

## THE SKY IS NOT FALLING: UNIONIZATION, WAL-MART AND FIRST-CONTRACT ARBITRATION IN CANADA

*Gregor Murray*<sup>1</sup>  
Professor,  
School of Industrial Relations,  
Université de Montréal,  
Montréal, Québec, Canada

*Joelle Cuillerier*<sup>2</sup>  
Graduate Student,  
School of Industrial Relations,  
Université de Montréal,  
Montréal, Québec, Canada

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### ABSTRACT

The conflict between property rights and the right of association creates the case for various policy avenues to ensure that employees have effective access to the right to associate for the purposes of collective bargaining. One such labour policy in Canada is first-contract arbitration. The experience of this policy in Quebec over the last three decades has achieved key objectives: ensuring first agreements for newly unionized workers, developing constructive bargaining relationships and overcoming what can be a major obstacle to an effective right to associate. After reviewing this experience, this article provides an overview of the unionization campaigns resulting in union certifications for the United Food and Commercial Workers Canada in six Wal-Mart facilities in Quebec province over the last six years. It then examines two recent cases of first-contract arbitration for these certifications. In one case, the company summarily closed the department concerned after the first contract was awarded. In the second case, the store remains open, with an operative collective agreement. Absent a policy of first-contract arbitration, it appears unlikely that this would be the case. The evolution of the bargaining relationship beyond the first-contract will provide a key test of the relative efficacy of Canadian policy approaches to ensure the freedom of association.

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**L**abour and employment relations are one area that brings sharply into focus conflicts between different types of rights. Most democratic societies seek to protect private property, such as the freedom of enterprise and the freedom to contract, but such rights are never absolute. The abolition of slavery placed distinct limits on the notion of property as regards human beings. Property is similarly limited by larger community and social purposes, for example in the ways that urban planning regulations, the assessment of environmental impact or consumer protection can circumscribe

the use of property and the freedom to contract. Individual liberties also limit or condition property rights, as in the consideration of racial and gender equality. As community standards evolve, so too does the exercise of property rights since they are subject to those standards. This is the history of regulatory activity of industry which is neither new nor exceptional. Business regulation is as old, indeed older, than the limited liability company itself and has ever conditioned the exercise of property rights.

Labour and employment rights are a good example of this historical pattern. Whereas employers once claimed the right to pursue their business strategies according to absolute principles of freedom of contract, from the nineteenth through to the twentieth century, such rights came to be the subject of a range of individual and collective rights. The core tenet is that labour is not a commodity like other commodities since it concerns human beings who enjoy rights. Pre-eminent among these is the freedom of association. Workers in most democratic societies are accorded the right to associate for the purposes of collective bargaining. This objective is at the very core of the key conventions of the International Labour Organization and, more recently, of its 1998 *Declaration of Fundamental Principles and Rights at Work*. As societies emerge from periods of dictatorship, one of the first steps towards democracy is the effective recognition of the freedom of association. This is a fundamental right that has made its way into core statements of constitutional rights. For example, the *Canadian Charter of Rights and Freedoms* (1982) guarantees to all the following freedoms: conscience and religion; thought, belief, opinion and expression, including freedom of the press and other media of communication; peaceful assembly; and association. These rights have a pre-eminent character relative to other legislation and are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In a recent 2007 decision, the Supreme Court of Canada has enlarged its interpretation of the meaning of freedom of association to include collective bargaining (Fudge 2008).

Most national labour laws seek to find some kind of balance between the recognition of property rights and what have come to be seen as fundamental human rights, including the right to associate for the purposes of collective bargaining. There is often an empirical distance between a right in principle and effective access to that right. A continuing challenge for labour policy is how to make human rights, such as freedom of association, effective in the face of property rights, especially when freedom of association is a right exercised in the very same physical space as property rights. In democratic societies, employers are normally constrained from firing individuals for exercising their right to associate and are generally obliged to recognize unions, subject to some kind of test as to their legitimacy, for example their representativeness. In some countries, the right to associate and even to strike is deemed to be an individual right that can be accessed at virtually any time. In other countries, notably the

United States and Canada, the right to associate is subject to an administrative determination of the majoritarian principle, i.e. it is a right that is exercised when there has been a demonstration of majority support.

How you make such a demonstration is the subject of ongoing debates. If effective access to the right to associate for the purposes of collective bargaining is frustrated by employers who contest the right of their employees to engage in such behaviour or discriminate against those who do so or mobilize their company's resources against such an objective, especially on company premises controlled by managers arguing against the exercise of the right to associate, it would be difficult to conclude that workers in that enterprise are able to exercise effectively what is recognized as a fundamental right in a democratic society. This is, of course, the basis of robust argument to level the playing field in terms of union access to company premises, the nature of face-to-face and captive-audience meetings between managers and employees, methods to determine representativeness that takes account of the specificity of a situation where one party is seeking to exercise a right (freedom of association) in a physical space that is subject to the direct and detailed control of another right (property), and many other dimensions of the unionization process (Doorey 2008), while ensuring that there is scope for discussion among workers about exercising their right to associate. In the absence of such mechanisms and significantly dissuasive penalties where holders of property rights transgress associational rights, it is difficult to ensure effective access to the freedom of association.<sup>3</sup>

Even when employees are able to secure collective representation by a union, the employer can in effect refuse to deal with the union and to frustrate the effective exercise of the freedom of association. It's in this context that a number of jurisdictions in Canada have implemented first-contract arbitration procedures where, in the absence of agreement on a first collective agreement, one of the parties can make a request for compulsory interest arbitration. The fundamental issue remains how to ensure an effective freedom of association.

