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7 November 2022

Melançon Marceau Grenier Cohen s.e.n.c. Me Sibel Ataogul

1717 René-Lévesque Blvd. E. #300 Montreal (QC)

H2L 4T3

**TAT file(s)** External file(s)

## 1251090 71 2111

EMPLOYER: McGill University

ASSOCIATION: Association of McGill Professors of Law (AMPL) / Association mcgillienne des professeurs.e.s de droit (AMPD)

# DECISION TRANSMISSION

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Administrative Labour Court

500, Boul. West, Suite 18.200 Montreal (QC) H2Z 1W7

**Telephone: 514 873-7188**

Toll free: 800 361-9593

Fax: 514 873-3112

Attachment(s)

500, Boul. West, Suite 18.200 Montreal (QC) H2Z 1W7

**Telephone: 514 873-7188**

Toll free: 800 361-9593

Fax: 514 873-3112

**ADMINISTRATIVE LABOUR COURT**

**(Labour Relations Division)**

Region : Montreal

File : 1251090-71-2111

Accreditation file : AC-3000-1683

Montreal, November 7, 2022

## BEFORE THE ADMINISTRATIVE JUDGE : Jean-François Séguin

**Association of McGill Professors of Law (AMPL) / Association mcgillienne des professeurs.e.s de droit (AMPD)**

Applicant

c.

## McGill University

Defendant

# DECISION

**OVERVIEW**

1. In the open field, do "*full-time, salaried professors at the Faculty of Law of McGill University*" represent a distinct group that can be certified under section 25 of the *Labour Code*,*1* the Code?
2. This is the question that the Tribunal must answer, as it is seized with an application for certification filed on November 7, 2021 by the Association of McGill Professors of Law (AMPL) / Association mcgillienne des professeurs.e.s de droit (AMPD), the Association, against McGill University, the Employer.

1 RLRQ, c. C-27.

1. More specifically, the Association is seeking accreditation for the group

of the following employees:

**"All full-time professors at the Faculty of Law of McGill University employed under the Quebec Labour Code.**

1. For its part, the Employer believes that the unit is inappropriate because it does not take into account the converging interests of another group of employees that the Association is attempting to divide and the history of labour relations at the University. Specifically, he argues that the Association does not include all employees who should be included in the appropriate bargaining unit in the circumstances. He proposes a comprehensive unit representing all faculty employed by him, regardless of their faculty, which he describes as follows:

**"All tenure-track or tenured faculty members of McGill University who are employed under the Quebec Labour Code.**

1. The case leads the Court to answer the following questions:

- Is the bargaining unit sought by the Association appropriate?

- If so, does the Association have the representative character to enable the Court to

accredit it?

1. For the reasons set out in the following analysis, the Tribunal finds that, within the Quebec university community, the Employer is in the unique situation where the quasi-general unit that would be all of its professors is not represented by an association that is certified or covered, in whole or in part, by another application for certification.
2. Thus, in the open field, after application of the recognized criteria and consideration of the general objectives of the Code, this distinct group of employees constitutes a viable and therefore appropriate bargaining unit. Ultimately, the Tribunal did not have the necessary demonstration that this unit cannot in any way serve as a basis for establishing collective labour relations.
3. Since the Association has sufficient representative character, it is accredited accordingly.

# THE CONTEXT

1. The Employer has 11 faculties, including the Faculty of Law. Each faculty has professors, with the exception of the *School of Continuing Studies*. The Faculty of Law does not have a department as most faculties do.
2. Unlike other Quebec universities2 , the Employer is in the situation where its 1744 professors are not unionized. However, the vast majority of its other employees are. Thus, it is already covered by 15 accreditations.
3. The analysis of the Code and the applicable case law criteria is therefore an open field.
4. In addition, the Employer has two voluntary associations of non-unionized employees: MUNASA (McGill Non-Academic Staff Association - Executive and Professional) and MAUT (McGill Faculty and Library Association).
5. This group is part of this second non-unionized employee association, which currently includes professors, librarians, *faculty lecturers* and some senior managers. There is no collective agreement or contract for this voluntary association.
6. Finally, the list of employees covered by the bargaining unit sought by the Association includes 40 names. It is composed of *Professors*, *Associate Professors* and *Assistant Professors* who work at the Faculty of Law.

# ANALYSIS AND REASONS

## The applicable law

1. Article 3 of the Code enshrines the right of association in the following terms:

**3.** Every employee has the right to belong to an employees' association of his or her choice and to

participate in the formation of this association, its activities and administration.

1. The Code also provides that3 "[t]he right *to certification exists in respect of all employees of the employer or each group of such employees that forms a separate group for the purposes of this Code.*"
2. The parameters established under the Code are thus intended to promote the exercise of this right, as provided for in consistent case law, particularly since the 1990 *Jay Norris case4* , in which the Labour Court expressed itself as follows

2 See paragraph 73 of this decision.

3 Article 21 of the Code.

4 *Jay Norris Canada Inc.* v*. Glass Workers, Local 1135 of the International Brotherhood of Painters and Allied Trades*, [1990] AZ-91147005 (T.T.) at 11-12.

In my view, since the general objective of the Code is to encourage unionization, while not depriving the employer of his right to operate his business efficiently and profitably, this criterion must be particularly sensitive, especially in open field situations, where none of the other traditional elements are clearly and obviously applicable. [...].

