WCB v. *Canada*, 2007 NWTSC 109

Date: 2007 12 18
Docket: S-0001-CV2005000361

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES AND NUNAVUT

Applicant

- and -

ATTORNEY-GENERAL OF CANADA

Respondent

Application to determine whether territorial mine health and safety laws apply to private contractors and their employees when working on a mine reclamation project on federally-owned lands.

Heard at Yellowknife, NT, on November 14, 2007.

Reasons filed: December 18, 2007.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Applicant: Adrian C. Wright and Sacha Paul

Counsel for the Respondent: Andrew Fox

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REASONS FOR JUDGMENT

[1] The issue on this application is whether territorialoccupational health and safety laws apply to private contractors and their employees when working on a federal mine reclamation project on federally-owned lands in the Northwest Territories.

[2] This case is fundamentally about a question of interjurisdictional immunity,but one posed in a most peculiar way. When these types of cases arise ordinarily the federal government would be arguing that the provincial law of generalapplication (or in this case territorial law) has no applicability to the federal undertaking. The other level of government would be arguing that it did. Here the situation is turned upside down. The applicant, a territorial entity, seeks a declaration that the territorial legislation that it administers, and that applies generally to mine safety and construction, does not apply to the federal project in question in this case.

[3] This is not a question of the validity of any legislation, merely its applicability. The concept of interjurisdictional immunity arises because, in a federal state such as Canada, there are inevitably circumstances in which legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may affect matters beyond that legislature's jurisdiction without necessarily being unconstitutional. Incidental intrusions into the authority of another government level

may be accepted. However, if the legislation in question affects the basic and fundamental core of the other government's exclusive power, then that legislationmay be inapplicable to the activity in question.

[4] In this case the issue arises because, on the one hand, the federal project in question is the remediation of an abandoned mine located on federal property. Section 91(1A) of the *Constitution Act, 1867* empowers the federalgovernment with exclusive jurisdiction to enact laws in respect of federally-owned property. On the other hand, various items of territorial legislation, specifically the *Mine Health and Safety Act*, S.N.W.T. 1994, c.25, exist to regulate the health and safety of workers on mine sites. It is not disputed that this territorial legislation is a valid exercise by the Northwest Territories legislature of powers conferred upon it by the *Northwest Territories Act*, R.S.C. 1985, c. N-27. But the territorial authority, in this case, says that any attemptto enforce the territorial legislation would be an intrusion upon the exclusive federal authority over a federalundertaking on federally-owned lands, notwithstanding the fact that the work is being performed by private contractors. The applicant says that the *Mine Health and Safety Act* is a unified and comprehensive statute and any attempt to divide it up and try to determine what may apply on this project and to whom would be an administrative nightmare. The federal government says that the territorial legislation does apply, and wants it to apply, not to its own employees, but to the private contractors and their employees.

[5] Interjurisdictional immunity is commonly invoked as a protective doctrine, one that protects one government's authority from intrusion by another. But here the government one would expect to rely on it, the federal government, denies it and accepts the territorial authority. On the other hand, the territorial authorityinvokes the doctrine so as to shield it from exercising any authority or responsibility.

Background Facts:

[6] The project in question is the reclamation and remediation of the Colomacmine site. Colomac, located at 64 degrees north latitude some 220 kilometres north of Yellowknife, was the site of a gold mine which operated from 1990 to 1997, when its owner, Royal Oak Inc., went bankrupt. The mine is located on federal land. Until Royal Oak abandoned the site, the land was leased to it by the federal government. On Royal Oak's bankruptcy, the lease reverted to the federal government and the

Department of Indian Affairs and Northern Development manages and controls the site.

[7] The federal government has adopted a site remediation programme which involves major reclamation projects, including the decommissioning and deconstruction of site facilities, land and water decontamination, site engineering and environmental assessment. The work is being carried out by four contractors, all of which are privately-owned, territorially-registered businesses. One of the contractors is designated as the prime contractor for the project.

