

Federal Court



Cour fédérale

Date: 20110531

Docket: T-511-10

Citation: 2011 FC 637

Ottawa, Ontario, May 31, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

OCEAN STEEL & CONSTRUCTION LTD.

Applicant

and

**RHEAL ARSENEAULT, ROYCE BOIES,
DAVE CAMERON, MARK R. CUMMINGS,
MICHAEL DUNCAN, JACQUES GOGUEN,
HENRI GUILLEMETTE, GERALD HACHEY,
MATTHEW HOMENEY, DANIEL R.
HOWARD, MATHIEU LOSIER, TONY J.
MILLS, GLEN TABER, NORMAND
THIBODEAU, PATRICK THIBODEAU**

Respondents

And

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a fair wage officer and inspector of Human Resources and Skills Development Canada (the inspector), dated March 5, 2010. The inspector determined that the applicant had not paid the individual respondents at the wage rates established by Human Resources and Skills Development Canada (HRSDC)'s Regional Director, Atlantic Region, found in the Fair Wage Schedule for New Brunswick-East, made pursuant to the *Fair Wages and Hours of Labour Act*, RSC 1985, c L-4 (the Act) and the *Fair Wages and Hours of Labour Regulations*, CRC c 1015 (the Regulations).

[2] The applicant requests an order:

1. Granting a writ of *certiorari* quashing the decision;
2. Declaring that the decision was made contrary to law, in excess of jurisdiction and is a nullity;
3. Declaring that the application is not required to pay the amounts referenced in the decision to the individual respondents;
4. Directing the inspector to revoke any requests for the holdback of funds due and owing to the applicant pursuant to its sub-contract under contract 37687, or otherwise seek to enforce the decision; and
5. Granting the applicant its costs of this application.

Background

[3] Ocean Steel & Construction Ltd. (the applicant) is an incorporated company based in Saint John, New Brunswick. The applicant fabricates, supplies and installs reinforcing steel for construction projects.

[4] Maxim 2000 Inc. (Maxim) was awarded Contract number 37687 (the prime contract) with Defense Construction Canada on June 27, 2008. The Labour Conditions of the prime contract stipulated that all persons employed by the subcontractor were required to be paid wages in accordance with the attached Fair Wage Schedule of New Brunswick – East (Fair Wage Schedule NB-East). The Labour Conditions and Fair Wage Schedule NB-East were listed and available to all potential bidders, including bidders on subcontracts, during the tender process.

[5] The applicant entered into a subcontract dated June 30, 2008, with Maxim to supply and install concrete reinforcing steel in a project at Canadian Forces Base (CFB) Gagetown, New Brunswick. The applicant's contract with Maxim incorporated all of the provisions of the prime contract, including the Labour Conditions and Fair Wage Schedule NB-East.

[6] The Fair Wage Schedule NB-East was developed pursuant to the Act and the Regulations. Paragraph 3(1)(a) of the Act states that under every contract with the Government of Canada, employees shall be paid fair wages. The Act defines fair wages in section 2. Mr. Justice William McKeown in *Kinetic Construction Ltd v Canada (Attorney General)*, 27 Admin LR (3d) 296,

[2000] FCJ No 1181 (QL) (FCTD) broke down the definition at paragraph 21:

The definition of fair wages contains three elements. Fair wages are wages that (a) are generally accepted as current for competent workmen; (b) in the district in which work is being performed; (c) for the character or class of work in which workmen are respectively engaged.

[7] Section 4 of the Regulations sets down the process for determining fair wages:

4.(1) Subject to subsections (3) and (4), where there is a wage rate fixed, from time to time, by or under an Act of the legislature of a province that is applicable in the district in which the work is being performed for the character or class of work, and that rate is generally accepted as current, the fair wage shall be the provincial rate.

(2) Where there is no wage rate fixed by provincial law for the district, the fair wage shall be equivalent to the average of salaries paid in that district for the character or class of work, based on statistical estimates produced by Statistics Canada from an occupational survey of the construction sector.

(3) Where the wage rates fixed by provincial law for a district are not generally accepted as current, the fair wages shall be the wage rates determined under subsection (2).

(4) In no case shall the fair wage rate be less than the minimum hourly rate fixed pursuant to Part III of the *Canada Labour Code*.

4.(1) Sous réserve des paragraphes (3) et (4), le juste salaire payable pour un travail dans un district donné est, le cas échéant, le taux prévu et éventuellement modifié par la législation provinciale pour ce travail compte tenu de sa nature ou catégorie, si ce taux est généralement accepté comme étant le taux courant.

(2) En l'absence de taux prévu par la législation de la province pour un district donné, le juste salaire est équivalent à la moyenne des salaires payés dans ce district, compte tenu de la nature ou catégorie de travail, obtenue à partir des estimations statistiques de Statistique Canada qui sont établies selon les enquêtes de professions pour le secteur de la construction.

(3) Lorsque, pour un district donné, les taux de salaires prévus par la législation provinciale ne sont pas généralement acceptés comme étant courants, les justes salaires pour ce district sont ceux déterminés conformément au paragraphe (2).

