IN FACT AND IN LAW

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Recent Amendments to the Québec *Labour Code*

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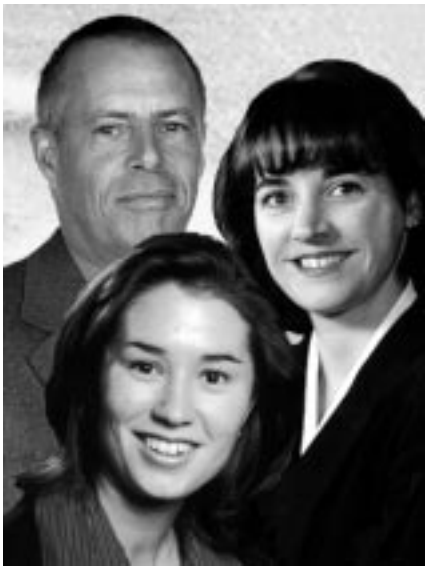
On June 21, 2001, Québec's National Assembly enacted Bill 31, *An Act to amend the Labour Code, to establish the Commission des relations du travail and to amend other legislative provisions*, which was tabled in May by the new Minister of State for Labour, Employment and Social Solidarity, Mr. Jean Rochon.

In the spring of 2000, the former Minister of Labour, Ms. Diane Lemieux, unveiled her policy objectives by submitting a document for consultation entitled, "*Pour un Code du travail renouvelé* [Towards a modernized Labour Code]". In May of that year, our firm published a bulletin commenting that policy, which proposed a substantial revision of the Québec *Labour Code*.

Ms. Lemieux subsequently tabled *Bill 182*, which was the legislative equivalent of the policy set forth in the consultation document. The Bill was widely criticized by union and employer representatives alike.

After the last cabinet shuffle, Mr. Jean Rochon, the new Minister of Labour, announced that he was abandoning the reform of the *Labour Code* initiated by his predecessor, preferring instead to table new



draft legislation that would give greater consideration to preserving the balance which is essential in labour relations.

Bill 31, which was the subject of public consultation before a parliamentary committee and was again the object of criticism by union and management representatives, was finally assented to on June 21, 2001.

Since its enactment in 1964, the *Labour Code* had not been the subject of any noteworthy amendments. Apart from *Bill 182*, which was abandoned, *Bill 31* is the first major reform of the *Labour Code* since 1977. Given that the reality of the labour market has changed considerably over that time, the Minister's amendments to the existing legislative framework are significant.

Mr. Rochon's major policy objectives in this reform consist in improving labour relations by accelerating the certification process and by abolishing the Tribunal du travail, which shall be replaced by the Commission des relations du travail.

In this bulletin, we shall deal with the four main areas affected by the reform:

- the creation of a Commission des relations du travail;
- the transmission of rights and obligations upon the alienation or transfer of the operation of an enterprise (sections 45 and 46);
- the conditions applicable to the conversion of an employee's status;

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- the resolution of protracted labour disputes.

The Commission des relations du travail

The reform of the *Labour Code* provides for the establishment of a new, unified decision-making authority having jurisdiction over labour relations, namely the Commission des relations du travail, which replaces the Office of the Labour Commissioner General and the Labour Court [Tribunal du travail]. Through this new decision-making authority, the legislator has sought to favour an administrative rather than a judicial approach so as to accelerate the settlement of labour disputes.

The establishment of the Commission des relations du travail is also aimed at eliminating several levels of judicial authority and at granting decision-making powers that are final and without appeal to the Commission and the new "labour relations officers". Thus, under the new provisions of the Code, Commission decisions are not subject to appeal, therefore resulting in the abolition of the Labour Court.

For all practical purposes, the new authority will take over the functions currently entrusted to the Office of the Labour Commissioner General in matters related to collective labour relations and will dispose of individual complaints and recourses that were previously lodged with the Office under the *Labour Code* and other statutes. The Minister of Labour retains his mediation and conciliation functions to facilitate the collective bargaining process.

The Commission has broad powers and, more specifically, it may summarily dismiss any application, complaint or proceedings that it deems to be abusive or dilatory; it may ratify a conciliation agreement that is in conformity with the law; it may issue orders, including interim orders, to safeguard the rights of the parties; and it may call upon the parties to attend a pre-hearing conference if it considers that to be useful under the circumstances.

The new administrative tribunal also has the power to accelerate the certification process considerably. Under the new *Labour Code*, the Commission must now rule on a petition for certification within 60 days of the filing thereof. Previously, union organizations that had filed such petitions could wait for union recognition for several months, or even years, while the employer exhausted all available remedies. Regarding any other matter, subject to the applications referred to in section 45.1 (which we will examine hereafter), the Commission shall now render its decision within 90 days after the case is taken under advisement. Regarding the applications referred to in section 45.1, the Commission shall render its decision within 90 days following the filing thereof with the Commission. In both cases, the president of the Commission may grant an extension.

The "labour relations officer" also plays a role in speeding up the certification process. In particular, he or she may immediately certify an association even where there is no agreement with the employer as regards part of the bargaining unit, if the officer considers that the association is nonetheless representative and that it will remain representative regardless of any decision of the Commission on the description of the bargaining unit.

