

CHAPTER XI

Business or Workplace Closure in Quebec: Is the Employer “Socially Responsible”? **Fermeture d’entreprise ou d’établissement au Québec : l’employeur est-il socialement responsable ?**

Dominic ROUX and Pierre VERGE¹

ABSTRACT

On 29 April 2005, Wal-Mart announced that it was closing its Jonquière store in Quebec, causing many employees to lose their jobs immediately. This closure provoked a general outcry in Quebec, because the workers had been unionized since August 2004 and were attempting to conclude a first collective agreement. Wal-Mart argued that the closure was necessary because the store was “unprofitable” – which no one believed! On November 2009, the Supreme Court of Canada ruled in favour of Wal-Mart, stating that the union in this case had not taken the right action under Quebec law! This legal saga raises important questions regarding the issue of corporate social responsibility in Canada. First, we will examine the foundations and limitations of the right of any employer to close its business or one of its workplaces, and, second, we will analyze the limitations brought about to the employer prerogative by freedom of association.

KEYWORDS

Close a Workplace, Employer, Prerogative, *Canadian Charter of Rights and Freedoms*, *Quebec Charter of Human Rights and Freedoms*, Code civil of Quebec, Limitations, Law, Collective agreement, Freedom of association

RÉSUMÉ

Le 29 avril 2005, Wal-Mart a annoncé la fermeture de son établissement de Jonquière, ville située au Québec, conduisant au licenciement de plusieurs dizaines de travailleurs. Cette fermeture souleva un tollé, puisque depuis plusieurs mois, les travailleurs étaient représentés par un syndicat et tentaient de conclure leur première convention collective. Wal-Mart alléguait que cette fermeture était due au fait que le magasin n’était pas « rentable », ce que personne ne croyait ! En novembre 2009, la Cour suprême du Canada a donné gain de cause à Wal-Mart, jugeant que le syndicat n’avait pas entrepris le bon recours en vertu de la loi québécoise ! Cette saga judiciaire soulève d’importantes questions en lien avec la responsabilité sociale de l’entreprise (RSE) au Canada. Cet article examinera d’abord les fondements et les limites du droit de tout employeur de fermer son entreprise ou l’un de ses établissements, pour ensuite aborder la confrontation de ce droit à la liberté syndicale.

MOTS-CLÉS

Fermeture d’une entreprise, Employeur, Prérogative, Charte canadienne des droits et libertés, Charte québécoise des droits et libertés de la personne, Code civil du Québec, Limitations, Protection de la loi, Accords collectifs, Liberté d’association

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¹ The authors thank Valérie Gareau, undergraduate student in law at Laval University, for her valuable contribution to case law research.

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Section I. Introduction

On 29 April 2005, the Wal-Mart Canada Corporation announced that it was closing its Jonquière store in the Saguenay – Lac St-Jean region of Quebec. This decision was to take effect the same day, causing many employees to lose their jobs immediately. Does such news really merit attention? Business or workplace closures or mass layoffs following company reorganizations, restructuring, mergers, relocations, and so on appear in the headlines every day. Nevertheless, this particular store closure provoked a general outcry in Quebec among industrial relations experts, public opinion leaders and citizens. Why? Because the workers had been unionized since August 2004 and were attempting to conclude a first collective agreement with Wal-Mart. Wal-Mart argued that the closure was necessary because the store was “unprofitable” – which no one in Quebec believed! Moreover, it was well known (Wal-Mart even asserts almost this publicly) that the corporation’s philosophy, based on low prices, was “hardly compatible” with the presence of unions in the workplace. It did not require a great leap, therefore, to conclude that the corporation was “anti-union”...

Be that as it may, it is important to note that in the industrial relations system in Quebec, apart from the public service, public sector and construction industry, collective bargaining is decentralized, taking place at the level of the firm (rather than the industry sector). Multi-employer bargaining, which is not common under Quebec law, is regulated to some degree by a legal framework;² however, it remains extremely rare. Thus, when a union wins the support of the majority of a group of employees working for the same employer, called the “bargaining unit”, it can be “certified” by the Quebec Labour Relations Board (CRT), which grants it a monopoly over the entire realm of collective representation and bargaining. The said employer and the certified union are then required to negotiate a collective agreement “diligently and in good faith”, and this agreement will apply to and will be binding upon all the employees in this unit (Morin, Brière, Roux and Villaggi, 2010, p. 933 ff.; Verge, Trudeau and Vallée, 2006, p. 141 ff.). This is what the Wal-Mart management and the newly certified union of the employees at the Jonquière store had attempted to do, having held nine bargaining sessions between October 2004 and February 2005. However, perceiving that it would be virtually impossible to conclude an agreement, the union asked the Quebec Minister of Labour, in accordance with the Labour Code, to appoint an arbitrator, who would have the power to impose the content of the first collective agreement. This request was accepted by the Minister on 9 February 2005. However, on the same day, Wal-Mart announced that the Jonquière store would be permanently closing its doors on 6 May 2005, a date which was later moved ahead by one week.

² *Labour Code*, R.S.Q., c. C-27 (hereinafter: “L.C.”), s. 68; *Canada Labour Code*, R.S.C., 1985, c. L-2 (hereinafter: “C.L.C.”), ss. 33-34. This type of bargaining is notably found in professional sports. See Fournier and Roux, 2009.

In response, the union and the dismissed employees brought several legal actions against Wal-Mart, arguing that the closing of the Jonquière store was motivated by anti-union rather than business considerations. One of the two main actions taken was the filing of a complaint under Section 15 of the L.C., in which the employees claimed to have been illegally dismissed for exercising a legally recognized right, that is, their right to obtain union certification and negotiate a collective agreement. It must be said that the outcome of this legal action appeared very uncertain from the outset. Indeed, the CRT (and the tribunals who had, before 2002, jurisdiction over this matter) had long and unanimously applied the following reasoning drawn from a 1981 decision by the now-defunct Labour Court:

“In our free enterprise system, there is no legislation to oblige an employer to remain in business and to regulate his subjective reasons in this respect... If an employer, for whatever reason, decides as a result to actually close up shop, the dismissals which follow are the result of ceasing operations, which is a valid economic reason not to hire personnel, even if the cessation is based on socially reprehensible considerations. What is prohibited is to dismiss employees engaged in union activities, not to definitively close a business because one does not want to deal with a union or because a union cannot be broken, even if the secondary effect of this is employee dismissal.”³

Could it not be said that this reasoning, of which Wal-Mart was keenly aware, is unacceptable given that it has the effect of virtually depriving the employees of any meaningful remedy in such circumstances? Nevertheless, in this first Wal-Mart case, it was on the basis of this reasoning that the CRT originally rejected the Jonquière store workers’ complaint, a decision that was later upheld by the Superior Court of Québec and the Court of Appeal of Québec. Moreover, on 27 November 2009, in a divided decision (6-3), the Supreme Court of Canada ruled in favour of Wal-Mart, stating that the union and the workers in this case had not taken the right action! At the same time, however, the Court qualified the approach that had been advocated by the tribunals since 1981, ruling that closing a business or workplace, while remaining a legitimate prerogative for any employer,⁴ nevertheless does not “[...] immuniz[e] it from any financial consequences for associated unfair labour practices”; and that the closure itself can constitute “[...] an unfair labour practice aimed at hindering the union or the employees from exercising rights under the

³ Comments by Justice Lesage, originally included in his ruling on *City Buick Pontiac (Mtl) Inc. v. Roy*, [1981] T.T. 22, p. 26 [our translation].

