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Contracting-out at Arbitration II
Les sous-contrats et l'arbitrage II

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Résumé de l'article

Les huit décisions d'arbitres de la province de Québec que nous avons examinées — décisions rendues avant l'entrée en vigueur de l'article 10 A de la loi des relations ouvrières (S.R.Q., 1941, Ch. 162A) — apportent dans leur ensemble une solution identique aux griefs résultant de la concession de sous-contrats par la direction de l'entreprise : la concession de sous-contrats n'est qu'une manifestation du droit acquis qu'a cette dernière de diriger ses activités; une exclusion expresse dans la convention collective est nécessaire si on veut restreindre ce droit. Cette attitude, on la trouve aussi bien dans les deux premières décisions rapportées, où l'arbitre saisi a dû interpréter, dans chaque cas, une disposition particulière de la convention traitant des mises-à-pied, que dans les autres où l'arbitre ou la majorité du tribunal d'arbitrage n'a fait qu'adopter d'emblée la théorie dite « des droits réservés » exposée dans un premier article. Il faut cependant faire état d'une décision de monsieur le professeur Émile Gosselin dans laquelle ce dernier établit une distinction entre le sous-contrat « d'entreprise » et celui qui ne l'est pas, distinction analogue à celle faite entre le sous-contrat « for services » et celui « of service » qu'on retrouve dans quelques décisions d'Ontario.

Dans l'espèce, on a décidé qu'il n'y avait rien d'exprimé ou d'implicite dans la convention collective pour empêcher la Compagnie de concéder un sous-contrat en vertu duquel le sous-traitant agit de façon vraiment indépendante du sous-contractant (contrat d'entreprise). Enfin, il est quelques décisions qui font aussi appel à l'un ou l'autre des facteurs suivants: la bonne foi du sous-contractant, l'usage accepté dans l'industrie ou dans l'entreprise, le motif d'économie à la base de la concession du sous-contrat. Les arbitres syndicaux pour leur part, dans leurs dissidences, s'en remettent à la théorie dite « des limites implicites aux droits de la direction » pour s'opposer au sous-contrat.

L'étude faite au cours de ces deux articles des décisions d'arbitres américains et canadiens relatives à des griefs logés à la suite de sous-contrats tend à révéler une conception différente de la question non pas tant entre les arbitres du Québec d'une part et ceux des autres provinces d'autre part. Telle différence d'attitude existe plutôt entre les arbitres américains et leurs confrères canadiens. Aux États-Unis, on s'en souvient, les arbitres ont tendance, aujourd'hui, à s'abstenir de discussions de principes régissant les droits de gérance pour mettre l'accent sur les circonstances particulières qui ont entouré la concession d'un sous-contrat. Ils n'admettent, en général, ce dernier que s'il a été accordé en toute bonne foi, pour favoriser un meilleur rendement économique; il y a unanimité, maintenant, pour écarter toute tentative de la direction d'éviter, par un sous-contrat, les taux de salaires prévus dans la convention ou de réduire l'importance numérique de l'agent négociateur. Au Canada, cependant, la majorité des décisions rendues dans les provinces autres que le Québec et toutes les décisions de cette dernière province que nous avons examinées énoncent le principe qu'il faut une défense expresse dans la convention pour refuser à la direction cet exercice de son droit général de gérer l'entreprise qu'est la concession d'un sous-contrat. Il n'y a, à vrai dire, que quelques sentences d'Ontario où l'on a étudié les raisons particulières qui ont pu pousser un entrepreneur à accorder un sous-contrat. Les quelques fois où, dans cette province, on a pu juger bien fondé le grief logé à la suite d'un sous-contrat, c'est que l'arbitre avait alors fait le raisonnement que la clause de reconnaissance dans la convention, ou, disons, la clause d'ancienneté empêchait implicitement la direction d'accorder tel sous-contrat.