1. A separate group is an appropriate bargaining unit when it achieves the objective of certification, i.e. the conclusion of a collective agreement, and will be viable from a labour relations perspective5.
2. The criteria for determining the appropriateness of a bargaining unit have long been known6 and have been applied consistently7 . They can be summarised as follows8 :
   1. The criteria developed by the case law to assess the appropriateness of the distinct group were first set out in *International Union of United brewery, flour, cereal, soft drink and distillery workers of America (Local 239)* v. *Coca-Cola Ltd,* [1978] R.L. 391 (O.R.C.), a decision rendered on November 23, 1963, and then repeated in *Sicard Inc.*

c. *Syndicat national des employés de Sicard (CSN),* [1965] R.D.T. 353 (C.R.T.).

These assessment criteria are as follows:

* the community of interest;
* the history of labour relations in the company or sector;
* the will of the employees;
* the geographical or organisational criterion;
* the preservation of industrial peace;
  1. The relative weight of these criteria is determined on a case-by-case basis, but it should be noted that the Supreme Court held that the community of interest criterion is paramount in *U.E.S., Local 298* v. *Bibeault,* [1998] 2 S.C.R. 1048.
  2. Furthermore, in its analysis, the Board must also take into account the general objectives of the *Code*, which aim to promote the exercise of the right of association of employees with a view to negotiating a collective agreement.

5 *United Food and Commercial Workers, Local 501* v. *Interforest Ltd. (Plating)*, [1991] AZ-91144015 (T.C.).

6 *International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America*

*(Local 239)* v. *Coca-Cola Ltd.* 1978 R.L. 391 (a 1963 decision of the Labour Relations Board); *Syndicat national des employés de Sicard (CSN)* v. *Sheet Metal Workers' International Association*, 1965 R.D.T. 353, at 362-363.

7 *Syndicat des employées et employés professionnels-les et de bureau, section locale 575, SEPB CTC-FTQ* c. *Fédération des Caisses Desjardins du Québec*, 2017 QCTAT 3026, par. 77.

8 *Bakery, Confectionery, Tobacco and Grain Millers International Union Local 55* v. *Aliments Martel inc.* 2010 QCCRT 0333.

1. The Tribunal's role is circumscribed and marked out: it should not ask which of the two units is more appropriate, but simply whether the one proposed by the union is appropriate. Between two equally, but differently appropriate, units, the one submitted by the union must be chosen9.
2. In sum, in the open field, the bargaining unit sought must simply be appropriate to be a distinct group within the meaning of the Code, without being *the* "*most appropriate*"10 , even if it presents inconveniences for the employer or requires accommodations11 on its part.
3. An Employer challenging the appropriateness of a bargaining unit must demonstrate that it would be very difficult for the Employer to negotiate and implement a collective agreement for the proposed separate group12 :

[...]. [It is not the unit proposed by the employer that the Commissioner must decide. The initiative always remains with the union, which must indicate the unit it wishes to represent, and it is this unit that the Commissioner must declare appropriate or not. As has already been said on several occasions, the employer is tackling a false objective if it seeks to establish that the unit it proposes is appropriate. The fact that it is - and the Commissioner recognizes this in this case - does not prevent him from having to demonstrate that the unit proposed by the union does not cover a distinct group of employees and is therefore not appropriate for the purposes of the Code. In other words, the certification procedure does not involve a beauty, health or viability contest between two certification units proposed by the parties. It is sufficient that the unit proposed by the union is appropriate for it to be recognised as such, independently of any other unit that is equally or more appropriate.

[...]

[...]. [A union seeking to represent a distinct group of employees need not prove the appropriateness of such a unit, but the burden of proof is on the opposing party to prove that in that enterprise such a distinct group does not constitute an appropriate group, failing which the Commissioner can and must grant the application for certification.

[...]

[...] [I]t is up to the employer to explain why this distinct group cannot in any way be used as a basis for establishing a collective employment relationship, failing which the right to certification for this distinct group is assured.

9 *International Alliance of Theatrical Stage Employees, Image Technicians, Artists and Allied Trades of the United States, its Territories and Canada (IATSE Local 262)* v. *Aréna des Canadiens inc.* 2011 QCCRT 0103, para 63.

10 See in particular: *United Food and Commercial Workers, section*

*Charcuterie Tour Eiffel inc.* 2004 QCCRT 0060, par. 46; *Syndicat des Métallos, section locale 8922* v. *Services McKinnon inc.* 2009 QCCRT 0339, para. 66; *Syndicat des travailleuses et travailleurs du commerce - CSN* v. *Village Vacances Valcartier inc.* 2022 QCTAT 4119, para. 26.

11 *Teamsters Québec local 1999* v. *Promark-Télécon inc.* 2020 QCTAT 982, para. 120.

12 *Jay Norris Canada Inc.* supra note 4 at 8-10.

1. The case law is also consistent in stating that each case is a case by case basis. Thus, a given criterion may, in a particular case, have a preponderant effect while in another case it may be of lesser importance13. This weighting is a matter of discretion linked to the expertise of the Tribunal14 :

[34] It should be noted that in this case, the judge recalls the *broad discretion* of the Commissioner. It appears from this passage that the administrative authorities did not take into account *all* the criteria, but rather only those "*which they deemed appropriate in the circumstances...*". The Court considers that the exercise of the Commissioner's discretion includes the choice he may make as to the weight to be given to each of the criteria. With respect, the Court considers that it is not essential to analyze in detail the six *Sicard* criteria in order for the proposed unit to be considered appropriate. It is sufficient that these criteria have been considered by the Commissioner.

1. Finally, the Tribunal is one of the guardians of freedom of association and its protection15 . When it comes to accreditation, its jurisdiction is described as "*hyperspecialised* "16 , whereas it constitutes the "*hard core* "17.
2. Everything is now in place to answer the central questions that concern us.