This article provides a brief overview of the experience of first-contract arbitration, with a particular focus on Quebec province and the case of Wal-Mart Canada Corporation and the United Food and Commercial Workers Canada where, to date, there have been two first-contract arbitration awards, with a possibility of others in the future. We first look at the operation of this legislative provision, then profile Wal-Mart and the Wal-Mart unionization campaigns in Quebec, before considering the process and results of these cases of first-contract arbitration. Despite the fact that Wal-Mart has closed two unionized facilities in Quebec since the beginning of this campaign (a store in Jonquière and a Tire & Lube Express department at another store in Gatineau), a collective agreement at its Saint-Hyacinthe store came into effect in April 2009. Simply expressed, this store continues to operate under the aegis of a first collective agreement and the sky is not falling. Given the company's apparent reticence to deal with unions at

its other locations in North America, this result is no doubt of interest to those who are seeking to understand the role of first-contract arbitration in ensuring effective access to the right of association.

## **FIRST-CONTRACT ARBITRATION AND THE FREEDOM OF ASSOCIATION**

Employers can feel challenged, even threatened, by the exercise of the freedom of association with regard to their property and often seek, by all means possible, to frustrate the exercise of this right. Thomas Kochan (1980: 182) put it aptly when he suggested that a top priority for American employers is to remain union free and this only appears to shift when they have to learn to deal with a union. The North American policy norm is nonetheless an obligation to bargain in good faith with a legally constituted union. However, there is no obligation to conclude an agreement. Even when workers secure representation rights, employers can, if done in good faith (presuming that what this entails is easily ascertained), simply delay and delay and delay, until the realistic exercise of the right to associate is effectively frustrated. Newly unionized workers might of course also have inflated expectations about the ability of their employer to satisfy their demands. Or there may simply be such “bad blood” that it is difficult to constitute a bargaining relationship.

That is why a number of Canadian jurisdictions began to experiment with first-contract arbitration. The 1970s gave rise to some bitter and even violent first-contract disputes in Canada where it was clear that workers could not really exercise their right to bargain collectively. Paul Weiler (1980: 53), an early commentator on the development of this policy tool in Canada, described the imposition of a first contract “as a trial marriage, one which could allow the parties to get used to each other and lay the foundations for a more mature and enduring relationship”. It is meant to be “an exceptional” device (Sexton 1987), smoothing the way towards a more enduring relationship, where public policy foresees the possibility of interest arbitration in the case of a failure to resolve contending claims for the content of a first collective agreement.

It’s also important to emphasize the pedagogical aspect of this public policy. Employers have historically had issues with the emergence of collective representation and, after certification has occurred, both parties have to learn to develop a constructive working relationship. The mediation-arbitration process developed in the context of first-contract arbitration encourages this heuristic by allowing the parties to come to agreement on core aspects of their relationship, by making the argument to a third-party neutral on other aspects, by listening to the arguments of the other party, by having the option at any time to come to an agreement on one or another clause of the first contract while these discussions are in process , by interacting with the arbitrator and reading the justifications

that inform the arbitration award and then by having to live and operationalize the results of the process. The policy demonstrates that it is possible to develop a working relationship, that the sky will not fall, and that the parties can actually take advantage of these exceptional circumstances to learn how to deal with each other. This is not to suggest that issues will not remain or that the relationship cannot evolve over time but it seems that exceptional measures are required to help the parties develop a constructive relationship at the outset and first-contract arbitration offers a policy avenue to achieve this objective. The question cannot be an existential one, about the union's right to exist on the employer's premises, but rather about the type of relationship that can be developed between parties who share so many common interests about the efficient operation of the organization in which they work and the need for healthy and productive working conditions for the organization's employees, if only they can learn to make the process work.

According to the constitutional division of labour between provincial governments and the national government in Canadian federalism, employment relations are a split jurisdiction according to the industry where employees are located. More than 90 per cent of employees are regulated by provincial labour law, which gives rise to interesting variations from one province to another. The province of Quebec inserted a first-contract arbitration clause in its labour code in 1977. British Columbia experimented with the process prior to Quebec and seven Canadian jurisdictions now have some form of first-contract arbitration. Quebec, which is the second largest jurisdiction in Canada (after Ontario) in terms of population, uses a system of a single arbitrator with a "winger" named by each party to advise the arbitrator but not to participate in the decision-making process. The arbitrator can move from the mediation to the arbitration phase if it appears unlikely that the parties will reach agreement (for an excellent overview in English, see Sexton 1987). The objective of this policy is simple: incite the parties to reach an agreement on their first contract without conflict and thereby help the parties towards a stable bargaining relationship.

Quebec offers an especially interesting case study because there is now more than thirty years of experience with this legislative provision. The most comprehensive study of this experience of first-contract arbitration was done by the Quebec Ministry of Labour over the twenty-four-year period 1978 to 2001 (Marotte and Paré 2002). It reveals a number of interesting insights. During that period, there were more than a thousand requests made for first-contract arbitration ( $n=1,031$ ), of which just over half (52.5 per cent) were granted. Of those that were granted ( $n=541$ ), 43.1 per cent had a first agreement imposed by the arbitrator and 39.9 per cent signed a collective agreement of their own volition. The other outcomes included withdrawal of the request by the union (5.9 per cent) or the employer (0.2 per cent), closure of the firm (3.1 per cent), decertification of the union (2.6 per cent), ongoing arbitration (2.5 per cent), a

decision not to intervene (2.2 per cent, but exclusively before a minor legislative adjustment facilitating intervention in 1983), and a settlement outside of the arbitral process (0.4 per cent). The authors note that the possibility of arbitration seems to be a powerful incentive to settle in the mediation phase of the two-step process since 39.9 per cent of these cases actually signed an agreement during the process of first-contract arbitration. It should also be noted that the process provides that any clause on which the parties agree automatically becomes part of the arbitration award.

