



Gambling on the unionization of managerial employees

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To date, Quebec's *Labour Code* (the "*Code*") expressly prohibits managerial employees from unionizing. A recent series of decisions arising from a dispute between casino employees and their employer, however, suggests the blanket ban on managerial unionization could be lifted (or at least limited) in the coming months, thereby creating the potential for a momentous shift in labour relations in the province of Quebec.

Opening the door to unionized managers

The dispute at hand dates back to November 2009, when casino employees with managerial status applied for permission to unionize in an attempt to prevent their employer from unilaterally modifying working conditions. The employer immediately sought to have the petition for certification quashed, citing the managerial status of the concerned employees, which bars them from unionizing pursuant to the *Code*. Up until that point, the applicable law and related jurisprudence suggested the employer would easily succeed on that motion. However, when the employees argued that the prohibition to unionize unfairly infringed on their freedom of association protected by both the *Canadian Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms*, the Administrative Labour Tribunal (the "Tribunal") agreed with them on that point ¹.

In its decision the Tribunal found that the prohibition to unionize infringed on the employees' freedom of association guaranteed by the Canadian and Quebec Charters, and deemed the relevant provision of the *Code* to be inoperative with respect to these employees. The decision further suggested that it is unfair to paint all managerial employees with the same brush, and that it may be appropriate to allow employees who are designated as “managers”, but who lack substantive decision-making authority, to unionize.

In light of the Tribunal's decision, we may see a significant shift in Quebec labour relations once the dust has settled and all pending litigation related to this matter has been resolved.

Safeguarding the potential to unionize

In the most recent decision related to these proceedings, the Quebec Court of Appeal was asked to set aside an arbitrator's decision to the effect that the casino employees should benefit from the protections afforded under the *Code* until such time as the Administrative Labour Tribunal renders a decision on the merits of the petition for certification¹. In support of this position, the employer claimed that the presumption of the validity of the law should prevail. Surprisingly, perhaps, the Court did not agree.

The practical effect of this decision is that, for the time being, the protections afforded under the *Code* are triggered from the moment a petition for certification is filed and will continue to operate until the Administrative Labour Tribunal renders a decision on the merits of the petition for certification. In this particular case, the employer is therefore proscribed from unilaterally changing the working conditions of its employees at least until the time the Administrative Labour Tribunal determines whether these employees are legally allowed to unionize. Evidently, the risk is that employees who are not allowed to unionize will benefit from the protections afforded by the *Code*, at least provisionally, and for an indeterminate period of time, thereby greatly limiting the employer's managerial and administrative powers in the interim. While the Court acknowledged these inconveniences for the employer, it found that it would be a greater affront to prematurely set aside the safeguards contained in the *Code* and attempt to backtrack if it was ultimately found that these employees are allowed to unionize.

Considerations for the near future

While the decision on the petition for certification, expected to come down in the coming months, will only be valid with respect to the concerned casino employees, higher courts will likely be called upon to review the ability of managerial employees to unionize more generally. The decisions related to this case so far suggest that we may be on the cusp of a new era in Quebec labour law that will involve a case-by-case determination as to whether “managers” have powers substantial enough to merit a restriction on their ability to unionize. Employers have an interest in remaining attentive to this case, as they may be dealt a new set of cards when it comes to managing their management in the near future.

[1] *Sociétés des casinos du Québec c. Association des cadres de la Société des casinos du Québec*, 2016 QCTAT 6870

[2] *Sociétés des casinos du Québec c. Association des cadres de la Société des casinos du Québec*, 2017 QCCA 877

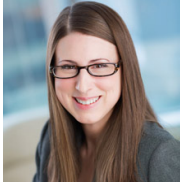
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