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Reasons for decision

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation; Pharmaprix, Shoppers Drug Mart Inc.; Les services Santé Claude Gervais Inc.; Entreprise David Tan Inc.; Gestion Noura A. Shahid Inc.; Gestions Fortier-Allan Inc.; 2321-5510 Québec Inc.,

employers,

and

Uniprix Inc.; 3908852 Canada Inc.; Bishara Pharma Inc.; Société J. Lacroix Inc.; Gestion Morico Inc.; Louise Fortin Paquette Pharmacienne; Familiprix Inc.; Groupe Hébert, Ferlatte Inc.; Gingras, Hébert et Associés, Pharmaciens General Partnership; Hébert et Associé, Pharmaciens, General Partnership; Charest-Pharma Inc.; St-Louis Pharma Inc.; Pointe Ste-Foy Pharma Inc.; Hébert, Ferlatte et Associés, Pharmaciens, General Partnership; Pharmacie Sylvie Champagne Pharmacien Inc.; Pharmacie Mathieu Sabourin et Mathieu Labonté Pharmaciens Inc.,

interested parties.

Board File: 27977-C

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation; Pharmaprix, Shoppers Drug Mart Inc.; Les entreprises Kim Luu Inc.; Les gestions Magdi Tebechrani Inc.; 9183-0067 Québec Inc.; Service de Gestion Jean-Michel Guillotte Inc.; 9159-8532 Québec Inc.,

employers,

and

Uniprix Inc.; 3908852 Canada Inc.; Bishara Pharma Inc.; Société J. Lacroix Inc.; Gestion Morico Inc.; Louise Fortin Paquette Pharmacienne; Familiprix Inc.; Groupe Hébert, Ferlatte Inc.; Gingras, Hébert et Associés, Pharmaciens General Partnership; Hébert et Associé, Pharmaciens, General Partnership; Charest-Pharma Inc.; St-Louis Pharma Inc.; Pointe Ste-Foy Pharma Inc.; Hébert, Ferlatte et Associés, Pharmaciens, General Partnership; Pharmacie Sylvie Champagne Pharmacien Inc.; Pharmacie Mathieu Sabourin et Mathieu Labonté Pharmaciens Inc.,

interested parties.

Board File: 27978-C

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation; Pharmaprix, Shoppers Drug Mart Inc.; Gestions Lucap Inc.; 9070-4701 Québec Inc.; Carophil Inc.; Gestion Lise Hamel-Chartrand Inc.; Gestion Riteal Inc.; La corporation de gestion E.A. Michot,

employers,

and

Uniprix Inc.; 3908852 Canada Inc.; Bishara Pharma Inc.; Société J. Lacroix Inc.; Gestion Morico Inc.; Louise Fortin Paquette Pharmacienne; Familiprix Inc.; Groupe Hébert, Ferlatte Inc.; Gingras, Hébert et Associés, Pharmaciens General Partnership; Hébert et Associé, Pharmaciens, General Partnership; Charest-Pharma Inc.; St-Louis Pharma Inc.; Pointe Ste-Foy Pharma Inc.; Hébert, Ferlatte et Associés, Pharmaciens, General Partnership; Pharmacie Sylvie Champagne Pharmacien Inc.; Pharmacie Mathieu Sabourin et Mathieu Labonté Pharmaciens Inc.; Gestion H.B. Duyen Nguyen (2010) Inc.,

interested parties.

Board File: 27979-C

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation; Pharmaprix, Shoppers Drug Mart Inc.; 9186-9750 Québec Inc.; Gestion Christian Duguay Inc.; 9195-9965 Québec Inc.; Les gestions Syl-Von Inc.; Gestion Réjean Mimeault Inc.; Entreprises AD Sidera Inc.; 9209-3152 Québec Inc.,

employers,

and

Uniprix Inc.; 3908852 Canada Inc.; Bishara Pharma Inc.; Société J. Lacroix Inc.; Gestion Morico Inc.; Louise Fortin Paquette Pharmacienne; Familiprix Inc.; Groupe Hébert, Ferlatte Inc.; Gingras, Hébert et Associés, Pharmaciens General Partnership; Hébert et Associé, Pharmaciens, General Partnership; Charest-Pharma Inc.; St-Louis Pharma Inc.; Pointe Ste-Foy Pharma Inc.; Hébert, Ferlatte et Associés, Pharmaciens, General Partnership; Pharmacie Sylvie Champagne

Pharmacien Inc.; Pharmacie Mathieu Sabourin et
Mathieu Labonté Pharmaciens Inc.,

interested parties.

Board File: 27980-C

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation; Pharmaprix, Shoppers
Drug Mart Inc.; 9013-5617 Québec Inc.; 2970-9177
Québec Inc.; 9199-8468 Québec Inc.; Entreprises
Jami Elate Inc.; 7302622 Canada Inc.,

employers,

and

Uniprix Inc.; 3908852 Canada Inc.; Bishara
Pharma Inc.; Société J. Lacroix Inc.; Gestion
Morico Inc.; Louise Fortin Paquette Pharmacienne;
Familiaprix Inc.; Groupe Hébert, Ferlatte Inc.;
Gingras, Hébert et Associés, Pharmaciens General
Partnership; Hébert et Associé, Pharmaciens,
General Partnership; Charest-Pharma Inc.; St-Louis
Pharma Inc.; Pointe Ste-Foy Pharma Inc.; Hébert,
Ferlatte et Associés, Pharmaciens, General
Partnership; Pharmacie Sylvie Champagne
Pharmacien Inc.; Pharmacie Mathieu Sabourin et
Mathieu Labonté Pharmaciens Inc.,

interested parties.

Board File: 27981-C

Neutral Citation: 2013 CIRB **690**

July 3, 2013

The Canada Industrial Relations Board (the Board), composed of Ms. Louise Fecteau, Vice-Chairperson, and Messrs. Patrick J. Heinke and Norman Rivard, Members, considered the above-noted files.

Appearances

Mr. Jean-François Beaudry and Ms. Stéphanie Lindsay, for the Canadian Union of Postal Workers;

Messrs. Luc Beaulieu and Lukasz Granosik, for the Canada Post Corporation;

Mr. Guy Lemay, Ms. Josiane L'Heureux and Mr. Guy Lavoie, for Pharmaprix, Shoppers Drug Mart Inc.;

Mr. Richard Lacoursière, for Les services Santé Claude Gervais Inc., Gestion Noura A. Shahid Inc., and Gestions Fortier-Allan Inc.;

Messrs. Christopher Deehy and Shawn Connely, for Entreprise David Tan Inc., and 2321-5510 Québec Inc.;

Ms. Sylvie Thibault, for 9070-4701 Québec Inc., 9183-0067 Québec Inc., 9159-8532 Québec Inc., and Carophil Inc.;

Mr. Paul A. Venne, for Service de Gestion Jean-Michel Guillotte Inc.;

Mr. Shai Mergui, for Gestion Lucap Inc.;

Ms. Nancy Boyle, for Gestion H.B. Duyen Nguyen (2010) Inc., and Gestion Riteal Inc.;

Messrs. Louis-Philippe Bourgeois and Louis-Philippe Taddeo, for La corporation de gestion E.A. Michot;

Mr. Marc Charland, for Les entreprises Kim Luu Inc., and Les gestions Magdi Tebechrani Inc.;