Among the cases that were refused first-contract arbitration by the Minister of Labour (n= 487 or 47.2 per cent of the requests), the major reason was that a collective agreement was concluded by the parties (52.8 per cent). The other major reasons included the decertification of the union because it was no longer representative (18.9 per cent), the closure of the firm (7.0 per cent), the withdrawal of the request by the union (6.2 per cent) or the employer (0.4 per cent), a preference to opt for voluntary arbitration (6.2 per cent) in which case the parties are also responsible for the cost of the arbitration, and other unspecified reasons (8.6 per cent).

The request for first-contract arbitration can be made by either party. Consistent with our argument that it is mainly the union side seeking to secure an effective exercise of freedom of association rights, it is the union that made the request in 81.7 percent of the cases between 1978 and 2001 (the employer did so in 17.7 per cent of these cases).

A key conclusion emerging from this overview of the Quebec experience with first-contract arbitration is that a significant proportion of the cases considered, both those accepted in the process by the Minister of Labour and those refused, resulted in a first agreement. If we cumulate those cases resulting in (a) an award or (b) an agreement before reaching the award stage that were part of the arbitral process and (c) those cases that were refused because they had reached an agreement, this amounts to a conservative estimate of 68.5 per cent of the cases considered in the 1978-2001 period that resulted in a first contract. If we add those cases that opted for voluntary arbitration or reached agreement outside of the process or where the arbitration was ongoing, there were 72.9 percent of cases where an agreement was likely.

In order to ensure that the trends observed in the Ministry of Labour study of the 1978-2001 period hold for the most recent data available (the seven years spanning 2002-2008), we analyzed this later data. During the 2002-2008 period, there were 208 cases of which 151 were admitted into the first-contract arbitral process and 57 were excluded. Among those included, 37.8 per cent reached agreement and 50.3 per cent received an arbitration award. Among those excluded, 66.7 per cent reached a first collective agreement. This suggests that the results are largely similar with a total rate of agreement on first contracts of 82.2 per cent (including cases included in this process resulting in voluntary

agreements or arbitration awards and cases excluded because they reached a first agreement).

Overall, when we integrate the data from the two periods for a total of 1239 cases over the 1978-2008 period, 86.4 per cent of those admitted into the process either reached an agreement or received an award. When we examine the cases included in and excluded from the process, we estimate that in 74.5 per cent of cases there was either an agreement reached voluntarily (49.6 per cent) or an award granted (24.9 per cent).

On the basis of this extensive experience in Quebec province, it would appear that first-contract arbitration is associated with powerful incentives to reach some form of agreement and that the policy objective of ensuring effective access to associational rights for the vast majority of workers concerned is attained.<sup>4</sup> An interesting test case is nonetheless how this policy deals with the most reluctant of employers.

## **THE CASE OF WAL-MART**

According to the most recent data available from the United Nations Agency, UNCTAD (2008), Wal-Mart Corporation was in 2006 certainly among the world's most important transnational corporations. In terms of sales, it was second in the world (just behind ExxonMobil Corporation) and 11<sup>th</sup> overall in terms of foreign sales. In terms of assets, it was 15<sup>th</sup> overall and 10<sup>th</sup> in terms of its foreign assets. Finally, it was the largest overall employer (1.91 million workers worldwide) and foreign employer (540,000 employees outside of the United States). In terms of overall employment, it was more than four times the size of its nearest rivals (Siemens of Germany, McDonalds of the United States, Deutsche Post of Germany and Carrefour of France) and in terms of foreign employment it had almost half as many workers again as its nearest rival (McDonald's Corporation).

From the founding of its first store in 1962, Wal-Mart became the largest retailer in the United States by 1990. Its foreign expansion dates from 1991 when it developed a joint venture with Mexico's largest retailer (Fishman 2006). It entered the Canadian market in 1994 when it purchased 122 Woolco Stores from the Woolworth Corporation. This purchase was notable because it excluded the 22 Woolco stores that were either unionized ( $n = 10$ ) or that had downtown locations (Bianco 2006). Wal-Mart Canada Corporation currently has approximately 312 locations and employs nearly 80,000 persons.<sup>5</sup> Approximately 71,000 employees in Canada are paid hourly, of which 11,500 in Quebec in 54 different stores.

Wal-Mart is not a corporation known for its pro-union bias. While it describes itself as pro-associate (a term used internally to refer to its employees) as opposed to anti-union, there are multiple indicators that where possible it has

sought to contest the legitimacy of unions and the need for a union presence in its operations. This has been evident in the few cases in the United States when there have been unionization attempts and the vigorous internal company policies to remain union free (Greenhouse 2008: 250). This was also the case with its workers in China where the company only reluctantly agreed in 2006 to deal with union representatives (Harney 2008: 138), reportedly after considerable pressure from local and national governments.

