Federal Court of Appeal | Cour d'appel fédérale

Date: 20191002

Docket: A-88-18

Citation: 2019 FCA 244

CORAM: **WEBB J.A.**
NEAR J.A.
DE MONTIGNY J.A.

BETWEEN:

TELECON INC.

Applicant

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 213

Respondent

Heard at Vancouver, British Columbia, on June 26, 2019.

Judgment delivered at Ottawa, Ontario, on October 2, 2019.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Telecon Inc. (Telecon, or the applicant) applies for judicial review of a decision of the Canada Industrial Relations Board (the Board) dated February 19, 2018 (the Decision). The Board granted the application for certification of the International Brotherhood of Electrical Workers, Local Union No. 213 (the IBEW, or the respondent), under section 24 of the *Canada*

Labour Code, R.S.C. 1985, c. L-2 (the Code), with respect to technical field and warehouse employees of Telecon.

[2] For the reasons that follow, I would dismiss the application for judicial review with costs.

I. Background

[3] Telecon is a telecommunications network infrastructure service provider incorporated in 1967, with headquarters in Montréal, Québec. It has approximately 572 employees in Western Canada. There was very little evidence, both before the Board and before this Court, as to the nature of the work performed by Telecon. As found by the Board, its services notably include the construction, installation and inspection of telecommunications infrastructure. Telecon also provides materials and installs wireline services (such as fibre-to-the-home, including in-suite cabling for residences and businesses), in addition to building, testing and maintaining wireless towers, small cells and Wi-Fi networks for third parties.

[4] In a supporting document filed with the Board, the applicant describes its business as follows:

> …Canada's leading telecommunications network infrastructure services provider. [Telecon] leverage[s] [its] national presence, network of 3,000 professionals, client relationships, and 50-year history to offer industry-leading design, infrastructure and connectivity solutions to telecommunications companies nationwide.
>
> Applicant's Record, vol. 2 at p. 152

[5] It also claims to have "[w]ell established and long-standing relationships with Canada's key telecommunications providers", to have "actively contributed to the backbone of Canadian telecommunications networks for 50 years" through its telecommunications infrastructure services, and to have "connected users to various types of telecommunications networks" (Applicant's Record, vol. 2 at pp. 152, 160 and 161).

[6] On January 16, 2018, pursuant to subsection 24(1) of the Code, the IBEW filed an application with the Board to represent all 71 technical field and warehouse employees working for Telecon in British Columbia. The application excluded office and sales employees, as well as managers.

[7] Telecon opposed the certification application on two grounds. First, it claimed that the labour relations at issue are subject to provincial regulation rather than federal regulation under the Code, and that the Board therefore did not have jurisdiction to entertain the application. In support of that contention, it pointed to a letter from an inspector of Employment and Social Development Canada expressing the view that a subsidiary of Telecon was a provincial business rather than a federal one. Second, Telecon argued that in the event the Board granted the application, it should exclude eight "Team Lead" positions from the proposed bargaining unit as these positions are managerial and have access to confidential information.

II. Impugned decision

[8] On February 19, 2018, the Board notified the parties of its ruling by way of a bottom-line decision, with full reasons to follow at a later date (2018 CIRB LD 3933). The Board rendered

its decision without an oral hearing, as it is authorized to do (s. 16.1 of the Code). The Board found it had constitutional authority to deal with the matter and granted the certification application. It further held that the "Team Lead" positions should be included in the certified bargaining unit.

[9] The reasons for the decision were issued on March 21, 2018 (2018 CIRB LD 3948 [Board's reasons]). After summarizing the relevant facts of the case and the parties' submissions, the Board entertained Telecon's constitutional objection. While it recognized that "most labour relations in Canada are subject to provincial jurisdiction" (at p. 7), it noted that the types of operations expressly enumerated in section 2 of the Code were subject to federal jurisdiction.

[10] Proceeding to an analysis of the Board's decision, it is helpful to set out the relevant provisions of the Code. Part 1 of the Code is entitled "Industrial Relations", and section 4 thereof reads as follows:

This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.	La présente partie s'applique aux employés dans le cadre d'une entreprise fédérale et à leurs syndicats, ainsi qu'à leurs employeurs et aux organisations patronales regroupant ceux-ci.

[11] The phrase "federal work, undertaking or business" is defined at section 2 of the Code. The portions of this provision which are relevant to the present application read as follows:

In this Act,	Les définitions qui suivent s'appliquent à la présente loi.
federal work, undertaking or business means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,	*entreprises fédérales* Les installations, ouvrages, entreprises ou secteurs d'activité qui relèvent de la compétence législative du Parlement, notamment :
…	…
(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,	les installations ou ouvrages, entre autres, chemins de fer, canaux ou liaisons télégraphiques, reliant une province à une ou plusieurs autres, ou débordant les limites d'une province, et les entreprises correspondantes;
…	…
(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces,	i) les installations, ouvrages, entreprises ou secteurs d'activité ne ressortissant pas au pouvoir législatif exclusif des législatures provinciales;

[12] Applying the functional approach set out in the seminal decision of *Northern Telecom v. Communications Workers*, [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1 [*Northern Telecom 1*], the Board held that the "daily operations and normal activities of Telecon go well beyond those of a local work or undertaking" (Board's reasons at p. 8), as they "involve supplying a telecommunications system, connecting residential and non-residential customers to the telecommunication system and building and maintaining that system" (*ibid*.).

[13] On this basis, the Board distinguished the present case from that of *Construction Montcalm* where the business at issue was held to be provincial as it "did not deal solely with the construction of airports" (Board's reasons at p.8, referring to *Construction Montcalm Inc. v.*

Minimum Wage Commission, [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641 [*Construction Montcalm*]). For the Board, the business here is closer to that in *XL Digital Services Inc. v. Communications, Energy and Paperworkers Union of Canada*, 2011 FCA 179, 338 D.L.R. (4th) 758 [*XL Digital*], which installed cable for residential customers and was found to fall under federal jurisdiction. In closing, the Board held that no reliance was to be placed on the inspector's letter provided by Telecon (Board's reasons at p. 8).

[14] With respect to the second issue before it, the Board found that the position of "Team Lead" should be included in the bargaining unit. This conclusion is not challenged by Telecon.

III. Issue

[15] The present application raises only one question, which can be formulated as follows: Was the Board correct in holding that it had the required constitutional jurisdiction to consider the application for certification?

IV. Analysis

[16] Whether the determination of the labour relations at issue are subject to federal or provincial legislation is a constitutional question to be examined under the correctness standard (see *Syndicat des agents de sécurité Garda, Section CPI-CSN v. Garda Canada Security Corporation*, 2011 FCA 302, 430 N.R. 84 at para. 29; *Nishnawbe-Aski Police Service Board v. Public Service Alliance of Canada*, 2015 FCA 211, [2016] 2 F.C.R. 351 at para. 6 [*Nishnawbe*]; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 58).

[17] To the extent that they are severable from the constitutional issue, the findings of fact underlying the Board's decision are entitled to deference (see *Consolidated Fastfrate v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 at para. 26 [*Consolidated Fastfrate*]; *Conseil de la Nation Innu Matimekush-Lac John v. Association of Employees of Northern Quebec (CSQ)*, 2017 FCA 212, 284 A.C.W.S. (3d) 625 at para. 14; *Syndicat des débardeurs du port de Québec v. Société des arrimeurs de Québec Inc.*, 2011 FCA 17, 203 A.C.W.S. (3d) 177 at para. 45; *CHC Global Operations (2008) Inc. v. Global Helicopter Pilots Association*, 2010 FCA 89, 186 A.C.W.S. (3d) 1123 at para. 22). As such, these findings are subject to the reasonableness standard.

[18] However, the Board's assessment of the constitutional significance to be attributed to those facts is assimilated to a constitutional question.

