IN FACT AND IN LAW

Labour Law

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# Maintenance and Repair Work on a Building:
## Are You Subject to the Rules Governing the Construction Industry?

By Véronique Morin

Whether your company engages in maintenance activities, manages or rents space in a building,[1] you should give serious consideration to applicable construction industry rules before agreeing upon a price: a recent judgment of the Court of Appeal may be of interest to you if, under Québec legislation, your employees are required to be members of a construction trade (carpenter, plasterer, plumber, electrician) in order to perform their work.

If you are the owner of one or more buildings, you should prioritize the use of your own employees to perform maintenance and repair works on such buildings.

Indeed, the Court of Appeal recently upheld a decision of the Construction Industry Commissioner stating that the *Act respecting labour relations, vocational training and manpower management in the construction industry* (S.R.Q. c. R-20, hereinafter referred to as the "R-20 Act") applies to maintenance and repair work performed by employees other than those of the owner of the building on which such work is performed.[2]

### Factual Background

A maintenance company, Industries de maintenance Empire Inc. ("Empire"), performed painting work for a client, Cadillac Fairview Ltée, on one of the shopping centres which it operates.

The *Commission de la construction du Québec* claimed salaries and penalties from Empire in conformity with the rates applicable under the R-20 Act in respect of the employees who had performed the painting work.

Empire contested the claim, arguing that it was entitled to benefit from the exception provided for under section 19 (2) of the R-20 Act.

### The Exception Provided For Under Section 19 (2) of the R-20 Act

Empire asserted that, not being a professional employer, it was exempt from the application of the R-20 Act and that the maintenance and repair work had been performed by its own employees.

Empire thus submitted that it was entitled to benefit from the exception provided for under section 19 (2) of the R-20 Act, which reads as follows:

> **"19. This Act shall apply to employers and employees in the construction industry but it shall not apply to:**
>
> **[...]**
>
> **2) maintenance and repair work done by permanent employees and by employees replacing them temporarily, hired directly by an employer other than a professional employer; (...)"**

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1 In the private sector only. It should be noted that the establishments in the health and education public sectors are exempt from the application of the *Act respecting labour relations, vocational training and manpower management in the construction industry* with respect to maintenance, repair, renovation and alteration work performed by their own employees on their own buildings (section 19 (8) of *An Act respecting labour relations, vocational training and manpower management in the construction industry*, S.R.Q. c. R-20).

2 *Commission de la construction du Québec* v. *Industries de maintenance Empire Inc.* et *autre*, C.A. Montréal, 500-09-013604-038, November 14, 2003.

The *Commission de la construction du Québec* denied Empire the benefit of the above-mentioned exception on the grounds that it did not own the building on which the painting work had been performed.

## The Decision of the Construction Industry Commissioner

The parties agreed to submit a single issue to the Commissioner, that is, whether an employer who is not the owner of a building on which maintenance and repair work is being performed is entitled to claim the benefit of the exception under section 19(2) of the R-20 Act.

The parties had agreed that the painting work constituted maintenance and repair work within the meaning of the Act (maintenance and repair work being generally considered as aiming to rehabilitate a damaged or dilapidated building).

The parties had also agreed that Empire was not a professional employer, who is defined under section 1(k) of the R-20 Act as being an employer whose main activity is to do construction work. They had further agreed that the employees who had performed the work were those of Empire and thus had been hired directly by that company.

Before the Commissioner, the *Commission de la construction du Québec* never argued that Cadillac Fairview Ltée was a professional employer. As such, Cadillac Fairview Ltée did not circumvent the provisions of the Act by having maintenance and repair work performed by a non-professional employer (Empire) in order to unlawfully benefit from the exception provided for in section 19 (2) of the R-20 Act.

The Commissioner dismissed the Empire's arguments and ruled that section 19 (2) of the R-20 Act implicitly requires that the non-professional employer also be the owner of the building on which maintenance and repair work is performed.

Such conclusion was based essentially on prior decisions of the Construction Industry Commissioners, who, for many years, upheld the opinion that the exception provided for in section 19 (2) of the R-20 Act only applies to the extent that the work is performed for the benefit of a non-professional employer, in other words, when that non-professional employer owns the building, **even though the Act does not explicitly set out such a requirement**.

The Commissioner also relied on a comment made by the Supreme Court of Canada in the case of *Construction Industry Commission* v. *Montreal Urban Community Transit Commission* ([1986] 2 S.C.R. 327). Without answering the question raised by the Empire before the Commissioner, the Supreme Court of Canada had agreed with certain submissions according to which the legislator intended to lighten the burden on building owners by allowing them to do maintenance and repair work on their buildings themselves.

In conclusion, the Commissioner held that Empire could not benefit from the exception under section 19 (2) of the R-20 Act, since the work was not performed on buildings it owned, nor could that company, in turn, make its client benefit from such exception, even though both Empire and Cadillac Fairview Ltée were not professional employers within the meaning of the R-20 Act.

## The judgment of the Court of Appeal

The Superior Court reversed the Commissioner's decision. The Court concluded that the Commissioner's decision was patently unreasonable since it added to the provisions of the R-20 Act by requiring that the non-professional employer own the building in order to benefit from the exception under section 19 (2) of the R-20 Act.

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The *Commission de la construction du Québec* was granted leave to appeal the Superior Court judgment.

On November 14, 2003, the Court of Appeal reinstated the decision of the Commissioner on the grounds that such decision was not patently unreasonable.

On the basis of the exclusive and specialized jurisdiction of the Construction Industry Commissioner and his ability to interpret the intention of the legislator, the Court of Appeal found that the Commissioner's conclusions were not irrational.

## Comments

A company that owns a building would be entitled to benefit from the exception under section 19 (2) of the R-20 Act only to the extent that maintenance and repair work thereto is performed exclusively by its own employees and not those of a third-party. In other words, a company that owns a building should use the services of its own employees and not those of another employer, including those of a subsidiary, to avoid becoming subject to the R-20 Act.

This also means that anyone who manages a building must also own such building in order to benefit from the exception under section 19 (2) of the R-20 Act.

It is also important for any building owner who wishes to benefit from the exception under section 19 (2) of the R-20 Act to be able to demonstrate that the work performed constitutes **maintenance and repair work and not renovations**. The latter, by their scope and nature, are more extensive than the former since their goal is not only to rehabilitate the building, but also to improve it by changing its form or its components.

Any contract pertaining to maintenance or other services offered by a non-professional employer should be reviewed in order to assess whether such contract may result in exposure to potential claims from the *Commission de la construction du Québec*. Such a review will also help determine whether new conditions should be negotiated with the client in order to avoid unnecessary litigation.

On January 13, 2004, a petition for leave to appeal was filed with the Supreme Court of Canada. We should learn of its fate in the following months.

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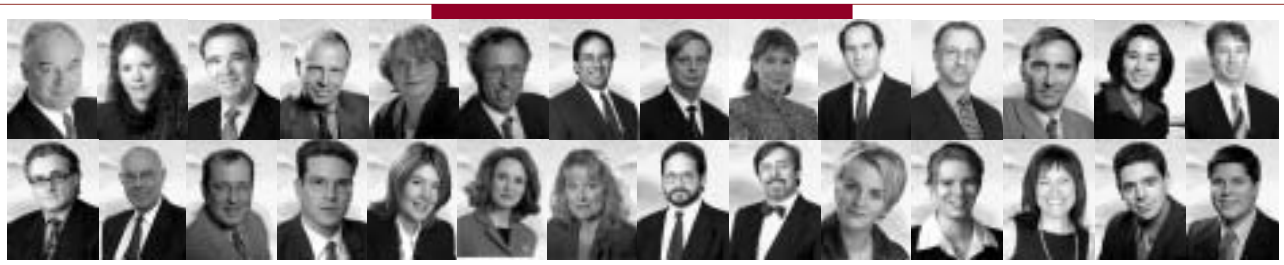

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