



SUPREME COURT OF CANADA

CITATION: Plourde v. Wal-Mart Canada Corp., 2009 SCC 54

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BETWEEN:

Gaétan Plourde

Appellant

and

Wal-Mart Canada Corporation

Respondent

- and -

Commission des relations du travail, Alliance of Manufacturers & Exporters

Canada, also known as Canadian Manufacturers and Exporters,

Fédération des travailleurs du Québec (FTQ), Coalition of BC Businesses,

Canadian Chamber of Commerce, Canadian Civil Liberties Association,

Conseil du patronat du Québec and Canadian Labour Congress

Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT:

(paras. 1 to 65)

Binnie J. (McLachlin C.J. and Deschamps, Fish, Charron

and Rothstein JJ. concurring)

DISSENTING REASONS:

(paras. 66 to 147)

Abella J. (LeBel and Cromwell JJ. concurring)

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PLOURDE v. WAL-MART

Gaétan Plourde

Appellant

v.

Wal-Mart Canada Corporation

Respondent

and

**Commission des relations du travail,
Alliance of Manufacturers & Exporters Canada,
also known as Canadian Manufacturers & Exporters,
Fédération des travailleurs du Québec (FTQ),
Coalition of BC Businesses,
Canadian Chamber of Commerce,
Canadian Civil Liberties Association,
Conseil du patronat du Québec and
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Interveners

Indexed as: Plourde v. Wal-Mart Canada Corp.

Neutral citation: 2009 SCC 54.

File No.: 32342.

2009: January 21; 2009: November 27.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Labour relations — Dismissal — Business closure — Remedies — Union certified to represent employees — Negotiations to conclude first collective agreement with employer unsuccessful — Employer announcing closure of business — Complaint by employee that loss of employment was due to union activities — Whether employees of closed business can bring their claim under ss. 15 to 17 of Quebec Labour Code and benefit from statutory presumption in s. 17 that they were dismissed because they exercised their collective bargaining rights — Whether definitive business closure still “good and sufficient reason” within meaning of s. 17 to justify dismissal — Labour Code, R.S.Q., c. C-27, ss. 15 to 17.

In August 2004, the union to which P belongs was certified to represent the employees of Wal-Mart in Jonquière. The Jonquière store was the first Wal-Mart store to be unionized in North America. After several fruitless bargaining sessions, the union filed an application under the Quebec *Labour Code* to establish the provisions of a first collective agreement. On February 9, 2005, the Minister of Labour referred the dispute to arbitration and notified the parties of the referral. That same day, Wal-Mart informed the employees of its decision to close the store. On April 29, 2005, P’s employment, along with that of approximately 190 other employees, was terminated. Many proceedings were initiated by the Wal-Mart employees or their union arising out of the store’s closure, which was presented by the union merely as a step taken by Wal-Mart in a larger employer strategy of hindrance, intimidation and union-busting. In this case, P filed a complaint under ss. 15

to 17 of the Code and claimed to have lost his employment because of his union activities. He sought an order that he be reinstated in his job.

The Commission des relations du travail (“CRT”) held that P could rely on the presumption under s. 17, since he had engaged in numerous significant union activities that were concomitant with the termination of his employment. However, the CRT found that Wal-Mart had shown the store’s closure to be genuine and permanent and that in itself, according to a long line of cases from *City Buick* onwards, is “good and sufficient reason” within the meaning of s. 17 to justify the dismissal. The Superior Court dismissed P’s application for judicial review and held that the CRT was correct in not requiring Wal-Mart to prove its reasons for closing the store. The Court of Appeal dismissed P’s motion for leave to appeal. All tribunals rejected P’s argument that the traditional case law should be disregarded in favour of the freedom of association.

Held (LeBel, Abella and Cromwell JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and **Binnie**, Deschamps, Fish, Charron and Rothstein JJ.: The question raised by this appeal is not whether employees have a remedy against an employer who closes a workplace for anti-union motives (they do have such a remedy under ss. 12 to 14 of the Code) but whether employees of a closed business can bring their claim within ss. 15 to 17 so as to obtain the considerable advantage of a statutory presumption that they lost their jobs because they exercised their collective bargaining rights. Under ss. 15 to 17, the question before the tribunal relates to the reasons for the employees’ loss of jobs whereas the question that can be put in play under ss. 12 to 14 is the broader issue of why the plant was closed at all, and specifically was it

closed as part of an anti-union strategy. A finding of an unfair labour practice under ss. 12 to 14 opens up broader redress under the general remedial provisions provided by ss. 118 and 119 of the Code for the benefit of all employees who suffered as a result of the wrongful store closure, including those who were not involved in union activity, and even for those who opposed the union. [11-12]

This Court in *Place des Arts* endorsed the view that no legislation in Quebec obliges an employer to remain in business and that an employer can close a plant for “socially reprehensible considerations”. While the effect of *Place des Arts* is to exclude in a workplace closure situation the application of s. 17, that case does not stand for the more sweeping proposition that closure immunizes an employer from any financial consequences for associated unfair labour practices. Nor does it preclude a finding that the closure itself constitutes an unfair labour practice aimed at hindering the union or the employees from exercising rights under the Code. It is open to a union or employees to bring evidence of anti-union conduct to establish an unfair labour practice under ss. 12 to 14 of the Code. [8] [10] [54]

In the result, the procedural vehicle offered by ss. 15 to 17 of the *Labour Code* is not available to an employee in circumstances where a workplace no longer exists. The s. 15 reinstatement remedy presupposes the existence of a place to which reinstatement is possible. The *City Buick* doctrine that a definitive workplace closure constitutes “good and sufficient reason” for the purposes of s. 17 has been followed consistently and was not overruled by the legislature when extensive amendments were made to the Code in 2001. The reference in s. 15 to an order to “reinstatement such employee in his employment” signals unambiguously the legislative contemplation

of an ongoing place of employment as the foundation of a successful s. 15 application. This limited role for s. 15 is consistent with the text and purpose of ss. 15 to 17. [4] [13] [35-36] [47] [50]

Section 15 provides a summary remedy backed by a presumption against the employer. The legislature has specified in s. 15 the remedies available for its breach. Adding the generality of ss. 118 and 119 remedies to a s. 15 violation would give the s. 17 presumption an expanded effect beyond reinstatement and associated relief contemplated in the ss. 15 to 17 group of provisions for an illegal dismissal. Former employees of a closed workplace in search of general remedies would never be obliged to establish anti-union misconduct because its existence would always be presumed in their favour as soon as they established that prior to the closure they had exercised “a right arising from this Code”. This would significantly alter the balance between employers and employees intended by the Quebec legislature. [39]

Nothing in this decision affects the full range of relief available from the CRT under ss. 15 to 19 in situations where the workplace continues in existence. The issue in this appeal is limited to the availability of the s. 17 presumption where the plaintiff seeks relief against what is alleged to be an illegal dismissal in a situation where the workplace has closed. The relief available when ss. 15 to 19 are properly invoked in the context of a lesser sanction has not been put in issue before us and the scope of this judgment is limited accordingly. [40]

This Court’s decision in *Health Services*, which recognized that the freedom of association protected by s. 2(d) of the *Canadian Charter of Rights and Freedoms* includes a procedural right to collective bargaining, is of no assistance here. Section 3 of the Code guarantees

the right of association to workers in Quebec and the legislature has crafted a balance between the rights of labour and the rights of management in a way that respects freedom of association. No argument was raised against the constitutionality of any provisions of the Code and the Constitution does not require that every provision, including s. 17, must be interpreted to favour the union and the employees. [7] [55]

Reference was made by the Canadian Labour Congress and other interveners to labour law and practice outside Quebec which they say take a somewhat different approach to this problem. However, in a federal state there is no requirement that provincial regulatory schemes must align themselves. It is apparent that some of the differences in the jurisprudence from province to province are a function of the statutory setting in which they are made. Labour relations practices in some of the other provinces should not dictate the outcome in Quebec, which in relation to the s. 17 presumption has been based for many years on a principle recently endorsed in *Place des Arts*. The CRT's refusal to extend the s. 15 reinstatement remedy to a closed workplace is a reasonable interpretation of its constituent Act and this Court should not interfere with it. [58-59] [61] [63]

Per LeBel, Abella and Cromwell JJ. (dissenting): A dismissal in the case of the closing of a business can be scrutinized for anti-union animus under s. 15 to 19 of the *Labour Code*. To suggest otherwise represents a marked and arbitrary departure from the philosophical underpinnings, objectives and general scope of the *Labour Code*. [69] [76]

The implementation of the remedies under ss. 15 to 19, including the presumption in s. 17, represented one of the most significant reforms in modern labour law. Until 2001, ss. 12 to 14,

which protect the union's ability to establish, organize and administer its affairs without employer obstruction, were penal provisions and there was no possibility of a civil remedy such as reinstatement or compensation. Sections 15 to 19 were added to the *Labour Code* 50 years ago to provide access to civil remedies for anti-union conduct by an employer, and to facilitate this access through a presumption levelling the evidentiary playing field between employers and employees. Once the employee shows that he or she is exercising a right under the *Labour Code*, s. 17 creates a legal presumption in his or her favour, shifting the burden to the employer to demonstrate that it had a "good and sufficient reason" to sanction the employee, that is, one that was not motivated by anti-union animus. The presumption under s. 17 is at the procedural core of the legislature's scheme to protect employees from unfair labour practices, and is one of labour law's most vaunted equity tools for redressing the evidentiary advantage held by employers. [68] [84] [90] [122]

As a result, two complementary remedial routes — penal consequences under ss. 12 to 14 and civil ones with the benefit of the presumption under ss. 15 to 19 — became available to allow employees to redress unlawful conduct on the part of the employer and to enforce their associational rights. Until 1981, the case law in Quebec had confirmed that an employer's motives must always be assessed to determine whether anti-union animus is involved in the decision to terminate someone's employment. It is therefore inconsistent with both legislative and judicial history to hold that the most drastic possible employer conduct involving the termination of employment — the closing of a business — is a form of dismissal which is uniquely exempt from scrutiny for anti-union animus. [91] [100-101] [122]

Yet, this was the impact of *City Buick* in 1981, which concluded that a closing is a "good

and sufficient reason” which rebuts the presumption under s. 17. The effect of that case has been that under the *Labour Code*, an employer’s conduct has been immunized from scrutiny for anti-union motives when a business has been closed. *City Buick* was a departure from what had been an undisputed approach requiring, in every context, an assessment of “the real and serious reason” for a dismissal, and ignored not only the consistent stream of Quebec jurisprudence on what constitutes a dismissal, but also the consistent jurisprudential confirmation that once an employee has been dismissed and demonstrated that he or she was exercising a right under the *Labour Code*, the burden shifts to the employer to demonstrate that the dismissal was not motivated by anti-union animus. *City Buick*’s dramatic departure from the remedial approach and legislative objectives embodied in the *Labour Code* makes it unsustainable. Closing a business can in fact be the most severe form of reprisal for union activity. Since in all other complaints involving s. 15 the Commission scrutinizes the motives of the employer for anti-union animus, it is inconsistent with the intent of the *Labour Code* in general, and with the purpose of s. 15 in particular, to scrutinize only the authenticity of a closing, rather than the reasons behind it. Labour boards across Canada have consistently refused to immunize employers who are inspired to close a business — and dismiss employees — for anti-union motives. Furthermore, they have consistently held that a decision that is tainted by anti-union animus, whether a closing or any other action, is a violation of labour rights. [101] [104] [106-108] [109-110] [112] [114]

There is no philosophical, jurisprudential, or textual support for the idea that ss. 15 to 19, including the presumption in s. 17, apply only to dismissals in an ongoing workplace. Dismissed employees are entitled to have their dismissals scrutinized for anti-union motives under ss. 15 to 19. There is no reason to deprive them of access to this same remedial scheme, including the wide

remedial scope in ss. 118 and 119, when their dismissals result from an employer closing down the entire workplace. Though reinstatement is not a feasible remedy in a closed workplace, it is not the only remedy contemplated by s. 15, it is only the most expansive one possible to fulfill s. 15's objectives. To suggest that ss. 15 to 19, including the remedies available under ss. 118 and 119, are only available to a dismissed employee in the case of an ongoing workplace, contradicts the consistent, historic and unequivocal confirmation that remedial statutes require a broad interpretation consistent with the purposes of the legislation, not a word-by-word parsing that drains the language of its remedial content. The better approach is to interpret the legislative scheme in a way that connects recognized rights to meaningful remedies. [69] [125-126] [137]

Cases Cited

By Binnie J.

Applied: *City Buick Pontiac (Montréal) Inc. v. Roy*, [1981] T.T. 22; *I.A.T.S.E. Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 SCC 2, [2004] 1 S.C.R. 43; **distinguished:** *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; **referred to:** *Boutin v. Wal-Mart Canada inc.*, 2005 QCCRT 225, [2005] D.C.R.T.Q. n° 225 (QL); *Boutin v. Wal-Mart Canada inc.*, 2005 QCCRT 269, [2005] D.C.R.T.Q. n° 269 (QL); *Pednault v. Compagnie Wal-Mart du Canada*, [2005] J.Q. n° 16222 (QL), aff'd 2006 QCCA 666, [2006] R.J.Q. 1266; *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 503 v. Ménard*, 2007 QCCS 5704, [2008] R.J.D.T. 138; *Lafrance v. Commercial Photo Service Inc.*, [1980] 1 S.C.R. 536; *Hilton Québec Ltée v. Labour*

Court, [1980] 1 S.C.R. 548; *Asselin v. Lord*, D.T.E. 85T-193, SOQUIJ AZ-85147041; *Syndicat des travailleurs en communication, électronique, électricité, techniciens et salariés du Canada (C.T.C. — F.T.Q.) v. Schwartz*, [1986] T.T. 165; *Bourget v. Matériaux B.G.B. Ltée*, D.T.E. 95T-1257, SOQUIJ AZ-95147099; *Syndicat des employés de la société chimique Laurentide Inc. v. Lambert*, D.T.E. 85T-523, SOQUIJ AZ-85147077; *Teamsters — Conférence des communications graphiques, section locale 555M v. Joncas Postexperts inc.*, 2008 QCCRT 249, [2008] D.C.R.T.Q. n° 249 (QL); *Section locale 175 du Syndicat canadien des communications, de l'énergie et du papier (SCEP) v. Petro-Canada*, 2008 QCCRT 246, [2008] D.C.R.T.Q. n° 246 (QL); *Lagacé v. Laporte*, [1983] T.T. 354; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Dar v. Manufacturier de bas Iris inc.*, [2000] R.J.D.T. 1632, motion for judicial review dismissed, Sup. Ct. Mtl., No. 500-05-061084-008, January 12, 2001; *Bélanger v. Hydro-Québec*, D.T.E. 86T-86, SOQUIJ AZ-86147016; *Produits Coq d'Or Ltée v. Lévesque*, [1984] T.T. 73; *T.A.S. Communications v. Thériault*, [1985] T.T. 271; *Altour Marketing Support Services Ltd. v. Perras*, D.T.E. 83T-855, SOQUIJ AZ-83147158; *Maresq et Brown Bovari (Canada) Ltd.*, [1963] R.D.T. 242; *Industrielle (L'), Compagnie d'assurance sur la vie v. Nadeau*, [1978] T.T. 175; *Société des Hôtels Méridien Canada Ltée v. Tribunal du travail*, 80 CLLC ¶14,026; *Hilton Québec Ltée v. Tribunal du travail*, C.A. Québec, No. 200-09-000312-782, January 16, 1979; *Caya v. 1641-9749 Québec Inc.*, D.T.E. 85T-242, SOQUIJ AZ-85147051; *Bérubé v. Groupe Samson Inc.*, D.T.E. 85T-932, SOQUIJ AZ-85147126; *Ouellette v. Restaurants Scott Québec Ltée*, D.T.E. 88T-546, SOQUIJ AZ-88147062; *Entreprises Bérou inc. v. Arsenault*, [1991] T.T. 312; *Silva v. Centre hospitalier de l'Université de Montréal – Pavillon Notre-Dame*, [2007] R.J.D.T. 363; *St-Hilaire v. Sûreté du Québec*, 2003 QCCRT 559, [2003] D.C.R.T.Q. n° 559 (QL); *Jalbert v. Sobeys Québec*, 2007 QCCRT 608, [2007] D.C.R.T.Q. n° 608 (QL); *Arsenault v. C & D*

Aerospace inc., 2006 QCCRT 654, [2006] D.C.R.T.Q. n° 654 (QL); *Crawford Transport Inc. and Teamsters, Local 879* (2006), 146 C.L.R.B.R. (2d) 234; *Pegasus Express Inc. and Teamsters, Local 880* (2006), 140 C.L.R.B.R. (2d) 77; *International Wallcoverings and Canadian Paperworkers Union* (1983), 4 C.L.R.B.R. (N.S.) 289.

By Abella J. (dissenting)

City Buick Pontiac (Montréal) Inc. v. Roy, [1981] T.T. 22; *Pednault v. Compagnie Wal-Mart du Canada*, [2005] J.Q. n° 16222 (QL); *Plourde v. Cie Wal-Mart du Canada*, 2006 QCCRT 159, [2006] D.C.R.T.Q. n° 159 (QL); *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 503 v. Ménard*, 2007 QCCS 5704, [2008] R.J.D.T. 138; *Boutin v. Wal-Mart Canada inc.*, 2005 QCCRT 269, [2005] D.C.R.T.Q. n° 269 (QL); *Bourgeois v. Compagnie Wal-Mart du Canada*, 2005 QCCRT 502, [2005] D.C.R.T.Q. n° 502 (QL); *Compagnie Wal-Mart du Canada v. Commission des relations du travail*, 2006 QCCS 3784, [2006] J.Q. n° 6894 (QL), aff'd 2008 QCCA 236, [2008] J.Q. n° 673 (QL) (*sub nom. Compagnie Wal-Mart du Canada v. Desbiens*); *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460; *Côté v. Compagnie F.W. Woolworth*, [1978] R.L. 439; *Syndicat canadien des communications, de l'énergie et du papier, section locale 194 v. Disque Améric Inc.*, [1996] T.T. 451; *Gauthier v. Sobeys Inc. (numéro 650)*, [1995] T.T. 131; *Industrielle (L'), Compagnie d'assurance sur la vie v. Nadeau*, [1978] T.T. 175; *United Last Co. v. Tribunal du travail*, [1973] R.D.T. 423; *Syndicat des salariés de distribution de produits pharmaceutiques (F.I.S.A.) v. Medis, Services pharmaceutiques et de santé inc.*, [2000] R.J.D.T. 943; *Maresq et Brown Bovari (Canada) Ltd.*, [1963] R.D.T. 242; *Distinctive Leather Goods*

Ltd. v. Dubois, [1976] C.A. 648; *Lafrance v. Commercial Photo Service Inc.*, [1980] 1 S.C.R. 536; *Société des Hôtels Méridien Canada Ltée v. Tribunal du travail*, 80 CLLC ¶14,026; *Hôpital Notre-Dame v. Chabot*, D.T.E. 85T-258, SOQUIJ AZ-85147054; *Silva v. Centre hospitalier de l'Université de Montréal*, 2007 QCCA 458, [2007] R.J.D.T. 363; *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965); *National Bank of Canada and Retail Clerks' International Union*, [1982] 3 Can. L.R.B.R. 1; *J.D. Irving Ltd. and C.E.P.* (2003), 94 C.L.R.B.R. (2d) 105; *Central Web Offset Ltd. and C.E.P., Local 255G* (2008), 155 C.L.R.B.R. (2d) 113; *Hunt Manufacturing Ltd. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 170*, [1993] B.C.L.R.B.D. No. 291 (QL); *EF International Language Schools Inc. (Re)*, [1997] B.C.L.R.B.D. No. 203 (QL); 874352 *Ont. Ltd. (Comox District Free Press) and G.C.I.U., Local 525M* (1995), 26 C.L.R.B.R. (2d) 209; *Retail, Wholesale and Department Store Union, Local 454 v. Westfair Foods Ltd.*, [1993] S.L.R.B.D. No. 2 (QL); *Academy of Medicine*, [1977] O.L.R.B. Rep. 783; *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, 80 CLLC ¶14,062; *Humber College of Applied Arts and Technology*, [1979] O.L.R.B. Rep. 520; *Doral Construction Ltd.*, [1980] O.L.R.B. Rep. 693; *I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 SCC 2, [2004] 1 S.C.R. 43; *Houde v. Université Concordia*, 2007 QCCRT 454, [2007] D.C.R.T.Q. n° 454 (QL); *Craig v. Université McGill (Office of Secretariat)*, 2007 QCCRT 278, [2007] D.C.R.T.Q. n° 278 (QL); *Dallaire v. Sûreté du Québec*, 2007 QCCRT 74, [2007] D.C.R.T.Q. n° 74 (QL); *Desgagné v. Québec (Ministère de l'Emploi, de la Solidarité sociale et de la Famille)*, 2005 QCCRT 351, [2005] D.C.R.T.Q. n° 351 (QL); *Ouimet v. Solotech location inc.*, 2005 QCCRT 180, [2005] D.C.R.T.Q. n° 180 (QL); *Bazinet v. Commission scolaire de la Seigneurie-des-Mille-Îles*, 2004 QCCRT 606, [2004] D.C.R.T.Q. n° 606 (QL); *D'Amour v. Autobus*

Matanais inc., 2004 QCCRT 450, [2004] D.C.R.T.Q. n° 450 (QL); *Marcoux v. Thetford Mines (Ville)*, 2004 QCCRT 76, [2004] D.C.R.T.Q. n° 76 (QL); *Simard v. Québec (Ministère de la Sécurité publique)*, 2004 QCCRT 57, [2004] D.C.R.T.Q. n° 57 (QL); *Bédard v. Étalex inc.*, 2004 QCCRT 45, [2004] D.C.R.T.Q. n° 45 (QL); *Laramée v. Coop de taxi de Montréal*, 2004 QCCRT 30, [2004] D.C.R.T.Q. n° 30 (QL); *Turcotte v. Montréal (Ville)*, 2003 QCCRT 545, [2003] D.C.R.T.Q. n° 545 (QL); *Turpin v. Collège d'enseignement général et professionnel de St-Laurent* (1988), 26 Q.A.C. 296; *Cie Price Ltée v. Auclair*, D.T.E. 88T-688, SOQUIJ AZ-88021372; *Hôpital Royal Victoria v. Duceppe*, [1984] T.T. 163; *Altour Marketing Support Services Ltd. v. Perras*, D.T.E. 83T-855, SOQUIJ AZ-83147158; *Produits Coq d'Or Ltée v. Lévesque*, [1984] T.T. 73; *T.A.S. Communications v. Thériault*, [1985] T.T. 271; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 S.C.R. 27; *Syndicat des infirmières et infirmiers du Centre hospitalier de l'Archipel (FIIQ) v. Plante*, [2003] J.Q. n° 997 (QL); *Immeubles Bona Ltée v. Labelle*, [1995] R.D.J. 397; *Québec (Gouvernement du) (Revenu Québec) v. Fortin*, 2009 QCCRT 241, [2009] D.C.R.T.Q. n° 241 (QL); *Côté v. Corp. Dicom Dorval*, [1987] T.A. 183.

Statutes and Regulations Cited

Act to amend the Labour relations Act, S.Q. 1959-60, c. 8.

Act to amend the Labour Code, to establish the Commission des relations du travail and to amend other legislative provisions, S.Q. 2001, c. 26, s. 63.

Act respecting labour standards, R.S.Q., c. N-1.1

Canadian Charter of Rights and Freedoms, s. 2(d).

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 3.

Civil Code of Québec, S.Q. 1991, c. 64, art. 1590.

Interpretation Act, R.S.Q., c. I-16, s. 41.

Labour Code, R.S.Q., c. C-27, ss. 3, 12, 13, 14, 15, 16, 17, 18, 19, 59, 114, 116, 118, 119, 143.

Labour Relations Act, S.Q. 1944, c. 30.

National Labor Relations Act, 49 Stat. 449.

Authors Cited

Adams, George W. *Canadian Labour Law*, 2nd ed. Aurora, Ont.: Canada Law Book, 1993 (loose-leaf updated March 2009, release 32).

Bergevin, Michel. “L’opportunité et l’efficacité de la réintégration”, in Meredith Memorial Lectures 1988, *New Development in Employment Law*. Cowansville: Yvon Blais, 1989, 283.

Brière, Jean-Yves, avec la collaboration de Jean-Pierre Villaggi. *Relations de travail*, vol. 1. Brossard, Qué.: Publications CCH, 1997 (loose-leaf updated 2009, n° 307).

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Gagnon, Robert P. *Le droit du travail du Québec*, 5^e éd. Cowansville, Qué.: Yvon Blais, 2003.

Gagnon, Robert P. *Le droit du travail du Québec*, 6^e éd. mise à jour par Langlois Kronström Desjardins sous la direction de Yann Bernard, André Sasseville et Bernard Cliche. Cowansville, Qué.: Yvon Blais, 2006.

Lluelles, Didier, et Benoît Moore. *Droit des obligations*. Montréal: Thémis, 2006.

Morin, Fernand, Jean-Yves Brière et Dominic Roux. *Le droit de l’emploi au Québec*, 3^e éd. Montréal: Wilson & Lafleur, 2006.

Québec. Assemblée nationale. *Journal des débats de la Commission permanente de l’économie et du travail*, 2^e sess., 36^e lég., vol. 37, n° 22, 29 mai 2001.

Québec. Assemblée nationale. *Journal des débats de la Commission permanente de l’économie et du travail*, 2^e sess., 36^e lég., vol. 37, n° 32, 18 juin 2001.

Summers, Clyde. “Labor Law in the Supreme Court: 1964 Term” (1965), 75 *Yale L.J.* 59.

Verge, Pierre, Gilles Trudeau et Guylaine Vallée. *Le droit du travail par ses sources*. Montréal:

Thémis, 2006.

APPEAL from a judgment of the Quebec Court of Appeal (Rochon J.A.), 2007 QCCA 1210, [2007] J.Q. n° 10678 (QL), dismissing an application for leave to appeal from a judgment of Corriveau J., 2007 QCCS 3165, [2007] J.Q. n° 7019 (QL), dismissing an application for judicial review of a decision of the Commission des relations du travail, 2006 QCCRT 207, [2006] D.C.R.T.Q. n° 207 (QL). Appeal dismissed, LeBel, Abella and Cromwell JJ. dissenting.

Bernard Phillion, Claude Leblanc and Gilles Grenier, for the appellant.

Roy L. Heenan, Corrado De Stefano and Frédéric Massé, for the respondent.

Hélène Fréchette, Vanessa Deschênes and Lucie Tessier, for the intervener Commission des relations du travail.

George Avraam, Mark Mendl, Jeremy Hann and Kevin B. Coon, for the intervener the Alliance of Manufacturers & Exporters Canada.

Robert Laurin, for the intervener Fédération des travailleurs du Québec (FTQ).

Robin Elliot, for the intervener the Coalition of BC Businesses.

Guy Du Pont, for the intervener the Canadian Chamber of Commerce.

Andrew K. Lokan and Jean-Claude Killey, for the intervener the Canadian Civil Liberties Association.

Manon Savard and Sébastien Beauregard, for the intervener Conseil du patronat du Québec.

Steven Barrett and Lise Leduc, for the intervener the Canadian Labour Congress.

The judgment of McLachlin C.J. and Binnie, Deschamps, Fish, Charron and Rothstein JJ. was delivered by

BINNIE J. —

[1] On April 29, 2005, Wal-Mart shut its store at Jonquière, in the Saguenay-Lac-St-Jean area of Quebec. The workers at this particular store had chosen to collectively bargain through their union, which had been certified by the Commission des relations du travail (“CRT”) on August 2, 2004. Thereafter negotiations to conclude a collective agreement were unsuccessful. On February 9, 2005, the Minister of Labour appointed an arbitrator to resolve the outstanding differences. On the same day, Wal-Mart announced closure of the store. On May 17, 2005, the appellant filed a complaint under s. 16 of the *Labour Code*, R.S.Q., c. C-27 (“Code”), claiming [TRANSLATION] “I lost my employment because of the unionization of my establishment.” He sought an order that he be reinstated in his job. This could only occur if the store was ordered to be re-opened. For the reasons that follow I believe the claim was rightly rejected and that the appeal should be dismissed.

I. Overview

[2] This proceeding is one of many initiated by the Wal-Mart employees or their union the United Food and Commercial Workers Union, Local 503, arising out of the closing of the Jonquière store, including other proceedings before the CRT invoking its general remedial powers under ss. 114, 118 and 119 of the Code (*Boutin v. Wal-Mart Canada inc.*, 2005 QCCRT 225, [2005] D.C.R.T.Q. n° 225 (QL); 2005 QCCRT 269, [2005] D.C.R.T.Q. n° 269 (QL)) and proceedings for judicial review related thereto, as well as a class action (*Pednault v. Compagnie Wal-Mart du Canada*, [2005] J.Q. n° 16222 (QL) (Sup. Ct.)). The Jonquière store was the first Wal-Mart store to be unionized in North America, and the *Pednault* Statement of Claim included the allegations that the store closure was intended to intimidate employees [TRANSLATION] “of any other Wal-Mart store who have engaged in or are considering engaging in unionization activities” and “to frustrate attempts to unionize this store and any similar applications in any other store” (2006 QCCA 666, [2006] R.J.Q. 1266, at paras. 9 and 10). The class action was eventually dismissed on the basis that the subject matter of the dispute lay more appropriately within the jurisdiction of the CRT rather than the courts. In addition, the union launched a grievance against Wal-Mart under s. 59 of the Code alleging, amongst other things, that Wal-Mart [TRANSLATION] “also encouraged, fomented and fostered rumours that the Wal-Marts in St-Hyacinthe and Brossard would soon be closing” (*Travailleurs et travailleuses unis de l’alimentation et du commerce, section locale 503 v. Ménard*, 2007 QCCS 5704, [2008] R.J.D.T. 138, at para. 3). In other words the Jonquière closing was presented by the union merely as a step taken by Wal-Mart in a larger employer strategy of hindrance, intimidation and union-busting.

[3] In this particular proceeding, Wal-Mart's answer to the s. 16 complaint was that the appellant lost his job not because of union activity but because the store no longer existed and therefore no jobs were available. Abella J. argues that Wal-Mart's response reflects Quebec case law that has wrongly "resulted in a blanket immunization from scrutiny for business closings, and has prevented both unions and employees from seeking *any* remedy for anti-union conduct when a business is closed" (para. 66; (emphasis added)). I do not agree that such an immunity exists. Even Wal-Mart did not claim that the closing of its Jonquière store was immunized from "scrutiny" or could serve to deny unions and employees "any remedy for anti-union conduct".

[4] The issue before the Court, as I see it, is quite limited albeit it is an important one. It is a matter of procedure that has nothing to do with any general inquiry into Wal-Mart's labour practices. The narrow issue is whether the procedural vehicle offered by ss. 15 to 17 of the Code is available to the appellant in circumstances where a store no longer exists. More specifically, the issue is whether an employee in such circumstances has the benefit of the *presumption* in s. 17 that the loss of jobs was a "sanction" imposed for an unlawful motive, namely union busting. With all due respect to those of a different opinion, my view is that the necessary foundation of a s. 15 order is the existence of an ongoing workplace. The appropriate remedy in a closure situation lies under ss. 12 to 14 of the Code (which were in fact invoked by Jonquière employees in the *Boutin* case mentioned earlier). Abella J. writes that:

I see no reason why the Commission cannot order [compensation] under ss. 15 and 119 of the *Labour Code* if it is satisfied that the closing was motivated by anti-union animus. [para. 146]

If my colleague were to substitute ss. 12 to 14 in place of s. 15 in her conclusion we would be in agreement.

[5] From the perspective of the appellant and his union, the major attraction of the procedure under ss. 15 to 17 is precisely the statutory presumption under s. 17 which provides that where the employer takes action against an employee who is exercising rights under the Code, the CRT must assume that the sanction was imposed or the action taken because of the exercise of such employee rights until the employer shows otherwise. The appellant argues that the workplace closure was such a “sanction” or “action” and the presumption therefore applies. Section 17 provides:

17. S’il est établi à la satisfaction de la Commission que le salarié exerce un droit qui lui résulte du présent code, il y a présomption simple en sa faveur que la sanction lui a été imposée ou que la mesure a été prise contre lui à cause de l’exercice de ce droit et il incombe à l’employeur de prouver qu’il a pris cette sanction ou mesure à l’égard du salarié pour une autre cause juste et suffisante.

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.

The onus is thus put on the employer (here Wal-Mart) to establish that the sanction or action against the complainant was taken “for good and sufficient reason” (s. 17) which in practice means a decision free of taint of anti-union activity. Wal-Mart complains that it cannot logically be inferred from the fact of prior union activity that the closure of the Jonquière store was a “sanction or

reprisal”.

[6] In electing the procedure under ss. 15 to 17, the appellant was confronted with a long line of cases in the Quebec courts and in this Court addressing re-instatement issues, including *Lafrance v. Commercial Photo Service Inc.*, [1980] 1 S.C.R. 536, and *Hilton Québec Ltée v. Labour Court*, [1980] 1 S.C.R. 548. Subsequently in *City Buick Pontiac (Montréal) Inc. v. Roy*, [1981] T.T. 22, the Quebec Labour Court held that a business closure itself is “good and sufficient reason” within the meaning of s. 17 to justify the dismissal [TRANSLATION] “even if the closure is based on socially reprehensible considerations” (*per* Judge Lesage, at p. 26). The rationale is that the loss of employment is explained by the closure. Re-instatement in a closed workplace is not a feasible or appropriate remedy. The cause of the *closure*, on the other hand, is a distinct question that may be pursued under other provisions of the Code, as will be discussed.

[7] Counsel for Wal-Mart reminds us that *City Buick* was recently approved by our Court in *I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 SCC 2, [2004] 1 S.C.R. 43. The appellant, however, contends that this line of cases from *City Buick* onwards, should now be reconsidered because, he says, the constitutional scope of freedom of association has recently been broadened by this Court in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, and the provisions of the Code must now be re-interpreted in that light. For the reasons that follow I do not think that the *Health Services* decision is of any assistance here.

[8] The rule in Quebec that an employer can close a plant for “socially reprehensible

considerations” does not however mean it can do so without adverse financial consequences, including potential compensation to the employees who have thereby suffered losses.

A. *The Existence of Alternative Remedies*

[9] *City Buick*, as quoted and affirmed by this Court in *Place des Arts*, spoke of “socially reprehensible considerations”. It did not offer an employer immunity under the Code for *illegal* conduct.

[10] It is open to a union or employees to bring evidence of anti-union conduct to establish an unfair labour practice under ss. 12 to 14 of the Code. The disadvantage from the employees’ point of view is that the s. 17 presumption is not available in an application under those provisions. A s. 12 claim that the employer committed an unfair labour practice is for the union or employees to establish, not for the employer to rebut.

[11] The bottom line in this appeal is therefore not whether employees have a remedy against an employer who closes a workplace for anti-union motives (they do have a remedy) but whether employees of a closed business can bring their claim within ss. 15 to 17 so as to obtain the considerable advantage of a statutory presumption that the dismissals were *because* the employees exercised their collective bargaining rights.

[12] The issue under ss. 12 to 14 is not the same issue as under ss. 15 to 17, although both procedures address the problem of anti-union activity. Under ss. 15 to 17, as interpreted by the

CRT, the question before the tribunal relates to the reasons for the employee's dismissal (to which the real and definitive closing of the workplace has been held to be a good and sufficient answer) whereas the question that can be put in play under ss. 12 to 14 is the broader issue of *why* the plant was closed at all, and specifically was it closed as part of an anti-union strategy. A finding of an unfair labour practice under ss. 12 to 14 opens up broader redress under the general remedial provisions of the Code for the benefit of *all* employees, including those who were not involved in union activity, and even for those who *opposed* the union, but who nevertheless suffered as a result of the wrongful store closure.

[13] 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. On the other hand, the *City Buick* line of cases reflects the countervailing difficulty faced by employers in proving a closure to be free of taint in "mixed-motive" closures. The *City Buick* doctrine that a definitive workplace closure constitutes "good and sufficient reason" for the purposes of s. 17 (because no reinstatement is possible) is well understood and the Quebec legislature made no change during the major amendments of 2001, despite representations on the issue, as hereafter described. As will be seen, the relevant extracts from *City Buick* were incorporated into this Court's judgment in *Place des Arts*, at para. 28, to which Gonthier J. added, for the Court, "I respectfully agree with Judge Lesage's account." It would be unfortunate, absent compelling circumstances, if the precedential value of an unanimous decision of this Court was thought to expire with the tenure of the particular panel of judges that decided it.

II. Facts Specific to This Appeal

[14] In August 2004, the union to which Mr. Plourde belongs was certified to represent the employees of Wal-Mart in Jonquière. After several fruitless bargaining sessions, the union filed an application under the Code to establish the provisions of a first collective agreement. On February 9, 2005, the Minister of Labour referred the dispute to arbitration and notified the parties of the referral. That same day, Wal-Mart informed the employees of its decision to close the store. On April 29, 2005, the appellant's employment, along with that of approximately 190 other employees, was terminated.

[15] After the closure was announced, the employees and the union brought a number of proceedings to obtain relief. In addition to various proceedings under the Code, including the one at bar, a civil proceeding was brought in *Pednault* that took the form of a motion for authorization to institute a class action on behalf of all the employees of the Jonquière store. In that motion, it was alleged that the closure infringed the employees' freedom of association under s. 3 of the *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, and damages were claimed. The Court of Appeal upheld a judgment granting a motion for declinatory exception on the basis that the dispute fell within the exclusive jurisdiction of the Commission des relations du travail ("the Commission"), since it clearly concerned the exercise of employees' rights provided for in , and employer conduct punishable pursuant to, the Code.

[16] In the case at bar, Mr. Plourde, along with several other employees, filed a complaint under ss. 15 *et seq.* of the Code and claimed to have lost his employment because of his union

activities.

III. Relevant Statutory Provisions

[17] *Labour Code*, R.S.Q., c. C-27

12. Aucun employeur, ni aucune personne agissant pour un employeur ou une association d'employeurs, ne cherchera d'aucune manière à dominer, entraver ou financer la formation ou les activités d'une association de salariés, ni à y participer.

Aucune association de salariés, ni aucune personne agissant pour le compte d'une telle organisation n'adhérera à une association d'employeurs, ni ne cherchera à dominer, entraver ou financer la formation ou les activités d'une telle association ni à y participer.

13. Nul ne doit user d'intimidation ou de menaces pour amener quiconque à devenir membre, à s'abstenir de devenir membre ou à cesser d'être membre d'une association de salariés ou d'employeurs.

14. Aucun employeur, ni aucune personne agissant pour un employeur ou une association d'employeurs ne doit refuser d'employer une personne à cause de l'exercice par cette personne d'un droit qui lui résulte du présent code, ni chercher par intimidation, mesures discriminatoires ou de représailles, menace de renvoi ou autre menace, ou par l'imposition d'une sanction ou par quelque autre moyen à contraindre un salarié à s'abstenir ou à cesser d'exercer un droit qui lui résulte du présent code.

Le présent article n'a pas pour effet d'empêcher un employeur de suspendre,

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.

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.

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.

This section shall not have the effect of preventing an employer from suspending, dismissing or transferring an employee for a

congédier ou déplacer un salarié pour une cause juste et suffisante dont la preuve lui incombe.

15. Lorsqu'un employeur ou une personne agissant pour un employeur ou une association d'employeurs congédie, suspend ou déplace un salarié, exerce à son endroit des mesures discriminatoires ou de représailles, ou lui impose toute autre sanction à cause de l'exercice par ce salarié d'un droit qui lui résulte du présent code, la Commission peut :

a) ordonner à l'employeur ou à une personne agissant pour un employeur ou une association d'employeurs de réintégrer ce salarié dans son emploi, avec tous ses droits et privilèges, dans les huit jours de la signification de la décision et de lui verser, à titre d'indemnité, l'équivalent du salaire et des autres avantages dont l'a privé le congédiement, la suspension ou le déplacement.

Cette indemnité est due pour toute la période comprise entre le moment du congédiement, de la suspension ou du déplacement et celui de l'exécution de l'ordonnance ou du défaut du salarié de reprendre son emploi après avoir été dûment rappelé par l'employeur.

Si le salarié a travaillé ailleurs au cours de la période précitée, le salaire qu'il a ainsi gagné doit être déduit de cette indemnité;

b) ordonner à l'employeur ou à une personne agissant pour un employeur ou une association d'employeurs d'annuler une sanction ou de cesser d'exercer des mesures discriminatoires ou de représailles à l'endroit de ce salarié et de lui verser à titre d'indemnité l'équivalent du salaire et des autres avantages dont l'ont privé la sanction, les mesures discriminatoires ou de représailles.

16. Le salarié qui croit avoir été l'objet d'une sanction ou d'une mesure visée à l'article 15

good and sufficient reason, proof whereof shall devolve upon the said employer.

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.

That indemnity is due in respect of the whole period comprised between the time of dismissal, suspension or transfer and that of the carrying out of the order, or the default of the employee to resume his employment after having been duly recalled by his employer.

If the employee has worked elsewhere during the above mentioned period, the salary which he so earned shall be deducted from such indemnity;

(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.

16. The employees who believe that they

doit, s'il désire se prévaloir des dispositions de cet article, déposer sa plainte à l'un des bureaux de la Commission dans les 30 jours de la sanction ou mesure dont il se plaint.

17. S'il est établi à la satisfaction de la Commission que le salarié exerce un droit qui lui résulte du présent code, il y a présomption simple en sa faveur que la sanction lui a été imposée ou que la mesure a été prise contre lui à cause de l'exercice de ce droit et il incombe à l'employeur de prouver qu'il a pris cette sanction ou mesure à l'égard du salarié pour une autre cause juste et suffisante.

114. La Commission est chargée d'assurer l'application diligente et efficace du présent code et d'exercer les autres fonctions que celui-ci et toute autre loi lui attribuent.

...

118. La Commission peut notamment :

1° rejeter sommairement toute demande, plainte ou procédure qu'elle juge abusive ou dilatoire;

2° refuser de statuer sur le mérite d'une plainte . . . ;

3° rendre toute ordonnance, y compris une ordonnance provisoire, qu'elle estime propre à sauvegarder les droits des parties;

4° décider de toute question de droit ou de fait nécessaire à l'exercice de sa compétence;

5° confirmer, modifier ou infirmer la décision, l'ordre ou l'ordonnance contesté et, s'il y a lieu,

have been the victim of a sanction or action referred to in section 15 must, if they wish to avail themselves of the provisions of that section, file a complaint at one of the offices of the Commission within thirty days of the sanction or action.

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.

114. The Commission is responsible for ensuring the diligent and efficient application of the provisions of this Code and exercising the other functions assigned to it under this Code or any other Act.

...

118. The Commission may, in particular,

(1) summarily reject any motion, application, complaint or procedure it considers to be improper or dilatory;

(2) refuse to rule on the merits of a complaint . . . ;

(3) make any order, including a provisional order, it considers appropriate to safeguard the rights of the parties;

(4) determine any question of law or fact necessary for the exercise of its jurisdiction;

(5) confirm, modify or quash the contested decision or order and, if appropriate, render the decision or order which, in its opinion,

rendre la décision, l'ordre ou l'ordonnance qui, à son avis, aurait dû être rendu en premier lieu;

6° rendre toute décision qu'elle juge appropriée;

...

119. Sauf au regard d'une grève, d'un ralentissement d'activités, d'une action concertée autre qu'une grève ou un ralentissement d'activités ou encore d'un lock-out, réels ou appréhendés, dans un service public ou dans les secteurs public et parapublic au sens du chapitre V.1, la Commission peut aussi:

1° ordonner à une personne, à un groupe de personnes, à une association ou à un groupe d'associations de cesser de faire, de ne pas faire ou d'accomplir un acte pour se conformer au présent code;

2° exiger de toute personne de réparer un acte ou une omission fait en contravention d'une disposition du présent code;

3° ordonner à une personne ou à un groupe de personnes, compte tenu du comportement des parties, l'application du mode de réparation qu'elle juge le plus approprié;

...

should have been rendered or made initially;

(6) render any decision it considers appropriate;

...

119. Except with regard to an actual or apprehended strike, slowdown, concerted action, other than a strike or slowdown, or lock-out in a public service or in the public and parapublic sectors within the meaning of Chapter V.1, the Commission may also

(1) order a person, group of persons, association or group of associations to cease performing, not to perform or to perform an act in order to be in compliance with this Code;

(2) require any person to redress any act or remedy any omission made in contravention of a provision of this Code;

(3) order a person or group of persons, in light of the conduct of the parties, to apply the measures of redress it considers the most appropriate;

...

IV. Adjudicative History

A. *Commission des relations du travail*, 2006 QCCRT 207, [2006] D.C.R.T.Q. n° 207 (QL)

[18] Wal-Mart submitted that it had proven that the employments were terminated for good

and sufficient reason within the meaning of s. 17 of the Code, that reason being the complete and permanent closure of the Jonquière store. Mr. Plourde contended that a loss of employment resulting from an infringement of freedom of association could not be a loss of employment for good and sufficient reason.

[19] According to the Commission, there was no doubt that the appellant could rely on the presumption under s. 17, since he had engaged in numerous significant union activities that were concomitant with the termination of his employment. However, the Commission found that Wal-Mart had shown the store's closure to be genuine and permanent. The evidence supported the conclusion that the establishment no longer had any employees, was closed to the public and had been emptied of its merchandise and equipment and stripped of any identifying signage or colours. Moreover, the resiliation of the lease and the uncontradicted explanations regarding efforts to sell the building sufficed to show, in light of the evidence as a whole, that the closure of the store was genuine.

[20] Mr. Plourde conceded that the courts have consistently and unanimously held for more than 25 years that the genuine closure of a business constitutes a good and sufficient reason for the purposes of s. 17 of the Code. But he argued that it was necessary to depart from this line of authority in favour of the freedom of association protected by the Quebec *Charter* and the *Canadian Charter of Rights and Freedoms*. The Commission rejected the appellant's argument and concluded that there was no support in the case law for an inference that an employer could be compelled, on the basis of freedom of association, to remain in business against its will. The Commission found that in *Société de la Place des Arts de Montréal*, the Supreme Court had endorsed, without

qualification, the comment of Lesage J. in *City Buick* that what is prohibited by s. 15 of the Code is dismissing employees engaged in union activities, not permanently closing a business because one does not want to deal with a union. Where the closure is real, genuine or permanent, the reason for the termination of employment is the closure, not the union activities of certain employees.

[21] The Commission thus concluded that freedom of association does not bar an employer from closing its business, regardless of its reason for doing so.

B. *Quebec Superior Court*, 2007 QCCS 3165, [2007] J.Q. n° 7019 (QL)

[22] According to Corriveau J., the courts have long held that the genuine closure of an establishment constitutes “good and sufficient reason” within the meaning of s. 17 of the Code, and the Commission was accordingly correct in not requiring Wal-Mart to prove its reasons for closing the store. She wrote the following:

[TRANSLATION] The closure of an establishment is not in itself an action or a sanction against an individual; it is the reason for a loss of employment, and that loss constitutes the action against the employee within the meaning of s. 17 of the *Code*.

Furthermore, it is because the closure of an establishment is the reason for an action and not an action in itself that the courts have historically recognized that closure constitutes “good and sufficient reason” if it is genuine. [paras. 34-35]

[23] Corriveau J. then considered the appellant’s argument that the traditional case law should be disregarded in favour of the freedom of association protected by the *Charters*. In her opinion, although the *Charters* do protect freedom of association, they do not grant a right to a

particular form of association. The Code expands the scope of freedom of association for a particular type of association and specifies the conditions for its application. Hence, according to the judge, it is difficult to imagine that the *Charters* themselves can expand the scope of the provisions of the Code.

C. *Quebec Court of Appeal*, 2007 QCCA 1210, [2007] J.Q. n° 10678 (QL)

[24] In brief reasons, Rochon J.A. held that the case did not raise a new issue requiring the intervention of the Court:

[TRANSLATION] The applicant submits, in essence, that evidence of the real, genuine and permanent nature of the closure of the Jonquière store cannot, on its own, whatever the motives may be, constitute a good and sufficient reason. On the contrary, the applicant writes:

Similarly, where the presumption these measures entail applies as a result of activities that are protected by both the *Code* and the *Charter*, there is also a presumption that the *Charter* has been violated.

...

The applicant's proposition does not stand up in light of the Supreme Court of Canada's holding in *I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal*, which does not provide support for any questioning of the high court's recent decision in *Health Services and Support Facilities Subsector Bargaining Assn. v. British Columbia*. [paras. 4 and 6]

Accordingly, the application for leave was rejected.

V. Analysis

[25] The multiple proceedings commenced by the union and numerous employees following the closure of the Jonquière store were based on the contention that Wal-Mart is a union-busting employer with a long track record of anti-union activity. In this context, it was alleged that the closing of the Jonquière store was intended not only as a reprisal against Jonquière employees who had chosen to be represented by the union, but to send a “chilling” signal to other Wal-Mart employees at other stores in the Saguenay area and across its retail empire that if they, too, chose to be represented by a union their jobs would be at risk.

A. Remedies under Sections 12 to 14 of the Labour Code

[26] Section 12 of the Code prohibits an employer from in any manner “hindering” the activities of any association of employees. In *Asselin v. Lord*, D.T.E. 85T-193, SOQUIJ AZ-85147041, the Labour Court recognized that s. 12 is available where there is an allegation that closure of a particular workplace reflects anti-union conduct. The Labour Court, while not finding the anti-union conduct to be proved in that case, observed:

[TRANSLATION] If it is not shown that the sole purpose of the closure was to hinder the union’s activities, the employer cannot be found guilty . . . on the basis that the consequences of the closure are so serious that they clearly hinder the union’s activities.

Thus, the Court must be shown that the purpose of the employer’s actions was to hinder the union’s activities or to endeavour to compel an employee to refrain from or to cease exercising a right arising from this *Code* [Emphasis added; p. 46.]

(I am mindful that *Asselin* was decided in a penal context before civil remedies became available with the coming into force of ss. 114, 116(1), 118 and 119 in 2002: see *An Act to amend the Labour*

Code, to establish the Commission des relations du travail and to amend other legislative provisions, S.Q. 2001, c. 26, s. 63; O.C. 1314-2002. While relevant to the present debate, *Asselin* should be read in light of that different context.)

[27] The CRT and its predecessor, the Labour Court, have in fact granted relief or imposed a sanction under s. 12 where an employer has *threatened* to close a workplace for anti-union purposes: *Syndicat des travailleurs en communication, électronique, électricité, techniciens et salariés du Canada (C.T.C. – F.T.Q.) v. Raffi Schwartz*, [1986] T.T. 165 (penal proceeding); *Bourget v. Matériaux B.G.B. Itée*, D.T.E. 95T-1257, SOQUIJ AZ-95147099 (penal proceeding); *Syndicat des employés de la société chimique Laurentide Inc. v. Lambert*, D.T.E. 85T-523, SOQUIJ AZ-85147077 (penal proceeding); *Teamsters – Conférence des communications graphiques, section locale 555 M v. Joncas Postexperts inc.*, 2008 QCCRT 249, [2008] D.C.R.T.Q. n° 249 (QL) (civil proceeding); *Section locale 175 du Syndicat canadien des communications, de l'énergie et du papier (SCEP) v. Petro-Canada*, 2008 QCCRT 246, [2008] D.C.R.T.Q. n° 246 (QL) (civil proceeding). In *Lagacé v. Laporte*, [1983] T.T. 354, the Labour Court made an order under s. 13 of the Code against an employer who threatened closure as part of its anti-union activities.

[28] Professor Gagnon has explained the purpose of s. 12 as follows:

[TRANSLATION] Union independence implies an absence of both obstacles to and undue interference with legitimate collective action. Thus, the union group, the association of employees, must be able to form, organize and administer itself without being hindered or interfered with by the employer, under the control and according to the wishes only of the employees whose interests it is intended to defend. It is this strictly collective dimension of the right of association that the legislature had in mind when it enacted section 12, para. 1 L.C.

(R. P. Gagnon, *Le droit du travail du Québec* (6th ed. 2006), at p. 337.)

See also J.-Y. Brière with the collaboration of J.-P. Villaggi, *Relations de travail* (loose-leaf), vol. 1, at p. 2,402.

[29] A claim under s. 12 is logical because the essential thrust of the appellant's position is *not* that he alone or with some colleagues was singled out for discriminatory treatment but that Wal-Mart targeted generally the rights of *all* employees at the Jonquière store (and elsewhere). Jobs were lost not only by union supporters but by others who were indifferent about the union or who were altogether against union representation.

[30] Accordingly, ss. 12 to 14 were in fact pleaded by Jonquière employees in *Boutin v. Wal-Mart Canada inc.*, in May 2005. However, the *Boutin* proceedings were discontinued on or about December 5, 2007.

[31] A finding in favour of the union under ss. 12 to 14 would have allowed the CRT to exercise its broad remedial powers under ss. 118 and 119 of the Code. Whether the CRT would be as aggressive in fashioning a remedy as its counterparts in some of the other provinces would be for the CRT to determine. Under ss. 12 to 14, however, the employees or their union must prove the existence of anti-union misconduct on a balance of probabilities.

[32] In any event, the issue on this appeal is not whether the Wal-Mart employees at Jonquière had access to *some* remedy under the Code for the store closure if the closure could be

shown to be part of a union-busting strategy, but whether ss. 15 to 17 were properly available to have the workplace closure considered a “sanction” and anti-union motivation *presumed* in their favour.

B. The Remedies Under Sections 15 to 17 of the Labour Code

[33] In this case it was shown to the satisfaction of the CRT that Mr. Plourde had demonstrated a level of union activity that triggered the application of the s. 17 presumption. The burden thus shifted to Wal-Mart to show that the “real cause” of the dismissal was the store closure and that the definitive closure constituted “good and sufficient reason” to justify the dismissal. The CRT concluded that the closure was real and definitive, and that Wal-Mart had therefore discharged its onus under s. 17.

[34] The appellant sought judicial review of the CRT decision. The decision of the CRT on the proper interpretation of a provision of its constituent statute is entitled to a measure of deference and should be reviewed by the courts on a reasonableness standard: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.

[35] Sections 15 to 17 set out a remedy for any person who is dismissed, suspended, transferred, discriminated against or subjected to reprisals or other sanctions because of exercising rights under the Code. The remedy was added to the Code to address the deficiencies, from the employees’ point of view, of the then penal provisions prohibiting anti-union conduct by employers.

A successful prosecution under the previous law was cold comfort to employees who had lost their jobs. The reference in s. 15 to an order to “reinstatement such employee in his employment” (emphasis added) signals quite unambiguously the legislative contemplation of an ongoing place of employment as the foundation of a successful s. 15 application, although clearly more than one employee may join in a complaint: *Dar v. Manufacturier de bas Iris inc.*, [2000] R.J.D.T. 1632 (Lab. Ct.); motion for judicial review dismissed on January 12, 2001, Sup. Ct., Mtl, No. 500-05-061084-008.

[36] What, then, is the scope of the s. 15 remedy? My colleague’s discussion of the U.S. *Wagner Act* and various other historic milestones in North American labour relations is of interest but it is no substitute, with respect, for an analysis of what the Quebec legislature has actually *said* in the relevant statutory provisions. Section 15 authorizes the CRT to:

(a) order the employer or a person acting for an employer or an employers’ association to reinstatement 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.

That indemnity is due in respect of the whole period comprised between the time of dismissal, suspension or transfer and that of the carrying out of the order, or the default of the employee to resume his employment after having been duly recalled by his employer.

If the employee has worked elsewhere during the above mentioned period, the salary which he so earned shall be deducted from such indemnity;

(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. [Emphasis added.]

The CRT has consistently treated the indemnification provisions as limited to the situation of an ongoing business rather than a free standing power to award damages against employers for anti-union conduct associated with a closed business: *Bélanger v. Hydro-Québec*, D.T.E. 86T-86, SOQUIJ AZ-86147016. See also *Produits Coq d'Or Ltée v. Lévesque*, [1984] T.T. 73; *T.A.S. Communications v. Thériault*, [1985] T.T. 271. This limited role for s. 15 (albeit a powerful role in light of the statutory presumption against the employer) is consistent with the text and purpose of these provisions.

[37] In *Altour Marketing Support Services Ltd. v. Perras*, D.T.E. 83T-855, SOQUIJ AZ-83147158 (Lab. Ct.), indemnification was awarded only for the interim period between the wrongful dismissal and the time when the provincial board lost jurisdiction because the employer became federally regulated.

[38] Abella J. argues that this interpretation of s. 15 “is to attribute to the legislature an intention to redress only unlawful conduct which can be redressed by reinstatement. Such an ungenerous and impractical intention collides with the approach to remedies in the law of obligations set out in art. 1590 of the *Civil Code of Québec*” (para. 133). This is not so. There is an alternative remedy. It is found in ss. 12 to 14 of the Code. Abella J.’s interpretation, on the other hand, would erode the distinct roles assigned by the legislature to the ss. 12 to 14 group of provisions and the ss. 15 to 19 group. In a workplace closure situation they would be duplicative. My colleague notes that “one of the remedies Plourde seeks is compensation” (para. 146). This is so, but it is in the context of a complaint, which is dated some weeks after the store closed on April 29, 2005, that specifically includes a demand that Wal-Mart be ordered [TRANSLATION] “to reinstate

me in or transfer me back to my employment” (see exhibit P-2, A.R. vol. II, p. 68).

[39] Abella J. also contends that the general remedial powers under ss. 118 and 119 are available to the CRT on a s. 15 application (paras. 140-141). I do not agree. Section 15 provides a summary remedy backed by a presumption against the employer. The legislature has specified in s. 15 the remedies available for its breach. Adding the generality of ss. 118 and 119 remedies to a s. 15 violation would give the s. 17 presumption an expanded (and comprehensive) effect beyond the reinstatement and associated relief contemplated in the ss. 15 to 17 group of provisions for an illegal dismissal. Employees in search of general remedies would never have to establish anti-union misconduct. Its existence would always be presumed in their favour as soon as they established they had exercised “a right arising from this Code”. This, in my view, would significantly alter the balance between employers and employees intended by the Quebec legislature. The better view, I believe, is that where employees seek relief under the general remedial provisions of the Code, their remedy lies under ss. 12 to 14, as already discussed.

[40] On the other hand nothing in these reasons affects the full range of relief available from the CRT under ss. 15 to 19 in situations where the workplace continues in existence. In these situations, s. 15(b) provides that the CRT may order the employer to cancel an illegal sanction. Where the illegal sanction falls short of dismissal, the issue of reinstatement does not arise and lesser remedies will be considered. I will say nothing further about “lesser remedies” because the issue in this appeal is limited to the availability of the s. 17 presumption where the plaintiff seeks relief against an illegal dismissal. The relief available when ss. 15 to 19 are properly invoked in the context of a lesser sanction has

not been put in issue before us and the scope of this judgment is limited accordingly.

C. This Court's Recent Decision in Place des Arts (2004) Grew Out of 45 Years of Consistent Quebec Jurisprudence on Workplace Closures.

[41] In *Place des Arts*, at para. 28, the judgment of our Court adopted and expressly agreed with certain observations made by Judge Lesage in *City Buick*, in the context of the s. 17 presumption:

[TRANSLATION] 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. [Emphasis added; emphasis in original deleted; p. 26.]

Accordingly, these words can no longer be dismissed as merely the expression of the Quebec Labour Court in 1981. The words express the unanimous view of the Supreme Court of Canada in 2004.

[42] In ruling that s. 15 is not appropriate in a workplace closure situation, the CRT in this case thus drew from a long line of authority commencing over 45 years ago. In *Maresq et Brown Bovari (Canada) Ltd.*, [1963] R.D.T. 242, a case that did not involve a workplace closure but the dismissal of a single employee, Judge Alan Gold of the

Magistrate's Court of Quebec, then vice-chairman of the Labour Relations Board, stated at p. 246:

Thus, in order to decide whether or not the Act has been violated, we must, of necessity, consider the reason indicated by the employer for discharging his employee but our consideration must be solely directed to determine if this reason is the real and determining reason — the *causa causans* of the dismissal — or only a simulated reason given to mask the real reasons, which is the employee's trade union activity and which has brought about the employer's displeasure. It is not for us to sit as a board of review upon the employer's decision other than to decide the sincerity of his action. [Emphasis added.]

In *Maresq*, the employee was fired at a time when he was taking part in union organizing, but the court was satisfied that the employer did not know that. The employee was held to have been fired for “fair and sufficient” reasons.

[43] Judge Gold's *causa causans* approach was followed in a number of cases including by the Labour Court in *Industrielle (L'), Compagnie d'assurance sur la vie v. Nadeau*, [1978] T.T. 175, and by the Quebec Court of Appeal in *Société des Hôtels Méridien Canada Ltée v. Tribunal du travail*, 80 CLLC ¶ 14,026, and *Hilton Québec Ltée v. Tribunal du travail*, C.A.Q., No. 200-09-000312-782, January 16, 1979.

[44] The issue came before this Court in *Lafrance*, where Chouinard J. said:

It remains for the Court to resolve the principal question raised by this appeal, namely the meaning of the phrase “another good and sufficient reason” in s. 16 [now s. 17] and the scope of the jurisdiction of the investigation commissioner and of the Labour Court on appeal.

From the outset it has been held that this phrase means that the investigation commissioner must be satisfied that the other reason relied on by the employer is of a substantial nature and not a pretext, and that it constitutes the true reason for the dismissal.

(See also *Hilton Québec*, per Chouinard J., at p. 550.)

[45] The next case in this chain of pedigree is *City Buick*, to which extensive reference has already been made. Unlike *Maresq*, which involved the dismissal of a single employee, *City Buick* arose out of the closure of a business. The comments in that case, now backed by *Place des Arts*, that a real and definitive workplace closure is a complete answer to any attempt to invoke the s. 17 presumption are therefore applicable to this appeal.

[46] In Quebec (and elsewhere) the firing of a single employee often merits heightened scrutiny (e.g. the imposition of the reverse onus that requires an employer to prove that it has a good and sufficient reason for firing an employee who was at the time engaged in protected union-related activity) but in Quebec the CRT and the courts have not thought it appropriate to impose such a reverse onus in the case of the closure of an entire plant. The Quebec view is that the immediate reason the employees were dismissed is that their jobs no longer existed because of the closure. The reason for the closure is a more remote question which, it was held, is not to be determined on a s. 15 application.

[47] In *Maresq*, Judge Gold had said that the real reason for the dismissal *was* relevant (i.e. the court would not accept “a simulated reason given to mask the real reason, which is the employee’s trade union activity and which has brought about the employer’s displeasure”) whereas Judge Lesage said that in the case of a closure the employer’s decision

to close “for whatever reason [including] socially reprehensible considerations” (emphasis added) would not be reviewed under s. 17. A closure, for whatever reason, was still a closure, making reinstatement impossible. The decision of Judge Lesage has been followed consistently in Quebec in workplace closure situations (see, e.g., *Caya v. 1641-9749 Québec Inc.*, D.T.E. 85T-242, SOQUIJ AZ-85147051 (Lab. Ct.); *Bérubé v. Groupe Samson Inc.*, D.T.E. 85T-932, SOQUIJ AZ-85147126 (Lab. Ct.); *Ouellette v. Restaurants Scott Québec Ltée*, D.T.E. 88T-546, SOQUIJ AZ-88147062 (Lab. Ct.); *Entreprises Bérou inc. v. Arsenault*, [1991] T.T. 312.

D. Policy Concerns

[48] The ss. 15 to 17 procedure is designed to deal in a summary way with complaints of employees who claim to have been suspended, fired, or otherwise disciplined for engaging in union conduct. The presumption arises easily, i.e. anytime an employee is shown to be involved in any form of union activity. It is difficult to rebut. Any taint of anti-union animus will be fatal to the employer’s defence in a “mixed motive” decision, even if the employer had other good reasons for the sanction, as pointed out by the Quebec Court of Appeal in *Silva v. Centre hospitalier de l’Université de Montréal - Pavillon Notre-Dame*, [2007] R.J.D.T. 363, at para. 4:

[TRANSLATION] [w]here the motive for a sanction is unlawful, or where an unlawful motive is accompanied by a lawful one, the presumption of section 17 of the *Labour Code* is not rebutted. [Emphasis added.]

In so concluding, the Court of Appeal referred with approval to Professor Gagnon's observation that [TRANSLATION] "it will not be necessary for the C.R.T. to separate the lawful and unlawful considerations that may have contributed to motivating the employer. A decision tainted by an unlawful motive is fatally flawed, regardless of whether that unlawful motive was the deciding factor" (*Le droit du travail du Québec* (5th ed. 2003), at pp. 274-75 (emphasis added)).

[49] Similarly, the CRT held in *St-Hilaire v. Sûreté du Québec*, 2003 QCCRT 559, [2003] D.C.R.T.Q. n° 559 (QL), that the employer could not succeed where the fact the employee had filed a grievance had played a role in its decision not to renew her contract, even though other legitimate motives existed. The CRT affirmed that [TRANSLATION] "where an unlawful motive has contributed to a decision to dismiss, it changes the very nature of the decision, which can no longer be considered to be good and sufficient. By analogy, if just one drop of poison is placed in a vase full of water, 'all the water in the vase is irreparably contaminated'" (para. 139). See also: *Jalbert v. Sobeys Québec*, 2007 QCCRT 608, [2007] D.C.R.T.Q. n° 608 (QL), at para. 38, and *Arsenault v. C & D Aerospace inc.*, 2006 QCCRT 654, [2006] D.C.R.T.Q. n° 654 (QL), at para. 120. None of these cases involved workplace closures. From the employees' point of view, the sufficiency of a mere "taint" in a mixed motive situation considerably alleviates the difficulty of proof against the employer.

[50] The appellant points out, rightly, that the employer is generally in a better position than the employees to demonstrate "the real reason" behind the workplace closure but the respondent also has a valid point that the legislator could reasonably adopt the policy

that the simple existence of union activity prior to a closure should not, by itself, be sufficient to require the employer to open up its books to justify to the CRT's satisfaction that management's decision is untainted in any way by the union activity. The Quebec legislature saw fit not to modify the Code to overrule *City Buick* when extensive amendments were made to the Code in 2001. When questioned in 2001 about the potential scope of the CRT's powers under s. 119, and specifically whether these encompassed the power to prevent a business from closing, the Minister of Labour at the time, Mr. Rochon, responded:

[TRANSLATION] Mr. Rochon (Charlesbourg): . . . the Labour Code does not provide that a business can be prevented from closing or moving. That's impossible. What the Commission can order someone to do is limited to what the Code allows it to order, and in this regard the Code cannot prevent an employer from doing as it wishes with that business.

It seems clear therefore that the Minister, and through the Minister the other members of the National Assembly, were aware of the doctrine set out in *City Buick* and the cases that followed it. The Minister continued:

[TRANSLATION] If there was an action — an unfair practice — that involved shutting down a business solely to, as they say, bust a union, there may be other measures — under the penal code or otherwise — to take, but it is not the Commission, under the Code, that would be able to step in to prevent the business from closing. [Emphasis added.]

(*Journal des débats de la Commission permanente de l'économie et du travail*, 2nd Sess., 3th Leg., May 29, 2001, vol. 37, No. 22, at p. 47.)

It seems clear, therefore, that whatever “other measures” might be available, the legislators

understood that the Code as it stood in 2001 did not authorize the CRT to grant s. 15 relief after a workplace had shut its doors and when the Code was subsequently amended in 2001, the legislators did not see fit to make any amendments relevant to that issue.

E. *The Relevance of this Court's Decision in Place des Arts (2004)*

[51] As stated, the relevant *dicta* from *City Buick* was accepted as correct by this Court in *Place des Arts*. However, this case should not be read as broadly as Wal-Mart contends. The comments of Gonthier J. must be read in context. In that case the employer, after a protracted strike, decided to discontinue providing technical services to its tenants and other performers. Tenants and others were thereafter left to provide such technical services for themselves. The union complained under s. 109.1(b) of the Code that Place des Arts was thereby “utilizing” the employees of other employers to do the job of the strikers. The union sought to enjoin the use of substitute workers. This Court took the view that the complaint and the proposed remedy *contemplated the continued existence of an ongoing undertaking* by the Place des Arts technical services group which on the evidence no longer existed. That was the *ratio decidendi* of the case. In that context resort was made to the *City Buick* line of cases. This Court endorsed the view that no legislation obliges an employer to remain in business. However, Gonthier J. did not suggest that the closure immunized the employer from *any* consequences or that there was no remedy *anywhere* under the Code to provide for compensation to the terminated employees, or other relief or remedy, on proof that the termination was for anti-union reasons.

[52] I do not believe that *Place des Arts* should be read as holding that closure immunizes an employer from all financial consequences of related unfair labour practices. As the Canada Industrial Relations Board (“CIRB”) suggested in *Crawford Transport Inc. and Teamsters, Local 879* (2006), 146 C.L.R.B.R. (2d) 234:

It is important to keep in mind that the Supreme Court’s analysis [in *Place des Arts*] was made in the context of whether there had been a violation, in light of the particular wording of a provision under Quebec’s labour legislation prohibiting the use of replacement workers. . . . [t]hat decision, despite its confirmation of the right of enterprises to genuinely go out of business, does not stand for the proposition that there can never be a finding of a Code violation in the context where an employer subsequently discontinues or transforms its operations. [para. 90]

[53] In *Pegasus Express Inc. and Teamsters, Local 880* (2006), 140 C.L.R.B.R. (2d) 77, the employer had closed its business rather than comply with a previous CIRB cease and desist order in respect of an unfair labour practice. Following *Place des Arts*, the CIRB held it was not open to it to order the employer to re-open its business. In the CIRB’s view, *Place des Arts* had affirmed “that there is no legal limitation on an employer’s decision to close its business” (para. 27) yet the CIRB held that under the federal Labour Code relief could be awarded in respect of associated unfair labour practices.

[54] What, then, is the effect of *Place des Arts*? In my view, in affirming that “there is no legislation [in Quebec] to oblige an employer to remain in business” and that the “dismissals which follow are the result of ceasing operations”, the effect of *Place des Arts* is to exclude in a workplace closure situation the application of s. 17. This is because our Court adopted the proposition that the remedial order presupposed an ongoing business. In

this situation, a workplace closure is a complete answer. However, *Place des Arts* does not stand for the more sweeping proposition that closure wipes the employer's record clean and immunizes it from any financial consequences for associated unfair labour practices. Nor does it preclude a finding that the closure *itself* constitutes an unfair labour practice aimed at hindering the union or the employees from exercising rights under the Code. The appropriate remedies for employees as well as the union simply exist elsewhere under the Code, and in particular under ss. 12 to 14 relating to unfair labour practices.

F. *The Constitutional Argument*

[55] The appellant and interveners in his support argue that the foregoing jurisprudence should be modified in light of the decision in this Court in *Health Services*. In that case the Court recognized that the freedom of association protected by s. 2(d) of the *Canadian Charter* includes a procedural right to collective bargaining. The majority formulated the constitutional proposition as follows:

The right to collective bargaining thus conceived is a limited right. . . . [T]he right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. As P. A. Gall notes, it is impossible to predict with certainty that the present model of labour relations will necessarily prevail in 50 or even 20 years. . . . [Emphasis added; para. 91.]

[56] The appellant's argument extends the reasoning in *Health Services* well beyond its natural limits. In that case the state was not only the legislator but the employer. Here

the employer is a private corporation. Section 3 of the Code guarantees the right of association to workers in Quebec. Other provisions implement this general guarantee. The legislature has crafted a balance between the rights of labour and the rights of management in a way that respects freedom of association. No argument was raised by the appellant or any of the interveners against the constitutionality of *any* provisions of the Code, or claimed that in its entirety the Code fails to respect freedom of association. The appellant says the interpretation of the Code should be developed to reflect “*Charter* values”, but the entire Code is the embodiment and legislative vehicle to implement freedom of association in the Quebec workplace. The Code must be read as a whole. It cannot be correct that the Constitution requires that every provision, (including s. 17), must be interpreted to favour the union and the employees.

[57] Care must be taken not only to avoid upsetting the balance the legislature has struck in the Code taken as a whole, but not to hand to one side (labour) a lopsided advantage because employees bargain through their union (and can thereby invoke freedom of association) whereas employers, for the most part, bargain individually.

G. Labour Legislation in Other Provinces

[58] Reference was made by the Canadian Labour Congress and other interveners to labour law and practice outside Quebec which they say take a somewhat different approach to this problem. However, in a federal state there is no requirement that provincial regulatory schemes must align themselves. On the contrary, federalism permits wide

variation within the limits set by the Constitution, which is why the appellant in this case has raised a constitutional argument based on freedom of association as explained in *Health Services*, but which for the reasons just given I do not regard as applicable to this appeal.

[59] It is apparent that some of the differences in the jurisprudence from province to province are a function of the statutory setting in which they are made. Provincial labour relations statutes generally include provisions to the effect that nothing therein is to be interpreted as preventing an employer from closing for cause. It is also widely recognized that a closure may result from mixed motives that may be tainted with a desire to avoid having to deal with a union. In *International Wallcoverings and Canadian Paperworkers Union* (1983), 4 C.L.R.B.R. (N.S.) 289, the Ontario Labour Relations Board acknowledged the difficulty in a “mixed motive” case of reconciling the interests of employees and employers even where the statute provides for a legal inference of improper conduct against the employer in certain cases:

[T]he combined effect of the mixed motive approach and legal inference can result in the striking down of employer conduct where the Board is not prepared to accept tendered evidence of a *bona fides* business purpose as a complete answer to the adverse impact on trade union activity complained of. However, usually the Board has been reluctant to find by legal inference a partial but improper motive where direct and persuasive evidence of an acceptable business justification has been established by a respondent employer. [Emphasis added; para. 30.]

[60] Commenting on the mixed motive jurisprudence, former Justice George W. Adams noted in *Canadian Labour Law* (2nd ed. 2009), at para. 10.360:

May an employer close all or part of its business because of the burden of costs achieved by a trade union during many rounds of collective bargaining? May an employer react to these same costs by subcontracting out work or implementing technological change? . . . In each case, an employer may be able to assert genuinely that it is reacting only to economics not to the exercise of collective bargaining rights by employees and that labour legislation is not intended to insulate unionized employees from the realities of the marketplace. On the other hand, employees and their trade unions can argue that the statutory rights will be rendered illusory if an employer can simply pick up its business and move elsewhere on the arrival of a trade union. Both positions have considerable merit and labour boards have had to broker the conflicting legitimate interests arising in these situations using doctrines of intent, inference and various presumptions. [Emphasis added.]

[61] I do not believe that labour relations practices in some of the other provinces should dictate the outcome in Quebec, which in relation to the s. 17 presumption has been based for many years on a principle recently endorsed by the unanimous decision of this Court in *Place des Arts*. While this Court holds itself free to depart from its own prior decisions for compelling reasons, no such compelling reasons of policy or law have been identified that were not evident to the Court, albeit differently constituted, that decided *Place des Arts* five years ago. A measure of judicial consistency is necessary to enable those working in the labour relations field in Quebec to know the rules they are operating under. We should properly put *Place des Arts* in context, as I have endeavoured to do, but I do not think any compelling reason has been shown to overturn its fundamental premise.

[62] Abella J. claims that the foregoing interpretation represents “a marked and arbitrary departure from the philosophical underpinnings, objectives and general scope of the *Labour Code*” (para. 69). I do not accept this assertion as correct. The foregoing interpretation reflects the “philosophical underpinnings, objectives and general scope” of the

Quebec Labour Code as endorsed in *Place des Arts*.

[63] A distinguishing characteristic of federalism is that in matters of provincial labour relations the various provinces are free to strike their own balance according to their varying circumstances and attitudes. Quebec, for example, contemplates imposition of a first contract. Some of the other provinces do not provide for this possibility. For the reasons already given I believe the CRT's refusal to extend the s. 15 reinstatement remedy to a closed workplace is a reasonable interpretation of its constituent Act and I would not interfere with it.

VI. Conclusion

[64] Under s. 12, a union or employees may claim anti-union conduct on the part of the employer. Such a proceeding would focus directly on the reason for the closure of the store not on the reason for the dismissal of employees at a store that no longer exists. Under s. 12 the motive of Wal-Mart to close the Jonquière store would be highly relevant. If the CRT were satisfied that the closure occurred for anti-union reasons, the CRT could, if the matter were properly before it, fashion a remedy of benefit to all the former employees.

[65] For the reasons given, however, the procedure set out in ss. 15 to 17 does not provide an appropriate vehicle for the appellant's complaint in this case and the appeal must be dismissed.

The reasons of LeBel, Abella and Cromwell JJ. were delivered by

ABELLA J. —

[66] For nearly 30 years, the labour jurisprudence in Quebec has often followed the conclusion in the 1981 decision in *City Buick Pontiac (Montréal) Inc. v. Roy*, [1981] T.T. 22 that an employee's dismissal in the case of a genuine closing of a business cannot be remedied, even where the closing was for anti-union motives. This has resulted in a blanket immunization from scrutiny for business closings, and has prevented both unions and employees from seeking any remedy for anti-union conduct when a business is closed. This Court has now been asked, for the first time, to consider whether *City Buick* represents a reasonable interpretation of the Quebec *Labour Code*, R.S.Q., c. C-27.

[67] With great respect, it is my view that the conclusion in *City Buick* that a dismissal resulting from a genuine closing can never be scrutinized for anti-union motives, is a rebuke to the prior jurisprudence, to the history of the legislation, and to the purpose of the legislative scheme.

[68] The implementation of ss. 15 to 19 of the *Labour Code*, including the presumption in s. 17, represented one of the most significant reforms in modern labour law. Sections 12 to 14 were, until 2001, penal provisions. There was no possibility of a civil remedy such as reinstatement or compensation. Sections 15 to 19 were therefore added to the *Labour Code* 50 years ago to provide access to civil remedies for anti-union conduct by

an employer, and to facilitate this access through a presumption in s. 17 levelling the evidentiary playing field between employers and employees.

[69] Depriving employees of their right to rely on access to the fullness of this remedial scheme for dismissals when a workplace closes, including the presumption, deprives them of these rights in situations when they are most needed. To suggest, as the majority does, that the full substantive and procedural benefits of ss. 15 to 19 are unavailable to provide a remedy in the case of a business closed for anti-union reasons, represents a marked and arbitrary departure from the philosophical underpinnings, objectives and general scope of the *Labour Code*. Dismissed employees are entitled to have their dismissals scrutinized for anti-union motives under ss. 15 to 19. There is no reason to deprive them of access to this same remedial scheme, including the wide remedial scope in ss. 118 and 119, when their dismissals result from an employer closing down the entire workplace.

[70] I would therefore dissolve the immunity that *City Buick* granted employers from scrutiny under the *Labour Code* for anti-union motives when a business is closed, and remove its unwarranted restriction from access in such circumstances to the protections and remedial scope of the *Labour Code*, whether under ss. 15 to 19 or under ss. 118 and 119.

Background

[71] On August 2, 2004, the Commission des relations du travail (“Commission”) certified the United Food and Commercial Workers Union, Local 503 as the bargaining

agent for employees of Wal-Mart's outlet in Jonquière. Between October 27, 2004 and February 1, 2005, the Union and Wal-Mart held nine negotiating sessions. On February 2, 2005, the Union asked the Minister of Labour to appoint an arbitrator to determine the terms of the first contract. The Minister agreed on February 9, 2005. That same day, Wal-Mart announced that the store in Jonquière would close on May 6, 2005. On April 29, 2005, Wal-Mart informed all employees that the Jonquière store would close immediately rather than on May 6.

[72] The Union and employees sought relief against Wal-Mart, alleging that the closing was motivated by anti-union animus. There were several applications grounded in different parts of the *Labour Code* and the *Act Respecting Labour Standards*, R.S.Q., c. N-1.1 (*Pednault v. Compagnie Wal-Mart du Canada*, [2005] J.Q. n° 16222 (QL) (Sup. Ct.); *Plourde v. Cie Wal-Mart du Canada*, 2006 QCCRT 159, [2006] D.C.R.T.Q. n° 159 (QL); *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 503 v. Ménard*, 2007 QCCS 5704, [2008] R.J.D.T. 138; *Boutin v. Wal-Mart Canada inc.*, 2005 QCCRT 269, [2005] D.C.R.T.Q. n° 269 (QL)).

[73] Seventy-nine individual employees from the Jonquière store filed complaints against Wal-Mart under ss. 15 to 19 of the *Labour Code*, including Gaétan Plourde. At a pre-hearing conference on June 23, 2005, the parties agreed that only a few of the complaints would proceed first. The first set was heard at the Commission by vice-president Pierre Flageole (*Bourgeois v. Compagnie Wal-Mart du Canada*, 2005 QCCRT 502, [2005] D.C.R.T.Q. n° 502 (QL)). Applying *City Buick*, he concluded, based on the lack of evidence

about the termination of the lease, that Wal-Mart had not completely closed the store and was therefore in violation of the *Labour Code*. Wal-Mart sought judicial review. In *Compagnie Wal-Mart du Canada v. Commission des relations de travail*, 2006 QCCS 3784, [2006] J.Q. n° 6894 (QL), Courville J. upheld the Commission's decision. Wal-Mart appealed successfully. Gendreau J.A. concluded that it was unreasonable for the Commission to give priority to one factor — the absence of evidence about the termination of the lease — over other indicia that Wal-Mart had definitively closed the outlet (*Compagnie Wal-Mart du Canada v. Desbiens*, 2008 QCCA 236, [2008] J.Q. n° 673 (QL)).

[74] The next case heard by the Commission was the complaint in this case, *Plourde v. Cie Wal-Mart du Canada*, 2006 QCCRT 207, [2006] D.C.R.T.Q. n° 207 (QL). Plourde sought, among other remedies, compensation. He did not seek the re-opening of the store. Vice-president Flageole, who had decided the complaint in *Bourgeois*, this time came to a diametrically opposite conclusion. Again relying on *City Buick*, he accepted new evidence from Wal-Mart showing that it had terminated the lease and therefore concluded that the store closing was in fact definitive and genuine. Citing the “labour trilogy” (*Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, *PSAC v. Canada*, [1987] 1 S.C.R. 424, and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460), he also dismissed Plourde's argument that the store closing was contrary to his associational rights protected by the *Labour Code* and the *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

[75] Corriveau J. upheld the Commission's decision to dismiss Plourde's complaint

(*Plourde v. Commission des relations du travail*, 2007 QCCS 3165, [2007] J.Q. n° 7019 (QL)). Leave to appeal to the Quebec Court of Appeal was denied by Rochon J.A. (*Plourde v. Compagnie Wal-Mart du Canada inc.*, 2007 QCCA 1210, [2007] J.Q. n° 10678 (QL)).

Analysis

[76] The legal issue before us is whether a dismissal resulting from the closing of a business can be scrutinized for anti-union animus. Since 1981, and based on *City Buick*, the only scrutiny permitted in Quebec under the *Labour Code* was as to the genuineness of the closing, regardless of the motive.

[77] This is the first direct challenge in this Court to *City Buick*'s reign over business closings in Quebec, and it is a challenge based on *City Buick*'s divergence almost 30 years ago from labour law precedents, principles and purposes.

[78] It is important to note that 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. It is whether a remedy should exist under ss. 15 to 19 when the motive for the closing is anti-union.

[79] The legislative regime for labour relations in Quebec had historically consisted of a number of discrete laws responsive to specific concerns. The *Labour Relations Act*, S.Q. 1944, c. 30, was the first modern comprehensive labour regime, and its principles still

inform the nucleus of its current incarnation in the *Labour Code*.

[80] The *Labour Relations Act* was based on the approach adopted in the 1935 American *Wagner Act* (*National Labor Relations Act*, 49 Stat. 449). It was also based on the fundamental principles recommended by Canadian labour ministers at a conference in 1944, and which have been adopted throughout Canada. They include:

- (1) employee freedom of association and union recognition;
- (2) compulsory bargaining rights for certified trade unions;
- (3) postponement of the right to strike until after government intervention through conciliation;
- (4) prohibition of unfair labour practices by both employers and trade unions to protect individual rights and the collective bargaining process;
- (5) establishment of legal status and enforceability of the collective agreement;
- (6) provision for resolving disputes arising out of the collective bargaining agreement without resorting to strike; and
- (7) establishment of regulatory bodies with investigation and control powers in the form of boards of industrial relations.

(George W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at p. 1-15. See also Pierre Verge, Gilles Trudeau and Guylaine Vallée, *Le droit du travail par ses sources* (2006), at p. 41.)

[81] The purpose of such rights was eloquently addressed by Dickson C.J. in his dissent in *Reference Re Public Service Employee Relations Act*, where he said:

Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from

unfair, unsafe, or exploitative working conditions. . . . [p. 334]

. . .

Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. [pp. 365-66]

. . .

The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions. [p. 368]

[82] The Quebec labour relations scheme has the same genesis as other labour codes across Canada (Fernand Morin, Jean-Yves Brière and Dominic Roux, *Le droit de l'emploi au Québec* (3rd ed. 2006), at p. 811). As Robert Gagnon has noted:

[TRANSLATION] The Quebec *Labour Code* is patterned on a model common to all the equivalent legislation in Canada, and even in North America. It is predicated on the recognition and protection of the freedom of association of the persons to whom it applies It provides that they may choose a collective representative for their relations with the employer and may have the status of that representative recognized by government authorities through the certification process

(*Le droit du travail du Québec* (6th ed. 2008), updated by Langlois Kronström Desjardins, at p. 261)

[83] Some of the statutory reflections of the guiding principles protecting workplaces from “unfair labour practices” first enacted in 1944, were prohibitions against an employer from interfering with a union’s activities. They were found in provisions similar to those now found in ss. 12 to 14 of the *Labour Code*, which state:

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.

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.

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.

[84] These provisions protect the union’s ability to establish, organize and administer its affairs without employer obstruction (Gagnon, at pp. 306-7). Tactics such as intimidation or threats are prohibited by ss. 13 and 14, and can constitute an interference with union activity within the meaning of s. 12 (*Côté v. Compagnie F.W. Woolworth*, [1978] R.L. 439 (Sup. Ct.), at p. 459).

[85] But until the reforms of 2001 discussed later in these reasons, ss. 12 to 14 were only penal provisions and the sanction was a fine of \$100 to \$1000 per day (s. 143). An offence under these provisions required proof of an unlawful motive (*Syndicat canadien des communications, de l'énergie et du papier, section locale 194 v. Disque Améric Inc.*, [1996] T.T. 451; *Gauthier v. Sobeys Inc. (numéro 650)*, [1995] T.T. 131).

[86] The penal regime offered little practical assistance to employees. Not only was a fine on an employer of no compensatory benefit to them, the onus under these provisions was difficult to discharge and created an almost insurmountable procedural and evidentiary hurdle.

[87] As a result, the legislature amended the *Labour Relations Act* in 1959 by adding provisions to better protect the ability of employees to exercise their associational rights (*Act to amend the Labour Relations Act*, S.Q. 1959-1960, c. 8). Provisions similar to those now found in ss. 15 to 19 were introduced, expanding substantive and procedural access to remedies for anti-union conduct by an employer. The relevant portions of those provisions now state:

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.

...

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.

[88] Through these provisions, civil remedies not previously available in Quebec were added, including reinstatement. Judge Morin discussed the history and objectives of this enhanced remedial access now found in ss. 15 to 19 of the *Labour Code in Industrielle (L')*, *Compagnie d'assurance sur la vie v. Nadeau*, [1978] T.T. 175, where he said:

[TRANSLATION] At that time, the Labour Relations Act provided for freedom of association. It contained a number of measures to counter potential constraints on an employee's ability to exercise that freedom effectively. Both the Criminal Code and the Labour Relations Act provided for offences where any person tried to hinder an employee's union activities. However, the sanctions they provided for were still only penal in nature. Aside from the fact that it could sometimes be difficult to prove such tactics, their effect — where they consisted in suspension or dismissal — could be to prevent employees from exercising their legal rights even if the employer was ordered to pay a fine. Furthermore, at that time, it was not possible under the civil law to compel an employer to reinstate an employee. The legislature therefore saw fit to change the situation and better protect employees against certain employer tactics. Thus, the purpose of sections 21(a) to 21(d) was, where an employer had acted in such a way as to restrict an employee's rights, to compel the employer to pay the employee an indemnity and to reinstate the employee in his or her employ. [Sections 21(a) to 21(d) correspond to ss. 15 to 17 in the current *Labour Code*.]

...

Therefore, it appears that the purpose and objective of sections 14, 15 and 16 [ss. 15, 16 and 17] of the Labour Code is to provide greater assurance that an employer cannot retaliate against an employee for the employee's union activities. [p. 187]

[89] The significance of the new provisions was also explained by Gagnon J.A. in *United Last Co. v. Tribunal du travail*, [1973] R.D.T. 423 (C.A.) as follows:

[TRANSLATION] Sections [15 to 19] serve a very special function in our labour law scheme. Their purpose is to protect employees exercising rights under the Labour Code from certain reprisals — namely dismissal, suspension and transfer — their employer might take in response to the exercise of such rights. [p. 433]

He also noted that these provisions offer indispensable protection particularly at the crucial stage when a union is attempting to negotiate its first collective agreement:

[TRANSLATION] The legislature intended, at this stage in particular, to protect the exercise of the right of association, to guarantee that legitimate union activities can be carried on, and at the same time to avoid disrupting a nascent bargaining unit that might be certified at a later stage. [p. 434]

(See also Verge, Trudeau and Vallée, at p. 271)

[90] As in other jurisdictions, the onus of proof was reversed in this new remedial scheme: once employees showed that a sanction or action had been taken against them and that they were exercising rights under the *Labour Code* at the time, s. 17 created a legal presumption in their favour that the employer's conduct was a response to the exercise of such rights. The presumption shifted the burden to the employer to demonstrate that it had

a “good and sufficient reason” for its conduct towards the employees, that is, one that was not motivated by anti-union animus.

[91] The presumption was enacted to level the informational playing field between employees and employers, given the inevitable evidentiary difficulty for employees in attempting to prove that an employer’s conduct was motivated by an anti-union animus. The rationale for the presumption was cogently articulated by Adams, who said:

This protection prohibits, *inter alia*, the dismissal of union supporters because they are engaged in a protected activity. The employer, however, may contend that a dismissal was for cause or was prompted by bona fide business reasons. The union, on the other hand, will assert the discharge was motivated by “anti-union animus” or an unlawful intent, a prerequisite for a finding of an unfair labour practice dismissal under this type of provision. Because there are many legitimate reasons why an employee may be dismissed or laid off, a trade union or employee can experience real difficulty in establishing to a labour board’s satisfaction that the discharge was because of union activity. In recognition of this reality, in many Canadian jurisdictions the onus of proof is now reversed by statute and placed on the employer to demonstrate, on the balance of probabilities, that the discharge was not motivated by any grounds prohibited by the Act. A practical justification for the reverse onus rule is that the employer is the party with the most complete knowledge of the grounds for an employee’s discharge. Indeed, it has been held that the statutory reversal of the burden of proof in unfair labour practice proceedings merely brings those matters into line with the common law and arbitral judging of dismissal cases and does not contravene the presumption of innocence enshrined in s. 11(d) of the *Canadian Charter of Rights and Freedoms*. . . .

. . . Since employers are not likely to confess to an anti-union animus, tribunals have to rely on circumstantial evidence to draw inferences about employer motivation. [Emphasis added; pp. 10.7-10.8]

[92] As a result, two complementary remedial routes — penal consequences under ss. 12 to 14 and civil ones with the benefit of the presumption under ss. 15 to 19 — became available in 1959 to allow employees to redress unlawful conduct on the part of the employer

and to enforce the associational rights now explicitly protected at s. 3 of the *Labour Code* to form, belong to, and participate in a union's activities:

3. Every employee has the right to belong to the association of employees of his choice, and to participate in the formation, activities and management of such association.

[93] In 1964, the *Labour Code* was enacted. At the time, it was heralded as the most liberal piece of labour legislation in the country (Adams, at p. 2-79). Morin, Brière and Roux described its objectives as follows:

[TRANSLATION] One is political in nature and concerns the exercise of freedom in an action carried out in solidarity; the other, more economic and social, involves seeking fair remuneration for each individual's work. [p. 807]

Its purpose was also explained by Baudouin J.A. in *Syndicat des salariés de distribution de produits pharmaceutiques (F.I.S.A.) v. Medis, Services pharmaceutiques et de santé inc.*,

[2000] R.J.D.T. 943 (C.A.) as follows:

[TRANSLATION] The general and primary purpose of the *Labour Code*, which dates from 1964, is to promote industrial peace and strike a desirable balance between union aspirations and management rights. Thus, it is intended to limit sources of friction (which it does by providing for effective dispute resolution mechanisms), foster stability in industrial relations and maintain, to the extent possible, continuity and balance in collective relations. [para. 53]

[94] The *Labour Code* retained the two remedial approaches found in the 1959 *Labour Relations Act*, including the s. 17 presumption requiring the employer to demonstrate that its sanction against an employee was for "a good and sufficient reason".

[95] Gagnon J.A. in *United Last* remarked that once the presumption is triggered, [TRANSLATION] “the law places a heavy burden on the employer” (p. 435). Rigorous scrutiny of an employer’s motives has solid labour relations credentials in Quebec. As far back as 1963, in *Maresq et Brown Bovari (Canada) Ltd.*, [1963] R.D.T. 242 (L.R.B.), a case in which the employer was successful in rebutting the presumption, Gold J.M.C., explained :

. . . in order to decide whether or not the Act has been violated, we must, of necessity, consider the reason indicated by the employer for discharging his employee but our consideration must be solely directed to determine if this reason is the real and determining reason — the *causa causans* of the dismissal — or only a simulated reason given to mask the real reason, which is the employee’s trade union activity and which has brought about the employer’s displeasure. [Emphasis added; p. 246.]

[96] In 1978, Judge Morin in *Nadeau* continued this protective jurisprudential dialogue by explaining that the only “good and sufficient reason” for a dismissal is one that the employer can demonstrate is free of anti-union animus (p. 188-89).

[97] The concept of “dismissals” has been very broadly defined, as two Quebec Court of Appeal decisions demonstrate. In *United Last*, Gagnon J.A. confirmed that the term “dismissal” includes *any* form of termination motivated by union activity:

[TRANSLATION] The terms “dismissed” and “dismissal” must therefore be interpreted broadly enough that the legislature’s intention is not frustrated, and in my view that interpretation should cover all forms of termination of employment motivated by union activity. [Emphasis added; p. 435.]

[98] Similarly, Montgomery J.A. in *Distinctive Leather Goods Ltd. v. Dubois*, [1976]

C.A. 648, had held that the term “*congédiement*” must be interpreted broadly. In rejecting the employer’s argument that there is a hard and fast distinction between “*mise à pied*” and “*congédiement*”, he stated:

Appellant would have us hold that, once an employer has established that he had legitimate economic reasons for wishing to reduce his labour force, neither an inquiry commissioner nor the Labour Court has jurisdiction to inquire further into the matter. I cannot agree that this distinction is a valid one. The words used in section 15, *congédié, suspendu ou déplacé*, (in English, “dismissed, suspended or transferred”), are quite broad enough to cover the case of a *mise à pied* or lay-off. A particular dismissal or suspension may or may not constitute a lay-off, depending upon the circumstances and the motives of the employer. If the employer is able to establish that he had valid economic reasons for terminating the employment, then the complaint may be dismissed, but this is not, in my opinion, a question of jurisdiction. [p. 649]

(See also Verge, Trudeau and Vallée, at p. 91.)

[99] The steady stream of Quebec jurisprudence flowing with a broadly remedial current requiring scrutiny of the reasons for dismissals, culminated in this Court’s decision in *Lafrance v. Commercial Photo Service Inc.*, [1980] 1 S.C.R. 536. *Lafrance* involved the dismissal of employees who participated in an illegal strike. While Chouinard J. concluded that the employer had rebutted the presumption, in defining the phrase “good and sufficient reason”, he relied on Gagnon J.A.’s decision in *United Last*, Judge Morin’s decision in *Nadeau*, Mayrand J.A.’s decision in *Société des Hôtels Méridien Canada Ltée v. Tribunal du travail*, 80 CLLC ¶14,026 (C.A.), and, in particular, Gold J.M.C.’s judgment in *Maresq*. Citing *Société des Hôtels*, Chouinard J. confirmed that what must be determined is the [TRANSLATION] “real and serious reason . . . for the dismissal, and that it is not merely a pretext to camouflage a dismissal for union activities” (emphasis added):

From the outset it has been held that this phrase means that the investigation commissioner must be satisfied that the other reason relied on by the employer is of a substantial nature and not a pretext, and that it constitutes the true reason for the dismissal. [pp. 544-5]

[100] *Lafrance* did not involve the closing of a business, but its significance lies in its confirmation that an employer's motives must *always* be assessed to determine whether anti-union animus is involved in the decision to terminate someone's employment. (See *Hôpital Notre-Dame v. Chabot*, D.T.E. 85T-258, SOQUIJ AZ-85147054 (Lab. Ct.), and *Silva v. Centre hospitalier de l'Université de Montréal*, 2007 QCCA 458, [2007] R.J.D.T. 363.)

[101] It would be inconsistent with this legislative and judicial history to hold that the most drastic possible employer conduct involving the termination of employment — the closing of a business — is a form of dismissal which is uniquely exempt from scrutiny for anti-union animus. And yet that is precisely the impact of *City Buick*, which was decided only a year following this Court's decision in *Lafrance*.

[102] In *City Buick*, the unionized employees of a car dealership were in the process of renewing a collective agreement that had been imposed by an arbitrator. The employer locked out the employees. In response, the employees set up a picket line around the business. The general manager of City Buick Pontiac in Montreal openly admitted to the media that he would prefer to close his business rather than to deal with a union. Within days, the employees were laid off and the business was closed. The employees brought a complaint requesting remedies under s. 15 and were successful before the labour

commissioner.

[103] On appeal to the Labour Court, Judge Bernard Lesage concluded that the employees had established that the presumption in s. 17 applied to their dismissal because the exercise of their right to picket under the *Labour Code* was concurrent with the decision to dismiss them. He rejected the employer's argument that the closing was motivated by economic difficulties.

[104] However — and significantly — he also asserted that the dismissals resulted from the closing of the store, which was, in his view, [TRANSLATION] “a completely separate aspect” (p. 25). *City Buick* specifically affirmed the application of the s. 17 presumption to a workplace closing, but held that a closing is a “good and sufficient reason” which rebuts the presumption. Judge Lesage concluded that since there is no obligation for a business to remain open, an employer's motives for closing a business, anti-union or otherwise, are not relevant under s. 17.

[105] The reasons for the closing cannot be scrutinized, he held, even if the [TRANSLATION] “cessation is based on socially reprehensible considerations” (p. 26). The only relevant question is whether it is a genuine closing or a subterfuge. In his words,

[TRANSLATION] *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.* [p. 26]

The direct reason for the loss of jobs is the closing, he concluded, and a closing is always a “good and sufficient reason” within the meaning of s. 17 for employee dismissals. This conclusion has been interpreted as meaning that neither individual employees nor unions have been able to seek protection under the *Labour Code* from anti-union conduct when the conduct takes the form of a business closing, either under ss. 12 to 14 or under ss. 15 to 19.

[106] Despite this Court’s explicit conclusion in *Lafrance* that in order to rebut the presumption, an employer must demonstrate that the decision was not motivated by anti-union animus or it would be unlawful, *City Buick* considered only the *fact* of whether the closing was definitive, genuine and permanent, without in any way relating that fact to the possible underlying motives.

[107] It strikes me as oddly tautological to conclude that a business closing is a good enough reason for closing a business. The effect is to suggest that under the *Labour Code*, an employer’s conduct can be scrutinized for anti-union motives if a single employee is dismissed, but not if *all* employees are dismissed. Closing a business can in fact be the most severe form of reprisal for union activity. To close a business in order to avoid a union is to dismiss employees because they have engaged in union activity.

[108] Far from representing a continuation of the jurisprudential pedigree surrounding

dismissals as the majority asserts, *City Buick* cited no jurisprudence, either from the Supreme Court of Canada the previous year or from the long chain of Quebec jurisprudence stressing the importance of scrutinizing an employer's conduct in the case of a dismissal. *City Buick* ignored not only the consistent stream of Quebec jurisprudence on what constitutes a dismissal, but also the consistent jurisprudential confirmation that once an employee has been dismissed and demonstrated that he or she was exercising a right under the *Labour Code*, the burden shifts to the employer to demonstrate that the dismissal was not motivated by anti-union animus.

[109] *City Buick* was therefore a departure from what had been an undisputed approach requiring, *in every context*, an assessment of “the real and serious reason” for a dismissal. It adopted a new and dramatically narrower definition of a dismissal, resting on an artificial distinction between a dismissal when a business is closed and a dismissal in other circumstances. It is a distinction the majority seeks to retain.

[110] Since in all other complaints involving s. 15 the Commission scrutinizes the motives of the employer for anti-union animus, it is inconsistent with the intent of the *Labour Code* in general, and with the purpose of s. 15 in particular, to scrutinize only the authenticity of a closing, rather than the reasons behind it. Interpreting ss. 15 and 17 differently in the case of the closing of a business has the effect of rendering those provisions mute in such circumstances, leaving employees uniquely without their traditional remedial access in only one labour relations context, arguably the most dramatic for employees.

[111] As Professor Clyde Summers observed in his critical discussion of the U.S. Supreme Court's decision in *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965) which concluded that an employer's decision to close does not constitute an unfair labour practice:

The mischief in the Court's reasoning is that it ignores the rights of those who have been discriminatorily discharged. The essence of the Court's logic is that discharge for supporting the union is not itself an unfair labor practice, that it is no wrong as to the ones discharged, and that the law is not concerned with their injury.

("Labour Law in the Supreme Court: 1964 Term" (1965-66), 75 *Yale L.J.* 59, at p. 67)

In other words, the closing is not only punitive for those employees who attempt to unionize, but also sends a general message that unionization is an endeavour that carries the risk of the loss of jobs for all employees in that workplace.

[112] A comparative review of the jurisprudence demonstrates that labour boards across Canada have consistently refused to immunize employers who are inspired to close a business — and dismiss employees — by anti-union motives (Adams, at p. 10-9). Furthermore, labour boards have consistently held that a decision that is tainted by anti-union animus, whether a closing or any other action, is a violation of labour rights. (See generally, the Canada Labour Relations Board: *National Bank of Canada and Retail Clerks' International Union*, [1982] 3 Can. L.R.B.R. 1; New Brunswick Labour and Employment Board: *J.D. Irving Ltd. and C.E.P.* (2003), 94 C.L.R.B.R. (2d) 105; Alberta Labour Relations Board: *Central Web Offset Ltd. and C.E.P., Local 255G* (2008), 155 C.L.R.B.R. (2d) 113; British Columbia Labour Relations Board: *Hunt Manufacturing Ltd. and United*

Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 170, [1993] B.C.L.R.B.D. No. 291 (QL); *EF International Language Schools Inc. (Re)*, [1997] B.C.L.R.B.D. No. 203 (QL); *874352 Ont. Ltd. (Comox District Free Press) and G.C.I.U., Local 525M* (1995), 26 C.L.R.B.R. (2d) 209; Saskatchewan Labour Relations Board: *Retail, Wholesale and Department Store Union, Local 454 v. Westfair Foods Ltd.*, [1993] S.L.R.B.D. No. 2 (QL); Ontario Labour Relations Board: *Academy of Medicine*, [1977] O.L.R.B. Rep. 783; *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Inc.*, 80 CLLC ¶14,062 ; *Humber College of Applied Arts and Technology*, [1979] O.L.R.B. Rep. 520; *Doral Construction Ltd.*, [1980] O.L.R.B. Rep. 693.)

[113] In the view of the majority, the jurisprudence on the closing of a business in the rest of Canada is not relevant in Quebec, since it is up to each provincial legislature to decide on the proper balance between employer and employee rights. There is no doubt that provinces are entitled to strike their own legislative balance, but the current approach to business closings in Quebec did not emerge from a legislative construct, but from a jurisprudential one that was developed in *City Buick* and perpetuated notwithstanding its inconsistency with the interpretation of the Supreme Court in *Lafrance* a year earlier, with Quebec's own labour jurisprudence, and with the text of the *Labour Code* itself.

[114] I see *City Buick* as a singular deviation from the prior Quebec jurisprudence and a sharp departure from the remedial approach and legislative objectives embodied in the *Labour Code*. All this, in my view, makes it unsustainable.

[115] Nor do I find much support in *I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 SCC 2, [2004] 1 S.C.R. 43, for Wal-Mart's argument that *City Buick* should remain operative. The issue in *Place des Arts* was the use of replacement workers under s. 109.1(b) of the *Labour Code* and whether the union was entitled to an injunction against Place des Arts for "utilizing" replacement workers. The union was successful at the Quebec Superior Court and the Court of Appeal. In this Court, however, the conclusion was that the employer was not "utilizing" replacement workers. Section 109.1(b) was the only provision at issue in the case. The fundamental principles in *Place des Arts* about what constitutes "utilizing" workers under s. 109.1(b) and about the right of a business to close are not impugned in these reasons.

[116] *City Buick* was peripheral to the Court's analysis. *Place des Arts* affirmed *City Buick* only to the extent of confirming the proposition that employers have the right to close a business. Nothing in *Place des Arts* suggests that s. 15 cannot provide remedies to dismissed employees, or that the s. 17 presumption is unavailable in the case of a business closing.

[117] And, significantly, no one challenged or disputed the *City Buick* line of cases at any stage of the proceedings in *Place des Arts*. It can therefore hardly be said that the Court addressed its mind to its ongoing relevance in such a way that ought to constrain our central invitation in this case to consider its continued legitimacy.

[118] The fact that a single passage from *City Buick* was cited by this Court in connection with an unrelated issue and for a proposition that no one disputes, should not be taken as this Court giving its imprimatur to the central conclusion in *City Buick*.

[119] The majority is prepared to acknowledge that *City Buick* ought no longer to stand as a precedent to foreclose access to scrutiny for anti-union animus, but only if the scrutiny takes place under ss. 12 to 14 of the *Labour Code*, provisions traditionally used by unions, not employees. This prevents the scrutiny from being accompanied by the benefit of the presumption. An invitation is accordingly being extended by the majority to employees to wander from their habitual statutory home in ss. 15 to 19 and take up temporary residence under ss. 12 to 14 when they want a business closing scrutinized.

[120] It is frankly unclear from the jurisprudence and academic literature whether employees are also, like unions, able to use ss. 12 to 14. It is true that historically employees have not used these provisions, just as unions have eschewed ss. 15 to 19. But those are questions of standing that we need not address definitively in these reasons in the absence of full argument by the parties. In any event, the question is not whether employees are entitled to use ss. 12 to 14 to scrutinize dismissals when a business is closed, but whether they should be deprived of access to ss. 15 to 19, including the presumption in s. 17, in that same context.

[121] Both sets of provisions were designed to address an employer's anti-union conduct, but the 15 years between them represent an evolutionary arc that had less to do with

who had standing to challenge an employer's anti-union conduct and more to do with the recognition, implemented in ss. 15 to 19, that remedies other than penal ones were *additionally* appropriate, and that a different onus was justified to reflect the reality of the informational imbalance between employers and unions or employees.

[122] The majority offers no reason for depriving employees of the benefit of the historic protection of the presumption for dismissals in the case of workplace closings other than its concern about the “lopsided advantage” it offers. This “lopsided advantage” is at the procedural core of the Quebec legislature's scheme to protect employees from unfair labour practices, as Judge Morin explained in *Nadeau*:

[TRANSLATION] Since the purpose of the 1959 amendment was to afford effective protection to employees, the legislature, believing that employees would encounter excessive difficulties in trying to prove that they were transferred, suspended or dismissed because of their union activities, wished to reverse the burden of proof and accordingly created the presumption provided for in section 16 [s. 17 of the present *Labour Code*] [p. 188]

[123] And the presumption is hardly insurmountable. In addition to *Maresq* and *Lafrance*, employers have been able to discharge the presumption in numerous cases, such as *Houde v. Université Concordia*, 2007 QCCRT 454, [2007] D.C.R.T.Q. n° 454 (QL); *Craig v. Université McGill (Office of Secretariat)*, 2007 QCCRT 278, [2007] D.C.R.T.Q. n° 278 (QL); *Dallaire v. Sûreté du Québec*, 2007 QCCRT 74, [2007] D.C.R.T.Q. n° 74 (QL); *Desgagné v. Québec (Ministère de l'Emploi, de la Solidarité sociale et de la Famille)*, 2005 QCCRT 351, [2005] D.C.R.T.Q. n° 351 (QL); *Ouimet v. Solotech location inc.*, 2005 QCCRT 180, [2005] D.C.R.T.Q. n° 180 (QL); *Bazinet v. Commission scolaire de la Seigneurie-des-Mille-Îles*, 2004 QCCRT 606, [2004] D.C.R.T.Q. n° 606 (QL); *D'Amour v.*

Autobus Matanais inc., 2004 QCCRT 450, [2004] D.C.R.T.Q. n° 450 (QL); *Marcoux v. Thetford Mines (Ville)*, 2004 QCCRT 76, [2004] D.C.R.T.Q. n° 76 (QL); *Simard v. Québec (Ministère de la Sécurité publique)*, 2004 QCCRT 57, [2004] D.C.R.T.Q. n° 57 (QL); *Bédard v. Étalex inc.*, 2004 QCCRT 45, [2004] D.C.R.T.Q. n° 45 (QL); *Laramée v. Coop de taxi de Montréal*, 2004 QCCRT 30, [2004] D.C.R.T.Q. n° 30 (QL); *Turcotte v. Montréal (Ville)*, 2003 QCCRT 545, [2003] D.C.R.T.Q. n° 545 (QL); *Turpin v. Collège d'enseignement général et professionnel de St-Laurent* (1988), 26 Q.A.C. 296; *Cie Price Ltée v. Auclair*, 1988 D.T.E. 88T-688, SOQUIJ AZ-88021372 (Sup. Ct.); and *Hôpital Royal Victoria v. Duceppe*, [1984] T.T. 163.

[124] 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. Yet the majority's obvious discomfort with the presumption in s. 17 has caused it to interpret the legislation in such a way that the presumption is unavailable to assist an employee who has been dismissed when a workplace closes.

[125] With respect, there is no philosophical, jurisprudential, or textual support for the majority's idea that ss. 15 to 19, including the presumption in s. 17, apply to dismissals only where there is an ongoing workplace. Legislative provisions such as those found in s. 15 were for the express purpose of providing expanded civil remedies — including the procedural remedy of a presumption — for *any* conduct motivated by anti-union animus. Though reinstatement is not a feasible remedy in a closed workplace, it is not the *only*

remedy contemplated by s. 15, it is only the most expansive one possible to fulfill s. 15's objectives (*Altour Marketing Support Services Ltd. v. Perras*, D.T.E. 83T-855, SOQUIJ AZ-83147158 (Lab. Ct.); *Produits Coqs d'Or Ltée v. Lévesque*, [1984] T.T. 73; and *T.A.S. Communications v. Thériault*, [1985] T.T. 271).

[126] The majority's approach also seems to be an argument that bases its interpretation for the entire scheme introducing civil remedies in ss. 15 to 19 almost five decades ago, around four words in s. 15: "reinstated . . . in his employment". To suggest that s. 15 is only available to a dismissed employee in the case of an ongoing workplace, contradicts the unequivocal jurisprudence confirming that remedial statutes require a broad interpretation consistent with the purposes of the legislation, not a word-by-word parsing that drains the language of its remedial content. As Pierre-André Côté noted in *The Interpretation of Legislation in Canada*, (3rd ed. 2000):

At common law, traditionally a distinction is made between penal statutes and remedial statutes: the former are interpreted strictly, the other liberally. [p. 499]

And Iacobucci J., in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, confirmed that "benefits-conferring legislation" like labour legislation, was to "be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant" (para. 36).

[127] Quebec's *Interpretation Act*, R.S.Q., c. I-16, similarly guides us in s. 41, which states:

Every provision of an Act is deemed to be enacted for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights, or for the remedying of some injustice or the securing of some benefit.

Such statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit.

When it was applied in *Syndicat des infirmières et infirmiers du Centre hospitalier de l'Archipel (FIIQ) v. Plante*, [2003] J.Q. n° 997 (QL) (Sup. Ct.), the court noted:

[TRANSLATION] With this in mind, the proper approach is to favour a large and liberal interpretation of the Labour Code . . . [para. 57]

[128] Adams points out that the intended protection in the scheme was — and is — from reprisals generally, *including* dismissals (p. 10-7). The language of ss. 12 to 19 tracks this objective, referring to threats, intimidation, discrimination, sanctions, suspensions, transfers *and* dismissals, representing a continuum of anti-union conduct, with dismissals being the most serious. Section 15(b), for example, uses remedial language such as “cancel the sanction”, “cease practising discrimination”, and “pay him as an indemnity . . . other benefits of which he was deprived due to the sanction, discrimination or reprisals”.

[129] There must logically therefore be seen to be a continuum of remedies for this continuum of conduct, with reinstatement being the most significant. To see s. 15, therefore, as only being a vehicle for reinstatement, reads out the possibility of redress using other available remedies. A reinstatement hardly makes sense for the loss of a promotion, or a demotion, or a reduction in pay, or the failure to provide a pay increase, let alone a

threat of any of the above. These are among the kinds of activity that are encompassed by the words “discrimination”, “reprisal”, or “any other sanction” used in s. 15. And the language of s. 17, which creates the presumption, speaks generally of “the sanction . . . imposed . . . or the action . . . taken”.

[130] If the legislature had intended to restrict access to remedies for anti-union conduct to circumstances where only reinstatement was the appropriate remedy, it would hardly have provided such an expansive menu of unlawful conduct. That this entire scheme should instead be determined by the words “reinstate . . . in his employment” in s. 15, strikes me as introducing the interpretive novelty of a highly restrictive approach to remedial legislation which had traditionally attracted a highly expansive one.

[131] And as for the majority’s suggestion that since remedies for dismissals in the case of a workplace closing are available under ss. 12 to 14, recourse to ss. 15 to 19 must be seen to be duplicative, one can reasonably ask why such a confluence does not, equally, argue for finding ss. 12 to 14 duplicative, rather than ss. 15 to 19. The only difference, of course, is that the presumption is part of the ss. 15 to 19 remedial route, but not the one in ss. 12 to 14. It seems to me, with respect, that before such a remedial deprivation is permitted to occur through statutory interpretation, there should be a justification based on legislative and historic purpose, rather than on an objection to the presumption.

[132] It is true that the Commission, unlike an arbitrator, cannot refuse to grant reinstatement when it is feasible. It is also true that reinstatement is not feasible in the case

of a business closing. But it is no less true that Quebec's labour jurisprudence supports the imposition of subsidiary or alternative remedies, such as compensation, when reinstatement is not feasible.

[133] This is not surprising. To conclude that no appropriate remedial alternatives are available, is to attribute to the legislature an intention to redress only unlawful conduct which can be redressed by reinstatement. Such an ungenerous and impractical intention collides with the approach to remedies in the law of obligations set out in art. 1590 of the *Civil Code of Québec*, S.Q. 1991, c. 64, which provides for the application of alternative remedies (Didier Lluelles and Benoît Moore, *Droit des obligations* (2006), at paras. 2876-77). As Verge, Trudeau and Vallée note :

[TRANSLATION] Ordinary civil courts have never had trouble, where the circumstances so required, ordering the payment of wages or of damages to compensate for the nonperformance in kind of an employment contract, including an unlawful breach of the contract by one of the parties. [p. 212]

[134] It also contradicts the language and purpose of s. 15 of the *Labour Code*. In *Altour*, for example, compensation was ordered to be paid for an improper dismissal when the business of the employer was transferred to another jurisdiction and reinstatement was therefore no longer a practical remedy. As Gendreau J.A. stated in *Immeubles Bona Ltée v. Labelle*, [1995] R.D.J. 397 (C.A.):

[TRANSLATION] Thus, the arbitrator must consider all these factors to decide on the remedy: reinstatement, an indemnity, or any other remedy. An indemnity, if the arbitrator opts for this alternative, must therefore be designed to compensate for the loss associated with the contractual scheme, with the employment contract the employer has unjustly terminated. Usually, the arbitrator will award an amount equivalent to a certain number of weeks or

months of service. [p. 400]

(See also *Québec (Gouvernement du) (Revenu Québec) v. Fortin*, 2009 QCCRT 241, [2009] D.C.R.T.Q. n° 241 (QL), at para. 19; and Adams, at p. 10-126.2).

[135] Michel Bergevin offers examples of circumstances where reinstatement would not be appropriate but where another remedy, such as indemnity or compensation, is nonetheless available. These include:

[TRANSLATION]

- a deterioration in the complainant's interpersonal relations with management or with other employees;
- a complete breakdown of the relationship of trust that must exist, in particular, where the complainant held a high-ranking position in the company;
- contributory fault on the complainant's part that would warrant reducing his or her dismissal to a less severe disciplinary action;
- an attitude adopted by the complainant that suggests that the situation is unlikely to improve if he or she is reinstated;
- the complainant's being physically unable to immediately resume his or her duties;
- the elimination of the position held by the complainant at the time of his or her dismissal; and
- other events occurring after the dismissal that make reinstatement impossible, such as bankruptcy and lay-offs.

(“L’opportunité et l’efficacité de la réintégration”, in Meredith Memorial Lectures 1988, *New Development in Employment Law* (1989), 283, at p. 290, citing *Côté v. Corp. Dicom*,

Dorval, [1987] T.A. 183.)

[136] What is therefore required is a remedial interpretation fully consistent with the history and purposes of the provisions at issue. An inquiry into the “why” of an employee’s dismissal has always been at the core of an unfair labour practice allegation, and the presumption has always accompanied the inquiry. It should be no different in the case of a business closing. This leads to recognizing the availability for employees of both effective scrutiny *and* appropriate remedies in the case of dismissals for anti-union reasons, whether or not they result from the closing of a business.

[137] The reality is that because *City Buick* had foreclosed any scrutiny of business closings for anti-union motives, there has, until now, been no need to consider what the appropriate remedy for a dismissal under such circumstances would be. This has created a jurisprudential vacuum. It seems to me to be unduly restrictive to build an approach to rights under the *Labour Code* on the foundation of a remedial vacuum. The majority’s conclusion that ss. 15 and 17 do not apply in the case of a closing because they presuppose the existence of an “ongoing business” unduly restricts the expansive protection offered by these provisions. If a business is found to be closed for anti-union reasons, the fact that reinstatement is not a feasible remedy should not — and does not — cauterize access to a more feasible one. (See Verge, Trudeau and Vallée, at pp. 411-13.) Nor is there any justification for denying limiting the application of the presumption in s. 17 in these situations. The interpretive analysis should be driven by the broad objectives of the legislation, not by a narrow and literal interpretation of the remedy. The better approach, it

seems to me, is to interpret the legislative scheme in a way that connects recognized rights to meaningful remedies.

[138] And that connection, I think, is precisely what the legislature reinforced when it enacted ss. 118 and 119. The 2001 reforms to the *Labour Code* which created an independent Commission with jurisdiction over applications and complaints made under the *Labour Code*, also endowed it with related investigative, hearing and remedial powers (*Act to amend the Labour Code, to establish the Commission des relations du travail and to amend other legislative provisions*, S.Q. 2001, c. 26). Prior to these reforms, employees had no access to civil remedies for anti-union conduct under ss. 12 to 14, only under ss. 15 to 19. One of the purposes, therefore, was to expand the remedial powers available under the *Labour Code*.

[139] These increased powers are found at ss. 118 and 119, which state:

118. The Commission may, in particular,

(1) summarily reject any motion, application, complaint or procedure it considers to be improper or dilatory;

(2) refuse to rule on the merits of a complaint where it considers that the complaint may be settled by an arbitration award disposing of a grievance, except in the case of a complaint referred to in section 16 of that Code or in sections 123 and 123.1 of the Act respecting labour standards (chapter N-1.1) or a complaint filed under another Act;

(3) make any order, including a provisional order, it considers appropriate to safeguard the rights of the parties;

(4) determine any question of law or fact necessary for the exercise of its jurisdiction;

(5) confirm, modify or quash the contested decision or order and, if appropriate, render the decision or order which, in its opinion, should have been rendered or made initially;

(6) render any decision it considers appropriate;

(7) ratify an agreement, if in conformity with the law;

(8) dissolve an association of employees if it is proved to the Commission that the association participated in a contravention of section 12.

If an association dissolved under subparagraph 8 of the first paragraph is a professional syndicate, the Commission shall send an authentic copy of its decision to the enterprise registrar, who shall give notice of the decision in the *Gazette officielle du Québec*.

119. Except with regard to an actual or apprehended strike, slowdown, concerted action, other than a strike or slowdown, or lock-out in a public service or in the public and parapublic sectors within the meaning of Chapter V.1, the Commission may also

(1) order a person, group of persons, association or group of associations to cease performing, not to perform or to perform an act in order to be in compliance with this Code;

(2) require any person to redress any act or remedy any omission made in contravention of a provision of this Code;

(3) order a person or group of persons, in light of the conduct of the parties, to apply the measures of redress it considers the most appropriate;

(4) issue an order not to authorize or participate in, or to cease authorizing or participating in, a strike or slowdown within the meaning of section 108 or a lock-out that is or would be contrary to this Code, or to take measures considered appropriate by the Commission to induce the persons represented by an association not to participate, or to cease participating, in such a strike, slowdown or lock-out;

(5) order, where applicable, that the grievance and arbitration procedure under a collective agreement be accelerated or modified.

that while a violation of ss. 12 to 14 allows the Commission to order a remedy under ss. 118 and 119, those remedial powers are unavailable to the Commission under ss. 15 to 19 in the case of a dismissal arising from a workplace closing. There is no language in either ss. 118 or 119 which restricts their application in this way, and, in particular, there is no language referring to a distinction between a closed and ongoing workplace. Denying dismissed employees access to the wide remedial protection offered by the 2001 reforms under s. 15 in the case of business closings, is as anomalous as *City Buick* was in denying them access to having the reasons for the closing scrutinized.

[141] Sections 118 and 119 are found in Chapter VI of the *Labour Code*, which sets out the duties and powers of the Commission in general, without limit to their scope and application. The remedial references, in fact, allow the Commission to require conduct in “compliance with this Code” (in s. 119(1)), or to redress conduct “in contravention of a provision of this Code” (in s. 119(2)). It is not clear to me what there is in either the language or purposes of ss. 118 and 119 that permits us to conclude that every provision in the *Labour Code* is covered by the reforms *except* s. 15. To read the general wording of these enhanced remedial powers as somehow being selectively inapplicable to s. 15, is to impute a restrictive legislative intention not apparent to an ordinary reader.

[142] The majority relies on a Hansard reference dealing with the 2001 reforms to support the argument that ss. 15 to 19 do not provide a remedy for the closing of a business. But, with respect, this evidence does not support the majority’s distinction between the availability of remedies for employees under ss. 12 to 14 and under ss. 15 to 19. The

Minister of Labour said that the Commission lacks the power to prevent a business from closing. This is in no way responsive to the issue of whether the general remedies in s. 119 are available under s. 15. Nor is it responsive to whether the legislature put its mind to the immunity from scrutiny in *City Buick*. The Minister's statement focused solely on the unavailability of a particular remedy under s. 119(3): forcing a business to re-open. That question is not before us. What we are being asked to consider is not whether a business can be forced to reopen (no one submits that it can), but whether employees can scrutinize an employer's motives under ss. 15 and 17 when that business is closed.

[143] What is notable from Hansard, however, is that the Minister of Labour made it clear that s. 119 is not limited in its application. On the contrary, he explicitly stated that s. 119 [TRANSLATION] "covers everything that the Labour Code does, any act or omission provided for in the Labour Code". And further [TRANSLATION] "That is to say, the purpose of this section is to enable the Commission to take action to stop any activity contrary to this Code" (*Journal des débats de la Commission permanente de l'économie et du travail*, 2nd Sess., 36th Leg., vol. 37, No. 32, June 18, 2001, at pp. 17 and 21). This confirms the legislative intention that s. 119 encompasses a broad range of available remedies, including under s. 15.

[144] As the Minister also explained, and as the opening language of s. 119 indicates, the only restrictions on the use of that provision's remedial reach is in the case of "an actual or apprehended strike, slowdown, concerted action other than a strike or slowdown, or lock-out" in the public sector:

[TRANSLATION] Because, if you read the section as it is worded, the first paragraph refers to powers that are within the jurisdiction of the Conseil des services essentiels, and these are excluded from the powers the Commission can exercise. This paragraph says, “Except with regard to an actual or apprehended strike”, and so on, or “concerted actions other than a strike or slowdown, or lock-out”.

So, except in those cases, which are matters for the Conseil des services essentiels, the Commission’s powers are spelled out, and it is said, for example, regarding a lock-out, in (4), that “the Commission may issue an order not to authorize” and so on, and the words “actual or apprehended” are not repeated in relation to businesses. [*Ibid.*, at p. 20]

[145] Section 119 therefore applies throughout the *Labour Code* unless it is specifically excluded, and its only self-imposed restriction is found in its introductory paragraph. Section 15 is, notably, *not* excluded. This too confirms that the remedies in s. 119 are available under s. 15.

[146] In addition to other alternatives, one of the remedies Plourde seeks is compensation. I see no reason why the Commission cannot order such a remedy under ss. 15 and 119 of the *Labour Code* if it is satisfied that the closing was motivated by anti-union animus.

[147] I would therefore allow the appeal with costs throughout and refer Plourde’s complaint to the Commission to be heard on the merits.

Appeal dismissed, LEBEL, ABELLA and CROMWELL JJ. dissenting.

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