positions

[61] The parties provided helpful final arguments, as well as supplemental submissions in the Spring of 2015. Their differing viewpoints arise from the application of the well-known "functional test", *infra*. They disagree whether the functional test should focus on Waycobah itself or on the Fishery.

A. UFCW

[62] The UFCW urged the Board to find it had jurisdiction for three separate reasons: i) Waycobah's Fishery formed part of the Band's federal undertaking; ii) alternatively, the Fishery was vital, essential and/or integral to the Band's federal undertaking; or iii) the Fishery was being carried out pursuant to Aboriginal treaty rights.

[63] For its main argument, the UFCW argued that no distinction existed between Waycobah and the Fishery. The Fishery was wholly integrated into Waycobah's ongoing activities; there was no severable operation being carried out. The UFCW urged the Board to examine Waycobah as a going concern, rather than carving out its constituent activities. In the UFCW's view, Waycobah's operation of the Fishery fell within section 69 of the *Indian Act*, which concerned the Band's right to spend "its revenue moneys".

[64] Even if the Board examined the Fishery as a separate entity, the UFCW emphasized that revenue from the Fishery, an activity which resulted from specific federal programs designed to assist First Nations economically, allowed Waycobah to carry out its vital governance functions on the reserve.

[65] In its supplemental submissions filed in April, 2015, the UFCW reiterated that the Board must apply the functional test to Waycobah as a whole when deciding the jurisdictional question. In its view, it would be wrong to focus solely on an internal department or activity.

[66] Instead, since a Band Council is a federal undertaking, the UFCW argued that all employees directly engaged by Waycobah fell within federal jurisdiction. This occurred due to Waycobah exercising its rights, as conferred by the *Indian Act,* when dealing with its own employees, be they fishers or administrative employees.

[67] It was this direct employment relationship between Waycobah and the fishers, something which did not exist in other recent cases analyzing the extent of federal jurisdiction over First Nations' labour relations, *infra*, which distinguished the current scenario.

[68] The UFCW reminded the Board that the Fishery was not a discrete unit at Waycobah, but was instead fully integrated in several ways: i) Waycobah owned the fishing vessels and licences; ii) Waycobah's finance department handled the Fishery's budget and insurance; iii) fishing revenues were used for Waycobah's social programs and housing; iv) the Fishery's offices were located in the main Band building; and v) Chief and Counsel were ultimately

responsible for all key decisions impacting the Fishery, including which Band members would be hired and designated for fishing positions.

B. Waycobah

[69] Waycobah emphasized that the Nova Scotia *Trade Union Act*, R.S., c. 475, s. 1, regulated the working conditions of that province's fishers. Waycobah's fishers were not involved in any governance activity when working off the reserve in the coastal areas where the various licences give them a right to fish.

[70] In Waycobah's view, it is the act of fishing which is central to any legal analysis, rather than the fact that a Band may be involved in, or benefitting from, the activity.

[71] Waycobah emphasized that the fishing does not take place on the reserve. Moreover, the native fishers work with non-native fishers on the same vessels. The licensing system, with a few exceptions, was identical for Waycobah fishers and non-native commercial fishers. For example, a license is for a specific type of fish and quota, whether the fisher is native or non-native.

[72] In Waycobah's view, the entity to which the Board must apply the functional test is the Fishery, as opposed to the Band as a whole. The fact Waycobah may be involved in an activity does not automatically make that activity federal. Moreover, Waycobah emphasized that commercial fishing is not integral to a Band's governance functions.

[73] Waycobah suggested that Chief and Council do not run the Fishery. While they clearly have some involvement, it is instead the Band's administrative management team which operates the Fishery, as well as other commercial operations. The CEO noted that while he keeps Chief and Council informed about the Fishery, they generally took a hands-off approach and virtually always approved his recommendations.

[74] In this regard, Waycobah reminded the Board that a federal undertaking can carry on more than one business. As a result, the Fishery, which has no relationship with a Band's governance function, would remain subject to provincial jurisdiction.

[75] Waycobah referred to sections 81 and 83 in the *Indian Act* to describe the extent of its federal undertaking. Those sections do not refer to off-reserve fishing or other commercial businesses. Conversely, on-reserve policing, being directly mentioned in the *Indian Act*, would constitute part of Waycobah's governance function.

[76] Waycobah argued that the Fishery was not vital, essential or integral to the Band. Waycobah existed before it engaged in commercial fishing and it would continue to exist, even if it completely stopped its commercial fishing activities.

[77] Waycobah also argued that the UFCW had failed to demonstrate that the Fishery constituted a rights-based treaty fishery. The focus of the Crown's various programs was to provide access to the commercial fishery. A commercial fishery was quite different from a treaty-based fishery designed to provide for a moderate livelihood.

