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Supreme Court Upholds Labour Arbitrators' Exclusive Jurisdiction to Hear Human Rights Complaints Arising from Collective Agreements

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Can a unionized employee file a complaint before the Human Rights Tribunal of Ontario for disputes arising from the interpretation, administration, or alleged violation of a collective agreement? This question has been heavily debated amongst employers, unions, and the legal community.

On October 22, 2021, the Supreme Court of Canada issued its decision in *Northern Regional Health Authority v Horrocks*, 2021 SCC 42, wherein a majority of the justices found that Manitoba's statutory scheme granted labour arbitrators exclusive jurisdiction to hear all matters—including those involving human rights complaints—that arise from disputes under a collective agreement.

The Supreme Court majority's reasoning may apply to Ontario labour disputes as well.

Background

In 2011, Ms. Linda Horrocks filed a complaint with the Manitoba Human Rights Commission alleging that her former employer, the Northern Regional Health Authority ("NRHA"), unlawfully discriminated against her when it terminated her employment. The NRHA challenged the Commission's jurisdiction to adjudicate the matter on the basis that the grievance dispute process in the legislative scheme provided labour arbitrators with exclusive jurisdiction to hear Ms. Horrocks' complaint. The Commission disagreed and, following several appeals, this issue found itself before the Supreme Court.

Decision

Brown J, writing for the majority, agreed with the NRHA, and found that a labour arbitrator possessed exclusive jurisdiction to hear Ms. Horrocks' complaint notwithstanding the human rights-related allegations raised therein. The majority crafted a two-part test to determine whether a labour arbitrator's jurisdiction is exclusive in regard to a particular dispute. An adjudicator must:

1. Examine the relevant legislation to determine whether it grants the arbitrator exclusive

jurisdiction and, if so, over what specific matters. Where the legislation includes a mandatory dispute resolution clause, an arbitrator has the exclusive jurisdiction to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary; and

2. Assess the ambit of the collective agreement and the factual circumstances underpinning the dispute to determine whether the dispute falls within the scope of the arbitrator's jurisdiction. In general, all disputes that arise from the interpretation, application, or alleged violation of the collective agreement will fall within the arbitrator's jurisdiction.

The first step requires a careful interpretation of the statutory scheme to determine whether the legislature intended to provide labour arbitrators with exclusive jurisdiction, or whether it instead "clearly expressed legislative intent" for arbitrators and human rights bodies to share concurrent, or overlapping, jurisdiction. While every province possesses its own statutory scheme, several are sufficiently analogous to Manitoba's for the purpose of the *Horrocks* test.

Ontario Labour Arbitrators May Possess Exclusive Jurisdiction

Manitoba and Ontario have legislated analogous binding dispute resolution provisions in their respective labour relations statutes. These clauses grant exclusive jurisdiction to labour arbitrators over matters arising under a collective agreement, and demonstrate an intention to oust the operation of human rights legislation:

> *[I]n light of the jurisprudence of this Court which I have recounted, I am of the view that the inclusion of a mandatory dispute resolution clause in a labour relations statute must qualify as an explicit indication of legislative intent to oust the operation of human rights legislation.*

The Supreme Court majority indicated that Ontario's relevant provision serves this purpose.

Both Manitoba and Ontario have established human rights bodies to hear complaints alleging violations of their respective Human Rights Codes. But unless a legislature provides a "clearly expressed legislative intent" to grant concurrent jurisdiction to both labour arbitrators and a human rights body, arbitrators' exclusive jurisdiction will remain.

The Supreme Court majority noted that both British Columbia and the Government of Canada have expressly conferred concurrent jurisdiction on both labour arbitrators and human rights tribunals by granting these tribunals the power to defer consideration of a matter that may be subject to labour arbitration or a grievance procedure:

> *Ideally, where a legislature intends concurrent jurisdiction, it will specifically so state in the tribunal's enabling statute. But even absent specific language, the statutory scheme may disclose that intention.* ***For example, some statutes specifically empower a decision maker to defer consideration of a complaint if it is capable of being dealt with through the grievance process (see, e.g., Human Rights Code, R.S.B.C. 1996, c. 210, s. 25; Canada Labour Code, ss. 16(l.1) and 98(3); Canadian Human Rights Act, R.S.C. 1985, c. H 6, ss. 41 and 42). Such provisions necessarily imply that the tribunal has concurrent jurisdiction over disputes that are also subject to the grievance process****. In other cases, the provisions of a statute may be more ambiguous, but the legislative history will plainly show that the legislature contemplated concurrency*. [emphasis added]

The three examples cited by the Supreme Court majority in the above extract each involve a provision that expressly references a grievance process or arbitration. Such explicit references are not found in Ontario's *Human Rights Code*, nor does the legislative history of the *Code*, which was substantially rewritten in 2008, plainly show that the legislature intended to grant concurrent jurisdiction.

While Ontario's *Code* authorizes its Tribunal to defer consideration of a complaint according to its own rules, this power may not signal a "clearly expressed legislative intent" to grant the Tribunal concurrent jurisdiction over disputes arising from a collective agreement.

What if the Union Refuses to Pursue a Grievance Alleging a Breach of Human Rights?

Ms. Horrocks argued that, because a union controls members' access to labour arbitration, an aggrieved employee is left without recourse if the union declines to pursue the grievance and the employee cannot file a complaint with a human rights body. The Supreme Court majority considered this argument and rejected it on the basis that unions are subject to a duty of fair representation. If the union fails to fairly represent its members, then an aggrieved member is entitled to pursue a complaint against the union. As a result, unions' control over access to labour arbitration will not impact whether a labour arbitrator possesses exclusive jurisdiction.

In Our View

On the basis of the Supreme Court majority's reasons and Ontario's legislative scheme, the Human Rights Tribunal of Ontario may not have jurisdiction to hear a complaint from an employee arising from the interpretation, application, administration, or alleged violation of a collective agreement. The

Supreme Court has signalled that a province's human rights legislation must provide "a clearly expressed legislative intent" to displace arbitrators' exclusive jurisdiction. In our view, the Ontario Legislative Assembly may not have clearly expressed this intent.

This issue will very likely be litigated in Ontario over the months to come. The Tribunal has long held that it possesses concurrent jurisdiction over human rights-related matters arising from a collective agreement. Employees have similarly presumed access to the Tribunal in such circumstances. The *Horrocks* decision will represent a significant change if the majority's conclusion is applicable in Ontario. In light of both the potential significance of *Horrocks* and the fact-specific nature of human rights litigation, it may be some time before we have a clear answer regarding whether the Human Rights Tribunal of Ontario possesses concurrent jurisdiction following *Horrocks*.

Employers facing a human rights complaint arising from a dispute under a collective agreement nonetheless have a strong basis upon which to challenge the jurisdiction of the Human Rights Tribunal of Ontario. Such disputes should ideally be heard by a labour arbitrator in accordance with the collective agreement between the employer and the employee's union.

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