Federal Court  Cour fédérale

Date: 20110617

Docket: T-1105-10

Citation: 2011 FC 717

Ottawa, Ontario, June 17, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

COMMISSIONAIRES (GREAT LAKES)

Applicant

and

TANYA DAWSON

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Tanya Dawson was employed by Commissionaires (Great Lakes) ("CGL"). CGL provided Ms. Dawson's services to the Orderly Room of the Department of National Defence's Post Recruitment Education Training Centre ("PRETC") at Camp Borden in Borden, Ontario. In March 2009, Ms. Dawson was dismissed from her position with CGL. In August 2009, she filed a complaint pursuant to section 240 of the *Canada Labour Code*, RSC 1985, c L-2 (the "CLC"). CGL

objected to the complaint on the basis that its dismissal of Ms. Dawson is not subject to federal jurisdiction under the CLC.

[2] In June 2010, the adjudicator, Dr. Daniel J. Baum (the "Adjudicator") rejected CGL's jurisdictional arguments and found that Ms. Dawson was unjustly dismissed, within the meaning of the CLC.

[3] CGL seeks to have the decision set aside on the basis that:

i. the Adjudicator mischaracterized the nature of Ms. Dawson's employment and based his decision on erroneous findings of fact that disregarded the evidence before him; and

ii. the Adjudicator erred in concluding that Ms. Dawson's employment with CGL was sufficiently vital, integrated and integral to the core federal military undertaking of the Department of National Defence so as to bring her employment within federal jurisdiction, for the purposes of Part III of the CLC.

[4] For the reasons that follow, this application is granted.

I. Background

[5] CGL is a not-for-profit Ontario corporation founded in 1925. It provides workers from a qualified pool to businesses or organizations that have requested a person with specified skills to fill identified employment vacancies. In this respect, CGL bears some similarity to an employment agency. However, unlike many employment agencies, CGL continues to directly employ and to be ultimately responsible for the supervision of the Commissionaires it places with its clients.

[6] Historically, CGL's purpose was to provide work for veterans of the military and the RCMP. Demand for its services centered on security work. However, CGL now provides broader employment services in areas including clerical work, dispatching, parking enforcement, fingerprinting and security consulting. In general, CGL's employees are uniformed and assigned ranks similar to that in the military or the police.

[7] For many decades, CGL has provided services to the federal government pursuant to a national contract, called the National Master Standing Offer ("NMSO").

[8] Ms. Dawson commenced her employment with CGL in 2007. Shortly afterwards, PRETC requested a Commissionaire to work in its Orderly Room. Ms. Dawson was selected from a "deemed qualified pool" and she was interviewed by CGL's site manager for Camp Borden, Lieutenant Thomas Yeo. She was then sent to PRETC for a further interview.

[9] There is some dispute as to the nature of Ms. Dawson's work in the Orderly Room at PRETC. Ms. Dawson claims that she was responsible for handling claims of members of the military related to, among other things, payroll, and that PRETC required her to obtain secret level clearance. She also states that she was also responsible for assigning rooms to members who arrived at Camp Borden as part of Base Accommodations and for arranging transportation for military personnel leaving the Base for training or military tasks.

[10] However, Mr. Phillip Day, Human Resources Manager of CGL and the person who represented CGL at the hearings before the Adjudicator, states that there was no evidence that Ms. Dawson's responsibilities included payroll, nor was there evidence that secret level clearance was required for her position.

[11] While Ms. Dawson worked in the Orderly Room, there were issues regarding her work that were brought to the attention of Lieutenant Yeo. After meeting with Ms. Dawson, Lieutenant Yeo ordered her to remove her belongings and to vacate her position at PRETC. However, she was not at this time dismissed from her position as a Commissionaire.

[12] Subsequent to the vacation of her position, Ms. Dawson was summoned to appear for a meeting with Lieutenant Yeo. She did not attend. Mr. Day then requested a meeting with her. As the date for that meeting approached, Ms. Dawson informed Mr. Day that she had retained counsel. Mr. Day indicated that he wished to meet with her alone. Mr. Day subsequently cancelled the meeting and provided Ms. Dawson with a letter of discharge, terminating her position with CGL, effective March 24, 2009.

