

Federal Court



Cour fédérale

**Date: 20110222**

**Docket: T-901-10**

**Citation: 2011 FC 211**

**Winnipeg, Manitoba, February 22, 2011**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**ALAN SCHWARK  
and  
ALLIED SYSTEMS (CANADA) COMPANY**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of the 3 May 2010 Decision of a Referee appointed under Division XVI – Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code), whereby the Referee referred a wage recovery appeal back to the regional director of the Labour Program for re-determination.

## **BACKGROUND**

[2] The First Respondent, Mr. Schwark, is a former employee of the Second Respondent, Allied Systems (Canada) Company (Allied). Allied is engaged in the interprovincial, extraprovincial and international transportation by truck of new and used automobiles.

[3] Due to an on-the-job injury in 2004, Mr. Schwark underwent back surgery and was unable to perform his duties as a truck driver. Following a consultation between the Worker's Compensation Board (WCB) and Allied, Mr. Schwark was offered a position with Allied in a different capacity, specifically as a night security officer, which he accepted.

[4] On 22 June 2008, Mr. Schwark filed a complaint against Allied for non-payment of wages and other amounts in violation of section 174 of the Code. Inspector Faye Lawson of Labour Canada (the Inspector) investigated the complaint and subsequently sent Mr. Schwark a Preliminary Determination of Compliance letter, dated 29 October 2008, and a Notice of Unfounded Complaint, dated 13 November 2008. The Inspector found that Allied intended to pay Mr. Schwark in accordance with the agreement reached in its consultation with the WCB, that Allied did pay Mr. Schwark in accordance with the agreement and that the agreement complied with the Code. The Inspector also noted that, as Part III of the Code does not address the issue of indexing, there was nothing that the department could do for Mr. Schwark in that regard.

[5] Mr. Schwark appealed the Inspector's findings, and the matter was brought before Referee Derek A. Booth. The Referee rescinded the Notice of Unfounded Complaint and sent the matter back to the director of the Labour Program (of Labour Canada) for redetermination by a different inspector in accordance with sections 169, 171 and 178 of the Code; section 19 of the *Employment Standards Code of Manitoba*; and sections 40 and 47 of the *Workers Compensation Board Act*. This is the Decision under review.

### **DECISION UNDER REVIEW**

[6] The Referee found that both the employer and the employee had acted in good faith. However, he noted that the Inspector did not address Mr. Schwark's questions regarding loss of indexing and loss of pension and did not make clear to Mr. Schwark how he would be able to achieve a higher wage. The Referee also noted that neither the Preliminary Determination of Compliance nor the Notice of Unfounded Complaint addressed:

- a. subsection 171(1) of the *Canada Labour Code*, which provides that "the total hours worked in a week shall not exceed 48";
- b. section 169 of the *Canada Labour Code*, which provides "that no employer will cause an employee to work longer than 8 hours a day, 40 hours in any week"; and
- c. subsection 19(1) of the *Employment Standards Code of Manitoba*, which provides that "an employer's management rights do not include an implied right to require an employee to work overtime."

[7] The Referee rescinded the Notice of Unfounded Complaint and ordered the director of the Labour Program to instruct a different inspector to recalculate payments, wages, hours of work and benefits in compliance with the above-noted sections of the *Canada Labour Code* and the *Employment Standards Code of Manitoba*.

## ISSUE

[8] The Applicant raises the following issue:

Whether the Referee erred in his Decision to compel the director of the Labour Program to consider section 19 of the *Employment Standards Code of Manitoba* in a redetermination of the wage recovery appeal, given that the employer in question is engaged in a federally regulated undertaking for which federal legislation has exclusive jurisdiction.

## STATUTORY PROVISIONS

[9] The following provisions of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, are applicable in these proceedings:

### **Powers of the Parliament**

**91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act

### **Pouvoirs du Parlement**

**91.** Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi

assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
- 1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
- 2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.

exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

1. Abrogé.
- 1A. La dette et la propriété publiques.
2. La réglementation du trafic et du commerce.
- 2A. L'assurance-chômage.
3. Le prélèvement de deniers par tous modes ou systèmes de taxation.
4. L'emprunt de deniers sur le crédit public.
5. Le service postal.
6. Le recensement et les statistiques.
7. La milice, le service militaire et le service naval, et la défense du pays.
8. La fixation et le paiement des salaires et honoraires des officiers civils et autres du gouvernement du Canada.
9. Les amarques, les bouées, les phares et l'île de Sable.
10. La navigation et les bâtiments ou navires (*shipping*).
11. La quarantaine et l'établissement et maintien des hôpitaux de marine.
12. Les pêcheries des côtes de la mer et de l'intérieur.
13. Les passages d'eau (*ferries*) entre une province et tout pays britannique ou étranger, ou entre deux provinces.
14. Le cours monétaire et le monnayage.
15. Les banques, l'incorporation des banques et l'émission du papier-