Mr. Sylvain Lefebvre and Ms. Amélie Fahey, for Gestion Christian Duguay Inc., 9195-9965 Québec Inc., 9186-9750 Québec Inc., Entreprises AD Sidera Inc., Gestion Réjean Mimeault Inc., and Gestion Christian Duguay Inc.;

Mr. Pierre Martel, for Les gestions Syl-Von Inc., and Entreprises Jami Elate Inc.;

Ms. Marie Garel and Mr. Jean-René Ranger, for 9199-8468 Québec Inc.;

Mr. David Banon, for 7302622 Canada Inc.;

Ms. Annie Francescon, for Uniprix Inc.;

Messrs. Philippe-André Tessier and Jean-Denis Boucher, for 3908852 Canada Inc., Bishara Pharma Inc., Société J. Lacroix Inc., Gestion Morico Inc., and Louise Fortin Paquette Pharmacienne;

Mr. Jacques Reeves, for Familiprix Inc.;

Mr. Simon-Pierre Hébert, for Groupe Hébert, Ferlatte Inc., Gingras, Hébert et Associés, Pharmaciens General Partnership, Charest-Pharma Inc., St-Louis Pharma Inc., Pointe Ste-Foy Pharma Inc., and Hébert, Ferlatte et Associés, Pharmaciens, General Partnership;

Mr. Dany Milliard, for Pharmacie Sylvie Champagne Pharmacien Inc.;

Mr. Luc Jobin, for Pharmacie Mathieu Sabourin et Mathieu Labonté Pharmaciens Inc.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson.

I. Nature of the Applications

[1] Five applications for certification were filed at the same time by the Canadian Union of Postal Workers (CUPW or the union) on February 26, 2010, pursuant to section 24 of the *Canada Labour Code (Part I—Industrial Relations)* (the *Code*), and five single employer declaration applications were filed pursuant to section 35 of the *Code*. The union is seeking certification to represent employees working at postal outlets in various Pharmaprix, Shoppers Drug Mart Inc. (Pharmaprix) drug store franchises (the franchisees) located within a given geographic area. The union indicates that the Canada Post Corporation (the CPC or Canada Post) is the employer of the postal outlet employees. Alternatively, it submits that the CPC, Pharmaprix and the franchisees comprise a single employer in each of the files. The employers affected by the applications, by the five geographic areas covered in the five files in this matter, are the following:

[2] **File 27977-C:** the CPC, Pharmaprix, Les services Santé Claude Gervais Inc., Entreprise David Tan Inc., Gestion Noura A. Shahid Inc., Gestions Fortier-Allan Inc., and 2321-5510 Québec Inc.

[3] **File 27978-C:** the CPC, Pharmaprix, Les entreprises Kim Luu Inc., Les gestions Magdi Tebechrani Inc., 9183-0067 Québec Inc., Service de Gestion Jean-Michel Guillotte Inc., and 9159-8532 Québec Inc.

[4] **File 27979-C:** the CPC, Pharmaprix, Gestions Lucap Inc., 9070-4701 Québec Inc., Carophil Inc., Gestion Lise Hamel-Chartrand Inc. (now Gestion H.B. Duyen Nguyen (2010) Inc.), Gestion Riteal Inc., and La corporation de gestion E.A. Michot.

[5] **File 27980-C:** the CPC, Pharmaprix, 9186-9750 Québec Inc., Gestion Christian Duguay Inc., 9195-9965 Québec Inc., Les gestions Syl-Von Inc., Gestion Réjean Mimeault Inc., Entreprises AD Sidera Inc., and 9209-3152 Québec Inc.

[6] **File 27981-C:** the CPC, Pharmaprix, 9013-5617 Québec Inc., 2970-9177 Québec Inc., 7302622 Canada Inc. (or 139273 Canada Inc.), 9199-8468 Québec Inc., and Entreprises Jami Elate Inc.

II. Procedural Directions

[7] This decision deals with the issue of the Board's constitutional jurisdiction, which was raised from the outset by the CPC, Pharmaprix and the franchisees in all five files in this matter. Those parties submitted that the operations of the postal outlets of the franchisees concerned were provincially regulated. A total of 28 franchisees are affected by the five files. Given this large number, the franchisees agreed to identify themselves as fitting into one of three operational and organizational work "models." A document titled "Admissions on the constitutional issue" (translation) was accordingly entered into evidence on May 15, 2012 (document signed by all the franchisees and submitted to the Board on May 18, 2012). The union gave its consent to the document on May 22, 2012. The structural "models" into which the franchisees were divided are based on the evidence adduced by the franchisees at the hearings.

[8] **Model A** (based on the structure of Carophil Inc.) includes: Gestion Riteal Inc.; 2970-9177 Québec Inc., 9195-9965 Québec Inc.; Carophil Inc.; Gestions Magdi Tebechrani Inc.

[9] **Model B** (based on the structure of Service de Gestion Jean-Michel Guillotte Inc.) includes: Entreprises Kim Luu Inc.; Gestion Lise Hamel-Chartrand Inc. (now Gestions H.B. Duyen Nguyen (2010) Inc.); Gestions Syl-Von Inc.; Entreprises AD Sidera Inc.; 9070-4701 Québec Inc.; 9209-3152 Québec Inc.; Gestions Lucap Inc.; Service de gestion Jean Michel Guillotte Inc.; 9013-5617 Québec Inc.; 9159-8532 Québec Inc.; Gestion Christian Duguay Inc.; Entreprises David Tan Inc; 9186-9750 Inc.; 9199-8468 Québec Inc.; Gestion Noura A. Shahid Inc.; Entreprises Jami Elate Inc.

[10] **Model C** (based on the structure of Les services Santé Claude Gervais Inc. and Gestion Réjean Mimeault Inc.) includes: 139273 Canada Inc.; Services Santé Claude Gervais Inc;

Gestions Fortier-Allan Inc.; Gestion Réjean Mimeault Inc.; La corporation de gestion E.A. Michot; 2321-5510 Québec Inc.; 9183-0067 Québec Inc.

[11] The Board also addressed the issue of the true employer, which was added in the course of the proceedings in the context of a procedural decision made on June 20, 2011. The Board ruled that it could not determine the issue of constitutional jurisdiction without first identifying the true employer of the postal outlet employees covered by the certification applications. In the Board's view, the two issues were closely related and had to be considered together.

[12] In view of the significance of the evidence presented by the union regarding the issue of the true employer in the five files, the time frames and the costs incurred, and in view of the importance of ensuring the sound administration of justice, the Board decided that it would begin by hearing the evidence on the true employer in file no. 27977-C. The other four files were accordingly placed in abeyance until the Board could rule on the constitutional issue and the issue of the true employer in file no. 27977-C. Of note, however, is that the parties' evidence regarding the constitutional issue was completed for all five files.

[13] In addition, on November 24, 2011, the parties to file no. 27977-C entered into evidence admissions of facts relating to the issue of the true employer.

[14] Of note also is that the CPC raised several other preliminary objections. The Board informed the parties that it would rule on those objections if necessary after ruling on the constitutional issue and the issue of the true employer. Further, in a procedural decision issued on October 20, 2011, the Board decided that it would deal with the union's alternative application for a single employer declaration in file no. 27977-C only if necessary after it ruled on the constitutional issue and the issue of the true employer in that file. The Board moreover indicated that it might be able to rule on the application based on the documentation on file and the evidence already heard on the constitutional issue and the issue of the true employer.

