Federal Court  Cour fédérale

Date: 20091015

Docket: T-287-09

Citation: 2009 FC 1041

Ottawa, Ontario, October 15, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

THE BRITISH COLUMBIA CORPS OF COMMISSIONAIRES dba COMMISSIONAIRES BC

Applicant

and

ATTORNEY GENERAL OF CANADA and THE PUBLIC SERVICE ALLIANCE OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by the British Columbia Corps of Commissionaires (Commissionaires) seeking an order quashing the decision of a Health and Safety Officer (Officer) acting under Part II of the *Canada Labour Code,* R.S.C. 1985, c. L-2. In that decision, the Officer determined that the work of the Commissionaires under a contract with the Canada Border Services Agency (CBSA) to provide guarding and transportation services for immigration detainees from its

downtown and Vancouver International Airport detention facilities was not governed by Part II of the *Canada Labour Code*.

[2] None of the Respondents have filed submissions on this application and, on the day of the hearing, the Attorney General of Canada and the Public Service Alliance of Canada (PSAC) conceded that the decision under review was wrongly decided. Notwithstanding the challenge to the *prima facie* constitutional interests of the Province, the Attorney General of British Columbia advised that he took no position on the merits of this application.

[3] At the outset of the hearing I raised a concern that because the contract between the CBSA and the Commissionaires had expired earlier this year, the issue before the Court may have become moot. I am, however, satisfied that the underlying dispute between the Commissionaires and its aggrieved employees remains outstanding, as do a number of other labour relations disputes arising out of the work performed under the CBSA contract. The jurisdictional issue at the centre of this proceeding has been or could be expected to be raised in those collateral proceedings and it is likely to be a point of continuing contention until it is judicially resolved. Indeed, the same jurisdictional issue was recently considered by a Review Board of Work Safe British Columbia (the provincial workplace safety agency) but that Board declined to resolve it, in part, for the reason that it was pending before this Court.

[4] Notwithstanding the common ground that exists among the parties, the Court must still be satisfied that the Officer's decision contains a reviewable error and that there are no other reasons to deny prerogative relief.

[5] I have carefully reviewed the Officer's decision and I am satisfied that he erred in determining that the work performed by Commissionaires employees under the CBSA contract did not fall within the parameters of Part II of the *Canada Labour Code*. It is apparent that the Officer correctly identified the test to be applied, that being whether the work performed by Commissionaires employees was integral, vital or essential to the CBSA mandate: see *Northern Telecom Ltd. v. Communications Workers of Canada* (1979), [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1 (S.C.C.). But it is also apparent that he failed to properly apply that test to the essentially undisputed evidence before him.

[6] The *Northern Telecom* decision, above, dictates that the determination of whether federal jurisdiction applies to labour activity that is subsidiary to a core federal undertaking requires an assessment of whether the relationship is vital, essential or integral to that undertaking. This was said to necessarily involve an assessment of the interdependence of the two entities, including their physical and operational connections. The task was further described in the following passages from that decision:

> Another, and far more important factor in relating the undertakings, is the physical and operational connection between them. Here, as the judgment in *Montcalm* stresses, there is a need to look to continuity and regularity of the connection and not to be influenced by exceptional or casual factors. Mere involvement of the employees in the federal work or undertaking does not automatically import

> federal jurisdiction. Certainly, as one moves away from direct involvement in the operation of the work or undertaking at the core, the demand for greater interdependence becomes more critical.
>
> On the basis of the foregoing broad principles of constitutional adjudication, it is clear that certain kinds of "constitutional facts", facts that focus upon the constitutional issues in question, are required. Put broadly, among these are:
>
> (1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;
>
> (2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;
>
> (3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;
>
> (4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system and, in particular, the extent of the involvement of the installation department in the operation and institution of the federal undertaking as an operating system.

