



SUPREME COURT OF CANADA

CITATION: Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail) **DATE:** 20120517
DOCKET: 33935

BETWEEN:

Tessier Ltée

Appellant

v.

Commission de la santé et de la sécurité du travail

Respondent

- and -

**Attorney General of Ontario, Attorney General of Quebec, Attorney General of
British Columbia and Commission des lésions professionnelles**

Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell,
Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 62)

Abella J. (McLachlin C.J. and LeBel, Deschamps, Fish,
Rothstein, Cromwell, Moldaver and Karakatsanis JJ.
concurring)

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TESSIER LTÉE v. QUEBEC (C.S.S.T.)

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Appellant

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Indexed as: Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)

2012 SCC 23

File No.: 33935.

2012: January 17; 2012: May 17.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Division of powers — Labour relations — Company normally and habitually providing crane and heavy equipment rental services and, to lesser extent, stevedoring services — Whether stevedoring activities form part of federal jurisdiction over shipping — Whether stevedoring activities form integral part of federally regulated undertaking — Whether company's employees governed by federal or provincial occupational health and safety legislation — Constitution Act, 1867, ss. 91(10), 92(10), and 92(13).

T is a heavy equipment rental company that rents out cranes and heavy equipment. It also engages in intra-provincial road transportation and maintenance and repair of equipment. In 2005-2006, some of its cranes were used for stevedoring. This activity represented 14 percent of its overall revenue and 20 percent of the salaries paid to employees. T's stevedoring services were not performed by a discrete unit of employees; the employees were fully integrated into T's workforce and worked interchangeably across the different sectors of the organization. At the relevant time, all of T's activities took place within the province of Quebec.

In 2006, and based on the *Stevedores Reference*, [1955] S.C.R. 529, T's parent company sought a declaration from Quebec's Commission de la santé et de la sécurité du travail ("CSST") that T's activities fell under federal jurisdiction and that it was not, as a result, subject to provincial occupational health and safety legislation. T argued that its stevedoring activities are part of the federal government's jurisdiction over shipping, with the result that its employees should be federally

regulated. The CSST concluded that T's activities came under provincial jurisdiction. This conclusion was upheld by the Commission des lésions professionnelles but was overturned by the Superior Court. The Court of Appeal allowed the appeal and agreed that provincial regulation applied, based primarily on the findings that stevedoring represented only a minor part of T's overall operations, that it did not have a special stevedoring division, and that T had not adduced evidence of the nature of its contractual or organizational relationships with the federal shipping companies it serviced.

Held: The appeal should be dismissed.

Since *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 (P.C.), labour relations is presumptively a provincial matter. Despite the provinces' presumptive interest in the regulation of labour relations, the federal government has jurisdiction to regulate labour relations 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.

In the case of derivative jurisdiction, the essential operational nature of a work, business or undertaking is assessed to determine if that ongoing nature renders the work integral to a federal undertaking. The focus of the analysis is on the relationship between the activity, the particular employees under scrutiny, and the federal operation that is said to benefit from the work of those employees. The

relationship is to be considered from the perspective both of the federal undertaking and that of the work said to be integrally related, assessing the extent to which the effective performance of the federal undertaking is dependent on the services provided by the related operation, and how important those services were to the related work itself. The exceptional aspects of an enterprise do not determine its ongoing character.

Federal labour regulation may be justified when the services provided to the federal undertaking form the exclusive or principal part of the related work's activities. It may also be justified when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation. If the employees performing the work do not form a discrete unit and are fully integrated into the related operation, then even 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 employees' time or is a minor aspect of the essential ongoing nature of the operation.

In this case, T devoted the majority of its efforts to provincially regulated activities. Its essential operational nature is local, and its stevedoring activities, which are integrated with its overall operations, form a relatively minor part of its overall operation. As a result, T's employees are governed by provincial occupational health and safety legislation.

Cases Cited

Explained: *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529; **referred to:** *Bell Canada v. Quebec (Commission de santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396; *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696; *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327; *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112; *Agence Maritime Inc. v. Conseil canadien des relations ouvrières*, [1969] S.C.R. 851; *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754; *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R.86; *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Whitbread v. Walley*, [1990] 3 S.C.R. 1273; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407; *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115; *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147; *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Johnston Terminals and*

Storage Ltd. v. Vancouver Harbour Employees' Association Local 517, [1981] 2 F.C. 686; *Acton Transport Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 272, 5 B.C.L.R. (5th) 1; *Consumers' Gas Co. v. National Energy Board* (1996), 195 N.R. 150; *R. v. Blenkhorn-Sayers Structural Steel Corp.*, 2008 ONCA 789, 304 D.L.R. (4th) 498; *International Brotherhood of Electrical Workers, Local 348 v. Labour Relations Board* (1995), 168 A.R. 204; *General Teamsters, Local Union No. 362 v. MacCosham Van Lines Ltd.*, [1979] 1 C.L.R.B.R. 498; *Attorney-General for Ontario v. Winner*, [1954] A.C. 541.

Statutes and Regulations Cited

Act respecting occupational health and safety, R.S.Q., c. S 2.1.

Canada Labour Code, R.S.C. 1985, c. L-2.

Constitution Act, 1867, ss. 91, 92.

Authors Cited

Brun, Henri, Guy Tremblay et Eugénie Brouillet. *Droit constitutionnel*, 5^e éd. Cowansville, Qué.: Yvon Blais, 2008.

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp. Scarborough, Ont.: Thomson/Carswell, 2007 (loose leaf updated 2009, release 1).

Patenaude, Micheline. "L'entreprise qui fait partie intégrante de l'entreprise fédérale" (1991), 32 *C. de D.* 763.

APPEAL from a judgment of the Quebec Court of Appeal (Robert C.J. and Rochette and Bouchard JJ.A.), 2010 QCCA 1642, [2010] R.J.Q. 2131, [2010]

C.L.P. 691, [2010] R.J.D.T. 1027, SOQUIJ AZ-50671246, [2010] J.Q. n° 9074 (QL), 2010 CarswellQue 15641, reversing a decision of Viens J., 2009 QCCS 576, [2008] C.L.P. 1607, SOQUIJ AZ-50538032, [2009] J.Q. n° 1155 (QL), 2009 CarswellQue 1473. Appeal dismissed.

André Asselin, Sébastien Gobeil and Maxime-Arnaud Keable, for the appellant.

Pierre-Michel Lajeunesse, for the respondent.

Robin K. Basu and Shannon M. Chace, for the intervener the Attorney General of Ontario.

Jean-Vincent Lacroix, for the intervener the Attorney General of Quebec.

Jonathan G. Penner and Freya Zaltz, for the intervener the Attorney General of British Columbia.

The judgment of the Court was delivered by

ABELLA J. —

[1] Tessier Ltée is a heavy equipment rental company that rents out cranes for a variety of purposes and provides technical, operational, supervisory and consulting services in connection with its crane leasing. It is also engaged in other activities, including intra-provincial road transportation and maintenance and repair of equipment.

[2] In 2005-2006, Tessier had 25 cranes which were used in construction work and industrial maintenance. Some were also used for the loading and unloading of ships, an activity known as long-shoring or stevedoring. All of its activities took place within the province of Quebec.

[3] Stevedoring represented 14 percent of Tessier's overall revenue and 20 percent of the salaries paid to employees. Tessier's employees worked across the different sectors of the organization — an employee who operates a crane at a port one day may be involved in operating it at a construction site, or driving a truck, the next.

[4] The issue in this appeal is whether Tessier's employees are governed by federal or provincial occupational health and safety legislation.

Background

[5] Quebec's occupational health and safety statute is the *Act respecting occupational health and safety*, R.S.Q. c. S-21 (*Loi sur la santé et la sécurité du*

travail or *LSST*). It is administered by the Commission de la santé et de la sécurité du travail (CSST), and financed by contributions based on rates of assessment the CSST imposes on employers under its jurisdiction. It does not apply to federal undertakings: *Bell Canada v. Quebec (Commission de santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749.

[6] The *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001 (*Loi sur les accidents de travail et les maladies professionnelles* or *LATMP*), is Quebec's workers' compensation statute. The administration of this Act is also funded by employer contributions paid to the CSST, but it applies to all undertakings operating in Quebec, whether federal or provincial.

[7] There are therefore two separate rates of assessment established by the CSST. Its "general" rates apply to provincial undertakings, whose contributions go towards financing the administration of both the *LSST* and the *LATMP*. The "particular" rates apply to federal undertakings and exclude any fees that are directed at financing the *LSST*.

[8] In 2006, Tessier's parent company, Groupe Desgagnés, sought a declaration from the CSST that Tessier's activities fell under federal jurisdiction and that it was not, as a result, subject to the CSST's general rates. It argued that Tessier's stevedoring activities are part of the federal government's jurisdiction over shipping, with the result that its employees should be federally regulated.

[9] The CSST concluded that Tessier's activities came under provincial jurisdiction. This conclusion was upheld by the Commission des lésions professionnelles (CLP) but was overturned by the Quebec Superior Court. The Quebec Court of Appeal agreed with the CSST and CLP that provincial regulation applied, based primarily on the findings that stevedoring represented only a minor part of Tessier's overall operations, that it did not have a special stevedoring division, and that it had not adduced evidence of the nature of its contractual or organizational relationships with the federal shipping companies it serviced.

[10] For the reasons that follow, I would dismiss the appeal.

