IN FACT AND IN LAW

Labour

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The Supreme Court of Canada confirms the interpretative policy of section 45 of the Quebec *Labour Code* given by the Labour Court in the case of subcontracting

By Serge Benoît

The Ivanhoe Inc. and *Sept-Îles* cases

On July 13th, the Supreme Court of Canada rendered its decisions in *Ivanhoe Inc.* vs. *UFCW, Local 500* and *Sept-Îles (City)* v. *Quebec (Labour Court)*. The majority opinion was written by Justice Arbour, with Chief Justice McLachlin as well as Justices L'Heureux-Dubé, Gonthier, Iacobucci and Major concurring. Justice Bastarache, however, wrote a strong dissent.

The Ivanhoe case

Ivanhoe is a property management company which owns several office buildings and shopping centres.

In 1989, Ivanhoe stopped handling its own building maintenance and contracted it out to a maintenance company called Moderne. All of Ivanhoe's janitorial employees became Moderne's employees. The union, UFCW, Local 500, filed a petition under section 45 of the Quebec *Labour Code* to have the transfer of the certification and collective agreement to Moderne recognized. That petition was not contested. In 1991, when its contract with Moderne was about to expire, Ivanhoe invited bids for a new janitorial contract. It signed a contract with four new janitorial contractors. The UFCW then filed a motion under section 45 which was contested by both Ivanhoe and the four contractors.

Ivanhoe and the contractors essentially argued that section 45 cannot apply in the case of the performance of a simple contract for services, without the transfer of Ivanhoe's other property or assets—in this case, the contract only involved the transfer of tasks or functions. Ivanhoe and the contractors essentially based their view on the opinion rendered by Justice Beetz in the *Bibeault* case decided by the Supreme Court in 1988. In that case, Judge Beetz rejected the functional definition of an undertaking and adopted an organic definition instead.

Ivanhoe also argued that it was no longer an employer within the meaning of the *Labour Code* given that, in 1991, when the contracts for janitorial services were awarded to the four contractors, it had not had janitorial employees since 1989. Ivanhoe contested the concepts of potential employer and retrocession that the Labour Court had developed to justify the application of section 45 in those cases.

In addition, Ivanhoe and the contractors argued that the simple granting of a contract for services, and in particular a contract for janitorial services, does not constitute the transfer of part of an undertaking, pursuant to the Supreme Court's decision in *Lester (W.W.) (1978) Ltd.* and Canadian case law on the subject.

Finally, Ivanhoe claimed that it was entitled to have the union's certification cancelled under section 41 of the *Labour Code* since the union no longer held the necessary majority of members to maintain its certification with Ivanhoe.

The union, UFCW, Local 500, argued that the collective agreement negotiated and signed with Moderne, or the one signed with Ivanhoe, should follow the certification and be transferred to the four new contractors.

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The respective claims of Ivanhoe and the contractors, along with those of the union, were dismissed by all instances. At the end of 1999, Ivanhoe, the contractors and the union obtained leave to appeal to the Supreme Court, hence this decision.

The Decision

The justices of the Supreme Court sitting in this case, except for Justice Bastarache, dismissed the appeals because the interpretation given by the lower courts was not patently unreasonable. The Court confirmed in very clear terms the principle it has followed for several years, that of judicial deference to the decision-making autonomy of administrative tribunals. For the Court, judicial deference makes it possible both to respect the decision-making autonomy of administrative tribunals and to ensure consistency and predictability of the law. This ideal balance should only be disturbed by the superior courts where there are clearly absurd or irrational results.

The Supreme Court held that the labour commissioner and the Labour Court had the authority, by virtue of the *Labour Code* and the decisions of that Court, to assess the respective importance of the various components of the undertaking and to conclude in this case that the transfer of a right to operate, combined with the transfer of functions, was sufficient to justify the application of section 45, pursuant to the organic definition of an undertaking. The Supreme Court further held that the administrative tribunals charged with applying section 45 enjoy a broad discretion in determining and weighing the factors they apply in defining an undertaking and are free to develop specific tests to respond to the situation of a given industry.

The Court considered it very important and significant that a consensus existed within the majority of the Labour Court (only Judge Brière did not share his colleagues' opinion) as to the interpretation to be given to section 45. This consensus constituted a kind of interpretative policy of the court on the issue. Accordingly, in order to give effect to the purpose of section 45 in cases involving the temporary transfer of the operation of an undertaking, the theory of retrocession developed by the Labour Court was deemed reasonable, as was the fiction of the potential employer. Furthermore, as the Supreme Court had already indicated in the *Ajax* case (decision rendered in 2000), the transfer of the operation of an undertaking which results in the application of section 45 can take different legal forms.