[78] Waycobah noted that both the First Nations and the Crown accepted that their various fishing agreements were signed without prejudice to any treaty rights.

[79] In its supplemental April, 2015 submission, Waycobah argued that what is in essence a commercial fishery cannot fall within this Board's jurisdiction. It noted that the fishers, who include both native and non-natives, work in a commercial fishery whose activities all occur off the reserve and Indian lands. The Fishery itself is subject to the same laws and uses the exact same equipment as any other commercial fishery. Waycobah's Fishery constituted a "for-profit" enterprise and often operated in partnership with non-native commercial fishing businesses.

V. Analysis and Decision

A. Statutory Provisions

[80] Section 91(24) of *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, grants Parliament jurisdiction over certain matters involving Canada's First Nations:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) 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.

[81] Section 4 of the *Code* limits the Board's labour relations jurisdiction to employees employed on or in connection with a federal work, undertaking or business:

> 4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

[82] Section 2(*i*) of the *Code* incorporates Parliament's jurisdiction over matters falling outside the competence of the provincial legislatures, including its jurisdiction over First Nations:

> 2. In this Act,
>
> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,
>
> ...
>
> (*i*) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, …

B. Applicable Constitutional Law Principles

[83] The SCC's decision in *NIL/TU,O Child and Family Services Society* v. *B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696 (*NIL/TU,O*) has led to numerous tribunal and court decisions examining whether labour relations impacting First Nations are provincially or federally regulated.

[84] There is no dispute that labour relations presumptively fall within provincial jurisdiction; federal jurisdiction is the exception: *NIL/TU,O*, paragraph 6.

[85] *NIL/TU,O* also confirmed that the same constitutional test, involving first the "functional test" and secondly, if needed, the "core impairment" test, applied whether or not the case involved Canada's First Nations:

> [3] **For the last 85 years, this Court has consistently endorsed and applied a distinct legal test for determining the jurisdiction of labour relations on federalism grounds.** This legal framework, set out most comprehensively in *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 and *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, and applied most recently in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, is used regardless of the specific head of federal power engaged in a particular case. **It calls for an inquiry into the nature, habitual activities and daily operations of the entity in question to determine whether it constitutes a federal undertaking. This inquiry is known as the "functional test".** Only if this test is

> inconclusive as to whether a particular undertaking is "federal", does the court go on to consider whether provincial regulation of that entity's labour relations would impair the "core" of the federal head of power.
>
> (emphasis added)

[86] The challenge in numerous cases arises from the application of the functional test. Few cases have gone on to examine the core impairment test. In the instant case, does the Board focus on Waycobah or on the activities of the Fishery?

[87] Various key SCC decisions examining the applicable legal principles did not involve a Band being the actual employer and legally responsible for the activity in question.

[88] In *NIL/TU,O*, for example, a First Nations Band was not the actual employer. Instead, a British Columbia incorporated society carried out the activity.

[89] In *Four B Manufacturing Ltd.* v. *United Garment Workers of America et al*, [1980] 1 SCR 1031 (*Four B*), four aboriginal individuals carried out a commercial business on a reserve. In *Four B*, the SCC described the underlying constitutional facts and emphasized that the Band Council did not own or control the business in question:

> ***Four B* was incorporated pursuant to the laws of Ontario to carry on business as a manufacturer of shoes on the Tyendinaga Indian Reserve No. 38, a reserve set aside for the Band of Indians known as the Mohawks of the Bay of Quinte.** All of the issued shares of *Four B* are held by four brothers named Brant, all of whom are members of the Band.
>
> The business or operation of *Four B* consists entirely in the sewing of uppers on contract for the Bata North Star Jogger, a shoe manufactured by the Bata Shoe Company.
>
> ***Four B* is in no way owned or controlled by the Band Council which will have no share in its profits.** It had first been contemplated that the plant be owned and operated by the Band, but the majority of the Band voted against this project, apparently for some fiscal reasons; it was at that point that the Brant brothers decided to own and operate the plant privately, originally under the corporate name of Tyendinaga Mohawk Limited. However the Band Council took the view that the use of this name would not be in the best interest of the Reserve and it was changed for the present one.
>
> *Four B* occupies premises upon the Reserve pursuant to a three year renewable permit issued by Her Majesty the Queen in right of Canada with the approval of the Band Council. The permit, which creates no tenancy and can be cancelled at the discretion of the Minister of Indian Affairs and Northern Development, provides in part as follows:
>
> > That the Permittee will give preference in employment to local people for work in the permit area, however, if there are not sufficient applications from local area, the Permittee shall have the right to request assistance from Canada Manpower to fill the staff requirements from the surrounding districts.

> ***Four B*** **has received from the Government of Canada a total of $284,000 of which $51,000 represents a grant and the remainder borrowed funds. These monies were advanced pursuant to programs of the Department of Indian Affairs and Northern Development, designed to promote cooperation between Indian and non-Indian businessmen in order to assist Indians in developing and expanding viable businesses and to create jobs for Indians, on and off reserves.**
>
> (pages 1044–1045; emphasis added)

[90] The SCC described why these constitutional facts were not sufficient to oust provincial jurisdiction over *Four B*'s labour relations:

> 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.
>
> (page 1046; emphasis added)

[91] While neither *NIL/TU,O* nor *Four B* involved a Band acting as an employer when conducting a specific activity, other decisions have examined situations closer to the current scenario. Decisions, including those from the Federal Court of Appeal and the Federal Court of Canada, provide guidance about the extent of federal tribunals' jurisdiction over First Nations.

[92] In *Francis* v. *Canada Labour Relations Board,* [1981] 1 F.C. 225 (*Francis*) (reversed on a different point by the SCC in *Public Service Alliance of Canada* v. *Francis et al*., [1982] 2 SCR 72), the Federal Court of Appeal (FCA) examined whether this Board's predecessor, the Canada Labour Relations Board (CLRB), could certify the Public Service Alliance of Canada (Alliance) to represent a bargaining unit composed of a Band's employees.

[93] At paragraph 20 of the decision, the FCA noted that the employees' services were all related to the "administration of the Band":

> [20] 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 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. He refers to registrability, membership in a band, the right to participate in the election of chiefs and band councils, and

> Reserve privileges. 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*, 1867, 30 & 31 Vict., c. 3 (U.K.) [R.S.C. 1970, Appendix II, No. 5].
>
> (emphasis added)

[94] The FCA noted that the Band's carrying out of its governance functions made it a federal work, undertaking or business for the purposes of what is now section 4 of the *Code*.

[95] However, the FCA concluded that the Band was not an employer under the *Code* and thus the Alliance could not be certified. The SCC later reversed this specific conclusion and confirmed the Band was an employer and could be subject to a CLRB certification order.

[96] In *Saskatchewan Indian Gaming Authority Inc.* v. *National Automobile, Aerospace, Transportation and General Workers Union of Canada, 2000 SKQB 176 (CanLII)* (*SIGA*), upheld by the Saskatchewan Court of Appeal (*Saskatchewan Indian Gaming Authority Inc.* v. *National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2000 SKCA 138), the Court examined whether the Saskatchewan Labour Relations Board had correctly certified a unit of employees working for the Saskatchewan Indian Gaming Authority Inc. The Court concluded that the gaming operations, which were operated by a separately incorporated non-profit corporation, did not fall under federal jurisdiction.

[97] In *SIGA*, the Court examined the SCC's decision in *Four B*, which held that a native-owned business operating on a reserve still fell within provincial jurisdiction. The Court also considered the Saskatchewan Court of Appeal's decision in *Whitebear Band Council* v. *Carpenters Provincial Council of Saskatchewan* (1982), 135 D.L.R. (3d) 128 (Sask. CA) (*Whitebear*), which found that carpenters the Band hired for a housing project on the reserve fell within federal jurisdiction.

[98] In *SIGA*, the Court described how the *Whitebear* decision had adopted the FCA's reasoning in *Francis* when it concluded that the construction of housing on the reserve could not be separated from the local government function of a Band Council:

> [48] **Relying on the Federal Court of Appeal decision, Cameron J.A. concluded that "the power generally to regulate the labour relations of a band council and its employees, engaged in those activities contemplated by the Indian Act forms an integral part of primary federal jurisdiction" under s. 91(24) (at 138, emphasis added.)** He argued, further, that the specific activity of house construction could not be separated from the general local government function of the council. These passages from the judgment are instructive:
>
> > **As I have observed the primary function of an Indian band council is to provide a measure of self-government by Indians on Indian reserves. In enacting by-laws pursuant to their power to do so, and in performing generally their local Government function, an Indian band council is doing that which Parliament is exclusively empowered to do pursuant to s. 91(24) of the British North America Act, 1867 but which Parliament, through the Indian Act, has delegated band councils to do. In this sense the function of an Indian band council is very much federal.** So too, in my opinion, are their associated functions–acting at once as the representative body of the inhabitants of the reserve and the agent of the Minister with regard to federal programmes for reserves and their residents–and participating in certain of the decisions of the Minister in relation to the reserve. Given this, the provisions of the Indian Act to which I have referred, and the origin and nature, purpose and function of an Indian band council, I am satisfied that the power generally to regulate the labour relations of a band council and its employees, engaged in those activities contemplated by the Indian Act, forms an integral part of primary federal jurisdiction in relation to "Indians and Lands Reserved for the Indians" pursuant to s. 91(24). ... [At p. 138]
> >
> > ...
> >
> > In my opinion the particular activity in which Whitebear Band Council and its carpenters were engaged–the construction of houses on the reserve pursuant to the "single contribution" agreement–cannot be separated from the activity of the Band Council as a whole, isolated and assigned a different character than that of which it forms part–the general function of the Band Council. To do that would be to run counter to the principles of determination referred to in *Montcalm, supra*, [*Montcalm Construction Inc. v. Minimum Wage Com'n,* 1978 CanLII 18 (SCC), [1979] 1 S.C.R. 754 at 769] and have regard for exceptional or casual factors rather than looking to the normal or habitual activities of the work of the employer as those of a going concern to avoid the fractured application of the Constitution spoken of by Beetz J. in *Montcalm.* Accordingly, I am satisfied that the construction of houses on the reserve, in the circumstances, is part and parcel of the general operation as a whole of the Band Council and cannot properly be removed from that whole and viewed as an ordinary industrial activity in the Province and falling under provincial jurisdiction. [At p. 139]
>
> [*sic*]
>
> (italics in original; bold added)