THE UNIT OF NEGOTIATION UNIT WANTED BY THE ASSOCIATION APPROPRIATE?

## The application of the law in relation to evidence

The community of interest

1. The *Sicard18* case is the one that describes the elements of the

community of interest :

- similarity of work and functions;

- similarity in salary and remuneration;

13 *Syndicat des employées et employés professionnels-les et de bureau, section locale 575, SEPB CTC-FTQ*, supra, note 7, para. 79. See also: *United Food and Commercial Workers, Local 503* v. *Wal-Mart Canada*, 2004 QCCRT 0145, par. 9.

14 *Société Trader* v. *Commission des relations du travail*, 2010 QCCS 2593.

15 *Arcand* and *Workers* v. *United Food and Commercial Workers, Local 501*, 2018 QCTAT 4225, para 83.

16 *Syndicat des cols blancs de Gatineau inc.* v. *Regroupement des professionnels de la Ville de Gatineau*, 2013 QCCA 2037, para. 7.

17 *Service Employees' Union, Local 800* v. *Democratic Association of*

*Ressources à l'enfance du Québec (CSD) - Mauricie - Centre-du-Québec*, 2011 QCCA 2383, par. 52; cited with approval in *Syndicat des employées et employés professionnels-les et de bureau, section locale 574 (SEPB) CTC-FTQ* v. *Association syndicale des employés(es) de production et de services (ASEPS)*, 2017 QCCA 737, par. 108; application for leave to appeal dismissed by the Supreme Court of Canada on 8 March 2018.

18 *Syndicat national des employés de Sicard (CSN)*, supra, note 6.

- similarity of working conditions;

- similarity of qualifications;

- interdependence and interchangeability in functions;

- transferability and promotion of employees from one category to another.

1. In *Bibeault19* , the Supreme Court of Canada stated that

152. [...]. The important criteria for determining the appropriateness of the bargaining unit are well stated by Vice-Chairman Gold of the Quebec Labour Relations Board, later Chief Justice of the Superior Court, in *Coca-Cola Ltd.* supra, at pp. 409-410. The preeminent test is that of the community of interest of the employees in the proposed bargaining unit. This community of interest is to be assessed by reference to the similarity of the duties performed by the employees, the similarity of the wages and methods of remuneration applicable to the employees, the similarity of their skills and qualifications, the interdependence or interchangeability of their duties, and the transfer of employees from one class of employment to another.

[Our underlining]

1. The Superior Court20 reiterates this principle in the following terms:

[97] In the applicant's view, the fact that it is clear that the bargaining unit comprising the three types of representatives denotes a community of interest and is therefore an appropriate unit cannot be artificially split up into a unit comprising the three types of representatives. The court disagreed. The Commissioner was obliged to examine the notion of community of interest in the light of the unit proposed to him.

[Our underlining]

1. Recently, the Tribunal made the following comments21 :
2. Community of interest is, however, of particular importance in that collective bargaining, in its essence, is about bringing together employees who have common interests to serve the bargaining process. The grouping of interests is also a tool for preserving industrial peace in the company by avoiding the multiplication of bargaining tables.
3. Yann Bernard et al. in *Robert P. Gagnon, Le droit du travail au Québec*, 8th ed, Éditions Yvon Blais, 2022, at page 512, discuss the factors for assessing community of interest:

517 - Essential criterion - The existence of a community of interest between the employees of the group sought or to be determined has always appeared to be an essential condition for the recognition of the appropriate and homogeneous nature of a bargaining unit. This community of interest is assessed by taking into account, in particular, the nature of the functions performed by the employees, the interrelationship between these functions, the qualifications required, the structure of the labour relations and the

19 *U.E.S., Local 298* v. *Bibeault*, [1988] 2 SCR 1048.

20 *Trader Corporation*, supra, note 14.

21 *Syndicat des travailleuses et travailleurs du commerce - CSN*, supra, note 10.

In addition to the authority applied to employees, the sharing of the same working conditions, internal group cohesion, salaries and forms of remuneration, and staff mobility.

**There can be no recognition of a separate certifiable group without a community of interest among the employees in that group.** However, community of interest alone is not sufficient to qualify for certification of a separate group. The group must be appropriate for the purposes of collective bargaining practice, based on the other criteria for determining bargaining units.

[Emphasis and notes omitted in the original].

1. However, the following elements are demonstrated:

- There is no interchangeability or mobility between law professors and professors in other faculties;

- out of the entire faculty of the University, the *Provost* was only able to identify two cases, including that of Mr. Muniz Fraticelli who teaches both in the Department of Political Science of the Faculty of Arts and in the Faculty of Law. However, in exceptional cases, there may be

*"Joint appointments*;

- the Faculty of Law has its own teaching, research and administrative culture. On this point, the testimony of Professor Muniz-Fraticelli is relevant, as he works in two faculties, one of which is Law. He explains his findings on the specificity of the Faculty of Law:

* when he was hired, everything was handled with faculty representatives, he never spoke or met with the University *Provost* or his representatives;
* Unlike the Faculty of Arts, the length and number of credits vary widely and are determined by the Dean;
* teaching is more valued in law and it has to fulfil a profile in this respect, which is not the case in the other faculty;
* From this profile, the allocation of courses is done directly by the Dean. In the Faculty of Arts, colleagues share courses among themselves;
* In the Political Science Department, *course releases* are common. At the Faculty of Law, such a thing is only allowed in exceptional cases;
* His personal experience with working hours demonstrates that this is a matter for the Student Affairs Office of the Faculty of Law alone;
* For masters and doctoral degrees, thesis supervision agreements in the Faculty of Arts are made directly between students and professors. In law, this whole process is managed by the

