LABOUR LAW CENTRAL TO CONSTITUTIONAL FIGHT

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If there is a battle being waged over the tenets of Canada's Constitution and the Charter of Rights and Freedoms, the ground where the fight is taking place could very well be in labour and employment law. In recent years, the Supreme Court of Canada has been called upon to decide on myriad constitutional challenges, including the Charter obligations of jurisdictions or employers.

Heenan Blaikie LLP senior labour lawyer John Craig says this shows the real work on defining the Canadian Constitution is being accomplished by labour lawyers, "labour law has really become the focal point of constitutional law." To that end, he advises his students at the University of Western Ontario law school if they are interested in constitutional law, then labour and employment is the place to be. "I always say to my students if you really want to be a constitutional lawyer at the core, and argue about these issues, then become a labour lawyer, because it is the labour lawyers who are doing all the heavy lifting on the constitutional law side."

To illustrate his point, Craig calls to mind a pair of cases where the Supreme Court has been asked to consider a Canadian's right to collective bargaining. First there was the *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, which is held up as protecting collective bargaining rights for Canadian workers and unions. Secondly, in *Fraser v. Ontario*, a case dealing with the exclusion of agricultural
workers from Ontario's Labour Relations Act. Craig is representing the Ontario Federation of Agriculture against the challenge to the exclusion from the OLRA, which labour says is unconstitutional because it violates the freedom of association guarantee under the Charter. The *Fraser* decision is expected this year.

Division of powers is another area of Constitutional argument. Craig says it is an area of interest because of the obvious benefits for unions to have members subject to a single federal labour law rather than several provincial ones. While the rules for workers in each province have similarities, it is the federal system of card-check certification, which does not require a certification vote to establish a collective bargaining unit, that makes the national law more advantageous. Also, having one union representing several workers from different sections of a company can be a large stick to wield come contract time. "With the federal jurisdiction you have one-stop shopping," says Craig. "If you have a company that is operating nationally and you can get them to become federal then the Canada Industrial Relations Board is more likely to order a national bargaining unit of all the employees. Then the union hits the jackpot, at that point they have everyone in the company in one bargaining unit and that gives them a lot of leverage."

In its recent decision in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, the Supreme Court was asked to consider the division of powers with relation to ss. 91 and 92 of the British North America Act. The sections deal specifically with the interprovincial nature of transportation and communications making those industries subject to federal rules and not

provincial ones.

Fastfrate ships products from one part of Canada to another and has operations in Ontario, Quebec, Manitoba, Saskatchewan, Alberta, and British Columbia. Within provinces, Fastfrate uses its own resources to move freight but has a 10-year, $400 million co-operative agreement with Canadian Pacific Railway Ltd. to move freight interprovincially. Fastfrate shut down the last of its interprovincial services in 2004, at that time the company moved freight between Ottawa and Montreal. Today Fastfrate's employees do not cross provincial borders.

The union representing the Fastfrate workers applied to the Alberta Labour Relations Board for a declaration of whether the operations of the Calgary branch were subject to provincial or federal regulations. There was an earlier application to the Canada Industrial Relations Board from another union asking to have the Alberta, Saskatchewan, and Manitoba divisions certified as a regional bargaining unit.

The ALRB sided with the union representing the Calgary workers, saying the company was "subject to federal jurisdiction because it was part of a single, indivisible, interprovincial freight transportation undertaking."

The reviewing judge, who reaffirmed the existing provincial certification, struck down the decision, "holding that absent any physical involvement in the interprovincial carriage of goods, there was 'insufficient reason to displace the dominant presumption of provincial jurisdiction over labour relations.'" However, the Court of Appeal, in a majority decision, restored the ALRB ruling.

"This case went back and forth and back and forth at each level," says Tom Ross, the McLennan Ross LLP partner in Calgary who represented Fastfrate at the Supreme Court. The case eventually hinged on the purpose of the company's operations versus the practice of its workers. "One of the keys to the decision here is in order to have interprovincial transportation you must be involved in the physical transportation across provincial boundaries." While Fastfrate's operations are interprovincial in the sense that the company moves freight from one part of Canada to another, none of its employees are involved in moving the freight across provincial boundaries.

"All of the employees and their individual activities were self-contained in each province," says Ross. This provides an easier test for courts and labour boards, basing a decision on where the employees' operations occur, rather than the purpose of the business when deciding whether those workers should be covered by federal or provincial labour rules. "Especially in today's business world, it is hard to find a business that doesn't have some purpose extending beyond its own province." One of the reasons the court ruled in favour of Fastfrate was the company had arranged itself in a legitimate fashion, and not simply to avoid the national labour law. However, Craig says the ruling's minority opinion clearly shows there is a concern companies that would otherwise be federal will organize their operations through fairly sophisticated contracting-out mechanisms to move themselves into the provincial sector. "Imagine Canada Post subcontracts all the work of moving the mail across provincial boundaries and declares it is provincial because it no longer actually does the work that gets the stuff across the boundaries."

In writing the dissenting opinion in *Fastfrate*, Justice Ian Binnie pointed to the nature of modern business as a caution against allowing a company with operations in multiple jurisdictions contracting out interprovincial work to achieve the benefit of being under local labour laws. “In an era where contracting out elements of a service business is commonplace, the modalities of how a truly interprovincial transportation operation ‘undertakes’ to move its customers’ freight from one part of Canada and deliver it to another should not contrive to defeat federal jurisdiction,” wrote Binnie.

He viewed Fastfrate as “a single functionally integrated indivisible national transportation service,” with terminals at either end of the shipment. “This is not the case of a company that is simply present in each province with a stand-alone operation — like a chain of clothing stores.

“What Fastfrate does — the service it provides, its ‘undertaking’ — is to move freight from the hands of a customer in one part of the country to the hands of a customer in another part of the country.”

Regardless of the actual operations of Fastfrate, Binnie further wrote, labour law must evolve past the notion of business in the era when the BNA Act was enacted. Specifically pointing to division of legislative powers, he wrote the court must be cognizant of changing political and cultural realities. “Although the passage of time does not alter the division of powers, the arrangement of legislative and executive powers entrenched in the Constitution Act, 1867 must be applied in light of the business realities of 2009 and not frozen in 1867. The current Canadian economy would be unrecognizable to the statesmen of 1867,” he wrote. “A grown man is not expected to wear the same coat that fitted him as a child. Today’s coat is of the same design, but the sleeves are longer and the chest is broader and the warp and woof of the fabric is more elaborate and complex.”

In writing for the majority, Justice Marshall Rothstein further clarified the difference between the interprovincial nature of communications and transportation. Pointing to s. 92(10)(a) of the BNA Act, Rothstein said: “Communications undertakings can operate and provide international and interprovincial communication services from a fixed point whereas transportation, by definition, involves mobility of goods, persons, and transportation equipment across territory. In the transportation context, it is not possible for an undertaking to operate an interprovincial transportation service where it does not itself perform the interprovincial carriage.”

One test to protect workers of a random company suddenly arranging its operations to avoid a particular labour jurisdiction would be intent. “It is always a risky strategy if you are engaging in something in a colourable way to avoid jurisdiction,” says Ross. He believes the larger impact of this decision is to provide business with certainty, especially the freight-forwarding business, where the test would be location of an employee’s work functions and not the purpose of the company. “We want to encourage businesses to make rational decisions that best suit themselves and their shareholders and their customers, and it is a lot easier to do that when you know with certainty what the rules are.”