- |  |  |
|--|--|
| <p>16. Savings Banks.</p> <p>17. Weights and Measures.</p> <p>18. Bills of Exchange and Promissory Notes.</p> <p>19. Interest.</p> <p>20. Legal Tender.</p> <p>21. Bankruptcy and Insolvency.</p> <p>22. Patents of Invention and Discovery.</p> <p>23. Copyrights.</p> <p>24. Indians, and Lands reserved for the Indians.</p> <p>25. Naturalization and Aliens.</p> <p>26. Marriage and Divorce.</p> <p>27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.</p> <p>28. The Establishment, Maintenance, and Management of Penitentiaries.</p> <p>29. 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.</p> | <p>monnaie.</p> <p>16. Les caisses d'épargne.</p> <p>17. Les poids et mesures.</p> <p>18. Les lettres de change et les billets promissoires.</p> <p>19. L'intérêt de l'argent.</p> <p>20. Les offres légales.</p> <p>21. La banqueroute et la faillite.</p> <p>22. Les brevets d'invention et de découverte.</p> <p>23. Les droits d'auteur.</p> <p>24. Les Indiens et les terres réservées pour les Indiens.</p> <p>25. La naturalisation et les aubains.</p> <p>26. Le mariage et le divorce.</p> <p>27. La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle.</p> <p>28. L'établissement, le maintien, et l'administration des pénitenciers.</p> <p>29. Les catégories de sujets expressément exceptés dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces.</p> |
|--|--|

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Et aucune des matières énoncées dans les catégories de sujets énumérés dans le présent article ne sera réputée tomber dans la catégorie des matières d'une nature locale ou privée comprises dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces.

### **Exclusive Powers of Provincial Legislatures**

**92.** In each Province the Legislature may exclusively make Laws in relation to Matters

### **Pouvoirs Exclusifs des Législatures Provinciales**

**92.** Dans chaque province la législature pourra exclusivement faire des lois relatives aux

coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:
  - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
  - (b) Lines of Steam Ships between the Province and any British or Foreign Country:

matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

1. Abrogé.
2. La taxation directe dans les limites de la province, dans le but de prélever un revenu pour des objets provinciaux;
3. Les emprunts de deniers sur le seul crédit de la province;
4. La création et la tenure des charges provinciales, et la nomination et le paiement des officiers provinciaux;
5. L'administration et la vente des terres publiques appartenant à la province, et des bois et forêts qui s'y trouvent;
6. L'établissement, l'entretien et l'administration des prisons publiques et des maisons de réforme dans la province;
7. L'établissement, l'entretien et l'administration des hôpitaux, asiles, institutions et hospices de charité dans la province, autres que les hôpitaux de marine;
8. Les institutions municipales dans la province;
9. Les licences de boutiques, de cabarets, d'auberges, d'encanteurs et autres licences, dans le but de prélever un revenu pour des objets provinciaux, locaux, ou municipaux;
10. Les travaux et entreprises d'une nature locale, autres que ceux énumérés dans les catégories suivantes:
  - (a) Lignes de bateaux à vapeur ou autres bâtiments, chemins de fer, canaux, télégraphes et autres travaux et entreprises reliant la province à une autre ou à d'autres provinces, ou s'étendant au-delà des limites de la province;
  - (b) Lignes de bateaux à vapeur entre la province et tout pays dépendant de l'empire britannique ou tout pays étranger;

- |   |   |
|---|---|
| <p>(c) Such Works as, although wholly situate within the Province, are before or after their 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.</p> | <p>(c) Les travaux qui, bien qu'entièrement situés dans la province, seront avant ou après leur exécution déclarés par le parlement du Canada être pour l'avantage général du Canada, ou pour l'avantage de deux ou d'un plus grand nombre des provinces;</p> |
| 11. The Incorporation of Companies with Provincial Objects.   | 11. L'incorporation des compagnies pour des objets provinciaux;   |
| 12. The Solemnization of Marriage in the Province.  | 12. La célébration du mariage dans la province;   |
| 13. Property and Civil Rights in the Province.  | 13. La propriété et les droits civils dans la province;   |
| 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.        | 14. L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;    |
| 15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.                                | 15. L'infliction de punitions par voie d'amende, pénalité, ou emprisonnement, dans le but de faire exécuter toute loi de la province décrétée au sujet des matières tombant dans aucune des catégories de sujets énumérés dans le présent article;            |
| 16. Generally all Matters of a merely local or private Nature in the Province.  | 16. Généralement toutes les matières d'une nature purement locale ou privée dans la province.   |

## STANDARD OF REVIEW

[10] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the



reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[11] The Applicant asks this Court to determine whether federal or provincial legislation is applicable in the wage recovery appeal. This requires the Court to consider the division of powers in the *Constitution Act, 1867*. The Supreme Court of Canada held in *Dunsmuir*, above, that

correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867* .... Such questions, as well as other constitutional issues, are necessarily subject to correctness review ....

[12] Therefore, the appropriate standard of review is correctness.

## **ARGUMENTS**

### **The Applicant**

[13] The Applicant submits that the Referee erred in requiring the regional director of the Labour Program to consider provincial labour legislation, specifically section 19 of the *Employment Standards Code of Manitoba*, when redetermining the wage recovery appeal at issue.

[14] Allied Systems (Canada) is engaged in interprovincial, extraprovincial and international truck transportation, a federally regulated undertaking. The Applicant relies on subsection 92(10) of the *Constitution Act, 1867* and the Supreme Court of Canada's interpretation of that provision in *Consolidated Fastfrate Inc. v Western Canada Council of Teamsters*, 2009 SCC 53, to argue, first, that federal government has exclusive jurisdiction over federally regulated undertakings; and,

second, that Allied's transportation business meets the criteria of subsection 92(10). In addition, the Supreme Court of Canada stated in *Bell Canada v Québec (Commission de santé et de la sécurité du travail du Québec)*, [1988] 1 SCR 749, [1988] SCJ No 41 at page 751, that "this primary and exclusive jurisdiction precludes the application to those undertakings of provincial statutes relating to labour relations and working conditions."

[15] Based on the foregoing, the Applicant submits that, with respect to the wage recovery appeal at issue, the *Canada Labour Code* is applicable and provincial labour relations legislation is inapplicable.

[16] The Applicant seeks an order that the Decision be quashed or, in the alternative, be amended to remove consideration of section 19 of the *Employment Standards Code of Manitoba* in the redetermination of the wage recovery appeal.

### **The Respondent Mr. Schwark**

[17] Mr. Schwark observes that documents referencing both federal and provincial labour laws have been entered into evidence. He further observes that, in drafting the Preliminary Determination of Compliance letter and the Notice of Unfounded Complaint, Inspector Lawson failed to refer to section 169 of the Code and to subsection 19(1) of the *Employment Standards Code of Manitoba*, even though she referred to provincial legislation in adjudicating the complaint.

[18] Mr. Schwark alleges that the employment contract, the parties to which were Mr. Schwark, Allied and the WCB, was changed without his knowledge or consent so that it would conform to the *Employment Standards Code of Manitoba* respecting hours of work.

[19] Should the Court find that the Referee erred in stating that the redetermination should be made in accordance with, *inter alia*, section 19 of the *Employment Standards Code of Manitoba*, Mr. Schwark asks that the Court amend the Decision rather than quashing it, given that the Referee made considerable efforts in “cutting through all the misrepresentations and half-truths of Allied Systems.”

### ANALYSIS

[20] The Court was informed at the hearing that the dispute underlying this application has been settled to the satisfaction of all parties in that:

- a) Mr. Schwark has entered into settlement arrangements, the terms of which require him not to proceed further against Allied;
- b) Mr. Schwark takes the position that there is no further case to answer in that this whole application is now moot;
- c) Mr. Schwark has undertaken to file a Notice of Withdrawal of his original complaint and will provide a copy to the Applicant in the near future;
- d) The Applicant agrees that the application is now moot and has undertaken to file a Notice of Discontinuance of this application with the Federal Court upon receipt of a copy of Mr. Schwark’s Notice of Withdrawal of his complaint;

e) Allied Systems (Canada) Company has communicated to the Court through Counsel for the Applicant that it agrees with this result and Counsel for the Applicant has undertaken to file with the Court a copy of Allied Systems (Canada) Company's written confirmation to that effect.

[21] Given this significant change in circumstances, the Court agrees with the parties that this application is now moot.

**THIS COURT'S JUDGMENT is that:**

1. The application is dismissed for mootness.
2. No order will be made as to costs.

“James Russell”

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-901-10

**STYLE OF CAUSE:** **ATTORNEY GENERAL OF CANADA  
V ALAN SCHWARK and  
ALLIED SYSTEMS (CANADA) COMPANY**

**PLACE OF HEARING:** Winnipeg, Manitoba

**DATE OF HEARING:** February 22, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT** **Russell J.**

**DATED:** February 22, 2011

**APPEARANCES:**

Christine Singh FOR THE APPLICANT

Alan Schwark  
Allied Systems (Canada) Company FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

Myles J. Kirvan FOR THE APPLICANT  
Deputy Attorney General of Canada  
Winnipeg, Manitoba

Alan Schwark (Self Represented) FOR THE RESPONDENT,  
Winnipeg, Manitoba ALAN SCHWARK

Hyde Legal Professional Corporation FOR THE RESPONDENT,  
Mississauga, Ontario ALLIED SYSTEMS (CANADA) COMPANY