

Section 45 of the *Labour Code* and the Transfer of Part of the Operation of an Undertaking: The New Provisions Come Into Force on February 1, 2004!

An Act to amend the Labour Code (S.Q. 2003, c. 26)

This is a revised edition of a November 2003 bulletin pertaining to Bill 31 prior to its enactment.

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

On December 18, 2003, the Québec government took a major step in that direction by having Bill 31 enacted by the National Assembly, thus significantly amending the provisions of the *Labour Code* pertaining to the transmission of rights and obligations upon the transfer of part of the operation of an undertaking.

The Act, as assented to on December 18, 2003 (hereinafter referred to as the “Act”) is almost identical to Bill 31. It comes into force on February 1, 2004 and governs all transfers of part of the operation of an undertaking that become effective on or after February 1, 2004.

The Act features a sole modification: in the case of a motion concerning the applicability of sections 45 to 45.3 of the *Labour Code*, the *Commission des relations du travail* must render a decision within 90 days after the motion is filed.

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 vary the conclusions reached by the specialized decision-makers in this respect.

The Main Amendments Introduced by the Act

It is important to know the new rules that may apply upon the transfer of part of the operation of an undertaking in order to make informed decisions in view of the consequences of administrative reorganizations.

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

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

The Act provides that there will no longer be a transmission of rights and obligations upon the transfer of part of the operations of an undertaking where the employer-transferor only transfers to the transferee a simple “right to operate” and “functions” without transferring 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 refuse collection activities on their respective territories while transferring neither the certification nor 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 maintenance or computer equipment maintenance.



