

# COLLECTIVE AGREEMENTS AND OTHER REMEDIES

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In 1999, the Saskatchewan Court of Appeal issued three decisions in which the Court sought to clarify the extent to which a collective bargaining agreement precludes employees from access to other statutory schemes covering similar ground to the collective agreement. These cases gave the Court an opportunity to explore the implications of the Supreme Court decisions in *Weber v. Ontario Hydro* and *New Brunswick v. O'Leary* in this context.

In *Regier and Wolff v. Cadillac Fairview Corporation Ltd.*, two female employees of Cadillac Fairview Corporation Ltd. ("Cadillac"), a unionized employer, filed complaints with the Saskatchewan Human Rights Commission alleging sexual harassment and discrimination in their employment contrary to *The Saskatchewan Human Rights Code* (the "Code"). The complainants did not file a grievance under the collective bargaining agreement. Cadillac sought to prohibit the human rights Board of Inquiry from proceeding on the ground that the provisions of the Code were superseded by the collective agreement and Section 25(1) of *The Trade Union Act*.

Cadillac contended that the Code had no application to the a sexual discrimination complaint arising out of the employee/employer relationship governed by the collective agreement because the agreement provides for resolution of all disputes by final and binding arbitration. Further, they argued that an arbitrator appointed under the provisions of the collective agreement and Section 25(1) of the Act has exclusive jurisdiction to resolve the complaint.

In *Weber*, the Supreme Court said that where a dispute, "regardless of how it may be characterized legally, arising under the collective agreement, then the jurisdiction to resolve it lies exclusively within the labour tribunal and the courts cannot try it."

The Court made the following points:

1. Human rights are fundamental quasi-constitutional rights which embody fundamental values and public policy. Parties are not able to contract out of human rights provisions.
2. The mere fact that a collective agreement includes an article or clause which complies with the Code or a provision which covenants not to discriminate on the basis of the grounds set out in the Code, does not in and of itself transform the nature of the dispute from a human rights violation to a breach of the collective agreement.
3. The collective bargaining regime and the human rights regime are statutory processes, and either forum could be used to deal with the complaints of discrimination in this case. The question was which was the correct forum.
4. Previous decisions where the collective agreement process was found to be paramount were situations where a party to the collective agreement had tried to assert a concurrent common law right. These previous cases mean that if a dispute, in its essential character, arises out of the interpretation, application, violation, or meaning of the collective agreement, it will fall to be determined by an arbitrator appointed pursuant to the collective agreement. The policy behind the cases is that dispute resolution processes established under labour relations statutes should not be duplicated or undermined by concurrent common law actions in the courts.

5. Weber did not go so far as to state that any rights created by statute that affect employment rights must of necessity arise out of the collective agreement and can only be dealt with by arbitration. "The right which was allegedly violated in this case is a fundamental human right which employees and the union need not bargain and cannot contract out of." Human rights are fundamental rights and that Section 44 of the *Code* expressly provides that where there is a statutory conflict the *Code* takes precedence.
6. The *Code* provides for the involvement of the Human Rights Commission and the collective agreement does not permit this. The *Code* grants wide powers to redress violations of human rights, including damages and other compensation. The essential character of the dispute is a human rights violation and not a dispute arising out of the collective agreement. To find that it was a dispute under the collective agreement would be to permit the parties to contract out of the *Code*, something they cannot do.

In the result, the Court found that the Board of Inquiry did have jurisdiction to hear and determine the human rights complaints.

In *Parr v. Prince Albert District Health Board*, the issue was the relationship between the s. 25 of *The Trade Union Act* and the rights of remedies provided in *The Occupational Health and Safety Act*. In this case, an employee of the Health Board refused to perform certain work because she felt she would be endangering the health of a patient because she did not have the requisite training to do the work. She was suspended for two days without pay as a result of the refusal. She filed an occupational health and safety complaint. While the Health Board did provide the training required, the occupational health officer found that the employee was justified in refusing to work in the circumstances and that the employer's action in disciplining her was discriminatory under the *Act*. The officer issued a Notice of Contravention against the Health Board requiring it to pay the lost wages and to purge the employee's record of any reference to the discriminatory action. The Health Board challenged that decision.

The issue was whether *The Occupational Health and Safety Act* provisions were superceded by Section 25(1) of *The Trade Union Act*. Using the same approach as in the *Regier* case, the Court found that:

1. Occupational health and safety is an issue of substantial public policy. It applies to all employees and is not something the union needs to bargain. These rights exist independent of the collective bargaining agreement.
2. Incorporation of occupational health and safety provisions into a collective agreement does not remove the individual rights or the powers of the occupational health officer. The right to refuse dangerous work is an individual right. The parties to a collective agreement cannot contract out of the public interest rights as a matter of public policy.
3. The essential character of the complaint in this case is not a matter of discipline for failure to perform an assigned task, but rather a matter of discrimination under *The Occupational Health and Safety Act* for failure to perform dangerous work. The Occupational Health and Safety Division is not a party to the collective agreement dealing with interpretation of the collective agreement. It is a statutory body required to investigate when it receives a complaint. The collective agreement cannot take away that jurisdiction.
4. While the parties chose to incorporate some aspects of *The Occupational Health and*

*Safety Act* into the collective agreement, they cannot by doing so contract out of the rights and obligations under the Act.

The Court, in consequence, upheld the decision of the occupational health and safety officer.

The third case is *Saskatchewan (Labour Standards Branch) v. Dominion Bridge Inc.* This case involved the interplay between *The Labour Standards Act* and Section 25 of *The Trade Union Act*. In this case the collective agreement contained a layoff provision (one hour layoff notice) that provided less protection than was provided for in *The Labour Standards Act* (two weeks written notice). The question was whether Section 25 of *The Trade Union Act* ousted the jurisdiction of the Director of Labour Standards to determine the proper amount of pay in lieu of notice.

Again using the same approach, the Court found that:

1. *The Labour Standards Act* is public policy legislation.
2. The Act applies to all employees and employers including unionized employers. *The Act* provides for minimum employment rights that must be given to each employee. The employee and the union cannot contract out of these rights.
3. The essential nature of the dispute is a labour standards violation and not a dispute arising out of the collective agreement. To find the dispute to be one arising out of the collective agreement would be to permit the parties to contract out of *The Labour Standards Act*, something they cannot do.

The Court found, therefore that the investigator and adjudicator under the labour standards regime had jurisdiction to deal with the complaints.

It remains to be seen as other cases develop whether these decisions mean these or similar legislative provisions will always take precedence over the collective bargaining agreement. Will there be situations where the employee/union will be permitted to use the grievance process even if the essential character of the dispute would put the dispute in a different statutory forum? For example, if the union grieves a situation of sexual discrimination, will an employer be able to insist that the claim must go to a human rights tribunal? If the employee has the right to have the intervention of the human rights commission, does the employer also have the right to insist that the human rights commission be involved in the case? One can also speculate that there may be situations where an employee can proceed with a complaint to a statutory tribunal, grieve the same occurrence and seek remedies from both the arbitrator and the statutory tribunal? How these and other questions will sort themselves remains to be seen as new cases deal with these issues.

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