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Labour & Employment

Ruling in labour case 'go-to decision' on federal-provincial jurisdiction issue, law prof says

By **Ian Burns**

(October 9, 2019, 11:47 AM EDT) -- The Federal Court of Appeal has ruled a Quebec-based company is subject to federal labour law after the court determined the bulk of its work was in telecommunications despite its describing itself as a construction company, and a legal expert is saying the decision will be seminal in determining what companies will fall under federal jurisdiction in labour relations.

In January 2018, the International Brotherhood of Electrical Workers (IBEW) Local 213 filed an application with the Canada Industrial Relations Board (CIRB) to represent all 71 technical field and warehouse employees in B.C. working for Telecon, which describes itself as "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."

Under Canadian law, any employee who is employed in connection with the "operation of any federal work, undertaking or business" is subject to the *Canada Labour Code*. The board granted certification, but Telecon argued it did not have jurisdiction to entertain the application, claiming it was a construction company subject to provincial law, and because it does not itself operate a telecommunications network it was not subject to federal regulation.

Justice Yves de Montigny wrote there was no dispute that Telecon was not in itself a federal undertaking and did not operate a telecommunications network, but added "it is abundantly clear… that Telecon considers itself to be much more than a construction company." He noted the Supreme Court in *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)* 2012 SCC 23 ruled the federal government can regulate employment when it relates to a to a work, undertaking or business within the legislative authority of Parliament, or when it is an integral part of a federally regulated undertaking, which is sometimes referred to as derivative jurisdiction.

"The record show[s] the applicant's activities go far beyond the mere construction of a network. Indeed, according to Telecon's own description of its business, connectivity is as important as construction," he wrote. "It is now too late for Telecon to reinvent itself as a construction company."

Justice de Montigny wrote the CIRB was right to distinguish Telecon's case from that of *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, 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.

"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," he wrote. "It shows, without a doubt, that the services provided to that federal undertaking constitute the exclusive or principal part of the applicant's activities."

Michael Lynk, Western University’s faculty of law

Justice de Montigny then dismissed Telecon’s application for judicial review of the board’s decision. He was joined by Justices Wyman Webb and David Near in the unanimous decision, which was released Oct. 2 (*Telecon Inc. v. International Brotherhood of Electrical Workers, Local Union No. 213* 2019 FCA 244).

Leo McGrady of Koskie Glavin Gordon, who represented IBEW, said a lot of the jurisprudence surrounding the definition of a federal work or undertaking versus a provincial one is old, with some dating back to the 1970s.

“What this decision does is gather all of those older cases together and gives the issue fresh light and fresh language to clarify the principles,” he said. “And from a labour lawyer’s point of view, anything that makes life easier, in the sense that advice to the client is simpler and more straightforward, is good for the practice and good for the client.”

Michael Lynk of Western University’s faculty of law said he feels the decision in *Telecon* “would now be the go-to decision on whether to decide if a company’s operations are integral to a federal work or undertaking or not.” He added the issue of what is or isn’t a federal work or undertaking “has been fraught with all kinds of decisions going both ways” and there wasn’t much clarity until *Tessier*.

“What I like particularly about *Telecon* is that it applied *Tessier*, but also did a very good job with the available facts and it went through virtually the whole spectrum of the case law in the last 40 years on which companies fall on which side of the fence,” he said. “After *Tessier* and *Telecon*, it is going to be a lot easier for labour lawyers across the country to figure out whether the employer they are representing properly falls under federal or provincial labour relations.”

Lynk added the company in *Tessier* was found to be a provincial undertaking because the work being done federally was only a small part of its operations.

“In this case, the vast bulk of Telecon’s work is doing construction infrastructure for federal telecommunications companies, and that is all the difference. So, it is emphasizing more and more a percentage question — how much of your work as a company is tied up with doing this contract work for a federal work or undertaking?” he said. “The court is telling us is we have to look at how much time is spent by a company in doing that work.”

Telecon’s counsel did not respond to a request for an interview.