1988 CarswellQue 125, 35 Admin. L.R. 153, (sub nom. U.E.S., local 298 v. Bibeault) [1988] 2 S.C.R. 1048 , 95 N.R. 161, 89 C.L.L.C. 14,045, 24 Q.A.C. 244, [1988] 2 S.C.R. 1048, 13 A.C.W.S. (3d) 23, J.E. 89-141, EYB 1988-67863

Syndicat national des employés de la commission scolaire régionale de l'Outaouais c. U.E.S., local 298

SYNDICAT NATIONAL DES EMPLOYÉS DE LA COMMISSION SCOLAIRE RÉGIONALE DE L'OUTAGOUAIS (C.S.N.) v. UNION DES EMPLOYÉS DE SERVICE, LOCAL 298 (F.T.Q.)

Supreme Court of Canada

McIntyre,Chouinard,[FN*] Lamer, Le Dain and La Forest JJ.

Heard: October 29-30, 1986
Judgment: December 22, 1988
Docket: No. 18609

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Counsel: Clement Groleau and Raymond Levasseur, for appellant

Gaston Nadeau, for respondent

Richard Martel and André Durocher, for Services Ménagers Roy Ltée.

Jean Pomminville, for La Commission scolaire régionale de l'Outaouais.

Subject: Public; Labour and Employment

Labour Law --- Labour relations boards — Jurisdiction

Labour Law --- Bargaining rights — Successor rights — Successor employer

Reviewable for correctness despite privative clause.

Labour Code, R.S.Q. 1977, c. C-27.

Labour Code, R.S.Q. 1977, c. C-27.

Code du travail, L.R.Q. 1977, ch. C-27.

Under the Québec Labour Code , ss. 45-46, it was provided, first, that the "alienation or operation by another in

whole or in part of an undertaking ... shall not invalidate" certifications and collective agreements but rather that new employers were bound by such certifications and collective agreements (s. 45). Secondly, a labour commissioner was empowered to make orders necessary to effectuate such a transition (s. 46).

The Commission scolaire régionale de l'Outaouais (CSRO) employed contractors to perform janitorial services at six of its schools. These contracts for janitorial services were entered into on a yearly basis after competitive tendering. The employees of the two contractors in question were organized collectively under the Labour Code .

While the employees were on a legal strike, the CSRO lawfully terminated the contracts for janitorial services and after a further tendering process awarded all six contracts to another company (SMR).

Following this process, CSN, the union representing the employees of the former contractors, applied for an order under ss. 45-46 of the Labour Code . This was partially in response to an application by another union (FTQ) to be certified as the bargaining agent for all the employees of the new contractor. The labour commissioner granted CSN's application deciding, inter alia, that SMR was bound by the collective agreement entered into between the previous contractors and CSN, and also that it was bound by the legal strike. At the same time, FTQ's application for certification was dismissed. Both these decisions were sustained on appeal by the Labour Court. Under the Labour Code , decisions of both the labour commissioner and the Labour Court were protected by a privative clause which prevented review for other than jurisdictional error, i.e., it precluded review for mere non-jurisdictional error of law.

FTQ then applied for a writ of evocation to quash the decisions of both the labour commissioner and the Labour Court. This motion was granted and the Court of Appeal affirmed the Superior Court's judgment. CSN then applied for and was granted leave to appeal to the Supreme Court of Canada.

Held:

The appeal was dismissed.

1. The issue of whether or not the change of janitorial contractors was an "alienation or operation by another in whole or in part of an undertaking" in terms of s. 45 of the Labour Code was a jurisdictional issue on which the labour commissioner and the Labour Court had to be correct before exercising the authority conferred on them by s. 46. The existence of a situation contemplated by s. 45 was a condition of the jurisdiction conferred by s. 46. In terms of the traditional language of judicial review, this was a preliminary or collateral matter or, put in more modern and appropriate terms, s. 45 was a jurisdiction-limiting provision. The task of discerning whether a particular statutory provision came within this category was one of ascertaining legislative intention based on a pragmatic and functional analysis. Here, the relevant legislative indicators were, first, the objective, automatically applicable language of s. 45 does not necessarily involve any role by a commissioner (as opposed to s. 46 where a decision-making capacity was explicitly conferred) and second, the use of categories ("alienation or operation") from general civil law requires no special expertise.

2. Both the labour commissioner and the Labour Court had erred in their interpretation of s. 45. Collective bargaining and resulting collective agreements required a three-part framework: a single employer, a specific undertaking of the employer and the association of employees connected with that undertaking. Where the alienation or operation by another of an undertaking took place, the essential components of that three-part framework had still to exist for s. 45 to apply. By rejecting the need for a legal relation between successive employers and

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by defining undertaking solely by reference to the functional consideration of the duties performed by employees as described in the certification order, the labour commissioner and the Labour Court had given s. 45 an interpretation that failed to recognize that three-part framework.

To define undertaking simply in terms of the work performed by the employees would open the door to the transfer of rights and obligations under the Code and the collective agreement where there was no continuity. Rather, an undertaking covered all the means available to an employer to achieve its objective, and the test of continuity involved a consideration of whether there was sufficient continuation of the essential characteristics of the former employer's undertaking in the new employer's operations.

The functional test of what constituted an undertaking also erroneously precluded the necessity for a legal relation between the undertaking's successive employers. In terms of the legislative history, as well as the principles of collective bargaining and the language used, the purpose of the use of the terminology of "alienation" and "operation by another" in s. 45 was simply to create an exception to the normal civil law rule of relativity of contracts. This language necessitated a relation between the holder of a right and the one who acquired use of it. This involved a voluntary transfer of ownership, something which was not present here, as well as that alienation occurring as between the previous and the new employer. Moreover it was not permissible, for these purposes, to regard the undertaking in question as being that of CSRO rather than of the janitorial contractors. The contractors were the employers, not CSRO, and labour law was concerned with relations between employer and employee. Just because the CSRO had a legal obligation to provide janitorial services did not mean that CSRO operated a janitorial undertaking. As a matter of fact, CSRO never had such an undertaking, given that the certification was sought and obtained by the union directly with the contractors.

Cases considered:

Adam v. Daniel Roy Ltée, [1983] 1 S.C.R. 683, 83 C.L.L.C. 14,064, 1 D.L.R. (4th) 37, 50 N.R. 332 — considered

Alimentation de la Seigneurie Inc. c. Union des employés de commerce, local 500 , D.T.E. 83T-694 — referred to

Barnes Security Service Ltd. c. Assoc. internationale des machinistes et des travailleurs de l'aéronautique, local 2235, [1972] T.T. 1 — considered

Blanchard v. Control Data Can. Ltd., [1984] 2 S.C.R. 476, 14 Admin. L.R. 133, 84 C.L.L.C. 14,070, 55 N.R. 194, 14 D.L.R. (4th) 289 — considered

Brasserie Labatt Ltée c. Commissaire général du travail, [1986] R.J.Q. 908 (C.S.) — referred to

Brown, Syndicat national des travailleurs de la pulpe et du papier de La Tuque Inc. c. Comm. des relations ouvrières de la Province de Québec, [1958] Que. Q.B. 1 considered

C.U.P.E., Local 963 v. N.B. Liquor Corp., [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 79 C.L.L.C. 14,209, 26 N.R. 341, 97 D.L.R. (3d) 417 — considered

Cdn. Kenworth Ltd. c. Syndicat international des travailleurs unis de l'automobile, de l'aéronautique, de l'astronautique et des instruments aratoires d'Amérique, local 1146, [1975] T.T. 168 — referred to

Cegep de Shawinigan c. Syndicat du personnel de soutien du Collège d'enseignement de Shawinigan Enr.,

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[1976] T.T. 209 — referred to

Centrale de Chauffage Enr. c. Syndicat des employés des institutions religieuses de Chicoutimi Inc., [1970] T.T. 236 — referred to

Cie du Trust National Ltée c. Burns, [1985] C.S. 1286 (portée en appel) — referred to

Clinique communautaire de Pointe St-Charles v. Syndicat professionnel des diététistes du Qué., [1973] T.T. 338 — referred to

Comm. des normes du travail c. Banque nationale du Can. , D.T.E. 88T-282 (C.S.) — referred to

Comm. des normes du travail c. Delta Granite Inc. , J.E. 85-927 (C.S.) — referred to

Comm. des normes du travail c. Erdan, [1985] C.P. 353 — referred to

Comm. des normes du travail c. Frank White Entreprises Inc., [1984] C.P. 232 — referred to

Crevier v. A.G. Qué., [1981] 2 S.C.R. 220, 38 N.R. 541, 127 D.L.R. (3d) 1 — referred to

Derko Ltée c. Roy , (28 juin 1979), no 200-05-001343-792 (C.S.) — considered

Entrepôts Schenker Ltée c. Travailleurs canadiens de l'Alimentation et d'autres industries, local P-766, [1981] T.T. 420 — referred to

Fondation-Habitation Champlain Inc. c. Tribunal du travail , D.T.E. 86T-500 (C.S.) (porté en appel) — considered

Fraternité internationale des ouvriers en électricité c. National Cablevision Ltd., [1967] R.D.T. 314 — considered

Gérances West Cliff Ltée c. Union des employés de service, local 298, F.T.Q., [1981] T.T. 432 — referred to

Hull (Ville de) c. Bibeault , D.T.E. 83T-906 (C.S.) — referred to

Industries du frein total Ltée c. Syndicat international des travailleurs unis de l'automobile, de l'aérospatiale et de l'outillage agricole d'Amérique (T.U.A.-F.T.Q.-C.T.C.), section locale 1900, [1985] T.T. 220 — referred to

International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America (Local 239) c. Coca-Cola Ltd. (1963), [1978] R.L. 391 (Q.L.R.B.) — referred to

J.A. Hubert Ltée c. Syndicat des employés de soutien du Collège Ahuntsic, [1977] T.T. 110 — referred to

Labour Relations Bd. of Sask. v. John East Iron Works Ltd., [1949] A.C. 134, [1948] 2 W.W.R. 1055, [1948] 4 D.L.R. 673 (P.C.) — referred to

Lachine (Cité de) c. Union des employés municipaux de Lachine (Cité de), [1974] T.T. 279 — referred to

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Lecavalier c. Syndicat national des employés de ville de Laval Inc. (C.S.N.), [1976] 2 C.S. 856 not followed

Martinique Motor Inn Ltd. c. Union des Employés d'Hôtel, Motel et Club, [1973] T.T. 151 — referred to

Mode Amazone c. Comité conjoint de Montréal de l'Union internationale des ouvriers du vêtement pour dames, [1983] T.T. 227 — followed

Montreal Trust c. Tribunal du travail, [1975] R.D.T. 353 (C.A.) — not followed

National Bank of Can. v. Retail Clerks' International Union, [1984] 1 S.C.R. 269, 84 C.L.L.C. 14,037, 53 N.R. 203, 9 D.L.R. (4th) 10 — referred to

Parkhill Furniture & Bedding Ltd. v. International Molders & Foundry Workers Union, Local 174 (1961), 34 W.W.R. 13, 26 D.L.R. (2d) 589 (Man. C.A.) — referred to

S.E.I.U. v. Nipawin District Staff Nurses Assn., [1975] 1 S.C.R. 382, [1974] 1 W.W.R. 653, 41 D.L.R. (3d) 6 — referred to

Schwartz Service Station c. Teamster Local 900, [1975] T.T. 125 — considered

Sitri Inc. c. Cartage & Miscellaneous Employees' Union, Local 931 (F.T.Q.), [1977] T.T. 29 — referred to

Syndicat des employés de la Comm. régionale de Tilly (C.S.N.) c. Langlois, [1976] T.T. 165 — considered

Syndicat des employés de l'imprimerie de la région de l'amiante (C.S.N.) c. Imprimerie Roy et Laliberté Inc. , [1980] T.T. 503 — considered

Syndicat des Employés de Production du Québec et de l'Acadie v. Can. L.R.B., [1984] 2 S.C.R. 412, 14 Admin. L.R. 72, 84 C.L.L.C. 14,069, (sub nom. C.B.C. v. Syndicat des Employés de Production du Québec et de l'Acadie) 55 N.R. 321, 14 D.L.R. (4th) 457 — /appliqué

Syndicat des employés municipaux de Hull (ville de) c. Hull (ville de), [1985] C.A. 552 — not followed

Syndicat des salariés de la Boulangerie Weston (C.S.D.) c. Union des employés de commerce, local 501, T.U.A.C., [1986] T.T. 128 — referred to

Syndicat des salariés de service d'entretien (C.S.D.) c. Montcalm Carpets Specialists Ltd., [1981] T.T. 273 — referred to

Syndicat des travailleurs forestiers de la division Jacques Cartier (F.T.P.F.-C.S.N.) c. H.C. Leduc Ltée, [1977] T.T. 249 — referred to

Syndicat national des concierges des commissions scolaires des comtés de Richelieu, Verchères et Yamaska (C.S.N.) c. For-Net Inc., [1971] T.T. 146 — referred to

Syndicat national des employés de la Comm. scolaire régionale de l'Outaouais c. Services Ménagers Bordeaux, [1980] 3 Can. L.R.B. 43, [1980] T.T. 233 — referred to

Syndicat national des employés de l'aluminium d'Arvida Inc. c. J.R. Théberge Ltée, [1965] R.D.T. 449 —

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Union des chauffeurs de camions, hommes d'entrepôts et autres ouvriers, local 106 c. Alain Lacasse Transport Inc., [1977] T.T. 231 — considered

Union des employés de commerce, local 500 T.U.A.C. (U.F.C.W.) c. Union des employés de commerce, local 501 T.U.A.C. (U.F.C.W.) , D.T.E. 85T-521 — referred to

Union des employés de service d'édifices, local 298, F.T.Q. c. Syndicat des employés de soutien de maisons d'enseignement de la régionale le Gardeur (C.S.N.), [1971] T.T. 203 referred to

Statutes considered:

Canada Labour Code, R.S.C. 1970, c. L-1 —

s. 121 [re-en. S.C. 1972, c. 18, s. 1, now R.S.C. 1985, c. L-2, s. 21]

s. 144(5) [re-en. S.C. 1972, c. 18, s. 1, now R.S.C. 1985, c. L-2, s. 43(2)]

Code civil du Bas-Canada —

art. 1023

Code civil du Québec

Code du travail, L.R.Q. 1964, ch. 141 —

art. 16, mod. L.Q. 1969, ch. 48, art. 6

Code du travail, L.R.Q. 1977, ch. C-27 —

art. 1

art. 16

art. 21

art. 22

art. 23

art. 31

art. 32

art. 34

art. 45

art. 46

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art. 52

art. 58

art. 62

Loi sur les normes du travail, L.R.Q., ch. N-1.1 [autrefois L.Q. 1979, ch. 45] —

art. 96

art. 128

Loi sur l'instruction publique, L.R.Q. 1977, ch. I-14.

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alienation

concession

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enterprise

operation

undertaking

APPEAL from a decision of the Québec Court of Appeal dismissing an appeal from the judgment of the Québec Superior Court [reported at [1982] C.S. 977] granting a motion for the writ of evocation to quash a decision of the labour commissioner and the Labour Court [reported at [1982] T.T. 115].

The judgment of the Court was delivered by Beetz J.:

1 The interpretation and application of ss. 45 and 46 of the Labour Code , R.S.Q. 1977, c. C-27, are at issue in this case. These provisions state:

> 45. The alienation or operation by another in whole or in part of an undertaking otherwise than by judicial sale shall not invalidate any certification granted under this code, any collective agreement or any proceeding for the securing of certification 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 certification 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.
>
> 46. An [sic] labour commissioner may make any order deemed necessary to record the transfer of rights and obligations provided for in section 45 and settle any difficulty arising out of the application thereof.

2 The main question is whether s. 45 applies to the case of two "subcontractors" who succeeded each other under two "subcontracting" contracts awarded to them by the same principal, without there being any legal relation between the two "subcontractors". The question is bound up with the concept of an undertaking, which is at the heart of this provision, as well as with the identification of the undertaking in the case at Bar. The issue has been disputed in Quebec for many years.

3 The Court must also decide whether the question is jurisdictional in nature.

I — Proceedings And Facts

4 The respondent (the F.T.Q. Union) asked the Superior Court to issue a writ of evocation against a majority decision of the Labour Court affirming a decision of labour commissioner Réal Bibeault. The writ sought was also directed against the decision of the labour commissioner. At this stage of the proceedings, the allegations of fact made in the motion in evocation are taken as proven. Briefly stated, the facts are as follows:

5 The mis en cause Commission Scolaire Régionale de l'Outaouais (the C.S.R.O.) has always hired subcontractors to clean six of the schools mentioned in the motion for evocation. (The labour commissioner and the Labour Court also discussed other schools mentioned in related cases, but these other cases were not the subject of dispute in the Superior Court, the Court of Appeal or this Court.)

6 The contracts for janitorial services are awarded for each school annually through calls for tenders and are generally in effect from July 1 to June 30 of the following year.

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7 The contracts for janitorial services for the schools in question were awarded in 1979 to the mis en cause MBD Conciergeries Ltée (MBD) and Entreprises Netco Inc. (Netco).

