

## Decision of the Appeal Division

**Number: 00-1650**

**Date: October 18, 2000**

**Panel: Patrick L. Byrne, Heather McDonald, James A. Sheppard**

**Subject: Provincial Jurisdiction Over Health and Safety of Workers Whose Employer Had Them Work at a Federally Regulated Undertaking**


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### Introduction

- (1) The employer has filed an appeal of the reviewing officer's decision dated January 7, 2000 with the Appeal Division under Division 14 of the *Workers Compensation Act* (the "Act"). The reviewing officer's decision dated January 7, 2000 imposed an administrative penalty of \$3,500 on the employer under section 196(6) of the Act. The application for appeal was received by the Appeal Division on January 20, 2000. In the application for appeal the employer requested a stay or suspension of the reviewing officer's decision to impose the administrative penalty pending the consideration of their appeal on its merits. Applications for a stay or suspension are considered on a preliminary basis. In Appeal Division Decision #00-0375 dated March 15, 2000 an appeal commissioner in considering the employer's stay application stated: "The violations in question in this case involve a high risk of serious injury or death. For purposes of the stay application, the employer has failed to show that workers are not exposed to the dangers raised in the cited violations. There is no compelling or convincing evidence that worker safety will not be compromised or prejudiced by granting a stay. Nor is there evidence on file to show that the employer's efforts to achieve compliance could be compromised by the collection of the \$3,500 penalty imposed on January 7, 2000." For these reasons the employer's stay application was dismissed.

### Issue(s)

- (2) Does the Board have jurisdiction over the occupational health and safety of workers constructing living units for a federally regulated railway company on property owned and/or operated by that federally regulated railway company? Should the reviewing officer's decision of January 7, 2000 be confirmed, varied, or cancelled or referred back to the Board for reconsideration?
- (3) The orders written against the employer by the occupational safety officer on August 3, 1999 (for an inspection that took place on July 30, 1999) were written prior to the enactment of the *Workers Compensation (Occupational Health and Safety) Amendment Act, 1998* ("Bill 14") which came into force on October 1, 1999. Bill 14 created an entirely new Part (3) to the Act which addresses occupational health and safety matters. Because of Bill 14 there were consequential amendments made after October 1, 1999 to the existing Occupational Health and Safety Regulation (the "Regulation").

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- (4) Section 32(3) of the transitional provisions of Bill 14 provide that orders of the Board in relation to occupational health and safety under the Act that were in effect immediately before the new Part 3 of the Act came into force on October 1, 1999 are continued and are deemed to be orders of the Board under the new Part 3 of the Act. Section 34(1)(a)(b) of the transitional provisions of Bill 14 provide that where notice (like the September 10, 1999 letter from the Variance and Sanction Review Section in this case) of a proposed penalty under section 73(1) of the Act is given to an employer before October 1, 1999 and no decision on whether to levy the proposed penalty has yet been made, the procedure for dealing with the proposed penalty by the reviewing officer will remain the same as before October 1, 1999 but the reviewing officer may impose an administrative penalty under section 196(6) of the Act. The reviewing officer in this case imposed an administrative penalty under section 196(6) of the Act. The reviewing officer's decision of January 7, 2000 was made after October 1, 1999 and is appealable to the Appeal Division under Division 14 of the new Part 3 of the Act.
- (5) Section 207 of Division 14 of Part 3 of the Act provides for an employer's appeal to the Appeal Division of an administrative penalty imposed on an employer under section 196(6) of the Act. Section 212(1)(a)(b) of the Act provides that after considering the appeal, the Appeal Division panel may confirm, vary or cancel the decision under appeal or refer the matter back to the Board for reconsideration. This provision is broader in wording than the limited grounds that existed for appeals of this nature prior to October 1, 1999. Section 96(6)(c) of the Act had provided an employer with the right to appeal an assessment levied under section 73(1) (repealed) to the Appeal Division on the limited grounds of error of law, fact, or contravention of published policy. These limited grounds have been repealed and replaced by the provisions in section 212(1)(a)(b) of the Act. Appeal Division Decision #27 states:

An appeal involves an analysis of the correctness of the Board's decision; that is, whether there is a proper factual, legal and policy basis for the decision.

The actual nature of a hearing will vary in scope depending on the circumstances of a particular case. The hearing panel will have the information that was before the Board when it made its original decision and may hear any other evidence relevant to the issue before it.

- (6) The Appeal Division interprets the provisions of section 212(1)(a)(b) as providing it with the authority to re-weigh the existing evidence, seek and examine new evidence, and substitute its judgment for that of the reviewing officer's with respect to the findings of fact, the law, and Board policy. The Appeal Division has been granted a very broad scope of review in these cases.

