The real purpose of Quebec's labour-law proposals: Original intent of Article 45 has been distorted by the courts
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Labour unions are fighting with increasing vigour against Bill 31, the Quebec government's draft law to modify Article 45 of the Labour Code. To understand the debate and the government's intentions, you have to understand the origins and evolution of the legislation.

In 1958, the Quebec Court of Appeal ruled that a collective agreement that had been negotiated by someone who then sold the business would not apply to the new owner because this individual had not been party to the original collective agreement. This Court of Appeal decision was founded on the civil law principle that a contract affects only the parties to it.

A first change to this aspect of the law was made by the Quebec National Assembly in 1961, granting protection very similar to that of the current Article 45 of the Labour Code. The present wording of Article 45 was adopted in 1964.

It is generally accepted that the original goal of Article 45 was to prevent wage-earners from losing the rights and benefits granted in a contract just because the company is sold, or undergoes changes to its legal structure.

In the first years following the adoption of Article 45, specialized tribunals decided that the article does not apply to out-sourcing or subcontracts. However, two separate currents then developed within the courts:

According to the first, the fact that operations formerly covered under the contractor's collective agreement are now performed by the sub-contractor is sufficient to result in the application of Article 45. According to the second approach, much of the contractor's business – in both tangible and identifiable terms – must also be transferred to the subcontractor for Article 45 to apply. Such tangible and identifiable elements include location, methods, overall commercial equipment, inventory, services offered, suppliers, clients, mission, and so on.

In 1988, the Supreme Court of Canada resolved this debate within the specialized tribunals, preferring the second interpretation.

But tribunals, which are regularly called upon to resolve disputes over the application of Article 45, have applied the Supreme Court criteria in a very unequal fashion.

In fact, little or no transfer of tangible elements is currently required for a tribunal to conclude that a transfer of business has occurred, in which case Article 45 of the Labour Code applies. Given the jurisprudence developed by tribunals, the Supreme Court recently refused to intervene in a case involving the city of Sept-Îles, where a tribunal applied Article 45 in the situation of subcontracting, when operating rights were the only tangible element transferred. The decision did not meet the court's "unreasonable character" criteria.

Thus, a subcontractor with distinct equipment and employees can be declared bound by the client's accreditation and collective agreement. In this frequently occurring situation, the contractor's employees do not have any protection, as it is the subcontractor's employees who are accredited from that point forward. And yet the purpose of Article 45 of the Labour Code was to protect the client's employees.

Other provinces have legislative provisions similar to Article 45 of our Labour Code. But the interpretation by these provinces' respective courts has not resulted in the subcontractor being bound by the client's collective agreement when few or no identifiable and tangible elements are transferred.

It appears that Bill 31 was tabled with this background in mind. Bill 31 aims to renew the original goal of Article 45: to ensure that the sale of a business does not remove employees' protection gained in a collective agreement, while at the same time giving businesses sub-contracting flexibility similar to that seen elsewhere in Canada.