

Federal Court



Cour fédérale

Date: 20260720

Docket: T-1026-24

Citation: 2026 FC 971

Ottawa, Ontario, July 20, 2026

PRESENT: Justice Andrew D. Little

BETWEEN:

WESTOWER COMMUNICATIONS LTD.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS AND JUDGMENT

[1] The applicant, WesTower Communications Inc., provides wireless and wireline construction services to federal telecommunications companies. WesTower filed this application for judicial review of a decision made by an officer at Economic and Social Development Canada (“ESDC”) in a letter dated April 2, 2024, and communicated by email on April 3, 2024 (the “Decision”). The Decision concluded that the applicant is subject to federal jurisdiction for the purposes of labour legislation, namely, Part II of the *Canada Labour Code*, R.S.C., 1985, c. L-2.

[2] The central question on this application is whether the Decision correctly concluded that the *Canada Labour Code* applies to the applicant by virtue of federal “derivative” jurisdiction. The parties agree that the applicant is not subject to direct federal jurisdiction in relation to telecommunications.

[3] For the reasons that follow, I conclude that the Decision was correct to find that federal derivative jurisdiction applies to the applicant for the purposes of labour legislation. Accordingly, the application for judicial review must be dismissed.

I. Derivative federal jurisdiction over labour relations

[4] A synopsis of the applicable constitutional law provides the setting for this application. It will assist to understand the Decision, the admissibility of affidavit evidence on this application, and the applicant’s arguments on the merits of the judicial review. The principal sources of this synopsis are the Supreme Court’s decision in *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, [2012] 2 SCR 3 and the Federal Court of Appeal’s reasons in *Telecon Inc. v. International Brotherhood of Electrical Workers (Local Union 213)*, 2019 FCA 244 (application for leave dismissed, May 7, 2020, SCC File No. 38934, 2020 CanLII 32280).

[5] Sections 91 and 92 of the *Constitution Act, 1867*, do not expressly delegate jurisdiction over labour relations to either the provincial or federal governments. Legislation respecting labour relations is presumptively a provincial matter, but a federal presence exists. Since the *Reference re: Industrial Relations and Disputes Investigation Act*, [1955] SCR 529 (the

“*Stevedores Reference*”), the Supreme Court has concluded that Parliament can regulate labour relations when jurisdiction over the works is an “integral part” of its competence under a federal head of power.

[6] The Supreme Court has found that telecommunications falls within a federal head of power under the *Constitution Act, 1867*, sections 92(10)(a) and 91(29): see *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 SCR 225, at pp. 267-68; *Téléphone Guèvremont Inc. v. Quebec (Régie des télécommunications)*, [1994] 1 SCR 878, aff’ing *Québec (Procureur général) c. Québec (Régie des télécommunications)*, 1992 CanLII 3743 (QC CA).

[7] Relying on several prior decisions, the Supreme Court found in *Tessier* that a “level of government cannot have exclusive authority to manage a work or undertaking without having the analogous power to regulate its labour relations”: *Tessier*, at para 15. Thus, Parliament has jurisdiction over labour relations by way of narrowly interpreted exceptions to the presumed provincial jurisdiction, including in the application of the *Canada Labour Code: Telecon*, at para 23.

[8] Federal jurisdiction over labour relations can be direct or derivative. As described by Abella J. in *Tessier*:

[18] In the case of direct federal labour jurisdiction, we assess whether the work, business or undertaking’s essential operational nature brings it within a federal head of power. In the case of derivative jurisdiction, we assess whether that essential operational nature renders the work integral to a federal undertaking. In either

case, we determine which level of government has labour relations authority by assessing the work's essential operational nature.

[Emphasis added.]

[9] A court's analysis of derivative jurisdiction is functional. It must analyze the related undertaking (here, the applicant) as a going concern and considers only its ongoing character. Its exceptional aspects do not determine its essential operational nature: *Tessier*, at para 19.

[10] The Supreme Court in *Tessier* provided guidance on the analytical framework for assessing whether a related undertaking is “integral” to a federal undertaking – that is, whether federal derivative jurisdiction is justified over the related undertaking. The “focus of the analysis is on the relationship between the activity, the particular employees under scrutiny, and the federal operation that is said to benefit from the work of those employees”: *Tessier*, at para 38. Following Estey J's reasons from the *Stevedores Reference*, the Supreme Court in *Tessier* referred to passages relating to the integration of a related undertaking into a federal undertaking from its earlier discussions in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 SCR 178, at pp. 185-186; *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 SCR 115 (*Northern Telecom 1*), at p. 132; *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 SCR 733 (*Northern Telecom 2*), per Estey J. at pp. 766-768 and per Dickson J. at p. 771-774; *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 SCR 147; *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 SCR 1112, at pp. 1138-1139. See *Tessier*, at paras 36-43.

[11] The Court in *Tessier* also referred with approval to the dissenting reasons of McLachlin J. (later C.J.) on derivative federal jurisdiction in *Westcoast Energy Inc. v. Canada (National*

Energy Board), [1998] 1 SCR 322, esp. at paras 111, 125 and 128. The test to determine whether a related operation is integrated or “functionally connected” to the federal undertaking is flexible, different decisions have emphasized different factors, and there is no simple litmus test: *Tessier*, at para 45.

[12] The Supreme Court in *Tessier* then stated:

[46] So this Court has consistently considered the relationship from the perspective both of the federal undertaking and of the work said to be integrally related, assessing the extent to which the effective performance of the federal undertaking was dependent on the services provided by the related operation, and how important those services were to the related work itself.

[47] Applying these principles to the facts of this case, can it be said that *Tessier*’s stevedoring activities are integral to a federal undertaking in a way that justifies imposing exceptional federal jurisdiction for purposes of labour relations?

[Emphasis added.]

[13] The Supreme Court noted that, until its decision in *Tessier*, it had applied the derivative jurisdiction test for labour relations in two contexts. First, federal labour regulation may be justified when the services provided to the federal undertaking form the exclusive or principal part of the related work’s activities. Second, federal labour regulation may be justified when the services provided to the federal undertaking are performed by employees who form a “functionally discrete unit” that can be constitutionally characterized separately from the rest of the related operation: *Tessier*, at paras 48-49.

[14] In *Tessier*, the issue was whether its stevedoring operations formed a significant part of its overall operations: *Tessier*, at para 51. Because *Tessier*’s operations were indivisible and

integrated, the Supreme Court held that “[o]nly if its dominant character is integral to a federal undertaking will a local work or undertaking be federally regulated; otherwise, jurisdiction remains with the province”: *Tessier*, at para 55. In the circumstances, Tessier did not meet this threshold. The majority of its operations were non-shipping activities; its stevedoring activities accounted for 14 percent of its overall revenue and 20 percent of the salaries paid to employees: *Tessier*, at para 56. Its stevedoring work was local – all at specific sites in Quebec – and was a small or minor part of its overall operations: *Tessier*, at paras 57-59.

[15] The Supreme Court concluded the analysis from the perspective of the federal undertaking by assessing the dependency of the federal undertaking on Tessier’s operations. In a passage emphasized by the applicant, Justice Abella stated:

[61] To be relevant at all, a federal undertaking’s dependency on a related operation must be ongoing. Yet we have no information about the corporate relationship between Tessier and the shipping companies, whether Tessier’s stevedoring activities were the result of long-term or short-term contracts, or whether those contracts could be terminated on short notice. There is nothing, in short, to demonstrate the extent to which the shipping companies were dependent on Tessier’s employees. As a result, as in the Court of Appeal, no conclusions could even have been drawn about whether those of Tessier’s employees who occasionally performed stevedoring activities were integral to federal shipping undertakings. This too argues against imposing exceptional federal jurisdiction.

[Emphasis added.]

[16] To foreshadow the derivative jurisdiction analysis below, I note the three recent appellate decisions that were prominent in the parties’ submissions on this application.

[17] The applicant relied on *Ramkey Communications Inc. v. Labourers' International Union of North America*, 2019 ONCA 859 (application for leave dismissed, May 7, 2020, SCC File No. 38979, 2020 CanLII 32276), and *Madysta Télécom ltée c. Commission des normes, de l'équité, de la santé et de la sécurité du travail*, 2020 QCCA 183 (application for leave dismissed, June 25, 2020, SCC File No. 39105, 2020 CanLII 41792). These cases found provincial jurisdiction (and rejected federal derivative jurisdiction) over labour relations of companies involved in the construction of towers for telecom companies.