[8] The contract with the prime contractor contains a number of conditions relating specifically to safety issues. The prime contractor must prepare a site specific safety plan that must comply with the *Mine Health and Safety Act*. If there is any conflict between the two, the Act shall prevail. Also, the prime contractor, for the purposes of that Act, assumes the role of "Mine Manager" and must discharge the duties and responsibilities required of that position under the Act. Individuals must be appointed to the positions of Mine Manager, Acting Manager and Supervisors who meet or exceed the qualifications and criteria outlined in the Act for those positions. The prime contractor must develop a mine rescue plan as required by the Act as well as other safety procedures so as to comply with the Act and all other occupational health and safety regulations. All of this is significant because the *Mine Health and Safety Act* places a great deal of responsibility on designated mine officials for ensuring compliance with safety requirements.

[9] The *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6, assigns the responsibility for administration of the *Mine Health and Safety Act* to the applicant. The issue of the applicant's jurisdiction to enforce this Act on federal works or undertakings generally, and at the Colomac mine site specifically, has been the subject of much discussion between the applicantand the federalgovernment for several years. The applicant's position has been that the provisions of Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2, dealing with occupational health and safety in respect of employment on or in connection with any federal work or undertaking, apply to the Colomac project and to the work of the contractors. The federal governmenthas taken the position that Part II of the *Labour Code* applies to all federal government employees working on the project and to the physical premises, buildings and structures, owned by the federal government; the territorial legislation, however, should apply to the activities of the contractors and their employees.

[10] The issue is complicated, of course, by the fact that the Northwest Territories is not a province. Legislatively, Parliament has invested the Territories with many of the powers similar to a province. But it remains subject to, in the words of one Supreme Court of Canada case, "the all-encompassing legislative authority of the Parliament of Canada": *Canada (Labour Relations Board)* v. *City of Yellowknife* (1977), 76 D.L.R. (3d) 85 (S.C.C.), at p. 86 (per Laskin C.J.C.).

Analysis:

[11] The doctrine of interjurisdictional immunity is grounded on the exclusive authority given to the federal Parliament and the provinces to legislate in specific classes of subjects as delineated in ss. 91 and 92 of the *Constitution Act, 1867*. As noted in *Canadian Western Bank* v. *Alberta*, [2007] S.C.J. No. 22 (at para. 34), if a power is truly exclusive, it cannot be invadedby another government's legislationeven if the power remains unexercised. The same reasoning applies to a situation where the federal government simply wants some other level of government to exercise its authority. If a federal power is exclusive then it pre-empts provincialor territoriallaws of general and specific application insofar as such laws affect a vital part of the federal work or undertaking. The interjurisdictional immunity rule is a constitutional principle. It cannot be waived nor can it be affected by contractual arrangements, like the ones in this case between Canada and the private contractors: *City of Mississauga* v. *Greater Toronto Airport Authority* (2000), 192 D.L.R. (4th) 443 (Ont. C.A.), at para. 73 (leave to appeal denied [2001] S.C.C.A. No. 83).

[12] The Northwest Territories, because it is not a province, does not enjoy the same "exclusivity" over certain classes of subject as do the provinces. The Territories have no constitutionally entrenched powers. It has only those powers delegated by Parliament through the *Northwest Territories Act*. And, by virtue of s. 16 of that Act, all territorial legislation is subject to that Act and any other Act of Parliament. The analysis in this case, however, can proceed along similar lines as those in cases involving a clash between federal and provincial powers. Section 17 of the *Northwest Territories Act* provides a form of parity for territorial jurisdiction in respect of classes of authority with the enumerated provincial heads of power in s. 92 of the *Constitution Act, 1867*: "Nothing in section 16 (of the *Northwest Territories Act*) shall be construed as giving the Commissioner in Council greater powers with respect to any class of subjects described therein than are given to legislaturesof the provinces..." Therefore,

the case law discussing federal immunity in the face of provincial law has relevance to the present case.

[13] As outlined in *Canadian Western Bank* (at paras. 35 - 41), the doctrine of interjurisdictional immunity was developed to protect federal heads of power and federally regulated undertakings from provincial encroachment, and also to protect provincial heads of power from federal encroachment. But, as the case law demonstrates, it has been invoked most often in favour of federal immunity at the expense of provincial legislation. If the provincial law trenches on the "basic, minimum and unassailable core" of the federal subject then the doctrine stipulates that the provincial law must be read down to exclude the federal subject (see Hogg, P.W., *Constitutional Law of Canada*, looseleaf edition, Vol. 1, at 15 - 36). This doctrine, however, is limited. The generally preferred approach is that, where possible, the ordinary operation of statutes which are enacted in furtherance of the public interest should be favoured in the absence of conflicting enactments by different levels of government. This is a recognition that overlappingpowers are unavoidablein a federal state.

