COURT OF APPEAL FOR ONTARIO

CITATION: Ramkey Communications Inc. v. Labourers' International Union of North America, 2019 ONCA 859
DATE: 20191101
DOCKET: C66613

Hoy A.C.J.O., Tulloch and Jamal JJ.A.

BETWEEN

Ramkey Communications Inc.

Applicant (Respondent)

and

Labourers' International Union of North America, Ontario Provincial District Council, Utility Contractors Association of Ontario, and Ontario Labour Relations Board

Respondents (Appellant/Respondents)

L.A. Richmond and Ben Katz, for the appellant Labourers' International Union of North America

Frank Cesario and Amanda Cohen for the respondent Ramkey Communications Inc.

Bonnea Channe and Giovanna Di Sauro, for the respondent Utility Contractors Association of Ontario

Aaron Hart, for the respondent Ontario Labour Relations Board

Courtney Harris and Ravi Amarnath, for the intervener Attorney General of Ontario

Heard: September 12, 2019

On appeal from the order of the Divisional Court (Regional Senior Judges Geoffrey B. Morawetz and Robbie D. Gordon and Justice Julie A. Thorburn), dated August 13, 2018, with reasons reported at 2018 ONSC 4791, 142 O.R. (3d) 193, quashing two decisions of the Ontario Labour Relations Board, dated March 23, 2017, with reasons reported at [2017] O.L.R.B. Rep. 261, and dated May 17, 2017, with reasons reported at 300 C.L.R.B.R. (2d) 141.

Hoy A.C.J.O.:

A. OVERVIEW

[1] Ontario has presumptive constitutional jurisdiction over labour relations within its boundaries. The issue in this appeal is whether that presumptive jurisdiction has been displaced through the operation of "derivative jurisdiction" such that federal labour laws apply to construction labourers employed in Ontario by the respondent, Ramkey Communications Inc.

[2] On August 8, 2015, the appellant, Labourers' International Union of North America, Ontario Provincial District Council, applied to the Ontario Labour Relations Board for certification under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, as amended, of all Ramkey's construction labourers employed in six Ontario counties, except for those in the industrial, commercial and institutional sector and persons at or above the rank of non-working foremen. These construction labourers were a subset of Ramkey's employees in Ontario.

[3] Ramkey opposed certification. It argued that its construction labourers — which it calls “construction technicians” — performed essential work for federally regulated telecommunications companies and that their labour relations should, therefore, be federally regulated.

[4] The Board was not satisfied that the presumption of provincial jurisdiction was displaced and granted certification as a provincially regulated bargaining unit. Ramkey sought judicial review. The Divisional Court found that Ramkey’s construction technicians were engaged derivatively in work that is vital, essential, or integral to a federal undertaking and, therefore, should be federally regulated. It quashed the Board’s decision.

[5] The Union now appeals to this court. It argues that the Divisional Court misconstrued and misapplied the relevant case law, applied the wrong legal test for derivative jurisdiction and failed to defer to the Board’s extensive factual findings in its 119-page decision.

[6] I conclude that the Divisional Court erred by failing to give effect to the Board’s clear finding that Rogers was not dependent on the services of Ramkey’s construction technicians. Considering and giving appropriate weight to that finding, I would not impose exceptional federal jurisdiction over Ramkey’s construction technicians.

[7] Below, I provide some further background, drawn from the findings of fact made by the Board, outline the decisions of the Board and the Divisional Court, and then turn to my analysis.

B. BACKGROUND

[8] Ramkey is incorporated under the laws of Ontario. It does not itself own, have any interest in, or operate any telecommunications undertaking. It is not owned by any federally regulated undertaking. It is a local contractor, with operations in London, Ontario, and some surrounding areas.

[9] At the time of the Union's application, Ramkey provided services as a third-party contractor, on a non-exclusive basis, mainly to Rogers, but also to other federally regulated telecommunications companies. To a significantly smaller extent, Ramkey also provided some services to entities that are not federally regulated telecommunications companies.