### **Notification of Parties/Method of Appeal**

- (7) Section 211(2) of the Act requires an employer who is appealing an administrative penalty to the Appeal Division to provide notice of the appeal application to the workforce by posting such notice at the workplace and also providing notice to the Joint Health and Safety Committee/Worker Health and Safety Representative/Union, where applicable. The employer's

representative, on the application for appeal, has indicated that such a notice has been posted and given in this case. The Appeal Division has also notified the Joint Health and Safety Committee/Worker Health and Safety Representative/Union, if applicable, in a letter dated February 16, 2000 of the employer's appeal of the reviewing officer's decision dated January 7, 2000. The Appeal Division did not receive a notice of participation form from any of these parties nor any notification from any of the employer's workers that they wish to participate in this appeal. The employer's appeal will proceed without the participation of these other parties.

- (8) The employer's representative on the application for appeal requested an oral hearing. Their reasons were based on wanting to interview Board officers. They had requested the attendance of the occupational safety officer as a witness. No further reasons (either in the application for appeal or the employer's representative's July 8, 2000 submission) were given as to why an oral hearing was required in this case. On a preliminary basis the employer's representative's request for an oral hearing was referred to the deputy chief appeal commissioner who denied the request but it was left open to the panel assigned to this appeal to consider this matter again.
- (9) Appeal Division Decision #27 states that Part 3 of the Act does not specify the type of hearing the Appeal Division must hold. An appeal may be conducted by way of written submissions, an oral hearing or a combination of both. Decision #27 sets out some of the factors (not exhaustive) that may be considered in deciding whether or not to hold an oral hearing:

| Oral Hearing   | Written Submissions  |
|--|--|
| <ul style="list-style-type: none"> <li>• the factual underpinnings of the order are in dispute or significant new evidence is available</li> <li>• there is a significant issue of credibility of witnesses involved</li> <li>• the case raises an issue of general significance or a significant policy issue</li> <li>• the complexity of the case</li> <li>• an oral hearing was not held by the Board</li> <li>• there are two parties (or more) to the appeal and one party requests a hearing</li> <li>• the amount of the penalty is significant</li> </ul> | <ul style="list-style-type: none"> <li>• no reasons are given for an oral hearing</li> <li>• there is only one party</li> <li>• the appeal turns simply on the interpretation or legal analysis of a word, phrase or provision in the Act or Regulations where witnesses would not be required to resolve the matter</li> <li>• the credibility of witnesses is not an issue</li> <li>• an oral hearing was held by the Board</li> </ul> |

- (10) An oral hearing was held by the reviewing officer. The employer's representative's July 8, 2000 submission does not contain any new evidence, nor does it raise a significant issue of credibility. There is only one party. Further, the appeal turns (and the employer's representative's submission is focused) on the issue of the Board's jurisdiction over the occupational health and safety of workers constructing living units for a federally regulated railway company on property owned and/or operated by that federally regulated railway company. For these reasons the panel has concluded that an oral hearing is not required to render a fair and thorough decision.

## Background and Evidence

- (11) On July 30, 1999 a Board occupational safety officer inspected the employer's worksite on property owned and/or operated by a federally regulated railway company. The occupational safety officer in his memo dated August 5, 1999 to the regional manager states:

I inspected the worksite of [the employer] at the [property owned and/or operated by a federally regulated railway company] on Friday July 30, 1999 and issued Inspection Report number [1999].

Two [of the employer's] workers were observed working without adequate fall protection at and near the edge of a 6:12 sloped roof, at a height of approximately 19 feet, and in an area in which a fall hazard existed.

A review of this employer's record was conducted to determine prior knowledge. Similar violations were cited on previous Inspection Reports [1999], [1998] & [1998]. A Warning Letter for similar violations was processed under Sanction Recommendation [S.R.1999].

