ARTICLE

The Origins and Application of the "Core of Indianness" in Indigenous Labour Relations: Returning to Four B Manufacturing v. United Garment Workers of America

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Abstract: This article examines the history of, and legal precedent set by, *Four B Manufacturing v. United Garment Workers of America*, a 1980 Supreme Court of Canada case involving an Indigenous-owned manufacturing firm that resisted the efforts of its Indigenous and non-Indigenous workers to form a union on the Tyendinaga Mohawk Territory, a reserve in southeastern Ontario. The employer, Four B, contested the jurisdiction of the Ontario Labour Relations Board and argued, unsuccessfully, that as an "Indian enterprise," its own operations were a matter of federal jurisdiction. We return to the case of *Four B* for three interrelated reasons. First, we argue that *Four B* remains relevant because of the ways that the political economy of settler-colonial Canada continues to structure Indigenous enterprises, labour, and employment as ongoing sites of tension. Second, as the inaugural case dealing with the "core of Indianness" – a contested legal concept used by the courts to determine federal jurisdiction over Indigenous labour – this case both set the legal precedent and shaped the subsequent political terrain of Indigenous labour relations. Third, the issues addressed in *Four B* contextualize recent jurisdictional struggles over Indigenous enterprises, labour, and employment in what we term the "Indigenous public sector" – namely, health care, social services, and First Nations government administration. The article reviews the case history of *Four B*, setting this against the backdrop of deindustrialization in southeastern Ontario during the period, before tracing how the case influenced the juridical and political landscape of Indigenous labour

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relations. We close by considering the potential tensions between Indigenous self-determination and the exercise of collective bargaining rights by Indigenous workers.

Keywords: Indigenous labour relations, settler colonialism, "core of Indianness", public-sector unionism, jurisdiction

Résumé : Cet article examine l'histoire et le précédent juridique établi par *Four B Manufacturing c. United Garment Workers of America*, une affaire de la Cour suprême du Canada de 1980 impliquant une entreprise de fabrication appartenant à des Autochtones qui a résisté aux efforts de ses travailleurs autochtones et non autochtones dans le but de former un syndicat sur le territoire mohawk de Tyendinaga, une réserve du sud-est de l'Ontario. L'employeur, Four B, a contesté la compétence de la Commission des relations de travail de l'Ontario et soutenu, sans succès, qu'en tant qu'« entreprise indienne », ses propres activités relevaient de la compétence fédérale. Nous revenons au cas de *Four B* pour trois raisons interdépendantes. Premièrement, nous soutenons que *Four B* demeure pertinent en raison de la façon dont l'économie politique du Canada colonial continue de structurer les entreprises, la main-d'œuvre et l'emploi autochtones en tant que sites de tension permanents. Deuxièmement, en tant que première affaire portant sur le « cœur de l'indianité » – un concept juridique contesté utilisé par les tribunaux pour déterminer la compétence fédérale sur le travail autochtone – cette affaire a à la fois établi un précédent juridique et façonné le terrain politique ultérieur des relations de travail autochtones. Troisièmement, les questions abordées dans *Four B* contextualisent les récentes luttes juridictionnelles sur les entreprises, le travail et l'emploi autochtones dans ce que nous appelons le « secteur public autochtone » – à savoir les soins de santé, les services sociaux et l'administration gouvernementale des Premières Nations. L'article passe en revue l'histoire de l'affaire *Four B*, dans le contexte de la désindustrialisation dans le sud-est de l'Ontario au cours de la période, avant de retracer comment l'affaire a influencé le paysage juridique et politique des relations de travail autochtones. Nous terminons en examinant les tensions potentielles entre l'autodétermination autochtone et l'exercice des droits de négociation collective par les travailleurs autochtones.

Mots clefs : relations du travail autochtones, colonialisme de peuplement, « cœur de l'Indianité », syndicalisme dans le secteur public, juridiction

In 1976, a majority-Indigenous workforce of apparel production employees on the Tyendinaga Mohawk Territory in southeastern Ontario certified a union local of the United Garment Workers of America. Their employer, Four B Manufacturing Ltd., which was owned and operated by four Indigenous brothers from Tyendinaga, resisted the workers' organizing campaign, challenging first the jurisdiction of the Ontario Labour Relations Board (OLRB) and ultimately provincial legislative authority over Four B's employment relations. *Four B Manufacturing v. United Garment Workers of America*, after initial appeals in Ontario, eventually reached the Supreme Court of Canada (SCC) in 1979, where the employer argued that, as an "Indian enterprise," its operations were a matter of federal jurisdiction.[1] The employer maintained that Four B's labour relations went to the "core of Indianness," a contested legal concept used by courts to determine the federal government's legislative power over and responsibility to Indigenous peoples under section 91(24) of the *Constitution Act, 1867.* This section of the Canadian Constitution

1. *Four B Manufacturing v. United Garment Workers* (1980) 1 SCR 1031.

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setting out federal power over "Indians, and lands reserved for the Indians" has been a source of legislative uncertainty, given the division of powers between the federal government and the provinces. Areas of provincial authority, such as labour and employment, regularly come into conflict with section 91(24) and have produced multiple protracted political and juridical contestations, of which *Four B* is considered the inaugural case.[2]

The employer in *Four B* was unsuccessful in its appeals. Justice Beetz and the majority at the SCC determined that the case ultimately concerned "the rights of Indians and non-Indians to associate with one another for labour relations purposes" and to bargain collectively with "an Ontario corporation, privately owned by Indians."[3] The SCC majority argued that nothing inherent in the operations of Four B made it a particularly "Indian" firm and that the business was, therefore, subject to provincial laws and regulations. *Four B*, as the first case dealing with Indigenous labour relations to reach the SCC, set a strong legal precedent and thereby shaped the juridical and political parameters within which subsequent struggles over Indigenous labour relations in Canada have taken place. *Four B*'s significance in the jurisprudence relating to Indigenous enterprises, labour, and employment relations calls for an extended historical case analysis in light of present struggles for Indigenous resurgence, self-determination, and decolonization. More broadly, this case exemplifies the many contradictions and tensions generated by the uneven and contested incorporation of Indigenous peoples and their labours into capitalist relations of production in settler-colonial Canada.

In our view, the analysis of *Four B* and its legacy in subsequent cases addressing jurisdiction over Indigenous enterprises and labour relations complicates the material and legal dichotomy between private- and public-sector workplaces in Canada when it comes to Indigenous workers. These issues are especially topical at present because the federal government recently recognized an Indigenous right to govern child and family service provision while simultaneously remaining silent on jurisdiction over labour relations in workplaces performing this social reproductive labour.[4] As we argue, the problem of legislative authority, jurisdiction, and, ultimately, political power over Indigenous labour and employment continue to stem, in the first instance, from the Canadian state's settler-colonial control over Indigenous peoples.

2. Brad Morse, "Aboriginal People and Labour Relations," *Revue générale de droit* 17, 4 (1986): 663; Craig Mazerolle, "Creating an Aboriginal Labour Law," *University of Toronto Faculty of Law Review* 74 (Winter 2016): 19.

3. *Four B* (1980) SCR, 1047; Wilfred List, "Provincial Labor Law Covers Indian Company on Reserve, Supreme Court Rules," *Globe and Mail*, 22 December 1979.

4. Adam D. K. King, Veldon Coburn, Leah F. Vosko, Olena Lyubchenko, Rebecca J. Hall, Andrea M. Noack, and Tyler Chartrand, "What's at the 'Core of Indianness'? Bill C-92, Labour, and Indigenous Social Services," brief prepared for the Yellowhead Institute, 10 November 2020, https://yellowheadinstitute.org/2020/11/10/whats-at-the-core-of-indianness-bill-c92-labour-and-indigenous-social-services/.