[14] In *Bell Canada* v. *Quebec*, [1988] 1 S.C.R. 749, Beetz J. (writing for the Court) wrote (at pp. 859 - 860) that, for the interjurisdictional immunity rule to apply, it is sufficient to show that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking. However, in the more recent *Canadian Western Bank* case, and in *British Columbia* v. *Lafarge Canada Inc.*, [2007] S.C.J. No. 23, the Supreme Court of Canada has narrowedthat application. It is not enough to show that a provincial statute merely "affects" a federal undertaking. It is necessary to demonstrate that it "impairs" the core of the federal power or undertaking (see *Canadian Western Bank* at para. 48). The word "impairs" implies adverse consequences. Furthermore, it is not a question of how the statute affects the federal undertaking generally; it is a question of whether the statute impairs an "essential and vital" part of the undertaking that makes it specifically of federal jurisdiction. The use of the terms "essential and vital"therefore restrictsthe analysisto that which is "absolutely indispensable or necessary" to the core federal power (see *Lafarge Canada* at paras. 42-43).

[15] So the question in this case becomes whether the enforcement of territorial occupational health and safety legislation at the Colomac mine site, with respect to the activities of the government's contractors and their employees, would impair an

absolutely indispensableor necessarycomponent of the federalgovernment's authority over federally-owned property.

[16] What is the core of the federal competence with respect to property?

[17] It has been held that "property" in s. 91(1A) of the *ConstitutionAct, 1867* means property in its broadest sense. The rights enjoyed by the federal government are those of a proprietor: the ability to control use and access, sale, lease or other alienation, etc. The power includes partial interests such as the reversionary interest in land that has been leased: see *Greater Toronto Airport Authority (supra)*, at paras. 66-69.

[18] The federal power to legislate with respect to federally-owned propertyacts as a subject-matter limitation on provincial or territorial legislative powers. This does not mean that federally-owned lands become extra-territorial federal enclaves immune from all provincial or territorial laws of general application. Those laws may still apply but only if they do not trench on, or purport to regulate, the essential aspects of the federal power: see *Lafarge Canada (supra)*, at paras. 55-56; *Paul* v. *British Columbia*, [2003] 2 S.C.R. 585 (at paras. 14 & 19); *Quebec* v. *Construction Montcalm Inc.*, [1979] 1 S.C.R. 754 (at p. 778).

[19] In this case, the reclamation project at Colomac is not only on federal land but it is also a federal work or undertaking. The Government of Canada adopted a remediation plan; it set out the scope of the work; it retained the contractors; and, it specified what work those contractors are to do and how to do it. The contractors report to federal public servants. So I think it is clear that this is a federal work or undertaking. It is one project with some aspects being done by private contractors and some aspects being done by federal employees. But it is one integrated project.

[20] The reclamation project comes within the ambit of the *Mine Health and Safety Act.* That statute defines "mine" (in s.1) as including:

> (a) a place where the ground is mechanically disturbed or an excavation is made to explore for or to produce minerals, other than a place where persons use only hand tool to explore for minerals:
>
> (b) machinery, equipment and material used in connection with a mine;
>
> (c) buildings and shelters used in connectionwith a mine, other than bunkhouses, cook houses and related residential facilities;

> (d) a place where mining activities such as exploratory drilling, excavation, processing, concentrating, storage, waste disposal and *work associated with mine site reclamation are carried out*;
>
> (e) a mine under construction; and
>
> (f) *a closed mine*. [Emphasis added]

[21] The respondent federal government in this case draws on the immunitydoctrine to say that the territorial Act does not apply to it, its employees, and the structures and buildings on the site owned by it. The respondent argues, however, that the activities of the contractors can be discretely regulated by the territorial mine safety inspectors. In doing so it places reliance on the *Montcalm Construction* case (noted previously).

