Federal Court of Appeal | Cour d'appel fédérale

Date: 20110119

Dockets: A-253-09
A-76-10

Citation: 2011 FCA 17

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
MAINVILLE J.A.

BETWEEN:

SYNDICAT DES DÉBARDEURS DU PORT DE QUÉBEC
(CUPE, LOCAL 2614)

Applicant

and

SOCIÉTÉ DES ARRIMEURS DE QUÉBEC INC.
and
QUEBEC STEVEDORING COMPANY LTD.
and
ST. LAWRENCE STEVEDORING INC.
and
BÉTON PROVINCIAL
and
CRIBTEC INC.
and
SNF QUÉBEC MÉTAL RECYCLÉ (FNF) INC.

Respondents

and

ATTORNEY GENERAL OF QUEBEC

Party to the proceedings
under section 57 of the
Federal Courts Act

Hearing held at Québec, Quebec, on January 11, 2011.
Judgment delivered at Ottawa, Ontario, on January 19, 2011.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
NADON J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The Syndicat des débardeurs du Port de Québec (CUPE, Local 2614) (the "Union") is seeking judicial review of a decision of the Canada Industrial Relations Board (the "CIRB") dated June 2, 2009, and bearing reference number 2009 CIRB 451 (the "Decision"), dismissing its applications to add the respondents Béton Provincial Ltd. ("Béton Provincial"), SNF Québec Métal Recyclé (FNF) Inc. ("Québec Métal Recyclé") and Cribtec Inc. ("Cribtec") to the list of employers named in its geographic certification.

[2] The Union is of the opinion that some of these companies' employees are assigned to the loading and unloading of ships and to other related activities within the geographic boundaries of the Port of Québec. The CIRB rejected the Union's arguments in support of that claim.

[3] The CIRB also dismissed the Union's application seeking a declaration that certain Cribtec Inc. employees engaged in electrical and mechanical maintenance of the equipment used in the loading and unloading of ships were to be considered employees of St. Lawrence Stevedoring Inc.

[4] The Union is also seeking judicial review of the CIRB's decision dated February 11, 2010, and bearing reference number 2010 CIRB 491 (the "Reconsideration Decision"),

dismissing its application for reconsideration of those matters under section 18 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("Code").

[5] The Union raised the following two questions in its applications for judicial review:

(a) Did the CIRB err in law in determining that the grounds on which an application for reconsideration may be made were limited to those listed in section 44 of the *Canada Industrial Relations Board Regulations, 2001*, SOR/2001-520 (the "Regulations")?

(b) Did the CIRB err in law in making its decision when it adopted an excessively narrow interpretation of subsection 34(1) of the Code and, more specifically, of the concept of "longshoring", such as when it determined that the work carried out by the contractors at the Port of Québec was "local in nature" and not subject to the Union's geographic certification?

Background

[6] Stevedoring enterprises and longshore workers are subject to an exceptional union and employer certification system through geographic certification. This system was integrated into the Code in 1973 following various public inquiries into the turbulent labour relations in Canadian ports.

[7] The work of longshore workers at the Port of Québec, as at all the ports of the St. Lawrence, is governed by a "closed shop" clause, requiring longshore workers to be members

of the Union in order to be hired. Stevedoring enterprises must therefore hire their longshore workers through the Union's hiring hall using a complex method of assignment. Furthermore, the stevedoring enterprises must all be members of the employer association for the Port of Québec, namely, the Société des arrimeurs de Québec Inc. It is a mandatory employer certification system.

[8] For our purposes, the following provisions of the Code govern this exceptional system:

34. (1) Where employees are employed in	**34.** (1) Le Conseil peut décider que les employés de plusieurs employeurs véritablement actifs dans le secteur en cause, dans la région en question, constituent une unité habile à négocier collectivement et, sous réserve des autres dispositions de la présente partie, accréditer un syndicat à titre d'agent négociateur de l'unité, dans le cas des employés qui travaillent :
(*a*) the long-shoring industry, or	*a*) dans le secteur du débardage;
(*b*) such other industry in such geographic area as may be designated by regulation of the Governor in council on the recommendation of the Board,	*b*) dans les secteurs d'activité et régions désignés par règlement du gouverneur en conseil sur sa recommandation.
the Board may determine that the employees of two or more employers actively engaged in the industry in the geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.	[…]
. . .	
(3) Where the Board, pursuant to	(3) Lorsqu'il accorde l'accréditation

subsection (1), certifies a trade union as the bargaining agent for a bargaining unit, the Board shall, by order,

(*a*) require the employers of the employees in the bargaining unit

(i) to jointly choose a representative, and
(ii) to inform the Board of their choice within the time period specified by the Board; and

(*b*) appoint the representative so chosen as the employer representative for those employers.

(4) Where the employers fail to comply with an order made under paragraph (3)(*a*), the Board shall, after affording to the employers a reasonable opportunity to make representations, by order, appoint an employer representative of its own choosing.

. . .

(5) An employer representative shall be deemed to be an employer for the purposes of this Part and, by virtue of having been appointed under this section, has the power to, and shall, discharge all the duties and responsibilities of an employer under this Part on behalf of all the employers of the employees in the bargaining unit, including the power to enter into a collective agreement on behalf of those employers.

visée au paragraphe (1), le Conseil, par ordonnance :

a) enjoint aux employeurs des employés de l'unité de négociation de choisir collectivement un représentant et d'informer le Conseil de leur choix avant l'expiration du délai qu'il fixe;

b) désigne le représentant ainsi choisi à titre de représentant patronal de ces employeurs.

(4) Si les employeurs ne se conforment pas à l'ordonnance que rend le Conseil en vertu de l'alinéa (3)*a*), le Conseil procède lui-même, par ordonnance, à la désignation d'un représentant patronal. Il est tenu, avant de rendre celle-ci, de donner aux employeurs la possibilité de présenter des arguments.
[…]

(5) Pour l'application de la présente partie, le représentant patronal est assimilé à un employeur; il est tenu d'exécuter, au nom des employeurs des employés de l'unité de négociation, toutes les obligations imposées à l'employeur par la présente partie et est investi à cette fin, en raison de sa désignation sous le régime du présent article, des pouvoirs nécessaires; il peut notamment conclure en leur nom une convention collective.

(5.1) The employer representative may require each employer of employees in the bargaining unit to remit its share of the costs that the employer representative has incurred or estimates will be incurred in fulfilling its duties and responsibilities under this Part and under the terms of the collective agreement.	(5.1) Le représentant patronal peut exiger de chacun des employeurs des employés de l'unité de négociation qu'il lui verse sa quote-part des dépenses que le représentant patronal a engagées ou prévoit engager dans l'exécution de ses obligations sous le régime de la présente partie et celui de la convention collective.
. . .	[…]
(7) The Board shall determine any question that arises under this section, including any question relating to the choice or appointment of the employer representative.	(7) Pour l'application du présent article, il appartient au Conseil de trancher toute question qui se pose, notamment à l'égard du choix et de la désignation du représentant patronal.

[9] Longshore workers at the Port of Québec have, for several decades, been members of a union certified under this system. Following a change in union allegiance in 1997, the Syndicat des débardeurs du Port de Québec (CUPE, Local 2614) was certified under section 34 to represent the unit described as follows:

> [TRANSLATION]
> all employees of all employers engaged in the loading and unloading of vessels and other related activities in the geographical region of the Port of Québec.

[10] For various reasons, including technological changes and the relocation of stevedoring enterprises, the volume of work for longshore workers at the Port of Québec has decreased over the last few decades. In this context, the Union complains that certain longshoring activities at the Port of Québec are being carried out by employees of companies that are not part of the employer association and not included in its bargaining unit.

[11] The Union therefore filed a series of applications before the CIRB, seeking to have more than ten employers that operate at the Port of Québec and that are not members of the employer association recognized as falling within the scope of its geographic certification. However, the Union withdrew its application regarding most of these employers. Only certain activities of Béton Provincial, Québec Métal Recyclé and Cribtec remain at issue.

[12] Béton Provincial is a company that specializes in the manufacturing and delivery of concrete and concrete-based products. It operates, directly or through subsidiaries, more than 60 places of business in Quebec, with 900 employees.

[13] In the course of its activities, Béton Provincial acquires cement powder from various suppliers, including cement powder by maritime shipments. It uses the services of St. Lawrence Stevedoring Inc. (“St. Lawrence Stevedoring”) and longshore workers belonging to the Union to unload these ships, an operation that requires four longshore workers with certification to operate cranes and hydraulic shovels, plus one superintendant. The bulk cement powder is taken from the ship’s hold using a bucket crane and poured into the cone of a hopper, and a pneumatic vacuum system then moves it to Béton Provincial’s storage facility.

[14] However, it is Béton Provincial employees who operate the equipment used to move and position the hoppers on the dock; connect the hoppers to the conduit system used to move the cement powder to the storage facility; and monitor an automated console that manages the flow of the hopper, the drop point for the powder and the filling of the silos. Béton Provincial installed

this system, owns it and ensures its technical maintenance. Therefore, three unionized employees from Béton Provincial, who amongst them have specialized knowledge of automated systems, electricity, mechanics and welding, are onsite to maintain and repair the compressors connected to the unloading system, take action if an alarm sounds and help unclog hoppers. All of these activities of Béton Provincial are contemplated by the Union's application.

[15] Québec Métal Recyclé is in the business of buying and reselling scrap metal and has several places of business in Quebec and the Maritime provinces, including one on a leased dock in the Beauport sector of the Port of Québec. In Beauport, the scrap metal arrives by truck and is piled on the dock while awaiting resale and shipping. The scrap metal that is resold locally is shipped by truck and represents 95 per cent of the company's market. In the case of international resale, the buyer deals with a broker, which charters a ship and retains the services of St. Lawrence Stevedoring and its longshore workers for the loading.

[16] The loading of the scrap metal onto ships is carried out using a crane equipped with an electromagnet, operated by a subcontractor of St. Lawrence Stevedoring. Once the scrap metal is loaded into the ship's hold, the longshore workers spread it out using a wheeled loader. In 2005 and 2006, there were 25 loading days at the Port of Québec, at a rate of 2 to 2.5 days per ship.

[17] However, the scrap metal delivered by truck is piled for storage by Québec Métal Recyclé employees using hydraulic shovels and a wheeled loader. These activities of Québec Métal Recyclé are also contemplated by the Union's application.

[18] Québec Métal Recyclé's hydraulic shovel was also used during the loading of a ship to push the scrap metal on the dock so that it could be picked up by the electromagnet crane, but the parties stated at the hearing before this Court that this activity has now been replaced by a trucking system that transports the scrap metal from the storage site at the port to the loading dock.

[19] Cribtec is an electrical company specializing in instrumentation, automated systems and electrical and mechanical maintenance work. Cribtec serves 10 businesses at the Port of Québec and has 42 employees assigned there for that purpose.

[20] One of the businesses thus served is St. Lawrence Stevedoring, for which Cribtec carries out, among other work, maintenance work and mechanical repairs on heavy machinery used for longshoring. Some of this work had previously been carried out by St. Lawrence Stevedoring directly, through its own employees who were members of the Union. In recent years, all of this work has been contracted to Cribtec, which actually hired some of St. Lawrence Stevedoring's employees for this purpose. The electrical and mechanical maintenance work performed by Cribtec employees for St. Lawrence Stevedoring is also contemplated by the Union's application.

The majority opinion of the CIRB

[21] The majority of the CIRB panel that heard the case (Michèle Pineau and André Lecavalier) dismissed the Union's arguments primarily on the basis of this Court's

decision in *Cargill Grain Co., Gagnon and Boucher Division v. International Longshoremen's Assn., Local 1739* (1983), 51 N.R. 182, [1983] F.C.J. No. 948 (QL) ("*Cargill*"), and the CIRB's decision in *Société des Arrimeurs de Québec Inc. v. Syndicat des débardeurs du Port de Québec (CUPE, Local 2614)*, 2005 CIRB 339.

[22] In the majority's opinion, the CIRB must determine, first, whether the activities of the undertakings at issue are longshoring within the meaning of section 34 of the Code and, second, whether, as a result of these activities, these undertakings fall within federal labour jurisdiction (Decision at para. 199).

[23] Regarding Béton Provincial, the majority concluded that the activities at issue were not longshoring within the meaning of section 34 of the Code, mainly because the longshoring activities related to the unloading of the cement powder ended as soon as this powder was placed in the hoppers, in the possession and under the control of Béton Provincial (Decision at para. 218).

[24] The majority applied similar reasoning to Québec Métal Recyclé's activities in determining that the piling of the scrap metal on the dock leased by this company was a pre-loading activity, as possession of the scrap metal was relinquished by its owner for the purposes of loading it onto a ship only once it was picked up by the electromagnetic crane (Decision at para. 264).

[25] As for Cribtec, the majority decided that this business's activities were not ancillary to those of St. Lawrence Stevedoring so as to subject the business to federal jurisdiction. The majority was of the opinion that the following factors were determinative in this regard (Decision at paras. 255 to 257):

(a) Cribtec employees did not work exclusively for St. Lawrence Stevedoring.

(b) These services, though regular, accounted for only a small part of Cribtec's sales figures and only 20 per cent of St. Lawrence Stevedoring's equipment maintenance budget.

(c) Cribtec's employees were not supervised by St. Lawrence Stevedoring.

(d) There is no federal regulation applicable to the maintenance of equipment used in longshoring. Each business applies its own standards and, in the case of construction work, the Régie du bâtiment du Québec assumes responsibility for inspections and ensures that the work meets provincial standards.

(e) St. Lawrence Stevedoring is free to do business with the company of its choosing for maintenance and repair work. It does not depend on Cribtec's specific expertise.

The dissenting opinion

[26] In his dissenting opinion, Bernard Paquette relied mainly on *Reference re: Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (the "*Stevedores' Reference*"), to conclude that longshoring includes the handling of merchandise from the hold of a ship to the delivery of the merchandise at the tailboards of trucks or railway car doors. In addition, relying principally on this Court's decision in *Bernshine Mobile Maintenance Ltd. v. Canada Labour*

Relations Board, [1986] 1 F.C. 422 (C.A.), he found that the maintenance of equipment relating to a federal undertaking normally fell within federal jurisdiction.

[27] Relying on this legal analysis, he was of the opinion that Béton Provincial's activities were ancillary to longshoring and were necessary in order to complete the transportation and ensure delivery of the cargo to the recipient (Decision at paras. 291 and 296). In this regard, he distinguished this Court's decision in *Cargill*, noting that Béton Provincial employees had to set up and remove temporary facilities for unloading operations on the dock, whereas, in *Cargill*, the unloading facilities were permanent, and their operation merely required the services of the ship's crew.

[28] He adopted the same reasoning to conclude that Québec Métal Recyclé's activities on the dock were ancillary to longshoring. Since the piling of scrap metal on the dock was related to the loading of a ship, these activities fell within the scope of the certification (Decision at paras. 323 and 324).

[29] Lastly, regarding Cribtec, he determined that this business had taken over the work previously carried out for St. Lawrence Stevedoring by employees represented by the Union. The provisions of the Code and the CIRB's long tradition of protecting the jurisdiction of unions upon transfers of work, undertakings or businesses therefore had to be taken into consideration. Thus, an approach that helped to protect the union's bargaining unit against the subcontracting of work should have been applied.

Reconsideration Decision

[30] A panel composed of the CIRB's chairperson, Elizabeth MacPherson, and vice-chairpersons William G. McMurray and Louise Fecteau, dismissed the application for reconsideration filed by the Union pursuant to section 18 of the Code.

[31] The reconsideration panel was of the opinion that the majority of the initial panel had not erred in applying the principles established by *Cargill* to Béton Provincial and in not considering Québec Métal Recyclé's activities to be ancillary to longshoring (Reconsideration Decision at paras. 80 and 90).

[32] As for Cribtec, the reconsideration panel found that the majority of the initial panel had not erred in determining that this business's activities were not ancillary to those of St. Lawrence Stevedoring, given that the services, even those on the dock, were not rendered exclusively and accounted for only a small part of Cribtec's sales figures and only 20 per cent of St. Lawrence Stevedoring's equipment maintenance budget (Reconsideration Decision at para. 82).

Did the CIRB err in law in determining that the grounds on which an application for reconsideration may be made were limited to those listed in section 44 of the Regulations?

[33] At paragraph 67 of the Reconsideration Decision, the CIRB stated that the circumstances that may be adduced in support of an application for reconsideration were limited to those listed in section 44 of the Regulations. This is clearly an error, in light of this Court's decisions that are entirely to the contrary in *Société des arrimeurs de Québec v. Canadian Union of Public Employees, Local 3810*, 2008 FCA 237, at paras. 9 and 10, and *ADM Agri-Industries Ltée v.*

Syndicat national des employés de Les Moulins Maple Leaf (de l'Est), 2004 FCA 69, at paras. 40 and 42.

[34] It seems that, despite this error, the CIRB's Reconsideration Decision nevertheless took into account all of the arguments raised by the Union in support of its application for reconsideration: on this point, see paragraphs 28 to 36 of the Reconsideration Decision. The Union also failed to explain to this Court how it was prejudiced by that error of the CIRB in its application for reconsideration under section 18 of the Code.

[35] Consequently, while the CIRB did err in this case, this error was not determinative, and the application for judicial review should therefore not be allowed on this ground alone: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 40; *Lajeunesse v. Canada (Employment and Immigration Commission)*, [1995] F.C.J. No. 1369 (QL), at para. 6 (F.C.A.); *Pal v. Canada (Minister of Employment and Immigration)* (1993), 70 F.T.R. 289, [1993] F.C.J. No. 1301 (QL), at para. 9.

Did the CIRB err in law in making its decision by adopting an excessively narrow interpretation of subsection 34(1) of the Code?

Béton Provincial and Québec Métal Recyclé

[36] The Union submits that the CIRB's decision essentially raises a constitutional issue: whether the concerned activities fall within the scope of a provincial or federal work, undertaking or business. While such an issue is raised as regards Cribtec's activities, such is not the case for Béton Provincial and Québec Métal Recyclé.

[37] The CIRB's decision regarding Béton Provincial and Québec Métal Recyclé relied mainly on this Court's decision in *Cargill*. The issues before the CIRB with respect to these two businesses could therefore be resolved without raising any constitutional issues. Indeed, issues raising the application of subsection 34(1) of the Code are for the CIRB to decide. Such issues fall within the CIRB's core area of expertise and are normally reviewable on the standard of reasonableness: *J.D. Irving Ltd. v. International Longshoremen's Association, Local 273*, 2003 FCA 266, [2003] 4 F.C. 1080, at paras. 10 to 11; *Halifax Longshoremen's Association, Local 269 v. Offshore Logistics Inc.* (2000), 257 N.R. 338, [2000] F.C.J. No. 1155 (QL) (F.C.A.), at paras. 17 to 18.

[38] Case law has also identified the concept of longshoring as including cargo handling and related activities (i) from the moment the shipper or the shipper's agent relinquishes physical possession of the cargo at the port for the purpose of loading a ship and (ii) upon the unloading of a ship, up to the point the recipient or the recipient's agent takes physical possession of this cargo, at the port.

[39] In the *Stevedores' Reference*, at page 531, the Supreme Court of Canada considered to be longshoring the loading and unloading of cargo and related activities as long as the cargo was the responsibility and under the control of the stevedoring enterprise. In that case, the facts were not in dispute. The stevedoring enterprise's activities at issue under its contracts with its clients included handling the cargo from the train or truck to the ship for the loading, and vice-versa for the unloading. The conclusion to be drawn is that longshoring begins, during the loading, when the stevedoring enterprise physically takes delivery of the cargo at the port and ends, during the unloading, as soon as the stevedoring enterprise physically delivers the cargo to its recipient or the recipient's agent.

[40] In *Cargill*, the three-judge panel reached the same conclusion: longshoring ends during the unloading of a ship as soon as the cargo's recipient takes physical possession of the cargo at the port:

> The employees of applicant in question here do not unload ships: this work is done by members of the ship's crew. Applicant's employees operate and maintain equipment which transports grain to silos (after it has been unloaded and moved to applicant's facilities) and then moves it on to the trucks of applicant's customers. When these employees perform this work, the maritime transport has ended, since the goods have arrived at their destination and are in the possession of the recipient. For this reason, the work of these employees does not seem to me to be connected with transport, but rather with the grain business operated by applicant in Quebec City. (Justice Pratte at para. 12)
>
> While it is true that the Gagnon and Boucher Division made its employees responsible for handling and storing grain prior to its distribution to customers, it did so in my opinion after the goods had been emptied into hoppers, and received by it, and thus when transport had been completed. . . . (Justice Marceau at para. 27)
>
> In present case, the ships are unloaded by their crews. The grain, once delivered on the dock, has arrived at its destination and passes under the control of its

> owner, the applicant, for the purposes of its business as a supplier of feed grains. The employees of the applicant who look after the handling and storage on the dock are only receiving goods which have already been unloaded. Even then they spend only a tiny proportion of their time on this aspect of their work. . . . (Justice Hugessen at para. 37)
>
> (Emphasis added)

[41] This approach led the CIRB to find that the activities of Béton Provincial and Québec Métal Recyclé were not longshoring. This was a reasonable decision in light of the CIRB's findings of fact and the applicable case law.

[42] In Béton Provincial's case, the cargo is delivered into the hoppers, and the longshoring activities end at that point. Contrary to the Union's arguments, there is no significant conceptual difference between delivering the cargo to the tailboard of a Béton Provincial truck and delivering the cargo into a hopper belonging to Béton Provincial. In both cases, the stevedoring enterprise's responsibility for the cargo ends upon delivery, and the longshoring activities cease at that point.

[43] Similarly, in Québec Métal Recyclé's case, the scrap metal is piled up on a dock leased by this company for storage purposes. These activities occur before the stevedoring enterprise takes physical possession of the cargo, and therefore before the longshoring activities begin.

[44] Given these findings, the CIRB did not need to determine the constitutional character of Béton Provincial's and Québec Métal Recyclé's activities. Accordingly, this Court need not consider these issues with respect to these two businesses.

Cribtec

[45] Regarding Cribtec, the question is whether this company renders services to St. Lawrence Stevedoring, a federal undertaking, so as to become an integral part thereof. The CIRB had to carry out a constitutional analysis to answer this question, and that analysis is reviewable on the standard of correctness. However, where it is possible to treat the constitutional issue separately from the factual findings that underlie it, deference is owed to the initial findings of fact: *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters* [2009] 3 S.C.R. 407, at para. 26; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 58; *CHC Global Operations (2008) Inc. v. Global Helicopter Pilots Association*, 2010 FCA 89, at para. 22.

