EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Urban Native Indian Education Society
("UNIES" or the "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	1999/250
DATE OF DECISION:	November 15, 1999

DECISION

OVERVIEW

This is an appeal brought by Urban Native Indian Education Society ("UNIES" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 1st, 1999 under file number ER 1330 (the "Determination").

The Director's delegate determined that UNIES owed its former employees, Marcia B. Krawll ("Krawll") and Raymond LaPerrière ("LaPerrière"), the sums of, respectively, $17,795.57 and $8,273.13 ($26,068.70 in total), on account of unpaid wages and interest. Further, by way of the Determination, the Director also levied a $0 penalty pursuant to section 98 of the *Act* and section 29 of the *Regulation.*

UNIES appealed the Determination on three separate grounds, namely, that the Director's delegate erred by:

> i) "making the Determination taking into account documentary evidence without giving UNIES an opportunity to makes [sic] submissions thereon, contrary to the laws of natural justice and fairness";
>
> ii) "making a Determination, despite the fact that UNIES is an aboriginal organization controlled from an Indian Reservation, and, as such, is not subject to the Provincial Employment Standards Legislation"; and
>
> iii) "making a determination without taking into account the fact that instructors are exempt from the overtime and hours of work provision [sic] of the Employment Standards legislation."

UNIES's appeal was heard on July 14th, 1999 at the Tribunal's offices in Vancouver, however, because the employer did not deliver the appropriate notices required by section 8(2) of the B.C. *Constitutional Question Act,* the employer's argument that the employer is not subject to the *Act* by reason of its status as "an aboriginal organization controlled from an Indian Reservation" was adjourned pending the delivery of the appropriate notices and further written submissions from the parties and the federal and provincial attorneys general.

The employer's appeal with respect to the first and third grounds proceeded on July 14th and in a written decision issued on August 20th, 1999 (B.C.E.S.T. Decision No. 309/99) I confirmed the Determination, subject to a ruling on the constitutional issue. My formal order provided as follows:

> "...if the employer wishes to pursue its second ground of appeal it is hereby directed to deliver **six copies** of its full submission with respect to this ground to the Tribunal **by no later than 4:00 P.M. on Friday, September 10th, 1999.** In the event the employer does not deliver its submission on the constitutional issue as directed herein, this ground of appeal will be dismissed as abandoned.
>
> The Tribunal will, in turn, deliver the employer's submission on the constitutional issue to the respondent employees as well as to the Director and the provincial and federal Attorneys-General and make will further directions regarding the delivery of the such parties' reply submissions.
>
> Once all of the parties' submissions are in hand, I will issue a written decision on the constitutional issue."

The appropriate notices have now been delivered and, accordingly, I am now in a position to address the constitutional issue raised by UNIES in its appeal. I should note that neither complainant employee filed a comprehensive submission; Ms. Krawll simply adopted the submission made by legal counsel for the Director (dated and filed with the Tribunal on October 4th, 1999). The other complainant, Mr. LaPerrière, did not file any submission with respect to the constitutional issue. By way of letter to the Tribunal dated September 27th, 1999, legal counsel for the Attorney General of Canada advised that "the Attorney General of Canada will not be intervening in this matter but I would appreciate receiving a copy of your decision...". The agent for UNIES chose not to deliver any further submission, being content to rely on his original 3-page written submission filed with the Tribunal and dated June 14th, 1999.

ISSUE TO BE DECIDED

The Constitutional Issue

As noted above, the appellant, in its amended notice of appeal filed with the Tribunal on April 29th, 1999, crystallized the constitutional issue in the following terms:

> "[The Director erred] in making a Determination, despite the fact that UNIES is an aboriginal organization controlled from an Indian Reservation, and, as such, is not subject to the Provincial Employment Standards Legislation."

BACKGROUND FACTS

In support of its appeal on this issue, the employer relies on the following, essentially uncontested, facts (reproduced from UNIES' June 14th submission):

- "The financial administration of the operation is located on an Indian Reserve in North Vancouver";

- "The services of the society are delivered almost exclusively to aboriginal persons, although the society does not discriminate";

- "The persons delivering the service are almost all aboriginal, but, once again, the society does not discriminate";

- "The services delivered take into account aboriginal traditions and history".

