Pension dispute involving nine unions, hundreds of non-unionized employees, must be arbitrated, Supreme Court of Canada rules

Date : November 1, 2006

A split decision of the Supreme Court of Canada, *Bisaillon v. Concordia University* (May 18, 2006), highlights the difficulties of applying the rules set out in *Weber v. Ontario Hydro*. *Weber* is a decision that is familiar to FOCUS Alert readers. This decision upholds the following principle: where the essential character of a dispute between a unionized employee and the employer arises out of the collective agreement between the parties, that dispute shall not be litigated in court but solved through arbitration. The Court held in *Bisaillon*, (by a margin of four to three) that a complex dispute involving the funding of a pension plan must be resolved by arbitration. Significantly, the pension plan involved 4,100 members, 80 per cent of whom were unionized under nine different collective agreements.

The dispute arose over claims that Concordia University had amended its pension plan to charge administrative costs, grant itself contribution holidays and to reclaim part of the surplus in the event of plan termination. Richard Bisaillon (president of one of the nine unions) brought forth a claim to authorize a class action law suit through an application to the Quebec Superior Court. The action initiated by Bisaillon sought an order declaring the plan amendments void and compelling Concordia to re-pay moneys it had removed from the plan.

Concordia and one of the unions, the Concordia University Faculty Association (CUFA), moved to have the application for class action authorization dismissed. They claimed the matter was in the exclusive jurisdiction of the grievance arbitrator and that the application interfered with the unions' exclusive right to represent their members. The motion, successful in the Quebec Superior Court, was denied in the Quebec Court of Appeal. The Court of Appeal held that the dispute arose out of the pension plan itself, not from the collective agreement, which applied to *Bisaillon*. The Court of Appeal viewed the plan as existing independently of any of the collective agreements between Concordia and its unions. Concordia and CUFA appealed to the Supreme Court of Canada.

DISPUTE MUST BE ARBITRATED

In a majority ruling the Supreme Court, applying the *Weber* principles, held that courts had no jurisdiction over the dispute. In terms of the disputes subject matter, the Court observed that all of the collective agreements at issue made some reference to the pension plan, and that Concordia retained control over the administration of the plan:

> "[…] Concordia made a commitment to the unions to offer the Pension Plan to the employees covered by the agreements in accordance with the conditions of the plan. The

> unions thus obtained certain assurances with respect to the maintenance of the plan and the eligibility of the employees they represented. In effect, the parties decided to incorporate the conditions for applying the Pension Plan into the collective agreement. In this context, the employer was not in the position of a third person, such as an insurer providing insurance benefits proposed by the parties to the collective agreement. On the contrary, Concordia appeared to retain effective control over the administration of the Pension Plan while committing itself, at least implicitly, to respect and fulfill various rights and obligations provided for in the plan or arising out of the legislation applicable to it. In so doing, it also recognized the […] jurisdiction of the grievance arbitrator."

The Court also stated that allowing a class action to proceed would breach the representation rights of the nine unions under provincial labour legislation. As part of the collective agreement, the pension plan was a condition of employment that resulted in the prohibition of the employees' right to act on an individual basis. Moreover, the unions could not make the tactical decision to allow Bisaillon to represent the employees in the pension dispute. The unions could not disregard their obligation under labour legislation to represent their members in disputes arising out of the collective agreement.

PROCEDURAL CHAOS NOT INEVITABLE

The Court acknowledged that while its decision could create potential conflicting results and procedural difficulties in several potential arbitral proceedings, this possibility was not sufficient to justify holding that courts had jurisdiction.

The Court stated that procedural chaos arising out of multiple proceedings was not a foregone conclusion. Many, or possibly all of the unions could arrive at an agreement with the employer to submit the various grievances to a single arbitrator. The Court believed this approach was preferable in this case. Even if an arbitrator decided in the union's favour in a grievance filed by only one union, all the employees would benefit. Since all the money wrongfully taken from the pension fund would be returned, all employees would indirectly benefit from this award. The Court also stated that assuming the worst, Concordia could resolve any potential conflict arising from contradictory or incompatible arbitration awards by complying with the award least favourable to it.

Accordingly, the appeal was allowed.

DISSENT: FINANCING OF PLAN TRANSCENDS COLLECTIVE AGREEMENTS

The three dissenting judges held that the courts should take jurisdiction over the dispute, because its subject matter was the financing of the pension plan itself, an issue which transcended any single collective agreement or employment contract:

> "The claim advanced by [Bisaillon] centres around the financing of the Plan itself. It is

> unaffected by the particular agreement binding a given member of the Plan to the appellant university. Thus, while I agree that pension plans may sometimes be "swallowed up" by collective agreements that incorporate them, this cannot be what happened here. In this case, […] the indivisible nature of the Plan patrimony contrasts directly with the nine distinct collective agreements and hundreds of distinct employment contracts that bind the Plan members to the appellant university. Put simply, the Plan transcends any one collective agreement."

The indivisibility of the plan was essential to understanding the nature of the dispute. All beneficiaries of the fund shared the same claim with respect to the pension plan, because they arose out of the plan, not out of their various collective agreements and employment contracts. The dissent stated that if the plan is underfinanced then all its members are affected in the same way. Similarly, and as noted by the Court majority, if an arbitrator allowed a grievance regarding the plans funding, all members would benefit. In the dissent's view, this fact demonstrated that the claim transcended any one specific collective agreement.

In Our View

The dissent in this decision was critical of the majority for adopting a "but for" approach to *Weber*, under which the test is: can a claim be made without the existence of the collective agreement? In the dissent's view, this was a misapplication of the *Weber* principles, which involve determining the essential nature of the dispute. Here the dissent stated that all Bisaillon was able to show was "a mere connection" between his claim and the provisions of the collective agreement.

While the issues are not identical, the results in this case seem to be consistent with the traditional approach towards the arbitrability of benefits-related claims. Traditionally, the language of the collective agreement determined the issue. If the agreement showed the employer intended to assume responsibility for providing benefits, the employee could pursue the claim at arbitration. If the agreement was silent about benefits, or if the employer undertook merely to pay the plan premiums, the employee had to sue the insurer. (For a series of cases dealing with this issue, see "Ontario Court of Appeal revisits arbitrability of employee benefit claims" and the links contained in that article on our Publications page).

In this case, seven of the collective agreements specifically provided that the employees they covered were entitled to participate in Concordia's pension plan in accordance with the terms set out in the plan. One collective agreement provided that Concordia agreed to maintain the existing plan for employees in its bargaining unit, while another agreement referred indirectly to the plan by specifying the ages at which employees become eligible for full retirement benefits or for early retirement. This may be more than the "mere connection" referred to by the dissent, and satisfy the test applied by arbitrators in determining whether a benefits dispute can be arbitrated or litigated.

For further information, please contact Paul Lalonde at (613) 940-2759.