[15] Seventeen (17) days of hearing were held on the constitutional issue and the issue of the true employer, on December 6, 8 and 10, 2010, April 27, 2011, May 9, 2011, June 8, 9, 10 and 20, 2011, October 20, 2011, November 24 and 25, 2011, April 26, 2012, and May 14, 15, 30 and 31,

2012. The parties then filed written arguments on the two issues and the Board reserved judgment on December 6, 2012.

III. Interim Decisions

[16] The Board issued a number of interim decisions in these cases, either prior to or in the course of the proceedings:

- On June 14, 2010, the Board issued *Canada Post Corporation*, 2010 CIRB LD 2369 (LD 2369), in which it dismissed a preliminary objection by the CPC, Pharmaprix and all of the franchisees whereby they sought to have the union's applications dismissed, alleging that they did not meet the requirements of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*), in particular sections 10(d) and (e) thereof. The applications for reconsideration of that decision were dismissed by the Board in *9013-5617 Québec Inc.*, 2010 CIRB LD 2449.
- On October 20, 2010, the Board issued *Canada Post Corporation*, 2010 CIRB LD 2447 (LD 2447), in which it granted (limited) interested party status to Uniprix and the Uniprix franchisees only within the context of determining the Board's constitutional jurisdiction.
- On April 8, 2011, the Board issued *Canada Post Corporation*, 2011 CIRB LD 2531 (LD 2531), in which it granted (limited) interested party status to Familiprix and Familiprix franchisees only within the context of determining the Board's constitutional jurisdiction.
- On June 7, 2011, the Board issued *Canada Post Corporation*, 2011 CIRB LD 2575 (LD 2575), in which it dismissed a request made by the CPC with respect to giving notice to third parties pursuant to section 11(1) of the *Regulations*.
- On March 22, 2012, the Board issued *Canada Post Corporation*, 2012 CIRB 638 (RD 638), which dealt with the admissibility as evidence of an expert report (the Seid report). The Board ruled that the expert report was admissible in part. It allowed the part pertaining to the business rules applicable to franchises and concessions.

- On May 3, 2012, the Board issued an oral decision, which it confirmed in writing in *Canada Post Corporation*, 2012 CIRB LD 2789 (LD 2789), in which it dismissed a non-suit motion filed by the CPC on the ground that it was not the true employer.

[17] In addition, a large number of confidentiality orders were issued in these cases throughout the introduction of evidence by the parties.

IV. Oral Evidence

[18] A large number of witnesses were heard during the hearings:

- For the union: Mr. Jacques Côté, Chief Operating Officer, CPC; Mr. Louis F. O'Brien, Chief Customer Officer, CPC; Mr. Frank Cianciullo, Director, Retail Business, CPC; Mr. Alain Bouvier, Director, Collection and Delivery Operations, CPC; Ms. Stéphanie Cadieux, student, formerly a postal outlet employee in a drug store operated by Gestion Noura A. Shahid Inc.; Ms. Johanne Rousseau, Postal/Wicket Clerk and Team Leader, CPC; Ms. Aline Dumouchel, Postal Outlet Manager, Les services Santé Claude Gervais Inc.; Ms. Linda Boissonneau, Retail Manager, CPC; Mr. David Tan, Owner-Pharmacist, Entreprise David Tan Inc.; Ms. Monique Turgeon, Postal Outlet Manager, Entreprise David Tan Inc.; Claude Gervais, Owner-Pharmacist, Les services Santé Claude Gervais Inc.
- For Pharmaprix: Mr. Terrance Landry, Senior Vice-President, Special Projects, Pharmaprix.
- For the franchisees: Mr. Claude Gervais, Owner-Pharmacist, Les services Santé Claude Gervais Inc.; Ms. Julie Moreau, Store Manager, Les services Santé Claude Gervais Inc.; Mr. Nabil Chikh, Owner-Pharmacist, Carophil Inc.; Mr. Marc Rousseau, Store Manager, Gestion Réjean Mimeault Inc.; Mr. David Bouhier, Store Manager, Service de Gestion Jean-Michel Guillotte Inc.; Ms. Yvonne Khamla, Owner-Pharmacist, Gestion Réjean Mimeault Inc.; Ms. Sophie Robert, Cosmetics Counter Manager, Les services Santé Claude Gervais Inc.

- For the CPC: Mr. Frank Cianiullo, Director, Retail Business, CPC; Mr. Alain Bouvier, Director, Collection and Delivery Operations, CPC; Mr. Louis Illiakis, Retail Point-of-Sale (RPS) Operator; and Mr. Michael Seid, Franchise Consultant.

V. Background and Facts

[19] In the instant case, the Board must determine whether or not it has the constitutional jurisdiction to entertain the application for certification filed pursuant to section 24 of the *Code* in file no. 27977-C. In its application, the union is seeking certification to represent the employees working at the postal outlets located in the drug stores identified in that file. The CPC is a corporation established under the *Canada Post Corporation Act*, R.S.C., 1985, c. C-10 (the CPC Act). In 1987, the CPC introduced an Authorized Dealer Program under which the CPC and Shoppers Drug Mart Inc. (Shoppers) entered into a Master Dealership Agreement on April 27, 2009, to introduce postal outlet dealers into drug store franchises. Pursuant to that master agreement, the CPC granted Shoppers (and Pharmaprix in Quebec) the right to authorize certain franchisees, including those covered by the certification applications in this matter, to operate postal outlets in their drug stores.

[20] Shoppers is incorporated under the laws of Canada and is authorized to issue licences to operate businesses using the Shoppers system outside Quebec. Pharmaprix is a wholly-owned subsidiary of Shoppers and is authorized by Shoppers to issue licences in Quebec to operate retail businesses using the Pharmaprix system and trademark.

[21] Based on the evidence, the franchisees in this matter are all parties to a licensing agreement with Pharmaprix and are authorized to operate their respective businesses using the Pharmaprix trademark. Under a recognition agreement, Pharmaprix has moreover granted the franchisees a revocable licence to operate postal outlets in their drug stores.

VI. Analysis and Decision

[22] According to the union, in this matter, the operations of the postal outlets located in the franchisees' drug stores come directly within a class of subject under exclusive federal jurisdiction, that is, "postal service." Section 91(5) of the *Constitution Act, 1867* provides as follows:

91. ... it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:

...

5. Postal Service.

[23] The union accordingly submits that labour relations for employees working in the franchisees' postal outlets come directly under federal jurisdiction.

[24] The CPC, Pharmaprix and the franchisees, however, are all of the view that the Board does not have constitutional jurisdiction to rule on the union's certification applications. They raise two main points in support of their arguments. The first is that the postal outlet operations are not a "postal service" within the meaning of section 91(5) of the *Constitution Act, 1867*. They argue that there are accordingly no federal operations involved and so the labour relations of the franchisees concerned cannot be federally regulated in the instant cases.

[25] The second point raised by the employers is that, even if the Board were to find that the operations of the franchisees' postal outlets do fall within the jurisdiction provided for under section 91(5) of the *Constitution Act, 1867*, the franchisees concerned remain provincially regulated businesses, in keeping with the teachings of the Supreme Court of Canada, such as in *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23.