[reproduced as written]

- (12) The occupational safety officer issued an inspection report dated August 3, 1999 to the employer containing five orders citing violations of section 3.22 (employer's responsibility), 3.23 (supervisor's responsibility), 8.8(b) (personal protective equipment/fall protection), 8.10(1) (personal clothing), and 11.2(1) (fall protection system) of the Regulation. These were sections contained in the Regulation before the subsequent amendments to the Regulation after Bill 14 came into force on October 1, 1999.
- (13) A recommendation for sanction was processed and a proposed penalty letter dated September 10, 1999 was sent to the employer by the Variance and Sanction Review Section, Prevention Division. The penalty letter informed the employer that a proposed penalty of \$3,500 was being considered based on information that work practices which carried a high risk of death, serious injury or industrial disease, were being conducted by the employer and for repeat non-compliance with the Regulation.
- (14) An oral hearing was held by the reviewing officer on November 9, 1999 with the employer, his representative, and the occupational safety officer in attendance. As outlined in Appeal Division Decision #00-0375:

The employer raised the issue of the Board's authority to regulate construction activity of living units on \*federal government property at the sanction review hearing. The sanction review officer relied on a 1979 Supreme Court of Canada decision in denying the employer's appeal on that issue. Following the violations leading to the proposed penalty, the employer developed a written safety program with the assistance of a consulting firm. The employer's representative submitted a draft of that written program following the November 9, 1999

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sanction review hearing to illustrate their commitment to actively pursue a program of compliance. The sanction review officer found that persuasive means by the Board failed to get a meaningful commitment to comply on the day of the inspection. The sanction review officer also found that the violations exposed workers to a high risk of injury or death and noted that the employer did not contest the issue of high risk.

[reproduced as written]

\*Note: should read property owned and/or operated by a federally regulated railway company

## **Law and Policy**

- (15) Although the reviewing officer's decision of January 7, 2000 was made after October 1, 1999 to impose an administrative penalty under section 196(6) of the new Part 3 of the Act, the basis upon which that administrative penalty was imposed arose from violations of the Regulation as it read prior to October 1, 1999 (prior to Bill 14 and the new Part 3 of the Act with subsequent amendments to the Regulation). It is relevant in this case to examine the Act and the Regulation as they were read at the time of the occupational safety officer's inspection.
- (16) The employer's representative has cited Prevention Division policies 1.6.5, 1.6.8, 1.6.9, and draft operating instruction A2.4.6. The employer's representative has not cited Prevention Division policies 1.4.1 (application of sanctions), and 1.4.3 (penalty assessments in high risk work situations), or the new policies concerning the proposing and levying of administrative penalties that came into force on October 1, 1999: D12-196-1-2-3-10. Section 196(6)(a) provides that the employer is not liable to an administrative penalty if the employer proves that the employer exercised due diligence to prevent the failure, non-compliance or conditions to which the penalty relates. The recommended schedule of sanctions outlined in Prevention Division policy 1.4.1 is still applicable in this case as the Panel of Administrators extended the use of this schedule for violations of the Regulation occurring before May 1, 2000. We will address these published policies and the draft operating instruction in our reasons and decision.

## **Reasons and Decision**

- (17) We will address the employer's representative's written submission dated July 8, 2000 in our reasons and decision. We have also reviewed the penalty and firm files for this employer. We have reviewed and considered the written submissions the employer's representative made to the reviewing officer. We have also carefully reviewed and considered the reviewing officer's decision of January 7, 2000 in deciding the issues in front of us.
- (18) If these workers had not been constructing living units for a federally regulated railway company on property owned and/or operated by that federally regulated railway company there would have been no question as to the applicability of the Act and the Regulation to the occupational health and safety of these workers.

## Jurisdictional Issue

- (19) The employer's representative has taken the position that the occupational safety officer did not have jurisdiction nor authority to conduct an inspection on federally regulated property and had no jurisdiction to document procedures and penalties on a federally regulated railway company's land situated in the province of British Columbia.

## Constitutional Principles

- (20) The evidence is that the employer entered into a contract as a framing contractor with a construction company who acted as the general contractor for a federally regulated railway. The employer agreed to frame a 32-bedroom crew facility located on property situated in the province of British Columbia and owned and/or operated by the federally regulated railway company.
- (21) There is no dispute that the railway company involved in this case is an interprovincial railway company. Hogg in his book entitled "Constitutional Law of Canada," 2nd ed. Toronto: Carswell, 1985 states:

The essential scheme of s. 92(10) [*Constitution Act, 1867*] is to divide legislative authority over transportation and communication on a territorial basis. The specific references in s. 92(10)(a) to "lines of steam or other ships, railways, canals, telegraphs" do not allocate those modes of transportation or communication unqualifiedly to the federal Parliament. The references must be read in the context of the later reference to "other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province"; and the whole of paragraph (a) must be read as an exception to the grant of provincial authority over local works and undertakings. The effect is to allocate to the federal Parliament the authority over *interprovincial* or *international* shipping lines, railways, canals, telegraphs and other modes of transportation or communication; and to allocate to the provincial Legislatures the authority over *intraprovincial* shipping lines, railways, canals, telegraphs and other modes of transportation or communication.