The uncertainty and tensions concerning jurisdiction over Indigenous enterprises and labour relations thus motivate revisiting the case of *Four B* with three interrelated aims. First, we posit that the politics of Indigenous economic development under settler colonialism make labour relations and employment law key sites of tension. Conflicts between the federal government and the provinces – and between Indigenous nations, Indigenous employers, and majority-Indigenous unions – stem in large part from the absence of First Nations' formal rights to govern labour and employment. Cases related to Indigenous labour and employment law, therefore, largely concern questions over which apparatuses of the settler-colonial state possess exclusive legislative authority. Even as First Nations governments have assumed greater political autonomy over other areas of governance – most recently, child and family services – these governments have not typically developed labour relations laws or frameworks.[5] Where such frameworks have been pursued, they have at times substantially limited workers' rights to form unions and collectively bargain.[6]

Second, we examine the case of *Four B* to interrogate how the settler state uses the concept of the "core of Indianness," particularly in cases involving legislative authority over Indigenous enterprises and labour relations. This "core of Indianness" – as it has been applied in cases dealing with hunting and fishing rights, labour, and other "provincial laws of general application" – has not been defined by Indigenous peoples' self-conceptions but rather used to delineate the federal powers it attracts and the federal responsibilities it entails.[7] Further, the SCC's more recent turn toward a narrow conception of the "core" has largely limited federal jurisdiction over Indigenous labour and employment to direct band council employment. Nevertheless, despite these more recent legal developments, Indigenous labour regulation remains

5. Adam D. K. King, Veldon Coburn, Leah F. Vosko, Rebecca J. Hall, Olena Lyubchenko, and Andrea M. Noack, "Determining the 'Core of Indianness': A Feminist Political Economy of *NIL/TU,O v. BCGEU*," *Aboriginal Policy Studies* 10, 1 (2022): 63–89; See An Act respecting First Nations, Inuit and Métis children, youth and families SC 2019, c. 24.

6. This article traces the legal and jurisdictional background that shapes this tension between Indigenous self-determination and the protection and promotion of collective bargaining and other labour rights. We are concerned with how this tension crystallized in the case of *Four B*. A fuller treatment of the tension is, however, beyond the scope of this paper. Other cases shape this history as well. See, for example, *Manitoba Teachers' Society, on behalf of the Fort Alexander Teachers' Association (Local 65 of the Manitoba Teachers' Society) v. The Chief and/or Fort Alexander School Board of the Sagkeeng Education Authority* (1984) 1 FC 1109; *Saskatchewan Indian Gaming Authority Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) et al.* (2000) 2000 SKQB 176; *Mississaugas of Scugog Island v. CAW* (2006) ON SCDC 17944. See also Morse, "Aboriginal People and Labour Relations"; Mazerolle, "Creating an Aboriginal Labour Law."

7. Caroline Dick, "'Culture and the Courts' Revisited: Group-Rights Scholarship and the Evolution of s.35(1)," *Canadian Journal of Political Science* 42, 4 (2009): 957. See also *R. v. Sparrow* (1990), CSC 104, RCS 1075.

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contested. Revisiting *Four B* and the subsequent cases that draw on its precedent allows us to understand how Indigenous labour rights have come to be defined, shaped, and exercised within the political economy of Canadian settler colonialism. In particular, we review the most significant labour relations cases wherein the "core of Indianness" has figured and trace this contested concept's application since *Four B*.

Third, and finally, the issues at stake in *Four B* contextualize recent conflicts around Indigenous enterprises and labour relations – particularly those in what can be loosely defined as the "Indigenous public sector." By this we mean workplaces that engage in socially reproducing and caring for Indigenous people, communities, and modes of life but do not fall within what has been traditionally demarcated as Canadian public-sector workplaces.[8] In short, Indigenous workers performing what would, in non-Indigenous spaces, be considered public-sector work (i.e. waged activities vital to social reproduction) are often employed by band councils or organizations at an arm's length from First Nations governments, not provincial or federal government agencies.[9] When it comes to accessing collective bargaining rights through legislation designed to facilitate labour relations, Indigenous "public sector" workers' unique jurisdictional location in the colonial constitutional order and complex legal identity complicate the "private/public" dichotomy established by Canadian law and reproduced in practice by labour boards and unions.

It is therefore notable, we argue, that the precedent-setting *Four B* case concerned a union campaign in a private-sector enterprise. In the decades that followed, labour boards and courts applied and refined the SCC's interpretation of the "core of Indianness," as well as the "functional test" the court developed to determine jurisdiction over Indigenous enterprises and labour relations in *Four B*, to cases involving labour relations and employment standards in public- and quasi-public-sector workplaces, including healthcare, educational, and social service agencies. In part, this reflects the broader

8. Gina Starblanket and Heidi Kiiwetinepinesiik Stark, "Towards a Relational Paradigm – Four Points for Consideration: Knowledge, Gender, Land, and Modernity," in Michael Asch, John Borrows, and James Tully, eds., *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018), 176–207; Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); David Camfield, "Settler Colonialism and Labour Studies in Canada: A Preliminary Exploration," *Labour/Le Travail* 83 (Spring 2019): 147–172.

9. While beyond the scope of this article, integrating a deeper understanding of settler colonialism into Canadian labour studies research requires engagement with Indigenous feminist and feminist political economy scholarship that highlights the internal relations of production and social reproduction, including the relationality of land and labour, particularly as these relate to struggles over the public and private spheres. See, for example, Starblanket and Stark, "Towards a Relational Paradigm"; Rebecca Jane Hall, *Refracted Economies: Diamond Mining and Social Reproduction in the North* (Toronto: University of Toronto Press, 2022); Gina Starblanket, "Being Indigenous Feminists: Resurgences against Contemporary Patriarchy," in Joyce Green, ed., *Making Space for Indigenous Feminism* (Halifax: Fernwood, 2017), 21–41.

Canadian labour movement's concentration in public-sector workplaces. As a greater proportion of union members are now found in the public sector, unions have correspondingly organized units of Indigenous workers performing similar work in their communities. Against the objections of some First Nations and Indigenous employers, the courts have determined that these workplaces – even when they explicitly engage in reproducing Indigenous cultures, practices, and communities – are also not relevant to the "core of Indianness."[10] In an effort to critically expand the tradition of Canadian political economy scholarship, this article is thus concerned with the interactions between Indigenous labour relations, settler colonialism, and economic development and examines the crystallization of these issues in the case of *Four B*. While elsewhere we have discussed Indigenous labour relations that cut across waged and unwaged and productive/reproductive dichotomies, here we focus specifically on waged labour as a site of tension.[11]

Thus, we begin with a brief review of the political and legal context of Indigenous waged labour relations, exploring the ways that uncertainty over jurisdiction has produced recurring conflicts. We then turn to a thorough examination of the case history of *Four B*. In this section, first, we outline some of the details regarding Four B Manufacturing Ltd. and its operations, placing these in the context of both the crisis of Canadian federalism in the 1970s and the beginnings of deindustrialization in southern Ontario, which form a background to the case. Following a review of the various stages of the case, we then consider the precedent and legacy of *Four B* – in particular, the ways in which the argument and "functional test" set out by the majority justices at the SCC have been used by subsequent courts, tribunals, and labour boards responsible for rendering decisions involving cases in the "Indigenous public sector." We then close with a brief consideration of how the political projects of Indigenous self-determination and the protection of workers' rights might be jointly articulated in the future.

The Political and Legal Context of Indigenous Labour Relations

The uncertain place of Indigenous labour relations in settler-colonial Canada arises from the structure of Canadian federalism and from the failure to

10. As we explore below, *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* (2010) SCC 45 is considered the determinative case in this area. See also Maggie Wente, "Case Comment: NIŁ TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union and Communication Energy and Paperworkers of Canada v. Native Child and Family Services of Toronto," *Indigenous Law Journal* 10, 1 (2011): 133–144.

11. King et al., "Determining the 'Core of Indianness'"; Rebecca Jane Hall, Leah F. Vosko, and Veldon Coburn, "Indigenous Access to Social Assistance and Identity: A Gendered Relational Reading of Settler Colonial Containment in Shubenacadie Indian Band v. Canada," *Social Politics* 29, 4 (2022): 1520–1543.