A. Operations of the Franchisees' Postal Outlets

[26] The CPC presented extensive evidence in an effort to prove that the franchisees are actually merely resellers of CPC products and services and do not perform the functions required to qualify as operators of a postal service within the meaning of the CPC Act. It refers the Board in particular to sections 5(1) and 14(1) of that Act, arguing that the CPC has sole and exclusive responsibility for establishing and operating a postal service for the **collection, transmission and delivery** of messages, information, funds and goods both domestically and internationally. The sections in question read as follows:

5. (1) The objects of the Corporation are:

(a) to establish and operate a postal service for the collection, transmission and delivery of messages, information, funds and goods both within Canada and between Canada and places outside Canada;

(b) to manufacture and provide such products and to provide such services as are, in the opinion of the Corporation, necessary or incidental to the postal service provided by the Corporation; and

(c) to provide to or on behalf of departments and agencies of, and corporations owned, controlled or operated by, the Government of Canada or any provincial, regional or municipal government in Canada or to any person services that, in the opinion of the Corporation, are capable of being conveniently provided in the course of carrying out the other objects of the Corporation.

...

14. (1) Subject to section 15, the Corporation has the sole and exclusive privilege of collecting, transmitting and delivering letters to the addressee thereof within Canada.

[27] The CPC, along with Pharmaprix and the franchisees, submits that the franchisees do not in any way operate a postal service. In its view, the franchisees are merely points of contact for the public, delivering services that are authorized by the CPC in the same way as are the services delivered by operators of convenience stores, Costco and grocery stores, referring to the sale of stamps, for example.

[28] According to the CPC, “postal service” in the constitutional sense does not start until the items are collected by CPC staff. Therefore, in the CPC’s view, depositing a letter in a postal outlet would be considered pre-collection rather than collection. In making this argument, it relies on the testimony of Mr. Alain Bouvier, Director, Collection and Delivery Operations, CPC, who testified at length in this regard to explain to the Board what collection, transmission and delivery entail.

[29] The union disagrees. In its view, the exclusive authority of the Parliament of Canada extends to the operations of the franchisees’ postal outlets and so the franchisees’ labour relations may be subject to federal legislation. The union refers the Board to two decisions of the Federal Court of Appeal, in *Canada Post Corporation v. Canadian Union of Postal Workers* [1989] 1 F.C. 176 (C.A.); and *TurnAround Couriers Inc. v. Canadian Union of Postal Workers*, 2012 FCA 36 (*TurnAround*), as well as a decision of the Supreme Court of Canada, in *Reference Re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248, arguing that the “postal service” contemplated in section 91(5) of the *Constitution Act, 1867* includes the operations of the postal outlets of the franchisees in this matter.

[30] In the recent decision of the Federal Court of Appeal in *TurnAround*, *supra*, the Court considered whether TurnAround’s operations, which entailed collecting, transporting and

delivering, for a fee, time-sensitive letters and small packages in the Toronto area by bicycle or on foot, constituted a “postal service” within the meaning of section 91(5) of the *Constitution Act, 1867*. The Board had held in that matter that TurnAround was providing a “postal service” within the meaning of section 91(5) of the *Constitution Act, 1867* and that its operations therefore fell within federal jurisdiction.

[31] The Court found that TurnAround’s operations were independent of any contract or other type of relationship with the CPC and that its services were neither offered nor included in the statutory monopoly of the CPC. The Court accordingly set aside the Board’s decision. In its analysis in *TurnAround, supra*, the Court referred to a specialist’s description of the essential characteristics of the postal service in Canada, which it summarized as follows:

[47] First, the service is universal and available to all. In other words, the CPC must collect mail from anywhere in Canada and deliver it to any address in Canada, and must accept any items up to a certain weight that customers want to have delivered.

[48] Second, the service is affordable by all. In particular, the cost of the service does not depend on the remoteness of the location to which mail is to be delivered. In practice, this means that postal service in high-density areas subsidises the service provided in areas that are less populated and further removed from the major conurbations.

[49] Third, the service requires a national operational network in order to discharge the obligations of universal service, availability, and affordability. The network includes post offices and sorting plants, a national system of addresses and postal codes, and a payment system (generally a system of prepayment through the sender’s purchase of the necessary stamps).

[50] Fourth, the postal service must be operated or regulated by a national, governmental entity in order to ensure that the necessary requirements of a national service are in place and the network supporting it is working properly. Currently, the CPC, a Crown corporation, performs this role. Even if Parliament decided to turn the operational functions of the CPC over to one or more commercial corporations, a public authority would still be required to regulate the service in order to ensure that it retained the defining attributes of a national postal service, thereby discharging Canada’s international obligations.

[51] Fifth, in order to facilitate the international transmission and delivery of mail, the Treaty of Bern of 1874 established the General Postal Union, subsequently called the Universal Postal Union (UPU).

The UPU’s formation integrated a series of national postal services into one coherent and remarkably efficient and effective international postal service.

(Campbell affidavit, CPC’s Application Record, p. 17)

The UPU is now an agency of the United Nations. Only a national service can discharge Canada’s international obligation to meet the postal service standards established by the UPU.

[52] It hardly needs saying that TurnAround has none of these characteristics of a postal service.

[53] **Purposes:** The purposes served by section 91(5) in conferring exclusive legislative competence on Canada with respect to “Postal Service” are to be found largely in the characteristics described above. A national postal service was a necessity for the economic development of Canada, and performed an important nation-building role: see CPC’s Application Record, pp. 44-49; *The Politics*

of *Post*, at 27-32. These purposes could only be achieved by vesting the necessary legislative authority in the federal Parliament.

3. Application to this case

[54] The considerations examined above in my opinion indicate that “Postal Service” in section 91(5) refers to the national delivery system, which is currently either operated directly by the CPC or managed by it through contracts with other entities.

(emphasis added)

[32] In the instant matter, the Board is of the view that, while the operations of the franchisees’ postal outlets may not in themselves constitute “postal service” within the meaning of section 91(5) of the *Constitution Act, 1867*, they are an integral part of the CPC’s postal service described in *TurnAround, supra*. The fact that the postal outlets do not carry out all of the collection, transmission and delivery operations for which the CPC is responsible does not preclude recognition that their operations may, in a derivative manner, form an integral part of the CPC’s postal service.

[33] Unlike the situation in *TurnAround, supra*, where there was no connection with the CPC, the franchisees in this matter have tangible connections with it, through the Master Dealership Agreement signed on April 27, 2009, between Shoppers and the CPC, which allows them to operate postal outlets in their respective drug stores. The Master Dealership Agreement sets out strict requirements regarding the manner of operation of a postal outlet, and the franchisees comply with those requirements under a “recognition agreement” (translation) that each franchisee signs, recognizing that it has received a copy of all the general provisions and the terms and conditions related to the Master Dealership Agreement and its appendices. The recognition agreement even stipulates that the CPC has the right to amend the general provisions and terms and conditions of the Master Dealership Agreement at any time and that the franchisee agrees to be bound by the amendments.

[34] Section 1.1 of appendix 1 to the Master Dealership Agreement moreover specifically states that the CPC has designed a system for the development, opening and operation of retail outlets specializing in the sale to the public of postage stamps and other “**postal products and services,**” in specially designed and standardized premises using distinctive marketing techniques and equipment.