[22] The issue in *Montcalm Construction* was whether the Quebec minimum wage law applied to a contractor doing construction work on federal property (constructing runways at an airport). The contractor disputed the applicability of the provincial law on the basis that the work fell under the federal government's exclusive authority over federal property and aeronautics. The majority in the Supreme Court of Canada held that the provincial law did apply. The province was competent to legislate over employment. The fact that the work was being done on federal property did not insulate the contractor from laws of general application governing the civil rights of its employees. The law had nothing to do either with property use or aeronautics. It did not purport to regulate either. The payment of wages is not an integral part of the core federal jurisdiction. Therefore the law applied.

[23] Of particular relevance are the comments of Beetz J. to the effect that statutory provisions dealing with safety are generally such that they rarely affect the vital or essential aspects of a federal undertaking. Beetz J. distinguished between the design and planning of an airport, for example, which will have a direct effect upon its operational qualities, and the mode or manner of carrying out the construction of the airport. He wrote (at p. 771):

> . . . Thus, the requirement that workers wear a protective helmet on all construction sites including the construction site of a new airport has everything to do with construction and with provincial safety regulations and nothing to do with aeronautics: see R. v. Beaver Foundations Ltd. [(1968), 69 D.L.R. (2d) 649.] and R. v. Concrete Column Clamps (1961) Ltd. [[1972] 1 O.R. 42.] See also Re United

> Association of Journeymen, etc. Local 496 and Vipond AutomaticSprinkler Co. Ltd. [(1976), 67 D.L.R. (3d) 381.], where Cavanagh J. of the Alberta Supreme Court held that "the fact of construction of a building called an air terminal does not ... show that the construction is connected with aeronautics" and that, while an aerodrome is a federal work, employees constructing such a building are subject to provincial labour relations legislation.

[24] This general propositionabout the applicability of provincialsafety laws was not followed, however, in subsequent cases. In the *Bell Canada* case (noted previously), the Supreme Court concluded that the application of a provincial statute respecting occupational health and safety could not apply to a federally regulated telephone company because such application would "enterdirectly and massivelyinto the field of working conditions and labour relations ... and ... management and operation" of the federal utility (at para 128). To the same effect is *Canadian National Railway Co.* v. *Courtois*, [1988] 1 S.C.R. 868, released concurrently with *Bell Canada*, where the same provincial act was declared inapplicable to a federally -regulated railway. In a third case, *Alltrans Express Ltd.* v. *British Columbia*, [1988] 1 S.C.R. 897, the Court held that the occupational safety aspects of the provincial *Workers' Compensation Act* could not apply to an interprovincial trucking business because to do so would intrude on the management of a federal undertaking.

[25] It is interesting that the unanimous judgment in *Bell Canada* was written by Beetz J. (the author of the majority judgment in *Montcalm Construction* released 10 years earlier). In *Bell Canada* he had some pointed comments about the dangers associated with co-extensive jurisdiction in the occupational health and safety field (at paras. 257-261):

> That leaves the "policy" argument, according to which it would always be open to Parliament to protect federal undertakings against provincial statutes by an exercise of its so-called ancillary power and the application of the paramountcy of federal legislation.
>
> I must say that I find very little merit in such an argument, both in general terms and when invoked in the particularfield of occupational health and safety.
>
> It is an argument which relies on a spirit of contradiction between systems of regulation, investigation, inspection and remedial notices which are increasingly complex, specialized and, perhaps inevitably, highly detailed. A division of jurisdiction in this area is likely to be a

> source of uncertainty and endless disputes in which the courts will be called on to decide whether a conflict exists between the most trivial federal and provincial regulations, such as those specifying the thickness or colour of safety boots or hard hats.
>
> Furthermore, in the case of occupational health and safety, such a twofold jurisdiction is likely to promote the proliferation of preventive measures and controls in which the contradictions or lack of co-ordination may well threaten the very occupational health and safety which are sought to be protected.
>
> Federalism requires most persons and institutions to serve two masters; however, in my opinion an effort must be made to see that this dual control applies as far as possible in separate areas.

[26] This passage was quoted by the applicant's counsel in this case as support for his argument that any attempt to apply the territorial Act to only certain workers on the Colomac project, and to only certain things on the Colomac property, and to try to decipher what work or things are immune to territorial regulation, would lead to administrative confusion and inconsistency, a "nightmare" in his words. This is demonstrated, in my opinion, by looking at the Act and some of the provisions in the federal contracts for the Colomac project.