To summarize, Wal-Mart is a global corporation with a comparatively recent history that has experienced a rapid expansion, both in its country of origin and abroad. Its commercial successes are numerous and its commercial failures quite rare (on the case of Germany, see Christopherson 2007). Low costs are an integral part of its overall strategy as a lean retailer and tight control of labour costs and vigorous supply-chain management are key components of that strategy. With its formative culture in the southern US, finding a balance between property rights and the freedom of association does not appear to have figured high on the list of its priorities.

#### **THE WAL-MART UNIONIZATION CAMPAIGN IN QUEBEC**

The most sustained and successful unionization campaigns of Wal-Mart locations in North America have taken place in Quebec province (for an overview of the Wal-Mart unionization campaigns in Canada up to 2005, see Adams 2005). As of mid-2009, these campaigns by the United Food and Commercial Workers Canada have resulted in six successful certifications in three Wal-Mart stores and in three Tire & Lube departments (two linked to stores that were also certified and one to a store where there is no certification). Table 1 gives an overview of the key dates and the steps in the process of these six units.

The first certification was obtained in Jonquière Quebec, an isolated and heavily unionized primary resource and aluminum smelting town some two hundred kilometres north of Quebec City. This case made headlines across the globe because Wal-Mart announced the closure of the store, purportedly because of its non-viability, a week after the union representing the workers in this store applied for first-contract arbitration under Section 93 of the Quebec Labour Code. This case has been the source of ongoing legal battles between the union and employer, including individual complaints of unfair labour practices and psychological harassment and collective complaints about the right of the employer to close its store in the context of first-contract negotiations (Coutu 2007, Vallée 2007). Although the right of the employer seemed to be well established on this point in Quebec, the Supreme Court of Canada gave the union leave to appeal. The case was heard in January 2009 and a decision is pending. Key questions concern a range of issues related to employers dismissing employees for exercising their freedom of association (in a context



where the Supreme Court of Canada has gradually been broadening its interpretation of the freedom of association) and the powers available to the Quebec Labour Relations Commission to grant remedies should there be a violation of freedom of association. In the meantime, as part of the legal wrangling, the much delayed first-contract arbitration for the Jonquière store, now closed since April 2005, is always in process.

**Table 1:**  
Unionization Campaigns Resulting in Certifications at Wal-Mart Facilities in Quebec

	Jonquière	Gatineau - Maloney	St-Hyacinthe		Gatineau - Plateau	
	Store	Tire & Lube	Store	Tire & Lube	Store	Tire & Lube
UFCW Local	503	486	501	501	486 and 502	486
Certification application	1) 21/12/2003 2) 6/07/2004	10/05/2005	4/10/2004	28/01/2005	1) 18/03/2005 (486) 2) 14/05/2005 (502)	18/03/2005
Card check / Election	1) Election lost by 8 votes 2) Card check	Card check	Card check	Card check	1) Application withdrawn 2) Card check	Card check
Date of certification	2) 2/08/2004	30/06/2005	14/01/2005	9/03/2005	2) 17/12/2008	17/12/2008
Request for first-contract arbitration	01/02/2005	20/06/2006	24/11/2005	Regular negotiations underway	Regular negotiations underway	Regular negotiations underway
First agreement awarded	Pending	13/08/2008	8/04/2009			
Other major incident	Closure announced: 9/02/2005 Supreme Court decision pending	Closure announced: 15/10/2008				

The second and third certifications came at Wal-Mart's Saint-Hyacinthe store in a commuter town of the same name roughly 50 kilometres to the east of Montreal. This was in some respects a surprising location because it does not have the same kind of union culture as a remote resource town like Jonquière. The certification was granted in January 2005 for the main store and in March 2005 for the Tire & Lube department. After nine months of negotiations, the union representing the workers made an application for first-contract arbitration. In this two-step mediation and arbitration process, to which we shall return in greater detail below, and after constant delays and related legal cases arising from that and other Wal-Mart unionization campaigns, a first contract was awarded in April 2009.

A next batch of three certifications came at two Tire & Lube departments and one Wal-Mart store in Gatineau Quebec (formerly known as Hull prior to a series of municipal government amalgamations), just across the Ottawa River from Ottawa, Canada's national capital. Employment in Gatineau is largely dominated by the federal public service, which is heavily unionized. Applications were made in March and May 2005, intriguingly after the announcement of the Jonquière closure. The union reported that this actually worked as an incentive for potential union members at Wal-Mart's Gatineau locations. An initial application was withdrawn at one store to be resubmitted two months later after an intensive organizing blitz and certifications were granted in May and June 2005. Two of these certifications were mired in protracted legal wrangling, with the Supreme Court of Canada refusing to give leave to the appeal submitted by Wal-Mart with regard to decisions made by the Quebec Labour Relations Commission.

It's worth highlighting a few key features of these cases. First, unlike elsewhere in North America, there have been six separate certifications of Wal-Mart facilities over the 2004 to 2008 period.

Second, all of these certifications were the result of cardcheck campaigns, as stipulated by Quebec law, where the Labour Relations Commission ascertained that there was majority support. It should be emphasized that this support is validated in a detailed way by independent representatives of the Labour Relations Commission who verify that individual employees voluntarily signed the cards and continue to be members of the union for the purposes of collective bargaining. Note that there was an additional case, at Brossard Québec, a suburb on the south shore of Montreal, where the union lost a certification vote by a significant margin (149 to 51).