[35] The evidence also shows that the setup of a postal outlet in a franchisee's drug store, its identification with the Canada Post colours and logo, the equipment, and the products offered for sale, as well as Canada Post quality, service and advertising standards are all supplied and controlled by the CPC. The Retail Point-of-Sale (RPS) system used in postal outlets allows the CPC to remotely record the transactions made in the postal outlets, among other things. Postal outlet sales are moreover included in the CPC's revenues, as confirmed by witness Jacques Côté, Chief Operating Officer, CPC. Further, according to witness Louis F. O'Brien, Chief Customer Officer, CPC, the RPS system is also used in all of the CPC's corporate post offices across Canada.

[36] All of the above leads the Board to conclude that the operations of the franchisees' postal outlets are an integral part of the operation of the CPC's national network. As clearly explained by the Federal Court of Appeal in *TurnAround*, *supra*, the term "postal service" in section 91(5) refers to the national delivery system, which is currently either operated directly by the CPC or "managed by it through contracts with other entities." In the instant matter, the operations of the franchisees' postal outlets are carried out in compliance with the contracts signed with the CPC. While such postal outlets do not constitute a "postal service" per se, they are, as a whole, essential points of contact for the CPC.

[37] The Board will look at derivative jurisdiction from a constitutional perspective a little further on. However, it wishes to emphasize here that the operations of the postal outlets, when isolated, could very well be deemed an integral part of the CPC's postal service and accordingly be subject to derivative federal jurisdiction. This could be true even though the postal outlets do not perform all of the CPC collection, transmission and delivery operations. When, for instance, the Board found in the past that the security guards at Pearson Airport formed a discrete unit that fell within derivative federal jurisdiction, there was no doubt that the security guards in question did not perform all of the operations specific to an airport. Yet that did not prevent the Board from finding that the security services they performed were vital, essential and integral to the operations of Pearson Airport and that they fell within the Board's jurisdiction (see *A.S.P. Incorporated*, 2006 CIRB 368).

[38] Considering the above, the Board's constitutional analysis in this matter cannot end at this stage. In fact, contrary to what the union states in its written submissions, it is not possible to "rely on dissociation of the businesses" (translation) at this stage of the analysis. The union submits that the postal outlets are actually separate entities under direct federal jurisdiction and that, therefore, the constitutional analysis should end here. It argues that the postal outlet employees should fall directly within the Board's jurisdiction despite the fact that the outlets are integrated into drug stores. According to that logic, for example, a group of employees of a retail business such as The Bay or Sears located in Ottawa that handles delivery of furniture in the Gatineau area should fall directly within federal jurisdiction, even though the retail business for which the employees work is clearly provincially regulated, because the employees perform interprovincial transport operations.

[39] Again according to the union, although the Board has determined that it should address the issue of the true employer when considering the issue of constitutional jurisdiction, the characterization of the business as provincial or federal should be decided without regard for the identity, status or legal structure of the employer. Respectfully, the Board disagrees, based on the teachings of the Supreme Court of Canada, which are analyzed in the section below.

B. Constitutional Principles Established by the Supreme Court of Canada

1. Presumption of Provincial Jurisdiction

[40] First, as the Supreme Court of Canada pointed out in *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, labour relations are presumptively a provincial matter because they come within a class of subject that relates to property and civil rights in the province, as provided for under section 92(13) of the *Constitution Act, 1867*.

2. Functional Analysis

[41] Also in *NIL/TU, O Child and Family Services Society, supra*, the Supreme Court explained the approach to be taken in determining constitutional jurisdiction over labour relations. It then brought up the scope of the functional test for determining the nature of the activities of the business as "a going concern":

[12] The approach to determining whether an entity's labour relations are federally or provincially regulated is a distinct one and, notably, entails a completely different analysis from that used to determine whether a particular statute is *intra* or *ultra vires* the constitutional authority of the enabling government. Because the regulation of labour relations falls presumptively within the jurisdiction of the provinces, the narrow question when dealing with cases raising the jurisdiction of labour relations is whether a particular entity is a "federal work, undertaking or business" for purposes of triggering the jurisdiction of the *Canada Labour Code*.

[13] The principles underpinning this Court's well-established approach to labour relations jurisdiction are set out by Dickson J., writing for a unanimous Court, in *Northern Telecom* [*Northern Telecom v. Communication Workers*, [1980] 1 S.C.R. 115]. The case dealt with the jurisdiction of the labour relations of a subsidiary of a telecommunications company which was itself unquestionably a federal "work, undertaking or business" under s. 92(10)(a) of the *Constitution Act, 1867*. Adopting Beetz J.'s majority judgment in *Construction Montcalm* [*Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754], Dickson J. described the relationship between the division of powers and labour relations as follows:

(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one. [p. 132]

[14] He then set out a "functional test" for determining whether an entity is "federal" for purposes of triggering federal labour relations jurisdiction. Significantly, the "core" of the telecommunications head of power was not used to determine, as part of the functional analysis, the nature of the subsidiary's operations:

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity. [Emphasis added; p. 132.]

3. Decision of the Supreme Court of Canada in *Tessier*

[42] In *Tessier, supra*, the Supreme Court of Canada issued a very interesting decision regarding the division of constitutional jurisdiction in the area of labour relations. In that matter, *Tessier* provided crane and heavy equipment rental, intraprovincial road transportation, and equipment maintenance and repair services. Some of its cranes were used for stevedoring operations.

Tessier argued that its stevedoring operations fell within federal jurisdiction over shipping and that it was not, as a result, subject to provincial occupational health and safety legislation. The Supreme Court was then dealing with an appeal from the decision of the Quebec Court of Appeal that provincial legislation applied.

[43] The Supreme Court began by pointing out that the regulation of labour relations is presumptively a provincial matter. However, it then stated that federal jurisdiction over labour relations may apply in two circumstances:

- when the employment relates to a work, undertaking, or business directly under federal jurisdiction (direct jurisdiction);
- when the employment is an integral part of a federally regulated undertaking (derivative jurisdiction).

a. Derivative jurisdiction

[44] The Supreme Court also pointed out that in the case of derivative jurisdiction, as in the case of direct federal labour jurisdiction, it is necessary to assess the business's **essential operational nature** to determine if that ongoing nature renders the work integral to a federal undertaking. According to the Court, the focus of the analysis must be 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 Court stressed that the relationship is to be considered from the perspective of both 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 are to the related work itself. The Court also stated that **exceptional aspects of an enterprise do not determine its essential operational nature**.

[45] The Court indicated that federal labour jurisdiction may be justified within the framework of derivative jurisdiction in two contexts:

- when the services provided to the federal undertaking form the exclusive or principal part of the related work's activities;

- 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 other words, a discrete work unit.

[46] Speaking on behalf of the Court, Abella J. had the following to say in *Tessier, supra*:

[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* [*Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529]; *Letter Carriers' Union of Canada* [*Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178]).

[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* [*Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733], 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:

... the 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.)

C. Application to This Case

1. Undertaking to Be Considered and True Employer

[47] To begin with, it should be noted that the identity of the true employer is important for making the constitutional determination in this matter. In fact, to assess whether or not the postal outlet employees fall within federal jurisdiction, it is necessary to first determine for what undertaking they work. Indeed, before considering the essential operational nature of the undertaking, it is necessary to determine what entity is the “going concern” at issue. It should be noted in that regard that the union maintains that the employer of the postal outlet employees is

the CPC and that the postal outlet is the entity to be considered from a constitutional perspective. The union is moreover of the view that the franchisees are merely intermediaries, playing a kind of agency role with the CPC. It submits that the level of autonomy of the postal outlet employees is very limited and, more importantly, governed by a system that enables the CPC to use third parties (the franchisees) to select and hire the said employees.

[48] Yet section 1.2 of the appendix to the Master Dealership Agreement between the CPC and Shoppers provides that the postal outlet must be located inside a “**pre-existing host business**” and, indeed, all the postal outlets in this matter were introduced into pre-existing drug stores.

[49] Further, the oral evidence indicates that the “going concern” is in fact the drug store and not the postal outlet. The postal outlet is actually a department of the drug store, just as the cosmetics counter and photofinishing service are. According to the evidence on file, its area accounts for no more than five percent of the total area of the drug store. Additionally, according to the evidence heard, the franchisees agreed to operate a postal outlet on their premises because it attracts customers and increases the drug stores’ sales. That is why the postal outlet is located at the back of the retail area. Customers have to walk through the retail area to get to it.

[50] The union did not produce any evidence that might show that the CPC is the true employer of the postal outlet employees. Rather, the evidence on file supports the position of the CPC, Pharmaprix and the franchisees that the franchisees are the true employers of the said employees. It is important to remember here that admissions of facts on the issue of the true employer were entered into evidence in file no. 27977-C. Those admissions indicate the following:

1. (1) Pharmaprix Inc. is authorized by Shoppers Drug Mart Inc. to grant licences in Quebec for the operation of retail outlets using the Pharmaprix Inc. system and trademark.
2. (2) The “**Owner-Pharmacist**” (for the purposes of this decision, the expression is deemed to include the pharmacist as an individual and/or the pharmacist’s management company, depending on the context) who is party to a licence agreement with Pharmaprix Inc. may operate a “**drug store**” using the Pharmaprix trademark.
3. (3) The owner-pharmacists covered by the certification applications in this matter are party to a licensing agreement filed in evidence as **PX-2**.
4. (5) The postal outlets are located in the businesses’ retail stores.
5. (7) Job applications are received from a variety of sources, including resume drop-offs at the drug store by applicants, references, or online applications through the Pharmaprix Website.
6. (13) The wage rate for all of the employees of the drug store (including those assigned to the postal outlet) is determined by the franchisee.

7. (14) In setting the wage rate, the franchisee may rely on a wage scale developed by Pharmaprix following a market study or may choose to base the rate on other criteria or circumstances, such as the employee's experience, staff shortages, the urgency of the hiring process, or any other factor the franchisee deems appropriate.

8. (15) The franchisee decides on employee benefits (for example, bonuses, vacation, group insurance, employee discounts, and leave) for the drug store's employees (including those assigned to the postal outlet).

9. (16) There is one payroll for all of the drug store's employees (including those assigned to the postal outlet) and the method and frequency of payment of wages and benefits by the franchisee are the same for all employees.

10. (22) The drug store's employees (including those assigned to the postal outlet) submit their leave requests to the franchisee.

11. (23) The franchisee determines hours of work and draws up the work schedules for the drug store's employees (including those assigned to the postal outlet).

12. (25) The franchisee opens and maintains a personnel record for each employee of the drug store (including those assigned to the postal outlet), registers with and pays employer contributions to the *Commission des normes du travail*, the *Commission de la santé et de la sécurité du travail*, the *Régie des rentes du Québec*, the *Régie de l'assurance maladie du Québec*, etc. for all employees of the drug store (including those assigned to the postal outlet), and issues RL-1 and T-4 slips and other forms each year for all the drug store's employees (including those assigned to the postal outlet).

13. (26) The franchisee provides records of employment and any reference letters if applicable to employees (including those assigned to the postal outlet) whose employment is terminated and deals with any complaints or claims made by employees or former employees to the *Commission de la santé et de la sécurité du travail*, the *Commission des normes du travail* or any other bodies to which complaints or claims might be made.

(translation)

[51] In addition to the above admissions of facts, two owner-pharmacists (Messrs. Claude Gervais and David Tan), a drug store manager (Ms. Julie Moreau) and two postal outlet managers (Ms. Monique Turgeon and Ms. Aline Dumouchel) testified in the context of the issue of the true employer in file no. 27977-C. The oral evidence and the parties' admissions that the testimony of Claude Gervais, Monique Turgeon and Aline Dumouchel also applied to employees performing the same duties for other franchisees in this matter were conclusive. They in fact showed that the franchisees in this matter are the ones in charge of staffing, including determining the number of employees assigned to the postal outlet. With the exception of the training provided for the first employee assigned to a drug store's postal outlet, which is overseen by the CPC and delivered off site, training for employees assigned to the postal outlets is handled by the franchisees. Further, the franchisees conduct performance evaluations and supervise the postal outlet employees on a daily basis, as well as assign the employees' duties and terminate their employment, if needed. The franchisees determine what uniform the

employees are to wear, and postal outlet employees wear the same uniform as all other employees of the drug store except dispensary and cosmetics counter staff.

[52] It is true that the CPC set stringent terms and conditions for the operation of the postal outlets when it entered into the Master Dealership Agreement with Shoppers. The Board carefully considered the comments made by Franchise Consultant Michael Seid in that regard. According to Mr. Seid's testimony and the portion of his report entered into evidence, such stringent terms and conditions are characteristic of the type of relationship that exists between a franchisor and a franchisee. Mr. Seid explained that it is important for a franchisor (such as the CPC in this matter) to set standards for the delivery of specific products and services. However, the Board concurs with the CPC's argument that there is a fundamental difference between control over the hallmarks of a brand (the "Canada Post" brand in this case) and day-to-day control over employees' working conditions.

[53] In a decision cited by the union, the CPC and the franchisees, *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, the Supreme Court of Canada set out the principles applicable in determining the true employer in labour law. That matter involved the use of a personnel agency and a tripartite relationship. Then Chief Justice Lamer submitted that a comprehensive and flexible approach was required. Speaking for the majority, he stated the following:

[48] ... In my view, in a context of collective relations governed by the *Labour Code*, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work—and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.

[54] The admissions of facts and the oral evidence as a whole in the matter before the Board show that the franchisees in file no. 27977-C have fundamental control over the overall working conditions of the postal outlet employees in the sense set out by the Supreme Court in *Pointe-Claire (City) v. Quebec (Labour Court)*, *supra*.

[55] For all the foregoing reasons, the Board finds that the true employer of the employees assigned to the postal outlets in file no. 27977-C simply cannot be the CPC. The franchisees are the employers of the employees assigned to the postal outlets in their drug stores.

[56] Given these circumstances, it is in fact the drug stores that are the going concerns at issue. It is therefore the essential operational nature of the drug stores rather than the postal outlets that must be considered in the constitutional analysis.

2. Analysis of the Essential Operational Nature of the Drug Stores

[57] As submitted by the franchisees, the normal and habitual activities of a drug store are of two types: (1) its primary purpose is to engage in the practice of pharmacy pursuant to the *Pharmacy Act*, R.S.Q., chapter P-10; (2) its second purpose is to engage in retail sales.

[58] Section 27 of Quebec's *Pharmacy Act* provides that only a pharmacist entered on the roll of the *Ordre des pharmaciens du Québec* may be owner of a pharmacy. Mr. Claude Gervais, Owner-Pharmacist of Les services Santé Claude Gervais Inc., moreover confirmed in his testimony that the drug store cannot be open for business unless there is a pharmacist on the premises.

[59] Since the essential operational nature of the operations of a franchisee clearly appears to be engaging in the practice of pharmacy and retail sales, the Board finds that the going concern is of a local nature and is provincially regulated pursuant to the *Constitution Act, 1867*.

[60] Thus, any conclusion to the effect that the Board has jurisdiction would have to be in the context of derivative constitutional jurisdiction rather than direct jurisdiction, since pharmacy operations do not fall directly within a class of subject under federal jurisdiction.

[61] As previously stated in *Tessier, supra*, the Supreme Court of Canada has set out two possible contexts in which derivative federal jurisdiction might apply to the labour relations of a business that is itself provincially regulated: (1) when the services provided to the federal undertaking form the exclusive or principal part of the related work's activities; and (2) 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 (a discrete work unit).

[62] Moreover, in *Tessier, supra*, the Supreme Court indicated that, in the absence of a discrete work unit, even if the work of the employees concerned is vital to the functioning of a federal undertaking, it will not render federal an undertaking that is otherwise provincial “if the work represents an insignificant part of the employees’ time or is a minor aspect of the essential ongoing nature of the operation.” Speaking for the Court, Abella J. stated the following in *Tessier, supra*:

[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...**

(emphasis added)

[63] In order to determine whether derivative federal jurisdiction applies to the operations of the postal outlets in this matter, the following tests must accordingly be applied. First, do the services of the postal outlet form the exclusive or principal part of the drug store’s operations? If so, the Board might have the necessary jurisdiction. If not, then are the postal outlet services delivered by employees who form a discrete work unit? If so, then derivative federal jurisdiction could apply with respect to that discrete unit.

a. Do the services of the postal outlets form the exclusive or principal part of the drug stores’ operations?

[64] The evidence on file shows that postal outlet sales account for a small percentage of the franchisees’ revenues. According to the testimony of Mr. Terrance Landry, Senior Vice-President, Special Projects, Pharmaprix, Shoppers Drug Mart Inc., a franchisee’s postal outlet accounts for only about 3% of overall sales. It should be recalled that, in *Tessier, supra*, the stevedoring operations accounted for 14% of Tessier’s overall sales, yet the Supreme Court found that those operations formed “a relatively minor part of its overall operation.”

[65] The drug stores in this matter each have about 50 employees and, according to the evidence heard, have no more than six or seven employees assigned to their postal outlets.

[66] In *Tessier, supra*, the Supreme Court referred to another of its decisions, in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178, to point out that a “small amount of local activity [will not] overwhelm the nature of an undertaking that is otherwise an integral part of the postal service” (paragraph 19). It may be deduced that, conversely, a small percentage of activity that is an integral part of the postal service will not overwhelm the nature of an undertaking that is essentially local in nature.

[67] Since the introduction of postal outlets in their drug stores was above all a way for the franchisees to attract customers and increase the sales of their existing drug stores, it may be concluded that the postal outlets are but a minor aspect of the essential ongoing nature of their drug stores.

[68] The Board accordingly finds that the services delivered by the postal outlets are not an exclusive or principal part of the drug stores' operations and therefore cannot be subject to federal jurisdiction.

b. Are the postal outlet services provided by employees who form a discrete work unit?

[69] The Board must now determine whether or not it could apply the federal legislation only to the services provided by the franchisees' postal outlet employees as “discrete work units,” as explained by the Supreme Court in *Tessier, supra*. In order for the Board to arrive at such a finding, it would have to be satisfied that the employees in question form functionally discrete units that can be constitutionally **characterized separately** from the rest of the franchisees' operations.

i. Oral evidence

[70] The Board notes that the only postal outlet employee to testify at the request of the union was Ms. Stéphanie Cadieux.

[71] Ms. Cadieux worked for franchisee Gestion Noura A. Shahid from June 2009 to June 2010. She initially worked in the postal outlet and was trained by Ms. Jiny Roy, the person in charge of

the franchisee's postal outlet. In fact, Ms. Roy was her supervisor. Ms. Cadieux explained that the training software (called Anita) integrated into the RPS system used in the postal outlet and the procedures guide came from the CPC. She indicated that she and two other employees worked in the postal outlet. Her hours of work were varied and the postal outlet's business hours were different from those of the drug store. The postal outlet closed one hour earlier than the rest of the drug store. Using a sketch of the postal outlet filed into evidence, Ms. Cadieux described her work environment and explained how she started work each day. She then showed, among other things, how letter mail was handled using the RPS system. She explained that she was not able to ring in sales for products from the retail area of the store using the RPS system and had to direct customers to the retail checkout counters to pay for their product. When questioned by the Board, Ms. Cadieux stated that, toward the end of her employment, she also worked on the "floor" (in the retail area) of the drug store and at the cosmetics counter. She indicated that she received training as a floor clerk from the drug store's manager (or assistant manager). She stated that, during her employment with the franchisee, she worked primarily in the postal outlet but that toward the end, this had changed and she spent half and, by the very end, all of her working hours on the floor. The drug store's assistant manager in fact determined with her the time she would work on the floor as a clerk and the time she would spend in the postal outlet. Ms. Cadieux stated that she wore the franchisee's uniform both when working on the floor and when working in the postal outlet; the uniform was the same. The only difference was the "Postal Outlet" (translation) pin that she wore below her nametag when working in the postal outlet. The drug store's manager determined her working conditions, and Ms. Jiny Roy oversaw her work schedule. Ms. Roy reported to the drug store's manager. Any work-related information was relayed either by Ms. Roy in the case of information pertaining to the postal outlet or by the assistant manager of the drug store in the case of information pertaining to her work on the floor.

[72] Mr. Claude Gervais testified during the course of the evidence presented by the franchisees. Mr. Gervais is the Owner-Pharmacist of three Pharmaprix franchisees in Boucherville, one of which is covered by the certification applications, that is, Les Services Santé Claude Gervais Inc. Mr. Gervais described the organization of the drug store covered by a certification application in the case before the Board. He explained that his bookkeeper, Ms. Sandra Boucher, is responsible for all of the bookkeeping for the drug store, including for the postal outlet. He stated that the postal outlet's transaction records have to be entered manually, since the CPC software is not

linked to the drug store's centralized system. All employee remuneration, including remuneration for employees assigned to the postal outlet, is handled by the bookkeeper. Mr. Gervais employs approximately 55 workers. Ms. Julie Moreau, the drug store's manager, handles hiring and staff management and conducts the employee performance evaluations, including those for employees working in the postal outlet, but excluding those for dispensary and cosmetics counter staff. Mr. Gervais assumes direct responsibility for the dispensary, and the cosmetics counter has its own manager, Ms. Sophie Robert. Wages for the drug store's staff (except cosmetics counter and dispensary staff) are set by Ms. Moreau or by Mr. Gervais himself when a new employee is seeking higher wages than expected. Mr. Gervais' full-time employees are entitled to group insurance coverage. If they are unable to report to work or if they request permission to take time off, they contact their respective immediate supervisors. Hours of work are determined by the supervisors, Ms. Moreau, Ms. Robert, or Mr. Gervais himself, depending on the department involved. The supervisors deal with evaluations, discipline and training. Cosmetics department training is sometimes provided off site by suppliers such as Guerlain, Chanel, etc. and is sometimes paid for by the said suppliers. Mr. Gervais confirmed that employees working in the postal outlet and floor clerks wear the same uniform.

[73] One key piece of information provided by Mr. Gervais in his testimony is that none of the six or seven employees assigned to the postal outlet in his drug store works exclusively in the postal outlet. In fact, Mr. Gervais explained that they sometimes work on the floor to restock shelves or at the checkout or photofinishing counter. He also indicated that even when employees are assigned to the postal outlet for a given block of hours, they can still be asked to restock shelves in the retail area near the postal outlet. Further, when there are no customers in need of service in the postal outlet, the employee assigned to the outlet may be asked to prepare price tags for the drug store or tend to the greeting card section in the retail area.

[74] Ms. Sophie Robert also testified for franchisee Les services Santé Claude Gervais Inc., as Cosmetics Counter Manager. Among other things, she confirmed that she handles the training for employees assigned to the cosmetics counter and explained that training is sometimes provided by suppliers such as Chanel, etc. She also explained that display and visual presentation standards as well as prices for cosmetics are set by the suppliers. The suppliers also work with her to set annual sales objectives.

[75] As indicated previously, Mr. David Tan, pharmacist and franchisee, Ms. Aline Dumouchel, Postal Outlet Manager of franchisee Les services Santé Claude Gervais Inc., and Ms. Monique Turgeon, Postal Outlet Manager of franchisee Entreprise David Tan Inc., also testified before the Board. Their testimony confirmed the degree of integration of postal outlet operations with the operations of the drug stores.

ii. Analysis

[76] While it is true that postal outlets may appear to be physically separate from the other departments of the drug stores, being well-defined areas at the very back of the retail areas, the structural severability that the Board must assess as part of its constitutional analysis is not limited to a physical location within an undertaking or the fact that a separate department may exist. Many undertakings have a number of departments such as legal, administrative and IT services. It is not uncommon for such departments to be physically separated from one another and even sometimes be located on different floors of a building or in different buildings. Yet their operations may still be fully integrated with one another on an operational level and form different parts of the whole of a going concern. While the departments appear to be separate groups within the business, they are not necessarily “functionally discrete unit[s] that can be constitutionally characterized separately from the rest of the [...] operation.”

[77] In the Board’s view, the same holds true for a postal outlet, in that it is a department that is well integrated into the retail sales operation of a drug store. It must be borne in mind that, according to all of the testimony heard, the main reason for introducing a postal outlet is to increase the drug store’s sales. The postal outlet therefore appears to be part of the basic structure of the drug store as a local business, as are other departments such as the cosmetics or photofinishing counters.

[78] It must also be borne in mind that the postal outlet employees are in constant contact with the drug store’s operations and work in the drug store itself on an ongoing basis.

[79] In *Tessier, supra*, the Supreme Court referred to its decision in *Northern Telecom v. Communication Workers*, [1983] 1 S.C.R. 733 (Northern Telecom 2), to provide an example of a ruling where it had determined that the employees formed a functionally discrete unit that could

be constitutionally characterized separately from the rest of the related operation. The union in fact cited this decision in its written arguments. It may be recalled that the Court stated the following in this regard:

[49]... 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:

... the 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]

[80] The evidence in the instant matter, however, shows that, contrary to the case in *Northern Telecom 2*, the postal outlet employees work inside the drug stores, since the postal outlets are located on the actual drug store premises, not on CPC premises. In addition, the evidence indicates that the employees serve the franchisees' clientele and are fully integrated with the other employees, as indicated in the admissions entered into evidence. Various aspects such as employee remuneration, working conditions, dress code, benefits, payroll, discipline, hours of work and performance evaluations satisfy the Board that the employees are fully integrated into the drug stores' operations. Additionally, according to the testimonies of Ms. Cadieux and Mr. Gervais, there can be some mobility in the work of employees assigned to the postal outlets, since they can be called on to work in the retail area of the drug store.

[81] With respect to the training provided to employees assigned to the postal outlets, while the evidence indicates that at least one person receives training overseen by the CPC, any other employees assigned to the postal outlets are trained by the person in charge of the postal outlet.

[82] The Board accordingly is unable to find that the evidence heard demonstrates severability of postal outlet operations from the rest of the drug stores' retail operations.

[83] The Board moreover is sensitive to the franchisees' argument that making a distinction between employees assigned to the postal outlet and their other employees would mean that an employee assigned to the postal outlet for a given shift could be subject to federal jurisdiction for

part of the shift and provincial jurisdiction for another part of the same shift when, for instance, the employee restocks shelves for the drug store. In its reply, the union argued that the Board did not need to concern itself with the practical ramifications of a finding that the labour relations are federally regulated, and that such ramifications were merely something to which the employers would have to adjust. The franchisees quite justifiably cited Beetz J. of the Supreme Court of Canada in *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, which involved a similar situation. Speaking for the majority of the Court, Beetz J. stated the following:

... 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.

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[84] The Board is of the view that it cannot endorse a constitutional interpretation that might result in the Constitution being fragmented in this manner and not being applicable at all times.

[85] It is therefore clear, in light of the evidence in this matter, that postal outlet services are not provided by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the franchisees' operations.

VII. Conclusion

[86] For the reasons set out above, the Board finds that, while the operations of the franchisees' postal outlets may form an integral part of a "postal service" within the meaning of section 91(5) of the *Constitution Act, 1867*, the Board does not have constitutional jurisdiction to rule on the union's certification application in file no. 27977-C. In light of the evidence heard and the case law considered, it is clear that the franchisees are the true employers of the postal outlet employees covered by the certification application in this matter and that the drug stores are the going concerns in the instant case. The federal operations carried out in the franchisees' postal outlets account for a small portion of the franchisees' normal and habitual activities, which are those of drug stores under provincial jurisdiction. Furthermore, the franchisees' federal operations are not severable from their other operations, and the employees who perform those

federal operations do not form a discrete unit that can be constitutionally characterized separately from the rest of the franchisees' operations. Therefore, the franchisees' operations as a whole remain those of drug stores and retail businesses, which by their essential operational nature, fall within provincial jurisdiction within the meaning of the *Constitution Act, 1867*. Under the circumstances, the Board does not have the constitutional jurisdiction to grant the certification application in file no. 27977-C; accordingly, the application must be dismissed.

[87] The Board determined that it would not entertain the union's alternative application for a single employer declaration in file no. 27977-C unless deemed necessary after it had ruled on the constitutional issue and the issue of the true employer in this case. The Board has already found, based on the evidence heard, that the employees covered by the union's certification application are employees of the franchisees and subject to provincial jurisdiction. Therefore, the application for a single employer declaration could only be considered starting from the fact that the employees in each of the postal outlets concerned work for a provincially regulated franchisee. If the union has any additional written submissions to make concerning its alternative application for a single employer declaration in file no 27977-C, it may file them with the Board by **September 13, 2013**. The other parties will then have **20 days** to file their responses and the union will have a further **20 days** to reply.

[88] Finally, the Board asks that the union advise it as to whether or not it plans to provide any different evidence in regard to the other four files, which were placed in abeyance, that is, those numbered 27978-C, 27979-C, 27980-C and 27981-C, and asks that the union file its submissions in this regard by **September 13, 2013**. The other parties will then have **20 days** to file their responses and the union will have a further **20 days** to reply.

[89] This is a unanimous decision of the Board.

Translation

Louise Fecteau
Vice-Chairperson

Patrick Heinke
Member

Norman Rivard
Member