Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Communications, Energy and Paperworkers Union of Canada,

applicant,

and

XL Digital Services Inc., doing business as Dependable HomeTech,

respondent.

Board File: 28083-C
Neutral Citation: 2010 CIRB **543**
September 28, 2010

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, Messrs. Norman Rivard and David Olsen, Members. A hearing was held in Toronto, Ontario, on August 9 and 10, 2010.

Appearances

Mr. J. James Nyman, for the Communications, Energy and Paperworkers Union of Canada; and Mr. Brent J. Foreman, for XL Digital Services Inc., doing business as Dependable HomeTech.

I – Nature of the Application and Background

[1] On April 14, 2010, the Communications, Energy and Paperworkers Union of Canada (CEP or the union) filed an application pursuant to section 24 of the *Canada Labour Code*

(Part I - Industrial Relations) (the *Code*), to be certified as the bargaining agent for a group of approximately 27 employees of XL Digital Services Inc., doing business as Dependable HomeTech (XL Digital or the employer), in London, Ontario.

[2] A case management conference was held with the parties on July 26, 2010. It was agreed that the Board would first determine whether it had constitutional jurisdiction, following a hearing exclusively devoted to this issue. If the Board found that it had jurisdiction to hear the application, it would then determine the inclusion or exclusion of the disputed position of field management support technician (FMST).

[3] Having carefully considered the material filed by the parties, as well as the evidence and arguments advanced at the two-day hearing, the Board found it had the requisite jurisdiction to deal with this application for certification. The remaining issue regarding the FMST did not impact the CEP's majority support and its entitlement to be certified. The parties were informed of the Board's decision on August 23, 2010 in *XL Digital Services Inc., doing business as Dependable HomeTech*, 2010 CIRB LD 2415, which attached interim certification Order No. 9919-U, certifying the CEP as bargaining agent for the following bargaining unit:

> all employees of XL Digital Services Inc., doing business as Dependable HomeTech, working in and out of London, Ontario, excluding managers and those above the rank of manager.

[4] These are the Board's reasons for decision on the constitutional issue.

II – Facts

A) XL Digital's Operations

[5] XL Digital is a cable installation and servicing business incorporated in the Province of Ontario and operating under the name Dependable HomeTech in Kitchener, London, and Ottawa, Ontario.

[6] Cancable Inc. (Cancable) acquired XL Digital in October 2007. At the time, XL Digital had an installation and service agreement with Rogers Cable Communications Inc. (Rogers) for a three-year

term in London, Ontario. The contract has since been renewed for another three-year term.

[7] The nature of XL Digital's business is two-fold:

> (i) the installation of cable and related equipment (jacks, splitters, cables, and modems), troubleshooting and servicing in regard to such equipment for cable companies; and
>
> (ii) connecting equipment to cable, telephone, and internet services provided by a cable provider for residential customers.

[8] XL Digital's work is exclusively generated through its contract with Rogers. It has two other competitors that perform similar work in London.

B) Cancable in Windsor

[9] Cancable provided similar services for Cogeco in Windsor, Ontario, up until May 1, 2010, when the contract was terminated by Cogeco. The work performed by Cancable for Cogeco in Windsor was similar to XL Digital's work in London, with a few exceptions. Cancable did mostly installation work on behalf of Cogeco and did very little service work. Most of the service work was done by Cogeco's own technicians. Cancable was the only contractor working for Cogeco in Windsor.

[10] The issue of whether Cancable's Windsor operations fell within the scope of the *Code* was the subject of an adjudicator's decision in May 2008. In the context of an unjust dismissal complaint under section 240(1) of Part III of the *Code* filed by a technician against Cancable, an adjudicator determined that the operations fell under provincial jurisdiction.

C) The Components of a Cable Network

[11] The employer described the main components of a cable network and its relationship to them. It noted that a cable network can be subdivided into three sections: (1) the headend; (2) the distribution network; and (3) the customer premise activity.

[12] The headend of a cable network is the area in which all signals are received and converted for retransmission purposes.

[13] The distribution network runs from the headend to either a pedestal (for a single family dwelling), a multitap (an aerial plant on telephone poles), or a panel box (for a multi dwelling unit). These are collectively referred to as "outlets" for the purposes of this decision. The signals are distributed from the headend to fibre nodes. Each node can serve between 500 to 1000 people. The signals are then distributed from the node to the outlet.

[14] The customer premise activity begins at the distribution tap, located in the outlet, and ends in the specific area where the service is received by the customer. A cable can either run directly from the distribution tap to the customer's residence or can run from the distribution tap to a customer service enclosure (CSE) and then from a CSE to a customer's residence depending on the type of outlet.

[15] XL Digital only provides services beginning at the distribution tap and ending at the installation and/or attachment to the customer's devices (i.e. converters, digital boxes, handheld controllers, or modems). This was referred to earlier as the customer premise activity.

D) Technicians' Duties

[16] XL Digital's technicians serve residents in London who are seeking to be connected to Rogers for the first time or customers who are already connected to Rogers, but who are seeking to receive an upgrade or additional service.

[17] A technician can be assigned to install a new outlet for a new customer at Rogers or an existing customer who needs a service upgrade. When technicians are called upon to install a digital box, they have to program that box to ensure it is functioning in the system. The Board heard evidence concerning the manner in which XL Digital's and Rogers' technicians interact during this process to ensure that the customer is able to receive Rogers' service. During the installation, XL Digital's

technicians may be required to install or replace wiring and in some cases, to install a CSE.

[18] XL Digital's technicians are also assigned when a customer experiences problems with the service received. The technician will perform a signal test to detect the source of the interruption of service. If the signal is not strong enough at the outlet, the XL Digital technician will not fix it; instead, the technician will notify Rogers and provide diagnostic information in order for Rogers' maintenance technicians to resolve the problem. If the signal level is not strong enough at the CSE or the problem is between the CSE and the outlet, the XL Digital technician will repair it. If the problem arises from the digital box itself, the technician will replace the digital box and send the defective box back to Rogers, if it was provided by Rogers. The same procedure is followed when there is a problem with a modem or a handheld device provided by Rogers.

[19] XL Digital's technicians are occasionally called upon to perform audits to make sure residents are not illegally connected to Rogers' system. Informal audits are done each time a technician attends at a residence and discovers that a customer is illegally receiving a service. The technician will disconnect those services and will notify Rogers. If a customer uses a digital box for television, that box is ultimately controlled by Rogers at the headend. If the television service is analog, the technician can physically disconnect the service at the outlet by disconnecting the cable or can install filters to filter out the stations for which the customer has not subscribed.

[20] XL Digital's technicians sell service upgrades to Rogers customers and receive commissions for doing so. Rogers provides XL Digital's technicians with brochures and marketing material to that effect.

E) Assignment and Scheduling

[21] Every month, XL Digital provides Rogers with a list of technicians who are available that month, along with their service level capabilities and geographical proximity to customers. Rogers inputs this information into the "CLICK" software. Through "CLICK", Rogers' customer service representatives can see which technicians are available, their qualifications and proximity. When a customer calls Rogers and the customer service representative determines that a visit to the

customer's premise is required, he or she logs into "CLICK" to view the technicians' availabilities. The "CLICK" program includes both XL Digital technicians and Rogers' own technicians. XL Digital's technicians do not have access to "CLICK."

[22] Rogers and XL Digital use the Field Service Management System (FSMS) software, which XL Digital is required to install on its technicians' laptops. This software allows XL Digital's technicians to access their daily Rogers work orders and to refer maintenance requests back to Rogers. The work order specifies the customer's name and address along with the corresponding task code.

[23] When a XL Digital technician arrives in the morning, he or she logs into FSMS to see his/her specific work order. In order to provide real time service, XL Digital's supervisors can see all the jobs that have been assigned. Once the technician logs in and inputs the status in FSMS, Rogers can see if the technician is *en route* or on site. Once the work is complete, the technician logs into FSMS to indicate that the work is complete and to input comments if needed. This allows Rogers' customer service representatives to see if the work has been completed and if a follow-up is required.

[24] If no work has been assigned to a technician, XL Digital calls Rogers to see if some work can be reassigned. If a technician is not available to work on a scheduled day, XL Digital will contact Rogers to let them know and will get another technician to complete the work.

[25] Rogers reserves the right to remove specified personnel from a project. When this happens, which the Board understands rarely occurs, XL Digital personnel investigate the incident, and if it finds the request to be unreasonable, XL Digital will ask Rogers to have the request reconsidered.

F) Equipment and Training

[26] XL Digital has its own procurement department and supplies cables, jacks, and splitters, which must meet the specifications set out by Rogers.

[27] Digital boxes, modems or hand devices are supplied by Rogers or can be purchased elsewhere by the customer. When a technician is called upon to install such equipment, XL Digital receives the equipment from Rogers. XL Digital has a warehouse in London, which is a receiving point for all material deliveries by Rogers.

[28] XL Digital provides its own vans, ladders, meters, laptops and cell phones to its technicians. The technicians' uniforms have a Dependable HomeTech logo which specifies they are under contract with Rogers. The technicians provide their own hand tools necessary to perform the work under the service agreement.

[29] Rogers identifies the training necessary to perform the work under the installation and service agreement. Technicians can either train with Rogers' program or in-house. XL Digital runs its own cable college training and certification program. In London, technicians have to travel to Kitchener for a six to eight-week training and certification program, which specifically includes the "Rogers' Certification" in addition to a new hire orientation on XL Digital's policies and procedures. At all material times to this application, technicians have been trained in house.

III – Positions of the Parties

[30] The employer submits that the Board does not have the requisite constitutional jurisdiction to deal with this certification application, because its operations fall under provincial jurisdiction. It relies on the reasoning and findings of the adjudicator in *Jones* v. *Cancable Inc.*, [2008] C.L.A.D. No. 132 (QL), which found that a similar operation in Windsor fell under provincial jurisdiction.

[31] The union argues that XL Digital's operations fall under federal jurisdiction, because XL Digital provides services in connection with a broadcasting undertaking, which is regulated by the Parliament of Canada. It submits that the decision in *Jones* v. *Cancable Inc.*, *supra*, failed to take into account the statutory framework in the broadcasting and telecommunications industry and failed to consider relevant constitutional facts. The union submits that XL Digital's operations are essential, vital, and integral to Rogers' undertaking.

IV – Analysis and Decision

(a) Constitutional Principles

[32] The scope of the Board's jurisdiction over labour relations is described in section 4 of the *Code,* which reads:

> 4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

[33] Section 2 of the *Code* defines "federal work, undertaking or business" as follows:

> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,
>
> (a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,
>
> (b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,
>
> (c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,
>
> (d) a ferry between any province and any other province or between any province and any country other than Canada,
>
> (e) aerodromes, aircraft or a line of air transportation,
>
> (f) a radio broadcasting station,
>
> (g) a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*,
>
> (h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,
>
> (i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, and
>
> (j) a work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the *Oceans Act* apply pursuant to section 20 of that *Act* and any regulations made pursuant to paragraph 26(1)(k) of that Act.

[34] Recently, the Supreme Court of Canada reiterated the well-established principle that labour relations generally falls within the exclusive jurisdiction of the provinces (see *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, [2009] 3 S.C.R. 407) (*Consolidated Fastfrate*). Thus, federal jurisdiction over labour relations is the exception.

[35] Federal jurisdiction over labour relations extends only to those works or undertakings that fall within the classes of subjects expressly excepted from the provincial heads of power and to those enterprises deemed vital, essential or integral to a core federal work or undertaking.

[36] It is not disputed by the parties that Rogers is a federal undertaking. Cable-television delivery involving the relaying and delivering of programming that is broadcast and specifically Rogers Cable TV Limited, has been determined by the Supreme Court of Canada in *Capital Cities Communications* v. *CRTC*, [1978] 2 S.C.R.141 to be a federal undertaking as a telecommunications and broadcasting undertaking on account of sections 91 and 92(10)(a) of the *Constitution Act*, *1867*.

[37] It was not strenuously pressed on the Board by union counsel that XL Digital's operations were in their own right a federal undertaking engaged in telecommunications and broadcasting; rather it was urged that XL Digital's operations were an enterprise that was integral to the core federal undertaking. The determination of whether a subordinate operation is integral to the core federal undertaking is a factual one dependent on the nature of that operation and its normal or habitual activities as a "going concern."

[38] This test was described by the Supreme Court of Canada in *Northern Telecom* v. *Communications Workers*, [1980] 1 S.C.R. 115 (*Northern Telecom No. 1*) as follows:

> ... the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, ... to look at the "normal or habitual activities" of [that operation] as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.
>
> (page 133)

[39] Therefore, the Board must first examine the extent of Rogers' federal undertaking. Then, the Board will examine XL Digital's operations to determine whether they are vital, essential or integral to the federal core undertaking.

(b) The Extent of Rogers' Federal Undertaking

[40] One of the arguments XL Digital advanced was that it does not perform work on Rogers' cable network. XL Digital explained that its employees only perform work in the customer premise activity.

[41] XL Digital referred to the Supreme Court of Canada's decisions in *United Transportation Union* v. *Central Western Railway Corp.*, [1990] 3 S.C.R. 1112 (*Central Western Railway*) and *Consolidated Fastfrate*, *supra*. The constitutional question before the Court in the *Central Western Railway*, *supra*, case was whether the *Code* applied to the labour relations of Central Western Railway's operations of a short railway line located entirely within the province of Alberta. Central Western Railway arranged for the use of grain cars by the grain industry and saw to the delivery of the cars to Canadian National Railway's (CN) track for onward shipping. CN did not use Central Western Railway's track for its business. In finding that the *Code* did not apply to Central Western Railway's operations, the Court noted that the two companies only worked together when the grain cars were transferred to CN locomotives. The transfer was seen as a connection at the end of a local transportation business as opposed to being integrated into CN's operations.

[42] Similarly, in *Consolidated Fastfrate*, *supra*, the majority of the Court concluded that the labour relations of Consolidated Fastfrate Inc.'s (Fastfrate) Calgary operation were subject to provincial jurisdiction. It determined that an undertaking that performs consolidation and deconsolidation and local pickup and delivery services does not become an interprovincial undertaking simply because it has an integrated national corporate structure and contracts with third party interprovincial carriers. Fastfrate used its own terminal employees and mostly its own local drivers and trucks. One Fastfrate branch picked up and consolidated freight within the originating province, while another branch

deconsolidated and delivered the freight in the receiving province. Fastfrate employees and equipment did not cross provincial boundaries and played no role in the interprovincial transportation. The majority was of the view that section 92(10)(a) of the *Constitution Act*, *1867* and the jurisprudence interpreting it do not contemplate that a mere contractual relationship between a shipper and an interprovincial carrier would qualify Fastfrate as an undertaking connecting the provinces or extending beyond the limits of the province. Rather, it is the carriers that facilitate carriage across interprovincial boundaries that constitute federal transportation works and undertakings. The Supreme Court of Canada noted that merely facilitating interprovincial transport will not, without more, attract federal jurisdiction. In the majority's view, the functional analysis must center on what operations the undertaking actually performs.

[43] The majority of the Court noted the major difference between the communications and transportation contexts:

> [60] It is true that in the communications context, the constitutional inquiry has at times focussed on "the service that is provided and not simply ... the means through which it is carried on": *Public Service Board* v. *Dionne*, [1978] 2 S.C.R. 191, at p. 197. The difference between the communications and transportation contexts, however, is that communications undertakings can operate and provide international and interprovincial communication services from a fixed point. If one were to focus only or primarily on the means by which a communication undertaking provides interprovincial services to its customers, the result could be that two companies operating and providing identical services would be subject to different jurisdictions depending on their modes of transmission (i.e. whether they send and receive signals from one fixed location or whether they have an interprovincial presence).
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> (*Consolidated Fastfrate*, *supra*)

[44] In the Board's view, the broadcasting or telecommunications network cannot be divided in the same way as the transportation industry, as suggested by the employer. In that respect, it is important to review the Supreme Court of Canada's decision in *Public Service Board et al.* v. *Dionne et al.*, [1978] 2 S.C.R. 191, in which the Court examined whether the Quebec government had the authority to regulate television broadcasting limited to Quebec subscribers and the Supreme Court of Canada's decision in *Capital Cities Communications Inc.* v. *CRTC*, *supra*.

[45] In *Public Service Board et al.* v. *Dionne et al.*, *supra*, the Supreme Court of Canada confirmed that cable distribution undertakings fall under federal jurisdiction and explained the extent of those undertakings. In that case, the Quebec Court of Appeal had set aside three decisions of the

Quebec Public Service Board, which authorized Mr. Raymond d'Auteuil, one of the appellants in the Supreme Court of Canada, and Mr. François Dionne, the respondent, to establish and operate cable distribution undertakings in certain defined areas in the Province of Quebec. The appellants argued that the undertakings should be provincial, because the cable distribution operation was locally situated and limited in its subscribers to persons living in Quebec. The Supreme Court of Canada rejected the appellants' arguments and confirmed that, where television broadcasting and receiving is concerned, there cannot be a separation for constitutional purposes between the carrier system, the physical apparatus, and the signals that are received and carried over the system. The Court noted the following:

> The fundamental question is not whether the service involved in cable distribution is limited to intraprovincial subscribers or that it is operated by a local concern but rather what the service consists of.
>
> ...
>
> There is another element that must be noticed, and that is that where television broadcasting and receiving is concerned there can no more be a separation for constitutional purposes between the carrier system, the physical apparatus, and the signals that are received and carried over the system than there can be between railway tracks and the transportation service provided over them or between the roads and transport vehicles and the transportation service that they provide. In all these cases, the inquiry must be as to the service that is provided and not simply as to the means through which it is carried on. Divided constitutional control of what is functionally an interrelated system of transmitting and receiving television signals, whether directly through air waves or through intermediate cable line operations, not only invites confusion but is alien to the principle of exclusiveness of legislative authority, a principle which is as much fed by a sense of the constitution as a working and workable instrument as by a literal reading of its words. In the present case, both the relevant words and the view of the constitution as a pragmatic instrument come together to support the decision of the Quebec Court of Appeal.
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> (pages 192 and 197)

[46] Similarly, in *Capital Cities Communications Inc.* v. *CRTC*, *supra*, the appellants, namely Capital Cities Communications Inc., Taft Broadcasting Company, and WBEN Inc., operated television broadcasting stations in Buffalo, New York and their broadcasts were receivable in nearby Canadian communities. Rogers Cable TV Limited was licensed under the *Broadcasting Act* to operate a community and cable television distribution system and to receive broadcasts of the appellants' stations, within a specific part of Toronto. Rogers decided to delete commercial messages from the programs received from the appellants' stations and transmit the appellants' programs to its subscribers with substituted announcements of its own. Rogers applied to the Canadian Radio-television and Telecommunications Commission (CRTC) to amend its licence to permit deletion of

commercial messages and substitution of its own commercial messages. The CRTC decided that it would not permit Rogers to insert replacement signals carrying commercial messages, but did authorize the deletion of the commercial messages received by Rogers on condition that public service announcements be inserted in replacement. The appellants appealed to the Federal Court of Appeal under the provisions of the *Broadcasting Act* and filed applications for judicial review of the CRTC decisions. The appeals and applications were dismissed. The applicants ultimately appealed to the Supreme Court of Canada.

[47] One of the main arguments of the appellants was that legislative jurisdiction in respect of the regulation of television signals received by Cablevision companies was divided. Exclusive federal jurisdiction as far as the reception of foreign domestic television signals at the antennae of the Cablevision companies was conceded. It was contended however that once signals were received at those antennae, federal legislative power was exhausted and any subsequent distribution of those signals within a particular province was a matter exclusively for the province.

[48] Chief Justice Laskin, in his reasons for the majority, disagreed with the argument and stated the following:

> I am unable to accept the submission of the appellants and of the Attorneys-General supporting them that a demarcation can be made for legislative purposes at the point where the cable distribution systems receive the Hertzian waves. The systems are clearly undertakings which reach out beyond the Province in which their physical apparatus is located; and, even more than in the *Winner* case, they each constitute a single undertaking which deals with the very signals which come to each of them from across the border and transmit those signals, albeit through a conversion process, through its cable system to subscribers. The common sense of which the Privy Council spoke in the *Radio* case seems to me even more applicable here to prevent a situation of a divided jurisdiction in respect of the same signals or programmes according to whether they reach home television sets and the ultimate viewers through Hertzian waves or through coaxial cable.
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> (page 159)

[49] In the Board's view, these principles are reinforced by the statutory framework applicable to the broadcasting and telecommunications industry. The *Broadcasting Act* and the *Telecommunications Act*, contain specific provisions which define "broadcasting" and "telecommunications." The following definitions can shed some light on the extent of these undertakings.

[50] Section 2 of the *Broadcasting Act* defines "broadcasting" as follows:

> "Broadcasting" means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;
>
> (emphasis added)

[51] Section 2 of the *Telecommunications Act* defines "telecommunications" as follows:

> "Telecommunications" means the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system;
>
> (emphasis added)

[52] In light of the above, the Board does not agree with the employer's argument that a determination can be made for legislative purposes at the point of the distribution tap. In the Board's view, the Supreme Court of Canada considers a cable network to be a federal undertaking in its entirety from the headend to the point at which the customer receives the service. The Board is not convinced the network should arbitrarily end at the distribution tap and exclude the customer premise activity, without which the customer could not receive Rogers' services. The Board finds that Rogers' federal undertaking begins at the headend when the information is transmitted and continues to the point at which the information is received by the customer.

[53] That said, the Board must determine whether XL Digital's installation and servicing operations at the customer premise activity are vital, essential, or integral to Rogers' undertaking.

(c) XL Digital's Operations as a "going concern"

[54] In *Northern Telecom No. 1*, *supra*, the Supreme Court of Canada addressed the question of constitutional jurisdiction as it related to a group of supervisors in the Western Region Installation Department of Northern Telecom. The Court did not have enough constitutional facts to determine the issue, but noted the following constitutional facts were required:

> (1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;
>
> (2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;
>
> (3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;
>
> (4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system, and in particular, the extent of the involvement of the installation department in the operation and institution of the federal undertaking as an operating system.
>
> (page 135)

[55] In *Northern Telecom* v. *Communication Workers,* [1983] 1 S.C.R. 733 (*Northern Telecom No. 2*), the majority of the Supreme Court of Canada concluded that the work of the installers of Northern Telecom Canada Ltd. (Telecom) fell within federal jurisdiction on the basis that the vast majority of the installers' work was "physically installing sophisticated telecommunications equipment" produced by Telecom into Bell Canada's telecommunications network.

[56] The determination of the constitutional jurisdiction in that case depended on whether the installers were engaged integrally in the operation of the Bell telecommunications network; or whether these services were truly performed as the last act in the manufacture by Telecom of its specialized telecommunications' equipment. The Supreme Court of Canada concluded as follows:

> The facts I have already set out either by excerpts from testimony or from the Board award or the reasons for judgments below. The almost complete integration of the installers' daily work routines with the task of establishing and operating the telecommunications network makes the installation work an integral element in the federal works. The installation teams work the great bulk of their time on the premises of the telecommunications network. The broadening, expansion and a refurbishment of the network is a joint operation of the staffs of Bell and Telecom. The expansion or replacement of the switching and transmission equipment, vital in itself to the continuous operation of the network, is closely integrated with the communications delivery systems of the network. All of this work consumes a very high percentage of the work done by the installers.
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> (pages 766-767)

[57] In that case, the installers of Telecom spent a very high proportion of their time working on the Bell telephone network. The contract between Bell and Telecom was for the switching of communications carried by the network and for the transmission of those communications. The switching and transmission equipment installed in the networks was manufactured by Telecom, though some of the equipment installed derived from other sources. The work of the installers was to install this equipment in the telecommunications network on Bell's premises, and sometimes on the premises of Bell's customers. When the equipment was assembled and installed, the actual switching or act of interconnection and bringing the equipment into operating condition as a part of the Bell network, was made by employees of Bell. After the equipment was installed, it was maintained by employees of Bell and not by the installers, except under specific repair contracts which would not amount to the maintenance of the network by the installers. Although not a determinative factor in that case, the corporate relationship between Bell and Telecom was taken into account as well. Telecom was a wholly-owned subsidiary of Northern Telecom Limited, which in turn was 60.5% owned by Bell.

[58] XL Digital relied heavily on *Jones* v. *Cancable Inc.*, *supra*. In that case, the employer alleged the adjudicator did not have jurisdiction to entertain an unjust dismissal complaint under section 240(1) of Part III of the *Code* against Cancable, as its business operations properly fell within provincial jurisdiction. Dependable IT, the subsidiary of Cancable at issue (now known as Dependable HomeTech), provided installation-connection services to Cogeco in Windsor. The adjudicator decided that Cancable's operations fell under provincial jurisdiction.

[59] In the Board's view, the decision in *Jones* v. *Cancable Inc.*, *supra*, is not persuasive in this case for a number of reasons.

[60] Although the services provided by Dependable IT are similar to the services provided by XL Digital to Rogers in this case, XL Digital provides more than simply installation services for Rogers. XL Digital employees are engaged in Rogers' service, troubleshooting and work in the area between the distribution tap and the customer's devices.

[61] The adjudicator in *Jones* v. *Cancable Inc.*, *supra*, relied extensively on a number of other decisions by adjudicators and referees appointed to hear complaints of alleged unjust dismissal and wage recovery appeals under the provisions of the *Code*, including *Pomeroy* v. *JP Cable Installations Ltd.,* [2001] C.L.A.D. No. 207 (QL); *Technical Service Solutions* v. *Pierce,* [2001] C.L.A.D. No. 509 (QL); *Johnson* v. *Faria Distributing Inc*. (*c.o.b. Atlantic Cable Communications*), [2005] C.L.A.D. No. 80 (QL); and *Correia* v. *Conex Cable Technology Specialists Inc.,* [2007] C.L.A.D. No. 483 (QL). These cases adopted the following reasoning from *Pomeroy* v. *JP Cable Installations Ltd., supra,* where the adjudicator found that JP Cable's work as an installation contractor and collection agency for Rogers fell under provincial jurisdiction:

> [15] ... To suggest that every totally independent contractor that works, partially or exclusively for a federally regulated company becomes itself federally regulated is to read much too much into the intent of the Canada Labor Code. It is clearly intended to apply to business undertakings that operate inter-provincially or in designated industries. It extends to subsidiaries of those undertakings that are owned or controlled by them and exist primarily to serve the needs of those companies with respect to their activities covered by the Code.
>
> [16] I find that JP Cable Installations Ltd. is not such a company. It is a fully independent contractor neither owned nor controlled by Rogers Cable or any other telecommunications company covered by the Canada Labor Code. Rogers could replace JP Cable Installations Ltd. with a variety of other local suppliers. JP Cable Installations Ltd. could also choose to do work for other companies, either competitors to Rogers or other firms requiring cabling and wiring, not necessarily in the Cable Television or Internet provider businesses a fact supported by its categorization as a construction company by the (then) Workers' Compensation Board in Ontario.
>
> [17] Accordingly, I find that I have no jurisdiction in this matter and the complaint is dismissed.

[62] With respect, the Board does not agree that whether a company/contractor is totally independent or not in terms of control and/or ownership of a federally regulated company is determinative of how vital, essential or integral it is to the federal undertaking.

[63] Nevertheless, the adjudicator in *Jones* v. *Cancable Inc.*, *supra*, adopted this line of reasoning:

> [60] ...
>
> i. Cancable Inc. is provincially incorporated. All of its work, relevant to this proceeding, is performed in the WindsorEssex area. Unlike the situation in Northern Telecom, Cancable Inc.'s employees do not directly engage in work "connecting any province with any other province, or extending beyond the limits of a province" for purposes of section 2 of the Canada Labour Code. The Stevedores' Reference is distinguishable on the same ground as there the ships operated between ports in Canada and ports outside of Canada;

> ii. Cancable Inc. is an independent company and is not owned by Cogeco or any other cable service provider; and
>
> iii. The Respondent provides the vans, ladders, meters, lap-top computers and other equipment necessary to fulfill its contact with Cogeco.

[64] In the Board's view as well, whether a company is provincially or federally incorporated, is not determinative of how vital, essential or integral it is to the federal undertaking.

[65] The Supreme Court of Canada has stated in *Northern Telecom No. 1*, *supra,* that corporate organization is not determinative in assessing constitutional jurisdiction; the physical and operational connection between the undertakings being a more important factor:

> In the field of transportation and communication, it is evident that the niceties of corporate organization are not determinative. As McNairn observes in his article, *supra*, at pp. 380-1:
>
> A transportation or communication undertaking is a possible corporate activity but it may or may not be segregated from the total corporate enterprise or it may even be larger in scope than a single corporate enterprise. To determine questions of this nature corporate objects have a certain relevance. But of primary concern is the integration of the various corporate activities in practice (including the corporate organizations themselves if more than one is involved) and their inherent interdependence.
>
> McNairn's comment is borne out by the cases. On the one hand, a single enterprise may entail more than one undertaking, e.g. Canadian Pacific Railway's Empress Hotel was found to be an undertaking separate and independent from the railway undertaking in *Canadian Pacific Railway Co.* v. *Attorney-General for British Columbia*. On the other hand, two separate corporate enterprises may be found to be included within one single and indivisible undertaking, as in stevedores employed by a stevedoring company loading and unloading ships in the Stevedoring case, or a trucking company which did 90 per cent of its business for the Post Office in *Letter Carriers' Union of Canada* v. *Canadian Union of Postal Workers*.
>
> Another, and far more important factor in relating the undertakings, is the physical and operational connection between them. Here, as the judgment in Montcalm stresses, there is a need to look to continuity and regularity of the connection and not to be influenced by exceptional or casual factors. Mere involvement of the employees in the federal work or undertaking does not automatically import federal jurisdiction. Certainly, as one moves away from direct involvement in the operation of the work or undertaking at the core, the demand for greater interdependence becomes more critical.
>
> (pages 134-135)

[66] In addition, the adjudicator distinguished the facts in *Jones* v. *Cancable Inc.*, *supra*, from those in *Northern Telecom No. 2*, *supra*, on the basis that the work performed by Cancable employees was not a "continuing activity contributing to the continued operation of Cogeco's cable service network:"

> [52] In this instance, it is difficult to say that work occurs "simultaneously" between Cogeco, the federal undertaking, and the employees of Cancable Inc. Cogeco is the service provider. It established and operates the cable network. In my judgment, the Home Technology Technicians, such as the Complainant, do not participate in the actual operation of the network, as was the situation in Northern Telecom. Instead, they simply link new users or services to same through a connection to the customer's residence. Indeed, on Mr. Jepson's evidence, the Home Technology Technicians perform no real work on the network.
>
> [53] The Home Technology Technicians do not spend the "great bulk" of their time on Cogeco's premises. Rather, they attend at the residences of Cogeco's customers for purposes of performing their installation-connection work. I note that in Northern Telecom, the installers there carried out approximately eighty percent (80%) of their work at Bell Canada's premises. This was also the case in Bernshine Mobile Maintenance Ltd. as that company provided its services at the premises of Reimer Express Lines Limited.
>
> [54] On my assessment, the Home Technology Technicians are not engaged in "a joint operation" with Cogeco staff, nor do they work side by side with them, as occurred in Northern Telecom. There, the installers played an integral role in a constant program of rearrangement, renewal, updating and expansion of Bell Canada's switching and transmission systems and in the installation of telecommunications equipment designed to carry out these needs. In that context, the installers were seen as "vital" to the continuous operation of the Bell network. In contrast, the work performed by the Home Technology Technicians is not a continuing activity contributing to the continued operation of Cogeco's cable service network. The excerpt from Technical Service Solutions Inc., reproduced in the second full paragraph on page twenty-six (26) of this Decision, applies equally to the circumstances of this case.

[67] In the Board's view, the analysis in that case did not take into account the extent of the federal undertaking at play as discussed, *supra*. The adjudicator found that linking a new customer to the network through a connection to the customer's residence was not part of the actual operation of the network.

[68] Union counsel referred to the decision of the Ontario Labour Relations Board (OLRB) in *Phasecom Systems Inc.*, [2005] OLRB Rep. July/August 688, which, in the Board's view, offers a more persuasive constitutional analysis.

[69] In that case, the OLRB was seized with an application for certification by the Teamsters to represent a group of satellite installers at Phasecom. The employer installed satellite receiving dishes and related equipment pursuant to a contract with Bell ExpressVu. Phasecom contended that its operations were integral to Bell ExpressVu's operation of its satellite television system.

[70] It was admitted that customers could have installed the dishes and other equipment themselves or arrange with the retailer to have someone install the equipment for them. Where Bell ExpressVu was the retailer, it arranged for the installation to be performed by companies with whom it subcontracted for this service. Phasecom was one of three subcontractors for Bell ExpressVu. Phasecom was responsible for dispatching its employees to the customers' homes. The equipment installed was owned by Bell ExpressVu. Phasecom was occasionally called upon to repair and replace satellite dishes and other receiving equipment.

[71] The OLRB reviewed a number of Supreme Court of Canada decisions, including *Northern Telecom No. 2*, *supra*, and *Construction Montcalm Inc.* v. *Minimum Wage Com.*, [1979] 1 S.C.R. 754. The OLRB was of the view that the facts in that case established that Phasecom was an integral part of Bell ExpressVu's maintenance and delivery of satellite television services to its subscribers. Phasecom's operations were an ongoing and habitual part of Bell ExpressVu's operations, and could not be described as "casual" or "exceptional." It referred to the decision of the Supreme Court of Canada in *Construction Montcalm Inc.* v. *Minimum Wage Com.*, *supra*, in which the employer, a construction company, was engaged in a single "casual" project for the construction of runways at Mirabel airport. This project was not sufficient to bring the construction company into the federal sphere.

[72] Having reviewed the cases submitted by the parties and having summarized the relevant constitutional facts at the outset, the Board will now apply each of the factors set out in *Northern Telecom No. 1*, *supra*, to the facts of this case.

(1) The General Nature of XL Digital's Operation as a "Going Concern"

[73] The nature of XL Digital's business, as described earlier, is primarily the provision of cable installation and servicing of cable wiring for cable providers. XL Digital has operations in London, Ottawa, and Kitchener. At each of these locations, XL Digital provides cable installation and servicing of cable wiring exclusively to Rogers. Thus, the general nature of XL Digital's operations as a "going concern" is the provision of cable installation and servicing of cable wiring for cable providers.

(2) The Nature of the Corporate Relationship Between XL Digital and Rogers

[74] There is no evidence that XL Digital is owned by Rogers. XL Digital is a wholly-owned subsidiary of Cancable, a company incorporated in Ontario. XL Digital has been under contract with Rogers to provide cable installation and servicing of cable wiring in London since 2007. The initial agreement was for a three-year term and has been renewed for three more years.

[75] As noted in *Central Western Railway*, *supra*, "something more than a physical connection and a mutually beneficial commercial relationship with a federal work or undertaking is required for a company to fall under federal jurisdiction." Thus, the mere fact that XL Digital has a service contract with Rogers does not automatically bring that industry under the purview of the *Code*. Conversely, the absence of a corporate relationship does not necessarily preclude a finding that an operation otherwise providing vital, essential, or integral services to a federal undertaking, falls within federal jurisdiction (see *Northern Telecom No. 2*, *supra*).

(3) The Importance of the Work Done by XL Digital for Rogers as Compared With Other Customers

[76] To examine this factor, the Board must look at the "normal and habitual activities" of XL Digital as a "going concern." As indicated earlier, XL Digital has worked exclusively and continuously for Rogers since 2007. Its normal and habitual activities are:

> (i) the installation of cable and related equipment (jacks, splitters, cables, and modems), troubleshooting and servicing in regard to such equipment for cable companies; and
>
> (ii) connecting equipment to cable, telephone, and internet services provided by a cable provider for residential customers.

[77] XL Digital's technicians are given work assignments daily by Rogers through the FSMS to perform services at Rogers' customers' premises. When a technician is not scheduled to perform any services, he or she is not assigned to a different operation. The technicians are only assigned to work at a Rogers' customer's residence.

[78] Thus, the service provided by XL Digital for Rogers cannot be said to be merely exceptional or casual.

(4) The Physical and Operational Connection Between XL Digital and Rogers Within the Cable and Internet System.

[79] In the Board's view, the facts in this case indicate a significant level of involvement of XL Digital in Rogers' operations. While XL Digital and Rogers do not operate in the same building, its technicians perform work in the premises of Rogers' customers and from Rogers' distribution tap to the customer's residence, which, as stated earlier, is an integral part of Rogers' network.

[80] The technicians are assigned work orders directly from Rogers' personnel through the FSMS system. XL Digital's technicians must have specific qualifications to perform work on Rogers' network and these qualifications are taken into account when Rogers assigns technicians using the "CLICK" program. When a technician detects something wrong with a signal at the distribution tap, he or she will contact Rogers to have a Rogers technician fix the problem. XL Digital's technicians are responsible for diagnosing signal problems on the Rogers network, including at the outlet. The technicians update the status of their work orders in FSMS in real time according to Rogers' specifications in order to allow Rogers to provide status updates to its customers.

[81] When a new service is installed, such as digital television, the technician connects the digital box to the customer's television, but contacts Rogers to install the appropriate software from the headend. Rogers uploads software into the system supplied to the technicians to configure the digital box. The information (program channel spectrum) to configure the digital box is downloaded into the technician's computer who in turn inputs it into the digital box. Rogers maintains control over

the television services provided through the digital box and can subtract services from the headend, rather than having to physically disconnect a cable when the television signal is analog. In the Board's view, this evidence indicates that XL Digital's technicians do interact with Rogers' employees on an ongoing basis in a continuing activity contributing to Rogers' cable undertaking.

[82] Moreover, XL Digital's technicians go beyond merely connecting customers to the Rogers' network. XL Digital's technicians receive commissions when they sell service upgrades or new services to Rogers' customers. They are also called upon to make necessary repairs if the problem occurs in the customer premise activity. In other words, XL Digital performs functions that Rogers must provide to ensure customers have access to, and receive their broadcasting programs and telecommunications services. In fact, Rogers' technicians provide similar functions in house. The scheduling of all technicians, whether Rogers' own or those of XL Digital, are managed by the "CLICK" program.

[83] Although XL Digital provides its own vans, ladders, meters, laptops and cell phones to its employees, it is required to supply cables and splitters and such other tools in accordance with the specifications set out by Rogers. Telecommunications and broadcasting devices, such as digital boxes, modems or handheld devices are supplied by Rogers or can be purchased elsewhere by the customer. They are not supplied by XL Digital. Thus, XL Digital is often called upon to install equipment that belongs to Rogers and receives such equipment from Rogers.

[84] In the Board's view, without any reception of broadcasting or telecommunications signal at a customer's premise, Rogers would not be providing a complete broadcasting and telecommunications service. XL Digital allows Rogers' customers to have access to its cable and internet services and ensures the effective delivery of broadcasting and telecommunications services as a "going concern."

[85] All of the above facts indicate that XL Digital's operations are a vital, essential, and integral part of Rogers' federal undertaking. The Board finds that the operations carried out by XL Digital in London fall under federal jurisdiction. Consequently, the Board has jurisdiction to entertain the application for certification under section 24 of the *Code*.

V – Conclusion

[86] In summary, the Board finds that XL Digital's operations in London fall under federal jurisdiction. Therefore, the Board has the requisite constitutional jurisdiction to deal with the application for certification.

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

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Graham J. Clarke
Vice-Chairperson

_____
Norman Rivard
Member

_____
David Olsen
Member