IN FACT AND IN LAW

SEPTEMBER 2011

Labour and Employment

lavery
LAW ▸ BUSINESS

UPDATE ON PLANNED PRODUCTION SHUTDOWNS

JEAN BEAUREGARD

SINCE 1968, LABOUR RELATIONS IN THE CONSTRUCTION INDUSTRY HAVE BEEN GOVERNED BY A SPECIFIC STATUTE, THE *ACT RESPECTING LABOUR RELATIONS, VOCATIONAL TRAINING AND WORKFORCE MANAGEMENT IN THE CONSTRUCTION INDUSTRY* (HEREINAFTER REFERRED TO AS "R-20").

AT THE TIME, R-20 WAS ENACTED TO PUT SOME ORDER IN AN INDUSTRY STRUGGLING WITH AN INCREASING NUMBER OF APPLICATIONS FOR CERTIFICATION AND REGIONAL DECREES.

The coming into force of R-20 stabilized the sector and resulted in better competition between contractors, who all became subject to the same working conditions with the result that competition was from then on based on factors other than the working conditions of workers.

One of the key elements of R-20 was its scope of application. Indeed, how could so-called construction work be distinguished from similar work performed on the periphery of this industry?

Thus, over time, R-20 was amended for the purpose of making adjustments in this respect.

It is understandable that the concerns of industrial or commercial enterprises that hire so-called "maintenance" workers are not the same as those of building contractors who bid to obtain "maintenance" contracts.

The same is true with respect to the working conditions of workers employed in the industrial sector: they enjoy employment stability that does not exist in the construction industry.

R-20 has therefore provided for exceptions allowing these industrial and commercial enterprises to directly hire workers to perform so-called "maintenance" work[1].

But what about planned maintenance work that is carried out regularly within businesses and requires reliance on outside labour?

PLANNED PRODUCTION SHUTDOWNS

The purpose of these stoppages, commonly known as "shutdowns", is to carry out maintenance, repair, renovation or modification work on production machinery or to install such machinery. They require a total production shutdown for a short period of time.

Due to the fact that these production shutdowns result in losses, the work must be carried out quickly by skilled labour.

But is this work, performed by outside contractors, subject to R-20?

THE HISTORY OF R-20

In the early 1970s, a few months after R-20 came into force, the legislator adopted a regulation applicable to production machinery, *Regulation no. 1*.

Over time, this regulation, the drafting of which has always been deficient, was amended several times and caused the establishment of many review commitees[2].

The first version of *Regulation no. 1* provided that work that constituted "the installation, repair or maintenance of production machinery" was governed by R-20 only if it was carried out by construction employers with the assistance of their employees.

This drafting created two categories of enterprises, namely, those who had the status of "professional employers" in construction and other contractors[3].

[1] R-20, sections 19(2) and 19(8).

[2] For example, the Comité d'étude et de révision de la *Loi sur les relations du travail de l'industrie de la construction* (Committee for the review and revision of the Act respecting Labour relations in the construction industry), better known as CERLIC, the amendment to the *Act to amend the Act respecting labour relations, vocational training and manpower management in the construction industry and other legislative provisions*, Bill 42, which became Chapter 61 of the Statutes of Québec of 1993 (discussed, passed but never put in force) and the report of the Groupe de travail sur la machinerie de production (Task force on production machinery), August 19, 2002.

[3] Section 1 *k*) professional employer: an employer whose main activity is to do construction work and who usually employs employees for any kind of work which is the object of a collective agreement.

To avoid what they considered as unfair competition, "professional employers" created legal entities that worked only in the field of "maintenance", which exempted them from being covered by R-20.

However, the labour problem remained.

Indeed, this labour force ("construction millwright, pipe fitter, insulator, boilermaker, electrician, welder, etc.") mainly came from the construction industry and the unions representing them insisted that their working conditions be maintained with respect to activities related to planned shutdowns, irrespective of the status of the employer.