(4) Le juste salaire ne doit en aucun cas être inférieur au salaire horaire minimum fixé sous le régime de la partie III du *Code canadien du travail*.

[8] In May 2007, New Brunswick wage rates for performance of work on Crown construction projects was set under the *Minimum Wage for Categories of Employees in Crown Construction Work Regulation*, NB Reg 2007-34 (NB Regulation 2007-34).

[9] Mr. Bruce Boughen, the manager, Labour Standards Operations, Labour Program, HRSDC (the manager), was involved in 2007 in assessing the New Brunswick provincial wage rates. He received survey results from Statistics Canada in February and March of 2007 which he and the

Labour Program staff analyzed. He then drafted a Fair Wage Schedule for both New Brunswick East and West using the “most frequently paid” indicator pursuant to subsection 4(2) of the Regulations.

[10] Following the enactment of a new provincial wage schedule for New Brunswick, the manager assessed the wage rates set by the province. The manager concluded that the provincial wage rates were not “generally accepted as current” under subsection 4(3) of the Regulations principally because they treated the entire province as one district for the purpose of wage rates. The manager found that Statistics Canada data indicated that the wages varied between the east and west districts.

[11] By memorandum dated July 10, 2007, Mr. Pierre Meunier, regional director, Labour Program, Atlantic Region (the regional director) approved the Fair Wage Schedule NB-East under section 5 of the Regulations.

[12] From January to March 2010, the inspector conducted a fair wage inspection of the wages paid to the applicant’s employees pursuant to the established Fair Wage Schedule NB-East.

Inspector’s Decision

[13] In her March 5, 2010 decision, the inspector noted that she performed her inspection according to the Act and the Regulations. She determined that the applicant had not paid the wages

stipulated in the Labour Conditions and Fair Wage Schedule of contract 37867 awarded to it by Defense Construction Canada.

[14] The inspector found that there were wages owing for fifteen “rodman” positions (the individual respondents) amounting to \$19,743.66.

Issues

[15] The applicant submitted the following issues for consideration:

1. What is the appropriate standard of review of the inspector’s decision?
2. Did the inspector act without jurisdiction and/or acted beyond her jurisdiction when:
 - a. She determined that the applicant had failed to comply with the provisions of the Act and in particular subsection 3(1) thereof;
 - b. She failed to give effect to subsections 4(1) or 4(3) of the Regulations by:
 - i. ignoring or disregarding the wage rates fixed by the NB Regulation 2007-34 in the absence of any evidence that they were not generally accepted as current and in the face of evidence that the wage rates paid the individual respondents were the rates provided by the applicable collective labour agreements.
 - c. She determined that the provisions of the Regulations prevailed over the provisions of the NB Regulation 2007-34, when the latter specifically provided for a wage rate for the class of work involved;

3. The inspector erred in law in interpreting the provisions of the Regulations in that she failed to give effect to the provisions of the New Brunswick Regulation 97-125 under the *Apprenticeship and Occupational Certification Act* (RSNB 1973, c A-9.1 (AOCA)) and in particular, subsection 13.1(1) thereof, by finding that the individual respondents were entitled to the full ironworker wage rate specified by the Federal Fair Wage Schedule, notwithstanding the fact that none of the individual respondents were certified journeymen ironworkers and notwithstanding the fact that the Federal Fair Wage Schedule expressly requires that the provincial AOCA be followed;

4. The Inspector based her decision on an erroneous finding of fact that she made in a perverse or capricious manner or without regard for the material before her, in that she concluded that the individual respondents performed the work of the Ironwork (Generalist) occupation, despite the evidence before her that the work in question was not that of a journeymen Ironworker (Generalist), but that of a Rod Setter (Reinforcing Steel) and despite the fact that none of the individual respondents was a journeymen Ironworker (Generalist) or a registered apprentice in that trade.

[16] The respondents submitted the following issues for consideration:

1. What is the standard of review applicable to the decision of the manager and the regional director, under the Regulations?

2. Did the manager err in determining that the rates set by the province of New Brunswick were not generally accepted as current in the New Brunswick-East district and did the regional director err in establishing a fair wage schedule for the district?

3. What is the standard of review of the inspector's decision?

4. Did the inspector commit a reviewable error in reaching her decision of March 5, 2010?
 - a. Did the inspector act within her jurisdiction in applying the Fair Wage Schedule for NB-East?
 - b. Did the inspector properly determine that the individual respondents fell into the ironworker category in the fair wage schedule?

[17] The issues are as follows:

1. What are the appropriate standards of review for the decisions of the manager, regional director and inspector?
2. Was the inspector required to apply the Fair Wage Schedule for New Brunswick-East once it was approved by the regional director?
3. Did the manager err in determining that the rates set by the province of New Brunswick were not generally accepted as current in the New Brunswick-East district and did the regional director err in approving a fair wage schedule for that district?
4. Did the inspector properly determine that the individual respondents fell into the ironworker category in the Fair Wage Schedule NB-East?