Il faut bien noter que les sentences arbitrales du Québec que nous avons examinées ont toutes été rendues avant l'entrée en vigueur de l'article 10 A de la loi des relations ouvrières (S.R.Q., 1941, Ch. 162 A). « L'aliénation ou la concession partielle de l'entreprise » que vise cet article pourrait bien ne pas être étrangère à l'idée de sous-contrat; un article subséquent se propose de traiter des origines et de la portée possible de cette disposition.

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Contracting-out at Arbitration II

Pierre Verge

The approach of Quebec arbitrators on the contracting out issue, as expressed in a number of awards rendered before the enactment of section 10 A of the Quebec Labour Relations Act, is examined in order to be compared with American and Canadian Common Law Provinces views.

Awards Involving Interpretation of a Particular Clause in the Agreement

An illustration of what, incidentally, could now well be considered a « partial operation of an undertaking by another » under the new Section 10 A of the Quebec Labour Relations Act, is provided by this first contracting-out case to be reviewed: [81] the employer, a hospital served its five maintenance painters sufficient notice that their functions were to be abolished and that, consequently, their services being no longer required, the individual contracts of employment were to be terminated. The Hospital then offered to the five painters jobs affording wages actually higher than the ones they previously had, but this time, as employees of its painting subcontractor.

At the time, (April 13, 1956) a grievance was brought up by the Syndicate on the grounds that a clause of the Agreement which stipulated a particular order (based upon professional qualifications, length of service, etc.,) to be followed in cases of laying off had been vio-

VERGE, PIERRE, avocat, LL.L., (Laval), M.A., (Economique), (McGill).

(81) Hôpital du Sacré-Coeur de Cartierville et le Syndicat des Employés d'Hôpitaux de Montréal Inc.; arbitral decision of a board created under the Quebec Trades Disputes Act (1941 R.S.Q., Ch. 167) and the Public Services Employees Disputes Act (1941, R.S.Q., Ch. 169) and presided over by Mr. Justice Antoine Lamarre. — April 1957 — Not reported. From Mr. Justice Lamarre.

lated. The Hospital, on its part, argued that the said clause had no application in the instance, since no lay offs were involved, but, rather, that what had actually taken place was an abolition of the jobs of « maintenance painter », and a permanent rupture of the individual contracts of employment, as opposed to the temporary effects of a lay off. The board agreed with this latter view with the consequence that the seniority clause was not applied. The right of Management — under a usually worded clause recognizing Management's right to manage and direct the Hospital in a manner compatible with the other clauses of the Agreement — was declared to be « absolute », since there was no clause in the Agreement limiting its exercise. There remained simply the usual notice requirement, which, in fact, had been complied with.

Another subcontracting issue revolved around the term « lay off ».[82] The question was as to whether the Company had the right to contract out work which its six janitors had been performing up to that time. The Agreement contained no « Management's rights » clause. The Union did not contend that the absence of an explicit reference to subcontracting in the Agreement was to be interpreted as a direct renunciation by the Company to the exercise of contracting out; rather the Union reasoned that the Company had implicitely agreed not to contract out any work performed at the plant by restricting the use of the term « lay off » to the single case of a « reduction in staff due to a shortage of work », and not extending the term to other possible situations such as, for instance, severance of employment for disciplinary reasons. The Union contended that a shortage of work — the sole reason for a lay off, according to the terms agreed upon — « cannot be studied in relation to the men but only in relation to the scope of work to be done ». In the present instance, the scope of work had not been reduced and there was no shortage of work of the type contracted out. Consequently, no lay off could be permitted. The board did not subscribe to the reasoning of the Union: « From the mere fact that the parties hereto agreed to restrict the use of the lay off to the single case of shortage of work », it does not follow that such shortage of work cannot be attributed to the Company's decision to hand over to an outside firm the execution of any specific work (including janitorial work) which, in the past, had been carried on by one or more of its employees. The shortage of work had to be studied « both in relation to the men and in relation to the scope

(82) Dominion Engineering Works Ltd. and International Association of Machinists, Local 1660 — a decision rendered by a board of arbitration presided over by Mr. Justice André Montpetit, of the Superior Court on May 29, 1961. Unreported. From Mr. Justice Montpetit.

of work » and not only in relation to the latter, as the Union contended. Accordingly, the grievance was denied. [83]

Award based on notion of « contrat d'entreprise »

Similarly, a subcontract given to an independent construction company by the Aluminum Company of Canada, Limited, and involving the construction of cement moldings brought forth the Syndicate's contention that this action amounted to a « resumption of operations », within the meaning of the Agreement, as far as carpenters' work was concerned. Accordingly, a carpenter who had been lowered to the rank of helper-blacksmith was entitled to be reinstated to his former job now that work of this latter type was available. A clause of the Agreement indeed provided that an employee whose rank had been lowered following a curtailment of operations had the right to be reinstated to his former job in the advent of « resumption of operations... » « provided work became available within a year from the date of the lowering ». The Syndicate affirmed that the Company could not be recognized as possessing the right to render the Agreement meaningless through contracting out work that would have otherwise been performed by unit members. The Syndicate, in addition to the already mentioned specific clause, sought collaterally in the recognition, statement of intentions clauses, implied limitations to managerial rights. There were defined in a clause of the usual type beginning with the words « Subject to the restrictions contained in this Agreement... » It also contended that it had bargained not only with respect to employees, but also with respect to the jobs themselves. The Company answered that the parties' silence over subcontracting had simply consecrated past practice. Arbitrator Emile Gosselin's thirty-page and heavily documented decision [84] represents the Quebec expression of the distinction between a contract « for services » and a contract « of service ». Professor Gosselin took the position that, interpreted as a whole, there is nothing in the Agreement which, either expressly or implicitely prevents the Company from awarding subcontracts whereby the outside firm actually has a free hand in the conduct of the farmed out operations and acts as an independent contractor, in the legal sense of the term, that is, is obligated solely to deli-

(83) Union nominee's dissenting notes in the present case are studied jointly with those related to the « Superheater » — Case, at p. 341.

(84) Aluminum Company of Canada, Limited (Arvida) and « Le Syndicat National Inc. ». Grief: A. Brisson (sous-contrats). Award rendered by Emile Gosselin, Oct. 8, 1959. Not reported. From Mr. Adrien Plourde, C.S.N., Arvida.

ver the work which has been performed according to its own ways. When such a situation is found to exist, the Agreement ceases to have any application, since it only covers employees and, thus, presupposes the « master servant » relationship as between individual employees and the Company. On the contrary, when the subcontract is ont one « d'entreprise » (for services) the Syndicate is entitled to claim the rights it may derive in its favour from the Agreement. In the instance at hand, it was ruled that the Company had entered an ordinary contract of labour with the outside firm, as opposed to one « d'entreprise », and that, through the subcontracting firm, it continued to direct operations. Accordingly, the lowered carpenter was entitled to be restored to his previous rank.

Awards involving straight application of « reserved rights » theory

The complexity of the facts involved does not prevent the inclusion of the following decision [85] rendered by a board presided over by Mr. Justice André Montpetit, among awards from which emerges the present standard treatment of subcontracting disputes in Quebec.

Dock pumping operations at an oil company had been contracted out as a result of what the Company contented was strickly a matter of « staffing of the dock. » The Union saw this as a narrowing down of the larger pumping Department of which the dock section was an integral part, and whose personnel it had been certified to represent. The Company stated that the act of contracting out had been carried out within the scope of Management's rights and responsibilities and that it was its absolute right to proceed as it did. The majority of the board fully agreed with the Company: « We believe that an employer, whoever he may be, is entitled to make a change such as the one which occurred here, namely, to hand over to a sub-contractor the operation of a portion of its industrial enterprise. We also believe that the employer when he adopts such a change is not obliged to justify it. Whether he be right or wrong is not « per se » a matter of grievance or dispute falling within the jurisdiction of an arbitration Board.

Of course, we also agree that an employer may either renounce such a right or limit the exercise thereof in a collective agreement, in

(85) Canadian Petrofina Limited and Oil, Chemical and Atomic Workers International Union (A.F.L.-C.I.O.-C.L.C.) Local 16-618. Decision rendered privately by a board under Mr. Justice André Montpetit (Feb. 18, 1959) and communicated by latter. Minority notes from Union nominee Yvan A. Legault (April 24, 1959).

which cases the issue involved may then very well become the subject matter of an arbitration decision if the agreement so provides. » To the majority of the board, then, the text of a clause first enumerating Management's exclusive functions (without referring to subcontracting) and then stating that « it was further agreed that the Company retains all rights and privileges not specifically relinquished or modified therein, » was « broad enough » to lead it to conclude that the Company « . . . never intended to renounce its fundamental right of managing and organizing its industrial enterprise as it saw fit *except in cases specifically provided for.* » The fact that the Company had discussed the « dock issue » at the meetings that preceded the Agreement could not be interpreted as a renunciation of its rights to contract out. The Union had not satisfied the board that there was « a clause in the agreement in which the Company renounces, directly or indirectly, its management right of subcontracting part of the work it has carried so far. » Consequently, the grievance was denied.

The Union nominee took the stand that, with the advent of Collective Bargaining, there cannot be any of these so-called « Management's vested rights » and that beyond the specific terms of the Agreement, « anything remains in principle subject to negotiations. » The Union could not be said to have so relinquished to the Company the right to contract out: the Union's jurisdiction over dock work had not been excluded in the Q. L. R. B. certificate and, at the time of the signing of the Agreement, employees of the larger department were « defacto » performing the work at the dock. The recognition of these jurisdictional rights « was ratified by the signature of the agreement. » The Union could not have signed its own dissolution and a corresponding limitation was thus imposed upon the managerial rights clause. « It was (Company's) to prove satisfactorily that subcontracting was its right and prerogative. » The majority award led to « a serious challenge of the very aims purposes of the collective labour agreement conceived as an institution. »

Justice Montpetit's approach to the contracting out issue is clearly stated in a case involving the cleaning of the office areas of a Sperry Gyroscope [86] establishment. This job, before Management's initiative,

(86) Sperry Gyroscope Company of Canada Ltd. and International Union of Electrical, Radio and Machine Workers (I.U.B.-A.F.L.-C.I.O.). Unreported decision of a board presided over by Justice André Montpetit (Aug. 16, 1960). From Mr. Justice Montpetit.

had been done by four of its employees. As a consequence of the contract with the outside firm, two of these employees were given other jobs by the Company, with one « incurring a temporary decrease of pay ». The remaining two were laid off. To the majority of the board, the only issue that had relevancy was as to whether or not the Company had the right to contract out the cleaning of its offices. The majority affirmed: ... « we do not believe that the Union's grievance can be maintained since the two lay offs and the temporary loss in pay which followed should only be considered as the consequences of the exercise of a contractual right by a party to an agreement... It is admitted by all concerned that there is no specific clause in the collective agreement prohibiting or limiting or event referring to the right to contract out as such » [87]. Accordingly, in the majority's opinion: « the right to contract out is part of the right to « generally manage » an industrial enterprise. And since it is quite evident that the enumeration found in (the Management's right clause) is not limitative, we fail to see how it can be said that the Union has not tacitely recognized in (that) article that the Company had the right to contract out. » The Union's contention that jobs and wages listing were tantamount to a contractual obligation towards the Union and the Labourers was dismissed, and so was any «alleged violation of the spirit and letter of the collective agreement. »

The usual argument against subcontracting is that it is an indirect way to render meaningless the contract entered into by the employer and that, at the extreme, it could lead to a complete destruction of the bargaining unit. This reasoning « in extremis » became reality in the B. O. A. C. case [88] where the Company had contracted out the work done by its whole working force of eighteen employees of its engineering and stores department at Dorval Airport. It was remarked by Union's counsel that it was « ... the first instance in Canadian labour history that all of the employees covered by the contract were being dismissed so that the contract was rendered negatory and of no effect... » It was unfeasible for Management, it was contended, « to lay off all of the

(87) The Management's rights clause acknowledged the Company's exclusive function of « generally managing the enterprise and, without restricting the generality of the foregoing (there then followed an enumeration of functions, including: « to let sub-contracts for the manufacture and/or repair of any products or parts thereof...) ...except to the extend limited in this Agreement... » The award does not seem to refer to this provision related to the contracting out of work of a manufacturing or repair nature.

(88) Re: United Automobile Workers and B.O.A.C., (10 Lab. Arb. Cas. 288) (H. Lande, Q.C.) (July 21, 1960).

men within the bargaining unit, » for, then, « the contract would no longer exist... and... would thus be cancelled unilaterally before its date of expiration. » To the Union, the Agreement was « a complete contract » between two equal parties, both of which « had to live by it. » The employer pointed out that no guaranty of employment could be derived from the Collective Agreement, that... « it (had) the right to reduce its staff and lay off men during the contract... (and that)... » if it (had) the right to lay off some of the men, it also (had) the right to lay off all of the men » The Company saw implied in any Collective Agreement « the right of management to determine its best policy of operation »: this « ... could conceivably require laying off part or all of the men. » To it, of course, contracting out was one of these inherent rights which Management must be presumed to retain unless it expressly surrenders it. Arbitrator H. Lande, Q. C., took the position that both the individual employee, as well as the employer, with the advent of collective bargaining, retain all of their original pre-union powers, except as these may have been expressly taken away in the Agreement. « For example, the individual employee may quit his job before the expiry of the contract, ... » and so they may all do « ... leaving no recourse to the employer and the union. » Correlatively: « The employer who signs a collective agreement sets out the conditions under which the employees shall work for him when there is work. He is not bound to provide work. He only gives up such of his powers as he expressly assigns in the contract, retaining all of his inherent, pristine rights. « Whence the necessity of an express prohibition to remove from the employer the right to contract out. This radical doctrine is tempered by the proviso that « the employer must be in good faith and be actuated by sound business principles. » In the instance it had been shown by evidence that the employer's decision « was based on a saving of 50% in costs and a consequent substantial improvement in efficiency. » Consideration was also given to the common practice of major world airlines of farming out work of the type involved and to the « very fair » notice of dismissal, severance pay, and assistance given by the employer to the laid off employees. The essence of the award, however, is a strict adherence to a « reserved rights » position with respect to both parties...

A more recent subcontracting case at the Arvida plant of the Aluminium Company of Canada Limited [89] was treated by Judge René

(89) Re: Le Syndicat national des employés de l'Aluminium d'Arvida, Inc. et l'Aluminum Company of Canada, Limited, (Arvida). Award rendered by Judge René Lippé. (Nov. 16, 1960) (Unreported). From: Mr. Adrien Plourde, C.S.N., Arvida.

Lippé more or less along the lines of the B. O. A. C. case to which it expressly refers. Four maintenance plumbers had been posted to a lower rank following the Company's move of having work of the type they had currently done performed by an outside firm. Judge Lippé refers to the usual two extreme schools on subcontracting; the views expressed by Professor Laskin in his « Falconbridge » award [90] are opposed to those of Me Lande, as found in the B.O.A.C. decision [91]. Judge Lippé expresses his agreement with arbitrator Lande. To him, the right to contract out is « inherent » in the right to manage the plants, as defined in the Management clause (usual type clause whereby the Syndicate recognizes that the managerial functions belongs to the Company, these functions being then enumerated non limitatively in the relevant clause). An express limitation to the right to contract out is imperative if the Company is to be denied this form of action. It is remarked, however, that a decision confirming the Company's right to contract out, in the absence of an express prohibition, might not have been rendered had it been revealed that the Company had acted in bad faith. But such was not the case, and, moreover, in the past, the Company had, at various occurences, awarded subcontracts without the Syndicate's grieving about it. The distinction that the Syndicate wanted to make as between work of a specialized construction nature that could not be performed by employees covered by the Agreement (this type of work, the Syndicate conceded, could possibly be farmed out) and maintenance work (as involved in the present case) was also rejected.

The legally-framed award in the « Combustion Engineering Superheater case involving contracting out of janitorial work also maintains firmly the « reserved rights » position » [92]. A Collective Agreement regulates individual contracts of lease and hire of services; these may be terminated by either party in the name of freedom of contract. The Agreement, unless it is specifically stipulated otherwise therein, does not act as a guaranty of employment for union members taken collectively or as individuals: employees may stop working for their employer, and the latter, in turn, enjoys a free hand in closing down his plant during the time the Agreement is in force (lock out case excluded). Con-

(90) See footnote (68), *Relations Industrielles*, Volume 18 (1963) No 2, page 188.

(91) See p. 340.

(92) Re: Elesco Workers Association, I.A.M. et Combustion Engineering Superheater Limited. (Grief Poulin). Decision rendered in May 1961 by a board presided over by Justice Antoine Lamarre. From Mr. Justice Lamarre and Company nominee, Me Carrier Fortin, C.R. (Also reported in: *Bulletin d'information du Ministère du Travail* (20 juin, 1961) numéro 976, 1961.)

tracting out is merely an expression of this general right. To take the words from the award « . . . la législation ouvrière n'abolit pas le droit et la liberté des parties de contracter en vertu du Code Civil et celles-ci peuvent convenir entre elles d'autres conditions pourvu qu'elles ne soient pas contraires à la Loi ou à la convention collective particulière. Il faut donc rechercher, dans une convention collective, les clauses qui limitent la liberté de contracter, stipulée par le Code Civil. » No clause of this nature being found in the Agreement with respect to contracting out, Management is free to exercise a right given by Law and not contractually limited by the Agreement. This latter only regulates the individual contracts, and the employer-employee relationship does not exist between the Company and the outside firm.

The documented union memorandum that anteceded the award brings other views on the matter. In substance this memorandum boils down to the dissenting notes of the board Union nominee, Mr. Louis Gagnon, in the Dominion Engineering Case [93]. An attempt is made to uproot the habitual position that an express provision is needed to take off from Management its right to contract out by demonstrating the precairious « historical, juridical and economical » arguments on which it stands. Reminiscent of Professor Laskin's « Peterborough » case [94], it is observed that the right historical perspective is that, with the advent of collective negotiations, a new world has been entered into, where « the concept of collective agreement has evolves so much that it supersedes the individual contracts of work. » The broad « residuary » management clause would be restrained, according to the ordinary interpretation rules of contracts, by the other substantive clauses of the Agreement and by the concept of « job ownership. » To avoid paying a job at the rate collectively determined by contracting out is merely to do indirectly what the Law and the contract forbid to do directly. « Economical motivation, . . . especially in Quebec, where too much stress is still placed on individualism in contracting . . . only has value as long as it respects the juridical provisions and concepts. For example, a person having rented a flat at $100 a month cannot resiliate said rental contract by pretending that she could pay less by renting a similar apartment from a neighbour at $50 and thus saving money be justified in so doing legally. Yet, it would be sound business principle to do so... »

(93) See p. 335 and ff. (Both documents communicated by Professor Roger Chartier (Laval) and Me Denis Lévesque, Lapointe & Lévesque, Montréal.)

(94) See *Relations Industrielles,* Volume 18, (1963), No 2, at p. 167.

Observations on Quebec awards

These latter dissenting union views do not break the unanimity of the Quebec arbitral awards that have been examined: [95] contracting out is but one expression of Management's inherent right to direct the undertaking, and its exercise cannot be curtailed unless Management has relinquished it through an express prohibition in the Agreement. This was found to be the rule prevailing in all cases at hand: in the first two, which were decided more immediately upon the specific meaning of « lay off » and of « shortage of work, » in Professor Gosselin's « Aluminium » award, grounded upon the notion of « contrat d'entreprise, » as well as in the last five more universal instances. « Good faith » was proclaimed in one case and hinted at in another. «Unobjected to past practice, » « common trade practice », the soundness of the business principles involved, each came to light once.

We could then say this survey of U. S. and Canadian arbitration awards rendered during the past decade over the contracting out issue-arising under agreements not dealing specifically with the subject - has tended to show a difference of approach not as much between Quebec, on the one-hand, and the Common Law Provinces and the United States, on the other. Rather, the cleavage followed the border line between the two countries. South of the border, recent awards, as seen in a first article, departing from theoretical discussions on managerial rights, have shown unanimity in arriving at limiting the exercise of contracting out to « good faith » decisions, dictated by « compelling logic or economies of operation », thus discarting any attempts by Management to avoid, through contracting out, contractual wages and conditions of work and to undermine the bargaining unit. In Canada, however, the majority of awards rendered in the Common Law Provinces, and all the Quebec ones that were reviewed, reasoned rather theoretically that an express prohibition is needed in the Agreement if Management is to be denied this particular form of generally directing the undertaking. The objective reasons that may, in a given set of circumstances, have dictated Management's course of action were given due consideration, as recalled, in but a few isolated Ontario decisions. If Management has then happened to be denied the right to contract out, it was also because the arbitrator had then accepted the reasoning

(95) This is not to exclude other decisions that may also possibly have been rendered privately on the issue.

that the recognition clause or, say, the seniority provision, acted implicitely as a bar that prevented Management from doing so.

All these Quebec arbitrations awards that have been examined, it is to be noted, were rendered before the enactment new section 10A of the Quebec Labour Relations Act, R.S.Q. 1941, Ch. 162 A [96]. This amendment while ruling over the « partial alienation or operation of an undertaking by another » may well affect the practice of subcontracting in our Province. The origins as well as this possible effect of the new provision are to be considered in a final article.

(96) R.S.Q., 1941, Ch. 162 A, Sec. 10 A, reads as follows :
Sec. 10 A
« The alienation of an undertaking otherwise than by judicial sale or its operation by another, in whole or in part, shall not invalidate any certificate issued by the Board, any collective agreement or any proceeding for the securing of a certificate or for the making or carrying out of a collective agreement.
The new employer, notwithstanding the division, amalgamation or changed legal structure of the undertaking, shall be bound by the certificate or collective agreement as if he were named therein and shall become ipso facto a party to any proceeding relating thereto, in the place and stead of the former employer.
The Board may make any order deemed necessary to record the transfer of rights and obligations provided for in this section and settle any difficulty arising out of the application thereof. »

LES SOUS-CONTRATS ET L'ARBITRAGE (II)

Les huit décisions d'arbitres de la province de Québec que nous avons examinées — décisions rendues avant l'entrée en vigueur de l'article 10 A de la loi des relations ouvrières (S.R.Q., 1941, Ch. 162A) [97] — apportent dans leur ensemble une solution identique aux griefs résultant de la concession de sous-contrats par la direction de l'entreprise : la concession de sous-contrats n'est qu'une manifestation du droit acquis qu'a cette dernière de diriger ses activités ; une exclusion expresse dans la convention collective est nécessaire si on veut restreindre ce droit. Cette attitude, on la trouve aussi bien dans les deux premières décisions rapportées, où l'arbitre saisi a dû interpréter, dans chaque cas, une disposition particulière de la convention traitant des mises-à-pied, que dans les autres où l'arbitre ou la majorité du tribunal d'arbitrage n'a fait qu'adopter d'emblée la théorie dite « des droits réservés » exposée dans un premier article [98]. Il faut cependant faire état d'une décision de monsieur le professeur Emile Gosselin [99] dans laquelle ce dernier établit une distinction entre le sous-contrat « d'entreprise »

(97) Il ne faut évidemment pas exclure la possibilité que d'autres sentences non publiées aient été rendues.
(98) Cf. *Relations Industrielles*, Volume 18, 1963, Numéro 2, à la page 194.
(99) Voir ci-avant à la p. 336.

et celui qui ne l'est pas, distinction analogue à celle faite entre le sous-contrat « for services » et celui « of service » qu'on retrouve dans quelques décisions d'Ontario. [100]

Dans l'espèce, on a décidé qu'il n'y avait rien d'exprimé ou d'implicite dans la convention collective pour empêcher la Compagnie de concéder un sous-contrat en vertu duquel le sous-traitant agit de façon vraiment indépendante du sous-contractant (contrat d'entreprise). Enfin, il est quelques décisions qui font aussi appel à l'un ou l'autre des facteurs suivants : la bonne foi du sous-contractant, l'usage accepté dans l'industrie ou dans l'entreprise, le motif d'économie à la base de la concession du sous-contrat. Les arbitres syndicaux pour leur part, dans leurs dissidences, s'en remettent à la théorie dite « des limites implicites aux droits de la direction » [101] pour s'opposer au sous-contrat.

L'étude faite au cours de ces deux articles des décisions d'arbitres américains et canadiens relatives à des griefs logés à la suite de sous-contrats tend à révéler une conception différente de la question non pas tant entre les arbitres du Québec d'une part et ceux des autres provinces d'autre part. Telle différence d'attitude existe plutôt entre les arbitres américains et leurs confrères canadiens. Aux Etats-Unis, on s'en souvient, les arbitres ont tendance, aujourd'hui, à s'abstenir de discussions de principes régissant les droits de gérance pour mettre l'accent sur les circonstances particulières qui ont entouré la concession d'un sous-contrat. Ils n'admettent, en général, ce dernier que s'il a été accordé en toute bonne foi, pour favoriser un meilleur rendement économique ; il y a unanimité, maintenant, pour écarter toute tentative de la direction d'éviter, par un sous-contrat, les taux de salaires prévus dans la convention ou de réduire l'importance numérique de l'agent négociateur. Au Canada, cependant, la majorité des décisions rendues dans les provinces autres que le Québec et toutes les décisions de cette dernière province que nous avons examinées énoncent le principe qu'il faut une défense expresse dans la convention pour refuser à la direction cet exercice de son droit général de gérer l'entreprise qu'est la concession d'un sous-contrat. Il n'y a, à vrai dire, que quelques sentences d'Ontario où l'on a étudié les raisons particulières qui ont pu pousser un entrepreneur à accorder un sous-contrat. Les quelques fois où, dans cette province, on a pu juger bien fondé le grief logé à la suite d'un sous-contrat, c'est que l'arbitre avait alors fait le raisonnement que la clause de reconnaissance dans la convention, ou, disons, la clause d'ancienneté empêchait implicitement la direction d'accorder tel sous-contrat.

Il faut bien noter que les sentences arbitrales du Québec que nous avons examinées ont toutes été rendues avant l'entrée en vigueur de l'article 10 A de la loi des relations ouvrières (S.R.Q., 1941, Ch. 162 A). « L'aliénation ou la concession partielle de l'entreprise » que vise cet article pourrait bien ne pas être étrangère à l'idée de sous-contrat ; un article subséquent se propose de traiter des origines et de la portée possible de cette disposition.

(100) Cf. *Relations Industrielles,* Volume 18, 1963, numéro 2, aux pages 184 et 185.
(101) Cf. *Relations Industrielles,* Volume 18, 1963, numéro 2, à la page 195.