[27] The *Mine Health and Safety Act* places the primary duty to protect the health and safety of employees and to ensure compliance with the Act on the "owner": s.2. The term "owner" is defined as the "immediate proprietor, lessee or occupier" of a mine: s. 1. Obviously the "owner" is the Government of Canada in this case. So, the most basic and primary duty imposed by the Act cannot be enforced in this case. The person responsible for all technical aspects of the project is the "engineer", a federal employee. The work of the contractors is supervised by a federal department (Public Works and Government Services). They conduct inspections to ascertain compliance with the contract requirements. The Site Specific Safety Plan that the prime contractor must prepare, which must comply with the *Mine Health and Safety Act*, is not presented to the territorial mine inspectors but to the federal engineer.

[28] Under the Act, an inspector may enter a mine at any time (including any buildings or structures) and may seize and detain anything that may be related to an infraction: ss. 21-22. An inspector may order remedial action or an immediate work stoppage: s.27. The owner of a mine must provide access and assistance to an

inspector: s. 23. Yet, in this case, both parties agree that the Act cannot apply to the Government of Canada, its employees, or its buildings, structures and equipment. It seems to me that these enforcement provisions would be severely limited as a result. And surely that cannot be in the interest of worker safety.

[29] It is also instructive that the Court, in *Bell Canada*, noted the existenceof federal occupational health and safety legislation that applied to the workplace (Part II of the *Canada Labour Code*). So it was not a situation of a legislative or regulatory vacuum if the provincial statute did not apply. The same situation arises here (although admittedly the *Mine Health and Safety Act* is more specifically related to mine safety than the more general provisions of the *Canada Labour Code*).

[30] The discussion so far has focussed on the potential of the territorial law intruding on the management and operation of the Colomac project as a federal work or undertaking. As stated in *Bell Canada* (at para. 19), an exclusive federal jurisdiction precludes the application to federal undertakings of provincial laws relating to labour relations and working conditions since such matters are "an essential part of the very management and operation of such undertakings, as with any commercial or industrial undertaking". But there are also implications from the fact that the project is located on federal land.

[31] The applicant's counsel, in his written argument, reviewed many of the provisions in both the *Mine Health and Safety Act* and the regulationsmade thereunder (some 224 pages of them) to demonstrate how they can affect not only the use to which the property is made but how it is to look and what may or may not be placed upon it. The Act requires generally that a mine be "constructed, developed, reconstructed, altered or added to in accordance with this Act and the regulations": s. 2(3)(b).

[32] The applicant relies on two cases to support its arguments. The first is *Canada (National Battlefields Commission)* v. *Commission de transport de la Communauté urbaine de Quebec*, [1990] 2 S.C.R. 838. There the questionwas whetherthe licensing system for public transport established by the *Quebec Transport Act* applies to a sightseeing bus service offered by a private contractor. The SupremeCourt held that it did not. The sightseeing service was an integral part of the legislative mandate conferred on the National Battlefields Commission and the provincial permit system would make the service offered in the park subject to the discretionary control of the provincial regulator. Notwithstanding the fact that the service was one offered by a

private contractor, it was in essence a federal service on federal property. The provincial regulatory power affected a vital or essential aspect of the management or operation of the service and therefore it was constitutionally inapplicable.

[33] In the *National Battlefields* case, however, the Court commented that the sightseeing service, while exempt from the permit requirements of the provincial law, was not necessarily exempt from the safety aspects of the same law. Gontier J. wrote (at para. 45):

> I hasten to add that this does not mean that the federal service is necessarily exempt from the application of provincial legislation dealing with safety in the transport industry, which is secured in the Act by a separate mechanism from the permit system. Indeed, the provisions dealing with safety are generally such that they rarely affect the vital or essential aspects of a service or undertaking. They rather tend to touch on certain secondary aspects of operations,which may often be likened to the example given in Construction Montcalm, supra, at p. 771, of the requirement by a province that workers wear a protective helmet on all construction sites, a requirement which was applicable to the site of a new airport.

[34] At first blush these comments may be seen as contradicting the Court's earlier statements in *Bell Canada (supra)* regarding the effect of occupational safety legislation. But I think on reflection that the two can stand side by side.