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The legislative reform thus grants broad powers to the commissioners and labour relations officers of the Commission des relations du travail, who, in all likelihood, will be appointed from among the current commissioners and certification agents.

However, the legislator has accelerated the certification process while eliminating any right of appeal. An alternative would have been to adopt the Ontario solution, which provides for the holding of a secret vote of union allegiance within five (5) days of the filing of a petition for certification.

As a consequence of the present reform and in the interest of legislative consistency, the National Assembly has amended various statutes to specify that remedies that were previously be exercised before the Labour Commissioner will now be exercised before the Commission des relations du travail.

For example, the reform has a considerable impact on municipalities. On December 20, 2000, Bill 150, *An Act to again amend various legislative provisions respecting municipal affairs* was enacted. Under that Act, the legislator transferred to the Labour Commissioner General the jurisdiction previously held by the Commission municipale du Québec over the remedies of certain employees of municipal bodies with respect to dismissal, reduction in salary or a suspension for more than 20 working days. In light of the new municipal legislation, the amendments made by the *Labour Code* bring the necessary adjustments by way of a schedule pertaining specifically to the remedies provided under other legislation and by a modification of the relevant sections of the *Cities and Towns Act* (R.S.Q., c. C-19) and the *Municipal Code of Québec* (R.S.Q., c. C-27) so as to confer the jurisdiction of the Labour Commissioner General upon the new Commission des relations du travail.

Apart from the powers retained by the Minister of Labour with respect to conciliation, mediation and arbitration, the reform concentrates all the powers related to the adjudication of disputes arising from the application of the *Labour Code* within a single body, while in the same breath eliminating any appeal from its decisions. However, as previously provided for in the Code, the Commission may, upon application and subject to well-defined conditions, review or revoke a decision that it has rendered.

The transmission of rights and obligations (sections 45 and 46)

The Minister's ostensible goal in reforming the *Labour Code* was to foster a positive effect on labour relations by allowing a more flexible application of section 45, which provides for the transfer of union certification and the transmission of the rights and obligations related thereto, in the event of the total or partial alienation or transfer of the operation of an enterprise.

From this standpoint, new section 45 does not provide for the automatic transmission of existing union rights to a third-party acquirer in the event of the total or partial alienation or transfer of the employer's undertaking.

The reform introduces a prescription period in all situations regarding an application for a determination regarding the interpretation of section 45. Previously, the Code did not provide for any such delay, with the result that, until very recently, section 45 applied automatically and could not be subject to a prescription period. However, the higher courts had recently begun imposing reasonable delays on unions claiming a transmission of their rights. According to this recent trend, a union would be given approximately nine (9) months to file an application, failing which, its claim could be the subject of a motion to dismiss.

The *Labour Code*, as amended, goes even further than the current case law by imposing a time limit of 90 days on the union to apply to the Commission des relations du travail for a determination on the transmission of rights and obligations. This time limit prevents unions from invoking tardily the application of section 45. In order to translate this principle into action, the employer is required to give the union a notice of the total or partial alienation or transfer of the operation of the enterprise indicating the intended date of the transaction. Failing such notice, the union has 270 days from its knowledge of the fact that the undertaking has been alienated or transferred within which to apply to the Commission for determination of the matter.

Regarding the partial or total transfer of an undertaking, i.e., when a part of an undertaking is contracted out to a third party, the reform brings some important clarifications and provides new conditions for application.

On the one hand, the amendments allow the parties to specifically agree that upon the transfer, they elect not to invoke the application of section 45. Contrary to the provisions of the former Code and the case law establishing that section 45 is of public order and therefore may not be the subject of an agreement, the new Code allows the parties to waive the application of section 45 in advance and hence to waive the transfer of certification to the new employer. Such a waiver also binds the Commission.

On the other hand, in the absence of such an agreement, the certification and the collective agreement are transferred to the new employer. However, the amendments to the Code provide that the collective agreement is terminated twelve (12) months after the transfer, or earlier, depending on the expiry date provided in the collective agreement. The transferee is therefore compelled to respect the working conditions provided in the transferred collective agreement for a maximum of one year, after which time, it may negotiate a new collective agreement with the union. This provision allows both negotiating parties to adjust to the new situation.

In another vein, the reform of the Code guarantees the application of section 45 where the transfer of an undertaking subject to federal jurisdiction becomes subject to the legislative authority of Québec. A similar provision also exists in the *Canada Labour Code* where an enterprise subject to provincial jurisdiction becomes subject to federal jurisdiction.

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The purpose of this new provision is to protect the union's acquired rights, namely the certification and the collective agreement, from becoming null as the result of a change in the jurisdiction over the enterprise, as had previously been the case. The amendments therefore constitute a solution for the unions by providing that a certification, a collective agreement or a proceeding taken under the *Canada Labour Code* with a view to obtaining a certification, or the signing or carrying out of a collective agreement are deemed to have been taken under the Québec Code. Certification of an enterprise subject to federal jurisdiction is thus automatically renewed if the enterprise becomes subject to Québec jurisdiction.