[13] In August 2009, Ms. Dawson submitted a complaint of unjust dismissal pursuant to Part III of the CLC. CGL immediately sent a letter raising an objection to the complaint on the basis that the CLC did not apply to CGL. The Adjudicator was subsequently appointed and heard the complaint in March and April, 2010.

II. The Decision under Review

[14] In a decision dated June 14, 2010, the Adjudicator concluded that CGL had unjustly dismissed Ms. Dawson, within the meaning of the CLC. He then ordered CGL to, among other things, pay Ms. Dawson damages totaling $40,916.89.

[15] The Adjudicator dealt with the jurisdictional issue at the outset of his decision.

[16] After briefly reviewing the nature of the Applicant's business, he noted that CGL is a not-for-profit Ontario corporation that operates in an area of the province bounded by Bowmanville, Sarnia and Parry Sound.

[17] He then acknowledged the Applicant's submissions that, throughout its 85-year history, the Commissionaires have never been subject to federal jurisdiction, that contracts entered into between CGL and its employees specifically acknowledge the application of Ontario employment legislation, and that the NMSO provides that the federal government may request the Commissionaires to supply employees on conditions set forth in the NMSO, including compliance with provincial employment laws.

[18] He then proceeded to observe that "the precise issue to be decided under this head is … whether federal or provincial legislation is to apply to the work done by Ms. Dawson."

[19] In reviewing the applicable law, the Adjudicator acknowledged that "Parliament has no authority over labour relations, as such" and that "the terms of a contract of employment … are matters within the authority of the provinces."

[20] That said, he noted that "Parliament may assert exclusive jurisdiction over subjects if they are an *integral part of a matter within the primary competence of the federal government*" (emphasis in original). In this regard, he noted that subsection 91(7) of the *Constitution Act, 1867* confers exclusive jurisdiction over "militia, military and naval service, and defence" to Parliament.

[21] Given the foregoing, and relying upon *Northern Telecom Ltd v Communications Workers of Canada*, [1980] 1 SCR 115, the Adjudicator observed that it was necessary to examine "the normal or habitual activities of the organization in question". He then quoted from *Central Western Railway*

Corporation v United Transportation Union, [1990] 3 SCR 1112, at para 45, where the Supreme Court stated that, in determining constitutional jurisdiction in labour matters, the key issue is whether the relationship between that organization and the core federal undertaking can be characterized as "vital," "essential," or "integral."

[22] Applying the foregoing principles to the facts of the case at bar, the Adjudicator stated that the issue was whether the work performed by Ms. Dawson "fell into a category marked by the British North America Act as exclusive to the federal government and whether her work was germane to that category." He proceeded to find that her work was directly related to the Canadian forces ("CF"), specifically, in relation to intake, payroll and processes for governing the movement of military personnel.

[23] On this basis, he concluded that federal jurisdiction applied to the case before him. He then turned to the merits of the complaint, which are not within the scope of this application.

III. <u>Standard of review</u>

[24] It is common ground between the parties that the Adjudicator's ruling on the jurisdictional issue in this case is reviewable on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 50; *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 SCR 407, at para 26; *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7, at para 26). That said, any factual findings made by the Adjudicator in reaching his determination on the jurisdictional issue are reviewable on a standard of reasonableness (*Consolidated Fastfrate*, above, at para 26). Similarly, the Adjudicator's treatment of the evidence adduced in the hearings before him is also reviewable on a standard of reasonableness (*Dunsmuir*, above, at paras 51-55;

Canada (Minister of Citizenship and Immigration) v Khosa, 2009 SCC 12, [2009] 1 SCR 339, at para 46).

[25] It follows that the first issue that has been raised by CGL is reviewable on a standard of reasonableness, whereas the second, jurisdictional, issue is reviewable on a standard of correctness.

IV. <u>Preliminary Issue</u>

[26] Prior to the oral hearing in this application, Ms. Dawson submitted a motion to strike all or parts of certain paragraphs of an affidavit sworn by Mr. Day. She asserted that the paragraphs in question either contained opinion evidence, argument or evidence that was not put before the Adjudicator.

[27] After reviewing, at the outset of the oral hearing of this matter on June 2, 2011, each of Ms. Dawson's objections to Mr. Day's affidavit, I applied the principle that the "strik[ing of] affidavits or portions of affidavits in judicial review applications is a discretion which should be exercised sparingly and be granted only in cases where it is in the interest of justice to do so, for example or in cases where a party would be materially prejudiced …" (*Armstrong v Canada (Attorney General)*, 2005 FC 1013, at para 40).

