

**SUPREME COURT OF CANADA**

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| **Citation:** United Food and Commercial Workers, Local 503 *v.*Wal‑Mart Canada Corp.**,** 2014 SCC 45, [2014] 2 S.C.R. 323 | **Date:** 20140627  **Docket:** 34920 |

Between:

United Food and Commercial Workers, Local 503

Appellant

and

Wal-Mart Canada Corporation

Respondent

- and -

Conseil du patronat du Québec inc., Alliance of Manufacturers & Exporters Canada,

also known as Canadian Manufacturers & Exporters, Canadian Association of

Counsel to Employers and Confédération des syndicats nationaux

Interveners

**Official English Translation**: Reasons of LeBel J.

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 98)  **Joint Dissenting Reasons:**  (paras. 99 to 142) | LeBel J. (McLachlin C.J. and Abella, Cromwell and Karakatsanis JJ. concurring)  Rothstein and Wagner JJ. |

u.f.c.w., local 503 *v.* wal-mart, 2014 SCC 45, [2014] 2 S.C.R. 323

United Food and Commercial Workers, Local 503 Appellant

v.

Wal-Mart Canada Corp. Respondent

and

Conseil du patronat du Québec inc.,

Alliance of Manufacturers & Exporters Canada,

also known as Canadian Manufacturers & Exporters,

Canadian Association of Counsel to Employers and

Confédération des syndicats nationaux Interveners

**Indexed as:** United Food and Commercial Workers, Local 503 ***v*.** Wal-Mart Canada Corp.

2014 SCC 45

File No.: 34920.

2013: December 6; 2014: June 27.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for quebec

*Labour relations — Certification — Maintenance of conditions of employment — Collective dismissal — Arbitration — Union certified to represent employees — Negotiations to conclude first collective agreement with employer unsuccessful — Employer announcing closure of business — Union filing grievance alleging that dismissal of employees constituted unilateral change in conditions of employment that is prohibited by s. 59 of Quebec Labour Code — Whether s. 59 can be used to challenge resiliation of contracts of employment of all employees of establishment — If so, whether arbitrator rendered unreasonable award in concluding that, in this case, resiliations constituted unlawful change in conditions of employment — Labour Code, CQLR, c. C-27, ss. 59, 100.12.*

Wal-Mart opened its Jonquière establishment in 2001. In August 2004, the Commission des relations du travail certified United Food and Commercial Workers, Local 503 (“the Union”) as the bargaining agent for the employees working at the establishment. In the months that followed, Wal-Mart and the Union met several times to negotiate the terms of a first collective agreement. These meetings proved to be unsuccessful, and on February 2, 2005, the Union applied to the Minister of Labour to appoint an arbitrator to settle the dispute that remained between the parties. One week later, Wal-Mart informed the Minister of Employment and Social Solidarity that it intended to resiliate the contracts of employment of all the approximately 200 employees who worked in its Jonquière establishment “for business reasons” on May 6 of that year. After breaking the news to its employees, the business actually closed its doors earlier than planned, on April 29, 2005. Believing that the decision was based on anti-union considerations, the employees and their union brought a series of proceedings against their former employer. In most of these proceedings, the result favoured Wal-Mart.

On March 23, 2005, the Union submitted the grievance at issue in this appeal. It alleged that the dismissal of the employees constituted a change in their conditions of employment that violated s. 59 of the *Labour Code* (“*Code*”), which provides that, from the filing of a petition for certification, an employer may not change its employees’ conditions of employment while the collective agreement is being negotiated without the written consent of the certified association. Since Wal-Mart had not proved that its decision to dismiss was made in the ordinary course of its business, the arbitrator concluded that the resiliation of the contracts of employment of all the employees constituted a unilateral change that was prohibited by s. 59. His award was affirmed by the Superior Court, but overturned by the Court of Appeal. The judges of the Court of Appeal, although divided on how broadly s. 59 should be construed, agreed that the section did not apply in the circumstances of the case before them.

*Held* (Rothstein and Wagner JJ. dissenting): The appeal should be allowed and the case remanded to the arbitrator to determine the appropriate remedy in accordance with the disposition of his award.

*Per* McLachlin C.J. and LeBel, Abella, Cromwell and Karakatsanis JJ.: The true function of s. 59 of the *Code* is to foster the exercise of the right of association. Its purpose in circumscribing the employer’s powers is not merely to strike a balance or maintain the *status quo* during the negotiation of a collective agreement, but is more precisely to facilitate certification and ensure that the parties bargain in good faith. The “freeze” on conditions of employment codified by s. 59 limits any influence the employer might have on the association-forming process, eases the concerns of employees who actively exercise their rights, and facilitates the development of what will eventually become the labour relations framework for the business.

Since s. 59 is not directly concerned with the punishment of anti-union conduct, the prohibition for which it provides will apply regardless of whether it is proven that the employer’s decision was motivated by anti-union animus. It is the union representing the employees that must prove that a unilateral change in working conditions has been made for the purposes of s. 59. To discharge this burden, the union must show: (1) that a condition of employment existed on the day the petition for certification was filed or a previous collective agreement expired; (2) that the condition was changed without its consent; and (3) that the change was made during the prohibition period. The “condition of employment” concept is a flexible one that encompasses anything having to do with the employment relationship on either an individual or a collective level. The right to maintenance of the employment relationship is the basis for a condition of employment for employees, although that condition is nevertheless subject to the employer’s exercise of its management power. Unlike s. 17 of the *Code*, s. 59 does not create a presumption of change or automatically reverse the burden of proof. The union must adduce sufficient evidence to prove that the alleged change is inconsistent with the employer’s normal management practices. However, nothing prevents the arbitrator hearing the complaint from drawing presumptions of fact from the whole of the evidence presented before him or her in accordance with the general rules of the law of civil evidence as normally applied. As a result, if the union submits evidence from which the arbitrator can infer that a specific change does not seem to be consistent with the employer’s normal management practices, a failure by the employer to adduce evidence to the contrary is likely to have an adverse effect on its case. A change can be found to be consistent with the employer’s “normal management policy” if (1) it is consistent with the employer’s past management practices or, failing that, (2) it is consistent with the decision that a reasonable employer would have made in the same circumstances. The arbitrator must be satisfied that those circumstances exist and that they are genuine.

In the case of a complaint under s. 59, s. 100.12 of the *Code* and art. 1590 of the *Civil Code of Québec* confer broad remedial powers on the arbitrator. An arbitrator can order reparation in kind, but where the circumstances do not lend themselves to such a remedy, he or she can order reparation by equivalence. The latter remedy will be appropriate where the employer goes out of business either in part or completely, at least insofar as it is impossible to reinstate the employees dismissed in contravention of s. 59. Unlike s. 15 of the *Code*, s. 59 contains no word or language that would support a conclusion that its applicability depends on the existence of an active business or, more simply, of a possibility of reinstatement. *Plourde v.* *Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] 3 S.C.R. 465, therefore cannot support the conclusion that the closure of a business rules out any possibility of applying s. 59 of the *Code*. In the instant case, there is nothing to preclude the arbitrator from ordering an alternative remedy in the form of damages.

An arbitrator, who is required by law to decide any complaint based on s. 59 of the *Code*, has considerable discretion in doing so that the ordinary courts must respect. Deference is in order, and judicial review will be available only if the award was unreasonable. In this case, the arbitrator’s award is clearly one of the possible, acceptable outcomes which are defensible in respect of the facts and law. The arbitrator was right to decide that invoking the closure of the Jonquière establishment did not on its own suffice to justify the change for the purposes of s. 59. He did not place an inappropriate burden of proof on the employer. His statement that Wal-Mart had not shown the closure to have been made in the ordinary course of the company’s business was grounded in his view that the Union had already presented sufficient evidence to satisfy him that the change was not consistent with the employer’s past management practices or with those of a reasonable employer in the same circumstances. It was in fact reasonable to find that a reasonable employer would not close an establishment that “was performing very well” and whose “objectives were being met” to such an extent that bonuses were being promised. These inferences of fact, which Wal-Mart did not challenge, led the arbitrator to hold that the resiliation of the contracts of employment and, therefore, the change in the conditions of employment of all the establishment’s employees violated s. 59. This conclusion was reasonable in light of the facts and the law.

*Per* Rothstein and WagnerJJ. (dissenting): Section 59 of the *Code* does not apply in situations involving the complete and permanent closure of a business. As this Court stated in *Plourde v. Wal-Mart Canada Corp.*, the recourse available in such circumstances lies under ss. 12 to 14 of the *Code*.

Section 59 cannot apply to Wal-Mart’s genuine and definitive closure of its Jonquière store because it would require Wal-Mart to justify its decision to close the store, which is inconsistent with the employer’s right, under Quebec law, to close its business for any reason. The sole requirement is that the business closure be genuine and definitive. Once an employer exercises its right to close up shop, then s. 59 of the *Code* cannot impose an additional *ex post facto* justification requirement simply because this closure gives rise to a secondary effect — the collective termination of employees. A store closure, by definition, does not conform to previous business practices. If s. 59 were to apply to a situation of store closure, the result would be that businesses could never prove a store closure was business as usual. It would also mean that the employer would be prevented from exercising its right to close its business during the s. 59 freeze period and yet could, immediately upon the conclusion of a collective agreement, the exercise of the right of lock out or strike, or the issuance of an arbitration award, close its business for any reason. Legislation cannot be interpreted to give rise to such absurd results. To apply s. 59 to business closure situations would also undermine the *Code*’s assignment of the burden of proof and thereby disrupt the *Code*’s internal coherence. Under ss. 12 to 14, the claimant must prove that anti-union animus motivated the store closure. Contrarily, under s. 59, the employer would bear the burden of justifying the store closure under the “business as usual” rule.

The text and context of s. 59 of the *Code* also indicate that it cannot apply to a business closure situation because it presupposes the existence of an ongoing business. Section 59 is designed to facilitate the conclusion of a collective agreement within an existing employment relationship; it is not designed to maintain the employment relationship.

Finally, s. 59 cannot apply in the context of a business closure as there is no appropriate remedy available to the arbitrator. Where there is a breach of s. 59, then, the arbitrator must provide a remedy that restores the *status quo ante*. Since employers in Quebec have the right to close their business, an arbitrator cannot order an employer to reopen a store. While it is true that an arbitrator has the power to award damages under s. 100.12 of the *Code*, such a remedy would be inconsistent with the purpose of s. 59, since it would not restore the balance between the parties or facilitate the conclusion of a collective agreement. Arbitrators may award damages to compensate for harm that cannot be compensated for by an award in kind. Wal-Mart has already compensated employees of the Jonquière store for the loss of their jobs by paying them severance pay in an amount equal to two weeks of work peryear of service. Since s. 59 does not apply to the business closure situation, it gives rise to no additional financial consequences for Wal-Mart.

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By LeBel J.

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Compagnie Wal-Mart du Canada — Établissement de Jonquière*, [2006] R.J.D.T. 1665; *Travailleurs et travailleuses unis de l’alimentation et du commerce, section locale 503 v. Ménard*, 2007 QCCS 5704, [2008] R.J.D.T. 138; *La Reine v. Harricana Metal Inc.*, [1970] T.T. 97; *Club coopératif de consommation d’Amos v. Union des employés de commerce, section locale 508*, [1985] AZ-85141201; *Association des juristes de l’État v. Commission des valeurs mobilières du Québec*, [2003] R.J.D.T. 579; *Coopérative étudiante Laval v. Syndicat des travailleurs(euses) de la coopérative étudiante Laval*, [1984] AZ-84141225; *Association du personnel administratif et professionnel de l’Université Laval (APAPUL) v. Syndicat des employés de l’Université Laval (SCFP), section locale 2500*, [1985] AZ-85142069; *Plastalène Corp. v. Syndicat des salariés de Plastalène (C.S.D.)*, [1990] AZ-90141158; *Union des routiers, brasseries, liqueurs douces & ouvriers de diverses industries (Teamsters, Local 1999) v. 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Compagnie Paquet Ltée.*, [1959] S.C.R. 206; *Syndicat des travailleurs et des travailleuses des épiciers unis Métro-Richelieu (C.S.N.) v. Lefebvre*, 1996 CanLII 5705; *Automobiles Canbec inc. v. Hamelin*, 1998 CanLII 12602; *Séminaire de la Très Sainte-Trinité v. Tremblay*, [1991] R.J.Q. 428; *Pakenham v. Union des vendeurs d’automobiles et employés auxiliaires, section locale 1974, UFCW*, [1983] T.T. 189; *Union des employés de commerce, local 500 v. Provost inc.*, [1981] S.A.G. 732; *Scierie Béarn v. Syndicat des employés(es) de bureau Scierie Béarn*, [1988] AZ-88141194; *Syndicat des employés de la Commission scolaire du Haut St-Maurice v. Rondeau*, [1993] R.J.Q. 65; *Union des employé-e-s de service, local 800 v. 2162-5199 Québec Inc.*, [1994] T.A. 16; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; *U.F.C.W., Local 1518 v. 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O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Olymel, s.e.c. v. Syndicat des travailleurs d’Olympia (CSN)*, 2007 QCCA 865 (CanLII); *Syndicat des employés de Daily Freight (CSN) v. Imbeau*, [2003] R.J.Q. 452; *Syndicat canadien de la Fonction publique, Section locale 3666 v. Desnoyers*, [1996] AZ-96029022; *S.E.D.A.C. Laboratoires inc. v. Turcotte*, [1998] AZ-98029150; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Consolidated-Bathurst Inc. v. Syndicat national des travailleurs des pâtes et papiers de Port-Alfred*, [1987] R.J.Q. 520; *Syndicat des chargées et chargés de cours de l’U.Q.A.C. (CSN) v. Syndicat des professeures et professeurs de l’Université du Québec à Chicoutimi*, 2005 QCCRT 364 (CanLII).