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recognize Indigenous jurisdiction over many areas of governance.[12] Canadian federalism sets out that federal and provincial/territorial governments are relatively autonomous and share in sovereignty by dividing powers over different aspects of policymaking. Canada's relationship with First Nations, Inuit, and Métis poses challenges to both the paramountcy of the federal government and the division of powers between the federal and provincial governments.[13] The settler-colonial Canadian state's governance of Indigenous peoples and their enterprises and labour brings the discordant and divergent processes of Canada's model of federalism, which rests upon the doctrine of interjurisdictional immunity, into tension. As noted above, the federal government reserves "exclusive Legislative Authority" in relation to "Indians, and lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867.* At the same time, section 92(13) of the *Constitution Act, 1867* vests the provinces with legislative power over "property and civil rights," which entails matters respecting employment law and labour relations. It is at the nexus of these discordant powers – the legal volley between federal and provincial jurisdictions with respect to the regulation of Indigenous peoples, their lands, and their labours – that the construction and narrowing of conceptions of "Indianness" have been reproduced within the judiciary. Despite the exclusive federal power over matters falling within the so-called "core of Indianness," provincial laws of general application frequently breach the paramountcy of federal authority by extending provincial legislation into constitutional domains reserved for Parliament.[14] Indeed, section 88 of the *Indian Act* states that all provincial laws of general application, including labour laws, apply to peoples with "Indian" status in the provinces and on reserves, which are otherwise federal territory and subject to federal jurisdiction.[15] However, the precise scope of provincial labour relations and employment standards laws is a politically contentious issue – one that has often hinged on the degree to which particular labours do or do not relate to so-called "Indianness."

As a result, labour relations in Indigenous workplaces in settler-colonial Canada are characterized by significant jurisdictional and political uncertainty. Although Indigenous peoples and nations have fought for, and in some cases achieved, degrees of political and economic autonomy, there have been relatively few attempts to construct or enact independent industrial relations frameworks for First Nations reserves or workplaces.[16] Where

12. Shiri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet?," *Canadian Journal of Law and Society* 29, 2 (2014): 145–161.

13. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

14. See Borrows, *Recovering Canada*.

15. Indian Act, RSC 1985.

16. Mazerolle, "Creating an Aboriginal Labour Law."

such political-legislative experiments have occurred, they have been largely underwhelming in terms of the protections and rights extended to workers, Indigenous and non-Indigenous.[17] Moreover, despite declarations from Indigenous political organizations, such as the Assembly of First Nations, that Indigenous peoples should govern and control their own labour relations free from settler interference, provincial and federal labour relations boards have been resistant to this idea.[18]

Instead of transferring power to Indigenous governmental bodies, various provincial and federal courts and tribunals have attempted to manage the contradictions in Canada's jurisdictional model regarding governance of Indigenous peoples and their labours through application and refinement of the "core of Indianness" concept. Efforts to clarify the scope of the "core of Indianness" have attempted to delineate the boundaries of the federal responsibility to Indigenous peoples under section 91(24) of the *Constitution Act, 1867* and, in effect, sidestep demands for Indigenous control over labour relations. These efforts are part of the broader legal process of clarifying the historical scope of "Aboriginality" as a protective identification.[19] There arises, therefore, a two-sidedness to "Indianness": while "Indian" identity is regulated by the settler-colonial state through the *Indian Act*, it is simultaneously and contradictorily (given the act's assimilatory intent) a source of both identity protection and material protection (i.e. of land and livelihoods), particularly for those with "Indian status."[20] "Indianness" has evolved, conceptually, as both a tool and articulation of long-standing and multiscalar processes of dispossession, including settler-colonial appropriations of Indigenous lands, resources, and labours and settler governance over Indigenous identities and impediments to Indigenous "modes of life."[21]

At times, Indigenous nations or employers and Indigenous workers find themselves in conflict over the jurisdiction of labour relations. While Indigenous nations or employers in some cases resist the imposition of federal or provincial labour boards – whether as a union avoidance strategy or out

17. For example, *SIGA v CAW* (2001); *Mississaugas of Scugog Island v CAW* (2005). For commentary, see Yale D. Belanger, "Labour Unions and First Nations Casinos: An Uneasy Relationship," in Belanger, ed., *First Nations Gaming in Canada* (Winnipeg: University of Manitoba Press, 2011), 288–310; Belanger, "Indigenous Workers, Casino Development and Union Organizing," in John Peters, ed., *Boom, Bust and Crisis: Labour, Corporate Power and Politics in Canada* (Halifax and Winnipeg: Fernwood, 2012), 144–162.

18. Assembly of First Nations, *Resolution No. 13: Labour Relations* (Ottawa: Confederacy of Nations, 1999).

19. Dimitrios Panagos, *Uncertain Accommodation: Aboriginal Identity and Group Rights in the Supreme Court of Canada* (Vancouver: UBC Press, 2016).

20. Veldon W. R. Coburn, "A Genealogy of Contemporary Indianness: A Foucauldian Analysis of Identity and Society in Anti-Colonization Politics," PhD thesis, Queen's University, 2019.

21. Coulthard, *Red Skin, White Masks*, 4.

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of a desire to exercise self-determination – Indigenous workers seeking to unionize depend on the labour laws and institutional apparatuses of the settler-colonial state. For example, during a union drive at the NIŁ TU,O Child and Family Services Society in 2010, the employer sought federal jurisdiction over its labour relations because it believed this to be one element on the path toward self-determination.[22] In other cases, however, appeals of provincial or federal labour board certifications have been a union avoidance tactic, raising questions about the ultimate relationship between Indigenous self-determination and the protection of rights to freedom of association within the context of settler colonialism.[23] These conflicts raise difficult questions about the relationship between Indigenous economic development and the protection of workers' rights. The colonial dispossession of Indigenous peoples, as with colonialism the world over, has resulted in uneven economic development with its consequent social disparities and inequalities.[24] When First Nations governments and/or Indigenous peoples and enterprises pursue economic development strategies, the involvement of established trade unions can pose or represent yet another colonial interference.[25] At times, Indigenous self-determination and the protection of workers' rights to form or join trade unions converge; in other instances, self-determination comes at the expense of collective bargaining rights, where the development objectives or strategies of particular Indigenous nations are challenged (or perceived to be challenged) by trade union organization. Tensions between Indigenous self-determination and collective bargaining rights are, ultimately, an outcome of settler-colonial capitalism's particular development in Canada.[26]

22. Appellant's Factum, *NIL/TU,O Child & Fam Serv v. BCGEU* (2010). A note on the typographical difference in the spelling of NIŁ TU,O Child and Family Services: The latter rendering conforms to the spelling and pronunciation used by the organization, which is from the Coast Salish SENĆOŦEN language. In all instances referring to the organization, we use this spelling, whereas when referring to court cases ("*NIL/TU,O*"), we use Canadian courts' spelling, which disregards the language difference.

23. For example, see *Manitoba Teachers' Society v. Fort Alexander* (1984) as well as *Qu'Appelle Indian Residential School Council v. Canadian Human Rights Commission et al.* (1987), 14 FTR 31 (*TD*).

24. David Harvey, *The Limits to Capital* (London: Verso Books, 2006), 415–417.

25. Paul Roth, "Indigenous Voices at Work," in Alan Bogg and Tonia Novitz, eds., *Voices at Work: Continuity and Change in the Common Law World* (Oxford: Oxford University Press, 2014), 96–121.

26. See Brock Pitawanakwat, "Indigenous Labour Organizing in Saskatchewan," *New Socialist*, no. 58 (September–October 2006): 32. See also Belanger, "Labour Unions and First Nations Casinos"; Belanger, "Indigenous Workers"; Mazerolle, "Creating an Aboriginal Labour Law"; Roth, "Indigenous Voices at Work."

The Case of *Four B Manufacturing v. The United Garment Workers of America*

Four B Manufacturing was an Indigenous-run manufacturer of leather tennis shoes that operated between 1974 and 1980 on the Tyendinaga Mohawk Territory, a reserve near the city of Belleville in southeastern Ontario. Though an independently established and incorporated business enterprise, the company was subcontracted to, and worked exclusively for, the Bata Shoe Company, which operated a shoe and apparel factory in nearby Picton, Ontario, as well as its flagship manufacturing facility in Batawa, Ontario. Four B Manufacturing was incorporated on 28 June 1974 as Tyendinaga Mohawk Ltd., a private enterprise owned and operated by four band council members (the Brant brothers), under the *Business Corporations Act, 1970*, a provincial law in Ontario. The business was developed as a private undertaking because the Tyendinaga Band Council and reserve residents were concerned about the potential "taxability of reserve lands if the Band owned the proposed company" and feared losing the limited protections extended to "status Indians" under the federal *Indian Act*.[27] Following a vote by reserve residents to determine the ownership model of the business, Carl Brant elected to own the plant privately.[28]

On 14 January 1975, the name of the firm was changed to Four B Manufacturing Limited to further distance the company from the band council, who "felt that the use of the former name would not be in the best interests of the reserve."[29] While it was incorporated as a share-issuing firm, at the time of the court cases reviewed in this article, shares were still owned entirely by Carl Brant (the president and general manager) and his three brothers, who acted as "directors" of Four B Manufacturing until its closure.

