

## Wal-Mart, Unions and Free Speech in Canada

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Ogilvy Renault's Labour and Employment Law Group is one of Canada's largest management-side practices. We represent a significant number of private and public sector employers and provide a wide variety of advocacy services and strategic advice. This newsletter deals with issues of importance in Canadian labour and workplace law.

On August 2, 2004, the Quebec Labour Relations Board certified the United Food and Commercial Workers ("UFCW") to represent workers at the Wal-Mart store in Jonquière, Quebec, thus opening the door for the UFCW to become the first union to represent Wal-Mart workers in North America. As the UFCW steps up its organizing efforts at Wal-Mart stores across Canada, part of the Company's response has been to challenge Canadian labour laws, which limit an employer's ability to communicate with its employees during an organizing drive. Although still in its early stages, Wal-Mart's free speech strategy could have a significant impact on labour legislation in every Canadian jurisdiction.

### ATTEMPTS TO UNIONIZE WAL-MART CANADA

The Jonquière organizing drive is the most recent of numerous attempts to unionize Wal-Mart stores in North America. As one of the world's largest retailers, Wal-Mart employs over 1.5 million people in more than 4,500 stores worldwide. Although the Company has been ranked as one of the best retailers to work for in Canada, it has come under fire from labour advocates, who believe the Company should pay higher wages and provide employees with more benefits. Other than the meat department at a Wal-Mart store in Texas, none of Wal-Mart's American locations has ever been unionized. Moreover, once the meat department was certified in Texas, Wal-Mart switched to pre-packaged meats and shut down the department before bargaining was established.

In Canada, a Wal-Mart store in Windsor, Ontario, obtained union certification in 1996, but the store was decertified before a collective agreement was established. The Windsor case also raised issues of employer free speech when the union was awarded automatic certification due in part to charges that Wal-Mart had acted unfairly when it refused to answer the employees' questions about whether the store would close if the union campaign succeeded. After this case, the remedy of automatic certification following a finding of an unfair labour practice was eliminated from the Ontario *Labour Relations Act*.

### SUCCESS IN QUEBEC

Under Quebec law, unions can be certified without a majority vote by employees if they file enough union cards to demonstrate that they represent a "majority of workers." On August 2, 2004, the Quebec Labour Relations Board certified the UFCW to represent workers at the Jonquière Wal-Mart store after the union presented signed union cards from more than half of the eligible workers. On September 9, 2004, the Quebec Labour Relations Board dismissed an argument made by Wal-Mart that the Union's membership evidence was invalid because such evidence included membership cards

signed by employees during a previous organizing drive in April 2004. The Board held that the cards were valid because the employees had not withdrawn their support. The Board also accepted the Union's proposed bargaining unit as appropriate, rejecting Wal-Mart's contention that supervisors, administrative staff and security guards should be included.

On the heels of the Union's success in Jonquière, Union representatives have vowed to continue to press for unionization at other Wal-Mart locations. Representatives of the Quebec branch of the UFCW have said that they intend to file an application to represent Wal-Mart workers in the city of Brossard, Quebec, in the near future. In addition, the UFCW has applications pending for Wal-Mart stores in North Battleford, Saskatchewan, and in Terrace, British Columbia.

## **AN EMPLOYER'S RIGHT TO COMMUNICATE**

In response to this apparent increase in organizing activity, Wal-Mart has appealed to the Canadian Constitution, a strategy that could have broad implications for Canadian labour law. Relying on the *Canadian Charter of Rights and Freedoms*, Wal-Mart recently argued before a Saskatchewan court that Saskatchewan's labour legislation unduly restricted its right of free speech.

The issue arose following a UFCW organizing drive in the Saskatchewan town of Weyburn. During subsequent certification proceedings, the Saskatchewan Labour Relations Board ordered Wal-Mart to produce and disclose a large number of internal management documents which the union had requested. Wal-Mart applied to the Saskatchewan Court of Queen's Bench for judicial review of the Board's order. During these proceedings, Wal-Mart also sought a declaration that section 9 of the Saskatchewan *Trade Union Act*, which restricts an employer's ability to communicate with employees during an organizing drive, offends the free speech guarantee contained in the *Charter*. Wal-Mart argued that these restrictions infringe on its freedom to communicate because they unfairly silence communication between the Company and its employees.