[46] In *Northern Telecom v. Communications Workers*, [1980] 1 S.C.R. 115 ("*Northern Telecom, 1980*"), at page 135, Justice Dickson identified certain relevant factors for determining whether a business providing a federal undertaking with services or equipment forms an integral part of the federal undertaking:

> (1) the general nature of the service provider's operation as a going concern and, in particular, the role of the services within the operation of the federal undertaking;

(2) the nature of the corporate relationship between the service provider and the other companies that it serves, notably the federal undertaking at issue;

(3) the importance of the work done for the federal undertaking at issue as compared with other customers of the service provider; and

(4) the physical and operational connection between the services and the federal undertaking at issue and, in particular, the extent of these services in the operation of the federal undertaking as a whole.

[47] These factors are often referred to in case law to determine whether contractors of federal undertakings fall under federal jurisdiction in regard to their labour relations: *Northern Telecom v. Communication Workers*, [1983] 1 S.C.R. 733, at pages 754 to 756 and 770 to 774 (*Northern Telecom, 1983*); *Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al*, [1983] 1 S.C.R. 147; *Seafarers' International Union of Canada v. Crosbie Offshore Services Ltd.*, [1982] 2 F.C. 855 (C.A.); *Bernshine Mobile Maintenance Ltd. v. Canada (Labour Relations Board),* above; *Public Service Alliance of Canada v. City of Saskatoon* (1998), 229 N.R. 207, [1998] F.C.J. No. 862 (QL), at para. 3.

[48] These factors set out in *Northern Telecom, 1980*, are not intended to be applied in a strict or rigid manner; instead, the test should be flexible and attentive to the facts of each particular case. The test involves determining in a functional and practical manner whether the undertakings at issue depend on one another such as to be operationally integrated: *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112, at

pages 1139-40.

[49] The degree of operational integration may vary, but it must be substantial and important, as well as vital, essential or fundamental. In *Northern Telecom, 1983*, Bell Canada bought 90 per cent of its communication and transmission equipment from Northern Telecom, and 95 per cent of all such equipment bought by Bell was installed by Northern Telecom. Installation work for Bell accounted for 80 per cent of the work of the Northern Telecom installers. In *Bernshine Mobile Maintenance Ltd. v. Canada (Labour Relations Board)*, above, the work done by Bernshine was almost exclusively devoted to the related federal undertaking. In *Public Service Alliance of Canada v. City of Saskatoon*, above, the fire department of the city at issue was the only one available to provide timely fire fighting and prevention services at the airport, and the airport division was an autonomous operation that was separate from the rest of the city's fire department.

[50] In this case, at paragraphs 248 to 251 of its Decision, the CIRB properly identified the state of the case law on the constitutional analysis that it had to conduct, and ultimately found that Cribtec and St. Lawrence Stevedoring were not functionally integrated.

[51] This conclusion is based on several important findings of fact drawn by the CIRB from the evidence adduced and described at paragraphs 252 to 257 of the Decision, such as the fact that Cribtec employees do not work exclusively for St. Lawrence Stevedoring; that the services account for only a small part of Cribtec's sales figures and only 20 per cent of St. Lawrence

Stevedoring's equipment maintenance budget; that Cribtec's employees are not supervised by St. Lawrence Stevedoring; and that there is no federal regulation applicable to the maintenance of equipment used in longshoring that would limit St. Lawrence Stevedoring's choice regarding equipment maintenance services, should it want to replace Cribtec.

[52] Given these findings of fact that attract deference, and considering the applicable legal principles established by the case law, I am of the opinion that this Court should not intervene, nor should it set aside the CIRB's finding that Cribtec's activities for St. Lawrence Stevedoring were activities carried out by an electrical and construction contractor that were not functionally integrated to a federal work, undertaking or business.

[53] I would therefore dismiss both applications for judicial review with costs to the respondents.

"Robert M. Mainville"
J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
M. Nadon J.A."

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	January 11, 2011
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A. NADON J.A.
DATED:	January 19, 2011

APPEARANCES:

Jacques Lamoureux	FOR THE APPLICANT SYNDICAT DES DÉBARDEURS DU PORT DE QUÉBEC (CUPE, LOCAL 2614)

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Jean-François Dolbec	FOR THE RESPONDENT BÉTON PROVINCIAL
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