[reproduced as written]

- (22) In *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)* (1988), 51 D.L.R. (4th) 161 the Supreme Court of Canada addressed three appeals (*Bell Canada, Alltrans Express Ltd., and the Canadian National Railway Co.*) heard jointly that considered the constitutional jurisdiction of British Columbia and Quebec provincial occupational health and safety legislation as it applied to federal undertakings (*Bell Canada, Alltrans Express Ltd, and the Canadian National Railway Co.*). *Bell Canada, supra*, dealt with whether or not Quebec safety law dealing with the protective reassignment of a pregnant worker applied to Bell Canada. The *Alltrans Express Ltd. v. WCB (B.C.)* (1988), 51 D.L.R. (4th) 253 case dealt with the applicability of British Columbia safety laws dealing with safety footwear and safety committee requirements

to an interprovincial trucking company. The *Canadian National Railway Co. v. Courtois* [1988] 1 S.C.R. 868 case dealt with the applicability of Quebec safety laws dealing with accident investigative powers of the Quebec Commission to the Canadian National Railway Co.

- (23) The Judicial Committee of the Privy Council (to which originally decisions of the Supreme Court of Canada could be appealed) had held that provincial workers' compensation schemes were constitutionally valid in their application to federal undertakings (see *Workmen's Compensation Board v. C.P.R. Co.* (1919), 48 D.L.R. 218). However, in *Bell Canada*, supra, the Supreme Court of Canada found that provincial occupational health and safety laws (even though British Columbia's occupational health and safety laws were part of an overall workers' compensation legislative scheme) intruded on the federal Parliament's exclusive jurisdiction over labour relations, working conditions and management of federal undertakings. Thus these provincial laws although constitutionally valid were not applicable to federal undertakings (see Appeal Division Decision #93-1569 (10 *Workers' Compensation Reporter* 195) which recognized this same principle). This means in this case that the provincial occupational health and safety laws contained in the Act and the Regulations were not applicable to the federally regulated railway company who was receiving services from the employer.
- (24) It should be noted the *Canada Labour Code* and its regulations contain provisions relating to safety and health in the workplace. The *Canada Labour Code* (Part II) (the "Code") contains occupational health and safety provisions. The Code was amended on September 30, 2000. At the time of the occupational safety officer's inspection (July 30, 1999) section 123 of the Code read as follows:

*Application*

**Application of Part**

- 123.(1) Notwithstanding any other Act of Parliament or any regulations thereunder, this Part applies to and in respect of employment
- (a) **on or in connection with the operation of any federal work, undertaking or business** other than a work, undertaking or business of a local or private nature in the Yukon Territory, the Northwest Territories or Nunavut;
  - (b) by a corporation established to perform any function or duty on behalf of the Government of Canada; and
  - (c) by a Canadian carrier, as defined in section 2 of the *Telecommunications Act*, that is an agent of Her Majesty in right of a province.

[emphasis added]

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Idem

(2) Except as otherwise expressly provided in any other Act of Parliament, this Part does not apply to or in respect of employment in a portion of the public service of Canada specified from time to time in Schedule I to the *Public Service Staff Relations Act*.

R.S., 1985, c. L-2, s. 123; R.S., 1985, c.9 (1st Supp.), s. 2; 1993, c. 28, s. 78, c. 38, s. 89.

123.1 [Repealed, 1996, c. 12, s. 2]

(25) Section 2 of the *Code* stated:

### Interpretation

2. In this Act,

**“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:**

- (a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada, [I.A.R.]
- (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,**
- (c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,
- (d) a ferry between any province and any other province, or between any province and any country other than Canada,
- (e) aerodromes, aircraft or a line of air transportation,
- (f) a radio broadcasting station,
- (g) a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*,

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- (h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,
  - (i) **a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces; and**
  - (j) a work, undertaking or activity in respect of which federal laws within the meaning of the *Canadian Laws Offshore Application Act* apply pursuant to that Act and any regulations made under that Act.
- [emphasis added]

(26) In addition the regulations to the *Code* provided in section 12.10 fall protection provisions as follows:

12.10(1) Where a person, other than an employee who is installing or removing a fall-protection system in accordance with the instructions referred to in subsection (5), works from

(a) an unguarded structure that is

(i) **more than 2.4 m above the nearest permanent safe level, or**

(ii) above any moving parts of machinery or any other surface or thing that could cause injury to an employee upon contact,

(b) **a temporary structure that is more than 6 m above a permanent safe level, or**

(c) a ladder at a height of more than 2.4 m above the nearest permanent safe level where, because of the nature of the work, that person cannot use one hand to hold onto the ladder,

the employer shall provide a fall-protection system.