[99] In *SIGA*, seemingly *in obiter*, the Court asked itself whether a Band which operated a casino directly would be subject to federal jurisdiction. The Court concluded that the Band's operation of a casino was fundamentally different from building housing for its members on the reserve, since a gambling enterprise did not arise from specific authority under the *Indian Act* or other delegated authority:

> [60] **What, then, would be the situation of such a business, were it operated by a band council?**
>
> [61] **To be clear, it is my view that such an operation would not fall within the ratio of *Whitebear Band Council* for the band council's authority to operate such a business would not, in any case, be derived from the *Indian Act*, or other delegated authority. Nor would it, in my view, be doing that which, in the words of Cameron J.A., "Parliament is exclusively empowered to do pursuant to s. 91(24)."**
>
> [62] The applicant argued that the authority of *Whitebear Band Council* extends to *all* activities of band councils, because of the court's comment, in that case that, the Band Council's activity in relation to construction of housing could not be distinguished from its general administration of the Band. The Court cited the principle from *Montcalm*, *supra*, that in order to determine whether an undertaking, service or business is federal one must look at the normal or habitual activities of the business or as a going concern, without regard for exceptional or casual factors, to insure that the *Constitution* is applied with continuity and regularity.
>
> [63] **The applicant relies upon these remarks to argue that this Court should not distinguish the operation of casinos, through the vehicle of SIGA, from the general authority of band councils in relation to municipal administration of First Nations Bands in Saskatchewan.** In assessing this argument, this comment from Pigeon J., writing for the majority in *Canada Labour Relations Board v. City of Yellowknife*, 1977 CanLII 230 (SCC), [1977] 2 S.C.R. 729, another case cited in *Whitebear Band Council* is significant:
>
> > ...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. In *Canadian Pacific Railway v. Corporation of the Parish of Notre-Dame de Bonsecours* [[1899] A.C. 367] (at p. 372), Lord Watson said:
> >
> > ...the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company.
> >
> > In accordance with this view of the criterion for the division of legislative jurisdiction, it was decided that jurisdiction over hotel employees was provincial even in the case of hotels owned by a federal railway company: *Canadian Pacific Railway v. Attorney General for British Columbia and Attorney General for Canada* [[1950] A.C. 122]; *Canada Labour Relations Board v. C.N.R.* [*Empress Hotel,* 1974 CanLII 154 (SCC), [1975] 1 S.C.R. 786.]
>
> [64] **Thus, while Cameron J.A. emphasized in *Whitebear Band Council* that it would not be appropriate to draw fine distinctions among various activities undertaken by a band council in the performance of its federally conferred power to administer the**

> **municipal affairs of the band, this principle does not go so far, in my view, as to preclude *any* distinctions among activities in which a band council might be involved, even indirectly. While individual band councils are indirectly involved in the operation of SIGA, and Indian bands definitely receive economic benefit from the casinos, including but not limited to the development of employment opportunities for their members, these factors would not, in my view, be distinguishable from the operation of a hotel by a federal railway, a matter held in the *Empress Hotel* case, *supra*, to fall within provincial jurisdiction.**
>
> [65] I emphasize again, in this context, that the casino at issue before me is operated as a commercial enterprise to provide entertainment to a wide class of persons, by no means limited to First Nations persons nor, indeed, especially intended for them, and that casinos, generally, are subject to provincial regulation.
>
> [66] **In the final result, I have concluded that the matter before me is to be distinguished from the situation before the Court in *Whitebear Band Council* and falls within the ratio of *Four B Manufacturing.* However one characterizes the indirect role played by the band councils in the ownership and operation of SIGA, it is impossible to conclude that the operation of the casinos is pursuant to a statutory power conferred upon the band councils by the *Indian Act.*** It is clear that SIGA's authority to operate the Northern Lights Casino does not derive from federal legislative authority. Rather, it is established by the agreements between the Province of Saskatchewan and the FSIN and provincial legislation described above.
>
> [*sic*]
>
> (emphasis added)

[100] In *Munsee*, the Federal Court confirmed *Francis* still stood for the proposition that federal jurisdiction applied to employees whose work dealt directly with Band governance. Munsee overturned an adjudicator's decision in which he had concluded that he lacked jurisdiction over a Band employee working in the Band's administration office.