This is a "*Graduates Studies*" project that takes care of assignments;

* On the structural aspects, the fact that the Faculty of Law does not have a department as in most faculties entails various peculiarities regarding the workload of the professors;
* On cultural aspects, funding and fundraising are much more institutionalised in the Faculty of Law and encouraged by the Dean. In the Faculty of Arts, it is more a matter of personal initiatives of the professors;
* he also observes a very different culture of involvement in the Faculty of Law

where teachers are involved in large numbers in the

*"Faculty Council*. In comparison, in the Faculty of Arts, he only attends meetings to ensure a quorum;

* Even when the *Provost*'s approval is required, e.g. when taking a sabbatical, he is expected to rely on the recommendations of the Faculty of Law.

- On the cultural aspect, Dean Leckey also testified on the specificity of the Faculty of Law, notably with regard to its own student admission process. He described this process as unique ("*that has no equivalent*") at the Employer, where professors are directly involved in recruitment by sitting on the admissions committee and receiving letters of recommendation from candidates. Moreover, the Faculty of Law has its own admissions office;

- Finally, in a document describing the faculty, Dean Leckey notes that it "*brings together in a complex workplace a range of employees with varying abilities and aspirations* ***and a particular geographic***". [Emphasis added.]

1. The element of staff mobility and interdependence of functions is clearly exceptional in the employer's case, whereas the case law rather requires consistency and regularity22.

22 *Teamsters Québec local 1999*, supra, note 11, para. 80, citing : *Hebdos Télémédia inc.* v.

*Syndicat des journalistes des Hebdos Télémédia*, [1992] AZ-92147114 (T.T.).

1. In this case, common sense23 dictates that the group of law professors in the Employer's law school have a community of interest. Moreover, although it is of the opinion that they are not "*accreditable*" within the meaning of the Code, the University nonetheless writes that the "*professors of the Faculty of Law possibly form a distinct group*". Such a statement is not insignificant.
2. Therefore, the Employer fails to convince the Tribunal that it is faced with an artificial division24 on the part of the Association for strategic purposes in order to improve its chances of success in obtaining representative status25.
3. Finally, the Employer's argument that law professors are as subject to various regulations26 as all other professors at the University is also not accepted.
4. Although they may be subject to certain regulations in the same way as other teachers, this does not prevent law teachers from having a different community of interest from other teachers.
5. The above is more than sufficient to demonstrate the presence of a

community of interest within the Association's target group.

The will of the employees

1. With respect to the test of the employees' wishes, the Employer argues that this is a

This is a "*criterion among others without predominant weight*".

1. He refers in particular to the following excerpt from a 1973 decision of the Labour Court concerning the *Syndicat des professeurs de la faculté de droit de l'Université de Montréal27* , to which we will return:

[...] The main argument of the appellant's counsel concerns the will of the employees. [...] The will of the employees should be considered as a predominant criterion.

The Tribunal does not agree with this claim in any way, for if the will of the

What about other criteria?

23 *Syndicat national des employés de Sicard (CSN)*, supra, note 6, at 12.

24 *Association of Research Employees (Lady Davis Institute for Medical Research)* v *Lady Davis Institute for Medical Research*, 2012 QCCRT 209, para 60.

25 *Syndicat des employés de magasin et de bureau de la Société des alcools du Québec* and *Société*

*québécoise du cannabis (SQDC)*, 2019 QCTAT 18, par. 45, citing : *Syndicat des travailleuses et travailleurs du garage A.J.M. (C.S.N.)* v. *Garage A.J.M. inc.* 1999] RJDT 1683 (T.C.).

26 In particular the *Regulations Relating to the Employment of Tenure Track and Tenured Academic Staff* and *Regulations Relating to the Employment of Academic Staff*.

27 *Syndicat des professeurs de la faculté de droit de l'Université de Montréal* v. *Université de Montréal*, [1973] T.T. 284, 285-286.

1. However, the Court of Appeal had the opportunity to recall the evolution of freedom of association resulting from the recent case law of the Supreme Court of Canada28 . Thus, the importance of the employees' will as a criterion is not in doubt.
2. However, this is not new. In fact, the 1973 excerpt pleaded by the employer was directly criticised in 1990 in the *Jay Norris case29 , the* landmark decision30 in the field of free-field certification as in this case:

Then, taking up each of SICARD's criteria, the appellant submitted that they all converged in terms of the homogeneity of the group modelled on the company's structure and that the various elements put in evidence formed a veritable "Berlin wall" against which the Commissioner could only really oppose the sole criterion of the employees' will, by wrongly making it a veritable "locomotive" criterion.

The appellant cited a number of judgments affirming the principle that this criterion is of relative importance, obliging us to focus on the examination of other, more objective criteria (SYNDICAT DES PROFESSIONNELS DES SERVICES AUX ÉTUDIANTS 1974

T.T. 213; SYNDICATE OF PROFESSORS OF THE LAW FACULTY OF

L'UNIVERSITÉ DE MONTRÉAL 1973 T.T. 284). For its part, the respondent has also submitted a number of judgments that make this criterion an extremely important element to be considered in an open field, if not the first to be considered (SEARS CANADA INC, 200-52-000041-85, September 26, 1985, Paul YERGEAU J.; PETER HALL SCHOOL 1981 S.T. 251).