⁴ *Plourde v. Wal-Mart Canada Corp.*, [2009] 3 S.C.R. 465 (hereinafter: “*Wal-Mart I*”), para. 54; *Desbiens v. Wal-Mart Canada Corp.*, [2009] 3 S.C.R. 540.

Code”.⁵ In fact, the recourse the employees and their union had was therefore provided for in Sections 12 to 14 of the L.C., provisions which prohibit “unfair labour practices”.⁶ We will come back to this later.

However, the important point here is that the Supreme Court of Canada confirmed that in this case of a workplace closure based on illegal motives or even “socially reprehensible considerations” (read: “anti-union reasons”), the employer is “socially responsible” and must compensate the terminated workers as provided for in the law!

The other main action was a grievance submitted in March 2005 by the union alleging that the collective dismissal constituted a violation of s. 59 the L. C. This Section provided that “[f]rom the filing of a petition for certification and until the right to lock out or to strike is exercised or an arbitration award is handed down, no employer may change the conditions of employment of his employees without the written consent of each petitioning association and, where such is the case, certified association”. By “freezing” conditions of employment, the law seeks to “facilitate certification and ensure that in negotiating the collective agreement the parties bargain in good faith”⁷. On June 27, 2014, the Supreme Court of Canada, in a divided decision (5-2), confirmed the arbitrator’s award which initially gave reason to the union. The majority of the Court wrote:

*“Although s. 59 does not in fact deprive the employer of this power to go out of business either in part or completely, and by extension to resiliate the contracts of employment of some or all of its employees, the section does require that it exercise the power in a manner consistent with its normal management practices. [...] As I mentioned above, the necessary principal effect of the section is to “freeze” the employer’s business environment as it existed at the time the union arrived, which includes how the employer exercised its management power”*⁸.

In fact, the Court judged that the arbitrator was right when concluding that the closure of the Jonquière store and the consecutive dismissals were “not consistent with the employer’s normal management practices”⁹; thus, this decision was a unilateral change in conditions of employment prohibited under s. 59 of the L.C. The arbitrator will now have to determine the appropriate remedy for these 200 employees dismissed nine years ago! It was a huge victory for these employees and their union.

⁵ *Wal-Mart I*, paras. 8, 9, 51 and 54.

⁶ *Id.*

⁷ *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45 (hereinafter: *Wal-Mart II*), para. 34-35.

⁸ *Id.*, para. 80.

⁹ *Id.*, para. 82-83.

Ultimately, the legal saga surrounding the closing of the Jonquière Wal-Mart store raises important questions regarding the issue of corporate social responsibility in Canada. For the purposes of this paper, we will limit our focus, first, to a general examination of the foundations and limitations of the legally recognized right of any employer doing business in Quebec to close its business or one of its workplaces (Section II), and second, more particularly, to an analysis of the scope of the freedom of association in the face of this employer prerogative (Section III).

It might be helpful to preface this discussion by specifying that Canada is a federal state, whereby the jurisdiction to legislate in the area of labour is shared between the federal Parliament and the ten Canadian provinces. That being said, questions relating to working conditions, in principle, come under the legislative jurisdiction of the provinces, which have the mandate to regulate “*property and civil rights in the province*” or “*matters of a merely local or private nature in the province*”.¹⁰ Federal jurisdiction in this matter includes the federal public service and working conditions in businesses connected to its areas of jurisdiction such as banks, radio and television broadcasting stations, aeronautics, and road, railway and maritime transport (going beyond provincial boundaries). It is estimated that slightly less than 10% of the labour force in Canada works for an employer under federal jurisdiction.

Section II. The right to close a business or workplace: the prerogative of any employer, inherent in the capitalist system

The pre-eminence of the freedom to engage in business as a guiding principle in any capitalist society cannot be denied. In the Western world, its legal origins date back more than two centuries, as do those of its twin, the “freedom to work”.¹¹ Together, these two freedoms signify the right of any person to pursue any livelihood or a vocation, either as an “entrepreneur”, through a corporation or individually, or as a “salaried worker” or “employee”. This therefore means doing business or “operating a business” – and by extension, closing this business – or joining the “labour market” by offering one’s services to the employer of one’s choice, who is then free to hire one or not (Collin *et al.*, 1980, p. 178 ff.).

In Quebec, the freedom to engage in business is a specific facet of the general legally recognized freedom

¹⁰ *The Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.), ss. 92 (13) and (16).

¹¹ It should be noted that, in France, the Law of March 2-17, 1791 put an end to the guilds and craft corporations’ tutelage over labour, which had been a characteristic of the Ancien régime: “*Every person is free to engage in any business or to practise any activity, craft or trade that he considers appropriate.*” [our translation] The *Déclaration de la Constitution française du 24 juin 1793* later makes a specific reference to this: “*No kind of work, crop, or commerce may be forbidden to the industry of citizens.*” (Article 17) See Veneziani, 1986, p. 34.

of all persons, since it is not subject to any criminal prohibition. This freedom – historically referred to as the “freedom of commerce” – is not specifically recognized in private law in Quebec, but nonetheless represents a fundamental “principle” of the legal system.¹² Economic law or “business law” provides for some particular protections of the freedom to engage in business so as to ensure free competition between economic agents (*Competition Act*, R.S.C., 1985, c. C-34), but also in order to allow the free exercise of this freedom while imposing on it a very specific legal framework.¹³

Labour law addresses the freedom to engage in business from several different angles, starting with the employer’s freedom to hire, which is exercised together with the employee’s freedom to work (Roux, 2005, p. 198 ff.). These two freedoms are based on the rules applicable to a “contract of employment”, as stipulated in the *Civil Code of Québec* (C.C.Q., ss. 2085 to 2097). The employer is free to enter into such a contract with the employee of its choice and vice versa.¹⁴ The freedom to engage in business is also expressed through the different forms that hiring can take. Indeed, the Quebec legislator favours flexibility in work organization, such that the employer is totally free to use or decline to use a range of employment modes, which depart from the reference model of full-time employment for an indeterminate term, and has no obligation to justify this decision. Thus, an employer can choose to resort to a contract for services with a “self-employed worker” (C.C.Q., s. 2098 ff.), a casual work contract which is valid for a fixed term (C.C.Q., s. 2086), a part-time work contract, etc. Consequently, the employer enjoys almost complete freedom when it comes to hiring, except for considerations relating to constitutional rights and freedoms, such as the prohibition against discrimination in hiring¹⁵, or those relating to public order, such as the requirements related to the minimum legal working age, or constraints related to qualifications or occupational skills. The freedom to engage in business can also be taken advantage of by an employee who has left his job and starts a business, sometimes even competing with his former employer. The latter, certainly, must be able to require adequate protection from actions that may be taken by third parties – or even its own current or former employees – when such actions hinder its freedom to operate the business or endanger its very legitimate interests. However, as stipulated in Section 2088 of the C.C.Q., the obligation to act faithfully and honestly and to respect confidentiality, which applies during a reasonable time after cessation of an employment contract, is reduced to its simplest form of expression, since a

¹² On the notion of “legal principle”, see Roux, 2005, p. 31-72.