[10] Ramkey has two different kinds of technicians, whom it refers to as "sales technicians" and "construction technicians".

[11] The sales technicians perform residential and commercial installation and service work, mostly, if not exclusively, for Rogers, which owns and operates a federally regulated telecommunications network. The sales technicians are not part of the agreed-upon bargaining unit the Union seeks to certify. This appeal is solely about Ramkey's construction technicians.

[12] Ramkey established a small group of construction technicians in 2012. Its construction technicians began to provide services to Rogers in 2014, and it established a construction division. The construction technicians worked on Rogers' telecommunications network closer to the headend, where the signals originate. This work, which includes placement of new lines and supporting infrastructure as well as plant maintenance on existing ones, requires the use of equipment, skills and construction capabilities that are not necessary for the residential installation service work performed by sales technicians.

[13] Rogers was Ramkey's dominant client at the time of the application. In the 2013 and 2014 fiscal years, as well as the first portion of 2015, Rogers constituted over 90% of Ramkey's total revenues. The majority of Ramkey's work for Rogers was service installation, as opposed to construction, which was done by the sales technicians. The Rogers' construction work accounted for somewhere between 10-13% of Ramkey's revenues. Ramkey also did a small amount (never more than 1.5% of its total revenues) of construction work for non-telecommunications clients. This work was similar to the work it performed for Rogers. Ramkey wants to increase the construction work it does for non-telecommunications clients.

[14] At the time of the Union's application in August of 2015, Ramkey employed approximately 35 construction technicians. During the hearing before the Board

in 2016, however, Rogers “pulled back” all the construction work it had given to Ramkey, for reasons unrelated to this proceeding. This necessitated layoffs.

[15] Ramkey performs services for Rogers under the terms of a written contract which Rogers can essentially terminate on 30 days’ notice. Ramkey is not the exclusive provider of these services to Rogers, nor is Ramkey guaranteed any kind or amount of work from Rogers. In fact, Rogers always has more than one contractor in an area. There are active and successful competitors for the Rogers’ work in the geographic areas in which Ramkey carries on business, some of which are provincially certified by the Union. Some of them continue to perform the construction work that Ramkey no longer performs for Rogers.

[16] Prior to the Union’s application, it appears that Ramkey followed and complied with Ontario’s employment statutes and regulations. It asserted that it was subject to federal jurisdiction for the first time in this proceeding.

(1) The Board’s Decision

[17] The Board reviewed key authorities, which I discuss later in these reasons, addressing when presumptive provincial jurisdiction over labour relations is displaced. In the Board’s view, those authorities signal that the presumption of provincial jurisdiction over labour relations will only be displaced “in the clearest of cases”.

[18] *Construction Montcalm Inc. v. Min. Wage Com.*, [1979] 1 S.C.R. 754, played a significant role in the Board's analysis. In *Montcalm*, the Supreme Court held that provincial minimum wage legislation and related labour legislation applied to a contractor building a runway at an airport, a federally regulated undertaking. In the Board's view, *Montcalm* stands for the proposition that labour relations of construction industry employers are subject to provincial jurisdiction, even when the employees are constructing a federally regulated undertaking. The Board explained that simply building a federal undertaking is not vital or integral to the operation of a federal undertaking; building, constructing, repairing (and even connecting to) the federal undertaking is not equivalent to operating the federal undertaking. Applying *Montcalm*, the Board concluded that presumptive provincial jurisdiction over Ramkey's construction labourers was not displaced.

[19] The Board noted that it is not unusual to certify construction activities of an employer separate from its non-construction activities (which may not be certified at all). It also noted that the fact that one part of an employer's operations is subject to one jurisdiction does not, *per se*, preclude the labour relations of another part from being subject to another jurisdiction. In this case, the Union did not concede, and the Board did not determine, that the sales technicians were subject to federal jurisdiction. But the Board found that, even if they were, any resulting practical or logistical problems would be neither impossible to overcome

nor sufficient to displace the presumption of provincial jurisdiction over the construction labourers.

