IN FACT AND IN LAW

Labour Law

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Partial sale of a business: the employees don't have the option of staying or going.

By Danielle Côté

When a business division is sold within the meaning of article 45 of the Quebec Labour Code, the employees affected don't get to choose their favored employer as between the vendor and the purchaser.

This was the holding of the Superior Court of Quebec in the *Association des ingénieurs et scientifiques des télécommunications* v. *Sylvestre*[1] *case*, in which the Court confirmed an arbitration award rendered by Me. André Sylvestre dismissing a grievance on the grounds that the employees attached to a division that had been sold did not have the right to choose between continuing their work for the purchaser or exercising their rights against the vendor under the collective agreement.

The Facts

On August 29, 1997, Framatome Connectors Canada (hereinafter "F.C.I.") purchased the connector division of Northern Telecom Canada Limited (hereinafter "Nortel"), located in Lachine.

The Association des ingénieurs et scientifiques des télécommunications was certified to represent the specialized technicians, scientists and engineers working for Nortel in its establishments on the island of Montreal and immediate surrounding area.

Two weeks before the planned purchase date, F.C.I. informed its future employees, in particular, that they would become the employees of F.C.I. as of the purchase and that their working conditions would be those provided for in the collective agreement between the Association and Nortel. At the same time, F.C.I. also asked them to indicate whether they wished to continue their employment with F.C.I.

A few days later, Nortel notified the Association in writing that on August 29, 1997 it would lay off the employees who decided not to continue their employment with F.C.I.

The same day, the Association sent a letter to Nortel contesting its position that the employees had no other option but to continue their employment with F.C.I. The Association gave notice to Nortel to abide by the right of the employees to choose their preferred employer, whether the vendor Nortel or the purchaser F.C.I.

Nortel stood by its position. According to it, by virtue of the purchase, F.C.I. became bound by the collective agreement and thereupon assumed Nortel's obligations by recognizing the seniority and abiding by the collective agreement. Accordingly, all the employees covered by the purchase became employees of F.C.I. Employees who decided not to continue their employment with F.C.I. were therefore voluntarily choosing to leave their employment.

On August 29 as scheduled, the ten employees attached to the connector division were transferred to F.C.I.

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[1] Montreal Sup. Ct., 500-05-044023-982, 1999-06-29, J.E. 99-1648.

The Association filed a grievance through which it claimed the right of the employees involved to opt between exercising their rights against Nortel (namely, to be laid off and possibly recalled by Nortel) under the collective agreement, or to continue their employment with F.C.I. The Association requested that Nortel's decision be overturned.

It is important to note that the application of article 45 of the Quebec Labour Code (L.R.Q., c. C-27) (hereinafter "Q.L.C.") was not contested. All admitted that there had effectively been a partial alienation (sale) of the undertaking (business) within the meaning of this article.

Arbitration Award

On July 31,1998, arbitrator André Sylvestre dismissed the grievance.

The union's lawyer had invoked the fundamental right of an employee to choose the employer for whom he or she wished to work. In support of this submission, he based himself on the case of *British Columbia Government Employees' Union* v. *Industrial Relations Council*, [2] in which the Supreme Court of British Columbia held that article 53.(1) of the *Industrial Relations Act* (the equivalent of article 45 Q.L.C.) did not automatically entail the transfer of the employment contract of an employee to another employer.

The Court essentially based its judgment on the following rule of the common law:

> "**One of the most fundamental rights we possess as free people is to choose the employer for whom we will work. The importance of this is self-evident; most working people occupy at least half their waking hours in their employment. A law which requires a person to be contractually bound to an employer not of his choosing is directly contrary to this basic freedom of choice.**"
> **(p. 12,161)**

Thus, according to this reasoning, article 45 Q.L.C. would bind the subsequent employer, whether he liked it or not, but would not necessarily bind the employee, who could then choose to remain with the vendor and exercise the recourses conferred on him by the collective agreement.

However, according to arbitrator Sylvestre, the employee's right to choose his employer in the event of the partial sale of an undertaking must have a legal foundation in the collective agreement, in the Quebec *Labour Code* or in the *Civil Code of Quebec*. Firstly, he concluded that the collective agreement was silent on the issue.

As for the *Labour Code*, the arbitrator was of the view that the terms of article 45 Q.L.C. do not provide this protection for the employee affected by an alienation. Likewise, the *Civil Code of Quebec* does not allow for a different interpretation of article 45 (nor does the *common law* for that matter). Finally, he stated that in his view the rights derived from an individual employment contract disappear if the employee is covered by a collective agreement. This individual contract cannot therefore be invoked as a source of the right claimed.

The arbitrator therefore decided that the employees could not exercise the right claimed in the grievance, namely, to choose their preferred employer as between the vendor and purchaser.

Motion for Judicial Review

The Association filed a motion for judicial review against the arbitration award before the Superior Court. According to the Association, the arbitrator had committed an error going to jurisdiction in deciding that the employees attached to the under-taking that was sold automatically became the employees of F.C.I.

The Association alleged that article 45 Q.L.C. created rights in favour of the employees and the Association, and created obligations on the Association and the purchaser, but did not create any obligations on the employees.

[2] 88 C.L.L.C. 14,030 (judgment of Justice Shaw rendered on February 12, 1988)

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In this regard, the Association maintained that in the case of a partial alienation, for example, of a specific sector of activity such as in the instant case, the employees in this sector were entitled to become employees of the purchaser if they so wished. However, the transfer of the rights and obligations from the vendor to the purchaser did not mean that the employees were no longer employees of the vendor once the transaction was completed.

According to the Association, the arbitration decision had, in particular, the effect of eliminating certain advantages of the employees concerned, such as the opportunities for mobility and advancement with Nortel, which did not exist with F.C.I. In addition, the Association relied on the Quebec *Charter of Human Rights and Freedoms* (R.S.Q., c. C-12) to contend that the employees did not belong to the former employer, and that it could not sell their intellectual and work capabilities. Finally, the Association stated that it was not asking Nortel to provide work for these people, but only that their employment relationship with Nortel be preserved. In other words, the employees in question wished to exercise the option of remaining with their former employer, even if they risked being laid off and deprived of work indefinitely.

In short, according to the Association, in the case of a partial alienation of an undertaking, the employees affected ended up with two employers and two collective agreements.

For its part, Nortel maintained that the affected employees were in no case employees of both Nortel and F.C.I. According to Nortel, article 45 Q.L.C. provides for two successive and non-cumulative situations. Thus, following the alienation of the undertaking on August 29, 1997, the collective agreement ceased to be binding on Nortel, since F.C.I. was the successor employer. The employees affected by the alienation therefore ceased to work for Nortel. The issue of the applicability of the collective agreement did not arise since F.C.I. succeeded Nortel and was bound to comply with the terms of the agreement, notably by hiring the employees according to their seniority.

Judgment of the Superior Court

The Superior Court decided not to intervene, confirming the arbitration award.

We know that in judicial review matters, the Superior Court does not exercise a power of appeal and can only intervene if the lower tribunal, here the grievance arbitrator, has committed a "jurisdictional error" or a "patently unreasonable or irrational error."

The Superior Court concluded that article 45 Q.L.C. makes no distinction between total and partial alienation of an undertaking when it states that the new employer is bound by the certification or collective agreement as if it were named therein.

The Superior Court dismissed the submission of the Association that, in the case of a partial alienation, the ten employees covered by the grievance ended up with two employers and two collective agreements. Rather, the Superior Court accepted Nortel's argument that article 45 Q.L.C. has a successive and not a parallel effect in time.

The Court was therefore of the view that, as a result of the purchase, the employees affected had ceased to work for Nortel and followed the connector division transferred to F.C.I.; and that these were legal effects arising through the sole operation of law.

The Superior Court stated that the "collectivization" of the work relationships had, for all practical purposes, eliminated the individual rights of the employees where they are governed by a collective agreement, and that the collective agreement was the sole source of rights of the employees covered by it. Further, according to the Court, there was no provision in the collective agreement which would allow the employees to choose their employer in case of the partial or total alienation of the undertaking.

This judgment of the Superior Court is under appeal to the Quebec Court of Appeal.

Conclusion

We hope this judgment will clarify a certain wavering in the case law by virtue of which some have claimed that, in the case of a partial alienation of an undertaking, the vendor's employees attached to the undertaking could decide to continue to work for the vendor rather than joining the purchaser, a claim based in particular on the reasoning followed in the case of *British Columbia Government Employees' Union*, noted above.

It will therefore be interesting to follow the progress of the file in the Court of Appeal.

Who knows what the third millennium has in store for us on this issue!

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