On July 23, 2004, the Saskatchewan Court of Queen's Bench rendered a decision<sup>1</sup> sympathetic to Wal-Mart's constitutional argument. According to the Court, the offending provision in the *Trade Union Act* may be "out of touch with reality" because it was in place before the *Charter* was enacted. However, even though the Court agreed that Wal-Mart had legitimate concerns regarding the constitutionality of the provision, it refused to rule on the issue because the Saskatchewan Labour Relations Board had not yet determined whether the certification of the union should proceed.

The Company had voiced similar arguments during an earlier organizing campaign in Thompson, Manitoba. Wal-Mart avoided certification in that instance when, on June 4, 2004, employees voted against joining the UFCW. Nonetheless, during the campaign, Wal-Mart made several public statements regarding its frustration with Manitoba's labour legislation, which, like most labour statutes in Canada, contains provisions that limit an employer's ability to communicate with employees freely about unionization during a union organizing drive. Because of these restrictions, Wal-Mart argued that it could not live up to its fundamental commitment to "open communication in the workplace."

## **THE IMPACT OF THE CONSTITUTIONAL ARGUMENT**

Having received positive encouragement from the Saskatchewan court, Wal-Mart, along with other employers in Canada, can be expected to pursue this constitutional argument in the future. A spokesperson for Wal-Mart has said that the Company intends to initiate legal battles across the country in the hope of establishing its right to communicate with employees "in a non-intimidating manner."<sup>2</sup> If Wal-Mart is successful, Canada's labour laws could change significantly, as such a ruling could enlarge management rights during organizing drives. Less restricted communication with employees could enable management to exert more of an influence on workers during a union campaign. As the Saskatchewan court's decision has already raised controversy, the question of an employer's right to communicate with employees during a union drive could ultimately be determined by the Supreme Court and thus may potentially impact upon labour legislation across Canada.

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1. [\*Wal-Mart Canada Corp. v. Saskatchewan \(Labour Relations Board\)\*](#), 2004 SKQB 324.

2. Smith, G. "Stakes high in Wal-Mart, union fight; North America's biggest labour organization and largest retailer square off in Weyburn, Sask." *The Globe and Mail* (August 2, 2004).



The purpose of this document is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of Ogilvy Renault or any member of the Firm on the points of law discussed.

For further information, please contact one of the lawyers of the Labour and Employment Law Group mentioned below:

**Montréal**  
Manon Savard (514) 847-4520  
[msavard@ogilvyrenault.com](mailto:msavard@ogilvyrenault.com)

**Vancouver**  
Thomas A. Roper (604) 806-3850  
[troper@ogilvyrenault.com](mailto:troper@ogilvyrenault.com)

**Toronto**  
John B. West (416) 216-3976  
[jwest@ogilvyrenault.com](mailto:jwest@ogilvyrenault.com)

**Ottawa**  
Mary J. Gleason (613) 780-8635  
[mgleason@ogilvyrenault.com](mailto:mgleason@ogilvyrenault.com)

**Québec**  
Jean Houle (418) 640-5036  
[jhoule@ogilvyrenault.com](mailto:jhoule@ogilvyrenault.com)

If you wish to correct your mailing information, please contact Carol Saykaly by telephone at (514) 847-4695, by fax at (514) 286-5474 or by email at [csaykaly@ogilvyrenault.com](mailto:csaykaly@ogilvyrenault.com).

Montréal Suite 1100  
1981 McGill College Avenue  
Montréal, Quebec H3A 3C1  
Tel.: (514) 847-4747  
Fax: (514) 286-5474

Ottawa Suite 1500  
45 O'Connor Street  
Ottawa, Ontario K1P 1A4  
Tel.: (613) 780-8661  
Fax: (613) 230-5459

Québec Bureau 520  
500 Grande Allée est  
Québec, Quebec G1R 2J7  
Tel.: (418) 640-5000  
Fax: (418) 640-1500

Vancouver 800 Park Place  
666 Burrard Street  
Vancouver, B.C. V6C 3P3  
Tel.: (604) 806-0922  
Fax: (604) 806-0933

Toronto Suite 3800  
Royal Bank Plaza, South Tower  
200 Bay Street  
P.O. Box 84  
Toronto, Ontario M5J 2Z4  
Tel.: (416) 216-4000  
Fax: (416) 216-3930

London 38 Charterhouse Square  
London EC1M 6EQ  
England  
Tel.: +44 20 7600-9005  
Fax: +44 20 7600-9006

[ogilvyrenault.com](http://ogilvyrenault.com)