Four B operated its factory on "a designated portion of an Indian reserve [Tyendinaga]," using a permit issued by the federal Department of Indian Affairs and Northern Development (DIAND) under sections 18 and 28(2) of the *Indian Act*, which stipulate how reserve lands shall be used and grant the minister the right to issue permits for private contracts on reserve lands, respectively. This permit necessitated an arrangement between the company owners, the Tyendinaga Band Council, and the federal government through DIAND, which detailed the area of the reserve on which the company would operate. The tripartite agreement provided for a three-year period of use and occupancy, with the potential for renewal, but was explicit that the operational permit created no tenancy – ostensibly to prevent Four B Manufacturing from obtaining tenancy rights vis-à-vis DIAND.[30] The agreement also gave the

27. *Four B* (1980) SCR, 1035.

28. *Four B Manufacturing Ltd. and United Garment Workers of America* (1977), 17 OR (2d) 80, 7.

29. *Four B* (1977) OR, 6.

30. This seems to suggest that DIAND was concerned to have some distance between itself and

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Minister of Indian Affairs the right to cancel the permit at any time, granting the federal government considerable power over the terms and conditions of Four B Manufacturing's operations. The company was also issued a $284,000 loan by the Indian Economic Development Fund of DIAND, $51,000 of which was in the form of a grant. After a year of operation, the plant had not turned a profit, but Brant, in testimony before the OLRB, indicated that "any future profits of the corporation would go to himself and his brothers and not to the Band Council or the Tyendinaga Reserve."[31] The Ontario Divisional Court similarly determined that "the applicant [Four B] is neither owned by, nor in any way controlled or directed by, the Band Council. Neither the Band Council nor the reserve itself will share in the profits of the applicant."[32]

The DIAND permit further stipulated that preference in employment be given to the local population on-reserve but added that "if there are not sufficient applications from [the] local area, the Permittee [Four B] shall have the right to request assistance from Canada Manpower to fill the staff requirements from the surrounding districts."[33] Consequently, at the time that workers filed for union certification in 1976, Four B Manufacturing employed 68 people: 48 Indigenous members of the Tyendinaga band, ten former band members (i.e. Indigenous women who had lost their "Indian" status through marriage to "non-Indian" men), and ten non-Indigenous people.[34] Following an organizing drive in the fall and winter of 1976 – led principally by four female, Indigenous line workers – a local of the United Garment Workers of America (UGWA) was certified at the OLRB in January 1977.[35] Although we do not know the gender identity of all Four B employees, it is likely that the bargaining unit was largely female production employees, given who led the organizing drive and filed unfair labour practice complaints and the highly feminized nature of the apparel manufacturing industry in southeastern Ontario during this period. The lead organizer inside the factory had previously worked for a nearby denim manufacturer that was represented by the UGWA before that company's facilities were shuttered.[36] The UGWA thus had connections with

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Four B at the time that the former issued the permit.

31. *Four B* (1977) OR, 7–8.

32. *Four B* (1977) OR, 6.

33. *Four B* (1980) SCR, 1036.

34. Lynn Gehl, "'The Queen and I': Discrimination against Women in the 'Indian Act' Continues," *Canadian Woman Studies* 20, 2 (2000): 64–69; Joyce Green, "Canaries in the Mines of Citizenship: Indian Women in Canada," *Canadian Journal of Political Science* 34, 4 (2001): 715–738; Sharon McIver, "Aboriginal Women's Rights as 'Existing Rights,'" *Canadian Woman Studies* 15, 2 (1995): 34–38. See also the forthcoming Hall, Vosko, and Coburn, "Access to Social Assistance and Identity."

35. At the time, unions in Ontario were still certified via "card check" with no stipulated OLRB-supervised secret ballot vote.

36. *United Garment Workers of America (Complainant) v. Four B Manufacturing Ltd.*

some of these female workers who had recently experienced a plant shutdown – a phenomenon that was becoming much more frequent as the apparel industry began to outsource production overseas and deindustrialization proceeded in the region around Belleville and Prince Edward County.

Four B Manufacturing contested the UGWA union certification on the basis that the OLRB had no jurisdiction over the company's labour relations. Instead, the company contended, its business was a federal undertaking on account of the Indigenous nature of the enterprise and was therefore not subject to provincial employment and labour relations legislation. The OLRB denied the company's initial application for judicial review, which set in motion a series of subsequent appeals that ultimately reached the SCC in the winter of 1979. By all indications, the employer initially sought federal jurisdiction to avoid recognizing or bargaining with the UGWA local. However, as the appeals process proceeded, the company developed a series of arguments meant to demonstrate federal jurisdiction over its operations based on the federal government's constitutional authority.

Four B Manufacturing at the OLRB

The adjudicators at the Ontario Labour Relations Board determined that Four B Manufacturing's operations were covered by the *Ontario Labour Relations Act* (*OLRA*) and certified the UGWA as the bargaining agent, directing the employer to recognize the union and begin first contract bargaining. As decisions from subsequent appeals noted, however, the OLRB adjudicators made this determination without resort to federal "enabling legislation" – that is, without reference to section 88 of the *Indian Act*.[37] The employer contested the jurisdiction of the OLRB immediately. The basis of the appeal and request to set aside the union certification was that the *OLRA* did not apply because of the federal government's relationship to Indigenous peoples under section 91(24). In order to avoid the application of section 88 of the *Indian Act*, however, the employer had to show "preemptive federal legislation," which in this case was the *Canada Labour Code* (*CLC*).[38] The employer therefore drew on the opening clause of section 88 – which begins, "Subject to the terms of any treaty and any other Act of the Parliament of Canada …" – and argued that it meant section 91(24) combined with the *CLC* rendered the business a federal undertaking.[39]

The OLRB adjudicators rejected the employer's argument regarding federal jurisdiction and the "Indianness" of the enterprise and, in so doing, first articulated a line of reasoning that would be deployed in each subsequent appeal

(Respondent) (1977) ON LRB 413.

37. *Four B* (1980) SCR.

38. Because of the doctrines of "interjurisdictional immunity" and "federal paramountcy," in order to demonstrate that a "provincial law of general application" does not apply, it must be shown that there is federal legislation that occupies the "field."

39. *UGWA v. Four B* (1977) ON LRB.

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decision. It is worth quoting at length the adjudicators' summary regarding why Four B Manufacturing fell within the provincial jurisdiction of the OLRB:

> The respondent operates a small private business which is engaged exclusively in the process of sewing uppers for running shoes. As a commercial shoe manufacturing operation or part thereof, it is subject to the regulatory authority of the province of Ontario, the jurisdiction in which it was incorporated. Although owned and operated by Indians and located on an Indian reserve, the evidence establishes that there is nothing "Indian" about the kind of business which the respondent is operating. On the contrary, it is the kind of industrial enterprise which can and is being carried on throughout the Province by non-Indians. It is true that most of the respondent's employees are Indians and that Indians are granted a preference with respect to employment. But the fact is that non-Indians are being employed. We would point out as well that the employees of the respondent have organized themselves in the same fashion as have employees employed in enterprises having no connection whatever with Indians. The presence of the union here is simply the result of the economic development which has taken place on the Reserve.[40]

According to the adjudicators, Four B was a private-sector business like any other in Ontario, with a workforce seeking to exercise rights to form a union and collectively bargain under provincial labour relations legislation. For the OLRB adjudicators, the association of Indigenous and non-Indigenous employees together was a critical factor. They reasoned that "the economic development" on the reserve – that is, the presence of the Four B Manufacturing facility – had resulted in efforts to organize an industrial union and that there was nothing in the enterprise's operations that would indicate it was outside of provincial jurisdiction. On this basis, the OLRB further directed the employer to bargain in good faith, even after the latter refused to recognize the union and sought leave to appeal at the Ontario Divisional Court.

