The end of the third round in the dispute over right of managers to unionize

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On February 8, 2022, the Court of Appeal handed down a decision that could change the legal landscape of labour relations in Québec[1]. This legal saga has been going on for over 10 years between the Association des cadres de la Société des Casinos du Québec (the Association) and the Société des Casinos du Québec (the Employer).

The ruling

A brief overview is in order. This case initially arose from the Association's petition for certification of first level managers (also known as “Operations Supervisors” (OSS) or “Table Managers”) working in the gaming area of the Casino de Montréal. It is important to note, and quite unique, that the Employer had five or more levels of management at the time, with the primary function of these first level managers being to ensure the application of the Employer's rules and policies in the gaming area.

In this petition for certification, the Association sought, among other things, a declaration that the general exclusion of management personnel from the definition of employee contained in section 1(l)(1) of the *Labour Code* (the Code) was inoperative with respect to the OSS.

In December 2016, the Administrative Labour Tribunal (the Labour Tribunal) ruled in favour of the Association and concluded that this exclusion unjustifiably infringed on the freedom of association of its members and, consequently, it suspended the application of this exclusion to them for the purpose of analyzing the petition for certification that had been filed[2]. Approximately two years later, the Superior Court restored the status quo by reversing the Labour Tribunal’s conclusions[3]. This decision was appealed by the Association.

Following a detailed analysis of the applicable principles, the Court of Appeal overturned the Superior Court's decision and reinstated the Labour Tribunal's interlocutory decision, as there were no grounds for reviewing the Tribunal's decision in its view. It held that the Labour Tribunal, on the basis of the evidence before it, had not erred in concluding that:

> “the inability of the OSS to receive meaningful recognition of the Association, their lack of access to a court or specialized dispute resolution mechanism to sanction the Employer's interference, obstruction or bad faith bargaining, or to seek protection of their right to return to work in the event of a strike in the context of collective bargaining are effects of the exclusion at issue and that they too constitute a substantial interference with the OSS' freedom of association.”[4] [Our translation]

Furthermore, the Court of Appeal confirmed the Labour Tribunal's conclusion that this substantial interference was not justified, because the interference with the freedom of association of management personnel was not as minimal as possible. Indeed, the exclusion of management personnel from the Code's regime is categorical and makes no distinction on the basis of the managers’ rank in the undertaking or the nature of their duties. The Labour Tribunal notes that there are other models of labour relations (particularly elsewhere in Canada) that allow specific groups of employees to unionize by imposing certain conditions, thereby infringing on the freedom of association in a much more limited way.

The Court of Appeal also noted that “the unqualified exclusion of all levels of management personnel from the definition of employees clearly appears to be at odds with the evolution of freedom of association in recent jurisprudence” of the Supreme Court of Canada, and that the Attorney General of Québec, a party to the proceedings, had failed to demonstrate that this “imbalance remains justified”[5] [our translation] .

However, “considering the potential effect of this judgment on the Québec labour relations regime for management personnel in general, or for management personnel whose situation (...) is similar to that of OSS in this case”[6] [our translation] , the Court of Appeal considered it appropriate to suspend the order rendering inoperative the exclusion to the OSS for a period of twelve months. It will therefore be up to the Québec legislator to identify the mechanism that will adequately respond to the Court of Appeal's conclusions. Although a legislative reform modifying the definitions provided for in the Code is not the only possibility, the fact remains that the legislator could be tempted to implement such a reform and draw inspiration from the legislative provisions in force elsewhere in Canada.

What's Next?

Given the stakes involved, it is likely that the Employer will apply for leave to appeal this case before the Supreme Court of Canada where this saga may finally play out, and that this case will be of interest to the highest court in the country.

Should the Supreme Court of Canada refuse to hear a potential appeal or uphold the Court of Appeal's decision, we believe that a reform of the Code could be on the horizon. Indeed, other provisions of the Code currently raise important issues, including the anti-scab provisions and the notion of establishment in an era of work relocation (*i.e.* remote working) [7]. Although the cases and topics may be different, the invitation from a tribunal would essentially be the same, notably to “update” the Code to reflect current social issues.

The BLG Labour and Employment Law team will keep you informed of developments in this area.

[1]Association des cadres de la société des casinos du Québec v. Société des casinos du Québec, 2022 QCCA 180.

[2] Association des cadres de la Société des casinos du Québec and Société des casinos du Québec inc., 2016 QCTAT 6870.

[3] *Société des casinos du Québec inc*. v. *Tribunal administratif du travail*, 2018 QCCS 4781.

[4] *Association des cadres de la société des casinos du Québec* v. *Société des casinos du Québec*, cited at note 1, at paragraph 143.

[5] *Id.*, at paragraph 182.

[6] *Id.*, at paragraph 189.

[7] *Unifor, section locale 177* v. *Groupe CRH Canada inc.*, 2021 QCTAT 5639.

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