[28] In so doing, I agreed to strike a small number of passages that were essentially argument, speculation or opinion, while I declined to strike passages that contained "new" evidence that I considered to be relevant, or potentially relevant, to the jurisdictional issue that has been raised in this application (*McFadyen v Canada (Attorney General)*, 2005 FCA 360, at paras 14-15). This is reflected in my Order below.

V. Analysis

A. *Did the Adjudicator err by mischaracterizing the nature of Ms. Dawson's employment and basing his decision on erroneous findings of fact that disregarded the evidence before him?*

[29] In the absence of a transcript of the proceedings before the Adjudicator, or any notes that he may have taken, CGL relied on the affidavit of Mr. Day to assert that there was no evidence that administration of payroll formed any part of Ms. Dawson's job. Alternatively, CGL asserted that the finding that the Respondent's work was related to "payroll" is too vague to be of assistance in determining the issue of the application of federal jurisdiction.

[30] CGL further submitted that the Adjudicator's finding that Ms. Dawson's work was related to "processes governing the movement of military personnel" is misleading and could be interpreted as including military exercises, which is not supported by any evidence. Once again, CGL asserted that this finding is too vague, lacks context, and is an insufficient basis upon which to conclude that federal jurisdiction exists.

[31] Regarding the Adjudicator's finding that Ms. Dawson was required to obtain "secret" security clearance, CGL submitted that this disregards the evidence given at the hearing to the effect that "secret" level clearance was not required for Ms. Dawson's position. CGL noted that although Ms. Dawson testified that she required "secret" level clearance, no other evidence was produced at the hearing to corroborate this claim. CGL submits that the Adjudicator appeared to give significant weight to this finding in his decision, and that even if this finding is accepted at face value, it would not indicate that the military was dependent on the work performed by Ms. Dawson or that her work was vital, essential or integral to the military's operations.

[32] In affidavits dated October 8, 2010 and December 21, 2010, Ms. Dawson disputed, among other things, CGL's position that there was no evidence given at the hearing regarding whether (i) her job included administration of payroll; and (ii) she was required to have "secret" level clearance to perform her duties at PRETC.

[33] In the absence of a transcript of the hearings that were held before the Adjudicator, it is not possible to determine whether the Adjudicator's findings on those points were erroneous or unreasonable. Accordingly, CGL has not met its burden of proof in this regard.

[34] That said, I agree with CGL that the Adjudicator's finding that Ms. Dawson's work related, among other things, to "process for governing the movement of military personnel", should not be construed as including "military exercises." Mr. Day stated in his affidavit dated August 5, 2010 that there was no evidence adduced before the Adjudicator that Ms. Dawson was responsible for or involved in the movement of military personnel, except for training purposes. In her affidavit dated October 8, 2010, Ms. Dawson characterized her role in this regard as being "responsible for arranging transportation for military personnel leaving the base for training or military tasks". I do not interpret this evidence, or the Adjudicator's above-quoted characterization of her role, as suggesting that Ms. Dawson was involved in arranging any transportation that might occur during military exercises. I mention this only because it is relevant to my assessment of the jurisdictional issues discussed below.

B. *Did the Adjudicator err in concluding that federal jurisdiction applied?*

[35] The CGL submitted that while the Adjudicator cited some of the appropriate principles for determining the issue of jurisdiction, he disregarded these principles in his analysis and did not apply the correct test in making his determination. CGL asserted that the Adjudicator's analysis

only considered whether the Respondent's work was "germane" and "directly related" to the federal undertaking, namely military, rather than whether it was "vital", "integral", or "essential" to that undertaking. More importantly, CGL submitted that the Adjudicator failed to take into account the nature of its operations, its relationship with the military and the importance of its work for the military. In this regard, it stated that the Adjudicator failed to take into account the fact that the CGL is an Ontario corporation that operates only in Ontario and operates much like an employment agency, all of which would ordinarily bring its labour relations entirely within provincial jurisdiction. CGL added that the Adjudicator also failed to consider whether the "core" of the federal undertaking, being the military, would be impaired by provincial regulation of CGL's labour relations.