The employer ignored these instructions. In late 1976, the UGWA, on behalf of the four workers who had initiated the organizing drive, filed unfair labour practice complaints. The union alleged that the company's general manager and president, Carl Brant, had told employees that he was "annoyed that the employees were 'sneaking around behind my back' by joining a union" and made recurring references to layoffs, causing employees to believe that their jobs were in jeopardy if they unionized.[41] According to records from the unfair labour practice hearing, prior to the union filing cards with the OLRB, Carl Brant had also directed the assistant manager to provide paper forms to employees of the potential bargaining unit, asking them to state their intention to withdraw their names from the proposed union. When this was unsuccessful, the employer then informed employees that "if the organizational attempts of … [the] union continued that there would be significant layoffs in the plant."[42] The union also alleged that the employer held meetings and "sought to persuade employees to frustrate the complainant's [union]

40. *Four B* (1977) OR, 8.

41. *UGWA v. Four B* (1977) ON LRB, 2.

42. *UGWA v. Four B* (1977) ON LRB, 2.

campaign."[43] The factory had a "shop committee" system, which the employer tried to convince workers was superior to union representation. According to workers' testimony at the OLRB, the employer held an internal vote and claimed that the results demonstrated employee preference for the shop committee system.

According to the four employees who brought unfair labour practice complaints to the OLRB, when these attempts to forestall the union organizing drive proved unsuccessful, the employer then laid off 32 employees at the factory and later failed to recall them according to their seniority, as had been the practice up to that point.[44] These October 1976 layoffs – which the employer argued were the result of a strike at the nearby Bata factory that limited Four B Manufacturing's supplies and work – included the four women who initiated the union organizing campaign. In front of the OLRB, the employer demanded that the complainant workers and union provide evidence that the layoffs were a response to the union activity. However, the OLRB decision made clear that in cases involving allegations of wrongful employer misconduct during a union organizing campaign, the burden of proof to demonstrate that no retaliation took place rests with the employer. The employer presented no such evidence, and thus the OLRB ruled that layoffs of the four workers constituted "an anti-union motive" and ordered reinstatement of the complainant employees with compensation for lost wages and benefits, while also instructing the employer to commence bargaining with the certified UGWA local.[45]

Against the employer's objections, the OLRB pointed out that in cases where a union is certified but an employer appeals the jurisdiction of the labour relations board, the employer is nevertheless legally obligated to proceed as though the union is the legally certified bargaining agent in the workplace – that is, to bargain in good faith until any future appeal is successful, in which case the prior certification and any collective agreement established is rescinded. However, while Four B Manufacturing pursued its appeal of the OLRB's decisions at the Ontario Divisional Court, it continued to resist recognizing or bargaining with the union.

Four B Manufacturing's Initial Appeal

The outcome of Four B Manufacturing's first appeal at the Ontario Divisional Court both continued the line of reasoning regarding provincial jurisdiction begun at the OLRB *and* opened space for a further articulation of the "Indianness" of the employer's operations. The majority decision upheld the ruling of the OLRB, maintaining that Four B Manufacturing was not a federal undertaking or an inherently "Indian" business. It found that the *OLRA* "was not legislation in relation to 'lands reserved to the Indians' which is reserved to

43. *UGWA v. Four B* (1977), 4.

44. *UGWA v. Four B* (1977), 2

45. *UGWA v. Four B* (1977), 6.

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the federal Government under s. 91 of the *British North American Act, 1867*."[46] The court further noted that "there was nothing in the nature of the operations or activity of the applicant's business, as a business, that would bring it under any other federal head of power."[47]

The employer's appeal to the Ontario Divisional Court sought to set aside both decisions of the OLRB concerning the certification of UGWA and the unfair labour practice remedies that called for reinstatement of the four workers laid off as a result of union organizing activities. The employer further sought orders "declaring that The Ontario Labour Relations Board was without jurisdiction to make the said decisions" and "restraining or prohibiting the respondents [the union and the four dismissed workers] … from implementing or enforcing the decisions of The Ontario Labour Relations Board aforesaid."[48] In rejecting this appeal, the majority rested their opinion on a reading of section 92 of the *Constitution Act, 1867*, which outlines provincial legislative authority. The decision reads: "In my opinion, the test as to the application of Provincial legislation within a Reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s. 91."[49] By this the justices meant that section 91 "enumerates classes of subjects," but it does not carve out entire spaces (reserves) within provincial boundaries where provincial legislation is inapplicable.

The majority further suggested that even if the band had owned Four B Manufacturing, this should have no bearing on jurisdiction over the company's labour relations. Their reasoning in this respect followed from a narrow interpretation of the "integral" activities of a band council and governance of a First Nations reserve. According to the majority, even if the reserve itself could have been considered a "federal undertaking" for purposes of federal legislative authority, Four B – as a private manufacturing firm – did not form an "integral" part thereof.[50]

The dissenting opinion, written by Justice Weatherston, however, argued that Four B Manufacturing was in fact a federal undertaking, identifying the financing through DIAND and the identities of the owners and the majority of the employees involved, taken together, as sufficient to establish

46. *Four B* (1977) OR, 2.

47. *Four B* (1977) OR, 2.

48. *Four B* (1977) OR, 4.

49. *Four B* (1977) OR, 9-10.

50. *Four B* (1977) OR, 18. This argument about the "core" functions of the band council would shape later decisions where federal jurisdiction was upheld – that is, cases where the band council is the direct employer and the employees concerned are performing work directly related to band governance. This approach also now informs how labour inspectors determine jurisdiction when responding to employment standards complaints from non-unionized Indigenous employees on reserves.

that "the whole manufacturing business is Indian in character" (but not in *function*, which the dissenting justice accepted was the manufacture of shoe uppers).[51] Weatherston further argued that exclusive federal legislation in the realm of labour relations was not limited to "undertakings, businesses or enterprises" but also extends to persons when they are deemed "federal persons."[52] Disagreeing with the majority's interpretation of provincial laws of general application, he contended that such laws apply only when they affect Indigenous peoples as "ordinary persons" and do not touch their culture or identity. In this regard, he concluded, "The *Ontario Labour Relations Act* does not directly touch 'Indianness,' but it does directly affect the civil rights of Indians, and their relationship one to another, and to their employer."[53] This, according to Weatherston, rendered Four B Manufacturing's operations a matter of federal legislative authority.

The majority were not convinced by this argument. Nevertheless, Weatherston's argument did conform in part to the employer's interpretation of the issues involved. Together with the later arguments of the dissenting minority at the SCC, this also positioned *Four B* within a broader, ongoing political and legal debate over the relative powers of the federal government and the provinces.

Four B Manufacturing at the Supreme Court

In 1979, the Supreme Court of Canada also dismissed Four B Manufacturing's appeal in a 7–2 ruling, with Chief Justice Laskin writing the dissenting position. The majority, led by Justice Beetz, upheld the union's position and the decisions of the lower courts, maintaining that the employer's operations fell within provincial jurisdiction and were therefore subject to the *OLRA*. However, the contrasting arguments – and the order of facts on which they were based – presented by Beetz and Laskin raised a set of complex political questions that would shape future legal battles over the jurisdiction of labour and employment on Indigenous lands. Moreover, we see in the SCC's *Four B* decision a crystallization of Beetz and Laskin's long-running debate over provincial autonomy and the powers of the federal state in Canada.[54] In this context, the *Four B* case should in part be read with an understanding of how issues related to Indigenous sovereignty, rights, and labour became inserted into the broader crisis of Canadian federalism in the 1970s. The SCC became another political arena wherein the state tried to manage the struggle

51. *Four B* (1977) OR, 24.

52. *Four B* (1977) OR, 21.

53. *Four B* (1977) OR, 23.

