SUPREME COURT OF CANADA CONFIRMS ARBITRATOR'S USE OF ESTOPPEL IS WITHIN AREA OF EXPERTISE AND MUST BE REASONABLE

Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals, 2011 SCC 59 ("*Nor-Man Regional Health Authority*")

When an arbitrator relies upon the principle of estoppel (or, indeed, any common law or equitable remedy) in an award, does the arbitrator step outside his or her area of expertise? Must the arbitrator's decision be "reasonable" or "correct" on a subsequent judicial review? These were the questions that faced the Supreme Court of Canada in its recent decision in *Nor-Man Regional Health Authority*.

The Lower Court Decisions

Nor-Man Regional Health Authority stemmed from an arbitration in which the grievor claimed that Nor-Man Regional Health Authority Inc. (the "Employer") had denied her certain vacation benefits in violation of the collective agreement. While arbitrator Simpson accepted the Manitoba Association of Health Care Professionals' (the "Union") position in the grievance, he found that the employer's practice was "long standing, consistent, and open", and was apparent to all employees and the Union. As a result, Simpson held that the Union was estopped from grieving the practice until the expiration of the collective agreement.

The Manitoba Court of Queen's Bench dismissed the Union's application for judicial review. However, the application was allowed by the Manitoba Court of Appeal, which found that question of whether the arbitrator properly applied the equitable concept of "promissory estoppel" was a pure question of law and that the appropriate standard of review was therefore "correctness", notwithstanding the fact that arbitrator's decisions are typically given deference by the courts, and reviewed on a standard of "reasonableness". Applying the "correctness" standard, the Court of Appeal concluded that the arbitrator had incorrectly applied the remedy of promissory estoppel and, accordingly, allowed the Union's appeal.

The Employer subsequently appealed to the Supreme Court of Canada.

The Supreme Court's Comments Regarding the Appropriate Standard of Review

Fish J., writing for a unanimous Supreme Court, began his analysis of the appropriate standard of review by confirming that courts traditionally afford arbitrators significant deference upon judicial review, and that arbitration decisions must typically meet only a reasonableness standard, rather than one of correctness. However, Fish J. then reviewed the circumstances by which an arbitrator might bring him or herself within the ambit of the "correctness" standard:

> An administrative tribunal's decision will be reviewable for correctness if it raises a constitutional issue, a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'", or a "true question of jurisdiction or vires". It will be reviewable

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> for correctness as well if it involves the drawing of jurisdictional lines between two or more competing specialized tribunals. [At para. 35. Citations omitted.]

The Court found that the arbitrator's application of estoppel did not represent a question of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (at para. 36). Much of the Court's discussion concerned whether the application of estoppel by the arbitrator served to move the decision from the traditional realm of reasonableness into the more stringent area of review for correctness. While the Court held that this was not the case, it also stressed that the discretion of arbitrators in applying common law or equitable principles is not without limits:

> …the domain reserved to arbitral discretion is by no means boundless. An arbitral award that flexes a common law or equitable principle in a manner that does not reasonably respond to the distinctive nature of labour relations necessarily remains subject to judicial review for its reasonableness. [At para. 52.]

As noted above, the decisive issue for the Court was whether the arbitrator had, in fact, applied the equitable principle of promissory estoppel as suggested by the Manitoba Court of Appeal. This is discussed in more detail below.

<u>The Supreme Court's Comments Regarding the Use of Common-Law and Equitable Principles by Arbitrators</u>

The Manitoba Court of Appeal had held that correctness was the governing standard in the case at bar because, in the Court of Appeal's view, the issue involved a question of central importance to the legal system as a whole that was beyond the expertise of the arbitrator, given that it involved the application of an equitable principle of law by an arbitrator. The Court, however, characterized the matter differently. Indeed, Fish J. noted that the "estoppel" relied upon by arbitrator Simpson was not synonymous with the doctrine of promissory estoppel found in the courts. To that point, Fish J.'s comments at paragraphs 44 and 45 are worth quoting at length:

> Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.
>
> On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates — and well equipped by their expertise — to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, 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 grievances of which they are seized. [At para. 45. Emphasis added.]

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Fish J. observed that arbitrators are generally free to modify and adapt common law and equitable remedies for use in a labour relations context, provided that they do so in a reasonable manner. Accordingly, the Court dismissed the Union's claim that arbitrator Simpson erred when he applied the principle of estoppel in a manner different than that required for a finding of "promissory estoppel", as established by the Supreme Court of Canada in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50. Fish J. reiterated that the traditional requirements of the equitable remedy were not applicable in the context of labour arbitrations. To this effect, he stated:

> The question is not whether the labour arbitrator failed to apply *Maracle* to the letter, but whether he adapted and applied the equitable doctrine of estoppel in a manner reasonably consistent with the objectives and purposes of the [*Labour Relations Act*], the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of Ms. Plaisier's grievance. [At para. 60.]

The Court determined that the deference traditionally afforded to labour arbitrators was appropriate in the case at bar, and that the Court of Appeal had erred in holding that the arbitrator had wandered outside his area of expertise by relying on the doctrine of estoppel.

Comment

The Court's decision in *Nor-Man Regional Health Authority* reinforces the existing principle that arbitral decisions are subject, as a general rule, to the reasonableness standard of review. As discussed in *Dunsmuir*, an arbitrator may attract a higher standard of review, particularly where the issue being considered is one that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise.

However, *Nor-Man Regional Health Authority* stands for the proposition that an arbitrator's application of common-law or equitable principles does not necessarily result in the decision falling outside the adjudicator's specialized area of expertise. In fact, the Court has afforded arbitrators a seemingly broad ability to tailor common-law and equitable principles to suit the unique labour relations environment. Indeed, it is only where such tailoring or "flexing" is done in a manner that does not reasonably respond to the distinctive nature of labour relations that the action will attract judicial review on a standard of "correctness".

It is not clear exactly what type of application of common-law or equitable principles would fall outside the scope of an arbitrator's jurisdiction, and future applications for judicial review seeking to apply a standard of "correctness" will likely face the challenge of demonstrating that the arbitrator has not sufficiently modified, or has inappropriately applied, a judicial concept or tool to the labour relations environment. One notes that in the short period since *Nor-Man Regional Health Authority* was released, the decision has already been used to support an arbitrator's use of the common-law doctrine of rectification to apply the wording of a memorandum of understanding signed at the conclusion of the bargaining process to a collective agreement (see *United Food and Commercial Workers, Local 1400 v Real Canadian Superstores*, 2011 SKQB 466).

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Christopher Sinal
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