Applicant's Written Submissions

[18] The applicant submits that considering the factors in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the decision of the inspector should be reviewed on the correctness standard. First, the decision of the inspector is not protected by a privative clause under the Regulations and

the role of an inspector not mentioned in the Act. The absence of a privative clause suggests a less deferential standard. Second, the definition of inspector in the Regulations is taken from the *Canada Labour Code*, RSC 1985, c L-2. The Minister may designate any person an inspector and no particular expertise or qualifications required, indicating that less deference is appropriate. Third, the purpose of the Act or the Regulations as gleaned for their content is that of labour standards legislation. Unlike other labour standards legislation, the lack of appeal suggests that the Regulations do not favour a deferential standard of review. Finally, the nature of the question, whether the individual respondents were being paid fair wages, could only be answered after analyzing the interplay between federal and provincial legislation. This type of legal analysis should be reviewed on a correctness standard.

[19] The applicant submits that the inspector acted without jurisdiction by not applying section 3 of the Act and section 4 of the Regulations. She was required to interpret the Act and Regulations, examine provincial legislation, inquire into the provincial wage rates and determine whether they are generally accepted as current. However, she simply applied the Fair Wage Schedule NB-East. The inspector should have considered the fact that there are separate collective agreements for rod setters and ironworkers. Because she did not address these key issues, the inspector lost jurisdiction to perform her inspection.

[20] The applicant argues that the inspector also erred in finding that the Fair Wage Schedule NB-East prevailed over the NB Regulation 2007-34. There is nothing in the Act or the Regulations that provides that if a federal wage schedule exists, it will prevail over provincial rates.

[21] The applicant contends that only where there is no provincial law for the district or the provincial law is not accepted as current do the Regulations permit the regional director to establish a fair wage schedule. The New Brunswick wage schedule met all the criteria in subsection 4(1) of the Regulations. There was no evidence that the wages set in the New Brunswick wage schedule were not generally accepted as current. Further, there is no record that the regional director ever turned his mind to the question of whether the provincial rate was generally accepted as current. Therefore, the regional director lost jurisdiction to issue the Fair Wage Schedule NB-East.

[22] Finally, the applicant submits that the inspector erred in finding that employees in the position of rodman should be paid as ironworkers. The Fair Wage Schedule NB-East incorporated the AOCA. The AOCA does not provide for reinforcing ironworker (rodman) but does recognize ironworker (generalist). None of the individual respondents were journeymen ironworker (generalist) nor are any registered as apprentices in that trade and it was an error to determine that they should be paid as such.

Respondents' Written Submissions

[23] The respondents submit that the applicant's challenge of the inspector's decision implicitly challenges two other decisions:

1. The decision of the manager under section 4 of the Regulations that the New Brunswick provincial rates were not generally accepted as current and could not be used to determine fair wages; and

2. The decision of the regional director approving the Fair Wage Schedule NB-East under section 5 of the Regulations.

[24] The respondents submit that these decisions are all reviewable against the reasonableness standard.

[25] In *Kinetic* above, the Federal Court considered the standard of review applicable to a similar decision of a regional director under the earlier version of the Regulations. The Court held that were the regional director to have reviewed and compared the Statistics Canada data and then determined the wage, the Court would have recognized a broad relative expertise. This was the action taken by the manager in the case at bar and therefore this decision is entitled deference.

[26] The respondents submit that according deference is supported by the *Dunsmuir* above, factors. The statutory scheme and the Regulatory Impact Analysis Statement (RIAS) demonstrate that the purpose of the legislation is to ensure fair wages are paid on federal construction contracts. The absence of a privative clause is not determinative and is outweighed by the other factors. The lack of a right of appeal indicates deference. Likewise, the decision whether to accept provincial rates as current is one of fact and policy with no question of law raised and therefore deference automatically applies. The manager's decision arises from the combined experience of HRSDC and Statistics Canada with authority and expertise in compiling statistics and therefore deference should apply.

[27] The respondents note that the decision of the regional director approving the fair wage schedule is not directly challenged in the notice of application. However, the respondents submit that in reviewing this decision, the reasonableness standard should apply for the same reasons outlined in the discussion of the manager's decision. The director's decision is directly connected to and flows from the decision of the manager.

[28] The respondents submit that the decision of the inspector is also reviewable on the reasonableness standard. *Dunsmuir* above, requires an examination of the empowering legislation. The legislation such as the Act, the Regulations, the Labour Conditions and the RIAS contemplate that an inspector's role is to conduct inspections of employment records to ascertain compliance by contractors, such as the applicant, with the applicable fair wage schedules. Therefore, the inspector's decision is exclusively factual and deference is appropriate. The absence of a privative clause in the Act and the Regulations is a neutral factor and not determinative. The inspector performed her role within the specialized area of federal construction contracts with access to the unique resources of the HRSDC Labour Program. This is entitled to deference.

[29] Moreover, the respondents submit that the Federal Court of Appeal and the Federal Court in *Dynamex Canada Inc v Mamona*, 2003 FCA 248 and *Westcoast Energy Inc v Canada (Labour, Regional Safety Officer)* (1995), 104 FTR 123, have reviewed inspectors of the *Canada Labour Code* and determined that where the decision involved questions of fact or mixed fact and law, they are entitled to deference.

