A Unionized Boss? The Court Of Appeal Makes Its Ruling!



You may recall that, on April 10, 2017, we published an initial article regarding two unprecedented decisions rendered by the Court. These decisions concerned the scope of the freedom of association right and questioned the constitutionality of excluding management personnel from the definition of employee under the *Labour Code*.

Since then, the decision between the *Association des cadres de la société des casinos du Québec* (ACSCQ) and *the Société des casinos du Québec* has been brought under judicial review and then to appeal. On February 8, 2022, the Court of Appeal rendered its long-awaited decision.

Background and Trial Proceedings

To provide some context, everything began in 2009 when the ACSCQ filed a request for certification to represent first-level managers from the Montreal Casino. This request also included an application to declare that the exclusion of management personnel provided for in section 1(*l*)1 of the *Labour Code* is unenforceable against the employees concerned by the request, since freedom of association is guaranteed by the Canadian and Quebec Charters of Rights and Freedoms, and such exclusion deprives them of their right to collectively bargain their conditions of employment.

In 2016, the *Tribunal administratif du travail* (the Tribunal) held that exclusion unjustifiably infringed on managers' freedom of association. In 2018, the Superior Court reversed this decision and declared section 1(*l*)1 of the *Labour Code* operative and valid. The ACSCQ appealed this decision.

Decision

The Court of Appeal allowed the appeal and found in favor of the management association. In its voluminous decision, the Court of Appeal referred to the historical aspect of excluding management personnel from the notion of employee and emphasized the numerous recognitions of management employee associations in Quebec, despite the absence of a law that officially covers these employees.

According to the Court, the right to bargain collectively is a constitutional right, and this process will be considered genuine only when employees, regardless of rank, have the freedom of choice and independence to decide their collective interests. In the Court's view, the Attorney General of Quebec failed to establish that the measure

restricted the right "as little as reasonably possible for the purpose of achieving the legislative objective" – in other words, that no "less prejudicial means of achieving the legislative objective" existed.

Based on these principles, the Court of Appeal overturned the Superior Court's decision and reinstated the decision of the *Tribunal administratif du travail*. It also suspended, for a period of 12 months, the effects of the Tribunal's declaration concerning the inoperative nature of the exclusion provided for in section 1(*l*)1 of the *Labour Code*.

Conclusions

As we pointed out a few years ago, the particular facts of this case were initially of paramount importance to the reasoning of the trial court. Indeed, the employees involved in the certification requests at issue were first-level managers in a Crown corporation that included five or more levels of management.

In light of some of the comments made by the Court, it will be interesting to monitor both the legislative and jurisprudential impact of this decision over the next few years. Will the Supreme Court of Canada be asked to take a position on the issue? Stay tuned!

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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