[36] I agree that the Adjudicator erred by: (i) applying an erroneous test in determining the issue of jurisdiction; (ii) failing to assess whether the normal or habitual activities of CGL are such as to render CGL a federal undertaking, service or business, for the purposes of the jurisdictional analysis; and (iii) failing to consider whether provincial regulation of CGL's labour relations would impair the "core" of federal jurisdiction over the military. I also agree that the Adjudicator begged the question to be decided when he observed, at the outset of his analysis of the jurisdictional issue, that "Part III of the *Canada Labour Code*" controls this matter. There is nothing in the statute which, in itself, allows for an estoppel again at individuals for whom the law was designed to protect."

[37] The Supreme Court recently addressed the issue of federal jurisdiction over labour and employment relations in *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696. There, the Supreme Court considered

whether the labour relations of child welfare services provided by the appellant ("NIL/TU,O") to certain First Nations in B.C. fell under federal jurisdiction, pursuant to s. 91(24) of the *Constitution Act, 1867*, which confers jurisdiction to the Parliament of Canada in respect of "Indians and lands reserved for Indians". The Court unanimously concluded that NIL/TU,O's labour relations fell under provincial jurisdiction. However, the Court split with respect to the test that should be applied when determining whether federal jurisdiction applies to labour relations.

[38] The majority decision, written by Justice Abella, confirmed (at para 11) that: (i) labour relations are presumptively a provincial matter; (ii) the federal government may acquire jurisdiction over labour relations only by way of exception; and (iii) this exception has been "narrowly interpreted." Justice Abella then described the test that applies in this regard in the following terms:

> [18] … [I]n determining whether an entity's labour relations will be federally regulated, thereby displacing the operative presumption of provincial jurisdiction, *Four B* [*Manufacturing Ltd v United Garment Workers of America*, [1980] 1 SCR 1031] requires that a court first apply the functional test, that is, examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking. If so, its labour relations will be federally regulated. Only if this inquiry is inconclusive should a court proceed to an examination of whether the provincial regulation of the entity's labour relations would impair the core of the federal head of power at issue.

[39] Justice Abella emphasized that, if it is necessary to proceed to the second step of the assessment, the question is not whether the entity's operations lie at the "core" of the federal head of power, it is whether the provincial regulations of that entity's labour relations would impair the "core" of that head of power (*NIL/TU,O*, above, at para 20).

[40] Justice Abella ultimately concluded that NIL/TU,O's labour relations fell within provincial jurisdiction because the essential nature of its operations is to provide child and family services,

which falls into the provincial sphere and is regulated exclusively by the provinces. She rejected (at paras 39-40 and 45) the argument that the presence of federal funding, the cultural identity of NIL/TU,O's clients and employees, and its mandate to provide culturally appropriate services to Aboriginal clients displaced the presumption in favour of provincial jurisdiction. In short, she observed that "[t]he community for whom NIL/TU,O operates as a child welfare agency does not change *what* it does, namely provide child welfare services" (*NIL/TU,O*, above, at para 45, emphasis in original). Given that the functional test was conclusive, she found that an inquiry into whether NIL/TU,O's activities or operations lie at the "core" of a federal undertaking or head of power was not required.

[41] The minority judgment in that case, written by Chief Justice McLachlin and Justice Fish, applied a different test in reaching the conclusion that provincial jurisdiction applied. In brief, it stated that "the central question is whether the operation [in this case NIL/TU,O], viewed functionally in terms of its normal and habitual activities, falls within the core of a federal head of power, in this case s. 91(24) of the *Constitution Act*, 1867" (*NIL/TU,O*, above, at para 58). In applying that test, the minority judgment stated that "the first step is to determine the extent of the core federal undertaking or power. Having done this, one asks whether, viewed functionally, the operation's activities fall within that power" (*NIL/TU,O*, above, at para 61).

[42] In the case at bar, the test applied by the Adjudicator was whether the work performed by Ms. Dawson "fell into a category marked by the British North America Act as exclusive to the federal government and whether her work was germane to that category" (emphasis added). He then proceeded to determine that her work was directly related to the military, specifically, in

relation to intake, payroll and processes for governing the movement of military personnel. On that basis, he concluded that "federal jurisdiction applies."