[30] The respondents submit that both the decision of the manager and regional director were reasonable. The applicant's submissions largely ignore the role and responsibility of the manager. However, it was the manager who examined the 2007 wage rates fixed for New Brunswick and compared them to data from Statistics Canada. He came to a reasonable conclusion that the provincial rates could not be generally accepted as current per subsection 4(3) of the Regulations because the provincial wage rates were inconsistent with the Statistics Canada data and did not reflect the variance in wage rates between the different areas of New Brunswick. Pursuant to subsection 4(2), the manager used the "most frequently paid" wages to prepare new fair wage schedules for two New Brunswick districts, East and West. These draft fair wage schedules were then recommended to and approved by the regional director under section 5 of the Regulations.

[31] The decision to create a fair wage schedule was appropriate given this Court's decision in *Kinetic* above, which determined that there should have been distinct wage districts in British Columbia where the wage rates for the Vancouver and Victoria areas were different from the rest of the province.

[32] These decisions fell well within the range of possible acceptable outcomes and are therefore reasonable according to the *Dunsmuir* decision.

[33] The respondents further submit that the inspector did not err in applying the Fair Wage Schedule NB-East. There is no provision in the Act, the Regulations, Labour Conditions, the *Canada Labour Code* or the Operational Program Directives (OPD) 870 or 871 that imposes any duty on the inspector to make determinations about provincial rates and establish a fair wage

schedule. Once the regional director has approved a fair wage schedule under section 5 of the Regulations, the inspector must make determinations of wages and rates in accordance with that schedule. Moreover, the applicant's subcontract and the prime contract expressly incorporate the Labour Conditions and Fair Wage Schedule NB–East. The applicant was not permitted to pay wages at the provincial rate. The inspector was correct that once a fair wage schedule is in existence, it prevails over existing provincial rates.

[34] The inspector did not err in determining that the individual respondents were ironworkers. The applicant described the individual respondents as rodsetters and rodmen in its documentation, but this category of employee is not included in the Fair Wage Schedule NB-East. It was reasonable for the inspector to consult the National Occupation Classification and find that rodsetters were incorporated into the broader category of ironworker found in the Fair Wage Schedule NB-East. The inspector's authority to include the individual respondents in the ironworker category is found in section 8 of the Regulations. This was a reasonable conclusion supported by the facts and law.

Analysis and Decision

[35] **Issue 1**

What are the appropriate standards of review for the decisions of the manager, regional director and inspector?

To date, no court has determined the standard of review for a decision of an inspector under the Act. However, this Court determined that the reasonableness *simpliciter* standard was appropriate for a regional director under the previous version of the Regulations, in *Kinetic* above.

[36] In *Dunsmuir* above, the Supreme Court highlighted several factors which may be considered in assessing the appropriate standard of review. These are:

1. the presence or absence of a privative clause;
2. the purpose of the tribunal as determined by the enabling legislation;
3. the nature of question at issue; and
4. the expertise of the tribunal.

[37] Both parties have undertaken a thorough analysis of the above factors. However, I find the Supreme Court's statement in paragraph 64 of *Dunsmuir* above, particularly important to the case at bar. The Court held that:

In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[38] The nature of the question at issue in both the decision of the manager and inspector is highly factual. While the manager's decision involves interplay between the facts and law, the inspector's decision is entirely factual.

[39] The Supreme Court noted at paragraph 53 of *Dunsmuir*, that questions of fact or mixed fact and law are reviewable on the reasonableness standard:

Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at pp. 599-600; Q., at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

(See also paragraph 51).

[40] The role of the inspector was to determine into what category of the Fair Wage Schedule NB-East the individual respondents fell and whether they were paid in accordance with the rates for that category. If not, how much was owing to them? These were purely factual issues.

[41] The manager's decision involved determining whether there was provincial legislation setting wage rates for particular classes of employment and if so, whether those rates were generally accepted as current. This involved receiving and analyzing data from Statistics Canada and comparing that data to the wage rates set in provincial legislation. This process was largely factually based and where it involved questions of law, such as interpreting legislation to determine the meaning of fair wages, these questions were intertwined with the factual assessments.

[42] Finally, I agree with the respondents that the regional director's decision is directly connected to that of the manager and should be assessed on the same standard of review.

[43] As such, I conclude that the analysis of the nature of the question at issue is determinative of the standard of review analysis and consequently, all of the decisions involved should be reviewed on the reasonableness standard.

[44] **Issue 2**

Was the inspector required to apply the Fair Wage Schedule for New Brunswick-East once it was approved by the regional director?

As noted by the respondents, there are no provisions in the Act, the Regulations, Labour Conditions, the *Canada Labour Code*, the OPD 870 or OPD 871 which impose a duty on an inspector to make a determination about provincial wage rates and establish a fair wage schedule.

[45] The HRSDC Labour Program assigns the analysis of provincially-established wage rates under section 4 of the Regulations to the Labour Standards Operations at the National Headquarters in Ottawa. The regional director then prepares a fair wage schedule pursuant to section 5 of the Regulations.

[46] Once approved by the regional director, the Fair Wage Schedule NB-East was applicable to federal construction contracts in that district, including the applicant's subcontract with Maxim for the concrete reinforcing work at CFB Gagetown.

[47] Moreover, the applicant's subcontract and the prime contract expressly incorporate the Labour Conditions and the Fair Wage Schedule NB-East. The applicant was, or should have been, aware during the tender process and at the time of negotiations with Maxim of the minimum wage rates required by the contract. Nothing in the legislation or contract permits the applicant to pay wages at the provincial rate once a federal wage schedule has been established.

[48] Furthermore, once the Fair Wage Schedule NB-East was applicable to federal construction contracts in that district, including the applicant's, the inspector was not free to choose whether or not to apply it. Pursuant to OPD 870 section 7.6, which outlines the role of an inspector, she was

required to make a determination of whether the wages paid by the applicant accorded with the Fair Wage Schedule NB-East.

[49] I find that there was no error on the part of the inspector applying the Fair Wage Schedule NB-East to the applicant.

[50] **Issue 3**

Did the manager, labour standards operations err in determining that the rates set by the province of New Brunswick were not generally accepted as current in the New Brunswick-East district and did the regional director err in approving a fair wage schedule for that district?

The only concern raised by the applicant's submissions regarding the determination of the fair wage schedule is that the issuance of the fair wage schedule should be done by the regional director. The applicant notes that there is no record of the regional director ever turning his mind to the question of whether the provincial rate was generally accepted as current.

[51] OPD 871 section 7.1 indicates that the analysis of the provincial wage rates in the process of establishing a fair wage schedule shall be done by the labour regional head, in consultation with labour standards operations at National Headquarters.

[52] It is clear from Mr. Boughen's affidavit and cross-examination that as the manager, labour standards operations, HRSDC, he examined the provincial wage rates for New Brunswick. He compared those rates to the information provided by Statistics Canada. He determined that the rates were not accepted as current stating that:

[T]he New Brunswick rates treated the province as constituting one district for the purpose of wage rates. However, based on Statistics Canada data from previous surveys, and as confirmed by the 2006-2007 survey, I concluded that there were two distinct districts in New Brunswick, and that wages varied between them. The first district was comprised of the cities and surrounding areas of Fredericton, Moncton and Saint John and had generally higher wage rates overall, with some exceptions. The Labour Program called this the “New Brunswick-East” district. The remainder of the Province had comparatively lower rates overall, again with some exceptions, and was called the “New Brunswick-West” District. As such, the variances in the data between these areas of New Brunswick did not support a single provincial rate. I therefore determined that the provincial wage rates were not ‘generally accepted as current’ under s.4(3) of the [Regulations].

[53] The conclusion arrived at by the manager is consistent with this Court’s decision in *Kinetic* above. In that case, Mr. Justice McKeown held that where the wage rates differed between regions of British Columbia, the regional director should have developed fair wage schedules to reflect these differences. At paragraph 21 and 23 he held:

... the definition of fair wages, "in the district in which the work is being performed," is a reference to a geographical region containing the actual site of the construction project. There is no definition of "district" in the Act, Regulations or Amended Regulations. The Director has put forward that for purposes of his decision he will treat the district as the whole of British Columbia. However, the Regulations and Amended Regulations contemplate for the purpose of determining prevailing wages, a district must be a region in which the prevailing wages are fairly consistent or relatively uniform, and must be wages for competent workmen in such area.

[...]

In my view, if I substitute Regulations for Policy, it is the same question as I have to answer here. The evidence before me is that the wage rates vary from region to region in British Columbia and the Director has not made any attempt to determine if the provincial schedule continues to be the generally accepted wage rate in the province or the particular district in question.

[54] In the case at bar, the regional director signed off on the Fair Wage Schedule NB-East as developed by the manager and his staff at labour operation standards.

[55] The decision of the manager analyzing the data from Statistics Canada and recommending creation of a fair wage schedule for the district of New Brunswick East was transparent, intelligible and justified and was therefore reasonable on the *Dunsmuir* above, standard.

[56] Although section 5 of the Regulations specifies that a regional director shall prepare a schedule of wage rates, I see no error on the part of the regional director relying on the detailed analysis and process undertaken by the manager of labour standards operations for HRSDC and approving the Fair Wage Schedule NB-East.

[57] **Issue 4**

Did the inspector properly determine that the individual respondents fell into the ironworker category in the fair wage schedule?

As found above, the inspector was required to apply the Fair Wage Schedule NB-East.

[58] Also found above, the applicant was, or should have been, aware of the requirement to pay the workers according to the Fair Wage Schedule NB-East.

[59] The position of the individual respondents is referred to by the applicant as rodman and rodsetter. However, neither position appears in the Fair Wage Schedule for NB-East.

[60] The applicant submits that the inspector was required to apply the AOCA, subsection 13.1(1) and New Brunswick Regulation 97-125 which does include the position of rodman.

[61] The Fair Wage Schedule NB-East states that:

The apprentice wage rates are included into this schedule by reference to the *Apprenticeship and Occupational Certification Act* (AOCA) of the province. Thus, where the AOCA refers to a percentage of a corresponding journeyperson's wage for a specific occupation, that percentage shall be applied against the wages listed below.