By Rothstein and Wagner JJ. (dissenting)

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APPEAL from a judgment of the Quebec Court of Appeal (Vézina, Léger and Gagnon JJ.A.), 2012 QCCA 903, [2012] R.J.Q. 978, [2012] R.J.D.T. 387, [2012] AZ-50856639, [2012] J.Q. no 4538 (QL), 2012 CarswellQue 4819, setting aside a decision of Moulin J., 2010 QCCS 4743, [2010] R.J.D.T. 1118, [2010] AZ-50678295, [2010] J.Q. no 10112 (QL), 2010 CarswellQue 10570, dismissing an application for judicial review of an arbitral award, [2009] R.J.D.T. 1439. Appeal allowed, Rothstein and Wagner JJ. dissenting.

Claude Leblanc, Bernard Philion, Gilles Grenier and Stéphanie Lindsay, for the appellant.

Corrado De Stefano, Frédéric Massé, Danny Kaufer and Louis Leclerc, for the respondent.

Ronald J. McRobie, Dominique Monet and *Guy-François Lamy*, for the intervener Conseil du patronat du Québec inc.

George Avraam, Mark Mendl and Cherrine Chow, for the intervener the Alliance of Manufacturers & Exporters Canada.

Stephen F. Penney and Jeffrey W. Beedell, for the intervener the Canadian Association of Counsel to Employers.

Éric Lévesque, Isabelle Lanson and Karim Lebnan, for the intervener Confédération des syndicats nationaux.

English version of the judgment of McLachlin C.J. and LeBel, Abella, Cromwell and Karakatsanis JJ. delivered by

LeBel J. —

1. Introduction
2. On April 29, 2005, Wal-Mart Canada Corp. (“Wal-Mart”) closed its store in Jonquière in the Saguenay–Lac-Saint-Jean region. The closure, which had been announced the day an arbitrator was appointed to resolve an impasse in negotiations for a first collective agreement with the union certified for that establishment, led to a series of proceedings based on various sections of the *Labour Code*, CQLR, c. C-27 (“*Code*”), and the *Act respecting labour standards*, CQLR, c. N-1.1 (“*A.L.S.*”). This appeal, the final chapter in this long legal battle, concerns the interpretation of the first paragraph of s. 59 of the *Code*, which reads as follows:

From the filing of a petition for certification and until the right to lock out or to strike is exercised or an arbitration award is handed down, no employer may change the conditions of employment of his employees without the written consent of each petitioning association and, where such is the case, certified association.