Lastly, section 45 was amended to eliminate the exception pertaining to judicial sales. Specifically, the acquirer of a bankrupt company is now bound by the certification, collective agreement and any proceedings related thereto. This could greatly restrict the flexibility of an acquirer who seeks to extensively reorganize the company so as to return it to profitability.

New section 46 further clarifies the powers granted to the Commission regarding the transmission of rights and obligations and the difficulties arising therefrom.

Previously, with respect to the amendment of collective agreements, a Labour Commissioner was generally regarded as only being vested with powers pertaining to the merger of seniority lists and the reorganization thereof. New section 46 allows not only for the merger of bargaining units, and by that very fact, employee seniority lists covered thereby, but confers upon the Commissioner the jurisdiction required to determine which collective agreement remains in force and which provisions thereof are applicable. The Commissioner therefore has broad latitude to make whatever adaptations he considers necessary.

Along the same lines, the Commissioner may order that a vote be held to verify the representative character of an association and to designate a single union representative for a given group of employees.

New section 46 allows parties to agree on the consequences of an alienation or transfer, notably on the description of the bargaining units and the designation of the association that is to represent the group of employees concerned. The Commission now has full jurisdiction to render any decision necessary to implement such an agreement.

Finally, according to section 46, where the transfer of an enterprise occurs during the certification process, the certification can be protected and continue to bind the new employer, notwithstanding that a decision on certification has yet to be rendered by a Commissioner.

In summary, the Commission may grant, amend or merge certifications, order a vote to be held under certain circumstances and implement agreements between the parties regarding their decision to waive the application of section 45 or determining the conditions for its application.

Conditions applicable to a conversion of employee status

Contrary to the approach of his predecessor, the present Minister of Labour, Mr. Rochon, has retained the existing definition of employee and dropped the plan to codify the concept of "dependent contractor or dependent provider of services".

On the other hand, the Minister's reform provides guidelines to prevent an employer from attempting to eliminate a union by changing the status of its employees. The new provisions are thus aimed at ensuring that no employer will be able to convert its employees into independent contractors in order to prevent unionization.

In consequence, the legislative amendments require an employer to give notice to the relevant union if it wishes to bring changes to its enterprise's mode of operation so that, from its perspective, the status of employees covered by a certification or petition for certification would be converted into that of contractors without employee status. The notice must state the nature of the changes considered.

If the union does not share the employer's view regarding the consequences of the changes on the status of employees as stated in the employer's notice, the union then has 30 days from receipt of the notice to apply to the Commission des relations du travail for a ruling on the consequences of such changes. In doing so, it is unlikely that the Commission could prevent the employer from going ahead with its reorganization plan. However, before implementing the proposed changes, the employer must wait until the Commission renders its decision or, if the union had not filed an application, until the expiry of the 30-day period the union has to do so. Where applicable, the Commission must render its decision within 60 days of the filing of the union's application. Once again, its decision is final and without appeal.

Resolution of protracted labour disputes

The reform of the *Labour Code* provides certain mechanisms for the settling of protracted labour disputes and the resolution of deadlocked situations.

Basically, the Code's new provisions allow an employer or a union to apply to the Commission to intervene in order to facilitate the settlement of their dispute and the signing of a collective agreement. The Commission may then order a person, a group of persons or an association to cease performing, not to perform or to perform an act in order to be in compliance with the Code; it may order that the grievance and arbitration procedure under a collective agreement be accelerated or modified; and it may issue an order not to authorize or participate in, or to cease authorizing or participating in, a strike, work slowdown or lock-out.

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At the employer's request, and if the Commission considers that such a measure may foster the negotiation or signing of a collective agreement, the Commission may order that a secret ballot be held on the last offers made by the employer. The secret ballot is then held under the supervision of the Commission, in accordance with the rules it may determine.

The Commission may order the holding of such a ballot only once during the negotiation of a collective agreement. It is therefore in the employer's interest to wait until the best possible moment to file such a request with the Commission.

With this amendment to the Code, the employer may thus inform the employees of the contents of its proposals, thereby countering any union misinformation, if such is the case. Previously, the Code did not require the association representing the employees to submit the employer's proposals to its members.

Lastly, this amendment provides that the vote must be held by secret ballot, which constitutes a better safeguard to ensure democracy in the workplace.

Conclusions

Although the reform enacted in accordance with Mr. Rochon's proposals contains fewer measures prejudicial to employer interests than the draft legislation tabled by his predecessor, Ms. Diane Lemieux, the legislative tools needed by businesses to maintain and enhance their competitiveness are still lacking. Given the national and global context of deregulation and trade liberalization, it is necessary to lower rather than raise obstacles to economic development.

Accordingly, in order to obtain a more flexible legislative framework that would have increased their competitiveness, employers had hoped that the government would expressly allow contracting out by further limiting the scope of section 45.

They also regret the absence of a provision that would have rendered mandatory the holding of a secret ballot under the supervision of the Minister of Labour, as a prerequisite to union certification. Such a vote would be a concrete manifestation of the most basic rules of democracy, which would give the process considerable credibility in the eyes of employers and of employees opposed to union representation.

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