The question of the weight to be given to this criterion has been the subject of so many judgements that I will not undertake the exercise of commenting on them.

For my part, I believe that **since the general objective of the Code is to encourage unionization**, while not depriving the employer of his right to operate his business efficiently and profitably, **one must be particularly sensitive to this criterion, especially in open field situations, when none of the other traditional elements are clearly and obviously in evidence. Even if the divide is not perfect, except for a meaningless division which on its face does not allow the objectives of collective bargaining to be achieved, it makes sense to focus on the willingness of a group of workers to want to operate together as a union**.

[...]

In short, what this file shows is that the elements are sometimes in opposite directions, so that **the Commissioner,** who, as we have seen, has balanced the whole by highlighting one aspect rather than another, **cannot be reproached for having emphasised this criterion of the employees' wishes, even if this clashes with the company's organisational structure**.

[Emphasis in original and our emphasis].

28 *Syndicat des employées et employés professionnels-les et de bureau, section locale 574 (SEPB) CTC-FTQ*, supra, note 17, paras. 110-112. The Court of Appeal refers primarily to the 2015 trilogy case, *Mounted Police Association of Ontario* v. *Canada (Attorney General)*, 2015 SCC 1.

29 *Jay Norris Canada Inc.* supra note 4 at 10-12 and 18.

30 *9149-4567 Québec inc (Villa Berthier)* v. *Tribunal administratif du travail*, 2020 QCCS 2262, par. 21.

1. In this case, the Court found that a group of employees had freely expressed their will

to unite and join together to negotiate their working conditions under the Code.

1. In addition to the representative character, the membership cards and the Association's resolution in support of its application for certification, the will of the employees is also defined as follows31 :

The will of the employees is that expressed and protected by the freedom of association, that is, the will to associate and unite with others and, as Justice Lesage so aptly put it, the choice to unite unionically "in a unit with or without the other workers of the same employer "32 in order to establish and modify work-related objectives33.

This willingness to form and join new associations and thus unite with or without the employer's other workers will therefore be taken into account as one of the criteria for analysing appropriate unity.

[...]

To conclude, beyond the simple percentage obtained in a representative character, the will of the employees, within the meaning of the *Labour Code*, is that linked to their exercise of the freedom of association, namely to form new associations, to join them, with or without the other employees of the employer [...].

1. The criterion of the employees' will is met here.

The history of labour relations in the company or sector

1. There is no history of a collective labour relationship between the parties within the meaning of the Code. In more than fifty years, there has been no application for certification involving them or the entire faculty.
2. However, there are 15 accreditations within the Employer. The Employer argues that most of these are for the University as a whole and that this should be the case for its professors. This would be clear from the questioning of the Director of Labour and Employee Relations.

31 Mathilde BARIL-JANNARD, *La liberté de choix, composante de la liberté d'association : la perspective québécoise et son régime général de rapports collectifs du travail*, Développements récents en droit du travail (2022), vol. 511, Barreau du Québec, p. 83 and 86.

32 Note 67 in the text: *International Association of Machinists and Construction Workers*

*l'aéroastronautique, Local 987, FTQ, CLC* v. *Syndicat des travailleurs de Vickers Canada*,

T.T. No. 500-000330-80, 11 September 1980, j. Lesage J. See also: *Unifor* v. *Rio Tinto Alcan inc.* 2018 QCTAT 5660, para. 60

33 Note 68 in the text: *Mounted Police Association of Ontario* v. *Canada (Attorney General)*, supra, note 28, para. 86.

1. However, this position of the Employer was quickly weakened. The Employer also has bargaining units that are focused on a single location and not the University as a whole.
2. These include accreditations covering only :

- the thermal power plant in downtown Montreal;

- the MacDonald campus thermal power plant;

- the trades in downtown Montreal;

- the MacDonald campus trades;

- the Computing Centre;

- the Printing Department;

- and the Department of Residences and *Faculty Club*.

1. As for the history of labour relations in the sector of activity, i.e., university teaching, it should be noted that there are accreditations for each faculty at the Université de Sherbrooke, i.e., those of the Association des professeures et professeurs de la Faculté de médecine de l'Université de Sherbrooke (APPFMUS), the Association des professeurs d'enseignement clinique de la Faculté de médecine de l'Université de Sherbrooke (APECFMUS), as well as the one covering the Faculté de génie de l'Université de Sherbrooke.
2. The latter is held by the Association des ingénieurs-professeurs en sciences appliquées, AIPSA, and covers engineer-professors and engineer lecturers. In addition, a collective agreement concluded and negotiated with the Université de Sherbrooke governs their working conditions since May 26, 2017.
3. With regard to this reality, the Tribunal notes the following elements of the testimony

of the President of AIPSA:

- Many elements are proposed and managed by the faculty in question and then submitted to the University for final approval, as in this case. These include the budget, curriculum, hiring, discipline and aggregation;

- There are also "*Cross Appointments*" between two or more faculties;

- AIPSA members are subject to a multitude of regulations, policies, guidelines, standards and procedures that apply equally to other teachers, as they do within the Employer.

1. This subjection to rules common to other professors has clearly not affected the possibility of accreditation for a single faculty at the Université de Sherbrooke.
2. This reality elsewhere in the academic community is an indication of viability that reinforces the Tribunal's view that such a distinct group can serve as a basis for establishing a collective working relationship.

The geographical and organisational criterion

1. In this respect, the *Entreprise H. Pépin34* is well known and unavoidable:

Indeed, certification by establishment is considered a natural unit, since the workplace, which serves as a gathering place and pivot around which all the employees' relations with each other and with management revolve, seals the community of interest between them. This is why, when in such a workplace, their willingness to want to operate as a union arises, there is reason to be particularly sensitive to this in the open field, since the objective of the Code is to promote unionisation.