54. James C. MacPherson, "In Memoriam: The Honourable Jean Beetz," *Osgoode Hall Law Journal* 29, 4 (1991): 677.

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for national independence in Québec, and Québécois moderates such as Beetz sought to carve out and clarify greater provincial autonomy.[55]

While these broader political questions form the background of *Four B* at the SCC, the central disagreement between the majority and minority revealed itself through contrasting interpretations of the "practical activities" of Four B Manufacturing – the raison d'*ê*tre of the company and its place within the community. Beetz's narrow interpretation of the company's "activities" (i.e. industrial manufacturing) contrasted with Laskin's broader characterization of the company's contribution to community development. Beetz found no basis in the claim that the operation of Four B Manufacturing struck at the "core of Indianness" and that the federal government held legislative power over the Indigenous employer's operations; in demonstrating this, the majority set out a "functional test" to determine jurisdiction in future cases dealing with jurisdiction over Indigenous labour and employment.

Beetz, writing for the majority, began his factual outline of the case by detailing the company's incorporation under provincial legislation, noting that Four B "was incorporated pursuant to the laws of Ontario to carry on business as a manufacturer of shoes on the Tyendinaga Indian Reserve No. 38."[56] He also outlined what he understood to be the "normal activities" of the enterprise (manufacturing shoes), from which he concluded that its labour relations, like those of any commercial enterprise, were unquestionably provincial.[57] Beetz and the majority did not find Four B Manufacturing's location on a First Nations reserve, nor the federal permit agreement and loan, to trouble these facts. Beetz instead set out a "functional test" to determine whether the federal government had legislative authority. This functional test first involves querying the primary focus, or "activities," of the enterprise to determine if they normally fall within provincial jurisdiction. Only if the first step is inconclusive is the second step taken to determine whether the relevant provincial law "impairs the status or capacity of Indians." "The functional test," Beetz summarized, "is a particular method of applying a more general rule, namely, that exclusive federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal jurisdiction over some federal *object* [emphasis added]."[58] In this way, Beetz distinguished the *object* of the functional test from the *people* against whom it might be applied. From this, he surmised that the test applied only to "practical activities" and not to particular persons or peoples – that the Indigenous identity (or "Indian" status) of the business owners, workers, or community

55. Bryan D. Palmer, *Canada's 1960s: The Ironies of Identity in a Rebellious Era* (Toronto: University of Toronto Press, 2009), 311–322.

56. *Four B* (1980) SCR, 1044.

57. *Four B* (1980) SCR, 1045.

58. *Four B* (1980) SCR, 1047.

members had no bearing on what the business produced and therefore on the outcome of the functional test to determine jurisdiction.

In a passage that has been reproduced and deployed as a standard of measure in many subsequent cases involving Indigenous industrial relations, he wrote,

> There is nothing about the business or operation of [Four B] which might allow it to be considered as a federal business: the sewing of uppers on sport shoes is an ordinary industrial activity which clearly comes under provincial legislative authority for the purposes of labour relations. Neither the ownership structure of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. By the traditional and functional test, therefore, *The Labour Relations Act* applies to the facts of this case, and the [Ontario Labour Relations] *Board* has jurisdiction.[59]

Where Beetz gives fuller treatment to the issue of "Indianness," and where he departs from the dissenting position at the lower court, is interesting because of the ways "Indian" identity and civil rights to organize are thought to relate. At the lower court, Justice Weatherston had argued that "Indian status" made Indigenous peoples "federal persons" *and* that this "federal personhood" also encompassed "Indian civil rights" – in this case, their right to freely associate and form unions under federal legislation. Beetz, in contrast, framed the issue as involving "the rights of Indians and non-Indians to associate *with one another* [emphasis added] for labour relations purposes, purposes which are not related to 'Indianness.'"[60] In the first instance, collective bargaining rights are articulated as related to federal "Indian" personhood; in the latter argument, these two things are set against each other. According to the SCC majority's reasoning, the *Indian Act* does not provide for regulation of labour relations but instead regulates Indigenous people only as Indigenous people – that is, only with regard to their "Indianness."[61] In contrast to the dissenting position at the Ontario Divisional Court, Beetz argued that there can be no "federal subjects" *in toto* who are governed by the federal government. Insofar as the federal government has constitutional authority over Indigenous peoples, this is only related to aspects of their "Indianness." The consequence of this argument is that Indigenous peoples' lives are understood to be segmented into portions having to do with their culture and identity (as regulated through the *Indian Act*), on the one hand, and their labour and civil rights on the other hand. Beetz stated that "as long as such [provincial] laws do not single out Indians nor purport to regulate them *qua* Indians, and as long also as they are not superseded by valid federal law," provincial laws of general application, such as labour relations legislation, apply to Indigenous

59. *Four B* (1980) SCR, 1046.

60. *Four B* (1980) SCR, 1047.

61. Note the parallels to cases concerning Aboriginality and "title." See Panagos, *Uncertain Accommodation*; Dick, "'Culture and the Courts' Revisited."

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businesses and employees.[62] The UGWA's lawyer celebrated the SCC's decision as a labour victory but noted that the drawn-out court case had had a "chilling effect" on the union campaign. "The court decision is wonderful, but," he asked, "how can you expect to keep a bargaining unit together over such a long period in face of the coercion that took place?"[63]

Chief Justice Laskin, however, provided a dissenting opinion, constructing his argument around the federal permit and funding of Four B, the nature of the ownership structure in the context of local concern over the "taxability of reserve land," and, most notably, an opposing interpretation of Four B Manufacturing's "function" in the Tyendinaga community. In contrast to Beetz's emphasis on the company's "practical activities" and provincial incorporation, Laskin focused on the role of the federal government and DIAND in setting the conditions for the company's existence. The dissenting chief justice focused, in particular, on how sections 18 and 28 of the *Indian Act* had been used to designate the land and facilities for Four B's operations. Because "reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart," and because the Minister of Indian Affairs is permitted to authorize use of reserve lands for "Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, *for any other purpose for the general welfare of the band* [emphasis added]," Laskin reasoned that Four B Manufacturing was principally a federal undertaking of the latter variety.[64] As well, the use of federal money under the special Indian Economic Development Fund to finance the enterprise, Laskin claimed, further attracted federal authority. If DIAND was providing funding, as well as negotiating and issuing permits, as functions of its powers under the *Indian Act*, the chief justice maintained that the company's operations must therefore be a matter of federal jurisdiction.

Finally, in addressing the corporate structure and private ownership of Four B under Ontario legislation, Laskin pointed out that the Brants and the Tyendinaga Band Council had chosen this arrangement because they feared their reserve lands would otherwise become federally taxable. Though he did not express the issue in these terms, Laskin recognized that the owners of Four B Manufacturing and the residents of the Tyendinaga community had made decisions about the company's ownership structure in the context of the

62. *Four B* (1980) SCR, 1048–1049. This line of reasoning would be further clarified in *Dick (Appellant) and R. (Respondent)* (1985) 2 RCS and subsequent cases involving hunting and fishing rights, wherein provincial laws of general application (such as wildlife preservation laws) were found to not strike at "the core of Indianness" and therefore apply equally to Indigenous peoples, preventing them from hunting or fishing "out of season" or using "non-traditional means."

63. List, "Provincial Labor Law," 4.

64. *Four B* (1980) SCR, 1037.

settler-colonial relations of Canadian federalism, which, as they understood it, introduced a risky trade-off between collective ownership of a business through the band government and the limited financial benefits (land tax exemption) obtained through the *Indian Act*.