¹³ *Canada Business Corporations Act*, R.S.C., 1985, c. C-44; *Companies Act*, R.S.Q., c. C-38; *Civil Code of Québec*, S.Q. 1991, c. 64 (hereinafter: “C.C.Q.”), ss. 2186 to 2266 (general partnerships, undeclared partnerships, or limited partnerships); C.C.Q., ss. 2267-2279 (associations).

¹⁴ Section 2085 of the C.C.Q. stipulates this explicitly by defining a contract of employment as “[...] a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer”.

¹⁵ *Charter of human rights and freedoms*, R.S.Q., c. C-12 (hereinafter: “Quebec Charter”), ss. 10, 16 to 20; *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (hereinafter: “C.H.R.A.”), ss. 3 and 7.

former employee can start his own competing business or go on to work for a competitor and actively solicit the business of the former employer's clients, as long as no illegal acts are committed, such as the appropriation of property or use of confidential information belonging to the former employer.¹⁶ Similarly, Section 2089 of the C.C.Q. legitimizes, under certain conditions, the common practice by which employers require from their employees an explicit commitment not to compete with them should they leave the business. However, since this practice constitutes an infringement of the freedom to engage in business and, more particularly, the freedom to work and the freedom of commerce,¹⁷ this “non-compete agreement” must be limited in time, geographical ambit and type of employment, and the restrictions must be strictly “[...] *necessary for the protection of the legitimate interests of the employer*” (C.C.Q., s. 2089).¹⁸

However, unlike the legally recognized freedom of association of workers, when it comes to a corporation's freedom to engage in business, constitutional protection from the state or public authorities cannot be invoked, in particular, the protection stemming from the affirmation, in Section 7 of the *Canadian Charter of Rights and Freedoms*,¹⁹ of the right of everyone “to life, liberty and security of the person [...]”. In fact, under Section 7, a “*corporation's economic rights find no constitutional protection.*”²⁰ Even in the case of a natural person, such protection only extends to “*basic choices going to the core of what it means to enjoy individual dignity and independence*”.²¹ Consequently, “[t]he ability to generate business revenue by one's chosen means is not a right that is protected under section 7 of the Charter.”²² Like the Canadian Charter, Section 1 of the *Québec Charter of Human Rights and Freedoms*, which applies to both government action and private dealings and is almost constitutional in nature,²³

¹⁶ 9129-3845 *Québec inc. c. Dion*, 2012 QCCA 1276 ; *Gestion Marie-Lou (St-Marc) inc. c. Lapierre*, D.T.E. 2003T-864 (C.A.). That said, the tribunals have long pointed out the importance of safeguarding the freedom to engage in business, the “freedom of commerce” and the freedom to work: in concrete terms, this consists in allowing any person to practise an occupation or any work as he sees fit, including operating a business even if this potentially means competing with his former employer: *Herbert Morris Ltd v. Saxelby*, [1916] 1 AC 688, p. 714; *Canadian Aero Service Ltd v. O'Malley*, [1974] S.C.R. 592.

¹⁷ *Cameron v. Canadian Factors Corp. Ltd.*, [1971] S.C.R. 148 (Justices Pigeon (p. 155) and Laskin (p. 162-163)).

¹⁸ This agreement, which must be put down in writing and in express terms, is rendered invalid if the employer dismisses the employee without a serious reason or gives the employee such a reason to leave his job: C.C.Q. s. 2095.

¹⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11], hereinafter referred to as the “Canadian Charter”. It should be noted that the Canadian Charter enjoys pre-eminent status in Canada. It applies to government action, that is, to dealings between the state and individuals, and allows the courts in Canada to nullify any legal rule that impairs in an unjustified and disproportionate way the rights and freedoms set out in it (ss. 1 and 32).

²⁰ *Irwin Toy Ltd v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, p. 1004 (Justices Dickson, Lamer and Wilson).

²¹ *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, p. 893 (Justice La Forest).

²² *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6, para. 46 (Justice Major). This case involved the operation of video lottery machines.

²³ Given that the courts can nullify any legal provision that derogates from it (s. 52).

ensures every human being the “*right to life, and to personal security, inviolability and freedom*”. The freedom to close a business is the reverse side of the freedom to engage in business in the first place. It shares with it, then, this simple affirmation as a general, but not pre-eminent, legal principle.

Furthermore, the C.C.Q. stipulates that ownership of property gives the owner the right “*to use, enjoy and dispose of [it] fully and freely, subject to the limits and conditions for doing so determined by law*” (C.C.Q., s. 947). Here again, however, no particular constitutional protection is attached to the right of ownership.²⁴ The Quebec *Charter of Human Rights and Freedoms* nevertheless ensures the right of every person to “*the peaceful enjoyment and free disposition of his property, except to the extent provided by law*”.²⁵ This right is thus proclaimed in the context of fundamental human rights. Beyond this essential connection to the person, then, the subjective right of ownership no longer has the pre-eminence that stems from this connection. It therefore becomes just a simple right. This is certainly the case for the right of ownership of a business owned by a corporation. Nevertheless, it must be acknowledged that the rules of labour law in Quebec convey a firm intent to preserve the right of ownership for the benefit of every employer, which includes, as seen above, the right to close the business or any part of it. The right of ownership, like the freedom to engage in business, must be ensured; the capitalist system requires it. The various types of property, both tangible and intangible, which make up the business, but also the business itself “as a going concern”, can all be subject to this right. Several legislative provisions, on the other hand, ensure that the contract of employment or the collective agreement is maintained if the business is sold or if ownership is transferred, either totally or in part.²⁶ At the same time, however, in stipulating these precisions, these rules also implicitly recognize the right of any employer to totally or partially sell or transfer ownership of the business, which can include shutting down part of its operations by entrusting them to subcontractors! Ownership of the business thus carries with it the right to close up shop, completely or partially, even though, in return, as will be seen below, the employer is bound by its legal and contractual obligations applicable in the context of a business closure. Nevertheless, these obligations, while softening the direct consequences of the employer’s decision to close the business – mainly the loss of jobs –, in no way call into question this employer prerogative.

To sum up, labour law in Quebec indisputably recognizes the right of an employer to close a business and its corollary, that of not being obliged to reopen it. Both the majority and minority judges in the Wal-Mart decision of November 2009 were in agreement on this point: “[...] *no legislation obliges an employer to*

²⁴ *Wallot c. Québec (Ville de)*, 2010 QCCS 1370; appeal dismissed 2011 QCCA 1165.

²⁵ *Quebec Charter*, s. 6.

²⁶ L.C., s. 45; *An Act respecting labour standards R.S.Q., c. N-1.1* (hereinafter: “A.L.S.”), ss. 96 and 97; C.L.C., ss. 44, 47 and 189.

remain in business”;²⁷ “[...] the issue is not whether an employer has the right to close a business, a proposition no one challenged before us, nor is it whether an employer can be required to open a business.”²⁸ That said, however, the legal system nevertheless imposes intrinsic and extrinsic limits on this fundamental right. These will be examined in the section that follows.