[emphasis added]

(27) The employer's workers were engaged in framing work for a construction company acting as the general contractor for a federally regulated railway company on property owned and/or operated by this federally regulated railway company. This, however, did not automatically exclude provincial occupational health and safety laws contained in the Act and Regulation from applying to such a worksite. The reviewing officer cited the case of *Construction Montcalm Inc. v. Quebec (Minimum Wage Comm.)* [1979] 1 S.C.R. 754 ("*Montcalm*") in concluding that the Board did have authority in this case to issue the orders cited in the inspection report. In that case the Supreme Court of Canada dealt with whether or not provincial laws concerning

minimum wage benefits could be applied to a building contractor/construction company that had employed workers to construct runways at Mirabel airport in the province of Quebec. Mr. Justice Beetz, for the majority of the court states:

The issue must be resolved in the light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: *Toronto Electric Commissioners v. Snider* [[1925] A.C. 396.] By way of exception however, Parliament may assert exclusive jurisdiction over these matters **if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject**: *In re the validity of the Industrial Relations and Disputes Investigation Act* [[1955] S.C.R. 529] (the Stevedoring case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but **only if it is demonstrated that federal authority over these matters is an integral element of such federal competence**; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one; *In re the application of the Minimum Wage Act of Saskatchewan to an employee of a Revenue Post Office* [[1948] S.C.R. 248.], (the Revenue Post Office case); *Quebec Minimum Wage Commission v. Bell Telephone Company of Canada* [[1966] S.C.R. 767.] (the Bell Telephone Minimum Wage case); *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers* [[1975] 1 S.C.R. 178.] (the Letter Carriers' case). **The question whether an undertaking, service or business is a federal one depends on the nature of its operation**: Pigeon J. in *Canada Labour Relations Board v. City of Yellowknife* [[1977] 2 S.C.R. 729.], at p. 736. **But, in order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", (Martland J. in the Bell Telephone Minimum Wage case at p. 772), without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity**; *Agence Maritime Inc. v. Canada Labour Relations Board* [[1969] S.C.R. 851.] (the Agence Maritime case); the Letter Carriers' case.

[reproduced as written, emphasis added]

- (28) The court found that the construction of an airport is not in every respect an integral part of aeronautics (under federal jurisdiction). Mr. Justice Beetz states:

In submitting that it should have been treated as a federal undertaking for the purposes of its labour relations while it was doing construction work on the runways of Mirabel, Montcalm postulates that the decisive factor to be taken into consideration is the one work which it happened to be constructing at the relevant time rather than the nature of its business as a going concern. **What is**

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implied, in other words, is that the nature of a construction undertaking varies with the character of each construction project or construction site or that there are as many construction undertakings as there are construction projects or construction sites. The consequences of such a proposition are far reaching and, in my view, untenable: constitutional authority over the labour relations of the whole construction industry would vary with the character of each construction project. This would produce great confusion. For instance, a worker whose job it is to pour cement would from day to day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he pours cement one day on a runway and the other on a provincial highway. I cannot be persuaded that the Constitution was meant to apply in such a disintegrating fashion.

To accept Moncalm's submission would be to disregard the elements of continuity which are to be found in construction undertakings and to focus on casual or temporary factors, contrary to the *Agence Maritime* and *Letter Carriers'* decisions. **Building contractors and their employees frequently work successively or simultaneously on several projects which have little or nothing in common. They may be doing construction work on a runway, on a highway, on sidewalks, on a yard, for the public sector, federal or provincial, or for the private sector. One does not say of them that they are in the business of building runways because for a while they happen to be building a runway and that they enter into the business of building highways because they thereafter begin to do construction work on a section of a provincial turnpike. Their ordinary business is the business of building. What they build is accidental. And there is nothing specifically federal about their ordinary business.**

[reproduced as written, emphasis added]

- (29) The court found Montcalm not to be a part of federal undertaking, service or business. Based on the information before the court as to its ordinary business, Montcalm was presumed to be an ordinary building contractor subject to the conditions of work generally prevailing in the construction industry.
- (30) The court also dealt with the argument that provincial laws do not apply to federal property. Mr. Justice Beetz states:

