Dividing up of certified bargaining units – The Québec Court of Appeal calls into question the automatic application of traditional criteria

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By way of two decisions [1] handed down jointly on May 8th of this year, the Québec Court of Appeal held that it is no longer appropriate to mechanically apply the existing analytical framework regarding the criteria for the division of a bargaining unit. Based on principles recently stated by the Supreme Court of Canada, the Court of Appeal held that the limits imposed by such criteria on employees' freedom of choice, in violation of the fundamental right of freedom of association, may be unjustified and disproportionate in certain circumstances.

This was indeed the conclusion of the Court of Appeal with regards to the appeals from two applications for judicial review of decisions rendered by the *Commission des relations du travail* (the "**CRT**", Labour Relations Commission), in light of the decision in Mounted Police Association of Ontario v. Canada (Attorney General).[2] The latter decision was rendered by the highest court in the country after judgment was reserved by the Superior Court of Québec on the judicial review cases referenced above.

The Renaud-Bray Case

In the case of *Syndicat des employées et employés professionnels-les et de bureau, section locale 574 (SEPB) CTC-FTQ c. Association syndicale des employés(es) de production et de services (ASEPS),*[3] the employees of bookseller Renaud-Bray's Victoriaville store, who at the time were members of a broadly-defined bargaining unit which included nine other establishments, claimed to be inadequately represented by the appellant Union. They wished to be excluded from the broadly-defined unit and to join the respondent Association, in order to return to the separate unit that existed for their store prior to the merger of the certifications held by the Union in 2004.

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As grounds for their application, the employees cited the significant differences in economic and operational context as compared with the other stores in the existing unit, most of which were located in the metropolitan Montréal region. Deciding in this case on the application for judicial review, the Superior Court found that the CRT had erred by imposing on the Association the heavy burden of satisfying the criteria ordinarily applicable when dividing up a certified bargaining unit. It was not useful in the Court's view to return the case to the CRT, and as such, it proceeded to certify the Association.

In its reasons, the Court of Appeal applies the reasonableness standard and reviews the evolution of the scope of freedom of association as guaranteed by the Charters [4] and labour legislation,[5] before taking stock of the more recent shift in the case law which favours a generous and purposive approach to the constitutional guarantee. In adopting the principles set out in the *Mounted Police Association of Ontario case* referred to above,[6] the Court points out that freedom of association protects the right to join with others and form associations, which in turn includes the right of employees to choose what is in their interest and how they should pursue that interest.

The Court then identifies the traditional criteria for dividing up a certified unit, which require the presence of serious grounds justifying a reversal of the presumption in favour of maintaining an existing bargaining unit and which, contrary to those criteria applicable to bargaining unit certification or merger applications, clearly set aside any consideration of employee preference. The Court further states that limits on the freedom of choice of employees with regards to bargaining units is inevitable, but that these limits can only restrict freedom of association in a proportionate and justified manner in the circumstances, so as to enable the adequate functioning of labour relations.

Judging that in the case at hand, the customary criteria applicable to the division of a bargaining unit were applied disproportionately and unjustifiably, the Court of Appeal holds that the CRT's decision is unreasonable on three grounds: (i) the CRT did not consider the question of the employees' opposition to joining the broadly-defined unit in the first place, despite the fact that no assessment of the representative character of the applicant association at the time of the merger of the nine bargaining units was conducted, (ii) the CRT did not consider the history of the certifications with this employer, which revealed that with respect to this employer, each individual store generally represents the appropriate bargaining unit, and (iii) the CRT did not determine in what respect ensuring the stability of the existing bargaining unit or preserving industrial peace were considerations justifying its application of the traditional criteria, thus ignoring the employees' clear preference. The Court of Appeal concludes by finding that the trial judge exceeded his jurisdiction, specifically in that he should have referred the case back to the Tribunal administratif du travail (the "**TAT**", Administrative Labour Tribunal) rather than certify the Association directly.

The Ville de Québec Case

In the second case, *Syndicat des juristes du secteur municipal (CSQ) c. Alliance des professionnels et professionnelles de la Ville de Québec*, [7] the CRT had refused to divide the bargaining unit for professionals employed by the City of Québec, which would have enabled 30 jurists working for the City to be certified in a separate unit, as requested by same. The jurists claimed that their duties of professional conduct made it untenable for them to be grouped into a common unit with the other professionals working for the City, because they were consistently having to signal the omissions and faults of their colleagues to their employer, which placed them in a constant situation of conflict of interest.

At the time, the CRT had applied the traditional criteria for dividing up a bargaining unit, without justifying this approach and without commenting on the dilemma in terms of professional conduct that resulted from the jurists' duty of loyalty, limiting rather its short discussion to the issue of

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potential conflicts of interest. Moreover, the CRT did not deal with recent developments relating to the scope of the constitutional right to freedom of association or with the effects of same on the application of the traditional criteria for unit division. The Superior Court, sitting in judicial review, subsequently decided that the CRT's decision was among the reasonable outcomes.

The Court of Appeal, once again in a judgment written by the Honourable Justice Robert M. Mainville, takes note of these serious shortcomings in the CRT's discussion. On the basis of the Supreme Court's guidance, and repeating the grounds it cited in the *Renaud-Bray* case, the Court of Appeal holds that the initial decision was unreasonable and returns the case to the TAT so that it may evaluate the case while taking into consideration the evolution of the constitutional right to freedom of association.

Lessons to be Drawn

Over the coming months, it will be important to closely monitor the TAT's position, while the Tribunal reassesses whether the presumption in favour of maintaining an existing bargaining unit and the exceptional nature of its division remain constitutionally acceptable in light of the broader reading of the right to freedom of association now adopted by the courts. More specifically, the TAT will have to decide whether recourse to the traditional analytical framework with respect to the division of bargaining units results in a disproportionate and unjustified restriction on employees' freedom of choice, to such an extent that this limit is no longer necessary to ensure the adequate functioning of labour relations./p>

It will be interesting to observe how the TAT answers this question, considering that the Court of Appeal specified that the Renaud-Bray decision was not to be interpreted as holding that the customary criteria will henceforth always be inapplicable, but rather that the lesson to draw from the decision is that such criteria may be inappropriate in certain circumstances and that [TRANSLATION] the mechanical application of the criteria [...] is not per se a justification for restricting employees' freedom of association.

We will keep you informed of developments in this respect.

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1. Syndicat des employées et employés professionnels-les et de bureau, section locale 574 (SEPB) CTC-FTQ c. Association syndicale des employés(es) de production et de services (ASEPS), 2017 QCCA 737 et Syndicat des juristes du secteur municipal (CSQ) c. Alliance des professionnels et professionnelles de la Ville de Québec, 2017 QCCA 736.
2. [2015] 1 R.C.S. 3.
3. See above, note 1.
4. Canadian Charter of Rights and Freedoms, Part I of The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s. 2; Charter of Human Rights and Freedoms, C.Q.L.R. c. C-12, s. 3.
5. Labour Code, C.Q.L.R. c. C-27, s. 3.
6. See above, note 2.
7. See above, note 1.

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