Federal Court  Cour fédérale

**Date: 20181128**

**Docket: T-1315-17**

**Citation: 2018 FC 1180**

**Edmonton, Alberta, November 28, 2018**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**NORTHERN INTER-TRIBAL HEALTH AUTHORITY INC. AND PETER BALLANTYNE CREE NATION HEALTH SERVICES INCORPORATED**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA, MINISTER OF FINANCE**

**Respondents**

## JUDGMENT AND REASONS

[1] The Northern Inter-Tribal Health Authority Inc. [NITHA] and Peter Ballantyne Cree Nation Health Services Incorporated [PBCNHS], the Applicants, seek judicial review of two decisions communicated by James Rogers, Relationship Manager for the Office of the Superintendent of Financial Institutions of Canada [OSFI], on February 28, 2017 [the Decisions].

[2] Mr. Rogers is the Relationship Manager with the Private Pension Plans Division of OSFI. Mr. Rogers stated that OSFI was reaffirming its previously held position that the pension plans of the Applicants do not fall under federal jurisdiction and as such are to be registered provincially.

[3] The Applicants say they took on delivery of the long standing federal government's obligation to provide health services to First Nation members. These health services would revert to federal government delivery should the Applicants cease to provide the services. The Applicants submit their pension plans fall under federal jurisdiction and are to be registered federally.

[4] On review of the submissions by the Parties [the Applicants and Respondent] and the evidence before the OSFI decision-maker, I agree with the Applicants and grant the application for *certiorari*. Further, based on that evidence and the additional historical evidence provided by the Parties subsequent to the hearing, I also grant the application for a declaration that the Applicants' pension plans are a federal government undertaking and fall under federal jurisdiction.

[5] My reasons follow.

## I. **Background**

### A. *Peter Ballantyne Cree Nation Health Services Incorporated [PBCNHS]*

[6] PBCNHS is a non-profit corporation incorporated to deliver health services for the Peter Ballantyne Cree Nation. It was registered in Saskatchewan on March 10, 1995 and its registered

office is located in Prince Albert, Saskatchewan, on the Chief Joseph Custer Reserve #201 which was formerly known as the Opawikoscikan Reserve #201.

[7] On March 17, 1995, shortly after PBCNHS's incorporation, the federal government and Peter Ballantyne Cree Nation and PBCNHS entered into an agreement that made PBCNHS responsible for the delivery, administration, provision and control of federal health services and programs provided to members of the Peter Ballantyne Cree Nation. PBCNHS has since then entered into four subsequent agreements with these same parties for delivery of the health services.

[8] The Peter Ballantyne Cree Nation has about 6,286 on-reserve members to which PBCNHS provides on-reserve health programs and services. PBCNHS provides these programs and services through three primary care centers (located in Pelican Narrows, Deschambault Lake, and Southend) and two community health centers (located in Sturgeon Landing and Kinoosao). All five of these centers are located on reserves in northern Saskatchewan.

[9] Under the most recent agreement PBCNHS provides both first level services (those offered directly in the community) and second level services (administration, co-ordination, training and technical support, supplied from its central office that is located on-reserve in Prince Albert). First level services and programs being provided include: Primary Health Care-Health Child Development, Mental Wellness, Healthy Living, Communicable Disease Control and Management, Clinical and Client Care, and Home and Community Care. Second level services and programs being provided include Health Infrastructure Support, Health System Capacity, Health Planning and Quality Management, and Health Facilities.

[10] There are 148 allocated positions at PBCNHS and 137 of these positions were occupied in September 2017. Of these 137 occupied positions, 115 are members of the Peter Ballantyne Cree Nation which is approximately 84% of all occupied positions.

[11] As an employer, PBCNHS provides a registered pension plan to its employees. It had originally registered this plan with the federal authority for this purpose, OSFI (OSFI Registration No: 56930).

[12] PBCNHS does not own an airstrip or a pharmacy however it does share ownership jointly, along with the Peter Ballantyne Cree Nation, of an ambulance corporation that provides services to the Cree Nation's remote communities. The Affiant for PBCNHS states the ambulance corporation complies with provincial regulation and is entirely separate from the first and second level services PBCNHS provides.

[13] The Affiant for PBCNHS states that "[i]n cases where the On-Reserve resident Peter Ballantyne Cree Nation member requires non-Federal health programs or services off-Reserve, such as hospitalization, these programs and services are provided by the Province of Saskatchewan."

[14] The PBCNHS Affiant states that if they were to reject federal funding there is no other source of funding to allow PBCNHS to continue to exist as it does. The Affiant states that adhering to provincial regulation by health programs on-reserve occurs to ensure proper standards are met because there are no federal guidelines or legislation that are directly applicable.

[15] The PBCNHS Affiant goes on to state that in the event the current agreement was terminated, or PBCNHS was not able to provide the first and second level services, the responsibility for providing these first and second level services would revert back to the federal government and not to the Province of Saskatchewan. The Affiant further states that if the federal government was providing these same services (i.e. if PBCNHS did not exist) then federal government employees would also follow provincial guidelines and legislation for health services.

B. *The lead up to the Decision under review with respect to PBCNHS*

[16] In correspondence dated May 10, 2012, James Rogers (a Project Specialist with the Private Pension Plans Division of OSFI at that time) notified PBCNHS that OSFI had determined their pension plan was subject to provincial legislation and as such it was to be transferred to the provincial pension regulator in Saskatchewan. In correspondence dated May 30, 2012, the transfer was confirmed by the Saskatchewan Financial Services Commission – Pension Division [SFSC].

[17] PBCNHS opposed this determination in correspondence dated April 2, 2013 taking the position that the pension plan is subject to federal jurisdiction because the nature, activities, and daily operations of PBCNHS constitute a federal undertaking.

[18] PBCNHS asked what it would need to do to return its pension plan back to federal registration with OSFI. The Affiant for PBCNHS reports that “OSFI did not advise them in relation to the Federal re-registration of the Registered Pension Plan”.

[19] PBCNHS sent further correspondence to OSFI dated February 11, 2014 reasserting its position its pensions were to be registered federally. In correspondence dated June 10, 2014 James Rogers (now as Supervisor with OSFI) advised PBCNHS that OSFI maintained its determination that the pension plan was to be registered provincially.

[20] There was a legal challenge in court over this matter. An agreement was reached December 6, 2016 to have the matter re-determined no later than March 1, 2017 with any judicial review of that redetermination to be brought in the Federal Court.

C. *Northern Inter-Tribal Health Authority [NITHA]*

[21] NITHA is a non-profit corporation that was incorporated and registered in Saskatchewan on May 8, 1998. Its registered office is located in Prince Albert, Saskatchewan, on the Chief Joseph Custer Reserve #201 which was formerly known as the Opawikoscikan Reserve #201.

[22] NITHA provides third level health programs and services to four groups (its constituting Members): the Prince Albert Grand Council, the Meadow Lake Tribal Council, the Lac La Ronge Indian Band, and the Peter Ballantyne Cree Nation (through the latter Nation's health corporation, PBCNHS (the Co-Applicant)).

[23] These third level services have been, and continue to be, conducted pursuant to agreements entered into between NITHA and the federal government. The first of these agreements commenced 2000-2001 and was followed by the subsequent agreements, amendments and extensions.

[24] Third level health services are those of a coordination and advisory nature in support of second level services in the community. These third level services and programs are itemized as:

- Medical Health Officer and communicable disease control services,
- nursing program support and advisory services, including nursing practice consultant,
- nursing recruitment and retention services,
- Dental Officer services,
- environmental health support and advisory services,
- addictions support and advisory services,
- health education support and advisory services,
- mental Health support and advisory services,
- nutritionist services,
- health careers and training support,
- policy, planning and research services,
- informatics services; and
- management and administration.

[25] NITHA provides an enumerated benefits pension plan to its employees and had originally registered it with OSFI.

[26] The Affiant for NITHA states that it adopts provincial regulations and guidelines to ensure proper standards are met because there are no directly applicable federal guidelines or legislation. Furthermore, the Affiant asserts that if the federal government was providing these

same services (i.e. if NITHA did not exist) then federal government employees would also follow provincial guidelines and legislation for health services.

