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The End of Round Two in the Dispute over the Right of Managers to Unionize

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On December 7, 2016, the Administrative Labour Tribunal (the ALT) decided that "first level" managers working for the Société des Casinos du Québec (the Corporation) could unionize, since section 1(*l*)(1) of the *Labour Code* excluding managers from the definition of "employee" was inoperative. In their regard, it would unjustifiably interfere with the principle of freedom of association guaranteed by the Charters. The Corporation applied for judicial review of the decision and, after four days of hearing, the Superior Court rendered judgment on November 5, 2018.

The Facts

L'Association des Cadres de la Société des Casinos du Québec (the ACSCQ), had filed an application for certification to represent "first level" managers working in the gaming area of the Montréal Casino on November 10, 2009. The Corporation objected to the application, on the grounds that managers could not be covered by any union certification, since they are excluded from the definition of "employee" under the *Labour Code.*

In the reasons supporting its decision, the ALT held that:

- excluding managers from the definition of "employee" violated their rights to associate and bargain collectively for their working conditions; and
- that violation was unjustified in a free and democratic society.

Before the Superior Court, the Corporation argued that the ALT had erred, particularly by applying the wrong analytical framework, in assigning constitutional status to the legislative scheme of the *Labour Code* and by guaranteeing the ACSCQ a particular model of labour relations, which is not the objective of freedom of association.

The Decision

Following analysis, the Superior Court ruled in favour of the Corporation. The Superior Court recalled that in order to prove interference with the principle of freedom of association, the ACSCQ was required to prove three things:

- its contestation of the exclusion of managers under the *Labour Code* was based on freedom of association, rather than on access to a specific legal regime;
- the exclusion of the managers concerned by the application of the *Labour Code* would entail a substantial impairment of their right of freedom of association; and
- the State was responsible for that substantial impairment.

The Superior Court found that the ALT had correctly decided the nature of the ACSCQ's contestation. Regarding the second element, certain acts of the Corporation — especially its refusal to negotiate certain important working conditions, together with its decision to alter others unilaterally — sufficiently restricted the ability of the managers concerned to bargain collectively regarding their working conditions to convince the Superior Court that their right to freedom of association had indeed been substantially affected.

Contrary to the ALT, however, the Superior Court did not hold the State responsible for that impairment. That adverse effect was rather the result of acts and conduct imputable to the Corporation, which were acts of a private nature, rather than acts committed by the State, for the purpose of excluding the managers in question from the application of the *Labour Code*.

Finally, the Superior Court did not believe that the impossibility for the managers to avail themselves of the right to strike, as permitted by the *Labour Code*, in itself constituted any substantial impediment to their right of free association. According to the Superior Court, there was nothing to prevent the managers from organizing a concerted work stoppage as part of a process for negotiating their working conditions. Furthermore, because the right to strike had been given constitutional standing and had been held to be an essential component of freedom of association ever since *Saskatchewan Federation of Labour v. Saskatchewan*[1] was decided, the managers involved could contest any measure that might be imposed on them after exercising the right to strike, using the remedies for breaches of fundamental freedoms provided for by the Charters.

Conclusions

Because the ACSCQ had failed to demonstrate all the factors required to establish the violation of freedom of association resulting from the exclusion of the managers from the *Labour Code*, the Superior Court allowed the application for judicial review, quashed the ALT's decision and declared that the exclusion stipulated by section 1(*l*)(1) of the *Labour Code* was constitutionally valid and operative.

Although it re-establishes the *status quo*, it is beyond doubt that this decision will be challenged in appeal. It therefore remains to be seen how the Court of Appeal and, eventually, the Supreme Court of Canada, will rule before the final outcome of this judicial saga will be known.

[1] [2015] 1 S.C.R. 245, 2015 SCC 4.

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