Perhaps most interestingly, Laskin challenged the majority's interpretation of Four B's "function," which the latter had reduced to the "practical activities" of manufacturing shoes. Instead, the chief justice found the "function" of Four B to be economic development on the reserve, or as the permit agreement issued by DIAND put it, "employing members of the Band in all positions possible and … for the benefit of the Band as a whole to improve their economic position and provide continuing employment for Band members."[65] Moreover, this particular interpretation of Four B's community function was not troubled by the fact that some of the employees were not "Indians." Laskin maintained that,

> In my opinion, if the Band Council or any Indians, members of the Band, were to carry on a business on the Reserve, which would have to be with the consent of the Minister and the Band Council, as provided by ss. 18 and 28 of the *Indian Act*, and were to employ only Indians on the Reserve as employees, it would be beyond question that provincial labour relations legislation could not constitutionally be applicable to the employees and their employer. It would not matter in such a case if there was no federal legislation which could be invoked by the employees to form a trade union to seek certification on their behalf. *The reason for this conclusion is simply that the activity involves only Indians on a reserve, as employees and employer, and is conducted by them on the Reserve* [emphasis added].[66]

Yet Laskin believed it was not necessary to find "Indian exclusivity" to establish federal legislative authority over Four B Manufacturing. In fact, he argued, "The governing document [of the enterprise] is the permit agreement authorized by s. 18 of the *Indian Act*," adding, "I do not think that this view of the matter is altered by the fact that at the time of certification not all employees were members of the Band or all were Indians." As he concluded, "The factory operation in its direction and in its complement of employees is substantially an enterprise of Indians for Indians on an Indian reserve. Indeed, this was the purpose of the permit agreement."[67] The use of "substantially" in the latter statement gestures away from the narrow functional test deployed by Beetz and the majority as evidence of Four B's "private" operations and, instead, toward a broader view of the company's function in the community. According to Laskin, what mattered was the developmental function of the enterprise in the community, not the composition of its workforce. In Laskin's view, the functional test, as employed by the majority, relied on a narrow interpretation of an undertaking's "function" and in the case of *Four B*, it misapprehended the jurisdiction of the company for the purposes of labour relations. Although

65. Quoted in *Four B* (1980) SCR, 1043.

66. *Four B* (1980) SCR, 1036–1037.

67. *Four B* (1980) SCR, 1038–1039.

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Laskin's position ultimately supported an Indigenous employer found to have committed unfair labour practices in an effort to halt a union organizing drive, the chief justice nevertheless advanced a strong argument for federal jurisdiction over Indigenous labour relations – an argument with which subsequent courts and tribunals, as well as Indigenous workers and employers, would contend.

The finding of the SCC in *Four B*, as well as the debate between the ruling majority and dissenting minority, reflected, in part, the broader dynamics of settler-colonial capitalism in Canada – particularly the changes wrought by neoliberal restructuring and deindustrialization in the late 1970s and early 1980s. Unremarked on in the SCC's decision was the relationship between Bata's subcontracting strategy and the use of federal funds for Indigenous economic development. The uneven development that settler colonialism forces on Indigenous peoples, particularly those on reserves, structured Tyendinaga as a space of potential accumulation with an initially non-union and exploitable workforce for the Bata Shoe Company. Simultaneously, DIAND grants and preferential federal loans allowed Four B Manufacturing to run as a private enterprise that was turning no profit in the name of "community development" while the parent company, Bata, utilized the subcontracted company as a site for labour outsourcing and union avoidance.[68] Workers' efforts to unionize at Four B reconfigured these structural dynamics, but not before the jurisdictional uncertainty of organizing in an Indigenous-owned and -operated enterprise located on reserve land allowed the employer to undermine workers' collective bargaining rights through the legal process. In the long run, however, the SCC's majority decision set in motion a clear – if contested – articulation of provincial jurisdiction over Indigenous labour relations, outside of direct band council employment and the provisions of the *Indian Act*.

Narrowing the "Core of Indianness" across the "Indigenous Public Sector"

THE NARROW INTERPRETATION of the "core of Indianness" and federal legislative authority established in *Four B* set the precedent for future challenges to provincial and federal jurisdiction over Indigenous enterprises and labour. Following *Four B*, however, the vast majority of cases that Indigenous employers brought before labour boards and courts challenging provincial or federal jurisdiction have involved workers in public-sector workplaces (or workplaces performing public-sector functions), such as healthcare, educational, and social services, often located on First Nations reserves or working for First Nations band councils. Since these workers are not direct employees of either

68. These economic and political trends fit within the broader shift outlined in Kathryn M. Dudley, *The End of the Line: Lost Jobs, New Lives in Postindustrial America* (Chicago: University of Chicago Press, 1994), and Steven High, *Industrial Sunset: The Making of North America's Rust Belt, 1969–1984* (Toronto: University of Toronto Press, 2003).

the federal or provincial government, they typically pursue union certification under legislation designed to cover private-sector employees in non-Indigenous workplaces (the various provincial labour relations acts or the portion of the *Canada Labour Code* covering industrial relations).[69] Jurisdictional uncertainty and the lack of a clear private-/public-sector distinction often converge to leave both Indigenous workers and Indigenous employers in political, legal, and economic limbo.

In the years immediately following *Four B*, the jurisprudential trend seemed to bend toward a broader interpretation of "core of Indianness," as federal labour boards and courts made determinations of federal jurisdiction over Indigenous labour relations in areas having to do with public, social, and health services. In some of these cases, band councils directly operated the workplaces in question, while in others, they did so indirectly. For example, in *Qu'Appelle* (1987), a former residential school operated by a band council was found to be within federal jurisdiction when employees brought gender discrimination complaints against the employer at the Canadian Human Rights Tribunal.[70] In *Sappier v. Tobique Indian Band Council* (1988), the Federal Court of Appeal found a child welfare agency of the Tobique Indian Band to be a federal undertaking to which the *CLC* applied, after an employee brought an unjust dismissal complaint against the Chief of the Tobique Band.[71] As well, in *Sagkeeng* (1995), a federal court determined that federally appointed adjudicators had jurisdiction to hear unjust dismissal and human rights complaints brought by an employee of an on-reserve alcohol rehabilitation centre operated by the band, since the centre "designed and operated [its services] to meet the needs of its Indian beneficiaries" and, therefore, touched the "core of Indianness."[72] Interestingly, judges and adjudicators in this series of cases drew on what they understood to be the "functional test" from *Four B* but instead used the "test" to demonstrate that many social, health, and educational services were in fact principally concerned with the reproduction of "Indianness" – effectively recognizing that the work of Indigenous social reproduction, or labour performed for the purposes of daily and intergenerational reproduction of people, community, culture, and modes of life, are at the "core of

69. In the current *Canada Labour Code*, RSC 1985, c. L-2, industrial relations are set out in Part I. However, during *Four B Manufacturing v. United Garment Workers of America*, industrial relations was covered in Part V of the *Canada Labour Code* (1970).

70. *Qu'Appelle Indian Residential School Council v. Canadian Human Rights Commission et al.* (1987). In this case, the employer appealed the decision of the Canadian Human Rights Tribunal (CHRT), claiming that their operations fell within provincial jurisdiction. The CHRT disagreed, arguing that educational facilities operated by the band council were under federal jurisdiction and thus the human rights complaints could be heard at the CHRT.

71. *Sappier v. Tobique Indian Band Council* (1988) 87 NR 1 (FCA). Here, again, the Tobique Indian Band appealed the decision of the Canadian Labour Relations Board on the grounds that their labour relations were a provincial matter.

72. *Sagkeeng Alcohol Rehabilitation Centre Inc v. Abraham* (1995) 1 CNLR 184 (FCTD).

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Indianness." Similarly, in *Shubenacadie Indian Band v. Canadian Human Rights Commission*, 1997 and 2000, a case involving alleged discrimination in band-administered social assistance, the judge found federal jurisdiction over social assistance because such income support payments were "an activity designed to enhance the status of the Indian people and their families."[73]

This broader interpretation of the "core of Indianness," which included Indigenous public- and quasi-public-sector workplaces and services vital to Indigenous peoples' social reproduction within the federal jurisdiction, was relatively short-lived, however. Beginning in the late 2000s, another set of decisions began to rely on a stricter interpretation of Beetz's "functional test" to narrow the range of workplaces thought to touch the "core of Indianness," thus expanding the reach of provincial legislation and labour boards to Indigenous-run public workplaces.[74] For example, the SCC's 2010 decision in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* is widely considered the determinative case establishing provincial jurisdiction over Indigenous social service workplaces. In this decision, the focus of the "functional test" moved away from querying the extent to which the "practical activities" of particular workplaces touch the "core of Indianness" in the first step and, instead, returned to strictly assessing whether workplace activities *normally* fall within provincial jurisdiction – in most cases, eliminating the need to question whether "Indianness" is implicated at all. The "functional test," according to the argument in *NIL/TU,O*, demonstrated that child and family services were not integrally related to what makes "Indians, and lands reserved for the Indians" a federal responsibility. Importantly, the employer in *NIL/TU,O* objected to this reasoning, referring to it as an "outdated and regressive approach to interpretation of the Constitution."[75] The NIŁ TU,O Child and Family Services Society expressly understood federal jurisdiction over its services, as well as its labour relations, as a path to self-determination – though this has by no means been a general interpretation of the question of federal jurisdiction among Indigenous employers.

Following *NIL/TU,O*, courts and tribunals have largely considered Indigenous public service agencies, whether on-reserve or off, band-operated or not, to be within whichever provincial jurisdiction the reserve or workplace happens to

73. *Shubenacadie Indian Band v. Canadian Human Rights Commission et al.* (1997) 138 FTR 275 (*TD*); *Shubenacadie Indian Band v. Canadian Human Rights Commission et al.* (2000) 256 NR 109 (FCA); Hall, Vosko, and Coburn, "Access to Social Assistance and Identity."

74. Notably, *Norway House Cree Nation Nurses Local 139 of the Manitoba Nurses' Union v. Norway House Cree Nation* (2008) MB LB 89140; *Norway House Cree Nation Nurses Local 139 of the Manitoba Nurses' Union v. Norway House Cree Nation* (2011) MB LB 98458 – both of which build on *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* (2010) and the case heard with *NIL/TU,O*: *Communication, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto* (2010) 2 RCS (SCC) 46.

75. Appellant's Factum, *NIL/TU,O* (2010) SCC, at para 80.

be located. For example, in *Norway House Cree Nation Nurses Local 139 of the Manitoba Nurses' Union v. Norway House Cree Nation* – a case concerning health services operated by a First Nation and delivering "culturally appropriate care" to Indigenous clients – the Manitoba Labour Board was found to have jurisdiction and rested its decision on *NIL/TU,O*.[76] As in *NIL/TU,O*, the labour board treated the "function" of health care as a general, and provincial, matter, separate from "Indianness."[77] Because health care, social services, and education are "generically" matters of provincial legislative authority, so too are Indigenous providers of these services, whether they deliver such services entirely or primarily to Indigenous people or through content or practices geared toward the cultural or national reproduction of Indigeneity. The "core of Indianness," according to the courts following *NIL/TU,O*, now encompasses only those activities directly related to the *Indian Act*, which in the realm of employment and labour relations means only direct band council employment performing activities "integral" to "Indianness," such as matters directly related to band governance.

Notably, the legal juxtaposition established in *Four B* – between the "core of Indianness" and access to collective bargaining under provincial legislation – has been extended to include paid labour in health care and public, social, and educational services. By doing so, courts have seemingly foreclosed future attempts by Indigenous nations or employers to invoke the "core of Indianness" as an approach to greater self-determination or political autonomy over labour relations in Indigenous-run public and social services. At the same time, by both narrowing the "core of Indianness" and clarifying some of the jurisdictional confusion involved in Indigenous employment law and labour relations, they have also disincentivized Indigenous employers from potentially using jurisdictional appeals to delay or frustrate union organizing campaigns or labour board remedies.

76. *Norway House Cree Nation* (2011), 11.

77. Note the use in this case of the "normal" or "practical activities" formulation first employed in *Four B*: "Neither the operation of the health clinic by the First Nation, the cultural identity of the majority of the clinic's clients and employees, any mandate to provide linguistic and or culturally-appropriate services to Aboriginal clients, the location of the clinic on reserve lands, federal funding of the clinic, the Band's power to make by-laws respecting health under section 81 of the Indian Act, or the presence of the 1964 Agreement, taken separately or together, have any effect of the operational nature of the business…. Health is not a head of power under section 91 of the Constitution Act, 1867. It is not a matter under the exclusive power of Parliament. Rather it has a double aspect. Pursuant to sections 92(7) and 92(13) of the Constitution Act, 1867, Provincial Legislatures have extensive jurisdiction over health. … Applying the functional test to the Respondents' operations, the Board is satisfied that the nature, operations and habitual activities of the Respondents do not constitute federal undertakings. Rather, they are provincial undertakings and the presumption in favour of provincial jurisdiction over the labour relations in question remains operative." *Norway House Cree Nation* (2011), 14.

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Conclusion: Unifying Self-Determination and the Protection of Workers' Rights

In this article, we have traced the contours and case history of *Four B Manufacturing Ltd. v. United Garment Workers of America*, which culminated in the Supreme Court of Canada's 1980 decision finding Indigenous labour relations in an on-reserve private manufacturing firm to be outside the "core of Indianness" and therefore within provincial, not federal, jurisdiction. We have also explored some aspects of the precedent that *Four B* set for Indigenous labour relations in the years following and up to the present.

The question of jurisdiction over Indigenous enterprises, labour, and employment, however, goes far deeper than various courts' development and application of a technical, legal device, which is itself a product of settler-colonial relations. Rather, the problem of legislative authority, jurisdiction, and, ultimately, political power over Indigenous labour and employment stems, in the first instance, from the Canadian state's settler-colonial control over Indigenous peoples. Trying to clarify the precise "division" of this power between federal and provincial governments through the problematic notion of the "core of Indianness" gives only the thinnest legal veneer to what is an ongoing colonial project of dispossession – with its attendant impacts on labour relations and workers' rights. By treating "Indianness" as a stale legal concept abstracted from the material life and self-conception of the peoples to whom it is applied, the legal apparatus of the settler state has reproduced the federal government's legislative authority over Indigenous peoples.

The *Four B* case also illuminates the tensions and contradictions at the heart of Indigenous labour relations. Four B Manufacturing's original appeal of the OLRB's certification of the UGWA local was, initially, an attempt to delay and ultimately decertify a union formed by Indigenous women seeking to exercise collective bargaining rights in an on-reserve, private-sector workplace. The employer's argument that Indigenous labour relations were within the federal jurisdiction seems only to have emerged on an ad hoc basis as the case proceeded and as the OLRB and higher courts found that the company had engaged in unfair labour practices and union avoidance. Yet these case details should not lead us to dismiss the arguments that Chief Justice Laskin advanced in the dissenting SCC decision regarding federal jurisdiction and federal responsibility to Indigenous peoples. Rather, the issues set out in *Four B* ought to motivate scholars and activists committed to decolonization to think critically about the tensions that are, at times, generated when Indigenous workers attempt to organize unions or otherwise exercise labour rights. This is an especially pressing issue in instances where Indigenous employers or band councils view such union organizing efforts as impeding self-determination or economic development. How to balance these two political projects – advancing Indigenous self-determination and protecting collective bargaining rights

– remains on open question. Addressing it will involve considering what forms Indigenous workers' rights might ultimately take.

The continued uncertainty over Indigenous labour relations and employment law nevertheless frequently operates to the disadvantage of Indigenous workers, who confront a jurisdictional limbo that delays access to vital labour rights afforded to most other employees in Canada. Yet we must also recognize that it is apparatuses of the settler-colonial state that, at present, provide for and protect such employment standards and collective bargaining rights, whether through provincial or federal minimum standards and labour relations laws or via the Charter of Rights and Freedoms.[78] When making strides in affirming material commitments to Indigenous rights and sovereignty, the labour movement in Canada must include Indigenous workers' social reproduction and self-determination as part of a common struggle against the dispossessive and exploitative settler-colonial, capitalist social relations regulated and enforced by the Canadian state and its juridical-jurisdictional apparatus. As part of this challenge, there is a need to work collaboratively to conceptualize the forms that Indigenous labour laws might take within the struggle for self-determination in order to adequately protect Indigenous workers' free association rights. In the final analysis, it might be the case that a substantive commitment to decolonization challenges the ways that labour and labour relations are conceptualized in settler-colonial Canada. At the same time, decolonization that does not challenge capitalist property relations in Indigenous nations could create an economic context in which labour rights are at risk of being restricted or curtailed. For these reasons, commitments to decolonization and labour rights must ultimately go hand in hand, which is, at times, easier said than done. On their own, neither is sufficient.

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78. Mazerolle, "Creating an Aboriginal Labour Law." See also Larry Savage and Charles W. Smith, *Unions in Court: Organized Labour and the Charter of Rights and Freedoms* (Vancouver: UBC Press, 2017).

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