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CASE LAW UPDATE: SUPREME COURT OF CANADA EXPANDS SCOPE OF ARBITRATION

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On September 18, 2003, the Supreme Court of Canada released a decision (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*¹) dealing with the application of human rights and employment statutes in the context of a collective agreement. Arguably, this decision has expanded the scope of an arbitrator's jurisdiction to include the enforcement of all employment-related legislation, regardless of the existence of a connection to a collective agreement.

In this particular instance, the Court was asked whether a grievance arbitrator has the power and jurisdiction to enforce the substantive rights and obligations of the *Human Rights Code*. As discussed in detail below, the Court held that an arbitrator is empowered to enforce those rights as if they were implicitly incorporated within all collective agreements.

Facts

The facts of the case are as follows. The grievor was a probationary employee and a member of the union. Her terms of employment were governed by a collective agreement that stated a probationary employee could be discharged at the sole discretion of, and for any reason satisfactory to, the employer. The agreement further stated that any decision to terminate a probationary employee was not subject to the grievance and arbitration process. Prior to the expiry of her probationary term, the employee went on maternity leave. Within a few days of returning to work, the employee was discharged.

Decision

After the case progressed through the Divisional Court and the Ontario Court of Appeal, the Supreme Court of Canada held that an arbitrator not only has the power but also the **responsibility** to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement.

The rationale underlying the Supreme Court's decision is that human rights and employment statutes "establish a floor beneath which an employer and

¹ 2003 SCC 42.

union cannot contract". In other words, despite an express provision in the collective agreement stating a probationary employee can be terminated for any reason, no employee can be terminated on grounds that offend the *Code*. Furthermore, the Court determined that granting arbitrators the authority to enforce substantive human rights will promote the expeditious resolution of workplace disputes and has the added advantage of bolstering human rights protections.

Impact

What impact will this decision have on future arbitrations? This case stands for the proposition that an alleged violation of the *Code* will also constitute a violation of the collective agreement. As a result, an arbitrator is now empowered and required to consider human rights complaints whenever they arise. Furthermore, the reasoning in this case applies to all employment-related legislation, not just the *Human Rights Code*.

The real impact of this decision will only become clear over time. Practically speaking, the likely result will be the filing of grievances alleging violations of the *Human Rights Code* or other employment-related statutes which have not typically been considered as being arbitrable under a collective agreement. Only once novel claims have been raised and dealt with at arbitration will we know into what new areas, if any, this decision leads the grievance arbitration process.

If you have any questions regarding this Newsletter, or wish to receive a copy of the above decision, please contact any member of Miller Thomson's Labour and Employment Group.

ABOUT THE AUTHOR:

Michael Conradi is a member of our Labour and Employment Group and advises clients in both the public and private sector.

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