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Supreme Court of Canada affirms first-level managers in Quebec cannot unionize under Labour Code

By **Stéphane Beaulac, Camille Paradis-Loiselle and Nicolas Séguin**

Law360 Canada (June 14, 2024, 1:12 PM EDT) -- In a highly anticipated decision, published on April 19, 2024, the Supreme Court of Canada affirmed the constitutionality of the *Labour Code*'s denial of a first-level managers association's right to obtain a union certification (*Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec,* [2024] S.C.J. No. 13). The significance of this decision can only be appreciated through an understanding of the case's procedural history and broader context.

Stéphane Beaulac

In 2009, the Administrative Labour Tribunal (ALT) heard the Association des cadres de la Société des casinos du Québec's request for certification to represent certain first-level managers. The managers' employer, the Société des casinos du Québec inc. opposed the association's request, arguing that these managers could not be considered "employees" under the *Code*'s definition and that in granting them the right to obtain union certification, managers would be at risk of potential conflicts of interest. The ALT held that it was unconstitutional to exclude managers from the purview of the *Code* and that such an exclusion would infringe on the manager's freedom of association, guaranteed to them by s. 2(d) of the *Canadian Charter of Rights and Freedoms* and by s. 3 of the *Québec Charter of Human Rights and Freedoms*. In response, the company sought judicial review by the Superior Court. In their decision, the Superior Court overturned the ALT's decision, ruling that managers could validly be excluded from the *Code*'s definition of "employees." The association subsequently appealed this decision. The Court of Appeal overturned the Superior Court's decision and reinstated the ALT's decision.

Camille Paradis-Loiselle

Supreme Court of Canada's decision

The crux of the Supreme Court's decision hinged on the constitutionality of s.1(l)1 of the *Code*, which broadly defines "employee" as "a person who works for an employer and for remuneration" but explicitly excludes a person who is employed "as manager, superintendent, foreman or representative of the employer in his relations with his employees." Only an association of "employees" is eligible for certification and labour standards protections, including the right to engage in collective bargaining. This includes the right for an association to make collective representations to the employer that the latter must take into consideration in good faith, freedom of choice in selecting representation and the right to strike.

Nicolas Séguin

Justice Mahmud Jamal, supported by Justices Andromache Karakatsanis, Nicholas Kasirer and Michelle O'Bonsawin, established that any court that has to determine whether a law or government action violates s. 2(d) of the Charter must first determine if the activities fell within the scope of the freedom

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of expression guarantees and secondly, if government actions substantially impeded (by its purpose or effect) said activities. (And by implication, art. 3 of the Québec Charter.)

Applying this framework, the majority found the association's claim involved activities that were guaranteed by s.2(d) of the Canadian Charter. (In addition to the majority opinion of the four judges, the reasons include two concurring opinions: from Chief Justice Richard Wagner and Justice Suzanne Côté, on the one hand, and from Justice Malcolm Rowe, on the other.) These include the right to form an association with sufficient independence from the employer, presenting demands collectively to the employer and ensuring these demands are considered in good faith.

Secondly, the majority concluded that the legislative exclusion did not substantially interfere with the associative rights of the managers. In this case, the managers had successfully formed an association recognized by the company. The company also agreed to consult the association before setting or modifying the working conditions of these managers. For the majority, these elements demonstrate that the legislative exclusion provided for in se.1(l)1 of the *Code* does not substantially hinder the right of management employees to engage in collective bargaining and that they remain able to associate and bargain collectively with their employer. In the end, all Supreme Court judges (both majority and minority) concurred in allowing the appeal and overturning the decision of the ALT.

Furthermore, it is worth noting that the majority of judges reiterated that the legislator's intent behind the exclusion of managers from the definition of "employee" was to preserve their loyalty, prevent conflicts of interest and all interference and ensure that employers can be confident that managers truly represent their interests.

The decision is not only important because of the conclusions of the judgment or the reasons given by the majority. On the contrary, the concurring reasons of Justice Côté, supported by Chief Justice Wagner and Justice Rowe's additional reasons, addressed administrative and constitutional law matters.

Justice Côté clarified the standard of review applicable in such situations, which all judges (both majority and minority) agree with. She is of the opinion that the standard of correctness should apply to findings of law, given that they are part of an analysis of a constitutional issue. As for findings of mixed fact and law, Justice Côté is of the opinion that the standard of correctness must also apply. Indeed, she highlighted that there is no reason that the ALT findings would be owed deference since the constitutional questions that the ALT had to answer were too important. Showing a high level of deference could have the impact of undermining judicial efficiency and public confidence in the judicial system.

For Justice Côté, it is important to define the nature of the association's claims, as she considers that its positive or negative nature can influence the applicable analytical framework. As a reminder, positive claims require the government to act in certain ways while negative claims require the

government to refrain from acting in certain ways. In this case, Justice Côté concluded that this was a positive claim that the government agrees to include managers in the *Code*'s particular statutory regime.

On this point however, Justice Côté (and, with her, Chief Justice Richard Wagner; Justice Malcolm Rowe concurred but for his own reasons) is in the minority, since the majority of the four judges did not accept the idea that it would be appropriate to systematically distinguish between claims of a positive or negative nature when analyzing freedom of association. In this respect, the majority is aware that the situation will be different under s. 2(d) of the Canadian Charter and under s. 2(b) in relation to freedom of expression, the latter cases drawing a clear distinction between positive and negative rights to freedom of expression. Ultimately, the takeaway is that the Charter rejects a rigid application of the dichotomy between positive and negative rights, a lesson by the Supreme Court that has a good chance of setting a precedent in the country (even if it only comes from a majority of four judges for the time being).

In addition to her consideration of the nature of the association's claims, Justice Côté analyzes the case's jurisdictional dimension. More specifically, in her application of the analytical framework, she highlights the remedial power of the ALT to hear the association's contestations and the impact of bringing the action before the ALT rather than the Superior Court. The association's choice to bring a motion for accreditation shows its objective to have its members protected under the *Code*'s collective labour relations regime. The objective was not to obtain a ruling of unconstitutionality from the Superior Court. Justice Côté reminds us that a suspension of a declaration of unconstitutionality would be the appropriate remedy for a positive claim yet, the ALT does not have the power to issue this declaration. This contradiction demonstrates that the association and its members are claiming access to the specific statutory regime provided by the *Code*. As such, Justice Côté writes that the first analytical criterion fails to be met, given that the Association's claim is based on access to a particular labour relations statutory regime, rather than on the freedom of associations. This branch of the analysis indicates that a party's chosen procedural vehicle when obtaining a declaration of unconstitutionality is cardinal and will certainly set a precedent regarding the general rights and freedoms guaranteed by the Charter.

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