Quebec's Act Respecting Occupational Health and Safety : A Federal Undertaking Is not Subject to the Obligations of a Principal Contractor

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On March 16, 2015, the *Commission des lésions professionnelles* (the CLP) declared that Quebec's ***Act Respecting Occupational Health and Safety***(OHSA) is inapplicable to a federal undertaking, the St. Lawrence Seaway Management Corporation (the Corporation), and annulled all the decisions issued by inspectors from the *Commission de la santé et de la sécurité du travail* (the CSST) affecting the Corporation.

This decision ***Corporation de Gestion de la Voie maritime du Saint-Laurent et Construction Injection EDM inc.*** resolves the debate on the inapplicability of the obligations regarding health and safety on a construction site incumbent upon a principal contractor, in accordance with **Chapter XI** (art. 194-222) of the OHSA.

In this case, the Corporation was challenging numerous intervention reports issued by CSST inspectors that identified the Corporation as principal contractor of the construction work performed by contractors at the locks of St. Lambert, Ste. Catherine and Beauharnois.

The CLP appraised the evidence and found, that in accordance with the criteria set by case law and the OHSA, the Corporation is the "principal contractor" of all the construction sites at issue, except for one construction site which was distinct from the other sites because the contractor was responsible for all the work performed in connection with the reconditioning of the Beauharnois locks' machinery.

The CLP thus pursued its analysis by considering whether Chapters X (inspection) and XI (special provisions respecting construction sites) of the OHSA were applicable to the Corporation.

Counsel for the Corporation argued that these Chapters do not apply, on constitutional grounds, to a federal undertaking by virtue of the doctrine of interjurisdictional immunity, and subsidiarily, to an agent of the Federal Crown by virtue of the statutory immunity privilege of the Crown. Regarding its main argument, the Corporation relied on the trilogy of cases rendered by the Supreme Court of Canada in 1988, namely the cases ***Bell Canada v. Québec (CSST)***,(Bell Canada), ***Canadian National Railway Co. v. Courtois***, (Courtois), and ***Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)***, (Alltrans).

Counsel for the CSST and Quebec's General Attorney (QGA) submitted that the effects of the 1988 trilogy cited above ought to be distinguished with respect to the application of the doctrine of interjurisdictional immunity given that the Bell Canada, Courtois and Alltrans cases did not deal specifically with the

provisions applicable to the principal contractor of a construction site. The QGA further argued that the Corporation was not an agent of the Crown.

The CLP sided with the Corporation. The CLP first concluded that the mission conferred on the Corporation by the Federal Government with respect to the operational control of the Canadian portion of the St. Lawrence Seaway constituted the sole *raison d'être* of the Corporation and that was sufficient to conclude that it was a federal undertaking – such qualification was not challenged by the parties.

Regarding the provisions of Chapter X (art. 177-193) of the OHSA, the CLP considered that it was unnecessary to rule again on the application of these provisions to a federal undertaking given that the Supreme Court of Canada established in the Courtois case that articles 62 and 177 to 193 of the OHSA were inapplicable to an undertaking engaged in interprovincial railway transportation, an industry with similarities with interprovincial marine transportation.

Contrary to the Bell Canada and Courtois cases, the CLP noted that none of the decisions challenged by the Corporation involved its own employees and that they rather targeted the Corporation in its capacity as a principal contractor, and not as an employer. In order to verify the validity of Chapter XI (art. 194-222) of the OHSA in respect of division of powers, the CLP began by assessing the pith and substance doctrine and the double aspect doctrine. In application of the Bell Canada case, the CLP concluded that the OHSA was valid and that it did not bear on two aspects.

The CLP thereafter examined the application of the doctrine of interjurisdictional immunity, by taking into account the teachings of the Supreme Court of Canada enunciated in ***Canadian Western Bank v. Alberta***. In the case at hand, the CLP considered that given the existence of prior decisions dealing with the same subject matter (Bell Canada, Courtois and Alltrans), the doctrine of interjurisdictional immunity may apply.

Furthermore, the CLP decided that the doctrine shall apply given that the enforcement of provisions of Chapter XI to the Corporation would result in an impairment on working conditions, labour relations and management of the undertaking.

In fact, according to the CLP, although it is true that the relationship between a construction worker and a principal contractor is not merely as concrete as the relationship of a worker and his employer, this relationship is far from being inexistent since article 195 applies to all construction workers and article 196 imposes on the principal contractor the duty to observe all obligations imposed on employers, including the obligation to take all necessary measures to protect health and safety of construction workers. The CLP noted that in similar fashion to industry workers, the rights conferred to construction workers form part of their working conditions and the principal contractor is not estranged to the exercise of these rights. Also, considering that the principal contractor shall assume all of the obligations provided by the OHSA, it can be concluded that the OHSA entails, for the principal contractor, consequences on working conditions, labour relations and management of the undertaking.

On the notion of impairment, the CLP stressed that the enforcement of OHSA on the Corporation, as a principal contractor of a construction site, may impair the management or operations of the undertaking. For example, an order issued by a CSST inspector or the exercise by a construction worker of a right of refusal may result in a work stoppage.

Finally, the CLP asserted that in the event that this decision would open the door to a legal vacuum, it would be up to the legislator to fill the gap or, alternatively, to the site owner to apply administrative standards which would remedy this situation.