Nine Years Too Late, Wal-Mart's First Unionized Employees Win At The Highest Court

The saga of North America's first unionized Wal-Mart has taken a significant turn in favour of its former employees, nine years after they lost their jobs when the store in Jonquière, Quebec was permanently shut. Much ink has been spilled telling the story of the Jonquière store, its successful unionization in 2004, and its closure in 2005, which was announced on the very day that an arbitrator had been appointed in relation to the what was to have been the store's first collective agreement. Now, the Supreme Court of Canada in United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp., 2014 SCC 45 has, for a second time, considered the rights of the store's employees in the context of that store closure. This time, however, the Court issued a significant victory in favour of the employees which may have implications across the country.

In 2009, the Court dismissed a pair of appeals – Plourde 2009 SCC 54 and Desbiens 2009 SCC 55 – in which former employees sought remedies after the store closure. On June 27, 2014, the Court released the decision of a seven-member panel's consideration of a grievance claiming that Wal-Mart's closure of the store violated the "freeze" provisions of Quebec's Labour Code. Similar to provisions elsewhere, the s. 59 "freeze" restricts the employer's ability to "change the conditions of employment of his employees" during certain phases of collective bargaining. In a 5-2 ruling, the Court upheld an arbitrator's award which had found that the closure of the store constituted an impermissible change in the employees' employment conditions in the absence of evidence that the closure was made in the ordinary course of the company's business.

The Court's Judgments

The majority judgment of the Court was authored by LeBel J., who – along with Abella and Cromwell JJ. – had dissented in Plourde and Desbiens.

LeBel J. first dealt with the question of whether s. 59 of the Labour Code – the statutory "freeze" provision – should be interpreted to apply in the context of a business that no longer exists. Wal-Mart and several interveners had argued that there is no employment relationship nor "conditions of employment" following the closure of a business and that the section is not designed to consider the actual closure of a business and its consequences.

LeBel J. rejected this approach and instead interpreted the provision broadly and substantively. He found that the purpose of s. 59 is to "facilitate certification and ensure in negotiating the collective agreement the parties bargain in good faith" (para. 34). Furthermore, it intentionally "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." (para. 35).

In essence, LeBel J. found that the section is substantive and not procedural because its "true function" is to foster the exercise of the right of association and to offer "more than a mere procedural guarantee." Instead:

> In a way, this section, by imposing a duty on the employer not to change how the business is managed at the time the union arrives, gives employees a substantive right to the maintenance of their conditions of employment during the statutory period. [Para. 37]

LeBel J. went on to find that the continuation of employment is "always the basis for a condition of employment" (para. 43). To determine whether a "change in conditions of employment" is justifiable or not during the "freeze" period, LeBel J. articulates a test that assesses whether an employer's decision "consistent with its normal management practices" (para. 52). He suggests such an assessment can be made by either looking to "past management practices" of the employer or considering whether in the circumstances the decision was "reasonable" and "consistent with the decision that a reasonable employer would have made in the same circumstances." (para. 57). The judgment suggests that "reasonableness" will mean that the decision would not have been different in the absence of union activity and related negotiation (see paras. 52 and 57).

Given that the closure of a business is by definition extraordinary, LeBel J. describes how the arbitrator will need to consider the evidence:

> [81] In this context, if the union's evidence satisfies the arbitrator that the resiliation of the contracts was not consistent with such a practice, the employer must present evidence to prove the contrary….
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> [82] If the employer wishes to avoid having the arbitrator accept the complaint filed under s. 59, therefore, it must show that the change in conditions of employment is not one prohibited by that section. To do so, it must prove that

its decision was consistent with its normal management practices or, in other words, that it would have proceeded as it did even if there had been no petition for certification. Given that going out of business either in part or completely is not something that occurs frequently in any company, the arbitrator often has to ask whether a reasonable employer would, in the same circumstances, have closed its establishment….Without suddenly becoming an expert in this regard, the arbitrator must also, therefore, above all else, be satisfied of the truthfulness of the circumstances relied on by the employer and of their significance. [Citations omitted]

In the case of Wal-Mart, the arbitrator had found that the employer only advanced the closure of the store as the explanation for the termination of the employees and had therefore failed to justify the change as being permissible under s. 59. LeBel J. found that this was a reasonable decision "[g]iven the absence of evidence" on the question of whether the employer would have closed its business absent the union activity (para. 94).

A forceful dissent by Rothstein and Wagner JJ. argues that the majority's test "is inconsistent with the employer's right, under Quebec law, to close its business for any reason" as long as the closure is "genuine and definitive" (para. 127).

[128] ….Despite the employer's unqualified right to close its business, Justice LeBel states that it is not enough for an arbitrator to determine whether the employer had the pre-existing right to act as it did – the arbitrator must be further satisfied that the employer exercised this power in conformity with its previous business practices or with those of a "reasonable employer".

[129] But a store closure, by definition, does not conform to previous business practices. If s. 59 were to apply to a situation of store closure, the result would be that businesses could never prove a store closure was business as usual. It would also mean that the employer would be prevented from exercising its right to close its business during the s. 59 freeze period and yet could, immediately upon the conclusion of a collective agreement, the exercise of the right of lock out or strike, or the issuance of an arbitration award, close its business for any reason. Legislation cannot be interpreted to give rise to such absurd results.

Potential Significance

Although the decision is specific to the context of the Quebec Labour Code, similar "freeze" provisions exist across Canada and there are several aspects of the judgment which suggest it may have broad implications. LeBel J. justifies his interpretation of the provision in reliance on the importance of ensuring good faith during union formation and collective bargaining, and expressly notes that the s. 59 mechanism "is by no means specific to Quebec" and is reflected in provisions in other Canadian regimes that circumscribe the management acts of employers during certain periods (para. 60). Employers considering the closure or significant restructuring of a business during a statutory "freeze" period will need to carefully consider whether their proposed course of action reflects "normal management practices" or is – or could be seen to be – motivated by other factors.

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Article by Elder Marques

McCarthy Tétrault LLP