[27] The NITHA Affiant also states that in the event the current agreement was terminated, or NITHA was not able to provide the third level services, the responsibility for providing these third level services would revert back to the federal government and not to the Province of Saskatchewan. The Affiant further states that in the event NITHA were to reject federal funding there is no other source of funding to allow NITHA to continue to exist.

[28] The partners of NITHA do not receive funding for Emergency Response Coordinator positions (the Affiant states this is a second level service) and NITHA provides this funding through its own program and services funding.

D. *The lead up to the Decision under review with respect to NITHA*

[29] In correspondence dated August 30, 2013, Nancy Desormeaux (a Supervisor with the Private Pension Plans Division of OSFI) notified NITHA that OSFI had determined their pension plan was subject to provincial legislation and as such it was transferred effective August 1, 2013 to the provincial pension regulator in Saskatchewan.

[30] NITHA opposed this determination in correspondence dated February 14, 2014, taking the position that the pension plan is subject to federal jurisdiction because the nature, activities, and daily operations of NITHA constitute a federal undertaking. NITHA requested that OSFI recognize that the pension plan falls under federal jurisdiction and advise them of the required steps to return to registration with OSFI.

[31] In correspondence dated June 10, 2014, James Rogers (now as Supervisor with OSFI) advised NITHA that OSFI maintained its determination that the pension plan was to be registered provincially.

[32] There was a legal challenge in court over this matter. An agreement was reached December 6, 2016 to have the matter re-determined no later than March 1, 2017 with any judicial review of that redetermination to be brought in the Federal Court.

## II. **The Decisions**

[33] The OSFI Decisions, which were reconsiderations of previous decisions, were communicated by James Rogers in letters dated February 28, 2017.

### A. *The Decision with respect to PBCNHS*

[34] James Rogers states that the OSFI Decision has been made by applying the test set out in the Supreme Court of Canada's [SCC's] judgment in *NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union*, 2010 SCC 45 [*NIL/TU,O*]. He writes in the Decision that OSFI must first consider the "functional test" to determine whether the entity constitutes a federal undertaking and if this test is inconclusive it is to then proceed to look at whether provincial regulation would impair the core of a federal head of power.

[35] OSFI states that using the functional test it has "examined PBCNHS's normal, habitual activities based on all the information provided to us and have arrived at the conclusion that the nature of PBCNHS's operations are the provision of health care and social services to the on-reserve community residents in Pelican Narrows, Deschambault Lake, Southend, and Sturgeon

Landing." OSFI notes that general legislative jurisdiction over health and social programs belongs to the provinces and states that the distinctive Aboriginal component of the service delivery does not change the nature of PBCNHS's operations and activities or the jurisdiction over its labour relations.

[36] OSFI takes note of PBCNHS's argument that the services it provides are those that are a responsibility of the federal government but OSFI states that the agreements and jurisprudence only create funding relationships and should not be interpreted as an attempt to regulate PBCNHS's health services. In support of this OSFI lists the following points:

- Past jurisprudence has held that although the federal government has the power to spend money and impose conditions on which the money is available this should not be taken as an intention to regulate the entirety of the area to which money is provided.
- The most recent agreement supports OSFI's position in their opinion as:
    - the preamble sets out that it is an agreement to provide funds for the provision of certain services and that it does not affect constitutional rights;
    - although PBCNHS must submit reports to Health Canada, and Health Canada may audit them and recover unauthorized spending, such control is to make sure that PBCNHS remains eligible for funding and those funds are used as prescribed;
    - although Health Canada is empowered to take necessary steps in the case of a health emergency this should not factor into the functional test as it is merely a casual factor;

- PBCNHS could refuse funding or terminate the agreement if it wanted and as such would be able to avoid complying with any conditions from the Federal government, meaning it is not federally regulated;
- the agreement states it does not create an agency, employer-employee, association, or joint venture between Health Canada and PBCNHS, meaning that there is no link between the Federal government and the provision of services (it is only a funding relationship);
- the agreement does not have a provision about the management of labour relations.

[37] OSFI states that although PBCNHS stated in correspondence that provincial legislation applicable to the provision of its federal on-reserve health services and programs does not exist, its documents point to the contrary (PBCNHS had since clarified this point by stating that it meant there was nothing from the Province delegating the provision of these services to PBCNHS). The OSFI notes some of the following points from PBCNHS's materials:

- it has referenced that it is challenging to meet provincial requirements to use a certain transportation vehicle;
- provincial licencing requirements for paramedics must be met;
- it lists the number of First Responders registered with Saskatchewan Health and the number of Emergency Medical Responders licenced with the Saskatchewan College of Paramedics;

- Nurses have annual reviews for renewal as required by the Saskatchewan Registered Nurses Association;
- the Mental Health and Addictions Program has a goal of establishing links to specialized services within both the private, provincial and federal systems;
- for Communicable Disease Control they follow the Provincial Immunization and CDC guidelines and had as a goal the provision of immunizations in accordance with schedules established by Saskatchewan and First Nations Inuit Health Branch in Saskatchewan;
- Northern Medical Services states it provides salaries for physicians through a transfer payment from Saskatchewan Health.

[38] Based on all of the above OSFI states that the material provided by PBCNHS has not changed its opinion that it is not a federal undertaking. OSFI states that given PBCNHS operations are in health care and social services, and that it is solely a funding relationship with Health Canada, the presumption of provincial jurisdiction over labour (pensions) has not been overcome. For this reason OSFI maintains its previously held position that PBCNHS's pension is to be registered provincially.

B. *The Decision with respect to NITHA*

[39] James Rogers states the OSFI Decision has been made by applying the test set out in the Supreme Court of Canada's judgment in *NIL/TU,O*. He writes in the Decision that OSFI must first consider the "functional test" to determine whether the entity constitutes a federal undertaking and if this test is inconclusive it must them proceed to look at whether provincial regulation would impair the core of a federal head of power.

[40] OSFI states that using the functional test it has "examined NITHA's normal, habitual activities based on all the information provided to us and have arrived at the conclusion that the nature of NITHA's operations are the provision of health services to its four constituting members (i.e., the Meadow Lake Tribal Council, the Prince Albert Grand Council, the Lac La Ronge Indian Band and the Peter Ballantyne Cree Nation)." OSFI notes that general legislative jurisdiction over health and social programs belongs to the provinces and states that the distinctive Aboriginal component of the service delivery does not change the nature of NITHA's operations and activities or the jurisdiction over its labour relations.

[41] OSFI notes NITHA's argument that the services it provides are those that are a responsibility of the federal government but states that on reviewing the agreements and jurisprudence the agreements only create funding relationships and should not be interpreted as an attempt to regulate NITHA's health services. In support of this OSFI lists the following points:

- past jurisprudence has held that, although the federal government has the power to spend money and impose conditions on which the money is available, this should not be taken as an intention to regulate the entirety of the area for which money is provided;
- the most recent agreement supports OSFI's position in their opinion as:
    - the preamble sets out that it is an agreement to provide funds for the provision of certain services;
    - although NITHA must submit reports to Health Canada, and Health Canada may audit them and recover unauthorized spending, such control is to make sure that NITHA remains eligible for funding and those funds are used as prescribed;

- although Health Canada is empowered to take necessary steps in the case of a health emergency this should not factor into the functional test as it is merely a casual factor;
- NITHA could refuse funding or terminate the agreement if it wanted to and as such would be able to avoid complying with any conditions from the Federal government, meaning it is not federally regulated;
- the agreement states it does not create an agency, employer-employee, association, or joint venture between Health Canada and NITHA, meaning that there is no link between the federal government and the provision of services (it is only a funding relationship);
- the agreement does not have a provision about the management of labour relations.

