

PENSIONS

First Nations Public Security Pension Plan — Appeal from Federal Court decision (2018 FC 747) finding that police officers, special constables hired, remunerated by band councils under tripartite agreement also involving federal, Quebec governments are employed in federal work, undertaking or business — Federal Court expressing view that police officers', special constables' pension plan registered under *Pension Benefits Standards Act, 1985*, R.S.C., 1985 (2nd Supp.), c. 32 (PBSA), that Office of the Superintendent of Financial Institutions (OSFI) of Canada should continue to administer plan — First Nations Public Security Pension Plan (Plan) first being registered by OSFI in 1981 — Police services of band councils members of Plan all subject to policing services agreements reached between each of these band councils, Government of Canada, Government of Quebec — OSFI responsible for regulating, supervising private federal pension plans registered under PBSA — Following *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696 (*NIL/TU,O*), *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46, [2010] 2 S.C.R. 737, OSFI concluding unnecessary to transfer supervision of Plan to provincial authorities — OSFI reassessing situation following *Nishnawbe-Aski Police Service Board v. Public Service Alliance of Canada*, 2015 FCA 211, [2016] 2 F.C.R. 351 (*Nishnawbe-Aski*) — OSFI expressing view that *Nishnawbe-Aski* [TRANSLATION] “overturned” *NIL/TU,O* — OSFI concluding Plan not registered under PBSA, should be transferred to Retraite Québec because Plan members not employed in work, undertaking or business under federal legislative authority — Federal Court finding that normal, habitual activities of Indigenous police forces closely connected to governance activities of band councils, therefore within Parliament's jurisdiction — Federal Court also finding that OSFI erred in considering that Court had overturned *NIL/TU,O* in *Nishnawbe-Aski* — Whether Federal Court erring in law in finding that police officers participating in Plan employed in connection with operation of federal work, undertaking or business within meaning of PBSA — Federal Court not erring in allowing application for judicial review, declaring that police officers, special constables hired, remunerated by band councils members of Plan employed in work, undertaking or business within federal jurisdiction — In determining whether regulation of labour relations within federal jurisdiction, first step being to apply functional test, thus examine nature, operations, activities of entity to determine whether it constitutes federal undertaking — Question in this case whether fact that police officers whose pension plan at issue here employed by band councils determinative, sufficient to distinguish this case from *NIL/TU,O*, *Nishnawbe-Aski* — Indigenous police services deriving their existence, powers from provincial, not federal, legislation — Federal Court erring in suggesting that *Indian Act*, R.S.C., 1985, c. I-5, s. 81(1)(c) authorizing band councils to establish own police forces — Absent agreements, provincial authorities responsible for maintaining order within territories delimited in those agreements — Essentially nothing distinguishing factual context of this case from that of *Nishnawbe-Aski* — Functional test having to be applied in same way in Indigenous matters as in any other matter — Nature, operations, habitual activities of entity having to be examined to determine whether it is a federal undertaking — Entity to be considered being band council, not police services — Band council clearly being an “undertaking” under federal jurisdiction for labour relations purposes — Fact that police forces under authority of band councils exercise powers delegated by province, subject to certain general provincial standards not being determinative of which level of government has jurisdiction over their labour relations — Under functional test, normal, habitual activities of undertaking for which person works important — Vast number of difficulties in implementation arising from any other finding — This case differing from facts in *NIL/TU,O*, *Nishnawbe-Aski* — Not following from foregoing that any activity or duty whose performance under band council authority will fall under federal jurisdiction — Activity or duty having to be truly assimilated to or associated with governance of a First Nation — Fact that labour

relations of Indigenous police forces falling under federal jurisdiction not calling into question due process of validly enacted Quebec laws on administration of civil, criminal justice — PBSA, its Regulations applying to Plan because participating employees employed in “included employment” within meaning of PBSA — Appeal dismissed.

QUEBEC (ATTORNEY GENERAL) V. PICARD (A-293-18, 2020 FCA 74, de Montigny J.A., reasons for judgment dated April 15, 2020, 40 pp.)