[19] The applicant contends that the Board's conclusion on jurisdiction is wrong. First, it claims that direct federal jurisdiction is excluded because it does not itself operate a telecommunications network. Second, it argues that derivative federal jurisdiction is not triggered by its operations. In support of this claim, the applicant submits that unlike in *XL Digital*, support to telecommunications companies does not constitute the major part of its business. Rather, when considered globally, its activities are that of a construction company and therefore under provincial jurisdiction (*Construction Montcalm*). The applicant also points to the inspector's letter and to arbitral decisions (including an Ontario Labour Relations Board (OLRB) certification of some of its technicians) which it says support its claim.

[20] In my view, this argument must fail for the following reasons.

[21] The parties agree as to the applicable principles. Jurisdiction over labour relations and working conditions is not delegated to either the provincial or federal governments under sections 91 and 92 of the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*]. Canadian courts have long accepted that legislation respecting labour relations is presumptively a provincial matter since it engages the provinces' legislative authority under subsection 92(13) (Property and Civil Rights) and, arguably, under subsections 92(1) (Local Works and Undertakings) and 92(16) (Local Matters) of the *Constitution Act, 1867* (see *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5).

[22] Despite the provinces' presumptive interest in the regulation of labour relations, there remains a federal presence in this area. In the *Stevedores Reference*, the Supreme Court held that Parliament can regulate labour relations when jurisdiction over the works is an integral part of its competence under a federal head of power (*Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529, [1955] 3 D.L.R. 721 [*Stevedores Reference*]). The rationale is that a "level of government cannot have exclusive authority to manage a work or undertaking without having the analogous power to regulate its labour relations" (*Tessier Ltée v. Quebec* (*Commission de la santé et de la sécurité du travail*), 2012 SCC 23, [2012] 2 S.C.R. 3 at para. 15 [*Tessier*], relying for that proposition on *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767 at pp. 771-772, 59 D.L.R. (2d) 145; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 at pp. 816-17, 825-26

and 833, 51 D.L.R. (4th) 161; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327 at pp. 363-364 and 368-69, 107 D.L.R. (4th) 457).

[23] It follows that Parliament only has jurisdiction over labour relations by way of exceptions, which have always been narrowly interpreted (see *Nishnawbe* at para. 50; *Consolidated Fastfrate* at para. 27). This is reflected in the definition of "federal work, undertaking or business" found in section 2 of the Code. Clause (b) of that definition simply restates part of paragraph 92(10)(a) of the *Constitution Act, 1867*, which identifies certain classes of works withdrawn from the provinces and rendered federal matters by the terms of subsection 91(29). Clause (i) either applies the residual power of Parliament to the field of works and undertakings, or stems from a perception of the effect of subsection 92(10) exceptions with respect to "Local Works and Undertakings" (*Northern Telecom 1* at p. 128).

[24] The Supreme Court has recognized that the federal government has jurisdiction to regulate employment in two particular circumstances, namely:

> …when the employment relates to a work, undertaking, or business within the legislative authority of Parliament [i.e. direct jurisdiction]; or when it is an integral part of a federally regulated undertaking, sometimes referred to as derivative jurisdiction…
>
> *Tessier* at para. 17

See also *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112 at p. 1124, 76 D.L.R. (4th) 1 [*UTU*].

[25] In the first case, where direct jurisdiction is claimed, the Court must "assess whether the work, business or undertaking's essential operational nature brings it within a federal head of power" (*Tessier* at para. 18). In the second case, where derivative jurisdiction is alleged, it must assess "whether that essential operational nature renders the work integral to a federal undertaking" *(ibid.*). In both cases, it is by "assessing the work's essential operational nature" that the Court decides which level of government has authority (*ibid.*). In other words, it requires a "functional, practical [judgment] about the factual character of the ongoing undertaking" (*Northern Telecom 1* at p. 133, citing *Arrow Transfer Co. Ltd.*, [1974] 1 Can. L.R.B.R. 29 at pp. 34-5, [1974] B.C.L.R.B.D. No. 4).