[101] In *Munsee*, Mr. Justice LeBlanc distinguished the employees' situation in NIL/TU,O, from that of a person employed directly by a Band to help administer its internal affairs:

> [40] To borrow the terms used by Madam Justice Abella in *NIL/TU,O*, I do not think it can be said, in the present case, that the employer is an agency "that is in all respects regulated by the province", that its function is "unquestionably a provincial one" and that Ms Flewelling exercised "exclusively provincial delegated authority" under a provincial legislation. **Here, the employer is a Band Council to which the *Indian Act* applies and Ms Flewelling was engaged in the general administration of the band's affairs, including on-reserve housing and matters concerning Indian reserve lands.** Her work activities were described by the Adjudicator as follows:
>
> > The Complainant worked in the Employer's finance department in the Nation's office. She was the only employee in that department and so she did all the usual accounting duties. She maintained the Employer's financial records,

> including accounts payable, accounts receivable, payroll, bank deposits and bank reconciliation.
>
> (emphasis added)

> [41] The evidence before the Court shows that Ms. Flewelling's salary was paid out of federal monies received by the Nation; monies which consisted of the main share of the Nation's funding.
>
> [42] **According to *St Regis*, the business or operation of a Band Council is that of a local government deriving its authority from the *Indian Act* and the applicable regulations.** It has a "comprehensive responsibility of a local government nature" (*St Regis*, Justice Le Dain, at para 27). **It carries out governance functions through the employment of administrative employees. Ms Flewelling was one of those employees.**
>
> (emphasis added)

[102] Furthermore, the Court in *Munsee* confirmed that the administration of a First Nations Band was a federal undertaking:

> [45] **I am not prepared to say that *Francis* was overruled by *NIL/TU,O.* The absence of any consideration of this crucial factor, is, in my view, fatal to the Adjudicator's ruling. In other words, based on *Francis*, the functional test is conclusive that the administration of the Nation's Band is a federal undertaking within the meaning of the *Code*.**
>
> (emphasis added)

[103] In *Fox Lake Cree Nation* v. *Anderson*, 2013 FC 1276 (*Fox Lake*), the Federal Court held that a Band's "Negotiations Office," a discrete unit which was separate from the Band's general administration and governance, fell within provincial jurisdiction.

[104] Mr. Justice Zinn described the facts in *Fox Lake* which involved a Band setting up a "Negotiations Office" to negotiate on its behalf:

> [3] In or around 2000, the FLCN [Fox Lake Cree Nation] established an office near Winnipeg, Manitoba, to negotiate contracts on behalf of the FLCN with Manitoba Hydro [Hydro] with respect to significant hydro-electric projects on the Churchill, Nelson, Rat, and Burntwood river systems, and the development of the Lake Winnipeg Regulation System north of the 53rd parallel. **The office was referred to as the Keeyask Project Negotiations Office [Negotiations Office] and at the time of its creation, was considered an "internal"consulting office. It was not incorporated as a separate legal entity. Prior to setting up the Negotiations Office, the FLCN had used an outside consulting firm to negotiate with Hydro on its behalf.**
>
> (emphasis added)

[105] The dispute in *Fox Lake* concerned whether an employee dismissed by the Negotiations Office could file an unjust dismissal complaint under Part III of the *Code*.

[106] The Court decided that the focus of its jurisdictional analysis had to be on the activities of the Negotiations Office itself, in order to determine whether it was a federal work, undertaking or business:

> [20] **Accordingly, whether Mr. Anderson's employment falls under federal or provincial jurisdiction rests on whether the operations of the Negotiations Office is properly characterized as being a federal work, undertaking, or business within the meaning of s. 2 of the *Code*.** If it is, then the presumption that the province has exclusive jurisdiction over its labour relations has been ousted.
>
> (emphasis added)

[107] The Court rejected the argument that the test had to focus on the Fox Lake Band as a whole:

> [25] **Contrary to the submission of the Attorney General, the proper procedure is not to examine the operations of the FLCN as a whole when considering jurisdiction; rather, as was stated by Mr. Graham, it is to "consider the operations and habitual activities of the FLCN Band's operations which are the subject of the jurisdictional challenge, namely the operations and habitual activities of the Negotiations Office." This is because a single employer may have both federally and provincially regulated employees:** *NIL/TU,O* at para 22; *Tessier Ltée v Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, [2012] 2 SCR 3 at para 49 [*Tessier*].
>
> (emphasis added)

[108] The Court concluded that the Negotiations Office fell within provincial jurisdiction:

> [32] **When properly considered, the habitual activities of the Negotiations Office are to negotiate with Hydro, a provincial crown corporation established and regulated by provincial statute, with respect to the development of new hydro-electric projects generally, which projects are wholly situated in the province. Apart from the fact that the FLCN is an Indian Band and that some of the negotiated provisions acknowledge the adverse effects that these projects will have on the members of the Band, there is nothing federal about the Negotiations Office's work.** Furthermore, the Supreme Court of Canada in *NIL/TU,O* at para 45 made clear that the "community for whom [the entity] operates… does not change *what* it does" and that the fact that "[the entity's] services are provided in a culturally sensitive manner" does not on its own displace the provincial nature of the entity.
>
> [33] **The Attorney General of Manitoba argues that where the employer is an Indian Band, unless there is an activity that the employee is engaging in that is so distinct and separate from the Band, that employee should be federally regulated. This submission ignores express guidance from the Supreme Court of Canada in *NIL/TU,O* that the functional test looks specifically at the habitual activities of the entity in**

> **question, not who is providing the services and not who is benefiting from the services.** Additionally, the analysis does not change simply because subsection 91(24) is engaged. The Supreme Court stated at para 20 of *NIL/TU,O* that: "There is no reason why, as a matter of principle, the jurisdiction of an entity's labour relations should be approached differently when s. 91(24) is at issue. The fundamental nature of the inquiry is—and should be—the same as for any other head of power." The fact that the employer in this case is an Indian Band is not relevant to the functional test. This submission also ignores the presumption that labour relations falls within provincial jurisdiction.
>
> (emphasis added)

[109] The applicable legal principles arising from the above case law review may be summarized as follows:

i) The determination of jurisdiction over any entity's labour relations, including for cases involving First Nations, is subject to the same two-step test: i) the functional test and, if necessary, ii) the core impairment test (*NIL/TU,O*);

ii) A Band's governance activities constitute a federal undertaking; the *Code* applies to employees working for a Band who carry out tasks associated with that federal undertaking (*Francis*; *Munsee*; *White Bear*);

iii) In cases involving a First Nations Band, the functional test focuses on the activity being conducted, rather than on the Band Council's overall operations (*Fox Lake*);

iv) Not everything a Band carries out itself constitutes a federal work, undertaking or business; a Band's Negotiations Office does nothing identifiably federal which would oust the presumption in favour of provincial labour relations (*Fox Lake*); and

v) A casino business, even if operated directly by a Band, would be subject to provincial jurisdiction, since that particular activity did not arise from any delegated authority in the *Indian Act* (*SIGA*).

C. Decision

[110] The UFCW put forward three alternative reasons why this Board had the jurisdiction to certify its requested unit of fishers. Despite the UFCW's well-prepared arguments, the Board has concluded that current constitutional principles oblige it to decline jurisdiction.

1. Is the Fishery a federal undertaking?

[111] The Board has concluded that the functional test requires it to focus on the Fishery's activities when deciding whether provincial or federal jurisdiction applies to its labour relations.

[112] Waycobah is clearly the employer in this case. This distinguishes the factual situation from those described in *NIL/TU,O* and *Four B*.

[113] Both *Francis* and *Munsee* found that a Band Council was a federal undertaking. They further noted that employees employed directly by the Band Council, and who were providing services directly related to that Band's general administration and central governance, fell within federal jurisdiction.

[114] *Fox Lake* (Negotiations Office), and to a degree *SIGA* (a casino), noted a further distinction that not every activity a Band might carry out itself necessarily falls within federal jurisdiction. The appropriate analysis needs to consider whether the activity in question falls within a Band's obligations pursuant to the *Indian Act* or other delegated authority.

[115] In this case, the fishers the UFCW seeks to represent carry out off-reserve commercial fishing. There was no evidence that any of the fishers assisted Waycobah in carrying out its general administration or governance functions.

[116] The oral evidence contained few specifics about elver fishing. Elvers can be found in the ocean, but do migrate to fresh water streams. The Board had no evidence that any elver fishing occurred on Waycobah's reserve. Waycobah's CEO testified that only two Fishery employees worked on the reserve and they performed office functions. Accordingly, this case deals with off-reserve commercial fishing.