Section III. Limitations of the right to close a business or workplace and the employer’s responsibilities with regard to laid-off workers

We will first consider the general limitations of the employer’s right to close a business, that is, separately from its confrontation with the freedom of association (1). This confrontation will be addressed thereafter (2).

1. Limitations imposed by the law and the collective agreement

The laws applicable in Quebec, i.e. Quebec law and federal law, do not limit the employer’s decision to close a business, in and of itself. Under both legal systems, the law only intervenes with regard to the consequences of this decision, that is, the termination of employment that will ensue for the employees concerned. First, there is the question, depending on the case, of the employees’ entitlement to the complete fulfilment of any fixed term employment contracts that may be involved,²⁹ or, in the case of contracts with an indeterminate term, the eligibility to receive prior notice of termination or compensation, in accordance with the combined requirements of both C.C.Q. (s. 2091) and specific legislation (A.L.S., s. 82 ff.; C.L.C., ss. 235 to 237). In the latter case, the amount of notice or compensation required varies according to the length of service of the employee.

However, the total or even partial closure of a business usually leads to a collective dismissal of employees. In this case, the entitlement to prior notice or the corresponding compensation, and their extent, depend on the number of employees affected by the dismissal. Both jurisdictions intervene fairly similarly in this regard. However, in dealing with collective dismissal, it should be noted that neither Quebec law (A.L.S., ss. 84.0.1 to 84.0.15: these provisions were adopted in 2002), nor federal law, which is older and more interventionist, challenges the validity of the decision behind the collective dismissal.

²⁷ *Wal-Mart* decision, para. 51.

²⁸ *Id.*, para. 78.

²⁹ An employee whose fixed term contract of employment is terminated for no serious reason before it expires has the right to claim all remaining compensation in lieu of prior notice of termination. (C.C.Q. s. 2092): *Industries Flexart ltée c. Baril*, [2003] R.J.D.T. 39 (C.A.).

Indeed, the law merely prescribes a number of procedural rules aimed at lessening the negative impact of the closure on the employees affected. Notice of collective dismissal must first be given to the Minister with jurisdiction over this matter. The length of the notice, under Quebec law, increases in stages in accordance with the number of employees affected by the dismissal (A.L.S., s. 84.0.4).³⁰ This public notice of the dismissal must be followed by the forming of a joint committee of employer representatives and employee representatives, whether or not the employees are represented by a union (A.L.S., s. 84.0.9; C.L.C., s. 214). Under Quebec law, the goal of this committee is to “[...] *provide the employees affected by the collective dismissal with any form of assistance agreed on by the parties to minimize the impact of the dismissal and facilitate the maintenance or re-entry on the labour market of those employees*” (when it is not a case of temporary mass layoffs).³¹

This statutory system regarding collective dismissal resulting from a business or workplace closure may seem a little weak in comparison to the systems that prevail in several European countries, such as France, since, for example, it includes no legal obligation for employers of 50 or more employees to produce a “job-saving plan” aimed at avoiding dismissals or at least reducing their numbers (*Code du travail français* (French Labour Code), Article L. 1233-61 ff.). However, the rules that apply in Quebec must nevertheless be taken together with those provided for in many collective agreements, which can prove to be more restrictive for the employer. It should be noted that, in Quebec, approximately 40% of some 4 million workers are represented by a certified union, that is, 25% of workers in the private sector and 82% of those who work for the public sector. This means that the working conditions of this portion of the labour force are bound to be regulated by a collective agreement (*Ministère du Travail*(a), 2014, pp. 4-9). Moreover, collective agreements usually deal, either explicitly or implicitly, with the employer’s right to close the business or one of its workplaces. For example, many collective agreements deal with the individual or collective dismissals that result from the closure by providing for severance pay – sometimes merely referring to the minimum prior notice stipulated in the law, and sometimes granting higher compensation, most often calculated on the basis of the employee’s seniority.³² Many collective

³⁰ Failure to give notice or insufficient notice will entitle each employee to a wage-based indemnity accordingly: s. 84.0.13; no such consequence is provided for in the C.L.C.

³¹ The goals of the committee formed under federal law, called a “joint planning committee”, are similar: C.L.C., ss. 221 and 226. This law imposes compulsory arbitration if there is no agreement between the employer’s representatives and the representatives of the redundant employees within the committee. The arbitrator’s mission is, in particular, to help the joint committee to develop the adjustment program that it is required to set up (ss. 223 to 225). However, it does not have the power to “[...] *review the decision of the employer to terminate the employment of the redundant employees*” or to “[...] *delay the termination of employment of the redundant employees*” (s. 224(5)).

³² 24% of the collective agreements examined in 2013 by the Quebec *Ministère du travail* (Ministry of Labour) considered dismissal and/or business or workplace closure as events entitling employees to severance pay: *Ministère du Travail*(c), 2013, p. 57.

agreements restrict – and sometimes even completely prohibit – the employer’s right to shut down part of its operations, in particular, by using subcontractors to do the work of the employees who are members of the bargaining unit.³³ Others stipulate that the union must be consulted prior to the decision to reduce the number of employees, and provide for specific employee evaluation criteria or a procedure to follow in carrying out the dismissals.³⁴

Moreover, employees credited with one year (businesses under federal jurisdiction) (C.L.C., s. 240) or two years (businesses under Quebec jurisdiction) of uninterrupted service (A.L.S., s. 124), are protected from unjust dismissal. However, the case law of the tribunals with jurisdiction in this matter illustrates its respect for the employer’s discretionary power when it comes to decisions based on these business considerations.³⁵ The jurisdiction of the tribunals is thus considerably reduced, as they cannot interfere in economic decisions made by the employer. For example, in Quebec, the power of the CRT is limited to determining whether the contested termination of employment constitutes a legal dismissal, that is, a true elimination – or significant transformation – of the employee’s position, or whether it is really a “veiled firing”; in the latter case, the dismissal is actually a pretext aimed at getting rid of an employee who is considered by the employer to be “undesirable”.³⁶ For the Court of Appeal of Québec, it is up to the complainant to demonstrate that the employer acted in “bad faith” or that its intention was to conceal a “veiled firing”,³⁷ a burden that can be very heavy for an employee to bear. That said, it should be noted that the tribunal has jurisdiction to decide whether an unlawful factor played a part in the employer’s decision. Also, the employee can indirectly contest the purpose of the employer’s decision by contesting the veracity of the alleged economic difficulties or the need to carry out a restructuring of the business.³⁸ The employer therefore remains completely free to decide whether or not to carry out a restructuring as it sees fit, and it hardly matters whether the underlying motivation for the decision to restructure the business relates solely to the goals of optimal profitability, that is, maximizing profit, or whether it is a

³³ According to the Quebec Ministry of Labour, some of the provisions set out in the collective agreements examined in 2013 prohibited subcontracting at all times (1.38%) or considered this practice to be conceivable if, notably, it did not lead to any layoffs or dismissals (12%): *Ministère du Travail*(b), 2013, p. 28.

³⁴ *Resto-casino inc. c. Syndicat des employées et employés de la Société des casinos du Québec, section resto-casino inc. (CSN)*, D.T.E. 2001T-1058 (T.A.).