[7] The evidence before the Officer describing the nature of the working relationship between the Commissionaires and CBSA established that the former provided monitoring and transportation services for immigration detainees in a number of different contexts. This required that detainees be maintained in custody including the occasional use of restraining devices. The nature of these activities was described by the Commissionaires in the following submission to the Officer:

> a. Commissionaires are assigned to CBSA to perform enforcement activities associated with the implementation of federal Immigration laws, specifically, detaining persons who have entered the country under questionable circumstances

and who have to have their status in Canada determined by the IRB or other applicable federal bodies.

b. The Commissionaires' duties include: detaining persons at the Pacific Region Holding Centre; transporting them to hearings or to/from incarceration (in the case of potentially dangerous persons); escorting persons under orders to leave Canada to flights or to the US Border; picking up persons who have been detained in Canada, but are to be dealt with in Vancouver; maintaining custody of immigration detainees who have been taken to medical facilities for treatment; detaining, on a temporary basis, persons who enter Canada under questionable circumstances through YVR and are awaiting further processing by CBSA; performing escorts and detentions for CBSA offices at Library Square; and arranging for feeding and medical care of persons in detention.

c. The persons for whom the Commissionaires are responsible are not prisoners – they are persons who have entered Canada under questionable circumstances or who have been ordered to leave the country and are not trusted to do so on their own. Persons who have committed criminal acts are handled by Correctional Services.

d. The Commissionaires working for CBSA are NOT responsible for acting as bodyguards to these individuals. Rather they are to maintain custody of persons to ensure Canada has control of questionable individuals.

[8] The Officer found that these duties were not essential, vital or integral to the operations of the CBSA because:

(a) The work contracted to the Commissionaires could be performed by CBSA personnel;

(b) The loss of service from the Commissionaires would not be detrimental to CBSA operations;

(c) The Commissionaires had subsequently been replaced by a provincially regulated agency;

(d) Commissionaires employees did not carry out risk assessments, determine the level of required restraint, make arrests, perform law enforcement functions or interpret the law; and

(e) The provision of security services has typically been found to be a provincially regulated activity.

[9] In addition to the above, the Officer applied a decision from the British Columbia Labour Relations Board where the provision of radio room communication services by the Commissionaires to the Department of Fisheries and Oceans (DFO) was held not to be essential to the work of that agency.

[10] Surprisingly, what the Officer completely failed to consider was the fact that PSAC had been previously ordered by the Canada Industrial Relations Board to be the certified bargaining agent for this unit of employees under Part I of the *Canada Labour Code*.

[11] It is apparent to me that the Officer misunderstood the legal test that he was bound to apply. It was of no relevance to his assessment to find that the work of Commissionaires employees could be done by CBSA employees or by some other “provincially regulated agency”. These findings essentially beg the question that had to be decided. I agree with counsel for the Commissionaires that the determination of what is essential or vital to a core federal undertaking requires an

assessment of the tasks or functions performed. The Officer needed to ask whether the work carried out by the Commissionaires' employees was essential or vital to the operational mandate of the CBSA such that the loss of the service would prevent the CBSA from fulfilling its legal responsibilities. The fact that the CBSA had contracted out some of those functions to some other entity, whether provincially regulated or not, was of no legal significance.

[12] While the Officer was correct that the provision of passive or incidental security service to a federal or federally regulated agency has been generally held to fall within provincial labour jurisdiction, the authorities also establish that the type of active security or support performed under this contract with the CBSA is a matter falling within federal jurisdiction. Contrary to the Officer's finding, the type of work performed here was closely analogous to airport security screening: see *Pinkerton's of Canada Ltd.* (1990), 90 CLLC 16, 061, 82 di 18, affirmed (1992), 32 A.C.W.S. (3d) 940, [1992] F.C.J. No. 271 (QL) (F.C.A.). The Officer's further reliance on the British Columbia Labour Board decision dealing with DFO radio operations was also in error. That decision was overturned on reconsideration in *Re British Columbia Corps of Commissionaires*, [2001] B.C.L.R.B.D. No. 277. In that review decision, the Board also held that it was of no legal significance that Commissionaires employees did not interpret or enforce the law. What was important was whether their assigned tasks were vital to the overall enforcement of the law by field officers. The Board found that they were and the same conclusion must be drawn on the undisputed facts of this case.

[13] In most cases of this sort, the Court would order that the decision under review be returned to the decision-maker for redetermination. This is, however, one of those few cases where there is only one correct determination such that a declaration is appropriate.

[14] None of the parties have requested costs and no order of costs will be made.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is allowed and the decision under review is quashed.

THIS COURT FURTHER DECLARES that the employees of the Applicant who performed work on behalf of the Canada Border Services Agency at 700 – 300 West Georgia Street, Vancouver, British Columbia and at the Vancouver International Airport are governed by Part II of the *Canada Labour Code*.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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