1. In this case, the Faculty of Law - which, unlike the vast majority of faculties, does not have a department - occupies its own dedicated premises, namely the *Old Chancellor Day Hall* and *New Chancellor Day Hall*.
2. As for organisational aspects, the Employer argues that its structure is

It is "*extremely centralised*". Lengthy evidence is given on its "*Provostial*" model of governance. In doing so, he argues that the Tribunal should conclude that the Law School has little or no autonomy and that the group in question cannot have any distinctive character and thus be an appropriate unit.

1. The argument is not convincing, although the following appears from the facts presented:

- From the organisation chart of the faculty, it can be seen that it is an organisation in itself, to use the Association's expression. It has its own academic, administrative, human resources and communications staff. This staff is managed by an internal *Faculty Administrator* and various staff members report directly to this person;

- The faculty has its own conditions regarding salaries, working hours, opportunities for advancement, credits, supervision, teaching assistance, funding, grants and scholarships, and professional development. Much of this is done through the Dean and his

*"Associate Deans*" and "*Assistant Deans*";

34 *Entreprise H. Pépin (1991) inc.* v. *Union des employés du secteur industriel, section locale 791*, [1993] AZ-94147013 (T.T.). To the same effect: *Syndicat des travailleuses et travailleurs de l'Exode - CSN* v. *Maison de réhabilitation l'Exode inc.* 2005 QCCRT 0588.

- Dean Leckey explained in particular that he has the final word on assignments, administrative load, teaching load and reliefs (after consultation with the *Provost*). He also explained that the faculty has its own expectations and criteria for the accreditation of professors. Moreover, he confirmed that the *Provost* never meets the candidate and that he has never refused an application. The same is true for the granting of a research chair, where he is the one who recommends, without ever seeing it refused by the *Provost*;

- As for the negotiation of the salary at hiring, Dean Leckey has a margin agreed with the *Provost*, which is specific to the faculty. To exceed this margin, he must request the Provost's authorization. However, as far as salary increases are concerned, he alone decides within the parameters of the Employer, but according to his own criteria. He added that this process was specific to the faculty, in which the *Provost* was not involved;

- specifically on grant applications, they are only supervised at faculty level by the *Associate Dean - Research* who supports professors in their submission and leads the process of nominating colleagues for various awards and honours;

- for aspects requiring the *Provost*'s approval, there is no evidence that the Provost has ever refused a recommendation from the Dean;

- It prepares and manages its own budget, including the budget it generates by obtaining funding from external sources ("*External Funds"*) and awarding research contracts to third parties, and has its own bodies, committees, rules and practices, including under its "*Handbook of Academic Regulations, Resolutions and Policies*";

- it ensures its own institutional development through its own

This is a "*Career Development Office*" for the sole benefit of its students;

- It also has its own *Space Committee* which manages the buildings, office allocation, space use and renovation planning, and a *Graduate Office* which administers the Masters and PhD programmes;

- it has its own system for hiring *Group Assistants* to support the teachers;

- Finally, its decision-making body is the *Faculty Council* composed of law professors, students and administrative staff, to which all faculty committees report.

1. In addition, the Employer's articles of association expressly provide for the control exercised by the faculties:

"7.5 Each faculty shall, subject to the authority of Senate, control the courses of study and the academic work of the faculty, and provide rules governing the arrangement of its timetable and examinations and the conduct of its meetings.

1. As more concrete illustrations of the scope of this control, the Court of First Instance gives four examples:

- When major changes were made to its curriculum, changing the designation of its degree from LLB (Legum Baccalaureus) to JD (Juris Doctor), both *Provost* Manfredi and Dean Leckey indicated that this revision was the sole initiative of the Faculty of Law and that it carried out the redesign alone. The only involvement of the University was in the final approval, which was obtained;

- On the question of "*Joint Assignments*", the testimony of Professor Muniz-Fraticelli shows that there is no centralisation of their management, which remains at the faculty level alone without any coordination between the faculties concerned;

- During recent structural renovations to the Faculty of Law's website, she alone managed this project and contracted the design to an external firm;

- The Association also points out, and rightly so, that the annual agreements (2016 to 2020) between the *Provost* and the Faculty of Law show that the latter manages the vast majority of its living and working conditions and that the University acts as the final approval body and funder, as the reality of AIPSA at the University of Sherbrooke also demonstrates.

1. These examples are not exclusive to a highly centralised organisation. The above elements reveal a certain specificity of the Faculty of Law. It has a reality that appears unique35.
2. In any case, the case law is consistent in affirming that the unity of

negotiation does not have to follow the Employer's structures36 :

[48] Emphasizing the principle that the purpose of the Code is to promote unionization, Justice St-Arnaud of the Labour Court stated that unless the proposed unit is a senseless division, the criterion of the will of the employees must be prioritized in the open field, rejecting the idea that the unit must follow the structures of the enterprise.

[Our underlining and footnote omitted]

35 Since each case is a case in point, this finding applies only to the evidence administered in respect of this faculty alone. The Tribunal does not rule on the reality of the other faculties.

36 *Teamsters Québec, local 106* v. *Location d'outils Simplex, s.e.c.* 2016 QCTAT 1395. Appeal for judicial review dismissed, 2018 QCCS 898.

1. The geographical and organisational criterion in no way impedes the appropriateness of the bargaining unit sought.

Preserving industrial peace

1. Much of the Employer's argument is based on various decisions between 1971 and 1976 in which applications for faculty certification were rejected. As we shall see, the findings of the Labour Court are those of the time and developed in quite different contexts.
2. In this regard, the Employer refers in particular to the following passage from the 1973 decision in *Syndicat des professeurs de la faculté de droit de l'Université de Montréal37* , which was discussed above with respect to its criticized position on the lack of predominance of the test of the employees' will:

[...] The Tribunal fully agrees with the Commissioner-investigator on this point. It is important to avoid unnecessary multiplication of bargaining units, especially in a case such as this where the main difference between a professor in one faculty and another faculty is the subject matter taught and the personal manner in which the teaching is done. As the Tribunal indicated at the beginning of this judgment, the working conditions are the same for all the professors of the University, who must be integrated into a whole decided by the high authorities of the University.

1. However, this is not what the evidence in this case shows and there are many distinctions

The following distinctions must be made with regard to this judgment. These distinctions are as follows.

1. First, the Tribunal has already noted the weaknesses of the Employer's central claim that its organisational structure is highly centralised. It is therefore not here in the presence of an integration "*within a whole decided by the high authorities of the University*".
2. Second, as discussed above, there is a particular culture at the Employer's Faculty of Law. *Provost* sums up this when he states that each faculty "*has it's own reality"*. Coming from one of the University's most senior leaders, such a statement cannot be taken lightly. Moreover, it confirms the Tribunal's own findings.
3. Third, unlike other Quebec universities,38 the Employer is, fifty years later, in the unique situation where its professors are not unionized and the vast majority of its employees are.

37 *Syndicat des professeurs et professeures de l'Université de Montréal*, supra, note 27, at 288.

38 Bishop's University (unit accredited in 1992), Concordia University (unit accredited in 1981), Université du Québec (unit accredited in 1972 and 1973), Université Laval (unit accredited in 1984), Université de Montréal (unit accredited in 1975), Université de Sherbrooke (unit accredited in 1974)

1. However, at the risk of being repetitive, the particular case under study is in the free field and in

the absence of a competing application for accreditation.

1. Fourthly, the Labour Court bases its reasoning on the *University of Sherbrooke39* decision from earlier in the year, in which it sees a similarity of facts40. It should be distinguished from the present case since the analysis in that case takes into account the multiplicity of units requested at the same time41 :

In the present case, the multiplicity of units clearly arose because the commissaire-enquêteur was seized of several requests at the same time for people practising the same teaching profession for the same employers. The commissioner-investigator had to consider whether the unit requested was appropriate in all the circumstances of the case. His decision had to take into account the multiplicity of units with the same employer in order to determine, along with other factors, whether the unit sought was appropriate [...].

1. This is not the issue here, as there is no trade union competition in demand.
2. However, the latter decision recalls an important aspect of the analysis

applicable and should not be evaded. This reminder from 1973 is timeless42 :

The law and case law recognise the coexistence of several units within the same employer, but each case is a case-by-case one and it is in the light of the circumstances that it will be decided whether to recognise separate units.

1. Fifthly, the Labour Court made the following finding43 :

It should be noted here that at the Université de Montréal there are fourteen (14) faculties and two (2) schools equivalent to faculties. According to the appellant's claim, there would therefore be a profusion of unions for professors in addition to the unions that already exist for other groups, and Mr. Archambault, the Vice-Rector, clearly mentioned in his testimony that it would be almost impossible to maintain industrial peace and to have similar conditions in the various faculties if there were separate certifications.

[Our underlining]

1. In the present case, the Tribunal simply does not have this demonstration either on

impossibility or near-impossibility nor on the need for similar conditions.

39 *Syndicat des professeurs de la faculté d'administration de l'Université de Sherbrooke* v. *Université de Sherbrooke*, [1973] T.T. 217.

40 *Syndicat des professeurs et professeures de l'Université de Montréal*, supra, note 27, at 285.

41 *Syndicat des professeurs de la faculté d'administration de l'Université de Sherbrooke*, supra, note 39, at 221.

42 *Idem.*

43 *Syndicat des professeurs et professeures de l'Université de Montréal*, supra, note 27, at 288.

1. Moreover, it should be noted that the Director of Labour and Employee Relations testified that, with 15 certifications, the Employer has grouped negotiating tables to facilitate the exercise of these.
2. Significantly, the Employer clearly knows how to create processes to mitigate the impact of multiplicity, and nothing has been said about not being able to do the same with respect to the unity sought here.
3. Moreover, the Employer cites the 1971 decision of *Association des ingénieurs, professeurs au département d'ingénierie, Université du Québec à Trois-Rivières44* , in which the real debate was also that of competition between two units sought by two distinct associations, one quasi-general (the University) and the other specific (the engineering department). Again, this is not the issue in this case.
4. The Employer also refers to the 1971 *Laval University case45 .* However, the evidence referred to the same framework for the entire faculty and uniform working conditions. This is not the case here.
5. It should also be noted that the Employer did not make any attempt to show that "*the main difference between a professor of one faculty and a professor of another faculty consists in the subject matter that is taught and the personal way of doing the teaching*", which was present before the Labour Court.
6. Five decades later, it is an understatement to say that the

The academic environment has evolved and become more complex.

1. Ultimately, the Employer refers to a possible and eventual "*undue balkanization of units for the purpose of negotiating a collective agreement*", but does not identify any compelling evidence of a real threat to industrial peace. Such arguments are not new, and they suffer a uniform fate in the case law, while they are a heavy burden on the Employer.
2. Very recently, the Superior Court made a similar finding46 :
3. Thus, raising conflicts resulting from possible bargaining units is

hypothetical and cannot be retained.