[20] Nor, the Board concluded, did the fact that the overwhelming majority of Ramkey's work was for Rogers displace the presumption of provincial jurisdiction over labour relations. The focus for the Board was not whether Rogers' business was vital, essential, or integral to Ramkey, but whether Ramkey was vital, essential, or integral to Rogers. The work done by Ramkey was not so vital that Rogers insisted it be done by its own employees. The controls that Rogers had over Ramkey were not greater than any owner/client or general contractor in the construction industry might exercise over any subcontractor. Moreover, the work given by Rogers to Ramkey was neither permanent nor particularly secure. If Ramkey was unavailable to perform the work, Rogers would simply use another contractor. Rogers could easily survive without Ramkey.

[21] The Board was not persuaded that Ramkey was vital, essential, or integral to the operation of a federal undertaking (Rogers or other telecommunications companies); Ramkey was not, therefore, derivatively subject to federal jurisdiction.

[22] Following receipt of a letter from the federal government (discussed in more detail below), Ramkey asked the Board to reconsider its decision. The Board refused, and Ramkey applied for judicial review of both decisions.

(2) The Divisional Court's Decision

[23] After reviewing the jurisprudence and noting that Ramkey was provincially incorporated and independently owned, the Divisional Court summarized the relevant presumption of provincial jurisdiction and how it is displaced, at para. 49:

> There is therefore a presumption that [Ramkey] is provincially regulated unless Ramkey is associated with a core federal undertaking, the habitual operation of Ramkey's employees is to service the federal undertaking, or there is a vital, essential or integral relationship with the federal undertaking(s).

[24] For the purposes of its analysis, the Divisional Court defined the federal undertaking as the telecommunications companies with which Ramkey does business. It then described the work of Ramkey's construction technicians, at para. 51:

> Ramkey's technicians perform construction services that include installing, maintaining and repairing telecommunications networks. Almost all of their work (approximately 99% between 2013 and 2015) was for telecommunications companies, most of which was for Rogers. Ramkey now does less work for Rogers but almost all of the work it used to do Rogers, is done for other telecommunications companies that are also federally regulated.

[25] The Divisional Court distinguished *Montcalm*, on which the Board had relied, on the basis that the construction technicians were not simply engaged in construction, at para. 53:

> In this case by contrast, the core of Ramkey's work is to install and maintain the fibre optic telecommunications network in good working order for existing and prospective clients. This work is highly integrated with that of Rogers and other telecommunications companies and has been so integrated for an extended period. The type of work they do installing, maintaining and enhancing fibre optic cable, is integral to providing telecommunications and that work is operational (as it involves maintaining and enhancing the network on an ongoing basis not simply construction).

[26] The Divisional Court emphasized, at para. 54, that "the network could not function without the work done by Ramkey. Each part [of the network] is essential to the functioning of the network as, without these services there would be no functioning network".

[27] The Divisional Court continued by underscoring the importance of Ramkey's work to telecommunications companies and Ramkey itself, at paras. 55, 59:

> In short, Ramkey is beholden to the telecommunications companies for the work that it does and the work that Ramkey does is integral to the services provided by telecommunications companies like Rogers, to its clients. Telecommunications services cannot be offered without a functioning network line…
>
> In short, when looking at the past and present work done by Ramkey, almost all of the volume of work was done for telecommunications companies, and the type of work done is an important component and integral to the services offered by cable companies and their ability to offer their service.

[28] The Divisional Court concluded by finding that there was derivative jurisdiction in this case, at para. 60:

> We therefore find that Ramkey's construction technicians are engaged derivatively in work that is vital, essential or integral to a federal undertaking and therefore should be federally regulated.

[29] The Divisional Court granted the application for judicial review and quashed both of the Board's decisions.

C. ANALYSIS

[30] The heart of this appeal is whether the Divisional Court correctly applied the test for displacing the province's presumptive labour jurisdiction over Ramkey's construction technicians. As I will explain, respectfully, in my view, it did not. Significantly, it failed to consider whether the effective performance of the telecommunications network operated by Rogers was dependent on the particular employees under scrutiny, namely Ramkey's construction technicians, especially given that Rogers had ceased using Ramkey's construction technicians. On the facts found by the Board, the effective performance of Rogers' telecommunications network is clearly not dependent on Ramkey's construction technicians. In my view, applying the correct analytical framework, as recently re-articulated by the Supreme Court in *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, [2012] 2 S.C.R. 3, and considering and giving appropriate weight to the factor of

dependency in this analysis, provincial labour jurisdiction over the construction technicians is not displaced.

[31] Below, I review the chain of jurisprudence considered in and leading to *Tessier* and then apply the principles emerging from this jurisprudence to the facts of this case.

(1) The jurisprudence

[32] Turning to first principles, labour relations is presumptively a provincial matter since it engages the provinces' authority over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. Parliament has jurisdiction to regulate employment in two circumstances: when the employment relates to a work, undertaking, or business within the legislative authority of Parliament; or when it is an integral part of a federally regulated undertaking, sometimes referred to as derivative jurisdiction: *Tessier*, at paras. 11, 17.

[33] The first circumstance is not applicable here: Ramkey is a local work and does not itself own or operate a federally regulated telecommunications network. This appeal concerns the second circumstance. Is the employment of Ramkey's construction technicians an integral part of a telecommunications network — a federally regulated undertaking — such that Parliament has derivative jurisdiction over it?

(a) The *Stevedores' Reference*

[34] The doctrine of derivative jurisdiction is often traced back to the Supreme Court's decision in *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (the "*Stevedores' Reference*"). In the *Stevedores' Reference*, eight of nine judges concluded in separate reasons that federal labour law applied to the stevedores in question because their work was integral to the federally regulated shipping companies that used them. The majority reasoned that the employees devoted all their time to the shipping companies and that those companies relied on them exclusively to load and unload all of their cargo.

[35] In coming to this conclusion, Estey J. observed, at p. 568, that "[i]f … the work of stevedoring, as performed under the foregoing contracts, is an integral part or necessarily incidental to the effective operation of these lines of steam ships, legislation in relation thereto can only be competently enacted by the Parliament of Canada". This approach, Abella J. would later observe in *Tessier*, at para. 31, reflects the proper framework for analyzing derivative jurisdiction. As Dickson C.J., writing for the majority in *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112, at p. 1137, subsequently commented, "Federal jurisdiction [in the *Stevedores' Reference*] seems to have been based on a finding that the core federal undertaking was dependent to a significant degree on the workers in question".

(b) *Letter Carriers'*

[36] The Supreme Court next addressed derivative jurisdiction in *Letter Carriers' Union v. C.U.P.W.*, [1975] 1 S.C.R. 178. In *Letter Carriers'*, at pp. 185-86, Ritchie J., writing for a unanimous court, adopted Estey J.'s observation from the *Stevedores' Reference*, at p. 568, that the court should look at whether the local operation is "an integral part or necessarily incidental to the effective operation" of the federal undertaking. As Dickson C.J. later commented in *United Transportation*, at p. 1137, in finding that the respondent company's employees performing work under contracts with the Post Office were subject to federal jurisdiction, "the court [in *Letter Carriers'*] seems to have been much influenced by the dependence of the post office upon its subcontractors for mail delivery".

(c) *Telecom 1*

[37] In *Northern Telecom v. Communications Workers*, [1980] 1 S.C.R. 115 ("*Telecom 1*"), the issue was whether a subset of Northern Telecom's employees who worked as supervisors in its installation department were subject to federal labour laws. The installation department installed telecommunications equipment in the federally regulated telephone network of Northern Telecom's parent corporation, Bell Canada. Dickson J. (as he was then) explained the analytical framework for assessing whether an operation is vital to a federal undertaking, at p. 132:

> First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", "essential" or "integral".

[38] As Abella J. later explained in *Tessier*, at para. 38, the focus of the analytical framework established in *Telecom 1* 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".

[39] The appeal in *Telecom 1* was dismissed because of the absence of relevant evidence.

(d) *Telecom 2*

[40] The issue of derivative jurisdiction returned before the Supreme Court in *Northern Telecom v. Communications Workers*, [1983] 1 S.C.R. 733 ("*Telecom 2*"), which dealt with a different labour dispute. Estey J., writing for the majority, applied the analytical framework established in *Telecom 1* to a different subset of Northern Telecom's employees engaged in installing equipment in the telephone network of Bell and in the facilities operated by Northern Telecom's other customers and found that the labour relations of these employees should be assigned to the federal sphere. Dickson J., writing concurring reasons, observed

that the case was “close to the boundary line” but that the labour relations of Northern Telecom should be federally regulated: at p. 774.

[41] As was the case in *Telecom 1*, Northern Telecom was a subsidiary of Bell. Bell acquired 90% of its switching and transmission equipment from Northern Telecom and 95% of all such equipment was installed by Northern Telecom. Northern Telecom’s installers had no contact with the other Northern Telecom employees engaged in manufacturing, but instead worked closely with Bell employees, spending “the great bulk of their time” on Bell’s premises (at p. 767) and never working on Telecom’s premises (at p. 770). The work for Bell consumed a very high percentage of the work done by the installers (at p. 767). Key factors weighing in favour of federal jurisdiction included “[t]he almost complete integration of the installers’ daily work routines with the task of establishing and operating [Bell’s] telecommunications network” (at pp. 766-67) and the interprovincial scope of the work of the employees, which extended into at least five provinces (at p. 768).

(e) *United Transportation*

[42] In *United Transportation*, by contrast, the Supreme Court declined to find derivative jurisdiction over a local railway’s employees. That case arose out of the sale of a 105-mile railway line in Alberta from Canadian National Railway, a federally regulated railway company, to a provincial railway company, Central

Western Railway Corporation. Did federal labour legislation continue to apply to the employees working on this railway line? Dickson C.J., writing for the majority, answered “no”.

[43] Unlike in *Telecom 1*, there was no daily or simultaneous connection between the two enterprises. Each company operated independently within its own sphere: *United Transportation*, at p. 1141. Also, unlike in *Telecom 1* and *Telecom 2*, the employees were located wholly within a single province.

[44] Significantly, Dickson C.J. considered, at p. 1142, whether CN was dependent on Central Western, an important factor which, in his view, emerged from the *Stevedores' Reference* and *Letter Carriers'*:

> Finally, and perhaps most importantly, it cannot be said that CN is in any way dependent on the services of [Central Western]. … Consequently, in contrast to the *Northern Telecom* cases, the core federal undertaking (CN) would not be severely disadvantaged if [Central Western's] employees failed to perform their usual tasks. In sharp contrast to the *Stevedores' Reference* or *Letter Carriers'* case, the effective performance of CN's obligations as a national railway is not contingent upon the services of [Central Western]. These factors point strongly, almost decisively, against a finding of federal jurisdiction over the employees in question. [Emphasis added.]

(f) *Westcoast Energy*

[45] The role of dependency in the derivative jurisdiction analysis was next addressed in McLachlin J.'s (as she was then) dissent in *Westcoast Energy Inc.*

v. Canada (National Energy Board), [1998] 1 S.C.R. 322. Unlike the other cases in this line of jurisprudence, *Westcoast Energy* was not a labour dispute. It concerned the jurisdiction of the federal government to regulate two natural gas processing plants and related gathering pipelines that were connected to a mainline transmission pipeline that undisputedly came within federal jurisdiction. The majority found that the pipeline system came with federal jurisdiction under s. 92(10)(a) of the *Constitution Act, 1867*. Consequently, the majority did not consider derivative jurisdiction.

[46] McLachlin J. dissented, finding that the processing plants did not fall under federal jurisdiction under either s. 92(10)(a) or a derivative jurisdiction analysis. Drawing on Dickson C.J.'s reasons in *United Transportation*, she noted that dependency was one of the relevant factors in the derivative jurisdiction analysis, at para. 141:

> [t]o be relevant at all, the dependency must be permanent ... It is also clear that dependency of the local work or undertaking on the interprovincial enterprise is immaterial … Dependency is relevant only where the interprovincial work or undertaking is dependent on the local enterprise in the sense that the latter is essential to the interprovincial enterprise's delivery of services.

[47] McLachlin J. explained that, even where the federal work or undertaking is permanently dependent on a provincial work or undertaking, the provincial work or undertaking may not be transferred to federal jurisdiction. If the provincial

undertaking retains its distinct identity and is not functionally integrated with the federally regulated enterprise, it remains under provincial jurisdiction: at para. 143. Thus, dependency alone may not be sufficient to transfer a work or undertaking to federal jurisdiction.

(g) *Tessier*

[48] *Tessier*, the Supreme Court's most recent decision addressing derivative jurisdiction, also comments on dependency as a factor in the analysis.

[49] Tessier Ltée was a provincially regulated company that had a fleet of 25 cranes, some of which were used for loading and unloading ships. Tessier argued that its stevedoring activities fell under federal jurisdiction over shipping, with the result that its employees should not be governed by provincial occupational health and safety legislation. However, stevedoring represented only 14% of Tessier's overall revenue and 20% of the salaries paid to employees. Further, Tessier's employees worked across various areas of its operations. An employee who operated a crane at a port one day might operate it at a construction site, or drive a truck, the next.

[50] Abella J., writing for the court, explained that where derivative jurisdiction is asserted, it must be assessed whether the work, business or undertaking's essential operational nature renders the work integral to a federal undertaking: *Tessier*, at para. 18.

[51] She then went on to articulate the analytical framework for assessing whether a related work is integral to a federal undertaking. She adopted Dickson C.J.'s explanation from *United Transportation* of the role of dependency in determining whether a local work is sufficiently integrated with a federal undertaking for federal jurisdiction to extend to the local operation's workers. She also observed that McLachlin J.'s dissent in *Westcoast Energy* was "of particular assistance", noting in particular her comment to the effect that the test is flexible, with different decisions emphasizing different factors, and her consideration of dependency: *Tessier*, at para 45.

[52] Tying these cases together, she wrote, at para. 46:

> So 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. [Emphasis added.]

[53] Abella J. observed that the Supreme Court had thus far applied the derivative jurisdiction test in two different contexts: when the services provided to the federal undertaking form the exclusive or the principal part of the related work's activities, as in the *Stevedores' Reference*; and when the services provided to the federal undertaking are provided by a unit of employees that is functionally independent of the rest of the related operation, as in *Telecom 2*.

Abella J. explained that, in the latter context, the court will assess the essential operational nature of the unit as a separate entity, rather than focusing on the local work as a whole.

[54] *Tessier* presented the court with a third context in which to apply the derivative jurisdiction test, namely "when the employees performing the work do not form a discrete unit and are fully integrated into the related operation": *Tessier*, at para. 50. Abella J. wrote, at paras. 50-51, that in such a case:

> [E]ven if the work of those employees is vital to the functioning of a federal undertaking, it will not render federal an operation that is otherwise local if the work represents an insignificant part of the employee's time or is a minor aspect of the essential ongoing nature of the operation.
>
> …
>
> [F]ederal jurisdiction is only justified if the federal activity is a significant part of its operation. [Emphasis added.]

[55] Assessing the extent to which the effective performance of the federal undertaking was dependent on Tessier's services and how important those services were to Tessier itself, Abella J. concluded that Tessier's essential operational nature was local, and its stevedoring activities were integrated with its overall operations and formed a relatively minor part of its overall operation: at para. 59.

[56] This conclusion was sufficient to dispose of the appeal. However, Abella J. added, that, to be relevant, a federal undertaking's dependency on a related

operation must be ongoing: at para. 61. Since there was nothing to demonstrate the extent to which the shipping companies were dependent on Tessier's employees, the absence of evidence of dependence also argued against imposing "exceptional federal jurisdiction": *Tessier*, at para. 61.

(2) Applying these principles to the facts of this case

(a) A preliminary comment

[57] It is important to remember that, just as *Telecom 1* and *Telecom 2* were about subsets of Northern Telecom's employees (its supervisors and installers, respectively), the particular employees under scrutiny on this appeal are a distinct subset of Ramkey's employees, its construction technicians, who are organized into a separate division. It is not about the sales technicians, who form the bulk of Ramkey's employees, nor about the services they provide to Rogers and others. The presumption, absent evidence to the contrary, is that those employees are subject to provincial jurisdiction.

[58] As noted earlier in these reasons, until this proceeding, Ramkey accepted that it was subject to Ontario's labour laws. After Ramkey had finished its closing submissions before the Board, Ramkey received a letter dated December 2, 2016 from the federal government's Employment and Social Development Canada Labour Program. In the letter, a federal government inspector advised

that she had concluded an investigation regarding the jurisdiction of Ramkey with respect to labour standards legislation. The letter states, in relevant part:

> Based on information provided to me, I have determined that Ramkey Communications Inc. is engaged in telecommunications installation, maintenance and repair, a dedicated service that is considered vital, essential, integral or necessarily incidental to a federal undertaking. Therefore, Part III of the *Canada Labour Code* applies to your company.

Relying in part on the letter, Ramkey asked the Board to reconsider its decision. The Board declined to do so.

[59] The letter is clearly not determinative of the issue of federal jurisdiction over the construction technicians. That is the issue before this court. The Attorney General of Canada was served with a Notice of Constitutional Question but it opted not to intervene in the proceedings. Further, after the letter was issued to Ramkey, and subsequent to the Board's decision, Ramkey was convicted in the Ontario Court of Justice of offences under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended, in relation to an incident on October 8, 2014 involving a construction technician: see *R. v. Ramkey Communications Inc.* (6 March 2018; 27 March 2018), Brantford, File No. 0260 999 15 6497 (Ont. Prov. Ct.). Counsel for the Attorney General of Ontario advised the court that Ramkey's appeal of the finding that its construction technicians are provincially regulated and of the sentence is being held in abeyance by agreement pending the outcome of this appeal.

[60] Nor, for the purposes of my analysis, does the letter displace the presumption that the sales technicians are subject to provincial jurisdiction. The Union does not concede that the sales technicians are subject to federal jurisdiction. And, until the Union brought its application, Ramkey did not assert that it was subject to federal jurisdiction. Indeed, as the Board noted in its reasons, at para. 42, in 2007 a predecessor of Ramkey successfully argued that it was subject to provincial jurisdiction: *Correia v. Conex Cable Technology Specialists Inc.*, [2007] C.L.A.D. No. 483. Whether the presumption that the sales technicians are subject to provincial jurisdiction is displaced is an issue for another day, on a complete record.

(b) Applying *Tessier*

[61] Unlike the employees in *Tessier*, who routinely worked across various areas of Tessier's operations, performing different tasks, the construction technicians are a distinct subset of Ramkey's employees and can be constitutionally characterized separately from the rest of Ramkey's employees.

[62] As *Tessier* instructs, at para. 46, I therefore consider the relationship from the perspective of the federal undertaking and of the construction work said to be integrally related, assessing (1) how important Ramkey's construction services for the federal undertaking were to Ramkey's construction division, and (2) the

extent to which the effective performance of the federal undertaking was dependent on Ramkey's construction services.

[63] While the construction services provided by Ramkey to Rogers and other federal undertakings formed a relatively minor part of Ramkey's overall activities, at the time of the Union's application, they unquestionably formed the overwhelming part of the construction division's activities. And Rogers was Ramkey's dominant client. However, during the course of the hearing before the Board, Rogers ceased using Ramkey's construction technicians.

[64] More importantly, the effective performance of Rogers was not in any way dependent on Ramkey's construction services. Unlike in *Tessier* or in the Federal Court of Appeal's recent decision in *Telecon Inc. v. International Brotherhood of Electrical Workers, Local Union No. 213*, 2019 FCA 244, in this case, the Board made clear findings that Rogers was not dependent on Ramkey's construction technicians. The effective performance of Rogers' telecommunications network was not contingent upon the services of Ramkey's construction technicians. The controls Rogers had over Ramkey were no greater than any owner/client or general contractor in the construction industry might exercise over any subcontractor. Rogers only began using Ramkey's construction technicians in 2014. It had no long-term commitment to use Ramkey's construction technicians. It never relied exclusively on Ramkey's construction technicians. In 2016, in the course of the hearing before the Board, Rogers "pulled back" all the construction

work it had given to Ramkey's construction technicians. Ramkey's competitors performed the construction work Ramkey used to do for Rogers. Moreover, while the hearing before the Board focused on the relationship between Ramkey and Rogers, there is no evidence before this court (and the Board did not find) that any other telecommunications network to which Ramkey's construction technicians provided services was dependent on those services.

[65] I acknowledge that, in *Tessier*, Abella J. observed, at para. 45, that the test for derivative federal jurisdiction is flexible: "Different decisions have emphasized different factors and there is no simple litmus test". Here, however, in the absence of dependency – and in circumstances where Ramkey's construction technicians ceased to do any work for Rogers – it simply cannot be said that Ramkey's construction technicians are vital or integral to Rogers' operations as a federal telecommunications undertaking.

[66] Respectfully, the Divisional Court erred by considering the extent to which the delivery of telecommunications services by Rogers and other telecommunications companies like Rogers was dependent on having a functioning network line and on work of the type performed by Ramkey's construction technicians. The proper focus is the extent to which Rogers and the other telecommunications companies, to which Ramkey's construction technicians provided construction services, were dependent on the services of

Ramkey's construction technicians — the particular employees under scrutiny: *Tessier*, at para. 38.

[67] Given the clear findings by the Board that Rogers was not dependent on Ramkey's construction technicians, I conclude that this is not a case where exceptional federal jurisdiction can be found.

(c) A note on *Montcalm*

[68] While I agree with the Board's decision that Ramkey's construction technicians are not subject to federal jurisdiction over labour relations, I do not agree to the extent that the Board's reasons might be taken as suggesting that *Montcalm* stands for the proposition that there is a special presumption that the labour relations of construction industry employers are subject to provincial jurisdiction. There is no "construction presumption". Rather there is a provincial presumption over labour relations generally. The same principles apply to construction employees as to other employees in determining whether they are subject to derivative federal jurisdiction.

D. DISPOSITION AND COSTS

[69] For these reasons, I would allow the appeal, set aside the order of the Divisional Court, and restore the Board's order granting certification to the Union. I would order that Ramkey pay costs of the application for judicial review to the

Divisional Court, of the motion for leave to appeal, and of the appeal to the Union in the aggregate amount of $20,000, inclusive of HST and disbursements.

Released: “AH” “NOV 01 2019”

“Alexandra Hoy A.C.J.O.”
“I agree M. Tulloch J.A.”
“I agree M. Jamal J.A.”