Noteworthy Decision Summary

Decision: A1603799 **Panel:** Warren Hoole **Decision Date:** April 24, 2017

This decision is noteworthy for its analysis of the jurisdiction of the Workers' Compensation Board, operating as WorkSafeBC (Board), to consider constitutional questions.

This appeal concerned an alleged case of discriminatory action brought by a worker who was employed as an installer of satellite television systems in BC. Through a chain of contractual relationships, the worker installed satellite systems on behalf of a national telecommunications company.

The national telecommunications company contracted all its satellite television installation work across Canada to another national corporation (the national installation manager). The national installation manager in turn contracted with a BC corporation (the BC installation manager) to manage installations within BC. The BC installation manager in turn contracted with various local installers, both corporations and sole proprietors, to perform the actual installation work. The worker was the sole employee of one such local installer, a BC corporation solely owned by the worker's wife (the local installer). The local installer was registered as an employer with the Board.

As a result of communications regarding disagreement between the BC installation manager and the local installer and worker, the worker formed the view that he was being bullied and harassed by personnel at the BC installation manager. The worker contacted the national installation manager and voiced his concerns. On learning that the worker had communicated his concerns to the national installation manager, one of the owners of the BC installation manager contacted the worker to inform him of his unhappiness, and that his contract was suspended. Shortly after that the BC installation manager terminated the local installer's contract.

The worker filed a complaint under the *Canada Labour Code* with respect to the termination of his contract. Although the complaint appeared to be made against only the national installation manager, the worker said the complaint was also filed against the BC installation manager. A *Canada Labour Code* adjudicator concluded that the *Canada Labour Code* did not apply because the worker's circumstances did not fall within the federal constitutional authority. The worker's complaint was dismissed.

The worker filed a complaint of discriminatory action with the Board. A Board adjudicator concluded that the activities of both the national installation manager and the BC installation manager were vital, essential, or integral to the operations of a national telecommunications company. Since telecommunications fall within the exclusive area of federal authority, the Board found that the *Workers' Compensation Act* (Act) did not apply.

The WCAT panel found that WCAT has the authority at common law to deal with constitutional matters, following *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54. The panel found further that WCAT's authority was limited by section 45 of the *Administrative Tribunals Act* (ATA) but not by section 44 of the ATA, with the result that WCAT has authority to deal with constitutional questions other than questions relating to the *Canadian Charter of*

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Rights and Freedoms (Charter). The panel found that the constitutional question raised in the appeal concerned the division of powers between federal and provincial governments, but did not concern the Charter; consequently, WCAT had jurisdiction to consider the constitutional question.

The WCAT panel noted that labour relations, including discriminatory action complaints under the Act, are generally within provincial constitutional authority, but that authority may be curtailed where it intrudes into the core operations of the federal telecommunications power. Furthermore, where provincial labour relations legislation touches upon a secondary actor that is vital, essential, or integral to the primary federally-regulated telecommunications provider, that provincial labour relations legislation may also be inapplicable to the secondary actor. The panel noted that the national installation manager and the BC installation manager both performed over 95% of their work for two federally regulated telecommunications companies; consequently, both were integral to the core operations of those federally regulated companies. Thus, Part 3 of the Act did not apply to them, and, accordingly, the worker's appeal was denied.

The panel acknowledged that the denial of the worker's complaint appeared to leave the worker without forum with jurisdiction to consider his complaint. However, the panel concluded there was no legal authority permitting principles of equity, comity, or issue estoppel to ground constitutional jurisdiction.

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DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

[1] The worker considers that he lost his job in retaliation for raising workplace safety concerns. He therefore filed a complaint of discriminatory action with the British Columbia Workers' Compensation Board (Board) on February 23, 2015.

[2] In a February 17, 2016 decision the Board concluded that the worker's complaint fell within the authority of the federal government and not the provincial Board. The Board therefore declined to hear the merits of the worker's discriminatory action complaint.

[3] The worker now appeals to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

[4] Can the Board hear the merits of the worker's discriminatory action complaint?

Jurisdiction

[5] The worker filed his appeal with the WCAT pursuant to section 240 of the *Workers Compensation Act* (Act). The key issue in the appeal is whether the Act applies to the worker's circumstances or whether the *Canada Labour Code* is instead applicable. The question of whether federal or provincial legislation applies is a matter of constitutional law.

[6] My jurisdiction to hear constitutional matters arises from a combination of sources. First, in *Nova Scotia (Workers' Compensation Board) v. Martin* 2003 SCC 54, the Supreme Court of Canada concluded as a general matter that tribunals such as the WCAT have the common law authority to deal with constitutional matters. The Court noted that it was potentially open to legislatures to limit by statute any particular tribunal's presumptive common law constitutional authority.

[7] In this regard, section 245.1 of the Act (amended December 18, 2015) referentially incorporates section 45 of the BC *Administrative Tribunals Act* (ATA). Section 45 of the ATA provides that the WCAT may not hear questions relating to the *Canadian Charter of Rights and Freedoms* (Charter).

[8] However, section 245.1 of the Act does not referentially incorporate section 44 of the ATA. Section 44 of the ATA precludes an affected tribunal from consideration of all "constitutional questions" as that phrase is defined in section 1 of the ATA.

[9] The result of the ATA, *Martin*, and the Act, is that the WCAT may consider any "constitutional question" that does not involve the Charter. Because the question of provincial or federal

competency is a "division of powers" constitutional issue and not a Charter issue, it follows that I have the necessary jurisdiction to consider the constitutional applicability of the Act to the worker's complaint of discriminatory action.

[10] The employer respondents in the current appeal have filed the required notice under the British Columbia *Constitutional Questions Act*. Both Attorneys-General declined to participate in the appeal.

Background and Evidence

[11] The Board officer has already summarized the relevant evidence and his decision is available at www.worksafebc.com. I therefore need not repeat that evidence in detail.

[12] It will suffice to state that the worker is involved in the satellite television system installation business. He performs this work through a chain of contractors starting with a large national corporation and ending with a small, closely-held British Columbia company.

[13] More specifically, the structure in place at the time of the alleged discriminatory action involved, first, a head contractor in the form of a large national telecommunications corporation. This corporation in turn contracts all of its satellite television installation work across Canada to a national corporation that manages these installation contracts. I will describe this contractor as the "national installation manager."

[14] For installations in British Columbia, the national installation manager in turn contracts with a British Columbia company that I will describe as the "BC installation manager." The BC installation manager then hires small regional contractors to carry out the actual satellite television installation work. The small regional installer contractors are generally incorporated.

[15] In the circumstances of the current appeal, the worker is directly employed by one of the small regional installers. The small regional installer in question here is incorporated in British Columbia and its sole shareholder is the worker's wife.

[16] In summary, the essence of this arrangement is that the national telecommunications corporation contracts its installation work to a national manager, who in turn contracts to a British Columbia manager, who in turn contracts with the small regional installer, either in the form of a closely-held British Columbia company, or in the form of a sole proprietor.

[17] In this appeal, the small regional installer was registered as an employer with the Board at the time in question. It had no staff other than the worker. The small regional employer reported the worker's earnings as assessable payroll to the Board for assessment purposes. The small regional installer's essential purpose appears to have been to facilitate the performance of satellite television installation work pursuant to the contractual framework described above.

[18] In early 2015, or possibly in late 2014, friction arose between the small regional installer, its worker, and the BC installation manager. It appears that the friction related to whether or not the

worker was adequately responsive to email and telephone directions from the BC installation manager. I make no comment as to the validity, or otherwise, of this concern; however, the email evidence shows that the relationship between the parties had soured by the first few weeks of January 2015.

[19] As a result of the exchange of emails and phone calls around this conflict, the worker formed the view that he was suffering bullying and harassment at the hands of the BC installation manager. He therefore contacted an executive with the higher level contractor in the structure described above, that is, the national installation manager. The worker mentioned his bullying and harassment concerns to that executive.

[20] The worker said that the executive promised to discuss the issue at a telephone meeting with the BC installation manager later that day. In the interim, the worker spoke with one of the owners of the BC installation manager. According to the worker, the owner advised the worker that the concerns had been cleared up.

[21] A few hours later, one of the owners of the BC installation manager again contacted the worker. This time, the worker described the owner as angry. The owner had just spoken with the executive from the national installation manager about the worker's concerns. The owner told the worker that he did not like people complaining about him and "going behind his back". The owner advised the worker that he was indefinitely suspended. A few days later, the owner advised the small regional installer, and thus, in effect, the worker, that the contract with the BC installation manager was terminated.

[22] The worker responded by filing a February 12, 2015 complaint under part 3 of the *Canada Labour Code* (R.S.C., 1985, c. L-2). It appears that this complaint was made only against the national installation manager, although the worker says the complaint was also made against the BC installation manager. In a decision dated March 12, 2015, the *Canada Labour Code* adjudicator concluded that the worker's circumstances did not fall within the federal constitutional authority, with the result that the *Canada Labour Code* was inapplicable and the worker's complaint was dismissed.

[23] It was against this background that the worker then filed his provincial complaint of discriminatory action under the Act. The Board solicited submissions and evidence from the parties about the Board's constitutional authority to hear the worker's discriminatory action complaint.

[24] For its part, the Board ultimately concluded that the activities of both the national installation manager and the BC installation manager were vital, essential, or integral to the operations of the national telecommunications company. As such, because telecommunications is an exclusive area of federal authority, the Board found that the Act did not apply and that the Board lacked the jurisdiction to hear the merits of the worker's discriminatory action complaint. It is from this conclusion that the worker now appeals.

Reasons and Findings

[25] The Board has already set out the applicable constitutional principles. In simple terms, the Canadian constitution divides powers between the federal and provincial spheres. At times some overlap is permitted; however, in other circumstances it is constitutionally impermissible for one jurisdiction to intrude into the other.

[26] That is the case with telecommunications, which is an exclusive area of federal constitutional authority. Although labour relations, including discriminatory action complaints under the Act, are generally within provincial constitutional authority, the general provincial constitutional authority over labour relations may be curtailed where that authority intrudes into the core operations of the federal telecommunications power.

[27] Furthermore, where, as here, provincial labour relations legislation touches upon a secondary actor that is vital, essential, or integral to the primary federally-regulated telecommunications provider, that provincial labour relations legislation may also be inapplicable to the secondary actor.

[28] The Board adjudicator accurately set out the law in this regard and I would, with respect, adopt it as my own. In addition, the Board adjudicator sought relevant evidence from the parties as to the nature of their relationship and the type and percentage of work carried out. None of the parties in the current appeal have seriously contested this evidence and I accept it as accurate.

[29] The evidence shows that the national installation manager and the BC installation manager both perform the vast bulk (approximately 95%) of their work on behalf of two federally-regulated telecommunications corporations. It follows that the operations of the national installation manager and the BC installation manager are integral to federally regulated telecommunications corporations such that part 3 of the provincial Act has no application to them. I therefore agree with the Board adjudicator's analysis and reach the same conclusion for the same reasons.

[30] In doing so, I am well aware that the worker finds himself in a perplexing position. Neither the federal nor the provincial regulators consider themselves authorized to deal with the merits of his complaint. Nevertheless, I know of no legal authority that permits principles of equity, comity, or issue estoppel to ground constitutional jurisdiction. The worker appears to argue that issue estoppel should apply here; however, he cites no authority for this proposition and I know of none. If the worker wishes to resolve this constitutional dilemma, it may be that he should pursue judicial review of the decision under the *Canada Labour Code*. Indeed, that decision appears to me to have been cursory and made without a full evidentiary foundation. It may well be incorrect. In the alternative, the worker may instead wish to pursue a judicial review of my decision.

[31] In summary, I find that the Board was correct to conclude that part 3 of the Act is constitutionally inapplicable to the worker in relation to his dispute with the BC installation manager and the national installation manager. It follows that the worker's complaint of discriminatory action under the Act cannot succeed.

[32] I note that I have not mentioned the worker's submissions in any detail because the bulk of them relate to the merits of his discriminatory action complaint. Other than a brief reference to

issue estoppel, which, in my view cannot ground constitutional jurisdiction, the worker's submissions were not substantially directed at the constitutional question in issue. Accordingly, I have not considered it necessary to describe or respond to the bulk of the worker's submissions.

[33] As a result, I must deny the worker's appeal.

Conclusion

[34] I confirm the Board's February 17, 2016 decision (2015D066). No expenses were requested or apparent and I therefore make no order for the reimbursement of appeal expenses.

Warren Hoole
Vice Chair

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