

Case No.: 2005-48

Canada Labour Code
Part II
Occupational Health and Safety

SSI Micro Ltd.
Applicant

Decision No. CAO-06-048
December 13, 2006

This case was decided by Appeals Officer Richard Lafrance, based on the written submission received from the applicant and the health and safety officer's investigation report and documents explaining his rationale for federal determination.

(Written submissions received between May 15, 2006 and late August 2006)

For the Appellant

Brian Beresh, Agent and Counsel to SSI Micro Ltd.

Jeff Philipp, President/CEO, SSI Micro Ltd.

Health and safety officer

Bryan Lloyd, Labour Program, Human Resources and Skills Development Canada, Calgary, Alberta

- [1] This case concerns an appeal filed on November 10, 2005 by Brian Beresh, Counsel for SSI Micro, under subsection 146(1) of the *Canada Labour Code*, Part II (the *Code*). The appeal was made against a direction issued by health and safety officer (HSO) Bryan Lloyd.
- [2] The direction was issued on November 2, 2005, further to the investigation conducted by HSO Lloyd following the fatal electrocution of two SSI Micro employees.
- [3] The direction states:

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(b)

On October 30, 2005, the undersigned health and safety officer conducted an investigation into a multiple work place fatality, in the work place operated by SSI Micro Ltd. being an employer subject to the *Canada Labour Code*, part II (CLC) in the yard south of 806 Whiskey Jack Drive, Enterprise, NWT (600 33' 45'' North, 1160 08' 54'' West), the said work place being sometimes known as the SSI Micro – Enterprise communication site.

The said health and safety officer considers that the performance of an activity constitutes a danger to employees while at work:

The installation, maintenance, servicing, erection and repair of field communication devices and towers present a danger to field operations employees.

The following contraventions of the Occupational Health and Safety Regulations (COHSR) and the CLC, observed at the time of the investigation, led the said health and safety officer to the conclusion of danger.

1. SSI Micro Ltd. Field operations employees did not observe safe limits of approach to overhead high voltage power lines while erecting a communication tower. 8.5(7) COHSR
2. SSI Micro Ltd. Field operations employees were not provided with the necessary supervision, training and instruction while erecting a communication tower. 125.(1)(q) CLC
3. SSI Micro Ltd. Field operations employees were not made aware of the known and foreseeable hazards present while erecting a communication tower. 125.(1)(s) CLC
4. SSI Micro Ltd. Field operations employees were not provided the necessary personal protective equipment to prevent injury from the hazards present. 12.1 COHSR

Therefore, you are **HEREBY DIRECTED**, pursuant to paragraph 145(2)(b) of the *Canada Labour Code*, to take measures to correct the conditions that constitute the danger immediately.

Issued at Fort Providence, NWT, this second day of November, 2005.

[4] A request for a stay of the direction was also made by the appellant on November 10, 2005. The undersigned Appeals Officer, who heard the request, refused to grant the stay¹.

[5] B. Beresh argued the following in his written submission:

The activity described by Brian Lloyd as constituting a danger to employees at work does not fall within the jurisdiction of Part II of the *Canada Labour Code*. Therefore:

- i. The Human Resources and Skills Development Canada Labour Program lacks the jurisdiction in this case to investigate and/or issue directions to SSI Micro Ltd.;

¹ *SSI Micro Ltd.*, Canada Appeals Office on Occupational Health and Safety, Appeals Officer Richard Lafrance, Decision 05-049(S), December 6, 2005

- ii. SSI Micro Ltd. is exempt from the jurisdiction of the *Canada Labour Code* and/or the Department of Human Resources and Skills Development Canada Labour program;
- iii. SSI Micro was not performing services which fall within the jurisdiction of the Federal Government of Canada.

- [6] B. Beresh further argued that the four contraventions that led HSO Lloyd to his conclusion of danger were based on an assumption made during a preliminary investigation and that HSO Lloyd erred in issuing the directions without further investigation.
- [7] B. Beresh also maintained that HSO Lloyd erred by ignoring that human error caused the workplace fatalities. He ignored as well the fact that third parties not under the control or supervision of SSI Micro caused the fatalities.
- [8] B. Beresh stated that section 123(1)(a) of the Code represents Parliament's direction as to when the Code is to have jurisdiction over employment. It states the following:
123(1) Notwithstanding any other Act of Parliament or any regulations thereunder, this Part applies to and in respect of employment
(a) on or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut[.]
- [9] B. Beresh argued that the activity of SSI Micro, *i.e.* installing, maintaining, servicing, erecting and repairing field communication devices and towers, is a business of local and private nature within the Northwest Territories and Nunavut.
- [10] B. Beresh pointed out as well that SSI Micro is an internet provider for people living in the Northwest Territories and Nunavut and that its customers reside solely within these jurisdictions.
- [11] B. Beresh also recognized that SSI Micro is linked to the rest of the world via a satellite connection registered through Industry Canada and purchases satellite space with Telesat.
- [12] In addition, B. Beresh affirmed that while the service allows access to information that originates beyond the boundaries of Nunavut and the Northwest Territories, the information is consumed within these jurisdictions.
- [13] B. Beresh confirmed as well that the SSI Micro network relays no other information than that associated with everyday internet use and that this internet use is for private citizens.
- [14] B. Beresh further argued that it is SSI Micro's position that it is not a federal undertaking, business or work connected to any federal undertaking, work or business.

- [15] Citing the Supreme Court's decision in *Northern Telecom Ltd. v. Communication Workers of Canada*², B. Beresh argued that:
- (a) Parliament has no authority over labour relations;
 - (b) Parliament may assert exclusive jurisdiction by exception if it is demonstrated that such jurisdiction is an integral part of its primary competence over some other single federal subjects;
 - (c) Primary federal competence can prevent the application of provincial law, if it can be demonstrated that the federal authority over the matter is an integral element of such federal competence.
 - (d) The questions of whether an undertaking, service or business is a federal one depend on the nature of its operation.
 - (e) 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.
- [16] B. Beresh further claimed that, according to the Supreme Court's decision in *Alberta Government Telephones*³, the courts must be guided by the particular facts of each situation.
- [17] B. Beresh made the final arguments on this point that even if SSI Micro has some degree of interconnectedness whereby information that exists outside the Northwest Territories and Nunavut is accessed, it is not conclusive that the activity that SSI Micro carries on constitutes a federal undertaking. The use of satellite space with Telesat and the license that allows SSI Micro to broadcast its signal amongst its towers are exceptional factors that cannot be used to construe that SSI Micro forms an integral part of the Telesat service or any federal undertaking.
- [18] Regarding paragraph 123(1)(c) of the Code, B. Beresh declared that, while SSI Micro can arguably be construed as a telecommunication common carrier, the company is not an agent of Her Majesty in right of a province.
- [19] In conclusion, B. Beresh submitted that HSO Lloyd and HRSDC improperly assumed jurisdiction over SSI Micro.
- [20] No other party came forward as a respondent in the present case. As indicated by Jeff Philipp, President/CEO of SSI Micro Ltd, there is no union representing the employees, nor is there a health and safety committee present in the enterprise.
- [21] HSO B. Lloyd explained his rationale for his conclusion of federal jurisdiction and I retain the following.

² *Northern Telecom Ltd. v. Communications Workers of Canada* [1980] 1 S.C.R. 115

³ *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)* [1989] 2 S.C.R. 225

- [22] SSI Micro activity attracts federal jurisdiction under section 91 of the *Constitution Act*, that states the following
- [...]
to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces[.]
- [23] Citing the Supreme Court's decision in *Capital Cities Communications*⁴, HSO Lloyd declared that this decision supports the principle that undertakings that transmit on Hertzian wave length signals are part of a communication system.
- [24] As well, HSO Lloyd stated that the *Regulation and Control of Radio Communications in Canada*⁵ case decided in favor of establishing federal jurisdiction in relation to transmitting communications, on the basis that radio communications did not exist when sections 91 and 92 of the *British North America Act* were promulgated.
- [25] HSO Lloyd further stated that in *Communications and Electrical Workers of Canada, Khaled Maloum and Louise Arbour, Complainants, and National Pagette Ltd., Employer*⁶, the Canada Labour Relations Board [now the Canada Industrial Relations Board - CIRB], held that the use of electromagnetic waves, essential to its activity, makes it part of the radio communication industry; its essential use of telephone equipment and the nature of the services it offers its clients makes it part of the telecommunications industry. Those activities establish interprovincial communications on a regular and continuous basis.
- [26] B. Lloyd went on to state that SSI Micro is the largest Internet Service Provider (ISP) in the Canadian North. In this regard, SSI Micro provides LAN, Wan, frame relay/Managed Internet Protocol Connectivity, Satellite/Wireless communication, roaming IPASS, design and implementation of Voice Over Internet Protocol (VOIP) and Digital Subscriber Lines (DSL) to numerous clients throughout the Northwest Territories and Nunavut.
- [27] HSO Lloyd further stated that in *Communications, Energy and Paperworkers Union of Canada, locals 401 and 902 v. Island Telecom Inc. and Island Advanced Solutions Inc.*⁷, the CIRB found that ISP allows those computers connected throughout the network to communicate, transmit and receive information across the world. Once access to internet is guaranteed, there are no geographical boundaries to the movement of digital bits.
- [28] HSO Lloyd added that the Board determined that the nature of ISP work done by Island Tel Advanced Solutions (ITAS) clearly extended beyond the boundaries of Prince

⁴ *Capital Cities Communications Inc. v. Canadian Radio-television Commission* [1978] 2 SCR 141

⁵ *Regulation and Control of Radio Communications in Canada* [1932] (3d) 609 (Radio)

⁶ *Communications and Electrical Workers of Canada, Khaled Maloum and Louise Arbour, Complainants, and National Pagette Ltd., Employer*, CLRB decision no. 836, November 1990

⁷ *Communications, Energy and Paperworkers Union of Canada, locals 401 and 902 v. Island Telecom Inc. and Island Advanced Solutions Inc.*, CIRB decision no. 59, February 24, 2000

Edward Island, therefore bringing it within the definition of a federal work given in subsection 2(b)⁸ of the Code.

- [29] HSO Lloyd further pointed out that although certain aspects of SSI Micro may be territorial in nature, such as LAN/SWAN software development, firewall service, etc., SSI Micro also performs extra-provincial communications activities as part of its regular and continuous operation and, as a result, attracts federal jurisdiction.

Analysis and Decision

- [30] The first issue to be decided is whether SSI Micro comes within the federal jurisdiction with regard to the application of the *Canada Labour Code*.
- [31] Should I find that SSI Micro does not come within the federal jurisdiction, I will relinquish all authority over the matter and will cease any inquiry into it.
- [32] However, should I decide that SSI Micro does come under federal jurisdiction, I will then have to consider the arguments to be submitted by B. Beresh regarding the appeal of the direction issued by health and safety officer B. Lloyd.
- [33] The Supreme Court indicated in the *Capital Cities Communications*⁹ decision, that according to the *Regulation and Control of Radio Communications*¹⁰ case, Parliament has exclusive jurisdiction to legislate with respect to employment matters relating to radio, television, telegraph and telecommunications, including the transmission and reception of signs, signal, pictures and sounds of all kinds by means of Hertzian waves, including the right to determine the character, use and location of the apparatus employed.
- [34] Another tribunal decision, although not binding, made by the CIRB in *Communications, Energy and Paperworkers Union of Canada, locals 401 and 902 v. Island Telecom Inc. and Island Advanced Solutions Inc*¹¹, gives a detailed analysis of the status of internet providers. Having reviewed the Board's decision, I agree with the CIRB that when the use of electromagnetic waves forms an essential part of the activity of an enterprise, it makes the enterprise part of the radio telecommunication industry.
- [35] B. Beresh argues that even if SSI Micro has a degree of interconnectedness whereby information that exists outside the Northwest Territories and Nunavut is accessed; it is not conclusive that the activity carried on by SSI Micro makes it a federal undertaking.

⁸ 2. In this Act,

"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:

(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,

⁹ *Capital Cities Communications Inc. v. Canadian Radio-television Commission*, *supra*

¹⁰ *Regulation and Control of Radio Communications in Canada*, *supra*

¹¹ *Communications, Energy and Paperworkers Union of Canada, locals 401 and 902 v. Island Telecom Inc. and Island Advanced Solutions Inc.*, *supra*

The use of satellite space with Telesat and the license that allows SSI Micro to broadcast its signal amongst its towers are exceptional factors.

- [36] I find that these are not exceptional factors. B. Beresh indicated in his arguments that SSI Micro has other activities than installing, maintaining, servicing, erecting and repairing field communication devices and towers. He stated that SSI Micro is an internet provider for people living in the Northwest Territories and Nunavut. In addition, SSI Micro connects its client to the rest of the world via a satellite connection registered through Industry Canada and purchases satellite space with Telesat. The service allows access to information that is beyond the boundaries of Nunavut and the Northwest Territories, and this, on a regular and continuous basis.
- [37] B. Beresh did not demonstrate in any fashion that SSI Micro's activity of providing internet services to its clients was done on an occasional basis or in exceptional circumstances. In fact, the purpose of the enterprise is to connect its clients to the rest of the world, *via* the internet connection that it provides throughout the Northwest Territories and Nunavut on an ongoing basis.
- [38] As stated in the *Northern Telecom Ltd. v. Communications Workers of Canada*¹² decision, Parliament does not have any authority over labour relations. However, Parliament may assert exclusive jurisdiction by exception, if it is demonstrated that such jurisdiction is an integral part of its primary competence over other specific federal subject matters.
- [39] In view of the evidence submitted and the fact that telecommunication is a single federal subject; I find that SSI Micro is a telecommunication enterprise that has the capacity, and indeed does provide out-of-territory and international telecommunication services to its subscribers on a continuous and regular basis. As such, SSI Micro falls under federal jurisdiction and therefore, is governed by the *Canada Labour Code*.
- [40] Having decided that SSI Micro is an employer subject to the *Canada Labour Code*, I must now turn to the merits of the appeal filed by SSI Micro against the direction issued by HSO Lloyd.
- [41] Since most of the arguments presented by B. Beresh dealt with the matter of applicable jurisdiction of the enterprise, I will allow SSI Micro, if it so wishes, to proceed on the merits of the case and to provide the undersigned evidence and arguments in support of its position in appeal.
- [42] SSI Micro will be required to inform the undersigned within 20 days of the present decision as to whether it intends to do so at a formal hearing or through written submission.

¹² *Northern Telecom Ltd. v. Communications Workers of Canada*, *supra*

Richard Lafrance
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: CAO-06-048 (A)

Appellant: SSI Micro Ltd.

Respondent: N/A

Key Words: jurisdiction, maintenance, repairs, field operations, denied

Provisions: *Canada Labour Code, Part II*, 146(1), 145(2)(b), 123(1)(a), 123(1)(c)

Summary:

The issue concerns the rationale for federal determination to be decided by the Appeals Officer. The appellant argued that due to the fact that SSI Micro does field repairs, and erects communication devices and Towers in fall under provincial jurisdiction as it is a local and private in nature to the North West Territories and Nunavut.

The Appeals Officer found that due to the fact that SSI Micro Ltd. provides a service to internal and national clients/servers, they are under federal jurisdiction. The Appeals Officer denied the stay request.