In its second submission, Montcalm contends that provincial law does not apply on federal Crown lands. Again I disagree. The exclusive power of the Province to make laws in relation to property and civil rights under s. 92(13) of the Constitution is territorially limited only by the words "in the Province", and Mirabel is located in the Province. The enumeration of exclusive federal powers in s. 91 of the Constitution, including the power to make laws in relation to the public debt and property, operates as a limitation *ratione materiae* upon provincial jurisdiction, not as a territorial limitation. The impugned provisions relate

neither to federal property nor to any other federal subject but to civil rights and, in my view, they govern the civil rights of Montcalm and its employees on federal property. Federal Crown lands do not constitute extra-territorial enclaves within provincial boundaries any more than Indian reserves. What Martland J. wrote for the majority of this Court in *Cardinal v. Attorney General of Alberta*, [[1974] S.C.R. 695.] at p. 703, with respect to Indian reserves is equally applicable to federal

Crown lands:

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. Two of those subjects are Indians and Indian Reserves, but if Provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the Province, including Indian Reserves, even though Indians and Indian Reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the Federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded.

[reproduced as written]

- (31) The principles outlined by Mr. Justice Beetz in the *Montcalm*, supra, case were again cited and summarized by Mr. Justice Dickson (as he then was) in *Northern Telecom Ltd. v. Communication Workers of Canada*, [1980] 1 S.C.R. 115 which dealt with the certification of a union for employees of Northern Telecom Limited by the Canada Labour Relations Board. Madame Justice Saunders in *Northern Mountain Helicopters Inc. v. WCB of B.C. et. al.* [1999] 8 W.W.R. 674 recently applied *Montcalm* supra, in a decision (upheld on appeal by the B.C. Court of Appeal) which held that the British Columbia Occupational Health and Safety Regulation did not apply to ground crew employees working in British Columbia for a heli-logging operation. The court found the heli-logging operation to be subject to federal legislation. Madame Justice Saunders summarized the development of the law in this area in her judgment:

[29] This case proceeds on the basis that jurisdiction to regulate the occupational health and safety of these ground crew employees of Northern Mountain Helicopters is either provincial or federal. In *Québec (Commission de la santé & de la sécurité du travail v. Bell Canada*, [1988] 1 S.C.R. 749 (S.C.C.) and *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897

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(S.C.C.) Mr. Justice Beetz speaking for the court, held that the double aspect theory cannot operate to support the applicability of both federal and provincial regulations in the matter of occupational health and safety standards.

[30] The result is that this jurisdiction lies either with the federal government operating through H.R.D.C. or the provincial government operating through the WCB.

[31] In determining which government has constitutional jurisdiction in this case the court is guided by the following principles, summarized by Mr. Justice Dickson in *Northern Telecom Ltd. v. Communications Workers of Canada* (1978), [1980] 1 S.C.R. 115 (S.C.C.), at 132, summarizing the principles set out in *Construction Montcalm Inc. v. Quebec (Minimum Wage Commission)* (1978), [1979] 1 S.C.R. 754 (S.C.C.):

- (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
- (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
- (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
- (4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
- (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
- (6) In order to determine the nature of the operation, 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; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

[32] In *Bell Canada* and *Alltrans Express*, both *supra*, Mr. Justice Beetz considered these principles in the context of occupational health and safety standards. After recognizing that general legislation for health belongs to the provinces subject to the powers conferred on the federal government relating to peace, order and good government: *Schneider v. R.*, [1982] 2 S.C.R. 112 (S.C.C.), and

that provincial workers compensation schemes are applicable to federal undertakings: *British Columbia (Workmen's Compensation Board) v. Canadian Pacific Railway Company*, (1919), [1920] A.C. 184 (British Columbia P.C.), he held that because the pith and substance of occupational health and safety regulations is working conditions, labour relations and management of an undertaking, provincial occupational health and safety regulations do not apply to federal undertakings. He stated at p. 833 of *Bell Canada*:

. . . the exclusivity rule . . . does not apply only to labour relations or to federal undertakings. It is one facet of a more general rule against making works, things or persons under the special and exclusive jurisdiction of Parliament subject to provincial legislation, when such application would bear on the specifically federal nature of the jurisdiction to which such works, things or persons are subject.

[33] The case at bar considers the same provincial scheme as was before the court in *Alltrans Express*, and is similar to the one described in *Bell Canada*.

[34] It follows that the British Columbia occupational health and safety regulations are directed to working conditions, labour relations and management. As such, they may not apply to a federal undertaking. Nor may they apply, in the words of Mr. Justice Beetz in *Bell Canada*, *supra*, to "a work, thing or person under the special and exclusive jurisdiction of Parliament. . . when such application would bear on the specifically federal nature of the jurisdiction to which such works, things or persons are subject". The issue is whether the helicopter logging aspect of Northern Mountain Helicopter's business is or is not, federal.

