



**SUPREME COURT OF CANADA**

**CITATION:** Communications, Energy and Paperworkers Union  
of Canada v. Native Child and Family Services of Toronto,  
2010 SCC 46

**DATE:** 20101104  
**DOCKET:** 32908

**BETWEEN:**

**Communications, Energy and Paperworkers  
Union of Canada**

Appellant  
and

**Native Child and Family Services of Toronto**

Respondent  
- and -

**Attorney General of Canada, Attorney General of Ontario,  
Attorney General of Quebec, Attorney General of New Brunswick,  
Attorney General of Manitoba, Attorney General of British Columbia,  
Attorney General for Saskatchewan, Assembly of First Nations of  
Quebec and Labrador and First Nations of Quebec and  
Labrador Health and Social Services Commission**

Interveners

**CORAM:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and  
Cromwell JJ.

**REASONS FOR JUDGMENT:** Abella J. (LeBel, Deschamps, Charron, Rothstein and  
(paras. 1 to 12) Cromwell JJ. concurring)

**JOINT CONCURRING REASONS:** McLachlin C.J. and Fish J. (Binnie J. concurring)  
(paras. 13 to 14)

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*Canada Supreme Court Reports*.

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CEP v. NATIVE CHILD AND FAMILY SERVICES OF TORONTO

**Communications, Energy and Paperworkers  
Union of Canada**

*Appellant*

v.

**Native Child and Family Services of Toronto**

*Respondent*

and

**Attorney General of Canada, Attorney General of  
Ontario, Attorney General of Quebec, Attorney General  
of New Brunswick, Attorney General of Manitoba,  
Attorney General of British Columbia, Attorney General  
for Saskatchewan, Assembly of First Nations of Quebec  
and Labrador and First Nations of Quebec and Labrador  
Health and Social Services Commission**

*Interveners*

**Indexed as: Communications, Energy and Paperworkers Union of Canada v. Native Child and  
Family Services of Toronto**

**2010 SCC 46**

File No.: 32908.

2009: December 8; 2010: November 4.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Constitutional law — Division of powers — Labour relations — Aboriginal peoples — Child welfare agency providing services to Aboriginal children and families in Toronto — Union applying to Canada Industrial Relations Board for certification as bargaining agent for child welfare agency’s employees — Agency arguing its labour relations within exclusive provincial authority — Whether agency constitutes a federal undertaking based on its nature, operations and habitual activities — Whether Aboriginal aspects of agency’s operations and service delivery displace presumption of provincial jurisdiction over labour relations — Constitution Act, 1867, s. 91(24).*

Native Child and Family Services of Toronto, is a children’s aid society that provides services to Aboriginal families in Toronto. The Union applied to be certified as the bargaining agent for Native Child’s employees. Native Child challenged the application, arguing its labour relations were within exclusive provincial authority. The Canada Industrial Relations Board concluded Native Child’s labour relations were an integral part of primary federal jurisdiction over “Indians” under s. 91(24) of the *Constitution Act, 1867* and therefore subject to the *Canada Labour Code*. The Federal Court of Appeal disagreed, concluding that Native Child’s labour relations were under provincial jurisdiction.

*Held:* The appeal should be dismissed.

*Per* LeBel, Deschamps, **Abella**, Charron, Rothstein and Cromwell JJ.: As noted in *NIL/TU, O Child and Family Service Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, released concurrently, labour relations presumptively fall under provincial authority. Federal jurisdiction arises only as an exception when the nature of an entity's operations can be properly characterized as federal on an application of the "functional test". That presumption has not been displaced in this case. Native Child's mandate to deliver effective, culturally-appropriate services to Aboriginal clients and communities does not alter the fact that the essential function of the agency's operation is to deliver child welfare services, a provincial function.

*Per* **McLachlin** C.J. and **Fish** and Binnie JJ.: Based on the approach outlined in *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, federal labour relations jurisdiction does not apply.

### **Cases Cited**

By Abella J.

**Applied:** *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45; **referred to:** *C.U.P.E. v. Native Child and Family Services of Toronto*, [1995] O.L.R.D. No. 4298 (QL).

By McLachlin C.J. and Fish J.

**Referred to:** *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45.

### **Statutes and Regulations Cited**

*Canada Labour Code*, R.S.C. 1985, c. L-2.

*Child and Family Services Act*, R.S.O. 1990, c. 11. ss. 1, 7(1), 15(2), (3), (4).

*Constitution Act, 1867*, s. 91(24).

*Corporations Act*, R.S.O. 1980, c. 95.

APPEAL from a judgment of the Federal Court of Appeal (Décary, Sexton and Sharlow JJ.A.), 2008 FCA 338, 382 N.R. 330, [2009] 1 C.N.L.R. 218, 2009 C.L.L.C. 220-022, 302 D.L.R. (4th) 700, [2008] F.C.J. No. 1497 (QL), 2008 CarswellNat 3855, setting aside an order of the Canada Industrial Relations Board, Order No. 9289-U. Appeal dismissed.

*Douglas J. Wray and Jesse M. Nyman*, for the appellant.

*Mark V. Ellis*, for the respondent.

*Peter Southey and Sean Gaudet*, for the intervener the Attorney General of Canada.

*Sean Hanley and Bruce Ellis*, for the intervener the Attorney General of Ontario.

*Sylvain Leboeuf and Monique Rousseau*, for the intervener the Attorney General of Quebec.

*Gaétan Migneault*, for the intervener the Attorney General of New Brunswick.

*Cynthia Devine*, for the intervener the Attorney General of Manitoba.

*Paul E. Yearwood*, for the intervener the Attorney General of British Columbia.

*R. James Fyfe*, for the intervener the Attorney General for Saskatchewan.

*David Schulze and Barbara Cuber*, for the interveners the Assembly of the First Nations of Quebec and Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission.

The judgment of LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

[1] Native Child and Family Services of Toronto (“Native Child”) is a children’s aid society that provides services to Aboriginal families in Toronto. In 2007, the Communications, Energy and Paperworkers Union of Canada applied to the Canada Industrial Relations Board to be certified as the bargaining agent for all Native Child employees except students, supervisors and persons above the rank of supervisor. Native Child challenged the application, arguing that its labour relations were within exclusive provincial authority.

[2] The Board rejected Native Child’s objection, concluding that Native Child’s labour relations were an integral part of primary federal jurisdiction over “Indians” under s. 91(24) of the *Constitution Act, 1867* and therefore subject to the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Order No. 9289-U, dated November 23, 2007). On judicial review, Sexton J.A. disagreed, concluding that Native Child’s labour relations were under provincial jurisdiction (2008 FCA 338, 382 N.R. 330). I agree.

[3] As in *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, 2010 SCC 45, released concurrently, the issue in this appeal is whether the provincial or federal government has jurisdiction over the agency’s labour relations. As noted in *NIL/TU, O*, labour relations presumptively fall under provincial authority. Federal jurisdiction arises

only as an exception when the nature of an entity's operations can be properly characterized as federal on an application of the "functional test".

[4] In 1986, Native Child was incorporated under Ontario's *Corporations Act*, R.S.O. 1980, c. 95, to provide "a life of quality, well-being, caring and healing" to Toronto's Aboriginal community by offering child welfare and family support services that were "culture-based" and respectful of "the supreme values of Native people, the extended family, and the right of self-determination" (*C.U.P.E. v. Native Child and Family Services of Toronto*, [1995] O.L.R.D. No. 4298 (QL), at para. 3).

[5] In 1987, Native Child and Ontario's Minister of Community and Social Services entered into an agreement that identified Native Child as an authorized service provider under the *Child and Family Services Act*, R.S.O. 1990, c. C.11. The Act regulates the delivery of all child welfare services in the province and s. 7(1) empowers the provincial government to make agreements with persons, municipalities and agencies for the provision of child welfare and support services, and to pay for those services out of legislative appropriations. The agreement provided that Native Child was a "native-controlled, community based agency" (*C.U.P.E.*, at para. 3) that would provide support, prevention and advocacy services to Aboriginal children and families in Metropolitan Toronto. As a service provider, Native Child had to enter into annual service agreements with the provincial government, which had line by line budget approval over Native Child's funding.



[6] In 2004, Ontario's Minister of Children and Youth Services designated Native Child as a children's aid society under s. 15(2) of the Act, which provides:

The Minister may designate an approved agency as a children's aid society for a specified territorial jurisdiction and for any or all of the functions set out in subsection (3), may impose terms and conditions on a designation and may vary, remove or amend the terms and conditions or impose new terms and conditions at any time, and may at any time amend a designation to provide that the society is no longer designated for a particular function set out in subsection (3) or to alter the society's territorial jurisdiction.

[7] Native Child, when fulfilling its statutory functions, is bound to comply with the Act's objectives, standards and procedures, most notably the Act's paramount purpose of "promot[ing] the best interests, protection and well being of children" (ss. 1(1), 1(2) and 15(4)). As a children's aid society, Native Child's functions include: investigating allegations or evidence that children who are under the age of sixteen years or are in the society's care or under its supervision may be in need of protection; protecting, where necessary, children who are under sixteen or are in the society's care or under its supervision; providing guidance, counselling and other services to families for protecting children or for the prevention of circumstances requiring the protection of children; providing care for children assigned or committed to its care under the Act; supervising children assigned to its supervision under the Act; placing children for adoption; and performing any other statutory duties (s. 15(3)). Some of its support services are directed towards children's mental health, family well-being, parental education, childhood education and youth outreach, and have

included a customary care program, a sexual abuse program for women and children, a summer camp and a mother's assistance program.

[8] Native Child shares responsibility for delivering child welfare services in Toronto with the Children's Aid Society of Toronto, the Catholic Children's Aid Society of Toronto, and the Jewish Children's Aid Society. Toronto's Aboriginal population can seek child welfare services from any of these agencies — they are not required to rely on Native Child.

[9] From the record, it appears that the federal government has provided some funding to Native Child, but the province, bolstered by some municipal and non-governmental contributions, funds the bulk of Native Child's operations. There is no formal band involvement in Native Child's governance, although its employees and board members are primarily Aboriginal.

[10] In my view, the nature of what Native Child does is to deliver child welfare services. This falls under provincial jurisdiction. Native Child, wholly regulated by the *Child and Family Services Act*, is a fully integrated, provincially designated children's aid society that provides services in accordance with statutory standards in Toronto. The crux of its operations is, as Native Child submitted, to "provide child and family services pursuant to Provincial statutorily prescribed standards in the same manner and with the same professionalism that is provided by all such 'sister' agencies in the Province".

[11] It is argued, however, that the Aboriginal aspects of Native Child's operation render it a federal undertaking by virtue of s. 91(24). Yet as explained in *NIL/TU,O*, a provincially regulated child welfare agency's mandate to deliver effective, culturally appropriate services to Aboriginal clients and communities does not alter the fact that the essential function of the agency's operation is to deliver child welfare services, a provincial function. While the identity of Native Child's clients undoubtedly has, and should have, an impact on the way the agency delivers services, it does not alter the essential nature of what Native Child does.

[12] For these reasons and for those set out in *NIL/TU,O*, I am of the view that the presumption in favour of provincial jurisdiction over labour relations has not been displaced. I would therefore dismiss the appeal with costs.

The reasons of McLachlin C.J. and Binnie and Fish JJ. were delivered by

THE CHIEF JUSTICE AND FISH J. —

[13] Though we concur with Justice Abella in her conclusion that the society's culturally directed services do not attract federal labour relations jurisdiction, we do so on the basis of the approach outlined in our reasons in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45.

[14] We would dismiss the appeal.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Caley & Wray, Toronto.*

*Solicitors for the respondent: Baker & McKenzie, Toronto.*

*Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

*Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.*

*Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.*

*Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.*

*Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.*

*Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.*

*Solicitors for the interveners the Assembly of the First Nations of Quebec and Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission: Dionne Schulze, Montréal.*