[117] The Board accepts that the fishers' activities may provide some economic benefit to Waycobah, as would the sums obtained for contracting out fishing licences and vessels. Waycobah would be able to use those additional funds for helpful social purposes on the reserve.

[118] But the fact that a commercial activity, such as a fishery, a casino or a gas station/general store, might provide a Band with additional resources to better the lives of its members is not conclusive for purposes of the functional test.

[119] The Board must instead examine the Fishery's essential operational nature, habitual activities and daily operations in order to decide whether it is a federal undertaking. This analysis when conducted in this case shows that the Fishery's habitual activities are to fish commercially off the reserve, in essentially the same way that any commercial fishing business would operate.

[120] When examining the Fishery from this perspective, the Board could not find a link to Waycobah's governance functions. This distinguishes the facts in this case from those in *Munsee*, where the employee worked directly in the Band's administration.

[121] The situation might be otherwise for activities clearly described in sections 81 and 83 of the *Indian Act*. However, the *Indian Act* makes no mention of an off-reserve commercial fishery, or other comparable for-profit activities like operating a casino. The only mention of fishing in section 81 of the *Indian Act* limits itself to activities "on the reserve":

> 81.(1) The council of a band may make by-laws not inconsistent with this *Act* or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:
>
> …
>
> (*o*) **the preservation, protection and management of fur-bearing animals, fish and other game on the reserve**;
>
> (emphasis added)

[122] The UFCW also did not persuade the Board that section 69 of the *Indian Act* somehow brought any and all activities on which a Band might spend money within federal jurisdiction:

> 69.(1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.

[123] If such an order existed, and the subsequent spending of "moneys" were determinative of federal jurisdiction, then all commercial activities which had any federal funding support would be subject to the *Code*. This conclusion would effectively do away with the application of the functional test.

[124] After applying the functional test, the Board concludes that the Fishery is not a federal undertaking.

2. In the alternative, is the Fishery vital, essential or integral to Waycobah's federal undertaking?

[125] In the alternative, the UFCW suggested that the derivative jurisdiction analysis provided the Board with jurisdiction to issue the requested certification order.

[126] In *Tessier Ltée* v. *Québec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, [2012] 2 S.C.R. 3 (*Tessier*), the SCC summarized the derivative jurisdiction analysis:

> [18] **In the case of direct federal labour jurisdiction, we assess whether the work, business or undertaking's essential operational nature brings it within a federal head of power. In the case of derivative jurisdiction, we assess whether that essential operational nature renders the work integral to a federal undertaking.** In either case, we determine which level of government has labour relations authority by assessing the work's essential operational nature.
>
> (emphasis added)

[127] At paragraph 49 of Tessier, the SCC referred to its two seminal decisions in *Northern Telecom Limited* v. *Communications Workers of Canada et al.*, [1980] 1 S.C.R. 115 (*Northern Telecom #1*) and *Northern Telecom Canada Limited et al.* v. *Communication Workers of Canada et al.*, [1983] 1 S.C.R. 733 (*Northern Telecom #2*). It described why it had concluded under the derivative jurisdiction analysis that Northern Telecom's installers were vital and essential to Bell Canada's telecommunications undertaking:

> [49] **Second, this Court has recognized that federal labour regulation may be justified when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation.** In *Northern Telecom 2*, for example, the installers were functionally independent of the rest of Telecom. This Court was therefore able to assess the essential operational nature of the installation department as a separate entity, as Dickson J. noted:
>
> > ... **the installers are functionally quite separate from the rest of Telecom's operations. The installers ... never actually work on Telecom premises; they work on the premises of their customers. In respect of Bell Canada, the installation is primarily on Bell Canada's own premises and not on the premises of Bell Canada's customers.** ... The installers have no real contact with the rest of Telecom's operations. Telecom's core manufacturing operations are conceded to fall under provincial jurisdiction, but there would be nothing artificial in concluding that Telecom's installers come under different constitutional jurisdiction. [pp. 770–71]
>
> (See also *Ontario Hydro*, where the employees who fell under federal jurisdiction were only those employed on or in connection with facilities for the production of nuclear energy; *Johnston Terminals and Storage Ltd.* v. *Vancouver Harbour Employees' Association Local 517*, [1981] 2 F.C. 686 (C.A.), and *Actton Transport Ltd.* v. *British Columbia (Director of Employment Standards)*, 2010 BCCA 272, 5 B.C.L.R. (5th) 1, where certain workers were severable from their employer's overall operation and were therefore subject to different labour jurisdiction.)
>
> (emphasis added)

[128] The FCA recently described the elements of the derivative jurisdiction test in *Syndicat des agents de sécurité Garda, Section CPI-CSN* v. *Garda Canada Security Corporation*, 2011 FCA 302:

> [38] Therefore, I propose to first examine the federal undertaking in question and then the services provided by Garda, in order to finally reach a conclusion as to whether there is a "vital", "essential" or "integral" link between the operations of the concerned federal undertaking and these services.

[129] The Board conducted a derivative jurisdiction analysis in *Raytheon Canada Limited*, 2015 CIRB 789 (*Raytheon 789*), and determined that a contractor's "care, custody and control" of Canada's Northern Warning System (NWS) brought these discrete activities within federal jurisdiction.

a. The Federal Undertaking

[130] It is not disputed that Waycobah is a federal undertaking. Both *Munsee* and *Francis* confirm that the administration of a First Nations Band is a federal undertaking.

b. What Services Does the Fishery Provide to the Federal Undertaking?

[131] The Fishery operates some of the significant assets which DFO gave to Waycobah under both the MRI and AICFI. The native fishers do not operate these assets alone; non-native fishers may fish alongside them in the same vessel. Some Fishery assets are contracted out to commercial fishing operations in order to provide additional funds to Waycobah and employment opportunities for those living on the reserve.

c. Are the Fishery's Services Vital, Essential or Integral to Waycobah's Undertaking?

[132] The Board cannot conclude that the Fishery's services are vital or essential to Waycobah's federal undertaking in the way the derivative jurisdiction analysis would require.

[133] Certainly, Waycobah benefits economically from the revenue the Fishery brings in. That revenue allows Waycobah to provide additional services to members living on the reserve.

[134] But if contributing to Band revenues were sufficient to satisfy the derivative jurisdiction test, then the Board would also have to accept jurisdiction over any and all commercial entities a First Nations Band operated. That finding would run counter to the established jurisprudence that those types of commercial activities do not involve a Band's governance responsibilities.

[135] In essence, a Band, like any federal undertaking, can operate both federal and provincial undertakings, depending on the activity in question. But purely commercial activities, even if their genesis resulted from significant federal funding, do not become subject to federal jurisdiction merely because they are carried out by, or for the benefit of, a First Nations Band.

[136] The Board is not satisfied that the Fishery's commercial activities are sufficiently vital or essential to satisfy the derivative jurisdiction test. The evidence did not indicate that Waycobah could not operate without the continued support of the Fishery.

[137] By contrast, in *Northern Telecom* #2, Bell Canada could not have operated its telecommunications undertaking without Telecom's installers' continuous work. Similarly, in *Raytheon 789*, the Canadian Forces could not have monitored intrusions into Canadian airspace without the contractor meeting its obligations to keep the NWS radar infrastructure up and running.

3. In the further alternative, are Waycobah's fishing activities subject to the *Code* as a result of treaty rights?

[138] The Board has decided to dismiss the UFCW'S third alternative argument on the basis of a lack of evidence. While a rights-based fishery may be a federal undertaking, there was no evidence to persuade the Board that this case involved that type of fishery.

[139] First of all, for the MRI and AIFI programs, both the Crown and the participating First Nations agreed that the significant transfer of assets used to create a commercial fishery was without prejudice to any treaty rights. Despite its name, the MRI focused on helping First Nations Bands develop a commercial fishery, rather than a rights-based fishery. The UFCW's certification application sought to represent employees in this commercial fishery.

[140] Secondly, the fishery in question, far from one allowing Band members to earn a "moderate livelihood", is purely commercial. For conservation reasons, DFO did not simply issue new fishing licences for First Nations Bands. Rather, DFO purchased capacity from the commercial fishing sector and transferred those assets to participating First Nations Bands.

[141] The participating Bands have used those assets to increase employment opportunities for their members. They have also contracted out both licences and vessels to commercial fishing operations in exchange for additional income.

[142] Finally, it appears that treaty negotiations are continuing in Nova Scotia about many issues, including fishing.

[143] These reasons satisfy the Board that Waycobah's Fishery does not constitute a treaty rights-based fishery which would come within its jurisdiction.

VI. Conclusion

[144] The UFCW filed a certification application for a bargaining unit of fishers employed by Waycobah. Waycobah contested this Board's jurisdiction to certify that unit.

[145] The Board has concluded that Waycobah's Fishery, even though operated directly by the Band itself using its own employees, falls within provincial jurisdiction.

[146] It is the essential operational nature of the Fishery which determines this Board's jurisdiction.

[147] The offshore commercial Fishery, being unrelated to the federal undertaking Waycobah carries on pursuant to the *Indian Act*, remains subject to provincial labour relations legislation.

[148] The Board must accordingly dismiss the UFCW's certification application.

[149] This is a unanimous decision of the Board.

_____
Graham J. Clarke
Vice-Chairperson

_____
Richard Brabander
Member

_____
Norman Rivard
Member