[26] In order to determine the "essential nature" of the operation at issue, "one must look at the normal or habitual activities of the business as those of 'a going concern' … without regard for exceptional or casual factors" (*Construction Montcalm* at p. 769). In other words, an operation should not be "characterized as a federal or provincial one on account of casual factors" (*ibid.* at p. 770). Otherwise, the Supreme Court cautioned, "the Constitution could not be applied with any degree of continuity and regularity" (*ibid.* at p. 769).

[27] In the case of derivative jurisdiction, the focus of the functional analysis "is on the relationship between the activity, the particular employees under scrutiny, and the federal operation that is said to benefit from the work of those employees" (*Tessier* at para. 38, relying on *UTU* at pp. 1138-39). The relationship is to be considered "from the perspective both of the federal undertaking and of the work said to be integrally related, assessing the extent to which the effective performance of the federal undertaking was dependent on the services provided by

the related operation, and how important those services were to the related work itself" (*Tessier* at para. 46). This inquiry may lead the Court to conclude that a company which would otherwise be:

> …provincially regulated for purposes of labour relations, might nonetheless come under federal jurisdiction if the effective performance of the federal undertaking that relies on it would not be possible without the services of the related company. Federal jurisdiction over labour relations in such cases is based on a finding that the federal undertaking is dependent to a significant degree on the workers in question…
>
> *Tessier* at para. 32

[28] This means that an operation could be subject to derivative federal labour jurisdiction even if it carries on some provincially-related activities (*Tessier* at para. 36). This was precisely the case in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178, 40 D.L.R. (3d) 105 [*Letter Carriers*], where the Court held that an undertaking that devoted 90 percent of its time to delivering and collecting mail, and 10 percent to local activities, was a federal one. Mail-collecting activity, "which was the main and principal part of the undertaking's operation, was essential to the function of the postal service and brought the undertaking within federal labour regulation" (*Tessier* at para. 36).

[29] A second example of derivative jurisdiction is that of *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R 733, 147 D.L.R. (3d) 1 [*Northern Telecom 2*], in which the Supreme Court found that installation employees at Northern Telecom should be under federal labour jurisdiction as they provided services that were vital to Bell Canada, a federal undertaking. It should be noted that, as in *Letter Carriers*, the installation services

supplied to Bell occupied a very high percentage of the employee's time, but not all of it (*Northern Telecom 2* at p. 752).

[30] If the functional inquiry into derivative jurisdiction is inconclusive, courts will proceed to an examination of "whether provincial regulation of the entity's labour relations would impair the core of the federal head of power at issue" (*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 at para. 18). This two-step labour relations test is unique (*ibid*. at para. 20), entailing "a completely different analysis from that used to determine whether a … statute is *intra* or *ultra vires* the constitutional authority of the enabling government" (*ibid.* at para.12).

[31] This framework and these principles are not in dispute. I shall now apply them to the facts of this case.

[32] The record before this Court (and before the Board) is rather sparse. This is unfortunate, especially considering that the assessment of whether a business falls under federal or provincial jurisdiction for the purposes of labour relations "calls for a fairly complete set of factual findings" (*Northern Telecom 1* at p. 139). As noted by Chief Justice Dickson, facts will be of particular importance when considering the connection between a subsidiary operation and a core undertaking. Despite this, neither party takes issue with the sufficiency of the evidence, and I do not believe that the record is so sparse as to put this Court in a position where it is unable to resolve the question of constitutional jurisdiction.

[33] There is no dispute that Telecon is not itself a federal undertaking and does not operate a telecommunications network; the applicant is right to argue that direct federal jurisdiction is excluded in the present case. Thus, the question to be resolved becomes whether Telecon's essential, ongoing operations are vital, essential or integral to a federal undertaking or an integral element of the federal jurisdiction over telecommunications.