Third, these campaigns have been a veritable fiesta for a number of law firms involved in the process. Wal-Mart's counsel in Canada appears to have explored just about every legal recourse available (see Vallée 2007: 252 *et passim*) and the union's counsel has responded in kind. The fact that the Supreme Court of Canada did give leave to appeal one of the decisions related to the Jonquière

case, for which the result is pending, also indicates that there are real issues related to the conflicts of rights highlighted at the outset of this article. The net effect of this combination of the high stakes for the parties and the substantial resources that they engaged in the campaign has meant that this particular series of applications for certification and negotiation have been tied up in legal wrangling. This has resulted in substantial delays, as can be seen by the length of time between the applications for certifications and the granting of the applications and also in the length of time between the applications for first-contract arbitration and some result from this process. To take the example of the Gatineau-Plateau certifications, the duration between the application for certification and the granting of the certification was more than three years. Similarly, it took more than four years between the granting of certification and the first-contract award in the Saint-Hyacinthe store. In companies characterized by a relatively high turnover of employees, such as in the retail sector where companies like Wal-Mart operate, this means that there is considerable distance between the initial organizing campaign and the eventual result of that campaign. It also creates the opportunity to profile new employees and to make the argument “on the floor” about the desirability of collective representation. While such discussion is a normal part of legitimate discourse between employees, there is a danger if the employer uses the effective control of the workplace accruing from its property rights to stifle employee interest in exercising their associational rights. The clearly expressed will to associate, as determined by the detailed analysis of the Labour Relations Commission, will then have been effectively denied.

Fourth, Wal-Mart in fact closed two operations: its Jonquière store in 2005 at the outset of the arbitral process for a first collective agreement and its Tire & Lube operations in one of the Gatineau locations in 2008 when a first contract was awarded by the arbitrator. According to some observers, the timing of one of these closures was such that it had the anticipated chilling effect in the one certification election vote (at the Brossard store where a certification vote was lost by a significant margin in April 2005) but did not seem to dissuade potential union members from signing cards in other unionization campaigns (at the Gatineau store in May 2005). Moreover, it can be questioned whether these closures, especially that of Jonquière, did not have an overall negative impact on the company as its aggressive anti-union reputation ran up against community values in what remains one of the two most unionized provinces in Canada.

Finally, in accordance with Quebec labour laws, two of these six certifications resulted in first-contract arbitration; another is pending for the other closed facility, which also awaits a Supreme Court decision. It's to those two cases of first-contract arbitration that we now turn because they provide some insight into how first-contract arbitration potentially opens up space for exercising the freedom of association.

## THE GATINEAU-MALONEY AGREEMENT<sup>6</sup>

The Gatineau-Maloney Tire & Lube department agreement covers nine employees (four full-time and five part-time) who engage in a variety of basic maintenance operations for vehicles in a department adjacent to the main Wal-Mart store on West Maloney Boulevard in Gatineau, Quebec. This store employs a total of 250 employees, including the nine in the Tire & Lube department who are represented by Local 486 of the United Food and Commercial Workers of Canada.

In 2005, at the time of the application for certification, employees in the Tire & Lube department (there are 45 such departments in the 51 stores in Quebec) were found to form a distinct group for the purposes of collective representation by the Quebec Labour Relations Commission. While they have some points in common with other employees in the store, this group of technicians must each have a driver's license, receives special training, wears different clothes, has little mobility within the store and has schedules and holiday planning managed separately from other employees.

After the intervention of a conciliator in May and June 2006, the union representing these workers applied for first-contract arbitration and an arbitrator, who first acts as a mediator and then as an arbitrator, was named in August 2006 with a first meeting of this process taking place in November 2006. While the two parties were able to resolve the majority of clauses that would make up the agreement, there were five outstanding issues. These included the length of the first contract, the pay scale, the rate of pay for work on Boxing Day (December 26<sup>th</sup>), the continuation of a store performance bonus scheme for unionized employees, and the wages to be paid to the employee involved in the negotiations. By the nature of the process according to Quebec policy and precedent, the arbitrator must make decisions in the interests of equity and good faith, while taking account of comparable conditions, the evidence produced by the parties and a reading of what the parties would have agreed upon in the normal collective bargaining process (and not simply what the arbitrator might prefer).

On the length of the agreement, the employer favoured a one-year contract while the union argued that an agreement of three years in duration in the light of the length of time involved and the arbitral process currently under way. The arbitrator opted for three years in the absence of any employer justification to the contrary.

On the pay scale, the employer noted that all Tire & Lube technicians are part of a store-wide wage scale in Canada. The auto technicians are in Category 2 of this scale, which starts at \$8.90 an hour and is subject to annual increases over ten years to reach somewhere between \$10.90 and \$13.90 an hour, depending on annual evaluations which accord increases between 20 cents an hour for a

satisfactory performance to 50 cents an hour for an exceptional performance. The previous experience of new employees can be recognized in their starting salary. It's also Wal-Mart's policy in Canada to respect a differential with the legal minimum wage rate so the starting rate for employees would not be the minimum rate on the company wage scale, but might begin on the next rung in the pay scale. The employer advocate noted however that the company would be willing to grant a 30 cent an hour increase on the basis of seniority (each anniversary of the date of hiring). The employer representative stated that if the arbitrator decided to change the Wal-Mart wage scale in Quebec, then the company would "regretfully be obliged" to close its Tire & Lube department in this store.

