The Limited Rights of Unionized Employees to sue without the consent of the Union that has breached

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On October 13, 2016, the Québec Court of Appeal, through the Honourable Justice Marie-France Bich, rendered an important and unanimous judgment, holding that a union will retain the exclusive right of representation of its members in petitioning for judicial review, even where a court has previously ruled that the union has failed in its duty to represent those same employees.

Facts

The facts are as follows: In the municipal mergers that occurred in 2002, the City of Saint-Laurent became a borough of the City of Montréal. A collective agreement therefore had to be concluded between the new employer (the City of Montréal) and the *Syndicat des fonctionnaires municipaux de Montréal (SCFP)* (the "Union"). The Union acted on behalf of all the white- collar employees of the City of Montréal, and not only those who had worked for the City of Saint-Laurent. In those negotiations, the employees previously employed by the City of Saint-Laurent realized that the Union had abolished their rights under a group insurance plan, thus abolishing a right which they considered to be vested. They requested that the Union take action, but it failed to do so. The employees then filed a claim, in 2004, against the Union for contravening its duty of fair representation pursuant to section 47.2 of the *Labour Code*. These legal proceedings ended in 2011 when the Court of Appeal held that the Union had indeed breached its duty of fair representation. The Court of Appeal ordered that the grievances of the unionized employees against the City of Montréal be referred to arbitration and that these employees be represented by legal counsel of their choice, at the expense of the Union.

Arbitrator Foisy heard the employees' case and rendered an arbitral award dismissing their grievances. The employees then filed a motion for judicial review before the Superior Court of Québec. The Superior Court, after hearing the case, granted the City of Montréal's motion to dismiss the case, holding that the employees could not file such a motion without the prior consent of the Union. The whole matter was then appealed to the Court of Appeal of Québec.

Practical Aspects

Essentially, the Court of Appeal of Québec held that the Union had indeed lost their exclusive right or representation of the employees in regards to the filing and hearing their grievances, but had regained that right when arbitrator Foisy rendered his decision. The Court of Appeal of Québec maintained that the employees were then compelled to ask the Union to file a motion for judicial review on their behalf. If the Union then refused to file the motion for review, the employees, in order to be entitled to file a judicial review, would then have to file a new motion with the Québec Labour Tribunal (the "*Tribunal administratif du travail*") , in order to obtain another judgment declaring that the Union had failed once more to fulfill its duty of fair representation.

The Court of Appeal acknowledged that its reasoning would give rise to a multiplicity of legal proceedings, lengthy periods for filing contestations, as well as substantial legal costs; but the Court found that that was simply one of the risks inherent in labour relations. The risk was therefore deemed acceptable under the circumstances. Thus, before any case is heard, an employer must await the outcome of such parallel proceedings.

Although the solution proposed by the Court of Appeal may complicate the notion that motions for judicial review must be filed within a "reasonable" period of time, which is generally considered to be 30 days, the Québec Court of Appeal found that the filing of new proceedings under section 47.2 of the *Labour Code*, when the Union refuses to file a motion for judicial review, could constitute exceptional circumstances under which the notion of "reasonable time" may be extended. Thus, in certain circumstances, the employer may expect to receive a motion for judicial review several months or even several years after an arbitrator has rendered his or her award, should a tribunal or a court recognize the employees were once more wrongfully represented by their trade union, as per section 47.2 of the *Labour Code*.

It is important to note that where a grievance is granted by an arbitrator, and where the employees who filed the grievance are represented by legal counsel of their choice (as the union has breached its duty of fair representation), the Court of Appeal recognizes that the employer should file its motion for judicial review against the employees, because they would then be able to institute legal proceedings in defence. However, it may be advisable, in such a case, to include the union in the proceedings, so as to ensure that the employer can defend itself against a possible motion to dismiss based on the union's right of exclusive representation.

Although this judgment is an important one, it might still be appealed to the Supreme Court of Canada, because the legal deadline for doing so has not yet expired. We will keep you informed of any and all future developments that may arise in this case.

By

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