The most interesting aspect of this case, which warrants further discussion in a later bulletin, involves the transfer of the collective agreement originating with either the transferor or the transferee (this issue was appealed by the union). In this case, all instances, from the labour commissioner to the Court of Appeal, had refused to allow the collective agreement signed by Moderne to be transferred to the four new transferees since there was no legal relationship between them. The Supreme Court did not find this conclusion unreasonable since section 46 of the *Labour Code*, as amended in 1990, confers the responsibility for settling difficulties arising out of the application of section 45 upon labour commissioners and the Labour Court and this authority is central to their specialized jurisdiction.

The refusal to transfer the collective agreement negotiated and signed by the first transferee to the subsequent transferee was first examined by Judge Bernard Lesage of the Labour Court in *Coopérants (Les) - Société mutuelle d'assurance-vie* (D.T.E. 87T-300), whose decision was never contested. On this point, the Supreme Court of Canada's decision opens the door to the exercise of discretion by administrative tribunals: (p.89-90)

> "**Thus, in a situation like the one in this case, where there are multiple collective agreements, including one signed with a subcontractor and another which had probably expired, that might govern the labour relations within the undertaking and where, on the other hand, there are employees who might lose any union protection if no agreement, even an amended one, were to apply to them, the labour commissioner may choose from a range of solutions, and may also create solutions, in order to settle the complex difficulties that arise in the manner the commissioner considers most appropriate in the circumstances.**
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> **For example, the collective agreement signed with Moderne could have been transferred to the new employers with a new expiry date established as the date of the transfer, so that the jobs and working conditions could have been safeguarded for the bargaining period only. Similarly, the expiry date of the agreement signed with Ivanhoe could have been amended**

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to safeguard the jobs during the negotiations for the purpose of concluding a new agreement. Had he considered it appropriate, the commissioner could also have made a ruling providing for the transfer of only the part of either of the collective agreements relating to job security for a limited period, so that the parties could agree on a new collective agreement while the employees could not have been dismissed with impunity. Lastly, it was also possible to decide as the commissioner did in this case, that none of the agreements would be transferred. (...)

In any event, the appropriate solution is a matter to be decided by the specialized tribunals, on which the legislature has conferred broad discretion to settle difficulties arising out of the application of section 45. Determining what arrangements will best preserve balance in collective labour relations is within the special expertise of those decision-making bodies."

As mentioned above, neither the Labour Court nor the commissioners have dared to go as far as the Supreme Court appears to allow them to, by giving them almost absolute discretion in the matter. This topic will certainly give rise to much debate!

With regard to the petition for cancellation of certification presented by Ivanhoe, as it no longer employed unionized workers, the Supreme Court accepted the interpretation given by the labour tribunals. That interpretation stated that Ivanhoe had the necessary interest to make the request, but it could not prevail since it had temporarily transferred the operation of its undertaking and its transferees were now the subject of certification. Accordingly, only the transferees were authorized to present such a petition to verify the representativeness of the union and to ask for the cancellation of the certification if the conditions mentioned in section 41 were present.

The *Sept-Îles* case

This decision, rendered the same day as the *Ivanhoe Inc.* judgement, involves the same principles and the opinions of the bench were divided in the same manner.

In this case, the City of Sept-Îles had contracted out the garbage collection service in certain districts of the city to subcontrac-tors. The collective agreement allowed for contracting out provided that it did not cause any wage cuts or loss of benefits, which had not occurred in this case. Notwithstanding that provision, the union filed a motion under section 45 seeking to obtain that the transfer of the certification and the collective agreement to the subcontractors be recorded.

The City argued that it had not transferred any part of its undertaking since the service contracts granted left it with ultimate control over the activities of its sub-contractors and that, accordingly, it remained master of its undertaking. The Supreme Court held that the existence of contracts laying down certain precise methods of performing the work was not a barrier to applying section 45. In this case, the commissioner and the Labour Court used the criterion of the subordination of the employees to the contractors in order to determine the degree of legal autonomy that the contracts gave the contractors in operating the part of the undertaking that had been transferred. As the elaboration of these criteria is central to the specialized jurisdiction of the labour commissioner, given that it is related to the transfer of the operation of an undertaking, the Supreme Court refused to intervene.

Finally, even if the collective agreement authorizes subcontracting on certain conditions, that does not amount to a waiver of the application of section 45, which is a provision of public order.

Conclusion

The decisions rendered in *Ivanhoe Inc.* and *Sept-Îles* lays to rest the controversy surrounding the interpretation given by the Labour Court to section 45 of the Quebec *Labour Code* regarding a simple contract for work. Subcontracted work is covered by the provision regarding the transfer of an undertaking. It is now up to the legislator to change things and, so far, he has been reluctant to do so, preferring to remain silent on the matter. However, since the courts have decided, the ball is now in the legislator's court.

One thing is certain, the Supreme Court no longer wants the superior courts to intervene in what it considers to be the exclusive and specialized domain of the administrative tribunals except in the case of clearly irrational errors which have no basis in reality. The proof of this is the explicit acknowledgement of the almost absolute discretion given to the labour commissioners and the Labour Court under section 46 of the *Code*. Only time will tell how the case law will evolve on these issues.

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