The union hired an actuarial specialist to study comparable wage rates in similar operations in Quebec. He could draw on the work done by a bipartite committee structure (made up of employer and union representatives in the garage sector) that makes recommendations about regional rates of pay in this sector. Movement between rungs within the scale is generally on the basis of 2,000 hours of experience in the job. On the basis of its analysis, the union requested a basic rate for technicians of \$11.54 an hour, rising to \$15.17 for the top of the scale, with annual cost-of-living increases anticipated for the next two years of the agreement. Movement from one rung to the next would be on the basis of experience (in blocks of 2,000 hours).

A key issue therefore concerned the comparator groups, notably in an institutional context where there is an administrative decree determining the working conditions of persons employed in garages doing this kind of work in different regions of Quebec.<sup>7</sup> The company did not believe that the decree system offered appropriate comparisons. The union made the contrary argument but opted for the average wage of the decree system, arguing that the employer would not have accepted the highest rate, nor the union the lowest, and added a projected wage increase that reflected the overall rate of wage increases in Quebec in subsequent years of the agreement. The arbitrator found in favour the union position with regard to the scale, the annual increases and the progression from one rung to the next on the basis of hours worked (with the exception that the arbitrator stipulated that it be the number of hours really worked). In particular, he emphasized that the Wal-Mart business model, which the employer argued would have to be maintained, must henceforth take account of the particular conditions prevailing in the garage sector in Quebec, but that the employer could use other clauses in the collective agreement to signal performance problems to individual employees. A key argument was that Wal-Mart was already observing the scales determined by the decree in the regions where it was in effect.

The employer position on working on holidays was that it should be at regular pay since, according to the company's vice-president of human

resources, they should receive regular pay unless it is a legal holiday in which case they receive time and a half. The employer representative noted that if it was necessary to pay time and half on the 26<sup>th</sup> of December, the employer could decide not to open the Tire & Lube department on that day. The union maintained that the decrees in this sector provide for time and a half payment on the 26<sup>th</sup> of December and the arbitrator ruled in favour of the union argument.

On the store performance bonus scheme, which varies from one location to the next, the employer representative noted that it is a way to recognize the loyalty and interest of employees in store performance and that all employees in each store are treated equally on this count. However, since the employees in the Tire & Lube department had opted to be unionized, the employer's criteria to be eligible for the bonus were no longer being met. The union argued that the employer was simply seeking to punish employees who had opted to unionize and that this was illegal and an affront to the freedom of association. The arbitrator ruled that all employees, unionized or not, contribute to the financial success of the store and should be included in the bonus scheme.

On the payment of the employee participating in the first-contract negotiation and arbitration process, the union argued that the employer's position not to pay that person was untenable.

Moreover, the union counsel also deplored an employer complaint that the employees were not participating in the arbitration process. This suggested, according to the union representative, an unwillingness to recognize the nature of the collective bargaining process. The arbitrator found in favour of the payment of the employee representative involved in face-to-face negotiation with employer representatives during regular working hours.

It's clear that the arbitrator was not impressed by the arguments put forward by Wal-Mart and its representatives with regard to the non-comparability of its operations to others working in this sector. Nor could the employer make a convincing case to exclude unionized employees from the store performance bonus scheme or not to pay the employee involved in direct wage negotiations. In essence, the arbitrator found in favour of the union on all the contentious issues. There was clearly a culture shock in terms of the company's business model, despite the clearly expressed threat to close this department if the arbitrator found in favour of the union's position on pay.

This culture shock continued well beyond the arbitration award. Two months later, Wal-Mart closed its Tire & Lube operations at the Gatineau-Maloney store, noting that the award was completely unrealistic and would entail an increase in prices. However, it offered the employees concerned the possibility of a transfer to the main store or to another Tire & Lube operation in the region (Mercier 2008). For the union, this was further proof that Wal-Mart did not respect Quebec's labour laws, especially as it was already obliged to pay similar wages in other regions where there was a regional decree for employees

in this sector, and that it sought to send an anti-union message to any other employees thinking about unionizing.

### **THE SAINT-HYACINTHE MAIN STORE AGREEMENT<sup>8</sup>**

In contrast to the previous case, the Saint-Hyacinthe first-contract arbitration concerned the main store. After certification in January 2005 and 11 months of negotiation, Local 501 of the United Food and Commercial Workers of Canada made a request for first contract arbitration for the 180 employees (of which roughly half work full-time) in this unit. In December 2005, the Minister of Labour named the same arbitrator as in the Gatineau Tire & Lube department. He would again act as mediator and arbitrator. During the six mediations sessions, the parties reached agreement on many aspects of the collective agreement. There were four outstanding issues: three of which (wages and pay scales, overtime hours for the 26<sup>th</sup> of December and the coverage of the store performance bonus scheme) were similar to the issues considered in the Gatineau arbitration and one (dental benefits) was different. There followed 15 days of arbitral hearings on these issues. The entire process was characterized by long delays because of the difficulty of finding dates where the parties were available.