1. On being asked to determine whether that provision applied in the context of the closure of the Jonquière establishment, arbitrator Jean-Guy Ménard concluded that the resiliation of the contracts of employment of all the employees of that establishment constituted a prohibited unilateral change. His award was affirmed by the Superior Court, but overturned by the Court of Appeal. The judges of the Court of Appeal, although divided on how broadly s. 59 should be construed, agreed that the section did not apply in the circumstances of the case before them.
2. In my opinion, the Court of Appeal erred in intervening as it did. Arbitrator Ménard’s analysis and the conclusions he drew are not unreasonable. On the contrary, it seems to me that the prohibition provided for in s. 59 of the *Code* is indeed applicable to the facts of this case. I would accordingly allow the appeal, dismiss the application for judicial review and declare the arbitration award, and its disposition, to be valid.
3. Origins and History of Litigation Between Wal-Mart and the Union
4. Wal-Mart opened its Jonquière establishment in 2001. Three years later, in August 2004, the Commission des relations du travail (“Commission”) certified United Food and Commercial Workers, Local 503 (“the Union”) as the bargaining agent for the employees working at the establishment. In the months that followed, Wal-Mart and the Union met approximately 10 times to negotiate the terms of what would in normal circumstances have become the first collective agreement between the parties.
5. These meetings proved to be unsuccessful, and the Union therefore availed itself of the option of first agreement arbitration under s. 93.1 of the *Code* on February 2, 2005, applying to the Minister of Labour to appoint an arbitrator to “settle the dispute” that remained between the parties. One week later, Wal-Mart informed the Minister of Employment and Social Solidarity that it intended to close its Jonquière establishment on May 6 of that year and that, on the same date, it would be resiliating the contracts of employment of all the employees who worked there. After breaking the news to its employees, the business actually closed its doors earlier than planned, on April 29, 2005. Nearly 200 employees lost their jobs.
6. Believing that the decision was based on anti-union considerations, the employees and their union brought a series of proceedings against their former employer. On March 23, 2005, before the establishment had even closed, the Union submitted the grievance at issue in this appeal. The next day, the Union and several employees applied to the Commission for an interlocutory and permanent order enjoining the company to keep its Jonquière establishment open. The following month, one of the employees, Alain Pednault, applied to the Superior Court for authorization to institute a class action against his employer, arguing, *inter alia*, that the employer had violated various rights protected by the *Code* and the *Charter of human rights and freedoms*, CQLR, c. C-12. Finally, a few weeks after the establishment closed, a group of employees that included Gaétan Plourde filed a series of complaints with the Commission under ss. 15 to 19 of the *Code*, which prohibit dismissals and other actions taken in response to employees’ union activities.
7. In most of these proceedings, the result favoured Wal-Mart. First, the Commission dismissed the application for an order enjoining the company to keep its Jonquière establishment open, holding that no *prima facie* case had been made out (*Boutin v.* *Wal-Mart Canada inc*., 2005 QCCRT 225 (CanLII); 2005 QCCRT 269 (CanLII), aff’d 2005 QCCRT 385 (CanLII), and 2007 QCCS 3797 (CanLII)). Next, the Superior Court dismissed Mr. Pednault’s application for authorization to institute a class action. It found, and the Court of Appeal agreed, that the Commission had exclusive jurisdiction over the subject matter of the proposed action (*Pednault v. Compagnie Wal-Mart du Canada*, 2005 CanLII 41037 (Que. Sup. Ct.), aff’d 2006 QCCA 666, [2006] R.J.Q. 1266).
8. Finally, the complaints in which Mr. Plourde and his coworkers alleged a violation of ss. 15 to 19 of the *Code* were ultimately rejected by a majority of this Court (*Plourde* *v.* *Wal-Mart Canada Corp.*, 2006 QCCRT 207 (CanLII), aff’d 2007 QCCS 3165 (CanLII), 2007 QCCA 1210 (CanLII), and 2009 SCC 54, [2009] 3 S.C.R. 465; *Desbiens v.* *Wal-Mart Canada Corp.*,2009 SCC 55, [2009] 3 S.C.R. 540). In that first case, Mr. Plourde argued that he, together with other employees, had been dismissed for his union activities. Relying on ss. 15 to 19 of the *Code*, he sought to be reinstated in his job. The Court’s answer, which was purely procedural (para. 4), was essentially based on the language of s. 15.
9. The majority of this Court found that the language of that section is clear: the course open to the Commission is to order that an unlawfully dismissed worker be reinstated “in his employment” (see paras. 35-36, 39 and 54). Given that it lacks the power to award damages as an alternative remedy (paras. 36 and 39), the Commission, which cannot order an offending employer to keep running its business, simply has no way to ensure respect for the rights of dismissed employees. Even if it did have such a power, however, on the basis of *I.A.T.S.E., Stage Local 56 v.* *Société de la* *Place des Arts de Montréal*, 2004 SCC 2, [2004] 1 S.C.R. 43, closure would be a “good and sufficient reason” for dismissal within the meaning of s. 17 (paras. 41 *et seq.*) and, as such, would in practice constitute a complete answer for an employer against which a complaint has been filed under ss. 15 to 19 of the *Code*.
10. Having determined that the s. 15 scheme was inapplicable, the majority added that the closure of an establishment does not shield an employer from all the consequences of its decision (paras. 8, 51-52 and 54). Quite the contrary, given that there are other sections under which a claim for compensation might lie. In the case at bar, the employees are arguing that s. 59 is one such section.
11. Procedural History of the Appeal
    1. Preliminary Decisions Concerning the Grievance Arbitrator’s Subject-Matter Jurisdiction
12. The grievance at issue in this appeal was initially dismissed at a preliminary stage on the basis that the arbitrator lacked jurisdiction over the subject matter(*Travailleurs et travailleuses unis de l’alimentation et du commerce, section locale 503 v. Compagnie Wal-Mart du Canada — Établissement de Jonquière*, [2006] R.J.D.T. 1665 (T.A.) (Jean-Guy Ménard)). After analyzing the wording of the complaint, Arbitrator Ménard found that it was [translation] “fundamentally concerned” with alleged violations of rights established in the *Code* (paras. 18-22). As a result, s. 114 of the *Code* left him with no choice but to decline jurisdiction in favour of the Commission.
13. However, that decision was reviewed by the Superior Court a few months later (*Travailleurs et travailleuses unis de l’alimentation et du commerce, section locale 503* *v.* *Ménard*, 2007 QCCS 5704, [2008] R.J.D.T. 138). Applying the correctness standard, Taschereau J. noted that the arbitrator should have determined the true subject matter of the complaint rather than relying on its words alone (paras. 42-43). In the absence of evidence to the contrary, [translation] “one could not find on the basis of the words . . . that the arbitrator lacked jurisdiction” (para. 44). On the contrary, he stated, “without hiding behind strict formalism, as the respondent arbitrator did”, it seemed clear that the complaint was based on s. 59 (paras. 44-48). It was in fact up to the arbitrator to rule on the complaint, although he might have to reconsider his jurisdiction in light of the evidence adduced (paras. 49-51).
    1. Grievance Arbitrator’s Award, [2009] R.J.D.T. 1439
14. Exercising his jurisdiction in this regard, Arbitrator Ménard upheld the Union’s complaint and reserved the right to determine the appropriate remedy.
15. After considering all the evidence, he found first that the dispute concerned the dismissal of the employees and not, as Wal-Mart suggested, the closure of its establishment (paras. 14-17). This meant that it had to be decided whether a dismissal can violate s. 59 of the *Code* and whether the dismissal in this case was in fact such a violation.
16. Relying on the relevant case law, Arbitrator Ménard noted that the purpose of the freeze on conditions of employment imposed by s. 59 is to protect, for a specified period of time, the right to form a union and negotiate a collective agreement. To this end, the section prohibits an employer from changing its employees’ conditions of employment until that period expires. Given that this “freeze” is relative in nature, however, it does not prevent the employer from running its business as it would normally do outside the period specified in the *Code*. The employer can therefore make any changes it wishes in the management of its workforce, but only if it does so [translation] “in accordance with criteria it established for itself before the arrival of the union in its workplace” (paras. 18-20).
17. Moreover, he added, it is [translation] “now accepted by judges and authors alike that a layoff or dismissal can result in a change in conditions of employment” (para. 22). As a result, the employer must justify its decision to dismiss “by proving that it was made in the ordinary course of its business” (para. 24). In the absence of some additional explanation by the employer, the fact that the closure of the establishment was a “business decision” within its exclusive authority does not on its own constitute such proof. Although it is always open to an employer to go out of business, the employer must nonetheless explain a decision to do so during the period covered by s. 59. The employer in this case did not do so (paras. 25-29).
    1. Superior Court, 2010 QCCS 4743, [2010] R.J.D.T. 1118
18. On a motion for judicial review, the Superior Court upheld Arbitrator Ménard’s award. To begin, Moulin J. reiterated that the arbitrator had jurisdiction to decide the case. In his opinion, Mr. Ménard’s decision to hear the case was not only reasonable, but also correct in law. In this regard, the fact that the circumstances on which the grievance was based could give rise to various remedies did not deprive the arbitrator of his powers and jurisdiction under s. 59 of the *Code* (paras. 25-39).
19. Applying the reasonableness standard, Moulin J. then held that, on the merits, the arbitrator’s award had all the qualities that make a decision reasonable. First, in light of the case law of this Court and of the Court of Appeal, it was not unreasonable to conclude that the dismissal of all the employees of an establishment could constitute a change in their conditions of employment (paras. 47-50). Second, it was just as reasonable to ask an employer challenging the merits of a complaint to show that the change was made in the ordinary course of its business. In the absence of evidence to that effect, the arbitrator was justified in holding as he did (paras. 51-57).
    1. Court of Appeal, 2012 QCCA 903, [2012] R.J.Q. 978
20. Wal-Mart appealed to the Court of Appeal, which set aside the Superior Court’s decision, granted the application for judicial review, annulled the arbitration award and rejected the Union’s complaint. Two members of the court wrote separate reasons that led to the same result.
21. In reasons concurred in by Gagnon J.A., Vézina J.A. first stated his view that closure does not “constitute” a change in conditions of employment. Rather, it is a termination of employment, which in his opinion falls outside even an extended meaning of the concept of conditions of employment (paras. 117-19). Relying on observations made by the majority of this Court in *Plourde*, he added that, to remedy an unlawful change in conditions of employment, [translation] “it is necessary to return to the former situation, to restore the operation of the business to how it was run before” (para. 121). However, such a “remedy is not possible . . . given that no one can be forced to continue operating a business, no matter what his or her reasons for closing it might be” (para. 122). Before dismissing the proceeding under s. 59, however, he pointed out that there was nothing to prevent the employees from filing a complaint alleging a violation of ss. 12 and 14 of the *Code* with the Commission (paras. 124-27).
22. Unlike his colleagues, Léger J.A. considered both the arbitrator’s jurisdiction and the validity of his award (para. 9). In his view, the standard that applies when a superior court reviews the exercise of an arbitrator’s power to rule on a complaint based on s. 59 of the *Code* is not reasonableness, but correctness (paras. 50-57). Having said this, however, he held that the arbitrator had not erred in taking jurisdiction in this case. Nor did the fact that the employees could obtain other remedies by means of a complaint to the Commission have the effect of depriving the arbitrator of his powers and jurisdiction under ss. 59 and 100.10 of the *Code* (paras. 65-74).
23. On the merits, however, Léger J.A. found that the arbitrator’s reasoning [translation] “[was] so incoherent” that he could not find it to have the qualities that make a decision reasonable (para. 84). First of all, it was contradictory to find that the employer had the power to close its business while at the same time accepting that the continuation of the employment relationship was a condition of employment (paras. 96-97). Moreover, by upholding the complaint, the arbitrator was adding to the employees’ conditions of employment, which was incompatible with the very concept of a statutory freeze (paras. 98-100). The arbitrator’s award was therefore unreasonable.
24. Analysis
    1. Issues
25. This appeal raises a series of issues concerning the nature and scope of s. 59 of the *Code*,as well as its applicability where a business is closed either completely or in part. Thus, the Court must decide whether s. 59 can be used to challenge the resiliation of the contracts of employment of all the employees of an establishment. If it can be so used, the Court must also decide whether the arbitrator rendered an unreasonable award in concluding that, in this case, the resiliations constituted an unlawful change in conditions of employment.
    1. Positions of the Parties and the Interveners
26. The Union agrees with Arbitrator Ménard’s award and argues that the Court of Appeal erred in law in finding that s. 59 of the *Code* does not apply in the context of the closure of an establishment. In essence, the Union submits, the Court of Appeal’s decision was based on a misinterpretation of the *Code* and a misreading of this Court’s decisions in *Place des Arts* and *Plourde*. If the Court of Appeal had adopted an interpretation consistent with the language and the context of s. 59, then it should have concluded that the closure of the Jonquière store did not preclude the application of that provision.
27. According to the Union, not only is it well established that dismissal may constitute a change in conditions of employment, but the employer in the instant case has produced no evidence to justify that change. In the absence of evidence that would support a conclusion that the employer’s decision was made in the ordinary course of its business, the change was unlawful. Moreover, the words of s. 59, unlike those of s. 15, contain no indication that the only possible remedy is to reinstate the employees affected by the unjustified change. They say nothing to prevent the arbitrator from ordering reparation by equivalence. Finally, the Union adds, this conclusion is consistent not only with the language and context of s. 59, but also with that section’s objectives: it precludes the employer from taking measures that might hinder the formation of a union and the negotiation of a collective agreement, while favouring the effective exercise of the right of association.
28. In response, Wal-Mart argues that the Court of Appeal’s decision is well founded in law. The application of s. 59 presupposes the existence of an ongoing business, since, where such a business no longer exists, there is no longer an employment relationship or a condition of employment, nor is there a balance to be maintained between the parties. In every case, the arbitrator’s role is limited to restoring the situation that existed before the change. Given that the arbitrator has no power to compel a business to reopen, there is simply nothing the arbitrator can do. In any event, Wal-Mart adds, dismissals resulting from the permanent closure of a business do not constitute a change in conditions of employment. Since an employer has the right to close its business without having to justify its action, continued employment cannot be a condition of employment. Furthermore, since the sole purpose of s. 59 is to maintain the employees’ conditions of employment, this section does not have the effect of creating conditions that did not exist before the petition for certification was filed. Dismissal cannot therefore constitute a change in conditions of employment.
29. Three of the four interveners, supporting Wal-Mart’s position, add that the role of s. 59 is not to regulate the closure of businesses. Instead, in Quebec, as elsewhere in Canada, it is the provisions on unfair practices that apply in cases involving closure. As a result, s. 59 is quite simply not the appropriate mechanism for remedying the consequences of the closure of an establishment. In contrast, the fourth intervener argues that the other remedies provided for in the *Code* are complementary. Section 59 and the broad remedial powers conferred on arbitrators by the *Code* can therefore be used by employees to obtain compensation in a case involving an unjustified closure. Section 59, which establishes a substantive legal rule, must also be interpreted in light of the principle of full compensation that applies both in our domestic law and in international law.
    1. Section 59: Nature and Interpretation
30. Since the mechanism for freezing conditions of employment now codified in s. 59 of the *Code* was adopted, the interpretation of that section has been the subject of much discussion. The diversity of judicial opinions on this subject has created uncertainty in some areas that I wish to discuss in relation to this case. In this regard, I will review the section’s legislative context, objectives and role first, before discussing the conditions under which it applies. Finally, I will comment briefly on the powers available under the section to an arbitrator who must determine whether it applies.
    * 1. Legislative Context, Objectives and Role of Section 59
31. The substance of what is now the first paragraph of s. 59 of the *Code* was originally found at the end of s. 24(1) of the *Labour Relations Act*, R.S.Q. 1941, c. 162A, in a division entitled “Forbidden Practices” (“*1944 Act*”). This Act was inserted into the revised statutes in 1944 by the *Act to constitute a Labour Relations Board*, S.Q. 1944, c. 30. Inspired by a U.S. law generally known as the *Wagner Act* (*National Labor Relations Act*, 49 Stat. 449 (1935)), the *1944 Act* codified [translation] “a partially new conception of labour-management relations” while at the same time introducing “profound changes” into the law then in force (M.-L. Beaulieu, *Les Conflits de Droit dans les Rapports Collectifs du Travail* (1955), at pp. 175-79). It gave employees a right of association, established a bargaining process, imposed on the parties a duty to bargain in good faith and prohibited various types of unfair practices (M. G. Bergeron, “La procédure de négociation et le recours à la grève ou au lockout”, in *Le Code du Travail du Québec (1965): le XXe congrès des relations industrielles de l’Université Laval* (1965), 135, at pp. 136-39).
32. Although the *1944 Act* was an important step in the development of labour relations in Quebec, it failed to adequately protect the exercise of the rights it affirmed (Bergeron, at p. 137). As a result, 20 years after it was enacted, it was replaced by the first version of the *Labour Code* (R.S.Q. 1964, c. 141). The objective of that code,which was the product of a wide-ranging synthesis, was to establish a general scheme applicable to all labour relations (R. P. Gagnon, L. LeBel and P. Verge, *Droit du travail en vigueur au Québec* (1971), at p. 82;G. Hébert, “Trends in the New Quebec Labour Code” (1965), 20 *I.R.* 61, at p. 62).
33. The *Code* was more comprehensive than the *1944 Act*, and was divided into nine chapters set out in a logical order based on events in which an association would be involved. In that codification, the “Forbidden Practices” division of the *1944 Act* disappeared and its various sections were redistributed. Because of the link between s. 24(1) and the collective bargaining process, the substance of that provision was naturally incorporated into the chapter entitled “Collective Agreements”.
34. In the years that followed the enactment of the *Code*, recognition of this link between the prohibition codified in s. 59 of today’s *Code* and the “Collective Agreements” chapter led some to express the opinion that the section’s purpose was to maintain a certain balance, or even the *status quo*, during the negotiation of a collective agreement. For example, shortly after the new *Code* came into force, Judge Melançon of the Labour Court stated that [translation] “[i]n our opinion, the purpose of this section of the Labour Code is to ensure that the balance that existed between the parties before the petition for certification was filed . . . is maintained . . . until one of the parties acquires the right to strike or the right to lock out . . .”: *La Reine v.* *Harricana Metal Inc.*, [1970] T.T. 97, at p. 99.
35. Adopting this logic in his reasons in the instant case, Léger J.A. wrote that [translation] “the purpose of section 59 is to strike a balance during a clearly defined period of time, that is, throughout the bargaining process” (para. 58). With respect, I cannot agree with this conclusion. I have difficulty finding that the legislature’s objective in enacting this section was purely procedural. Frankly, I do not see how maintaining the *status quo* or striking a *balance* can be a legislative objective in itself. Rather, the objective lies in what might flow from the preservation of this balance.
36. In my opinion, the purpose of s. 59 in circumscribing the employer’s powers is not merely to strike a balance or maintain the *status quo*, but is more precisely to facilitate certification and ensure that in negotiating the collective agreement the parties bargain in good faith (Bergeron, at pp. 142 and 147; F. Morin, *Le Code du travail: sa nature, sa portée, ses effets* (1971), at pp. 16-17; *Club coopératif de consommation d’Amos* *v. Union des employés de commerce, section locale 508*, [1985] AZ-85141201 (T.A.), at pp. 11-12; *Association des juristes de l’État* *v.* *Commission des valeurs mobilières du Québec*, [2003] R.J.D.T. 579 (T.A.), at para. 71).
37. The “freeze” on conditions of employment codified by this statutory provision limits the use of the primary means otherwise available to an employer to influence its employees’ choices: its power to manage during a critical period (see G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), vol. 2, at p. 10-80.3; B. W. Burkett et al., eds., *Federal Labour Law and Practice* (2013), at p. 171). By circumscribing the employer’s unilateral decision-making power in this way, the “freeze” limits any influence the employer might have on the association-forming process, eases the concerns of employees who actively exercise their rights, and facilitates the development of what will eventually become the labour relations framework for the business.
38. In this context, it is important to recognize that the true function of s. 59 is to foster the exercise of the right of association: F. Morinet al., *Le droit de l’emploi au Québec* (4th ed. 2010), at pp. 1122-23 (see also A. C. Côté, “Le gel statutaire des conditions de travail” (1986), 17 *R.G.D.* 151, at p. 152; *Coopérative étudiante Laval* *v. Syndicat des travailleurs(euses) de la coopérative étudiante Laval*, [1984] AZ-84141225 (T.A.), at p. 22; *Association du personnel administratif et professionnel de l’Université Laval (APAPUL)* *v. Syndicat des employés de l’Université Laval (SCFP), section locale 2500*, [1985] AZ-85142069 (T.A.), at pp. 43-44; *Plastalène Corp. v. Syndicat des salariés de Plastalène (C.S.D.)*, [1990] AZ-90141158 (T.A.); *Union des routiers, brasseries, liqueurs douces & ouvriers de diverses industries (Teamsters, Local 1999) v. Quality Goods I.M.D. Inc.*, [1990] AZ-90141179 (T.A.), at p. 6; *Syndicat des salarié-e-s de la Guilde des musiciens du Québec* *v. Guilde des musiciens du Québec*, [1998] AZ-98141137 (T.A.), at p. 11, aff’d 2001 CanLII 38640 (Que. C.A.); *Travailleurs et travailleuses de l’alimentation et du commerce, section locale 501* *v. Wal-Mart Canada (St-Hyacinthe)*, [2010] AZ-50688504 (T.A.), at para. 80).
39. By codifying a mechanism designed to facilitate the exercise of the right of association, s. 59 thus creates more than a mere procedural guarantee. In a way, this section, by imposing a *duty* on the employer not to change how the business is managed at the time the union arrives, gives employees a substantive *right* to the maintenance of their conditions of employment during the statutory period. This being said, it is the employees, as the holders of that right, who must ensure that it is not violated.
    * 1. Conditions for the Application of Section 59, Paragraph 1
40. I wish to note first that, since s. 59 is not directly concerned with the punishment of anti-union conduct, the prohibition for which it provides will apply regardless of whether it is proven that the employer’s decision was motivated by anti-union animus (*Union des routiers, brasseries, liqueurs douces & ouvriers de diverses industries*; *Syndicat des employé-es de SPC Automation (CSN)* *v. SPC Automation Inc.*, [1994] T.A. 718; *Société des casinos du Québec inc.* *v. Syndicat des employé(e)s de la Société des casinos du Québec*, [1996] AZ-96142008 (T.A.); *Sobey’s inc. (No 650) v. Syndicat des travailleurs et travailleuses de Sobey’s de Baie-Comeau (CSN)*, [1996] AZ-96141261 (T.A.); *Association des juristes de l’État* *v.* *Conseil du Trésor*, 1999 CanLII 5144 (T.A.); *Centre de la petite enfance Casse-Noisette inc.* *v.* *Syndicat des travailleuses(eurs) en garderie de Montréal — CSN*, [2000] R.J.D.T. 1859 (T.A.); *Association des juristes de l’État* *v.* *Commission des valeurs mobilières du Québec*; Côté, at p. 156). The essential question in applying s. 59 is whether the employer *unilaterally* changed its employees’ conditions of employment *during the period of the prohibition*.
41. As a result, s. 59 requires that the union representing the employees prove that a unilateral change has been made. To discharge this burden, the union must show: (1) that a condition of employment existed on the day the petition for certification was filed or a previous collective agreement expired; (2) that the condition was changed without its consent; and (3) that the change was made between the start of the prohibition period and either the first day the right to strike or to lock out was exercised or the day an arbitration award was handed down, as the case may be. In the instant case, the first two of these facts are disputed by the employer.
    * + 1. Continuation of the Employment Relationship as a Condition of Employment
42. The “condition of employment” concept has been given a large and liberal interpretation since this Court’s decision in *Syndicat catholique des employés de magasins de Québec Inc.* *v.* *Compagnie Paquet Ltée.*, [1959] S.C.R. 206, at pp. 211-12; see also *Société des casinos du Québec inc.*, at pp. 14-15; *Syndicat des travailleurs et des travailleuses des épiciers unis Métro-Richelieu (C.S.N.)* *v.* *Lefebvre*, 1996 CanLII 5705 (Que. C.A.), at p. 19; *Automobiles Canbec inc.* *v.* *Hamelin*, 1998 CanLII 12602 (Que. C.A.); *Séminaire de la Très Sainte-Trinité* *v.* *Tremblay*, [1991] R.J.Q. 428 (Sup. Ct.), at pp. 433-34; *Sobey’s inc.* *(No 650)*, at p. 11; *Association des juristes de l’État* *v. Conseil du Trésor*, at p. 15; *Centre de la petite enfance Casse-Noisette inc.*; *Association des juristes de l’État* *v.* *Commission des valeurs mobilières du Québec*, at pp. 598-99; Gagnon, LeBel and Verge, at pp. 236-39; F. Morin and R. Blouin, with J.-Y. Brière and J.-P. Villaggi, *Droit de l’arbitrage de grief* (6th ed. 2012), at p. 202.
43. Thus, the “condition of employment” concept is a flexible one that encompasses [translation] “anything having to do with the employment relationship on either an individual or a collective level” (Morinet al., at p. 1161; *Pakenham* *v*. *Union des vendeurs d’automobiles et employés auxiliaires, section locale 1974, UFCW*, [1983] T.T. 189, at pp. 193-94; *Centre de la petite enfance Casse-Noisette inc.*). This flexibility led the Quebec courts to hold long ago that, in the context of a contract of employment for an indeterminate term, continuation of the employment relationship constitutes a condition of employment (Morin and Blouin, at p. 202; *Pakenham*, at pp. 202-4; *Union des employés de commerce, local 500* *v. Provost inc.*, [1981] S.A.G. 732; *Scierie Béarn* *v.* *Syndicat des employés(es) de bureau Scierie Béarn*, [1988] AZ-88141194 (T.A.); *Séminaire de la Très Sainte-Trinité*; *Syndicat des employés de la Commission scolaire du Haut St-Maurice* *v.* *Rondeau*, [1993] R.J.Q. 65 (C.A.), at p. 68 *a contrario*; *Union des employé-e-s de service, local 800* *v.* *2162-5199 Québec Inc.*, [1994] T.A. 16).
44. The condition of continued employment is implicitly incorporated into the contract of employment and need not be expressly stipulated. The essence of every contract is that it requires each party to perform its obligations as long as the other party does so and no other recognized cause of extinction of obligations occurs (art. 1458, para. 1 and art. 1590, para. 1 of the *Civil Code of Québec* (“*C.C.Q.*”), see D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at para. 1969). The law applicable to contracts of employment does not stray from this principle in providing that where a contract is resiliated, a “serious reason” (art. 2094 *C.C.Q.*) or “good and sufficient cause” (s. 124 *A.L.S.*) must be shown, or reasonable notice must be given (art. 2091 *C.C.Q.* and s. 82 *A.L.S.*). Absent one of these justifications, the employer is bound by an obligation to continue employing the employee. This principle is all the more fundamental in our modern society, because the systemic importance of work means that the vast majority of employees are completely dependent on their jobs (in this regard, see *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368; *Delisle* *v.* *Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at para. 66; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 25; *Isidore Garon ltée* *v.* *Tremblay*, 2006 SCC 2, [2006] 1 S.C.R. 27, at para. 35). In this context, it can be said that such employees have a reasonable expectation that their employer will not terminate their employment except to the extent and in the circumstances provided for by law.
45. Whether it is based on the *Civil Code*, on labour legislation or on the implicit content of a contract of employment, this right to continued employment is therefore always the basis for a condition of employment for employees (art. 1434 *C.C.Q.*). However, this condition is not absolute. The employer retains at all times the power to manage its business, and this includes the power to resiliate the contract of employment of one or more of its employees for “legitimate reasons” (economic, disciplinary, etc.) or upon “sufficient” notice of termination.
46. Section 59 does not change this factual and legal situation. Like any other condition of employment, maintenance of the employment relationship remains a condition but is nevertheless subject to the employer’s exercise of its management power. Therefore, in the words of Deschamps J.A., as she then was, [translation] “although dismissal is not, strictly speaking, a condition of employment, the condition of continued employment, and thus the protection against dismissal without a good and sufficient reason, can be included in the conditions of employment covered by section 59 L.C.”: *Automobiles Canbec inc.*, at p. 13.
47. In extending the conditions and powers that exist at the time the petition for certification is filed, s. 59 does not make them different in degree. Although continuation of the employment relationship remains a condition of employment, that relationship does not become any more or less “certain” than before (*Coopérative étudiante Laval*, at pp. 32-33; *Union des employé-e-s de service, local 800*, at pp. 22-31; *Syndicat des salariés des Industries Leclerc (CSD) v. Industries Leclerc inc.*, [1996] T.A. 554; *Syndicat des salarié-e-s de la Guilde des musiciens du Québec*, at p. 12; *Fraternité des policiers et policières de Carignan* *v.* *Ville de Carignan*, [2000] AZ-00142040 (T.A.), at p. 56; *Association des juristes de l’État* *v.* *Commission des valeurs mobilières du Québec*, at para. 76). The employer can therefore resiliate a contract if it does so for legitimate reasons within the meaning of the law. In such a case, however, for the resiliation not to be considered a *change in conditions of employment within the meaning of s. 59*, it must be consistent with the employer’s normal management practices in this regard.
    * + 1. Changes in Conditions of Employment and the “Business as Usual” Rule
48. To prove that the change made by the employer is a “change in conditions of employment” within the meaning of s. 59, the union cannot simply show that the employer has modified how it runs its business. It must also establish that this modification is inconsistent with the employer’s “normal management practices”: M. Coutu et al., *Droit des rapports collectifs du travail au Québec* (2nd ed. 2013), vol. 1, *Le régime général*, at pp. 577-79.
49. Although s. 59 of the *Code* might seem, if interpreted literally and in isolation, to have the effect of completely “fixing” or “freezing” the employer’s business environment, the opposite is in fact true: to avoid paralyzing the business, the section leaves the employer with its general management power, which survives the union’s arrival on the scene but is then circumscribed by the law. This power must be exercised [translation] “in a manner consistent with the rules that applied previously and with the employer’s usual business practices from before the freeze”: P. Verge, G. Trudeau and G. Vallée, *Le droit du travail par ses sources* (2006), at p. 139; R. P. Gagnon et al., *Le droit du travail du Québec* (7th ed. 2013), at pp. 597-98.
50. In this context, the employer cannot simply argue that its decision is consistent with the powers conferred on it in the individual contract of employment and by the general law before the petition for certification was filed. *It must continue acting the way it acted, or would have acted, before that date* (*Syndicat des employés de la Commission scolaire du Haut St-Maurice*; *Gravel & Fils Inc.* *v. Syndicat d’entreprises funéraires*, [1984] T.A. 87, at pp. 90-91; *Pakenham*; *Woolco (No. 6291)* *v.* *Syndicat national des employés de magasins de Chicoutimi (CSN)*, [1983] AZ-83141325 (T.A.), at pp. 7-8; *Association du personnel administratif et professionnel de l’Université Laval (APAPUL)*; *Plastalène Corp.*; *Syndicat des salariés des Industries Leclerc (CSD)*; *Syndicat des employés de Télémarketing Unimédia (CSN)* *v. UniMarketing inc.*, [1997] T.A. 549; *Association des juristes de l’État* *v.* *Commission des valeurs mobilières du Québec*, at para. 84; *Travailleurs et travailleuses de l’alimentation et du commerce, section locale 501*, at para. 80).
51. On this point, I wish to stress that to accept the opposite argument — that the employer can change its management practices in all circumstances because it had the power to do so before the union’s arrival — would be to deprive s. 59 of any effect. Thus, s. 59 was enacted for the specific purpose of preventing the employer from [translation] “exercising its great freedom of action at the last minute by being particularly generous or adopting any other pressure tactic” (Morin et al., at p. 1122). To permit the employer to keep using its managerial powers as if nothing had changed would, when all is said and done, be to allow the employer to do that which the law is actually meant to prohibit.
52. Professor Côté comments as follows in this regard:

[translation] [S]uch an approach, which would ultimately involve maintaining, without qualification, the employer’s power and prerogative to unilaterally dictate or change conditions of employment, in law or in fact, could quickly become paradoxical.

What would be the rationale for this rule if it were to be interpreted as affirming, under the guise of a prohibition against changing conditions of employment, a nearly absolute power to change such conditions by sophistically equating that power with a condition of employment? [p. 161]

1. An interpretation that would leave the employer with all the freedom it had before the petition for certification was filed would be contrary to s. 41 of the *Interpretation Act*, CQLR, c. I-16, which favours a broad and purposive interpretation of the provision. It seems to me that such an interpretation would also overlook the fact that the employer ceases to have sole control over labour relations in its business after the union arrives on the scene. Once the petition for certification is filed, the employer is dealing with [translation] “the possible implementation of a new scheme of labour relations in the business, a system that is now institutionalized”, and it must take this new system into account in exercising its management power: R. Blouin, “La convention collective de travail en tant qu’instrument juridique non contractuel et monopolisateur des conditions de travail, d’où la problématique particulière qui en découle dans le secteur de l’éducation”, in Barreau du Québec, vol. 235, *Développements récents en droit du travail dans le secteur de l’éducation* (2005), 51, at p. 68.
2. In this context, to find that there has been no unlawful change in conditions of employment within the meaning of s. 59 of the *Code*, an arbitrator must do more than simply determine that the employer had the power to act the way it did before the union’s arrival. He or she must also be satisfied that the employer’s decision was consistent with its normal management practices or, in other words, that it would have done the same thing had there been no petition for certification.
3. There will often be an inevitable overlap between proving the employer’s power and proving that the power was exercised in accordance with past management practices. An arbitrator hearing a complaint concerning the resiliation of the contract of employment of an employee who had, without justification, no longer been performing his or her work for weeks can thus readily conclude that the decision was based on a power that the employer would have exercised even if the petition for certification had not been filed. However, many situations arise in which proof of the existence of a power will not automatically support a conclusion that it has been exercised in a particular way. For example, the fact that an employer can unilaterally increase its employees’ wages without notice does not necessarily prove that it would have done so had a union not come on the scene.
4. Unlike s. 17 of the *Code*, s. 59 does not create a presumption “of change” or automatically reverse the burden of proof, which continues to rest with the employees and the union. The latter must therefore adduce sufficient evidence to prove that the alleged change is inconsistent with the employer’s “normal management practices”. However, nothing prevents the arbitrator hearing the complaint from drawing presumptions of fact from the whole of the evidence presented before him or her in accordance with the general rules of the law of civil evidence (arts. 2846 and 2849 *C.C.Q.*) as normally applied. As a result, if the union submits evidence from which the arbitrator can infer that a specific change does not seem to be consistent with the employer’s normal management practices, a failure by the employer to adduce evidence to the contrary is likely to have an adverse effect on its case (J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at p. 748).
5. Regardless of who adduced the evidence to be considered by the arbitrator, there are two ways for the arbitrator to determine whether a specific change is consistent with the employer’s normal management practices. First, for the employer’s decision not to be considered a change in conditions of employment within the meaning of s. 59 of the *Code*, the arbitrator must be satisfied that it was made in accordance with the employer’s *past* management practices. In the words of Judge Auclair, the arbitrator must be able to conclude that the employer’s decision was made [translation] “in accordance with criteria it established for itself before the arrival of the union in its workplace”: *Pakenham*, at p. 202. (See also *Woolco (No. 6291)*, at pp. 7-8; *Gravel & Fils Inc.*, at p. 90; *Plastalène Corp.*; *Union des routiers, brasseries, liqueurs douces & ouvriers de diverses industries*, at pp. 6-7; *Société des casinos du Québec inc.*, at pp. 16-19; *Association des juristes de l’État* *v.* *Commission des valeurs mobilières du Québec*, at para. 75.)
6. Second, the courts have held that the employer must continue to be able to adapt to the changing nature of the business environment in which it operates. For example, in some situations in which it is difficult or impossible to determine whether a particular management practice existed before the petition for certification was filed, the courts accept that a decision that is [translation] “reasonable”, based on “sound management” and consistent with what a “reasonable employer in the same position” would have done can be seen as falling within the employer’s normal management practices (Gagnon et al., at p. 600; Burkett et al., at p. 171; *Plastalène Corp.*; *Syndicat des employés de Télémarketing Unimédia (CSN)*; *Association des juristes de l’État* *v. Commission des valeurs mobilières du Québec*; *Société du centre Pierre-Péladeau* *v.* *Alliance internationale des employés de scène et de théâtre, du cinéma, métiers connexes et des artistes des États-Unis et du Canada (I.A.T.S.E.), section locale 56*, 2006 CanLII 32333 (T.A.); *Travailleurs et travailleuses de l’alimentation et du commerce, section locale 501*).
7. Thus, a change can be found to be consistent with the employer’s “normal management policy” if (1) it is consistent with the employer’s past management practices or, failing that, (2) it is consistent with the decision that a reasonable employer would have made in the same circumstances. In other words, a change [translation] “that would have been handled the same way had there been no attempt to form a union or process to renew a collective agreement should not be considered a change in conditions of employment to which section 59 of the Labour Code applies”: *Club coopératif de consommation d’Amos*, at p. 12.
8. In either case, whatever the nature of the circumstances relied on by the employer in making the change, the arbitrator dealing with the complaint must first be satisfied that those circumstances exist and that they are genuine (see *Gravel & Fils Inc.*, at p. 91; *Mont-Laurier (Ville de)* *v.* *Syndicat des professionnels et professionnelles de la Ville de Mont-Laurier (CSN)*, 1995 CanLII 1874 (T.A.), at pp. 33-37; *Syndicat des employés de Télémarketing Unimédia (CSN)*, at pp. 559-60; *Syndicat des salarié-e-s de la Guilde des musiciens du Québec*, at pp. 12-13; *Syndicat des travailleuses et travailleurs du Centre d’approbation de Nordia — CSN* *v. Nordia Inc.*, 2012 CanLII 82540 (T.A.), at paras. 429-44).
9. When all is said and done, although the arbitrator has the power to assess the nature of the change contested by the union and the context in which it was made, the *Code*, far from prohibiting all changes in conditions of employment, prohibits those that are not consistent with the management policy the employer adopted or would have adopted before the union’s arrival. This analytical approach leaves the employer with the freedom of action it needs to continue operating its business as it did before that time. The approach is thus perfectly consistent with the objectives of the statutory “freeze”, since it protects the employees’ rights without depriving the employer of all of its management power.
10. The mechanism codified in s. 59 is by no means specific to Quebec, as it exists in all provinces of Canada and at the federal level (Adams, at pp. 10-80.3 to 10-96; Burkett et al., at p. 171). In all the general labour relations schemes in Canada, therefore, although the employer does not lose its right to manage its business simply because of the arrival of a union, it must, from that point on, exercise that right as it did or would have done before then (see *Spar Aerospace Products Ltd. v. Spar Professional and Allied Technical Employees Association*, [1979] 1 C.L.R.B.R. 61; *Metropol-Basefort Security Group Ltd.* (1990), 79 di 139 (C.L.R.B.); *Bizeau v. Aéroport de Québec Inc.*,2004 CIRB 261 (CanLII); *Public Service Alliance of Canada v. Hamlet of Kugaaruk*, 2010 CIRB 554 (CanLII); D. J. Corry, *Collective Bargaining and Agreement* (loose-leaf), vol. 1, at ¶9:1200). If the employer does not exercise its prerogatives consistently, it is liable to whatever penalty the arbitrator considers appropriate in the circumstances.
    * 1. Arbitrator’s Powers
11. As in cases concerning the interpretation or the application of a collective agreement, grievance arbitrators are empowered to rule on alleged violations of the right provided for in s. 59 (s. 100.10 of the *Code*; *Syndicat des employés de la Commission scolaire du Haut St-Maurice*; *Syndicat canadien de la Fonction publique, section locale 1450* *v.* *Journal de Québec, division de Groupe Québécor inc.*, [1996] R.J.Q. 299 (Sup. Ct.); *Syndicat des salariés des Industries Leclerc (CSD)*; *Sobey’s inc., No 650 v. Syndicat des travailleurs et travailleuses de Sobey’s de Baie-Comeau*, [1996] T.A. 721; *Université McGill* *v.* *Munaca*, [2003] AZ-50193382 (T.A.), at para. 44, aff’d [2004] AZ-50264810 (Sup. Ct.)).
12. Where an arbitrator upholds a complaint, s. 100.12 of the *Code* and art. 1590 *C.C.Q.* confer broad powers on him or her to compel the employer to remedy any harm it may have caused. The arbitrator has a [translation] “power of correction and reparation that is sufficiently effective for him or her to really decide the grievance and ensure that all concerned can fully enjoy their rights” (Morin and Blouin, at p. 547; see D. Veilleux, “La portée du pouvoir remédiateur de l’arbitre. . . Contestée!” (1995), 55 *R. du B.* 429; *Alberta Union of Provincial Employees v.* *Lethbridge Community College*, 2004 SCC 28, [2004] 1 S.C.R. 727, at para. 40; *Hôpital St-Charles de Joliette v.* *Syndicat des employés d’hôpitaux de Joliette inc.*, [1973] R.D.T. 129 (C.A.), at p. 134; *Association des pompiers de Montréal inc. (APM)* *v. Montréal (Ville de)*, 2011 QCCA 631 (CanLII); see also Verge, Trudeau and Vallée, at pp. 212 *et seq.*).
13. In the case of a complaint under s. 59, the legislative origin of the employer’s duty does not limit the scope of the arbitrator’s remedial power. In 1977, the Quebec legislature decided that complaints of unlawful changes to conditions of employment should be dealt with as if they were grievances (*An Act to amend the Labour Code and the Labour and Manpower Department Act*, S.Q. 1977, c. 41, s. 48). Since that time, arbitrators ruling on alleged violations of s. 59 have had exactly the same remedial powers as if they were deciding a grievance filed under a collective agreement (*Automobiles Canbec inc.* (*per* Otis J.A.); *Travelways Ltd.* *v.* *Legendre*, [1987] AZ-87149123 (Sup. Ct.); Morin and Blouin, at pp. 203-4). In appropriate circumstances, therefore, an arbitrator can order reparation in kind, such as the reinstatement of a condition of employment. Where the circumstances do not lend themselves to such a remedy, however, the arbitrator can order reparation by equivalence. The latter remedy will be appropriate where the employer goes out of business either in part or completely, at least insofar as it is impossible to reinstate the employees dismissed in contravention of s. 59.
    1. Closure of a Business and Application of Section 59
14. Wal-Mart argues that the closure of its Jonquière establishment bars its employees from invoking s. 59. In the alternative, it submits that in any event, the closure constitutes a full defence that justifies the change in the employees’ conditions of employment. Neither of these arguments is valid. In my opinion, 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.
    * 1. Applicability of Section 59 in the Context of the Closure of a Business
15. On appeal, Vézina J.A. relied essentially on *Plourde* to hold that the closure of a business rules out any possibility of applying s. 59 of the *Code*. More specifically, he reproduced para. 35 of that judgment, in which the majority of this Court had stressed that “[t]he reference in s. 15 to an order to ‘reinstate such employee in his employment’ signals quite unambiguously the legislative contemplation of an ongoing place of employment as the foundation of a successful s. 15 application” (emphasis in original). Basing his analysis on this passage, Vézina J.A. stated:

[translation] To remedy an unlawful change in a condition of employment, it is necessary to return to the former situation, to restore the operation of the business to how it was run before. By way of analogy, to remedy an allegedly unlawful closure, it would be necessary to reopen the business, to begin operating again.

This remedy is not possible, however, given that no one can be forced to continue operating a business no matter what his or her reasons for closing it might be. [paras. 121-22]

1. With respect, the passage from *Plourde* quoted by Vézina J.A. does not support a conclusion that “[t]o remedy an unlawful change in a condition of employment, it is necessary to return to the former situation, to restore the operation of the business to how it was run before.” Rather, the passage in question leads to the conclusion that *Plourde* was based essentially on the *words* of s. 15 (see also in *Plourde*, paras. 36, 39 and 54). According to the majority of this Court, those words, in placing limits on the powers of the Commission des relations du travail, only authorize it to order that the dismissed employee be reinstated. Such a result necessarily presupposes the existence of an active business. Unlike s. 15, however, s. 59 contains no word or language that would support a conclusion that its applicability depends on the existence of an active business or, more simply, of a possibility of reinstatement. *Plourde* therefore cannot support the Court of Appeal’s conclusions.
2. I would stress in passing, adopting the words and the logic expressed by Binnie J. in *Plourde*, that if the Quebec legislature had intended reinstatement to be the only possible remedy for violation of the right to unchanged conditions of employment, it would have “actually *said* [so] in the relevant statutory provisions” (para. 36 (emphasis in original)). Given the absence of such an indication, there is nothing to preclude the arbitrator from ordering an alternative remedy in the form of damages.
3. In this regard, at no point did the majority of the Court in *Plourde* hold that an employer’s closure of an establishment would on its own shield the employer from any action by its employees. On the contrary, Binnie J. mentioned several times that an employer that goes out of business can be required to remedy losses suffered by its terminated employees. For example, he said the following early in his reasons:

The rule in Quebec that an employer can close a plant for “socially reprehensible considerations” does not however mean it can do so without adverse financial consequences, including potential compensation to the employees who have thereby suffered losses. [para. 8]

(See also the final sentence of para. 51, as well as paras. 52 and 54.)

1. Far from being isolated, this statement echoed the conclusion reached by Gonthier J. several years earlier in *Place des Arts*, in which, as Binnie J. wrote in *Plourde* (at para. 51), the Court had held that

the complaint and the proposed remedy *contemplated the continued existence of an ongoing undertaking* by the Place des Arts technical services group which on the evidence no longer existed. That was the *ratio decidendi* of the case. In that context resort was made to the *City Buick* line of cases. This Court endorsed the view that no legislation obliges an employer to remain in business. However, Gonthier J. did not suggest that the closure immunized the employer from *any* consequences or that there was no remedy *anywhere* under the Code to provide for compensation to the terminated employees, or other relief or remedy, on proof that the termination was for anti-union reasons. [Underlining added; italics in original.]

1. Thus, in the absence of clear language excluding any form of remedy other than reinstatement, or if the claimant is not seeking such reparation “in kind”, the arbitrator, who cannot of course impose the reinstatement of an employee in an establishment that has been closed, nonetheless retains the power to order reparation by equivalence. However, Wal-Mart, with which Rothstein and Wagner JJ. agree, counters the possibility of such an order by further submitting that the purpose and the nature of s. 59 preclude the courts from applying that section once the business has been closed. In short, Wal-Mart argues that the section’s purpose is to maintain a balance between the parties, but only during the collective bargaining period, in order to preclude the employer from putting pressure on its employees. But in putting an end to collective bargaining, the closure renders s. 59 inapplicable, since, Wal-Mart alleges, there is no longer a balance to maintain, nor are there employees to protect.
2. With respect, this argument is wrong. On the one hand, it seems to me to disregard the fact that, *absent a clear indication to the contrary*, the content of a substantive right is not determined by the scope of a particular remedy. On the other hand, insofar as it presupposes that the purpose of s. 59 is to maintain the *status quo*, it is based on a flawed premise. As I mentioned above, the primary purpose of s. 59 is not, in itself, to restore the balance for a given period of time, but to facilitate certification and foster good faith in collective bargaining in order, ultimately, to enable employees to exercise their right of association. Hence, the fact that it is impossible to attain the procedural balance the legislation is designed to maintain during a bargaining period does not preclude the arbitrator from giving full effect to s. 59 by ordering that an employer that has violated its employees’ *rights* remedy the resulting harm, if only by way of reparation by equivalence.
3. In other words, the termination of the process undertaken further to the petition for certification does not eliminate the employer’s obligation to make reparation for a violation of s. 59. Nor can it be said that a breach of the duty defined in s. 12 of the *Code* not to interfere with employees’ freedom of association cannot be sanctioned if the employer has gone out of business (*Plourde*, at paras. 26-31). By way of analogy, would a court considering a breach, as of the time the breach occurred, of the duty of good faith codified as part of the general law in art. 1375 *C.C.Q.* refuse to sanction that breach solely because at the time of the hearing, the contract between the parties had been resiliated? Of course not. In such a case, resiliation does not erase the violation of the right of the creditors, the employees in the case at bar. If an employee proves the injury, he or she can be granted compensation (arts. 1458, 1590 and 1607 *C.C.Q.*; *Automobiles Canbec inc.*; *Union des routiers, brasseries, liqueurs douces & ouvriers de diverses industries*; *Natrel inc. v. Syndicat démocratique des distributeurs (CSD)*, [2000] R.J.D.T. 670 (T.A.)).
4. From this perspective, the purpose of s. 59 of the *Code* does not preclude reparation by equivalence, and neither do the section’s words or its nature. As professors Verge and Roux point out, the law is not [translation] “powerless when it comes to remedying the consequences of the closure of a business. Generally speaking, independently of any penal sanctions that might be applicable under the *Labour Code*, reparation by equivalence is always possible” : P. Verge and D. Roux, “Fermer l’entreprise: un ‘droit’. . . absolu?”, in Barreau du Québec, vol. 245, *Développements récents en droit du travail* (2006), 223, at p. 259. As a result, an arbitrator considering a case involving a closure cannot refuse to apply s. 59 of the *Code* on the basis that specific performance is no longer possible.
5. Before going further into the application of s. 59 in such a case, allow me to digress by discussing the argument on which the position of my colleagues Rothstein and Wagner JJ. is essentially based, namely that since this Court’s decision in *Plourde*, only a remedy under ss. 12 to 14 of the *Code* is available after a business has been closed. My colleagues’ conclusion is based on Binnie J.’s comment that “[t]he appropriate remedy in a closure situation lies under ss. 12 to 14 of the Code” (para. 4). In their view, this statement — which they characterize as “unequivocal” — is a precedent that closes the door on any other remedy (para. 121).
6. I agree with my colleagues that a precedent should be revisited only for the serious reasons this Court recently described in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. However, I cannot accept their, to say the least, broad interpretation of Binnie J.’s statement. First of all, as I mentioned above, the issue in *Plourde* was limited to the applicability of ss. 15 to 17 of the *Code*. The case therefore did not concern the applicability of every section that might be invoked. Indeed, that is what Binnie J. himself said in writing the following at para. 4 of his reasons:

The issue before the Court, as I see it, is quite limited albeit it is an important one. It is a matter of procedure that has nothing to do with any general inquiry into Wal-Mart’s labour practices. The narrow issue is whether the procedural vehicle offered by ss. 15 to 17 of the Code is available to the appellant in circumstances where a store no longer exists. More specifically, the issue is whether an employee in such circumstances has the benefit of the *presumption* in s. 17 that the loss of jobs was a “sanction” imposed for an unlawful motive, namely union busting. [Emphasis added.]

1. Given that the “narrow” issue was thus “limited” to the applicability of ss. 15 to 17 of the *Code*, it cannot be argued, as my colleagues do, that Binnie J.’s comments with regard to ss. 12 to 14 constitute a “precedent” that the Court is bound to follow in the future. In my opinion, they amount, at most, to a simple *obiter* that was limited to that specific case as presented, argued and analyzed. Furthermore, the remainder of Binnie J.’s sentence — which my colleagues do not mention — shows that he was discussing the alternative offered to employees by ss. 12 to 14, because that was what had been submitted to the Court:

The appropriate remedy in a closure situation lies under ss. 12 to 14 of the Code (which were in fact invoked by Jonquière employees in the *Boutin* case mentioned earlier). [Emphasis added; para. 4.]

1. It thus seems clear that Binnie J. did not intend to identify *every* possible remedy available to the employees or, above all, to respond to questions that were not before the Court. Moreover, I would note that he discussed neither the administrative remedies nor the general law remedies that might have been available. Does this necessarily mean that those remedies are never available when the resiliation of the employees’ contracts results from the closure of the establishment where they worked? That because Binnie J. did not mention them as alternatives, *Plourde* now precludes their application? I do not think so.
2. Indeed, the issue in *Plourde* was totally different from the one in the case at bar. *Plourde* is thus not a precedent that would render s. 59 inapplicable. As I mentioned above, therefore, there is nothing that precludes the application of that section in the context of the closure of an establishment. An arbitrator hearing a case in such a context must, as in any other case concerning a decision that results in a change in conditions of employment, determine whether the employer’s decision — to resiliate all the contracts of employment in this instance — is consistent with its past management practices or with those of a reasonable employer in the same circumstances.
   * 1. Employer’s Justification: Need to Explain the Closure
3. Ten years ago, in *Place des Arts*, our late colleague Gonthier J. stressed that neither the *Code* nor Quebec law in general precludes companies “[from going] out of business, either completely or in part” (para. 28). He added, however, adopting the words of Judge Lesage from *City Buick Pontiac (Montréal) Inc. v. Roy*, [1981] T.T. 22, that the exercise of the right to do so is contingent upon the decision to go out of business being [translation] “authentic and not a simulation” (para. 29).
4. Contrary to the view expressed by Rothstein and Wagner JJ. (at paras. 119 and 129), the application of s. 59 of the *Code* does not call this now well-established principle into question (see *Plourde*, at paras. 41 *et seq.*; *Boutin v. Wal-Mart Canada inc.*, 2005 QCCRT 269 (CanLII); *Société du centre Pierre-Péladeau*; *Syndicat des travailleuses et travailleurs du Centre d’approbation de Nordia — CSN*). Although s. 59 does not in fact deprive the employer of this power to go out of business either in part or completely, and by extension to resiliate the contracts of employment of some or all of its employees, the section does require that it exercise the power in a manner consistent with its normal management practices (see *Gravel & Fils Inc.*, at p. 90; *Syndicat des employés de Télémarketing Unimédia (CSN)*, at pp. 559-60; *Société du centre Pierre-Péladeau*, at para. 74; *Syndicat des travailleuses et travailleurs du Centre d’approbation de Nordia — CSN*, at para. 429-49). As I mentioned above, the necessary principal effect of the section is to “freeze” the employer’s business environment as it existed at the time the union arrived, which includes how the employer exercised its management power.
5. In this context, if the union’s evidence satisfies the arbitrator that the resiliation of the contracts was not consistent with such a practice, the employer must present evidence to prove the contrary (Royer and Lavallée, at p. 748).
6. If the employer wishes to avoid having the arbitrator accept the complaint filed under s. 59, therefore, it must show that the change in conditions of employment is not one prohibited by that section. To do so, it must prove that its decision was consistent with its normal management practices or, in other words, that it would have proceeded as it did even if there had been no petition for certification. Given that going out of business either in part or completely is not something that occurs frequently in any company, the arbitrator often has to ask whether a reasonable employer would, in the same circumstances, have closed its establishment: see *Syndicat des travailleuses et travailleurs du Centre d’approbation de Nordia — CSN*. Without suddenly becoming an expert in this regard, the arbitrator must also, therefore, above all else, be satisfied of the truthfulness of the circumstances relied on by the employer and of their significance.
7. If, after conducting this inquiry, the arbitrator is convinced that the resiliation is not consistent with the employer’s normal management practices, he or she must find that the employer’s decision resulted in a unilateral change in conditions of employment that is prohibited by s. 59 of the *Code*. The arbitrator will then have no choice but to sanction the violation of the right protected by that section by deciding on the appropriate remedy. Given that the employer cannot be ordered to continue operating or to reopen its business, the arbitrator can order it to compensate the employees whose rights have been violated.
   1. Validity of Arbitrator Ménard’s Award
8. An arbitrator, who is required by law to decide any complaint based on s. 59 of the *Code*, has considerable discretion in doing so that calls for deference on the part of the ordinary courts. In the instant case, Arbitrator Ménard held that, in the circumstances, the resiliation of all the contracts of employment constituted a change in the employees’ conditions of employment within the meaning of s. 59. In light of the facts and of the applicable law, I find his award reasonable and, hence, unreviewable.
   * 1. Standard of Review: Reasonableness
9. Since 1944, writes Professor Trudeau, grievance arbitration [translation] “has gradually emerged as the sole, obligatory and final method of settling disputes concerning the interpretation and application of collective agreements”: G. Trudeau, “L’arbitrage des griefs au Canada: plaidoyer pour une réforme devenue nécessaire” (2005), 84 *Can. Bar Rev.* 249, at p. 249. This Court, aware of the systemic importance accorded by Canadian legislatures to this expeditious, effective and specialized dispute settlement method, has always shown great deference to awards of arbitrators who act within the limits of their jurisdiction (*Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, at p. 488; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, at p. 721; *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230, at p. 251; *Ivanhoe inc. v. UFCW, Local 500*, 2001 SCC 47, [2001] 2 S.C.R. 565, at para. 32; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at paras. 16 *et seq.*; *Alberta Union of Provincial Employees*, at para. 41; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; Morin and Blouin, at p. 635).
10. In Quebec, the courts have assumed this same attitude of deference when ruling on the legality of arbitration awards under what is now s. 59 of the *Code* (*Olymel, s.e.c. v. Syndicat des travailleurs d’Olympia (CSN)*, 2007 QCCA 865 (CanLII); *Syndicat des employés de Daily Freight (CSN) v. Imbeau*, [2003] R.J.Q. 452 (C.A.); *Automobiles Canbec inc.*; *Guilde des musiciens du Québec v. Syndicat des salarié(e)s de la Guilde des musiciens du Québec (C.S.D.)*, 2001 CanLII 38640 (Que. C.A.); *Syndicat des travailleurs et travailleuses des épiciers unis Métro-Richelieu*, at p. 25; *Syndicat des employés de la Commission scolaire du Haut St-Maurice*; *Syndicat canadien de la Fonction publique, Section locale 3666 v. Desnoyers*, [1996] AZ-96029022 (Sup. Ct.); *S.E.D.A.C. Laboratoires inc. v. Turcotte*, [1998] AZ-98029150 (Sup. Ct.)). In view of the criteria developed by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, it seems to me that this judicial deference should continue to apply.
11. On the one hand, as I mentioned above, the Quebec legislature saw fit in 1977 to extend the jurisdiction of arbitrators by requiring that any disagreement relating to the maintenance of conditions of employment provided for in s. 59 be referred to arbitration as if it were a grievance (s. 100.10 of the *Code*; *Consolidated-Bathurst Inc. v. Syndicat national des travailleurs des pâtes et papiers de Port-Alfred*, [1987] R.J.Q. 520 (C.A.)). While thus displaying a [translation] “concern to avoid a multiplication of forums for deciding questions that are alike” (Morin *et al.*, at p. 1304), the legislature at the same time considered that this was the best way to protect a union’s initiative at this crucial stage of negotiation of a first collective agreement. As Arbitrator Tremblay put it in *Sobey’s inc., No 650*, at p. 725,

[translation] [The legislature] knew very well that there is no collective agreement during the pre-certification period. It nonetheless wished to protect the employees’ conditions of employment during that period by, first, having any complaint with respect to them dealt with as if it were a grievance and, second, providing that such complaints can be submitted to arbitration.

1. On the other hand, by granting sole jurisdiction over such grievances to arbitrators, the National Assembly recognized their expert knowledge and the fact that they are specialists in such matters (*Consolidated-Bathurst Inc.*; *Automobiles Canbec inc.* (*per* Otis J.A., at pp. 43-44); *Syndicat canadien de la Fonction publique, section locale 1450*; *Syndicat des chargées et chargés de cours de l’U.Q.A.C.* *(CSN) v. Syndicat des professeures et professeurs de l’Université du Québec à Chicoutimi*,2005 QCCRT 364 (CanLII)).
2. To this I should add the fact that the legislature has, in ss. 139, 139.1 and 140 of the *Code*, enacted what Arbour J. described as “general full privative clauses” (*Ivanhoe inc.*, at para. 25). It cannot therefore be doubted that the Quebec legislature intended to give the grievance arbitrator full latitude to rule on an alleged violation of the right provided for in s. 59. As a result, deference is in order, and judicial review will be available only if the award was unreasonable.
   * 1. Arbitrator Ménard’s Award Was Reasonable
3. In the case at bar, there is no support for a finding that Arbitrator Ménard’s award was unreasonable. On the contrary, in light of the principles I have been discussing, the award seems to be perfectly consistent with the words and the purposes of s. 59, and with the meaning and the scope the Quebec legislature intended to give that section. It is therefore clearly one of the “possible, acceptable outcomes which are defensible in respect of the facts and law”, *Dunsmuir*, at para. 47.
4. Moreover, turning to the arbitrator’s analysis, I would note at the outset that in determining that the case concerned a change in the employees’ conditions of employment rather than the legality of the closure, he correctly identified the subject matter of the litigation (paras. 14-17). In addition to stressing the distinction between the subject of the change and its raison d’être that flows from the interpretation given to s. 59 by judges and commentators, this premise enabled him to find, quite rightly, that s. 59 did not preclude the employer from closing its business (paras. 20 and 26).
5. This led the arbitrator to review the whole of the dispute in light of relevant principles drawn from the legislation itself, as well as from the case law and the academic literature (paras. 18-24). After stating that s. 59 [translation] “is intended to protect the right to form a union and negotiate a collective agreement” (para. 18), he correctly identified the facts the Union must prove in order to succeed (para. 19). Then, discussing the only one of these facts that was at issue in this case, he found on the evidence that the Union had established that the “collective layoffs” constituted a change in conditions of employment (para. 25). From this perspective, the quoted passages from the case law and the summary of the evidence set out at the start of the award suggest that he saw continuation of the employment relationship to be the condition of employment that had been changed by the employer.
6. Regarding the reason given to justify this change, Arbitrator Ménard held that the closure of the establishment did not suffice to explain the layoffs (para. 26). Since that was the only argument the employer had advanced, he found that the employer had failed to justify its decision and that the change was accordingly contrary to s. 59 (paras. 25 and 27-29).
7. On this point, I note that the arbitrator was right to maintain that invoking the closure (or the right to close its business) did not on its own suffice to justify the change for the purposes of s. 59 (para. 26). As I mentioned above, an arbitrator who hears a complaint based on that section cannot merely find that the employer has the power to manage its business and, in so doing, to close it. The arbitrator must also be satisfied that the employer would have closed the business even if the petition for certification had not been filed. Given the absence of evidence to that effect, however, it was reasonable to find that the closure did not flow from a normal management practice.
8. In discussing the “business as usual” rule and its application in this case, Arbitrator Ménard did not place an inappropriate burden of proof on the employer. In fact, it is clear from his review of the Union’s evidence that the Union had shown that the store’s situation did not suggest it would be closed. For example, Mr. Ménard stated early in his reasons that he was adopting the following [translation] “additional evidence”:

[translation] [T]he Employer at no time told anyone that it intended to go out of business or that it was experiencing financial difficulties. On the contrary, it indicated that, from a perspective of five (5) years, the store was performing very well and that its objectives were being met. [para. 2]

He then quoted a passage from the testimony of Gaétan Plourde in which Mr. Plourde revealed that the establishment’s manager had indicated to him that bonuses would be paid for 2003 (para. 2).

1. In this context, it must be understood that the arbitrator’s statement that the employer had not shown the closure to have been made in the ordinary course of the company’s business was grounded in his view that the Union had *already* presented sufficient evidence to satisfy him that the change was not consistent with the employer’s past management practices or with those of a reasonable employer in the same circumstances. It was in fact reasonable to find that a reasonable employer would not close an establishment that “was performing very well” and whose “objectives were being met” to such an extent that bonuses were being promised.
2. Given that his award was based on this objective finding, the arbitrator neither created a legal presumption nor reversed the onus. All he did was draw inferences of fact from the evidence that had been established before him, which he was free to do under the *Civil Code* and the *Labour Code*. These inferences, which Wal-Mart did not challenge, led Arbitrator Ménard to hold that the resiliation of the contracts of employment and, therefore, the change in the conditions of employment of all the establishment’s employees violated s. 59. I find this conclusion reasonable in light of the facts and the law. In these circumstances, the Court of Appeal should have dismissed the appeal and affirmed the Superior Court’s judgment dismissing Wal-Mart’s application for judicial review.
3. Conclusion
4. For these reasons, I would allow the appeal, set aside the judgment of the Court of Appeal and restore the Superior Court’s judgment dismissing the application for judicial review of Arbitrator Ménard’s award. I would remand the case to Arbitrator Ménard to determine the appropriate remedy in accordance with the disposition of his award. I would award costs throughout to the appellant.

The following are the reasons delivered by

Rothstein and Wagner jj. (dissenting) —

1. Introduction
2. This is the latest in a seemingly interminable series of cases in this Court and the courts in Quebec arising from the closure of the Wal-Mart store in Jonquière, Quebec over nine years ago. As in the other litigation, the question is whether the unfair labour practice provisions of the *Labour Code*, CQLR, c. C-27 (“*Code*”), ss. 12 to 14, should be the basis of the union’s complaint, rather than other provisions of the *Code*. In this appeal the union resorts to s. 59, which provides for a temporary prohibition on employers changing the conditions of employment, to argue that the Jonquière store closure and resultant employee termination are impermissible in the absence of justification. In doing so, the union attempts to side-step the requirement of proving that the store closure was motivated by anti-union animus.
3. The union appeals a decision rendered by the Quebec Court of Appeal on May 11, 2012. The Court of Appeal allowed the appeal brought by Wal-Mart from a judgment rendered by the Quebec Superior Court on judicial review on October 6, 2010. That judgment upheld an arbitration award made on September 18, 2009, which found that the employee dismissals on April 29, 2005 were unlawful.
4. Section 59 of the *Code* provides:

**59.** From the filing of a petition for certification and until the right to lock out or to strike is exercised or an arbitration award is handed down, no employer may change the conditions of employment of his employees without the written consent of each petitioning association and, where such is the case, certified association.

The same rule applies on the expiration of the collective agreement until the right to lock out or to strike is exercised or an arbitration award is handed down.

The parties may stipulate in a collective agreement that the conditions of employment contained therein shall continue to apply until a new agreement is signed.

1. The union argues that s. 59 of the *Code* is applicable in the case of a business closure and does not require that there be an ongoing business. According to the union, the continuation of the employment relationship is a condition of employment for the purposes of s. 59 of the *Code*. The closure of the Jonquière Wal-Mart store was thus a change in the conditions of employment that must be justified by Wal-Mart. Wal-Mart did not provide such justification. The union also submits that the arbitrator is not limited to restoring the *status quo ante* under s. 59 of the *Code* and that s. 100.12 empowers the arbitrator to award damages.
2. For the reasons that follow, we are of the opinion that the appeal is without foundation. Section 59 of the *Code* does not apply in the business closure context. As this Court stated in *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] 3 S.C.R. 465, the recourse available in such circumstances lies under ss. 12 to 14 of the *Code*. To say that s. 59 of the *Code* applies here would deny the employer the right to close its business and would be inconsistent with the purpose of s. 59.
3. Background
4. The facts of the case are well known to this Court. As in *Plourde* and *Desbiens v. Wal-Mart Canada Corp.*, 2009 SCC 55, [2009] 3 S.C.R. 540, this appeal has its roots in the decision of Wal-Mart to close its Jonquière store on May 6, 2005.
5. On August 2, 2004, the Commission des relations du travail (“CRT”) certified the union to represent employees of the Wal-Mart store in Jonquière. Between October 26, 2004 and February 1, 2005, the union and Wal-Mart held nine bargaining sessions but were unable to conclude a collective agreement. On February 2, 2005, the union applied to the Minister of Labour for the appointment of an arbitrator to determine the content of the first collective agreement. On February 9, 2005, the Minister of Labour referred the dispute to arbitration and notified the parties that he had done so. That same day, Wal-Mart announced that it would close its Jonquière establishment for business reasons, effective May 6, 2005. It informed employees that they would receive severance pay in an amount equal to two weeks of work per year of service. On April 29, 2005, Wal-Mart informed its employees that the store would, in fact, close that day, and collectively dismissed its 192 employees.
6. Wal-Mart employees initiated a series of proceedings related to the closure of the Jonquière store. In 2009, this Court addressed a proceeding brought by Gaétan Plourde under ss. 15 to 17 of the *Code*. Mr. Plourde sought to rely on the presumption of anti-union animus in s. 17, since he had engaged in numerous union activities that were concomitant with the termination of his employment. Binnie J., writing for the majority, noted that “[t]he appropriate remedy in a closure situation lies under ss. 12 to 14 of the Code” (at para. 4) and dismissed the appeal. Sections 12 to 14 of the *Code* were, in fact, invoked in *Boutin v. Wal-Mart Canada inc.*, 2005 QCCRT 225 (CanLII); 2005 QCCRT 269 (CanLII), but that proceeding was ultimately discontinued by the applicants on or about December 5, 2007. And, in *Pednault v. Compagnie Wal-Mart du Canada*, 2006 QCCA 666, [2006] R.J.Q. 1266, a former employee sought authorization to institute a class action, alleging that Wal-Mart’s decision to close the Jonquière store violated the employees’ freedom of association. The Quebec Court of Appeal found that the dispute was within the CRT’s exclusive jurisdiction and dismissed the motion.
7. Judicial History
8. In this case, the union filed a grievance under s. 59 of the *Code* on March 23, 2005. The union argued that Wal-Mart had changed the conditions of employment by closing the Jonquière store. The grievance alleged, *inter alia*, that the employer had [translation] “encouraged, fomented and fostered” rumours that the Saint-Hyacinthe and Brossard stores would close and that the employer was seeking to change the conditions of employment for anti-union reasons. The conditions of employment were described in the grievance as consisting of the right to associate, the right to bargain collectively, and the right to secure a collective agreement.
9. On August 30, 2006, arbitrator Jean-Guy Ménard declined jurisdiction in favour of the CRT. He found that the true subject matter of the complaint was [translation] “the violation of rights established in the *Labour Code* through tactics that were considered to be unlawful” and was therefore within the CRT’s exclusive jurisdiction ([2006] R.J.D.T. 1665, at para. 21).
10. On November 1, 2007, the Superior Court set aside Mr. Ménard’s decision because [translation] “in the instant case, in the absence of evidence, one could not find on the basis of the words of the grievance that the arbitrator lacked jurisdiction without hiding behind strict formalism, as the respondent arbitrator did” (2007 QCCS 5704, [2008] R.J.D.T. 138, at para. 44). The Superior Court remitted the matter to Mr. Ménard and asked him to reserve his decision on the preliminary objection and address it at the same time as the merits.
11. On September 18, 2009, the arbitrator allowed the union’s grievance. Finding that the grievance concerned the dismissals and not the closure of the store, he held that the dismissals constituted a change in the conditions of employment. The arbitrator acknowledged that employers in Quebec have the right, *a priori*, to close up shop. However, where this causes a change in the conditions of employment under s. 59 of the *Code*, the employer must prove that the change was made in the ordinary course of business. Wal-Mart failed to show that the dismissal of employees was “business as usual” ([2009] R.J.D.T. 1439, at para. 20).
12. On October 6, 2010, the Quebec Superior Court, *per* Moulin J., dismissed Wal-Mart’s application for judicial review (2010 QCCS 4743, [2010] R.J.D.T. 1118). Contrary to Wal-Mart’s submissions, the Superior Court found that the arbitrator did not apply a presumption that dismissals during the s. 59 freeze period are illegal. Rather, the arbitrator only used the word “presumption” to indicate that, after his preliminary finding of fact that the employer changed a condition of employment, the change was presumed to contravene s. 59 of the *Code* unless the employer successfully invoked the “business as usual” defence.
13. Moulin J. held that the dismissal of an employee may constitute a change in the conditions of employment. It was therefore reasonable for the arbitrator to find that termination of *all* employees in the context of a business closure was a change in conditions of employment under s. 59 of the *Code*. And, since Wal-Mart had merely argued that this change was implemented for business reasons, it was not unreasonable to conclude that Wal-Mart did not successfully demonstrate that the store closure was part of the ordinary course of business.
14. On May 11, 2012, the Quebec Court of Appeal set aside the judgment of the Superior Court (2012 QCCA 903, [2012] R.J.Q. 978). Like Mr. Ménard in his first arbitration award, Vézina J.A. (with Gagnon J.A.) found that the true nature of the dispute related to ss. 12 to 14 of the *Code*. He assessed whether it was nevertheless possible to equate the complete and permanent closure of a business with a change in conditions of employment. In this regard, he stated that it [Translation] “is not a change, but a termination of employment. The operation of the business does not change; it ceases” (para. 117). The permanent closure of an establishment “falls outside” the concept of a condition of employment (para. 118). Vézina J.A. also found that it is impossible to restore the *status quo ante* in a store closure situation because this would amount to forcing the employer to continue operating its business, which would be inconsistent with the well-established principle in Quebec law that an employer has the right to close its business.
15. In concurring reasons, Léger J.A. found that it was unreasonable to view the dismissals as justified by a business closure on the one hand and to consider the termination of the employment relationship to be a change in conditions of employment on the other. The arbitrator’s analysis was unreasonable, since it shifted the debate from justification for the dismissals to the cause of the store closure. Léger J.A. also found that the arbitrator’s decision was inconsistent with the employer’s continued right, during the s. 59 freeze on conditions of employment, to manage the business. In short, Mr. Ménard’s decision denied the employer the right to close its business and gave the employees a right to employment stability that they had not previously enjoyed.
16. Issues
17. This Court must determine whether s. 59 of the *Code* applies in situations involving the complete and permanent closure of a business. If so, it will be necessary to determine whether the closure of Wal-Mart’s Jonquière store constitutes a change in conditions of employment contrary to s. 59 of the *Code*.
18. Statutory Provisions
19. The relevant statutory provisions are contained in Appendix.
20. Analysis
    1. Section 59 of the Code — Legislative History and Purpose: Not to Prevent Closure of a Business
21. The provision that later became s. 59 of the *Code* was initially located in the forbidden practices section of the *Labour Relations Act*, R.S.Q. 1941, c. 162A. However, in 1964, it was moved to the chapter entitled “Collective Agreements” in the new *Code*, which was enacted to consolidate seven employment law statutes and to thus provide a more coherent legislative framework (F. Morin et al., *Le droit de l’emploi au Québec* (4th ed. 2010), at p. 939). Section 59 provides for a temporary “freeze” that prevents employers from changing the conditions of employment from the time of the filing of a petition for certification or the expiration of a collective agreement, until the right to lock out or to strike is exercised or an arbitration award is handed down.
22. The purpose of s. 59 is to maintain [Translation] “the fragile equilibrium existing between the parties at this stage of nascency of the collective labour relations process” (*Automobiles Canbec inc. v. Hamelin*, 1998 CanLII 12602 (Que. C.A.), Otis J.A., at p. 37; see also F. Morin and R. Blouin, with the collaboration of J.-Y. Brière and J.-P. Villaggi, *Droit de l’arbitrage de grief* (6th ed. 2012), at p. 200). The maintenance of the *status quo* is designed to facilitate the negotiation of a collective agreement: see *Union des routiers, brasseries, liqueurs douces & ouvriers de diverses industries (Teamsters, Local 1999) v. Quality Goods I.M.D. Inc.*, [1990] AZ-90141179 (T.A.), at p. 6.
23. However, there is nothing to suggest that s. 59 of the *Code* was designed to prevent an employer from closing its business. Before the Commission consultative sur le travail et la révision du Code du travail chaired by Judge René Beaudry of the Provincial Court, for instance, some unions requested that stricter standards be adopted for business closure situations, including a [Translation] “stringent procedure for justifying closures” (*Le travail: une responsabilité collective: Rapport* *final de la* *Commission consultative sur le travail et la révision du Code du travail* (1985), at p. 85). However, the final report made no recommendation in that direction. And, in connection with the 2001 amendments to the *Code*, the then Minister of Labour, Jean Rochon, stated:

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

(National Assembly, *Journal des débats de la Commission permanente de l’économie et du travail*, vol. 37, No. 22, 2nd Sess., 36th Leg., May 29, 2001, at p. 47)

* 1. Section 59 of the Code Does Not Apply

1. Wal-Mart contends that s. 59 of the *Code* does not apply in cases, as here, where there is a genuine and definitive closure of a business. For the reasons that follow, we agree.
   * 1. The Appropriate Recourse for Cases of Business Closure Lies Under Sections 12 to 14 of the *Code*
2. This Court has already settled the question of how, in the case of store closure, former employees may seek recourse under the *Code*. In proceedings arising out of the same factual circumstances as those before us now, this Court stated that “[t]he appropriate remedy in a closure situation lies under ss. 12 to 14 of the Code” (*Plourde*,at para. 4). This unequivocal statement should preclude this Court from now attempting to shoehorn the store closure situation into s. 59 of the *Code*. As Justice Binnie observed in *Plourde*, “[i]t would be unfortunate, absent compelling circumstances, if the precedential value of a . . . decision of this Court was thought to expire with the tenure of the particular panel of judges that decided it” (para. 13).
3. With respect, the majority seeks to revive the position adopted by the dissent in *Plourde* (at paras. 107 and 110) to the effect that the closure of a business is *not* a complete answer and that recourses other than ss. 12 to 14 exist under the *Code*. This approach undermines the principle of *stare decisis*, whose importance this Court so recently emphasized in *Canada v. Craig*,2012 SCC 43, [2012] 2 S.C.R. 489.
4. The union, for its part, argues that *the dismissal of employees* from the Jonquière Wal-Mart store amounts to a changed condition of employment contrary to s. 59 of the *Code*. However, as explained below, there can be no inquiry into changed conditions of employment where the closure of the store had the secondary effect of employment ceasing to exist. Instead, the appropriate recourse falls under s. 12 of the *Code*, which “would focus directly on the reason for the closure of the store not on the reason for the dismissal of employees at a store that no longer exists” (*Plourde*,at para. 64). Despite the failure of the previous attempt by employees and the union to pursue Wal-Mart under s. 12 of the *Code* (*Boutin*), the union now tries to circumvent the requirements of s. 12 by resort to s. 59.
   * 1. Employer’s Right to Close its Business
5. It is trite law in Quebec that an employer has the right to close its business: *I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 SCC 2, [2004] 1 S.C.R. 43, at para. 28; *Plourde*,at para. 41. In *Place des Arts* and *Plourde*, this Court adopted the articulation of the right as set out in *City Buick Pontiac (Montréal) Inc. v. Roy*, [1981] T.T. 22:

[translation] In our free enterprise system, there is no legislation to oblige an employer to remain in business and to regulate his subjective reasons in this respect. . . . If an employer, for whatever reason, decides as a result to actually close up shop, the dismissals which follow are the result of ceasing operations, which is a valid economic reason not to hire personnel, even if the cessation is based on socially reprehensible considerations. What is prohibited [in the context of the s. 17 presumption] is to dismiss employees engaged in union activities, not to definitively close a business because one does not want to deal with a union or because a union cannot be broken, even if the secondary effect of this is employee dismissal. [Emphasis deleted; p. 26.]