[42] The OSFI states that although NITHA stated in correspondence that provincial legislation applicable to the provision of its third level federal on-reserve health services and programs did not exist, its documents point to the contrary (NITHA had since clarified this point by stating that it meant there was nothing from the Province delegating the provision of these services to NITHA). The OSFI states that these materials demonstrate that some NITHA services are outside federal funding and also that they adhere to provincial licencing requirements, standards and guidelines. The OSFI then notes some of the following points from NITHA's materials:

- "the NITHA Partnership has representation at both federal and provincial levels";

- NITHA has a goal of implementing the provincial Mental Health and Addictions 10 year Action Plan and has connected with and participated in provincial initiatives including 4 working groups (health, education, justice, and social services);
- NITHA provides funding to its partners for "Second level Emergency Response Coordinators" as the First Nation Inuit Health Branch funding does not cover this service
    - NITHA has since clarified that the federal government provides this funding to it, instead of to its members, and then NITHA provides the funding to its members;
- the Emergency Response Coordinator has partnered with Provincial Emergency Management and Fire Safety;
- it continues to participate in the Saskatchewan Oral Health Coalition;
- Saskatchewan Health has launched a Panorama System which is now being used by 15 communities within NITHA, and Saskatchewan and NITHA are conducting legal consultation regarding the logistics of this system
    - NITHA has now clarified that this is a vaccination tracking system throughout Saskatchewan, and it makes sense to have a reliable and transferable vaccination records system so health professionals throughout the province have access;
- the Public Health Nurse provided support to NITHA by training NITHA's nursing staff on the Saskatchewan Health/Child Health Clinic Guideline;
- the Environmental Health Advisor strived to meet provincial reporting requirements;
- Case Management is the responsibility of Community Health Nurses along with Saskatchewan's TB prevention and Control Program.

[43] Based on all of the above OSFI states that the material provided by NITHA has not changed its opinion that NITHA is not a federal undertaking. OSFI states that given the operations are in the health services area, and that it is solely a funding relationship with Health Canada, the presumption of provincial jurisdiction over labour (pensions) has not been overcome. For this reason OSFI maintains its previously held position that NITHA's pension is to be registered provincially.

## III. **Legislation**

[44] The *Pension Benefits Standards Act*, RSC 1985, c 32 (2nd Supp) [*PBSA*] provides:

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| Application of Act | Application de la loi |
| 4 (1) This Act applies in respect of pension plans. | 4 (1) La présente loi s'applique relativement aux régimes de pension. |
| *Definition of pension plan* | *Définition de régime de pension* |
| (2) In this Act, pension plan means a superannuation or other plan organized and administered to provide pension benefits to employees employed in included employment (and former employees) and to which the employer is required under or in accordance with the plan to contribute, whether or not provision is also made for other benefits or for benefits to other persons, and includes a supplemental pension plan, whether or not the employer is required to make contributions under or in accordance with the supplemental pension plan, but does not include | (2) Pour l'application de la présente loi, régime de pension s'entend d'un régime de retraite ou autre institué et géré en vue d'assurer des prestations de pension aux salariés occupant un emploi inclus ainsi qu'aux anciens salariés, que le régime prévoie ou non d'autres prestations ou le paiement de prestations à d'autres personnes, et au titre duquel et conformément auquel l'employeur est tenu d'y verser des cotisations; est assimilé à un régime de pension tout régime complémentaire, au titre duquel ou conformément |

(a) an employees' profit sharing plan or a deferred profit sharing plan as defined in sections 144 and 147, respectively, of the Income Tax Act;

(b) an arrangement to provide a retiring allowance as defined in subsection 248(1) of the Income Tax Act;

(b.1) a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act; or

(c) any other prescribed arrangement.

*Definition of supplemental pension plan*

(3) In subsection (2), supplemental pension plan means a pension plan for employees whose membership in another pension plan is a condition precedent to membership in the supplemental pension plan and that is an integral part of that other plan.

Definition of included employment

(4) In this Act, included employment means employment, other than excepted employment, on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada,

auquel l'employeur est tenu d'y verser des cotisations, mais non :

a) les régimes de participation des employés aux bénéfices et les régimes de participation différée aux bénéfices au sens des articles 144 et 147 de la Loi de l'impôt sur le revenu;

b) les ententes en vue du versement d'une allocation de retraite au sens du paragraphe 248(1) de la Loi de l'impôt sur le revenu;

b.1) les régimes de pension agréés collectifs au sens du paragraphe 2(1) de la Loi sur les régimes de pension agréés collectifs;

c) les autres ententes prévues par les règlements.

*Définition de régime complémentaire*

(3) Au paragraphe (2), régime complémentaire s'entend d'un régime de pension auquel les salariés ne peuvent adhérer que s'ils participent à un autre régime de pension, et qui fait partie intégrante de celui-ci.

Définition de emploi inclus

(4) Pour l'application de la présente loi, emploi inclus s'entend de tout emploi, autre qu'un emploi exclu, lié ou rattaché à la mise en service d'un ouvrage, d'une entreprise ou d'une activité de compétence fédérale et lié

including, without restricting the generality of the foregoing,

(a) any work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of a ship and transportation by ship anywhere in Canada;

(b) any railway, canal, telegraph or other work or undertaking connecting a province with another province or extending beyond the limits of a province;

(c) any line of steam or other ships connecting a province with another province or extending beyond the limits of a province;

(d) any ferry between a province and another province or between a province and a country other than Canada;

(e) any aerodrome, aircraft or line of air transportation;

(f) any radio broadcasting station;

(g) any bank or authorized foreign bank within the meaning of section 2 of the Bank Act;

h) any work, undertaking or business that, although wholly situated within a province, is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada or for the

notamment à :

a) un ouvrage, une entreprise ou une activité exploitée relativement à la navigation et les expéditions par eau, intérieures ou maritimes, y compris la mise en service d'un navire et le transport par navire au Canada;

b) un chemin de fer, canal, télégraphe ou autre ouvrage ou entreprise reliant une ou plusieurs provinces ou s'étendant à l'extérieur d'une province;

c) une ligne de navires à vapeur ou autres reliant une ou plusieurs provinces ou s'étendant au-delà des limites d'une province;

d) un traversier exploité entre une ou plusieurs provinces ou une province et un pays étranger;

e) un aérodrome, un aéronef ou une ligne aérienne;

f) une station de radiodiffusion;

g) une banque ou une banque étrangère autorisée, au sens de l'article 2 de la Loi sur les banques;

h) un ouvrage, une entreprise ou une activité que le Parlement déclare être à l'avantage général du Canada ou de plusieurs provinces même si l'ouvrage ou l'entreprise sont situés, ou l'activité est exercée, entièrement à l'intérieur d'une

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| advantage of two or more provinces; and | province; |
| (i) any work, undertaking or business outside the exclusive legislative authority of provincial legislatures, and any work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut. | i) un ouvrage, une entreprise ou autre activité qui ne relèvent pas de la compétence législative exclusive des provinces ou qui sont de nature locale ou privée au Yukon, dans les Territoires du Nord-Ouest ou au Nunavut. |
| [emphasis added] | [Je souligne] |

[45] This definition of included employment in PBSA mirrors the broad and non-exhaustive definition of "federal work, undertaking or business" used in section 2 of the *Canada Labour Code,* RSC 1985, c L-2 [CLC]. For this reason the jurisprudence with respect to the CLC on what constitutes a federal undertaking is applicable to what constitutes a federal undertaking under the PBSA.

[46] The *Canada Labour Code,* RSC 1985, c. L-2 provides:

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| 2 In this Act, | 2 Les définitions qui suivent s'appliquent à la présente loi. |
| *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, | entreprises fédérales Les installations, ouvrages, entreprises ou secteurs d'activité qui relèvent de la compétence législative du Parlement, notamment : |
| (a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada, | a) ceux qui se rapportent à la navigation et aux transports par eau, entre autres à ce qui touche l'exploitation de navires et le transport par navire partout au Canada; |
| | b) les installations ou ouvrages, entre autres, chemins |

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,

(d) a ferry between any province and any other province or between any province and any country other than Canada,

(e) aerodromes, aircraft or a line of air transportation,

(f) a radio broadcasting station,

(g) a bank or an authorized foreign bank within the meaning of section 2 of the Bank Act,

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, and

(j) a work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the Oceans Act apply pursuant to

de fer, canaux ou liaisons télégraphiques, reliant une province à une ou plusieurs autres, ou débordant les limites d'une province, et les entreprises correspondantes;

c) les lignes de transport par bateaux à vapeur ou autres navires, reliant une province à une ou plusieurs autres, ou débordant les limites d'une province;

d) les passages par eaux entre deux provinces ou entre une province et un pays étranger;

e) les aéroports, aéronefs ou lignes de transport aérien;

f) les stations de radiodiffusion;

g) les banques et les banques étrangères autorisées, au sens de l'article 2 de la Loi sur les banques;

h) les ouvrages ou entreprises qui, bien qu'entièrement situés dans une province, sont, avant ou après leur réalisation, déclarés par le Parlement être à l'avantage général du Canada ou de plusieurs provinces;

i) les installations, ouvrages, entreprises ou secteurs d'activité ne ressortissant pas au pouvoir législatif exclusif des législatures provinciales;

j) les entreprises auxquelles les lois fédérales, au sens de l'article 2 de la Loi sur les océans, s'appliquent en vertu de l'article 20 de cette loi et des règlements d'application

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| section 20 of that Act and any regulations made pursuant to paragraph 26(1)(k) of that Act; (*entreprises fédérales*)<br><br>[emphasis added] | de l'alinéa 26(1)k) de la même loi. (*federal work, undertaking or business*)<br><br>[Je souligne] |

## IV. **Issues**

[47] The Applicants submit the OSFI erred in law in rendering the Decisions as, on the applicable test, the Applicants' activities conducted pursuant to their respective agreements [the Agreements] are properly federal undertakings and for this reason their pension plans should be registered federally.

