

Section 45 of the *Labour Code* and the Transfer of Part of the Operation of an Undertaking (Bill 31)

An Act to amend the Labour Code (Bill 31)

On June 4, 2003, at the opening of the 37th Legislature of the National Assembly, the Prime Minister of Québec announced that the government intends to review the labour laws “so that they better reflect the reality of today’s employers and employees” and more specifically, to revise section 45 of the *Labour Code* “in order to facilitate recourse to sub-contractors”.

On November 13, 2003, the Minister of Labour took an important step in that direction by introducing Bill 31 at the National Assembly. This bill significantly amends the provisions of the *Labour Code* in respect of the transmission of rights and obligations upon the transfer of part of the operation of an undertaking.

Section 45 of the Labour Code and Sub-contracting

The main purpose of Section 45 of the *Labour Code* is to safeguard the union certification, collective agreement and related proceedings upon the alienation or operation by another in whole or in part of an undertaking. In such cases, the new employer is bound by the certification and the collective agreement as if he was named therein.

Section 45 does not deal specifically with sub-contracting. However, specialized decision-makers have gradually interpreted the concept of “transfer of part of the operation of an undertaking” as including several sub-contracting instances. Section 45 thus applies where the evidence reveals not only similarity of “functions” performed for the transferee versus those performed for the employer-transferor but also the transfer of the “right to operate the undertaking”.

During the summer of 2001, the Supreme Court of Canada confirmed that Section 45 could apply to sub-contracting and that there was no reason to intervene to change the conclusions reached by the specialized labour law decision-makers in this respect.

The Main Amendments Introduced by Bill 31

It is important to become familiar with the new rules that may apply upon the transfer of part of the operation of an undertaking in order to make informed decisions in respect of possible administrative reorganizations.

Indeed, the rules apply very differently depending on whether the transfer in part of the operation of an undertaking occurs before or after the coming into force of Bill 31.

In Some Instances, the Sub-contractor Will be Bound by Neither the Certification Nor the Collective Agreement of the Transferring Party

The Bill provides that there will no longer be a transmission of rights and obligations upon the transfer of part of the operation of an undertaking where such transfer does not entail transferring to the transferee, in addition to “functions” or the “right to operate”, most of the elements that characterize the part of the undertaking involved. In such circumstances, the sub-contractor will be bound neither by the certification nor the collective agreement entered into with the transferor.

Impact of the Amendment

By introducing this amendment, the legislator puts an end to the (translation) “*precedents slide*” that allowed the application of Section 45 to transfers of “functions” and of the “right to operate the undertaking” (without transfer of employees, equipment or other assets from the transferor’s undertaking), thus getting Québec back on an equal footing with the other Canadian provinces.

For instance, this amendment should enable municipalities to contract out snow removal or garbage collection activities on their respective territories without effecting a transfer of the certification or the collective agreement that governs work conditions of their employees. It should also enable businesses to sub-contract, without effecting a transfer of the certification, some activities such as housekeeping or computer equipment maintenance.

In the Other Cases of Transfer in Part of the Operation of an Undertaking, the Collective Agreement of the Transferor is Transferred to the Sub-contractor, but Expires on the Day the Transfer Becomes Effective

Upon the transfer of part of the operation of an undertaking that also involves the transfer of the certification and collective agreement, that is, where the transfer includes most of the elements that characterize the relevant part of the employer-transferor’s undertaking, Bill 31 provides that the collective agreement thus transferred expires on the day that such transfer becomes effective. Thus, the collective agreement must be renegotiated between the certified union and the new employer.



LAVERY, DE BILLY

BARRISTERS AND SOLICITORS



Impact of the Amendment

The sub-contractor to whom the collective agreement that was entered into with the transferor is transferred may renegotiate the terms of such agreement on the basis of his own economic reality. Under the current laws, the sub-contractor is bound by the transferor's collective agreement for a period of time sometimes exceeding twelve months, which in many cases (translation) "deters" potential tenderers.

A Limit to the New Conditions Applicable to the "Transfer of Part of the Operation of an Undertaking"

In addition to concordance provisions, the Bill introduces a limit to the new conditions applicable to the transfer of part of the operation of an undertaking, which the minister calls a (translation) "strong safeguard".

Thus, the new conditions (no transfer of the certification and collective agreement or expiration of the collective agreement on the day the transfer becomes effective) may be set aside by the *Commission des relations du travail* where it is proved that the transfer of part of the operation of an undertaking has been effected by the employer "for the main purpose of hindering the formation of an association of employees or undermining the continued integrity of a certified association of employees".

Impact of this Provision

This safeguard provision aims at insuring compliance with the fundamental principles of freedom of association and protection of employees' rights set forth in the *Labour Code*.

Thus, an employer who effects a transfer of part of the operation of his undertaking must be able to demonstrate his good faith at all steps of the process and justify the reasons underlying his business decision. In other words, the legislator aims at preventing unfair practices towards a certified association or an association in the process of being certified. At the same time, the current form of the text suggests that the burden of proof in respect of such unfair practices rests with the certified association.

Coming Into Force of the Amendments Introduced by Bill 31

Particular consultations on Bill 31 will take place during the coming weeks. A date of coming into force has yet to be determined.

Let's emphasize that the Bill, in its current form, features a transitional provision whereby the new rules should only apply to transfers of part of the operation of an undertaking that become effective after the date of assent of the Act.

Our team will carefully monitor the upcoming developments concerning the enactment of Bill 31 in order to keep you posted with respect to any relevant modification and its potential impact for your business.

The Labour and Employment Law Group

You may contact any of the following members of the Labour and Employment Law group with regard to this bulletin.

At our Montréal office

Pierre L. Baribeau
Jean Beaugard
Monique Brassard
Denis Charest
Michel Desrosiers
Jocelyne Forget
Mathieu Fortier
Philippe Frère
Alain Gascon
Michel Gélinas
Isabelle Gosselin
Jean-François Hotte
France Legault
Guy Lemay
Carl Lessard
Dominique L'Heureux
Josiane L'Heureux
Catherine Maheu
Isabelle Marcoux
Véronique Morin
Marie-Claude Perreault
Érik Sabbatini
Antoine Trahan

At our Québec City office

Ève Beaudet
Pierre Beaudoin
Claude Larose
Marie-Hélène Riverin
Madeleine Roy

at our Laval office

Pierre Daviault
Gilles Paquette
René Paquette

Montréal

Suite 4000
1 Place Ville Marie
Montréal, Québec
H3B 4M4

Telephone:
(514) 871-1522
Fax:
(514) 871-8977

Québec City

Suite 500
925 chemin Saint-Louis
Québec City, Québec
G1S 1C1

Telephone:
(418) 688-5000
Fax:
(418) 688-3458

Laval

Suite 500
3080 boul. Le Carrefour
Laval, Québec
H7T 2R5

Telephone:
(450) 978-8100
Fax:
(450) 978-8111

Ottawa

Suite 1810
360 Albert Street
Ottawa, Ontario
K1R 7X7

Telephone:
(613) 594-4936
Fax:
(613) 594-8783

Web Site

www.laverydebilly.com

All rights of reproduction reserved. This bulletin 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.