[62] However, there is no evidence to suggest that the individual respondents were apprentices. Rather, they were simply classified as rodmen by the applicant.

[63] Section 8 of the Regulations states that:

8. There shall be included in every contract a provision that, where there is no wage rate for a particular character or class of work, the contractor will pay wages for that character or class of work at a wage rate not less than the rate established under section 4 for an equivalent character or class of work.

8. Le contrat stipule que l'entrepreneur verse, à l'égard d'un travail d'une nature ou d'une catégorie données pour lequel aucun taux n'est prévu dans l'échelle des taux de salaires, un taux de salaire qui n'est pas inférieur à celui établi conformément à l'article 4 pour un travail de nature ou de catégorie équivalente.

This was also included in the contract with the applicant through clause 02.2 of the Labour Conditions.

[64] As such, the applicant was required to pay the rodmen employees at a wage rate of an equivalent class of work listed in the Fair Wage Schedule NB-East. The possible positions were:

Electricians
Plumbers
Pipefitters, Steamfitters
Sheet Metal Workers
Ironworkers
Carpenters
Bricklayers
Cement Finishers
Tilesetters (including terrazo, marble setters)
Drywall Installers, Finishers, Lathers and Tapers
Roofers
Painters
Heavy Duty Equipment Mechanics
Refrigeration and Air Conditioning Mechanics
Crane Operators
Truck Drivers
Operators Heavy Equipment (excluding Cranes, Graders, Asphalt Paving)
Grader Operators
Pressure Vessel Welder
Paver and Asphalt Plant Operators
Traffic Accommodation Person (Flag Persons)
Trade Helpers, Labourers (excluding Flag persons)

[65] The inspector determined that based on the National Occupation Classification - H324 Ironworkers description, the position of rodman was of an equivalent nature to the ironworker position.

[66] This was a reasonable assessment. The NOC–H324 states that ironworkers:

Ironworkers fabricate, erect, hoist, install, repair and service structural ironwork, precast concrete, concrete reinforcing materials, curtain walls, ornamental iron and other metals used in the construction of buildings, bridges, highways, dams and other structures and equipment. They are employed by construction ironwork contractors.

[Emphasis added]

[67] The applicant submits that the respondents produced a document which indicated that ironworkers (rebar/rodmen) are different than other ironworkers. This is the Occupation Concordance Table for the National Construction Industry Wage Rate Survey prepared by Statistic Canada. However, in this document, each of these sub-groups of ironworkers are still classified as ironworkers under the NOC - H324 so this has no bearing on the reasonableness of the inspector's findings as these sub-groups would continue to form part of the ironworker class under the Fair Wage Schedule NB-East.

[68] As such, there was no error in the inspector's assessment.

[69] The application for judicial review is dismissed with costs to the respondent.

JUDGMENT

[70] **IT IS ORDERED that** the application for judicial review is dismissed with costs to the respondent.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*Fair Wages and Hours of Labour Act, RSC 1985, c L-4*

2. “fair wages” means such wages as are generally accepted as current for competent workmen in the district in which the work is being performed for the character or class of work in which those workmen are respectively engaged, but shall in all cases be such wages as are fair and reasonable and shall in no case be less than the minimum hourly rate of pay prescribed by or pursuant to Part III of the *Canada Labour Code*;

...

3.(1) Every contract made with the Government of Canada for construction, remodelling, repair or demolition of any work is subject to the following conditions respecting wages and hours:

(a) all persons in the employ of the contractor, subcontractor or any other person doing or contracting to do the whole or any part of the work contemplated by the contract shall during the continuance of the work be paid fair wages;

2. « justes salaires » Les salaires généralement réputés courants pour les ouvriers qualifiés dans le district où le travail est exécuté, compte tenu de la nature ou de la catégorie de travail à laquelle ces ouvriers sont respectivement employés; cependant, ces salaires doivent dans tous les cas être justes et convenables et ne peuvent en aucune circonstance être inférieurs au salaire horaire minimum prescrit par la partie III du *Code canadien du travail* ou sous le régime de cette partie.

...

3.(1) Tout contrat conclu avec le gouvernement du Canada pour la construction, la restauration, la réparation ou la démolition de quelque ouvrage est assujéti aux conditions suivantes concernant les salaires et heures de travail :

a) toutes les personnes à l’emploi d’un entrepreneur, d’un sous-traitant ou de tout autre individu qui exécute ou entreprend d’exécuter totalement ou partiellement l’ouvrage prévu par le contrat doivent, durant la continuation de l’ouvrage, toucher de justes salaires;

Fair Wages and Hours of Labour Regulations, CRC c 1015

4.(1) Subject to subsections (3) and (4), where there is a wage rate fixed, from time to time, by or under an Act of the legislature of a province that is applicable in the district in which the work is being performed for the character or class of work, and that rate is generally accepted as current, the fair wage shall be the provincial rate.

(2) Where there is no wage rate fixed by

4.(1) Sous réserve des paragraphes (3) et (4), le juste salaire payable pour un travail dans un district donné est, le cas échéant, le taux prévu et éventuellement modifié par la législation provinciale pour ce travail compte tenu de sa nature ou catégorie, si ce taux est généralement accepté comme étant le taux courant.