8 At the time, the appellant (the C.S.N. Union) held four certificates of certification for the Netco employees working at four of the schools, and two certificates covering the MBD employees working at the other two schools.

9 On December 9, 1979, the Netco and MBD employees began a legal strike.

10 As a consequence of this strike, the C.S.R.O. legally terminated the contracts awarded to Netco and MBD and, on January 24, 1980, after calls for tenders, awarded contracts for janitorial services in the six schools to the mis en cause Services Ménagers Roy Ltée (Services Ménagers Roy), which with its employees began to perform the contract.

11 The three mis en cause Services Ménagers Roy, MBD and Netco are three separate corporations operating separate undertakings, and compete to obtain contracts for janitorial services offered by public institutions and commercial undertakings.

12 The mis en cause Services Ménagers Roy is an undertaking specializing in janitorial services, and it does business in various parts of Quebec.

13 No contract or transaction of any kind was entered into between the mis en cause Services Ménagers Roy, MBD and Netco in respect of the janitorial work at the six schools, and it was admitted that no legal relation existed between them.

14 On February 5, 1980, the F.T.Q. Union filed an application for certification covering the employees of Services Ménagers Roy working in the Outaouais area. At that time, the F.T.Q. Union included among its members in good standing nearly all the employees of Services Ménagers Roy working in the Outaouais area.

15 At about the same time, the C.S.N. union filed applications with the labour commissioner general citing ss. 45 and 46 of the *Labour Code* , seeking to have the transfer of the rights and obligations of MBD and Netco to Services Ménagers Roy recorded pursuant to those sections and so defeat the application of the F.T.Q. Union for certification.

16 On April 29, 1981, labour commissioner Réal Bibeault granted the C.S.N. Union applications; he recorded the transfer of the rights and obligations of MBD or Netco, as the case might be, to Services Ménagers Roy and declared that Services Ménagers Roy was bound by the certification of MBD or Netco, and by the legal strike, and that it became a party to any resulting proceeding in the place and stead of MBD or Netco, as if it had been named therein.

17 On the same day, labour commissioner Réal Bibeault dismissed the F.T.Q. Union's application for certification because of his previous decision. In view of the transfer of the rights and obligations of MBD and Netco to Services Ménagers Roy, a legal strike was in progress at the latter's premises and the application for certification was outside the time limits specified by ss. 22 and 58 of the *Labour Code* .

18 These decisions were appealed to the Labour Court, and were upheld by a majority of that Court: *Services Ménagers Roy Ltée v. Syndicat national des employés de la comm. scolaire régionale de l'Outaouais (C.S.N.)*, [1982] T.T. 115 .

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19 On March 9, 1982, the F.T.Q. Union filed in the Superior Court the motion for evocation referred to above against the decisions of commissioner Réal Bibeault and the Labour Court.

20 On November 5, 1982, Louis-Philippe Landry J. allowed the motion for evocation: Union des employés de service, local 298 (F.T.Q.) v. Bibeault, [1982] C.S. 977 .

21 On January 16, 1984, Beauregard, McCarthy and Malouf JJ.A. of the Quebec Court of Appeal affirmed the Superior Court judgment.

22 Hence the appeal with leave of this Court.

II — The Decisions Of The Labour Commissioner, The Labour Court And The Courts Below

23 Before turning to these decisions it will be helpful to review the origins of ss. 45 and 46 of the Labour Code and their interpretation during the period leading up to the Labour Court's decision in the case at Bar.

1. The Origins of ss. 45 and 46 and the History of Their Interpretation

24 Chouinard J., speaking for this Court, explained the origins of ss. 45 and 46 of the Labour Code in Adam v. Daniel Roy Ltée, [1983] 1 S.C.R. 683, 83 C.L.L.C. 14,064, 1 D.L.R. (4th) 37, 50 N.R. 332 . The sections in question were numbered 36 and 37 at that time. Chouinard J. wrote the following at pp. 688-689 [S.C.R.]:

> Section 36 was adopted in 1961 by 9-10 Eliz. II, c. 73, as s. 10a of the Labour Relations Act , R.S.Q. 1941, c. 162A, which the Labour Code replaced. Its primary purpose was to alter the situation created by the decision of the Court of Appeal in Brown, Syndicat national des travailleurs de la pulpe et du papier de La Tuque Inc. v. Commission des relations ouvrières de la Province de Québec, [1958] Que. Q.B. 1 .
>
> The union had been certified to represent the employees of Brown Corporation at the La Tuque mill, and a collective agreement had been concluded for a period of three years. Shortly after signing this agreement, Brown Corporation sold its mill to Canadian International Paper Co.
>
> The union applied to the Labour Relations Board to have its certification amended, substituting for Brown Corporation the name of Canadian International Paper Co., which under the contract of sale had assumed responsibility for the collective agreement.
>
> The Board initially allowed the union's request, but subsequently, at the request of a rival association, it revised its decision and cancelled the union's certification. Although it did not say so, the board appears to have based its decision on the principle of relativity of contracts contained in art. 1023 C.C. :
>
> 1023 . Contracts have effect only between the contracting parties; they cannot affect third persons, except in the cases provided in the articles of the fifth section of this chapter.
>
> The certification had lapsed as a result of the sale of the mill.
>
> By a majority of four to three, the Court of Appeal affirmed the judgment of the Superior Court, which quashed the writ of prohibition issued against this decision of the Board.
>
> In Centrale de chauffage Enr. v. Syndicat des employés des institutions religieuses de Chicoutimi Inc. et L'Hôpital de Chicoutimi, [1970] R.D.T. 344 , Donat Quimper A.C.J. of the Labour Court explained, at pp.

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347-48, the reasons justifying adoption of this article and the intent of the legislator:

[TRANSLATION]

In the years that followed adoption of the *Labour Relations Act* in 1944, it became apparent that certain transfers of ownership and work transfers had the effect of impeding the normal exercise of the right of association. In the case of a sale, unless there was an agreement to the contrary the buyer had no obligation either to the employees or to their association. The certification or collective agreement binding on the former owner ceased to apply.

. . . . .

Similarly, the practice of certain employers of giving work which was usually done in their own establishments to third parties to do could interfere with an application for certification if the transaction was accompanied by layoffs and, in some cases, deprive the employees transferred to the service of the subcontractor of the benefits of an existing or future agreement. Here again, the certification or agreement was effective only with regard to the principal employer.

These are the two (2) situations which the legislator sought to remedy by enacting the first paragraph of section 10a. By that provision, he sought to protect the right of representation of the association and to maintain working conditions, whatever the fortunes of the business, apart from a judicial sale. He did this by, first, linking the certification and the collective agreement no longer to the person of the employer but to the business. It followed that henceforth the certification and collective agreement were part of the business. In the case of a sale, the buyer became bound by both the certification and the agreement. He succeeded to the rights and duties of the seller toward his former employees and the association.

The application of these new provisions encountered problems and is still the subject of controversy over twenty years after their adoption.

25 As Robert P. Gagnon, L. LeBel and P. Verge observe in *Droit du travail* (Québec: Presses de l'Université Laval, 1987) at 332:

(Translation)

The first paragraph of s. 45 contemplates the two types of situation the legislator clearly had in mind in enacting this provision, namely the alienation or operation by another of an undertaking. Alienation or operation by another, whether total or partial, will not invalidate certification, and the rights and obligations pertaining thereto will be transferred to the new employer.

26 The circumstances in which s. 45 applies to these two relatively straightforward types of situations generally do not present any great difficulty.

27 However, the matter appears to become more complicated in situations such as that which arises where the original employer resumes operation of the part of the undertaking he had granted to a third party: *Martinique Motor Inn Ltd. c. Union des Employés d'Hôtel, Motel et Club*, [1973] T.T. 151 ; it also seems to be complicated in situations like the one at Bar in which one contractor loses his contract to another with whom he has no connection.

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28 The disputes referred to by Chouinard J. are very well described by Catherine Saint-Germain, "Historique de la situation avant le jugement Commission scolaire régionale de l'Outaouais", in M. Brière, R.-P. Gagnon and C. Saint-Germain, La transmission de l'entreprise en droit du travail (Cowansville, Que.: Éditions Yvon Blais, 1982) at 2-11.

29 The evolution of and the contradictions in the decisions of the Labour Court may be divided into two major periods.

30 The first period begins with the adoption in 1961 of the provision that would become s. 45 of the Labour Code , and ends in 1975 with Schwartz Service Station c. Teamster Local 900, [1975] T.T. 125 .

31 During this first period, the Court rendered judgments such as Syndicat national des employés de l'aluminium d'Arvida Inc. c. J.R. Théberge Ltée, [1965] R.D.T. 449 ; Centrale de Chauffage Enr. c. Syndicat des employés des institutions religieuses de Chicoutimi Inc., [1970] T.T. 236 ; Syndicat national des concierges des commissions scolaires des comtés de Richelieu, Verchères et Yamaska (C.S.N.) c. For-Net Inc., [1971] T.T. 146 , the facts in which are similar to those in the case at Bar; Union des employés de service d'édifices, local 298, F.T.Q. c. Syndicat des employés de soutien de maisons d'enseignement de la régionale le Gardeur (C.S.N.), [1971] T.T. 203 , which also has points of similarity with those in the case at Bar; Martinique , supra; Cdn. Kenworth Ltd. c. Syndicat international des travailleurs unis de l'automobile, de l'aéronautique, de l'astronautique et des instruments aratoires d'Amérique, local 1146, [1975] T.T. 168 .

32 Catherine Saint-Germain summarizes these judgments rendered in the first period as follows, op. cit., at p. 6:

> (Translation)
>
> Thus, these first decisions of the Labour Court laid down two major principles governing the interpretation to be given to s. 45 of the Code:
>
> — an undertaking is defined as functions, activities covered by a certification or a collective agreement; the identity of the employees carrying out these duties, the transfer of the equipment used and so on ... are not determining factors in the transfer of the undertaking: operation by another of the undertaking thus exists when work covered by a certification is placed in the hands of a third party;
>
> — The new employer must have received a right from the previous employer in as much as operation by another [within the meaning of the Code] implies a meeting of minds. In order for the certification or agreement to follow the undertaking as provided in s. 45 of the Labour Code, there must be a finding of a consensual transaction between the original and the new employer.
>
> However, these principles were placed in doubt by several later decisions of the Court. Neither the theory of the undertaking as a functional reality nor the legal relation theory received unanimous judicial support.

33 The Labour Court judgments rendered during the second period, which immediately precedes the judgment in the case at Bar, are summarized in part by Catherine Saint-Germain, op. cit., at pp. 6-8:

> (Translation)
>
> Undoubtedly the greatest disruption of established precedent resulted from the judgment of Chief Judge

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> Geoffroy in Jack Schwartz Service Station v. Teamsters Local 900, [1975] T.T. 125 . Briefly, the facts were as follows: the Texaco company leased a service station to various operators in turn. With each lease the new employer hired new employees, but the contracts between Texaco and the tenants were identical; could the certification issued with respect to one of the tenants be transferred pursuant to s. 45 so as to apply to a subsequent operator?
>
> Established precedent had traditionally answered this question in the negative, because of the lack of any direct connection between the various operators. In recording the transfer of the certification under s. 45, Chief Judge Geoffroy rejected the traditional approach and found that there does not have to be any legal relation between successive employers for this section to apply.
>
> . . . . .
>
> For the definition of an undertaking, Chief Judge Geoffroy adopted the principle of the undertaking as a group of functions already developed in Théberge, Centrale de chauffage ... if the work carried out by various operators is the same, the undertaking is transferred even if new employees are hired by each new operator.
>
> . . . . .
>
> Schwartz upset the established precedents of the Court on s. 45 of the Code, and the Court has remained divided since then. Some judges have accepted Schwartz and others have declined to do so.
>
> In Services Ménagers Bordeaux (1980), 3 Can. L.R.B. 43; [1980] T.T. 233, Judge Burns adopted the thesis put forward in Schwartz . ... [T]he question was whether the certification and the agreement issued in respect of a subcontractor for janitorial services should be transferred when the school board terminated the contract and awarded it to another subcontractor. Adopting Schwartz , Judge Burns answered in the affirmative.

34 Judge Morin, for his part, confirmed the requirement of a relation (between the previous and the new employer) in Syndicat des employés de l'imprimerie de la région de l'amiante (C.S.N.) c. Imprimerie Roy et Laliberté Inc., [1980] T.T. 503 , although he added certain nuances to the rule. In his view, there must be a legal relation between the parties for s. 45 to apply, but this relation need not be contractual or direct. At p. 507, he wrote:

> (Translation)
>
> This relation is not severed by the fact that there is an intermediary. For my part, I agree that there must be a relation, but the relation is not necessarily a nominate contract within the meaning of the Civil Code between the old and the new employers.

35 Judge Morin reiterated this position in the case at Bar.

36 Other judges of the Labour Court, like Judge Girouard, continued to impose the traditional requirement of a direct transfer between the old and the new employers. For Judge Girouard, the transfer of an undertaking is:

> (Translation)

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> ... the finding of an intent (hence the exception of a judicial sale) and an act by which that employer divests himself of an undertaking that had been assumed by him and places it in the hands of, or 'passes' it to, the other employer.

See in this regard Syndicat des salariés de service d'entretien (C.S.D.) c. Montcalm Carpets Specialists Ltd., [1981] T.T. 273 ; Entrepôts Schenker Ltée c. Travailleurs canadiens de l'Alimentation et d'autres industries, local P-766, [1981] T.T. 420 .

37 Moreover, the Judges who continue to hold to the traditional view with respect to the requirement of a legal relation have a concept of the undertaking which differs from that originally developed in Théberge and Centrale de Chauffage , supra, and which paradoxically appears to favour the departure made in Schwartz , supra, regarding the absence of any requirement of a legal relation between the old and new employers. On this point, Catherine Saint-Germain describes a position such as that taken by Judge Girouard as follows, op. cit., at p. 9:

> (Translation)
>
> This concept of the transfer of an undertaking is based on a quite different view of the undertaking from that adopted by Judge Lespérance and Associate Chief Judge Quimper in Théberge and La Centrale de Chauffage (that is, an undertaking viewed simply as a group of functions covered by the certificate of certification). Judge Girouard sees the undertaking as an organic reality, as an entire productive entity containing human, physical and intellectual components, namely employees, equipment, a purpose, work premises and so on.

38 Catherine Saint-Germain cites the following passage from the judgment of Judge Girouard in Entrepôts Schenker , supra:

> (Translation)
>
> These tasks, duties, positions, or activities should not be isolated [from the rest of the undertaking] and then used as a basis for concluding that they alone constitute the undertaking: that amounts to a confusion of the organized whole with one or more of its components. It is through this confusion that one arrives at the conclusion, which I consider mistaken, that the effect of the certification is to confer a monopolistic exclusivity over the duties or positions.

39 Catherine Saint-Germain concludes in part as follows regarding the contradictions in decisions of the Labour Court before the judgment rendered in the case at Bar, op. cit., at pp. 9-10:

> (Translation)
>
> We find that the decisions of the Labour Court have produced several interpretations of this provision, none of which has so far been unanimously accepted by the judges; ... [in the opinion of certain judges] it should only apply to situations in which the undertaking, as an organized whole , a specific entity containing various components, is transferred to a new employer and an immediate and direct consensual transaction can be said to have taken place between this new employer and the employer who transfers the undertaking.
>
> In opposition to this thesis is the theory originating in Schwartz : the undertaking is to be seen in the context of certification, that is as a group of functions covered by the certification certificate, and a transfer of the

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> undertaking or its operations must be found to exist each time a new employer exercises authority over these certified duties, even where there is no legal relation between the successive employers.

40 In an attempt to resolve these contradictions in the case at Bar, the Labour Court adopted the suggestion of the parties that the full bench of eleven Judges should sit. As we shall see, despite the existence of a clear majority on the conclusions, this attempt had only limited success in terms of stating principles and clarifying concepts.

41 The parties did not discuss the propriety of the exceptional procedure followed by the Labour Court of sitting with a full bench. I express no opinion on this point.

2. The Decision of the Labour Commissioner

42 The labour commissioner, Mr. Réal Bibeault, found that the evidence showed there was no legal relation between the janitorial service companies; however, relying principally on the Labour Court judgments in Schwartz and Syndicat national des employés de la Comm. scolaire régionale de l'Outaouais c. Services Ménagers Bordeaux , supra, he held that the only conditions for the application of s. 45 of the Labour Code are the existence of a new employer and the continuity of the undertaking. According to this line of authority, the existence of a legal relation between successive employers is not a condition for the application of s. 45. He also referred, inter alia, to the judgment of Judge Morin in Imprimerie Roy et Laliberté Inc. , supra, according to which the existence of a legal relation between the old and the new employer is not necessary for s. 45 to apply. He adopted a concept of the undertaking put forward by Judge Burns in Services Ménagers Bordeaux , at p. 242 [[1980] T.T.]:

> (Translation)
>
> [W]e are concerned with the operation constituted by janitorial services performed at the Nicolas Gatineau comprehensive school.

43 As we saw earlier, the labour commissioner concluded that s. 45 of the Labour Code applied and that the rights and obligations of MBD or Netco, as the case might be, had been transferred to Services Ménagers Roy, which he declared bound by the certifications of MBD and Netco and by the legal strike initiated against them.

3. The Decision of the Labour Court

44 This decision is very detailed. It takes up ninety pages of the Labour Court reports. Eight of the eleven Judges of the Court wrote separate reasons containing at times rather subtle differences. It is therefore not an easy decision to summarize. An adequate summary is however provided in the objective headnote prepared by the Labour Court law editors and published with the Court's decision. A more detailed and more critical summary has also been published by Robert P. Gagnon, "L'article 45 du Code du travail après le jugement C.S.R. Outaouais", in La transmission de l'entreprise en droit du travail , op. cit., at pp. 145-163.

45 Seven of the eleven Labour Court Judges dismissed the appeal from the labour commissioner's decision. They held that there had been a transfer of the undertaking in the circumstances. Consequently, the rights and obligations attached to the certification were also transferred from the undertakings covered by the certifications to the new subcontractors by virtue of s. 45 of the Labour Code . The Judges in question were Chief Judge Geoffroy, Associate Chief Judge Beaudry and Judges Morin, Auclair, Burns, Saint-Arnaud and Brière. Judge Brière

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however dissented in part on certain matters which he would have referred back to the labour commissioner for further inquiry.

46 The four dissenting Judges would have allowed the appeal. They were Judges Girouard, Lesage, Prud'Homme and Aubé.

47 However, the seven majority Judges did not all arrive at their conclusions for the same reasons, and there were also slight differences between the opinions of certain minority Judges.

3.1 Continuity or the Preservation of the Essential Elements of the Undertaking

48 The only condition which all the Labour Court Judges considered essential to the application of s. 45 was the continuity of the undertaking. This agreement is superficial, however, since the Labour Court Judges agreed neither on the identification of the undertaking in the case at Bar nor on the definition of the undertaking.

3.2 The Legal Relation between Successive Employers

49 They also were not in agreement on what is probably the chief point in dispute: for s. 45 to apply, must there be a legal relation between the old and the new employer, resulting from an agreement between them to transfer the undertaking, such that the first employer transfers a right or rights to the second?

50 Four Judges of the Labour Court were clearly of the opinion that the existence of a relation, legal or otherwise, direct or indirect, between successive employers is not a condition for the application of s. 45. In their view, the only condition for the application of this section, when a new employer replaces the old, is that the undertaking must continue. Their principal spokesman was Chief Judge Geoffroy, with whom Judges Auclair, Saint-Arnaud and Burns simply concurred. According to Chief Judge Geoffroy, in view of the principles of civil law which s. 45 was meant to correct, "alienation of an undertaking" within the meaning of this section is (translation) "the extinction by whatever means of the legal connection an employer had to the ownership or the enjoyment of an undertaking" [[1982] T.T., p. 122].

51 Judge Morin, who was part of the majority, repeated the thesis he had first put forward in Imprimerie Roy et Laliberté Inc. In his opinion, which he stated inter alia at p. 138:

> (Translation)
>
> [F]or there to be continuity of an undertaking, a relation between the previous and the new employer must exist.

52 In Judge Morin's opinion, however, this relation is not necessarily contractual, legal or direct. In the case at Bar, it is provided by the C.S.R.O.

53 Associate Chief Judge Beaudry concurred in the opinion of Chief Judge Geoffroy and in that of Judge Morin, which at least on the surface indicates an internal contradiction with respect to the requirement of some kind of relation between successive employers.

54 Judge Brière agreed with the majority's basic conclusions, but some of his reasoning is distinct from that of the majority. Unlike the other majority Judges, he concluded that for there to be continuity of the undertaking there has to be a legal relation established by contract or at law between successive employers — other than a

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simple purchase of particular goods or services that does not result in a loss of employment or layoff. However, this legal relation does not have to be direct provided it is continuous. The Labour Court law editor summarizes the approach taken by Judge Brière on this point as follows:

> (Translation)
>
> [T]his legal relation does not necessarily have to be direct; yet it must be continuous, the undertaking passing through the party conferring the right to operate the undertaking to the successive operators so as to establish a continuous link in successive rights. As the school board was never the employer in the operation of the janitorial service undertaking, it did not transfer a functional undertaking when it entrusted the execution of janitorial services to the first subcontractor; however, the termination of this arrangement led to a transfer of the undertaking from the subcontractor to the school board, since the board was taking back the right to operate the undertaking. The undertaking therefore did not move between operators, but went from the party conferring the right to operate it to the first subcontractor, from the first subcontractor back to the party conferring the right, and so on. This type of transfer of an undertaking brings about a transfer of rights and obligations pursuant to s. 45.

55 The minority Judges, on the other hand, had no doubt that a legal relation between the two subcontractors was necessary.

56 Judge Girouard wrote, inter alia, at p. 193:

> (Translation)
>
> [T]he consensual transaction between two parties, whereby rights in the operation of the undertaking are conferred, is the sine qua non of the application of s. 45, in that the consent of the parties gives rise to the circumstances upon which s. 45 is based.

57 Judge Lesage agreed with the opinion of Judge Girouard, but expanded, if that is possible, on Judge Girouard's reasons, and Judge Prud'Homme concurred in the opinion of Judge Lesage with brief additional comments. Judge Aubé agreed, at a minimum, with the conclusions of his three dissenting colleagues, subject to a distinction as to the nature of an undertaking, about which I will say a word later.

58 Thus it would appear that five of the eleven Judges of the Labour Court considered that no relation of any kind between subcontractors is necessary before s. 45 can apply. Six of the eleven thought the contrary, and five of these considered that the relation in question had to be a legal relation, whether direct (the dissenting Judges) or indirect (Judge Brière).

3.3 The Identification of the Undertaking

59 As I have already indicated, the Judges of the Labour Court also disagreed as to the identification of the undertaking in the case at Bar. Is the undertaking we are concerned with that of the C.S.R.O. or the undertakings of each subcontractor designated in a certification?

60 Chief Judge Geoffroy and the three Judges who simply concurred in his opinion concluded that the undertaking in question was that of the C.S.R.O.

61 Similarly, Associate Chief Judge Beaudry, at pp. 130-131, and Judge Brière, at p. 146, expressed the

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view that the undertaking in question is that of the C.S.R.O. However, at p. 175, Judge Brière wrote that the C.S.R.O. did not transfer an undertaking when it entrusted the execution of janitorial services at its schools to the first subcontractor.

62 In contrast, the minority Judges were of the opinion that the undertaking in question in s. 45 can only be that of the employer designated in a certification, and in the case at Bar the undertaking can only be that of the subcontractors: see pp. 185, 200, 204 and 205.

63 This point of view appears to have been shared by Judge Morin, who, although part of the majority, wrote at p. 137:

> (Translation)
>
> In the cases under consideration, cases involving janitorial services in schools, the nature of the undertaking covered by s. 45 must be determined.
>
> . . . . .
>
> First, we must dispel any ambiguity. The certifications in question are directed not to the school board's undertaking, but to the undertakings operated by the janitorial service subcontractors who were affected by the certifications. Although essentially these subcontractors are, by virtue of a contract, operating a part of the school board's [larger] undertaking, the undertakings designated in the certifications are those operated by the various employers who were, at the time the certifications were issued, the various subcontractors for janitorial services.

3.4 The Concept of an Undertaking

64 Without doubt, however, the concept of an undertaking gave rise to the greatest number of different approaches in the Labour Court judgment, subtle differences that are not easy to pinpoint or summarize. All the Judges took the certification into account in defining the concept of an undertaking, but their unanimity went no further than that.

65 Chief Judge Geoffroy and the three Judges who concurred in his opinion continued to endorse the functional concept of an undertaking, which they maintained found authority in some of the earliest decisions of the Labour Court, and in particular in the judgment of Associate Chief Judge Donat Quimper in Centrale de Chauffage , on which they relied and which will be discussed below.

66 It should be pointed out that the opinion of Chief Judge Geoffroy on the lack of any requirement of a legal relation between subcontractors is largely due to his view of an undertaking.

67 In contrast with Chief Judge Geoffroy and the Judges who simply concurred with him, the dissenting Judges, with the probable exception of Judge Aubé, supported the organic concept of an undertaking. Paradoxically, they also relied on the initial decisions of the Labour Relations Board and the Labour Court, emphasizing that this concept is limited by the certification. Judge Girouard adopted the following definition of an undertaking, at p. 186:

> (Translation)

It is the organized group of operations set in motion by an agent for a definite purpose. These operations take the form, inter alia, of tasks, duties, occupations, activities, performed in a defined framework using specific methods having regard to the wishes and resources of the agent.

68 The following passage is found on the same page, a few lines earlier:

(Translation)

[The certification] is tailored to the undertaking which an employer intended to carry on, assume [and] direct, and follows it when the employer alienates the undertaking or transfers its operation to another employer; in any case, the certification cannot come into existence for an undertaking which an employer has not assumed, nor for the undertaking of another employer: these are undertakings not initially designated in the application for certification, and no relationship, either by alienation or by transfer of operations, is established between them and the first employer.

69 As noted above, Judge Lesage concurred with Judge Girouard but added his own comments.

70 At p. 199, he dissociated himself from Chief Judge Geoffroy's opinion with respect to the nature of an undertaking:

(Translation)

With respect, this diffuse concept of an undertaking, associating it with the principal economic agent who is the pivot of all the related activities [in the case at bar, the undertaking of the C.S.R.O.], is entirely at variance with the wording of s. 45 itself, seen in the perspective of the Labour Code . It focuses purely on the continuity of the undertaking, seen in a wide economic perspective, without looking at the limits imposed by the Code by referring to alienation.

71 On the same page and the page following, Judge Lesage wrote:

(Translation)

The juxtaposition of the employer and the certification, as the point of departure and the consequence of alienation in the wording of s. 45, is so fundamental that it necessarily implies that only activities actually directed by the employer, and for which he hires employees, are at the heart of the undertaking in question and give it its definition. For the purposes of s. 45, therefore, it is the alienation of the personal undertaking affected by collective rights we are concerned with.

. . . . .

Accordingly, both the natural meaning of the words and the context of the Labour Code require that we separate a given undertaking from its economic context and consider it strictly in terms of the specific activities and personal contribution of the employer designated in the certification and the other collective rights which will continue despite the alienation.

. . . . .

The undertaking, which must be found to have been alienated before s. 45 can apply, is that under the legal

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control of the employer who is certified or is affected by collective rights, and by definition only he may dispose of it.

72 Judge Aubé, who was among the dissenting Judges, relied at p. 204 on the definition of an undertaking given by Associate Chief Judge Donat Quimper in Centrale de Chauffage , and cited by the Chief Judge of the Labour Court, Judge Geoffroy, in the case at Bar, and drew the following conclusion:

(Translation)

Accordingly, in the cases under consideration the undertaking is the totality of janitorial services performed in the various schools concerned.

73 He concluded that there had been, at least potentially, a transfer of the operation of its undertaking by the C.S.R.O., since the school board could have in the past and could still in the future decide to operate the undertaking itself. However, s. 45 could not apply (in the case at Bar) because no certification of the undertaking had ever bound the C.S.R.O., and the application of s. 45 depends on the certification of the party conferring rights in the undertaking. Consequently, wrote Judge Aubé:

(Translation)

It is more than apparent, in the cases under consideration, that in as much as the certifications were issued in respect of the subcontractors, the certifications applied to the undertaking of the subcontractor and not the undertaking of the school board.

74 He also concluded at p. 205 that there was no continuity of the undertaking in the case at Bar:

(Translation)

Did the new subcontractors continue the business of those who had performed the janitorial services before them in the same schools? It seems evident to me that they did not.

75 Judge Morin, who formed part of the majority, and with whom Judge Beaudry concurred as well as with Chief Judge Geoffroy, rejected both the operational and the organic concepts of an undertaking. In his opinion, while the organic concept of the undertaking would unduly limit the operation of s. 45 of the Labour Code , the functional concept of the undertaking is so broad as to make it impossible to distinguish between two similar undertakings, and consequently would make any determination as to the continuity of the same undertaking equally impossible. He therefore adopted what is perhaps an intermediate position, based on pragmatism. At pp. 136-137 he wrote:

(Translation)

[T]he undertaking must be analysed above all in the context of the certification. Section 45 applies only to an undertaking covered by a certification. This undertaking must correspond first and foremost with the functions covered by the certificate of certification.

. . . . .

This does not mean that it will not be necessary in certain cases to determine whether human components,

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physical components and even intellectual components are present. That will depend on each case. Thus, an undertaking which is defined essentially in terms of high technology will not be found to have continued to exist if that high technology was not part of the transfer. The same thing, for example, might be true where one school bus company succeeds another if no equipment or buses were alienated or transferred. It all depends on the essential characteristics of the undertaking in relation to the certification applicable to it.

. . . . .

When we want to know here if the undertaking continued to exist, we will have to ask whether both before and after the alienation or transfer of operations the work that employees were hired to do, namely janitorial work, continued to be performed in the same schools as before.

76 Judge Morin concluded as follows, at p. 137:

(Translation)

We must therefore look at the functions covered by the various certifications in the instant case. The certification that s. 45 is intended to protect here is that covering janitorial services in a particular school. That is how the certifications were issued.

If the certification had covered employees performing janitorial work for a subcontractor in, for example, the entire Hull area, the undertaking protected by s. 45 might have been different. Thus, in such a case it might have appeared that the undertaking to which s. 45 applied was not janitorial services in a single school but janitorial services at several locations in the area.

But that is not the case here.

77 Finally, Judge Brière also took his own line regarding the concept of an undertaking. At pp. 144-145, he considered no less than half a dozen definitions of an undertaking which appeared to contain a significant organic component, including the following:

(Translation)

An undertaking is essentially an organic relationship between an employer and his employees, or a group of employees .

78 Judge Brière nevertheless concluded as follows at p. 174:

(Translation)

I propose to adopt the 'employee' factor as the principal component of an undertaking in defining the transfer of the undertaking and determining the rights and obligations passed on [to the new employer] in the event of such a transfer.

79 Judge Brière had already derived the consequences several pages earlier, at p. 148:

(Translation)

There is only a transfer of an undertaking within the meaning of the Labour Code when this actually exists,

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that is, the work duties transferred were in fact performed by employees whose rights would be affected by the transfer of the undertaking if their continuity were not guaranteed by law.

The employees must therefore be found to work or have the right to work in the transferred undertaking.

80 Robert Gagnon, "L'article 45 du Code du travail après le jugement C.S.R. Outaouais", op. cit., at pp. 160-161, summarizes the position taken by Judge Brière on this point:

(Translation)

This undertaking is basically the functional undertaking, to which is added the consideration of the identity of those performing duties, that is, for purposes of s. 45, the employees.

. . . . .

On these bases, therefore, Judge Brière concluded that the identity of the employees was the essential component of an undertaking for the purposes of applying s. 45 and the determining factor in a finding that the undertaking had been transferred.

81 There was thus no decisive majority in the Labour Court judgment on the crucial question of the concept of an undertaking.

3.5 A Jurisdictional Question

82 Before concluding the summary of this judgment, two points should be mentioned that had been raised in the opinions of the minority Judges.

83 In the view of Judge Girouard, speaking for the minority, the error made by labour commissioner Réal Bibeault, and so by the majority of the Labour Court, is jurisdictional in nature. Judge Girouard wrote at p. 185:

(Translation)

Under s. 46, the finding required by the provisions of s. 45 is within the jurisdiction, and part of the responsibility, of a commissioner, who may also 'settle any difficulty arising out of the application' of these provisions. ... I should say at once that, for all that, neither a commissioner (nor the Court) can disregard the actual provisions of s. 45, which only apply where there is factual evidence of an alienation or operation by another, and of a certification of the party who confers the right to operate; these facts then 'confer jurisdiction' and an error as to their existence appears to me to be of a jurisdictional nature precluding application of the privative clause in s. 118 of the Code.

84 This opinion was accepted by the Superior Court and the Court of Appeal.

85 Judge Lesage wrote at p. 203 that the interpretation adopted by him (translation) "seems to be the only reasonable one as far as our s. 45 is concerned". It follows that in his opinion the contrary interpretation is necessarily unreasonable.

4. The Decision of the Superior Court

86 After summarizing the facts, which must be taken as proved, Landry J. began at p. 979 [[1982] C.S.], by

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reviewing the principles relating to the right of evocation which he felt were applicable and which he drew from various decisions and writers:

(Translation)

The applicant alleged want and excess of jurisdiction. A competent tribunal does not exceed its jurisdiction when it makes an error of law or fact within the exercise of that jurisdiction. Only an error by which a tribunal assumes jurisdiction it does not have can be the subject of evocation.

An error of law giving rise to jurisdiction is therefore reviewable by evocation. Similarly, an error regarding facts which create jurisdiction is also reviewable in the same way.

. . . . .

An inferior tribunal therefore cannot by an erroneous decision as to the existence of conditions preliminary to the exercise of its power assume a jurisdiction which it does not have.

87 On the same page, Landry J. referred to s. 45 of the Labour Code :

(Translation)

In s. 45 the Labour Code lays down a principle which has the effect of making a certification given to employees of one employer valid in respect of a new employer. The new employer will be bound by the certification already given on two conditions:

(a) he acquired the undertaking operated by his predecessor as the result of an alienation or transfer of the operation of the undertaking;

(b) a certification was granted with respect to the undertaking before the alienation or transfer of operations and was in effect at the time of the alienation or transfer of operations.

88 At p. 980, Landry J. referred to s. 46 of the Labour Code , and went on to observe:

(Translation)

The labour commissioner thus has the power to record a transfer of rights and obligations and to make whatever orders are necessary for this purpose. However, this power can only be exercised where a prerequisite has been met, namely the alienation or operation by another of the undertaking.

. . . . .

To make an order under s. 46, the commissioner must be satisfied as to the existence of the prerequisites already mentioned. If the commissioner records an alienation of an undertaking within the meaning of s. 45 when in fact and in law no such alienation took place, he is assuming a jurisdiction he does not have when he makes an order pursuant to s. 46. The labour commissioner has no jurisdiction to make an order under s. 46 in a case not covered by s. 45.

89 Secondly, Landry J. reviewed the background of s. 45 and its interpretation by the Labour Court and proceeded to give his own interpretation of the provision, at pp. 983-984:

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(Translation)

Section 45 requires first the existence of an employer carrying on an undertaking and having employees represented by a certified association.

. . . . .

[A] certification requires an employer and employees. The certification does not have to cover all the employees of an employer. A group of employees forming a 'separate group' can be the subject of a certification. Agreement between the employer and the employee association is sufficient to define a 'separate group'.

It can thus be seen that in the case of a subcontractor the person to whom the subcontractor provides services is in no way a party to the application for certification. In principle, therefore, the subcontractor's customer should not have a certification set up against him solely on the ground that the employees and employer chose to limit a certification to the group of employees assigned by the employer to perform services for this customer.

The undertaking referred to in s. 45 must be the undertaking designated in the certificate of certification. It therefore has to be the undertaking of the employer named in the certificate of certification. Accordingly, there can be no question of a third party's undertaking.

The legislator has not defined the word 'undertaking'. Is the legislator referring when he uses this term to the actual function assigned to the employee, in this case janitorial work? — or is he referring to the ordinary meaning of this word as it is used in everyday language? In the absence of a statutory definition, the ordinary meaning is generally given to the words used.

90 Landry J. cited several dictionary definitions of the word undertaking and continued:

(Translation)

In the second paragraph of s. 45 the legislator speaks of a division, amalgamation or change in the legal structure of the undertaking. How can the legislator be thought to mean anything here other than 'a commercial or industrial enterprise' in the broad sense? An undertaking exists in a legal framework, a sole proprietorship, a partnership or a limited company. When he refers to the undertaking's legal structure, the legislator means the legal framework in which employer, managers and employees operate. The word 'undertaking' thus does not refer only to the specific function performed by an employee. It refers to the components of a business as a whole.

91 Landry J. then elaborated on the concepts of alienation and operation by another:

(Translation)

For there to be an alienation or operation by another of an undertaking, the person holding the right of ownership in the undertaking must perform a legal act which has the effect of transferring some right in the undertaking to someone else.

. . . . .

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The alienation referred to in s. 45 of the Labour Code must therefore be an alienation made by the employer mentioned in the certificate of certification or by someone legally authorized, by law or by the employer, to alienate all or part of the employer's undertaking (with the exception of a judicial sale). In such a case, the person who acquires all or part of the undertaking will be bound by the certification obtained by employees of the previous employer.

92 At pp. 984-985 Landry J. drew the conclusions from these premises which obviously led him to authorize issuance of a writ of evocation. He added the following observations:

(Translation)

What was the undertaking of MBD and Netco on July 1, 1979? For each of the schools, the undertaking of each of these employers was a janitorial service undertaking with a limited duration, namely a period of one year. It was not an undertaking for an indefinite time.

. . . . .

How can it be said that the effect of the certification is to create an undertaking that goes beyond the limits of the employer's undertaking? The employees certainly could not claim that the certification in such a case guarantees them more rights in respect of the school board than their own employer has. ...

However, the certification does not take away the right of the school board to issue calls for tenders and award its contracts to another subcontractor. In such a case, the new subcontractor is not continuing his competitor's undertaking or a part of that undertaking. The undertaking in question is his own.

... The effect of the certification here was thus to protect the employees in respect of an undertaking of a limited duration, subject to possible renewals by the school board.

93 As can be seen, Landry J.'s opinion is substantially similar to that of the minority Judges of the Labour Court as to the requirement of a legal relation between subcontractors, the identification and concept of the undertaking and the jurisdictional nature of these questions.

5. The Judgment of the Court of Appeal

94 The judgment is brief. The preamble contains a single clause approving the Superior Court judgment:

(Translation)

WHEREAS the decision of the Superior Court is correct ...

III — Terminology

95 At the beginning of these reasons, I placed in quotation marks the words "subcontractor" and "subcontracting" used in the case at Bar by most of the Judges of the Labour Court, by the Superior Court and by the parties in their facta to refer to MBD, Netco and Services Ménagers Roy, or to the contract awarded to each of these entities. The labour commissioner, Réal Bibeault, however, called MBD, Netco and Services Ménagers Roy (translation) "contractors for janitorial services". The only Judge who dealt with this point was Judge Morin, who at p. 138 referred in passing to the Quillet dictionary, to give the following definition to the word "sub-

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contractor":

(Translation)

... person assuming responsibility for certain parts of a project, supply contract or undertaking for which another has overall responsibility.

96 Some clarification is called for.

97 The words "subcontractor" and "subcontracting" and the definition given to them by Judge Morin may suggest that the subcontractors in question here are subordinate contractors or subcontractors whose work corresponds to the first definition of subcontracting proposed by G. Dion in *Dictionnaire canadien des relations du travail* , 2d ed. (Québec: Presses de l'Université Laval, 1986) at 449 ("subcontractor"):

(Translation)

Part of a project assigned to a principal contractor accepted on a subordinate basis by a specialized contractor.

98 In actual fact, MBD, Netco and Services Ménagers Roy are contractors, as the labour commissioner Réal Bibeault stated, not subcontractors. They are parties to a contract for the lease and hire of work and one might apply to them the definition of a contractor found at p. 192 of G. Dion's dictionary:

(Translation)

Person who undertakes by contract ... to perform given work for a definite price. Such person usually has complete freedom in performing the work subject to the terms of the contract.

99 However, one may also apply to their work the second definition of subcontracting proposed by G. Dion, op. cit., at p. 449:

(Translation)

Practice by which an organization assigns the performance of certain work to an independent specialized contractor. This contractor assumes complete responsibility for this work, which he performs himself or has performed by his own employees, either on the premises of the party awarding the contract (e.g. janitorial services, food services and so on), or outside in his own establishment. ... A business may use subcontractors for various reasons: lower cost, lack of materials or labour, specialized personnel, emergency requirements and so on.

100 I believe that the Labour Court Judges, the Superior Court and the parties in their facta intend this second meaning rather than the first when they speak of subcontractors and subcontracting.

IV — The Submissions Of The Parties

101 The arguments made by the appellant can be reduced to two propositions:

(1) the Superior Court, and subsequently the Court of Appeal, despite the existence of a privative clause in the *Labour Code* , erred in justifying their intervention by the theory of questions "preliminary" or "collater-

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al" to the exercise of jurisdiction, and in holding that the existence of an alienation or operation by another of an undertaking within the meaning of the Civil Code is a prerequisite to exercise of the power to issue a record of the transfer of rights and obligations;

(2) the interpretation of s. 45 by the labour commissioner and the Labour Court is the correct one: at least, it cannot be argued that it is a patently unreasonable interpretation, any more than, as the appellant concedes, the interpretation of the minority of the Labour Court can be regarded as patently unreasonable.

102 Respondent, for its part, maintained the contrary propositions supported by the mis en cause C.S.R.O. and Services Ménagers Roy.

103 As explained below, these two submissions may at first glance appear to be inconsistent.

104 The first submission requires the Court to decide whether the labour commissioner and the Labour Court have the jurisdiction2 necessary to make the decisions which they made, without being subject to judicial review in the event that they erred in law.

105 The second submission assumes an affirmative response to the question raised by the first but raises the issue of whether, in the exercise of their jurisdiction, the labour commissioner and the Labour Court lost their jurisdiction by giving ss. 45 and 46 a patently unreasonable interpretation.

106 The two submissions were made by the appellant alternatively. The Superior Court and the Court of Appeal did not address the second, but the respondent made the question of patent unreasonableness its first submission, and in its factum, the appellant sought to answer the submission in advance.

107 I will state my conclusions before proceeding any further: the interpretation of s. 45 by the labour commissioner and the Labour Court is in error and the errors are jurisdictional in nature. However, I arrive at these conclusions for reasons which differ from those of the Superior Court and the Court of Appeal. In view of these conclusions, it is not necessary to decide whether the errors made by the labour commissioner and the Labour Court are patently unreasonable.

V — The Jurisdiction Of Labour Commissioner Under ss. 45 And 46

1. Introduction

108 Did the labour commissioner and the Labour Court, in deciding whether there was a transfer of rights and obligations under s. 45 when the C.S.R.O. awarded a contract for janitorial services, perform an act which was within their jurisdiction stricto sensu? That is the first point this Court must decide. In other words, if the decisions of the labour commissioner and the Labour Court are in error, are they subject to judicial review by the superior Courts?

109 The appeal thus raises once again the always difficult, delicate and controversial question of the exercise by superior Courts of their superintending and reforming power over administrative tribunals. I do not intend to undertake an exhaustive study of the rules governing the exercise of this superintending and reforming power. I shall confine myself to cases in which the administrative tribunal has erred in law in its decision. Nevertheless, it seems advisable before analysing the jurisdiction of the labour commissioner to make certain preliminary observations on the analytical methods to be used in deciding when a matter is jurisdictional in nature.

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2. Analytical Methods

110 As I indicated in the preceding section, the parties considered the jurisdiction of the labour commissioner in two lights: first, does one of the events mentioned in s. 45, namely the alienation of an undertaking or its operation by another, constitute a preliminary question or, in other words, a prerequisite to the exercise of the power conferred by s. 46? And secondly, is the interpretation given to s. 45 by the labour commissioner and the Labour Court patently unreasonable?

111 S.A. de Smith, *Judicial Review of Administrative Action* , 4th ed. by J.M. Evans (London: Stevens, 1980) at 114, defines a preliminary question as follows: "A preliminary or collateral question is said to be one that is collateral to 'the merits' or to 'the very essence of the inquiry'; it is 'not the main question which the tribunal has to decide' " (footnote references omitted). In so far as the determination of whether the prerequisite has been met (the preliminary or collateral question) is not the main question which the tribunal has to decide; it is not within its jurisdiction stricto sensu. I say stricto sensu because the tribunal is generally required to decide the preliminary or collateral question as well, before exercising the powers it has, but as this question determines its jurisdiction it cannot err in deciding it. Any error in the matter amounts to a refusal to exercise its jurisdiction stricto sensu or an excess of jurisdiction stricto sensu by the Court, and makes its decision illegal and void.

112 The concept of a prerequisite, or what amounts to the same thing, of a preliminary or collateral question, has been the subject of both scholarly and judicial analysis. As an example, I refer to the following passage from *Syndicat des Employés de Production du Québec et de l'Acadie v. Can. L.R.B.*, [1984] 2 S.C.R. 412 at 421, 14 Admin. L.R. 72, 84 C.L.L.C. 14,069, (sub nom. *C.B.C. v. Syndicat des Employés de Production du Québec et de l'Acadie*) 55 N.R. 321, 14 D.L.R. (4th) 457 :

> This ... is a fleeting and vague concept against which the courts were warned by this Court in *New Brunswick Liquor Corporation* (*supra*), at p. 233.

113 As Lamer J. pointed out in *Blanchard v. Control Data Can. Ltd.*, [1984] 2 S.C.R. 476 at 490 -491, 14 Admin. L.R. 133, 84 C.L.L.C. 14,070, 55 N.R. 194, 14 D.L.R. (4th) 289 , the difficulty presented by the concept of the preliminary or collateral question is the absence of any coherent test for distinguishing what is in fact preliminary. To use the language of Lamer J., the current tendency "is thus to limit the concept of a 'preliminary question' as far as possible" [S.C.R., at 491].

114 The idea of a "patently unreasonable interpretation" is a part of this current tendency. According to this idea, which took shape in *C.U.P.E., Local 963 v. N.B. Liquor Corp.*, [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 79 C.L.L.C. 14,209, 26 N.R. 341, 97 D.L.R. (3d) 417 , a tribunal that interprets legislation in a patently unreasonable manner exceeds its jurisdiction even though stricto sensu it has jurisdiction to answer the question. In *N.B. Liquor Corp.* , supra, it was argued that the interpretation of s. 102(3) of the *Public Service Labour Relations Act* , R.S.N.B. 1973, c. P-25, by the Public Service Labour Relations Board had resulted in an excess of jurisdiction. Dickson J., as he then was, at p. 233 rejected the concept of the preliminary or collateral question because it did not assist in the determination of the Board's jurisdiction. He then examined the wording of the Act and the legislative purpose in enacting it and in creating a specialized Board; he also considered the area of expertise of members of the Board and concluded at p. 236 that "[t]he interpretation of s. 102(3) would seem to lie logically at the heart of the specialized jurisdiction confided to the Board." As interpretation of the provisions was within the Board's jurisdiction stricto sensu, the Board could err in its interpretation provided its errors were not "patently unreasonable". At p. 237, Dickson J. illustrated what he meant by this with examples

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taken from S.E.I.U. v. Nipawin District Staff Nurses Assn., [1975] 1 S.C.R. 382 at 389, [1974] 1 W.W.R. 653, 41 D.L.R. (3d) 6 :

> ... acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting the provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

In short, Dickson J. concluded, an error is patently unreasonable when "its construction cannot be rationally supported by the relevant legislation" and "demands intervention by the court upon review". As the interpretation adopted by the Board in that case was not of this nature, it was not subject to judicial review.

115 It should, however, be carefully borne in mind that N.B. Liquor Corp. does not mean that only a patently unreasonable error can lead to an excess of jurisdiction. In Syndicat des Employés de Production du Québec et de l'Acadie , supra, at pp. 420-421, this Court had occasion to consider the nature of the errors which result in an excess of jurisdiction [[1984] 2 S.C.R.]:

> A mere error of law is an error committed by an administrative tribunal in good faith in interpreting or applying a provision of its enabling Act, of another Act, or of an agreement or other document which it has to interpret and apply within the limits of its jurisdiction.
>
> A mere error of law is to be distinguished from one resulting from a patently unreasonable interpretation of a provision which an administrative tribunal is required to apply within the limits of its jurisdiction. This kind of error amounts to a fraud on the law or a deliberate refusal to comply with it. ... An error of this kind is treated as an act which is done arbitrarily or in bad faith and is contrary to the principles of natural justice. Such an error falls within the scope of s. 28(1)(a) of the Federal Court Act , and is subject to having the decision containing it set aside.
>
> A mere error of law should also be distinguished from a jurisdictional error. This relates generally to a provision which confers jurisdiction, that is, one which describes, lists and limits the powers of an administrative tribunal, or which is [TRANSLATION] 'intended to circumscribe the authority' of that tribunal, as Pigeon J. said in Komo Construction Inc. v. Commission des relations de travail du Québec, [1968] S.C.R. 172 at p. 175. A jurisdictional error results generally in an excess of jurisdiction or a refusal to exercise jurisdiction, whether at the start of the hearing, during it, in the findings or in the order disposing of the matter. Such an error, even if committed in the best possible good faith, will result nonetheless in the decision containing it being set aside.

116 In its decision, a tribunal may have to decide various questions of law. Certain of these questions fall within the jurisdiction conferred on the tribunal; other questions however may concern the limits of its jurisdiction.

117 It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:

> 1. If the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;

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> 2. If however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

118 The idea of the preliminary or collateral question is based on the principle that the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and that such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator. The theoretical basis of this idea is therefore unimpeachable — which may explain why it has never been squarely repudiated: any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions. The principle itself presents no difficulty, but its application is another matter.

119 The theory of the preliminary or collateral question does not appear to recognize that the legislator may intend to give an administrative tribunal, expressly or by implication, the power to determine whether certain conditions of law or fact placed on the exercise of its power do exist. It is not always true that each of these conditions limits the tribunal's authority, but except where the legislator is explicit, how can one distinguish a condition which the legislator intended to leave to the exclusive determination of the administrative tribunal from a condition which limits its authority and as to which it may not err? One can make the distinction only by means of a more or less formalistic categorization. Such a categorization often runs the risk of being arbitrary and may in particular unduly extend the superintending and reforming power of the superior Courts by transforming it into a disguised right of appeal.

120 The concept of the preliminary or collateral question diverts the Courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked: "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"

121 The chief problem in a case of judicial review is determining the jurisdiction of the tribunal whose decision is impugned. The Courts, including this Court, have often remarked on the difficulty of the task. I doubt whether it is possible to state a simple and precise rule for identifying a question of jurisdiction, given the fluidity of the concept of jurisdiction and the many ways in which jurisdiction is conferred on administrative tribunals. De Smith points out, in *Constitutional and Administrative Law* , 4th ed. by H. Street and R. Brazier (London: Penguin Books Ltd., 1981) at 558:

> In approaching the solution to a particular case [on judicial review], the crucial questions will often be: What are the context and purpose of the legislation in question? What significance is to be attributed to the language in which a grant of statutory power is worded? *To a large extent judicial review of administrative action is a specialized branch of statutory interpretation* .

(emphasis added) Considering the challenge posed by statutory interpretation even in the most favourable circumstances, the great number of rules of interpretation and their inconsistencies, it is hardly surprising that the Courts have recognized how difficult it is to determine the jurisdiction of an administrative tribunal.

122 However, by limiting the concept of the preliminary or collateral question and by introducing the doctrine of the patently unreasonable interpretation, this Court has signalled the development of a new approach to determining jurisdictional questions.

123 The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error. At first sight it

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may appear that the functional analysis applied to cases of patently unreasonable error is not suitable for cases in which an error is alleged in respect of a legislative provision limiting a tribunal's jurisdiction. The difference between these two types of error is clear: only a patently unreasonable error results in an excess of jurisdiction when the question at issue is within the tribunal's jurisdiction, whereas in the case of a legislative provision limiting the tribunal's jurisdiction, a simple error will result in a loss of jurisdiction. It is nevertheless true that the first step in the analysis necessary in the concept of a "patently unreasonable" error involves determining the jurisdiction of the administrative tribunal. At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal. At this initial stage, a pragmatic or functional analysis is just as suited to a case in which an error is alleged in the interpretation of a provision limiting the administrative tribunal's jurisdiction: in a case where a patently unreasonable error is alleged on a question within the jurisdiction of the tribunal, as in a case where simple error is alleged regarding a provision limiting that jurisdiction, the first step involves determining the tribunal's jurisdiction.

124 This development seems to me to offer three advantages. First, it focuses the Court's inquiry directly on the intent of the legislator rather than on interpretation of an isolated provision. Determining the legislator's intent is especially desirable when the Court has to intervene in the decisions of administrative tribunals such as the labour commissioner or Labour Court. In *N.B. Liquor Corp.* , at pp. 235-236 [[1979] 2 S.C.R.], Dickson J. observed:

> Section 101 [a privative clause] constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and *finally* decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

[emphasis added] These observations are equally applicable to the labour commissioner and the Labour Court.

125 Second, a pragmatic or functional analysis is better suited to the concept of jurisdiction and the consequences that flow from a grant of powers. In *Judicial Review of Administrative Action* , op. cit., at p. 110, S.A. de Smith writes:

> Jurisdiction means authority to decide. Whenever a judicial tribunal is empowered or required to inquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari but are binding until reversed on appeal.

126 Under the preliminary or collateral question theory, the mere fact that an administrative tribunal must answer a preliminary or collateral question before it may exercise its powers suffices to transform the question into a jurisdictional question. Thus, the order in which the tribunal deals with the questions presented to it may determine the nature of those questions. Such a theory tends to empty the concept of jurisdiction of its content. Jurisdiction stricto sensu is defined as the power to decide. The importance of a grant of jurisdiction relates not to the tribunal's capacity or duty to decide a question but to the determining effect of its decision. As S.A. de

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Smith points out, the tribunal's decision on a question within its jurisdiction is binding on the parties to the dispute. In the exercise of its superintending and reforming power, a superior Court must not limit its inquiry to identifying the questions to be dealt with by the tribunal. The true problem of judicial review is to discover whether the legislator intended the tribunal's decision on these matters to be binding on the parties to the dispute, subject to the right of appeal, if any.

127 The third and perhaps the most important of the reasons why a pragmatic or functional analysis seems more advantageous is that it puts renewed emphasis on the superintending and reforming function of the superior Courts. When an administrative tribunal exceeds its jurisdiction, the illegality of its act is as serious as if it had acted in bad faith or ignored the rules of natural justice. The role of the superior Courts in maintaining the rule of law is so important that it is given constitutional protection: Crevier v. A.G. Que., [1981] 2 S.C.R. 220, 38 N.R. 541, 127 D.L.R. (3d) 1 . Yet, the importance of judicial review implies that it should not be exercised unnecessarily, lest this extraordinary remedy lose its meaning.

128 I turn now to the analysis of the labour commissioner's jurisdiction. Essentially the question is whether the legislator intended that the interpretation the commissioner is called upon to give of s. 45 be within his jurisdiction stricto sensu and binding on the parties, with no right of judicial review.

3. Analysis of Labour Commissioner's Jurisdiction

129 In support of his argument that interpretation of s. 45 is not a question of a jurisdictional nature, counsel for the appellant maintained that the interpretation of the wording of s. 45 is inseparable from the power conferred on the labour commissioner in s. 46 to make an order recording the transfer of rights and obligations from one employer to another. He alleged in particular that determining whether an alienation or operation by another exists is the very focus of the commissioner's inquiry and is therefore within his jurisdiction stricto sensu. Though they are divided on the point, the Courts have sometimes approved appellant's opinion (Montreal Trust c. Tribunal du travail, [1975] R.D.T. 353 (C.A.) ; Lecavalier c. Syndicat national des employés de ville de Laval Inc. (C.S.N.), [1976] 2 C.S. 856 ; Syndicat des employés municipaux de Hull (ville de) c. Hull (ville de), [1985] C.A. 552). However, I cannot subscribe to this point of view for the following reasons.

130 The first point to be mentioned is that the application of s. 45 does not result from the commissioner's determination that the requirements of that section have been met. Section 45 applies automatically. The transfer of rights and obligations occurs as of right on the day of the alienation, operation by another or change in legal structure of the undertaking. No other conclusion can be drawn from the wording of s. 46, which I cite again:

> 46. An [sic] labour commissioner may make any order deemed necessary to record the transfer of rights and obligations provided for in section 45 and settle any difficulty arising out of the application thereof.

131 Under this section, the commissioner's role is limited to "recording" the transfer of rights and obligations guaranteed in s. 45. The French version is equally explicit: "Un commissaire du travail peut rendre toute ordonnance jugée nécessaire pour constater la transmission de droits et d'obligations." (emphasis added) The commissioner's primary mission of recording the transfer of rights and obligations clearly indicates that the application of s. 45 is independent of such recording. Section 46, which empowers the commissioner to settle "any difficulty arising out of the application thereof" (emphasis added), assumes that s. 45 has already had its effect. The benefits mentioned in s. 45 for employees and their associations accrue to them before any decision of the commissioner and, as I shall mention below, even in the absence of such a decision. This is why decisions of the Labour Court consider that a new employer is responsible for implementing the collective agreement as soon as

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the undertaking is alienated or granted, without waiting for the decision of a commissioner recording the transfer of the agreement to such employer (R.P. Gagnon, L. LeBel and P. Verge, op. cit., at p. 342). In *Derko Ltée c. Roy* , (28 juin 1979), no. 200-05-001343-792 (C.S.), Côté J. clearly indicates the limits of the labour commissioner's jurisdiction under s. 46 (at p. 11):

(Translation)

When the conditions stated in s. 36 [now s. 45] of the *Labour Code* are met, the transfer of the original employer's rights and obligations to the new employer takes place by operation of law alone and *without intervention by the investigation commissioner* . The only purpose of an order which may subsequently be made by the investigation commissioner under s. 37 [now s. 46] is to record that such a transfer of rights and obligations has actually taken place. The investigation commissioner's jurisdiction is thus limited to recording the transfer of rights and obligations previously assumed by the former employer.

(underlining added)

132 The legislator did not intend to make the application of s. 45 subject to a determination by the labour commissioner. Judge Beaudry gave the reasons for this at p. 130 of the Labour Court judgment [[1982] T.T.]:

(Translation)

It is clear the legislator intended, in the event of a (legal) transformation of the undertaking, not only to avoid any ambiguity which might result but also to avoid the necessity of the certified union taking steps, taking amendment proceedings, changes of name and other changes which could lead to the temporary freeze of the means provided by the Code to give effect to the certification. This is why s. 45, which is public law, applies as of right. The legislator anticipated that employer-union relations could be disrupted by the obligation or simple necessity of instituting proceedings which, between their initiation and final resolution, might suspend the (already too long) periods of time specified in the Code for the attainment of its purpose, industrial peace.

133 Not only does s. 45 operate automatically, but recourse to the commissioner is also optional. Since 1967, the Labour Relations Board has held that s. 46 allows one of the parties to ask the commissioner to record the rights and obligations if that party deems it "necessary":

(Translation)

The Board is formally of the opinion that s. 36 operates automatically as soon as a contract of alienation comes into effect, without the Board having to intervene. As this provision is public law, one has to conclude that it affects both the rights of the parties and the rights of any subsequent party or third party. Nowhere in the Act is it stated that the Board must record its application for the provision to be effective. Nowhere in the Act is it stated that this transfer of rights must be made public by some kind of proceeding for it to be effective *ipso facto* in respect of third parties.

If the legislator intended the parties to make such a public declaration or to make rights in respect of third parties depend on such publicity, he would have said so. Furthermore, s. 37 indicates that the Board is to intervene, by order recording such alienation, only when this is 'deemed necessary'. Who may deem such recording necessary other than the parties to the transfer, and when can they deem it necessary except in the

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> event of disagreement between them?
>
> When the parties themselves recognize and record the full application of s. 36, there is no further obligation. Name change applications or applications to resolve problems arising out of the implementation of s. 36 are only incidental and add nothing further to the provisions of s. 36, which operate automatically.

(Fraternité internationale des ouvriers en électricité c. National Cablevision Ltd., [1967] R.D.T. 314 at 318 . See also Lachine (Cité de) c. Union des employés municipaux de la Lachine (Cité de), [1974] T.T. 279 .)

134 The transfer of rights and obligations thus does not depend on the conclusion arrived at by the commissioner on the facts and the law — nor indeed on the existence of a certificate recording the transfer — but on the fact that the requirements of s. 45 have actually been met. This is the major difference distinguishing s. 45 of the Labour Code from s. 128 of the Act respecting labour standards , R.S.Q., c. N-1.1 [formerly S.Q. 1979, c. 45]. Lamer J. stated that he did not find any question preliminary to the existence of jurisdiction in the latter provision (Blanchard , supra, [1984] 2 S.C.R., at 492):

> This observation [the absence of a prerequisite] gains additional weight from the actual wording of s. 128: the arbitrator has the powers specified in that section 'where [he] considers that the employee has not been dismissed for good and sufficient cause'. Section 128 does not make the use of these powers conditional on the objective existence of that cause, but on the arbitrator's subjective assessment .

(underlining added)

135 The powers conferred on the commissioner by s. 46 are fundamentally different from those given to the Canada Labour Relations Board under s. 144(5) of the Canada Labour Code , R.S.C. 1970, c. L-1, re-en. S.C. 1972, c. 18, s. 1, which Chouinard J. discussed in National Bank of Can. v. Retail Clerks' International Union, [1984] 1 S.C.R. 269 at 276, 84 C.L.L.C. 14,037, 53 N.R. 203, 9 D.L.R. (4th) 10 :

> In my opinion, however, when faced with a provision as clear as subs. (5) of s. 144, cited above, for which there is no equivalent in the Manitoba statute, no preliminary question is presented and there is no doubt that the Board had jurisdiction to determine the question: '(5) Where any question arises ... as to whether or not a business has been sold ... the Board shall determine the question'.

136 The respondent properly makes the following observations in its submission:

> (Translation)
>
> The 'general' jurisdiction of the labour commissioners is set forth in s. 23 of the Labour Code as follows:
>
> > A labour commissioner general, an assistant labour commissioner general, labour commissioners and certification agents shall be appointed to the Ministère du travail et de la main-d'oeuvre to ensure the efficiency of the certification procedure established by this Code and to perform the other duties assigned to them by this Code. Such persons ...
>
> . . . . .
>
> It can be seen at the outset that the legislator did not see fit to give the labour commissioner a general, ex-

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> clusive jurisdiction over implementation of and compliance with all the provisions of the Labour Code. He chose instead the approach of conferring several special powers, and limited himself to giving jurisdiction over specific and defined matters.
>
> . . . . .
>
> By proceeding in this way the Quebec legislator clearly differs from most other Canadian legislators, who have chosen instead to confer on a specialized and unique agency (generally a labour relations commission) true general jurisdiction over the interpretation and implementation of the legislation governing collective labour relations.
>
> In this respect, one may compare, for example, the jurisdiction conferred on the Canada Labour Relations Board by the Canada Labour Code (R.S., c. L-1), in particular in s. 121 ... or in s. 144(5):
>
> 121. The Board shall exercise such powers and perform such duties as are conferred or imposed upon it by, or as may be incidental to the attainment of the objects of, this Part including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, with any regulation made under this Part or with any decision made in respect of a matter before the Board.
>
> . . . . .
>
> 144. ...
>
> (5) Where any question arises under this section as to whether or not a business has been sold or as to the identity of the purchaser of a business, the Board shall determine the question.

137 Although in Blanchard and National Bank of Can. , supra, the words "prerequisite" and "preliminary question" are used, the idea that is conveyed by these terms is still valid. In these two cases, the legislation conferring power on the adjudicator and the Canada Labour Relations Board, respectively, is framed so as to make the legislative intent apparent. That intent is clearly that the adjudicator or the Board should have jurisdiction to determine if one of the conditions for the exercise of their power exists.

138 The labour commissioner, on the other hand, must ensure that the requirements stated in s. 45 are met before undertaking to resolve the difficulties arising out of the application of this provision. Although the commissioner may have to interpret s. 45, depending on the circumstances, his power to record the transfer of rights and obligations is essentially administrative in that it clarifies for the benefit of third parties the respective rights and obligations of the parties to the transfer. This power forms part of the commissioner's duties, which are "to ensure the efficiency of the certification procedure established by this code ... " (s. 23). Such a power does not authorize him to deny, by means of an erroneous decision, the rights and obligations whose exercise is guaranteed directly by s. 45 or to impose rights and obligations in circumstances not contemplated by s. 45. It is significant that the jurisdiction conferred on the commissioner by s. 46 is considerably more limited than that conferred on him by the Code in other areas. The legislator clearly differentiates in the Labour Code cases in which he intends to give the labour commissioner's decision a conclusive effect:

> 1. ...
>
> (1) 'employee' — a person who works for an employer and for remuneration, but the word does not include:

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> (1) a person who, in the opinion of the labour commissioner , is employed as manager, superintendent, foreman or representative of the employer in his relations with his employees;
>
> . . . . .
>
> 16. If it is shown to the satisfaction of the [labour] commissioner seized of the matter that the employee exercises a right accorded to him by this code, there shall be a presumption in his favour that he was dismissed, suspended or transferred because he exercised such right, and the burden of proof that the employee was dismissed, suspended or transferred for another good and sufficient reason shall be upon the employer. (R.S.Q. 1964, c. 141, as am. S.Q. 1969, c. 48, s. 6)
>
> 31. As soon as he has suspended the certification agent's investigation under section 29 or received the certification agent's report contemplated in section 30, the labour commissioner general must refer the matter to the labour commissioner whom he designates and direct him to grant or refuse the application for certification.
>
> In the case provided for in section 29, the labour commissioner seized of the matter shall not grant the certification if it is established to his satisfaction that section 12 has not been complied with.

(emphasis added)

139 There is another reason why I believe that interpretation of the requirements mentioned in s. 45 is not within the commissioner's jurisdiction. The decisions of this Court clearly indicate that jurisdictional questions are to be identified by their nature, which is not ordinarily within the expertise of an administrative tribunal. Lamer J. relied on Parkhill Furniture & Bedding Ltd. v. International Molders & Foundry Workers Union, Local 174 (1961), 34 W.W.R. 13, 26 D.L.R. (2d) 589 (Man. C.A.) , where the point at issue was similar to the one at Bar, when he formulated the following criterion in Blanchard , at p. 491 [[1984] 2 S.C.R.]:

> These questions are identified by the fact that they fall outside the limits of the enabling legislation itself, and are not usually within the area of expertise of the administrative tribunal (Parkhill Bedding & Furniture Ltd. v. International Molders & Foundry Workers Union (1961), 26 D.L.R. (2d) 589).

140 As I shall explain below, the concepts of alienation and operation by another are civil law concepts that require no special expertise on the part of an administrative tribunal. They are concepts which do not call on the labour commissioner's expertise, as would a decision respecting the representative nature of a petitioning association (s. 32 of the Code) or the description of the appropriate bargaining unit (s. 34 of the Code).

141 It is also significant that the labour commissioner's decision regarding alienation or operation by another of an undertaking has not always had the central importance it now has. The legislator could not have foreseen the disruptive effect which Schwartz Service Station c. Teamster Local 900 would have or the controversy over interpretation of s. 45 that would follow. Arguing that the determination of whether an alienation or operation by another exists is the very purpose of the commissioner's investigation, as counsel for the appellant did, attributes an intent to the legislator retrospectively. At the time ss. 45 and 46 were drafted, the question the legislator had to deal with was the transfer of certification in cases where the owner of an undertaking sold the undertaking or made third parties responsible for doing the work usually done in his own establishment, not the interpretation of the words "alienation" and "operation by another".

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142 Taken together, the wording of ss. 45 and 46, the legislative context of these sections and the area of expertise of the labour commissioner clearly indicate that the legislator did not intend the commissioner's decision as to the existence of an alienation or operation by another of an undertaking to be conclusive. The powers conferred on the labour commissioner in s. 46 are limited to resolving administrative difficulties that may arise out of an alienation or operation by another of an undertaking. A labour commissioner will undoubtedly, depending on the circumstances, consider the requirements contained in s. 45 before making an order under s. 46. Nevertheless, the question of alienation or operation by another of an undertaking is not within the labour commissioner's jurisdiction stricto sensu.

143 As the interpretation of s. 45 is a question of jurisdictional nature, the commissioner cannot erroneously conclude that an alienation or operation by another of an undertaking exists without exceeding his jurisdiction.

144 I turn therefore to the interpretation of s. 45.

VI — Interpretation of ss. 45 And 46

145

1. Introduction: Context of ss. 45 and 46

146 To interpret s. 45 in accordance with the legislator's intent, one has to look to his purpose in maintaining the certification or the collective agreement despite alienation or operation by another of the undertaking. The object of s. 45 is unquestionably to protect the benefits resulting from certification and the collective agreement. In Adam v. Daniel Roy Ltée , supra, Chouinard J. elaborated on this object at pp. 694-695 [[1983] 1 S.C.R.]:

> Section 36 seeks to encourage the stability of employment and prevent the disruption of labour relations, and to protect the rights of the union and the rights of the employees in the event of a change in the management or organization of the undertaking.

147 The object of s. 45 thus coincides with the purposes of certification and collective bargaining, namely the promotion of industrial peace and establishment of equitable relations between employer and employees: Labour Relations Bd. of Sask. v. John East Iron Works Ltd., [1949] A.C. 134, [1948] 2 W.W.R. 1055 at 1064, [1948] 4 D.L.R. 673 (P.C.) .

148 This common purpose means that a proper understanding of the operation of s. 45 must proceed from an examination of the requirements of the certification procedure and the negotiation of a collective agreement.

149 Certification is a mechanism whereby an association which counts among its members an absolute majority of all an employer's employees, or of a separate group of an employer's employees, is recognized as the sole representative of those employees to this employer for collective bargaining purposes. Under s. 1(b) of the Labour Code , "certified association" means "the association recognized by decision of the certification agent, the labour commissioner or the Court as the representative of all or some of the employees of an employer".

150 Certification is not an end in itself: it simply represents "the first step on the road to industrial peace" (International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America (Local 239) c. Coca-Cola Ltd.(1963), [1978] R.L. 391 at 406 (Q.L.R.B.) . The sole purpose of certification from a legal point of view is to facilitate the conclusion of a collective agreement: only a certified association may initiate

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the collective agreement bargaining procedure (s. 52).

151 However, the Code imposes certain requirements on the negotiation of a collective agreement.

152 First, each agreement must be negotiated with a single employer. The Code does not recognize the possibility of "multi-employer certification", to use the expression of Gagnon, LeBel and Verge in *Droit du travail* , op. cit., at p. 357. (I exclude the limited role played by employers' associations in this area.) The wording of the Code confirms the principle that an employee association is certified to negotiate with a given employer. Reference may be made, for example, to an extract from s. 21, which provides for the right to certification in the following words:

> 21. Any association of employees comprising the absolute majority of the employees of *an* employer ... is entitled to be certified.

(emphasis added)

153 The second condition for the conclusion of a collective agreement is that bargaining take place in the context of the specific undertaking of an employer. Although the Code does not expressly emphasize the specific identity of the undertaking implicated in the negotiation, this requirement is a necessary consequence of the certification procedure and negotiation of the collective agreement.

154 The evidence of this requirement is that the bargaining units contemplated by the Code are traditionally defined in terms of the specific undertaking in which the unit exists. The important factors in determining whether a bargaining unit is appropriate are ably set out by Vice-Chairman Gold of the Quebec Labour Relations Board, later Chief Justice of the Superior Court, in *Coca-Cola Ltd.* , supra, at pp. 409-410. The primary criterion is the mutuality of interest of employees in the proposed bargaining unit. This mutuality of interest is to be determined in light of the similarity of duties performed by the employees, the similarity of wages or methods of computing compensation applicable to employees, the similarity of skills and qualifications, the interdependence or interchangeability of functions and the transfer of employees from one employment category to another.

155 It follows from Vice-Chairman Gold's analysis that mutuality of interest cannot be determined without considering the undertaking in which the employees work. It is only possible to find whether similarity of duties, wages, working conditions or interchangeability of functions exists by looking at the undertaking in question. It is therefore not surprising that the appropriateness of a bargaining unit is determined with reference to the particular undertaking with which the unit is associated. The collective agreement concluded on behalf of the employees in the bargaining unit does not apply throughout a given industry. The collective agreement covers only the working conditions of the employees within the specific undertaking.

156 Each undertaking consists of a series of different components which together constitute an operational entity. It goes without saying that one of these components is the work done in the undertaking, but the specific identity of the undertaking is also determined by its particular physical, intellectual, human, technical and legal components.

157 The scope of a given collective agreement is potentially very wide. Section 62 of the Code provides:

> 62. The collective agreement may contain any provision respecting conditions of employment which is not contrary to public order or prohibited by law.

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158 Though certain provisions of a collective agreement may be suited to the industry at large to which a particular undertaking belongs, other provisions will relate only to working conditions within the particular undertaking covered by the collective agreement.

159 Similarly, the particular undertaking covered by the bargaining must be associated with an employer. A collective agreement is negotiated with a single employer and is concluded in order to bind that employer. The only employer who has the power to adapt working conditions to the requirements of the collective agreement in the undertaking is the one who controls that undertaking.

160 In short, the legislator intended that collective bargaining and the resulting collective agreement take place within the following three-part framework: an employer, his undertaking and the association of employees connected with that employer's undertaking.

161 It is also clear that when an undertaking is alienated or operated by another in whole or in part, the essential components of this three-part framework must continue to exist if the certification or collective agreement are to remain relevant. The collective agreement itself provides an example. If the circumstances of the alienation or operation by another of the undertaking are such that this three-part framework disappears, the collective agreement cannot apply. The conditions in which the agreement was intended to operate will no longer exist.

162 Though it is not explicit on this point, the very wording of s. 45 does not exclude the continued existence of the three-part framework following the operation of its provisions:

> 45. The alienation or operation by another in whole or in part of an undertaking otherwise than by judicial sale shall not invalidate any certification granted under this code, [nor] any collective agreement....
>
> The new employer, notwithstanding the division, amalgamation or changed legal structure of the undertaking, shall be bound by the certification or collective agreement.

The Code thus anticipates the effect of the arrival of a new employer due to an alienation or operation by another of the undertaking and the effect of certain changes in the legal structure of the undertaking on relations between the employer and employees as a whole, but the Code in no way dispenses with the requirement that there be an employer who controls the undertaking. Further, the requirement of a specific undertaking, at least in operational terms, also remains necessary for implementation of s. 45. In the absence of a specific expression of legislative intent, the provisions of s. 45 cannot be interpreted to operate in a manner contrary to the basic framework created by the Code of a single employer, a specific undertaking and an association of the employer's employees.

163 Any interpretation of s. 45 must be consistent with the three-part context which I have described above. By rejecting the need for a legal relation between successive employers and adopting a "functional" definition of the undertaking, the labour commissioner gives s. 45 an interpretation that does not recognize the existence of the three-part context in which collective bargaining must necessarily take place.

164 With respect, I believe that because of their desire to protect the certification and collective agreement despite all the vicissitudes of the undertaking, the labour commissioner and the majority of the Labour Court have taken a position inconsistent with the purpose of the Labour Code : to promote collective bargaining as a better means of guaranteeing industrial peace and of establishing equitable relations between employer and em-

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ployees.

2. The Definition of the Undertaking

165 In the context of s. 45, the undertaking becomes the most important component of the three-part framework postulated by the legislator: continuity of the undertaking is the essential condition for s. 45 to apply. The interpretation of s. 45 must therefore be approached through the definition of an "undertaking".

166 In his majority judgment, Chief Judge Geoffroy gave the undertaking a definition which is limited to the duties performed by the employees as described in the certificate of certification. Continuity of the undertaking, an essential condition for s. 45 to apply, is determined by reference to the similarity of the duties performed by workers for their new employer [[1982] T.T., at 123-124]:

> (Translation)
>
> The undertaking must be defined, since the legislator has not done so. The decisions of the Court, since the judgment of the late Associate Chief Judge Donat Quimper, have regarded it for the purposes of the Code in light of the collective agreement:
>
> The undertaking ... is the group of operations performed in an establishment in order to fulfil its purpose, the word 'operation' being used in the broad sense of tasks, functions, occupations and activities.
>
> This definition will be found, without substantial difference, in other jurisdictions. They all have in common that they regard an undertaking from the standpoint of the labour which performs the various functions necessary to carry out its purposes. This is the undertaking which is covered by a certification; it is for this undertaking that a collective agreement is concluded, becoming the law that governs it. It is with this undertaking that the certification and the agreement are associated.

167 This definition of the undertaking is the same as that given by Chief Judge Geoffroy in 1975 in Schwartz Service Station c. Teamster Local 900 , at p. 128 [[1975] T.T.]:

> (Translation)
>
> [F]inding the same undertaking under new management means finding the same jobs, tasks, activities and so on. These components are the basis and the object of the certification and the collective agreement.

168 This definition, and I say so with respect, is incorrect: the generality of its terms does not allow for identification of a specific undertaking and so leads to the transfer of rights and obligations in situations where there is no continuity. In addition, the "functional" definition gives a description of the undertaking which cannot be reconciled with the legal operations mentioned in s. 45.

169 It is of the very essence of an undertaking that, for the purposes of s. 45, it may be subject to alienation, operation by another, amalgamation, division or a change in legal structure. Defining the undertaking without considering the legal operations to which it may be subject results in an interpretation of s. 45 that cannot be justified by its wording.

170 The abstract definition of the undertaking suggested by Chief Judge Geoffroy does not take the whole of s. 45 in account. By describing the undertaking solely in terms of the functions or positions of the employees,

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the Chief Judge removes the undertaking from the various legal acts which are essential to the application of s. 45.

171 The use of the word "alienation" in s. 45 is inconsistent with the definition of an undertaking adopted by the Chief Judge. When he parts with his undertaking by sale, gift or other means, an employer is not alienating a group of functions but rather immovable property, equipment, work contracts, inventory, goodwill and so on, as the case may be. The legislator is explicit: s. 45 concerns the alienation of an "undertaking", not the alienation of "functions".

172 Similarly, the phrase "changed legal structure of the undertaking" makes the definition suggested by Chief Judge Geoffroy impossible to accept. There the undertaking is unquestionably seen as a whole, not solely in terms of the duties performed by employees. Positions or functions certainly cannot be the subject of a "changed legal structure". I adopt in this regard the observations of the Superior Court cited above [[1982] C.S., at 984]:

> (Translation)
>
> When he refers to the undertaking's legal structure, the legislator means the legal framework in which employer, managers and employees operate. The word 'undertaking' thus does not refer only to the specific function performed by an employee. It refers to the components of a business as a whole.

173 It is thus incorrect to treat the undertaking and the positions or functions listed in the certificate of certification as equivalent. The undertaking is not created by the certification: it predates it. Section 45 recognizes this simple fact in as much as it applies from the moment proceedings to obtain a certification are initiated. When a certification exists, it plays an important role: the certification lists the functions and duties carried out by the employees and permits a determination as to whether these functions and duties continue to exist within the new employer's operations.

174 Instead of being reduced to a list of duties or functions, the undertaking covers all the means available to an employer to attain his objective. I adopt the definition of an undertaking proposed by Judge Lesage in a subsequent case, Mode Amazone c. Comité conjoint de Montréal de l'Union internationale des ouvriers du vêtement pour dames, [1983] T.T. 227 at 231 :

> (Translation)
>
> The undertaking consists in an organization of resources that together suffice for the pursuit, in whole or in part, of specific activities. These resources may, according to the circumstances, be limited to legal, technical, physical, or abstract elements. Most often, particularly where there is no operation of the undertaking by a subcontractor, the undertaking may be said to be constituted when, because a sufficient number of those components that permit the specific activities to be conducted or carried out are present, one can conclude that the very foundations of the undertaking exist: in other words, when the undertaking may be described as a going concern. In Barnes Security , Judge René Beaudry, as he then was, expressed exactly the same idea when he stated that the undertaking consists of 'everything used to implement the employer's ideas'.
>
> . . . . .
>
> [E]ach case is unique in terms of adding a number of components to determine the foundations of the under-

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taking, in whole or in part. It is not always necessary for the movable and immovable property to be transferred, for specialized technical resources to be transferred, for inventory and know-how to be included in the transaction. There must however be adequate resources, directed towards a certain activity by the first employer, which are used by the second in an identifiable way for the same purposes in terms of the work required from employees, even if the commercial or industrial objective is different.

Precisely because of the need to identify in the second employer's operations the same use of operating resources transferred by the first employer (otherwise there would simply have been a transfer of physical assets which can be used for any purpose), it was found to be desirable to simplify matters and to say that, once the same activities were carried on by a second employer, it followed that the latter must have acquired sufficient operating resources from the first to ensure continuity of the undertaking. Some have gone even further and, seeking simple guidelines and accessible formulas, have purported to see passages in certain judgments as affirming a so-called occupational theory of the undertaking. This is an indirect way of getting around the problem of the legal relation, by reducing or indeed eliminating the practical necessity for a legal relation in the continuity of the undertaking.

175 This definition has since received the approval of several Judges of the Labour Court, and to the best of my knowledge it is the only one which takes into account the various legal operations required to bring s. 45 into operation. (Alimentation de la Seigneurie Inc. c. Union des employés de commerce, local 500 , D.T.E. 83T-694; Union des employés de commerce, local 500 T.U.A.C. (U.F.C.W.) c. Union des employés de commerce, local 501 T.U.A.C. (U.F.C.W.) , D.T.E. 85T-521; Industries du frein total Ltée c. Syndicat international des travailleurs unis de l'automobile, de l'aérospatiale et de l'outillage agricole d'Amérique (T.U.A.-F.T.Q.-C.T.C.), section locale 1900, [1985] T.T. 220 ; Syndicat des salariés de la Boulangerie Weston (C.S.D.) c. Union des employés de commerce, local 501, T.U.A.C., [1986] T.T. 128 .)

176 In view of the framework imposed on collective bargaining by the legislator, this "concrete" definition of the undertaking is the only one which proves capable of describing an undertaking in all its aspects. Without such a description, there are no means to determine the continuity of an undertaking which has been the subject of alienation or operation by another. Section 45 provides for a transfer of the certification and the collective agreement from one employer to another despite the alienation or operation by another of the undertaking: a certification which has been issued and an agreement which has been negotiated in the context of a specific undertaking. Continuity of the undertaking is a condition for the application of s. 45 because the relevance of the certification and the agreement depends on the existence of that undertaking, at least in its essential elements.

177 I repeat that similarity of functions is necessary to determine whether the essential elements of the undertaking continue to exist, but it is a mistake to make this the absolute criterion for applying s. 45. In general, this criterion does not allow a distinction to be made between two rival undertakings. Similarity of functions as such could only indicate continuity in an undertaking to the extent that the undertaking in question has no other special characteristic.

178 Instead of an unwarranted focus on a single factor, the test of continuity in an undertaking requires identification of the essential elements of the undertaking, which must be found to exist to a sufficient degree in the new employer's operations. Each component must be weighed according to its respective importance. If the clientele of a certain undertaking is by nature fluid, the fact that the new purchaser has kept none of his predecessor's customers will not be significant. On the other hand, an undertaking whose primary characteristic is exclusive equipment will be transferred to a new employer only in so far as the latter has acquired inter alia the

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equipment in question.

179 The need to develop a test that takes the undertaking as a whole into consideration has also been recognized in the analysis (s. 96 of the *Act respecting labour standards* (hereinafter referred to as the "A.L.S."):

> 96. The alienation or concession of the whole or a part of an undertaking otherwise than by judicial sale does not invalidate any civil claim arising from the application of this act or a regulation which is not paid at the time of such alienation or concession. The former employer and the new employer are bound jointly and severally in respect of that claim.

180 The courts and academic writers have often noted the relationship between s. 45 of the Code and s. 96 of the A.L.S. (*Comm. des normes du travail c. Delta Granite Inc.* , J.E. 85-927 (C.S.); *Comm. des normes du travail c. Banque nationale du Can.* , D.T.E. 88T-282 (C.S.); *Comm. des normes du travail c. Frank White Entreprises Inc.*, [1984] C.P. 232 ; *Comm. des normes du travail c. Erdan*, [1985] C.P. 353 ; G. Hébert and G. Trudeau, *Les normes minimales du travail au Canada et au Québec* (Cowansville, Qué.: Éditions Yvon Blais, 1987) at 55; R.P. Gagnon, "Droit du travail" in *Cours de la formation professionnelle du barreau du Québec, 1985-86* , vol. 8 (Cowansville, Qué.: Éditions Yvon Blais, 1986) 265 at 272.). Because of the personal nature of the right it confers, s. 96 sets out the transfer of employees to the new employer as a basic condition. However, the analysis of the continuity of the undertaking is not limited to ensuring that the duties of these employees are the same. In a document prepared for the purpose of expressing its views on the scope of the provisions of the A.L.S., the Commission des normes du travail proposes a test which goes well beyond a simple comparison of the duties of employees:

> (Translation)
>
> In order for s. 96 to apply, therefore, it must be shown that the *original undertaking has been continued* by the new employer. Certain guidelines have been developed for this purpose. Consideration may be given to the place of the business, the resources, the commercial equipment as a whole, goods in inventory, services offered, suppliers and customers, the name of the business, the purpose of the undertaking and so on.

(Direction des affaires juridiques of the Commission des normes du travail, *Loi sur les normes du travail, Règlement sur les normes du travail, Loi sur la fête nationale: Interprétation et jurisprudence* , (1986) at 58.)

181 Like s. 96 of the A.L.S., s. 45 sees the undertaking in the particular form it takes under an employer. Each undertaking has special characteristics that enable it to be the subject of an alienation, operation by another, amalgamation, division or change in its legal structure. The fundamental purpose of s. 45 is to regulate certain consequences in labour law of the transfer of a specific undertaking which originated with a given employer; it makes no claim to prescribe working conditions for an entire trade or occupation, without any distinction. Judge Girouard correctly explained the fundamental difference between s. 45 and special statutes intended to regulate the working conditions of all employees engaged in a similar occupation (at pp. 191 to 194) [[1982] T.T.]:

> (Translation)
>
> The tendency to see, in s. 45 of the Code, nothing but the undertaking itself, without any relation either to the originator of the undertaking (the employer in the words of the Code) or to the workforce necessary for its operation (the certified association in the words of the Code) brings about the application of this section

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to an activity, trade or profession despite the employers and despite the manner in which their employees have chosen to unionize and to be certified. As a result, they are subject to a monopolistic situation, just as is the case under the following statutes, where, however, the legislator intended and provided for the monopoly: the Professional Code and various enabling statutes in each profession; the Act respecting labour relations in the construction industry ; the Act respecting building contractors' vocational qualifications . An example of monopolistic application is also to be found in the Act respecting collective agreement decrees , when the decree is deemed to regulate a trade rather than undertakings (e.g. a decree regarding mechanics rather than a decree relating to garages).

. . . . .

When an association is certified, not only must it identify the employer with respect to which it is making its application, but it must also indicate the group of employees it intends to represent: this is known as the bargaining unit within a specific establishment. Sectorial or industrial certification generally does not exist under the Labour Code . Section 21 states: 'Any association of employees comprising the absolute majority of the employees of an employer ... is entitled to be certified.'

It necessarily follows that, under s. 45,

(a) a person who purchases goods and services required by his undertaking, when he has already decided not to 'make them' or 'provide them' himself, will not be bound by a certification and collective agreement that apply only to his supplier, e.g. the school board and M.B.D.;

(b) in the case of two suppliers of goods and services, a certification and collective agreement which concern one of the suppliers separately and exclusively cannot be transferred to the other unless the undertaking of the first supplier (or part thereof) has been transmitted to the second.

3. The Requirement of a Legal Relation between Successive Employers

3.1 A Legal Relation

182 If the adoption of a "functional" definition of an undertaking may lead to an erroneous conclusion about the continuity of the undertaking, it also excludes any necessity for a legal relation between the undertaking's successive employers. Seen as a group of functions, the alienation or operation by another of the undertaking in the traditional sense of those words becomes impossible. It thus becomes necessary to give the words "alienation" and "operation by another" a non-legal and even uncommon meaning, thereby excluding the legal relation which is usually considered inherent in these concepts.

183 The majority of the members of the Labour Court considered that the first paragraph of s. 45 does not require a legal relation between successive employers. Chief Judge Geoffroy said the following (at pp. 122 and 124):

(Translation)

'The alienation of an undertaking' means, seen from the standpoint of the undertaking as the provision suggests, the extinction by whatever means of the legal relation linking an employer to the ownership or enjoyment of an undertaking.

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. . . . .

> No requirement of the existence of a legal relation can be found in this first paragraph of s. 45. On the contrary, the legal relation linking the employer to the undertaking has been broken. All the paragraph says is that this break does not invalidate the collective agreement.

184 Judge Beaudry expressed essentially the same idea in the additional reasons he delivered (at pp. 130-131):

> (Translation)
>
> One thing is certain, and that is that the first paragraph of s. 45 does not say by whom the alienation or conferral of a right to operate the undertaking may or must be made. The paragraph announces in a negative manner the existence of successorship rights in favour of the certification with respect to the undertaking. The legislator attaches the certification to the undertaking rather than to the employer, as is the case when the certification is granted.
>
> . . . . .
>
> [S]ince the means by which the total or partial operation of the undertaking by another comes about is irrelevant to s. 45, any requirement of a legal relation between the 'first new employer' and the 'second new employer' would be an addition to the text of s. 45.

185 Similarly, Judge Morin considered that the determining factor is the continuity of the undertaking, without any additional requirement of a legal relationship between the two employers in question (at pp. 135-136):

> (Translation)
>
> This requirement of such a legal relation seems to me to be contrary to the letter and the spirit of s. 45. There is nothing in the wording of s. 45 to require that the alienation or operation by another be decided by the previous employer.
>
> . . . . .
>
> For s. 45 to apply, there must have been operation by another or alienation of the undertaking; this means that the same undertaking must have continued to exist.

186 Unlike the other members of the majority, Judge Morin considered that the factor of continuity of the undertaking required a connection between the two employers. However, he saw no requirement that the operation by another or the alienation proceed from the previous employer nor that the previous employer himself should have (by contract of sale or otherwise) put his undertaking into a second employer's hands. In the case at Bar, the necessary connection between the two subcontractors was established by the C.S.R.O., which was responsible for selecting the contractor to perform the janitorial services.

187 With the greatest respect for the contrary view, the position taken by the majority is, like the "functional" definition of an undertaking, untenable in light of the wording of s. 45 and the context of collective bargaining. While it is true that s. 45 does not expressly require a legal relation between successive employers, it is non-

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etheless a fact that the existence of such a connection is necessarily inferred from the principles of collective bargaining, the language used by the legislator and the history of ss. 45 and 46.

188 There is unanimous agreement that, again in the words of Chouinard J. in *Adam v. Daniel Roy Ltée* , at p. 688 [[1983] 1 S.C.R.], "[the] primary purpose [of s. 45] was to alter the situation created by the decision of the Court of Appeal in *Brown, Syndicat national des travailleurs de la pulpe et du papier de La Tuque Inc. c. Comm. des relations ouvrières de la Province de Québec*, [1958] Que. Q.B. 1 ." The effect of the Court of Appeal's decision in *Brown* was to recognize that the principles of civil law, and in particular the principle of the relativity of contracts stated in s. 1023 (*Civil Code of Lower Canada*) cause the certification and the collective agreement to become void when the undertaking is sold. Sections 45 and 46 were enacted to remedy this effect of the civil law.

189 What is noteworthy is that the language of s. 45 does not purport to alter the civil law or to preclude any application of the civil law to an undertaking which is the subject of a certification or a collective agreement. Its sole purpose is to prevent the certification or collective agreement from becoming void because of the rules of civil law.

190 In other words, s. 45 does not regulate in any general way the alienation or operation by another of an undertaking. For example, the sale of a unionized undertaking is made in accordance with the rules of the ordinary law, just as is the sale of a non-unionized undertaking. The effect of s. 45 is simply to preserve the validity of the certification and the collective agreement in the event of a sale, provided there is continuity of the undertaking.

191 Thus it is clear that the existence of an alienation or operation by another of the undertaking can only be established by reference to the civil law. Contrary to the submissions of the appellant, reference to the civil law definitions of alienation and operation by another does not attack the specialized nature of labour law. On the contrary, it is the legislator who has imposed such an approach: it is impossible to ignore the civil law when the Court must interpret a provision designed to create an exception to a civil law rule, that of the relativity of contracts, especially where the legislator expresses the exception in the terminology of the civil law.

192 Therefore I believe it to be mistaken to argue that a legal relation is unnecessary because s. 45 does not specify by whom the alienation or operation by another can be made. Such exactitude would have been quite superfluous. Alienation and operation by another are defined in terms of the relation between the holder of a right and the person who acquires the use of it. It is apparent that only someone who enjoys a right of ownership can alienate his undertaking. The following definitions all show that alienation presupposes a legal relation between the person who enjoys the right of ownership and the purchaser:

> (Translation)
>
> Alienation
>
> (1) Thus, sale, exchange and gift are regarded as true alienations. Customarily the term *alienation* is applied mainly to this type of act.
>
> (10) ... however, in usage, in legislation and in the books of legal scholars, the word *alienation* means in particular *the transfer of ownership from one person to another* . In this sense it is contrasted with the word *administration* . An administrator sometimes transfers use of a thing in order to get a better return from it;

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he never transfers ownership.

(22) From the fact that alienation is the consequence of ownership it follows that no one can, without our concurrence and consent, transfer the ownership of what is ours to someone else .

(underlining added) (R. de Villargues, *Dictionnaire du droit civil, commercial et criminel* , vol. 1, 4th ed., 1889, at 267-268, "alienation")

Alienation

(Translative) operation by which the person alienating voluntarily transfers to another the ownership in a thing (or other right), whether onerously (a sale is an alienation) or gratuitously (e.g. gift), *inter vivos* (gift from hand to hand) or *mortis causa* (legacy), by particular title (transfer of identified items of property) or by general title (universal legacy).

(underlining added) (Association Henri Capitant, *Vocabulaire juridique* , P.U.F., 1987, at 43 ("alienation"))

Alienation

Act by which a person transfers to another ownership of thing which forms part of his patrimony . Alienation by gratuitous title (gift or legacy) from alienation by onerous title (exchange, consumer loan or sale).

(emphasis added) (S. Corniot, *Dictionnaire de droit* , vol. I, at 93 ("alienation"))

Alienation

Transfer of thing or right, gratuitously or onerously, from one person to another .

(emphasis added) (A. Perraud-Charmantier, *Petit dictionnaire de droit* , (Librairie générale de droit et de jurisprudence, 1948 at 26 ("alienation"))

Alienation

Voluntary or legal transmission of ownership of thing or right, considered in relation to the transferor .

(emphasis added) (H. Capitant, *Vocabulaire juridique* , P.U.F., 1936, at 46 ("alienation"))

Alienation

Transfer of property *inter vivos* , especially of right of ownership.

(McGill University, *Dictionnaire de droit privé* , ed. by P.A. Crépeau (Centre de recherche en droit privé et comparé du Québec, 1985) at 17 ("alienation")) The concept of alienation is therefore based on a voluntary transfer of the right of ownership. This definition does not exclude the possibility that an intermediary might intervene in the legal relationship, but it confirms that the decision to alienate can be made only by the holder of the right of ownership, in this case the owner of the undertaking.

193 The existence of a legal relation is just as intrinsic to the concept of the operation by another of the undertaking ("concession"):

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Concession

1. Bilateral or unilateral juridical act by which a person, the grantor, gives another, the grantee, enjoyment of a particular right or benefit. Cf. assignment, rental, licence .

(Association Henri Capitant, op. cit., at p. 171.)

Concession

A word whose legal meaning varies depending on type, but which in any case covers mutual agreement .

(emphasis added) (R. Guillien and J. Vincent, Lexique des termes juridiques , 5th ed., 1981 at 96 ("concession"))

194 The intent to give up the right of ownership or the right to operate an undertaking is thus essential to the existence of an alienation or operation by another. This intent may be either immediate or conditional: it suffices that the holder of the rights in the undertaking consents to the acquisition of the ownership of the undertaking or to its operation by another.

195 The tribunals specializing in labour law have been the first to recognize that the words "alienation" and "operation by another" necessarily refer to the presence of a legal relation between successive employers. In 1970, in Centrale de Chauffage , Associate Chief Judge Quimper gave a definition of the word "operation by another" which has become classic [[1970] T.T., at 239]:

(Translation)

The words operation by another ... cannot be interpreted in the limited sense of the granting of a privilege, benefit or favour. Rather it must be given a broad meaning capable of embracing every kind of subcontract, otherwise it would be meaningless.

For there to be operation by another, therefore, two conditions must exist:

(1) the transfer of operations to a third party must originate within the framework of the undertaking ;

(2) the work transferred must be covered by a collective agreement or certification.

(emphasis added)

196 Some 2 years later, Judge Beaudry also concluded in Barnes Security Service Ltd. c. Assn. internationale des machinistes et des travailleurs de l'aéronautique, local 2235, [1972] T.T. 1 at 12 , that a legal relation must exist:

(Translation)

In interpreting the words 'operation by another' there does not appear to be any conflict between the English and French meanings. Neither assumes the idea of a sale, assignment or transfer of movable or immovable property or of rights. On the contrary, these expressions indicate the involvement of a third party in the management, administration or performance of the operations of the undertaking, in whole or in part, by gratuitous or onerous contract .

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(emphasis added)

197 In Syndicat des travailleurs forestiers de la division Jacques Cartier (F.T.P.F.-C.S.N.) c. H.C. Leduc Ltée, [1977] T.T. 249 , the Labour Court found that the revocation by the Quebec government of a forestry concession awarded to a contractor did not give rise to "operation by another" within the meaning of s. 45 (at p. 252):

(Translation)

> The legal concept of 'operation by another', within the meaning of s. 36, involves the expression of intent by the person who grants the right to operate the undertaking. There was no question of this in the case under consideration. Domtar did not 'decide', it was the subject of an expression of intent by the government through the Department of Lands and Forests, pursuant to the law.

198 The requirement of a legal relation has been indicated in many decisions of the Labour Court (Syndicat national des concierges des commissions scolaires des comtés de Richelieu, Verchères et Yamaska (C.S.N.) c. For-Net Inc. , supra; Martinique Motor Inn Ltd. c. Union des Employés d'Hôtel, Motel et Club ; Clinique communautaire de Pointe St-Charles v. Syndicat professionnel des diététistes du Qué., [1973] T.T. 338 ; Lachine (Cité de) c. Union des employés municipaux de Lachine (Cité de), [1974] T.T. 279 ; Cdn. Kenworth Ltd. c. Syndicat international des travailleurs unis de l'automobile, de l'aéronautique, de l'astronautique et des instruments aratoires d'Amérique, local 1146 , supra; Syndicat des salariés de service d'entretien (C.S.D.) c. Montcalm Carpets Specialists Ltd. , supra; Gérances West Cliff Ltée c. Union des employés de service, local 298, F.T.Q., [1981] T.T. 432). This rule has also been approved in several judgments of the ordinary courts of law (Lecavalier c. Syndicat national des employés de ville de Laval Inc. (C.S.N.) , supra; Hull (Ville de) c. Bibeault , D.T.E. 83T-906 (C.S.); Brasserie Labatt Ltée c. Commissaire général du travail, [1986] R.J.Q. 908 (C.S.) ; Fondation-Habitation Champlain Inc. c. Tribunal du travail , D.T.E. 86T-500 (C.S.) (on appeal)).

3.2 The Legal Relation Must Exist between the Preceding Employer and the New Employer

199 The concepts of alienation and operation by another are based on an intentional transfer of a right: it is therefore necessary to determine between whom this mutual intent must exist.

200 In my introduction to the interpretation of s. 45, I indicated that it is implicit in the principles of collective bargaining that the undertaking must necessarily be that of an employer. This connection between the employer and the undertaking is to be inferred from the fact that only an employer who controls an undertaking may adapt the working conditions existing in the undertaking to the terms of the collective agreement.

201 For the purposes of interpreting s. 45, the requirement of a relationship of control between the employer and the undertaking seems to me to lead inevitably to two conclusions. First, the undertaking which is alienated or operated by another must be that of the employer in respect of whom the certification is issued or with whom the collective agreement is concluded. Second, the alienation or agreement must occur between the previous and the new employer.

202 However, with respect to the question of the identification of the undertaking, Chief Judge Geoffroy concluded that the undertaking is that of the C.S.R.O. [[1982] T.T., at 127-128]:

(Translation)

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> In the cases at issue here, the party that in reality gives out the work to be performed is the school board, and the cleaning of its schools is its undertaking . It hired subcontractors to be responsible for operating the undertaking for a limited period (a year). The latter, because they hire and manage employees, are employers in the eyes of the Labour Code and only they can be designated in an association's certification and bound by a collective agreement.

(underlining added)

203 Judge Beaudry was entirely of the same opinion (at pp. 130-131):

> (Translation)
>
> First, as mentioned above, it is clear that the school board could confer the right to operate the janitorial service undertaking for which it was (legally) responsible, without itself assuming that undertaking. How could the school board grant the right to operate the undertaking without first being responsible for it? It is thus the school board, in accordance with its legal obligation to provide janitorial services, which alone can decide to transfer the operation from one operator to another; and it is the school board's original obligation (in whole or in part) that one or other of the operators assumes. The school board authorizes the arrival of a 'new employer' to an undertaking already subject to a certification.

204 With respect, such a conclusion can only result from a misunderstanding of the purposes of s. 45. Whatever the merits in terms of purely economic analysis of the argument that the janitorial services undertaking is that of the C.S.R.O. because it is "the party that in reality gives out the work", this argument finds no place in the context of collective bargaining. Collective bargaining, and indeed labour law, is concerned with labour relations, that is, with the relations between the employer and the employees. The C.S.R.O. is not, and has never been, an employer as defined by s. 1 of the Labour Code :

> 1. ...
>
> (k) 'employer' — anyone, including Her Majesty, who has work done by an employee.

Though the C.S.R.O. gives out the work, it gives it to subcontractors, who "have work done by employees".

205 Neither can I subscribe to the argument that the legal obligation to provide janitorial services imposed on the C.S.R.O. is a sufficient basis for affirming that the latter operates a janitorial service undertaking. The Education Act , R.S.Q. 1977, c. I-14, contains no requirement that the board assume janitorial services in its buildings itself. The mere right to engage in an activity is not a basis for concluding that an undertaking exists, while that right has neither taken concrete form through the allocation of personnel nor been formally recognized in the certificate of certification. The law on this point is well stated in Syndicat des employés de la Comm. régionale de Tilly (C.S.N.) c. Langlois, [1976] T.T. 165 , at 167-168:

> (Translation)
>
> Under sections 206 and 475 of the Education Act, as amended, a school board may:
>
> (a) provide for the transportation of pupils; or
>
> (b) grant any contract for such transportation; or

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> (c) make a lump sum contract with the holder of a permit for public transportation accessible to the public for the transportation of pupils; or
>
> (d) purchase from such permit holder the necessary tickets; or, finally,
>
> (e) pay directly to the parents of persons transported an amount equal to the tariff authorized for the transportation of pupils.
>
> In view of this summary of the powers regarding the transportation of pupils conferred on a school board by law, can it be said that the mere fact of having such powers is a basis for concluding that 'school transportation is an area of activity covered by the collective agreement'?
>
> The Court does not think so. It is not the powers that one may have, but the exercise of those powers, that determines what constitutes an 'area of activity' that may be covered by the provisions of a collective agreement.

(See also Syndicat national des concierges des commissions scolaires des comtés de Richelieu, Verchères et Yamaska (C.S.N.) c. For-Net Inc. ; Cégep de Shawinigan c. Syndicat du personnel de soutien du Collège d'enseignement de Shawinigan Enr., [1976] T.T. 209 ; J.A. Hubert Ltée c. Syndicat des employés de soutien du Collège Ahuntsic, [1977] T.T. 110 .)

206 Moreover, the position adopted by the appellant union confirms that the C.S.R.O. never had a janitorial service undertaking within the meaning of the Code, since the union sought certification directly with the subcontractors.

207 The only janitorial service undertaking that can be in question here is that of the subcontractors, that is, of the "employers", and the conclusion of the majority of the Court to the contrary, in view of the wording of s. 45, has rightly occasioned surprise (R.P. Gagnon, "L'article 45 du Code du travail après le jugement C.S.R. Outaouais", op. cit., at p. 156). As there was no link between the schoolboard and the janitorial service undertaking, it follows that the C.S.R.O. could neither alienate nor confer a right to operate it, nor, as Judge Morin maintained, be the source of a legal relation between the subcontractors in question.

208 Because of their conclusion that the janitorial service undertaking was that of the C.S.R.O. and that s. 45 did not expressly require a legal relation between successive employers, the Judges in the majority on the Labour Court, with the exception of Judge Morin, avoided any question of identification of the parties between whom the alienation or agreement to operate mentioned in s. 45 must occur.

209 The answer to this question is clear, even inescapable: the alienation or operation by another must occur between the preceding and the new employer. If the undertaking in question in s. 45 is that of the employer and if the alienation and operation by another are by their very nature defined in terms of the relation between the holder of a right and the person acquiring the use of that right, the conclusion is unavoidable: the legal relation created by the alienation or operation by another of an undertaking exists between successive employers.

210 This conclusion is, in any case, the only one that is consistent with the wording of s. 45 and the context of collective bargaining.

211 For the purposes of collective bargaining, the employer who negotiates and is bound by the terms of the collective agreement must at the same time be the one who controls the undertaking: otherwise, the employer

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would be unable to perform the obligations imposed by the agreement.

212 This requirement does not disappear because an alienation or operation by another of the undertaking has occurred. Section 45 says implicitly but necessarily that an undertaking is alienated, or the right to operate the undertaking is conferred, by the preceding employer to the new employer.

4. The Same Undertaking in Hands of a New Employer

213 I think it is opportune to summarize here the essential points of the interpretation of s. 45, as developed above.

214 The undertaking at issue in s. 45 (translation) "consists of a self-sustaining organization of resources through which specific activities can be wholly or partly carried on" (Mode Amazone , supra, at p. 231). The nature of collective bargaining requires that this undertaking be that of an employer. The employer is the one designated in the certification, the collective agreement, or by any proceeding "for the securing of certification or for the making or carrying out of a collective agreement" (s. 45). Alienation or operation by another of this undertaking establishes, by means of a voluntary transfer of a right, a legal relation between successive employers.

215 For a transfer of rights and obligations contemplated by s. 45 to operate, the fundamental components of an undertaking must be found to exist in whole or in part in the operations of a new employer following "[t]he alienation or operation by another ... in part of" that undertaking.

216 In the case at Bar, only an alienation or agreement to operate made by Netco or MBD in favour of Services Ménagers Roy of that part of their undertaking concerned with janitorial services in the C.S.R.O. schools would have caused a transfer of rights and obligations to be effected under s. 45 between Netco and MBD on the one hand and Services Ménagers Roy on the other.

217 The facts alleged by the parties to this case indicate, however, that there was never an alienation or agreement to operate between Netco and Services Ménagers Roy or between MBD and Services Ménagers Roy. Moreover, no part of the Netco and MBD undertakings was included in the operations of Services Ménagers Roy. The only conclusion possible is that s. 45 did not bring about a transfer of rights and obligations from Netco and MBD to Services Ménagers Roy.

218 In reality, the three subcontractors Netco, MBD and Services Ménagers Roy are competitors in the janitorial services industry. C.S.R.O. is a client which dealt first with Netco and MBD and then with Services Ménagers Roy. The interpretation of s. 45 adopted by the Labour Court majority, pursuant to which it found a transfer of rights and obligations to exist on the facts of the case at Bar, disregards the basis of s. 45. This misunderstanding of the basis of s. 45 has the effect of counteracting the very purpose of the provision: the Labour Court majority's interpretation allows s. 45 to be applied to two separate undertakings simply because they operate in the same area of activity.

219 Section 45 is based on the following premise: a specific undertaking is transferred from one employer to another. The wording of this section does not support the conclusion that rights and obligations have been transferred from one employer to another solely because each of them hires employees engaged in similar activities.

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220 Many examples illustrate that a definition of "undertaking" focusing only on the duties of employees leads to unexpected results. One of these, Fondation-Habitation Champlain Inc. c. Tribunal du travail , supra, is particularly relevant because of the similarity of the principles it applies to those of the case at Bar: an employer who recovers part of the clientele of a competitor who has terminated some of his operations is not on that account subject to the transfer of rights and obligations as provided for in s. 45. Pavillon de Beauharnois Inc. was a home which accommodated the elderly in two establishments, the "Pavillon" and the "Foyer". Pavillon de Beauharnois Inc. was forced to discontinue its activities at the Foyer and relocate 13 of the 33 residents to the Pavillon, while 15 others preferred to move to Fondation-Habitation Champlain Inc. The Fondation purchased part of the Foyer's furniture and equipment but did not hire new employees. The union representing the employees of Pavillon de Beauharnois Inc. asked that the Fondation be declared bound by the certification and collective agreement in effect. The labour commissioner granted the application based on the similarity of the undertaking operated by the Fondation. The Superior Court allowed the motion in evocation from this judgment. After noting that the services offered by the Fondation were not in all respects identical to those provided by the Foyer, Michaud J. added that the transfer of clients was not equivalent to the operation by another of the undertaking [D.T.E. 86T-500]:

> (Translation)
>
> The Court adopts the observations of L.P. Landry J. in Union des employés de service v. Bibeault et Tribunal du travail, [1982] C.S. 977 :
>
> > The term "operation by another" therefore implies ideas of ownership and the assignment of a right that one owns . (Emphasis added.) For there to be an alienation or operation by another of an undertaking, the holder of the right of ownership in the undertaking must perform a legal act which has the effect of transferring some right in the undertaking to someone else. For the purposes of s. 45 of the Code, an alienation or operation by another of part of the undertaking is sufficient for the protection provided by the section to employees covered by a certification to have its full effect.
>
> The Court cannot find in the facts put in evidence so much as an operation by another of part of the undertaking. The fact that thirteen residents of a home (thirteen out of thirty-three) move to a private residence for the elderly cannot justify the decision of respondent commissioner, which is an unreasonable interpretation of s. 45 of the Labour Code.

221 In his comment on the decision of the Labour Court in the case at Bar, Mr. Gagnon also pointed to the danger of assimilating the undertaking to the activities carried on by the employees:

> (Translation)
>
> There may be cases, as all the other judges pointed out, where the exclusive use of this approach makes it impossible to distinguish between the presence of two similar undertakings, on the one hand, and the continuity of a single undertaking, on the other. It is in these cases that it is dangerous to remove the definition of the undertaking suggested by Associate Chief Judge Quimper in the La Centrale de Chauffage Enr. case from the factual context which surrounds it. The context, in that case, was an employer designated in a certificate of certification who decided, in the interests of his undertaking, to have a third party perform certain functions formerly performed by his own employees. Taken together, these factors did not in any way suggest the simple co-existence of two similar undertakings operating in parallel, without any link that would indicate a continuity of operations from one to the other.

(R.P. Gagnon, "L'article 45 du Code du travail après le jugement C.S.R. Outaouais", op. cit., at 160.)

222 I can see no difference between the situation of a businessperson who withdraws when his contract ends and one who terminates his operations because of financial difficulty. No one would maintain that a businessperson acquires the undertaking of a rival who closes down, simply because he takes over his former competitor's customers; there is no reason for holding otherwise when a contract is lost by a business which nevertheless continues to operate elsewhere. In both cases the relationship between the undertaking and the customer has ended and a successor who takes over the market by concluding a new contract with the customer in question, and who has no dealings with his predecessor through which he could acquire the components of the undertaking, is not subject to the application of s. 45. The certification inexorably follows the fate of an undertaking whose viability depends on a contract, when no part of the undertaking survives in the operations of a new employer following termination of the contract:

> (Translation)
>
> The fate and the existence of a certification, like the fate and existence of an agreement, are linked to those of the undertaking covered by the certification and agreement: the fate of the appellant's certification and agreement here was linked to that of the undertaking of the mis en cause at the owner's premises, and this is what appellant understood and intended when the certification was in effect. The undertaking only existed for a limited time: obviously everything associated with it was also ephemeral. When this undertaking ceased or disappeared, and there was nothing to act as a bridge between it and some other undertaking which might, through the actions of the mis en cause, come after it, the appellant's certification and agreement on the premises of the mis en cause became invalid .

(emphasis added) (Syndicat des salariés de service d'entretien (C.S.D.) c. Montcalm Carpets Specialists Ltd., [1981] T.T., at 278)

223 The ultimate proof that Netco and MBD never alienated or conferred a right to operate their undertakings to Services Ménagers Roy is that it was open to them, when the contract between Services Ménagers Roy and C.S.R.O. ended, to submit a new bid so as to supplant their competitor and return their janitorial service undertaking to the C.S.R.O. premises. The following passage from the reasons of Judge Girouard in Union des chauffeurs de camions, hommes d'entrepôts et autres ouvriers, local 106 c. Alain Lacasse Transport Inc., [1977] T.T. 231 at 233-234 , perfectly describes the independent status of undertakings whose only common feature is that they are competing for the same customers:

> (Translation)
>
> There is no continuity whatever from the undertaking of the mis en cause to that of respondent, except that of a customer who goes from one supplier to another. There will of course be a resemblance, in competing undertakings in the same area of activities and services, between the equipment and activities of the employees of one and the equipment and activities of the employees of the other, but it is mere fancy to conclude solely on the basis of these facts that there has been a real transfer or a true handing over of one undertaking to the other (in terms of the context and essential components that make up the first undertaking).
>
> . . . . .
>
> [T]hese undertakings exist as separate legal and economic entities, they operate and continue to exist along-

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side each other, even compete, and their customers certainly do not bring them together, except that the customers may move from the mis en cause to the respondent, or vice versa, or indeed to other competing suppliers of the same desired services. Such a transfer of a service contract does not involve even in part a transfer of the undertaking from the mis en cause to the respondent.

However interesting any theory one may seek to associate with s. 36 of the Code may be, a judgment must refer to the actual content of that section, and it must rest on the actual wording: none of the facts mentioned in this section [is] in evidence in the case at bar and the section accordingly cannot be applied here.

(emphasis added) (See also the judgment of the Superior Court in Fondation-Habitation Champlain Inc. c. Tribunal du travail , as well as Sitri Inc. c. Cartage & Miscellaneous Employees' Union, Local 931 (F.T.Q.), [1977] T.T. 29 ; Syndicat des travailleurs forestiers de la division Jacques Cartier (F.T.P.F.-C.S.N.) c. H.C. Leduc Ltée , supra; Union des chauffeurs de camions, hommes d'entrepôts et autres ouvriers, local 106 c. Alain Lacasse Transport Inc. , supra, and Syndicat des salariés de service d'entretien (C.S.D.) c. Montcalm Carpets Specialists Ltd.)

224 I feel I should add a few observations about the fears expressed by the majority of the Labour Court, who were concerned that an interpretation which differed from that adopted by the Court would undermine the collective rights of the employees of subcontracting undertakings. I have already noted the ephemeral nature of the certification associated with an undertaking, or part thereof, whose existence is limited by a contract. The certification becomes inapplicable once the contract expires and no essential part of the undertaking is passed on to a new employer. Workers' rights may however be safeguarded if the association seeks a regional certification, as the F.T.Q. Union tried to do in the case at Bar. Judge Girouard explained [[1982] T.T., at 189]:

(Translation)

[A] union which has been certified on an employer's premises, and only for the part of his undertaking which is in a given locality, and which is aware of the precariousness of this limitation, directly dependent as it is on the duration of an annual contract, while it has made the task of organizing and obtaining a majority of supporters easier, has however made the existence of its certification and the practical usefulness of its agreement as uncertain as the part of the undertaking to which they are connected. In the same way the union, which is in the process of being certified for an employer, S.M.R., and for the Érablière comprehensive school (see above, at p. 178), will, if it succeeds, be in the same precarious position.

In contrast with this situation, the same union has already been certified with an employer, S.L.G., but with no such geographical limitation (see above, at p. 180), with the result that the employees covered by the certification and agreement with S.L.G. are not directly at the mercy of the comings and goings of their employer's customers: if a contract is lost or terminated at one place, another contract will be obtained elsewhere, or several other ongoing contracts will continue, and transfers can thus be made to save jobs.

225 The certification and collective agreement will then continue as long as the employer continues to operate its undertaking in the given region, instead of expiring with the contract on which it depends.

VII — Whether Interpretation Patently Unreasonable

226 The Superior Court has found the interpretation given to s. 45 by the Labour Court majority to be patently unreasonable on at least three occasions. The judgments in question were those of Mailhot J., as he then

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was, in Cie du Trust National Ltée c. Burns, [1985] C.S. 1286 (on appeal), of Greenberg J. in Brasserie Labatt Ltée c. Commissaire général du travail , supra, and of Michaud J. in Fondation-Habitation Champlain Inc. c. Tribunal du travail .

227 I do not have to decide the point: but if I had to do so, I would incline to the view taken by the Superior Court in these three judgments, bearing in mind inter alia the number, seriousness and cumulative effect of the Labour Court's errors regarding the concept of an undertaking, the identity of the undertaking and the requirement of a legal relation.

VIII — Conclusions

228 I would dismiss the appeal with costs, including costs in favour of the mis en cause Commission scolaire régionale de l'Outaouais and Services Ménagers Roy Limitée.

Appeal dismissed.

FN* Estey, Chouinard and Le Dain JJ. took no part in the judgment.

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