1. Only one condition attaches to the employer’s otherwise unimpeded right to close up shop: the closure must be genuine and definitive. As the above quotation makes clear, the employer may close its business for “whatever reason”. This Court affirmed that the *motives* for closure are beyond review by labour arbitrators and courts: *Place des Arts*,at para. 31. Only where anti-union animus is alleged under ss. 12 to 14 of the *Code* may tribunals inquire into an employer’s motives for closing its business: *Plourde*,at para. 26.
2. The facts in this appeal demonstrate that Wal-Mart, in closing its Jonquière store, exercised its legal right to close up shop. Although the initial grievance alleged anti-union animus, the union makes no such claims before this Court. In 2005, the union did file a complaint under ss. 12 to 14 of the *Code* (*Boutin*), but discontinued the proceedings in 2007 (see *Plourde*,at para. 30). The only inquiry available to the arbitrator and courts below in this case was into the genuineness of the store closure. In *Plourde*, Binnie J. wrote:

[T]he CRT found that Wal-Mart had shown the store’s closure to be genuine and permanent. The evidence supported the conclusion that the establishment no longer had any employees, was closed to the public and had been emptied of its merchandise and equipment and stripped of any identifying signage or colours. Moreover, the resiliation of the lease and the uncontradicted explanations regarding efforts to sell the building sufficed to show, in light of the evidence as a whole, that the closure of the store was genuine. [para. 19]

1. Section 59 cannot apply to Wal-Mart’s genuine and definitive closure of its Jonquière store because it would require Wal-Mart to justify its decision to close the store, which is inconsistent with the employer’s right, under Quebec law, to close its business for *any* reason. The sole requirement is that the business closure be genuine and definitive. Once an employer exercises its right to close up shop, then s. 59 of the *Code* cannot impose an additional *ex post facto* justification requirement simply because this closure gives rise to a secondary effect — the collective termination of employees.
2. Yet this is precisely what our colleague seeks to do at paras. 52-56 of his reasons. Despite the employer’s unqualified right to close its business, Justice LeBel states that it is not enough for an arbitrator to determine whether the employer had the pre-existing rightto act as it did — the arbitrator must be further satisfied that the employer exercised this power in conformity with its previous business practices or with those of a “reasonable employer”.
3. But a store closure, by definition, does not conform to previous business practices. If s. 59 were to apply to a situation of store closure, the result would be that businesses could never prove a store closure was business as usual. It would also mean that the employer would be prevented from exercising its right to close its business during the s. 59 freeze period and yet could, immediately upon the conclusion of a collective agreement, the exercise of the right of lock out or strike, or the issuance of an arbitration award, close its business for any reason. Legislation cannot be interpreted to give rise to such absurd results.
4. To apply s. 59 to business closure situations would also undermine the *Code*’s assignment of the burden of proof and thereby disrupt the *Code*’s internal coherence. Under ss. 12 to 14, the claimant must prove that anti-union animus motivated the store closure. Contrarily, under s. 59, the *employer* would bear the burden of justifying the store closure under the “business as usual” rule.
5. It is true that, where s. 59 applies, a claimant union has the initial burden of proving that the employer changed the conditions of employment after the filing of a petition for certification. But our colleague’s contention, at para. 54, that the union *also* bears the burden of proving that the change is incompatible with the employer’s usual business practice, departs from longstanding precedent for no apparent reason. The precedents are consistent that the *employer* bears the burden of justifying the changed condition of employment according to the “business as usual” rule: see *Syndicat des employé-es de SPC Automation (CSN) v. SPC Automation Inc.*, [1994] T.A. 718, at p. 753; *Mont-Laurier (Ville de) v. Syndicat des professionels et professionnelles de la Ville de Mont-Laurier (CSN)*, 1995 CanLII 1874 (T.A.); *Conseil conjoint du Québec*, *Syndicat du vêtement, du textile et autres industries, local 2625 v. Société en commandite Greb International (Division Kodiak)*, [1999] AZ-99141036 (T.A.), at p. 33; *Association des juristes de l’État v. Conseil du Trésor*, 1999 CanLII 5144 (T.A.), at p. 17. That is, the employer must show that the change was [translation] “in accordance with criteria it established for itself before the arrival of the union in its workplace” and must be “similar in nature to [those] that were made previously” (*Pakenham v. Union des vendeurs d’automobiles et employés auxiliaires, section locale 1974, UFCW*, [1983] T.T. 189, at p. 202).
6. The *Code* possesses, as our colleague explains, a logical order that traces the evolution of associational life in the workplace (para. 31). Expanding the available recourses under the *Code* in the manner suggested by the majority would inject a degree of duplication into the *Code* that is inconsistent with this logical ordering. The purpose of s. 59 is to protect the equilibrium between the parties as they work toward a collective agreement, and not to allow the union to get around its burden of proof under ss. 12 to 14 in the context of a business closure. To allow a claim to proceed under s. 59 in a store closure situation would confuse the separate objectives of these provisions. The task of this Court is certainly not to “erode the distinct roles assigned by the legislature” to ss. 12 to 14 and s. 59 (*Plourde*,at para. 38).
   * 1. Section 59 of the *Code* Presupposes the Existence of an Ongoing Business
7. Contrary to the conclusion of our colleague at para. 66, the text and context of s. 59 of the *Code* indicate that it cannot apply to a business closure situation because it presupposes the existence of an ongoing business. Section 59 is designed to facilitate the conclusion of a collective agreement within an existing employment relationship; it is not designed to maintain the employment relationship *per se*: R. P. Gagnon et al., *Le droit du travail du Québec* (7th ed. 2013), at p. 599.
8. A contextual analysis supports the view that the existence of an ongoing business is a condition precedent to the application of s. 59. The provision’s purpose is to maintain a balance between the employer and the employees during the nascent stage of the collective labour relations process, in order to facilitate the conclusion of a collective agreement; this is indicated by its location in the *Code*, in the chapter entitled “Collective Agreements”. This purpose is consistent with the fact that certification is not an end in itself, but the beginning of the collective bargaining process: *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048,at p. 1099.
9. The sole concern of the chapter in which s. 59 is located is to facilitate the conclusion of a collective agreement by the parties or through arbitration, as specified by s. 58. The freeze in employment conditions prescribed by s. 59 applies to achieve this objective; the period ends when “the right to lock out or to strike is exercised or an arbitration award is handed down”. But a collective agreement, lock-out, strike, or arbitration award can only take place in the context of the ongoing operation of a business. A strike or lock-out, or an arbitration award prescribing a collective agreement only make sense in the case of an ongoing business to which the strike, lock-out, or collective agreement will apply. The closure of a business, like the Jonquière Wal-Mart store, means that the right to lock out or to strike can never be exercised, and that an arbitration award imposing a collective agreement will never be applicable. Section 59 therefore cannot apply in the case of a store closure.
10. To the same effect, the words “employer” and “employees” in s. 59 indicate that these components are essential to the application of the provision. This Court has affirmed that, in the context of the *Code*, “the legislator intended that collective bargaining and the resulting collective agreement take place within the following three-part framework: an employer, his undertaking and the association of employees connected with that employer’s undertaking” (*Bibeault*,at p. 1101). In the case of the genuine and definitive closure of a business, two of these requirements, the employer and the undertaking, cease to exist. The elimination of these essential components of the collective bargaining process means that s. 59 of the *Code* cannot apply to the facts in this appeal. There can be no changed conditions of employment where there is, simply put, no employer, no undertaking, and therefore no employment.
    * 1. An Arbitrator Cannot Provide an Appropriate Remedy Under Section 59 in the Case of Business Closure
11. Section 59 cannot apply in the context of a business closure as there is no appropriate remedy available to the arbitrator. The objectives underlying arbitration are speed and fairness (Morin and Blouin, at p. 27). Arbitrators typically encourage solutions that are consistent with the parties’ practices in order to strengthen their continued relationship. The goal of the arbitrator, in responding to a breached obligation, is to return the parties to the situation prevailing before the breach (Morin and Blouin, at pp. 547-48).
12. The purpose of s. 59 of the *Code* is to maintain the balance between the employer and employees with a view to their continuing employment relationship. Where there is a breach of s. 59, then, the arbitrator must provide a remedy that restores the *status quo ante*. Since employers in Quebec have the right to close their business, an arbitrator cannot order an employer to reopen a store. While it is true that an arbitrator has the power to award damages under s. 100.12 of the *Code*, such a remedy would be inconsistent with the purpose of s. 59, since it would not restore the balance between the parties or facilitate the conclusion of a collective agreement.
13. Arbitrators may award damages to compensate for harm that cannot be compensated for by an award in kind (Morin and Blouin, at p. 555). Wal-Mart has already compensated employees of the Jonquière store for the loss of their jobs. There is no further compensable harm that would arise from a termination of the union certification process in breach of s. 59. In our view, an arbitrator cannot be expected to award a remedy under s. 100.12 that is severed from the breach it seeks to repair.
14. Our colleague notes that the employer’s exercise of its right to close its business cannot immunize it from the adverse financial consequences of such action (paras. 68-69). But this is plainly not the case here: upon closure of the Jonquière store, Wal-Mart paid its employees severance pay in an amount equal to two weeks of work *per* year of service. Since s. 59 does not apply to the business closure situation, it gives rise to no additional financial consequences for Wal-Mart. This does not mean that there is “no remedy *anywhere* under the Code . . . on proof that the termination was for anti-union reasons” (*Plourde*,at para. 51 (emphasis in original)). The remedy is simply to be pursued under ss. 12 to 14 of the *Code*, not s. 59. That the union’s previous attempt to pursue Wal-Mart under ss. 12 to 14 of the *Code* failed (*Boutin*) does not entitle it to an alternate pathway under s. 59.
15. Conclusion
16. In light of our conclusion that s. 59 does not apply to the facts on this appeal, it is not necessary to pursue a substantive analysis of the union’s s. 59 claim.
17. The appeal should therefore be dismissed, with costs payable to the respondent.

**Appendix**

*Labour Code*, CQLR, c. C-27

**12.** No employer, or person acting for an employer or an association of employers, shall in any manner seek to dominate, hinder or finance the formation or the activities of any association of employees, or to participate therein.

No association of employees, or person acting on behalf of any such organization, shall belong to an association of employers or seek to dominate, hinder or finance the formation or activities of any such association, or to participate therein.

**13.** No person shall use intimidation or threats to induce anyone to become, refrain from becoming or cease to be a member of an association of employees or an employers’ association.

**14.** No employer nor any person acting for an employer or an employers’ association may refuse to employ any person because that person exercises a right arising from this Code, or endeavour by intimidation, discrimination or reprisals, threat of dismissal or other threat, or by the imposition of a sanction or by any other means, to compel an employee to refrain from or to cease exercising a right arising from this Code.

This section shall not have the effect of preventing an employer from suspending, dismissing or transferring an employee for a good and sufficient reason, proof whereof shall devolve upon the said employer.

**59.** From the filing of a petition for certification and until the right to lock out or to strike is exercised or an arbitration award is handed down, no employer may change the conditions of employment of his employees without the written consent of each petitioning association and, where such is the case, certified association.

The same rule applies on the expiration of the collective agreement until the right to lock out or to strike is exercised or an arbitration award is handed down.

The parties may stipulate in a collective agreement that the conditions of employment contained therein shall continue to apply until a new agreement is signed.

**100.12.** In the exercise of his duties the arbitrator may

(*a*) interpret and apply any Act or regulation to the extent necessary to settle a grievance;

(*b*) fix the terms and conditions of reimbursement of an overpayment by an employer to an employee;

(*c*) order the payment of interest at the legal rate, from the filing of the grievance, on any amount due under an award he has made.

There must be added to that amount an indemnity computed by applying to that amount, from the same date, a percentage equal to the amount by which the rate of interest fixed according to section 28 of the Tax Administration Act (chapter A 6.002) exceeds the legal rate of interest;

(*d*) upon request of a party, fix the amount due under an award he has made;

(*e*) correct at any time a decision in which there is an error in writing or calculation or any other clerical error;

(*f*) in disciplinary matters, confirm, amend or set aside the decision of the employer and, if such is the case, substitute therefor the decision he deems fair and reasonable, taking into account the circumstances concerning the matter. However, where the collective agreement provides for a specific sanction for the fault alleged against the employee in the case submitted to arbitration, the arbitrator shall only confirm or set aside the decision of the employer, or, if such is the case, amend it to bring it into conformity with the sanction provided for in the collective agreement;

(*g*) render any other decision, including a provisional order, intended to protect the rights of the parties.

*Appeal allowed with costs throughout,* Rothstein *and* Wagner JJ. *dissenting.*

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