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Labour and Employment Newsletter

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Wal-Mart Could Not Thaw the "Statutory Freeze" by Closing its Store

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Where a retail store is performing very well, with objectives being met to such an extent that bonuses are being promised to employees, would a reasonable employer close that store? The Supreme Court of Canada determined in the *U.F.C.W., Local 503 v. Wal-Mart Canada Corporation* decision released on June 27, 2014 that the answer is no when the closure occurs while a collective agreement is being negotiated.

This grievance, along with several others based on different arguments by the United Food and Commercial Workers Union ("UFCW"), was brought against Wal-Mart after it closed its Jonquiere, Quebec store on April 29, 2005. The UFCW was certified as the bargaining agent for the store in 2004. This was the first Wal-Mart store in North America to complete the certification process and become unionized. The parties were unable to reach a collective agreement and the UFCW applied on February 2, 2005 to the Minister of Labour to appoint an arbitrator to settle the dispute. One week later, Wal-Mart advised the Minister that it intended to close the store on May 6, 2005 for "business reasons" and terminate all of the approximately 200 employees. In fact the store closed early, on April 29, 2005.

In this case the Supreme Court was called upon to consider the complaint of the UFCW that by closing the store Wal-Mart had violated s. 59 of Quebec's *Labour Code*, which prohibits employers from changing employees' conditions of employment while a collective agreement is being negotiated; this is often referred to as a "statutory freeze". Labour legislation across the country, including in Alberta (see sections 147(2) and (3) of the *Labour Relations Code*), contains similar "statutory freeze" provisions.

The majority of the Supreme Court of Canada, in a 5-2 ruling, agreed with the labour arbitrator (who decided the grievance at the first instance) that the employer had not shown the closure to have been made in the ordinary course of the employer's business. The closure could not be said to have been consistent with the employer's past management practices or with those of a reasonable employer in the same circumstances.

The matter was remitted back to the arbitrator to determine the appropriate remedy. An arbitrator in Quebec, as in many other Canadian provinces, has quite broad remedial powers, including the ability to order an alternative remedy in the form of damages; the closure of the store meant the usual remedy of reinstatement was not possible.

The effects of this ruling will be felt throughout Canada as it will apply to all general labour relations schemes. As the Supreme Court of Canada noted, the true function of s. 59 (and by analogy other "statutory freeze" provisions in Canada) is to foster the exercise of the right of association. Closing a store during a statutory freeze, where it is not consistent with the employer's past management practices or with those of a reasonable employer in the same circumstances, deprives employees of that right.

This decision serves as a reminder to employers that they are not entitled to alter the working conditions of their employees while a collective agreement is being negotiated (unless the alteration is consistent with past management practices or with those of a reasonable employer in the same circumstances). As well, in Alberta, employers are not entitled to alter the working conditions of any employees in the unit affected from the date of an application for certification by a union until the certification is refused or until 30 days after the union is certified. Accordingly, if an employer closed a store after a union certification application had been filed but before it had been finally dealt with or before the 30 day period after certification expired, the employer may have violated section 147(1) of the *Labour Relations Code* and could be required to pay damages to the affected employees.

The lawyers at Field Law are experienced in labour matters and able to advise your company on how to manage employees during collective agreement negotiations and union certification drives to ensure legal compliance.

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