(2) En l’absence de taux prévu par la législation

provincial law for the district, the fair wage shall be equivalent to the average of salaries paid in that district for the character or class of work, based on statistical estimates produced by Statistics Canada from an occupational survey of the construction sector.

(3) Where the wage rates fixed by provincial law for a district are not generally accepted as current, the fair wages shall be the wage rates determined under subsection (2).

(4) In no case shall the fair wage rate be less than the minimum hourly rate fixed pursuant to Part III of the *Canada Labour Code*.

de la province pour un district donné, le juste salaire est équivalent à la moyenne des salaires payés dans ce district, compte tenu de la nature ou catégorie de travail, obtenue à partir des estimations statistiques de Statistique Canada qui sont établies selon les enquêtes de professions pour le secteur de la construction.

(3) Lorsque, pour un district donné, les taux de salaires prévus par la législation provinciale ne sont pas généralement acceptés comme étant courants, les justes salaires pour ce district sont ceux déterminés conformément au paragraphe (2).

(4) Le juste salaire ne doit en aucun cas être inférieur au salaire horaire minimum fixé sous le régime de la partie III du *Code canadien du travail*.

Schedule Development Procedures - *Fair Wages and Hours of Labour Act and Regulations*
- OPD 871

(a) Use of provincial or territorial schedules

When construction industry wage rates are established for a province or territory by or under provincial or territorial legislation, the Labour Regional Head, in consultation with Labour Standards Operations at NHQ (LSOPS/NHQ), will evaluate the provincial or territorial rates to determine whether these rates will be adopted as federal construction contract wage rates.

(Regulation 4(1))

In general, the evaluation will consider whether the provincial or territorial rates may be realistically applied to each district in the region, and whether they are generally accepted as current by the construction industry in the affected region.

a) Utilisation des échelles provinciales ou territoriales

Si les taux de salaires pour le secteur de la construction sont établis dans la législation provinciale ou territoriale, ou en application de celle-ci, le chef régional du travail, en consultation avec le personnel de Normes du travail, Opérations (NTO), à l'administration centrale (AC), évaluera ces taux afin de déterminer s'ils seront adoptés comme contrats fédéraux de construction.

(Par. 4(1) du Règlement)

En général, l'évaluation considérera si les taux provinciaux ou territoriaux peuvent être appliqués de façon réaliste à chaque district de la région en question et s'ils sont généralement acceptés comme étant les taux courants dans le secteur de la construction de la région visée.

(Regulation 4(1))

More specifically, the evaluation will be based on the results of an investigation of the method by which the provincial or territorial rates were established, and will consider at least:

whether both union and non-union rates, or some combination, are represented;

whether the rates reflect a basic hourly wage, or whether other elements such as benefits, travel allowances, 'hardship pay' or bonuses are factored into the rates;

whether rates apply to districts within the province and which geographical areas of the province are included; and

which sectors of the construction industry are included.

When provincial or territorial rates are not available, or, as a result of the evaluation, have been found not to be suitable for use as federal construction contract wage rates, the federal construction contract wage rates shall be established according to statistical estimates produced by Statistics Canada.

(Regulations 4(2) & (3))

(b) Use of statistical estimates from Statistics Canada

On behalf of the Labour Regional Head, LSOPS/NHQ will, from time to time, evaluate Statistics Canada occupational and wage data to decide whether any existing data may be suitable for establishing Schedules of wage rates for federal construction contracts.

(Par. 4(1) du Règlement)

Plus précisément, l'évaluation sera basée sur les résultats d'une enquête menée sur la méthode qui a été utilisée pour établir les taux provinciaux ou territoriaux et en plus, elle considérera :

s'il y a représentation des taux syndicaux et non syndicaux ou une combinaison de ceux-ci;

si les taux représentent un taux horaire de base ou si d'autres éléments, par exemple les avantages sociaux, les allocations de voyages, les indemnités de difficulté d'existence ou les primes, entrent en ligne de compte dans les taux;

si les taux s'appliquent aux districts de la province en question et quels secteurs géographiques de cette dernière sont inclus;

les segments du secteur de la construction font parties de l'évaluation.

S'il n'y a pas de taux provinciaux ou territoriaux ou si, à la suite de l'évaluation, on a jugé qu'ils ne convenaient pas pour les contrats fédéraux de construction, les taux de salaires pour ces contrats seront établis à partir des estimations statistiques de Statistique Canada.

(Par. 4(2) et (3) du Règlement)

b) Utilisation des prévisions statistiques de Statistique Canada

Au nom du chef régional du travail, NTO de l'AC, de temps en temps, entreprendra une évaluation des données de Statistique Canada sur les métiers et les salaires afin de déterminer si ces données peuvent être utilisées pour établir les échelles des taux de salaires des contrats fédéraux de construction.

Where no suitable data exists, LSOPS/NHQ will negotiate with Statistics Canada for the conduct of a specialized survey of wage rates in the construction industry.

