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No class action where arbitrator has jurisdiction, court holds

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Class action legislation does not give courts jurisdiction over cases that would otherwise be dealt with by tribunals or arbitrators, the Supreme Court held in *Concordia v. Bisaillon*.[1] Thus unionized employees cannot institute class actions against their employers for disputes over the terms of their collective agreements. Writing for the majority, LeBel J. held that certifying a class action in such a case would be "incompatible with the exclusive jurisdiction of grievance arbitrators and the representative function of certified unions."

A unionized employee of Concordia University sought to bring class action on behalf of all members of an employee pension plan in order to contest the University's use and administration of the pension fund. The proposed class consisted of members of eight unions and several hundred non-unionized professional employees or managers.

Class action legislation does not confer subject-matter jurisdiction on the Superior Court over cases that would not normally fall within its reach, the court emphasized. Class action legislation is procedural, not substantive, and it does not alter the jurisdiction of courts and tribunals. Under relevant Quebec law, grievance arbitrators have exclusive jurisdiction over any disagreement arising from the interpretation and application of a collective agreement, including provisions relating to pension plans. Here, the collective agreements expressly referenced the pension plan, thus incorporating the plan into the agreements. Even if they did not, however, the arbitrator would have jurisdiction, LeBel J. held.

LeBel J. also noted that a certified union has a monopoly on representation, both in the negotiation and the implementation of collective agreements. This reflects the trade off inherent in the collective representation system: individuals strengthen their bargaining power by attaching themselves to the union, but in return, they sacrifice the ability to bring claims on their own.

Finally, LeBel J. addressed concerns of potential conflict between the affected unions' separate arbitration awards. He advanced the possibility of a quasi class action arbitration proceeding in which all or many of the unions involved would come to an agreement with the employer to submit their disparate grievances to a single arbitrator. Even if there were separate proceedings, one arbitration decided in a union's favour would render all other grievances moot since under the first arbitration, the money wrongfully taken from the pension fund would be returned.

Three of the seven judges on the panel dissented. Bastarache J., writing for the dissenters, agreed that class action legislation does not confer jurisdiction on the courts that properly belongs to labour arbitrators. However he disagreed that labour arbitrators have jurisdiction over this pension plan.

In particular, Bastarache J. took issue with LeBel J.'s reliance on the exclusive right of unions to represent their members. This exclusivity is different from the exclusive jurisdiction of labour arbitrators and should not be used as a proxy for the jurisdiction of labour arbitrators.

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Bastarache J. pointed out that there was one indivisible pension fund applicable to several different employee groups with nine different collective agreements. Thus no one collective agreement could purport to alter the terms of the pension plan, as any alteration would affect the rights of employees not a party to that collective agreement. Yet to decide Bisaillon's claim, a labour arbitrator would have to determine issues and bind employees who are not a party to the collective agreement applicable to Bisaillon.

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[2] 2006 SCC 19