

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE EMPLOYMENT STANDARDS ACT, RSBC 1996, c.113 AS AMENDED
AND IN THE MATTER OF DECISIONS MADE BY THE DIRECTOR OF EMPLOYMENT
STANDARDS DATED MAY 5, 2003, E.R. NO 104747 AND DECISION OF THE EMPLOYMENT
STANDARDS TRIBUNAL DATED AUGUST 24, 2005, BCEST NO. D128/05 AND IN THE MATTER
OF THE JUDICIAL REVIEW PROCEDURES ACT, RSBC 1996, C. 241, AS AMENDED AND IN
THE MATTER OF THE ADMINISTRATIVE TRIBUNALS ACT SBC 2004, C. 45

Citation: *Actton Transport Ltd. v. Director of
Employment Standards*,
2008 BCSC 1495

Date: 20081104
Docket: L-052520
Registry: Vancouver

Between:

Actton Transport Ltd. and Super Save Disposal Inc.

Petitioners

And

**Director of Employment Standards, Employment Standards Tribunal, Robert Cardinal,
Stephen Smith, Todd Norberg and Larry Catt**

Respondents

Before: The Honourable Mr. Justice Rice

Reasons for Judgment

Counsel for the Petitioners:

M.J. Weiler

Counsel for the Respondent Attorney General &
Director of Employment Standards:

G. Copley, R. Butler

Counsel for the Respondent Employment Standards
Tribunal:

E. Miller

Date and Place of Hearing:

September 29, 30;
October 1, 2, 6 & 7, 2008
Vancouver, B.C.

A. INTRODUCTION

[1] This is a judicial review of a decision of the British Columbia Employment Standards Tribunal (the “Tribunal”), issued August 24, 2005, BC EST #D128/5 (the “Original Decision”).

[2] The Original Decision concerns claims by the four individual respondents, Cardinal, Smith, Norberg and Catt (the “Complainants”), all of whom were formerly employed as drivers of garbage disposal trucks in the B.C. Lower Mainland for the Petitioner, Super Save Disposal Inc. (“SSDI”).

[3] The Petitioner Actton Transport Ltd. (“ATL”) owns an interprovincial trucking business. It was also the employer of the Complainants in that it paid their wages and benefits and contracted their services to SSDI.

[4] The Petitioners submit that the garbage disposal business was part of ATL’s trucking business and was therefore federal because ATL’s trucking business was federal. Alternatively, it was federal because it was functionally integrated with ATL’s trucking business.

[5] The question on appeal, and the constitutional jurisdictional question (“CJQ”), which was served on August 1, 2008, is whether the Tribunal erred in finding that the ***Employment Standards Act***, R.S.B.C. 1996, c. 113 (the “***ESA***”) applied to the Complainants on the facts of this case. In other words, does provincial or federal jurisdiction correctly apply to the Complainants’ employment?

[6] It is common ground that the review of a jurisdictional question requires the court to apply a standard of correctness both as to law and fact.

B. FACTS

[7] The facts are as follows:

- The Petitioners, ATL and SSDI, are both companies incorporated in B.C. and operate from an office in Langley, B.C. ATL is 100% owned by Actton Petroleum Sales Ltd., which is owned 100% by Bill Vandekerkhove. SSDI is owned jointly by Bill Vandekerkhove and Phil Vandekerkhove. ATL and SSDI maintain separate management.
- SSDI owns a number of garbage trucks and provides a garbage disposal service in the lower mainland of B.C. It is one of a number of similar garbage disposal companies owned by the Vanderkerkhoves in other provinces. SSDI holds a licence issued by the City of Surrey for “Business Category: 866-Trucking and Cartage”. SSDI does not have licences for interprovincial or international business operations. Its trucks do not leave the Province of B.C. to go to other provinces and do not cross the border into the USA.
- SSDI’s business is to pick up and unload garbage bins located at customers’ locations throughout the Greater Vancouver area using front-end fork-type loader trucks. The garbage trucks are dispatched from the Langley office each day.

- SSDI determines and establishes its customer base, sets the rates for garbage disposal, and enters into contracts for services. However, it does not supply its own drivers. It has its own employees and payroll, but it also contracts with ATL for the supply of drivers, mechanics, dispatchers and others.
- ATL owns and operates an interprovincial trucking business for which it employs drivers to drive various types of trucks. It provides SSDI and other companies with drivers, mechanics and dispatching services. ATL charges for the services and pays all expenses for those services, including drivers' wages and benefits like insurance for its drivers and others.
- On May 5, 2003, four Determinations were issued following an investigation by delegates of the Director of Employment Standards. The Petitioners were ordered to pay the Complainants amounts totalling \$54,185.41, representing unpaid wages and interest. Among other things, the Director concluded that the Petitioners were associated corporations pursuant to s. 95 of the **ESA**, and that both corporations fell under provincial jurisdiction.
- The Petitioners appealed the Determinations and their accompanying Reasons. On appeal, the Employment Standards Tribunal held that either ATL or SSDI could be deemed to be the employer of the Complainants pursuant to the **ESA**. It held that ATL was federally regulated but that the evidence did not establish that it was interprovincial or federal for every purpose. It found that the garbage disposal business was a purely intraprovincial business not functionally integrated with ATL'S federally-regulated interprovincial trucking operations.