[34] In its reasons, the Board characterizes Telecon's operations in the following way (at p. 8):

> The nature of Telecon's work is designing, building, maintaining and connecting telecommunications infrastructure, including connections from a home or business to the communications system.
>
> The daily operations and normal activities of Telecon go well beyond those of a local work or undertaking. The Board distinguishes the undertaking at issue in this case from the undertaking of the employer in *Construction Montcalm, supra* a construction company whose construction business did not deal solely with the construction of airports.
>
> Telecon is not simply a construction company, though it does engage in construction activities. Its daily and normal activities involve supplying a telecommunications system, connecting residential and non-residential customers to the telecommunications system and building and maintaining that system.

[35] In its oral and written submissions, Telecon did not object to the first paragraph of that description of its work, but claims that there is no evidence allowing the Board to find that Telecon is not only a construction company but also a provider of telecommunications systems. Yet, a careful review of the evidence that was before the Board shows that its factual findings find ample support in the material filed by the applicant itself. For example, we find the following description of Telecon's activities in its response to an information request:

> …The Company is specialized in the construction, installation and inspection of underground and aerial utilities as well as the installation, construction and commissioning of structured cabling infrastructure. In other words, it handles … all of the work related to the construction of telecommunications infrastructure,

> including the building of underground pipe runs and access shafts and the installation of telecommunication networks.
>
> [Emphasis added]
>
> Telecon receives mandates from its clients to build aerial and underground structures. With regards to infrastructures, Telecon's employees are responsible for the *construction, installation and inspection* of *underground and aerial utilities as well as the installation, construction and commissioning of structured cabling infrastructure*. In other words, it handles all of the work related to the building of telecommunications infrastructure, including the building of underground pipe runs and access shafts.
>
> [Emphasis added and *emphasis in original*]
>
> Finally, the connectivity sector is equally managed by Telecon. The Company's connectivity services, whether provided piece-rate or as part of an integrated end-to-end project, include material provisioning and installation for all wireline services, such as fibre-to-the-home (FTTH), which includes in-suite cabling in multi-dwelling units (residential and business). They also cover provisioning, construction, testing, and repair and maintenance services for third parties in regards to wireless towers small cells and Wi-Fi networks.
>
> [Emphasis added]
>
> Applicant's Record, vol. 2 at pp. 33-34

[36] In its supporting documents, Telecon also boasts that it is:

> …Canada's leading telecommunications network infrastructure services provider. We leverage our national presence, network of 3,000 professionals, client relationships, and 50-year history to offer industry-leading design, infrastructure and connectivity solutions to telecommunications companies nationwide.
>
> Applicant's Record, vol. 2 at p. 152, reproduced in the Board's decision at p. 2

[37] It is abundantly clear from that brochure that Telecon considers itself to be much more than a construction company. In describing the "full life cycle of telecommunications network services", it refers to its infrastructure capabilities ("construction, installation, testing, and maintenance of aerial and buried telecommunications network infrastructures"), design

capabilities ("planning, design and permitting of all elements related to telecommunications networks"), and connectivity capabilities ("installation, repair and in-building cabling solutions" and "provisioning and maintenance services for wireless towers, small cells and Wi-Fi networks"). To sum up its expertise, it states:

> Telecon is Canada's largest provider of turnkey and project management solutions, acting as the client's single point of contact in the deployment of telecommunications network operations on any scale.
>
> Applicant's Record, vol. 2 at p. 156

[38] It is now too late for Telecon to reinvent itself as a construction company. Quite to the contrary, the above references to the record show the applicant's activities go far beyond the mere construction of a network. Its involvement with telecommunications networks appears to be the predominant part of its work, and this is neither an exceptional nor a casual factor. Indeed, according to Telecon's own description of its business, connectivity is as important as construction. Far from rephrasing the nature of Telecon's work and activities, the Board relied on the applicant's own evidence and admissions. Deference is owed to the Board's findings of fact and to the factual inferences it drew from those facts. Despite the presumption of provincial jurisdiction over labour relations, the facts supporting such a presumption must be established. In the case at bar, they were not.