[48] The Respondent asserts that the OSFI's Decisions were reasonable in the exercise of its discretion. The Respondent states that OSFI applied the applicable functional test and reasonably concluded the Applicants were not a federal undertaking.

[49] Implicit in the Applicants' submission that the PBCNHS and NITHA activities are federal works and undertakings, is that the matter touches upon a constitutional question regarding the division of powers. The Respondent stresses the resolution of this question rests on reasonableness of the decision. In other words, the Applicants' view is that the standard of review is correctness while the Respondent's position is that the standard of review is reasonableness.

[50] Nevertheless, both Parties rest their submissions on the proper application of the test set out in the Supreme Court of Canada's judgment in *NIL/TU,O*.

[51] I would restate the issues as follows:

1) What is the applicable standard of review?

2) Do the Decisions meet the requisite standard of review for the application of the functional test in *NIL/TU,O*?

3) Has the basis for a declaration been met?

## V. **Parties' Submissions**

### A. *Applicants' Submissions*

[52] The Applicants state they do not take issue that general legislative jurisdiction over health or labour relations belongs to the provinces under the *Constitution Act*, 1867 RSC 1985, Appendix II, No 5. Instead the Applicants assert that on the functional test in *NIL/TU,O* their operations would be considered federal undertakings. They support this position by stating that the normal and habitual activities of the Applicants are providing on-reserve health programs and services (PBCNHS level 1&2 services and NITHA level 3 services) that the federal government would otherwise be responsible for providing, as it has in the past. The Applicants state that, based on functional analysis, they have displaced the presumption of provincial jurisdiction.

[53] The Applicants state that the federal government through Health Canada - First Nations Inuit Health Branch would normally provide such on-reserve health programs and services. They note that under the Agreements the Applicants are now providing such programs and services. As a result, the Applicants are receiving funds from the federal government. The Applicants also note that the federal government still has oversight of their operations through requirements of

accountability, reporting and a reversion of these services to the federal government in the event of termination or in instances where the agreed upon services are not being met.

[54] Unlike in *NIL/TU,O*, where the British Columbia provincial government had delegated certain authorities over child welfare to the entity in question, the Applicants state there has been no delegation from the Saskatchewan provincial government. Instead their authority to provide the on-reserve health services comes from the policies implemented by the federal government with respect to Indian health as a part of the federal government's constitutional jurisdiction over "Indians, and Lands reserved for the Indians": s. 91(24), *Constitution Act*, 1867.

[55] The Applicants agree that federal funding on its own does not render them a federal undertaking but states that it is the funding combined with the oversight and accountability attached to the funds and the fact that the services would otherwise be provided by the federal government that makes it a federal undertaking.

[56] With respect to NITHA the Applicants note that of its 30 employees only the nurses in the TB program, and NITHA's medical health officer, require provincial licensing while the remaining employees do not. The Applicants also point out that physicians are under provincial jurisdiction and that is why they are paid by the provincial government, although the federal government does provide some reimbursement for travel. Although some provincial legislation and regulations apply, the Applicants state that this legislation is followed as there is no competing federal legislation and following the provincial regulatory regime maintains proper safety standards.

[57] The Applicants request two remedies from this Court. First, they request that the February 28, 2017 decision be set aside using this Court's power under paragraph 18.1(3)(b) of the *Federal Courts Act*. Second, they request that a declaration be made that the Applicants' pension plans fall under federal jurisdiction. In support of the ability of this Court to make a binding declaration the Applicants cite a judgment in which the Federal Court of Appeal stayed a declaration of the Federal Court, as it found that the declaration had a binding and legal effect on the parties and thus provided a basis for seeking a stay of the declaration: *Assiniboine v Meeches*, 2013 FCA 114 at paras 11-15, 32 [*Assiniboine*].

B. *Respondent's Submissions*

[58] The Respondent submits the general presumption is that labour relations are provincial in nature and since pensions affect employment contracts, they are also presumptively provincial in nature. The Respondent references a 1937 Privy Council case in which unemployment insurance legislation, where it affected contracts of employment, was found to fall within provincial jurisdiction on property and civil rights on a *prima-facie* basis: *Canada (AG) v Ontario (AG)*, [1937] AC 355.

[59] The Respondent notes that pursuant to section 92 subsections: "7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals", "13. Property and Civil Rights in the Province" and "16. Generally all Matters of a merely local or private Nature in the Province" of the *Constitution Act*, 1867, provinces have a "broad and extensive" power over health: *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 68.

[60] The Respondent also notes that federal government funding of an operation does not transform a provincial entity into a federal entity: *NIL/TU,O* at para 40. In support of this point the Respondent sets out that this is the model used at present where the federal government, without unconstitutionally exceeding its jurisdiction, provides funding to provinces for health care and is able to stipulate conditions that must be met for the receipt of full funding.

[61] The Respondent submits that PBCNHS and NITHA are non-profit corporations registered in Saskatchewan and that the Agreements they have with the federal government are merely funding agreements. The Respondent states that there is no federal legislation that forces the federal government to provide such funding.

[62] The Respondent submits that the Agreements outline that they are not to affect treaty or Aboriginal rights which means that the Agreements are not implementations of treaties so there is no obligation to provide the funding from a treaty law viewpoint.

[63] The Respondent also notes that the Applicants are able to provide their services and programs according to their own design and that the Agreements set out that the Applicants act on their own behalf and that there is no relationship between the parties such as “principal-agent, employer-employee, [or] partnership of joint venture”. The Respondent submits that this further clarifies that the relationship is one of solely financial contribution along with oversight to the extent required to make sure the agreements are being followed.

[64] With respect to PBCNHS the Respondent sets out a number of the most common health positions and notes that many of these positions are subject to provincial regulation including

Registered Nurses, Nurse Practitioners, Licenced Practical Nurses, Medical Transportation Divers, and Home Health Aides (home care providers).

[65] With respect to NITHA the Respondent notes that much of the organization does not deliver services directly but mainly tracks, reports, and provides education on communicable diseases as well as providing advice on other health issues. The Respondent states that provincial legislation applies to the reporting of communicable diseases.

[66] The Respondent also notes that in *NIL/TU,O* at para 45 the majority of the SCC stated that "[n]either the presence of federal funding, nor the fact that *NIL/TU,O's* services are provided in a culturally sensitive manner, in my respectful view, displaces the overriding provincial nature of this entity".

[67] The Respondent concludes by stating that the essential nature of PBCNHS "is to deliver health services and the essential nature of NITHA is to monitor public health and to provide coordination and advice on health related programs." For this reason the Respondent states the jurisdiction of the Applicants' pension plans is provincial and that the existence of federal funding and provision of services in a culturally sensitive matter does not change this conclusion. Finally the Respondent also submits that even if the functional test was inconclusive the provincial pension legislation in Saskatchewan would not impair the narrow core of federal power with respect to "Indians and Lands reserved for the Indians" under subsection 91(24) of the *Constitution Act*, 1867.

## VI. **Analysis**

### A. *Standard of Review*

[68] The Applicants state that the central issue is one of law, that their work is a federal undertaking subject to federal pension regulation rather than falling within provincial jurisdiction. As the issue is a question of law, the Applicants thus assert it is to be resolved on the correctness standard.

