Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: NuStar Terminals Canada Partnership, 2013 OHSTC 25

Date: 2013-09-04
Case No.: 2012-82
Rendered at: Ottawa

Between:

NuStar Terminals Canada Partnership, Appellant

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer
Decision:	The direction is rescinded
Decision rendered by:	Pierre Hamel, Appeals Officer
Language of decision:	English
For the Appellant:	Mr. Eric Durnford, QC, Counsel, Ritch & Durnford

REASONS

[1] These reasons concern an appeal brought before the Occupational Health and Safety Tribunal Canada (Tribunal) under subsection 146(1) of the *Canada Labour Code* ("the Code") by NuStar Terminals Canada Partnership ("NuStar" or "the Company") of a direction issued on November 29, 2012 by Mr. William Gallant, Health and Safety Officer (HSO) with the Labour Program of Human Resources and Skills Development Canada (HRSDC). The appeal was accompanied by an application for a stay of the direction until the matter is decided on its merits. The stay was granted, with reasons issued on January 15, 2013 (*NuStar Terminals Canada Partnership*, 2013 OHSTC 1).

Background

[2] On November 21, 2012, HSO Gallant visited the work place operated by NuStar, at 4090 Port Malcolm Road, Point Tupper, Nova Scotia, for the purpose of conducting an inspection. Upon his arrival, HSO Gallant was refused access to the work place by NuStar's general manager.

[3] Following the applicant's refusal to allow access, HSO Gallant issued a direction to NuStar on November 29, 2012. The direction reads as follows:

> **IN THE MATTER OF THE *CANADA LABOUR CODE***
> **PART II – OCCUPATIONAL HEALTH AND SAFETY**
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)
>
> On November 21, 2012, the undersigned health and safety officer conducted an inspection in the work place operated by NUSTAR TERMINALS CANADA PARTNERSHIP, being an employer subject to the *Canada Labour Code*, Part II, at 4090 Port Malcolm Road, Point Tupper, Nova Scotia, B9A 1Z5, the said work place being sometimes known as NuStar Terminals, Point Tupper.
>
> The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:
>
> > 143. - Canada Labour Code Part II,
> >
> > Health and safety officer William Gallant was refused access to the NuStar Terminals, Point Tupper, by Blaise MacDonnell, General Manager on November 21, 2012.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*a*) of the *Canada Labour Code*, Part II, to terminate the contravention no later than November 29, 2012.
>
> Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*b*) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at Dartmouth, NS this 29th day of November, 2012.

(s) William (Bill) D Gallant
Health and Safety Officer
[…]

[4] On December 6, 2012, the applicant filed an appeal of that direction before the Tribunal. The sole ground upon which the appeal is founded is that, in NuStar's view, it is not subject to federal jurisdiction because it is not a "federal undertaking" as defined in the Code. NuStar contends that its business is the storage of petroleum products and as such, is and has always been subject to provincial jurisdiction (in this case the Province of Nova Scotia) regarding labour and employment matters.

[5] On January 17, 2013 the appellant and HSO Gallant were informed that the appeal would be determined on the basis of written submissions. They were also reminded of the need for the appellant to provide the Attorney Generals of Canada and of the Provinces with a Notice of Constitutional Question, as required by section 57 of the *Federal Courts Act.* On January 30, 2013, I held a teleconference at which participated Mr. Eric Durnford, Q.C., counsel for NuStar, and HSO Gallant. The purpose of the teleconference was to specify a time limit for the sending of the Notices of Constitutional Question, as well as timelines for the presentation of written submissions to the Tribunal.

[6] It is worth noting that I invited submissions from HSO Gallant although he is not a party to these proceedings. This matter is a threshold issue as to the applicability of the Code and the jurisdictional dispute is in reality between HRSDC and the Company. As a result, there is no respondent in this matter. In those circumstances, it is appropriate to give the HSO an opportunity to present submissions to support his conclusions that NuStar is federally regulated (see: *Canada (Attorney General)* v. *Total Oilfields Rentals Limited Partnership Inc.*, 2012 FC 321).

[7] On February 6, 2013, counsel for NuStar served a Notice of Constitutional Question to the Attorney General of Canada and the Attorney Generals of Provinces. On February 21, 2013, the appellant reported that most of the Attorney Generals had responded and had indicated that they would not participate in the proceedings. No contrary indication from any of the Attorneys General has been communicated to the Tribunal at the time of issuing the present reasons for decision. The final submissions were received on March 26, 2013.

The Issue

[8] The issue that I am called upon to decide is whether NuStar is a "federal work, undertaking or business", that would make it subject to the provisions of Part II of the Code. If the answer to that question is in the affirmative, the appeal must be dismissed. For the reasons that follow, I have decided that NuStar is <u>not</u> a "federal work, undertaking or business" and as a consequence, the appeal must be upheld and the direction rescinded.

The Facts

[9] The jurisdictional facts are essentially set out in HSO Gallant's report as well as in the appellant's submissions. Although the facts have not been filed with the Tribunal by way of affidavits, the statement of facts are to a large extent supported by documentary evidence provided by the Company. Paragraph 146.2(*c*) of the Code allows me to receive and accept any evidence and information on oath, affidavit or otherwise, whether or not admissible in a court of law. In such circumstances, my primary concern should be the reliability of that information, considering all the circumstances. The appellant's submissions and the supporting documentary material were shared with HSO Gallant and remained substantially uncontested. I find that they constitute a reliable basis upon which to make findings regarding the nature of NuStar's activities and their characterization from a constitutional law point of view. Indeed, what is truly at the heart of the dispute are not the facts themselves but rather the conclusions to draw from those facts, in relation to the proper characterization of NuStar's operations for constitutional purposes. The answer to the question at issue will flow from a detailed analysis of the activities of NuStar, and of the legal and practical relationship with its clients and other entities with whom it interrelates. I will relate those facts is some detail.

[10] NuStar's core business is described as being to provide petroleum products storage service to its customers. In 2012, approximately 71% of NuStar's revenue was derived from its petroleum products storage activities. Although the parent company, NuStar Energy LP is a multi-national limited partnership, the operation at Point Tupper (NuStar) is self-contained. It does not provide services to the multi-national nor are its operations integrated with its parent partnership as such. NuStar's activities take place wholly in the province of Nova Scotia. It is a provincially regulated Bulk Facility under the provincial *Activities Designated Regulations,* NS Reg 47/95, *and Petroleum Management Regulations*,NS Reg 44/2002 adopted under the Nova Scotia *Environment Act*, SNS 1994-95, c 1, and has an operating approval permit issued under these regulations.

[11] Nustar's operations at Point Tupper is comprised of NuStar Terminals Canada Partnership and Point Tupper Marine Services (PTMS). The two are separate legal entities for tax, liability and licensing purposes, and complement each other in the activities at Point Tupper. Stated broadly, NuStar's primary purpose is the running of the tank farm, while PTMS coordinates certain logistical and administrative aspects of petroleum products movement to and from the tank farm. It arranges for certain services via contracts with other companies, such as F.K. Warren vessel agent, which operates in the federal jurisdiction.

[12] NuStar has 500 acres of land within its fence line, where its storage tanks, pipelines, pumps, buildings and other infrastructure are located and 1500 acres of land surrounding its operations. It also owns the water lot upon which its dock is erected. It is not a public dock, it is private and not subject to federal regulation. The dock has two berths, one on each side of the dock.

[13] NuStar has the capacity to store just over 7.5 million barrels of petroleum products. It owns 37 steel oil tanks and one butane sphere, physically organized into

"North" and "South" tank farms. The North Tank Farm has eight of NuStar's largest oil tanks (capacity of 450,000 barrels each), where crude oil is stored. The remaining 29 tanks are a variety of sizes and are located on the South Tank Farm. The tanks on the South Farm hold a variety of products, such as gasoline, diesel, crude oil, residual fuels and blend components. Most of NuStar's tanks on the South Farm have mixing equipment and are used for blending components, as per the instructions of its customers. Each of the 37 oil tanks is connected to a foam spray pipeline system.

[14] All tanks are interconnected by pipeline so that the product in any tank can be moved to any other tank and to and from the dock. A number of pump stations are located on the site to enable the movement of product. NuStar's operation is fully automated, so that product can be moved from one place to another via computerized equipment in the Control Room, which is located on the dock. These automated activities are also monitored by operators in the field, and various procedures can, if necessary, be performed manually.

[15] NuStar also has a number of other buildings, including a workshop, and muster space for its maintenance and trade employees, and an office building for its administrative staff. Because of the nature of its operations, NuStar also has a fire hall, two fire trucks, a mobile foam pump and two ancillary vehicles. It has a basic water treatment plant on site, which is connected to the drainage system that serves the 500 acres within the fence line.

[16] The site was originally occupied by the Gulf Oil Refinery, which began operating in the 1960's. The refinery was closed in the 1980's and sat idle until the early 1990's, when the facility was purchased and began to be used for petroleum product storage. The facility changed hands a number of times in the 1990's and early 2000's, until NuStar purchased it in 2005. Since the focus had shifted to petroleum products storage, the refinery was dismantled, but all oil tanks and pipelines are original to the site.

[17] The Company points out that its activities and that of predecessor companies have always been provincially regulated with respect to occupational health and safety, labour relations and environmental matters. It cites as an example that it was comprehensively inspected in April 2008 by provincial OHS authorities, which led to the issuance of a report containing a number of findings and recommendations regarding NuStar's occupational health and safety situation.

[18] NuStar also points out that its labour relations have always been provincially regulated. Its non-management employees are represented by the Communications' Energy and Paperworkers Union of Canada, Local 585 (CEP), pursuant to a certification issued in 1994 by the Nova Scotia Labour Relations Board, and carried over to NuStar as successor employer. There have been several collective agreements negotiated since the CEP was certified to represent employees; a collective agreement is currently in existence between CEP and NuStar, its term ending on September 30, 2013.

[19] The Company points out that ships that dock at NuStar's wharf are subject to federal regulation by Transport Canada, as is the ship-to-shore interface, which ends at

the gangway. With respect to the vessel's cargo, Transport Canada's jurisdiction ends at the manifold where the vessel's pipe is connected to NuStar's loading arm. It also indicates that it operates a very similar facility at Whiffen Head, Newfoundland and Labrador, and that facility is also, and has always been, provincially regulated.

[20] NuStar has 75 employees, of which 25 work in the Operations Department, 32 in the Maintenance Department and 18 administrative staff. The Administration and Maintenance personnel work eight-hour shifts, Monday to Friday. Because NuStar operates around the clock, Operations staff are divided into two 12-hour shifts per day. The 20 operators are scheduled over a 28-day rotation, wherein they perform one of five possible operation roles: Dock, Control Room, North Tank Farm, South Tank Farm and Heater. Operators will be scheduled for the same position for a given week; when an operator returns from time off, he or she will be scheduled for a different position. Therefore, every operator rotates through each of the five positions over time, with the exception of the Control Room Operator, if a particular employee in the rotation does not have the necessary qualifications.

[21] NuStar blends petroleum components for one customer on the South Farm according to instructions received from that customer. On the North Farm, one of NuStar's customers has an adjacent facility where butane and propane are extracted from raw natural gas, which is brought via a pipeline from Sable Island. Propane and butane are loaded onto trucks and railcars and sold on the local market and beyond. The material that remains after the extraction (the condensate) is transferred via a pipeline from the customer's facility to tanks on NuStar's premises, where it is stored.

[22] The Company described the involvement of its staff with vessels as follows. NuStar's operators' main focus is to ensure that the transfer of product is done safely and in a secure manner. The type and quantity of product transferred, and the movement of product to and from the terminal, are decisions made exclusively by the customer. Prior to a vessel's arrival, NuStar draws up a Task Order, which describes the incoming load and details the pipeline route to be used when transferring the product from vessel to storage tank. When a vessel docks at NuStar's dock, the Dock Operator positions the gangway from the dock to the vessel. An independent laboratory service selected and paid for by the customer goes on board and tests the product. NuStar's shift Supervisor meets with the vessel's Chief Officer to make arrangements for the transfer of the petroleum product and to provide information relating to terminal rules and regulations. The Dock Operator and one other operator board the vessel to make connections necessary for the transfer of the product; the vessel's crew members remove the manifold plates over the vessel's pipes. The loading arms on NuStar's dock are then connected at the ship's manifolds. Two Operators are responsible for positioning the loading arms near the vessel's manifold. The Dock Operator then takes control of the computerized hydraulic system using a remote device to align the connection between the loading arm and the ship's pipe. The connections are then manually tightened by the Dock Operator, who then conducts a pressure test on each manifold to check for leaks. Once the loading arm is connected to the vessel's pipe, the Chief Officer of the vessel and the Control Room Operator communicate to coordinate the start of product flow.

[23] It takes approximately 30-45 minutes to connect the loading arms to the vessel, and the same amount of time to disconnect. The discharge of product from a vessel is powered by a pump located on the vessel; conversely, the loading of product onto a vessel is powered by NuStar's pumps. Custody over the product transfers from the vessel to NuStar at the vessel's manifold connection, which is the point where the product passes from the vessel's pipe to NuStar's loading arm, i.e. at the point where the product enters NuStar's land based infrastructure.

[24] Once the loading arms are connected and the product is flowing into NuStar's pipeline, it takes approximately 24-36 hours – depending on the size of the vessel and quantity of product – to discharge or load the vessel's cargo. During this time, Operations employees monitor the flow of product while attending to other duties. The Company provided calculations of the total number of "manhours" expended by Operations employees in 2012 in the movement of petroleum product from vessel to storage tank (or vice versa) in comparison with the total hours worked at the terminal by all its employees. In summary, the figures work out to a percentage of approximately 4% of the actual time worked by all other employees, and 3.3% of the total time paid to all other employees, i.e. factoring in overtime rates into base wages.

[25] It is pointed out that NuStar does not own the product that it stores. Petroleum products owners have contracts with NuStar to lease storage tanks and in some cases for NuStar to blend components. Tanks are designated for particular customers: some customers need tanks for crude oil, others for gasoline or other petroleum products. The owners decide when product will be moved and how long it will be stored in NuStar's tanks.

[26] It is the owners who directly charter vessels to move their product to and from NuStar. The customer determines what product a vessel will carry, where the vessel will come from and its destination, and when the vessel will arrive and leave the terminal, as illustrated by the Sample "voyage order" filed with the appellant's submissions. NuStar has no contractual or corporate relationship with the vessels that transport petroleum products. It receives a copy of the vessel's voyage orders, which provides basic information about the vessel, its cargo, and its anticipated arrival time.

[27] While at Point Tupper, the vessels needs are met by other contractors (e.g. tugs, water taxi, line handling, etc.) and the agent of record, the firm of F.K. Warren. PTMS has a contract with F.K. Warren to provide the standard services needed by a vessel in this type of situation, at the vessel's expense. Vessels are charged a single dock fee for contracted services, plus the standard fees such as harbour dues charged by Transport Canada and vessel traffic services fee charged by the Coast Guard. The dock fee is pre-paid by F.K. Warren, who then charges the vessel for the dock fee, a cost which is ultimately passed on to the petroleum product owner as the vessel's charterer. NuStar points out that less than 16 % of its revenue in 2012 was derived from dockage or wharfage fees.

[28] Finally, NuStar mentions that crew members onboard vessels are never permitted to set foot on its dock or within the terminal grounds. A vessel's crew members may take

a water taxi to non-NuStar shore facilities from the outboard side of the vessel, the side that is opposite to the berth. All other services to the vessel, such as stores provision, are also provided on the outboard side. Fresh water and vessel refueling services are not available at the terminal. Consequently, NuStar plays no role in the provision of services to vessels while berthed at the terminal.

Submissions of the Appellant

[29] Counsel for NuStar begins by asserting that its legal position is quite simple: NuStar's business, its *raison d'être*, is the bulk storage of crude oil and refined petroleum product commodities. He argues that the recent judgement rendered by the Supreme Court of Canada in *Tessier Ltée* v. *Québec (Commission de la santé et de la sécurité du travail* (hereafter referred to as "*Tessier*"), 2012 SCC 23, is on "all fours" with the instant case. When one applies the analytical framework set out by the Court in its interpretation of its seminal *Stevedores Reference* case (*Reference re Industrial Relations Disputes Investigations Act (Canada*), [1955] S.C.R. 529) to deal with cases such as the present case, the only possible conclusion is that NuStar is governed by provincial legislation. While NuStar is involved in the movement of petroleum products from vessel to storage tank, and even if it was found that such activity is "vital to the functioning of a federal undertaking", such activity represents an insignificant part of NuStar employees' time and is only a minor aspect of the "essential ongoing nature of the operation". The overwhelming majority of the activities on site, occupying almost all of NuStar's personnel, are the operation and maintenance of the storage tank farm infrastructure. In that respect, the involvement of vessels that bring petroleum products to its site is "incidental" to its main operation.

[30] Counsel for NuStar then set out leading cases which have, over the years, designed the appropriate analytical framework to deal with the question at issue in the present case. Firstly, provincial competence is the rule (*Tessier (supra)), Construction Montcalm Inc.* v. *Minimum Wage Commission*, [1979] 1 S.C.R. 754. Secondly, federal jurisdiction may apply in two circumstances: (1) directly, where the employment relates to a work, undertaking or business that falls within the legislative authority of Parliament under section 91 of the *Constitution Act, 1867;* or (2) indirectly: when the undertaking in question is not itself a "core federal undertaking", but its activities are integral to a core federal undertaking (sometimes referred as "derivative federal jurisdiction" over a subsidiary operation). Courts have applied the derivative approach to stevedoring.

[31] The relationship between the employer and the employees must relate to a substantial part of the activity that falls within federal jurisdiction (*ILA, Local 1739* v. *Maritime Employers Association* (1983), 51 NR 182 at para. 30; discussed in *Halifax Freight & Steamship Checkers, Local 1341* v. *Maritime Employers Association*, CLRB Decision No. 651 (September 8, 1987), at paras 19-27). The analysis must bear on a functional and practical consideration of the employer's activities as a going concern, and must focus on the primary activities of the subsidiary operation (*Arrow Transfer Co. Ltd*, [1974] 1 Can LRBR 29; *Northern Telecom Communications Workers (No. 1)*, [1980] 1 S.C.R. 115. It is only when the subsidiary operation is subsumed by the federal undertaking that federal jurisdiction applies (*Northern Telecom Canada Ltd. V.*

C.W.O.C., (No. 2), [1983] 1 S.C.R. 733). It is therefore necessary to examine the degree of integration between a federal undertaking and the subsidiary operation, and federal jurisdiction will only apply if the employees of the subsidiary operation spend most of their time serving a federal undertaking, that it is the exclusive or principal or dominant part of their work, or failing that, that the unit providing such services within the subsidiary operation is functionally severable from the rest of the related operation to be considered a distinct unit for the purpose of determining the degree of its integration with the primary federal undertaking (see: *Tessier*).

[32] Counsel for the appellant then refers to the division of legislative powers under sections 91 and 92(10) of the *Constitution Act, 1867,* to the definition of "federal work, undertaking or business" in section 2 of the Code and to the Application provision of Part II of the Code, set out in s. 123(1). In his view, the dominant character of NuStar's operation as a petroleum products tank farm is distinct from any tie it may have to navigation or international shipping. Merely being involved with the movement of petroleum products from vessel to storage tanks does not change the essential character of NuStar's normal and ongoing operation as a tank farm.

[33] Counsel further elaborated on the distinctions to be made with the *Stevedores Reference (supra),* and the case at hand. In that case, stevedoring employees devoted all of their time to federally regulated companies, who relied on them exclusively for loading and unloading their cargo, thus making the companies entirely dependent on the stevedoring employees to carry out their federally-regulated activity, i.e. international transportation of goods by ship.

[34] Counsel for NuStar then reviewed the constitutional facts and concluded that NuStar is a self-sufficient operation and that all its activities are totally integrated. Operations Department employees (25 out of 75) who work on the Dock Operations one week are assigned to other positions within the Tank Farms in subsequent weeks, such that the organization of work makes the workforce interchangeable. It would therefore be incongruent, impractical and contrary to the principles enunciated in the case law to apply federal laws to all of NuStar's employees in those circumstances, or to artificially sever the unit involved with loading/unloading petroleum products (*Construction Montcalm (supra); Tessier (supra).* Furthermore, the amount of time spent by employees that involves interaction with vessels is insignificant compared to the total number of hours worked by NuStar employees, i.e. 4% (*Maritime Employers Association (supra), Société des Arrimeurs de Québec Inc.,* 2009 CIRB 451).

[35] Counsel also points out that there is no contractual relationship between the appellant and international shippers. Shipping companies are therefore not "dependent" *per se* on NuStar's employees in relation to maritime transportation, which is the federally-regulated activity of concern here.

[36] It is also argued that NuStar does not operate a port facility. It does not perform any aspect of port services, has not been designated as a "public port" or "public port facility" under the *Canada Marine Act,* SC 1998, c. 10, nor is there a "port authority" at Point Tupper incorporated under that *Act*. Likewise, there is no "harbour commission"

under the *Harbour Commissions Act*, RSC, 1985, c. H-1. NuStar's premises are a private wharf, not open to the public, which is incidental to carrying out its core business of petroleum products storage (*Maritime Harbours Society,* OHSTC, Decision No. 05-054; *Halifax Freight and Steamship Checkers Co. Ltd (supra).*

[37] In conclusion, NuStar submits that I should find that all of its operations at Point Tupper, Nova Scotia, are within provincial, not federal, constitutional jurisdiction. Consequently, the appeal should be granted and the direction issued by HSO Gallant on November 29, 2012 should be quashed as having been made without jurisdiction.

Submissions on behalf of the HSO

[38] The submissions on behalf of HSO Gallant were filed with the Tribunal by Mr. Robert P. Reid, A/Technical Advisor, Occupational Health and Safety, HRSDC - Labour Program, in an email dated March 15, 2013. Mr. Reid argued that NuStar should be compared with more conventional stevedoring operations such as those conducted by container terminals, where goods are stored by these companies as part of a shipping continuum. He disagrees with NuStar's characterization of its business as one of petroleum storage. The goods which are stored in the yards, lots and piles are there awaiting transportation by some means, most likely by an interprovincial cargo mover. In the case of NuStar the products that it stores in the tanks are not stored for use on site. They are kept awaiting another ship or tanker truck.

[39] Stevedoring or longshoring is an integral and essential part of shipping. It does not stop at the connecting and disconnecting of means of conveyance to ships. The storage of the product and maintenance of the storage means is part of the handling that constituted the federal work. It is a fact that work conducted in the storage yards of container terminals or imported motor vehicle lots or other products stored in bulk such as sulphur or coal are considered to be subject to federal jurisdiction. There is some "blending of products" that is conducted on the property; however it is not the main activity.

[40] Mr. Reid reiterated that NuStar is a "federal work, undertaking or business" that is subject to the Code and that the direction should be upheld.

Reply of the Appellant

[41] In reply, counsel for the appellant reiterated the principles applying to the determination of "derivative jurisdiction" as they are enunciated in *Northern Telecom (No. 1), (supra)* and takes objection with the characterization made by the HSO that NuStar's activities are part of "shipping continuum". In his view, the analogy with the container terminal is not a valid one, since the storage of goods in this case is "an end in and of itself". Counsel provided "Product Load Timelines" documents which show that petroleum products stored in NuStar's tanks is moved incrementally over time, as per its customers' instructions; crude is generally stored for shorter periods of time than refined products, which may be stored at NuStar for 1 ½ to 2 years or more. Counsel also stresses the fact that the product is petroleum, which must be handled with extreme care by highly

qualified employees, and that it is a major difference with the temporary and short term storage other types of goods in transit, such as cars or other merchandise.

Analysis

[42] This case raises the question of determining which set of labour and employment laws, federal or provincial, applies to NuStar. The analytical framework to answer that question has been the subject of countless Courts and administrative tribunals pronouncements over time, including several decisions of the Supreme Court of Canada. Before reviewing that jurisprudence, one must start with the statutory context relevant to the determination of jurisdiction in the circumstances of this case.

[43] Paragraph 91 (10) of the *Constitution Act, 1867* vests the Parliament of Canada with legislative authority over "navigation and shipping". Section 92 of that Act, which sets out the heads of exclusive jurisdiction of provinces, provides as follows:

> **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:
>
> […]
>
> 13. Property and Civil Rights in the Province.
>
> 16. Generally all Matters of a merely local or private Nature in the Province.

[44] Section 123 of the Code defines the application of Part II as follows:

> **123.** (1) Notwithstanding any other Act of Parliament or any regulations thereunder, this Part applies to and in respect of employment
>
> (*a*) on or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut;
>
> […]
>
> [Underlining added]

[45] Section 2 of the Code defines the expression "federal work, undertaking or business" as follows:

> **2.** In this Act,
>
> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,
>
> (*a*) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,
>
> [Underlining added]

[46] The combined effect of these provisions is that an undertaking involved in interprovincial or international shipping or navigation is federally regulated, i.e. subject to the laws of Parliament. It is common ground that the context in which this case arises is interprovincial shipping and navigation.

[47] Counsel for the appellant has aptly outlined in his submissions the legal test developed by the Courts to analyze the question of constitutional jurisdiction over an undertaking or business. It is well established that, in principle, legislative jurisdiction over labour relations, including occupational health and safety, belongs "by default" exclusively to the provinces under the heads of "property and civil rights" and "matters of local and private nature in the province" (subsections 92(13) and (16) of the *Constitution Act, 1867*, respectively). However, Parliament has exclusive jurisdiction over matters described in section 91 of the *Constitution Act, 1867* and that exclusive jurisdiction extends to labour matters.

[48] The first question to consider then is whether NuStar carries out activities which directly make it subject to federal jurisdiction. We must assess whether the work, business or undertaking's essential operational nature brings it under a federal head of power. As mentioned earlier, the relevant head of jurisdiction to be considered in this matter is "navigation and shipping". HSO Gallant's justification to find that NuStar is under federal jurisdiction is primarily because of its involvement in loading and unloading ships, i.e. stevedoring. As the Supreme Court of Canada pointed out at paragraph 28 of its judgement in *Tessier*:

> [28] […] Since stevedoring is not itself a transportation activity that crosses provincial boundaries, it will not be subject to federal regulation directly under s. 92(10)(*a*) or (*b*): *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 (S.C.C.), at paras. 43 and 61. Rather, a stevedoring work or undertaking will be subject to federal labour regulation if it is integral to a federal undertaking in a way that justifies imposing exceptional federal jurisdiction.
>
> [Underlining added]

[49] The Court also reaffirms that the *Stevedores Reference*, to which HSO Gallant refers in his report – as did his colleague HSO Brookfield, who was also involved in the

analysis of the present matter at some point in time - , was decided as a "derivative jurisdiction" case (that expression will be further explained in these reasons), not a direct one. Accordingly, it must be understood that an undertaking's involvement in the loading and unloading of ships does not necessarily bring that undertaking under federal jurisdiction.

[50] After reviewing the constitutional facts, it seems rather clear that NuStar is not involved in any manner in the operation of a ship or vessel, or directly engaged in navigation or maritime transportation. Accordingly, no direct federal jurisdiction arises in this case.

[51] The second manner in which an undertaking may attract federal jurisdiction is if its activities are vital, essential or integral to a primary head of federal competence, in this instance international shipping, navigation or maritime transportation, so as to bring it under federal jurisdiction. These types of cases, which Courts have described as cases of "derivative jurisdiction", have generated an impressive body of case law, which requires the decision-maker to conduct an analysis of an undertaking's activities through the prism of fairly sophisticated legal principles elaborated by the Courts over time. That analysis is essentially driven by the so-called "constitutional facts" in each case. Those facts must be assessed with some minutia and detail, as will be illustrated later on. The exercise can prove perilous, as the jurisdiction may turn on the importance placed by a given decision-maker on certain facts or factors compared to others, as being more critical to the analysis than others. As a result, jurisdictional rulings in the jurisprudence are sometimes difficult to reconcile, at least on their face (see for example the discussion in: Snyder, Ronald, M., *The 2013 Annotated Canada Labour Code,* Carswell, at pages 3 to 5).

[52] Be that as it may, I agree with counsel for the employer's assertion that the analysis in this case is clearly one of "derivative jurisdiction". I note that the HSOs involved in this matter have made their analysis on that basis as well. The most recent writing in that series of derivative jurisdiction cases is the judgment rendered recently by the Supreme Court of Canada in *Tessier*, which counsel for the appellant cites profusely in his submissions. While the constitutional facts in *Tessier* slightly differ from the case at hand, the undisputable benefit of that decision to our analysis is that it provides a comprehensive overview of the case law on the very question of derivative jurisdiction in relation to navigation and shipping, and enlightens us with the correct interpretation of the seminal *Stevedores Reference* case, that case seemingly being the main foundation of HSO Gallant's conclusion.

[53] It is useful to briefly go over the salient principles that emerge from the *Tessier* judgment. The Supreme Court first reminds us that a case of derivative jurisdiction implies a functional analysis of the undertaking or business "as a going concern" without regard to exceptional or casual factors (paragraph 19). The Court then refers to the *Stevedores Reference* case as follows, at paragraph 32:

> [32] In *United Transportation Union*, Dickson C.J. summarized the *Stevedores Reference* as establishing the principle that a company that would otherwise be provincially regulated for purposes of labour relations, might nonetheless come under federal jurisdiction if the

> effective performance of the federal undertaking that relies on it would not be possible without the services of the related company. Federal jurisdiction over labour relations in such cases is based on a finding that the federal undertaking is dependent to a significant degree on the workers in question. In other words, federal jurisdiction was founded on the relationship between the activity of the stevedores and the relevant federal undertaking, not on the relationship between the stevedoring and the relevant head of power.
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> [Underlining added]

[54] The Court further asks: what then is the analytical framework for assessing whether a related undertaking is integral to a federal undertaking? Citing *Northern Telecom No. 1*, the Court states that the analysis must begin with the operation that is at the core of the federal undertaking, in this case maritime shipping. Then, we must arrive at a judgement as to the necessary relationship of that operation to the core federal undertaking, which must be characterized as vital, essential or integral to the federal undertaking in order to attract federal competency. Among the matters to consider in such an analysis are the general nature of the subsidiary operation as a going concern; the corporate and organizational structure of both enterprises; the importance of the work of the subsidiary operation for the federal undertaking; and the physical and operational connection or integration with the federal undertaking.

[55] At paragraph 38, the Court states:

> [38] 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: *United Transportation Union*, at pp. 1138-39. […]

[56] Furthermore, at paragraph 43, the Court states:

> [43] In *United Transportation Union*, this Court considered whether employees who worked for Central Western Railway Corp. were subject to provincial or federal labour regulation. Central Western operated a railway line located entirely within Alberta. The line had been purchased from Canadian National Railway (CN) with its financial assistance and was joined to the CN rail network at one point. After concluding that Central Western was not itself an inter-provincial railway under s. 92(10)(*a*) of the *Constitution Act, 1867*, Dickson C.J. considered whether the line was integral to CN, a federal undertaking. He noted that there was no daily or simultaneous connection between the two enterprises. Nor could it be said that CN was dependent on the services of Central Western — in fact, CN was trying to abandon the Central Western rail line, indicating that the line was not vital to CN's operations. Something more than physical connection and a mutually beneficial commercial relationship with a federal undertaking was required to satisfy the functional integration test. Because the requisite degree of integration was lacking, Central Western's employees were subject to presumptive provincial labour regulation.
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> [Underlining added]

[57] As the Supreme Court also stated in *C.U.P.E* v. *Paul L'Anglais Inc.* ([1983] 1 S.C.R. 147), the question is whether the federal undertaking could function effectively without the services provided by the subsidiary undertaking, meaning that the activities must be indispensable to that federal undertaking.

[58] Elaborating further, the Court states that federal jurisdiction may be justified when the services provided to the federal undertaking, having found to be integral to it, form the exclusive or principal part of the subsidiary's work activities. Alternatively, federal jurisdiction may also apply if such services are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the subsidiary operation.

[59] Finally, the Court concludes as follows at paragraph 50 of its judgment:

> [50] This appeal is the first time this Court has had the opportunity to assess the constitutional consequences when the employees performing the work do not form a discrete unit and are fully integrated into the related operation. It seems to me that even if the work of those employees is vital to the functioning of a federal undertaking, it will not render federal an operation that is otherwise local if the work represents an insignificant part of the employees' time or is a minor aspect of the essential ongoing nature of the operation: *Consumers' Gas Co. v. National Energy Board* (1996), 195 N.R. 150 (C.A.); *R. v. Blenkhorn-Sayers Structural Steel Corp.*, 2008 ONCA 789, 304 D.L.R. (4th) 498; and *International Brotherhood of Electrical Workers, Local 348 v. Labour Relations Board* (1995), 168 A.R. 204 (Q.B.). See also *General Teamsters, Local Union No. 362 v. MacCosham Van Lines Ltd.*, [1979] 1 C.L.R.B.R. 498; M. Patenaude, "L'entreprise qui fait partie intégrante de l'entreprise fédérale" (1991), 32 *C. de D.* 763, at pp. 791-99; and Brun, Tremblay and Brouillet, at p. 544.
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> [Underlining added]

[60] I must now apply these analytical principles to the facts of this case. Can it be said that NuStar's activities are vital and integral to a federal undertaking in such a way that justifies imposing exceptional federal jurisdiction for purposes of labour laws? The analysis must begin with an examination of the primary purpose of NuStar "as a going concern", its *raison d'être*: does one characterize its primary focus to be one of loading/unloading vessels? Or does it operate a storage facility of petroleum products brought in by sea?

[61] NuStar describes its core operations as the storage of petroleum products under agreement with the owner of such products, not with the shippers. That business includes off-loading those owner's products in its storage tanks, via a pipeline transmission system, for undetermined periods of time, and the loading of the product into vessels chartered by the products owners, not by NuStar, to transport their products to destinations of their choosing.

[62] On the other hand, HSOs Gallant and Brookfield based their views that NuStar should attract federal jurisdiction because its activities of loading and unloading of ships and operating a Port Facility are vital and integral to a federal undertaking, maritime transportation companies, involved in navigation and shipping (HSO Brookfield's Assignment Narrative Report, dated October 27, 2011; HSO Gallant's undated Assignment Narrative Report). As Mr. Reid put it in his submissions, NuStar should be "compared with more conventional stevedoring operations such as those conducted by container terminals. Goods in shipment are stored by these companies as part of a shipping continuum".

[63] Having considered all the facts, I am persuaded by NuStar's perspective regarding the primary nature of its operations. With the greatest of respect, it seems to me that the HSO's characterization of NuStar's operations, as attractive a proposition as it may be, misses the first principle that the Supreme Court has taught us as the starting point in cases of this nature: first, since NuStar's activities do not make it subject to direct federal jurisdiction under one of the heads of legislative powers, our starting premise must be that NuStar is regulated *a priori* by provincial labour laws. Second, when considering NuStar's activities for purposes of determining whether it might attract derivative federal jurisdiction, we must look at all its activities *as a going concern*, its corporate and organizational structure, and the extent of its integration with a primary federal undertaking, in this case companies involved in maritime transportation. The question to be asked then is whether the primary purpose of the work performed by NuStar is essential to the functions of international and interprovincial shippers?

[64] NuStar's primary purpose, it seems to me, is <u>not</u> to load and unload ships, as did the longshoring companies involved in the *Stevedores Reference* case. Such action is merely incidental to NuStar's primary purpose, which I find is the storage of petroleum products, as demonstrated by the facts. What NuStar does at its dock facility is to off-load the owners' products to its storage tanks, and the reverse when the products' owners arrange with vessels to transport their products to destinations of their choice. The facts show that NuStar does not provide services to international shippers. I consider critical in our analysis the fact that NuStar does not have any contractual arrangements with the shippers for loading/unloading of ships. Had this been the case, it would have provided an indicia of functional integration with the shipping companies, as was the case in the *Stevedores Reference*. This seems to me to be a key distinguishing factor. I cannot find in the description of NuStar's activities the kind of functional integration that Courts have required in order to attract federal jurisdiction, such as in *Central Western Railway (supra)* or the *Stevedores Reference* case. In that latter case, the fact that stevedoring companies were, as their main if not exclusive activity, providing services to, and under contract with, the shipping companies, was critical in establishing the degree of functional integration between the two undertakings: the shippers could simply not function without the stevedoring employees. In my view, NuStar's operations do not <u>substantially</u> entail the activities of loading and unloading vessels. As a result, NuStar is in no way integrated into the operation of international shippers so as to be essential for those shippers to carry out their activity.

[65] NuStar does not provide an essential link in the chain of federally regulated shipping operations. Shippers could engage in their core function (shipping) without involvement by NuStar. There is no operational requirement that international shippers store petroleum products at a fuel farm before shipping it to its final destination. The constitutional facts show that NuStar does not provide service to, nor does it earn significant revenue from, the shipping companies. I agree with NuStar that its operation is comparable, in concept at least, to freight forwarding, as it was discussed by the Supreme Court in *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters,* 2009 SCC 53. Although freight consolidation and deconsolidation helped core federal undertakings involved in interprovincial transportation to achieve economies of scale, the nature of the service provided was not found to be vital or essential to those undertakings. A business can act as an intermediary between interprovincial carriers and consumers who want to access those carriers at a reduced price. This does not mean that such a business becomes the operator and provider of the interprovincial carriage business. Accordingly, in spite of the fact that freight forwarding companies were closely integrated into a system of interprovincial transportation of goods, the Court nevertheless refrained from finding that their activities were necessarily incidental to that primary federally-regulated activity, for constitutional purpose. More precisely, the Court did not accept the characterization of freight forwarding services as being considered in a "shipping continuum", i.e. as a step in a global transportation undertaking. The consolidation and deconsolidation of goods was seen by the Court as a self-sufficient process, distinct from interprovincial transportation. Likewise, the storage function here should be regarded as a distinct step from maritime transportation of the product, in the same way as the primary activities of the freight forwarding companies had the effect of "interrupting", so to speak, the chain of transportation process. As NuStar has demonstrated in its account of the constitutional facts, its primary operations are independent and self-sufficient.

[66] The facts also show that the product is not stored for a short transit period, which could have perhaps brought more weight to the HSO's perspective. The products are stored for indeterminate periods of time, pending instructions from NuStar's customers as to their next destination. They can be stored up to 1.5 to 2 years. I am persuaded by the Company's argument that, as a matter of fact, the unloading of petroleum product into NuStar's tanks is "an end in itself' and not merely a step in the chain of maritime transportation.

[67] In *CUPE, Local 3810* v. *Services Maritimes Québec*, 2005 CIRB 339, the Canada Industrial Relations Board had to determine whether a number of companies operating various services in the Port of Québec, including loading and unloading of federally-regulated shipping companies, ought to be included in an existing geographic bargaining certificate. In order to do so, the Board had to make a finding that each of those companies were engaged in the federally-regulated "longshoring industry" before including their employees in the certificate. The interest of this case is that the facts relating to one of the companies in question (IMTT-Quebec Inc.) are in many ways similar to the activities of NuStar. The Board stated as follows, at paragraphs 84 and 85 of its decision:

> [84] IMTT- Quebec Inc. (International-Matex Tank Terminals) (IMTT) is a public terminal used to handle and store liquid bulk, including oil and

> chemical products (acid, peroxide, paraffin), petroleum (gasoline, heating oil) and food oils (vegetable, molasses). The liquid bulk cargo is unloaded from the ship directly into the silo using a narrow pipe. IMTT does not use a stevedoring company to unload the liquid bulk. The work on the dock is done by its own employees.
>
> [85] IMTT's situation is similar to that of the other employers covered by this application in that there is no evidence that IMTT is actively engaged in the longshoring industry in the Port, other than the fact that its clients' products are moved for storage into tanks located on the docks or not far from the docks. In the Board's opinion, the single task of connecting the pipes from the ship to the tanks is not enough to declare this business to be actively engaged in this industry. As a result, the Board finds that the unloading activities are only incidental to the primary activity of storage and that IMTT is not covered by the geographic certification.
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> [Underlining added]

[68] Likewise, in *Syndicat des débardeurs du Port de Québec, Local 2614 of CUPE,* v. *Société des Arrimeurs de Québec Inc.*, 2009 CIRB 451, the union had applied to the Board to amend its geographic certification to add additional employers on the basis that those employers were engaged in operations related to the loading and unloading of vessels at the Port of Québec. In reviewing the activities of one of these employers, Béton Provincial, the Board commented as follows at paragraphs 214 to 218:

> [214] The activities of Béton Provincial covered by the union's application involve making preparations for the unloading of cement powder, including moving the hoppers to the dock, connecting the compressors and testing the computerized control system equipment; operating the console during the unloading; and unhooking the compressors, returning the hoppers to the shed and cleaning up the dock after the unloading operation.
>
> [215] The preparation work is done by two permanent specialized employees of Béton Provincial who are part of a floating team. Mr. Harrison is an electrical specialist in the area of automated connections and Mr. Thibeault is the mechanical repair and welding supervisor. When cement powder is being loaded, another of Béton Provincial's permanent dock workers, Mr. Lajoie, handles the operation of the console that controls the flow of cement powder into the hoppers, the drop point and the silo filling. Messrs. Harrison and Thibeault (or workers filling in for them) are called on if a hopper becomes clogged or a mechanical or electrical problem arises. Béton Provincial employees unhook the compressors and return the hoppers to the shed. Longshoremen clean up the dock once unloading is completed.
>
> [216] Between 2004 and 2005, Béton Provincial received three shipments of cement powder by water. The unloading operations accounted for 31 days of work in a two-year period and employees spent 7% of their work time at the unloading site. The remainder of the time, the members of the floating team were assigned to operations at Béton Provincial's 60 other facilities, located mostly in Quebec. Outside the

> unloading period, the permanent dock employee sees to supplying the Québec-area tank trucks that come to the port with cement powder.
>
> [217] As the Federal Court of Appeal stated in *Cargill Grain Company Limited, Gagnon and Boucher Division* v. *International Longshoremen's Association, Local 1739, et al., supra*, the fact that some cargo handling and storage activities on the dock or in an area adjacent to the dock were declared ancillary to maritime transportation (as in *Reference re: Industrial Relations and Disputes Investigation Act (Canada), supra*) does not mean that all such activities are necessarily ancillary, even if they are carried out on a dock. Activities carried out on a dock are an integral part of longshoring when they are required to complete the transport and ensure delivery of the cargo to its recipient. In the same way as in *Cargill Grain Company Limited, Gagnon and Boucher Division* v. *International Longshoremen's Association, Local 1739, et al., supra*, Béton Provincial becomes the owner of the cargo as soon as it is poured into the hoppers.
>
> [218] The unloading operation begins when the cement powder is removed from the ship's hold and ends when it reaches the waterline, at which point Béton Provincial becomes the owner. The preparation work, that is, moving the hoppers onto the dock, connecting the compressors and testing the computerized control system equipment, is carried out before the unloading operation begins; therefore, such work must be considered ancillary to receiving the cargo only as of the time the cargo is poured into the hoppers. Yet as soon as the cargo is poured into the hoppers, it has arrived at its destination and its owner takes charge of it for the purposes of its business. Even though the hoppers are moved and connected on the dock, such activity is not considered unloading of a ship. Controlling the console, unclogging the hoppers and operating the console are all activities carried out after Béton Provincial has taken possession of the cargo and, therefore, after unloading. The same reasoning applies to the activities of unhooking the compressors and returning the hoppers to the shed when unloading has been completed and when the cement powder has been delivered to the recipient. When the employees perform the work, the maritime transportation has either been completed or has not yet begun. The ordinary meaning of the word longshoring includes loading and unloading of cargo, not all activities that take place on the dock.
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> [Underlining added]

[69] The Board confirmed its decision on reconsideration: *Syndicat des débardeurs du Port de Québec, Local 2614 of CUPE*, v. *Société des Arrimeurs de Québec Inc.*, 2010 CIRB 491. I accept NuStar's contention that the same reasoning should be applied to the instant case. In our case, custody (rather than ownership) over petroleum products is transferred at the moment when the product moves from the ship's manifold to NuStar's loading arm. From that moment on, the product is in NuStar's transmission lines on its way to being stored, which is NuStar's primary activity. The only link between NuStar's operations and "stevedoring" is the connection of the loading arms to the vessel and the preparatory work leading up to that point, and that is also a debatable proposition, as illustrated by the CIRB's decisions referenced above.

[70] That said, even if it was assumed that NuStar's activities of loading/unloading petroleum products shipped by sea constitutes an integral part of maritime transportation, akin to stevedoring, it does not necessarily lead to a determination of federal jurisdiction over the whole undertaking. In such a case, the analysis must continue and this is where, in my view, the principles enunciated in T*essier* become determinative of the issue before me. The constitutional facts must show that those activities are the principal if not the exclusive part of the subsidiary undertaking's (NuStar) work activities, in order to displace presumptive provincial jurisdiction. Or alternatively, if it can be shown that those activities are carried out by employees who form a functionally discrete and severable unit that can be constitutionally characterized as separate from the rest of the operation, the activities in question could be made subject to federal laws.

[71] As the Court states in paragraphs 51-52 of its judgment:

> [51] In this sense, Tessier's acknowledgment that it operates an indivisible undertaking works against its position that its stevedoring employees render the whole company subject to federal regulation. If Tessier *itself* was an inter-provincial transportation undertaking, it would be justified in assuming that the percentage of its activities devoted to local versus extra-provincial transportation would not be relevant: *Attorney-General for Ontario v. Winner*, [1954] A.C. 541. But since Tessier can only qualify derivatively as a federal undertaking, federal jurisdiction is only justified if the federal activity is a significant part of its operation.
>
> [52] In *Consumers' Gas*, for example, an inter-provincial pipeline carried 13 percent of Consumers' total volume and was an integrated part of Consumers' overall distribution system. In concluding that this indivisible undertaking was a local one, Hugessen J.A. placed particular emphasis on the fact that the inter-provincial aspect of the system was a relatively minor part of Consumers'operations:
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> > While it is clear that in cases of primary instance federal jurisdiction under s. 92(10)(a) it is enough that only a minor part of the undertaking be interprovincial so long as it is performed on a continuous and regular basis, the rule is otherwise in cases of secondary instance federal jurisdiction. In such cases the focus is not on the interprovincial undertaking but rather on an undertaking which, by definition, is primarily provincial and the inquiry is to determine whether such undertaking has become federal by reason of its integration with a core federal undertaking. For such purposes it is clearly not enough if the provincial undertaking's involvement in the federal undertaking is only minor in extent or casual in nature.. . . Here, [the federally-related activity] represents only 13% of the total volume received by Consumers' . . . . In our view, such a minor part of Consumers' business . . . cannot serve to bring it under federal jurisdiction. [Emphasis added; citations omitted; para. 10.]
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> [Underlining added]

[72] As mentioned earlier, the loading/unloading activities are, in my opinion, merely incidental to NuStar's primary storage business. In *Tessier*, the stevedoring activities accounted for 14% of its overall revenue and 20% of the salaries paid to its employees. In

the present case, 25 employees out of a complement of 75 or so, engage in those types of activities. The work related to those activities represents 4% of the total hours worked (or 3.3% of the total hours paid) in the 2012 reference year. I have no hesitation to conclude that such a figure is "insignificant" for constitutional purpose. (see also: *Maritime Employers Association (supra);* and *CUPE, Local 3810* v. *Services Maritimes Québec (supra).*

[73] On the alternative aspect of the test, it is quite clear to me that, in light of the constitutional facts and NuStar's organizational and operational structure, NuStar's activities of loading/unloading vessels are not performed by a discrete unit within the undertaking that could be severed for constitutional purpose. Activities at NuStar constitute, as its counsel points out, a totally integrated and self-sufficient operation. Activities related to the movement of petroleum products from vessel to storage tanks are performed amidst other tasks related to the maintenance and safe operation of the tank farm. NuStar is operating a multi-faceted and self-sufficient operation. It looks after its infrastructure, from emergency fire and medical services to waste water management, all related to its storage business. Its non-supervisory Operations employees rotate through the 4 positions, so that one week an Operations employee acts as Dock Operator (dividing his time between vessel relations and dock oversight) and the following week may be assigned to either tank farm, where involvement with vessels is non-existent. The Supreme Court had this to say in *Tessier* on the integration of employees into other related operations, at paragraphs 55 and 58:

> [55] In short, <u>if there is an indivisible, integrated operation, it should not be artificially divided for purposes of constitutional classification. Only 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.</u>
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> […]
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> [58] What emerges from this factual review is that Tessier's stevedoring services were not performed by a discrete unit and represented only a small part of its overall operation. Tessier's employees are an indivisible workforce who work interchangeably in various tasks throughout the company. To the extent that any of Tessier's employees perform stevedoring activities, they do so only occasionally. Crane operators who work at a construction site one day might assist in unloading ships the next day.
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> [Underlining added]

[74] In its submissions, NuStar takes objection to HSO Galant's statement that appeared to have influenced his determination that large supertankers discharge their loads at NuStar, and then the product is loaded onto smaller vessels. The employer replied that large vessels do not <u>need</u> NuStar to unload their product, as there are a variety of locations along the eastern seaboard that can accommodate large vessels. Furthermore, NuStar points out that very few large vessels discharged their product at NuStar's terminals, and the vessels that took on product were neither normally larger nor smaller than the vessels discharging the product. In any event, NuStar has no control over the

choice of the size of the vessel; that choice is made by product's owners. Be that as it may, I do not consider this factor as relevant for the purpose of constitutional determination.

[75] Finally, one last question that arises from the record is whether NuStar operates a port facility, which would bring it under federal jurisdiction as necessarily incidental to navigation. Firstly, it should be noted that NuStar does not perform any aspect of port services, such as line handling, water taxi, tugboat operation, stores provisions, fueling, pilotage, etc. The facts establish that Point Tupper, where NuStar's operations are located, has not been designated as a "public port" or "public port facility" under the *Canada Marine Act*, nor is there a "port authority" at that location. NuStar simply owns a private wharf where vessels will moor to load/unload their commodities for storage purposes. Counsel for NuStar refers to the decision rendered by an Appeals Officer in *Maritime Harbour Society* (Decision 05-054), where a distinction is made between a private wharf (related to fishing, fish preparation and the sale of fish) and a wharf that can be generally used by the public. The Appeals Officer reasons as follows at paragraphs 55 and 56:

> [55] To support his position that the Digby Fishermen's Wharf falls under provincial jurisdiction, C. W. Watkins compared this wharf to the Yarmouth Sea Products Wharf which is owned by a private company, Yarmouth Sea Products Limited, and located in the Yarmouth Harbour.
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> [56] The concern that I have with this comparison is that the situation was not comparable. Even though MHS is provincially incorporated and its wharf is no longer linked to any federal department, has no navigation light and is mainly used by local fishermen, the evidence was that the Digby Fishermen's Wharf is open to any vessel that needs to use these facilities subject to paying MHS mooring fees. For example, tall ships used the wharf in the summer of 2004. Therefore, this wharf is an essential component to navigation. In addition, the Digby Fishermen's Wharf is associated with shipping because it is used for the local shipping of the fishermen's catch. The evidence was also that the only activity of MHS is to own and operate the Digby Fishermen's Wharf while the activities of Yarmouth Sea Products Limited are associated with fishing, fish preparation and the sale of fish products, which fall well within the provincial jurisdiction and are not associated with navigation.
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> [Underlining added]

[76] I believe this reasoning is applicable to the situation under study here. We must fall back again on the primary purpose of NuStar's existence. Unlike the situation in the *Maritime Harbour Society* case above where the sole activity of that company was to operate the port, the operation of a private wharf in the instant case is entirely incidental to NuStar's primary business, which is not management of a port facility, but storage of petroleum products.

[77] As to the services provided to shipping companies when they land at NuStar's docks, the constitutional facts establish that NuStar has contracts with F.K Warren and others to provide certain services to vessels. As counsel for NuStar points out, it may be that the vessel's agents, F.K. Warren and the contractors it employs, provide services that

would make them subject to federal jurisdiction. However, even if it was to be the case, it does not bring NuStar into the federal sphere. In *Halifax Freight & Steamship Checkers (supra)*, the Canada Labour Relations Board (as it was then) found that companies that relied on the services of others were not caught by federal jurisdiction, especially when the companies' primary activities had no federal flavour. The Board states at paragraphs 22 and 23:

> [22] […] If one looks at the Eastern Canada Stevedoring Co. Lt. Case, it can be seen that the Supreme Court of Canada was dealing with a stevedoring company whose ongoing business consisted of loading and unloading of ships. In this application before us, the ongoing business of Mobil and the other companies referred to earlier is unquestionably that of oil and gas exploration. Normally employees employed by businesses engaged in exploration for oil and gas would fall under the constitutional jurisdiction of the province where the activity is taking place. So would the transportation of goods and equipment to the exploration site if carried out by employees of the exploration company. In these circumstances even if the goods and equipment were transported across provincial boundaries, the carriage of these goods by the owners would not constitute interprovincial transportation within the scope of the Code. For example, companies like The Bay, Canadian Tire, Sears, and many construction companies carry their own goods across provincial boundaries every day yet remain within provincial jurisdiction.
>
> [23] If, however, exploration companies decided to use an interprovincial trucking company or a railway to transport their goods across a provincial boundary, this in all likelihood would be classed as interprovincial transportation and it would fall within the ambit of the Code. But it would not be the exploration company that would be engaged in interprovincial transportation, it would be the trucking company or the railway company that hauled the goods. The exploration company would be merely a customer of the trucking company or the railway company, it would be engaged in the trucking or the railway industry.
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> [Underlining added]

[78] I believe that the same can be said here: NuStar is not drawn into federal jurisdiction simply because it may have contracted with federally-regulated entities to offer certain services to vessels.

[79] NuStar pointed out that its employees are subject to a collective agreement negotiated between the Company and the Communications, Energy and Paperworkers Union, Local 585 (CEP). The CEP is the certified bargaining agent for NuStar's employees, under a certificate issued by the Nova Scotia Labour Relations Board. The record also shows that it has been subject to a comprehensive inspection by provincial Occupational Health and Safety inspectors in 2008. NuStar also refers to another of its facilities that incidentally moves petroleum product in the course of storing it, the IMTT-NTL (International – Matrix Tank Terminals facility at Wiffen Head, Newfoundland, whose occupational health and safety is provincially regulated. There is no indication that such exercise of jurisdiction by provincial authorities has been challenged, until the issuance of HSO Gallant's direction. I will simply comment that those facts are not determinative of the constitutional jurisdiction of NuStar as an employer. At best, they provide an indication that the pre-eminence of the storage function has been recognized

historically, but those facts could not grant provincial jurisdiction if the functional analysis conducted pursuant to the appropriate legal principles set out in these reasons, had demonstrated otherwise.

[80] In summary, the unloading/loading of petroleum products from ships into its storage tanks is undisputedly necessary for Nustar's core mission: the storage of petroleum products brought in by sea. It is debatable whether the loading/unloading process, i.e. the action of connecting the pipes, pressure testing and controlling, and disconnecting the pipes, can be characterized as stevedoring in the sense understood in the jurisprudence, and I am of the view that it cannot. If I am mistaken in that finding, and assuming that it can, that activity is clearly incidental to NuStar's primary function to store the commodities as per contractual arrangements with the owners of the product, not with the shipping companies. It is not necessarily incidental or integral to shipping, in the sense understood in the jurisprudence. Furthermore, only a third of NuStar's total workforce may be called upon to perform that activity at different points in time, and that the actual time involved by those employees in the "loading/unloading" process represents 4% of the total hours worked by all of NuStar's employees. That percentage is truly "insignificant" for the purpose of the constitutional analysis. Finally, the work that may attract federal jurisdiction and the employees performing that work are integrated into a myriad of other tasks related to the operation and maintenance of the storage tanks, NuStar's primary business, and as such, cannot be functionally severed for the purpose of making them subject to the Code.

Decision

[81] For all the above reasons, the appeal is upheld. It is my determination that NuStar Terminals Canada Partnership's operations at Point Tupper, Nova Scotia, are within provincial constitutional jurisdiction, namely the Province of Nova Scotia. Consequently, I hereby rescind the direction issued by HSO Gallant on November 29, 2012, as having been made without jurisdiction.

Pierre Hamel
Appeals Officer