[39] The Board was therefore right to distinguish the present case from that of *Construction Montcalm*, in which the construction of an airport runway was out of the company's ordinary business and the employees had nothing more to do with the federal undertaking once it was completed. Unlike in *Construction Montcalm,* it cannot be said here that the ordinary business of the company at issue is that of "building", that "[w]hat they build is accidental", and that there is

nothing specifically federal about it (at p. 776). The evidence on the record is very specific as to what, if anything, is built or repaired by the applicant, and it all relates to telecommunications networks. It shows, without a doubt, that the services provided to that federal undertaking constitute the exclusive or principal part of the applicant's activities (*Stevedores Reference*; *Letter Carriers*).

[40] In oral argument, counsel for the applicant stressed that there is no evidence as to the importance of the work it performed for federal undertakings, none as to the involvement of employees in such undertakings, and none as to the corporate integration of Telecon with any federal undertaking. These factors were indeed applied in various cases applying the derivative approach, most notably in *Northern Telecom 2*. But as noted by Dickson C.J. in *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112 at p. 1147, 76 D.L.R. (4th) 1 and by McLachlin J. in *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 at paras. 125 and 128, 156 D.L.R. (4th) 456, different factors have been emphasized depending on the particular facts of each case, and there is no simple litmus test. On the contrary, the test is flexible and the ultimate question to be asked is whether the related work activities are so integral to a federal undertaking that federal jurisdiction over labour relations is justified. As the Supreme Court stated in its most recent case on the subject:

> … this Court has consistently considered the relationship from the perspective both of the federal undertaking and of the work said to be integrally related, assessing the extent to which the effective performance of the federal undertaking was dependent on the services provided by the related operation, and how important those services were to the related work itself.
>
> *Tessier* at para. 46

[41] The applicant also contends that the Board was wrong to rely on *XL Digital* to the extent that Telecon's activities differ from those of the cable installers that were found to fall under federal jurisdiction in that case. In my view, this submission must equally be rejected. In trying to distinguish the two cases, the applicant argues that the installation, repair and maintenance of telecommunications networks "does not constitute the major part of [its] business" (Applicant's Memorandum of Fact and Law at para. 41). However, it provides only a single inspection letter as evidence. While sparse, the record seems to indicate that, as in *XL Digital*, the activities at issue are indeed integral to telecommunications networks and thus justify imposing exceptional federal jurisdiction for labour relations purposes.

[42] The applicant has provided no evidence, nor made any submissions denying the importance of the work done by its employees for the companies of federal jurisdiction with which it does business. Consequently, I see no reason to interfere with the Board's finding that these employees "perform work that is vital and integral" to a federal undertaking (Board's reasons at p. 9). As noted by the Ontario High Court of Justice as long ago as 1970, there can be "no doubt that the telephone, telegraph and telecommunication companies could not function without the initial installations, and their continuous improvement, extension and expansion" (*Regina v. Ontario Labour Relations Board, Ex parte Northern Electric Co. Ltd.*, [1970] 2 O.R. 654, 11 D.L.R. (3d) 640 at para. 52, aff'd in [1971] 1 O.R. 121 (C.A.), 14 D.L.R. (3d) 537).

[43] I find that the Board was also right to conclude that no reliance had to be placed on the inspector's letter put forward by Telecon (Applicant's Record, vol. 2 at p. 169). As pointed out by the Board, that letter "does not refer to any facts relating to the undertaking and does not

recite any law" (*ibid.* at pp. 4-5). It is neither a decision of the Board, "nor does it appear to be the product of any adjudicative process involving the admission and consideration of evidence" *(ibid.*). Furthermore, this letter relates to a subsidiary "not targeted" by the application at hand (Applicant's Record, vol. 2 at p. 34). As such, it is not a final decision between the parties and it was not binding on the Board.