Therefore, the Complainants' employment was not removed from provincial jurisdiction and the **ESA**.

- The Petitioners sought judicial review of the Tribunal's decision.

C. EVIDENCE

[8] The Petitioners argue that the Tribunal decided the constitutional jurisdictional question on the basis of incomplete evidence.

[9] The Determinations of May 5, 2003 summarized the evidence of the Complainants to indicate that they were hired to drive trucks for SSDI and that "day-to-day direction and control was from SSDI personnel". The parties agree that this was incorrect. It is in fact ATL which provides drivers and personnel to direct and control those drivers.

[10] In coming to its decision the Tribunal had before it "new evidence which the Petitioners say showed that the director did not have jurisdiction" (BC EST #D128/05 at p. 8). This "new evidence" was "intended to supplement, clarify and further explain the evidence before the Tribunal in respect of operations of ATL and SSDI in the context of the CJQ" (Kitsul #8 at para. 3). The Petitioners complain that the Tribunal's analysis was incomplete and resulted in fundamental errors in analysis in determinations of the CJQ as then defined anew by the Tribunal. The Tribunal did not have adequate argument on these issues and therefore fell into error in deciding the CJQ. It was important, say the Petitioners, to raise this point as it impacts to some degree on the evidence considered by the Tribunal.

[11] In their final reply submission to the Tribunal, the Petitioners raised the circumstances of an ATL employee named Mr. McNeilly who had filed a complaint of his own on April 11, 2003. His evidence was regarded as extremely important by the Petitioners. He was an ATL driver who drove not only garbage trucks but also propane trucks for another related company, which driving involved interprovincial excursions. This, according to the Petitioners, demonstrated the integrated nature of the ATL trucking operation. The Tribunal rejected the evidence initially as irrelevant and in January 2007 rejected the Petitioners' application for reconsideration, stating in part that the Petitioners had not identified what evidence supported the argument that the Tribunal was wrong in its conclusion that Mr. McNeilly's evidence was irrelevant.

[12] At the judicial review hearing the entire record was made available to the Court, including the evidence of Mr. McNeilly. It was considered as new evidence, but of itself this new evidence is not determinative of the case. The issue is not whether this or any other new evidence may be viewed as proof of functional integration. Rather, it is whether all of the evidence as a whole including the new evidence, establishes the case for the Petitioners.

D. THE ORIGINAL DECISION

[13] The Tribunal decision of August 24, 2005 found that the Complainants were employed as garbage disposal truck drivers in the Lower Mainland, and that their work never required them to cross provincial or international borders. The Petitioners did not dispute these findings of fact, but submitted that the

Complainants nevertheless fell within federal jurisdiction because the Complainants were employed by ATL, not SSDI, and ATL is a federally regulated interprovincial trucking operation.

[14] The Tribunal found that it was as likely that the Complainants were employed by SSDI as ATL. Even assuming the employer was ATL, this fact alone did not establish that the complaints fell within federal jurisdiction.

[15] The Tribunal found that a business may have separate operations, each of which is properly regulated provincially or federally. A wholly intraprovincial operation which owns or has owners in common with those of an interprovincial operation is not removed from provincial jurisdiction merely because of common ownership. The intraprovincial business must also be functionally integrated with the interprovincial operation such that the whole is properly regarded as a single integrated federal undertaking rather than two separate undertakings, one or more that are federal and one or more that are provincial.

[16] The Petitioners submit that ATL “employees” were maintenance people as well as dispatchers. They were “people that interact with the drivers including disposal drivers”, and on that basis, “clearly the drivers are integrated with the ATL organization”. Without disputing that evidence, the Tribunal did not accept that it was sufficient to establish integration.

[17] The Tribunal found that the garbage disposal business was a business separate from the interprovincial trucking business of ATL and that as such the

Complainants' employment was not removed from provincial jurisdiction. The Complainants were therefore properly before the Director of Employment Standards.

[18] The Original Decision states in part as follows:

...on the basis of the evidence before me, I am satisfied that the [*Employment Standards*] Act governs the employment of each of the four complainants. The undisputed evidence is that each of the four employees carried out their duties entirely within the province of British Columbia. The nature of their work — garbage collection — is not an inherently federal matter (such as, say, air transportation, banking, telecommunications, or nuclear power generation) nor is it, so far as I can determine, an integral part of Actton's interprovincial or international trucking operations.

