Federal Undertakings Involved in Construction Projects Are Not Subject to a Provincial Occupational Health and Safety Legislation

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Are the provisions of chapter XI of the *Act respecting Occupational Health and Safety* (the Act), pertaining to construction sites and principal contractors, constitutionally applicable to federal undertakings? Such is the question that the Superior Court of Quebec has responded to in ***Commission des normes, de l'équité, de la santé et de la sécurité du travail c. Commission des lésions professionnelles, 2016 QCCS 2424***.

The context and the decision of the Commission des lésions professionnelles

In 2013 and 2014, the *Commission de la santé et de la sécurité du travail* (now the *Commission des normes, de l'équité, de la santé et de la sécurité du travail*, or CNESST) issued thirteen remedial orders against the St. Lawrence Seaway Management Corporation (the Corporation), a non-profit organization whose mandate includes, among others, administering, operating and maintaining the Canadian infrastructures of the St. Lawrence Seaway. The remedial orders were addressed to the Corporation as the principal contractor of construction sites where independent contractors hired by the Corporation performed work, the whole in accordance with chapter XI of the Act.

The Corporation contested these remedial orders before the *Commission des lésions professionnelles* (the CLP) alleging that the Act is not applicable to the Corporation as a federal undertaking.

In March 2015, the CLP rendered its decision and found that the Corporation is, in fact, the principal contractor of all but one of the construction sites. That said, the CLP accepted the Corporation's legal position and declared that the Act does not apply to a federal undertaking, even as a principal contractor, in accordance with the application of the doctrine of interjurisdictional immunity. In that regard, the CLP revoked the orders issued against the Corporation. Following this decision, the CNESST, filed a motion for judicial review with the Superior Court of the Province of Quebec.

The Superior Court's decision

On May 24, 2016, Justice Claudine Roy of the Superior Court of Québec dismissed the CNESST's motion for judicial review.

After reviewing the context of the litigation, Justice Roy notes that the constitutionality of the Act is not under debate. The application of the Act to provincial contractors retained by the Corporation is not in

dispute, nor is the fact that the Corporation is a federal undertaking and that, as an employer, the Corporation is outside the jurisdiction of the provincial Act.

Firstly, the judge notes that since ***Bell Canada – 1966***, only Parliament has jurisdiction to legislate on vital parts of federal undertakings, which include the management and operation of the undertaking and labor relations. As such, a provincial law that touches upon these elements, such as a law pertaining to the minimum wage, is inapplicable to a federal undertaking.

The judge then turns to the trilogy of 1988, namely the Supreme Court's decisions in ***Bell Canada – 1988***, ***Alltrans*** and ***Courtois*** : three decisions where the Supreme Court found that provincial laws pertaining to occupational health and safety were inapplicable to federal undertakings because the prevention of accidents in the workplace enters "directly and massively into the field of working conditions and labour relations on the one hand and, on the other [...] into the field of the management and operations of the undertaking", fields that form an essential part of federal undertakings.

Justice Roy rejects a narrow interpretation of these decisions and notes that the trilogy affirms that the Act goes further than simply "touching upon" a federal undertaking – rather, the Act is likely to impair such undertaking.

Finally, Justice Roy turns to the jurisprudence subsequent to the trilogy. She notes that, while constitutional law has evolved towards a trend of cooperative federalism, the doctrine of interjurisdictional immunity has not been set aside.

After setting out the numerous obligations imposed on a principal contractor and noting that principal contractors are bound by the same obligations as an employer under the Act, Justice Roy writes [translation]:

[85] The CNESST recognizes that the Act does not apply to the Corporation as an employer, but asks that the Court distinguish the situation where the Corporation acts as a principal contractor. The Court does not believe that such a distinction is appropriate because the Act imposes to the principal contractor the same obligations as those imposed to the employer. The effect on working conditions or labour relations and the management of the business, is the same whether the obligation be imposed in one capacity or another.

[86] To impose the obligations prescribed in the Act to the Corporation, as a principal contractor on a construction site – rather than as an employer – has as much impact on what makes the undertaking specifically federal, impairs directly the management and operations of the undertaking, and this especially since the very mission of the Corporation is to maintain, operate and manage the Seaway.

Therefore, the judge concludes that the Act in not applicable to the Corporation as a principal contractor.

Before concluding, the judge also notes that workers are not without protection. On the one hand, the contractors and their employees must comply with the obligations set out in Part XI of the Act and, on the other hand, she recognizes that part II of the *Canada Labour Code* applies to the Corporation and that some of the provisions contained therein are specifically aimed at protecting third parties and not only employees of the Corporation. She also notes that other provisions are aimed at protecting the workplace under its control, without regard to who may be there.

The Decision of the Court of Appeal of Quebec

On July 13th 2016, the Court of Appeal of Quebec rejected the application for leave to appeal on the basis that the decision rendered by the Superior Court of Quebec confirms a body of case law which is clear, abundant and stable, pertaining to the doctrine of interjurisdictional immunity.

The Decision of the Supreme Court of Canada

On February 2nd 2017, the Supreme Court of Canada also rejected the application for leave from the judgement of the Court of Appeal of Quebec, thereby putting an end to this legal saga.

Commentary

This matter is an important precedent for federal undertakings, especially in a context where a number of these Corporations are currently investing heavily in their infrastructure for construction, maintenance and improvement projects.

Indeed, the judgments confirm that, while the CNESST has jurisdiction on construction sites and on provincially regulated contractors, it does not have jurisdiction on federal undertakings in regards to occupational health and safety, even when the federal undertaking is involved in a construction project and may act as a principal contractor.

The decision of the Superior Court is especially relevant since it rejects the argument that the safety of workers would be compromised without the presence of a principal contractor on the construction site, particularly as they are also protected by certain provisions of the *Canada Labour Code.*

Finally, this decision confirms once again that the trilogy of cases rendered by the Supreme Court of Canada in 1988 pertaining to the inapplicability of occupational health and safety laws to federal undertakings, is still current and well-founded.

The St. Lawrence Seaway Management Corporation was represented by a team consisting of Mtre Patrick Essiminy and Mtre Éric Azran from Stikeman Elliott.