

## Supreme Court of Canada rules Wal-Mart closing unlawful

*Decision to close store not made in ordinary course of business as it was performing well: Court*

By Sherrard Kuzz LLP

Canada's Supreme Court has ruled that Wal-Mart Canada Corp. violated Quebec's labour laws when it closed a store in Jonquière almost a decade ago, eight months after its employees voted in favour of unionization with the United Food and Commercial Workers Union and following months of unsuccessful negotiation with the union.

In a 5-2 decision authored by Justice Louis LeBel, a former Quebec labour lawyer, the court said Wal-Mart violated s. 59 of the Quebec Labour Code, commonly known as the "statutory freeze" section. The statutory freeze prohibits an employer from changing an employee's conditions of employment from the time a petition for certification is filed (also known as an application for certification) until the petition has been dismissed, the union has been certified, or the employer/union are in legal strike/lockout position. There are two exceptions to the statutory freeze: the employer obtains written consent from the union to change a condition of employment, or the change occurs within the "ordinary course of business" — typically, a change that falls within the reasonable expectation of employees, so long as the change is not tainted by anti-union motivation. Other Canadian jurisdictions have a substantially similar provision in their labour legislation.

Wal-Mart's argument was essentially three-fold:

- The statutory freeze provision was not intended to apply to the *closing* of a store because a closing does not change conditions of employment, it terminates employment altogether; if the freeze provision could be applied to require a store to remain open, it would effectively function as a guarantee of employment — something that was never intended.
- The decision to close the store was within the exclusive jurisdiction of Wal-Mart's management rights.
- Even if the statutory freeze applies, the decision to close the store was in the ordinary course of business.

The union advanced a more liberal interpretation of the phrase "conditions of employment" which included the closing of an operation. It also objected to Wal-Mart's argument that the closing was in the ordinary course of business, leading compelling evidence the store "was performing very well," "objectives were being met," and employees had been promised bonuses.

The arbitrator agreed with the union — a view endorsed by Quebec's Superior Court, but then overturned by the province's court of appeal which accepted the argument that the freeze provision was never intended to force an employer to remain in business.

The Supreme Court of Canada overturned the Quebec Court of Appeal, preferring the union's more liberal interpretation of the statutory freeze:

"By circumscribing the employer's unilateral decision-making power in this way, the "freeze" limits any influence the employer might have on the association-forming process, eases the concerns of employees who actively exercise their rights, and facilitates the development of what will eventually become the labour relations framework for the business ... In this context, it is important to recognize that the true function of s. 59 is to foster the exercise of the right of association."

The Supreme Court also agreed with the arbitrator that the decision to close the store was not made in the ordinary course of business, because a reasonable employer would not have closed a store performing well.

The case has now been sent back to the arbitrator to "determine the appropriate remedy." Reopening the store is not an available option, as confirmed by the Supreme Court. Damages to the terminated employees will be the issue.

### What does this decision mean for employers?

Despite the high profile nature of this case, many in the legal community believe the Supreme Court's decision does not fundamentally change the law. Nevertheless, the decision acts as an important reminder to employers about the purpose and application of a "statutory freeze." In particular:

**The act of closing a business during a freeze period will be contrary to law unless the decision is made in the ordinary course of business and free from anti-union objectives.** In practical terms, this means that before announcing a closure, an employer will want to ensure there is sufficient, objective evidence to support the decision.

**Not every decision to close a business during a statutory freeze period will be considered a violation.** In Wal-Mart's case, the company provided little evidence to support its position the closing was consistent with normal management practices. Instead, Wal-Mart chose to rely primarily on the argument the closure was a business decision within its exclusive authority and not subject to the freeze at all. Had the evidence been different (such as if the store was performing poorly), the result may have been different as well.

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