[43] To the extent that the test applied by the Adjudicator may be said to have focused on the relationship between Ms. Dawson's work and the "core" of the military on the federal head of power over the military, it resembles the test articulated by the minority ruling of the Supreme Court of Canada in *NIL/TU,O*, above, and certain cases relied upon by Ms. Dawson (for example, *British Columbia Corps of Commissionaires (cob Commissionaires BC) v Canada (Attorney General)*, 2009 FC 1041, at paras 5 and 11; *Lloyd's Register North America Inc v Dalziel*, 2004 FC 822, at paras 19-21 and 33; *Bernshine Mobile Maintenance Ltd v Canada Labour Relations Board*, [1986] 1 FC 422, at 435; *Pinkerton's of Canada Ltd*, (1990) 90 CLLC 16,061). That said, it is readily apparent that the language used by the Adjudicator reflects a much more expansive test for asserting federal jurisdiction than the test that was adopted in the minority judgment in *NIL/TU,O*, above, and other cases relied upon by Ms. Dawson.

[44] Although the Adjudicator recognized, in his review of the applicable legal principles, the importance of examining "the normal or habitual activities of the organization in question", he failed to assess whether CGL's normal or habitual activities were such as to render CGL "'a federal work, undertaking or business' for the purposes of triggering the jurisdiction of the *Canada Labour Code*" (*NIL/TU,O*, above, at para 12).

[45] I acknowledge that the Adjudicator fairly summarized CGL's operations. However, he did not do so "without regard for exceptional or casual factors" (*NIL/TU,O*, above, at para 14; *Northern Telecom*, above, at 135), and he failed to implicitly or explicitly assess whether CGL's activities

were such as to render it a federal work, undertaking or business. As a result, his decision cannot stand.

[46] Ms. Dawson submitted that the test adopted by the Adjudicator is consistent with the test articulated in the majority judgment in *NIL/TU,O*, above, because "the entity in question in this case is not CGL, but is the PRETC Orderly Room and the DND within which Ms. Dawson works with military personnel and federal civil servants (and under their direction) as a component within a functioning unit".

[47] I disagree. As the Adjudicator appropriately recognized: (i) CGL "is the employer in this matter"; (ii) when issues regarding Ms. Dawson's work arose, they were "brought to the attention of the Commissionaire Camp Borden supervisor, Lieutenant Yeo; (iii) Lieutenant Yeo, in turn summoned Ms. Dawson and questioned and reprimanded her, both orally and in writing; (iv) "[t]hose were the reprimands that Ms. Dawson challenged"; and (v) Ms. Dawson was discharged from her employment by CGL, ostensibly for failing to attend meetings with Lieutenant Yeo and Mr. Day, respectively. In addition, CGL is the entity against whom Ms. Dawson filed her complaint of unjust dismissal, and the Adjudicator recognized that Ms. Dawson's placement with the PRETC Orderly Room at Camp Borden was effected through the NMSO, an agreement between CGL and the federal government. The Adjudicator also recognized that when Ms. Dawson was ordered by Lieutenant Yeo to vacate her position at PRETC, this did not mean that she was removed from her position as a Commissionaire.

[48] In addition, Ms. Dawson did not contest Mr. Day's evidence that, "when [she] was employed by CGL she shared the following key features of her employment in common with all other provincially regulated CGL employees:

a) The same hiring and pre-employment training process,

b) She was paid under the same payroll system as other CGL employees,

c) She was subject to transfer between sites to meet client requirements at CGL discretion,

d) She was covered by the same benefits plan as other CGL employees,

e) She was subject to the same uniform regulations as other CGL employees, and

f) She was subject to the same CGL policies and procedures."

[49] Collectively, these facts, together with the terms of her employment agreement and section 2.7 of the NMSO, discussed below, distinguish the case at bar from the "true employer" cases relied upon by Ms. Dawson, namely, *Plante v Entreprises Réal Caron Ltée*, [2007] FCJ No 1617; and *BFI Canada Inc (Re)*, [2004] ALRBD No 63.

[50] Based on the foregoing, I do not accept Ms. Dawson's position that: (i) CGL was not the relevant entity for the purposes of the application of the first step in the test adopted in the majority decision in *NIL/TU,O*, above; or (ii) she should be viewed as having, in essence, been a subsidiary of a federal undertaking, namely, the military.

