

THE COURT OF APPEAL CONFIRMS THE RIGHT OF AN EMPLOYER TO CONTINUE ITS OPERATIONS DURING A LABOUR DISPUTE

By Michel Gélinas and Nicolas Joubert

On September 14, 2011, the Court of Appeal of Quebec rendered a significant decision in the context of the labour dispute which occurred at the *Journal de Québec* (the “Journal”) in 2007-2008. This decision sheds some light on the scope of the “anti strikebreaker” provisions of the *Labour Code* (Quebec)¹.

Affirming the judgment of the Superior Court, the Court of Appeal noted that an employer may have the work of employees on strike or locked out performed by persons employed by a third person, provided that it is not performed in the establishment (premises) where the work stoppage has been declared.

Concept of establishment

It is to be noted that during this labour dispute the Journal kept on being published without interruption, which was made possible in particular by the use of articles and photographs from third party contractors whose services had been retained by the Journal. These third parties, who were not employees of the Journal, were working on the road gathering the news, like the employees of the Journal formerly did. They sent their articles and photographs to the Journal by email, making sure that they never worked at or visited the “establishment” of the Journal located on Béchard Street in Quebec City.

The Court had to decide whether this practice contravened section 109.1 (b) of the Labour Code, which provides that, for the duration of a strike or a lock out, employers are prohibited from utilizing, “in the establishment” where the labour dispute has been declared, the services of a person employed by another employer or the services of another contractor to discharge the duties of an employee who is a member of the bargaining unit on strike or locked out.

Decision of the Commission des relations de travail

The Commission des relations du travail (CRT) had interpreted this provision as meaning that all the work “normally performed” by the journalists and photographers of the Journal prior to the work stoppage, even that performed “outside” the Journal’s establishment (premises), could not be entrusted to a third-party contractor. In short, the work performed outside the establishment (premises) by the unionized employees before the labour dispute could not be performed at any place whatsoever by replacement employees.

Judgments of the higher courts

This interpretation by the CRT was declared unreasonable by the Superior Court because it modified or rendered meaningless the “anti strikebreaker” provisions. The Court of Appeal of Quebec confirmed that the fact that the replacement employees performed their duties outside, and at the same places where the journalists and photographers worked prior to the labour dispute, did not constitute a violation of section 109.1 (b) of the Labour Code. The prohibition in the Code concerns only the work performed “in the establishment” of the employer. The Court was of the view that the legislator had not intended to prohibit replacement work but rather only to prevent it being performed “in the establishment” of the employer, in order to prevent violence from occurring on the picket line in front of the establishment.

The Court specified that [translation] “despite the fact that for certain types of work it is easy to call upon replacement workers to perform work outside the establishment, while it may be less easy, difficult, very difficult or even impossible to do so for other types of work, that is not a relevant factor”. Indeed, the law applies to all and it may happen that it does not affect everyone in the same way. The Courts must however respect the choice made by the legislator, who is the only one who may amend the law.

The decision of the Court of Appeal confirmed the interpretation generally given to this provision since it came into force in the late 1970's.

This decision will no doubt be welcomed by employers who, like the Journal, are subject to a certification applicable to a specific address, while many of their activities take place outside of the establishment mentioned in the certification, in particular, transport businesses and employers hiring teleworkers. In labour dispute situations, these businesses may rely on replacement workers without contravening the Labour Code.

This decision may be appealed to the Supreme Court of Canada by the union representing the Journal employees.

Lavery represents the group of contractual photographers involved in the proceedings discussed above.

¹*Syndicat canadien de la fonction publique, section locale 1450 et al. v. Journal de Québec*, 2011 QCCA 1635.

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