[35] The normal rules of traffic safety (speed limits, mechanical fitness, rules of the road) would be just as applicable to a bus offering a sight-seeing serviceas to any other bus. Those regulations need not touch on, affect, or impair, the management of the service or the scope of its operations. Occupational health and safety legislation, because of its impact on the management and organization of the work, necessarily impairs the authority of the owner (in this case the Government of Canada) over the operations in question. In any event, the statements by Gontier J. were *obiter* and not a considered analysis of the specific point referenced in the above-quoted paragraph (although of course a trial judge must be cautious in disregarding any statement from the Supreme Court of Canada, even if it may be considered to be *obiter*).

[36] The second case, and one much more pertinentto the present case, is the *Greater Toronto Airport Authority* decision (referenced earlier). That case raised the issue of whether provincial building codes and municipal development by-laws applied to the

construction of a new terminal at the Pearson International Airport. The work was conducted by private contractors on land leased by the federal government to the Airport Authority. The government, however, had its own regime for the design and construction of airports with national building and fire codes applying to the work.

[37] The Ontario Court of Appeal held, in that case, that the provincialand municipal laws did not apply for two reasons. First, the federal aeronautics power encompasses all aspects of airports including the constructionof terminals(see paras. 35-36). As the Court noted, airports are integral to the subject-matter of aeronautics. Second, provincial and municipal laws, such as building code statutes, whose very subject matter is land or property development, cannot apply to federalproperty (see paras. 62-63). The application of these types of laws would intrude into the exclusive federal jurisdiction over federal public property. Even if the land is leased, the Crown still has a property interest and provincial or municipal laws regarding the construction, alteration or demolition of a building would necessarily affect the Crown's property interest (see para. 66). An application to appeal this decision to the Supreme Court of Canada was subsequently dismissed.

[38] In the present case, the *Mine Health and Safety Act* has a direct impact on how the Colomac land may be used. It prescribes conditions for the physical state of the property and all buildings, structures and equipment located on it. It regulates the use of the property and its physical attributes. Thus it is more like building and development codes than the generaloccupational health and safety legislationapplying to workplaces.

[39] Another pertinent point arising in the *Airport Authority* case relates to the facts of the present case. In *Airport Authority*, it was noted that the lease between the federal Crown and the Airport Authority obligated the Authority to at least negotiate with the local municipal authorities to try to come to an agreement respecting the application of provincial and municipal building codes. Such an agreement could provide for the application of those codes to the property. If there was no agreement, then the national building codes would apply. But, these contractual provisionsdo not alter the legal status of the provincial and municipal legislation (see paras. 73-75). As noted earlier, the interjurisdictional immunity rule is a constitutional principle that cannot be waived or altered by contract.

[40] In the present case, the respondent has imposed on its contractors an obligation to comply with the terms of the *Mine Health and Safety Act*. This it can do as a matter of contract. The contractors will have to comply. But the contract does not alter the legal status of that Act with respect to the Colomac project. Certainly the respondent could, because of its all-encompassing legislative competence with respect to the Northwest Territories, legislate the applicability of the territorial legislation. But it cannot impose on the applicant the obligation to enforce the Act on this project by simply making compliance a condition of its contract with the private contractors.

[41] Both parties acknowledge that it is the subject-matter of the work or undertaking that is decisive and not the identity of who carries out the work. But yet, in several instances, the respondent relies on the fact that the federalgovernment has exercisedits discretion to contract out aspects of the remediation work and the fact that the contractors are private businesses, independently owned and operated,for whom these are but some contracts in which they are involved. The respondent though acknowledges that the entire project relates to the federal power to control and use its property. It also acknowledges that the work of the contractors will be part of the overall project to remediate the land. All work done on the property is being conducted toward that goal. Yet, the respondent assumes that just because the contractors are not federal government entities, the territorial legislation,which would normally apply to them, applies to them on this project.

[42] The respondent's position highlights a concern that has been identified in a number of cases, that being an assumption that by choosing a particular corporate or contractual form the various players can determine the constitutional issue. As noted in *Alberta Government Telephones* v. *Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225, the Supreme Court has repeatedly emphasized that "the reality of the situation is determinative, not the commercial costume worn by the entitiesinvolved ... Constitutional jurisdictionshould not vary according to the corporate form involved" (see paras. 86-88).

