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Newsletter

Labour and Employment Law

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Quebec Labour Tribunal opens the door to management unions

On December 7, 2016, the Quebec Labour Tribunal (the "**Tribunal**") rendered two interlocutory decisions on the right to freedom of association of managerial personnel under the *Labour Code* (the "**Code**"). The Tribunal was forced to address this issue in response to petitions for certification from Hydro-Québec's first level managerial personnel and the Société des casinos du Québec (collectively the "**Employers**").

These decisions mark a turning point in the evolution of managerial personnel's right to freedom of association in Quebec. This is the first time a court has recognized that the exclusion of managerial personnel from the general system of the Code is a violation of their fundamental rights.

It is important to note that the debate regarding managerial personnel's right to freedom of association is not new. In fact, the Tribunal presented a historical review of the subject. The exclusion of managerial personnel from the definition of "employee" provided in the Labour Code already existed in 1944 in the *Labour Relations Act*, the Code's predecessor. It was during the Quiet Revolution in the 1960s that a movement emerged in favour of the unionization of managerial personnel, while mixed associations bringing together professionals and managerial personnel were also developing. In 1964, professionals were allowed to unionize, which led these mixed associations to exclude managerial personnel from their ranks. In the late 1970s, the Labour Court (as it then was) had certified first-line managers, maintaining that they were not real representatives of the employer. However, this certification was subsequently invalidated by the Superior Court and the Court of Appeal, which had determined that a person performing managerial functions could not be considered an "employee" as defined by the Code.

Consequently, exclusive managerial personnel associations were formed over the years, aiming to demand a specific labour relations regime. Steps were then taken both at the international and national levels, as certain aspects of such were deemed unsatisfactory.

In this regard, Canada, as a member of the International Labour Organization (the "**ILO**"), has ratified a number of important agreements with respect to labour rights which it has as of yet been unable to meet. The ILO Committee on Freedom of Association has urged the government to amend the Code on several occasions without success.

This historical review now brings us to the interlocutory decisions mentioned above. In these cases, the Association des cadres de la société des casinos du Québec (the "**ACSCQ**") and the Association professionnelle des cadres de premier niveau d'Hydro-Québec (the "**APCPNHQ**") jointly argued, among other things, that the exclusion of managerial personnel from the Code substantially impedes their association activities and that such an infringement is not justified in a free and democratic society.

The Tribunal ruled in their favor on the grounds described herein and acknowledged that such exclusion effectively undermines their right of association under the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter of Human Rights and Freedoms* (collectively the "**Charters**"), and that such infringement is not justified.

The Tribunal thus reiterated the main principles established by the Supreme Court in recent years regarding the right to collective bargaining. Furthermore, the Tribunal recognized that there has been a shift towards a broader and more liberal interpretation of freedom of association.

The Tribunal then analyzed whether the exclusion of managerial personnel from the system established by the Code violated their freedom of association. The Tribunal concluded that the statutory exclusion of managerial personnel from the definition of "employee" was intended to prevent an employer's representatives from collectively bargaining their working conditions, in order to avoid conflicts of interest. However, the Tribunal found that, because of this exclusion, associations representing managerial personnel are not completely independent. The ACSCQ and APCPNHQ are recognized voluntarily by their respective employers and there is no protection against interference or hindrance, which are both considered essential elements by the Supreme Court in order to consider that the objective of collective bargaining is achieved.

The Tribunal concluded that the ACSCQ and APCPNHQ were unable to restore a balance of power between the first level managerial personnel and their employer and were also unable to negotiate for their members on matters of importance. The final decision always lies with the employers in question who are not subject to any form of pressure. Furthermore, the absence of a system in place to sanction the obligation to negotiate in good faith renders the rights granted theoretical. The members of the ACSCQ and the APCPNHQ have no right to strike, which ultimately led the Tribunal to conclude that the exclusion of managerial personnel from the system established by the Code constitutes a substantial barrier to the right to collective bargaining.

The Tribunal also pointed out that this infringement of managerial personnel's fundamental rights was not justified in a free and democratic society. Consequently, the Tribunal concluded that it had jurisdiction and that it will therefore pursue its consideration of the petitions for certification filed by the ACSCQ and the APCPNHQ.

Once again, we would like to emphasize that these are important decisions in that they recognize for the first time that the exclusion of managerial personnel from the system established by the Labour Code violates their rights guaranteed under the Charters.

It should be noted that both these decisions are currently the subject of applications for judicial review before the Superior Court. It can be expected that the debate on this issue will continue before the Court of Appeal, possibly even before the highest court in the country.

We will keep you informed of any developments.

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