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A First Step on the Road to Unionizing Managers?

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On December 7, 2016, the Administrative Labour Tribunal rendered an important decision concerning the rights of Québec managers to be unionized.

In two inter-related decisions in disputes between the *Association professionnelle des cadres de premier niveau d'Hydro-Québec* ("APCPNHQ") and Hydro-Québec, and, between the *Association des cadres de la Société des casinos du Québec* ("ACSCQ") and the *Société des casinos du Québec*[1], the Tribunal held that subsection 1(*l*)(1) of the *Labour Code* infringed the freedom of association guaranteed by the Charters and hence was to be deemed inoperative with respect to the applications for certification filed by the APCPNHQ and the ACSCQ.

In other words, the Tribunal ruled that, at least as regards the applications that concerned Hydro-Québec and the Société des casinos du Québec, managers in Québec were to be considered as "employees", within the meaning of the *Labour Code*.

In reaching that conclusion, the Tribunal drew inspiration from the principles laid down by the Supreme Court of Canada in the *Health Services*[2] case, and especially, in the judgment in *Mounted Police Association of Ontario* ("MPAO")[3], holding basically that:

- excluding managers from the definition of "employee" violated their rights to freedom of association and to bargain collectively for their working conditions; and
- such a violation was not justified in a free and democratic society.

Oddly, from the standpoint of BLG's Labour and Employment Group, the Tribunal's ruling comes as only a partial surprise.

In fact, in view of the Supreme Court's landmark *Health Services* decision in 2007, reinforced in 2015 (through the trilogy of cases including the MPAO judgment), we could have expected that a tribunal would one day reaffirm the right of managers (at least the right of those executives termed "first-level managers") to bargain collectively with their employers to determine their working conditions.

What was somewhat unexpected, however, was the form that the restatement of that right took, being a declaration of inoperability of section 1(*l*)(1) of the *Labour Code*.

It must be understood that there is a fundamental distinction between having the right to bargain collectively for one's working conditions, on the one hand, and the right to have access to any particular labour relations regime, on the other; in other words, just because employees are entitled to bargain their collective working conditions together with their colleagues, does not necessarily entitle them to be certified under the legislative scheme established by the *Labour Code.*

In drafting its decision, the Tribunal had regard to that distinction, but, with respect, it seems to have believed that it was unnecessary to undertake any in-depth review of the underlying issues, since, as it understood its own powers, its role was limited to ruling on the constitutionality of subsection 1(*l*)(1) for the purposes of deciding the two (2) specific applications at hand (rather than for the purposes of providing guidance to the Québec

population as a whole)... That approach enabled the Tribunal to avoid considering the whole gamut of major problems caused by the systematic inclusion of managers in a Wagner-type collective labour relations system, as enacted by the *Labour Code*. In that regard, one can foresee potential conflicts between the new "managerial" bargaining unit and the scope of the pre-existing units, which already often cover "all employees within the meaning of the Code". We can also expect problems related to the presence of "employer representatives" in such bargaining units, particularly as regards prohibited practices. Nor must we lose sight of the problems of including managers in the concept of "employees", in the context of the anti-strike-breaking provisions. Indeed, the Tribunal is almost explicitly inviting the Superior Court to re-examine that matter, in order to determine, for the first time, the real consequences of the Supreme Court's new approach as it affects Québec's management personnel generally (as opposed to its consequences for these two very specific applications taken separately).

Higher courts will therefore undoubtedly be called upon to review whether the Tribunal's very targeted approach was correct and, in particular, to re-examine the validity of the solution proposed by the Administrative Labour Tribunal in a wider context.

That being said, the Tribunal's decision unquestionably constitutes a big stone thrown into the pond of labour relations in Québec and, one way or the other, the resulting ripples are likely to be felt for years to come in all organizations doing business in the Province.

[1] *Association des cadres de la Société des Casinos du Québec et Société des casinos du Québec inc. / Association professionnelle des cadres de premier niveau d'Hydro-Québec et Hydro-Québec*, CM-2009-5820 et CM-2014-7415

[2] [2007] 2 RCS 391

[3] [2015] 1 RCS 3

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