[69] The Respondent states that the issue is one of mixed fact and law as it is a determination of whether the factual matrix of the Applicants' activity, when applied to the law, results in it being within or outside federal jurisdiction. The Respondent notes that interpretation or application of a decision-maker's home statute, or closely connected statutes, is reviewable on the reasonableness standard.

[70] Although there is a general presumption of the reasonableness standard being applicable when a decision-maker is interpreting its home or closely related statute, there are exemptions to this presumption. These exemptions, as set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 58 – 61 [*Dunsmuir*], include "constitutional questions regarding the division of powers".

[71] In *NIL/TU,O*, and its companion case *Communications, Energy and Paperworkers Union of Canada v Native Child and Family Services of Toronto*, 2010 SCC 46, [2010] 2 SCR 737 [*Native Child*], the Supreme Court of Canada does not say what is the appropriate standard of review although *Native Child* clearly arrived before the Supreme Court through the judicial

review process from the Federal Court of Appeal [FCA] with that Court stating the standard of correctness was applicable as it was a constitutional question: 2008 FCA 338 at para 18.

[72] Subsequent to *NIL/TU,O* and *Native Child*, the Federal Court, when considering the issue whether a matter was a federal undertaking in *Canada (AG) v Munsee-Delaware Nation,* 2015 FC 366 at para 16 [*Munsee-Delaware Nation*], applied the standard of correctness (characterising the issue as a constitutional question of division of powers) while at the same time stating that findings of fact and characterizations of the employment by the decision-maker were owed deference and as such should be reviewed for reasonableness.

[73] More recently the Federal Court of Appeal judicially reviewed a decision which involved a determination whether an entity was within federal or provincial jurisdiction for the purpose of labour relations: *Conseil de la Nation Innu Matimekush-Lac John v Association of Employees of Northern Quebec* (CSQ), 2017 FCA 212 [*Nation Innu Matimekush-Lac John*].

[74] In *Nation Innu Matimekush-Lac John* the Federal Court of Appeal [FCA] stated it accepted that constitutional questions were to be reviewed on the correctness standard: at para 14. The FCA then continued on to state that what was at issue was not actually a constitutional question because it was not a determination of whether legislation exceeded the powers of the government enacting it (division of powers analysis): at para 15 citing *NIL/TU,O* at para 12. Instead the FCA stated the issue is a narrow one and concerns whether the presumption of provincial jurisdiction over labour relations has been rebutted: at para 16.

[75] The Federal Court of Appeal went on to state that the analysis of the decision-maker in this case rested on its findings of fact and these findings of fact can be separated from the

constitutional question of federal versus provincial jurisdiction. The FCA gave deference to the decision-maker's findings of fact on the activities and organizational structure of the entity it was examining. The FCA then proceeded to analyse the facts and relevant case law and determined that the entity in question was a federal undertaking.

[76] The Federal Court of Appeal decision in *Nation Innu Matimekush-Lac John* confirms the approach adopted in *Munsee-Delaware Nation*.

[77] In result, I adopt the standard of review as correctness, characterising the issue as a constitutional question of division of powers, while at the same time accepting findings of fact and characterizations by the decision-maker are owed deference and are reviewed for reasonableness.

B. *The Tribunal Record*

[78] After hearing the oral arguments, I asked the Parties to provide me with information on the historical background about the provision of federal health services on Indian reserves.

[79] The Applicants filed the "Supplementary Information on the Provision of Medical Services by the Federal Crown to the Applicants". The Respondents do not take issue with the content of the material supplied; however, the Respondents submit that the evidentiary record before Court on judicial review is restricted to the evidentiary record that was before the decision-maker.

[80] I agree with the Respondents on this point with regard to the application for *certiorari*. I make no reference to the supplemental information when considering that application. However, I am of the view that I am able to refer to the supplemental information in the application for a declaration which is a different matter.

C. *Applicable Test to be Applied*

[81] The applicable test for determining whether a matter is a federal undertaking is set out by the Supreme Court in *NIL/TU,O*. Justice Abella, for the majority, stated the first step is a "functional test" of whether the entity is a federal undertaking which requires "an inquiry into the nature, habitual activities and daily operations of the entity in question": at para 3, *NIL/TU,O*.

[82] Justice Abella went on to state it is only if the result of this functional test is inconclusive that the Court turns to the second element, which involves an analysis of whether provincial regulation of the entity's labour relations would impair the core of a federal power, which in this instance would be subsection 91(24) "Indians, and Lands reserved for the Indians": *Constitution Act*, 1867.

[83] I take note that a crucial finding of fact in *NIL/TU,O* was determination of the source of that organization's authority to act in child welfare matters. Justice Abella, for the majority of the Supreme Court, wrote:

> [24] The province of British Columbia (represented by a director appointed under the Act), the federal government (represented by the Minister of Indian Affairs) and *NIL/TU,O* (representing the Collective First Nations) are parties to a tripartite delegation agreement, first signed in 1999 and later confirmed in 2004 ("2004 Agreement"). Under this agreement, the provincial government, as the keeper of constitutional authority over child welfare, delegated

> some of its statutory powers and responsibilities over the delivery of child welfare services to the Collective First Nations to *NIL/TU,O*. … The federal government's role in the arrangement is limited to financing *NIL/TU,O*'s provision of certain services to certain children.
>
> [emphasis added]

[84] Justice Abella follows this passage with an extensive discussion of provincial oversight and then states:

> [36] What, then, does all this tell us about the nature of *NIL/TU,O* operations? Clearly *NIL/TU,O* is regulated exclusively by the provincial delegated authority. …
>
> …
>
> [39] None of this detracts from *NIL/TU,O*'s distinct character as a child welfare organization for Aboriginal communities. But the fact that it serves these communities cannot take away from its essential character as a child welfare agency that is in all respects regulated by the province. ...
>
> [emphasis added]

[85] I will come back to the question about the nature of an organization's operations later.

[86] Justice Abella goes on to state that federal government funding does not convert the operation into a federal activity, citing *Four B Manufacturing Ltd. v United Garment Workers of America*, [1980] 1 S.C.R. 1031 [*Four B*].

[87] *Four B* was considered by the Federal Court of Appeal in *Francis v Canada Labour Relations Board* [1981] 1 FC 225 (FCA) [*Francis*]. After quoting extensively from *Four B*, Justice Heald stated:

> 17 As I read the above quoted reasons of Beetz J., "exclusive federal competence" in relation to labour relations refers largely to "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 …". 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 employees in question.
>
> [emphasis added]

[88] Justice Heald went on to state:

> 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 the Band and its Council, I am satisfied that subject unit of employees is very directly involved in activities closely related to Indian status. … 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 Indians", this establishing federal legislative competence pursuant to the provisions of subsection 91(24) of the British North America Act, 1867 [citation omitted].
>
> [emphasis added]

[89] Justice Heald completed that portion of his analysis concluding Parliament occupied the field by the provisions of the *Canada Labour Code* and that the "work, undertaking or business" is a "federal" work, undertaking or business because "the activities engaged in are being discharged under the authority of the Indian Act".

[90] Justice Le Dain, dissenting in part, agreed that the activity engaged in was activity which falls under federal legislative jurisdiction with respect to "Indians and Lands reserved for the Indians" under subsection 91(24) of the *British North American Act*, 1867 and constitutes a

federal work, undertaking or business within the meaning of sections 2 and 108 of the *Canada Labour Code*.

[91] The majority of the Federal Court of Appeal, Chief Justice Thurlow and Appeal Justice Heald, decided *Francis* on the basis that a First Nation Council was not an entity that could be recognized as an "employer". On appeal, this conclusion was overturned by the Supreme Court of Canada in *Public Service Alliance of Canada v Francis* [1982] 2 SCR 72 which held that a First Nation Council was capable of being recognized as an employer. The Supreme Court did not rule on the Federal Court of Appeal conclusion, separately reached by Appeal Justices Heald and Le Dain, that the administrative activities of the Council and the First Nation were "continuously concerned with the status and the rights and privileges of the Band of Indians" and came under the federal jurisdiction over "Indians and Lands reserved for Indians".

[92] In applying the functional test, the Supreme Court in *NIL/TU,O* looked beyond the habitual activities of the entity to the underlying reason for the performance of the child welfare activities. It described the nature of the activities as being regulated exclusively by the provincial delegated authority. In *Francis* the Federal Court of Appeal similarly went beyond the descriptions of the activities to decide the activities were governmental in nature deriving from the federal *Indian Act*.

[93] In *Munsee-Delaware*, Justice LeBlanc of the Federal Court determined a federal adjudicator had jurisdiction to consider an unjust dismissal of an employee hired to work in an administration position in that First Nation's office. The Court relied on the Federal Court of Appeal's factual conclusion in *Francis* where Justice Heald, with Justice Le Dain concurring,

described the function of employees of the First Nation in that case as being "almost entirely concerned with the administration of the St-Regis Band of Indians". The administration of a First Nation's affairs is a governance activity within federal jurisdiction for "Indians and Lands reserved for Indians".

[94] The Federal Court went on to state at *Munsee-Delaware*, paragraphs 44-45:

> [44] As in this case, the St-Regis Band was engaged in education administration, in the administration of welfare and in the delivery of healthcare in the form of administration of an old age home. The Adjudicator ruled these activities were provincially regulated and that, therefore, nothing in the work performed by Ms. Flewelling was of the type which would normally be federally regulated. The fundamental nature of the "business" or operation of a Band and a Band Council, to which the *Indian Act* applies, as depicted by the Federal Court of Appeal in *Francis*, is completely lost in that analysis.
>
> [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]

[95] Returning to *NIL/TU,O*, Chief Justice McLachlin and Justice Fish, concurring in result, differed on the test to be applied and cautioned:

> [59] … The two stage test proposed by our colleague would mean that labour jurisdiction would be determined in many cases before consideration of the power under 91(24) is reached. With respect, deciding labour jurisdiction in a case such as this without scrutiny of the federal power hollows out the functional test as conceived on the authorities. If a court were satisfied that the operation's normal activities *look provincial* on their face, it would not need to go further.
>
> [emphasis added] [italic emphasis in original]

[96] In my view, care has to be taken in applying the *Four B* functional test to avoid simply conflating the nature of the activities in question with the habitual and daily operations involved in carrying out the activities.

D. *Application of Functional Test*

[97] Justice Abella's precise choice of words in articulating the functional test in *NIL/TU,O* is significant. She stated at paragraph 3: "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" [emphasis added]. The word "nature" is not synonymous with "habitual activities and daily operations". It is set out first and has its own separate, and significant, meaning.

[98] "Nature" is defined "as a thing's or person's innate or essential qualities or character". The Canadian Oxford Dictionary Oxford University Press 1998.

[99] In arriving at the OSFI Decisions, James Rogers writes in his letters of February 28, 2017 to PBCNHS and NITHA:

> In applying the functional test, we have examined PBCNHS's normal, habitual activities based on all the information provided to us and have arrived at the conclusion that the nature of PBCNHS's operations are the provision of health care and social services to the on-reserve community residents …

And also:

> In applying the functional test, we have examined NITHA's normal, habitual activities based on all the information provided to us and have arrived at the conclusion that the nature of NITHA's operations are the provision of health services to its four constituting members …

[100] The language in these letters suggests the OSFI decision-maker subordinated "nature" to "normal, habitual activities". OSFI errs by hollowing out the functional test in failing to have regard to an essential quality of the activity being the underlying reason for the activities.

[101] In defining the meaning of 'whereas', the Canadian Oxford Dictionary provides "2 (*esp in legal preambles*) taking into consideration the fact that". Such 'whereas' recitals set out facts that are to be taken into consideration in the document and often indicate the context for the making of an agreement.

[102] An examination of the Appendices attached to the OSFI Decisions listing relevant provisions in the respective Health Funding Consolidated Contribution Agreements between Canada and PBCNHS and NITHA confirms the narrowing of considerations taken into account in the OSFI Decisions. In both instances, Mr. Rogers only refers to certain 'whereas' recitals at the beginning of the Agreements:

A. With respect to PBCNHS:

> Whereas the Minister wishes to provide funds to [PBCNHS] in accordance with the terms and conditions of this Agreement for the provisions of Health Programs and Services …
>
> Whereas … the parties agree that this Agreement shall not be constituted so as to establish, affect, derogate from or prejudice aboriginal, treaty, constitutional or any other rights …
>
> [Emphasis by OSFI]

B. With respect to NITHA:

> Whereas the Minister wishes to provide funds to NITHA in accordance with the terms and conditions of this Agreement for the provision of Health Programs and Services …
>
> Whereas the Minister and the NITHA intend that nothing in this Agreement shall have the effect of, or be interpreted as, limiting or

> expanding any fiduciary relationships between Her Majesty the Queen, in Right of Canada, and First Nations people …
>
> [Emphasis by OSFI]

I consider the effect of this narrowed perspective is to unreasonably restrict the functional test analysis conducted by OSFI.

[103] OSFI does not consider the following 'whereas' clauses in each of the Agreements that are important when considering the nature of the activities covered by the Agreements. Those recitals are:

A. With respect to PBCNHS:

> WHEREAS the Crown entered into Treaty No. 6 with certain First Nations within the Province of Saskatchewan.
>
> …
>
> WHEREAS Canada by virtue of section 91(24) of the *Constitution Act* 1867, has legislative authority in respect of Indians and lands reserved for Indians.
>
> WHEREAS a special relationship exists between Her Majesty, the Crown and the First Nations of Canada.
>
> WHEREAS pursuant to this relationship the Minister has provided for the health and safety of First Nations people in accordance with the Indian Health Policy.
>
> …
>
> WHEREAS the First Nations and Inuit Health Branch of Health Canada has been established with the mandate to ensure the health and safety of First Nations people.
>
> WHEREAS the Minister has made available the First Nations Inuit Health Transfer Initiative to enable First Nations people to exercise control over health services.
>
> WHEREAS this Agreement is not intended, nor shall it be construed, as modifying Treaty No. 6, not [sic] is it intended as

> creating a new treaty within the meaning of section 35 of the *Constitution Act 1982.*

B. With respect to NITHA:

> WHEREAS Her Majesty the Queen, in Right of Canada, entered into Treaties 5, 6, 8 and 10 with certain First Nations in what is presently the Province of Saskatchewan.
>
> WHEREAS the parties acknowledge the historical and contemporary importance of the treaties to the relationship between Her Majesty the Queen, in Right of Canada, and the First Nation(s) of NITHA.

[104] Copies of Treaties 5, 6, 8 and 10 and the accompanying Treaty Commissioners' reports were not included in the material before the OSFI. However, these treaties are referenced in the Agreements and, as important historical documents, may not be ignored. The recitals referencing the Treaties give context and meaning to the nature of the Agreements every bit as much, indeed more, as the recitals OSFI chose to emphasize in its Decisions.

[105] I am entitled to have regard to these Treaties and the Treaty Commissioners' reports on the basis of long standing authority summarized by Supreme Court Justice Lamer in *R v Sioui* [1990] 1 S.C.R. 1025 at 1050 [*Sioui*] who wrote:

> I am of the view that all the documents to which I refer, whether my attention was drawn to them by the intervener or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge. As Norris J.A. said in *White and Bob* (at p. 629):
>
> > The Court is entitled "to take judicial notice of the facts of history whether past or contemporaneous" as Lord du Parq said in *Monarch Steamship Co., Ld. v. Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196 at p. 234, [1949] 1 All E.R. 1 at p. 20, and it is entitled to rely on its own historical knowledge and researches, *Read v. Bishop of Lincoln,* [1892] A.C. 644, Lord Halsbury, L.C. at pp. 652-4.

> The documents I cite all enable the Court, in my view, to identify more accurately the historical context essential to the resolution of this case.

[106] Turning to the treaties in question, Treaty 6, 8 and 10 include federal Crown promises of health care.

[107] Treaty No. 6 contains express written treaty promises including what may be termed the "Medicine Chest" clause:

> 1876 Treaty 6:
>
> That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by her Indian Agent or Agents, will grant to Indians assistance of such character and such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.
>
> …
>
> That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.
>
> [emphasis added]

[108] In Treaty No. 8, the Treaty Commissioners made oral promises that the federal Crown would provide health services:

> 1899 Report of Commissioners for Treaty No. 8:
>
> … They all wanted as liberal, if not more liberal terms, than were granted to the Indians of the plains. … They requested that medicines be furnished. At Vermilion, Chipewyan and Smith's Landing, an earnest appeal was made for the services of a medical man. …

> … We promised that supplies of medicines would be put in the charge of persons selected by the Government at different points, and would be distributed free to those of the Indians who might require them. We explained that it would be practically impossible for the Government to arrange for regular medical attendance upon Indians so widely scattered over such an extensive territory. We assured them, however, that the Government would always be ready to avail itself of any opportunity of affording medical service just as it provided the physician attached to the Commission should give free attendance to all Indians whom he might find in need of treatment as he passed through the country.
>
> [emphasis added]

[109] In Treaty No. 10, the Treaty Commissioner also made oral promises of health services by the federal Crown:

> 1907 Report of the First Commissioner For Treaty No. 10:
>
> They further requested that medicines be furnished, and made an earnest appeal for the appointment of a resident medical man.
>
> …
>
> I promised that medicines would be placed at different points in the charge of persons to be selected by the government, and would be distributed to those of the Indians who might require them. I showed them that it would be practically impossible for the government to arrange for a resident doctor owing to the Indians being so widely scattered over such an extensive territory; but I assured them that the government would always be ready to avail itself of any opportunity of affording medical service just as it provided that the physician attached to the commission should give free attendance to all Indians he might find in need of treatment.
>
> [emphasis added]

[110] There is no mention of health services in Treaty 5 or in the Treaty Commissioner's report although it is to be noted that medical officers were present and witnesses to the treaty and its subsequent adhesions.

[111] As an aside, I note the Treaty Commissioners spoke about the challenges of delivering medical aid to the locations in the country where the Indians were situated. Accordingly, on a related and surely undisputed point, I note the above Treaties all provided for Indian reserves where the Indians signatory to the Treaties were to reside.

[112] I am satisfied the historic Treaties and the Treaty Commissioners' reports make it clear that the federal Crown undertook to provide health services to the Indians on Indian Reserves. This federal undertaking of providing health services to the Indians rests on the aforesaid historic federal Crown treaty promises and assurances of medical aid as well as the federal jurisdiction for Indians on the Indian reserves that were provided for in the Treaties.

[113] The recitals in the Agreements set out the context for the agreed transfer to the Applicants of federal health services delivery that had been promised during the making of the Treaties. This federal undertaking is not merely the result of any recent federal spending policy.

[114] Accordingly, the PBCNHS and NITHA Health Agreements were made to enable the First Nations to take over delivery of federal health services being delivered by the federal government consistent with the solemn promises made to the Indians in treaty by the federal Crown.

[115] Although provincial regulation of general application applies to some of the health services on reserve, the mere fact this provincial legislation is applicable is not enough to bring the Applicants under provincial jurisdiction when they are engaged in delivering promised federal Crown health services.

[116] In my view OSFI failed to consider this essential factor concerning the nature of the Applicants' activities in delivering health services.

[117] In result, I am satisfied that the OSFI decision-maker, in conducting the functional test, unreasonably failed to have regard to important facts relevant to the nature of the endeavour, namely the treaty relationship between the First Nations and the federal government and, in particular, the federal nature of delivery of health services to the Treaty First Nations when deciding whether or not PBCNHS and NITHA delivery of these federal health services was a federal undertaking.

[118] I will grant the application for *certiorari* and quash the February 28, 2017 OSFI Decisions concerning PBCHNS and NITHA pensions.

E. *Request for a Declaration*

[119] In addition to their request for an order for *certiorari*, the Applicants sought further relief, being a request, as they stated, for:

> A declaration pursuant to s. 18(1) (a) and/or s. 18.1(3)(b) of the *Federal Courts Act*, 2002, c.8, s.14 that the Applicants' jurisdiction for registration of their employee pension plans is Federal.

[120] A declaration differs from other judicial orders in that it declares what the law is without ordering any specific action by a party. The issues determined by a declaration become *res judicata* between the parties and compliance with the declaration is expected: *Assiniboine et al v Meeches*, 2013 FCA 114 [*Assiniboine*].

[121] In this instance, consideration of the request for a declaration is appropriate given the matter at hand has already been the subject of extensive litigation and repeated decisions. The Parties have incurred significant expense and ordering a further decision could raise doubts as to whether the new decision is conducted fresh anew or is merely a defense of earlier thrice-repeated decisions.

[122] I had asked the Parties to provide historical background about the provision of health services on Indian Reserves. This information, together with the historical documentary record on the Treaties and Treaty Commissioners' reports reviewed above, provide a basis for considering the request for declaratory relief.

[123] The federal government is responsible for Indians, and Lands reserved for Indians. s. 91(24) *Constitution Act* 1867. In keeping with that jurisdiction, the federal Crown is responsible for the making of Indian treaties. Her Majesty the Queen in right of Canada is signatory to Treaties 5, 6, 8 and 10 with the First Nations whose health service delivery corporations are the Applicants in this proceeding.

[124] The promise of health services is contained as an express term in Treaty 6. The Medicine Chest clause was a promise by the federal Crown to provide health services to the First Nations party to treaty. Thus, the Treaty No. 6 First Nations and their members are entitled to expect health services from the federal government. It is unnecessary at this stage to consider the extent or method of delivery of such health services. It is sufficient to observe that the First Nations can look to the federal government for fulfilment of the Treaty 6 promise.

[125] In both Treaty No. 8 and Treaty No. 10, the Treaty Commissioners reported the Indians repeatedly requested medical services. The Treaty Commissioners wrote they promised that medical services would be provided by the federal Crown. Indeed, the Commissioners advised that the medical officers accompanying the treaty party provided medical assistance aid to the Indians attending the treaty negotiations.

[126] Both Treaty No. 5 and the corresponding Treaty Commissioner's reports are silent on medical services although it is to be noted that medical officers were present and witnessed Treaty 5 and subsequent adhesions. The medical officers present in the subsequent Treaties 6, 8 and 10 provided medical aid to the Indians attending the treaty talks and one may reasonably assume the medical officers present at Treaty 5 did the same.

[127] Indian Treaties are to be understood as the Indians would understand them. In *R v Badger* [1996] 1 S.C.R. 771 the Supreme Court of Canada stated:

> 55 The Indian people made their agreements orally and recorded their history orally. Thus, the verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation. Treaty No. 8 was initially concluded with the Indians at Lesser Slave Lake. The Commissioners then travelled to many other bands in the region and sought their adhesion to the Treaty. Oral promises were made with the Lesser Slave Lake band and with the other Treaty signatories and these promises have been recorded in the Treaty Commissioners' Reports and in contemporary affidavits and diaries of interpreters and other government officials who participated in the negotiations.
>
> [emphasis added]

[128] I pause at this point to note I am not deciding whether health services are a treaty right because I need not go so far. Instead I am considering whether or not the provision of health

services to the on-reserve Indians are in the nature of a federal government undertaking, more specifically whether the federal government undertook to deliver health services to the members of the Applicant First Nations in keeping with the promises by the federal Crown at the time of treaty making.

[129] The federal Crown's treaty promises and assurances of health services were not merely transitory or empty promises, nor were they directed only to the specific recipients of each treaty. The evidence provided in the "Supplementary Historical Information on the Provision of Medical Services by the Federal Crown to the Applicants" summarizes:

> The following report utilizes and reproduces except pages of the *Dominion of Canada Annual Reports of the Department of Indian Affairs* specifically from 1891-1918 that document the actual health services provided by doctors or medical officers to the 11 First Nations of the Prince Albert Grand Council, the Lac La Ronge Indian Band, Peter Ballantyne Cree Nation; and also, the 9 First Nations of the Meadow Lake Tribal Council, in Northern Saskatchewan.
>
> These reports were originally written by Treaty Commissioners, Treaty Inspectors, Inspectors of Indian Agencies or Indian Agents of the Department of Indian Affairs, who attended with doctors or medical officers at visits with the First Nations or they documented the Federal medical services provided by the various doctors or medical officers of the time or the Health conditions of the specific First Nations of the time and the medical services provided to alleviate sickness among the First nations.
>
> Additionally, the report concludes with 5 general summarizing documented reports on Indian Health Services in Canada and Saskatchewan taken from the *Dominion of Canada Annual Reports of the Department of Indian Affairs 1922, Report of the Superintendent General 1923; Canada Department of Mines and Resources-Indian Affairs Branch 1940, 1947 and Canada-Department of Citizenship and Immigration-Indian Affairs Branch 1954.*

[130] I need not go into the detail of the supplementary information other than to note that the provision of health services by the federal government to the members of the Applicant First Nations is long standing, going back to the times of the making of Treaties 5, 6, 8 and 10 and is in keeping with the federal Crown's treaty and oral promises made to provide health services to the members of the Applicant First Nations.

[131] I consider the federal government's undertaking to provide health services to Indians on Indian Reserves to be broader than just the treaty promises. The historical record shows the federal government provided health services to the Treaty 5 First Nations and their members even though there is no such promise recorded in Treaty 5.

[132] Moreover, the historical information shows the federal government has been providing health services to all First Nations and their members for a long time. The federal undertaking, as the Applicants submitted, is the federal assumption of responsibility to provide health services to all First Nations. This is reflected in the 1923 Department of Indian Affairs report which states in part:

> HEALTH SUPERVISION
>
> The health of Indians has been normal during the past. The department provides medical attention for the Indian bands in all parts of the Dominion and all possible effort is being made to preserve and improve the physical wellbeing of the native races.
>
> [emphasis added]

[133] I conclude, from the historical treaty record and the supplementary evidence that the provision of health services to the Indians is a long standing, century-long federal undertaking made in part, at the very least, in keeping with the treaty relationship between the Applicant First Nations and the federal government.

[134] Turning to the Agreements between the Applicants and the federal government, the 'Whereas' recitals make it clear that the health services that are the subject of the Agreements are health services that the federal government had undertaken to deliver to the First Nations. The health services are now to be delivered by the Applicants as the First Nations' chosen corporate delivery vehicles.

[135] Applying the functional test, the nature of the Applicants' activities is the delivery of health services that correspond to the federal undertaking to provide health services to the First Nations and their members on Indian reserves. This undertaking comes within federal jurisdiction pursuant to s. 91(24) jurisdiction *Constitution Act* 1867 which includes conduct of related matters on Indian reserves that are of concern for Indians and their rights as Indians and, as well, treaty making.

[136] In *NIL/TU,O*, Chief Justice McLachlin and Justice Fish referred to *Four B* at paragraph 64 as holding "the Indian operation of a business and its economic impact on the community was insufficient to characterize the operation of a federal business and bring it within the protected core of 91(24)." The Chief Justice then observed:

> [65] … The reference to Four B in this passage is simply a factual statement about the conclusion reached in that case. <u>It is not an assertion the Indian undertakings or businesses can never be federal matters governed by federal labour law.</u>
>
> [emphasis added]

Unlike the majority, after discussing *Four B* and other cases, they went on to address the other side of the coin, stating:

> [70] We may therefore conclude that the core, or "basic, minimum and unassailable content" of the federal power over "Indians" in s. 91(24) is defined as matters that go to the status and rights of Indians. Where their status and rights are concerned, Indians are federal "persons", regulated by federal law: [citation omitted]
>
> [emphasis added]

[137] The protected core of 91(24) includes Indian rights arising from the exercise of federal jurisdiction. In the application at hand, the delivery of health services on Indian reserves by the federal government is closely connected to the rights of Indians whose First Nations entered into treaty in reliance of the treaty promises and oral assurances given to them by the federal Crown.

[138] The Applicant First Nations and their members have a right to expect the federal government to honour its treaty promises and oral assurances to deliver health services. To alter the jurisdiction for such delivery to provincial jurisdiction is an impermissible abandonment of the federal treaty promises and assurances to provide health services. The Agreements maintain the treaty relationship which is made explicitly clear by the recitals that state the Agreements do not alter the treaty or fiduciary rights of the First Nations. Such rights continue notwithstanding the change in the method of delivery of health services.

[139] In my view the nature of the health services now being delivered by the Applicants are those health services promised in treaty and realized through the century-long federal government undertaking to provide of health services in keeping with its treaty relationship with the Applicant First Nations.

[140] As pointed out by the Supreme Court in Canada in *NIL/TU,O*, the entity engaged in the activity does not change the nature of the activity which remains the focus of the functional test

to be applied. Here, the fact that PBCNHS and NITHA are provincial non-profit corporations does not change the fundamental nature of the activities performed. The activity remains a federal undertaking to provide health services to the Treaty First Nations in keeping with its promises made at time of treaty-making which the federal government has honourably carried out for over a century since the times of treaty making.

[141] I do not see this as an instance of co-operative federalism as referred to in *NIL/TU,O* although it follows the same approach of a more beneficial delivery of health services by having that service delivered by the Applicant First Nations' corporations. Unlike in *NIL/TU,O*, the Saskatchewan provincial government is not party to the Agreements and there is no delegation of authority over health to the Applicants. The provision of health services is a federal undertaking that does not change in nature because a more beneficial delivery of those services has been adopted by the federal government by agreement with the First Nations and their health services corporations.

[142] I find the process of administration, provision and delivery of health services for on-reserve Indian members of the Applicant First Nations pursuant to the Agreements between the federal government and the Applicants, PBCNHS and NITHA, to constitute a federal undertaking that comes within the definition in subsection 4(4)(i) *PBSA*.

[143] I see no benefit to referring this matter back to the decision-maker for reasons already stated. I will grant the declaration sought.

F. *Extension of Time*

[144] The Notice of Application was filed five months after the Decisions were made and presumably communicated. Under the *Federal Courts Act* a Notice of Application is to be made within 30 days after the decision is first communicated or otherwise within a time set by a Judge of the Federal Court: the Act, s 18.1(2). I raised this question at the hearing of the application and was told there was a consent Order extending the time; however, to remove any doubt, I will address the question.

[145] The test to be used if granting an extension is whether there was a continuing intention to pursue the Application, some merit to the Application, no prejudice to the Respondent from the delay and a reasonable explanation for the delay: *Canada (AG) v Larkman*, 2012 FCA 204 at paras 61-62.

[146] This matter is clearly of importance to the Parties and the application for judicial review was part of an agreement to resubmit the application to OSFI for a decision which could be followed by an application for judicial review if the new decisions were further challenged.

[147] I am satisfied this Court should confirm an extension of time for the Notice of Application to the date of filing.

## VII. **Conclusion**

[148] I find that the OSFI Decisions do not meet the requisite standard of review. I find it is appropriate to grant the Applicants' request for *certiorari* and to order the February 28, 2017 OSFI Decisions concerning PBCNHS and NITHA quashed.

[149] I am satisfied the health services previously delivered by the federal government and now administered by the Applicants are federal undertakings within federal jurisdiction and I will grant the request for a declaration to that effect.

[150] I order the time for filing the Notice of Application is extended to the date of filing.

[151] Costs are awarded to the Applicants.

**JUDGMENT in T-1315-17**

**THIS COURT'S JUDGMENT is that**:

1. The Applicants' request for *certiorari* is granted and the OSFI Decisions concerning PBCNHS and NITHA respectively are quashed.

2. I declare the health services previously delivered by the federal government and now delivered by the Applicants are a federal undertaking within federal jurisdiction for subsection 91(24) *Constitution Act 1867* and comes within the meaning of the *Pension Benefits Standards Act*.

3. The time for filing the Notice of Application is extended to the date of filing.

4. Costs are awarded to the Applicants.

"Leonard S. Mandamin"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1315-17 |
| **STYLE OF CAUSE:** | NORTHERN INTER-TRIBAL HEALTH AUTHORITY INC. AND PETER BALLANTYNE CREE NATION HEALTH SERVICES INCORPORATED V ATTORNEY GENERAL OF CANADA, MINISTER OF FINANCE |
| **PLACE OF HEARING:** | SASKATOON, SASKATCHEWAN |
| **DATE OF HEARING:** | JUNE 13, 2018 |
| **JUDGMENT AND REASONS:** | MANDAMIN J. |
| **DATED:** | NOVEMBER 28, 2018 |

**APPEARANCES:**

| | |
|---|---|
| Carl Nahachewsky | FOR THE APPLICANTS |
| Cailen Brust<br>Marlon Miller | FOR THE RESPONDENT |

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