³⁵ See, in particular, C.L.C., s. 242 (3.1) a) stating that the adjudicator cannot intervene in the case of the “discontinuance of a function.” See, for example: *McKenzie c. Algonquin Nation Human Resources and Sustainable Development Corp. (Algonquin Nation HRSD)*, D.T.E. 2005T-1132 (T.A.); *Pomerleau c. Conseil de bande Kitcisakik (Québec)*, [2002] R.J.D.T. 1233 (T.A.).

³⁶ *Bousquet c. Desjardins*, D.T.E. 97T-1375 (C.A.). Under federal law: *Banque Royale du Canada c. Lapointe*, D.T.E. 2005T-574 (C.F.).

³⁷ *Kopczynski c. RSW inc.*, D.T.E. 2007T-648 (C.A.); *Cloutier c. AlSCO, division de Western Linen Supply Co. Ltd.*, D.T.E. 2005T-1134 (C.A.). While the employer remains the only judge of the purpose of carrying out a restructuring of the business, it nevertheless has the burden to prove the alleged economic difficulties: *Drolet c. ABB inc.*, 2009 QCCRT 209; *Laflamme c. Commission des relations du travail*, 2007 QCCS 998.

³⁸ *Cloutier c. AlSCO, division de Western Linen Supply Co. Ltd.*, D.T.E. 2005T-1134 (C.A.).

necessary step to save the business or maintain its competitiveness. Here again, the protection enjoyed by the employee seems quite weak, at least when compared to the system in France, since the employer, in Quebec, is under no obligation to place the employees in other positions internally or to provide the means of occupational adjustment before proceeding to their dismissal (*Code du travail français* (French Labour Code), Article L. 1233-4).

It now remains to be evaluated whether the confrontation between the employer's right to close a business or workplace and the freedom of association of workers more clearly defines the scope of the exercise of this right.

2. Closure used to impede the exercise of the freedom of association

Any action whose motivation goes against public order or, especially, a fundamental right – in particular a constitutional right – should be declared illegal. Yet, as seen above, until November 2009, the unanimous position of the tribunals, in applying the provisions of the L.C., gave pre-eminence to the employer's right to close a business over the employee's freedom of association when such a closure was real and definitive.³⁹ This position, moreover, is the same as that taken by the Supreme Court of the United States, at least with regard to closures that are total and definitive.⁴⁰

The freedom of association of employees, that is, the freedom to form a trade union, belong to it and participate in its lawful activities – which also includes the freedom of unions themselves to collectively represent employees when it comes to determining and applying their working conditions in accordance with the system of representation and collective bargaining set up under both federal and Quebec law -- relates to the general public order (L.C., ss. 3 and 12; C.L.C., ss. 8 and 94 (1)). Some of these elements even have constitutional protection from the public authorities, in accordance with Subsection 2 d) of the Canadian Charter, and in society generally, mainly from employers, given the pre-eminent nature of Section 3 of the Quebec *Charter of Human Rights and Freedoms* (Verge, 2010): the right to form an association and belong to it, the freedom to assemble and participate in the lawful activities of the association, protection from interference, coercion and discrimination in the exercise of these freedoms,⁴¹

³⁹ *City Buick Pontiac (Mtl) Inc. v. Roy*, *supra*, p. 26; *Ferme-Neuve (Municipalité de) et Syndicat international des travailleuses et travailleurs de la boulangerie, confiserie, tabac et meunerie, section locale 55 (grieffs collectifs)*, 2012T-353 (T.A.).

⁴⁰ But not in the case of a partial closure; the possibility that a partial closure might have the effect of discouraging union activities in other parts of the business justified this position: *Textile Workers Union of America v. Darlington Manufacturing Company*, 380 U.S. 263, 85 *Supr. Ct. R.* 994.

⁴¹ *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, para. 67.

and the right of workers to engage in a general process of collective bargaining on fundamental workplace issues,⁴² which the Supreme Court of Canada described in 2011 as being “[...] a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion”.⁴³ Thus, in accordance with the freedom of association of employees, any business closure aimed at hindering this freedom should clearly be illegal. Indeed, while the decision to close a business normally derives from the employer’s right to make its own decisions, this private decision-making power must be subordinate to public order and the legally recognized constitutional rights of workers and their union.

It was therefore entirely appropriate for the Supreme Court of Canada, in its Wal-Mart decisions, to specify what appeared as of 2006 to be indisputably obvious (Verge and Roux, 2006), that is, that the employer is not immunized from the consequences of a business closure when the motives underlying this decision infringe the fundamental rights of employees or go against public order, that is, when anti-union reasons are behind the closure. When this is the case, the employer must be held responsible for compensating the employees. However, in *Wal-Mart I*, the majority judges were caught up by a procedural problem, thus siding in this particular case with the employer. Specifically, they decided that the recourse taken by the union and the employees – a complaint of “dismissal for union activities” under Section 15 of the L.C. – was impracticable given the definitive nature of the closure. Thus, for businesses under Quebec jurisdiction, the only recourse possible in the case of a real or definitive business or workplace closure is a complaint of “unfair labour practices” under Sections 12 to 14 of the L.C.⁴⁴. For the majority judges (6 out of 9), the continued existence of an operational workplace was a necessary condition for the admissibility of recourse under Section 15 of the L.C. Why? Simply because the only possible remedy explicitly provided for in Section 15 of the L.C. in the case of “dismissal” for union activity is reinstating the employee who was illegally dismissed and paying the employee an indemnity

⁴² *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, paras. 19 and 89.

⁴³ *Ontario (Attorney General) v. Fraser*, [2011] 2 SCC 20, para. 54.

⁴⁴ Section 12: “No employer, or person acting for an employer or an association of employers, shall in any manner seek to dominate, hinder or finance the formation or the activities of any association of employees, or to participate therein. No association of employees, or person acting on behalf of any such organization, shall belong to an association of employers or seek to dominate, hinder or finance the formation or activities of any such association, or to participate therein.”

Section 13: “No person shall use intimidation or threats to induce anyone to become, refrain from becoming or cease to be a member of an association of employees or an employers' association.”

Section 14: “No employer nor any person acting for an employer or an employers' association may refuse to employ any person because that person exercises a right arising from this Code, or endeavour by intimidation, discrimination or reprisals, threat of dismissal or other threat, or by the imposition of a sanction or by any other means, to compel an employee to refrain from or to cease exercising a right arising from this Code.”

equivalent to his lost wages!⁴⁵ This is a crucial issue for employees, however, since recourse to Section 15 grants them a presumption in their favour which exempts them from having to prove that anti-union motives were behind the closure.⁴⁶ In practice, this burden is excessively difficult for employees to fulfill, which the majority judges recognized from the outset:

“All of this is not to underestimate the difficulty faced by the union or employees under ss. 12 to 14 in establishing that a particular closure was tainted by anti-union animus, although the minimal requirement of taint sets a relatively low threshold.”⁴⁷

On the other hand, the three minority judges preferred to put the emphasis on the essential role played by the presumption in the employee’s favour in these circumstances:

“The presumption under s. 17 is one of the most vaunted equity tools in modern labour law and is, arguably, as conceptually and analytically significant for employees seeking protection from anti-union conduct as is the presumption of innocence in criminal law.”⁴⁸