(32) We believe the crux of the matter can best be summed up by Hogg, "Constitutional Law of Canada," 2nd ed. Toronto: Carswell, 1985, when he states:

. . . The required connection with the federal undertaking is a functional or operational one. The fact that the employer is an interprovincial railway will not sweep a group of employees into federal jurisdiction, if they operate an hotel which is functionally separate from the railway. The fact that employees are engaged in constructing a runway at an airport will not sweep them into federal jurisdiction, if their work is simply construction, unrelated to the tasks of design or operation that would be an integral part of aeronautics. The fact that the employer is a company operated by Indians, and the business is on an Indian reserve, will not sweep employees into federal jurisdiction, if their work is simply the manufacturing of shoes. The Court has approached these cases on the basis that provincial competence over labour relations is the rule, and federal competence is the exception. Federal competence exists only where it is established that

the work performed by the employees is an integral part of an undertaking within federal jurisdiction, and that depends upon “legislative authority over the operation, not over the person of the employer”.

### **Application of Constitutional Principles and Analysis**

- (33) The evidence in this case, when considered in light of these broad constitutional principles outlined above, supports the conclusion that the Board did have jurisdiction in this case to apply the occupational health and safety provisions of the Act and the Regulation to the employer’s operations at this worksite.
- (34) The employer is not a federal work, undertaking or business. The general nature of its operations as a going concern (ordinary business) is construction not transportation (railway operations). The employer did not employ workers on or in connection with the operation of any federal work, undertaking or business (see section 123 of the Code) as those words are defined by section 2 of the Code. A review of inspection reports issued by the Board both before and after the July 30, 1999 inspection on various worksites operated by the employer around the province supports the conclusion that the employer was not confined to this single construction project or that the employer generally worked only for this federally regulated railway company.
- (35) The construction (framing) of living units is far removed from the operations of the federally regulated railway company. We recognize the comments made by the employer at the oral hearing held on November 9, 1999 that the living units were intended to house employees of the federally regulated railway company. However, the employer was not engaged in services that would have direct consequences for railway operations. Its services had nothing to do with the actual operation of the railway or its repair, maintenance, or construction. These services were not an integral, essential, or vital part of the railway operation. The employer acknowledged at the oral hearing held on November 9, 1999 that their work instructions and work supervision did not come from anyone employed by the federally regulated railway company. The services provided by the employer were not at the core of this federal undertaking.
- (36) By regulating the safety/labour relations matters of this employer through the Act and the Regulation the Board was not engaged in indirectly regulating the labour relation matters of the federally regulated railway company. The required connection with the federal undertaking (a functional or operational one) was not present in this case.
- (37) Section 2.1 of the Regulation (prior to October 1, 1999) read:

#### **Scope of application**

2.1 This Occupational Health and Safety Regulation applies to all employers, workers and all other persons working in or contributing to the production of any industry within the scope of Part 1 of the *Workers Compensation Act* and where applicable, to all persons within the scope of the *Workplace Act*.

- (38) Section 71(3) of the Act (repealed and now section 179 of the new Part 3 of the Act) provided an officer of the Board with the authority to inspect at all reasonable hours the place of employment of a worker within the scope of Part 1 of the Act. There is no evidence of any objection or allegations of trespass made by the federally regulated railway company against the Board for entering the property owned and/or operated by the federally regulated railway company on July 30, 1999 to conduct an inspection of the employer's operations. The occupational safety officer's testimony at the oral hearing on November 9, 1999 indicated that the Prevention Division had developed certain protocols with respect to inspections of provincial employers operating on the property of federally regulated entities.
- (39) At the time of the inspection on July 30, 1999 the employer was registered with the Board as an employer under the Act. There was no argument raised that the Act or the Regulations, apart from the jurisdictional issue, would not apply to the employer and its workers in this case.
- (40) We are not persuaded that the Prevention Division policies (1.6.5 – inspection of the B.C. Railway and B.C. Hydro and Power Authority Railway; 1.6.8 – jurisdiction over railway operations on private sidings; 1.6.9 – Labour Canada jurisdiction) and draft operating instruction 2.4.6 (which is not a published policy) cited by the employer's representative restrict the Board's jurisdiction in this case. In the event of a conflict between the Act or Regulations and the published policies of the governors, the Act and the Regulations are paramount (Decision #86 of the governors, 10 *Workers' Compensation Reporter* 781). In reviewing these policies we do not believe there is a conflict between them and the occupational health and safety provisions of the Act or Regulation and its applicability to the employer's operations given the evidence and the constitutional principles outlined above.
- (41) The employer's representative has not argued that the violation of sections 3.22, 3.23, 8.8(b), and 11.2(1) of the Regulation did not occur on July 30, 1999. The panel is satisfied that, on the balance of probabilities, the evidence establishes a violation of these provisions. As mentioned in the law and policy section of this decision section 196(6)(a) of the Act provides that the employer is not liable to an administrative penalty if the employer proves that the employer exercised due diligence to prevent the failure, non-compliance or conditions to which the penalty relates. We do not believe that the employer has proved the exercise of due diligence to prevent the failure, non-compliance or conditions to which the penalty relates. The employer is to be commended for taking remedial steps after the fall protection violation to seek compliance with the Regulation. However, this does not negate the violation of fall protection and the prior knowledge the employer had of these requirements as noted in the inspection reports issued to them and the warning letter dated June 10, 1999 that was sent to them by the Board.
- (42) The federally regulated railway company's minimum safety requirements for contractors working on railway property specifies the use of *fall prevention structures* for work at heights in excess of 8 feet above the nearest permanent safe level. *A fall protection system is required if it is physically impossible to provide safe fall prevention structures or when working on a temporary structure more than 20 feet above the newest permanent safe level.* The workers were on the roof of a permanent, not a temporary, structure on July 30, 1999. Given the wording of these requirements we do not think the 20 feet rule applies in this case and these requirements are