Analysis

[11] Jurisdiction over labour relations and working conditions is not delegated to either the provincial or federal governments under s. 91 or s. 92 of the *Constitution Act, 1867*. But since *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 (P.C.), courts have accepted that legislation respecting 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*: *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696, at para. 11.

[12] Despite the provinces' presumptive interest in the regulation of labour relations, there is still a federal presence in this area. As a result of the *Snider*

decision, the federal government amended the predecessor to the *Canada Labour Code*, R.S.C. 1985, c. L-2, that had been at issue in that case, restricting its application to operations which were within federal legislative authority.

[13] The constitutional validity of this narrower statute was considered in *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (the *Stevedores Reference*), where this Court answered two reference questions: whether this restricted federal labour legislation was *intra vires* Parliament; and whether it applied to the Toronto employees of a particular stevedoring company which engaged exclusively in stevedoring and did all the loading and unloading for seven companies engaged in extra-provincial shipping.

[14] This Court, in nine separate sets of reasons, answered the first question by unanimously upholding the federal statute, and concluding that notwithstanding *Snider*, Parliament was entitled to regulate labour relations when jurisdiction over the undertakings were an integral part of Parliament's competence under a federal head of power. As Abbott J. wrote:

[T]he determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures. [Emphasis added; p. 592.]

[15] This Court has repeatedly confirmed Justice Abbott's conclusion that a level of government cannot have exclusive authority to manage a work or undertaking without having the analogous power to regulate its labour relations: *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767, at pp. 771-72; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)* at pp. 816-17, 825-26 and 833; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, at pp. 363-64 and 368-69. See also H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at pp. 533 and 535.

[16] As to the second question in the *Stevedores Reference* asking which level of government had authority over the particular stevedoring company's labour relations, eight of nine judges¹ concluded in separate reasons that the federal labour statute applied to the employees in question because the work they did was integral to the federal shipping companies that used them. Based on extensive evidence regarding the services that the stevedores provided to the shipping companies, the majority concluded that the employees devoted all of their time to the federally regulated companies, who relied on them exclusively for the loading and unloading of their cargo.

[17] In the *Stevedores Reference*, this Court therefore established that the federal government has jurisdiction to regulate employment in two circumstances: when the employment relates to a work, undertaking, or business within the

¹ Justice Locke held that the Act applied to the stevedores but did not apply to clerical staff; Justice Rand held that the Act did not apply to any of the employees.

legislative authority of Parliament; or when it is an integral part of a federally regulated undertaking, sometimes referred to as derivative jurisdiction. Dickson C.J. described these two forms of federal jurisdiction over labour relations as distinct but related in *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112, at pp. 1124-25.

[18] In the case of direct federal labour jurisdiction, we assess whether the work, business or undertaking's essential operational nature brings it within a federal head of power. In the case of derivative jurisdiction, we assess whether that essential operational nature renders the work integral to a federal undertaking. In either case, we determine which level of government has labour relations authority by assessing the work's essential operational nature.

[19] In this functional inquiry, the court analyzes the enterprise as a going concern and considers only its ongoing character: *Commission du salaire minimum v. Bell Telephone Co. of Canada*. The exceptional aspects of an enterprise do not determine its essential operational nature. A small number of exceptional extra-provincial voyages which are not part of the local transportation company's regular operations, for example, do not determine the nature of a maritime transportation operation (*Agence Maritime Inc. v. Conseil canadien des relations ourrières*, [1969] S.C.R. 851), nor does one contract determine the nature of a construction undertaking (*Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754). Nor will a small amount of local activity overwhelm the nature of an undertaking that

is otherwise an integral part of the postal service (*Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178).

[20] Tessier's claim that it is a federal undertaking is based on its involvement with activities related to the shipping industry. Specifically, Tessier argued that this Court concluded in the *Stevedores Reference* that stevedoring is an essential part either of "[n]avigation and [s]hipping" under s. 91(10) of the *Constitution Act, 1867* or "[l]ines of [s]team and other [s]hips" under s. 92(10)(a) and (b) and is therefore subject to federal regulation. According to Tessier, any company whose employees are engaged in stevedoring is a company whose employees should be federally regulated for purposes of labour relations. Tessier therefore argued its case as one of direct jurisdiction. With respect, I do not share Tessier's interpretation either of the *Constitution Act* or the *Stevedores Reference*.

[21] The constitutional classification of the authority over the labour relations of stevedores flows from the allocation of powers over shipping. Sections 91(10) and 92(10) state:

91. [Powers of the Parliament]. . . it is hereby declared that . . . the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

10. Navigation and Shipping.

. . .

92. [Exclusive Powers of Provincial Legislatures] In each Province the Legislature may exclusively make Laws in relation to Matters coming

within the Classes of Subjects next hereinafter enumerated; that is to say,

...

10. Local Works and Undertakings other than such as are of the following Classes:—

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

b. Lines of Steam Ships between the Province and any British or Foreign Country:

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

[22] Section 91(10) confers exclusive legislative jurisdiction to Parliament over “Navigation and Shipping”. The section is not limited territorially. It encompasses those aspects of navigation and shipping that engage national concerns which must be uniformly regulated across the country, regardless of their territorial scope. In *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 62, this Court confirmed:

The scope of the s. 91(10) power includes maritime law which establishes the framework of legal relationships arising out of navigation and shipping activities. The federal power also includes the infrastructure of navigation and shipping activities. This power enables the federal government to build or regulate the necessary facilities like ports and to control the use of shipping lanes and waterways (A. Braën, *Le droit maritime au Québec* (1992), at pp. 68-75).

[23] The following aspects of navigation and shipping engage national concerns: maritime negligence law (*ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Whitbread v. Walley*, [1990] 3 S.C.R. 1273; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437); the execution of works for facilitating navigation (*Reference Waters and Water-Powers*, [1929] S.C.R. 200, at pp. 220-21); and harbours and ports (*Lafarge*). See also P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 22-21. In *Ordon Estate*, this Court explained:

The nature of navigation and shipping activities as they are practised in Canada makes a uniform maritime law a practical necessity. Much of maritime law is the product of international conventions, and the legal rights and obligations of those engaged in navigation and shipping should not arbitrarily change according to jurisdiction. The need for legal uniformity is particularly pressing in the area of tortious liability for collisions and other accidents that occur in the course of navigation. [para. 71]

Similarly, this Court has recognized that shipping undertakings need facilities to pick up and unload cargo so that the regulation of ports and harbours is not to be “hobbled by local interests”: *Lafarge*, at para. 64.

[24] But s. 91(10) does not confer *absolute* authority on the federal government to regulate shipping. Section 91(10) must be read in light of s. 92(10), the essential scheme of which is to divide legislative authority over transportation and communication works and undertakings based on the territorial scope of their activities.

[25] Section 92(10) gives authority to the provincial legislatures over local works and undertakings except those areas expressly referred to in s. 92(10)(a) and (b), including, among other things, lines of ships that operate beyond provincial boundaries. Under s. 92(10), the provinces are entitled to regulate transportation within their boundaries, while the federal government has jurisdiction over transportation that transcends provincial boundaries and connects the provinces with each other or with other countries.

[26] This Court has held that the matters assigned to the provinces and the federal government respectively under s. 92(10) and its exceptions limit the scope of the federal government's authority under s. 91(10). In *Agence Maritime Inc. v. Conseil canadien des relation ouvrières*, for example, the issue was which level of government had jurisdiction over the labour relations of a maritime transport company. For purposes of s. 92(10), Agence Maritime was an intra-provincial company since, except for irregular and exceptional out-of-province voyages, it operated wholly within the province of Quebec. Parliament could therefore not exercise labour authority over Agence Maritime under s. 92(10)(a) and (b). But Agence Maritime argued that its maritime transport operations nonetheless came within federal jurisdiction under s. 91(10) and were therefore subject to federal labour regulation. Fauteux J. confirmed that shipping undertakings within a province remain subject to provincial authority, stating that matters assigned exclusively to the provinces are not under federal jurisdiction:

[TRANSLATION] If the proposed interpretation were accepted, this would lead inevitably to the conclusion that in enacting ss. 91(29) and 92(10) (a) of the 1867 Act. . . the legislature spoke in vain. . . . [I]n a case such as this one, except as regards the navigation aspect, the combined effect of ss. 91(29) and 92(10)(a) and (b) is to exclude from Parliament's jurisdiction maritime transport undertakings whose operations are conducted strictly within a single province. [p. 859]

[27] The matters explicitly dealt with in s. 92(10) and its exceptions therefore limit the scope of Parliament's authority under s. 91(10). In fact, as Duff J. recognized in the *Reference re Waters and Water-Powers*:

If the subjects included under head 10, s. 91, embrace those falling within . . . "works and undertakings" connected with "navigation and shipping" . . . then . . . the subjects . . . connected with navigation and shipping in sub-heads (a) and (b) of s. 92(10) are nugatory. [p. 222]

[28] Section 92(10) concerns the authority over shipping works and undertakings, a power that, as noted, includes the authority to regulate the labour relations of those employed on the work or undertaking. The entire scheme of s. 92(10) turns on the territorial scope of the shipping activities concerned. The principle that has therefore developed about labour relations in the shipping context is that jurisdiction depends on the territorial scope of the activity in question. Since stevedoring is not itself a transportation activity that crosses provincial boundaries, it will not be subject to federal regulation directly under s. 92(10)(a) or (b): *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, at paras. 43 and 61. Rather, a stevedoring work or undertaking

will be subject to federal labour regulation if it is integral to a federal undertaking in a way that justifies imposing exceptional federal jurisdiction.

[29] That is how this Court has interpreted the *Stevedores Reference*. As previously noted, the eight judges in the *Stevedores Reference* who concluded that the Toronto shipping company was subject to federal labour regulation wrote separate reasons setting out different approaches to support their conclusions, making it unclear whether there was a unifying, underlying ratio.

[30] Tessier argued that it was directly subject to federal labour regulation, relying primarily on the following statement in Abbott J.'s reasons:

[T]he loading and unloading of ships . . . is an essential part of the transportation of goods by water. As such . . . it comes within the exclusive legislative authority of Parliament under head 10 of s. 91 of the British North America Act "Navigation and Shipping" [p. 591]

This passage, Tessier argued, established that Parliament has direct jurisdiction over the labour relations of stevedores since stevedoring is an integral part of Parliament's competence over navigation and shipping.

[31] But over the years, this Court came instead to apply the derivative approach set out in the reasons of Estey J. After noting that the shipping companies which relied on the stevedores operated extra-provincially and came within federal legislative authority, Estey J. concluded as follows:

If . . . 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. [p. 568]

Because the stevedoring activities of the Toronto company were essential to the federally regulated shipping companies, Estey J. held that federal regulation applied to its employees. (See *Letter Carriers' Union of Canada*, per Ritchie J., at pp. 185-86, and *United Transportation Union*, at pp. 1136-38.)

[32] In *United Transportation Union*, Dickson C.J. summarized the *Stevedores Reference* as establishing the principle that a company that would otherwise be provincially regulated for purposes of labour relations, might nonetheless come under federal jurisdiction if the effective performance of the federal undertaking that relies on it would not be possible without the services of the related company. Federal jurisdiction over labour relations in such cases is based on a finding that the federal undertaking is dependent to a significant degree on the workers in question. In other words, federal jurisdiction was founded on the relationship between the activity of the stevedores and the relevant federal undertaking, not on the relationship between the stevedoring and the relevant head of power.

[33] Tessier's submission that it qualifies directly as a federal undertaking based on its stevedoring activities is therefore undermined by the fact that the *Stevedores Reference* has been interpreted as a case of derivative jurisdiction. That case did *not* establish that a company that does *any* stevedoring is automatically

subject to federal regulation for purposes of labour relations. Any passages in the *Stevedores Reference* which suggest that Parliament has exclusive jurisdiction over the labour relations of all employees engaged in any regular stevedoring must therefore be seen as inconsistent with this Court's subsequent interpretations of that decision.

[34] The effect of the *Stevedores Reference* as interpreted over time, then, is that stevedoring is not an activity that brings an undertaking directly within a federal head of power, at least for purposes of labour relations regulation. Rather, Parliament will only be justified in regulating these labour relations if the stevedoring activities at issue are an integral part of the extra-provincial transportation by ship contemplated under s. 92(10)(a) and (b). This result is consistent with the understanding of the division of powers over shipping under ss. 91(10) and 92(10) and its exceptions reviewed above.

[35] What, then, is the analytical framework for assessing whether a related undertaking is integral to a federal undertaking?

[36] As noted, this Court first adopted the rule of derivative jurisdiction in the *Stevedores Reference*. In *Letter Carriers Union of Canada*, the Court concluded that an undertaking could be subject to derivative federal labour jurisdiction even if its federally related activities were not all that it did. In that case, the undertaking devoted 90 percent of its time to delivering and collecting mail under contracts with Canada Post and 10 percent to purely local activities. Ritchie J. held that the mail-

collecting activity, which was the main and principal part of the undertaking's operation, was essential to the function of the postal service and brought the undertaking within federal labour regulation.

[37] In *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 (“*Northern Telecom I*”), Dickson J. expanded on the rule of derivative qualification and explained the proper analytical framework for assessing whether a related company is vital to a federal undertaking. The issue in that case was whether the employees at Northern Telecom working as supervisors in its Western Region Installation Department were subject to federal or provincial labour jurisdiction. Dickson J. described the analytical framework as follows:

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”. [p. 132.]

[38] The focus of the analysis is on the relationship between the activity, the particular employees under scrutiny, and the federal operation that is said to benefit from the work of those employees: *United Transportation Union*, at pp. 1138-39. The appeal in *Northern Telecom I* was dismissed because of the absence of relevant evidence, but the theory behind the framework for assessing derivative labour jurisdiction has been consistently applied by this Court.

[39] In *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, this Court considered which level of government had labour jurisdiction over the employees of two subsidiaries of Télé-Métropole Inc., a federal undertaking involved in television broadcasting. Paul L'Anglais Inc. engaged in selling sponsored television air time and J.P.L. Productions Inc. produced programs and commercial messages. The companies were related in a corporate sense, the parent company was the subsidiaries' principal customer, and the parent benefitted from the subsidiaries' services. Nonetheless, Chouinard J. concluded that a television broadcasting undertaking could function effectively without the services provided by the subsidiary undertakings, meaning that these activities were not indispensable to the federal undertaking. Provincial labour jurisdiction was therefore found to apply.

[40] *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733 ("*Northern Telecom 2*"), involved different installation employees at Northern Telecom, but the constitutional issue was the same as it was in *Northern Telecom 1*: whether the installers should be under federal or provincial labour jurisdiction. More specifically, the question was whether these Telecom employees provided services that were vital to Bell Canada, a federal undertaking.

[41] In concluding that the labour relations of Telecom's installers fell under federal jurisdiction, Estey J., generally followed the approach developed by Dickson J. in *Northern Telecom 1*:

The almost complete integration of the installers' daily work routines with the task of establishing and operating the telecommunications network makes the installation work an integral element in the federal works. The installation teams work the great bulk of their time on the premises of the telecommunications network. The broadening, expansion and refurbishment of the network is a joint operation of the staffs of Bell and Telecom. The expansion or replacement of the switching and transmission equipment, vital in itself to the continuous operation of the network, is closely integrated with the communications delivery systems of the network. All of this work consumes a very high percentage of the work done by the installers.

...

[T]he assignment of these labour relations to the federal sphere reflects the nature of the work of the employees in question, the relationship between their services and the federal works, the geographic realities of the inter-provincial scope of the work of these employees transcending as they do several provincial boundaries, and the close and complete integration of the work of these employees and the daily expansion, refurbishment and modernization of this extensive telecommunication facility. [pp. 766-68.]

[42] Dickson J. concurred in the result but wrote separate reasons. He noted first that the installers were functionally separate from the rest of Telecom's operations. Second, he noted that Bell's ownership interest in Telecom made it somewhat easier to conclude that a segment of Telecom's operations was an integral part of Bell's operations. Third, he confirmed that involvement with Bell was the predominant part of the installers' work, occupying 80 percent of their time. Finally, the physical and operational connection between the installers and Bell was significant. The installers' services were therefore found to be an essential part of Bell's operations.

[43] In *United Transportation Union*, this Court considered whether employees who worked for Central Western Railway Corp. were subject to provincial or federal labour regulation. Central Western operated a railway line located entirely within Alberta. The line had been purchased from Canadian National Railway (CN) with its financial assistance and was joined to the CN rail network at one point. After concluding that Central Western was not itself an inter-provincial railway under s. 92(10)(a) of the *Constitution Act, 1867*, Dickson C.J. considered whether the line was integral to CN, a federal undertaking. He noted that there was no daily or simultaneous connection between the two enterprises. Nor could it be said that CN was dependent on the services of Central Western — in fact, CN was trying to abandon the Central Western rail line, indicating that the line was not vital to CN's operations. Something more than physical connection and a mutually beneficial commercial relationship with a federal undertaking was required to satisfy the functional integration test. Because the requisite degree of integration was lacking, Central Western's employees were subject to presumptive provincial labour regulation.

[44] In *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, this Court considered whether the federal government had the power to regulate two gas processing plants and related gathering facilities that Westcoast Energy Inc. proposed to build in northern British Columbia. The gathering and processing facilities were located wholly within the province of British Columbia, but a majority in this Court held that the facilities came within federal jurisdiction

because the processed gas was transported into an inter-provincial pipeline that Westcoast owned and operated. For the majority, then, this was a case of direct federal jurisdiction. Westcoast operated a single, indivisible undertaking that operated within a field of federal legislative competence, namely, as an inter-provincial transportation undertaking under s. 92(10)(a) of the *Constitution Act, 1867*.

[45] McLachlin J., writing in dissent, framed the case differently and in a way that is of particular assistance in this case. After noting that the gathering and processing plants themselves were not inter-provincial transportation undertakings (the direct jurisdiction test), she held that they could only be subject to federal regulation if they were integral to the inter-provincial pipelines. In applying the derivative approach, she emphasized that exceptional federal jurisdiction would only be justified when the related operation was functionally connected to the federal undertaking in such an integral way that it lost its distinct provincial character and moved into the federal sphere: para. 111. Like Dickson C.J. in *United Transportation Union*, McLachlin J. noted that the test is flexible. Different decisions have emphasized different factors and there is no simple litmus test: paras. 125 and 128. She considered the common management of and interconnection between the facilities and the pipeline and the dependency of the pipeline on the facilities and concluded that the facilities retained their distinct non-transportation identity. They were not vital, in the requisite constitutional sense, to the inter-provincial pipeline.

[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.

[47] Applying these principles to the facts of this case, can it be said that Tessier's stevedoring activities are integral to a federal undertaking in a way that justifies imposing exceptional federal jurisdiction for purposes of labour relations?

[48] To date, this Court has applied the derivative jurisdiction test for labour relations in two contexts. First, it has confirmed that federal labour regulation may be justified when the services provided to the federal undertaking form the exclusive or principal part of the related work's activities (*Stevedores Reference*; *Letter Carriers' Union of Canada*).

[49] Second, this Court has recognized that federal labour regulation may be justified when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation. In *Northern Telecom 2*, for example, the installers were functionally independent of the rest of Telecom. This Court was therefore able to assess the essential operational nature of the installation department as a separate entity, as Dickson J. noted:

[T]he installers are functionally quite separate from the rest of Telecom's operations. The installers . . . never actually work on Telecom premises; they work on the premises of their customers. In respect of Bell Canada, the installation is primarily on Bell Canada's own premises and not on the premises of Bell Canada's customers The installers have no real contact with the rest of Telecom's operations. Telecom's core manufacturing operations are conceded to fall under provincial jurisdiction, but there would be nothing artificial in concluding that Telecom's installers come under different constitutional jurisdiction. [pp. 770-71]

(See also *Ontario Hydro*, where the employees who fell under federal jurisdiction were only those employed on or in connection with facilities for the production of nuclear energy; *Johnston Terminals and Storage Ltd. v. Vancouver Harbour Employees Association Local 517*, [1981] 2 F.C. 686 (C.A.), and *Acton Transport Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 272, 5 B.C.L.R. (5th) 1, where certain workers were severable from their employer's overall operation and were therefore subject to different labour jurisdiction.)

[50] This appeal is the first time this Court has had the opportunity to assess the constitutional consequences when the employees performing the work do not form a discrete unit and are fully integrated into the related operation. It seems to me that even 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 employees' time or is a minor aspect of the essential ongoing nature of the operation: *Consumers' Gas Co. v. National Energy Board* (1996), 195 N.R. 150 (C.A.); *R. v. Blenkhorn-Sayers Structural Steel Corp.*,

2008 ONCA 789, 304 D.L.R. (4th) 498; and *International Brotherhood of Electric Workers, Local 348 v. Labour Relations Board* (1995), 168 A.R. 204 (Q.B.). See also *General Teamsters, Local Union No. 362 v. MacCosham Van Lines Ltd.*, [1979] 1 C.L.R.B.R. 498; M. Patenaude, “L’entreprise qui fait partie intégrante de l’entreprise fédérale” (1991), 32 *C. de D.* 763, at pp. 791-99; and Brun, Tremblay and Brouillet, at p. 544.

[51] In this sense, Tessier’s acknowledgment that it operates an indivisible undertaking works against its position that its stevedoring employees render the whole company subject to federal regulation. If Tessier *itself* was an inter-provincial transportation undertaking, it would be justified in assuming that the percentage of its activities devoted to local versus extra-provincial transportation would not be relevant: *Attorney-General for Ontario v. Winner*, [1954] A.C. 541. But since Tessier can only qualify derivatively as a federal undertaking, federal jurisdiction is only justified if the federal activity is a significant part of its operation.

[52] In *Consumers’ Gas*, for example, an inter-provincial pipeline carried 13 percent of Consumers’ total volume and was an integrated part of Consumers’ overall distribution system. In concluding that this indivisible undertaking was a local one, Hugessen J.A. placed particular emphasis on the fact that the inter-provincial aspect of the system was a relatively minor part of Consumers’ operations:

While it is clear that in cases of primary instance federal jurisdiction under s. 92(10)(a) it is enough that only a minor part of the undertaking be inter-provincial so long as it is performed on a continuous and regular

basis, the rule is otherwise in cases of secondary instance federal jurisdiction. In such cases the focus is not on the inter-provincial undertaking but rather on an undertaking which, by definition, is primarily provincial and the inquiry is to determine whether such undertaking has become federal by reason of its integration with a core federal undertaking. For such purposes it is clearly not enough if the provincial undertaking's involvement in the federal undertaking is only minor in extent or casual in nature. Here, [the federally-related activity] represents only 13% of the total volume received by Consumers' In our view, such a minor part of Consumers' business . . . cannot serve to bring it under federal jurisdiction [Emphasis added; citation omitted; para. 10.]

[53] Similarly, in *Blenkhorn-Sayers*, Sharpe J.A. concluded that the construction companies in question were single indivisible undertakings which had not created definable, discrete units exclusively devoted to the federally related activity. Two aspects of the companies' works were under review. The federal activity represented up to 15 percent of the companies' overall operations in one case and 29 percent in the other. On these facts, Sharpe J.A. concluded that exempting the employees in question from the uniform operation of provincial labour legislation would be inconsistent with the coherent application of constitutional principles: para. 32.

[54] Finally, in *International Brotherhood of Electrical Workers, Local 348*, the court noted that providing regular and important services to a federal undertaking is not sufficient to bring a related undertaking within federal jurisdiction over labour relations. In that case, the related operation's federally related services were "not casual" but also "not predominant" (at para. 15), representing about one quarter of the undertaking's overall operations: para. 15.

[55] In short, if there is an indivisible, integrated operation, it should not be artificially divided for purposes of constitutional classification. Only if its dominant character is integral to a federal undertaking will a local work or undertaking be federally regulated; otherwise, jurisdiction remains with the province. As McLachlin J. said in her dissenting reasons in *Westcoast Energy*:

The local work or undertaking must, by virtue of its relationship to the inter-provincial work or undertaking, essentially function as part of the inter-provincial entity and lose its distinct character. In the context of an inter-provincial transportation or communication entity, to be functionally integrated, the local work or undertaking, viewed from the perspective of its normal day-to-day activities, must be of an inter-provincial nature — that is, be what might be referred to as an “interconnecting undertaking”... If the dominant character of the local work or undertaking, viewed functionally, is something distinct from inter-provincial transportation or communication, it remains under provincial jurisdiction. [Emphasis added; citations omitted; para. 124.]

[56] As noted, at the relevant time, Tessier devoted the majority of its efforts to non-shipping activities, including renting cranes for construction work and industrial maintenance, renting heavy equipment other than cranes, and intra-provincial transportation. Its stevedoring activities accounted for 14 percent of Tessier’s overall revenue and 20 percent of the salaries paid to employees. Tessier’s employees were fully integrated, and worked across the different sectors of the organization.

[57] Tessier had a fleet of 25 cranes which were used for various purposes: construction work, industrial maintenance, and loading and unloading ships. Two of those cranes were permanently installed at the Baie-Comeau dock and one at the

Matane dock. Tessier was responsible for the loading and unloading of certain products that arrived in, or were shipped from, Matane, Sept-Îles, Havre-Saint-Pierre and Baie-Comeau. In Matane, Tessier's crane was used for loading paper pulp. At Baie-Comeau, the cranes were used to load newspaper, timber, and aluminum that was destined for overseas shipment. Some of these materials were loaded with assistance from cranes that were attached to the ships themselves and operated by employees of the shipping company. Finally, Tessier worked with Windsor Salt, which transports salt coming from Nova Scotia by ship to Sept-Îles or Havre-Saint-Pierre for use in salting the roads during the winter months. Tessier provided manpower to operate cranes installed on these ships. At least some of the shipping companies that Tessier serviced operated across provincial boundaries and were therefore federal undertakings.

[58] What emerges from this factual review is that Tessier's stevedoring services were not performed by a discrete unit and represented only a small part of its overall operation. Tessier's employees are an indivisible workforce who work interchangeably in various tasks throughout the company. To the extent that any of Tessier's employees perform stevedoring activities, they do so only occasionally. Crane operators who work at a construction site one day might assist in unloading ships the next day.

[59] In short, Tessier's essential operational nature is local, and its stevedoring activities, which are integrated with its overall operations, form a relatively minor

part of Tessier's overall operation. Not to retain provincial hegemony over these employees would subject them to federal regulation based on intermittent stevedoring, notwithstanding that the major part of Tessier's work consists of provincially regulated activities.

[60] Though it is no longer of relevance in light of this conclusion, it is worth noting that we have, in any event, little evidence that Tessier's stevedoring services were integral to the federal shipping companies it serviced. Tessier focused its argument on establishing that it was a federal shipping company directly under s. 91(10) or 92(10) and did not lead any evidence to show any derivative link to federal shipping undertakings. As a result, while we know that Tessier provided some shipping companies with cranes and operators to assist with the loading and unloading of their ships, we do not know much else.

[61] To be relevant at all, a federal undertaking's dependency on a related operation must be ongoing. Yet we have no information about the corporate relationship between Tessier and the shipping companies, whether Tessier's stevedoring activities were the result of long-term or short-term contracts, or whether those contracts could be terminated on short notice. There is nothing, in short, to demonstrate the extent to which the shipping companies were dependent on Tessier's employees. As a result, as in the Court of Appeal, no conclusions could even have been drawn about whether those of Tessier's employees who occasionally performed

stevedoring activities were integral to federal shipping undertakings. This too argues against imposing exceptional federal jurisdiction.

[62] I would dismiss the appeal with costs.

Appeal dismissed with costs.

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