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## Supreme Court Disallows the Re-litigation of a Criminal Conviction at Arbitration

In the decision of *Toronto (City) v. Canadian Union of Public Employees*, the Supreme Court of Canada recently found that an employee, who had been dismissed by his employer after being convicted of an offence under the *Criminal Code*, was not permitted to revisit the conviction at the arbitration hearing. In a case released at the same time, *Ontario v. O.P.S.E.U.*, the Supreme Court reached the same conclusion on very similar facts.

### Background

The grievor worked as a recreation instructor for the City of Toronto. His employment was terminated after he was convicted of sexually assaulting a young boy under his supervision. The grievor challenged the termination at arbitration, maintaining that he had not committed the assault, despite the finding at the criminal trial.

In determining whether there was just cause for dismissal, the arbitrator ruled that the criminal conviction was admissible evidence, but did not amount to conclusive proof of the assault. The arbitrator heard evidence and ultimately found that the employee had not committed the assault. The arbitrator ordered the grievor be reinstated.

Upon judicial review, the Divisional Court quashed the arbitrator's decision. The Divisional Court held that the arbitrator should not have gone behind the criminal conviction and made his own assessment of whether the employee had sexually assaulted the complainant. It relied on the principles of "issue estoppel" (which protects a decided issue from attack unless there is decisive new evidence or a showing of fraud) and "abuse of process" (which prohibits attack of a final decision of another court where the party had a "full opportunity of contesting the decision" in the first court), both applied in this case.

The Court of Appeal for Ontario affirmed the decision of the Divisional Court, but rejected that the principles of issue estoppel or abuse of process applied. Instead, the Court of Appeal found that the arbitrator did not take into account the adverse affects of re-litigation. It based its decision on the "finality principle," finding that the need for finality outweighed the grievor's desire to re-litigate the conviction. The Court of Appeal further found that the arbitrator's decision was not based on new evidence but rather a re-consideration of the evidence presented in the criminal proceedings. In particular, the Court of Appeal doubted the accuracy of the arbitrator's findings since the complainant did not testify before the arbitrator.

### Decision

By failing to give full effect to the criminal conviction, the Supreme Court held that the arbitrator made a patently unreasonable decision. The Supreme Court stated that the union was not entitled to challenge the grievor's criminal conviction at arbitration. It based its decision on the doctrine of abuse of process.

The Supreme Court found that the courts will turn to the doctrine of abuse of process to ascertain whether relitigation would violate principals like judicial economy, consistency, finality and the integrity of the administration of justice. In determining the abuse of process, the Court held that the facts in the case pointed to a blatant abuse of process. It found that since the grievor was convicted in a criminal court and had exhausted all his avenues of appeal, "his conviction must stand, with all its consequent legal effects."

## Decision (continued)

The Supreme Court acknowledged that while relitigation is normally detrimental to the administration of justice, there may be exceptions when:

- (a) the original proceeding was tainted by fraud or dishonesty;
- (b) fresh new evidence that was unavailable in the first proceeding shows the original decision was incorrect; or
- (c) fairness dictates that the original result should not be binding in the new context.

## Implications

The Supreme Court decision is favorable for employers because it effectively requires labour arbitrators to accept a criminal conviction as a binding fact, rather than conducting their own assessment of the facts. This essentially precludes arbitrators from re-trying criminal convictions. If an employee's employment is terminated because of a conviction, an arbitrator will only be required to determine whether the conviction amounts to cause for dismissal.

Notably, the Supreme Court decision does not require employers to await the outcome of criminal trials before terminating an employee. The case also does not suggest that employers should make disciplinary decisions on the basis of whether a conviction was secured. Employers must still carefully review the decision to terminate the employment of an employee on a case-by-case basis.

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