[43] The use of private contractors by the federal government or federally-regulated undertakings has led to many court cases particularly with respect to labour relations and union certification. The challenge in each case was to identify the core of the federal undertaking and then examine the relationship of the contractor's operation to that core. The relationship must be examined from a functional, practical point of view, particularly with respect to the degree of operational integration and its ongoing

nature: see *Northern Telecom Ltd.* v. *Communications Workers of Canada*, [1980] 1 S.C.R. 115 (at p. 132); *Re Canada Labour Code*, [1987] 2 F.C. 30 (C.A.), at para. 28.

[44] For example, in a case referenced by respondent's counsel, *R.* v. *Scott Steel Ltd.*, [2003] B.C.J. No. 396 (S.C.), the provincial safety regulations were held to apply to a contractor doing bridge reconstruction work for a federally-regulated railway. Employees of the contractor and the railway company worked together on the site but the work was divided into different aspects. The work conducted by the contractor, however, was held to be temporary. It was a specific reconstruction project which would cease once it was done. But the railway itself would go on. There was no operational integration with the railway nor was it to be an ongoing relationship (similar to the facts of *Re Canada Labour Code)*. The work did not form an integral part of the core federal undertaking. The provincial legislation thereforeapplied to the contractor.

[45] Here, the remediation project is the federal undertaking. Once it is finished, there will be no more operations on that land. The work of the contractors is integral to the project. It is not temporary because the contracts will last as long as the project does. From a functional and practical perspective, it is difficult to see where the work of the contractors does not implicate the core of the project in question, a federal undertaking on federal land. Any attempt to regulate these activities by territorial authorities, even if it is restricted to the work of the contractors, would necessarily impair the indispensable and necessaryaspects of the federalgovernment's authorityto control use of its property and operational control of this project.

[46] In conducting this analysis I have not forgotten the second argument advanced by the applicant in support of federal jurisdiction. That argument is that Part II of the *Canada Labour Code* applies to the Colomac project.

[47] Part II of the Code addresses occupational health and safety. It applies to the federal public service: s. 123(2). It also applies to and in respect of employment "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": s. 123(1)(a). A "federal work, undertaking or business" is defined in s. 2 of the Code:

> "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.
> ...
> (i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces.

[48] I have already described the Colomac project as a federalundertaking becauseit comes within the legislative authority of Parliament over federally-owned property. The only real question is whether it is a work, undertaking or business of a "local or private nature" in the Northwest Territories.

[49] The applicant's counsel submitted that the project is not an undertaking of a local or private nature because it is a public project, conducted by Canada not for private gain but for the public good. Counsel for the respondentargued that the private contractors are businesses of a "local or private nature"; they are not federally-connected entities; and, they are bound by all territorial laws of general application. Respondent's counsel also emphasized that the choice of using contractors was a discretionary decision by Canada (although I fail to see how that fact alters the analysis).

[50] In my opinion the answer to this question can be found in the 1977 *City of Yellowknife* case (cited earlier). In that case the Canada Labour Relations Board had certified a union as the bargaining agent for a unit of employees at the City of Yellowknife. That decision was set aside by the Federal Court of Appeal on the ground that the Board had exceeded its jurisdiction in that the City of Yellowknifewas not operating a federal work, undertaking or business within the meaning of s. 2 of the *Canada Labour Code.* The Supreme Court of Canada reversedthat judgmentand held that the Code applied to employees of municipal corporations in the Northwest Territories.

[51] The majority judgment was written by Pigeon J. who first observed that the result of the construction put upon the Code by the Federal Court was that municipal employees in the territories would not have the benefit of any compulsory collective bargaining legislation, a result contrary to the intent of Parliament in enacting the Code. He then pointed out that jurisdiction over labour matters depends on legislative authority over the operation, not over the person of the employer. Thus no distinction

can be drawn based on simply whether the employer is a private company or a public authority. Pigeon J. then considered the scope of federal jurisdiction generally in the context of the meaning of "federal work, undertaking or business" contained in the Code (the same then as now). He wrote (at pp. 88-90):