This situation lasted for several years and the governments made some attempts to regularize the matter.

At the same time as the construction unions made these demands, enterprises other than "professional employers", which specialized in industrial maintenance and directly employed their own labour force and trained it, gained momentum.

The two groups were facing each other.

On March 27, 2003, following the fact-finding report of the Groupe de travail sur la machinerie de production (task force on production machinery) (Mireault report), the Regulation was amended in order to, according to the explanatory notes included with the draft regulation, [*translation*] "identify established practices respecting production machinery, the installation of which mainly requires using professional expertise found in the construction industry".

It thus seems that the government wanted to pass a legislative amendment that, while identifying established practices, was not intended to have any effect on the industry.

What was said was done!

As soon as it came into force, participants in the industry could only note the shortcomings of its legislative drafting.

The amendment stipulated a general rule full of conditions for one to be subjected to the Act followed by a myriad of exceptions to that hypothetical subjection, which led many participants to say that nothing had changed after all.

Two key decisions confirmed that interpretation [4].

THE CURRENT SITUATION

Voluntary coverage always remains possible for an enterprise wanting to use professional contractors from the construction industry and construction workers holding certificates of qualification.

For the other enterprises, one finds that generally the work arising out of planned shutdowns, whether for the purposes of maintaining, installing or repairing production equipment, is rarely subject to R-20.

In fact, whatever the description given to the work to be performed may be (maintenance, repairs, installation, etc.), the Regulation provides that in order to be subjected to R-20 the work must call for reliance on professional expertise mainly found in the construction industry.

Now, the Courts have ruled that: [5]

> [translation] *"For the trade members mainly involved in the work at issue, such as pipe-fitters, millwrights, electricians, it is obvious that the professional expertise can be found both inside and outside the construction industry."*

Such is also the case for welding work [6].

As a result, maintenance and repair work carried out during planned shutdowns is not subject to R-20 because the trades participating in that work cannot claim that they have professional expertise mainly found in the construction industry.

It is therefore to be understood that, following these decisions, all planned shutdown work is no longer covered by R-20 unless it is carried out by workers whose professional expertise is mainly found in the construction industry, a concept which has not yet been clarified for other trades such as carpenter-joiners, tinsmiths, boilermakers, etc.

Now, even if these trades were considered as having professional expertise mainly found in the construction industry, it would remain to be established whether one of the exceptions provided under the Regulation might apply before one could claim that the maintenance work is covered by R-20. There's many a slip twixt the cup and the lip.

CONCLUSION

In view of the above-mentioned case law, the Ministère du Travail has set up a new committee with a mandate to consult the participants in order to find common ground and, if necessary, propose an amendment to the Regulation.

We understand that a new draft is currently under review but we doubt very much that it will result in bringing back into the construction industry an area of activity which, for nearly forty (40) years, has failed to become the subject of a consensus between the participants, namely the clients and the partners in the construction industry.

JEAN BEAUREGARD
514 877-2976 jbeauregard@lavery.ca

[4] *Domtar*, Decision 2855C, February 1, 2008 and the *Xstrata* case, January 31, 2008.

[5] Paragraph 450, Decision 2855C.

[6] Paragraph 455, Decision 2855C.

SUBSCRIPTION: YOU MAY SUBSCRIBE, CANCEL YOUR SUBSCRIPTION OR MODIFY YOUR PROFILE BY VISITING PUBLICATIONS ON OUR WEBSITE AT lavery.ca OR BY CONTACTING CAROLE GENEST AT 514 877-3071.

► lavery.ca

© Copyright 2011 ► LAVERY, DE BILLY, L.L.P. ► BARRISTERS AND SOLICITORS
The content of this text provides our clients with general comments on recent legal developments.
The text is not a legal opinion. Readers should not act solely on the basis of the information contained herein.

MONTREAL QUEBEC CITY OTTAWA