Supreme Court changes how arbitrators apply the law

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The Supreme Court of Canada ruled on December 2, 2011 that MAHCP could not rely on the terms of the collective agreement that it had bargained with the employer. The Supreme Court allowed an arbitrator to "estop" the union from collecting a benefit for its members. In allowing this estoppel the Supreme Court changed the law in Manitoba regarding labour arbitrations. This article will review the Supreme Court Decision written by Supreme Court Justice Fish.

The case started in July of 2008 when a member from Flin Flon filed a grievance because she was not being credited with the right vacation by the employer. The employer was calculating vacation entitlement without including casual service. The Arbitrator agreed with her that casual service should count for calculating vacation entitlement but said that because the employer had been calculating the vacation entitlement in that way for a long time, the union was "estopped" from enforcing the correct calculation until after the current collective agreement had ended.

MAHCP applied for judicial review of the decision on the basis that the arbitrator had incorrectly applied the law of estoppel in the case. The law of estoppel states that both parties to a practice have to be aware of the practice in order for one of the parties to be stopped from reneging on the practice. The employer had not shown that the union was aware of the employer's practice over the years. The judge reviewing the case agreed with the arbitrator and upheld the decision as it was imposed.

MAHCP Goes to the Supreme Court

MAHCP appealed the decision to the Manitoba Court of Appeal. The Manitoba Court of Appeal agreed with the union. The Court of Appeal said that the arbitrator had wrongly imposed the law of estoppel. The law of estoppel can only be used where there is evidence that both parties to the collective agreement had known about a practice and had either by actions or words agreed that the practice was correct. The Manitoba Court of Appeal decision overturned the arbitrator's decision because the arbitrator had incorrectly imposed the law of estoppel.

The employer appealed the decision to the Supreme Court of Canada. The Supreme Court avoided the analysis of whether or not the arbitrator was correct when he applied the law of estoppel. The Court dealt broadly with the issue of standard of review and hardly at all with respect to the issue before it, the correct application of the law of equitable/promissory estoppel. The Court did not say that the decision of the Court of Appeal was ***wrong*** when it said that the arbitrator had incorrectly applied the law of estoppel. Instead, the Supreme Court focused on the long-standing practice of the employer on the case. Justice Fish said:

> "…the arbitrator held that the union was barred by its long-standing acquiescence from grieving the employer's application of the disputed provisions. Given the employer's consistent and open practice of calculating vacation entitlements as it did, and the employer's detrimental reliance on the union's acquiescence, it would be unfair, the arbitrator found, for the union to now hold the employer to the strict terms of the collective agreement in that regard."

Until this case, unfairness alone has never been the sole reason for imposing an estoppel. The Supreme Court overhauled the powers of arbitrators in labour cases, especially as it relates to applying the law of estoppel. It stated that "Labour arbitrators are not legally bound to apply equitable and common law principles – including estoppel – in the same manner as courts of law... They (labour arbitrators) must, of course, exercise that mandate reasonably, in a manner consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance."

When discussing the arbitral cases that the employer relied on at the arbitration hearing, Justice Fish stated: "Both arbitrators were alive to the foundational principles of estoppel. Essentially, they found that the union was fixed with knowledge – constructive, if not actual – of the employer's mistaken application of the disputed clauses throughout the relevant time; that this sufficiently fulfilled the intention requirement of estoppel; that the employer could reasonably rely on the union's acquiescence; that the employer's reliance was to its detriment; and that all of this had the effect of altering the legal relations between the parties."

Justice Fish avoided the Court of Appeal's correct analysis of the law of promissory estoppel by making the determination that this was purely a labour relations issue and therefore was not a "general question of law". The Court of Appeal's analysis and application of promissory estoppel is still the correct way of interpreting the law of estoppel. However, the Supreme Court determined that labour arbitrators don't need to apply the law correctly...just reasonably.

A New Doctrine

Fish states further: "To assist them in the pursuit of that mission, arbitrators are given a broad mandate in adapting the legal principles they find relevant to the grievances of which they are seized." The broad discretion provided to the arbitrator in this case has essentially created a new doctrine of law applicable to labour arbitrators.

The new doctrine states that so long as the arbitrator issues a decision in a "manner consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance" it can deviate from the established legal requirements of the law as imposed by the courts and in other tribunal settings.

This is significant. It gives arbitrators in Manitoba a lot more power than they had before. It essentially deprives either the union or the employer from the ability to overturn an arbitrator's decision in court. That can work for or against a union. It means that matters will have to be dealt with at the local level. Only when the arbitrator clearly acts unreasonably will there be recourse to the courts. An arbitrator is allowed to act contrary to the law depending on what kind of law it is.

This decision comes at a time when arbitrators are being asked to deal with more and more sophisticated legal arguments. An arbitrator has jurisdiction to deal with any matter arising out of the employment relationship. As a result, negligence, assault, harassment, and any other tort that arises in the workplace have to be determined by an arbitrator. This case has essentially said that in deciding these matters an arbitrator simply has to be reasonable in the circumstances. He doesn't have to be right according to the law.

One of the benefits conferred by this case and the principles outlined therein is that an arbitrator can fashion a fair remedy without being bound by the application of the law as applied by the courts. This could be a significant benefit for the union in the long run because often it is the employer that seeks to impose the strict letter of the law when defending itself from grievances.

Only time will tell how these new found powers bestowed on arbitrators will affect labour jurisprudence in Manitoba.

This paper is intended as an introduction to the topic and not as legal advice. If you require specific advice with respect to your situation, you should contact a lawyer.

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