En l'absence de données convenables, NTO de l'AC négociera avec Statistique Canada la réalisation d'une enquête spécialisée sur les taux de salaires du secteur de la construction.

Schedule of Wage Rates: New Brunswick - East Zone

Wage Rates as of: August 13, 2007

Échelle des justes salaires à partir du : 13 août 2007

Construction trades workers on the federal government construction contract listed in this appendix must be paid a regular hourly wage rate no less than the rate on this schedule for the type of work they are doing under the contract.

Les travailleurs de métiers de la construction, sur un contrat fédéral de construction, doivent être payés à un taux de salaires non moindre que le taux de cette échelle pour le type de travail effectué en vertu du contrat en question.

The apprentice wage rates are included into this schedule by reference to the Apprenticeship and Occupational Certification Act (AOCA) of the province. Thus, where the AOCA refers to a percentage of a corresponding journeyman's wage for a specific occupation, that percentage shall be applied against the wages listed below.

Le salaire des apprentis est inclus dans cette échelle en faisant référence à la Loi sur l'apprentissage et la certification professionnelle (LACP) de la province. Ainsi, là où la LACP prescrit que le salaire d'un apprenti doit correspondre au pourcentage du salaire d'un ouvrier qualifié de la même occupation, le calcul sera effectué en utilisant les taux ci-dessous.

Classification of Labour	Fair Wage Rate Per Hour Not Less Than
Electricians	\$23.42
Plumbers	\$22.94
Pipefitters, Steamfitters	\$29.32
Sheet Metal Workers	\$21.87
Ironworkers	\$27.09
Carpenters	\$17.02
Bricklayers	\$21.69
Cement Finishers	\$17.07
Tilesetters (including terrazo, marble setters)	\$17.41
Drywall Installers, Finishers, Lathers and Tapers	\$18.62
Roofers	\$19.84
Painters	\$14.72
Heavy Duty Equipment	\$18.68

Catégorie de main-d'oeuvre	taux de juste salaire non inférieur à
Electriciens	\$23.42
Plombiers	\$22.94
Pipefitters, Tuyauteurs monteurs de tuyaux à vapeur	\$29.32
Toliers (ouvriers de feuilles de métal)	\$21.87
Monteurs de charpentes métalliques et ferrailleurs	\$27.09
Charpentiers-menuisiers	\$17.02
Briqueteurs-maçons	\$21.69
Finisseurs de béton ou ciment	\$17.07
Poseurs de carrelage (de céramique, de marbre, etc.)	\$17.41
Latteurs et poseurs de cloisons sèches – poseurs de lattes	\$18.62

Mechanics	
Refrigeration and Air Conditioning Mechanics	\$21.36
Crane Operators	\$20.82
Truck Drivers	\$13.61
Operators Heavy Equipment (excluding Cranes, Graders, Asphalt Paving)	\$15.09
Grader Operators	\$13.24
Pressure Vessel Welder	\$20.70
Paver and Asphalt Plant Operators	\$13.29
Traffic Accommodation Person (Flag Persons)	\$9.51
Trade Helpers, Labourers (excluding Flag persons)	\$13.05

Fair wage schedule prepared by: Labour Standards and Workplace Equity Branch, Labour Program, Human Resources and Skills Development Canada based on The National Construction Industry Wage Rate Survey (2006) conducted by the Small Business and Special Surveys Division, Statistics Canada.

Couvreurs de toits multicouches	\$19.84
Peintres	\$14.72
Mécanicien de machinerie lourde	\$18.68
Mécanicien en réfrigération et climatisation	\$21.36
Conducteurs/opérateurs de grue	\$20.82
Conducteurs de camions	\$13.61
Conducteurs-machin. lourde sauf grue niveleuse, pavage et asphalte)	\$15.09
Conducteurs de niveleuse (grader)	\$13.24
Soudeurs de réservoirs pour fluides sous-pression	\$20.70
Conducteurs de machinerie de pavage et d'asphaltage	\$13.29
Ouvrier chargé de diriger la circulation	\$9.51
Manoeuvres (sauf circul.)	\$13.05

L'échelle des justes salaires préparée par : Normes de travail et équité en milieu de travail, Programme du travail, Ressources humaines et Développement des compétences Canada basée sur l'Enquête nationale sur les taux salariaux dans le secteur de la construction (2006) faite par la Division des petites entreprises et enquêtes spéciales, Statistique Canada.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-511-10

STYLE OF CAUSE: OCEAN STEEL & CONSTRUCTION LTD.

- and -

RHEAL ARSENEAULT, ROYCE BOIES,
DAVE CAMERON, MARK R. CUMMINGS,
MICHAEL DUNCAN, JACQUES GOGUEN,
HENRI GUILLEMETTE, GERALD HACHEY,
MATTHEW HOMENEY, DANIEL R. HOWARD,
MATHIEU LOSIER, TONY J. MILLS,
GLEN TABER, NORMAND THIBODEAU,
PATRICK THOBODEAU

- and -

THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Fredericton, New Brunswick

DATE OF HEARING: December 14, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: May 31, 2011

APPEARANCES:

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James Gunvaldsen-Klaassen

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FOR THE RESPONDENT,
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