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not in conflict with the fall protection requirements of the Regulation when working on a roof. In fact they raise the minimum standard of fall protection from 10' to 8' where it is physically impossible to provide safe fall prevention structures (such as when working on a roof).

- (43) The occupational health and safety provisions of the Code, in particular the regulations dealing with fall protection, did not apply to the employer or their workers at this worksite. Even if they had applied it appears that the employer was not in compliance with them as they required fall protection at 8' and not 10' in these circumstances. If the employer was unsure of the applicability of the Regulation to this worksite it was incumbent upon them to clarify this with the Prevention Division.
- (44) The employer's representative did not question the high risk associated with this violation of fall protection. Although the presumption of high risk as outlined in Prevention Division policies 1.4.3 and D12-196-2 would not apply as fall protection is not listed the panel is satisfied that based on the evidence as to the height of the roof (19 feet), the slope of the roof (6:12) and the proximity of the workers to the edge of the roof there was a high risk of injury or death associated with the violation of fall protection in this case. We agree with the reviewing officer that based on the evidence and published policies (1.4.1, D12-196-1) an administrative penalty of \$3,500 was warranted in this case.

## **Conclusion**

- (45) The Panel in confirming the reviewing officer's decision of January 7, 2000 imposing an administrative penalty in the amount of \$3500 on the employer under section 196(6) of the Act concludes the following:
- As occupational health and safety legislation is designed to regulate working conditions, labour relations and the management of an undertaking this is a subject matter that constitutionally falls within exclusive provincial competence. This means that the occupational health and safety provisions in the Act and the Regulation are constitutionally valid pieces of provincial legislation.
  - However, the Act and the Regulation insofar as they empower the Workers' Compensation Board of British Columbia to regulate safety conditions, are inapplicable in respect of a federal undertaking (ie. the federally regulated railway company). A detailed analysis of the occupational health and safety provisions of the Act and the Regulation demonstrate that their pith and substance is working conditions, labour relations and the management of an undertaking. For federal undertakings, working conditions and labour relations are matters falling within the classes of subject mentioned in section 91(29) of the Constitution Act, 1867, and consequently are within the exclusive jurisdiction of the federal Parliament.

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- The occupational health and safety provisions in the Act and the Regulation may not apply to the operation of an undertaking, service or business if the undertaking, service or business is an integral part of an undertaking within federal jurisdiction. The question of whether an undertaking, service or business is an integral part of federal undertaking depends on the nature of its operations. In order to determine the nature of the operation, 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: otherwise, the Constitution could not be applied with any degree of continuity and regularity. In this case the operations of the employer as an “on going” concern were construction activities and were not found to be an integral part of the federally regulated railway company. For these reasons, the occupational health and safety provisions in the Act and the Regulations applied to this employer’s operations even though they were provided to a federally regulated railway company on property owned and/or operated by that federally regulated railway company.
  - The occupational health and safety provisions of the Code did not apply to this employer or their workers engaged in construction activities for a federally regulated railway company on property owned and/or operated by that federally requested railway company.
  - The employer failed to establish that the employer exercised due diligence to prevent the non-compliance of the fall protection requirements of the Regulation.

(46) The employer’s appeal of the reviewing officer’s decision dated January 7, 2000 is denied.