The arbitrator emphasized that there had been a clear will and an evident openness of mind on the part of the employer and the union to reach an agreement on the content of the collective agreement. It's also important to highlight that this first collective agreement contains many of the basic features of agreements that are common to unionized workplaces in North America and the majority of its content was determined through the bargaining process. These include a mission statement that the agreement seeks to foster cooperation harmony, communication and efficient customer service while establishing wages, hours and other working conditions for those covered by the agreement. It also recognizes a number of basic union and employee rights, notably that the union is the exclusive bargaining agent for the workers concerned and that employees outside of the bargaining unit will not do the work of those covered by the agreement. The agreement also recognizes management's rights to run its business, subject to the limits established by the collective agreement. Perhaps most significantly, the agreement establishes disciplinary procedures and a grievance procedure leading to third-party arbitration in the case of a failure to agree. The parties also reached agreement on working hours, breaks and overtime, the number of holidays and other paid days off during the year, the possibility of unpaid absences and maternity leave, and most benefits except dental, including time and half plus regular wages for work on a statutory holiday and the two-year duration of the first collective agreement. In broader terms, the union is also present to represent employees.

In terms of the issues considered by the arbitrator, the wage scale and progression within it were undoubtedly key issues in the arbitral process. As in the Gatineau case, the union argued that there should be four rungs on the pay scale (with small differences between each) and sought to establish the principle of an automatic progression through each scale on the basis of the number of hours worked. Workers at the lowest rung would start at a rate 10 cents more than the minimum wage and the differential between the top and the bottom of such a scale would be \$6.00. Should provincial minimum wage rates be increased, the wage scales would be adjusted automatically. The union also requested a 40 cent bonus per hour worked since the request for certification was made. In contrast, the employer made the argument that progression through the scale should be the result of managerial evaluations of employee performance and the amount of increases can vary from no increase whatsoever to 50 cents an hour in the case of exceptional performance (the current average increase being approximately 30 cents an hour per year, according to management testimony). The arbitrator in this case placed much greater emphasis on his role of making decisions in relation to what the parties might themselves have concluded and not in relation to what he may or may not feel is appropriate. He noted that the arbitrator must be particularly cognoscente of the fact that recourse to a strike or lock-out is not possible, which limits radical departures in the case of an imposed first contract agreement. Of particular relevance, in terms of wages, is the question of relevant comparators. This refers to issues of both internal and external equity. External equity need take account of the industry as a whole and competitors in the same region. Internal equity concerns other establishments of the same firm, be they unionized or not. The arbitrator must also take account of the evidence produced by the parties in the arbitral process.

The basic issue was whether the Saint-Hyacinthe store should be compared with a general goods distribution store or as a food distribution store such as the many chains serving the retail food industry. Contradictory evidence was presented on the part of both parties, the employer making the case for a general goods comparison and the union the case for retail food comparisons, which are much more likely to be unionized. The process included seven visits to possible comparator stores. The union evidence sought to make the case for overall convergence within the industry and that the leading retail food chains increasingly took on a generalist mandate. The arbitrator noted from the evidence that just 5 per cent of the surface of the Wal-Mart Saint-Hyacinthe store was dedicated to food and this did not include any fresh produce, whereas 60 per cent of the surface of comparator stores favoured by the union offered food products. The arbitrator therefore concluded that the most logical comparator would be that of a general goods store such as Zellers and not a long-time unionized retail food store where the union was already present. The arbitrator's justification concerned both the type of goods sold and the length of opening



hours (in Quebec, longer opening hours are permitted in retail food than in general goods).

In contrast to the Gatineau case, the same arbitrator rejected a change in the progression through the wage scale of the type advocated by the union because this would constitute too radical a change with the employer's existing business model and suggested that this be the subject of future negotiations. The arbitrator therefore found that the wage scale suggested by the employer should be applied. However, in keeping with the view that the parties would have normally arrived at a similar conclusion and that the union would have sought to negotiate a wage increase, the arbitrator concluded that there should be a 30 cent wage increase for each of the two years of the agreement.

As regards two of the other outstanding issues, whether work on the 26<sup>th</sup> of December would be paid regular wages or at an overtime rate plus their regular pay and the store-performance bonus scheme, the arbitrator came to the same conclusions as in the Gatineau case. Indeed, the arbitrator found that the employer suggestion to exclude unionized employees from this scheme was capricious and that this bonus should be maintained for the duration of the collective agreement.

Finally, as to whether the employer would make a contribution to the union-sponsored dental plan or maintain only the existing employer program, the arbitrator decided that it would not be appropriate, given his role in a first agreement, to unbundle the employer's combined health and dental plans in a way that favoured the union plan and therefore found for the employer.

In contrast to the Gatineau arbitration award, the Saint-Hyacinthe award was largely in favour of the employer positions. Both awards hinged on considerations of external equity but the Saint-Hyacinthe store award put much greater emphasis on consistency with the existing business model in the absence of any other compelling factors. It's clear that the presence of a well established institutional framework (through the decree system) targeting the same kinds of workers that were certified for the purposes of collective bargaining in the Gatineau Tire & Lube and the fact that Wal-Mart actually observed these rates of pay in regions where the decree was in effect in the garage sector were major determinants of the Gatineau award. External comparisons were also a major consideration for the Saint-Hyacinthe award. Here the arbitrator proved much more amenable to the employer arguments about the appropriate comparisons. This was the key to determining what the parties, of their own volition, might have agreed upon. The arbitrator did, however, discount what he viewed as a gratuitous anti-union position with regard to store performance bonus schemes. In as much as the arbitrator makes no mention of company threats to close the store in his Saint-Hyacinthe award, a threat that characterized the Gatineau first-contract arbitration proceedings seems to have disappeared from the Saint-Hyacinthe arbitral process.

The question therefore is how the employer will act in this newly unionized store for which there is a collective agreement in place until April 2011. Paradoxically, the employer victory on key points in this award creates somewhat of a quandary. Is it still possible to argue that a collective agreement is incompatible with the Wal-Mart business model when the arbitrator of this first collective agreement has sought to demonstrate exactly the contrary in the award? We can only speculate as to whether or not this was exactly the arbitrator's intention.

Of course, given high rates of turnover and the effective control of the day-to-day work climate in the store, there can be subtle pressures to undermine the legitimacy of the union and to seek a decertification in the window of opportunity provided by the Quebec Labour Code prior to the expiry of the current collective agreement in 2011. However, negotiations and/or first-contract arbitration are also underway in four other certification units. Nor is it impossible that other facilities make certification applications.

## CONCLUSION

To our knowledge, few North American employers welcome potential union representatives onto their premises and suggest that they would be delighted to see their employees exercise their right of association should they wish to take the opportunity to do so. In the absence of such an approach, the question of how to use public policy to ensure effective access to the right of association, in the face of competing and sometimes contradictory property rights and the question of how to promote the development of constructive bargaining relationships that can stand the test of time remain entirely relevant. Among a number of policy avenues, including multiple ways of ensuring effective access to union certification, first-contract arbitration provides one important way of achieving effective access to the right of association, as was demonstrated by our overview of the Quebec experience over the last three decades.

The Wal-Mart cases presented in this article represent an interesting test of this important feature of Canadian labour law. Against a backdrop of the closure of two unionized facilities in Quebec (the Jonquière store and the Gatineau-Maloney Tire & Lube department), most significant no doubt is that there is currently a collective agreement covering the 180 employees in the Saint-Hyacinthe store. In broader terms, the union is also present to represent employees in other forums, such as health and safety and indemnities for occupational injuries, and to be a collective voice on these and other issues which might concern them.

Irrespective of the variations observed in the two decisions presented above and the reasons mobilized for these variations, this agreement does not

seem to be incompatible with the company's business model and the employer representatives' attempts to arbitrarily exclude union members from performance pay were summarily dismissed by the arbitrator. In the absence of the first-contract arbitration policy instrument, determined employer resistance and the simple brandishing of a hypothetical incompatibility of union presence with a business model might well have provided the justification to stall negotiations indefinitely. The first-contract arbitration provisions in the Quebec Labour Code effectively removed this possibility and offered the first steps towards a working relationship. The result is therefore an instructive one for other North American jurisdictions seeking to assess a variety of policy instruments, once certification has been obtained, in order to ensure effective access to the right of association.

The key test over the longer term will come in the ability to maintain and develop a bargaining relationship beyond the imposition of a first contract. The issues related to freedom of association are not about to disappear. If holders of property rights cannot live with the kinds of accommodation that Canadian legislation seeks to broker between property rights and the fundamental right to associate, including bargaining collectively over working conditions, then no doubt civil society and judicial pressures will be required to achieve more robust policy measures that ensure effective access to this fundamental right.

## NOTES

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1. Gregor Murray ([Gregor.Murray@umontreal.ca](mailto:Gregor.Murray@umontreal.ca)) is professor in the School of Industrial Relations at Université de Montréal, Canada Research Chair on Globalization and Work and director of the Interuniversity Research Centre on Globalization and Work (CRIMT, [www.crimt.org](http://www.crimt.org)).
2. Joelle Cuillerier is in the graduate program in the School of Industrial Relations at Université de Montréal, where she is completing an MA degree. She has also been the acting administrative coordinator in the Interuniversity Research Centre on Globalization and Work (CRIMT, [www.crimt.org](http://www.crimt.org)).
3. For an historical overview of similarities and differences in labour policy approaches in Canada and the United States, see Gottlieb Taras 1997.
4. There is altogether less information on what happens to these first-contract settlements beyond the first agreement. A 1987 study by Jean Sexton looked at the 88 first-contract arbitration awards between 1978 and 1984 (the first seven years of the legislative provisions). Examining these cases qualitatively (but excluding where voluntary agreement was reached) and on the basis of responses for 72 of the 88 cases, he found that there were twenty-three cases where the agreement had been renewed at least once, that there were sixteen awards still in force and another four where bargaining was under way. In other words, the vital signs of collective bargaining were evident in 59.7 per cent of the cases observed with decertification occurring in 22.2 per cent of cases and closure (in a context of a severe recession in the early 1980s) in 13.9 per cent of cases.
5. (Wal-Mart Canada Fact Sheet 31 May 2009) ([http://www.walmart.ca/Canada-About\\_Walmart.jsp](http://www.walmart.ca/Canada-About_Walmart.jsp)).
6. Interest Arbitration, Arbitration award, first collective agreement. *Wal-Mart Canada Corp. Établissement du 640, Boulevard Maloney Ouest, Gatineau (Québec) AM-2000-6273 et Travailleurs et travailleuses unis de l'alimentation et du commerce, Section locale 486 (FTQ)*, before the arbitrator Me Alain Corriveau, 13 August 2008.

7. In Québec a collective agreement decree is a decree whereby the government imposes the application of the provisions of a collective agreement signed by a group of employees on other employees in the same field of activity. See Jalette, Charest and Vallée (2002) and Murray, Lévesque and Vallée (2000).
8. Interest Arbitration, Arbitration award, first collective agreement. *La Compagnie Wal-Mart du Canada. Établissement de Saint-Hyacinthe (Québec) et Travailleurs et travailleuses unis de l'alimentation et du commerce, Section locale 501 (FTQ)*, before the arbitrator Me Alain Corriveau, 8 April 2009.

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