> The authority of the Parliament of Canada to legislate in respect of any employees in the Northwest Territories is beyond question. Paragraph (i) of the definition of "federal work, undertaking or business" in s. 2 indicates an intention to exercise this jurisdiction. The general purpose of the definition was obviously to embrace only matters within federal legislative authority ...
>
> Reference is made in the Court below to the legislative powers granted to the Commissioner in Council by s. 13 of the *Northwest Territories Act*, R.S.C. 1970, c. N-22. It should be noted, however, that unlike provincial legislative powers, these are "subjectto this Act and any other Act of the Parliament of Canada" ...
>
> I can see no valid reason for presuming that in enacting the definition of "federal works, undertaking or business" for the purposes of the *Canada Labour Code*, Parliament intended that its scope would be restricted by consideration of the extent of the Commissioner's legislative authority in the same way as it is necessarily restricted by consideration of the extent of the Provinces' legislative authority. Paragraph (i) is a clear indication to the contrary ...

[52] The judgment of Pigeon J. also discussed in passing the meaning of the expression "other than a work, undertaking or business of a local or private nature in... the Northwest Territories". That expression was used in s. 27(1) of the Code (as it then was) dealing with the application of the part of the Code dealing with hours of work and wages:

> 27(1) This Part applies to and in respect of employees who are employed upon 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 the Yukon Territory or Northwest Territories, and to and in respect of the employers of such employees and to employment upon or in connection with the operation of any such federal work, undertaking or business.

[53] Pigeon J. wrote (at p. 88) that the aim of this provision was to leave scope for the operation of territorial laws regarding the same subject-matter (such as the territorial *Labour Standards Act*). Local businesses that do not work in an area of exclusive legislative authority enjoyed by Parliament are bound by the territorial law. If such a provision for local or private undertakings did not exist then all employers and employees would be subject to the federal law.

[54] Therefore, when Part V of the Code speaks of excluding those works, undertakings or businesses of a local or private nature, that means, in my opinion, operations that do not come within the exclusive legislative authority of Parliament. Since the Colomac project comes within the scope of the federal power over federally-owned property, Part V of the *Canada Labour Code* applies to it. Since it applies to the operation, it applies to all workers, whether employed by the government or by its contractors.

Conclusions:

[55] There is no doubt that the *Mine Health and Safety Act* is validly-enacted legislation. Ordinarily it applies to all mine sites in the Northwest Territories. And it would ordinarily apply to these private contractors working on a mine site. But in this case, we have a project on federal land run and controlled by the federal government. The work being conducted by these contractors is an integral part of the overallfederal reclamation project for the Colomac site. As a matter of constitutional doctrine, the project is immune from the jurisdictional authority of the Northwest Territories. The *Mine Health and Safety Act* does not apply to this project on this land.

[56] This result, however, does not leave a regulatory vacuum whereby no safety legislation applies. Part II of the *Canada Labour Code* applies becausethis is a federal undertaking within the legislative authority of Parliament. The Code applies to both government employees and the private contractors and their employees. In addition, the government can require, by contract, that its contractors comply with the requirements of the *Mine Health and Safety Act* even though it cannot compel territorial officials to enforce it.

[57] I think this result is also the most effective one in terms of ensuring safety. I agree with the submission made on behalf of the applicant that trying to apply the territorial statute and regulations only to some personnel and only to certain things on

the site would lead to a state of administrative confusion. There would be endless disputes over which law applies. The application of one law to the project would alleviate the very real potential for confusion.

[58] For these reasons, a declaration will issue declaring that:

1. The Colomac reclamation project is under exclusive federal jurisdiction.

2. The *Mine Health and Safety Act* does not apply to the project.

3. The *Mine Health and Safety Act* does not apply to the contractorsworking on the project.

4. Part II of the *Canada Labour Code* applies to the project and all parties working on it.

[59] The applicant shall have its costs of these proceedings.

J.Z. Vertes
J.S.C.

Dated this 18 day of December, 2007.

Counsel for the Applicant: Adrian C. Wright and Sacha Paul

Counsel for the Respondent: Andrew Fox

Docket: S-0001-CV-2005000361

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

WORKERS' COMPENSATION BOARD OF THE
NORTHWEST TERRITORIES AND NUNAVUT
Applicant

- and -

ATTORNEY-GENERAL OF CANADA
Respondent

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES
