Indexed as:

Northern Telecom Ltd. v. Communications Workers of Canada

Northern Telecom Limited, Appellant; and
Communications Workers of Canada, Respondent; and
David P. Thompson et al., Intervenors; and
The Canada Labour Relations Board, Tribunal.

[1980] 1 S.C.R. 115

Supreme Court of Canada

1978: November 15 / 1979: June 28.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law -- Labour relations -- Jurisdiction of the Canada Labour Relations Board -- Absence of evidence on the constitutional facts -- British North America Act, ss. 91, 92(10)(a) -- Canada Labour Code, R.S.C. c. L-1, ss. 2, 108.

On April 22, 1976, the Canada Labour Relations Board (the "Board") certified the Communications Workers of Canada (the "Union") as bargaining agent for the employees of Northern Telecom Limited ("Telecom") working as supervisors in its Western Region Installation Department. At the proceedings, Telecom did not directly contest the jurisdiction of the Board, stating it reserved its rights on that constitutional issue. Though no evidence was directed to the question of jurisdiction, the Board referred to the long history of the earlier certifications for the installers and held that Telecom's Installation Department at least was excluded by s. 92(10)(a) of the B.N.A. Act from provincial jurisdiction. Therefore, the Board had jurisdiction and the supervisors were employees within the meaning of the Canada Labour Code. Telecom unsuccessfully brought a section 28 application to set aside the order of the Board before the Federal Court of Appeal. Leave to appeal to this Court was granted on the question of whether the employees of Telecom are employed upon or in connection with the operation of any federal work, undertaking or business, within the meaning of the Code.

Held: The appeal should be dismissed.

Even if the Federal Court of Appeal appears to have treated the jurisdictional issue as one of judicial review of an administrative board, the answer to the question posed is found in principles governing the constitutional division of authority over labour relations. By section 108, the Board has jurisdiction with respect to persons employed on federal works, undertakings or businesses, as defined in s. 2 of the Code. To determine the constitutional issues, it is clear that certain kinds of 'constitutional facts' are required. Among these are:

(1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;
(2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;
(3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;
(4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system.

In determining whether a particular subsidiary operation forms an integral part of the federal undertaking, the judgment is functional and practical, emphasizing the factual character of the ongoing undertaking. To ascertain the nature of the operation, one must assess the normal or habitual activities of the business, which calls for a fairly complete set of factual findings. Here, there is some question as to the presence of both federal and provincial undertakings, requiring careful consideration of the connection between this subsidiary operation and the core undertakings. It is clear from the record that there is a near-total absence of relevant and material constitutional facts upon which such a delicate judgment must be made. Absent these facts, this Court would be ill-advised to essay to resolve the constitutional issue. Furthermore, Telecom did not apply to the Court, pursuant to Rule 17 of the Supreme Court Rules for the purpose of having a constitutional question stated. As Telecom effectively deprived a reviewing court of the necessary constitutional facts upon which to reach any valid conclusion on the constitutional issue, the matter will not be referred back to the Board to hear evidence. This Court being in no position to give a definite answer to the constitutional issue, that question awaits another day and the appeal is dismissed simply on the basis that the appellant Telecom has failed to show reversible error on the part of the Board.

Cases Cited

R. v. Ontario Labour Relations Board, Ex parte Northern Electric Co. Ltd., [1970] 2 O.R. 654, appeal quashed [1971] 1 O.R. 121; Jacmain v. Attorney General of Canada et al., [1978] 2 S.C.R. 15; Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754; Arrow Transfer Co. Ltd., [1974] 1 Can. L.R.B.R. 29; Capital Cities Communications Inc. v. C.R.T.C., [1978] 2 S.C.R. 141; Public Service Board v. Dionne, [1978] 2 S.C.R. 191; City of Toronto v. Bell Telephone Co. of Canada, [1905] A.C. 52; Quebec Minimum Wage Commission v. Bell Telephone Co. of Canada, [1966] S.C.R. 767; Canadian Pacific Railway Co. v. Attorney-General for British Columbia, [1950], A.C. 122; In re the validity of the Industrial Relations and Disputes Investigation Act, [1955] S.C.R. 529; Letter Carriers' Union of Canada v. Canadian Union of Postal Workers, [1975] 1 S.C.R. 178 referred to.

APPEAL from a decision of the Federal Court of Appeal [[1977] 2 F.C. 406] dismissing an application to set aside an order of the Canada Labour Relations Board. Appeal dismissed.

William S. Tyndale, Q.C., and Robert Monette, for the appellant.
Aubrey E. Golden and Maurice Green, for the respondent, Communications Workers of Canada.
George Hynna, for the Canada Labour Relations Board.

Solicitors for the appellant: Ogilvy, Montgomery, Renault, Clarke, Kirkpatrick, Hannon & Howard, Montreal.
Solicitors for the respondent: Golden, Levinson, Toronto.
Solicitor for the Canada Labour Relations Board: L.M. Huart, Ottawa.

The judgment of the Court was delivered by

DICKSON J.:-- On April 22, 1974, over five years ago, the Communications Workers of Canada (the "Union") applied to the Canada Labour Relations Board (the "Board") for certification in respect of a unit comprising some 148 employees of Northern Telecom Limited (formerly Northern Electric Company Limited) ("Telecom"). The proposed bargaining unit comprised:

> all employees of Northern Telecom Limited working in its Western Region Installation Department as supervisors.

The Board found that the supervisors were employees within the meaning of the Canada Labour Code, that the proposed unit was appropriate for collective bargaining and that the majority of the employees constituting the unit wished to have the Union

represent them as their bargaining agent. By an order of the Board, dated April 22, 1976, the Union was certified as bargaining agent for the employees in the unit.

At first glance, this would appear to be a routine application for certification. But the subsequent judicial history of this appeal has proven to be far from routine and its resolution puts the Court in an unusual and difficult dilemma. In no small part, this can be attributed to the strange position taken by Telecom in the proceedings. In order to understand how the situation arose, it is necessary to recount the history of this case--the positions of the parties before the Board, the proceedings before the Board, the Board's decision and the disposition of the section 28 application to the Federal Court of Appeal.

THE POSITIONS OF THE PARTIES BEFORE THE BOARD

All of the employees in the proposed bargaining unit work in that part of Canada lying to the west of Telecom's "Brighton Line", a line drawn north from the town of Brighton in the province of Ontario, which Telecom employs to divide the country into two regions for internal administrative purposes. The installers in this Western Region are covered by a collective agreement in which Telecom voluntarily recognized the same union, the Communications Workers of Canada, as bargaining agent for the installers. By the application which is the subject of the present proceedings, the Union sought certification as bargaining agent for the supervisors of these installers.

In its reply to the Union's application, the employer, then known as The Northern Electric Company Limited, stated that its business was that of designing, manufacturing and selling communications systems and equipments and of installing communications systems and equipments, throughout Canada and other parts of the world. The application was opposed principally on the ground that the proposed bargaining unit was not an appropriate unit for purposes of collective bargaining and further, that the supervisors performed management functions and were not "employees" within the meaning of the Canada Labour Code. Paragraph 15 of Telecom's reply reads in part:

> 15. The present application has been filed with your Honourable Board only because the applicant knows that it cannot be certified for this group by a provincial Board ...

In his opening statement before the Board Mr. Golden, counsel for the Union, alluded to paragraph 15 of the reply which, he said, raised inferentially, but not directly, a constitutional issue. He said:

> I would like to dispose of that to know whether, in fact, the respondent accepts the jurisdiction of this Board to here entertain this application on the basis of the constitution governing this country and if so, we will not have to deal with that any further. As I say, it has not been raised directly.

At the conclusion of his preliminary statement Mr. Golden returned again to the question whether the employer was advancing any constitutional challenge to the jurisdiction of the Board.

> First and of course, the most important area is whether to know or not the respondent challenges the constitutional jurisdiction because without that unless that is beside it I don't think we can go very much further.

Mr. Monette, counsel for Telecom, at the outset of his preliminary statement said:

> Well, Mr. Chairman and Members of the Board, with your permission I will address myself to one question which has been raised now on two occasions by my learned friend. Which he quotes as a constitutional issue. You will notice, from the reply of the respondent, there is no specific allegation where it is suggested that this Board does not have jurisdiction and if this were to be the respondent's opinion, it would be clearly stated in one or more paragraphs in the reply and there is nothing to that in the reply. May I state the following. Although the respondent does not and will not contest this Board's jurisdiction to hear the case and adjudge on its merits, I still don't want to leave my confrere under the impression and he knows that quite well, as much as I do, that the sole fact of one or more parties agreeing or suggesting that you have jurisdiction entails an immediate jurisdiction on the part of this Board and I just don't want to leave the impression that therefore it is a final and closed case. This respondent will not contest this Board's jurisdiction, but I still want to underline the fact that obviously you have the jurisdiction which is defined in the Act and still it is my suggestion, humble suggestion, that there is going to have to be an assumption on your part of the jurisdiction somehow or another based on facts. The only question I am saying is that even if I were to agree that you have jurisdiction, I don't think that this creates law as far as this board is concerned. So, I hope this answers my confrère's queries, on two occasions, on this. Once again stated we will not contest this Board's jurisdiction.

It will be observed that counsel stated, and repeated, that the employer did not contest the jurisdiction of the Board.

THE PROCEEDINGS BEFORE THE BOARD

The hearing continued for six days. The testimony and exhibits fill thirteen volumes. Most of the evidence was directed to the central issue of whether the supervisors performed management functions. That evidence exposed the internal operating procedures and hierarchy of Telecom, focusing upon the intricacies of the relationships between the supervisors and the installers beneath them, and between the supervisors and the various management personnel from the district managers on up through the departmental establishment. Only a trifle of the evidence could be said to have been directed to constitutional concerns or to be of relevance in resolving any such concerns.

As has been indicated, counsel for the Union attempted at the opening of the hearing to obtain some clarification as to the confusing stance of Telecom, but without success. In final argument, counsel for Telecom only added to the obfuscation when he said:

> The Company has stated its position on the constitutional issue in this case, and it only wishes to reiterate that it reserves all its rights to contest eventually with respect to constitutional grounds.

Mr. Golden was driven to make this statement on behalf of the Union at the opening of his argument to the Board:

> Firstly, I was not aware, except from having read the reply, that there was a serious constitutional issue in this case and it is not my opinion that there is now. My friend has reserved the respondent's rights to contest, eventually, with respect to the constitutional area and it's always been my understanding that with administrative law and practice, that the proper procedure is to give the tribunal, whose constitutional authority may be questioned, an opportunity to adjudicate on that question, itself, in order to determine whether or not it will assume jurisdiction. My friend, on a couple of occasions, has been invited to determine, to indicate, whether the matter is

> going to be raised or not, whether it will be left lying or will be seriously considered. He refused to abandon the position and invites this Board, in effect, to exercise its power to decide that it has jurisdiction, without the benefit of hearing evidence on the question of his jurisdiction and without the benefit of having had argument on its jurisdiction. Now, I point this out because I am, of course, inviting the Board to assume jurisdiction and to go on, hopefully, to certify and if my friend chooses to contest, at that point, I would like it clearly on the record, that the [employer] at no time has presented evidence or legal argument which would indicate that the Board did not have constitutional jurisdiction. I realize that the Board cannot, by its own decision, give itself constitutional jurisdiction where it did not have it.

THE DECISION OF THE BOARD

The Board held against Telecom on all counts. It found that the supervisors were employees within the meaning of the Canada Labour Code, that the proposed unit was appropriate for collective bargaining and that the majority of the employees constituting the unit wished to have the Union represent them as their bargaining agent. None of these matters remains in controversy. The only point of continuing consequence is paragraph (a) of the Board's decision which states that the Board has:

> (a) found that the employer and supervisors concerned are engaged upon a work, undertaking or business to which the Canada Labour Code applies;

The decision of the Board is a lengthy document in which all of the salient points are carefully reviewed. The earlier certification proceedings are also recounted.

As Mr. Monette, counsel for Telecom, noted during his closing argument, there is a long history of certification for the installers, East and West, though not, of course, for the supervisors. Mr. Monette said:

> There is no prior history of organization within the group of supervisors, may (sic) they East or West, however, there is an obvious long history of certification still in existence for the Installers, East and West. Ever since the 1940's, there has been a certification in the Province of Quebec and there has been a certification in the Province of Ontario. There has never emanated a Federal certification on account of lack of jurisdiction. However, in 1970, there were two cases that were brought in front of civil courts, one in the province of Quebec and one in the province of Ontario. And obviously, you know that l am referring to the judgment of Monsieur le juge Lacourcière of the Supreme Court of Ontario, 1970, I think Mr. Chairman indicated that there were already copies in the file, in the Board's file, of that decision.

Mr. Monette dealt at length with the judgment of Mr. Justice Lacourcière in R. v. Ontario Labour Relations Board, Ex parte Northern Electric Co. Ltd. [[1970] 2 O.R. 654, appeal quashed [1971] 1 O.R. 121] to which I will later return.

In its decision the Board detailed some of the history of the earlier certifications, which I will summarize:

> 1945--Installers in Eastern Region included in certification granted by Labour Relations Board of the Province of Quebec in a bargaining unit described as:
>
> All non-supervisory hourly-rated employees in the Province of Quebec excluding watchmen and printing trades.
>
> Later--Separate collective agreement negotiated by the employer with installers although they remained in same bargaining unit as all other hourly-rated employees who

were, generally speaking, in the manufacturing operations of the Company.

1958--The Union organized the installers of the Western Region and applied to the Canada Labour Relations Board for certification. The application was contested on constitutional grounds and the Canada Labour Relations Board declined to assume jurisdiction.

1968--The Union, although they held a collective agreement with the Company covering employees of the Western Region with headquarters in Toronto, save and except installation supervisors, filed an application with the Ontario Labour Relations Board for a unit of employees described as:

All employees in the Installation and Outside Plant Department of the respondent employed in the Province of Ontario except those for whom the applicant already has bargaining rights.

The company contested the constitutional jurisdiction of the Ontario Labour Relations Board and subsequently raised the same question before the Supreme Court of Ontario by way of a writ of certiorari to quash the decision of the Ontario Board. In the judgment of Lacourcière J., referred to above, the Court concluded:

> ... I have therefore reluctantly arrived at the conclusion that the Ontario Labour Relations Board proceeded upon an error of law ... I am satisfied that the ... company's Installation Department at least is excluded by Section 92(10) subparagraph (a) of the British North America Act from provincial jurisdiction. (at p. 672)

At the time of the application for certification now under consideration there was in force the collective agreement earlier mentioned, in which Telecom recognized the Union as sole and exclusive bargaining agent for employees of Western Region Installation having headquarters in Toronto and employed in connection with the installation of communications and related equipment. The recognition clause of the agreement specifically excludes installation supervisors. It is this group of' supervisory employees which the Union in the instant case proposed as an appropriate bargaining unit. Under the heading "(C) Salient Facts adduced in evidence" the Board states:

> Having become aware of the considerable litigation before the Courts as to the constitutional jurisdiction issues surrounding various groups of employees' certifications or attempts to get certified, and having read allegation 15 in the formal Reply of the employer ... the Board invited Company Counsel to comment on this matter in an opening statement. They replied that there was no contestation regarding the jurisdiction of the Board.
>
> Whereupon the Board proceeded to hear evidence and study exhibits produced by the parties.

Later in the decision one reads:

> (A) The Employer
>
> (a) Although Counsel for the employer had stated prior to the evidence being adduced in the instant case that they were not raising the issue of jurisdiction, that position was qualified at

the outset of the argument in the following manner:

> The Company has stated its position on the constitutional issue in this case, and it only wishes to reiterate that it reserves all its rights to contest eventually with respect to constitutional grounds.

(B) The Applicant

> (a) This Board had jurisdiction. As regards this question, the employer has presented no evidence and/or legal argument to substantiate a contestation.

Later, under the heading "Reasons for Judgment", "(A) General Comments", the Board observed that

> Leaving aside for the moment the problems inherent in the division of the employer's operations in this department between a Western and an Eastern region and the jurisdictional complexities, the present case does not contain any novel feature. It is strictly another application by a group of supervisors under the authority of Section 125(4) of the Code, to obtain collective bargaining rights...

Proceeding then to consider "(B) The Instant Case" the Board commenced

> 1. One must first realize that we are dealing here with only one department of this large company, that is, the department involved in the installation of switching equipment.

Then followed twenty pages in which the Board reviewed the work and responsibilities of the installation supervisors, concluding finally that they did not perform management functions of such a nature as to disqualify them from the definition of "employee" within the meaning of the Code.

The Board then turned its attention to the matter of jurisdiction, and said this:

> 5. As to the jurisdiction there is a long history of vacillating as to where the jurisdiction over the employees of this employer lies, especially in the case of the installers and now, their supervisors.
>
> The Board refers more particularly to the events surrounding the certification of the installers by the Quebec Board and the attempts by installers in Ontario to get certification from the Ontario Labour Relations Board as well as the refusal of the predecessor to this Board in 1958 to grant certification to the Communications Workers of America, Local C-4 for a group of installers.
>
> In the first place, this Board wishes to stress the fact that it provided itself with all pertinent decisions by the Quebec and Ontario Labour Boards as well as its own together with the judgment of the Honourable J. Lacourcière of the Ontario Supreme Court, rendered in 1970.
>
> Secondly, there has been a significant development in the operations of this employer since 1950 and especially in recent years, a development which had not fully evolved when this

> Board's predecessor, chaired by C. Rhodes Smith, declined to assume jurisdiction in 1958 when dealing with an application for certification by a group of installers of the Western Region of this employer.
>
> As to the import and consequences of this development on the jurisdiction of this Board, we were particularly interested in verifying that part of the operations of the employer consisted of
>
> "... a 'marked change in concept' whereby the company will undertake whatever the customer requires including repairs and maintenance in addition to installations."

Then followed two passages from the judgment of Mr. Justice Lacourcière and this comment:

> There has been no evidence in the instant case to contradict the facts as related in the above excerpts of the judgment of Mr. Justice Lacourcière.

The Board commended the "searching analysis" of Lacourcière J. as to the constitutional law issues involved and the jurisprudence, noting his conclusion as to the nature of the operations performed in the installation division of Telecom:

> ... I am satisfied that the system line-up testing in any event involves the operation of an interprovincial communications system.

and drawing comfort from his further conclusion:

> I am satisfied that ... the company's Installation Department at least is excluded by s. 92(10)(a) of the British North America Act from provincial jurisdiction and that the relevant employer-employee relations necessarily come within the purview of the Industrial Relations and Disputes Investigation Act.

The Board closed this portion of its decision by finding:

> Therefore the Board is convinced that it has jurisdiction in the instant case.

The application of the Union was granted and an order issued certifying the Union as the bargaining agent of the employees of Telecom in the proposed unit.

THE FEDERAL COURT OF APPEAL

Telecom brought a s. 28 application before the Federal Court of Appeal to review and set aside the order of the Canada Labour Relations Board. The court dismissed the application. The argument advanced on behalf of Telecom that the Board acted without jurisdiction was rejected without calling upon the Union to respond. The court held that when an applicant seeks to have a reviewing court set aside an order as having been made outside the scope of its jurisdiction, the onus is on the applicant to ensure that evidence of the facts necessary to support the application is before the court. The nub of the court's decision, delivered by the Chief Justice, is to be found in the following paragraph:

> It follows that, in this case, for the applicant to succeed on the jurisdiction point, there must be evidence before this Court upon which this Court can decide that the certification order was outside the scope of the Board's jurisdiction, and it also follows that in this case the onus was on the applicant to ensure that such facts were made to appear before this Court. The applicant

> did not seek to adduce any evidence on the point in this Court and abstained from putting the matter in issue before the Board. There is, therefore, no evidence upon which this Court can find that the Board acted beyond its jurisdiction.

In another paragraph the court added:

> I have not, moreover, overlooked the existence of evidence put before the Board in connection with the issues that were raised before the Board from which, taken by itself, some conclusions might be drawn with regard to the nature of that part of the applicant's business operations that are involved in this matter. In my view, in the absence of agreement that such evidence reveals an accurate picture of such operations from a jurisdictional point of view, it having been led before the Board in respect of entirely different issues, it cannot be used by this Court, as a reviewing court, to make findings of fact on the jurisdictional question. In my view, such a use of evidence led with reference to one issue with which a hearing is concerned to make findings on an issue with which a hearing was not concerned is not, in the absence of agreement or other special circumstances, sound. It might be added that, in my view, the facts raise a very difficult question from a jurisdictional and constitutional point of view, upon which this Court should not make a pronouncement in the absence of a full exploration of the facts relating to the jurisdictional and constitutional question as such.

THE ISSUE BEFORE THE COURT

Telecom then sought leave to appeal to this Court and leave was granted on this single question:

> Did the Federal Court of Appeal err in holding that the Canada Labour Relations Board had jurisdiction to deal with an application for certification on behalf of the employees concerned in respect of the question raised whether they are employed upon or in connection with the operation of any federal work, undertaking or business?

In order to understand the nature of the question upon which leave was granted, one has to consider the provisions of the Canada Labour Code, R.S.C. 1970, c. L-1 which delimit the Canada Labour Relations Board's jurisdiction in certification matters. Part V of the Canada Labour Code, is the "Industrial Relations" portion of the Code and s. 108 states:

> 108. This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

The definition of "federal work, undertaking or business" is found in s. 2 of the Code and the relevant portions read as follows:

> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including without restricting the generality of the foregoing:
>
> ...
>
> (b) a railway, canal, telegraph or other work or undertaking connecting any province with any other or others of the provinces, or extending beyond the limits of a province;

...

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces; and

(i) a work, undertaking or business outside the exclusive legislative authority of provincial legislatures;

Clause (b) of the definition is merely a restatement of a portion of s. 92(10)(a) of the British North America Act, one of the classes of works and undertakings withdrawn from the provinces and rendered a matter exclusively federal by the terms of s. 91(29), i.e. "Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". Similarly, clause (h) is a restatement of s. 92(10)(c) with the addition of the words "or undertaking". Clause (i) above would appear to be an effort to apply the general or residual power of the federal Parliament to the field of works and undertakings or it may stem from a federal perception of the effect of s. 92(10)'s exceptions from "Local Works and Undertakings".

Colin McNairn in his "Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction" (1969), 47 Can. Bar Rev. 355, at 393, took the view that the exceptions as exceptions ought to be narrowly construed against federal power. W.R. Lederman in his illuminating article, "Telecommunications and the Federal Constitution of Canada" in H.E. English, ed., Telecommunications for Canada (1973), 339 at 360, puts much greater stress upon the effect of s. 91(29) in converting these exceptions to an exclusive head of federal power and thus supports a broader reading of federal authority.

The importance of ss. 108 and 2 of the Canada Labour Code read in conjunction with ss. 91 and 92 of the British North America Act is the recognition of the essentially constitutional nature of the problem of jurisdiction raised in this case. There can be no doubt that the administrative jurisdiction--apart from constitutional questions--of the Canada Labour Relations Board in this case has been effectively engaged. Ignoring the constitutional issue, the general subject-matter of the dispute before the Board lies at the very heart of a labour board's administrative law jurisdiction. No jurisdictional error was committed by the Board in the course of the inquiry. In its purely administrative aspects, the Board's decision was not challenged in this Court.

The appellant and the respondent attempt to bolster their respective arguments by adverting to principles of judicial review of administrative action. Telecom argues that there is operative in this case a "double presumption" against the jurisdiction of the Board--flowing from the reinforcing effects of the Board being an inferior tribunal of restricted jurisdiction and labour relations being as a rule within provincial jurisdiction. By means of this "double presumption" against jurisdiction, Telecom argues that the burden of proof rested upon the applicant Union before the Board. The respondent Union opens its factum with an argument based upon Jacmain v. Attorney General of Canada and Public Service Staff Relations Board [[1978] 2 S.C.R. 15], namely, that a question of "jurisdictional fact" arises. Accordingly, suggests the Union, the Board should be allowed "a degree of latitude" in its jurisdictional findings, only requiring "substantial evidence for its decision of fact and a rational basis for its decision of law". The courts should therefore exercise restraint in declaring the tribunal to be without jurisdiction, when it reached its decision honestly and fairly, and with due regard to the material before it. In effect, the Union argues that the burden of proof lies upon Telecom who now challenges the jurisdiction of the Board.

It will be seen, upon reflection, that there is here neither a "double presumption" against the Board's jurisdiction, nor is there occasion for applying the "jurisdictional fact" doctrine upon review. As I have pointed out, there is no question of the Board's administrative or subject-matter jurisdiction.

The Federal Court of Appeal appears to have treated the jurisdictional issue in this case as one of judicial review of an administrative board which has taken jurisdiction in an administrative sense. On this view, quite clearly, the onus would rest upon the applicant for judicial review and not, by implication, upon the Union. But what is in question here

is not the Board's administrative jurisdiction in the classic sense of that term, but whether the jurisdiction given by Parliament to the Canada Labour Relations Board, through s. 108 of the Code, extends to the labour relations of the employees engaged in the work, undertaking or business here at issue, i.e., the installation department of Telecom. The answer to the question posed in the order granting leave must be found, not in the principles of judicial review of administrative action, but in the principles governing the constitutional division of authority over labour relations.

THE GRANTING OF LEAVE TO APPEAL

At the time leave was granted in this appeal, the Court had before it only the reasons for decision of the Canada Labour Relations Board and the judgment of the Federal Court of Appeal. As I have explained above, an important and difficult constitutional question would appear to have been raised on the record then before the Court.

When it came time to hear the appeal, the full record of some 2,479 pages was before the Court. In addition, an appendix containing the oral submissions of the parties before the Board was filed. It is to that record that we must look in resolving the case.

What became apparent in the course of oral argument was that serious problems existed in the scope and cogency of the evidence relating to the constitutional question, as a consequence of the position taken by Telecom before the Board. The Court was directed by counsel to some of the passages in the evidence that might afford the factual basis for a determination of the issue before the Court. Before delving into that evidence, we must consider the board constitutional principles applicable to the field of labour relations in order to determine the "constitutional facts" that are relevant and material to the decision this Court is being called upon to make.

THE CONSTITUTIONAL PRINCIPLES

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 those 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.

A recent decision of the British Columbia Labour Relations Board, Arrow Transfer Co. Ltd. [[(1974] 1 Can. L.R.B.R. 29], provides a useful statement of the method adopted by the courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", "essential" or "integral". As the Chairman of the Board phrased it, at pp. 34-5:

> In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.

In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, i.e., the installation department of Telecom, to look at the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.

Any core federal undertaking present in this case must be found within the telephone and telecommunications system. Constitutional jurisdiction over telecommunications is a difficult and controversial subject. It is a field which has been the subject of no little academic comment: see Telecommunications and the Federal Constitution of Canada by W.R. Lederman in H.E. English, ed., Telecommunications for Canada, An Interface of Business and Government (Toronto; Methuen, 1973); Mullan, Attainment of Objectives and Jurisdiction in Janisch, ed., Telecommunications Regulation at the Crossroads (Dalhousie Continuing Legal Education Series, No. 13, 1976), 149; Analysis of the Constitutional and Legal Basis for the Regulation of Telecommunications in Canada, Study 1(a), The Department of Communications (1971); McNairn, "Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction" (1969), 47 Can. Bar Rev. 355. Two recent judgments of this Court have dealt with constitutional jurisdiction in respect of certain aspects of telecommunications: see Capital Cities Communications Inc. v. C.R.T.C. [[1978] 2 S.C.R. 141] and Public Service Board v. Dionne [[1978] 2 S.C.R. 191].

At a minimum, it can be asserted that Bell Canada's operations have been found to be a federal undertaking: see City of Toronto v. Bell Telephone Co. of Canada [[1905] A.C. 52], and Quebec Minimum Wage Commission v. Bell Telephone Co. of Canada [[1966] S.C.R. 767].

In the field of transportation and communication, it is evident that the niceties of corporate organization are not determinative. As McNairn observes in his article, supra, at pp. 380-1:

> A transportation or communication undertaking is a possible corporate activity but it may or may not be segregated from the total corporate enterprise or it may even be larger in scope than a single corporate enterprise. To determine questions of this nature corporate objects have a certain relevance. But of primary concern is the integration of the various corporate activities in practice (including the corporate organizations themselves if more than one is involved) and their inherent

> interdependence.

McNairn's comment is borne out by the cases. On the one hand, a single enterprise may entail more than one undertaking, e.g. Canadian Pacific Railway's Empress Hotel was found to be an undertaking separate and independent from the railway undertaking in Canadian Pacific Railway Co. v. Attorney-General for British Columbia [[1950] A.C. 122]. On the other hand, two separate corporate enterprises may be found to be included within one single and indivisible undertaking, as in stevedores employed by a stevedoring company loading and unloading ships in the Stevedoring [[1955] S.C.R. 529, sub. nom. In re the validity of the Industrial relations and disputes Investigation Act.] case, or a trucking company which did 90 per cent of its business for the Post Office in Letter Carriers' Union of Canada v. Canadian Union of Postal Workers [[1975] 1 S.C.R. 178].

Another, and far more important factor in relating the undertakings, is the physical and operational connection between them. Here, as the judgment in Montcalm stresses, there is a need to look to continuity and regularity of the connection and not to be influenced by exceptional or casual factors. Mere involvement of the employees in the federal work or undertaking does not automatically import federal jurisdiction. Certainly, as one moves away from direct involvement in the operation of the work or undertaking at the core, the demand for greater interdependence becomes more critical.

On the basis of the foregoing broad principles of constitutional adjudication, it is clear that certain kinds of "constitutional facts", facts that focus upon the constitutional issues in question, are required. Put broadly, among these are:

> (1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;
> (2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;
> (3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;
> (4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system and, in particular, the extent of the involvement of the installation department in the operation and institution of the federal undertaking as an operating system.

It is with these evidentiary requirements in mind that I turn to review the record which is now before the Court in this appeal.

THE EVIDENCE

In the proceedings before the Board, there was some evidence concerning the general nature of Telecom's business and the role of the installation department within the company. No evidence was led to reveal the nature of the corporate and business relationships between Telecom and Bell Canada. All of the relevant evidence is found in the testimony of Mr. Lloyd Watt, at the time Director of S.P. 1 Installations for Northern Electric. As to the general nature of the business of Northern Electric, Mr. Watt said:

> Northern Electric Company designs, manufactures, sells communications equipment, cables in Canada and elsewhere in the world. The installation organization of Northern installs communications equipment in Canada and other countries of the world.

Watt clarifies this with the comment that Northern also installs other manufacturers' equipment, apart from that of Northern, "as an integral part of the system". This is followed by a description of the equipment installed, "basically, what we term central office switching and transmission equipment" and then he details the various types of such equipment.

The most detailed description of Northern's customers is contained in the following general comment:

> Q. Generally speaking, Mr. Watt, who are the customers or what is the type of customers Northern Electric has?
> A. The major customers are various telephone companies whether they be independent public utilities or government telephones, many small telephone companies, government agencies such as, the Department of Defence Production. We have had contracts with NATO for communications equipment installations.
>
> I guess looking at the Canadian telephone industry, we have worked for British Columbia Tel., Quebec Tel., Bell of course, the Manitoba Telephone System, Saskatchewan Government Telephone, City of Edmonton Telephones, Alberta Government Telephones. Basically, in the communication industry in Canada and in foreign countries such as, Turkey, it is called the P.T.&T. Post Telegraphs, and so on, Nigeria, that is for the Nigerian Government, Jamaica for an independent telephone company, that type of customer.

Watt describes installation within the company as "a department within a division". According to Watt, Telecom has seventeen manufacturing plans in Canada.

One can read through the thirteen volumes of evidence, only to find that that is the sum total of the evidence on the corporate and business relationships of Telecom.

As for the role of the installers within the system, there is some testimony on the part of Watt in response to questioning by the Chairman of the Board:

> The functions of the installer are to broadly put, assemble, cable, wire, adjust or verify and test a given piece of equipment, system or whatever, depending on the man's skill.
>
> In other words, if you could visualize this room without any furniture or equipment in it, that is what the central office looks like when we first arrive. The equipment is laid out and structures are erected to support the components to be assembled.
>
> The next natural sequence, of course, is to cable it to the various frames, interconnecting bays, switchboards, whatever, to bring it all together. The installer's work is limited to taking it to what we call the main frame, if you will, and from there on out it is the telephone cable that go in the manhole and the poles, etc., are usually installed by the telephone companies.
>
> However, in some contracts that we have had, we have taken it all on, that is the outside cabling and the construction of the building, almost like a turnkey operation, so the installer works, generally, within a central office. Although we have transmission installers who will work on towers on the wave guides, horns, reflectors and so on.
>
> Q. Does the work encompass after that the maintenance of that equipment?
> A. We, as a general rule, do not do maintenance unless it is a specific request of the customer for one or two installers or supervisors to stay behind to help train the customer and maintain the office. And they are on separate orders.

> We do provide customer training and we will, if requested by the customer, leave a skilled person or manager there to help him to get his system into service. That is generally what happens in the U.S.A.

Q. And, therefore, in those circumstances, your installers in fact operate the system?
A. In some instances.

In response to questions from counsel for Telecom on re-examination, with respect to the importance of the various functions of the installation department, Watt observed:

> The large bulk of our work consists of installing new and/or re-used equipment and testing it. The predominance of our work is in that area. The...