Although interprovincial and international trucking falls under federal jurisdiction by reason of section 92(10)(a) of the *Constitution Act, 1867*, a garbage collection enterprise operating solely within provincial boundaries — and any wage disputes that arise between such an employer and its employees — fall under provincial jurisdiction under section 92(13) and (16) of the *Constitution Act, 1867*. The complicating factor in this case is that, at least with respect to Actton, its operations have both federal (interprovincial/international trucking) and provincial (garbage collection) aspects. This latter issue does not seemingly arise with respect to Super Save since its operations appear to be entirely within provincial jurisdiction; in any event, counsel for the Appellants has not argued that Super Save is a federal jurisdiction firm. (para. 27-28)

[19] The Original Decision, at para. 29, then summarizes the legal principles set out by the Supreme Court of Canada in ***Construction Montcalm Inc. v. Minimum Wage Commission***, [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641 [***Montcalm***], as follows:

-the general rule is that labour and employment relations fall under provincial, not federal, jurisdiction;

-however, the federal government has authority over labour and employment relations if these latter matters are an integral aspect of

an enterprise or undertaking that clearly falls under federal jurisdiction (for example, aeronautics or banking); and

-whether an enterprise or undertaking is inherently a federal matter depends on the essential nature of its normal or regular operations.

The Original Decision continues:

While I am prepared to accept, for the purposes of these appeals, that Actton's work involves both interprovincial and international trucking – work that in the ordinary course of events would be regulated federally: see *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897 – I am also cognizant that different groups of employees within the same firm may separately fall under provincial and federal jurisdiction. (para. 30)

[20] After citing several Supreme Court of Canada decisions which support that proposition (at paras. 31-32), the Original Decision then states:

Since intraprovincial garbage collection is not an inherently federal matter, the employees of that aspect of Actton's business would only fall under federal jurisdiction if the garbage collection operations were functionally integrated with Actton's interprovincial/international trucking operations. (para. 33)

After considering (at paras. 33-36) the decisions in ***Westcoast Energy Inc. v.***

Canada (National Energy Board), [1998] 1 S.C.R. 322, 156 D.L.R. (4th) 456

[***Westcoast Energy***] and ***Northern Mountain Helicopters Inc. v. British Columbia***

(Workers' Compensation Board), [1998] B.C.J. No. 2525, 61 B.C.L.R. (3d) 361

(S.C. in chambers); appeal dismissed: 2000 BCCA 395, 77 B.C.L.R. (3d) 11; leave

to appeal to SCC refused: [2000] S.C.C.A. No. 428) [***Northern Mountain***

Helicopters], the Original Decision continues:

In my view, the interprovincial and international truck transport and delivery components of Actton's business stand in marked contrast to

the wholly intraprovincial garbage collection business. I do not consider that garbage collection can be fairly characterized as integrated within, or an essential component of, or otherwise reasonably ancillary to, Actton's interprovincial and international truck transport and delivery business – see *Canadian Air Line Employees' Association v. Wardair Canada (1975) Ltd. et al.*, [1979] 2 F.C. 91 (Fed.C.A.) and the cases cited therein.

There is absolutely no evidence before me of functional integration as between Actton's garbage collection business and its interprovincial/international trucking operations. Although there is some evidence of common ownership and control, those factors, standing alone, are insufficient to bring the garbage collection operation (which appears to be an entirely separate business enterprise from Actton's interprovincial/ international trucking operations) within the federal sphere. (paras. 37-38)

[21] The Original Decision goes on to say that while it may be that “certain aspects of each, essentially separate, business enterprise – namely, truck transportation/delivery and garbage collection – were (and still are) carried on under the Actton ‘umbrella’”, this did not mean that Actton's garbage collection business was federally regulated (para. 39).

[22] The Original Decision then states:

To this point, I have accepted, for the purposes of the foregoing discussion, the Appellants' assertion that the four complainants were employed solely and exclusively by Actton rather than by Super Save. However, as I will detail later on in these reasons, while it might be fairly said that the complainants were Actton employees, in my view, it can equally be fairly stated that they were also Super Save employees [see e.g., *Sinclair v. Dover Engineering Services Ltd. et al.* (1988), 49 D.L.R. (4th) 297 (B.C.C.A.)]. (para. 40, square brackets in original)

In light of the definition of “employee” and “employer” contained in section 1 of the *Act*, I am of the view that both Super Save and Actton could be fairly identified as an employer of each of the complainants. The complainants did “work” for Super Save and drove Super Save equipment while, at the same time, were paid and directed by at least some Actton employees. (para. 69)

In *Sinclair v. Dover Engineering Services Ltd.*, *supra*, our Court of Appeal recognized that a single individual could be employed by several separate corporations that form constituent elements of an integrated business enterprise...

