

BCLRB No. B102/95
(Leave for Reconsideration of BCLRB No. B429/94)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND
TRADING INTO HUDSON'S BAY DOING BUSINESS AS THE BAY

(the "Bay")

-and-

NORTHERN CARTAGE LIMITED

("Northern Cartage")

-and-

UNITED STEELWORKERS OF AMERICA, LOCAL 898

(the "Union")

PANEL: Stan Lanyon, Chair
Maria Giardini, Vice-Chair
Kate Young, Vice-Chair

COUNSEL: Ben Trevino, Q.C., for the Bay
Don Baron, for Northern Cartage
David L. Blair, for the Union

CASE NO.: 21051

DATE OF HEARING: November 29, 1994

DATE OF DECISION: November 30, 1994

DATE OF REASONS: March 10, 1995

REASONS FOR THE BOARD'S DECISION

I. NATURE OF APPLICATION

1 The Bay and Northern Cartage (the "Applicants") have both applied for a reconsideration of BCLRB No. B429/94. The original decision held that the Labour Relations Board had jurisdiction to entertain an application for a declaration that Northern Cartage is an ally of the Bay for the purpose of granting permission to the Union to picket at a place of business of Northern Cartage.

II. DECISION

2 On November 30, 1994 this Panel issued the following decision:

This Panel has concluded that the application for reconsideration should be granted, and the decision of the original panel finding that the Board has jurisdiction under the Code should be set aside.

III. THE FACTS

3 The facts are set out succinctly in the decision of the original panel as follows:

The Union is certified for a unit of employees at the Kamloops location of the Bay. The Union has been on strike against the Bay since August 2, 1994. It commenced full scale job action on September 24, 1994. The strike is lawful.

Northern Cartage is a motor carrier situated in Winnipeg, Manitoba, and extra-provincially registered in British Columbia, Alberta, Saskatchewan and Ontario. It transports cargo intra-provincially and inter-provincially between these provinces. It has operating authority from the Motor Carrier Commission of British Columbia and the equivalent administrations in other provinces to transport merchandise into, out of, and between points within the

provinces. The volume of inter-provincial transport is approximately seven to eight percent of overall volume: approximately 4,000 to 5,000 trips per year. Inter-provincial trips are also undertaken regularly on behalf of Zellers in British Columbia. With that Northern Cartage says it is a federal undertaking. This is not contested. Northern Cartage does not have any certifications with the Canada Labour Relations Board and is not signatory to any voluntary recognition agreements in any of the provinces where it operates.

Northern Cartage pulled trailers from the Bay Kamloops store on five occasions between October 7 and October 20. Those five trailers were delivered to its terminal in Calgary, Alberta. Northern Cartage has not provided any further service since this application was filed. It has indicated to the Board that it will not be providing such services for the duration of the strike. (pp. 2-3)

4 As noted, the labour dispute is provincial in origin in that a provincial union (USWA) is on strike against a provincial employer (the Bay).

IV. THE ORIGINAL DECISION

5 The original panel concluded that the provincial Legislature has the constitutional authority to authorize the Board to make an "ally" declaration against Northern Cartage and that it has exercised this authority with the enactment of the *Labour Relations Code*, and specifically the definitions of "ally" and "person".

6 The definition of "ally" begins with the phrase "ally means a *person* who...". The definition of "person" excludes "a person in respect of whom collective bargaining is regulated by the *Canada Labour Code*". The original panel held that these words do not exclude federal undertakings in respect of which collective bargaining is *not* regulated by the *Canada Labour Code*. In other words, federal undertakings that are certified to a trade union are excluded from the definition of "person"; however, those that are not covered by a certification issued under the *Canada Labour Code* are included within the definition. Therefore, Northern Cartage (which is a non-union federal operation) is caught by the definition of "person" and, consequently, the definition of "ally".

7 The original panel relied upon the Board's decision in *Canadian Pacific Express*, BCLRB No. 273/86, 14 CLRBR (NS) 113, which determined that the Labour Relations Board has jurisdiction to declare a federal undertaking an ally in a provincial dispute. It did not read the decision in *Hecate Logging Ltd. v. IWA, Loc. 1-85 et al.* (1988), 29 B.C.L.R. (2d) 318 (C.A.), to say that a federal presence *simpliciter* was enough to oust the jurisdiction of the provincial legislature. The original panel interpreted *Hecate Logging, supra*, as stating that the provincial legislature may not legislate with respect to matters which affect an essential part of the management and operation of a federal undertaking, and referring to the Supreme Court of Canada's decision in *Alltrans Express Ltd.*, [1988] 1 S.C.R. 897, 28 B.C.L.R. (2d) 312, [1988] 4 W.W.R. 385 (S.C.C.), found that the regulation of picketing in and of itself is not a matter which affects an essential part of the very management and operation of a federal undertaking.

8 The original panel concluded that the ultimate purpose for the ally declaration relates to regulating picketing of a provincial employer in a provincial dispute, and does not *per se* relate to the working conditions, labour relations, or management of Northern Cartage. Any ally declaration it made would only incidentally affect the federal undertaking, but would not sterilize its operation. Accordingly, the Board had jurisdiction to make the orders sought.

V. POSITIONS OF THE PARTIES

9 The Applicants argue that the original panel's interpretation of the definition of "person" is overly strict and exceeds the constitutional competence of the provincial Legislature. They argue that the original panel's interpretation purports to give the Board jurisdiction over all non-union undertakings whether they be federal or provincial. A contrast is drawn between the definition of "person" in Section 1, and the limited application of the successorship provision to federal employers in Section 36.

10 Referring to Court jurisprudence, the Applicants make three points. First, Parliament has exclusive jurisdiction over federal undertakings. Second, in approaching the question of statutory interpretation, a provincial statute should be read so as to render it *intra vires*. Third, there must be a recognition that the division of powers between the federal Parliament and the provincial legislatures may result in some anomalies. The Applicants argue that the Supreme Court of Canada decision in *Reference re Validity of Industrial Relations and Disputes Investigation Act*

(Canada), R.S.C., 1952, c.152, and as to its applicability in respect of certain employees of the Eastern Canada Stevedoring Company Limited, [1955] S.C.R. 529, [1955] 3 D.L.R. 721, 55 C.L.L.C. ¶15,223 at p. 399 ("Stevedoring" case) is determinative. In the *Stevedoring* case the Supreme Court of Canada concluded that the regulation of the employment of stevedores is an essential part of navigation and shipping, areas given exclusively to the Parliament of Canada, and consequently federal labour legislation regulating stevedores is *intra vires* of the Parliament of Canada.

11 Turning to the decision of the British Columbia Court of Appeal in *Hecate Logging*, *supra*, the Applicants say that the Court of Appeal very clearly states that the province has no power to oust the jurisdiction of the Court with respect to picketing at an enterprise falling under the exclusive jurisdiction of the federal government. In *Hecate Logging*, the Court determined that the provincial Code did not apply to the picketing of Hecate's loading and shipping activities because such picketing would clearly affect an essential part of the management of a federal undertaking.

12 Referring to the two theories that arise in constitutional jurisdiction cases, the "origin of dispute" and "location" theories, the Applicants say that the two theories are analytical tools used by the Courts where both the federal and provincial jurisdictions are spanned, and that the application of the theories has never been used to transfer jurisdiction from one authority to another.

13 The Applicants also rely upon two Labour Relations Board decisions. The first is *Hunterline Trucking Ltd.*, IRC No. C266/88, in which the Council ruled that Hunterline, a non-certified federal employer, was excluded specifically from the definition of "person" in the *Industrial Relations Act*, R.S.B.C. 1979, c.212. The second is *Tyco International of Canada Ltd.*, BCLRB No. B272/94, in which the Board held that it had no jurisdiction to regulate picketers at a provincial location where the picketing emanated from a non-provincial dispute.

14 In summary, the Applicants argue that granting the right to picket touches or affects a vital part of a federal undertaking. The Applicants reject the theory that in order for provincial legislation to be found unconstitutional the effect of it must be to sterilize a federal undertaking. They argue that this test has been rejected. The Applicants say that although a declaration of ally

status may fall within the constitutional authority of the provincial legislature, the determination of a right to picket falls outside the statutory authority as picketing affects and interferes with contracts of employment.

15 The Union argues that it is important to distinguish two issues in deciding this case. The first issue is whether the provincial legislature is competent to incidentally affect a federal employer in the course of legislating within its authority over property and civil rights within the province. The second issue is whether the Legislature, if competent, has enacted legislation to the extent required to affect a federal employer?

16 The Union argues that the definition of "person" adopted by the original panel reflects what the words say and what they mean. As Northern Cartage is not engaged in collective bargaining, its collective bargaining is not regulated by the *Canada Labour Code*. Northern Cartage is therefore not excluded from the definition of "person" and is subject to the ally provisions under the Code.

17 The Union relies upon the decision of the Supreme Court of Canada in *Irwin Toy Limited*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, and submits that all of the previous jurisprudence must be interpreted in light of this decision. The Union says that the provincial legislature has the authority to pass legislation which may well have a very significant effect upon a federal undertaking, as long as that legislation is directed towards a provincial concern. The Union relies on early Court decisions in which the Court applied the provincial *Trade-unions Act*, R.S.B.C. 1960, c.384 to regulate federal picketing. The Union relies on *Irwin Toy, supra*, to say that when a federally regulated company comes into the province and allies itself to a provincially struck employer, it has itself chosen to enter into the provincial field and can be adversely affected by its intrusion. Adopting the words in the *Irwin Toy* decision the Union says that the picketing does not sterilize the operations of Northern Cartage and even if it does Northern Cartage has invited its own sterilization, by entering into a provincial labour dispute.

18 In reply, the Applicants say that *Irwin Toy, supra*, does not overturn the long line of cases including *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, (1988), 51 D.L.R. (4th) 161 ("*Bell Canada 1988*"). The Applicants say that *Irwin Toy* addresses an area of property and civil rights where the province has paramount authority to

legislate, quite a different matter than labour relations. Since *Irwin Toy*, the test for determining the applicability of provincial labour legislation to federal undertakings remains the "vital and essential part" test. In any event, even if the "sterilization" test applies, picketing definitely constitutes an impairment or sterilization.

VI. ANALYSIS AND DECISION

A. Introduction

19 There are two main issues raised by this application for reconsideration. The first issue is whether the definitions of "person" and "ally" in the *Labour Relations Code* are intended to apply to non-union federal undertakings. If, as argued by the Applicants, these definitions exclude all federally regulated employers then that is the end of the matter. There is no constitutional issue to be decided. Alternatively, if the Union's interpretation of the definition of person is correct, then the constitutional issue arises; namely, whether the provincial legislature is competent to enact such legislation.

20 Our analysis of the issues is set out in the following manner. First, we set out the statutory provisions relevant to the application. Second, we describe the nature and origins of the ally doctrine. Third, we examine the definition of "person" in Section 1 of the Code to determine whether the definition (and consequently the definition of "ally") includes non-union federal undertakings. Finally, if such undertakings are included within the definitions of "person" and "ally", we examine the constitutional validity of these definitions and the applicability of the ally provisions in the Code to federal undertakings.

B. Statute

21 The following are the provisions of the Code that are relevant to our analysis of the issues in this case:

1. (1) In this Code

"employer" means a person who employs one or more employees

or uses the services of one or more dependent contractors and includes an employers' organization;

"person" includes an employee, an employer, an employers' organization, a trade union and council of trade unions, but does not include a person in respect of whom collective bargaining is regulated by the Canada Labour Code;

65. (1) In this section

"ally" means a person who, in the board's opinion, in combination, in concert or in accordance with a common understanding with an employer assists the employer in a lockout or in resisting a lawful strike;

(4) The board may, on application and after making the inquiries it requires, permit picketing

(b) at or near the place where an ally performs work, supplies goods or furnishes services for the benefit of a struck employer, or for the benefit of an employer who has locked out, but the board shall not permit common site picketing unless it also makes an order under subsection (6) defining the site or place and restricting the picketing in the manner referred to in that subsection.

(5) In subsection (4) "employer" means the person whose operation may be lawfully picketed under subsection (3).

67. Except as provided in this Code, a person shall not picket in respect of a matter or dispute to which this Code applies.

C. Ally Doctrine

23 Broadly speaking, the purpose of the picketing provisions in the Code is to allow picketing of a struck or locking out employer (the primary employer) and to insulate all other employers (secondary employers) from the effect of the lawful picketing: *KMart Canada Limited*, BCLRB No. B270/94 (Reconsideration of BCLRB No. B21/93). This general prohibition of secondary picketing is designed to protect neutral third parties. Such parties are not involved in the labour dispute and are in no position to take steps to settle the dispute.

24 An exception to this insulation of secondary employers arises where the secondary employer in some way assists the primary or struck employer to resist the effects of a lawful strike or lockout. A third party who assists a struck employer to resist a strike has joined the side of the employer in the dispute. The third party may lawfully do this but the price of doing so is the loss of its neutral status. Once this occurs, and the Board declares the third party employer an "ally", the union is entitled to bring economic sanctions against the ally in the form of picketing. The purpose of this picketing is to dissuade that ally and other parties from providing assistance to the struck employer. This assistance most often takes the form of performing struck work. However, it can also consist of other kinds of assistance: such as helping to manage a strike, the transporting and delivery of struck goods, providing facilities and assets to the struck employer, etc. The simple continuation of normal business or contractual relations between the secondary employer and the struck employer does not make the secondary employer an ally.

25 The "ally doctrine" was first developed by the Courts in the United States as an exception to the general statutory prohibitions against secondary picketing found in the *National Labour Relations Act* as enacted by the *Taft-Hartley Act*, 61 Stat 136 (1947), as amended, 29 U.S.C. ss 141-144 and 151-168. The American ally doctrine evolved to include two branches: the "struck work" doctrine and the "single enterprise" doctrine.

26 The judicial development of the "struck work" branch of the American ally doctrine was reviewed in the early Board decision in *Haul-Away Disposal Ltd.*, BCLRB No. 19/75, [1975] 2 Can LRBR 97. The essence of this branch is that it protects the right to picket a secondary employer where the neutrality of the secondary employer is lost by virtue of that employer

assisting the locking out or struck employer through the performance of struck work.

27

The "single enterprise" branch of the American ally doctrine was described by the B.C. Board in *Ocean Construction Supplies Ltd.*, BCLRB No. 263/85, (1985), 11 CLRBR (NS) 101 (upheld on reconsideration in BCLRB No. 201/87):

Absent his performance of struck work, a secondary employer may be held picketable by another employer's employees or by an outside union seeking to organize them in two major situations: when he actively controls the primary employer's managerial and labour decisions, or when he exercises supervisory power over the daily activities of the primary employer's workers extending beyond control of the result to control of the ways in which they perform their tasks. If neither type of control is present, a secondary employer may still be found to be "concerned" if his operations are sufficiently integrated both physically and economically with those of the primary employer to create a community of interests between the two sets of workers analogous to that between separate bargaining units working for the same employer. . . .

28

In contrast with the American experience, the "ally doctrine" in British Columbia evolved as a statutory creation, first enacted in the *Labour Code of British Columbia*, S.B.C. 1973 (2d Session), c.122, s.85. While the British Columbia ally provisions were originally premised on the American ally doctrine, the legislation did not incorporate the "single enterprise" branch of the American ally doctrine. Rather, the British Columbia legislation created a form of hybrid "ally doctrine" which, while based on the "struck work" branch of the American ally doctrine, provides a much broader concept of "ally" status. The key element in the statutory doctrine is that an employer must take positive steps to assist the struck employer. The essence of what constitutes an "ally" in British Columbia was described in *Ocean Construction Supplies, supra*:

...As the Board held later in the *Liquor Distribution Branch* case, "the touchstone of an 'ally' must be the objective fact that assistance is being provided to a struck employer" (at p. 347). To this we would add: "or to an employer who has locked out its employees".

The Board has also held that not every form of assistance to a struck employer renders a third party an "ally": see, *inter alia*, *Liquor Distribution Branch* at p. 340; *Dean Bros. Collision Repairs Ltd.*, [1981] 2 Can LRBR 467, BCLRB No. 40/81, and

cases referred to therein. The type of assistance envisaged, however, is "positive steps" (see *Chevron Canada Ltd.*, [1978] 2 Canadian LRBR 316, at 332), BCLRB No. 21/78, "unusual action" (see *Liquor Distribution Branch* at p. 340) or other such "active assistance" (see *Haul-Away Disposal Ltd.*, *supra*, at p. 102) which has the effect of reducing the impact of a strike against a primary employer or, alternatively, has the effect of strengthening the position of a primary employer which has locked out its employees. It is only when a secondary employer becomes involved in a labour dispute in the foregoing sense that it loses its neutrality and invites a potential "ally" designation. (pp. 115-116)

The Board in *Ocean Construction Supplies*, *supra* went on to expressly reject the adoption of the "single enterprise" branch of the American ally doctrine in British Columbia.

29 While Canadian Courts have not expressly developed a separate common law ally doctrine, there are cases where the Courts have allowed picketing of employers even though they were not directly involved in a labour dispute. The picketing was allowed in circumstances where the picketed employer was performing work, providing services or otherwise assisting the struck or locking out employer during a labour dispute. In such cases the Courts have generally allowed the picketing on the basis that, by virtue of the "assistance" provided to the struck employer by the secondary employer, the secondary employer's premises had become a primary location of the struck employer's business and, as such, a location of lawful primary picketing.

30 One example of such a situation arose in *Commonwealth Holiday Inns of Canada Ltd. v. Sundy et al.* (1974), 2 O.R. (2d) 601 (Ont. H.C.). In this case the union was engaged in lawful strike action against the Union Gas Company. When the union learned that the struck employer was operating its customer service departments from rooms rented from the Plaintiff hotel, it began picketing the hotel premises. The Court ruled that the Plaintiff, in effect, became the landlord to the struck employer, and had provided facilities from which the struck employer could continue its normal operations. The Court held that picketing of the hotel was not secondary picketing. The union was entitled to picket the hotel premises as a site of the struck employer's operations.

31 Other examples of the Courts allowing picketing of employers not directly involved in

labour disputes arose in a series of decisions issued by the B.C. Supreme Court in 1993-94 during the labour dispute between Rogers Cable T.V. Limited ("Rogers Cable") and the International Brotherhood of Electrical Workers, Local 213; *Rogers Video v. International Brotherhood of Electrical Workers, Local 213* (July 5, 1993), Vancouver C933680 (B.C.S.C.); *Ponte Bros. Contracting Ltd. v. International Brotherhood of Electrical Workers, Local 213* (October 26, 1993), Vancouver C935901 (B.C.S.C.); *Rogers Cantel Inc. v. B.C. Federation of Labour et al.* (January 14, 1994), Vancouver C936934 (B.C.S.C.) and *Canwest Pacific Television Inc. (c.o.b. UTV) v. International Brotherhood of Electrical Workers, Local 213* (February 3, 1994), Vancouver C940446 (B.C.S.C.).

32 In *Rogers Video, supra*, the plaintiff, Rogers Video, a division of Rogers Cablesystems, sought to enjoin the union from picketing its retail video outlets. Rogers Cable, the locking out employer, was a wholly owned subsidiary of Rogers Cablesystems. The Court ruled that if there was nothing more than the corporate relationship between Rogers Cable and the Plaintiff the picketing at the Plaintiff's stores would be unlawful as unionized employees of a subsidiary are not automatically permitted to picket the premises of the parent company and vice versa. The Court noted, however, that "the result might be different if the corporate structure was created for the purpose of dealing with the anticipated labour troubles". This comment suggests that if a subsidiary or a related company is established to enable the struck or locking out employer to resist or avoid the consequences of the strike or lockout then the picketing of the subsidiary employer might be allowed.

33 The Court, in *Rogers Video, supra*, went on to allow the picketing of several of the video stores which, in addition to engaging in the regular video rental/sales business, also conducted a full range of Rogers Cable's business with cable television consumers. The stores allowed the cable television customers to open and close accounts, make payments on accounts, rent equipment, have descrambling equipment activated and receive information on all the services offered by Rogers Cable. The Court found that given the circumstances the union could picket the stores as, not only were they places of business of Rogers Cable, they appeared to be primary places of business of Rogers Cable. As such, picketing of the stores was seen as primary rather than secondary picketing and was lawful.

34 A similar situation arose in *Ponte Bros. Contracting Ltd., supra*. In this case, the Court

allowed the union to picket the construction site on which the plaintiff contractor was installing underground ducts designed to carry the electrical cables which are an essential part of Rogers Cable's business. Again, the Court allowed the picketing on the basis that this was viewed as primary as opposed to secondary picketing. The planning, installation and maintenance of the lines was part of the business of Rogers Cable. It followed that the place where the Plaintiff was working was a place of operation of Rogers Cable that could be picketed.

35 In these cases the Courts have not referred to the picketed employer as an "ally" of the struck or locking out employer. Still, it is apparent that, where the facts warrant, the Courts will allow a union to picket the premises of a secondary employer that is assisting a struck employer even though the secondary employer is not directly involved in the labour dispute.

D. Section 1 - Definition of Person

36 In our view, this application for reconsideration can be decided on the basis of the definition of "person" in Section 1 of the Code. If the definition excludes federal undertakings such as Northern Cartage that is the end of the matter. If the provincial legislature has not sought to include federal undertakings as "persons" dealt with under the *Labour Relations Code*, it makes no difference whether the provincial legislature has the constitutional capacity to enact legislation which empowers the Board to declare a federal undertaking an ally and subject to picketing in the course of a provincial dispute.

37 The definition of person excludes "a person in respect of whom collective bargaining is regulated by the *Canada Labour Code*". The original panel held that these words mean that unionized federal undertakings are *not* covered by the legislation but a non-union federal undertaking is included within the definition. Therefore, Northern Cartage, which is a non-union federal undertaking, falls within the definition of person and can be declared an ally. We disagree with this decision of the original panel. It is our view that "person" excludes all federal undertakings whether or not they are subject to a federal certification order or have engaged in collective bargaining. Even if such an undertaking is not certified and does not engage in collective bargaining it is still subject to regulation by the *Canada Labour Code*.

38 In interpreting the meaning of the definition of "person" it is important that we proceed in accordance with established principles of statutory interpretation. The appropriate principles are

those described in E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (p. 87)

The interpretation of "person" which we have adopted is supported by the ordinary meaning of the words used in the statutory definition, the legislative history of the provision, and is an interpretation that is consistent with the scheme of the Code as a whole.

39 First, considering the ordinary meaning of the words used in the definition of "person", it is our view that the definition excludes all federally regulated undertakings, whether or not they are certified and whether or not they have engaged in collective bargaining. The collective bargaining of all federal undertakings is "regulated" by the *Canada Labour Code*. Just as the *Criminal Code* regulates the activities of all citizens, whether that citizen has engaged in an illegal act or not, the *Canada Labour Code* regulates the collective bargaining of all federal undertakings, whether or not that federal undertaking is presently certified or has engaged in collective bargaining.

40 In support of this view, we note that pursuant to Sections 2 and 4 of the *Canada Labour Code*, the *Canada Labour Code* applies to "any work, undertaking or business that is within the legislative authority of Parliament". This clearly covers all such undertakings, whether or not they are presently certified or have engaged in collective bargaining. This observation was also made by the Industrial Relations Council in *Hunterline Trucking Ltd.*, *supra*. In that case, the Council held that it had no jurisdiction to declare a non-union federally regulated trucking company an ally. We agree with the decision in *Hunterline Trucking Ltd.*

41 The legislative history of the definition of "person" also supports our interpretation of this definition. The exclusion of persons whose collective bargaining is regulated by the *Canada Labour Code* from the definition of "person" was enacted by the *Industrial Relations Reform Act*, S.B.C. 1987, c.24. Prior to this enactment, the definition of "person" (and consequently the

definition of "ally" which incorporated the definition of "person") included "an employee, an employer's organization, a trade-union and a council of trade-unions".

42 In *Squamish Terminals Limited*, BCLRB No. 51/75, [1975] 2 CLRBR 289, the Board referred to the early ally provision (Section 85(1)(c) of the *Labour Code*) and stated in *obiter dicta* that:

...The language of the Code creates no explicit exception to the operation of either s. 85(1)(c) or s. 86 when the party affected by the picketing happens to be a federal undertaking. (pp. 292-293)

Similarly, in late 1986, the Board in *Canadian Pacific Express, supra* ruled that the Board had the jurisdiction to declare a federal undertaking an ally in a provincial dispute. In reaching this conclusion, the Board stated:

The ally provisions of the *Labour Code* are not restricted by the words used from applying to a federal undertaking. Those provisions have general application. They do not necessarily result in a shutting down of the federal undertaking as the ally may extricate himself from the status by ceasing to perform the struck work. (pp. 117-118).

The *Industrial Relations Reform Act* was enacted in July 1987, less than a year after the decision in *Canadian Pacific Express*. The timing of the legislative change suggests that the change was intended as a response to this decision.

43 To the extent that the mischief the legislation was intended to rectify is relevant, we note that in the legislative debates concerning the enactment of the *Industrial Relations Reform Act*, there was significant debate about the change to the definition of "person". The debate referred to the confusion that existed concerning the scope of the Board's constitutional jurisdiction and the fact that this was creating difficulties for parties affected by picketing emanating from federal disputes or involving federally regulated employers. Reference was made to conflicting Board and Court decisions as evidence that the parties were uncertain as to whether they should go to the Board or to the Court for resolution of disputes concerning such picketing. The legislative debates also made express reference to the decision in *Canadian Pacific Express* in referring to

the confusion over the Board's jurisdiction. In our view, it is clear from these debates that it was the intention of the legislature, in enacting the amendments to the definition of "person", to provide a clear line around the Board's jurisdiction. It is equally clear that the line was intended to exclude all federally regulated employers as their industrial relations activities were subject to regulation by the *Canada Labour Code*: Debates of the Legislative Assembly (Hansard) - 1st Session, 34th Parliament, May 8, 1987 to June 4, 1987, Volume 3, at pp. 1370 - 1374.

44 We are further reinforced in our view of the proper interpretation of "person" when considering the scheme of the picketing provisions of the Code as well as the provisions of the Code as a whole. In our view, the interpretation of the words contained in the definition proposed by the original panel do not fit within the picketing provisions or within the scheme of the *Labour Relations Code* as a whole. For instance, the ally provisions as they apply to provincial employers do not make a distinction between union and non-union provincial employers. A non-union provincial employer who decides to assist a unionized provincial employer in its labour dispute will be declared an ally as would any other unionized employer who assisted such an employer. Indeed, it is most likely going to be a non-union employer who assists some struck employer. An employer who has its own collective bargaining relationship is unlikely to involve itself in some other labour dispute for fear that it would either breach its own collective agreement (ie. clauses prohibiting the handling of struck goods, or the crossing of a picket line, etc.) or poison its own labour relations. Conversely, it is irrelevant whether an employer is unionized or non-union when it seeks protection against unlawful secondary picketing. It serves no statutory purpose, nor does it make any labour relations sense, to protect only a unionized employer from illegal secondary picketing.

45 The impact of the definition proposed by the Union, and accepted by the original panel, would extend many provisions of the Code to federal undertakings. This would result in the potential for two statutory schemes applying to non-union federal employers. One example of the result that could occur is readily apparent when examining Sections 5 and 14 of the Code. Section 5 prohibits "persons" from engaging in a variety of acts (eg. refusing to employ a person, threatening to dismiss or otherwise threatening a person, discriminating against a person, etc.) because of a belief that the person is participating in proceedings under the Code (eg. testifying in a proceeding, making a disclosure required in a proceeding, making an application, filing a complaint or otherwise exercising a right conferred under the Code, etc.). Under Section

14(4)(f) of the Code, if the Board is satisfied that any "person" has violated Section 5 of the Code, the Board may certify the trade union if the employees affected are seeking trade union representation. Therefore, if we were to accept the Union's interpretation of the definition of "person" we would also have to accept that a federally regulated employer could be certified under the provincial Code where that employer committed an unfair labour practice contrary to Section 5 of the Code. This result would be entirely inconsistent with previous Board and Court decisions concerning the constitutional jurisdiction over labour relations.

46 It is important that one set of laws applies equally to all employees under one collective bargaining scheme. If the converse were true, and a collective bargaining dispute were to ensue, the conduct of a strike or lockout would be mired in legal and jurisdictional difficulties. For example, picketing rights may vary from province to province; replacement workers would be forbidden in some provinces (B.C., Ontario and Quebec) and not in others. There may well be overlapping provisions between federal and provincial legislation and if paramountcy is to govern, would that not be a matter of litigation? If that is the case, what benefit, if any, flows from having provincial laws apply? Collective bargaining disputes form a part of the parties' ongoing relationship and litigation is often an aspect of these disputes. Adding constitutional litigation to these disputes would be a real, not an academic, result.

47 In conclusion, we do not interpret the definition of "person" to include non-union federal operations. The definition of "person" excludes all federal undertakings whether they are union or non-union. As noted, this finding disposes of the application for reconsideration.

E. Constitutional Jurisdiction Over Labour Relations

48 If our interpretation of the definition of "person" (and, consequently, our interpretation of the "ally" provisions) is incorrect, and the Union's interpretation is correct then this raises the second issue before us; namely, whether the provincial legislature is competent to enact such legislation. It is our view that the provincial legislature is not competent to enact legislation empowering the Board to declare a federal undertaking to be an ally for the purposes of authorizing picketing of that federal undertaking. Accordingly, even if the Union's interpretation of the definitions of "person" and "ally" is correct, these definitions would have to be read down to exclude their application to federal undertakings in order to be constitutionally valid.

49 The following are our reasons for reaching this conclusion on the constitutional issue.

1. Introduction

50 It is generally accepted that the matter of labour relations falls within the exclusive jurisdiction of the provinces under Section 92(13) of the *Constitution Act, 1867*, "Property and Civil Rights in the Province": *Toronto Electric Commissioners v. Snider*, [1925] 2 D.L.R. 5, [1925] A.C. 396, [1925] 1 W.W.R. 785 (J.C.P.C.). An exception to this general principle exists in the case of federal undertakings covered by Sections 91(29) and 92(10)(a)(b) and (c) of the *Constitution Act, 1867*. These sections provide as follows:

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 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, -

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.

92. In each Province the legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

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;
- (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.

51 For years, both the Courts and labour tribunals have attempted to clarify the scope and extent of Parliament's and the provincial legislatures' authority to legislate with respect to the labour relations of undertakings falling within the Sections 91(29) and 92(10) exception to the provinces' exclusive jurisdiction over labour relations. The issue often arises where it appears that there is an overlap between the legislative competence of a province and Parliament.

52 The present case is one example of such a situation: a provincially certified trade union is involved in a labour dispute with a provincially regulated employer and is seeking to obtain an ally declaration, with its consequent right to picket against an employer who otherwise falls within the federal jurisdiction. Other cases may involve the opposite situation: a labour dispute between a federally certified trade union and a federally regulated employer spills over and involves picketing of a party who is subject to provincial regulation.

53 Rather than simply setting out a summary of the current status of the law concerning the constitutional jurisdiction of the province to legislate with respect to such circumstances, we feel it is beneficial to review the development of the law in this area. The last such review by the Board (*Chevron Canada Limited -and- Teamsters, Local Union 213*, BCLRB No. 21/78, [1978] 2 CLRBR 316) was almost 17 years ago. Since then, there have been significant judicial developments.

2. Decisions Under The *Trade-unions Act*

54 For many years (1959-1973) picketing in British Columbia was regulated by the province pursuant to the *Trade-unions Act, supra*. This Act dealt only with the regulation of picketing arising out of a strike or lockout. The right to strike and the method of acquiring this right were set out in two separate Acts: the *Labour Relations Act*, R.S.B.C. 1960, c.205 and the *Mediation Services Act*, S.B.C. 1968, c.26. Section 3 of the *Trade-unions Act* set out the scope of lawful picketing under the Act. In very general terms, Section 3 allowed picketing of the striking or

locking out employer and prohibited all other picketing, including secondary picketing. It forms the basis of today's picketing provisions (see *KMart, supra*).

55 During the period in which the *Trade-unions Act* was in force there were numerous Court decisions concerning the scope of the Act and, in some cases, the applicability of the Act to federal undertakings. See *Statutes of British Columbia Judicially Considered, 1960/78* -(Calgary: Burroughs, 1979-) for a listing and brief summary of the decisions made under the Act. See also: A.W.R. Carrothers, "The British Columbia Trade-unions Act, 1959" (1960) 38 Can. Bar Rev. 294; Tacon, *Tort Liability in a Collective Bargaining Regime* (Toronto: Butterworths, 1980); R. Brown, "Picketing: Canadian Courts and the Labour Relations Board of British Columbia" (1981) 31 U.T.L.J. 153; J.A. Manwaring, "Legitimacy in Labour Relations: The Courts, the British Columbia Labour Board and Secondary Picketing" (1982) 20 Osgoode Hall L. J. 274 and G.W. Adams, *Canadian Labour Law*, 2d ed. (Toronto: Canada Law Book, 1993).

56 Under the *Trade-unions Act* the Courts appeared to have no hesitation in applying the terms of the Act to regulate the picketing of federally regulated employers or picketing by federally certified trade unions.

57 In *Stock Exchange Building Corporation v. Federation of Telephone Workers of British Columbia* (1969), 70 W.W.R. 150 (B.C.S.C.), Verchere J. applied the *Trade-unions Act* in deciding that picketing by the Federation of Telephone Workers of British Columbia (a federally regulated trade union) at the offices of the Stock Exchange Building Corporation (a provincially regulated employer) was lawful.

58 In *Mark Fishing Co. Ltd. et al. v. United Fishermen & Allied Workers' Union et al.*, [1972] 3 W.W.R. 641, 24 D.L.R. (3d) 585 (B.C.C.A.), affirmed [1973] 3 W.W.R. 13 (S.C.C.), the Court found that the *Trade-unions Act* was valid legislation enacted by the province pursuant to Section 92(13) of the *B.N.A. Act* (now the *Constitution Act, 1867*). One of the justices, Maclean J.A., adopted the reasoning of the Court of Appeal in *Koss v. Koss et al.* (1961), 36 W.W.R. 100, 30 D.L.R. (2d) 242 (B.C.C.A.) and concluded that the *Trade-unions Act* dealt with matters relating to property and civil rights. As such the matters were entirely within the jurisdiction of the province.

59 In separate reasons, Robertson J.A. went further and expressly found that the *Trade-unions Act* could also apply to federal works and undertakings so long as the application of the *Trade-unions Act* did not also require the application of the provincial *Labour Relations Act* to the federal undertaking. Finally, Davey C.J.B.C. found that the dispute before the Court was, in fact, governed by the provincial *Labour Relations Act* and, accordingly, there was no issue concerning the validity of the *Trade-unions Act*. Davey C.J.B.C. noted, in *obiter dicta*, that the *Trade-unions Act's* validity may be "debatable" if, contrary to his decision, the *Industrial Relations & Disputes Investigation Act*, S.C. 1948 c.54, (the predecessor to the *Canada Labour Code*) applied.

60 In *Attorney General of Canada v. General Truck Drivers & Helpers Union, Local 31 et al.*, [1973] 5 W.W.R. 235, 37 D.L.R. (3d) 757 (B.C.S.C.), Berger J. found that picketing of the Vancouver Post Office by the union was illegal as it was contrary to Section 3(2) of the *Trade-unions Act*. It does not appear from the reasons that there was any issue taken as to the applicability of the *Trade-unions Act* to the picketing of Canada Post's premises.

61 In a later decision, *Mitchell Bros. Truck Lines v. General Truck Drivers & Helpers' Union Local 31 and Walcott*, [1974] 2 W.W.R. 631, 43 D.L.R. (3d) 764 (B.C.S.C.), the Court directly addressed the issue of the applicability of the *Trade-unions Act* to the conduct of picketing in a dispute relating to a federal undertaking. The Court concluded that the Act did apply to regulate picketing in circumstances where the labour relations of the parties was subject to federal regulation. The Court stated:

...I must consider the decision of Seaton J. as he then was in the case of *Lake City Industrial Corpn. Ltd. v. Federation of Telephone Workers of B.C.*, B.C., 21st July 1969 (not yet reported), in which it was held that since the federal Parliament had not legislated regarding picketing s. 3 of The *Trade-unions Act* applied to the conduct of pickets in a dispute relating to a federal undertaking. This decision was followed by Hinkson J. in *West Coast v. Seafarers International Union*, B.C., April 1970 (not yet reported). In the absence of a decision by the Court of Appeal to the contrary, I would not be justified in refusing to follow the two decisions to which I have referred. (pp. 633-634)

62 In *Moffat Communications Ltd. v. Hughes et al.* (1975), 55 D.L.R. (3d) 701, 76 C.L.L.C. ¶14,043 (B.C.S.C.), Bouck J. considered whether the *Labour Code* which was enacted in 1973 and replaced the former *Labour Relations Act*, *Mediation Services Act*, and *Trade-unions Act*, applied to remove the jurisdiction of the Court to restrain picketing by a federally certified union. In considering this issue, Bouck J. reviewed the jurisprudence under the *Trade-unions Act* and noted that the Act was applicable to regulate picketing by federally certified unions because it dealt mainly with the regulation of "picketing and lockouts" and not the other aspects of labour relations found in the *Labour Relations Act* and *Mediation Services Act*. Bouck J. concluded that the situation was different under the *Labour Relations Code*:

The latter statute now has combined within its provisions not only matters relating to certification, unfair labour practices, collective bargaining, conditions under which strikes and lock-outs may take place, etc., but also sections dealing with the regulation of picketing and lock-outs. In other words, the *Labour Code* is in part, a combination of the three previous Acts but with many alterations in form.

Therefore, while it may have been possible to use the *Trade-unions Act* in regulating the picketing of federally certified unions prior to the passage of the *Labour Code*, at this time it is far more difficult to extract the picketing provisions from the *Labour Code* and apply them in the same way to the federally certified union. (p. 708)

Bouck J. then compared the different strike provisions in the *Labour Code of British Columbia* and *Canada Labour Code* and concluded that the legislature did not intend that the provincial legislation was to apply to federally certified unions. Bouck J. did not decide that the legislature could not enact such legislation, just that it had not done so.

63 The above decisions make it clear that the Courts were of the view that the province had the capacity to enact valid legislation governing picketing and, further, that such legislation could and, in the case of the *Trade-unions Act*, did apply to federally regulated undertakings. However, while the Courts reached the same general conclusion in each of the decisions, it does not appear that each of the decisions necessarily reflected a consistent view concerning the division of powers between Parliament and the provincial legislature with respect to the regulation of picketing. In *Mark Fishing, supra*, and *Moffat Communications, supra*, it appeared

that the Courts viewed the power to regulate picketing as separate from the power to regulate labour relations. The power to regulate picketing appeared to be seen as a power which fell exclusively to the province under Section 92(13) of the *Constitution Act, 1867*, "Property and Civil Rights in the Province".

64 By contrast, the Courts saw the regulation of "labour relations" as a matter which fell to be shared by the provincial legislature and Parliament, the latter having exclusive jurisdiction to regulate labour relations of persons employed by federal works and undertakings. This view of the division of powers resulted in the suggestion in *Moffat Communications, supra*, that Parliament made no mention of picketing in the *Canada Labour Code* on the "apparent assumption" that it was a matter of property and civil rights within the province and not the subject of valid federal legislation.

65 A different view of the division of powers was reflected in *Mitchell Bros., supra*, (and the cases cited in that decision). In that case, the Court suggested that the provincial legislature and Parliament shared concurrent jurisdiction with respect to the regulation of picketing. In *Mitchell Bros., supra*, the Court concluded that Section 3 of the *Trade-unions Act* applied to regulate the conduct of picketing in disputes relating to federal undertakings because Parliament had not legislated with respect to picketing. Implicit in this conclusion is the suggestion that Parliament could regulate picketing in the federal sphere if it chose to do so.

3. Post Labour Code Decisions

66 The *Labour Code of British Columbia* came into force in late 1973. In the years following the enactment of the *Labour Code* both the Board and British Columbia Courts considered the competence of the provincial legislature to regulate labour relations and picketing and the applicability of the *Labour Code* to the regulation of labour relations and picketing in the province in circumstances where there was a "federal presence".

a) Early Board Decisions

67 In *Arrow Transfer Co. Ltd.*, BCLRB No. 4/74, [1974] 1 CLRBR 29, the Board relied

upon the Privy Council decision in *Toronto Electric Commissioners v. Snider, supra*, and the Supreme Court of Canada decision in the *Stevedoring* case as establishing the basic legal principles dividing legislative and administrative jurisdiction over labour relations.

68 In accepting these basic legal principles concerning the division of powers (albeit with some criticism of the status of the law) the Board expressed the view that Parliament and provincial legislatures shared a concurrent jurisdiction over labour relations subject to the paramouncy doctrine:

...*Prima facie*, collective bargaining law is provincial and the constitutional preference is for diversity, experiment, and local control. However, if the employees work in an undertaking which is of sufficient national importance that its overall supervision has been allocated to the federal government, then so also is the labour relations component of that undertaking. [I should note one other feature of this area of constitutional law. There is always a substantial grey area between the jurisdictional claims of the federal and provincial governments. In recent years, we find a growing trend toward judicial recognition of the concurrent authority of both governments, if they can exercise it without conflict (a trend which I have documented in Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973), 23 U. of T.L.J. 307). That solution is not possible here because both jurisdictions have legislated and Parliament has asserted its claims to the fullest. The Canada Labour Code extends to "any work, undertaking or business that is within the legislative authority of the Parliament of Canada". Accordingly, if there is any valid reason for holding an undertaking to be within the federal sphere, then Parliament's claim is paramount. This is so no matter how slight that claim may appear in relation to the overall character of the enterprise or how much more reasonable it might seem to have the collective bargaining by these employees left to the local and more accessible labour relations board... . (p. 32)

69 The first Board decision concerning the constitutional jurisdiction of the provincial legislature to regulate the scope of picketing arose in *Squamish Terminals Limited*, BCLRB No. 51/75, [1975] 2 CLRBR 289. In this case, the union was engaged in lawful strike action against Prince George Pulp and Paper Ltd., a provincially regulated employer. The labour dispute was,

therefore, a "provincial dispute". In support of its strike, the union picketed Squamish Terminals, a federal undertaking. Squamish Terminals applied to the Board for a declaration that the picketing of its terminal was unlawful under the *Labour Code*. The Board decided that the *Labour Code* was intended to regulate all picketing emanating from a provincial dispute even if that picketing was directed against a federal employer. In this particular case, the Board found that the picketing in question was unlawful. In reaching the decision that the Code allowed the Board to scrutinize the picketing of a federal undertaking the Board set out what became known as the "origin of dispute" theory; namely, that the Board had jurisdiction over any picketing that emanated from a provincial dispute:

In our judgment all picketing, (but only that picketing) which flows from a provincial labour dispute is subject to the Labour Code. That judgment is based both on the explicit language and the underlying rationale of the Code. The fundamental premise of the statute is the creation of a single, integrated body of law, the whole administered by one tribunal, which regulates the entire sweep of collective bargaining from original union organization, through bargaining and a collective agreement, and up to and including industrial conflict. Secondly, as a matter of labour relations policy, one cannot meaningfully isolate picketing from the strike which produced it. (p. 292)

The Board commented specifically on the ally provisions of the Code then in force (Section 85(1)(c)), concluding that it too applied to a federal undertaking:

...Alternatively, a secondary employer may have lost its neutrality in the labour dispute by becoming the ally of the struck employer. In that case it opens itself to the same type of peaceful picketing by the union which may legitimately be directed at the struck employer (under s. 85(1)(c)). The language of the Code creates no explicit exception to the operation of either s. 85(1)(c) or s. 86 when the party affected by the picketing happens to be a federal undertaking. In our assessment of the underlying policy of these provisions, there are no grounds for holding that such an exception should be implied. Of course as we stated earlier, we are not addressing the constitutional issue of whether such a limitation on the scope of provincial picketing law must be implied from the BNA Act. But we do hold that, as a matter of the proper interpretation of the Code, we have the jurisdiction to deal with this and similar

complaints about the legality of picketing which affects a federal undertaking when that picketing stems from a strike within the provincial sphere. (pp. 292-293)

b) Early Court Decisions

70 In *Squamish Terminals, supra*, the Board expressly refrained from commenting on the competence of the provincial legislature to enact legislation regulating the scope of picketing of a federal undertaking as that constitutional issue was before the Court of Appeal in a similar case arising from the pulp strike. Shortly after the decision in *Squamish Terminals*, the Court of Appeal issued two decisions involving picketing at the premises of a federal employer by workers involved in a provincial dispute: *Western Stevedoring Co. Ltd. et al. v. Pulp Paper & Woodworkers of Canada* (1975), 61 D.L.R. (3d) 701, 77 C.L.L.C. ¶14,066 (B.C.C.A.) and *Jebsens (U.K.) Ltd. v. Lambert et al.* (1975), 64 D.L.R. (3d) 574 (B.C.C.A.).

71 In *Jebsens*, employees of the B.C. Sugar Refinery who were locked out by the employer picketed a ship docked in the Vancouver harbour which was loaded with a cargo of raw sugar for delivery to the B.C. Sugar Refinery. The Court of Appeal ruled that the *Labour Code* did not apply to regulate the picketing of the federal undertaking. This jurisdiction rested with Parliament under its authority over navigation and shipping. As no federal picketing legislation had been enacted, the common law applied.

72 In *Western Stevedoring*, the facts were virtually identical to those in *Squamish Terminals, supra*. The PPWC was engaged in a lawful strike against Weyerhaeuser Canada Limited. As part of its strike action, the PPWC picketed Pacific Coast Terminals causing the employees of Western Stevedoring Co. Ltd., a federally regulated employer, to refuse to cross the picket line. The Court of Appeal granted an injunction prohibiting the picketing by the PPWC. In reaching this decision, the Court of Appeal found that it was beyond the powers of the provincial legislature to enact legislation intended to apply to the federally regulated employer. Consistent with this view, the Court went on to read down the definition of "employer" in the *Labour Code* to include only employers whose relations with their employees were within the legislative jurisdiction of the province.

73 The decisions in *Jebsens* and *Western Stevedoring* were issued approximately one month after the Board decision in *Squamish Terminals*. The nature of "federal presence" was identical in all three cases - a provincially certified trade union involved in a labour dispute with a provincial employer extended its picketing activity to a federal undertaking. Implicit in the Court of Appeal judgments is the rejection of the "origin of dispute" theory put forward by the Board in *Squamish Terminals*. Instead, the Court formulated what has become known as the "location theory": if the picketing activity is located at a federal undertaking then the jurisdiction is federal, notwithstanding that the labour dispute is provincial in origin.

c) Later Board Decisions

74 Shortly after the Court of Appeal's decisions in *Jebsens*, *supra*, and *Western Stevedoring*, *supra*, the Board issued three other decisions concerning the constitutional jurisdiction over picketing.

75 In *Domglas Ltd.*, BCLRB No. 95/76, [1977] 1 Can LRBR 322, members of the union who were engaged in a lawful strike against Domglas in Alberta picketed a Domglas warehouse and manufacturing plant in British Columbia. Domglas applied for a declaration that the picketing was illegal and for a cease and desist order in respect of the picketing. The first issue addressed by the Board was "whether or not the Board has the jurisdiction to regulate picketing flowing from a legal strike in another province". The Board relied upon the Court of Appeal decision in *Western Stevedoring*, *supra*, and ruled that it had jurisdiction to regulate the picketing in question. In reaching this conclusion, the panel relied upon the Court of Appeal's rejection of the "origin of dispute" theory, and adopted the "location" theory.

76 The next decision issued by the Board was *British Columbia Hydro and Power Authority*, BCLRB No. 4/78, [1978] 4 W.W.R. 746. This case concerned picketing of B.C. Hydro, a provincially regulated employer, emanating from a federally regulated dispute between Telecommunications Workers' Union and the British Columbia Telephone Company. B.C. Hydro applied to the Board for relief against picketing by the union at utility poles owned jointly by B.C. Hydro and B.C. Tel and at a building in which both B.C. Hydro and B.C. Tel maintained offices. In this case, the "federal presence" was the opposite of that found in *Squamish Terminals*, *Jebsens* and *Western Stevedoring*, all *supra*. The dispute was federal in

origin and the picketing was at a provincial location. The Board ruled that it had jurisdiction to regulate the picketing in question:

We are satisfied there is no constitutional impediment to the board's jurisdiction. The mere fact that a union has acquired its bargaining agency by virtue of the provisions of the Canada Labour Code does not mean that the provincial government has no authority to enact legislation governing picketing by that union. An argument that the provincial government does not have such authority is tantamount to a suggestion that the Trade-unions Act, R.S.B.C. 1960, c. 384, of this province, an Act repealed by the Labour Code, s. 151(c), was ultra vires the provincial legislature. That statute and its provisions concerning picketing were applied to both provincially and federally certified unions. ... In short, it is our view that there is no constitutional barrier to the application of provincially enacted legislation to picketing by a union representing employees of a federal employer. (pp. 750-751)

77 The Board then discussed both the "functional approach" adopted in *Squamish Terminals*, *supra*, and the legislative amendments made to the picketing provisions in response to the *Western Stevedoring* decision:

The functional approach to the scope of the Labour Code in relation to picketing did not receive judicial approval. In a case arising out of the same dispute and on very similar facts as those in *Squamish Terminals*, the Court of Appeal in *Western Stevedoring Co. Ltd. v. Pulp, Paper and Woodwks. of Can.* (1975), 77 C.L.L.C. 14,066, 61 D.L.R. (3d) 701, held that the Labour Code did not apply to picketing at the operations of a federal undertaking. This result turned on the definition of "picketing" as it appeared in the Code at that time. The court ruled that the reference to "employer" in the definition meant an employer whose labour relations with its employees are subject to provincial legislation. (After the decision in *Western Stevedoring* the Labour Code was amended. Certain of the amendments in the Labour Code of British Columbia Amendment Act, 1976 (B.C.), c. 26, appear to have been intended to alter the result in *Western Stevedoring*. The word "employer" in the definition of picketing as well as in s. 86 was changed to "person". It remains to be seen in the appropriate case whether *Western Stevedoring* is still the law

insofar as the application of the Code to provincial picketing at the operations of a federal employer is concerned.) The necessary implication of that judicial ruling was that the Code could regulate federal picketing at the operations of a provincial employer. (p. 752)

The clear implication of the Board's decision is that with the legislative amendments to the picketing provisions made in response to *Western Stevedoring*, the Board's jurisdiction (and thus the legislature's competence to enact such legislation) to regulate picketing at a federal location that had emanated from a provincial dispute was, at a minimum, an open question.

78 The next decision of the Board involving the constitutional jurisdiction over picketing was *Chevron Canada Limited, supra*. This case once again concerned picketing of a provincially regulated employer's premises where the picketing arose out of a federally regulated dispute. In this case, the picketers were employees of Airwest Airlines Ltd. who were engaged in a lawful strike against Airwest. The employees commenced picketing at the Victoria bulk plant operated by Chevron to cut off Chevron's deliveries of fuel from the bulk plant to the Air West terminal in Victoria's inner harbour. Chevron applied to the Board for an order enjoining the picketing.

79 In *Chevron* the Board set out to provide a comprehensive decision outlining the Board's constitutional jurisdiction over picketing. The panel first identified four circumstances in which divided jurisdiction over picketing arose: federal employees picketing a federal employer; federal employees picketing a provincial employer; provincial employees picketing a provincial employer; and finally provincial employees picketing a federal employer. The panel concluded that the provincial legislature was competent to enact valid provincial legislation regulating picketing in all four circumstances but had exercised its jurisdiction only in three of those circumstances. The *Labour Code* did not allow for the regulation of the activity of federal employees picketing a federal employer. In concluding that the province did have the capacity to enact legislation in respect of such picketing, the panel relied heavily upon the early decisions which dealt with the applicability of the *Trade-unions Act* to federally regulated employers. The panel adopted the distinction drawn in the early cases between picketing and labour relations and appeared to be of the view that the province was completely free to regulate picketing in the province as long as it did not attempt to make laws in relation to federally regulated labour relations matters. Thus, in *Chevron*, the Board took jurisdiction where the origin of the dispute

was federal and the location of the picketing was provincial.

80 In concluding its review of the constitutional jurisdiction over picketing the panel in *Chevron*, indicated its view that the jurisdiction over picketing of federal undertakings may very well be a concurrent jurisdiction shared by Parliament and the provincial legislatures:

...Similarly, although the Labour Code may apply to regulate picketing crossing the provincial and federal spheres of labour relations insofar as that picketing has a provincial aspect, another body of law, either statutory or common law, may apply at the same time to regulate the same picketing insofar as it has a federal aspect. ...The result is that, because the picketing has a federal aspect, a body of law outside the Labour Code may be applicable to regulate certain aspects of the picketing which, from a provincial perspective, is also subject to regulation by the Labour Code. (p. 327)

This view is similar to the views expressed in some of the early decisions under the *Trade-unions Act*. This view has since been rejected by more recent decisions of the B.C. Court of Appeal and the Supreme Court of Canada.

d) Later Decisions of the B.C. Court of Appeal

81 The constitutional jurisdiction over picketing was once again raised before the Court of Appeal in *British Columbia Ferry Corporation v. Telecommunication Workers Union et al.*, [1981] 6 W.W.R. 714, 128 D.L.R. (3d) 307, 31 B.C.L.R. 247 (B.C.C.A.), affirmed [1984] 3 W.W.R. 191 (S.C.C.). The picketing in this case emanated from a federal dispute between the Telecommunications Workers' Union and B.C. Tel and involved the legality of picketing at the places of business of B.C. Ferries and Fording Coal Limited, two undertakings within provincial legislative jurisdiction. Therefore, the circumstances in the *B.C. Ferry* case are the same as the circumstances that existed in the decisions in *B.C. Hydro, supra*, and *Chevron, supra*, where the Board claimed jurisdiction.

82 In *B.C. Ferry, supra*, the Court held, in two concurring judgments, that even if the provincial legislature was competent to enact legislation regulating the picketing in question it had

not exercised its jurisdiction in enacting the *Labour Code*. In the first judgment, Nemetz C.J.B.C. assumed, without deciding, that the province had legislative competence in the circumstances. He then went on to examine the provisions of the *Labour Code* and concluded (adopting the reasons of Bouck J. in *Moffat Communication, supra*) that the legislature of the province did not intend the *Labour Code* to apply to federally certified unions.

83 In concurring reasons, Craig J.A. (Hutcheon J.A. concurring) ruled that the provincial legislature is competent to enact legislation in respect of picketing of a provincial undertaking where the picketing emanates from a federal labour dispute but that the province had not exercised this power in the *Labour Code*. Craig J.A. reviewed the decisions in *Western Stevedoring, supra*, and *Jebsens, supra*, and stated that:

I do not think that an analysis of either decision justifies the conclusion that this court said, in effect, that the provincial legislature could not pass legislation pertaining to labour relations which might in certain circumstances affect a federal trade union or a federal employer. (p. 723)

84 Craig, J.A. then discussed the amendments to the *Labour Code* that were made following the decision in *Western Stevedoring, supra*. Counsel for the Respondent argued that with these amendments, the *Labour Code* was applicable to the picketing in issue before the Court. In support of this contention the respondents relied upon the Board's decisions in *B.C. Hydro, supra*, and *Chevron, supra*. Craig J.A. rejected these decisions and, in doing so, appeared to return to the "origin of dispute" theory originally proposed in the Board's decision in *Squamish Terminals, supra*, and rejected in the *Western Stevedoring* decision. Craig J.A. stated:

...The reasoning of the board in the *Hydro* decision and the *Chevron* decision, both *supra*, adopted by counsel for the respondents, is that the secondary picketing causes a work stoppage, that the labour relations of a provincial employer is "a matter" to which the Labour Code applies within the meaning of s. 88, and that therefore the board has jurisdiction. I think that this is an incorrect interpretation of s. 88 and that the correct interpretation is that the picketing must result from, or emanate from, "a matter or dispute" involving the provincial employer and his employees before the Act is applicable. The secondary picketing did not emanate from any "matter or dispute" between the employer and employees in

either case. The secondary picketing caused the work stoppage. Although the legislature is competent to enact legislation which would give the board jurisdiction in a case of this kind, I do not think the present legislation does give the Board the jurisdiction. (pp. 723-724)

85 The next decision in which the Court of Appeal dealt with constitutional jurisdiction over picketing was *Pacific Western Airlines Ltd. and West-Can Communications Ltd. (WestCan Cole & Webber) v. B.C. Federation of Labour et al.* (1986), 70 B.C.L.R. 108, 26 D.L.R. (4th) 87 (C.A.). In this case there was a labour dispute between PWA, a federally regulated employer, and the unions representing its employees. At the instigation of the unions striking PWA, the B.C. Federation of Labour declared PWA advertising material "hot" and, as a result, the respondent newspaper unions refused to handle PWA advertising. PWA applied for an injunction compelling the newspaper unions to handle its advertising. One of the issues raised on appeal was whether the dispute fell within the exclusive jurisdiction of the Labour Relations Board. In deciding this aspect of the appeal, the Court discussed both the "location" and "origin of dispute" theories of the Board's jurisdiction. The Court clearly adopted the "origin of dispute" theory (citing *Squamish Terminals, supra*, and *B.C. Ferry, supra*) in deciding that the *Labour Code* was not applicable in the circumstances before the Court. While the Court mentioned the "location" theory in its reasons, it was not clear whether it rejected this theory or simply found that it did not assist in determining the outcome of this particular case.

e) Supreme Court of Canada Decisions

86 In 1988/89 the Supreme Court of Canada issued two decisions which we see as determinative of the constitutional issue in this case. These are *Bell Canada 1988* and *Irwin Toy*. We will review these decisions in some detail.

(1) *Bell Canada 1988*

(a) Introduction

87 In *Bell Canada 1988*, the Supreme Court of Canada reviews in considerable detail its past jurisprudence which it sees as determinative of the federal-provincial legislative jurisdiction in relation to federal undertakings. (The lengthy judgement in *Bell Canada* effectively disposes of three related cases: *Bell Canada 1988*, *Canadian National Railway Co. v. Courtois et al.*, [1988])

1 S.C.R. 868, and *Alltrans Express Ltd.*, *supra*).

(b) Decision

88 In *Bell Canada 1988*, a pregnant employee of Bell Canada refused to work on a video display terminal. She gave her employer "a protective reassignment certificate" in accordance with Sections 33 and 40 of the *Act Respecting Occupational Health and Safety*, S.Q. 1979 c.63 (R.S.Q., c.S-2.1). The Supreme Court of Canada decided that these sections of the Act were not constitutionally applicable to a federal undertaking. The Act was characterized as an Act relating to working conditions, labour relations and the internal management of undertakings. As a provincial Act, it could not apply to a federal undertaking because Parliament had exclusive jurisdiction over the internal management (labour relations) of such undertakings.

(c) Propositions of Law

89 Beetz J., writing for the Court, summarizes the principles which he sees as determinative of the issues before him. These principles are set out in the form of five propositions which Beetz J. draws from earlier Supreme Court decisions. Propositions two, three and five are central to the Court's determination and are relevant to the issue under consideration by this Panel:

Proposition two

In principle labour relations and working conditions fall within the exclusive jurisdiction of the provincial legislatures: these matters fall into the class of subjects mentioned in s. 92(13) of the *Constitution Act, 1867*, "Property and Civil Rights in the Province": *Toronto Electric Comm'rs v. Snider* [1925] 2 D.L.R. 5, [1925] A.C. 396, [1925] 1 W.W.R. 785 ("*Snider*"). (p. 168)

Proposition three

Notwithstanding the rule stated in proposition two, Parliament is vested with exclusive legislative jurisdiction over labour relations

and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working conditions in the federal undertakings covered by ss. 91(29) and 92(10)(a), (b) and (c) of the *Constitution Act, 1867*, that is undertakings such as Alltrans Express Ltd., Canadian National and Bell Canada. It follows that this primary and exclusive jurisdiction precludes the application to those undertakings of provincial statutes relating to labour relations and working conditions, since such matters are an essential part of the very management and operation of such undertakings as with any commercial or industrial undertaking: ...This third proposition reflects, at least in part, a constitutional theory which commentators who have criticized it have called the theory of "interjurisdictional immunity". (pp. 168-169)

Proposition five

Proposition five is the double aspect theory, which appears to have been stated for the first time in *Hodge v. The Queen* (1883), 9 App. Cas. 117 at p. 130: "...subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within sect. 91."

It follows from this theory that two relatively similar rules or sets of rules may validly be found, one in legislation within exclusive federal jurisdiction, and the other in legislation within exclusive provincial jurisdiction, because they are enacted for different purposes and in different legislative contexts which give them distinct constitutional characterizations. (p. 171)

90 Beetz J. deals with proposition two summarily; the Quebec Act deals with labour relations and therefore falls within Section 92(13); he declares the Act *intra vires* and "valid and applicable to undertakings which it may constitutionally cover".

91 However, in regard to proposition three Beetz J. spends considerable time outlining and reviewing the Courts' jurisprudence, particularly three cases: *Reference re Minimum Wage Act of Saskatchewan*, [1948] 3 D.L.R. 801, 91 C.C.C. 366, [1948] S.C.R. 248 (the "*Postal Service Case 1948*"); the *Stevedoring* case; and *Commission du Salaire Minimum v. Bell Telephone Co. of Canada* (1966), 59 D.L.R. (2d) 145, [1966] S.C.R. 767, 66 C.L.L.C. ¶14,154 ("*Bell Canada*

1966"). From these three decisions the Court draws three principles which it sees as determinative of the issues raised in *Bell Canada 1988*: the exclusivity rule, the exercise of a primary power not ancillary powers, and the vital or essential rule.

92 In the *Postal Service Case 1948* the Court had to decide whether the minimum wage statute of Saskatchewan was applicable to a temporary employee at the post office. The Court concluded that the Saskatchewan statute did not apply to the federal employee. From this case, Beetz J. draws the conclusion that the power to make laws regarding federal undertakings covered by Sections 91(29) and 92(10)(a), (b) and (c) is exclusive to the federal Parliament. Even if Parliament has not exercised its primary powers, this does not mean that the provinces may enact legislation regulating the federal undertakings. In particular, it is not within the competency of a provincial legislature to legislate concerning industrial relations of federal undertakings.

93 Next, Beetz J. reviews the *Stevedoring* case. That case concerned the constitutional validity of federal legislation -- Part I of the *Industrial Relations and Disputes Investigation Act* which was the predecessor of the *Canada Labour Code*. Part I of this Act provided for collective bargaining, certification, unfair labour practices, strikes and lockouts. Under Section 53 of the Act, Part I was stated to be applicable in respect of "employees who are employed upon or in connection with the operation of any work, undertaking or business that is within legislative authority of the Parliament of Canada...".

94 The Court found Part 1 of the *Industrial Relations & Disputes Investigation Act* to be valid legislation of Parliament. In reviewing this case Beetz J. refers to the following passage as a "classic statement" on the issue of the constitutional jurisdiction over labour relations and federal undertakings:

The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, *working conditions* and the like, is in my opinion *a vital part of the management and operation of any commercial or industrial undertaking*. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with Provincial Legislatures. (p. 218)

This passage is significant as it establishes the "vital part" test for determining the extent or scope of Parliament's jurisdiction over federal undertakings. Where the subject matter of legislation pertains to "a vital or essential part" of the management and operation of federal undertakings (and this includes labour relations) the authority to enact such legislation falls exclusively within the jurisdiction of Parliament. In commenting upon the *Stevedoring* case Beetz J. states that its significance "is its at least partial reliance on earlier sources such as *Postal Service Case 1948*, and in particular the insistence by the majority of judges on emphasizing, even in *obiter*, the exclusive, and consequently primary and not ancillary, nature of the federal jurisdiction in the area" (pp. 218-219).

95 Before proceeding to an analysis of *Bell Canada 1966* Beetz J. poses the following question, the answer to which is said by Beetz J. to be significant to his determination of the issues before the Court:

In the *Postal Service Case 1948* and the *Stevedoring Case*, the court had already indicated the outline of an answer to this crucial question: does Parliament's power to legislate on working conditions and labour relations in federal undertakings and on the management of those undertakings derive from its primary, elementary or unassailable jurisdiction over them? -- or on the contrary does it derive from the power which is incidental and ancillary to its primary jurisdiction, ...

* * *

The answer to this crucial question dictates the answer to the question of whether provincial statutes apply to federal undertakings in the area of working conditions and labour relations and the management of undertakings. Such provincial legislation is inapplicable to federal undertakings when it has the effect of regulating matters which fall within the primary jurisdiction of Parliament.

The question was to be finally resolved in *Bell Canada 1966*. (p. 219)

96 Beetz J. then reviews the Court's decision in *Bell Canada 1966*. The issue in *Bell Canada 1966* was whether Bell Canada, a federally regulated employer, was subject to a wage

levy imposed by the Quebec Minimum Wage Commission pursuant to the *Minimum Wage Act*, R.S.Q. 1941, c.164. The Supreme Court found that the *Minimum Wage Act* did not apply to Bell Canada. In reaching this decision the Court set out Sections 91(29) and 92(10) of the *B.N.A. Act*, reviewed the actual wording of the Sections, and came to the conclusion that the federal power to legislate on matters of labour relations in relation to federal undertakings was not an ancillary power, but rather a primary power and, as a result, fell within the exclusive jurisdiction of the Parliament. Beetz J. quotes from Martland J.'s judgment in *Bell Canada 1966*:

With respect, I subscribe to this view. In my opinion, regulation of the field of employer and employee relationships in an undertaking such as that of the respondent's, as in the case of the regulation of the rates which they charge to their customers, is a "matter" coming within the class of subject defined in s. 92(10)(a) and, that being so, is within the exclusive legislative jurisdiction of the Parliament of Canada. Consequently, any provincial legislation in that field, while valid in respect of employers not within exclusive federal legislative jurisdiction, cannot apply to employers who are within that exclusive control. (p. 224)

Beetz J. sees this "exclusivity rule", approved by *Bell Canada 1966*, as determinative of the issues before the Court in *Bell Canada 1988*. It does so by affirming the exclusivity of Parliament's (Sections 91(29) and 92(10)) jurisdiction over federal undertakings.

97 After concluding that *Bell Canada 1966* was determinative of the issues before the Court in *Bell Canada 1988* (and, as a consequence, the provincial Quebec Act could not apply to Bell Canada as a federal undertaking) Beetz J. proceeds to the second part of his analysis; namely, a review of the academic criticism of the exclusivity rule made by a number of commentators: D. Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969) 47 Can. Bar Rev. 40, at para 53-7; P.C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U.T.L.J. 307, at pp. 340-43; and P.W. Hogg, *Constitutional Law of Canada*, 2d ed., (1985) at pp. 329-32 and 465-66. The Court decided to focus on the comments of Professor Hogg which are the most recent. (Professor Hogg has subsequently issued a third edition to his work on constitutional law.)

98 The Court, therefore, not only affirms the existing exclusivity rule but takes the

opportunity to critically discuss the position of those who hold the contrary view. This discussion is important because it explores the underlying issues (which are often unstated) that arise in decisions of the Board (and in some Court decisions) which have adopted a provincial perspective. We summarize this discussion under five sub-headings: exclusive vs. concurrent jurisdiction (which is at the core of the controversy); the double aspect doctrine; general vs. specific application and the pith and substance doctrine; the policy implications of the paramountcy doctrine; and the impairment rule.

99 Before proceeding to the Court's analysis of these five issues, we will briefly describe how the debate is framed within these constitutional concepts. First, the provincial side of the debate: the labour relations of a federal undertaking concerns both employment (provincial) and the management of a federal undertaking (federal). There is thus a double aspect to the "law" concerning the labour relations of a federal undertaking. This results in a concurrent jurisdiction over the labour relations of that federal undertaking. If industrial action is taken against a federal undertaking (picketing) and the dispute is provincial in origin, it makes labour relations sense to treat that dispute as functionally related and to manage it at the local level. Indeed, to insulate the federal undertaking (hold it immune) may simply prolong the dispute. Thus, provincial legislation ought to be able to validly affect the federal undertaking. If Parliament is unhappy with the manner in which the province is regulating that particular federal undertaking, then it can simply pass legislation and the paramountcy doctrine will cure any adverse affects that arise from provincial regulation.

100 Conversely, the federal view sees the management of a federal undertaking (including its labour relations) as falling within the exclusive jurisdiction of Parliament. The double aspect doctrine cannot be used as an interpretative tool to transfer jurisdiction from Parliament to the provinces. Therefore, the issue of whether the field has been "occupied" is not relevant. The paramountcy doctrine is therefore unnecessary, and indeed its application may actually have an adverse effect - an endless number of disputes in Court.

101 The Court begins its criticism with Professor Hogg's analysis (which we have expanded by reference to his text *Constitutional Law of Canada*) that labour relations falls within provincial jurisdiction under Section 92(13) Property and Civil Rights. Hogg takes the view that provincial labour relations legislation of a general application is valid because it is in "pith and substance"

legislation in relation to employment. As a result provincial legislation of general application in relation to a provincial matter may validly affect a federal undertaking. Further, the regulation of labour relations of federal undertakings should be regarded in relation to employment as well as in relation to a federal undertaking. As a result, "the law has a double aspect and should therefore be open to both levels of government". If the federal government is unhappy with the effect of provincial legislation upon a federal undertaking then it has the ability to pass legislation and the principle of paramountcy will govern. Further, the problem with the exclusivity rule is that it affords a federal undertaking immunity from provincial laws. This offends the pith and substance doctrine. Finally, though Courts have not stated when it is appropriate to apply the double aspect doctrine, it is generally applied when the federal and provincial characteristics of a law are "roughly equal in importance".

102 As stated, the result of Hogg's analysis is to create a concurrent jurisdiction over the labour relations of a federal undertaking (subject, of course, to the paramountcy doctrine). It is both this analysis and its result which Beetz J. directly responds to.

i) Exclusivity vs. Concurrent Jurisdiction

103 First, Beetz J. states that the analysis offered by Professor Hogg does not address the exclusivity rule which directly arises from the interpretation by Martland J. of Sections 91(29) and 92(10) of the *B.N.A. Act* in *Bell Canada 1966*. The management (and thus labour relations) of a federal undertaking are an integral part of the primary power assigned to the federal government under Sections 92(10) and 91(29). The management of a federal undertaking and its labour relations are part of the "basic and unassailable minimum" content to the class of subjects that fall under Sections 91(29) and 92(10). To deny this is "to strip the exclusive federal power of its primary content and transform it simply into a power to make ancillary laws connected to a primary power with no real independent content, ..." (p. 229).

104 In reply to the criticism that this power denies authority to legislatures in the important area of employment law Beetz J. responds in the strongest possible terms:

...In my view, and I say so with the greatest respect, this theory does not confer on Parliament any power that it does not already have, since it is an integral and vital part of its primary legislative authority over federal undertakings. If this power is exclusive, it is because

the Constitution, which could have been different but is not, expressly specifies this to be the case; and it is because this power is exclusive that it pre-empts that of the legislatures both as to their legislation of general and specific application, in so far as such laws affect a vital part of the federal undertaking. The exclusivity rule is absolute and does not allow for any distinction between these two types of statute. (p. 230)

105 In this passage are contained all the elements which have been derived from the previous jurisprudence and which Beetz J. sees as determinative of the issues in front of him in *Bell Canada 1988*. First, there is the fact that the power is exclusively and directly derived from the wording of Sections 91(29) and 92(10). Second, there is the fact that labour relations (which forms part of the management of a federal undertaking) is a vital and essential part of management of those federal undertakings. Third, and this follows from the second, the management of federal undertakings is a necessary and primary power to the jurisdiction set out in Sections 91(29) and 92(10). To rule otherwise or transform the power into an ancillary power is to effectively strip these two sections of the *B.N.A. Act* of any real content in managing federal undertakings.

ii) Double Aspect Doctrine

106 In addressing Professor Hogg's comments about a concurrent jurisdiction over labour relations Beetz J. responds that this "can only be a way of speaking". He states Professor Hogg likely intends to refer either to the "overlapping of federal and provincial legislation which may result from the exercise of an ancillary power by Parliament or the application of the double aspect theory; however, as I said at the start of these reasons, these are not concurrent powers such as the fields of agriculture or immigration" (p. 231). Beetz J. distinguishes and disagrees with the concept of the double aspect theory formulated not only by Hogg, but also the B.C. and the Quebec Courts of Appeal.

107 The B.C. Court of Appeal (*Alltrans, supra*) took the position that the compensatory scheme could not be severed from the prevention scheme; that there was a "necessary complementarity" between preventive measures concerning occupational health and safety and compensatory provisions concerning industrial accidents. As a result there was a double aspect to the law and a concurrent jurisdiction (both the province and federal government could legislate concerning safety, subject to federal paramountcy). Beetz J. takes the view that the provincial

preventive scheme had to be severed from the compensatory scheme - and was not applicable to the federal undertakings. As these undertakings are no longer subject to two preventative schemes there was "no further reason for the double aspect theory" (p. 235). (Compensation schemes were insurance schemes to cover accidents (torts); preventive schemes, on the other hand, directly intervened in the management (labour relations) of the federal undertaking.)

108 In regard to the Quebec Court of Appeal, Beetz J. cannot see the distinction between employer-employee relations (the federal aspect) and the individual employee's health and safety. He sees this distinction as purely "nominal" and, therefore, the application of double aspect unsustainable.

109 Finally in regard to Professor Hogg's conception of the double aspect theory he states:

... this further version of the double aspect theory seems to me to be wrong because, with respect, it is based on confusion between a matter, labour relations, and a class of subjects, federal undertakings. Additionally, this further version seems to me to ignore the fundamental or principal content that must be given to the federal power, and to strip this power of its content. (p. 241)

110 Earlier in the decision Beetz J. makes it clear that he views the double aspect theory as neither "an exception nor even as a qualification to the rule of exclusive legislative jurisdiction" (p. 172). He further states that the effect of it cannot be to create concurrent fields of jurisdiction in which Parliament and legislatures may legislate on the same aspect. In fact, the double aspect theory can only be invoked when it "gives effect to the rule of exclusive fields of jurisdiction" (p. 172). He further states that the broad wording of the exclusive legislative powers listed in Sections 91 and 92 of the *B.N.A. Act* cannot be combined into concurrent fields of power governed solely by the rule of paramountcy of federal legislation. This is directly contrary to the principles of federalism. Indeed Beetz J. relies upon Laskin C.J.C. in *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, [1976] 1 W.W.R. 699, to the effect that the distribution of legislative powers in Sections 91 and 92 cannot be interpreted or converted to a list of concurrent powers. Further, the lack of legislation by Parliament cannot have the effect of transferring to provincial legislatures powers that have been assigned exclusively to Parliament.

111 Professor Edinger, in *Application of Provincial Legislation on Safety In The Work Place To Federal Works And Undertakings* (1989) 68 Can. Bar Rev. 631, captures well Beetz J.'s view of the double aspect doctrine:

...It is the general subject matter of labour relations that has the double aspect -- not the law or the head of power. The provincial aspect of labour relations authorizes legislation in relation to section 92(13) regulating labour relations in provincial workplaces. The federal aspect consists of labour relations in workplaces under federal jurisdiction and regulated by legislation in relation to section 91(29). Each aspect is exclusive but the rules may be virtually identical. Though classification of a law may be evenly balanced in terms of section 91 or section 92 head of power it is a misuse of the term double aspect to say that the law has a double aspect. The court must determine the proper classification of that law and that classification may depend on a subject matter having a double aspect, but the law itself may deal only with the aspect of the subject matter within the jurisdiction of the enacting legislative body. (pp. 640-641)

iii) General vs. Specific Application and the Pith & Substance Doctrine

112 In response to the issue of the general application of the provincial statute which may affect a federal undertaking Beetz J.'s states:

...The particular effect of general provincial laws that would result from their application to federal undertakings would, in the case at bar, constitute an encroachment on the exclusive jurisdiction of Parliament. (p. 230)

The exclusive federal jurisdiction does not turn on the application of certain "drafting techniques" which would permit particular parts of provincial laws of general application to apply to matters within the exclusive federal jurisdiction. To do otherwise would be to permit the provinces to do indirectly what they cannot do directly; namely, to legislate in regard to such federal matters. Therefore, a constitutionally invalid provision is not saved by inserting it into a generally worded

enactment which is otherwise valid.

113 Finally, both R.M. Elliott, *Constitutional Law - Division of Powers -Interjurisdictional Immunity, Reading Down and Pith and Substance: Ontario Public Service Employees' Union v. Attorney General for Ontario* (1988) 67 Can. Bar Rev. 523 and E. Edinger, *Application of Provincial Legislation on Safety In The Work Place To Federal Works And Undertakings: Bell Canada v. Commission de la Sante et de la Securite du Travail, Canada National Railway Co. v. Courtouis; Alltrans Express Ltd., supra*, make the following point concerning the pith and substance doctrine: the doctrine describes "how" the characterization of a constitutional power is to be carried out and not "what" is to be characterized. The pith and substance doctrine requires only that once the relevant component of the legislation is identified, the characterization of that component be based upon its dominant or most important characteristic. However, that component may be an entire statute, a group of sections within a statute, or a single section or sub-section of a statute. Thus, the finding that a statute in its general application is, in pith and substance within provincial jurisdiction, does not save a particular part of that legislation should it intrude upon the federal jurisdiction; nor does it offend the pith and substance doctrine for the Court to select a particular component of that legislation as the focus of its inquiry.

iv) Policy Implications of Paramountcy Doctrine

114 In relation to the policy argument that it would be open to Parliament to protect a federal undertaking through the application of the paramountcy doctrine, Beetz J. states that anything less than immunity from the application of provincial laws would amount to nothing less than an invitation to litigate. If Parliament had to invoke the paramountcy principle to protect its exclusive jurisdiction, the Courts would be faced with a multiplicity of "endless disputes".

v) Impairment Rule

115 This leads to the final issue in the *Bell Canada 1988* decision and that is the test of "impairment". The concept of impairment arose in the field of federally incorporated companies: a provincial statute which impaired, paralysed or sterilized a federal undertaking was *ultra vires*. Beetz J. decides that a federal undertaking will be held immune if a provincial statute simply

affects a vital or essential aspect of a federal undertaking and the test of impairment was not relevant:

The impairment test is not necessary in cases in which, without going so far as to impair the federal undertaking, the application of the provincial law affects a vital part of the undertaking. (p. 244)

Beetz J. makes one additional comment in regard to the test of impairment. He states that in deciding what constitutes impairment "the Court cannot disregard potential impairment or effects" (p. 246). Here he is speaking of the right of an individual to refuse to perform unsafe work and states that "The exercise of the right of refusal in such a case manifestly impairs the operations of the undertaking" (p. 248). In coming to the conclusion that the Court could not measure degrees of impairment in such circumstances he states as follows:

...it is the right of refusal as a whole, with all it may entail, which must be held inapplicable to the federal undertaking. I think it is clear that the courts cannot be asked to decide on a case by case basis at what point there is impairment. (p. 248)

116 It is this issue of impairment in *Bell Canada 1988* which leads us to a discussion of the next decision (*Irwin Toy, supra*) upon which the union heavily relies. However, before doing so it is helpful to summarize *Bell Canada 1988*.

(d) Summary

117 The following principles emerge from *Bell Canada 1988* and the jurisprudence which it reviews:

1. Labour relations and working conditions fall within provincial jurisdiction under Section 92(13) *Constitution Act 1867* "Property and Civil Rights in the Province".
2. Parliament is vested with the exclusive jurisdiction over the labour relations of federal undertakings pursuant to Sections 91(29) and 92(10) of the *Constitution Act, 1867*. Therefore, these powers represent the exercise of a primary not ancillary power.

3. Provincial legislation that trenches upon a vital or essential part of a federal undertaking is *ultra vires*. The federal undertaking is held immune from the effect of any such legislation upon it.
4. The regulation of the management of a federal undertaking (including its labour relations) constitutes the basic and unassailable minimum content of the exclusive powers assigned to Parliament under Sections 91(29) and 92(10).
5. As a result of the exclusivity of the federal jurisdiction (and that it is an exercise of primary not ancillary power) the fact that Parliament has not occupied the field is not relevant; nor, therefore, is the paramountcy doctrine at issue. As a result, the provinces cannot pass valid legislation directed at regulating the management (including labour relations) of a federal undertaking.
6. Further, this exclusivity rule does not violate the pith and substance doctrine. The Courts' selection of any component part of a statute as the focus of its constitutional inquiry does not offend the pith and substance doctrine. A constitutionally invalid provision is not saved by inserting it into a provincial law of general application. A province cannot do indirectly what it is forbidden from doing directly.
7. The double aspect theory is neither an exception nor a qualification to the exclusivity rule and cannot be used to create concurrent fields of jurisdiction where none exist.
8. As a policy matter the application of the principle of concurrent jurisdiction, double aspect theory, ancillary and paramountcy doctrine (in addition to offending the division of powers) would result in both legal uncertainty and an endless number of disputes.
9. The actual impairment or paralysing of a federal undertaking by provincial legislation is not a necessary condition in order to hold that federal undertaking immune from the effect of the provincial legislation. It is sufficient if that provincial legislation simply affects a vital or essential part of that federal undertaking.

118 It is readily apparent, therefore, that the determinations made in *Bell Canada 1988* affect the issues before us. However, the Union argues that *Irwin Toy, supra*, affects the conclusions reached in *Bell Canada 1988*, particularly its conclusions regarding the requirements of impairment of federal undertakings.

(2) *Irwin Toy*

119 In *Irwin Toy, supra*, the Supreme Court of Canada considered the constitutional validity and applicability of sections of the *Consumer Protection Act*, R.S.Q., c.P-40.1, which placed significant restrictions on advertising directed at children under the age of thirteen years. The prohibitions applied to all forms of advertising within the province including television advertising. The evidence before the Court indicated, however, that most of the advertising affected would be television commercials. The constitutionality of these restrictions was challenged on the basis that they were *ultra vires* of the provincial legislature. The argument was that the legislation was, in reality, a "colourable" attempt, under the guise of consumer protection (provincial jurisdiction) to, in fact, regulate television advertising, a matter falling within exclusive federal jurisdiction. The Court rejected this characterization of the statute and stated that the legislation was genuinely aimed at consumer protection.

120 The second argument, raised by the intervenor (a television broadcaster), was that the restrictions on child advertising could not be applied to television commercials because the advertising, and the revenue it produced, were "vital or essential parts" of television broadcasting and that the regulation of television advertising impaired the broadcast undertakings (ie. revenues). The Court accepted that television advertising is a vital part of the operation of television broadcast undertakings but held that the effects on revenue were "incidental".

121 It was in response to this second argument that the Supreme Court of Canada considered the decision in *Bell Canada 1988*. In particular, the Court considered whether it was sufficient that provincial legislation had only to affect a vital or essential part of an undertaking in order to be found inapplicable, or whether the provincial legislation actually had to impair or sterilize the undertaking. The Court both affirms and refines the test set out in *Bell Canada 1988*. The Court refines the test by drawing a distinction between direct and indirect legislation and the requirement that legislation actually impair a federal undertaking. The category of direct and

indirect relates to the intended application (does it purport to regulate a matter within federal jurisdiction) of the statute; the impairment issue relates to the actual effect of the statute on the federal undertaking.

(a) Impairment

122 If a provincial law actually impairs a federal undertaking, it is unnecessary to consider the intended application of the statute (ie. whether the law purports to apply directly to the federal undertaking or merely has an indirect effect on the undertaking). A provincial law cannot be applied to a federal undertaking, either directly or indirectly, where that application has the effect of impairing the undertaking.

(b) No Impairment

123 If a provincial law purports to directly apply to a federal undertaking and affects a vital or essential part of the undertaking then the provincial law will be held to be *ultra vires* or inapplicable to the extent that it purports to apply to the federal undertaking. This result

follows even if the law does not impair the undertaking. If, however, a provincial statute does not purport to directly apply to a federal undertaking and any effect it may have is incidental, this incidental effect, even upon a vital or essential part of a federal undertaking, will not invalidate the provincial law, and the federal undertaking will *not* be held immune from the application of the law.

124 In *Irwin Toy*, the Court found that the *Consumer Protection Act* was aimed at advertisers not broadcasters (ie. it was not directed at a federal undertaking). Further, the effect on advertising revenues was incidental in the sense that it did not impair the federal undertaking. The provincial legislation therefore was upheld. The Court set out the impairment test as follows:

Recently, in *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 (Bell Canada 1988), Beetz J., writing for the Court, reviewed the principles of constitutional interpretation applicable to the regulation of federal undertakings. He distinguished between situations in which (1) a provincial law would, if applied to a federal undertaking, affect a vital part of its operation and (2) the effect of the provincial law on a federal undertaking, whether applied to it directly or not, would impair its operation (at pp. 859-60):

The impairment test is not necessary in cases in which, without going so far as to impair the federal undertaking, the application of the provincial law affects a vital part of the undertaking. . .

In order for the inapplicability of provincial legislation rule to be given effect, it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralysing it.

The federal government has exclusive jurisdiction as regards "essential and vital elements" of a federal undertaking, including the management of such an undertaking, because those matters form the "basic, minimum and unassailable content" of the head of power created by operation of s. 91(29) and the exceptions in

s. 92(10) of the Constitution Act, 1867. No provincial law touching on those matters can apply to a federal undertaking. However, where provincial legislation does not purport to apply to a federal undertaking, its incidental effect, even upon a vital part of the operation of the undertaking, will not normally render the provincial legislation ultra vires. (p. 955)

f) B.C. Court of Appeal Post *Bell Canada 1988* Decision

125 After the decision of the Supreme Court of Canada in *Bell Canada 1988* the B.C. Court of Appeal once again had the opportunity to consider the constitutional jurisdiction of the province to regulate picketing at the premises of a federally regulated employer.

126 In *Hecate Logging Ltd., supra*, the union was picketing the premises of R.J. Coulson, a logging contractor licensed by Hecate Logging Ltd. to log at Barr Creek, British Columbia (the origin of dispute was therefore provincial). The union learned, however, that the logs obtained from Coulson's operation were being loaded onto a ship located at Hecate's deep dock berth for export to Japan. The union began picketing the loading operation on land adjacent to the walkway onto the ship's dock. The B.C. Supreme Court granted an *ex parte* injunction against the picketing. The union appealed that ruling arguing that the origin of the dispute was provincial and, therefore, the Labour Relations Board had exclusive jurisdiction. Hecate argued that the Court had jurisdiction because the picketing was of a marine loading facility which fell under the exclusive jurisdiction of Parliament.

127 The Court of Appeal relied upon *Jebsens, supra*, which in turn had relied upon the *Stevedoring* case and *Bell Telephone 1966*. It found *Jebsens* "a complete answer to this appeal". The Court also relied upon *Bell Canada 1988* citing from Beetz J.'s third proposition: that the labour relations of a federal undertaking covered by Sections 91(29) and 92(10) fell within the exclusive jurisdiction of Parliament. McLachlin J.A. stated:

...It follows that on the test propounded in *Bell Can.* and its companion cases, the Labour Code can have no application in the case at bar, and the chambers judge was correct in ruling that the court had jurisdiction. (p. 323)

128 In *Hecate Logging*, *supra* the union argued that the reference to the "origin of dispute" in the B.C. Court of Appeal's decisions in *B.C. Ferries*, *supra* and *Pacific Western Airlines*, *supra*, assigned to the Labour Relations Board exclusive jurisdiction over all picketing of labour disputes which were provincial in origin, including those which affected the operations of a federal undertaking. McLachlin J.A. rejected this proposition and stated that notwithstanding what may be a "provincial aspect" to a labour dispute or to the picketing (either in the origin or the location of the dispute) the province is not competent to legislate in such matters. She stated:

The reference to the "origin of dispute" in the decisions of this court in *B.C. Ferries* and *Pac. Western Airlines* does not conflict with the fundamental rule reaffirmed by the Supreme Court in *Bell Can.* that the province cannot legislate on labour matters so as to affect the essential operations of a federal undertaking.

* * *

...Where picketing affects an essential aspect of the operations of a federal undertaking, the Labour Code does not apply notwithstanding that picketing possesses a provincial aspect, with the result that the jurisdiction of the court is not ousted. (p. 324)

129 Attempting to place *Hecate Logging Ltd.* within the context of *Irwin Toy*, is best done, we think, by referring to the question that McLachlin, J.A. said needs to be asked in order to determine the issue of jurisdiction:

...The decisions of the Supreme Court in *Bell Can.*, *Alltrans* and *C.N.R.* establish that the applicability of provincial labour laws in cases such as this depends on the answer to the broad question: Does the provincial legislation relate to "matters [which] are an essential part of the very management and operation of the [federal] undertaking". (p. 324)

130 In view of this question and the *Irwin Toy* decision the issues in the case before us may be framed as follows:

1. if the ally provisions (with the potential right to picket) of the British Columbia *Labour Relations Code* purport to apply directly to a vital or essential part of the very management of Northern Cartage (a federal undertaking) the statute will be held inapplicable and Northern Cartage will be held immune;
2. if the ally provisions (with the potential right to picket) of the British Columbia *Labour Relations Code* do not purport to apply to Northern Cartage but the effect of the provisions is to impair or sterilize Northern Cartage operations then the statute will be held invalid and Northern Cartage will be held immune; and
3. if the ally provisions (with the potential right to picket) of the British Columbia *Labour Relations Code* do not purport to apply to Northern Cartage, and the effect of the provisions on Northern Cartage operations is merely incidental, then the statute will be upheld and Northern Cartage will *not* be held immune.
4. Application of Law re Constitutional Jurisdiction

131 The Union relies heavily on the position of Professor Peter Hogg and also on the argument that *Bell Canada 1988* and *Hecate Logging* have to be read in light of the more recent decision of the Supreme Court of Canada in *Irwin Toy, supra*. The Union argues that *Irwin Toy* re-establishes the requirement of impairment or sterilization in the determination of the applicability of provincial legislation to federal undertakings. It argues that the picketing of the applicants would not sterilize their operations. However, even if it should paralyse or impair Northern Cartage's operations, Northern Cartage has entered the labour dispute voluntarily and can equally leave the dispute voluntarily. A close reading of *Irwin Toy Limited, Hecate Logging* and *Bell Canada 1988* does not support the Union's view of the law as set out in those decisions.

132 In applying the analysis of the Supreme Court of Canada in *Bell Canada 1988* and *Irwin Toy*, and the B.C. Court of Appeal decision in *Hecate Logging*, we come to the following conclusions. First, the *Labour Relations Code* is concerned with the labour relations which is a matter that falls within the class of subjects mentioned in Section 92(13) of the *Constitution Act*

1867: Property and Civil Rights in the Province. The Code is, therefore, *intra vires*, valid and applicable to undertakings which it may constitutionally cover.

133 Second, the Code, and in particular the definitions of "person" and "ally" cannot be applied directly to permit picketing of federal undertakings mentioned in Sections 91(29) and 92(10) of the *Constitution Act 1867* without regulating vital or essential parts of those federal undertakings. The ally provisions of the *Labour Relations Code* contemplate federal undertakings appearing before the Labour Relations Board and the Board making a declaration directly against the federal undertaking by naming that federal undertaking an ally. As a consequence of that ally status the Board may make an order granting a trade union the right to picket that federal undertaking. The Board's declaration and its consequent orders directly affect a vital and essential part of the management of that federal undertaking. An ally declaration and picketing order would therefore constitute an encroachment on the exclusive legislative authority of Parliament. The motivation or voluntariness of a federal undertaking in assisting a struck employer does not affect the constitutional division of powers.

134 Third, it is unnecessary to show an impairment of the federal undertaking (Northern Cartage) where the application of the provincial law applies directly to and affects a vital part of the undertaking.

135 Alternatively, if we are wrong in our view that the application of the ally provision is direct, then it is our conclusion that the indirect effect of the provision, including the possibility that Northern Cartage could be picketed, is not incidental and would impair, sterilize or paralyse Northern Cartage. That is after all the primary purpose of picketing. In support of this conclusion we rely upon Beetz J.'s comments in *Bell Canada 1988* and the reference to an individual's right to refuse unsafe work amounting to, in certain circumstances (if done collectively), a strike. The right to strike and its consequent right to picket is a union's primary weapon with which to impose economic harm upon a company. The intent and purpose of that weapon is to impose the maximum economic harm (ie. the complete shutdown of the employer). This well recognized purpose of strikes and picketing is the kind of potential impairment which the Court will consider and will not try to sort out on "a case by case basis at what point there is impairment". Rather, in these sorts of circumstances it "is the right of refusal as a whole, with all it may entail, which must be held inapplicable to the federal undertaking".

5. Reading Down

136 The reading down doctrine may be summarized with reference to Professor Peter Hogg's *Constitutional Law of Canada* (3rd ed.) pp. 15-23. Reading down is a rule of interpretation or a cannon of construction. In practice, the general language of a statute which may extend beyond the power of the legislative body, is construed more narrowly so as to be consistent with the scope of the enacting body's jurisdiction. The effect of reading down is to simply limit a statute where it overreaches the limits of its jurisdiction and thus preserve the remainder of the legislation which is within its jurisdiction. The Board previously read down the provisions of the *Labour Relations Code* in *KMart, supra*. In that case the definition of "picketing" was read down in order to conform with Section 2(b) (freedom of expression) of the *Charter of Rights and Freedoms*.

137 Beetz J. in *Bell Canada 1988* makes reference to reading down, quoting Laskin C.J.C. in *Dick v. The Queen*, [1985] 2 S.C.R. 309:

The *Wildlife Act* does not differ in this respect from a great many provincial labour laws which are couched in general terms and which, taken literally, would apply to federal works and undertakings. So to apply them, however, would make them regulate such works and undertakings under some essentially federal aspects. They are accordingly read down so as not to apply to federal works and undertakings: *Reference re Minimum Wage Act of Saskatchewan* (1948), 91 C.C.C. 366, [1948] 3 D.L.R. 801, [1948] S.C.R. 248 *sub nom. Reference as to applicability of Minimum Wage Act of Saskatchewan to an employee of a Revenue Post Office; Com'n du salaire minimum v. Bell Telephone Co. of Canada* (1966), 59 D.L.R. (2d) 145, [1966] S.C.R. 767, 66 C.L.L.C. para. 14,154; *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.* (1973), 40 D.L.R. (3d) 105, [1975] 1 S.C.R. 178, [1974] 1 W.W.R. 452. (p. 227)

Robertson J.A. in *Western Stevedoring Company, supra*, read down the definition of "employer" contained in the *Labour Code of British Columbia*, R.S.B.C. 1973, c.122, giving it a limited meaning (applying it only to provincial employers) in order to preserve its constitutionality:

Turning now to the provincial Code, it must follow that, if it is

intended to apply to employers in the stevedoring business, it is beyond the powers of the Legislature of the Province. To avoid such a result one must, therefore, construe the word "employer", which is thus defined in s. 1 of the Act:

"employer" means a person who employs one, or more than one, employee and includes an employers' organization;

as not including an employer the regulation of whose relations with his employees is within the exclusive jurisdiction of the Dominion. Put another way, the word "employer" must be confined in its scope to employers whose relations with their employees are within the legislative jurisdiction of the Province. (This well-recognized method of approach was applied, for example, in the *Stevedoring* case: see Kerwin, C.J., at p. 730 D.L.R., p. 535 S.C.R., Estey, J., at p. 757 D.L.R., p. 566 S.C.R., and Cartwright, J. (as he then was), at p. 771 D.L.R., p. 582 S.C.R.). (pp. 707-708)

138 Therefore, it is our conclusion that the definition of "person" in Section 1 of the *Labour Relations Code* can not validly include a federal undertaking. The definition of person is read down to include only those employers who fall within the legislative competence of the province.

VII. CONCLUSION

139 The application for reconsideration is allowed for the following reasons:

1. The definition of "person" in Section 1 of the Code excludes all federal undertakings whether they are union or non-union. Therefore, Northern Cartage is not a "person" and is not subject to the ally provisions under the Code.
2. In the alternative, if our interpretation of the definition of "person" is incorrect, then the definition exceeds the legislative competence of the Province. The definition must, therefore, be read down, in the context of an application to picket an employer as an ally, to include only those employers who fall within the legislative competence of the

Province. Northern Cartage is not such an employer. Accordingly, Northern Cartage is not a "person" and is not subject to the ally provisions under the Code.

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