[51] In my view, the application of the first step of the test articulated by Justice Abella in *NIL/TU,O*, above, demonstrates that CGL is not a federal undertaking, service or business. In short, leaving aside "exceptional or casual factors" (*NIL/TU,O*, above, at para 14), the normal or habitual activities of CGL include the following activities that were recognized in the Adjudicator's decision:

- CGL is a not-for-profit Ontario Corporation;
- it operates in an area from Bowmanville to Sarnia and to Perry Sound;
- its business bears some similarities to that of an employment agency;
- historically, its primary purpose has been to find and to provide meaningful work for veterans and the RCMP, although it now offers Commissionaire services to other types of clients;
- its clients apply to it for workers, usually with specified skills, often for an unspecified period of time;
- CGL sometimes maintains a pool of such persons who are often previously vetted and approved to fill requested vacancies;
- CGL establishes perspective employee pools in response to employment demand;
- in the past, that demand centered on security work, but it has since broadened to include clerical, dispatch, parking enforcement, fingerprinting and security consulting; and
- contracts between CGL and its employees specifically provide for the application of the *Ontario Employment Standards Act*.

[52] Based on the foregoing, I have no difficulty concluding that CGL is not a federal undertaking, service or business.

[53] My conclusion in this regard is reinforced by the following, uncontested evidence that was adduced in the context of the present application. In particular, Ms. Dawson's employment agreement with CGL, dated August 16, 2007, provides among other things, that she will "engage [herself] as a Commissionaire (security guard), to undertake all ordinary duties of a Commissionaire/security guard, and to accept any situation to which [she] may be assigned." That agreement also provides that "[h]ours in excess of 88 in a two-week pay period are subject to overtime payments in accordance with the *Ontario Employment Standards Act*."

[54] In addition, paragraph 2.7 of the NMSO, signed by CGL and the federal government, states as follows:

> The Corps in engaged by Her Majesty as an independent Contractor for the sole purpose of providing these services. Neither the Corps nor any of its personnel is an employee, servant or agent of Her Majesty. Departments and Agencies must be satisfied that an employer-employee relationship will not result when they enter into a contract for Commissionaire Services. When in doubt, before entering into a contract for the services of a Commissionaire, Department and Agencies should seek the advice of their legal adviser to ensure that there will be no employer-employee relationship in any resulting contract. **The Member Division of the Corps is solely responsible for supervisory duties such as scheduling work in accordance with the period of coverage requested, making final decisions with regard to the promotion and payment of wages to Commissionaires, enforcing disciplinary measures, etc.** (Emphasis in original)

[55] In summary, there is nothing about the nature, operations or habitual activities of CGL which might allow it to be considered to be a federal undertaking, business or service (*Four B*, above, at 1046).

[56] Even if it could be said that some of the work performed by Ms. Dawson was integral to the military, in the sense contemplated by the minority judgment in *NIL/TU,O*, above, I am satisfied

that such work can fairly be construed as having been exceptional, relative to CGL's habitual activities (*NIL/TU,O*, above, at paras 14 and 53-54; *Northern Telecom*, above, at 135), such that it would not render CGL a federal undertaking, business or service.

[57] That said, I am satisfied that the work performed by Ms. Dawson was not integral to the military. In short, it cannot be said that the military was in any way dependent on Ms. Dawson's services (*Central Western Railway*, above, at 1142 and 1143). This is confirmed by the evidence that she was not replaced after she vacated her position at PRETC. Lieutenant Yeo also testified that he was advised by the client (PRETC) that it would rather do without a Commissionaire than continue to retain Ms. Dawson's services.

[58] Even accepting, subject to my comments at paragraph 34 above, the Adjudicator's findings on the contested issues of Ms. Dawson's required level of security clearance and whether her work included the administration of payroll and related to processes for governing the movement of military personnel, I find that her work was largely clerical in nature. This is reflected in the following description of her work that she provided at paragraph 11 of her affidavit dated December 21, 2007:

> I was hired by PRETC to work in the Orderly Room because I had the knowledge and skill to assist the military personnel in completing the necessary forms, including travel claims and expenses and the documentation that they were required to submit. I would also ensure that they had completed their Wills and Last Testaments before being sent to other units. I averaged 50 to 100 of these recruits every Monday. I also dealt with the mail register for 50 to 500 military personnel who were students, handled a separate PRETC file for the Kingston Base and handled intake and out-clearances at each arrival at PRETC.