In my view, the Director's delegate need not have issued a section 95 declaration since both Super Save and Actton could have been lawfully (and separately) determined to [be] the complainants' employer and, jointly, could have been declared a "common employer" under the common law and, more importantly, in accordance with the statutory definition of "employee" and "employer" contained in section 1 of the *Act*. Notwithstanding that latter comment, however, as will be seen, I am not prepared to find that the delegate erred in making a section 95 declaration with respect to Super Save and Actton. (paras. 71-72)

The Tribunal concluded that the Director did not err in refusing to dismiss the four complaints for want of jurisdiction.

E. THE LAW

[23] The distribution of legislative power between the federal Parliament and the provincial legislatures is set out principally in sections 91 and 92 of the ***Constitution Act, 1867***, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, under which power is distributed to either level of government, provincial or federal, to make laws in relation to matters enumerated in each of those sections:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters

coming within the Classes of Subjects next hereinafter enumerated; that is to say ...

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ...

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

[24] Section 91 empowers Parliament exclusively to make laws in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces.

[25] Section 92(10) empowers the provincial legislatures exclusively to make laws in relation to local works and undertakings other than “works or undertakings ... extending beyond the limits of the province”.

[26] The recent decision of the Supreme Court of Canada in ***Canadian Western Bank v. Alberta***, 2007 SCC 22, [2007] 2 S.C.R. 3 [***Canadian Western Bank***], revisits a doctrine necessarily implicit in the Constitution and flowing from the exclusivity of powers assigned to the legislatures under section 92 of the ***Constitution Act, 1867***, and the powers assigned to Parliament under section 91 of the ***Constitution Act, 1867*** – interjurisdictional immunity. The Court in ***Canadian Western Bank*** affirmed the modern formulation of the doctrine, at para. 33:

Interjurisdictional immunity is a doctrine of limited application, but its existence is supported both textually and by the principles of federalism. The leading modern formulation of the doctrine of interjurisdictional immunity is found in the judgment of this Court in *Bell Canada (1988)* where Beetz J. wrote that "classes of subject" in ss. 91 and 92 must be assured a "basic, minimum and unassailable content" (p. 839) immune from the application of legislation enacted by the other level of government.

[27] When section 92(10) of the **Constitution Act, 1867** is in play for works and undertakings as in this case, the doctrine is of even more limited application (i.e. it is limited only to that which is strictly necessary):

Because the federal power is exceptional, it follows that it should be extended as far as required by the purpose that animates it, and no further. To derogate from the provincial power to regulate local works and undertakings, it must be shown that derogation is necessary to enable the federal government to maintain an interprovincial transportation or communication link.

Westcoast Energy, supra, per McLachlin J., dissenting, at para. 116.

[28] The general rule is that labour and employment relations fall under provincial, not federal, legislative jurisdiction. However, the federal government has authority over labour and employment relations (i.e. to derogate from the *prima facie* provincial jurisdiction) if these matters are an integral aspect of an enterprise or undertaking that otherwise clearly falls under federal jurisdiction: *Montcalm, supra*, at 768.

[29] The relevant law pertinent to the constitutional jurisdictional question was recently summarized by the B.C. Court of Appeal in *NIL/TU,O Child and Family Services Society v. British Columbia Government and Service Employees' Union*, 2008 BCCA 333, 81 B.C.L.R. (4th) 318, at paras. 24-27:

The starting point for analysis in this case is the general law concerning the division of legislative authority over labour relations between the provincial and federal governments. It is long-established that labour relations are *prima facie* within the legislative jurisdiction of provincial governments, being matters of Civil Rights in the Province, under section 92(13) of the *Constitution Act, 1867*.

There are, however, circumstances where labour relations are within federal jurisdiction. In *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (often referred to as the *Eastern Canada Stevedoring* case), Estey J. set out the four circumstances in which federal jurisdiction may arise at 564:

[Quotation omitted]

In *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115, Dickson J. (as he then was) for the court summarized the constitutional principles applicable to labour relations as follows at p. 131-132:

The best and most succinct statement of the legal principles in this area of labour relations is found in Laskin's *Canadian Constitutional Law* (4th ed., 1975) at p. 363:

In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise...

In an elaboration of the foregoing, Mr. Justice Beetz in *Construction Montcalm Inc. v. Minimum Wage Commission* [[1979] 1 S.C.R. 754] set out certain principles which I venture to summarize:

- (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
- (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as these of “a going concern”, without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

These considerations have come to be described as the “functional test”. Under this test, the court is required to examine the normal and habitual activities of an undertaking in order to determine whether federal authority over labour relations is integral to a matter of federal competence.