CHAIRMAN: Can you get any closer than that, 75% 80%?

A. Oh! I would say that it would be in the high 90's, of the kinds of work we do. Relating to instructing customers or assisting them on maintenance, a very small percentage occasional customer's request as distinct to in the U.S.A. of course, our people usually remain there for the cut-over and perhaps a week or two after assisting the telephone company. But in volume of work and time, it is a very small percentage.

Further, on the subject of testing, Watt testified:

Q. How do you rate testing in terms of complexity by comparison to other functions that have to be performed during an installation job?
A. Testing is, again, depending on the system and the

> unit being worked on, could be from very simple to extremely complex, solid state, etc.

Q. What is the importance of testing?
A. This is the final analysis of what we have sold to our customer as a product that will do a certain thing. The testing ensures that that piece, part or system will, in fact, do what we have sold the customer and meet the specifications.

That is the sum total of the evidence that describes, however scantily, the relationship between installation and operation in the telephone system.

THE DILEMMA

One thing is clear from the earlier discussion of the applicable constitutional principles. In determining whether a particular subsidiary operation forms an integral part of the federal undertaking, the judgment is, as was said in Arrow Transfer, a "functional, practical one about the factual character of the ongoing undertaking". Or, in the words of Mr. Justice Beetz in Montcalm, to ascertain the nature of the operation, "one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors" and the assessment of those "normal or habitual activities" calls for a fairly complete set of factual findings. The importance of such findings of fact is only heightened when one considers that some question exists here as to the presence of both federal and provincial

undertakings, requiring close and careful consideration of the connection between this particular subsidiary operation and the core undertakings.

Equally clear from the record is the near-total absence of the relevant and material "constitutional facts" upon which such a delicate judgment must be made. On the evidence in the record, this Court is simply not in a position to resolve the important question of constitutional jurisdiction over the labour relations of the employees involved in the installation department of Telecom.

The absence of any such evidence can be almost wholly attributed to the ambiguous stance taken by Telecom before the Board. Counsel for Telecom drew the Board's attention to the fact that the Telecom reply to the Union's application did not suggest that the Board lacked jurisdiction. Counsel assured the Board, subject to its "reservation", what "this respondent will not contest this Board's jurisdiction" and once again stated we will not contest the Board's jurisdiction". As Telecom made no challenge to the Board's jurisdiction, neither Telecom nor the Union adduced constitutional facts, and jurisdiction was not argued, before the Board. No further evidence was adduced before the Federal Court of Appeal on the s. 28 application to review and set aside the decision of the Board.

I am inclined toward the view that, in the absence of the vital constitutional facts, this Court would be ill-advised to essay to resolve the constitutional issue which lurks in the question upon which leave to appeal has been granted. One must keep in mind that it is not merely the private interests of the two parties before the Court that are involved in a constitutional case. By definition, the interests of two levels of government are also engaged. In this case, the appellant did not apply to the Court, pursuant to Rule 17 of the Supreme Court Rules, for the purpose of having a constitutional question stated. If the appellant had intended to raise a question as to the constitutional applicability of the Canada Labour Code, then the obligation was upon the appellant to assure that the constitutional issue was properly raised. As no constitutional question was stated nor notice served upon the respective Attorneys General, the Court lacks the traditional procedural safeguards that would normally attend such a case and the benefit of interventions by the governments concerned.

There is always the overriding concern that the constitution be applied with some degree of certainty and continuity and regularity and not be wholly subject to the vagaries of the adversarial process. The case at bar is an apt demonstration of the occasional vagaries of that adversarial process.

CONCLUSION

How is the Court to dispose of this case and resolve this dilemma? The matter could be referred back to the Board to hear evidence, find facts and consider arguments on the constitutional question. I do not think this would be an appropriate disposition of this case. The Union applied on April 22, 1974 to the Board for certification of the bargaining unit which is the subject-matter of these proceedings. To refer the whole affair back to the Board for a re-hearing would start the matter all over again. Over five years have passed. It would work a grave injustice on the employees seeking certification and reward the employer for the equivocal, and if I may say so, questionable tactics which it saw fit to adopt.

Telecom did not raise the constitutional question before the Board, nor did Telecom there take the position that the Board lacked a prima facie basis of facts upon which it could conclude that it had jurisdiction. Absent any serious challenge to its jurisdiction, the Board dealt with this issue briefly and assumed jurisdiction. Telecom, by its actions, effectively deprived a reviewing court of the necessary "constitutional facts" upon which to reach any valid conclusion on the constitutional issue.

After consideration of the full record in all its thirteen volumes, a record which the Court did not have available to it upon granting leave, I have concluded that this Court is in no position to give a definitive answer to the constitutional question raised. I think we must leave that question to another day and dismiss the appeal simply on the basis that the posture of the case is such that the appellant has failed to show reversible error on the part of the Canada

Labour Relations Board.

I would dismiss the appeal with costs throughout to the Union.

Appeal dismissed with costs.