[59] Likewise, in her initial written submissions, she stated that she "was hired by PRETC to work in the Orderly Room because she had the requisite knowledge and skill to assist military personnel in completing administrative forms for claims and handling administrative matters." In her supplementary submissions, she stated that she "was recruited by the Department of National Defence to work as a clerk within the Orderly Room of PRETC."

[60] In short, Ms. Dawson's duties, "while important and even necessary, [were] not vital, essential or integral to the core undertaking of" the military (*The British Columbia Corps of Commissionaires (the "Corps") v Public Service Alliance of Canada, Local No. 05/20500 (the "Union")*, BCLRB No. B184/2001, 2001 CanLII 33010, at para 37).

[61] Given my finding that CGL is not a federal undertaking, it is not necessary to consider whether provincial regulation of its labour relations, including with Commissionaires it places with the military, would impair the core of the federal head of power over "militia, military and naval service, and defence", as set forth in subsection 91(7) of the *Constitution Act, 1867*.

[62] That said, I agree with CGL that there is nothing in the Arbitrator's decision that could support a conclusion that the "core" of this federal head of power would be impaired by provincial regulation of CGL's labour relations.

[63] At the end of his treatment of the jurisdictional issue, the Adjudicator rejected CGL's position that applying federal jurisdiction to Ms. Dawson's complaint against CGL "might open the door for significant jurisdictional disputes". I do not agree with the Adjudicator's position. To conclude that federal jurisdiction exists in this matter would require significantly expanding the test

for establishing the existence of such jurisdiction to something similar to the test that the Adjudicator applied.

[64] Such an approach would not only be contrary to both the majority and minority decisions in *NIL/TU,O*, above, it would also be inconsistent with the longstanding approach of narrowly interpreting the scope of the exception to the principle that labour relations are presumptively a provincial matter.

[65] Indeed, such an approach would create significant scope for the types of situations that Justice Beetz, speaking for the majority in *Construction Montcalm Inc v Quebec (Minimum Wage Commission)*, [1979] 1 SCR 754, at 776, wished to avoid when he observed:

> In submitting that it should have been treated as a federal undertaking for the purposes of its labour relations while it was doing construction work on the runways of Mirabel, Montcalm postulates that the decisive factor to be taken into consideration is the one work which it happened to be constructing at the relevant time rather than the nature of its business as a going concern. What is implied, in other words, is that the nature of a construction undertaking varies with the character of each construction project or construction site or that there are as many construction undertakings as there are construction projects or construction sites. The consequences of such a proposition are far reaching and, in my view, untenable: constitutional authority over the labour relations of the whole construction industry would vary with the character of each construction project. This would produce great confusion. For instance, a worker whose job it is to pour cement would from day to day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he pours cement one day on a runway and the other on a provincial highway. I cannot be persuaded that the Constitution was meant to apply in such a disintegrating fashion.

VI. Costs

[66] The parties agreed that, subject to the exercise of the Court's discretion, the amount of costs, including disbursements, payable by the unsuccessful party should be fixed at $5,000. Particularly having regard to the fact that CGL raised the jurisdictional issue when it initially received Ms. Dawson's complaint and again at the outset of the hearings before the Adjudicator, I am satisfied that this is an appropriate amount to award against Ms. Dawson.

VII. Conclusion

[67] The application for judicial review is granted. The Adjudicator's decision will be quashed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is granted. The Adjudicator's decision dated June 14, 2010 is quashed.

2. Ms. Dawson shall pay to CGL costs in the amount of $5,000.00.

3. The following passages shall be struck from the affidavit of Mr. Phillip Day, sworn on August 5, 2010:

   a) The first and last sentences in paragraph 7.

   b) The following words in paragraph 12: "Dr. Baum's reasons failed to consider" – these shall be replaced with the words "There was".

   c) Paragraph 13.

   d) The first sentence in paragraph 14.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Landon P. Young	FOR THE APPLICANT
Hugh Pattison	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stringer Brisbin Humphrey Management Lawyers Toronto, Ontario	FOR THE APPLICANT
Hugh Pattison Barrister and Solicitor Toronto, Ontario	FOR THE RESPONDENT