Consequently, to reiterate, when the closure is real and definitive, a recourse available to employees and the union is that provided for under Sections 12 to 14 of the L.C., which imposes on them the obligation to “bring evidence of anti-union conduct”⁴⁹. They must demonstrate “that the closure occurred for anti-union reasons”⁵⁰, which, in practical terms, involves convincing the CRT that the employer was seeking to hinder the formation or the activities of a union (L.C., s. 12) or that it dismissed or imposed a sanction on employees so as to compel them to refrain from or cease exercising a legally recognized right (L.C., s. 14),

⁴⁵ Section 15: “Where an employer or a person acting for an employer or an employers’ association dismisses, suspends or transfers an employee, practises discrimination or takes reprisals against him or imposes any other sanction upon him because the employee exercises a right arising from this Code, the Commission may:

a) order the employer or a person acting for an employer or an employers’ association to reinstate such employee in his employment, within eight days of the service of the decision, with all his rights and privileges, and to pay him as an indemnity the equivalent of the salary and other benefits of which he was deprived due to dismissal, suspension or transfer.

b) order the employer or the person acting for an employer or an employers’ association to cancel the sanction or to cease practising discrimination or taking reprisals against the employee and to pay him as an indemnity the equivalent of the salary and other benefits of which he was deprived due to the sanction, discrimination or reprisals.”

⁴⁶ L.C., s. 17. “If it is shown to the satisfaction of the Commission that the employee exercised a right arising from this Code, there is a simple presumption in his favour that the sanction was imposed on him or the action was taken against him because he exercised such right, and the burden of proof is upon the employer that he resorted to the sanction or action against the employee for good and sufficient reason.”

⁴⁷ *Wal-Mart I*, para. 13.

⁴⁸ *Id.*, para. 124.

⁴⁹ *Id.*, para. 10.

⁵⁰ *Id.*, para. 64.

in particular, the right to form a union, participate in union activities and negotiate a collective agreement. It should be noted that the law that applies to businesses under federal jurisdiction differs substantially from that which applies to businesses under Quebec jurisdiction,⁵¹ insofar as, under federal law, a presumption in favour of employees is applicable if the complaint filed alleges that the employer was acting out of anti-union motives,⁵² in which case it is up to the employer to prove that real business concerns were behind the decision to close.

That said, there are two crucial stages in a union's activities during which the freedom of association is generally hindered, that is, the application for union certification and, when a union is already present in the business or part of the business, the process of collective bargaining, in particular in the case of a strike or lock-out. In these situations, the tribunal must decide whether the decision to close the business or one of its workplaces was based on real business concerns, that is, whether the motives truly related to the profitability of the business, or whether its aim was, rather, to impede or limit the exercise of the freedom of association of the employees and the union. On the one hand, with regard to the stage during which the union is being introduced into a business, the tribunal will certainly take into account, if applicable, the unusual, abrupt or absolute nature of a collective dismissal brought about by a closure which took place, for example, in the middle of a union recruitment campaign, not long after the filing of an application for certification or just after such certification was granted, if the economic justification for such action is not proven.⁵³ On the other hand, during the collective bargaining process, various factors can contribute to establishing the truthfulness of the employer's argument that economic reasons were behind the closure: the methodical nature of a decision of which initial steps were taken before the decision to close was made; the presence of a contextual element that had nothing to do with the collective bargaining or the formation of the union, such as a lease that was expiring;⁵⁴ the history of relations between the union and the employer and, more immediately, the general conduct of the employer during the collective bargaining process in question; proof that the closure did not have the effect of discouraging employees in other parts of the business from engaging in union activities, etc.⁵⁵ Conversely, bad faith or intransigence on the part

⁵¹ See Coutu, Bourgault and Desjardins, 2011, p. 241-242; Mac Neil, 2010.

⁵² Where a complaint is made in writing, the written complaint is itself evidence that failure by the employer to comply with Subsection 94(3) of the C.L.C. actually occurred and the burden of proof is on the employer to prove otherwise: C.L.C., subs. 98 (4).

⁵³ *Gagnon and 9075-5125 Québec inc. (Alma Honda - Alma Acura)*, D.T.E. 2008T-745 (CRT); *J.D. Irving Ltd. and C.E.P.*, (2003) 94 C.L.R.B.R. 105 (N.B.L. and E. Bd), particularly p. 122 (it should be noted that operations started up again not long after the workplace closure).

⁵⁴ *Starbucks Corp. v. CAW-Canada Local 3000*, (1997) 35 C.L.R.B. (2d) 244 (B-C.L.R.Bd).

⁵⁵ *874 352 Ontario Ltd (Court District Free Press) v. G.C.I.U., Local 525 M*, (1995) 26 C.L.R.B.R. (2d) 209 (B.-C.L.R. Bd.).

of the employer during the collective bargaining process,⁵⁶ past conduct on the part of the employer marked by the expression of anti-union sentiments, the lack of any serious economic justification,⁵⁷ and the moderate nature of union demands or a sudden and radical change in the employer's position during the collective bargaining process⁵⁸ are all factors that are likely to lead to the conclusion that the employer was actually refusing to tolerate the presence of the union.⁵⁹ The same conclusion will obviously be reached in the case of a closure that was only temporary.⁶⁰

That said, certain practical difficulties can complicate the task of the tribunal with jurisdiction in the case. Indeed, to what point can the tribunal accept the employer's argument concerning the profitability of the business? Should it decide in favour of the employer only when the more or less immediate non-profitability of the business – if it accepts the union's claims – is demonstrated? Can it also accept that the employer might have had good reason to act proactively, or preventively, so as to ensure the long-term economic health of the business as a whole by shutting down one of its workplaces or one business belonging to the same corporate group? What is certain in any case, however, is that the purpose of the employer's economic decisions cannot be challenged and the tribunal can merely verify the employer's claim that anti-union reasons were not behind the decision to close the business. Thus, the tribunal must concern itself exclusively with the true nature of the reasons behind this decision. As can be seen, the Wal-Mart decision did not resolve these questions. On the contrary, it will be up to the tribunals with jurisdiction in this matter to do so in the coming years.

The total or partial closure of the business can also represent a breach of specific legal obligations on the part of the employer, such as the obligation to negotiate in good faith with the union,⁶¹ or, as already seen in *Wal-Mart II*, the obligation to maintain working conditions following a union's application for certification or after the union has served notice to bargain⁶². However, this last employer's duty remains only if the right to strike or to lock out has not been used. In such a case, the union and the employees must establish that the business closure "is inconsistent with the employer's "normal management

⁵⁶ *Teamsters Local Union No. 879 v. Crawford Transport Inc.*, [2006] CCRI no 364.

⁵⁷ By analogy: *Gagnon and 9075-5125 Québec inc. (Alma Honda - Alma Acura)*, D.T.E. 2008T-745 (CRT).

⁵⁸ *Blanchette c. Au Roi du coq rôti inc.*, D.T.E. 2010T-572 (CRT).

⁵⁹ See also *Communication Workers of Canada and Academy of Medicine, Toronto Call Answering Service*, [1978] 1 C.L.R.B.R. 183 (Ont. L.R.Bd).

⁶⁰ *T.A.S. Communications c. Thériault*, [1985] T.T. 271.