44 *Association des ingénieurs, professeurs au département d'ingénierie, Université du Québec à Trois-Rivières* v. *Association des professeurs de l'Université du Québec à Trois-Rivières*, [1971] T.T. 287, at 290.

45 *Université Laval* v. *Association des ingénieurs, professeurs de la faculté des sciences de*

*Université Laval*, [1971] T.T. 281, 286.

46 *9149-4567 Québec inc (Villa Berthier)*, supra, note 30.

1. Whether this reasoning is based on an absurd premise remains to be seen, as the ALJ places the burden of proof on the employer to show that "it would be impossible to negotiate a collective agreement.
2. Without using the word impossible, it is clear that the decisions of the courts dealing with certification applications place a heavy burden on the employer. The Superior Court explained in *Trader Corporation* that the industrial peace test should not be equated with discomfort and inconvenience. More is needed.
3. This is in line with the reasoning of some landmark judgments handed down and applied by the administrative courts:
   * *Sicard*, quoted by the Court of Appeal in *Renaud Bray*: negotiation must not be made "practically impossible";
   * *Jay Norris*: unless there is a "meaningless carve-up that on its face does not suggest that the objectives of collective bargaining can be achieved", the will of a group of workers will be preferred;
   * *Canadians Arena Inc*: "the evidence must then convince that the requested unit is not viable or makes no sense, so that industrial peace is threatened".

[Notes omitted and emphasis added by the Superior Court]

1. The Employer must clearly establish that the industrial peace is likely to be compromised and threatened. However, it offers only hypothetical and premature apprehensions that the Tribunal cannot accept.47

## The conclusion on the application of the criteria to the bargaining unit sought

1. The initiative to propose a bargaining unit lies with the Association. It need only be appropriate to be recognized, regardless of any other unit that is equally or better48 , such as the one suggested by the Employer in this case:

[...] [T]he Commissioner did not, however, have to contrast this comprehensive and appropriate unity with the more limited unity sought by the Union, since the only question he had to answer was whether the unity sought was appropriate.49

1. In short, the Tribunal did not say that the unit proposed by the Employer was not appropriate. Rather, it found that the Association's proposal was appropriate, since all the criteria analyzed militate in favour of the appropriateness of the bargaining unit sought for the group of employees concerned.

47 *Société Trader* v. *Commission des relations du travail*, supra, note 14, para. 95.

48 *United Steelworkers of America, Local 9414c* . *EmballagePerformant Inc.* 2003 QCCRT 0584, para. 42.

49 *Entreprise H. Pépin (1991) Inc.* supra, note 34; *Société Trader*, supra, note 14, paras. 108 and 109.

1. The Employer therefore fails to convince the Tribunal that the bargaining unit sought by the Association is not viable or that it does not make sense, so that the industrial peace is threatened.50
2. Ultimately, the Tribunal did not have the necessary demonstration that this unit cannot in any way serve as a basis for the establishment of collective employment relationships51.
3. Here, a group of employees of the Employer have clearly expressed their willingness to act together from a trade union point of view within the framework of a collective labour relations regime.
4. In the absence of a demonstration that the unit they wish to form together is not viable, the employer's organisational structure cannot be an obstacle to this clear expression52.
5. Based on all of the above, the Tribunal finds that there is a distinct group constituting an appropriate bargaining unit for the purposes of the Code.

DOES THE ASSOCIATION HAVE THE REPRESENTATIVE CHARACTER TO ENABLE THE

COURT TO ACCREDIT IT?

1. The examination of the accreditation file indicates that the requirements of Chapter II of the Code are met and that the Association has the required representative character.
2. The wording of the unit sought refers both to the "*salaried*" status of teachers and to the "*regime provided for in the Quebec Labour Code*". This is self-evident in both cases. It is therefore necessary to adapt this wording and to remove these references.
3. Finally, after receiving additional submissions from both sides, the Tribunal found that the bargaining unit sought was the law professors, regardless of where they worked for the Employer. Their duties are carried out at various addresses on Peel Street in Montréal, given the configuration of the Faculty of Law.
4. This aspect is taken into account in the wording of the accreditation issued in order to

to ensure a sound application of the Code.

50 *Canadian Union of Public Employees, Local 4533* v. *Publications métropolitaines inc.* 2003 QCCRT 0148, para. 35.

51 *Jay Norris Canada Inc.* supra, note 4, at 10.

52 *Unifor* and *Hospitalité RD (Aéroport) inc. (Crowne Plaza Aéroport Montréal Hotel)*, 2019 QCTAT 5038, para. 52; *Teamsters Québec local 1999*, supra, note 11, para. 121.

# ON THESE GROUNDS, THE ADMINISTRATIVE LABOUR COURT :

**ACCREDITED** the **Association of McGill Professors of Law (AMPL) / Association mcgillienne des professeurs.e.s de droit (AMPD)** to represent :

**"All full-time professors at McGill University's Faculty of Law.**

From : **McGill University - Faculty of Law**

3644 Peel Street

Montreal, Quebec H3A 1W9

Targeted institutions:

All institutions.

Accreditation : AC-3000-1683



Jean-François Séguin

Mr. Sibel Ataogul

MELANÇON MARCEAU GRENIER COHEN S.E.N.C.

For the plaintiff

Mr. Corrado De Stefano

BORDEN LADNER GERVAIS LLP

For the defendant

Date reserved : 31 August 2022

/nk