[44] As for the order of the OLRB certifying some of Telecon's employees in Ontario (Applicant's Record, vol. 2 at pp. 191-203), I also believe that very little, if any, weight should be given to it here. As stressed by the respondent, the only issue in that case was the appropriate bargaining unit. The constitutional jurisdiction of the OLRB was never at play because both Telecon and the IBEW proceeded by agreement. As such, the decision only reflects the wishes of the parties to the agreement, and does not reflect the considered opinion of the OLRB. The same can be said of the decision of the then Labour Relations Commission of Quebec (Commission des relations du travail du Québec) in *Chenail c. Telecon Inc.*, 2012 QCCRT 153, which dealt with a complaint filed by a Telecon employee under section 122 of the *Act respecting labour standards*, C.Q.L.R. c. N-1.1.

[45] It should also be noted that the wording of the OLRB certification order differs greatly from that of the Board. That certificate was issued "in respect of all construction labourers in the employ of [Telecon] in all sectors of the construction industry in the City of Toronto" (Applicant's Record, vol. 2 at pp. 197-8), while the Board's order covered all its "technical field and warehouse employees" in British Columbia.

[46] It is also worth pointing out that the mere fact that the conduct of labour relations with respect to specific employees has been variously assigned and conducted according to the laws of Canada or of the provinces has not prevented the Supreme Court from finding that these employees were engaged integrally in the operation of a federal work (*Northern Telecom 2* at p. 760).

[47] Furthermore, counter to what the applicant seems to suggest, the mere fact that the Board and other administrative decision-makers may have come to different conclusions in other factual contexts in no way demonstrates that its determination in the present case is erroneous. This is especially true considering that other decisions bearing more factual similarities to the case at bar have followed a reasoning very similar to that of the Board (see *Ramkey v. Labourers International Union of North America et al.*, 2018 ONSC 4791, [2018] O.L.R.B. Rep. 804 [*Ramkey*], *Labourers' International Union of North America, Ontario Provincial District Council v. Connectall Communication Ltd.*, [2015] O.L.R.D. 1184 (OLRB), [2015] O.L.R.B. Rep. 307, as well as *Communications, Energy and Paperworkers Union of Canada v. XL Digital Services Inc.* 2010 CIRB 543, [2010] C.I.R.B.D. No. 50, aff'd *XL Digital*).

[48] The first of these cases, *Ramkey*, bears a striking resemblance to our own. Ramkey installs, maintains, and repairs telecommunications networks mostly for other federally regulated telecommunications companies. In its written submission, the applicant had relied on a decision of the OLRB finding that Ramkey's work was essentially related to the construction, building or repairing of federal undertakings and was therefore within provincial jurisdiction. However, by

the time of the hearing, that decision had been overturned by the Ontario Superior Court of Justice, which held that Ramkey's construction technicians were subject to federal jurisdiction.

[49] The Court noted that while Ramkey is provincially incorporated, it does work almost exclusively for federally regulated telecommunications companies (*Ramkey* at para. 50). In the Court's view, the case could thus be distinguished from *Construction Montcalm*, insofar as the construction work done by Ramkey was "specific to the telecommunications industry" (*ibid.* at para. 58). Unlike in *Construction Montcalm*, Ramkey "was not general construction and was not a 'one off' project but rather, part of an ongoing part of the telecommunications business" *(ibid.*). Finding that "almost all of the [employees'] volume of work was done for telecommunications companies" (*ibid.* at para. 59), the Court held that these employees are "engaged derivatively in work that is vital, essential or integral to a federal undertaking, and therefore should be federally regulated" (*ibid.* at para. 60).

[50] In my view, the same reasoning applies to the employees of Telecon included in the bargaining unit for which an application for certification has been filed with the Board.

V. Conclusion

[51] For all of the foregoing reasons, I am of the opinion that the present application for judicial review should be dismissed, with costs.

"Yves de Montigny"

J.A.

"I agree
Wyman W. Webb J.A."

"I agree
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	TELECON INC. v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 213
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 26, 2019
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	WEBB J.A. NEAR J.A.
DATED:	OCTOBER 2, 2019

APPEARANCES:

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