

## **INTERNET SERVICE PROVIDER FOUND TO FALL UNDER FEDERAL JURISDICTION**

*Island Telecom Inc.* [2000] C.I.R.B. No. 12 (C.I.R.B.)

### **Facts**

The Communications, Energy and Paperworkers Union of Canada, Locals 401 and 902 (the "CEP") sought a declaration that Island Telecom Inc. ("Island Tel") and Island Tel Advanced Solutions Inc. ("ITAS") were a single undertaking under the *Canada Labour Code* (the "*Code*"). In the alternative, the CEP sought a declaration that there was a sale of business within the meaning of the *Code* from Island Tel to ITAS.

ITAS was a wholly owned subsidiary of Island Tel operating as an internet service provider for Island Tel customers. Island Tel transferred employees to ITAS, giving rise to the union's applications.

ITAS argued that it was not operating a federal work and that therefore the Canada Industrial Relations Board (the "CIRB") lacked constitutional jurisdiction to consider the matter. The parties conceded that if ITAS fell within federal jurisdiction, Island Tel and ITAS met the test of being a single employer within the meaning of the *Code*.

### **Canada Industrial Relations Board**

The CIRB concluded that the internet service provider was a federally regulated operation. The CIRB noted that ITAS would constitute a federal undertaking in one of three circumstances:

1. if its activities were found to be interprovincial communications;
2. if it were found to operate a single interprovincial communications enterprise in common with Island Tel; or
3. if its operation were found to be integral to a core federal undertaking.

The CIRB considered jurisprudence involving telephone companies, concluding that the use of physical equipment of telecommunications is not sufficient to bring a business under federal jurisdiction. Nor is owning or operating physical equipment for telecommunications a prerequisite for a business to fall within federal jurisdiction. It is the nature of the services provided and the mode of operation of the undertaking that determine whether or not it falls within federal jurisdiction.

The CIRB heard expert evidence that internet service providers must use telecommunication systems such as the telephone, cable or satellite, through which to connect personal computers (PCs) to the internet. Although it used these systems, ITAS did not operate the physical equipment, nor did it operate the telecommunications connections.

The CIRB found that the two companies met the criteria to be declared a single employer under the *Code* on the basis that ITAS was itself a federal undertaking and on the basis that ITAS was functionally integrated with a federal undertaking. The CIRB decided to exercise its discretion to declare the two companies to be a single employer on the basis that the employees at Island Tel were being transferred to or hired by ITAS to do the same work that they had done at Island Tel, but in a non-bargaining unit environment.

### **Activities Were Interprovincial Communication**

The CIRB concluded that ITAS was a federal undertaking because the nature of the work done by ITAS extends beyond the limits of Prince Edward Island. The services provided by ITAS are critical for PC users in PEI to access international networks. ITAS enables international telecommunications via the internet.

### **Part of a Single Interprovincial Communication**

In the alternative, the CIRB found that even if ITAS was not a federal undertaking on its own account, it fell within federal jurisdiction on the basis that it is part of a single federal enterprise.

In reaching this conclusion, the CIRB reviewed the test for operating as a single federal undertaking that was set out by the Supreme Court of Canada in *West Coast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322. This test is whether two operations are functionally integrated and subject to common management, control and direction. The functional integration must include both a physical connection and an operational connection. In the *Island Tel* case, the CIRB found that Island Tel and ITAS were functionally integrated because providing access to the internet was an important part of Island Tel's strategy to preserve its market and remain competitive. Furthermore, there was a significant degree of common management, control and direction between the two companies.