IN FACT AND IN LAW

Labour Law

January 2004

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 subcontractor 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.





In the Other Cases of Transfer of_Part of the Operation of an Undertaking, the Collective Agreement of the Transferor is Transferred to the Subcontractor, 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, the Act provides that the collective agreement thus transferred expires on the day that such transfer becomes effective. Thus, such collective agreement must be renegotiated between the certified union and the new employer.

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 pre-existing legislation, the sub-contractor was bound by the transferor's collective agreement for a period of time sometimes exceeding twelve months, which in many cases (translation) "deterred" 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 Act 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 proven 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 an undertaking must be prepared 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 toward a certified association or an association in the process of being certified. At the same time, it seems reasonable to believe that the burden of proof before the Commission in respect of such unfair practices would rest with the applicant certified association.

Coming Into Force of the Amendments Introduced by the Act

Let's emphasize that the Act features a transitional provision whereby the former rules will continue to apply to transfers of part of the operation of an undertaking that became effective prior to February 1, 2004.

Our team will carefully monitor the upcoming interpretations of the newly enacted provisions by the *Commission des relations du travail* in order to better advise you in respect of their potential impact on your business.

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