In addition to the foregoing, the *viva voce* evidence before me (given during the course of the July 14th appeal hearing) discloses that:

- Neither complainant employee is of aboriginal origin;

- None of the UNIES programs are delivered on band land and, indeed, some of the programs are offered in conjunction with, and partially funded by, Vancouver City College;

- Krawll's evidence was that she spent about 25% of her time instructing in what was called the "Native Youth Worker Training Program", an outreach program whereby young adults were trained to work with predominantly, if not exclusively, native youth who found themselves "on the street"; her instructional duties focused on training youth workers in basic counselling skills. The balance of her time was spent in administrative duties relating to the program such as arranging for guest speakers, coordinating the other other instructors' schedules and their evaluations, and students' "practicums";

- LaPerrière worked in UNIES' Native Alcohol and Drug Counsellor Program--his main function was to help train adult aboriginals to become drug and alcohol counsellors. LaPerrière was one of several instructors and, in addition, he had quite a number of administrative duties regarding the delivery of the 1-year program;

ANALYSIS

As is quite properly noted by legal counsel for the Director in her submission, UNIES has not indicated whether its position is founded on section 91(24) of the *Constitution Act, 1967* (which grants exclusive jurisdiction over "Indians, and Lands reserved for the Indians" to the federal government) or section 35(1) of the *Constitution Act, 1982* (which states that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed"). Rather, the appellant's entire argument is based on a decision of the Federal Court of

Appeal, *Canada v. Folster* [1997] 3 F.C.R. 269. UNIES asserts that the *Act* does not apply to it by reason of the "principles" established by the Federal Court of Appeal in *Canada v. Folster*.

The Folster case

The agent for UNIES did not provide the Tribunal with a copy of the *Folster* decision (nor even its citation), however, I have now obtained and reviewed the reasons for decision in that case. The issue in *Folster* was whether or not the appellant, a status Indian, was obliged to pay federal income tax on income earned as an administrator of a hospital that primarily served aboriginals but which was not situated on an Indian Reserve. The Federal Court of Appeal held that the earned income in question was not taxable.

The appellant argues, by analogy from the *Folster* case, that the *Act* does not apply to it. UNIES' agent's submission on this point is as follows:

> "Since the issue before the court related to the question of the tax free status of the taxpayer, that issue, of course is really about whether or not such taxpayer is subject to the federal and provincial tax legislation, the Income Tax Act...
>
> I appreciate that the case at the Federal Court Appeal Division deal [sic] with the question of taxation, but the real issue was whether or not Federal and Provincial legislation dealing with taxation was binding on an aboriginal.
>
> I also appreciate the fact that, the courts, in dealing with income tax matters, almost always caution that their decisions are restricted to that [sic] facts of that particular case. However, the principals [sic, original underlining] in the cases are of general application in appropriate circumstances...
>
> The Court held that Federal and Provincial legislation, that being income tax legislation, did not apply.
>
> My submission is that in this case the Provincial legislation, the Labour Standards legislation, does not apply to UNIES."

I cannot accept the submission made by the agent for UNIES that the *Folster* decision established any sort of precedent as to when, and under what circumstances, federal or provincial legislation governs an aboriginal organization or its employees. The issue in *Folster* was a straight forward question of statutory interpretation, namely, whether or not, by reason of the combined effects of section 87(b) of the *Indian Act* and section 81(1) (a) of the *Income Tax Act*, Folster's income for the years 1984 and 1985 was taxable.

Section 87(b) of the *Indian Act* provides that "personal property of an Indian or a band situated on a reserve" is exempt from taxation. Section 81(1)(a) of the *Income Tax Act* states that income "that is declared to be exempt from income tax by any other [federal] enactment" is nontaxable.

The Federal Court of Appeal, applying three earlier Supreme Court of Canada decisions (*Nowegijick v. The Queen* [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band* [1990] 2 S.C.R. 85; *Williams v. Canada* [1992] 1 S.C.R. 877), held that income was "personal property". Further, because the taxpayer resided on a reserve and the employer, though not situated on a reserve (although it formerly had been), was nonetheless closely proximate to the reserve and served the interests of reserve members, the income could be properly characterized as "property situated on a reserve".

As I read the *Folster* decision, in no fashion does the Federal Court of Appeal attempt to delineate a general exemption from provincial laws for organizations whose financial administration office may be situated on a reserve.

Federal or Provincial Jurisdiction?

In my view, the proper approach to the jurisdictional issue is that set out in *Lone Wolf Contracting* (B.C.E.S.T. Decision No. D230/97), namely, the "functional test" by which the employer's normal ongoing operations are examined to determine if, properly viewed, the operations fall within federal or provincial competence.

Although UNIES' programs are intended, as were the operations in *Lone Wolf* (silviculture), to train and thereby enhance the economic prospects of aboriginals, it must be remembered that the essential purpose of the enterprise, namely, training and education, is generally considered to be a matter within the exclusive jurisdiction of the provinces. The training programs offered by UNIES are not offered exclusively to aboriginals, nor are the programs taught exclusively by aboriginals. The training does not take place on Indian land. Applying the principles established by the Supreme Court of Canada in *Four B Manufacturing Ltd. v. United Garment Workers of America* (1979), 102 D.L.R. (3d) 385 to the present case leads me to conclude that the operations of UNIES are subject to provincial rather than federal law and, thus, the *Act* governed the employment relationship between UNIES, as employer, and Krawll and LaPerrière, as employees.

ORDER

Having now addressed--and rejected--all of the grounds of appeal raised by the appellant, pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$26,068.70** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

It follows from the foregoing that the $0 penalty, also levied by way of the Determination, is similarly confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal