February 8, 2017

Good grief! Foremen on the picket line?

A recent decision from the Tribunal administratif du travail could usher in a whole new reality in Quebec labour law: supervisors having the right to collective bargaining and to go on strike!

Tectonic changes have been occurring in the labour relations in the past twelve months with little or no attention being paid by employers in Quebec. In January 2015, the Supreme Court had reversed the position that it took thirty years ago, and declared that not only was substantive collective bargaining a *Charter*-protected right, but that the right to strike was equally *Charter*-protected (*Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 SCR 245). Those rights could only be restricted by legislation when there is an overarching and urgent societal interest to do so, provided that the means chosen was the least intrusive that could achieve the goal.

These fundamental changes have recently been used by the Tribunal administratif du travail [TAT] to produce another tectonic change in one of the pillars of Quebec labour relations: the statutory exclusion of first-line supervisors from any possibility of unionization. Indeed, the December 7, 2016 declaration by the TAT in *Association des cadres de la Société des Casinos du Québec et Société des casinos du Québec inc.*, 2016 QCTAT 6870, that Section 1(*l*) of the Quebec *Labour Code*, defining an "employee", is inoperative, at least in that case because it denies that employer's first-line supervisors of these fundamental *Charter*-protected rights as recognized by the Supreme Court, fogs the distinction between management and labour, and will, unless overturned, create rather than settle conflict. While the direct effect of the decision right now only applies to the employers involved (Hydro-Québec intervened in that case and was itself covered by a similar companion decision, *Association professionnelle des cadres de premier niveau d'Hydro-Québec v. Hydro-Québec*, 2016 QCTAT 6871), its application will, no doubt, be progressively widened to include all first-line supervisors who do not in fact exercise some degree of substantive managerial authority.

Background

Traditionally, first-line supervisors were considered representatives of management who could not be placed into situations of divided loyalties or potential conflicts of interest. Since they represented manage-

Theodore Goloff
514 393-4007
tgoloff@rsslex.com

ment themselves, they could not and should not be open to any possibility of unionization or collective bargaining, rights that were legislatively created. Until viewed as *Charter*-protected rights, the state would be free to limit such legislatively created rights exclusively to those to whom they were intended to apply. Given the responsibilities that a union member has towards his fellow union brothers it was felt from the inception of the first labour relations statute in 1941, right through to the latest amendments to the *Labour Code* in 2015, that allowing supervisors to organize would create impossible conflicts of interest. The landscape and environment has now changed!

Why employers should take notice

Fundamentally, if this decision is allowed to stand and is widely applied, serious questions will arise as to how small and medium-size firms can operate efficiently. Think of the impact that decisions that first-line supervisors make or supposedly make every day if they are truly management representatives, decisions that bind employers. These include evaluation of probationary employees, evaluation of employees to be laid off or let go in the event of downsizing, assignment of overtime, selection of employees for promotion, assignment to and balancing of shifts, evaluation of employees for periodic salary advancement, recognition, documentation and decision regarding conduct requiring discipline, evaluation and effective treatment of employee complaints and grievances quickly and effectively as they arise, and a host of other vital decisions that impact the bottom line. All of these form part of what should be part and parcel of the role of a first-line supervisor. Some have said that such supervisors are the lynchpin between executive-level management and the shop floor. Scripture recognizes the impossibility of having a foot in two opposing camps in the parable "He who is not for me is against me". In a sense, the exclusion provided by Art. 1(*l*) of the *Labour Code* of foremen, supervisors and other representatives of managements in their dealings with employees mirror the parable.

The basic tenet of Quebec labour relations has now been thrust aside ostensibly on the basis that unionization, collective bargaining and the right to strike, are now recognized as fundamental *Charter*-based and *Charter*-protected human rights, at least for those that are really and truly "employees", and not the true persona of the "employer". How severely operations will be impacted remains to be seen. Much will depend in each case on whether and how effectively and completely first-line supervisors are true management decision makers. In very large organizations, such as the Société des casinos du Québec, first-line supervisors have seen their managerial role diluted, with decisions being made further up the line. Constant erosion of even minimally independent authority of first-line supervisors in the name of consolidation of power higher up the line and/or "standardization" in large organizations has blurred the boundaries between who is management and who is labour. The possible impact of the TAT's decision on such large organizations is far less drastic than on small and medium-sized employers because they, unlike small organizations, have multiple layers of supervisors. Small or medium-sized employers simply don't have that luxury! How successful will unionized supervisors be in protecting management rights and efficient operations without costly additional independent supervision present? Will they themselves, as the supervisors of the Société des Casinos, seek union certification?

Effects on continuing operations during a strike

Quebec's "anti-scab" legislation (Sections 109.1 et al. of the *Labour Code*) provides that management employees are about the only persons who might continue all operations during a lawful strike by unionized employees. Other unionized employees who are not themselves on strike are allowed to continue working doing only their own jobs. Up to now, any persons who were considered as being covered by S. 1(*l*) could do any and all work in the place and stead of striking employees. If the decision of the TAT is allowed to stand, what little

opportunity management may have in carrying on business during a strike might disappear: effectively, only executives could be doing the work of the bargaining unit on strike.

Conclusions

The TAT's decision was based on the labour relations of a very complex large employer where the true managerial authority of the supervisors involved had been eroded over the years.

One way to counter the problematic effects of the decision is for an employer to truly empower first-line supervisors with real decisional authority so that their role as the embodiment of the employer is unmistakable. In any case, wouldn't that lead to good "hands-on" management? Empowering such folks no doubt requires both training and their "buying into" managerial goals and procedures. It requires the confidence of their superiors that they will exercise discretion properly. Take for instance discipline. It's not sufficient to tell supervisors that they have to document instances of problematic conduct. For them, to truly do so regularly and apply rules of conduct consistently and accurately and fully requires that they understand why all of this is necessary and the process of progressive and constructive discipline. They have to self-identify with the reasonability of all of this and its importance for running the business efficiently. Being a good line operator does not itself equate to being a good supervisor. Fortunately for employers, such training when given by recognized experts qualifies for the one percent of salaries beyond $1,000,000 required by law to be allocated for training (*Act to Promote Workforce Skills Development and Recognition*, CQLR c D-8.3).

If employers continue to dilute the responsibilities of first-line supervisors, they can expect results much like in Société des casinos. If they strengthen their supervisors' authority and training, they will have a fair to middling shot at avoiding seeing these folks unionize, assuming of course that the TAT's decision withstands the inevitable and likely appeals process.

Employers generally, and particularly small or medium-sized enterprises, are well advised to discuss the potential impact of these decisions with their advisers, and to plan appropriate remedial action now, even though the immediate effect applies only to the employer involved in the case!

As the old adage goes "An ounce of prevention is worth a pound of cure".