[30] In determining whether an enterprise should be viewed as a single, integrated undertaking or several separate undertakings for the purpose of determining jurisdiction, courts have emphasized that it is the operational relationship that is determinative, not the corporate form:

Underlying many of the arguments is an unjustified assumption that by choosing a particular corporate form the various players can control the determination of the constitutional issue. This Court has made it clear in this area of constitutional law that the reality of the situation is determinative, not the commercial costume worn by the entities involved.

Alberta Government Telephones v. CRTC, [1989] 2 S.C.R. 225 at 263, 61 D.L.R. (4th) 193.

[31] Common ownership is not conclusive. The operations must be “functionally integrated” and subject to “common management, control and direction”: ***Westcoast Energy***, *supra*, at para. 49. In ***Northern Mountain Helicopters***, *supra*, at para. 38, the British Columbia Supreme Court noted:

...to say that Northern Mountain Helicopters is generally a federally regulated company is not an answer to the question of jurisdiction. Since the decision of *Canadian Pacific Railway Company v. A.G. of B.C.*... [cites omitted]... courts have recognized that a company may carry on more than one undertaking or business, and in the event the second business is not properly characterized as federal, it falls to be provincially regulated.

A single business may operate more than one undertaking:

Common ownership and coordination are also put forward as factors indicative of federal jurisdiction. A single company may own both interprovincial and local works or undertakings and coordinate their activities. The simple existence of common ownership and coordination is not enough to sweep a provincial work or undertaking into the federal regulatory net.

Westcoast Energy, *supra*, McLachlin J., dissenting, at para. 139.

[32] Finally, the issue of characterization of all or a part of an enterprise is fact dependent:

In determining whether a local work or undertaking is functionally integral to a federal interprovincial transportation or communications entity, the court must examine the substance of the activity being carried on: *Northern Telecom Ltd. v. Communications Workers of Canada (No. 1)*, [1980] 1 S.C.R. 115, at p. 132. As Dickson C.J. stated (for the majority) in *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225 (hereinafter *A.G.T. v. C.R.T.C.*), at pp. 257-58, "the

crucial issue in any particular case is the nature or character of the undertaking that is in fact being carried on". "Character of the undertaking" refers to the character of the normal or habitual activities of the local work or undertaking ...

Westcoast Energy, McLachlin J., dissenting, at para. 127.

F. ANALYSIS

[33] The following questions arise in determining jurisdiction:

- a) How are the business services sold by ATL to SSDI to be characterized as a matter of constitutional law? Federal or provincial?
- b) If these business services are not themselves federally regulated, is there a sufficient degree of functional integration between ATL's interprovincial trucking undertaking and these business services such that provincial regulation of employment standards would impair Parliament's ability to regulate ATL's interprovincial undertaking in some vital or essential way?

(a) Characterization

[34] The Petitioners argue that ATL was the employer of the Complainants, and that since ATL is federally regulated, its employees fell within federal jurisdiction. They argue that, according to ***United Transportation Union v. Central Western Railway Corporation***, [1990] 3 S.C.R. 1112, 76 D.L.R. (4th) 1, the Tribunal should have applied two separate legal tests. The first is whether the operation at issue is a federal work or undertaking. Then, and only if that question is answered in the negative, may the second test be applied, namely, whether the separate and distinct

provincial operation is integral to an existing federal work or undertaking such that it is itself subject to federal jurisdiction. Because ATL is a federal undertaking and ATL's management exercises control over the garbage hauling business, ATL submits that the garbage hauling business must also be federal. They are essentially one and the same business. The second test, that of functional integration, does not therefore need to be applied.

[35] The Petitioners further submit that the Tribunal failed to consider carefully the implications of ***Montcalm***, *supra*, and all of the aspects applicable to the particular circumstances of ATL as a going concern. The Petitioners argue that the principles of ***Montcalm*** support their view that all employees of ATL, including the disposal drivers and the four Complainants, are governed by and under federal jurisdiction.

[36] The issue in ***Montcalm*** was whether Quebec minimum wage laws were constitutionally applicable to the employment of workers employed by a building contractor who, under contract with the Crown in Right of Canada, was doing construction work on the runways of a new international airport at Mirabel on Federal Crown land. The Supreme Court of Canada held that ***Montcalm*** remained a provincially regulated employer even while it was doing work on the construction of the runway for Mirabel.

[37] It is important, say the Petitioners, to note that in ***Montcalm*** the SCC was dealing with two separate businesses owned and operated by two separate parties. This fundamental difference from ATL was overlooked by the Tribunal. ATL is not simply under "common ownership" as referenced by the Tribunal —there is only one

employer. ATL is the one employer, and ATL is owned by one person. It has exactly the same management as SSDI. Most importantly, ATL's and SSDI's businesses are one and the same – trucking and transportation. It is a single business. In *Montcalm*, by contrast, there were clearly two separate businesses, owned and operated by separate bodies, with one being construction, the other being aeronautics. In respect of this latter fundamental difference, the SCC noted, at 771:

But the mode or manner of carrying out the same decision in the act of constructing an airport stand on a different footing, 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.

[38] With respect, the question is not only whether ATI has a federally-regulated aspect. It is also whether within ATL there is more than one separate undertaking. If so, then any one of those businesses that is provincial and does not have a federal aspect of its own will be subject to provincial jurisdiction. It is well established that a commercial entity, such as ATL, may carry on more than one business, and be thereby subject to divided jurisdiction: *Canadian Pacific Railway v. Attorney General of British Columbia*, [1950] A.C. 122, [1950] 1 D.L.R. 721 [*Empress Hotel*]; *Northern Telecom v. Canadian Union of Communication Workers*, [1983] 1 S.C.R. 733, 147 D.L.R. (3d) 1; *Ontario Hydro v. Ontario (LRB)*, [1993] 3 S.C.R. 327, 107 D.L.R. (4th) 457; *Canadian National Railway v. Nor-Min Supplies Ltd.*, [1977] 1 S.C.R. 32, 66 D.L.R. (3d) 366 [*Nor-Min*].

[39] In the *Empress Hotel* case, the Privy Council was persuaded that the hotel operation was a separate undertaking from the CPR's interprovincial railway undertaking, notwithstanding the elements of common ownership, management and control, because the customer base for the hotel was not restricted to those persons actually travelling on the railway undertaking. The hotel was operated as a separate business with its own customer base and was indistinguishable from any other hotel offering services to the travelling public. The court said, at 732:

It appears from the facts stated in the Order of Reference that the appellant has so interpreted its powers and that in the *Empress Hotel* it does carry on general hotel business. It may be that, if the appellant chose to conduct a hotel solely or even principally for the benefit of travellers on its system, that hotel would be a part of its railway undertaking. Their Lordships do not doubt that the provision of meals and rest for travellers on the appellant's system may be a part of its railway undertaking whether that provision is made in trains or at stations, and such provision might be made in a hotel. But the *Empress Hotel* differs markedly from such a hotel. Indeed, there is little, if anything, in the facts stated to distinguish it from an independently-owned hotel in a similar position. No doubt the fact that there is a large and well-managed hotel at Victoria tends to increase the traffic on the appellant's system; it may be that the appellant's railway business and hotel business help each other, but that does not prevent them from being separate businesses or undertakings.

[40] It is also worthy of note that in the *Empress Hotel* case the C.P.R. made a very broad brush argument, similar to the Petitioners in this case, arguing that it had a "transportation system which is one integrated system". The court said, at 726:

The appellant's argument may be stated this way. The appellant has a transportation system which is one integrated system including ocean marine services; main and branch lines owned or operated by the appellant; services of passenger and goods trains; inland and coastal steamship services; airplane and telegraph services; stations with refreshment, lavatory and other amenities; a chain of transcontinental hotels, goods depots, wharfs, warehouses, grain elevators and other

activities. This unified system is a national undertaking which cannot be viewed as a conglomeration of local works and undertakings. The Empress Hotel, as the material in the record shows, is an integral part of this unified system.

[41] The Privy Council was not persuaded because it could not find on the facts that the businesses were functionally integrated. ATL's business also consists of two separate undertakings. One is an interprovincial/international trucking and transportation business in which its employees regularly and continuously drive trucks from locations within the province of B.C. to locations outside the province. The other is a local garbage collection business in which its employees drive garbage trucks to locations within the province only and at times and locations specified by SSDI. The garbage collection operation is *prima facie* a provincially regulated undertaking. The fact that ATL owns and operates both undertakings does not alter the fact that the undertakings are separate. Neither can ATL's ownership and operation of both undertakings of themselves bring an otherwise provincially regulated entity under federal jurisdiction. ATL's particular corporate structure may not be used to mask the "reality of the situation".

[42] One way of determining whether there is a separate undertaking is to pose the following question:

Other relevant questions, though not determinative, will include whether the operations are under common ownership (perhaps as an indicator of common management and control), and whether the goods or services provided by one operation **are for the sole benefit of the other operation and/or its customers, or whether they are generally available.** (emphasis added)

Westcoast Energy, *supra*, at para. 65.

[43] The garbage hauling business in this case is not for the sole benefit of the interprovincial/international trucking business or its customers. The garbage hauling services are generally available to any customer willing to pay the garbage hauling rates. If the garbage hauling services were provided for the sole benefit of the customers of its interprovincial/international trucking business, it could be said that ATL's garbage hauling services are part of the interprovincial/international undertaking. But they are not. The garbage hauling business has no such tie. It is like any other local business providing a similar service.

[44] In the ***Empress Hotel*** case the Court found that the two businesses had a synergy created by having employees from one business also work in the other business. That, however, did not prevent them from being separate businesses or undertakings. Business convenience, as in the sharing of employees between two undertakings, is not of itself a relevant factor that can push two undertakings together for constitutional purposes. The Supreme Court of Canada put it this way in ***Nor-Min***, at 332-333:

Nor, apart from such federal legislation, do we even reach any issue of immunity from provincial legislation unless the quarry is shown to be more than a convenience, more than a source of supply for railway purposes but, indeed, an essential part of the transportation operation in its day-to-day functioning. In the circumstances of the present case I cannot arrive at such a conclusion. The mere economic tie-up between the C.N.R.'s quarry and the use of the crushed rock for railway line ballast does not make the quarry a part of the transportation enterprise in the same sense as railway sheds or switching stations are part of that enterprise. The exclusive devotion of the output of the quarry to railway uses feeds the convenience of the C.N.R., as would any other economic relationship...

[45] I find that the business services sold to SSDI by ATI are *prima facie* subject to provincial regulation, including the setting of standards for contracts of employment under the **ESA**. The Tribunal was correct in that finding. Therefore, in order for the interprovincial trucking and the garbage hauling operations to be judged a single federal undertaking, as well as a single undertaking for the purpose of s. 92(10)(a), they must be subject to common management, control and direction, and also be functionally integrated (see ***Westcoast Energy***, *supra*, at para. 49).

(b) Functional Integration

[46] Functional integration requires that *prima facie* the provincial undertaking be vital or essential, not just integral, to the federally regulated undertaking. To be “vital or essential” the provincial undertaking must be shown to be “absolutely indispensable or necessary” to the federal undertaking. The test is strict in order to respect the constitutional boundaries of ss. 91 and 92 of the **Constitution Act, 1867**, and especially to recognize that federal jurisdiction over employment and labour matters is the exception and provincial jurisdiction is the general rule: ***Montcalm***, *supra*, at para. 768.

[47] The Petitioners submit that if the Complainants were employed in an intraprovincial garbage collection operation, then the Tribunal erred in finding that this operation was not functionally integrated with the interprovincial trucking operation such that the whole ought properly to be regarded as a single, integrated federal undertaking. They further submit that regulation of wages to be paid by “an undertaking, service or business” and the regulation of its labour relations “being

related to an integral part of the operation of the undertaking, service or business” are removed from provincial jurisdiction and are immune from the effect of provincial law if the undertaking, service or business is a federal one. The SCC in ***Montcalm*** noted that “The question whether an undertaking, service or business is a federal one depends on the “nature of its operation” considering the “normal or habitual activities of the business as those of a going concern” and without regard for exceptional or casual factors, “[o]therwise, the constitution could not be applied with any degree of continuity and regularity”: at para. 768.

[48] The Petitioners rely on several cases in which a single undertaking was found to exist. In ***Ontario (Attorney General) v. Winner***, [1954] J.C.J. No. 1, [1954] 4 D.L.R. 657, the Judicial Committee of the Privy Council considered whether restrictive provincial legislation could affect the operations of a bus company that had both interprovincial and intraprovincial operations. The Privy Council found there was a transportation undertaking connecting province with province and extending beyond the limits of the province of New Brunswick involving the same buses and the same routes. It held that the undertaking was in pith and substance a “connecting undertaking”: at 680-681.

[49] In ***Re Pacific Produce Delivery and Warehouses Ltd. v. RWDSU Local 580***, [1974] B.C.J. No. 890 (C.A.), 44 D.L.R. (3d) 130, the issue was the jurisdiction of the BC Labour Relations Board to certify a trade union for the employees of Pacific Produce. The Court of Appeal found that the “whole nature of the appellant’s business was the loading and hauling, within and without the Province, of

merchandise, the unloading of same at warehouses and the loading and [local] delivery of that merchandise”: at 139. It stated, at 138:

If an undertaking or business taken as a whole is in fact one and indivisible, the components making up the whole are integral to each other, then there is only one undertaking being carried on and it must be determined into which of the two jurisdictional ambits it falls.

[50] In *Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union Local 279 et al* (1983), 44 O.R. (2d) 560, 4 D.L.R. (4th) 452, the issue was whether the federal *Inflation Restraint Act* applied to the operations of OC Transpo and whether the Canada Labour Relations Board had jurisdiction to consider a bargaining in bad faith complaint. The Transit Commission, in addition to operating the public transit system in Ottawa, operated a small interprovincial route into Quebec. The Court found that the “essential undertaking of OC Transpo is the operation of a public transportation system...[an] integral and historical part of [which] is the operation of bus routes into Hull”: at 459-460. The entire system fell under federal jurisdiction because the interprovincial operation was continuous and regular; “the undertaking of OC Transpo connected Ontario to Quebec on a regularly scheduled basis”: at 464.

[51] The Attorney General responds that there is no evidence that the garbage hauling undertaking is “absolutely indispensable or necessary” to the international/interprovincial trucking undertaking. Both are stand-alone businesses. ATL’s trucking undertaking is an operation to provide trucking services, some interprovincial and some intraprovincial. Unlike the situations to be found in *Winner*, *Pacific Produce* and *Ottawa-Carleton* the intraprovincial activity is not subsumed

into a larger interprovincial business purpose. Only the interprovincial aspect of ATL's undertaking can be characterized as "connecting" and "extending". The provision of drivers to SSDI is not essential to achieving that connecting or extending purpose.

[52] The Attorney General submits, and I agree, that the Petitioners would have to demonstrate that the federal regulation of wages payable to all ATL drivers is equally "vital" or "essential" or "absolutely indispensable or necessary" to the interprovincial activities. In my judgment, even if this latter test were not applicable, the facts do not support a finding that there was any functional integration.

[53] The Petitioners respond that bifurcating constitutional authority over different aspects of ATL's business would create an "untenable situation". The Petitioners argue the Tribunal fell into error by dividing those ATL employees who worked interprovincially in the trucking business from those who worked intraprovincially in the garbage collection business. Such an approach, they say, would set a precedent that would result in chaos for employers. They rely on ***Northern Mountain Helicopters***, *supra*, where Saunders J. found there was a "practical inability to split the crew and pilots' efforts into different divisions...In my view the jurisdiction cannot and should not be parsed into such small portions:" at paras. 52-53. However, in ***Northern Mountain Helicopter***, a helicopter logging operation, federally regulated as an aeronautics concern, had hired its own employees to attach and detach logs, work that would normally be provincially regulated.

Saunders J. stated, at para. 48:

Functionally, the work of all Northern Mountain Helicopter's employees relates to the helicopter business. The employees in question interact with the pilots; their supervision on the ground is by the pilots and their supervisor who communicates with the pilots. The ground crew do not produce separate income or provide a service independent of the entire helicopter transportation service. They are under common management with the pilots and maintenance persons, and their hours of work are dependent on availability of the helicopter.

[54] *Northern Mountain Helicopter* is distinguishable from the present case because, unlike aeronautics, a trucking and transportation business is not necessarily an interprovincial undertaking for the purposes of s. 92(10)(a) of the *Constitution Act, 1867*. Only those parts of the undertaking which are “connecting” or “extending” are necessarily within that section. ATL’s garbage hauling services have no “connecting” or “extending” element to them. The garbage hauling services do not contribute functionally to the interprovincial part of the trucking operation.

[55] The Petitioners submit that, if bifurcated jurisdiction applies to ATL, a difficulty arises in determining the appropriate bargaining unit if ATL’s employees choose to unionize. The Attorney General concedes that the most efficient arrangement would be to have all of the employers and non-management employees designated within a single bargaining unit, and that it might complicate matters to have some in one unit and some in another. There is no actual problem, however, and is theoretical at present since no union represents ATL employees.

[56] Another problem allegedly is the impossibility of knowing what laws would apply to employees from day to day, resulting in uncertainty, disputes, litigation and

exposure to personal liability were there a *bona fide* dispute over which law applies.

The Attorney General answered that this is speculative only. It would be easy to determine which laws apply:

Any consequential and administrative or organizational changes — such as the allegation of mechanics or dispatcher’s time to local or under provincial driving — could likewise be readily accomplished. A mechanic’s time and dispatcher’s time could simply be regarded as an overhead item in determining the overall rate to be charged per garbage hauling services purchased by SSDI, such as a driver’s time would be part of the overhead charged to SSDI for garbage hauling service. As for bookkeeping time spent in local and inter-provincial driving could be recorded and paid accordingly in respect of endless disputes, inconsistent jurisdictional findings and personal liability. The ***Employment Standards Act*** disappears if overtime wages are simply paid based on the work being done by each driver due at any time.

[57] I am inclined to agree with the Petitioners on this point. Some confusion must be anticipated. However, I also believe that such difficulties will be avoidable in large measure, and remediable. While a bifurcated jurisdiction may be inconvenient for the Petitioners, it results from the particular corporate structure they have chosen for the running of their businesses. On the whole, therefore, the Petitioners have not demonstrated that the garbage collection business is functionally integrated with the interprovincial trucking business such that the whole constitutes a single, federally regulated undertaking. I find that the Tribunal was correct in making this finding.

G. CONCLUSION

[58] This Court affirms that the Tribunal’s decision on the constitutional jurisdictional question was correct. It did not err in finding that the Complainants’ employment fell under provincial jurisdiction.

[59] I thank Counsel for their laborious preparation and helpful submissions.

“The Honourable Mr. Justice Rice”