

Federal Court



Cour fédérale

**Date: 20201014**

**Dockets: T-1449-18  
T-413-18**

**Citation: 2020 FC 967**

**Ottawa, Ontario, October 14, 2020**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**WESTERN TRANSLOADING  
CORPORATION**

**Applicant**

**and**

**MICHAEL D. PETERSON AND THE  
ATTORNEY GENERAL OF CANADA**

**Respondents**

**JUDGMENT AND REASONS**

I. Nature of the matter

[1] This proceeding is a consolidation of two (2) related applications for judicial review.

[2] In T-413-18, Western Transloading Corporation [Western] seeks judicial review of a decision rendered on January 31, 2018, by a Labour Program Inspector [Inspector Dar] at

Employment and Social Development Canada, finding that Western is subject to federal labour jurisdiction.

[3] In T-1449-18, Western seeks judicial review of a decision rendered on July 3, 2018, by a Health and Safety Officer [Officer Chen] appointed under Part II of the *Canada Labour Code*, RSC 1985, c L-2 [Code]. Officer Chen concluded that her department had the jurisdiction to proceed with an investigation under Part II of the Code.

## II. Background

### A. *The Parties*

[4] Western is a transloading business that operates solely within the boundaries of British Columbia. The business transfers special crops such as dried lentils, peas and seeds from one mode of transportation to another, generally from railcars to shipping containers.

[5] Michael D. Peterson [Mr. Peterson] is a former employee of Western.

[6] The Attorney General of Canada [AGC] represents the Labour Program in this proceeding. The Labour Program administers the Code, including investigations of health and safety issues under Part II of the Code, and monetary/non-monetary disputes between employees and employers under Part III of the Code.

B. *History of the Proceedings*

(1) T-413-18

[7] In February 2015, Mr. Peterson made a monetary complaint against Western under Part III of the Code. The Labour Program assigned Inspector Dar to investigate.

[8] Before the Labour Program could adjudicate the complaint, Inspector Dar first had to determine whether Western was subject to federal labour jurisdiction. She solicited information directly from Western, reviewed legislation and case law, conducted research and discussed the file with her colleagues.

[9] In a letter dated November 29, 2017, Inspector Dar informed Western that she had concluded her investigation. She determined that Western engaged in the operation of a transloading and cross-dock facility and therefore, Part III of the Code did not apply to Western. Instead, she found that Western was subject to provincial labour laws because “the transloading of bagged cargo is an activity that falls under provincial jurisdiction pursuant to the Constitution Act, 1867”. She invited Western to contact the local office of the British Columbia Employment Standards branch for more information about provincial labour laws.

[10] On December 1, 2017, Inspector Dar wrote to Mr. Peterson advising him of the rejection of his complaint pursuant to subparagraph 251.05(1)(a)(i) of Part III of the Code. She explained that Western was not subject to federal jurisdiction because it engaged in the business of transloading and logistics activities which fall under provincial jurisdiction and therefore,

Western was not a federal work, undertaking or business to which the Code applied. Inspector Dar also notified Mr. Peterson of his right to challenge her findings providing his objection and documentation was submitted by December 18, 2017.

[11] For convenience, I shall refer to Inspector Dar's determination that Western is not subject to federal jurisdiction as her Initial Decision.

[12] On January 31, 2018, Inspector Dar wrote to the parties and informed them that her previous decision was incorrect. She explained that upon further examination of Western's business activities, she had concluded that Western operates a grain elevator as defined in paragraph 2(a)(i) of the *Canada Grain Act*, RSC 1985, c G-10 [CGA]. She concluded that, when considered in conjunction with paragraph 2(h) of the Code, Western's activities are a federal undertaking, thus subjecting Western to federal labour jurisdiction. I shall refer to this decision as the Reversal Decision.

[13] On March 2, 2018, Western filed an application for judicial review of Inspector Dar's Reversal Decision.

[14] By letter dated March 6, 2018, Inspector Dar informed Mr. Peterson that any further investigation of his monetary complaint was suspended pending the outcome of Western's application for judicial review.

[15] Following an order issued by Prothonotary Ring on April 18, 2018, Western amended its notice of application on April 24, 2018, to add the AGC as a Respondent. Mr. Peterson did not participate at any stage of the proceedings.

(2) T-1449-18

[16] On June 29, 2018, an employee of Western was injured by a forklift at Western's work site. The next day, the Labour Program assigned Officer Chen to investigate the incident. As a preliminary step in her investigation, Officer Chen assessed whether Western was subject to federal jurisdiction. She visited Western's facilities and noted the nature of its operations. She also reviewed related jurisdictional decisions, the definition of "elevator" in section 2 of the CGA, and Inspector Dar's report from the Reversal Decision and discussed the matter with a technical advisor.

[17] On July 3, 2018, Officer Chen confirmed that Western falls under federal jurisdiction. She therefore informed Western that she intended to proceed with her investigation [Jurisdiction Decision].

[18] On July 30, 2018, Western filed an application for judicial review of Officer Chen's Jurisdiction Decision.

[19] On January 9, 2019, Prothonotary Ring granted an order consolidating the two (2) proceedings.

III. Issues

[20] In its applications for judicial review, Western raises the following issues:

- a. Did the Labour Program have jurisdiction to make the Reversal Decision?
- b. In the alternative, did the Labour Program commit a reviewable error in concluding that Western operated a grain elevator and therefore fell under federal jurisdiction for labour and employment purposes?
- c. In the further alternative, did the Labour Program breach procedural fairness in arriving at the Reversal Decision by allowing the technical advisor to direct the decision ultimately made by Inspector Dar and by failing to provide Western with an opportunity to know the case against it or provide submissions when the matter was reopened?

[21] In response, the AGC submits that the central issue to be determined in this consolidated proceeding is whether Western's operations are federally or provincially regulated. In the AGC's view, Western is a grain "elevator" as defined in section 2 of the CGA such that it is a work for the general advantage of Canada which is therefore subject to federal labour jurisdiction under the Code.

[22] The AGC also submits that Western's judicial review applications are premature because a jurisdiction decision made in favour of an employee, concluding that the decision maker has jurisdiction, is not a final decision that is reviewable by this Court.

[23] As Western's application did not address the issue of prematurity, I issued a direction to the parties prior to the hearing requesting written submissions on two (2) issues, one of which related to whether the applications for judicial review were premature in light of the principles enunciated in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*].

[24] In its additional written submissions, Western argued that the applications did not engage the doctrine of prematurity. According to Western, the Reversal Decision was a final decision and if not, the circumstances in this particular case were exceptional and justified judicial intervention at this stage of the proceedings. The AGC reiterated its position that the applications for judicial review were premature.

[25] For the reasons below, I find that both applications for judicial review were brought prematurely. However, in the case of the application for judicial review of Inspector Dar's Reversal Decision, there are exceptional circumstances justifying the intervention of the Court at this early stage of the proceeding. I agree with Western that Inspector Dar did not have jurisdiction to review her Initial Decision based on the doctrine of *functus officio*. For that reason, that application for judicial review is allowed.

[26] As for the judicial review of Officer Chen's Jurisdiction Decision, no such exceptional circumstances exist. That application for judicial review is therefore dismissed.

#### IV. Analysis

##### A. *Inspector Dar's Reversal Decision*

###### (1) The Doctrine of Prematurity

[27] The general rule is that absent exceptional circumstances, the courts will not interfere with interlocutory decisions until the ongoing administrative processes have been completed and until all other available effective remedies have been exhausted. This rule has been described in a number of ways, including the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews (*CB Powell* at paras 30-32). The underlying purpose of this rule is to prevent fragmentation of the administrative process and to reduce the large costs and delays associated with premature court challenges, particularly where the party may ultimately be successful at the conclusion of the administrative process (*CB Powell* at para 32).

[28] These principles were reiterated by the Supreme Court of Canada in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paragraphs 35 to 38 and in subsequent decisions of both the Federal Court of Appeal and this Court (*Constantinescu c Canada (Procureur général)*, 2019 CAF 315 at para 2; *Agnaou c Canada (Procureur général)*, 2019 CAF 264; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2017 FCA 241 at paras 47-50, 53; *Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35 at paras 13-16; *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at paras 28-34 [*Wilson*];



*Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 at paras 16-18; *Girouard v Inquiry Committee Constituted Under the Procedures for Dealing With Complaints Made to the Canadian Judicial Council About Federally Appointed Judges*, 2014 FC 1175 at paras 18-19; *Douglas v Canada (Attorney General)*, 2014 FC 299 at para 128).

[29] Very few circumstances qualify as exceptional and the threshold for exceptionality is high (*CB Powell* at para 33). The presence of an important jurisdictional or constitutional issue, or concerns about procedural fairness, do not constitute exceptional circumstances (*CB Powell* at paras 33, 39-40, 45).

(a) *Was Inspector Dar's Reversal Decision a final decision?*

[30] Western submits this application for judicial review is not premature since the Federal Labour Program is treating the Reversal Decision as a final decision that conclusively determined Western was under federal labour jurisdiction. To support its position, Western relies on the fact that Inspector Dar opened a separate file for the jurisdictional investigation despite the existence of an ongoing assignment file for Mr. Peterson's complaint. Western further relies on the wording used by Inspector Dar in her letter to Mr. Peterson dated December 1, 2017, notifying him of his right to challenge her determination that the Labour Program did not have the jurisdiction to investigate his complaint because Western fell under provincial labour legislation. In contrast, no such right was communicated to Western in the Reversal Decision. Finally, Western also relies on the fact that Officer Chen relied heavily on the Reversal Decision in concluding that her department had the jurisdiction to proceed with an investigation under Part II of the Code, therefore considering that she was bound by Inspector Dar's Reversal Decision.

[31] I agree with the AGC that the Reversal Decision does not constitute a final decision.

[32] Where an employee makes a complaint to the Labour Program stating that the employer has contravened a provision under Part III of the Code (Standard Hours, Wages, Vacations and Holidays), an inspector of the Labour Program must first determine whether the Labour Program has the jurisdiction to investigate and decide the specific labour relations issues raised in the complaint. If the inspector is satisfied that he or she does not have jurisdiction over the employer, the inspector will reject the complaint pursuant to subparagraph 251.05(1)(a)(i) of the Code. Employees who have their complaints rejected at this stage are provided, under subsection 251.05(3) of the Code, the opportunity to request that the Minister of Labour [Minister] review the inspector's decision. If they decide not to do so, or if the request to the Minister to review the decision is unsuccessful, the process before the Labour Program is completed.

[33] However, where an inspector determines that he or she has jurisdiction to decide a complaint, the inspector then moves forward to determine whether the complaint is admissible and the allegations are justified. The Code provides for the possibility for the unsatisfied party to ask for the review of this final decision on the merits by the Minister, who may confirm, rescind or vary, in whole or in part, the decision (Code, ss 251.101(1) and 251.101(3)).

[34] In determining that Western was subject to federal labour jurisdiction, Inspector Dar issued an interim decision. She has not made a final decision on the merits of Mr. Peterson's complaint and the internal review process has yet to run its course. Western's application for judicial review is therefore premature.

(b) *Are there exceptional circumstances that justify the intervention of the Court?*

[35] Western submits, in the alternative, that the circumstances in this case are exceptional and justify judicial intervention at this stage of the proceedings. To the extent the Code does not provide an opportunity to challenge the Reversal Decision until after the complaint is decided, the Labour Program is not barred from promulgating that decision, as evidenced by Officer Chen's decision under Part II of the Code. As such, Western "has no adequate alternative remedy to stopping the spread of the Reversal Decision". Abstaining from deciding this application would force Western to proceed in multiple administrative reviews and would proliferate litigation of the same issue, which ought to be avoided and can be avoided by this Court hearing this application.

[36] Western further argues that there is no prejudice to any party should the Court intervene and provide a decision on the merits of the application. Early judicial intervention would not give rise to any issue of delay since Inspector Dar has held her adjudication of Mr. Peterson's complaint in abeyance pending the outcome of the application for judicial review. Additionally, Mr. Peterson has been unreachable since the commencement of this application, including during a six (6) month abeyance period beginning in July of 2018. He has not participated at any stage of the application. Forcing Western to see through a wage complaint adjudication without a participating adversary would prejudice Western since even if the complaint is determined to be unfounded, the Reversal Decision may be relied upon again, as it was by Officer Chen.

[37] Finally, both parties wish to resolve the merits of the underlying dispute on an urgent basis to avoid the compounding effects of Inspector Dar's decision and the uncertainty of whether Western is provincially or federally regulated for labour purposes. The record before the Court is complete and it is the most opportune time for the Court to examine the question. A determination of the application on its merits would constitute an efficient use of public resources.

[38] In *CB Powell*, the Federal Court of Appeal clearly rejected the argument that the presence of a jurisdictional or constitutional issue constitutes an exceptional circumstance justifying early recourse to the courts (*CB Powell* at paras 33, 39-40, 45). It also found that "the fact that all parties have consented to early recourse to the courts [is] not [an] exceptional circumstanc[e] allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted" (*CB Powell Limited* at para 33).

[39] I do not want to speculate on the outcome of Mr. Peterson's complaint. While the last communication with Mr. Peterson was by phone on March 13, 2015, and his current whereabouts are unknown at this time, I am unable to conclude, on the evidence before me, that he is no longer interested in pursuing his complaint. The reason for his absence from these proceedings may very well be that he has no interest in the determination of whether or not Western is subject to federal jurisdiction. Once the jurisdictional issue is resolved, Mr. Peterson could once more decide to participate in the proceedings.

[40] The Labour Program could also decide to proceed with the investigation in the absence of Mr. Peterson if it has sufficient information to do so. Once the investigation is complete, Western could decide not to pursue the jurisdictional issue if it is successful on the merits of the complaint. However, the Labour Program could deem the complaint abandoned. In such a circumstance, the Reversal Decision would stand and Western would be left with no adequate remedy to challenge the Reversal Decision.

[41] Given this last possibility and the fact that another decision maker has already relied upon the Reversal Decision and that others may do so in the future, I am prepared to find that the circumstances of this case meet the high threshold required for early recourse to the courts.

[42] The conclusion that I have reached regarding Inspector Dar's authority to make the Reversal Decision, as explained below, also weighs heavily in my determination on the issue of prematurity.

(2) The Doctrine of *Functus Officio*

[43] The first ground raised by Western in its application for judicial review is that Inspector Dar lacked jurisdiction to render the Reversal Decision based on the doctrine of *functus officio*. In essence, Western argues that once Inspector Dar rendered her Initial Decision, she was not entitled to revisit that decision as she did.

[44] As a general rule, the principle of *functus officio* holds that where a final decision has been rendered by an administrative tribunal acting in an adjudicative capacity, the matter is

concluded. The decision cannot be revisited simply because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change in circumstances. The only exceptions are where the tribunal or decision maker is authorized by statute to reconsider its decision, or where there has been a slip in drawing up the decision or an error in expressing the manifest intention of the decision maker, or when the decision is void (*Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at 860-861 [*Chandler*]).

[45] The AGC submits that Western's *functus officio* argument must fail given the interim nature of the determination on jurisdiction. According to the AGC, the principle of *functus officio* does not apply when an issue referred to a decision maker has not yet been answered. A tribunal may reconsider any procedural, evidentiary or interlocutory ruling made during the hearing. To support its position, the AGC provides two (2) examples: (1) an internal decision about the procedure to follow when dealing with a claim; and (2) interim decisions made by an arbitrator. In both cases, these decisions would not be final. The AGC submits that in Mr. Peterson's case, it was necessary for Inspector Dar to reconsider her Initial Decision in order to discharge her function under the Code, namely, the investigation of Mr. Peterson's complaint under Part III of the Code.

[46] The evidence on the record demonstrates that Inspector Dar considered her Initial Decision as final and dispositive of Mr. Peterson's entire complaint. In her letter to Western on November 29, 2017, also copied to Mr. Peterson, she wrote:

The purpose of this letter is to inform you that I have concluded an investigation regarding the jurisdiction of [Western].

Based on information provided to me, I have determined that [Western] is engaged in the operation of transloading and cross-

dock facility. This means that Part III of the [Code] does not apply to your company.

Instead, provincial labour laws apply to your company because the transloading of bagged cargo is an activity that falls under provincial jurisdiction pursuant to the *Constitution Act, 1867*.

[My emphasis.]

[47] Likewise, in her letter to Mr. Peterson dated December 1, 2017, also copied to Western,

Inspector Dar wrote:

Your former employer, [Western] is not a federal work, undertaking or business to which the [Code] applies. [Western] is not subject to federal jurisdiction for the purposes of labour legislation because it is engaged in the business of transloading and logistics activities which fall under provincial jurisdiction.

“251.05(1) An inspector may reject a complaint made under section 251.01, in whole or in part,

(a) if the inspector is satisfied

(i) that the complaint is not within their jurisdiction...”

I have concluded that the Labour Program does not have the jurisdiction to investigate your complaint, as [Western] falls under provincial labour legislation. Therefore based on subparagraph 251.05(1)(a)(i) your complaint is rejected. If you have not already done so, I recommend that you contact and file a complaint with your local British Columbia Employment Standard branch which is empowered to handle the complaint, as they have the authority to investigate this matter.

[My emphasis.]

[48] By rejecting Mr. Peterson’s complaint, she effectively put an end to the administrative process before the Labour Program.

[49] Her activity log also indicates that she closed her assignment report on November 30, 2017.

[50] I recognize that in her letter to Mr. Peterson on December 1, 2017, Inspector Dar employs the expression “preliminary determination” when referring to her determination that Western is not subject to federal jurisdiction. I also note that she provides him the opportunity to object to her determination. While she refers to her determination as “preliminary”, it does not change the fact that she had concluded at that time that the complaint should be rejected because Western was not subject to federal jurisdiction. In her letter, she also indicates that she will only consider a change in findings if new and credible evidence is provided before December 18, 2017. Mr. Peterson did not object nor did he submit new documentation. Accordingly, there was nothing left for Inspector Dar to decide after December 18, 2017. It is also worth mentioning that in her letter to Western on November 29, 2017, Inspector Dar did not refer to her determination as “preliminary”.

[51] At the hearing, the AGC also submitted that the Initial Decision was not final since the notice of rejection referred to in Inspector Dar’s letter of December 1, 2017 had not been sent out.

[52] Subsection 251.05(2) of the Code provides that if a complaint has been rejected, the inspector shall notify the employee in writing with reasons. In my view, the December 1, 2017 letter meets the criteria of the notice contemplated under subsection 251.05(2) of the Code. It



advises Mr. Peterson of the rejection of his complaint and it sets out the reasons for the rejection of the complaint.

[53] To accept the AGC's position that the decision was not final because a "notice of rejection of complaint" was not sent out would mean that the decision maker could, on its own motion and without consulting the parties, reach a different conclusion many months and even years later simply because the "notice of rejection of complaint" had not been sent out. The decision is distinct from the notice of rejection and, in the absence of statutory wording indicating otherwise, the decision's finality is not dependent on the issuance of a notice of rejection.

[54] It is important to emphasize that in the circumstances of this case, Mr. Peterson did not raise an objection to the jurisdiction determination and neither party requested that the decision be reconsidered. As it appears from the assignment report that Inspector Dar completed after making her Reversal Decision, it is only after speaking to a technical advisor that Inspector Dar reconsidered her earlier determination and concluded that Western fell under federal jurisdiction for labour and employment purposes because its operations fell within the definition of "elevator" as set out in the CGA:

Based on information provided by the employer and reviewing decisions from case law (*Parrish & Heimbecker Ltd.*, *Westnav Container Services Ltd.*), I determined the employer to fall under federal jurisdiction. Upon further discussion with the technical advisor, it was determined the employer operates a grain elevator as defined in the *Canada Grain Act*. As per paragraph 2(h) of the *Canadian Labour Code*, the activities of the employer are deemed to be a federal undertaking.

[My emphasis.]

[55] This can be compared with the assignment report she prepared following her Initial Decision where she essentially describes the same process with the exception that she had not initially consulted the technical advisor. She writes:

In addition to examining information provided by the employer and reviewing decisions from case law (*Parrish & Heimbecker Ltd., Westnav Container Services Ltd.*), I determined the employer to fall under provincial jurisdiction based on the following factors: the employer is not licensed to operate as a grain elevator; the pulses are owned by a third party; the product is not weighed, cleaned or graded; and the cargo is not stored in a silo or elevated in a bucket into a container for shipping. Because the company does not own a fleet of transport vehicles, they hire trucking companies to deliver the containers to the port for export.

[56] Western has raised the argument, in the alternative, that the Labour Program breached procedural fairness by allowing the technical advisor to direct the decision ultimately made by Inspector Dar and by failing to provide Western with an opportunity to know the case against it or provide submissions when the matter was reopened. In response, the AGC argues that Inspector Dar did not fetter her discretion to the technical advisor. Although she regularly consults with others regarding the decision she makes, Inspector Dar remained the ultimate decision maker. Furthermore, Western had the opportunity to provide its position on jurisdiction to Inspector Dar during the investigative process. When Inspector Dar reconsidered her initial determination, she did so by reconsidering the information already before her.

[57] Since I am of the view that Inspector Dar did not have the authority to issue the Reversal Decision, it is not necessary for me to decide whether a breach of procedural fairness occurred in this case.

[58] While the principle of *functus officio* must be applied flexibly in the context of administrative tribunals (*Chandler* at 861), the principle is intended to provide finality to decisions. The AGC has not demonstrated that any of the exceptions to the principle apply here. Once she had determined that the Labour Program did not have the jurisdiction to investigate the complaint, there was nothing left for Inspector Dar to decide. She was *functus* when she issued the Reversal Decision and as a result, the Reversal Decision is void.

[59] In view of my conclusion above, it is not necessary for me to decide whether Western is subject to federal or provincial jurisdiction for labour and employment purposes.

B. *Officer Chen's Jurisdiction Decision*

[60] Relying on the principles enunciated in *CB Powell*, I am of the view that the application for judicial review was brought prematurely.

[61] The evidence demonstrates that Officer Chen's determination that Western was subject to federal jurisdiction was made as a preliminary step in the investigation of an occupational health and safety incident. In her email to Western on July 3, 2018, Officer Chen informed Western that after consulting with a manager and technical assistant, she had concluded that Western fell under federal jurisdiction. She also indicated that Western's pending application for judicial review did not hinder her investigation of the incident that occurred at Western's work site. She informed Western that she and a senior investigator would be at the site the following day to continue the investigation of the incident. She also advised Western to have a number of

documents ready and that they would need to conduct interviews with anyone who was present or had witnessed the incident.

[62] Section 145 of the Code provides that upon completion of an investigation, the Minister's Delegate may issue a direction to the employer or employee concerned, or both, if he or she finds that a provision in Part II of the Code was contravened. Section 146 further provides for the possibility of an appeal to the Canadian Industrial Relations Board [Board] by the employer, employee or trade union that feels aggrieved by such a direction. If an appeal is brought under section 146, the Board will then inquire into the circumstances of the direction and the reasons for it and may vary, rescind or confirm the direction and issue any direction it considers appropriate.

[63] When it filed its application for judicial review of Officer Chen's Jurisdiction Decision, Western had not exhausted all of its rights under this statutory administrative process. Western was required to do so before having recourse to the Court.

[64] Western did not make any particular submissions on the issue of prematurity relating to this application for judicial review. The focus of its submissions throughout has been that Inspector Dar's Reversal Decision must be set aside to stop other decision makers from relying on it, as Officer Chen did in her jurisdiction determination. Though Western submitted that there were exceptional circumstances justifying the Court's intervention in that judicial review, it did not do so here. For that reason, I am not satisfied that exceptional circumstances exist in this application for judicial review, such that I should exercise my discretion to decide the

jurisdictional issue. The particular context of the application for judicial review of Officer Chen's Jurisdiction Decision, described below, further reinforces my decision not to do so.

[65] During the hearing, counsel informed me that Officer Chen's investigation was over and that directions were "purportedly delivered" to Western under Part II of the Code on July 13, 2018. Counsel did not inform the Court of the outcome of the investigation nor of the specifics of the directions. I asked counsel for Western whether the application for judicial review was moot and whether the Court could entertain an application for judicial review against an interlocutory decision when the underlying matter was over and no application for judicial review had been brought against the decision or direction that disposed of the matter.

[66] Counsel for Western attempted to draw a parallel with the decision of the Federal Court of Appeal in *Wilson*. The issue of prematurity in that case arose in the context of an application for judicial review of an adjudicator's decision that Mr. Wilson's dismissal was unjust. After determining that Mr. Wilson had made out his complaint of unjust dismissal under the Code, the adjudicator had adjourned the matter and directed the parties to discuss the appropriate remedy in the hope that they might settle. He indicated that absent a settlement, he intended to conduct a hearing to determine whether a remedy was warranted and, if so, what it should be. The employer sought judicial review of the adjudicator's decision that the dismissal was unjust. In the face of that, the adjudicator decided to adjourn the remedies hearing until after the judicial review was finally decided. Mr. Wilson argued that the application for judicial review was premature and that the adjudicator's decision on the merits was reasonable. The Federal Court dismissed the prematurity objection but found that the adjudicator's decision was unreasonable.

[67] The Federal Court of Appeal confirmed the principles laid down in *CB Powell*, upholding the prohibition against premature judicial reviews and reiterating that exceptions to the general rule are most rare. It recognized that “there are rare cases where the effect of an interlocutory decision on the applicant is so immediate and drastic that the Court’s concern about the rule of law is aroused” (*Wilson* at para 33). It noted that administrative decision makers, like courts, occasionally bifurcate the merits and the remedy and found that this sort of bifurcation often does not cause the ills identified in *CB Powell* (*Wilson* at para 36). The Federal Court of Appeal found that in the unusual circumstances of that case, the adjudicator’s decision to adjourn and to remain adjourned while judicial review was ongoing was a discretionary procedural choice suffused by factual and policy appreciation that deserved respect.

[68] Unlike in *Wilson*, Officer Chen chose not to adjourn her investigation despite being made aware of Western’s application for judicial review of Inspector Dar’s Reversal Decision. Moreover, in this case, the investigation is now over and it appears that directions were issued to Western in regards to the work incident.

[69] In any event, I do not intend to decide whether the application for judicial review is moot as the parties did not have the opportunity to fully argue this issue before me.

[70] In my view, I have insufficient information to determine the impact a decision on jurisdiction would have on the outcome of Officer Chen’s investigation and any direction that may have been issued as a result thereof. I must also consider that Western did not seek judicial review of any final decision or direction.

[71] In the absence of exceptional circumstances justifying this Court's exercise of discretion, the application for judicial review is dismissed on grounds of prematurity.

V. Conclusion

[72] I recognize that by declining to determine whether Western is subject to federal or provincial jurisdiction, the Labour Board will be faced with conflicting decisions. In finding that the Reversal Decision is void, the Initial Decision that Western is subject to provincial jurisdiction stands. In contrast, a finding of prematurity in relation to the judicial review of Officer Chen's Jurisdiction Decision means that her determination that Western is subject to federal jurisdiction stands.

[73] By leaving the issue undecided, Western will have the opportunity in the future, when the situation arises again, to argue the issue of jurisdiction before the Labour Program and to make the appropriate submissions on whether its activities fall under the authority of the CGA. The decision maker will be able to consider the nature of Western's business activities, as they are conducted at that point in time, review the applicable legislation and relevant case law and determine whether the structure and operation of Western's business is that of a grain elevator based on the facts before it. As the AGC noted in its submissions, there is no guarantee that Western will continue to employ the same processes and operations in the future.

[74] There is no doubt that counsel for the parties would have preferred that I exercise my discretion and determine whether Western is indeed subject to federal jurisdiction. However, it is

not the Court's role to provide advisory opinions, especially when there are several other grounds to dispose of the application.

[75] In view of the mixed results, each party shall bear its own costs.



**JUDGMENT in T-1449-18 and T-413-18**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review in file T-413-18 is allowed;
2. The application for judicial review in file T-1449-18 is dismissed on the ground of prematurity;
3. A copy of this Judgment and Reasons will be placed in each of the files;
4. Each party shall bear its own costs.

“Sylvie E. Roussel”

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKETS:** T-1449-18  
T-413-18

**STYLE OF CAUSE:** WESTERN TRANSLOADING CORPORATION v  
MICHAEL D. PETERSON AND THE ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** FEBRUARY 24, 2020

**JUDGMENT AND REASONS:** ROUSSEL J.

**DATED:** OCTOBER 14, 2020

**APPEARANCES:**

Taryn Mackie FOR THE APPLICANT  
Dallan Poulin

Jan Verspoor FOR THE RESPONDENT  
Michele Charles THE ATTORNEY GENERAL OF CANADA

**SOLICITORS OF RECORD:**

Norton Rose Fulbright Canada FOR THE APPLICANT  
LLP  
Barristers & Solicitors  
Vancouver, British Columbia

Attorney General of Canada FOR THE RESPONDENT  
Vancouver, British Columbia THE ATTORNEY GENERAL OF CANADA