[18] The respondent relied on the Federal Court of Appeal's decision in *Telecon*, which upheld, on judicial review, a decision of the Canada Industrial Relations Board ("CIRB") that federal derivative jurisdiction for labour relations applied to Telecon owing to its significant participation in the design, construction and maintenance of telecommunications networks and infrastructure for entities falling in federal jurisdiction over telecommunications.

II. Events leading to the Decision under review in this proceeding

[19] The following chronology is taken from the Activity Log and the "Case Summary Report – Jurisdiction" (the "Case Summary") prepared by the ESDC officer who rendered the Decision. The chronology and the facts are not materially in dispute between the parties.

[20] From 1992 until 2021, the applicant was treated as subject to federal jurisdiction for the purposes of labour legislation.

[21] In 2021, an officer at ESDC conducted an investigation into the applicant. The officer gathered information from the applicant and from the applicant's website.

[22] By letter dated July 16, 2021 (the "2021 Decision"), the officer concluded that the applicant was not subject to federal jurisdiction for the purposes of labour legislation. This letter advised that provincial law applied to the applicant because it was mainly engaged in telecommunications networks design, engineering, construction, and maintenance, activities that (according to the letter) fall under provincial jurisdiction under section 92(13) of the *Constitutional Act, 1867*.

[23] The 2021 Decision considered both direct and derivative jurisdiction and referred in footnotes to the Supreme Court's decision in *Tessier*, and to the appeal courts' decisions in *Ramkey Communications* and *Madysta Télécom*. The 2021 Decision did not refer to the Federal Court of Appeal's decision in *Telecon*. Based on these decisions, the 2021 Decision reasoned that "in order to fall under federal jurisdiction in a derivative way, employers like Westower [sic] must demonstrate that they are vital, essential and integral to a specific federally regulated telecommunications company" [emphasis added].

[24] The 2021 decision letter found that WesTower had not demonstrated that its main activities fall under federal jurisdiction and specifically, that it "did not establish that any of the federally regulated telecommunications clients depend[ed] directly on [WesTower] services to operate their business[es]". According to the letter, the applicant "offer[ed] services to many clients every year in the telecommunications sector, and ... none of those clients depend solely

or to a significant degree on [WesTower's] services since competing businesses offer equivalent services". The letter concluded that "from now on, provincial or territorial labour laws shall govern [WesTower] as an employer."

[25] In 2023, a different officer (who later rendered the Decision under review) learned that the applicant was a contractor performing work on telecommunications towers in northwestern Ontario. The officer discovered the 2021 Decision finding provincial jurisdiction but that in the federal government's database, there were over 100 intervention activities by the federal government with the applicant dating back to 1992. The officer consulted internally within the federal department's "Labour Program" and reviewed an internal memorandum that viewed the court decision in *Madysta* as not supported by "mainstream case law and should not be relied upon".

[26] The officer determined that jurisdiction over the applicant needed to be reassessed and commenced an investigation into jurisdiction. As part of the investigation, the officer contacted the applicant to gather facts. In October 2023, the officer met virtually with two of its senior employees. Soon after, in early November, the officer emailed detailed questions for the applicant, to which it responded in January 2024.

[27] On February 5, 2024, the officer advised the applicant of the preliminary findings in the investigation and invited the applicant to discuss or submit any additional information prior to February 16, 2024. Following some agreed time extensions, the applicant provided legal

submissions from its counsel dated March 28, 2024. The applicant did not respond to or correct any of the officer's preliminary factual findings.

[28] In early April 2024, the officer provided the applicant with the Decision.

III. The Decision

[29] Both parties treated the Decision as comprising three documents:

- a) a letter from the officer on ESDC letterhead dated April 2, 2024;
- b) a cover email from the office to the applicant on April 3, 2024, attaching the letter. The cover email communicated the outcome and some of the officer's reasoning; and
- c) the undated Case Summary prepared by the officer, which contained facts and detailed analysis.

[30] I agree with this characterization of the components of the Decision. These three documents show the facts and the underlying analysis that led to the overall conclusion in the Decision.

A. *The Letter dated April 2, 2024*

[31] This letter advised the applicant that the officer had concluded the investigation into jurisdiction and had determined that the applicant was subject to federal jurisdiction for the purposes of labour legislation. The letter advised:

The *Canada Labour Code*, Part II, applies because your company is almost exclusively dedicated to providing services to federal

undertakings under 2(b) of the *Canada Labour Code*, such as Rogers, Bell, Telus, etc. These services include, but are not limited to, the construction, maintenance, and repair of telecommunication towers. The federal undertakings depend on these services in order to properly function, so therefore your company is considered vital, essential, and integral to federal undertakings.

[Emphasis added.]

B. *Email dated April 3, 2024*

[32] The covering email also confirmed that federal labour jurisdiction applies to the applicant. The email advised that “[m]ainstream case law [did] not support the interpretation that in order for derivative federal jurisdiction to apply, one must be vital, essential, and/or integral to a specific federal company, as opposed to a federal industry or sector”. The email found that the Supreme Court’s decision in the *Stevedores Reference* supported the application of federal jurisdiction.

[33] According to the cover email, “[d]erivative federal jurisdiction [was] justified because WesTower is almost exclusively dedicated to providing services to federal undertakings and the federal undertakings depend on the services provided by WesTower in order to properly function”.

C. *The Case Summary*

[34] The Case Summary is a six-page detailed summary of facts and analysis, prepared by the officer using facts gathered during both the 2021 investigation and the 2023-2024 investigation.

[35] The Case Summary referred to the process leading to the Decision, including gathering information from the applicant’s representatives. Its analysis of the constitutional issues referred

to case law, including *Tessier*, *Madysta Télécom* and *Ramkey Communications*. It noted that in one meeting, the applicant's representatives questioned the decision in *Madysta Télécom* and raised the possible application of *R. v. LeBlanc & Royle Telecom Inc.* (1994), 18 OR (3d) 737 (CA), 1994 CanLII 572.

[36] The Case Summary set out the following facts:

- WesTower has between 400 and 600 employees throughout Canada, with five main areas of activities: wireless construction, wireline construction, professional services, technical services, and fabrication.
- Wireless construction makes up 85% of WesTower's work, which involves tower manufacturing and construction, network construction, project management, etc. 99% of these activities are performed by WesTower employees, but in rare cases, some work may be subcontracted out.
- Wireless construction includes site development and foundation work, fabrication of the tower, erection of the tower, installation of client supplied products such as the antenna, hook up of the power and network connections in the tower shelter, and the building of any shelter required to house telecommunications equipment.
- 90% of WesTower's wireless construction activities are devoted to Rogers, Bell, and Telus.
- Approximately 9% of WesTower's work is fabrication, which primarily involves the fabrication of tower and tower components. The applicant also fabricates non-telecommunication products, such as steel handrails and stairs; however, this is not the focus of its business.

- WesTower also sells tower components to other companies that would then be responsible to construct the tower. Approximately 5% of WesTower's annual revenue is associated with tower components sales to other companies.
- WesTower fabricates the towers to meet the requirements of its telecom client.
- WesTower is also engaged in telecommunication network and tower maintenance, inspections, and emergency repair services.
- WesTower operates in a free market, with many competitors who offer similar services for the construction, maintenance, and repair of telecommunication towers and networks.
- WesTower does not have any contracts where it has the sole rights to be the provider of services. All contracts are bid on by WesTower and their competitors.
- Currently, WesTower holds a Master Service Agreement (an "MSA") for tower design, construction, and maintenance services with Bell, Rogers, Telus, Xplore, Valley Fibre, and Sasktel.
- Generally speaking, telecom companies do not currently have the ability to fabricate, design, or construct telecommunication towers, which is why they contract this work to WesTower and other similar companies.
- Approximately 8-10% of WesTower's annual revenue is from work performed with non-telecom organizations, such as the CBC, NAV Canada, Coast Guard and BC Hydro.
- After WesTower constructs a tower for a client, it does not retain any rights or ownership over the tower. The client is not bound by contract to use WesTower

for future services, such as tower maintenance or inspections; however, the towers typically include a 12-month warranty.

- WesTower does not manufacture the antennae, which are typically provided by the client for WesTower to install on the tower.
- WesTower also provides tower network infrastructure maintenance and inspection services. If a telecom client has a tower connectivity outage, the client will request WesTower to investigate and diagnose the tower. At the request of the client, WesTower will also conduct proactive inspections on towers.
- WesTower holds emergency call-out contracts with telecom companies, to provide them with emergency tower repair services.
- During construction, WesTower does not select the location or position of towers. The client advises WesTower of the specific location and requirements.
- Steps 1-4 noted in Innovation, Science, and Economic Development Canada's Antenna Tower Siting Procedures process CPC-2-0-03 (CPC-2-0-03 — Radiocommunication and Broadcasting Antenna Systems (canada.ca) are not handled by WesTower, but rather its client.
- WesTower does not believe it falls within the jurisdiction of the *Telecommunications Act* or *Radiocommunication Act*.
- The majority of WesTower's employees are non-unionized. It has fewer than 20 unionized employees, which it hired from *Commission de la construction du Québec* union for Aerial Lineman work.

[37] The officer's analysis in the Case Summary considered an internal memorandum on jurisdiction that discussed the *Stevedores Reference* and advised that *Madysta Télécom* was "not supported by mainstream case law and should not be relied upon". The analysis found that, like the stevedoring companies, the applicant "exists to provide services to the federal telecommunications sector, primarily through wireless construction, which makes up 85% of their work. Of note, 90% of wireless construction is performed for Rogers, Bell, and Telus, who WesTower holds Master Service Agreements with". After a discussion of additional facts related to the applicant's business, the analysis found it "clear that WesTower exists to provide services related to telecommunications and is almost exclusively dedicated to the telecommunications sector".

[38] The analysis found that the applicant's activities were "vital to the proper functioning of the telecommunications sector". According to the analysis, the applicant "specializes in the construction and maintenance of cellular towers. Without properly functioning towers, wireless coverage in the vicinity of the tower would be lost, affecting the telecommunications network." The analysis referred to the applicant's design, fabrication and construction of towers to meet the requirements of its federally regulated telecom client, including activities that directly affect the functionality of the towers.

[39] The analysis noted the applicant's contracts to provide maintenance, inspection and repair of telecommunications towers and "emergency call-out services". The analysis found that generally speaking, "the telecom sector does not currently have the ability or capacity to perform work involving towers. In other words, if there is an issue with a tower that is affecting

telecommunications, then the telecom company relies upon WesTower, or a similar company, to resolve the issue.” To the officer, this was a clear “indication of just how vital and essential WesTower is to companies who are engaged in telecommunications networks connecting a province with another province or extending beyond the limits of a province”.

[40] In a passage challenged by the applicant, the analysis stated:

WesTower exists to provide specialized services to the telecommunication sector, with a focus on tower construction and maintenance. The majority of telecom companies do not currently have the ability or capacity to perform tower construction or tower related work. Accordingly, the telecom companies contract this work out to WesTower and WesTower’s competitors. The telecommunications sector relies on WesTower and companies similar to WesTower, for tower related work. If WesTower and companies who perform similar work ceased to exist, it would have a catastrophic effect on telecommunications, and the telecom sector’s ability to develop or maintain their tower infrastructure. If WesTower ceased to exist, then clearly one of their competitors would fill in the gap, but this does not mean that derivative federal jurisdiction does not apply.

The applicant’s submissions argued that the last sentence contained an error of law.

[41] The officer’s analysis concluded that the applicant met the test in the Supreme Court’s decision in *Tessier* for derivative federal jurisdiction, as it “is almost exclusively dedicated to providing services to federal undertakings (i.e. Rogers, Bell, Telus, etc.) in the telecommunications sector and these federal undertakings depend on WesTower in order to function ... it is vital, essential, and integral to the federal telecom sector”.

IV. The admissibility of affidavit evidence

[42] Both parties filed affidavits on this judicial review application. The applicant filed the affidavit of Mr Poon, while the respondent filed an affidavit of Ms Smith. Neither party objected to the filing of other's affidavit, but both recognized that the affidavits provided "new" evidence to supplement the record before the ESDC officer. Both parties referred to their own affidavits to support some arguments on the merits of this application.

[43] The applicant maintained that both affidavits were admissible and any concerns should go to weight. According to the applicant, the information in Mr Poon's affidavit is admissible as consistent with the information provided to the officer, with some additional details. The applicant maintained that nothing in the Poon affidavit contradicted the information provided to the officers during the two investigations. In addition, the applicant argued that some evidence he provided (the existence of office locations across Canada) is irrelevant in law to the constitutional analysis. The applicant conceded that Mr Poon's affidavit did contain new information on the termination provisions of the MSAs, but argued it was not determinative and was consistent with the information provided earlier. The applicant argued that there are always termination provisions in agreements.

[44] The respondent relied on Ms Smith's affidavit for the history of the application of federal labour legislation to the applicant and relied on Mr Poon's affidavit to confirm certain facts relation to the applicant's national construction business in many provinces and territories – across provincial boundaries.

[45] Are the affidavits admissible in this Court? Partly.

[46] The general rule on applications for judicial review is that the evidentiary record before a reviewing court is restricted to the evidentiary record that was before the administrative decision maker when the impugned decision was made: see e.g., *Laflamme c Canada (Agence du national)*, 2026 CAF 101, at para 14; *Andrews v Public Service Alliance of Canada*, 2022 FCA 159, at paras 18; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at para 19.

[47] There are exceptions to that general rule, one of which is for “general background” information: see *Andrews*, at para 19; *Association of Universities and Colleges*, at para 20. The Federal Court of Appeal has stated that such background information must be “limited to non-argumentative statements or summaries of the evidence which were before the merits-decider”. However, “in no circumstances should it introduce new information that goes to the merits of the case”: *Andrews*, at para 19. In that case, the appellate court rejected information in an affidavit that went “directly to the merits of the case” and which the applicant used to challenge findings of fact in the decision under review: *Andrews*, at para 20.

[48] There are some Federal Court cases that provide for some leeway to admit new evidence in matters involving constitutional issues under the *Canadian Charter of Rights and Freedoms*, particularly if the applicant had no opportunity to contribute to the record before the decision maker: see *Matsqui-Abbotsford Impact Society v. Canada (Attorney General)*, 2026 FC 268, at paras 101-102 and the cases cited there. There is longstanding appellate jurisprudence requiring

Charter challenges to be decided with the benefit of evidence and not in a factual vacuum or in the abstract: see e.g., *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27, [2022] 1 SCR 794, at para 70; *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086, at pp. 1099-1101; *MacKay v Manitoba*, [1989] 2 SCR 357, at pp. 361-362; *Bekker v Canada*, 2004 FCA 186, at para 12.

[49] The same principle applies in a factually-dependent division of powers case: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 SCR 146, at para 46. This Court has applied such flexibility to the admission of new evidence on judicial review of division of powers matters: *City of Medicine Hat v. Canada (Attorney General)*, 2019 CanLII 31004 (FC), paras 23-34 (cited in *Matsqui-Abbotsford Impact Society*, at para 101).

[50] Appeal courts have long emphasized the importance of a solid basis of factual findings for the constitutional analysis of whether a business falls under federal or provincial jurisdiction for the purposes of labour relations. The importance of facts relevant to the constitutional analysis is heightened for the consideration of the connection between the particular related or subsidiary operation (here, the applicant) and the core federal undertaking (here, the telecommunications undertakings). See *Telecon*, at para 32, quoting *Northern Telecom 1*, at p. 139; *East Coast Hydraulics & Machinery (2009) Limited v. International Longshoremen's Association, Local 1976*, 2025 FCA 64, at paras 9-10; *Picard v. Canada (Attorney General)*, 2018 FC 747, at para 36. The Supreme Court also noted the absence of certain evidence in *Tessier*, at paras 60-61.

[51] In its relatively brief reasons in *East Coast Hydraulics & Machinery*, the Federal Court of Appeal did not admit new evidence on judicial review and did not discuss flexibility in the legal test (one way or the other): at para 10.

[52] This application is not like *Telecon*, in which the overall record was sufficient but “sparse”. Here, the facts emerged from two investigations, during which the applicant had ample opportunity to contribute to the factual record and did so by providing detailed responses to the questions posed to it by the two officers. The proposed affidavit evidence is also not extrinsic evidence used in some cases that challenge the constitutionality of a statutory provision: see *Englobe Environment Inc. v. Canada (Food Inspection Agency)*, 2023 FC 1676, at para 16.

[53] Nonetheless, I believe that the application of some flexibility for additional facts is warranted in this case. Two factors are important to this flexibility: the nature of some of the evidence, and the events that led to this application.

[54] In my view, it is important that the Court have accurate facts as they stood when the Decision was made in April 2024. As I will explain, certain evidence in the Poon affidavit corrects and adds a few details to the existing factual record that was before the officer. While the applicant did not characterize the affidavit as containing corrections, that is the substance of the admissible “new” facts.

[55] The corrections and a few additional details in the Poon affidavit ensure that the specific facts about the wireless and wireline aspects of the applicant’s business, as existed as of the time

of Decision, are taken into account on this application. Admission of the information upholds the respective roles of the decision-maker (to find facts and make a decision on the basis of the record provided), and the Court (to conduct a review of the Decision, in this case on a correctness basis using the applicable constitutional principles): *Association of Universities and Colleges*, at paras 17-18, 20. The admission in this case is a minimal incursion into the administrative law principle that judicial review of a decision takes the record as it was before the decision-maker: *Association of Universities and Colleges*, at para 19; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, at para 97.

[56] In addition, from 1992 until 2021, the applicant was considered subject to federal jurisdiction, including the *Canada Labour Code*. The 2021 Decision reversed that, concluding that the applicant should be subject to provincial labour legislation. Then in 2024, the Decision under review disagreed with the conclusion of the 2021 Decision and returned the applicant to federal jurisdiction. These reversals obviously cannot continue – which is presumably why the applicant filed this application. The applicant requires a firm answer about what labour laws apply to its 600 workers across Canada.

[57] The additional affidavit evidence admitted on this application is either proper background information under the *Andrews* criteria or is narrow and seeks to ensure the Court has fully accurate and up-to-date information, as of the date of the Decision under review, on which to base the constitutional analysis.

[58] I turn now to the two affidavits.

A. *The affidavit filed by the applicant*

[59] The applicant filed the affidavit of its chief financial officer, Mr Poon. A close examination of its contents shows that it supplies some admissible evidence: proper background information and additional facts by way of correction and some elaborative details on certain topics that were already addressed in the fact summary in the officer's Case Summary. The affidavit also provides new evidence going to the merits, which is impermissible.

[60] The Poon affidavit includes the date and jurisdiction of applicant's incorporation, corporate information (parent company, a subsidiary) and the location of its head office and the locations of 16 offices across Canada. The new corporate information is not controversial and is background that does not impact the constitutional analysis. It can be admitted. The locations of the applicant's offices provide details of pre-existing facts that were more broadly stated; specifically, it refines the statements that the applicant has employees throughout Canada and provides services across Canada. It is also uncontroversial. It is not technically background information but is admitted under the narrow standard for additional information articulated above.

[61] The Poon affidavit confirms that the applicant has approximately 600 employees. The Case Summary advised 400-600, based on earlier information from the applicant. This information is confirmatory and appears to be an update for accuracy. Neither party referred to the different numbers during argument. The more precise number of employees, rather than a range, is not material to the constitutional analysis and is admissible on this application under the narrow standard above.

[62] The Poon affidavit includes more precise information about the applicant's business, as follows:

- a) Paragraphs 8a. and 8b. break down of the applicant's services into wireless and wireline construction. The affidavit describes the applicant's services as construction of wireless sites (comprising 63% of its business in 2023) and construction of wireline projects (22% of its business in 2023).
- b) Paragraph 8c. describes the applicant's engineering and design services including site designs and engineering specifications, which represent 2% of the applicant's business.
- c) Paragraph 8d. advises that the applicant's in-house fabrication and manufacture of items for the telecommunications and aviation sectors represented 11% of its business. By comparison, the officer's Case Summary refers to 9% of the applicant's business as fabrication, mostly towers and tower components. (The Poon affidavit does not break out telecommunications versus aviation fabrication, which could account for the difference.)

[63] In my view, the information in paragraphs 8a. and 8b. is admissible, as this evidence constitutes a correction of the applicant's previous information about how its construction work breaks down in percentage terms and describes its wireline business, as of the date of the Decision.

[64] The Case Summary noted that applicant was engaged in wireless and wireline construction. One of the facts provided by the applicant for the 2021 Decision was that wireless

construction was 85% of its business and wireline construction was less than 5%. The facts gathered in 2021 from the applicant were that the applicant had five lines of business, broken down as follows:

- Wireless Construction (85%)
- Wireline Construction (less than 5%)
- Professional Services (less than 5%)
- Technical Services (less than 5%)
- Fabrication (9%)

[65] In November 2023, the officer who made the Decision made preliminary findings and put them to the applicant, including the breakdown of wireless and wireline as stated above. The officer also asked a question (#12) about the nature of the wireless construction business. When it responded, WesTower described its wireless construction activities but did not correct the breakdown above and did not advise any change to the wireline construction aspect of its business.

[66] Paragraphs 8a. and 8b. of the Poon affidavit provide a breakdown of 85% of the applicant's business, distinguishing wireless and wireline construction. These paragraphs also describe the applicant's construction services: wireless construction as "managing and planning out the project site, installing towers and other telecom equipment, and inspection/maintenance/repair of telecom towers" and construction of wireline projects as "construction, testing, repair and maintenance of aerial and underground cable systems, anchoring, underground conduit placement, equipment installation, fibre optics fusion splicing, fibre applications, manhole installations and repairs, directional drilling, and pedestal installations".

[67] Paragraphs 8a. and 8b. also advise that the wireline work is performed by the applicant's subsidiary and a separate business unit of the applicant. Paragraph 25 of the Poon affidavit confirms that the applicant's operations did not "materially" change between 2021 and 2024 (other than the acquisition of the subsidiary, which does the wireline work).

[68] In short, the officer made the Decision on the basis of 85% of WesTower's work being wireless construction and less than 5% being wireline construction; Mr Poon's affidavit modifies those figures to 63% and 22% respectively. Notably, in both cases the sum of work on wireless and wireline construction is approximately 85%. From this evidence and the applicant's oral submissions, I understand paragraphs 8a. and 8b. of the Poon affidavit to update and correct the nature of this collective 85% of the applicant's business for 2023. The Poon affidavit provides a description of wireline construction that the applicant did not provide to the officer when the facts indicated that this aspect of the business was very small (less than 5%). (It does not advise when WesTower acquired the subsidiary.)

[69] I am conscious that the breakdown information for wireless and wireline and the description of wireline could be considered "new" evidence. I also recognize that the officer might have asked additional questions concerning wireline construction if the breakdown had been provided in a timely manner. However, the more precise and accurate information confirms in essence that at the time of the Decision, the applicant engaged in wireless construction and wireline construction (which the applicant argued is all construction work) simply in different proportions than the applicant had advised the officer. It did so for the same customers, which were all or nearly all federal undertakings. The Poon affidavit suggests no material change in the

aggregate proportion of the wireless plus wireline work in the applicant's business or in the identity of its customers. The Poon affidavit provides no additional details about the wireless or wireline work done for each customer.

[70] It is also important to recognize that this application was argued as a binary choice between the two orders of government for labour legislation purposes, for the applicant's workforce. The applicant did not advance the argument that its workforce should be divided as between itself and its subsidiary, or by carving out a "functionally discrete" business unit (as occurred in *Tessier*), for the purposes of the application of federal versus provincial labour legislation.

[71] In the circumstances, I admit paragraphs 8a. and 8b. and paragraph 25 to ensure the Court considers accurate information related to the applicant's business activities for federal undertakings that existed as of the date of the Decision in April 2024.

[72] Paragraph 8c. adds additional factual detail to the existing fact that the applicant provides some engineering services, including the nature of the engineering services and their proportion of business – only 2%. This refines the information provided for the 2021 Decision (professional services activities were less than 5% of the applicant's work). For its part, paragraph 8d. appears not to provide any incremental information and is best read as consistent with existing facts. The information in these paragraphs of the Poon affidavit appear to be consistent with and complementary to the information in paragraphs 8a. and 8b. Both paragraphs 8c. and 8d. are not

material to the constitutional analysis of derivative jurisdiction. They are admitted as updating existing facts for accuracy.

[73] Paragraph 9 of the Poon affidavit confirms that the applicant's largest customers from 2021 to 2023 were Rogers, Bell and Telus, facts that were already in the record before the officer. It is admissible as background information.

[74] The Poon affidavit, in paragraphs 10-15, provides a discussion of the applicant's customer relationships and refers to the MSAs mentioned in the officer's Case Summary. The affidavit advises that the MSAs can be terminated on short notice, evidence the applicant emphasized during oral argument. In my view, paragraphs 10-15 should not be admitted into evidence on this application. While the evidence about customer relationships is presented at a high level, it is in reality a characterization of those relationships that does not constitute the kind of "non-argumentative statements" contemplated by *Andrews*. The affidavit did not attach an MSA, whether a sample or anonymized; instead, it mentioned only certain selected aspects of the MSAs (concerning termination) in an effort to highlight a factor supportive of the applicant's argument on the merits of the constitutional dependency analysis: *Andrews*, at paras 19-20; *Tessier*, at para 61. The Court does not have the whole picture of the terms of the MSAs, which could have been provided to the officer or the Court. For these reasons, I find that paragraphs 10 to 15 of the Poon affidavit are not admissible on this application.

[75] Finally, through paragraphs 16 to 24, nine documents are attached to the Poon affidavit as exhibits, all of which were before the officer at the time of the Decision and are in the Certified

Tribunal Record. They are admissible as background information, only for easy reference as they are all already in the record before the Court.

[76] The Poon affidavit is admitted into evidence on this application, except for paragraphs 10-15.

B. *The affidavit filed by the respondent*

[77] The respondent filed an affidavit of Ms Smith, an employee of ESDC. The affidavit attached a list of “intervention activities” involving the applicant by ESDC’s labour standards and occupational health and safety business lines from December 1992 to August 2021. The source of the list was a federal computer program known as “LA 2000”. Ms Smith took screenshots of the list of interventions and compiled them into a list in Word. The list attached to the affidavit provides the Court with additional (but very cursory) details about the interventions.

[78] This information attracted considerable attention in the respondent’s written and oral submissions, given that there had been over 100 interventions by federal personnel in the years before 2021. The respondent also referred specifically to the nature of certain interventions. The applicant argued that the nature of the 100 interventions was irrelevant because what was believed prior to 2021 should not affect the constitutional analysis. The respondent made submissions on certain court decisions mentioned amongst the interventions.

[79] In my view, the Smith affidavit including the list of interventions should be admitted into evidence. The Case Summary noted the existence of over 100 federal government interventions

with the applicant since 1992, citing LA 2000 expressly as the source. Ms Smith had to compile the list of interventions using screenshots sourced from LA 2000, which likely explains why the list was not otherwise in the record. The Case Summary referred expressly to two legal cases mentioned on the list. It is apparent that the officer had access to and reviewed information on the list of interventions, even if the Case Summary did not confirm that that the officer reviewed the nature of each and every intervention.

V. Standards of Review

[80] The central question on this application for judicial review concerns the application of constitutional law to facts that are essentially undisputed. The standard of review for this issue is correctness, as the analysis concerns whether the labour relations at issue are subject to federal or provincial labour legislation: *Biogenie Canada Inc. v. Canada (Food Inspection Agency)*, 2025 FCA 150, at paras 25-26 (leave to appeal granted, May 28, 2026, SCC File No. 42060, 2026 CanLII 50173 (SCC)); *Telecon*, at para 16; *XL Digital Services Inc. v. Communications, Energy and Paperworkers Union of Canada*, 2011 FCA 179, at para 12. This correctness standard did not change with the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, at paras 17, 53, 55-56: see *Canada (Attorney General) v. Northern Inter-Tribal Health Authority Inc.*, 2020 FCA 63, [2020] 3 FCR 231, at paras 12-13.

[81] The findings of fact in the Decision are entitled to deference if they can be isolated from the constitutional issues. In that circumstance, the reasonableness standard applies: *Biogenie*

Canada, at para 26 (citing three Supreme Court cases); *Telecon*, at para 17; *XL Digital Services*, at para 13.

[82] The constitutional significance of facts is an aspect of the constitutional analysis reviewable on a standard of correctness without deference: *Telecon*, at para 18; *XL Digital Services*, at para 13.

VI. Analysis

[83] The Decision may be distilled into the following essential points:

- a) With respect to its essential operating nature, the applicant “exists” and is almost exclusively dedicated to providing services to the telecommunications sector including Bell, Telus and Rogers and other federally regulated telecoms. The applicant’s services include the design, fabrication, construction, installation of telecommunications towers, their ongoing maintenance and repair, and emergency services for those towers;
- b) the applicant’s activities are vital to the proper functioning of the telecommunications sector. The federal undertakings are dependent on the applicant’s services for the proper functioning of their networks. The telecom companies rely on the applicant’s vital services because they do not have the ability or capability to perform those services; and
- c) for derivative federal jurisdiction over labour relations to apply, it is not necessary for the applicant to be vital, essential or integral to a single or specific federal company or undertaking (as opposed to a federal sector or industry) or for the

applicant to be the sole provider of services to a federal undertaking. The Decision stated that it applied the principles in *Tessier* and the *Stevedores Reference*. The Decision declined to apply *Madysta Télécom*.

[84] On this application, the applicant did not take issue with any facts in the Decision. The applicant submitted that the Decision erred in law and misapplied the law to the facts. The applicant contended that the Decision erred when it concluded that the applicant's construction work was integral to a federal undertaking and in its analysis of the interdependence of the applicant and the federal undertaking. In essence, the applicant argued that there was no relationship of dependency of a federal undertaking on the applicant.

[85] More specifically, the applicant maintained that the Decision erred, first, by finding that derivative jurisdiction could exist in an industry in which the applicant and numerous competitors provide construction work to numerous federal undertakings; and second, by grouping the applicant's construction work collectively with the construction work of its competitors. According to the applicant, the correct constitutional analysis rests on whether the workforce of (or within) a single entity such as the applicant is so integral to a single federal undertaking such as a telecommunications company customer, to justify the application of federal jurisdiction over the applicant's labour relations.

[86] The applicant maintained that the Decision wrongly failed to follow the Supreme Court's decision in *Tessier* (particularly at paragraph 61), and by failing to follow the decisions of the Quebec Court of Appeal in *Madysta Télécom* and the Court of Appeal for Ontario in *Ramkey*

Communications. The applicant argued that the Federal Court of Appeal's decision in *Telecon* was either distinguishable or should not be followed, because it was decided on a sparse factual foundation and its reasoning relied on the Ontario Divisional Court's decision in *Ramkey Communications*, which was later reversed by the Court of Appeal for Ontario: see *Telecon*, at paras 47-50, discussing *Ramkey Communications Inc. v. Labourers International Union of North America et al.* (2018), 142 O.R. (3d) 193 (Div Ct), 2018 ONSC 4791. The applicant also maintained that *Telecon* incorrectly concluded that services could be provided to a network of federal undertakings.

[87] The respondent supported the correctness of the Decision. The respondent submitted that the Decision correctly concluded that the applicant exists to provide services to telecom companies that are federal undertakings, and that the telecom companies are dependent on the applicant for construction services that are vital, essential and integral to their operations and that they cannot perform themselves. The respondent disagreed with the applicant's view of the applicable constitutional law, arguing that it was not necessary for the applicant to provide services only to one federal undertaking. Instead, the respondent submitted that derivative jurisdiction could be found for labour relations legislation if the applicant provided essential operational services either (i) to several companies in the telecommunications sector, or (ii) to the telecommunications network of those companies which is itself a federal undertaking made up of an aggregate of telecom companies (citing *Telecon* and *LeBlanc & Royle Telecom*). The respondent noted that this Court is bound by decisions of the Federal Court of Appeal.

[88] Referring to the criteria in *Tessier*, the respondent supported the analysis in the Decision concerning installation of networks, the reasons why the applicant's work is integral to Telus, Bell and Rogers and their networks, and the dependency of these federal undertakings on the applicant for the proper functioning or performance of their networks. According to the respondent, the performance of the network constitutes a type of dependency in the telecom context and thus the applicant's services, which are broader than merely tower construction, are integral to the federal undertakings. In addition, the respondent argued that a properly functioning network is at the core of federal jurisdiction over telecommunications (citing *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at paras 66-69).

[89] For the following reasons, I conclude that the Decision was correct to conclude that derivative federal jurisdiction applies to the applicant's workforce for the purposes of labour relations legislation. In my view, the Decision correctly identified the principles set out in *Tessier* and applied them to the facts. The Decision is also consistent with the Federal Court of Appeal's analysis in *Telecon*, which this Court is bound to apply.

A. *The Decision correctly applied Tessier to the uncontested facts*

[90] The Decision correctly identified the analytical structure and correct legal principles for derivative federal jurisdiction over labour relations, as set out by the Supreme Court in *Tessier*.

[91] From a legal perspective, the Decision assessed whether the applicant's essential operational nature was integral to a federal undertaking, including the character of the applicant's services as a going concern and without undue focus on exceptional (minor) aspects. The

Decision concluded that these services formed a very significant part of the applicant's business. It also assessed the dependency of the federal undertaking on the applicant's services, including whether it was ongoing, and concluded that the services were integral to the federal undertaking. As may be seen, the Decision approached the analysis from the perspective of both the applicant and the federal undertaking. All of this is, at a high level, consistent with the applicable constitutional principles in *Tessier*. I will address the specific arguments raised in the applicant's submissions below.

[92] I see no error in the Decision's findings and analysis of the facts relating to the essential operating nature of the applicant. The Decision correctly accounted for the facts related to the applicant's ongoing operating characteristics, particularly its services provided to federal telecommunications companies. As the Decision found, a very substantial proportion of the applicant's work (85%) is wireless and wireline construction, of which 90% is for three companies (Bell, Telus and Rogers) that are federal undertakings in the telecommunications sector. Its MSAs include tower design, construction and maintenance services for six companies in the telecom sector, including Bell, Telus and Rogers and three others. Nearly all of the applicant's construction work (99%) is done by its own employees. On top of the 85% of its work that is wireless and wireline construction, another 9% of the applicant's business is fabrication, principally of towers and components. Tower fabrication is done to the specifications of the applicant's telecom customer.

[93] As the Decision found, the applicant also engages in telecommunications network and tower maintenance, inspections and emergency repair services.

[94] Mr Poon's affidavit confirmed the nature of 85% of the applicant's business for 2023, as 63% wireless construction and 22% wireline construction. Consistent with the analysis in the Decision, Mr Poon's affidavit described wireless construction as "managing and planning out the project site, installing towers and other telecom equipment, and inspection/maintenance/repair of telecom towers". He described construction of wireline projects as "construction, testing, repair and maintenance of aerial and underground cable systems, anchoring, underground conduit placement, equipment installation, fibre optics fusion splicing, fibre applications, manhole installations and repairs, directional drilling, and pedestal installations".

[95] Based on this information, all sourced from the undisputed facts listed in the Case Summary and the Poon affidavit, I conclude that from the perspective of the related undertaking (i.e., the applicant) the Decision correctly determined the essential character of the services provided by the applicant's indivisible workforce. It is the "construction" (as described) of wireless and wireline infrastructure for federal telecommunications companies. This work comprises a very substantial and dominant part of the applicant's business. Its role includes design and fabrication of wireless towers to the federal undertaking's specifications, installation of the wireless towers, the construction, testing, repair and maintenance of aerial and underground cable systems for wireline networks, and ongoing repair and maintenance of towers and networks after construction is completed. While each wireless or wireline project is local to where it is installed, the applicant's services are provided to telecommunications networks that are interconnected across Canada and the applicant provides its services to those networks across the country.

[96] I also see no error in the Decision's analysis from the perspective of the federal undertaking, based on the facts provided by the applicant and set out in the Decision. It made no error by determining that the applicant's work is vital to the creation and ongoing functioning of the networks of the federal telecommunications undertakings, or in the conclusion that the applicant's telecom company customers depend on the applicant's services for the proper functioning of their telecom networks (wireless and wireline). The Decision correctly found, based on the facts provided by the applicant, that the telecom companies do not have the ability to design, fabricate or construct telecommunications towers for their wireless businesses, so they contract this work to the applicant and other companies. In the absence of correcting or contrary information in Mr Poon's affidavit, the same must be true for the wireline business described in that affidavit – the federal telecommunications undertakings do not have the capacity or ability to engage in the wireline services provided to them by the applicant and are similarly dependent. In short, the Decision correctly found on the undisputed facts that the applicant's role is integrated into the creation, repair and maintenance of a network of towers essential to wireless telecommunications and into wireline networks.

[97] Before analyzing the applicant's specific arguments, I note that unlike the analysis in these Reasons, the Decision referred numerous times to the telecommunications "sector". I believe that the Decision simply used telecommunications "sector" as a shorthand. Its analysis focused on three telecom companies (Rogers, Bell and Telus) that figure prominently in the applicant's work, but also understood that there were three other telecom companies for which the applicant does similar work. In these Reasons, I have not adopted the "sector" language. The present analysis focuses on the facts of this case and the three principal companies in the

telecommunications sector for whose wireless and wireline networks the applicant does a very substantial proportion of its work.

B. *The impact of appellate court decisions*

[98] The parties disagreed about the impact of decisions of the Federal, Ontario and Québec courts of appeal and paragraph 61 of *Tessier*.

(1) The impact of the Federal Court of Appeal's decision in *Telecon*

[99] The analysis of the cases beyond *Tessier* must start with the Federal Court of Appeal's decision in *Telecon*, which concluded that derivative federal jurisdiction applied to govern labour relations of the Telecon employees at issue.

[100] Speaking for the court, de Montigny JA (now CJ) found that Telecon provided its services to "Canada's key telecommunications providers" through telecom infrastructure services and "connect[ing] users to various types of telecommunications networks" for many years: *Telecon*, at para 5.

[101] A detailed review of the evidence in the record in *Telecon* revealed references to the construction and installation of telecom infrastructure, system or networks, cabling infrastructure, wireline installation and construction, testing and repair and maintenance of wireless towers and Wi-Fi networks: see *Telecon*, at paras 34-35. The Federal Court of Appeal also referred to evidence of Telecon's "national presence" offering "design, infrastructure and

connectivity solutions to telecommunications companies nationwide”: *Telecon*, at para 36. The court held:

[37] It is abundantly clear from that brochure that Telecon considers itself to be much more than a construction company. In describing the “full life cycle of telecommunications network services”, it refers to its infrastructure capabilities (“construction, installation, testing, and maintenance of aerial and buried telecommunications network infrastructures”), design capabilities (“planning, design and permitting of all elements related to telecommunications networks”), and connectivity capabilities (“installation, repair and in-building cabling solutions” and “provisioning and maintenance services for wireless towers, small cells and Wi-Fi networks”).

[Emphasis added.]

[102] The Federal Court of Appeal found that Telecon was not merely a construction company, as it had argued; it was much more: *Telecon*, at paras 37-38.

[103] The Federal Court of Appeal found that the CIRB was correct to distinguish *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 SCR 754, “in which the construction of an airport runway was out of the company’s ordinary business and the employees had nothing more to do with the federal undertaking once it was completed”: *Telecon*, at para 39. The appeal court noted the Supreme Court’s statement that there was “nothing specifically federal” about the ordinary business of Construction Montcalm (citing *Construction Montcalm*, at p. 776).

[104] By contrast in *Telecon*, the Federal Court of Appeal found that the evidence on the record was “very specific as to what, if anything, is built or repaired by the applicant, and it all relates to telecommunications networks”. The evidence showed, “without a doubt, that the services

provided to that federal undertaking constitute the exclusive or principal part of the applicant's activities": *Telecon*, at para 39 [underlining added].

[105] In *Telecon*, the CIRB decision under review concluded that the relevant employees performed work that was "vital and integral" to a federal undertaking: *Telecon*, at para 42. The appeal court held that while the record was sparse, it seemed to indicate that, as in *XL Digital*, *Telecon*'s work was "integral to the telecommunications networks" of telecom companies, to justify imposing exceptional federal jurisdiction for labour relations purposes: *Telecon*, at para 41. The reasons of de Montigny JA referred to a longstanding Ontario case finding that the federal undertaking companies could not function without the initial installations and their continuous improvement extension and expansion: *Telecon*, at para 42, citing *R v. Ontario Labour Relations Board, Ex parte Northern Electric Co. Ltd.*, [1970] 2 O.R. 654, at para. 52, aff'd [1971] 1 O.R. 121 (CA).

[106] Several points emerge from this review of *Telecon* that directly address the issues raised by the applicant in this application.

[107] First, there is substantial overlap in the legal and factual basis for the finding of derivative federal jurisdiction in *Telecon*, and the legal and factual basis for the analysis in the present case. The respondent correctly submitted that the Federal Court of Appeal's decision in *Telecon* is binding on this Court.

[108] Second, the Federal Court of Appeal in *Telecon* found Telecon's work to be vital to the creation and ongoing functioning of the telecom networks. The same is true on the facts in the present case.

[109] *Telecon* affects the arguments and outcome of this application in another important respect. The construction and other services that grounded derivative federal jurisdiction in *Telecon* were not provided to a single telecommunications company: Telecon provided services to Canada's key telecommunications "providers" and to telecom "companies" (both plural): *Telecon*, at paras 4, 5, 36, 42. In addition, the appeal court's reasons also indicated that Telecon's building and repair services were all provided to telecommunications "networks" (*Telecon*, at paras 5, 37-39, 41) and that those networks were a federal undertaking: *Telecon*, at para 39. These aspects of *Telecon* meet the applicant's argument that there can only be a single federal company or undertaking to which a related entity provides services for the purposes of federal derivative jurisdiction over labour relations in telecommunications.

[110] Finally, it is convenient to address another argument made by the applicant now, because *Telecon* influences the analysis. The applicant submitted that the Decision erred by failing to apply paragraph 61 of *Tessier* (quoted above). However, unlike *Tessier*, there is information in this case about the relationship between the applicant and the telecommunications companies, which points to dependence on the applicant, including for the effective performance of the network (*Tessier*, at para 46). The MSAs between the applicant and the telecom companies, and the yearslong construction work for them, show an ongoing business relationship that was absent in *Tessier*, as does the extensive proportion of the applicant's work that is devoted to carrying

out the work under the MSAs. Also, unlike *Tessier*, the reliance of the telecom companies in this case on the skills and knowledge making up the applicant's services is evident through the absence of comparable capabilities within the telecoms themselves – a factual circumstance not disputed by the applicant. Further, the applicant's role in the creation and maintenance of wireless and wireline networks, and the obvious importance of the continuous functioning of towers and related infrastructure, as well as wireline cabling and related infrastructure, are also evidence to support a relationship of dependency as found in *Telecon* for the functionality of the wireless and wireline infrastructure when analyzing derivative jurisdiction: *Telecon*, at paras 40-42. Indeed, the evidence in the present case appears to be stronger than in *Telecon* on this issue. See also the Supreme Court's consideration of functionality, physical or operational connection, and importance of the related enterprise's services to the operation or "operating system" of the federal undertaking in *Tessier*, at paras 19, 36, 39, 51; *Westcoast Energy*, at paras 124, 127; *Central Western*, at pp. 1119 and 1140; *Northern Telecom 2*, at pp. 766, 770, 778; *Paul L'Anglais*, at p. 169; *Northern Telecom 1*, at pp. 133, 135 (#4); *Letter Carriers*, at p. 183.

[111] For these reasons, I find that numerous aspects of the Federal Court of Appeal's decision in *Telecon* support the correctness of the Decision under review in this application.

(2) The impact of the other appellate authorities

[112] *Tessier* did not provide guidance on whether the federal undertaking must be a single company to find federal derivative jurisdiction. None of the Supreme Court cases decided before *Tessier* addressed squarely the issue of a group of telecommunications companies as a federal

undertaking, although they often involved either a single related undertaking providing services to a single federal undertaking (e.g. *Northern Telecom 2*).

[113] Outside of the telecommunications realm, the *Stevedores Reference* involved stevedoring work provided by the Toronto employees of a company engaged exclusively in loading and unloading for seven shipping companies operating between Canadian and foreign ports: *Tessier*, at para 13; *Stevedores Reference*, at pp. 530-531, 536, 543, 567-568.

[114] Two provincial appellate cases cited by the parties on this application disagree on whether a federal telecommunications undertaking may be comprised of more than one entity.

[115] The applicant correctly observed that in *Madysta Télécom*, the Québec Court of Appeal held, with detailed supporting reasons, that a federal undertaking cannot be an industry or a group of undertakings: *Madysta Télécom*, at paras 71-86. *Madysta Télécom* was also a case involving construction for federally regulated telecommunications companies and its facts are similar to the present case. The appeal court found that the *Stevedores Reference* had to be examined in light of later developments in the Supreme Court cases and that the *Northern Telecom* decisions involved a single federal entity. In the Québec Court of Appeal's view, *Madysta* was arguing that it was integrated into a federal head of power, rather than a single discrete federal undertaking: *Madysta Télécom*, at paras 79-82.

[116] On the other hand, the Court of Appeal for Ontario has applied derivative federal jurisdiction to a case involving a "group of enterprises" that constituted a federal undertaking:

LeBlanc & Royle Telecom, at p. 740 of the Ontario Reports. The federal undertaking in *LeBlanc & Royle Telecom* was a group of eight entities engaged in interprovincial communications, including a broadcasting company, several telecommunications companies, the CBC and the Canadian Armed Forces. Most, if not all, were federally regulated: at p. 740.

[117] The Court of Appeal for Ontario found that the difference between a single core federal undertaking on one hand, and a group constituting a core federal undertaking on the other hand, appeared to be “irrelevant” having regard to the intertwining of labour relations and management in constitutional law: at pp. 740-741. As with *Madysta Télécom*, the facts in *LeBlanc & Royle Telecom* were similar to the present case. The business of LeBlanc was described as the “designing, building, erecting, inspecting, maintaining and repairing” of telecom towers including antennae, and emergency services. The affected employees were field crews located at six offices across Canada: at pp. 738-739. Witnesses provided evidence at trial about how the services of LeBlanc were integrated into operations of various customers: at p. 740. The appeal court rejected the argument that LeBlanc only provided construction, maintenance and repair services but not operations, because the trial judge found the field crews provided maintenance and emergency services, made ongoing changes to meet customer needs, and installed and maintained components of systems necessary for the proper functioning of the communications systems: at pp. 741-742. Overall, the Court of Appeal found no error that the employees were not governed by the Ontario provincial health and safety legislation.

[118] It appears that the Federal Court of Appeal's decision in *Telecon* was not cited to the Québec Court of Appeal (*Telecon* was released only a few months before *Madysta Télécom*). *Telecon* did not refer to *LeBlanc & Royle Telecom*.

[119] In light of the Federal Court of Appeal's decision in *Telecon*, the *Stevedores Reference* and the mixed views of two provincial appeal courts, I am unable to conclude that the Decision contained an error of law in its constitutional analysis in this matter involving telecommunications, by finding that more than a single entity may constitute a federal undertaking for the purposes of determining derivative federal jurisdiction over labour relations and the application of Part II of the *Canada Labour Code*.

[120] Because *Tessier* and *Telecon* bind this Court and I have found no errors in the Decision when applying those cases using a correctness standard of review, I do not find it necessary to resolve the inconsistencies in the provincial appellate court cases. In particular, it is not necessary to determine whether the Decision incorrectly relied on the internal ESDC advice that the Québec Court of Appeal's decision in *Madysta Télécom* was "not supported by mainstream case law". An answer to that question will not affect the outcome of the application in this Court.

[121] Finally, as just noted, the parties' submissions in this case have identified certain inconsistencies in the appellate case law on derivative federal jurisdiction over labour relations involving construction work for federal telecommunications undertakings. Given the reasoning in *Telecon*, which binds this Court, a resolution of the inconsistencies must be left to the appeal courts. Here, I will only observe that treating a telecommunications network as a federal

undertaking – as in *Telecon* – during the analysis of derivative federal jurisdiction is consistent with both the nature and function of the networks operated by the federally regulated telecom companies. The factual and legal analysis of derivative federal jurisdiction over labour relations cannot be insensitive to how the networks and their operation enable the communications in question (both inter-provincial and international). See, comparably, how the Supreme Court established the extent of direct federal jurisdiction over telecommunications in *Alberta Government Telephones*, at pp. 267-68 (*per* Dickson C.J., referring to the “physical framework for the provision of interprovincial and international telecommunications services”); *Téléphone Guèvremont*, at p. 879 (referring to “the nature of the services provided and the mode of operation of the undertaking” *per* Lamer CJ); see also *Châteauguay (City)*, at paras 66-69.

(3) The impact of other industry competitors providing services to the federal undertaking

[122] The applicant relied on the fact that it is a competitor in an industry with multiple participants that bid on construction work to be done for the telecom companies. The applicant submitted that the analysis of dependency in the Case Summary was in error when it stated that if “WesTower ceased to exist, then clearly one of their competitors would fill in the gap, but this does not mean that derivative federal jurisdiction does not apply”.

[123] In my view, the existence of competitors is not a silver bullet to answer the material question – whether the services provided by the related enterprise are integral, vital or essential to the federal undertaking, including the degree of the federal undertaking’s dependency on that enterprise. That is a question that must be answered by looking at all the facts, not simply whether there are multiple service providers in an industry. The existence of multiple court

decisions on derivative federal jurisdiction involving companies providing construction and other services to one or more telecommunications companies, with different outcomes depending on the specific facts, runs against the applicant's submission. This point is demonstrated by comparing this case with *Ramkey Communications*, as I will soon describe.

[124] The Federal Court of Appeal mentioned competitor construction companies in *XL Digital*. The court dismissed an application for judicial review of a decision that found federal derivative jurisdiction to apply. In that case, the decision under review concluded that all of the related entity HomeTech's revenues came from three-year contracts with Rogers. However, Rogers did not rely exclusively on HomeTech for the services in question but also contracted with HomeTech's competitors and used its own employees for some of the work: *XL Digital*, at para 10. The appeal court's analysis considered the nature of the federal undertaking into which HomeTech's services were integrated (at para 28-31, and earlier at paras 19-25), as well as HomeTech's reliance on Rogers and Rogers's allocation and scheduling of the employees' work: *XL Digital*, at para 29. The fact that Rogers did not rely exclusively on HomeTech and contracted with other competitors in the industry was not even mentioned in the court's analysis of federal derivative jurisdiction. The reasons in *XL Digital* imply the existence of a competitive construction industry does not preclude a finding of dependency or dictate the outcome of the derivative jurisdiction analysis.

[125] The applicant relied extensively on *Ramkey Communications*, a decision of the Court of Appeal for Ontario. In my view, this decision does not assist the applicant's position. It is factually distinguishable and its reasoning does not support the applicant's arguments.

[126] *Ramkey Communications* arose from a judicial review application of an Ontario Labour Relations Board (“OLRB”) decision concerning federal derivative jurisdiction over a group of 35 construction technicians, employed by Ramkey, who provided service installation services in and around London, Ontario. In 2013, 2014 and part of 2015, this work comprised 10-13% of Ramkey’s revenues. It was mostly done for Rogers, which was Ramkey’s dominant client. In 2015, Rogers “pulled back” all its construction work with Ramkey, apparently in favour of other service providers who were Ramkey’s competitors and who worked in the same geographic area.

[127] The OLRB decision under review found that Ramkey was not vital, essential or integral to Rogers for the purposes of derivative federal jurisdiction, and Rogers was not dependent on Ramkey for several reasons including that Rogers could simply use another contractor: *Ramkey Communications*, at para 20. The Court of Appeal declined to set aside the OLRB’s decision, allowing an appeal from the Divisional Court. The appeal court found that the construction technicians were a distinct subset of Ramkey’s employees: *Ramkey Communications*, at paras 57, 61.

[128] Considering the relationship between Rogers and Ramkey from the perspective of Rogers, the Court of Appeal noted that the OLRB made clear findings that Rogers’s effective performance was not dependent on Ramkey’s construction services (which distinguished *Ramkey* from *Telecon*) and that the effective performance of Rogers’ telecommunications network was not contingent on the services of Ramkey’s construction technicians: *Ramkey Communications*, at para 64. The appeal court considered the companies’ interrelationship and that there was no long-term commitment to use the construction technicians nor exclusive reliance on them.

Competitors performed the construction work in 2015 when Rogers “pulled back” work from Ramkey.

[129] The Court of Appeal found that the Divisional Court’s error was:

[66] ... considering the extent to which the delivery of telecommunications services by Rogers and other telecommunications companies like Rogers was dependent on having a functioning network line and on work of the type performed by Ramkey's construction technicians. The proper focus is the extent to which Rogers and the other telecommunications companies, to which Ramkey's construction technicians provided construction services, were dependent on the services of Ramkey's construction technicians -- the particular employees under scrutiny: Tessier, at para. 38.

[Emphasis added.]

[130] In the present case, we are not dealing with how one or more federal undertakings were dependent on a single distinct subset of employees who were engaged in a specific role in construction. The present case involves a finding of dependence in the Decision based on unchallenged facts that are materially different from those in *Ramkey Communications* including the nature and scope of the wireless and wireline services provided by WesTower as a whole, the impact of those services on the functioning of the federal telecom networks and, indeed, the pan-Canadian locations of the applicant’s services. This case concerns a very substantial proportion (more than 85%) of the WesTower’s business and most of its employees across a range of disciplines and activities from design, fabrication and construction of wireless towers and wireline infrastructure for the networks of three federal undertakings across the country, to ongoing maintenance, repair and emergency services.

[131] I recognize that in the passage quoted above, the Court of Appeal stated that the proper focus was the extent to which Rogers “and the other telecommunications companies” were dependent on the services of Ramkey's construction technicians. However, reading the reasons as a whole, and as noted in *Madysta Télécom*, the focus of the Court of Appeal’s analysis was on the relationship between Ramkey and Rogers: *Ramkey Communications*, at paras 21, 66; *Madysta Télécom*, at para 114.

[132] Although the Federal Court of Appeal’s reasons in *Telecon* referred to the overturned Divisional Court’s reasons in *Ramkey Communications*, the intervention of the Court of Appeal for Ontario makes no difference to the authority of *Telecon*. Near the end of the reasons, *Telecon* referred to the Ontario Divisional Court’s discussion of Ramkey’s connections to the telecommunications industry, namely that Ramkey did construction work specific to the telecommunications industry, was an ongoing part of the telecommunications business and almost all of its employees’ volume of work was done for telecommunications companies: *Telecon*, at paras 47-50. The Divisional Court’s errors in *Ramkey Communications*, as identified by the Court of Appeal for Ontario, concerned the factual assessment of dependency and the lower court’s failure to focus on the correct subset of employees at issue. The reversal of the Divisional Court’s decision does not infuse the same errors into *Telecon*. To the contrary, it underlines the similarity of *Telecon* to the present circumstances and demonstrates that *Ramkey Communications* is distinguishable from this case on its facts – just as the Court of Appeal for Ontario distinguished *Telecon*: *Ramkey Communications*, at para 64.

C. *Conclusion on Derivative Jurisdiction*

[133] The applicant has not demonstrated any error of law or misapplication of a legal principle to the present undisputed facts in this case. Applying a correctness standard of review, I find no reviewable errors in the Decision.

VII. Was the Decision capricious?

[134] The applicant alleged that ESDC acted in an arbitrary and capricious manner, given the history of this matter from 1992 (applying federal jurisdiction) to the 2021 Decision (finding provincial jurisdiction) to the Decision under review (finding federal jurisdiction). While the applicant recognized the high standard required to show capricious conduct, it submitted that the back-and-forth on jurisdiction justified such a finding. The applicant also contended that even if the conduct did not meet the threshold, it was relevant to costs of this application.

[135] The applicant's submission on this issue must be considered in context, specifically the complexity of this area of constitutional law and the need for a nuanced application of that law to the specific circumstances of each employer and the workers in question. Considering the two investigations that led to the 2021 Decision and the Decision under review, and the decisions themselves, I am unable to find any egregious conduct or reasoning, and certainly no perverse or capricious fact-finding, worthy of intervention under paragraph 18.1(4)(d) of the *Federal Courts Act*.

VIII. Conclusion

[136] For these reasons, the application for judicial review is dismissed.

[137] The respondent has prevailed on this application for judicial review. However, the applicant filed this application to ensure it had certainty on whether provincial or federal labour law applies to its employees. Given the history and ESDC's decisions in 2021 and 2024, it was reasonable and responsible to do so. In the circumstances, the applicant should not bear any of the respondent's costs in responding to the application. In the exercise of the Court's discretion, I conclude that each party should bear their own costs.

[138] As requested by the respondent, the style of cause will be amended under Rule 303(2) of the *Federal Courts Rules* so that the respondent is the Attorney General of Canada.

[139] Finally, I acknowledge and thank counsel for both parties for their helpful submissions on this application.

JUDGMENT IN T-1026-24

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended so that the respondent is the Attorney General of Canada.
2. The application for judicial review is dismissed.
3. There is no costs order.

"Andrew D. Little"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-1026-24
STYLE OF CAUSE:	WESTOWER COMMUNICATIONS LTD. v EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	FEBRUARY 17, 2026
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	JULY 20, 2026

APPEARANCES:

Devin S. Wehrle	FOR THE APPLICANT
Kim Roth	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MTL Atkins LLP Winnipeg, Manitoba	FOR THE APPLICANT
Deputy Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT