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THE QUÉBEC SYSTEM OF WORKER PARTICIPATION: TOWARD A REFOUNDATION ON A NEW CONSTITUTIONAL BASIS?¹

ABSTRACT

Workers' participation rights, centred around collective bargaining, present numerous weaknesses in Québec. The authors highlight in this respect the collision between collective bargaining rights and property rights, as well as freedom of commerce. However, for the authors, the new labour constitution in Canada heralds a positive change for workers' basic participation rights.

KEY WORDS: *Freedom of Association, Collective Bargaining, Labour Constitution, Workers' Participation Rights, Freedom of Commerce and Property Rights.*

RÉSUMÉ

Les auteurs soulignent les faiblesses, en termes de droits de participation, que présente le système actuel de négociation collective au Québec. Les auteurs s'attardent à la collision entre le droit de négociation collective et la liberté d'entreprendre et le droit de propriété. Cependant, la constitutionnalisation du droit du travail en cours au Canada annonce, de l'avis des auteurs, une révision à la hausse des droits de participation des travailleurs.

MOTS-CLÉS : *Liberté d'association, négociation collective, droits de participation des travailleurs, constitutionnalisation du droit du travail, liberté d'entreprendre et droits de propriété.*

1 Translation by Alexandra Law.

In Québec, the worker participation system in business is essentially based on the freedom of association of workers. In fact, the particular structure of labour law in the Québec context differs greatly from that observed in France. Although the legislative and contractual framework provides the means to introduce the representation of workers, workers are confronted with various obstacles to the full enjoyment of their rights of representation.

In the following paper, we will first discuss the particular structure of labour relations and the legislative and contractual framework covering the representation of workers (I). Second, we will present the obstacles to the participation of workers which flow, on the one hand, from the legislative framework and on the other hand, from the historical pre-eminence of property rights and freedom of commerce over labour law (II). Finally, we will briefly discuss what we call the "new constitution of labour" in its various components, evaluating the impact of the *Canadian Charter of Rights and Freedoms* on the rights of representation of employees (III).

I - THE REPRESENTATION OF WORKERS IN QUÉBEC: THE LEGISLATIVE AND CONTRACTUAL FRAMEWORK

Labour relations are influenced in Québec by a double distinction, between employees/non-employees on the one hand, and unionized/non-unionized workers on the other.² This double distinction has its origin in the *Wagner Act* adopted in 1935 in the United States.³ Thus, certain employees considered not to be employees in the sense of the Labour Code are generally deprived of any access to unionization, collective bargaining, and the right to strike. This is particularly the case of managers acting as representatives of the employer even if their actual role in this respect is quite limited. "Independent contractors" who find themselves in a situation of economic dependence are also excluded from the field of unionized labour relations in Québec.⁴ In addition, "unionized workers" are not first and foremost individual members of a union, but rather members of a bargaining unit (for example, production workers in a manufacturing establishment or the white collar workers of a municipal administration) which is represented by a certified union. We note that the unionization rate in Québec is about 40% of the workforce, a number which has remained relatively stable for several decades.⁵

To understand the structure of labour relations in Québec (and throughout Canada), it is necessary to return to the initial goals of the *Wagner Act*, including: a) the achievement of industrial peace, in order to promote the development of commerce and industry;

2 M.Coutu, L.-Lea Fontaine, G. Marceau and U. Coiquaud, *Droit des rapports collectifs de travail*, 2^e édition, Cowansville (Que.), Éditions Yvon Blais, volume 1, 2013, p. 8 and following.

3 *National Labor Relations Act*, 29 U.S.C. §§ 151-169.

4 Contrary to the situation which prevails at the federal level: see *Canada Labour Code*, R.S.C. (1985), c. L-2, s. 3. Canadian federal law only covers a minority of employees, approximately 10% of the labour force, concentrated though in strategic sectors (aeronautics, telecommunications, interprovincial transport, etc.).

5 A. Labrosse, *La présence syndicale au Québec en 2016*, Québec, ministère du Travail, de l'Emploi et de la Solidarité sociale, 2017.

b) the achievement of equal bargaining power of workers relative to employers, considering "the inequality of bargaining power between employees who do not possess full freedom of association."⁶

From the point of view of the theory of labour law, the *Wagner Act* paradigm is generally qualified, as opposed to the British voluntarist paradigm (collective *laissez-faire*),⁷ of "industrial pluralism."⁸ We can associate two fundamental principles to it: 1. negotiation must essentially take place at the level of the business, if not the establishment, and not at the level of the branch or sector,⁹ which represents for the employer the guarantee of an industrial peace lasting for at least a few to possibly several years; 2. through decentralized negotiation, the balancing of power in the business is realized, with workers thus compensating for the initial power imbalance between the isolated employee and the employer, and business by business, arriving hopefully at a form of industrial democracy.

In normative terms, the main components of the *Wagner Act*, which still form the basic architecture of the Québec *Labour Code*, can be described as follows:

- a) The union which holds the support of the majority of employees in a bargaining unit has the right to obtain a formal certification from the State;
- b) This certification is granted by an administrative tribunal which is considered neutral and impartial;
- c) The law protects employees from anti-union discrimination, such as refusal to hire, firing, and other sanctions for union activities;
- d) The certified union has a monopoly of representation over all employees who are members of the bargaining unit, meaning that it is the sole bargaining agent;
- e) Following transmission of a notice to bargain, the parties (the employer and the union) are required to negotiate in good faith in order to conclude a collective agreement;
- f) The collective agreement thus negotiated has full legal value and binds all employees who are members of the bargaining unit, whether or not they are members of the certified union.

In the Canadian context, the reception of the *Wagner Act* occurred in 1944, in the particular context of the State-controlled economy related to the war effort then underway. It was thus essentially the federal government which regulated labour relations; it adopted the *Wagner* model in 1944 via Order in Council n° 1003¹⁰, which would soon be imitated by all of the provinces, including Québec,¹¹ which reclaimed their exclusive jurisdiction over most labour relations following the end of hostilities.

6 *National Labor Relations Act*, cited above (extract from the preamble).

7 On voluntarism, see R. Dukes, *The Constitution of Labour. The Enduring Idea of Labour Law*, Oxford University Press, 2014, p. 69 and following. In Canada, J. Fudge, E. Tucker, *Labour before the Law. The Regulation of Worker's Collective Action in Canada, 1900-1948*, Toronto, University of Toronto Press, 2001, p. 51 and following.

8 See K. V. Stone, "The Post-War Paradigm in American Labor Law", *Yale Law Journal*, 1981, n° 90, p.1509-1580.

9 This is impossible in practice, given the obligation of industrial peace when there is a collective agreement in force.

10 C.P. 1003, 17 February 1944; (1944) 44 *Gazette du travail* 146.

11 *Labour Relations Act*, R.S.Q. 1941, c. 162A.

Afterward, there was a gradual, but fundamental, movement of “Canadianization” of the *Wagner* model. In fact, the Canadian and American systems of industrial relations followed increasingly divergent paths. There are now fundamental differences between these two variations on the *Wagner* model, for example the guarantee throughout Canada of job protection in the case of participation in a legal strike, which does not exist in the law of the United States.¹² This legal distance explains, in part at least, the disparities between the rates of unionization in the USA and Canada, and even more so in Québec.¹³

Moreover, we can describe the labour law in force in Québec as a hybrid model. In fact, while retaining the basic grammar of the *Wagner* model, this model was more influenced by European law than elsewhere in Canada. In particular, sector negotiation, imposed by legislation, prevails in the construction sector¹⁴ and in the public sector in Québec,¹⁵ a unique situation in Canada. In addition, Québec labour law has put forward certain original solutions, such as the prohibition on replacement workers (strike breakers), during the legal exercise of the right to strike.¹⁶

Nevertheless, Québec labour law in principle excludes the dualist model of representation (unions and works councils) which characterizes most European industrial relations systems. As under the *Wagner* model, it is essentially by a strongly decentralized system of collective bargaining, with recognition by State certification of only the majority union with respect to a bargaining unit, that the participation of workers in labour relations management is realized in the business.¹⁷ Of course, labour legislation occasionally requires the business to have representative bodies of staff, including in the non-unionized sector: for example, the *Act respecting occupational health and safety*¹⁸ obliges employers to have joint committees in the business. Under the *Act respecting labour standards*, in the case of collective dismissal, joint committees for the reclassification of employees must be put into place, etc.¹⁹ However, in the absence of union representation in the workplace, such committees appear to be deprived of any real efficacy.

It is extremely rare, *a fortiori*, that representatives of workers can sit on the boards of businesses, even if the *Labour Code* briefly imagines this possibility. Thus, the largest State-run company, Hydro-Québec, allows no employee delegate on its board of directors,

12 Beyond the fact that “at will” employment does not exist in Canada, we note, among other elements, mandatory grievance arbitration, the mandatory arbitration of interests in case of a blockage in the negotiation of a first collective agreement, the legislative imposition of check-off etc. For an overview, see M. Coutu, L.L. Fontaine, G. Marceau et U. Coiquaud, *Droit des rapports collectifs du travail*, op. cit., p. 19 and following.

13 This rate is 38.6% in Québec, versus 29.2% in English Canada and only 12% in the United States (A. Labrosse, *La présence syndicale au Québec en 2016*, op.cit., p.4).

14 *Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry*, CQLR, c. R-20.

15 *Act respecting the process of negotiation of the collective agreements in the public and parapublic sectors*, CQLR, c. R-8.2.

16 Québec *Labour Code*, s. 109.1.

17 For a classic overview, see H. Arthurs, “Developing Industrial Citizenship: A Challenge for Canada’s Second Century”, *Canadian Bar Review*, 1967, vol. 45, n°4, p.786-830.

18 *Act respecting occupational health and safety*, CQLR, c. S-2.1, s. 68 and following.

19 *Act respecting labour standards*, CQLR, c. N-1.1, s. 84.0.9.

while EDF, its French equivalent, reserves space for 6 delegates from its staff out of 18 members of its board having voting rights.²⁰

Let us note that in the case of unionized workplaces, collective agreements are voluminous documents which generally cover, in a very detailed way, all aspects of labour relations, from the advertising of posts and recruitment, to workplace discrimination, including holidays, work hours, seniority, training etc.²¹ The respect for collective agreement rules is assured by a specialized forum, the grievance arbitrator, who is named and remunerated jointly by the employer and union parties. Moreover, a joint forum present in many collective agreements, generally called a "labour relations committee", meets on a regular basis to discuss questions regarding professional relations in the business or institution.

II - OBSTACLES TO THE RIGHTS OF REPRESENTATION OF WORKERS

Major obstacles hinder the full representation of the interests of workers, resulting from the legislative framework on the one hand (A), and on the other hand, from the preeminent position historically granted by the courts to property rights and freedom of commerce (B).

A - THE LEGISLATIVE FRAMEWORK

A presentation of the Québec legislative framework derived from the *Wagner* model and its interpretation by specialized labour or common law tribunals allows us to identify certain weaknesses which characterize the rights of representation of workers in Québec:

1. The restrictive definition of the concept of employee, which excludes any person considered to have a hierarchical authority over their colleagues, even if this appears minimal in reality; this definition is no accident, as it corresponds to the dualist -and not at all pluralistic- vision of the business, valid across North America;

2. The residual conception of employer management rights, which prevails in the majority among grievance arbitrators and translates into a restrictive reading of the sections of the collective agreement. The latter is viewed as creating exceptions to the rights of management of the employer, which otherwise conserve their full force; this perspective

20 See the *Hydro-Québec Act*, CQLR, c. H-5, s. 4 and following. See <http://www.hydroQuébec.com/a-propos/gouvernance/conseil-administration.html> (page consulted in March 2018).

Comp. <https://www.edf.fr/groupe-edf/qui-sommes-nous/gouvernance/conseil-d-administration> (page consulted in March 2018).

21 Contrary to France, where the basic element is the branch collective agreement completed by numerous riders and at times business agreements, in Québec the collective agreement concluded at the level of the establishment or the business, completed as needed by letters of understanding, represents the essential document. It is only in the Québec public sector where the situation approaches more closely that which occurs in France: the principal agreement resides in the (national) collective agreements and sectorial agreements, completed by regional agreements and local understandings.

appears incompatible with the recognition of a real right to codetermination of the management of the business with workers;²²

3. The lack of recognition of minority unionism. Only the union having majority support from employees who are members of a bargaining unit has the right to bargain collectively with an employer. In other words, the certified union has a monopoly on representation over the employees concerned, for as long as it benefits from their majority support. There is an all-or-nothing logic here: if at the end of a union organizing campaign, the union fails to obtain the support of the absolute majority of workers who are members of the expected bargaining unit, it will not be certified by the State. Even if the union has strong support among employees (35% or more for example), the organizing drive will simply be a failure. The minority in favour of a union will be deprived of any possibility of collective bargaining with the employer. Moreover, even if in an "open field" a motion for certification can be validly presented at any time, in practice, because of the cost, the hard work and considerable mobilization of resources required in an organizing drive, it will be a long time before employees will see, if ever, the filing of a new motion for certification;

4. The legislative obligation of industrial peace during the course of the collective agreement. This legislative obligation, which does not exist in the United States, has two major consequences:

- a) on the one hand, unless there is a (very rare) clause allowing the renegotiation of certain subjects while the agreement is in force, unions cannot oblige the employer to negotiate during this period even subjects of capital importance not included in the collective agreement- for example, in case of business restructuring, mass layoffs, subcontracting or partial or total closing.²³ The employer is therefore free to determine the future of the establishment or business as he/she wishes, without the union having a right to have input, as long as he/she respects the collective agreement sections in force.²⁴ The obligation to have industrial peace has produced negative effects on the representation of employees' interests, in particular in the most decisive cases, which relate to profound restructuring. Such restructuring is becoming more and more frequent under the pressures of globalization;²⁵ it is not solely based on an economic logic, but is often used as a way to reduce union

22 The theory of residual rights, which is much in the majority, contradicts that of implicit limitations according to which "as soon as a union organization is certified and collective bargaining begins in an establishment," there is a change in the nature of the labour relations which implies that "the employer no longer has the sole right to decide everything in its establishment": G.Vallée, J. Bourgault, "Cadre juridique de la convention collective" in P. Jalette, M. Laroche and G. Trudeau, (eds.), *La convention collective au Québec*, Montreal, Chenelière Éducation, 3^e ed., 2017, 21, p. 45-47. Our translation.

23 S. 107, *Labour Code*.

24 For a critique of this situation, see P.Verge, *Le droit de grève. Fondements et limites*, Montreal, Éditions Yvon Blais, 1985, p.149 and following; G. Trudeau, "La grève au Canada et aux États-Unis: d'un passé glorieux à un avenir incertain", *Revue juridique* Thémis, 2004, n° 38, p. 1-48, p.42 and following.

25 See M.Coutu, J.Bourgault, "Le droit du travail et les restructurations industrielles au Canada : une pluralité normative", in C.Didry, A.Jobert (eds.), *L'entreprise en restructuration. Dynamique industrielles et mobilisations collectives*, Rennes, Presses universitaires de Rennes, 2010, p. 107-120.

influence on the business.²⁶ The union movement was taken by surprise by the speed of restructuring, particularly in the private sector, and has often been unable to counter it effectively;

- b) on the other hand, the impossibility for workers to go on strike during collective bargaining, for whatever reason, which creates a structural imbalance in labour relations, to the sole benefit of employers. Sanctions for “illegal” strikes, which can even include firing of employees and which threaten substantial fines for union organizations, are generally enough of a deterrent to prevent unions from engaging in economic action during the course of the collective agreement.

B - PROPERTY RIGHTS AND FREEDOM OF COMMERCE

From the perspective of the North American type of “economic constitution,”²⁷ unionization, collective bargaining, and the use of pressure tactics (such as striking and picketing) are generally perceived as posing obstacles to the optimal profitability of businesses. Certainly, historically, a number of employers, particularly large businesses, have found it advantageous overall to engage with unions in a common management, to the outside, of the labour market, and to the inside, of labour relations in the business. However, if we consider in particular the American example, this time appears over for a number of large firms in the United States, which attempt to avoid unionization, for example by moving their operations to southern states, which are more resistant to the presence of unions. In retail commerce, among others, unionization is considered incompatible with the dominant business model in competitive capitalism, which requires remuneration of the workforce at the lowest possible cost.

The establishment in Canada of an American anti-union multinational like Wal-Mart encouraged other employers, by ricochet, to demonstrate hostility toward unionization,²⁸ by invoking as needed the right to private property and freedom of commerce to close locations, with the single goal of preventing the establishment of a union. In addition, in

26 See below, in the following section devoted to business closures motivated by anti-union animus.

27 On the concept of the “economic constitution”, see for example G.Teubner, “Transnationale Wirtschaftsverfassung: Franz Böhm und Hugo Sinzheimer jenseits des Nationalstaates”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2014, 74, p.733-761.

28 See M.Coutu, “Licenciements collectifs et fermetures d’entreprise au Québec: Le cas Wal-Mart”, *Travail et emploi*, 2007, n°109, pp.39-50.

recent years, several cases of business closings in Québec, following the certification stage or collective bargaining stage, have given rise to numerous judicial decisions.²⁹

Through the study of the case law on business closings motivated by anti-union animus, we observe the central place which the courts have historically granted to freedom of commerce and the absolute right to “cease doing business” (despite the imprecision of the expression).³⁰ A brief review of the Wal-Mart case appears essential to us to situate the question properly. In North America, no location of this multinational firm had been unionized before the Wal-Mart in Jonquière³¹ became the subject of a union certification granted in August 2004 to the United Food and Commercial Workers (UFCW) by the Labour Relations Commission (Commission des relations du travail in French, “CRT” below).³² As the negotiations were going slowly, the union requested the nomination of an arbitrator of disputes in order to conclude a first collective agreement, as provided under the *Labour Code*.³³ However, on the very day that the Québec Minister of Labour named an arbitrator, Wal-Mart announced the upcoming closure of its Jonquière location, supposedly for economic reasons.

The principal recourse launched by the UFCW was based on section 15 of the *Labour Code*, which protects the job of an employee exercising union activities, with a right of reinstatement with full compensation in the event of firing.³⁴ In such a case, section 17 of the *Labour Code* creates a presumption in favour of the employee, aiding in the proof of illicit behaviour on the part of the employer. In fact, when the employee demonstrates the exercise of union activities concomitantly with the sanction, the latter is presumed to have been imposed because of anti-union animus. The employer must then necessarily prove,

29 We highlight 20 decisions at Wal-Mart [including 18 for the Jonquière store alone], 7 decisions at Zellers (large-scale stores) and 7 decisions at the interlocutory stage only at Couche-Tard (convenience stores). Since then, other litigation of the same type has occurred, for example in retail business: see *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 et Groupe BMTC inc.*, 2017 QCTAT 892 (furniture and electronics). See also *Syndicat des salariés des services d'alarme (CSD) (Section ADT) et Services de sécurité ADT Canada inc.*, 2018 QCTAT 1000 (closing of a technical support centre, motivated by anti-union animus); *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 et Ville de Rosemère*, 2017 QCTAT 5606 (complete closing of a municipal fire service); *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 c Rosemère (Ville)*, 2017 CanLII 71832 (QC SAT) – (same situation, but examined under section 59 of the *Labour Code*). See also: *Unifor, section locale 1209 et Delastek inc.*, 2018 QCTAT 1136 (collective dismissal of half of the employees during a legal strike).

See contra: *Syndicat des Métallos, section locale 7016 c. Systèmes et câbles d'alimentation Prysmian Canada ltée*, 2011 QCCRT 116 (closing of an establishment without sanction, following the unionized workers' rejection of employer offers).

30 In this way, the case law frequently confuses the business and the establishment, although these are very different legal concepts.

31 Jonquière (pop. 60,000) is one of the three boroughs forming the city of Saguenay in Québec.

32 In 2016, this became the Tribunal administratif du travail (TAT).

33 Section 93.1. of the Québec *Labour Code* provides that in case of an impasse, a first collective agreement can be imposed by an interest arbitrator named by the Minister of Labour, in order to ensure the completion of the unionization process.

34 This provision protects not only the union leaders, but any employee against any form of anti-union discrimination.

based on a preponderance of evidence, the presence of another “just and sufficient” cause justifying the imposition of the sanction.

Nevertheless, the Supreme Court of Canada (SCC below) decided in the majority, in a 2009 judgment, that this recourse cannot be used in the case of a business or location closure when the closure is “real and definitive,” whatever the motives may be.³⁵ In a debatable fashion,³⁶ the Court emphasized, invoking decisions of the former Labour Court from the 1980s, the right of the employer to cease doing business “even if the closure is based on socially reprehensible considerations.”³⁷ In other words, in the context of a recourse based on section 15 of the *Labour Code*, the decision-maker should not consider the motives for the closing: on the contrary, the simple observation of a real and definitive closure is enough to justify the layoffs. In this instance, the evidence demonstrated that it was true: according to the Court, the location was no longer active.³⁸

As a consequence, the right of the employer to cease doing business, even for socially reprehensible motives, (a right which, by the way, is not at all explicitly affirmed in Québec law), completely neutralized the legislative protection of union freedoms, in this case firings related to the exercise of the right to unionize. However, from our perspective, the recent movement of constitutionalization of labour law in Canada allows us to stem this current and affirm, on the contrary, to an extent which remains to be determined, the predominance of union freedom in the face of property rights and freedom of commerce.

III - THE CONSTITUTIONALIZATION OF LABOUR LAW: IMPACT ON THE RIGHTS OF PARTICIPATION OF WORKERS

Since the 2007 reversal of the SCC regarding the scope of section 2d) (Freedom of association) of the *Charter of Rights and Freedoms*, Canadian labour law has witnessed an important movement toward constitutionalization. In fact, reversing its earlier case law, which was very formalist and based on economic liberalism,³⁹ the Court recognized the right to collective bargaining, and then the right to strike, as fundamental constitutional rights, which it had totally refused to do previously. In our view, this reversal of case law holds considerable importance, the scope of which still remains to be precisely defined. The constitutionalization underway likely institutes a third historical step in the evolution of

35 *Plourde v. Wal-Mart Canada Corp.*, [2009] 3 S.C.R. 465.

36 See the dissenting reasons of Judges Lebel, Abella and Cromwell (*ibid.*, par. 66 and following), as well as the generally negative reaction in jurisprudence.

37 *City BuickPontiac (Montréal) Inc. c. Roy*, [1981] T.T. 22, followed by: *Caya c. 16419749 Québec Inc.*, D.T.E. 85T-242 (T.T.); *Bérubé c. Groupe Samson Inc.*, D.T.E. 85T932 (T.T.); *Ouellette c. Restaurants Scott Québec Ltée*, D.T.E. 88T546, (T.T.); *Entreprises Bérou inc. c. Arsenault*, [1991] T.T. 312; *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] 3 S.C.R. 465.

38 Incidentally, the Court rejected out of hand any relevance of constitutional freedom of association in this area, holding that this did not regulate private law relationships. In doing so, the SCC implicitly refused to take into consideration the Québec *Charter of Human Rights and Freedoms*, CQLR c C-12, which is nevertheless applicable to relationships of this nature, and which guarantees freedom of association in its article 3.

39 See the “Trilogy” of 1987: *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313 (hereafter, “Reference”); *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460 and *PSAC v. Canada*, [1987] 1 S.C.R. 424.

labour law in Canada, after the era of voluntarism or “collective laissez-faire” of the British type (from approximately 1872 to 1944), and then that of institutionalism (or “industrial pluralism”) fostered by the legislative reception of the *Wagner* model (1944-2007). It has an impact at once on the representation of workers related to the legislative framework (A) and on the interpretation by the courts of the meaning of property rights and freedom of commerce (B).

A - THE LEGISLATIVE FRAMEWORK

In order to illustrate the impact of the constitutionalization of labour law, we can first briefly recall the four points developed above (Part I), focusing on weaknesses in the representation of employees in Canada/Québec:

1. *Access to unionization.* Since the turn of the SCC in favour of the constitutionalization of labour law, many groups of workers, formerly deprived of any right to collective representation by various legislative provisions, have had their right to unionize recognized by the courts. Let us mention for example the members of the Royal Canadian Mounted Police, migrant agricultural workers, and “intermediate resources” in the health and social services sector.⁴⁰ In another very important development, in December 2016, the TAT judged the exclusion of upper-level managers from the right to unionize in Québec to be unconstitutional. The decision of the TAT is subject to a process of judicial review, which may be very long, as the State intends to defend this exclusion, which potentially concerns tens of thousands of managers in Québec and contradicts the dualist, strongly hierarchical vision of the business which prevails in North America.⁴¹

2. *The residual conception of management rights.* As we have mentioned, the traditional approach in labour law in Canada holds that the employer, apart from the express provisions of the collective agreement, conserves the whole of its residual management rights and can thus act according to its wishes.⁴² In a recent decision, the SCC nevertheless states that the employer, beyond good faith, must make decisions which are *objectively*

40 See: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 (federal police). Regarding agricultural workers, see *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016; *Ontario (Attorney General) v. Fraser* 2011 SCC 20; in Québec : *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 c. L'Écuyer*, 2010 QCCRT 191. See however the particular regime instituted by the Québec government concerning agricultural workers, sections 111.27 to 111.32 *Labour Code*. Regarding “intermediate resources” and other employees providing health and social services in the home, for whom the Québec government refused unionization, see *Confédération des syndicats nationaux c. Québec (Procureur général)*, 2008 QCCS 5076.

41 See *Association des cadres de la Société des casinos du Québec et Société des casinos du Québec inc.*, 2016 QCTAT 6870, (motion for judicial review, CS-500-17-097007-176); *Association professionnelle des cadres de premier niveau d'Hydro-Québec (APCPNHQ) et Hydro-Québec*, 2016 QCTAT 6871 (Motion for judicial review, CS-500-17-097044-179). As a matter of fact, the ruling of the TAT was put aside by the Québec Superior Court in *Société des casinos du Québec inc. c. Tribunal administratif du travail*, 2018 QCCS 4781 : this latter judgement will now be brought before the Québec Court of Appeal.

42 Moreover, following the prevailing majority current among grievance arbitrators, the employer is thus subject to a criterion of good faith, meaning that it must not proceed in a purely arbitrary or malicious manner.

reasonable and equitable.⁴³ For this purpose, the Court continues, it must proceed with an evaluation based on a “balancing of interests” of employees and employer: in particular, the grievance arbitrator must on the one hand, analyze the framework as defined by the collective agreement and, on the other hand, determine the goal of the employer and evaluate the method the latter has chosen to achieve it.⁴⁴ Although the SCC does not rely on constitutional norms for this issue, this objective approach, based on a balancing of interests with respect to the exercise of the employer’s residual rights is certainly more compatible with them than the simple requirement of good faith. It is enough to refer here to the opinion of Justices McLachlin and Lebel in the case of *B.C. Health Services*: “Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives.”⁴⁵

3. *The impossibility of minority unionism.* At this time, the courts have not been directly seized of this question. At the most, there is a somewhat obscure *obiter* of Justices McLachlin and Lebel on the subject.⁴⁶ Jurisprudence has nevertheless made reference to positions of the ILO, particularly to those of the Committee on Freedom of Association (CFA), which hold that it is against the principle of freedom of association that a minority union should for this reason alone be deprived of any rights of representation.⁴⁷ Recall that the SCC considers the decisions of the CFA to represent a highly persuasive source of interpretation of section 2d) of the *Charter of Rights and Freedoms*.⁴⁸ One must note the decisive importance of the fact that the SCC refused to constitutionalize the *Wagner* model, based only on *majority* representation, for the purpose of delineating the normative bases of freedom of association in Canada: the Court has emphasized several times that alternative models of union representation can serve the purposes of collective bargaining just as well.

Considering, among other things, Canada’s international obligations under Conventions 87 and 98 of the ILO,⁴⁹ it appears to us that when a union has significant support in a group of employees, without, however, obtaining majority support as demanded under the *Wagner* model, this union should have access to a good-faith collective bargaining process with the employer concerned, at least with respect to its own members. In our view, recognition of this possibility is imperative to bring Canadian and Québec legislation on labour into conformity with international law. This possibility would clearly allow a significant number

43 *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55.

44 *Ibid*, par. 25.

45 *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27, par. 85.

46 “But s. 2(d) does not require a process whereby every association will ultimately *gain* the recognition it seeks (...) As we said, s. 2(d) can also accommodate a model based on majoritarianism and exclusivity (such as the Wagner Act model) that imposes restrictions on individual rights to pursue collective goals” *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R., par. 98.

47 See in this sense: R. J. Adams, “Bringing Canada’s Wagner Act Regime into Compliance with International Human Rights Law and the Charter”, *Canadian Lab. & Emp. L.J.*, 2015-2016, n° 19, p. 365-398.

48 *Saskatchewan Federation of Labour c. Saskatchewan*, [2015] 1 S.C.R. 245, 2015 SCC 4, par. 69.

49 Especially as Canada has just ratified Convention n° 98 (June 2017).

of non-unionized employees to gain access to a form of collective bargaining with their employers.⁵⁰

4. *The obligation of industrial peace.* The validity of the legislative prohibition against any strike while a collective agreement is in force, independently of the question before the tribunal, has recently been put into doubt before certain arbitration tribunals, to this date without success.⁵¹ This prohibition, characteristic of labour legislation throughout Canada, extends also, as we have seen, to subjects not covered by collective agreements, as required in cases of restructuring of the business decided unilaterally by the employer, outside the legal periods of collective bargaining. The illegality of any pressure tactic even when the jobs of workers are at stake explains in part the powerlessness of private sector unions to face massive collective dismissals which have happened in several industrial sectors in Québec, such as forestry or metallurgy. In our view, this general prohibition imposed by law is incompatible with the recognition, since 2015, of the right to strike as a fundamental constitutional right of workers.⁵²

B - THE IMPACT ON PRIVATE PROPERTY RIGHTS AND FREEDOM OF COMMERCE

Although in the current state of the law, freedom of commerce and the right to cease operations still occupy an important position, they no longer protect the employer against any sanction in the case of an anti-union closing. Even if elements remain in the case law, the recent move toward the constitutionalization of labour law appears to be encouraging administrative labour tribunals and courts of law to place the freedom of association much more prominently, rather than affirming the primacy of employers' property rights and freedom of commerce. Let us examine certain recent cases related to anti-union interference (1) and the maintenance of working conditions (2).

1. Paradoxically, the formalist and restrictive decision of the SCC in the *Wal-Mart* case (2009) contained in itself the seeds of elements of a later evolution of the case law, which would be much more respectful of the right to unionize. In particular, though sections 15 and following of the *Labour Code* are of no use to dismissed employees due to a literal interpretation of the text, which still prevails, the Court opened the door, in *obiter dictum*, to the wider application of the concept of "hindering union activity" in sections 12 to 14 of the *Labour Code*, even in the case of a final closing down of the business.⁵³ On a case-by-case basis, it will be possible to evaluate the actual motives of the closing because this

50 The principle of minority unionism would thus apply to the only sector which is currently non-unionized. As for the unionized sector, considering the *Wagner* model, which remains legitimate in its foundation, it would remain governed by the majority principle. In other words, a union which went from a substantial minority support to majority support of the employees concerned would then benefit from the monopoly on representation, with all the consequences flowing from it. Such a situation appears to us to conform to the demands of international labour law.

51 See for example *Corporation d'urgences-santé c Syndicat du préhospitalier FSSS-CSN*, 2017 CanLII 81906 (QC SAT).

52 *Saskatchewan Federation of Labour c. Saskatchewan*, decision cited above.

53 *Ibid.* See also *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 503 c. Compagnie Wal-Mart du Canada*, 2014 CSC 45 (*Wal-Mart 2*).

does not create a barrier, even if the closing is real and definitive, to the use of complaints of hindering union activity contrary to sections 15 and following of the Labour Code.⁵⁴

In this way, several complaints based on the notion of hindering were filed concerning the closure of certain Couche-Tard convenience stores, which happened in the middle of the collective bargaining process. In an interlocutory decision, the CRT refused to grant a provisional order to maintain operations, based on the right to cease doing business.⁵⁵ It nevertheless emphasized that if these were truly anti-union closings, the tribunal could, during the hearing on the merits, order the reinstatement of the employees, with compensation, in other establishments.⁵⁶ A collective agreement was finally concluded, and the union withdrew the complaints.

Because, contrary to section 17 of the Labour Code, no legal presumption of anti-union animus can be invoked with respect to allegations of hindering or interference, the union must demonstrate that the closing of the business was based on this motive. At first glance, the burden of proof resting on the union appears heavy according to the traditional case law.⁵⁷ However, in the decision *Plourde v. Wal-Mart* of 2009, the SCC emphasized that proof of an anti-union animus in a case of hindering within the meaning of the Labour Code does not require conclusive evidence: the presence of a single anti-union consideration is sufficient to demonstrate the illegality of the employer's behaviour, even if other valid motives, of an economic nature for example, form the basis for the decision to close down.

This kind of approach is apt to greatly assist in proving anti-union behaviour in case of interference in the sense of section 12 of the *Labour Code*, despite the absence of the legal presumption mechanism which applies during a firing, suspension, transfer, etc. based on the exercise of a right provided by the Code (s. 15 and following, *Labour Code*).⁵⁸

2. By implicitly making an important case law reversal in 2014, the SCC opened the possibility of another type of recourse with a vast scope, in the case of restructuring, including anti-union closures. This decision,⁵⁹ although it makes no direct reference to it, is clearly within the movement of constitutionalization of labour law by giving a substantive interpretation to a provision of the *Labour Code* related to the maintenance of working conditions, previously seen as having only a procedural application.

54 *Ibid.*, par. 64.

55 *Syndicat des travailleuses et travailleurs des Couche-Tard de Montréal et Laval – CSN et Couche-Tard inc.*, 2011 QCCRT 0449. See in the same vein: *Syndicat international des travailleuses et travailleurs de la boulangerie, confiserie, tabac et meunerie, section locale 55 (SITTBCTM) et Lantic inc.*, D.T.E. 2013T-68 (T.A.).

56 2011 QCCRT 449.

57 See for example *Syndicat des Métallos, sections locales 7016 et 8428 c. Systèmes et câbles d'alimentation Prysmian Canada ltée*, 2011 QCCRT 0116 ; *Syndicat des travailleurs et travailleuses Au Roi du coq rôti c. Au Roi du coq rôti inc.*, 2010 QCCRT 0365.

58 See also, at the federal level: *Fedex Freight Canada Corp. v. Teamsters Local Union No. 31*, 2017 FCA 78 (closure of a service centre motivated by anti-union animus).

59 *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, [2014] 2 S.C.R. 323 (hereafter *Wal-Mart 2*).

Thus, in the case of the Jonquière Wal-Mart, the union had filed another complaint, before the grievance arbitrator this time, alleging that the closing of the establishment constituted a violation of section 59 of the *Labour Code*, which obliges the employer to maintain the working conditions in force, following the filing of a motion for certification.⁶⁰ In its 2014 decision, the Supreme Court judged that in this case,⁶¹ “the employer is (1) neither shielded by the closure of its establishment (2) nor, otherwise, relieved of the burden of proving that its decision was consistent with its normal management practices.”⁶²

If it fails to respect section⁵⁹ of the *Labour Code*, the employer must assume the consequences, including in cases of illegal closure, among others by compensating the workers affected, for the whole of the damage suffered. In light of the meaning of section 59 of the *Labour Code*, proof of such a change to working conditions depends of course on the union,⁶³ but it is not necessary to demonstrate that the decision was “motivated by anti-union animus.”⁶⁴

As soon as the union satisfies this burden of proof, the employer must then demonstrate that the behaviour is based on a routine management practice⁶⁵ and that it only proceeded with normal and essential changes for the daily administration of the business.⁶⁶ In particular, a change to the working conditions must be coherent with previous management practices in the business, or if not, must be “consistent with what a ‘reasonable employer in the same position’ would have done.”⁶⁷

In this way, during the closure of a business, the employer must demonstrate that major economic constraints reasonably imposed this kind of decision. Wal-Mart was unable to provide convincing evidence of such financial difficulties with respect to its Jonquière facility – on the contrary, the facts entered into evidence attested to the economic viability of the establishment – and thus its act was judged contrary to section 59 of the

60 This section prohibits the employer from modifying the working conditions of employees without the written consent of an association of employees from the moment of filing of a motion for certification or the expiration of the collective agreement, until the right of strike or lockout is exercised or an arbitral decision is rendered.

61 Before this decision, the case law considered that the exercise of management rights of the employer in a routine fashion “includes the right to cease activities in whole or in part”: *Alliance internationale des employés de scène et de théâtre, section locale 56 c. Société du Centre Pierre-Péladeau*, [2004] R.J.D.T. 1246 (our translation). (Motion for safeguard order, interim decision prior to decision on the merits): *Société du Centre Pierre-Péladeau c. Alliance internationale des employés de scène et de théâtre, du cinéma, métiers connexes et des artistes des États-Unis et du Canada (IATSE), section locale 56*, [2006] R.J.D.T. 293 (T.A.).

62 *Wal-Mart 2*, par. 64.

63 *Ibid.*, par. 46.

64 *Ibid.*, par. 38; *Union des routiers, brasseries, liqueurs douces & ouvriers de diverses industries c. Syndicat des employé-es de SPC Automation (CSN)*, [1994] T.A. 718; *Centre de la petite enfance Casse-noisette inc. c. Syndicat des travailleuse (eurs) en garderie de Montréal*, [2000] R.J.D.T. 1859 (T.A.).

65 *Wal-Mart 2*, par. 81.

66 *Travailleuses et travailleurs de l'alimentation et du commerce, section locale 501 c. Wal-Mart Canada (St-Hyacinthe) (grief syndical)*, D.T.E. 2010T-797 (T.A.).

67 *Wal-Mart 2*, par. 56.

Labour Code. As a result, almost six years after the closing of the Jonquière store, Wal-Mart finally had to compensate the dismissed workers to the tune of several million dollars.⁶⁸

Let us emphasize that in this very important decision, the SCC specifies the aim of section 59 of the *Labour Code*: it is meant not only to maintain the “balance” between the employer and union parties,⁶⁹ but above all aims to foster freedom of association and collective bargaining.⁷⁰ The connection with the new constitutional labour law appears evident here.

CONCLUSION

In the Canadian context, if we try to respond to the question “What rights of representation and participation are recognized for workers?” there would be little to say, unless we begin with the principle that collective bargaining, which happens at the level of the bargaining unit (generally at the establishment or the business), constitutes *at minimum* a functional equivalent to the system of works councils which is present, with multiple variations, at the European level. It is very rare in Canada that employee representatives sit on boards of directors of private or public businesses: nevertheless, in unionized environments, the strong union presence, including at the local level, allows for more or less similar results in terms of information or consultation.

Certainly, we note the numerous weaknesses, from the perspective of workers’ participation rights, which the present collective bargaining system in Canada presents, beginning with the absence of access to unionization for important categories of employees, such as in Québec managerial personnel and economically-dependent contractors. In the same vein, the legislative obligation of industrial peace and the principle of the absolute majority, historically linked to the reception of the *Wagner* model from the United States, represent obstacles to the full development of collective bargaining.

We have paid particular attention to the collision between collective bargaining and freedom of commerce and the right to private property, fundamental norms (even if unwritten) in the *economic constitution* of Canada. The anti-union closure of the Wal-Mart store in Jonquière, Québec, appeared to grant above all an absolute primacy to

68 Following an agreement between the UFCW and Wal-Mart, the exact terms of the settlement regarding the dismissal indemnities remain confidential.

69 A perspective which we link to the paradigm of industrial pluralism, considered outdated today.

70 See in this sense *R. v. Canadian Union of Public Employees, Local 1252*, 2016 CanLII 67993 (NB LEB), par. 24.

these economic norms over the collective rights of workers. Nevertheless, at the end of an epic battle before the courts, which took a decade, the 190 employees of the Jonquière *Wal-Mart* finally won their case, obtaining substantial compensatory indemnities. This victory at the end of the line before the SCC would be difficult to understand absent, in the background, the Court's reversal of case law on union freedom beginning in 2007: a movement of constitutionalization of labour law started from this moment. Its contours remain largely undefined, but, demanding a full conformity with international labour norms, it contains in it at least the beginnings of a possible deep transformation of the Canadian industrial relations system and the rights of representation and participation of workers which flow from it.

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~ Liberté d'entreprendre, Liberté d'association et restructurations d'entreprises, ed. Wilson & Lafleur, 2016.

~ « Le régime québécois de protection contre le harcèlement psychologique au travail : particularités et enjeux jurisprudentiels », *Revue de droit comparé du travail et de la sécurité sociale*, 2018-2, p. 22.

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~ « L'exercice de moyens de pression en cours de convention collective : l'impact de la liberté constitutionnelle d'association », *Cahiers de Droit*, 2018 (forthcoming).