⁶¹ *Syndicat des métallos, section locale 7016 c. Systèmes et câbles d'alimentation Prysmian Canada ltée*, D.T.E. 2011-204 (CRT); *Teamsters Local Union No. 879 v. Crawford Transport Inc.*, [2006] CCRI 364; *International Woodworkers of America, Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, (1983) C.L.L.C., para. 16, 066 (Ont. L.R. Bd).

⁶² L.C., s. 59; C.L.C., ss. 24 (4), 36.1 and 50 b).

practices”⁶³. Therefore, a business closure:

“can be found to be consistent with the employer’s “normal management policy” if (1) it is consistent with the employer’s past management practices or, failing that, (2) it is consistent with the decision that a reasonable employer would have made in the same circumstances. In other words, a change [translation] “that would have been handled the same way had there been no attempt to form a union or process to renew a collective agreement should not be considered a change in conditions of employment to which section 59 of the Labour Code applies”⁶⁴.

Lastly, what of the responsibility of the employer in the case of a closure that is deemed to be illegal? First, it is often said that an employer cannot be compelled to operate a business or remain in business against its will. The Supreme Court of Canada was unanimous on this point in both *Wal-Mart* decisions⁶⁵. Furthermore, to date, the tribunals have dismissed all requests for provisional measures aimed at having business operations temporarily maintained or a business reopened, pending a final decision concerning the legality of the closure.⁶⁶ Thus, even a finding that a closure was illegal may only have theoretical import. Fortunately, however, as seen above, in addition to the penal sanctions which are only applicable under Quebec law,⁶⁷ there are often feasible and appropriate measures of redress available, and the tribunals normally responsible for intervening in these matters – both the CRT⁶⁸ and the arbitrator⁶⁹ or, when federal law applies, the CIRB⁷⁰ – have ample powers to impose remedies. This notably includes a just and reasonable indemnity aimed at adequately compensating employees for job loss following an illegal closure⁷¹. As for the union, various measures aimed at restoring its ability to collectively represent the employees affected by the closure can be considered, at least if the operations of the totally or partially

⁶³ *Wal-Mart II*, para. 54.

⁶⁴ *Id.*, para. 57.

⁶⁵ See: *Wal-Mart I*, para. 51; *Wal-Mart II*, para. 63 and 83. ,

⁶⁶ *Syndicat des travailleuses et travailleurs des Couche-Tard de Montréal et Laval – CSN c. Couche-Tard inc.*, 2011 QCCRT 0449; *Syndicat des travailleuses et travailleurs du Mount Stephen Club - CSN c. Mount Stephen Club (9166-1389 Québec inc.)*, 2011 QCCRT 0499; *Section locale 880 de la Fraternité internationale des Teamsters c. Pegasus Express Inc.*, [2006] CCRI 364; *Teamsters Local Union No. 879 v. Crawford Transport Inc.*, [2006] CCRI 364; *Boutin c. Wal-Mart du Canada*, [2005] R.J.D.T. 886 (C.R.T.).

⁶⁷ L.C., s. 143 (sanction for intimidation or hindering union activities); the Canada Labour Code, on the other hand, does not include any penal sanction against the employer in this matter: s. 101(2).

⁶⁸ With regard to its general powers: L.C., subs.119 (1) (order to “cease performing” an act); (2) (to “[...] redress any act”); and (3) (to “[...] apply the measures of redress [which the Commission] considers the most appropriate”); subs. 118 (3) (“[...] make any order, including a provisional order, [which the Commission] considers appropriate to safeguard the rights of the parties”) and (6) (“[...] render any decision it considers appropriate”).

⁶⁹ L.C., s. 100.12; C.C.Q., s. 1590. See *Wal-Mart II*, para. 61-63.

⁷⁰ With regard to its general powers, C.L.C., subs. 99 (2): “[...] the Board may [...], by order, require [...] anything that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of [the objectives of Part I of the Code].”

⁷¹ *Wal-Mart I*, para. 31, 54, 64; *Wal-Mart II*, para. 61-63

closed business are in fact pursued in other locations or start up again⁷². Moreover, the general powers of both the CRT and its federal counterpart give these bodies the authority to order the employer to adopt various specific measures which are suited to the circumstances, so as to allow the union to get back on the path toward certification that was interrupted by the employer's illegal conduct.⁷³ Lastly, a definitive closure does not always exclude the possibility for the employees to find jobs within the business which correspond to those they held before the closure.⁷⁴ This could be the case when the closure only involved part of the business, such as one of its workplaces. The placement of employees in the branches of the business that are still in operation could thus be imposed.

Section IV. Conclusion

More than 15 years ago, the Supreme Court of Canada was of the opinion that:

“[Labour] law should be mindful of the acute vulnerability of terminated employees and ensure their protection by encouraging proper conduct and preventing all injurious losses which might flow from acts of bad faith or unfair dealing on dismissal, both tangible and intangible.”⁷⁵

This is right and just based on the twofold reasoning underlying the Court's opinion. On the one hand,

“Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society [;

⁷² In the case of a pending application for certification, federal law empowers the Canada Industrial Relations Board to “[...] certify a trade union despite a lack of evidence of majority support if the employer has [hindered legitimate trade union activities]; and if the Board is of the opinion that, but for the unfair labour practice, the trade union could reasonably have been expected to have had the support of a majority of the employees in the unit.” (C.L.C., s. 99.1). The L.C. confines itself to the usual requirements regarding proof of the representative nature of the applicant;

⁷³ For example, the employer may be required, within the specific limits established by these tribunals, to allow union representatives access to the workplace premises of the employees affected by the closure or to allow the union to post notices or hold meetings on these same premises, etc.: *National Bank of Canada v. Retail Clerks' International Union et al.*, [1984] 1 SCR 269, at 283 and 284. If, on the other hand, the business closure is definitive and renders these means of ensuring the continuity of the union's activities unfeasible, the employer may be obliged to reimburse the union for any expenses it incurred in running a recruitment campaign which proved to be futile as a result of the partial or total closure of the business: *Communications Workers of Canada v. Academy of Medicine*, [1978] 1 C.L.R.B.R. 183 (Ont. L.R.Bd), at 195.

⁷⁴ In *Syndicat des employé-es des magasins Zellers d'Alma et Chicoutimi (CSN) c. Zellers inc.*, 2011 QCCRT 101, the CRT ruled that the union's certification should be transferred to the new Zellers branch and ordered that the employees from the old branch who had been dismissed be reintegrated into the new branch, despite the fact that the first branch had been closed... 15 years earlier!!

⁷⁵ *Wallace v. Limited Grain Growers Ltd*, [1997] 3 S.C.R. 701, paras. 104 and 107 (Justice Iacobucci).

moreover,] a person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."⁷⁶

On the other hand, a fundamental inequality exists between the employee and the employer, which is inherent in any employment relationship. And it is mainly this structural imbalance between the opposing forces – this “relationship of subordination” – which justifies at first sight the *raison d'être* of labour law. This assumption is frequently referred to by both the legal doctrine (Morin, Brière, Roux and Villaggi, 2010, p. 134; Verge and Vallée, 1997, p. 25-30 and 101-131; Kahn-Freund, 1972, p. 8; Lyon-Caen, 1951; Sinzheimer, 1934) and the Supreme Court of Canada judges.⁷⁷

While the main function of labour law is to well and truly protect the employee – physical and psychological protection of his person, protection of his fundamental economic interests such as the freedom to work, remuneration, job, etc. – it nevertheless also ensures the legal mediation of social relations and in workplaces by seeking to achieve a balance between divergent economic and social interests.

Of course, while labour law must limit the most devastating effects of capitalism on workers, its ultimate end is not to abolish it; on the contrary, it even appears to play a role in safeguarding it.⁷⁸ Indeed, since private enterprise is the “vector” of the capitalist system, it irrefutably follows that public authorities must ensure that the most fundamental interests of the enterprise are taken into account. This principle is expressed, as seen above, through the recognition of the freedom to engage in business and the right of

⁷⁶ *Reference Re Public Service Employee Relations Act (Alb)*, [1987] 1 S.C.R. 313, p. 368, (Justice Dickson), comments reproduced in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, p. 1054-1055.

⁷⁷ *McKinley v. BC Tel.*, [2001] 2 S.C.R. 161, para. 54: “Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship”; *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, paras. 214 and 215: Justice Lebel first reiterated that “the fundamental nature of the employment relationship, whatever its form and shape, rests on an inequality which reflects an imbalance of economic power,” and then added that since the Industrial Revolution, trade unionism and the freedom of association have been “viewed as critical tools in the fight for a more stable and sometimes more equitable employment relationship”; *Cabiakman v. Industrial-Alliance Life Insurance Co.*, [2004] 3 S.C.R.195, para. 55: “However, the definition in the Civil Code of Québec has remained faithful to a classical conception of this type of contract. This conception is based on the acceptance of a relationship of subordination in which the employee accepts the employer's direction and control in performing the duties provided for in the contract. The creation of the relationship of subordination signifies that the employee agrees both that the employer must make necessary decisions in the business's interest and that his or her own work must be performed in a manner consistent with those decisions and with the guidance they provide, subject to any express or implied agreements between the parties”; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, para. 84: “Collective bargaining also enhances the Charter value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees.”

⁷⁸ Collin *et al.*, 1980; Jemmaud, 1978.

ownership, which are fulfilled by exercising the freedom to hire and the freedom to break the employment contract, as well as the freedom to reorganize or restructure the business, to transfer it either geographically or to prospective owners, to subcontract its operations in whole or in part, etc. The state will inevitably impose conditions and limits on the exercise of these multiple freedoms. It is in this respect that labour law expresses its fundamentally “realistic” nature (Verge and Vallée, 1997, p. 161-164). This dominant function was described by the late Professor Gérard Lyon-Caen (Lyon-Caen, 1995, p. 4) as follows:

*“Labour law is necessary for regulating the (power) relations which govern economic life by establishing a balance which is always unstable between the needs of businesses – employers, and the demands of those who work for them. It provides the market with a framework. What is true is that a perpetual debate of ideas – in each period – governs its interpretation.”*⁷⁹

The national labour law systems that regulate business or workplace closures are certainly fertile grounds for the emergence of these debates. Moreover, it should be kept in mind that this balance between the legitimate infringements of employers and those of workers varies from one country to another. It is also important to take into account the relevant national legislation *in its entirety* and the *many* forms of protection granted to employees in a given country before judging it too hastily...

Ideally, employers seek to have easy access to a skilled, loyal and stable workforce that they can subsequently lay off as they please; and in both cases, this should be done at the “lowest possible price” (Anderson, 2007, p. 419). However, workers’ expectations are in fact rooted in the very principle of social justice (Roux and Desjardins, forthcoming), recognized in the *Declaration of Philadelphia (1944)*, annexed to the Constitution of the ILO, which is “[...] *to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security [physical and psychological] and equal opportunity*”, and also to participate in collectively determining their working conditions through their representatives,⁸⁰ which includes the expectation to be “consulted if their economic future is threatened” (Anderson, 2007, p. 419).

Thus, in Quebec, we think that labour law establishes a *fine balance* between these divergent concerns,

⁷⁹ Our translation.

⁸⁰ ILO member-states granted a pre-eminent status to “freedom of association and the effective recognition of the right to collective bargaining” in the ILO *Declaration on Fundamental Principles and Rights at Work and its Follow-up*, adopted by the International Labour Conference at its 86th Session, June 1998.

especially since it recognizes that the employer must assume a degree of “social responsibility” for employees affected by a business or workplace closure. However, faced with an allegation of closure aimed at impeding the exercise of the freedom of association, given the absence of a presumption of illegality, as established by the Supreme Court of Canada in the two Wal-Mart decisions, and in contrast with the situation prevailing under federal legislation, it remains to be seen how the CRT or the arbitrators will interpret and apply Sections 12 to 14 and Section 59 of the L.C. in the case of measures taken to impede the exercise of the freedom of association by employees. Of course, some people might say that the specific obligations incumbent on employers doing business in Quebec in the case of business or workplace closure are pitifully weak. But, is this not the price to be paid in order to maintain a competitive national economy in these difficult times and this globalized world? Moreover, although considerable social inequalities continue to exist (and are even growing: OECD(a), 2011), the fact nonetheless remains that, for both the OECD and the IMF,⁸¹ Quebec,⁸² and even Canada as a whole,⁸³ have weathered the devastating repercussions of the recent world economic crisis relatively well, while maintaining an economic performance that is the envy of many countries... Obviously, this success is attributable to a multitude of political and economic decisions taken in recent years by governments in Canada, as well as by the efficiency of our institutions. But it is certainly reasonable to believe that the flexibility of the legislation applicable to business or workplace closure also contributed, albeit modestly.

References

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⁸¹ OECD(b), 2011, p. 1: “the labour market is recovering faster in Canada than in many OECD countries”; FMI, 2010: “Canada has rapidly emerged from the crisis. Output recovered forcefully at end - 2009 and early 2010, on the back of extraordinary and timely monetary and fiscal stimulus.” Moreover, for 2010, the average employment increased by 1.4% in Canada, whereas for the same year, the average rate in OECD countries was 0.3% (OECD(c), 2011).

⁸² *Ministère des Finances du Québec(a)*, 2011, p. 5: “Quebec came out of the recession quicker and stronger than its main North American economic partners. From the end of 2007 to the beginning of 2011: Quebec’s real GDP grew by 3.5%, compared to 1.2% in Canada and 0.1% in the United States; employment rose by 2.3% in Quebec, versus 1.7% in Canada and 1.2% in Ontario.” [our translation] See also *Ministère des Finances du Québec(b)*, 2011: “With 141,300 jobs created since July 2009, which allowed it to recover 225% of the jobs lost, Quebec was among the first to get back to and largely exceed the pre-recession employment level. At 7.3% last September, the unemployment rate is now back to that before the recession.” [our translation]

⁸³ Department of Finance Canada, 2011, p. 5: “Canada weathered the global recession better than most other industrialized countries and is the only Group of Seven (G-7) country to have more than recovered both all of the output and all of the jobs lost during the recession. The deterioration of the global economic situation has also begun to be felt in Canadian employment, which remains almost unchanged since July 2011. However, almost 600 000 more Canadians are working today than when the recession ended, and the unemployment rate has declined to 7.3 per cent, down significantly from a peak of 8.7 per cent during the recession.”

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