Greater Essex County District School Board v. United Association of Journeymen et al.

[Indexed as: Greater Essex County District School Board v. United Association of Journeymen]

107 O.R. (3d) 453

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Ontario Superior Court of Justice,
Divisional Court,
J. Wilson, R. Smith and Hoy JJ.
October 7, 2011

Employment -- Labour relations -- Arbitration -- Time limit in collective agreement for referral of grievance to arbitration mandatory -- Arbitrator not having discretion to extend time limits for referral to arbitration -- Section 48(16) of Ontario Labour Relations Act ("OLRA") not applicable -- Ontario Labour Relations Board not having jurisdiction to extend time for referral of grievance to arbitration under s. 133(1) of OLRA -- Ontario Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, ss. 48(16), 133(1).

In July 2004, the Union filed a grievance alleging that the School Board (which was formed by the merger of two school boards in 1998) had breached the provincial collective agreement by tendering contracts for construction work to non-union workers. The Union referred the grievance to arbitration before the Ontario Labour Relations Board (the "OLRB") four and a half months later, exceeding by four months the 14-day time limit for referral of a matter to arbitration in the collective agreement. At the same time, the

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Union brought an application to have the School [page454] Board declared a related employer. The vice-chair of the OLRB adjourned sine die the request for referral to arbitration pending a determination of the related employer application. In 2006, the vice-chair declared the School Board to be a related employer. The referral of the July 2004 grievance came back before the vice-chair, who ruled that although the grievance was untimely, the timelines could be extended and the matter was arbitrable (the "Jurisdiction Decision"). More than six years after the grievance was filed, the vice-chair ruled that the School Board had breached the collective agreement (the "Arbitration Decision"). The School Board brought an application for judicial review of both the Jurisdiction Decision and the Arbitration Decision.

Held, the application should be granted.

The applicable standard of review of the Jurisdiction Decision was reasonableness.

Contrary to the vice-chair's conclusion, the timelines for referral to arbitration under the collective agreement were mandatory rather than directory. There were clear consequences specified in the collective agreement if the timelines were not met. When the grievance timelines expired, there was nothing to refer to arbitration, and the OLRB had no jurisdiction to proceed. Moreover, in concluding that even if the timeline for referral to arbitration within 14 days appeared mandatory on its face, the words would be interpreted as directory if no consequence was provided for a failure to refer the matter to arbitration within the stated time, the vice-chair overstated the principle of when mandatory language becomes directive. The failure to specify a consequence in the collective agreement for non-compliance with a clause will not result in an otherwise mandatory clause becoming directive.

Section 48(16) of the Ontario Labour Relations Act, 1995 had no application in the circumstances. An arbitrator has discretion to extend time limits with respect to grievance procedures in accordance with s. 48(16), but an arbitrator has no discretion to extend time limits for referral to

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arbitration. Even if s. 48(16) applied, it was unreasonable for the vice-chair not to consider the mandatory statutory criteria of s. 48(16) as to whether it was appropriate to exercise the discretion, given the extraordinary delays in this case.

It was unreasonable for the vice-chair to conclude that the OLRB had jurisdiction to extend the time for referral of a grievance to arbitration pursuant to s. 133 of the OLRA. An interpretation giving the OLRB the power to extend timelines undermines the intended purpose of referring arbitration matters in construction grievances directly to the OLRB, namely, speedy resolution of disputes. Established interpretations in prior cases confirm that s. 133 of the OLRA allows timelines to be truncated, not extended. The vice-chair's interpretation of s. 133 creates a two-tiered system of arbitration, with different sets of rules for arbitration -- one with strict timelines that apply for consensual arbitration proceedings in accordance with the collective agreement and another with broad powers to extend timelines when the parties pursue arbitration before the OLRB. A regime of broad, unfettered discretion available to the OLRB sitting as arbitrator creates uncertainty for both unions and employers in time-sensitive situations. Section 133 should be interpreted as simply providing the OLRB with jurisdiction to deal with referrals to arbitration according to the rules that apply to arbitrators appointed by the parties pursuant to the collective agreement.

The Jurisdiction Decision was unreasonable. The OLRB had no jurisdiction to hear the grievance.

Cases referred to

Service Employees International Union, Local 204 v. Leisureworld Nursing Homes Ltd., [1997] O.J. No. 1469, 99 O.A.C. 196, 70 A.C.W.S. (3d) 281 (Div. Ct.), apld [page455]

James Bay General Hospital v. Public Service Alliance of Canada, [2004] O.J. No. 4666, 238 D.L.R. (4th) 730, 130 A.C.W.S. (3d) 953, 126 L.A.C. (4th) 12 (Div. Ct.), distd

B.S.O.I.W., Local 700 v. Lummus Co. Canada Ltd., [1976]

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O.L.R.B. Rep. January 980 (L.R.B.); Ontario Hydro, [1987] OLRB Rep. April 574 (L.R.B.), consd

Other cases referred to

Becker Milk Co. and Teamsters Union, Local 647 (Re), [1978] O.L.A.A. No. 71, 19 L.A.C. (2d) 217 (Lab. Arb.); Canadian Westinghouse Co. and Local 164 Draftsmen's Assn. of Ontario (Re), [1962] O.R. 17, [1961] O.J. No. 608, 30 D.L.R. (2d) 673, 62 CLLC 15,413 at 479 (C.A.); Centro Masonry Ltd., [1997] O.L.R.D. No. 2267 (L.R.B.); Communications, Energy and Paperworkers Union of Canada, Local 27 v. Bell Canada, [2011] O.J. No. 2681, 2011 ONSC 2517, 336 D.L.R. (4th) 368, 203 A.C.W.S. (3d) 840 (Div. Ct.); Consamar Inc., [1991] OLRB Rep. September 1021 (L.R.B.); Dominion Consolidated Truck Lines Ltd. v. Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 141 (1975), 9 O.R. (2d) 195, [1975] O.J. No. 9, 60 D.L.R. (3d) 37 (Div. Ct.); Don Cordingley Gradall Rental Ltd., [2007] O.L.R.D. No. 4219, 141 C.L.R.B.R. (2d) 191 (L.R.B.); Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, 2008 SCC 9, 329 N.B.R. (2d) 1, 64 C.C.E.L. (3d) 1, 164 A.C.W.S. (3d) 727, EYB 2008-130674, J.E. 2008-547, [2008] CLLC 220-020, 170 L.A.C. (4th) 1, 372 N.R. 1, 69 Imm. L.R. (3d) 1, 291 D.L.R. (4th) 577, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65, D.T.E. 2008T-223; Electrical Power Systems Construction Assn., [1990] OLRB Rep. March 243 (L.R.B.); Gottardo Masonry & Contracting Ltd., [1998] O.L.R.D. No. 2363, 44 C.L.R.B.R. (2d) 293, [1998] OLRB Rep. July/August 614 (L.R.B.); Greater Essex County District School Board v. International Brotherhood of Electrical Workers, Local 773 (2007), 83 O.R. (3d) 601, [2007] O.J. No. 185, 221 O.A.C. 22, [2007] CLLC 220-011, [2007] OLRB Rep. January/February 255, 154 A.C.W.S. (3d) 1099 (Div. Ct.), affg [2006] O.J. No. 3497, [2006] OLRB Rep. May/June 473 (S.C.J.) [Leave to appeal to C.A. refused 2007 CarswellOnt 9371 (C.A.); Leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 384]; Greater Niagara General Hospital and Ontario Nurses Assn. (Re), [1981] O.L.A.A. No. 2, 1 L.A.C. (3d) 1 (Schiff); Metropolitan Separate School Board and C.U.P.E., Local 1280 (Re), [1992] O.L.A.A. No. 82, 27 L.A.C. (4th) 154 (Brandt); Ontario Power Generation, [2003] O.L.R.D. No. 1835 (L.R.B.); Ontario Sheet Metal Workers' and Roofers' Conference v. Ellis-Don Ltd., [2010] O.J. No. 4204,

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2010 ONSC 3783, 268 O.A.C. 196, [2010] OLRB Rep. November/ December 1016 (Div. Ct.); Standard Underground High Voltage Ltd., [1997] O.L.R.D. No. 3479, [1997] OLRB Rep. September/October 936 (L.R.B.)

Statutes referred to

Labour Relations Act, S.O. 1975, c. 76

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, ss. 1(4), 44(6), 48 [as am.], (16), 69, 124(1), 133 [as am.], (1), (4), (5), (6), (9)

Public Sector Labour Relations Transition Act, 1997, S.O. 1997, c. 21, Sch. B [as am.]

Rules and regulations referred to

O. Reg. 457/97 (Public Sector Labour Relations Transition Act, 1997)

Authorities referred to

Andrew, Jeffrey M., Labour Relations Board Remedies in Canada, looseleaf, 2nd ed. (Aurora, Ont.: Canada Law Book, 2009)

Brown, Donald J.M., and David M. Beatty, Canadian Labour Arbitration, 4th ed. (Aurora, Ont.: Canada Law Book, 2008) [page456]

Sack, Jeffrey, C. Michael Mitchell and Sandy Price, Ontario Labour Relations Board Law and Practice, 3d ed., vol. 2, looseleaf (Markham, Ont.: Lexis-Nexis, 1997)

Waisberg, Harry, Report of the Royal Commission on Certain Sectors of the Building Industry (Toronto: Ministry of the Attorney General, Queen's Printer for Ontario, 1974)

APPLICATION for judicial review of decisions of the vice-chair of the Ontario Labour Relations Board.

Leonard P. Kavanaugh and Suzanne Porter, for applicant.

Ronald Lebi, for respondent union.

Voy T. Stelmaszynski, for OLRB.

The judgment of the court was delivered

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J. WILSON J.: --

Overview

[1] This application is for judicial review of two decisions of Vice-chair David McKee of the Ontario Labour Relations Board (the "Vice-chair"), dated January 5, 2009 [[2009] O.L.R.D. No. 55, 164 C.L.R.B.R. (2d) 1 (L.R.B.)] (the "Jurisdiction Decision") and May 14, 2010 [[2010] O.L.R.D. No. 1938, 2010 CanLII 26787 (L.R.B.)] (the "Arbitration Decision").

[2] The Greater Essex County District School Board (the "School Board") requests a declaration that the grievance in question was not arbitrable and hence that the Jurisdiction Decision should be quashed. Alternatively, if the grievance was arbitrable, the School Board relies upon the doctrine of promissory estoppel and requests that the Arbitration Decision be quashed.

[3] The Ontario Labour Relations Board (the "OLRB") has jurisdiction to hear arbitration matters only in the construction industry as time is so often of the essence in deciding these matters promptly before the pressing questions in issue become moot.

[4] The timelines in this case are extraordinary in their length and place in focus the applicant's challenge as to why the decisions of the Vice-chair are unreasonable.

[5] The grievance was filed by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (the "Union") on July 27, 2004. The grievance was not referred to arbitration until December 9, 2004, exceeding by four months the 14-day time limit for referral of a matter to arbitration outlined in the governing collective agreement. [page457]

[6] The Vice-chair then adjourned sine die the request for referral to arbitration pending a determination of whether the School Board was a related employer as a result of the 1998 merger of two former school boards. The grievance concerned work conducted by the School Board in 2004. The grievance was

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later amended to include further work that took place in 2005. Intervening decisions affecting the parties were pronounced in 2006 and following, declaring the School Board to be a related employer.

[7] On January 5, 2009, in the Jurisdiction Decision, five years after the grievance was filed, the Vice-chair concluded that the grievance was arbitrable and accepted the referral of the grievance to arbitration pursuant to s. 133(5) and (6) of the Ontario Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A (the "OLRA").

[8] On May 14, 2010 in the Arbitration Decision, six plus years after the grievance was filed, the OLRB rejected the School Board's argument that promissory estoppel applied and determined that the School Board had breached the governing collective agreement. The School Board was ordered to pay damages to the Union, the quantum of which was to be assessed.

[9] For reasons to be fully outlined below, we conclude that the grievance was not arbitrable in light of the terms of the parties' collective agreement and the principles outlined in Service Employees International Union, Local 204 v. Leisureworld Nursing Homes Ltd., [1997] O.J. No. 1469, 99 O.A.C. 196 (Div. Ct.) ("Leisureworld"). Further, we conclude that the alternate interpretation articulated by the Vice-chair that s. 48(16) of the OLRA may be employed to extend the time for referring the grievance at issue to arbitration was unreasonable. Finally, we conclude for a variety of reasons that the interpretation proposed that s. 133 of the OLRA would also provide the OLRB with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement is unreasonable.

[10] As we conclude that the Vice-chair was without jurisdiction to proceed with the arbitration, both the Jurisdiction Decision and the Arbitration Decision shall be quashed.

Standard of Review

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[11] The School Board submits that the standard of review with respect to the Jurisdiction Decision is correctness, whereas the Union and the OLRB argue that the appropriate standard of review is reasonableness.

[12] We are of the view that the applicable standard of review of the Jurisdiction Decision is reasonableness. [page458]

[13] We adopt the reasoning of Swinton J. in Communications, Energy and Paperworkers Union of Canada, Local 27 v. Bell Canada, [2011] O.J. No. 2681, 2011 ONSC 2517 (Div. Ct.). She confirmed that the determination of arbitrability engages the standard of review of reasonableness [at para. 19]:

> The interpretation by a labour arbitrator of a collective agreement, including what is arbitrable under that collective agreement, lies at the core of the arbitrator's expertise. Therefore, this decision is reviewable on a standard of reasonableness with respect to the issue of arbitrability (Parry Sound District School Services Administration Board v. O.P.S.E.U., Local 324, [2003] 2 S.C.R. 157 at para. 16; Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology (2006), 80 O.R. (3d) 1 (C.A.) at paras. 47-48).

[14] Although the Divisional Court concluded in Leisureworld that decisions as to arbitrability, made by interpreting the terms of the collective agreement as well as the statutory provisions of s. 48(16) of the OLRA, engaged the standard of correctness, we note that this decision was pre-Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9. The more recent trend in administrative law decisions is that the standard of review for expert tribunals interpreting their home statute will be reasonableness.

[15] The Supreme Court of Canada stated in Dunsmuir, at paras. 51 and 53, that "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness". Further, deference is appropriate

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"where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have a particular familiarity . . . [or] where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context": see Dunsmuir, at paras. 54-55.

[16] We conclude that a standard of reasonableness applies as the OLRB is recognized for its expertise, the governing legislation affords the decision-maker a strong privative clause, and as the matters for determination fits within the nature and purpose of the statutory regime. (See Ontario Sheet Metal Workers' and Roofers' Conference v. Ellis-Don Ltd., [2010] O.J. No. 4204, 2010 ONSC 3783 (Div. Ct.), at paras. 5-9.)

[17] All parties agree that the standard of review of the Arbitration Decision is reasonableness.

Background Facts

Merger of the two school boards

[18] The School Board is comprised of the former Essex County Board of Education and the former board of education for the City [page459] of Windsor. It was created as one School Board effective January 1, 1998, as part of a broader government initiative to merge hospitals and school boards to promote public efficiency.

[19] Prior to the 1998 merger, the geographic jurisdiction of the Windsor board was the City of Windsor. The geographic jurisdiction of the Essex board was the County of Essex, except the City of Windsor and the Township of Pelee.

[20] The former Windsor board was bound by provincial collective agreements with the Union and other unions. Therefore, all construction work for the Windsor board had to be performed by unionized workers bound by the provincial collective agreements.

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[21] The Essex board was not bound by the provincial collective agreements and could tender contracts for construction work to both union and non-union workers.

[22] The Union is a construction-industry trade union consisting of members who are plumbers and pipefitters and are party to the governing provincial collective agreements. Prior to 1998, the Union had bargaining rights with the Windsor board for both maintenance and construction work pursuant to the governing provincial collective agreements. Prior to 1998, the Union held no bargaining rights with the Essex board.

The transition provisions in the Public Sector Labour Relations Transition Act, 1997, S.O. 1997, c. 21, Sch. B

[23] When the School Board was created as a result of the merger in 1998 the Ontario government passed the Public Sector Labour Relations Transition Act, 1997, S.O. 1997, c. 21, Sch. B (the "PSLRTA") and regulations thereunder to recognize different labour practices and obligations such as in the predecessor school boards.

[24] O. Reg. 457/97 (the "Regulation") provided that bargaining rights held by unions in the construction industry were preserved, but only in the geographic areas of the predecessor school boards. The Regulation specifically addresses situations, where, as here, one of merged school boards was not party to the collective agreement. The Regulation provides:

1(1) If a predecessor employer was a municipality or a school board and a construction union had bargaining rights with respect to a bargaining unit of that employer that contained or would have contained employees who performed construction work, the following apply:

1. The description of the bargaining unit of the successor employer referred to in subsection 14(1) of the Act shall not include, or be changed under section 22 of the Act to include, employees who perform construction work outside the geographic jurisdiction of the predecessor employer unless

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the successor employer agrees. [page460]

2. Despite Sections 15 and 24 of the Act, a collective agreement that bound the predecessor employer immediately before the changeover date does not bind the successor employer with respect to construction work performed outside the geographic jurisdiction of the predecessor employer unless the successor employer agrees.

(Emphasis added)

Events post-merger to 2004

[25] After 1998, the School Board relied upon the Regulation to continue its past practice to tender construction contracts to both union and non-union workers for work performed in the geographic region of the former Essex board. In the geographic region of the former Windsor board, the School Board continued its past practice to tender construction contracts only to unionized workers subject to the provincial collective agreements.

[26] The tender documents issued by the School Board after 1998 reflected their understanding of their different obligations pursuant to the Regulation.

[27] The relationship between the Union and the School Board for maintenance work, as distinct from construction work, performed for the former Windsor School Board was governed by a different provincial collective agreement than that which governed construction work. The former Essex School Board was not subject to either agreement.

[28] After the creation of the merged School Board, during the labour negotiations in 2002 and 2004, the Union made efforts to extend bargaining rights for maintenance work (as distinct from construction work) to include the geographic area of Essex. The School Board resisted these requests and no extension was granted in the governing collective agreements in 2002 and 2004 to the Union for maintenance work in the geographic area covered by the former Essex School Board.

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[29] By way of contrast, no active steps were taken by the Union with respect to extending the bargaining rights of the Union for construction work until a letter was written by the Union's counsel on June 14, 2004. Counsel alleged in that letter that the School Board was bound by the provincial collective agreement for Essex as well as Windsor for all construction work performed. This letter is important in assessing the estoppel argument advanced by the School Board in the Arbitration Decision.

The Union files a grievance concerning construction work

[30] On July 27, 2004, the Union filed the grievance that is the subject matter of this proceeding with the School Board for breach of the provincial collective agreement as construction [page461] work was being done in the former Essex School Board at two schools by non-unionized workers.

[31] The terms of the provincial collective agreement state in art. 17.2 that "the difference may proceed directly to arbitration under the provisions set out in Article 18, within fourteen (14) regular working days from the date the grievance arose, but not later. Any time limits stipulated in this Article may be extended by mutual agreement of the parties in writing" (emphasis added).

[32] On December 9, 2004, four and a half months after the grievance was filed, the Union referred the grievance to arbitration before the Board. The School Board objected to the referral as being out of time.

[33] There is no explanation for the delay of four and a half months.

[34] It is this late filing of the grievance to arbitration that founds the School Board's assertion that the referral to arbitration exceeds the mandatory time limits stipulated in the governing collective agreement and that the grievance is therefore not arbitrable.

The Related Employer Application

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[35] On December 9, 2004, concurrent with the referral of the grievance to arbitration, the Union brought an application to have the School Board declared to be one employer, or to have the School Board declared a related employer pursuant to ss. 69 or 1(4) of the OLRA. In this application, the Union sought to acquire bargaining rights for construction work performed by the School Board beyond the geographic jurisdiction of the Windsor board to include construction work performed in the jurisdiction of the former Essex board (the "Related Employer Application").

[36] The history of the Related Employer Application beginning in December 2004 to date provides the backdrop for, and intertwines with, this application for judicial review.

[37] The School Board disputed the Union's application pursuant to ss. 1(4) and 69 of the OLRA. It was the position of the School Board that the geographic region of Essex was not subject to the provincial collective agreement for construction work either historically or by the clear, unequivocal transition provisions in the Regulation.

[38] On his own initiative, on December 9, 2004 the Vice-chair adjourned sine die the Union's referral of the July 27, 2004 grievance to arbitration. The School Board did not object to the adjournment, subject to preserving all of its rights with respect to issues of jurisdiction. [page462]

[39] Pending the determination of the Union's Related Employer Application, the School Board continued to rely on the terms of the Regulation and tendered construction work in the area of the former Essex board to both unionized and non-unionized workers.

[40] In 2005, three contracts in the area of the former Essex board were tendered to contractors employing non-unionized workers. On August 19, 2005, the Union amended the July 27, 2004 grievance to include work performed in Essex by non-unionized workers on these three other projects. The School Board did not object to this amendment, subject to preserving

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all of its rights.

[41] On January 4, 2006, Vice-chair McKee granted the Union's application pursuant to s. 1(4) of the OLRA and declared the School Board to be a related employer retroactive to the date of merger in 1998. He dismissed the Union's s. 69 OLRA application (the "2006 Related Employer Decision").

[42] The School Board sought judicial review of the 2006 Related Employer Decision [[2006] O.J. No. 3497, [2006] OLRB Rep. May/June 473 (S.C.J.)]. Sachs J., writing for the majority of the Divisional Court (2007), 83 O.R. (3d) 601, [2007] O.J. No. 185 (Div. Ct.), dismissed the application for judicial review. Carnwath J., in dissent, concluded that the School Board was entitled to rely on the Regulation and opined that the 2006 Related Employer Decision was patently unreasonable. Leave to appeal to the Ontario Court of Appeal and to the Supreme Court of Canada was denied: 2007 CarswellOnt 9371 (C.A.); [2007] S.C.C.A. No. 384.

[43] On June 9, 2006, the Union sought to have the grievance filed December 9, 2004 relisted for arbitration.

The Jurisdiction Decision

[44] After conclusion of the legal proceedings concerning the Related Employer Decision, the referral to arbitration of the December 9, 2004 grievance came back before the Vice-chair. On January 5, 2009, the Vice-chair concluded for a variety of reasons in the Jurisdiction Decision that although the grievance was clearly untimely in terms of the collective agreement, the timelines could be extended and the matter was arbitrable.

[45] The Vice-chair concluded, at paras. 46-54 of his reasons, that the terms of the governing provincial collective agreement respecting the referral of a grievance to arbitration were separate and distinct from the terms of the grievance procedure. Therefore, applying Leisureworld, he found that s. 48(16) was not available as a means by which to extend the time for referral to arbitration. However, the Vice-chair also found

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that, unlike in Leisureworld, the mandatory provisions found in the governing [page463] agreement related only to steps taken in the grievance procedure. In his view, the provisions respecting referral to arbitration were directive only. Hence, he concluded that he had discretion under the terms of the collective agreement itself to extend the directory timelines, and he exercised that discretion to extend the time to refer the matter to arbitration.

[46] In the alternative, the Vice-chair concluded that arbitration process and the grievance process were inextricably linked in the collective agreement, so the decision in James Bay General Hospital v. Public Service Alliance of Canada, [2004] O.J. No. 4666, 238 D.L.R. (4th) 730 (Div. Ct.) ("James Bay") applied and he had jurisdiction to extend the time limits pursuant to s. 48(16) of the OLRA.

[47] In the final alternative, the Vice-chair concluded that the OLRB had the authority to extend the time for referral to arbitration by the terms of s. 133 of the OLRA, which in his view grants the Board "unfettered discretion" (para. 62).

[48] In the result, on January 5, 2009, almost five years after the grievance was filed, the Vice-chair determined that it was "appropriate to accept the referral of the grievance to arbitration under subsections 133(5) and (6), despite the fact that the grievance was referred after the time limits set out in the Collective Agreement" (para. 74).

The Arbitration Decision

[49] The May 14, 2010 Arbitration Decision applied the 2006 Related Employer Decision of the Vice-chair to this grievance.

[50] As the Related Employer Decision was retroactive to the date of merger in 1998, the only defence available to the School Board in the circumstances was estoppel. In the Arbitration Decision, the Vice-chair rejected the School Board's position that the Union was estopped by its conduct from relying upon the terms of the collective agreement. He declared that the School Board had breached the terms of the

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governing provincial collective agreement and the matter was set for a hearing to assess the damages arising from the breach.

[51] The parties settled the quantum of damages payable by the School Board to the Union in the amount of $400,000. This settlement was without prejudice to the School Board's right to raise issues concerning the Jurisdiction Decision and the Arbitration Decision. Notwithstanding the settlement as to quantum, it is the position of the School Board that the requirement to pay damages to the Union in the facts of this case results in an unjust enrichment to the Union and is inequitable. [page464]

Analysis of the Terms of the Governing Collective Agreement

Plain meaning of the terms of the collective agreement

[52] A fundamental principle of both contract and labour law is that the terms of the governing collective agreement must be interpreted in accordance with the plain meaning of its words, and that the intention of the parties reflected in the words of the collective agreement is to be respected. If an arbitrator disregards the plain meaning of the collective bargaining agreement to, in effect, write something into the agreement and give the agreement a meaning that it otherwise could not reasonably bear, the arbitrator will have exceeded his jurisdiction and the award cannot stand: see, e.g., Canadian Westinghouse Co. and Local 164 Draftsmen's Assn. of Ontario (Re), [1962] O.R. 17, [1961] O.J. No. 608 (C.A.), at para. 4.

[53] The analysis therefore begins with a review of arts. 17 and 18 of the provincial collective agreement, which govern construction work with the Union.

[54] Articles 17 and 18 provide as follows:

ARTICLE 17 -- GRIEVANCE PROCEDURE

. . . . .

17.2 Any difference arising directly between the Zone

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Association or Contractor and the Union, or between the Zone Association and the Contractor, as to interpretation, application, administration or alleged violation of this Agreement, that cannot be resolved by a meeting or conference between the parties involved, shall be submitted by registered mail in writing by either of such parties to the Board within four (4) regular working days of such difference. The written submissions shall state the nature of the grievance, any pertinent provisions of this Agreement, and remedy sought.

On receipt of such grievance, the Board shall be convened, within four (4) regular working days, to discuss the grievance as submitted in writing, and attempt to reach a settlement between the parties. In the event a settlement cannot be reached within four (4) regular working days from the date upon which the Board convened, either party may request that the matter be referred to arbitration. Where there is no Board, the difference may proceed directly to arbitration under the provisions set out in Article 18, within fourteen (14) regular working days from the date the grievance arose, but not later. Any time limits stipulated in this Article may be extended by mutual agreement of the parties in writing.

17.3 Any grievance submitted by the employee, the Union, the Zone Association or the Contractor, that has not been carried through Article 17 -- Grievance Procedure Clauses and in accordance with the time limits specified, or mutually agreed to, will be deemed to have been settled satisfactorily by the parties of the grievance.

ARTICLE 18 -- ARBITRATION

18.1 In the event that any difference arising between any Contractor and [page465] any of the employees, or any direct difference between the Zone Association, or any Contractor and the Union or between the Zone Association and a Contractor, as to the interpretation, application, administration or alleged violation of this Agreement, including any question as to whether a matter is arbitrable,

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shall not have been satisfactorily settled by the Board under the provisions of Article 17 -- Grievance Procedure -- hereof, the matter may be referred by the Zone Association, any Contractor or Union to arbitration for the final binding settlement as hereinafter provided, by notice in writing given to the other party within fourteen (14) regular working days from the submission of the matter in writing to the Board.

18.2 When either party requests that a dispute be submitted to arbitration as herein before provided, it shall notify the other party in writing, and at the same time, nominate an arbitrator. Within (5) regular working days thereafter, the other party shall nominate an arbitrator.

18.3 The two arbitrators so nominated shall attempt to select by agreement, a Chairman of the Arbitration Board. If they are unable to agree upon a Chairman within a period of five (5) regular working days following the date of their appointment, they shall then request the Minister of Labour for the Province of Ontario to appoint a Chairman.

18.4 No person may be appointed as an arbitrator who has been involved in an attempt to negotiate or settle the grievance.

18.5 No matter may be submitted to arbitration which has not been properly carried through the proper steps of the Grievance Procedure.

18.6 The Arbitration Board shall not be authorized to make any decision inconsistent with the provisions of this Agreement, nor to alter, modify nor amend any part of this Agreement.

18.7 The proceedings of the Arbitration Board shall be expedited by the parties hereto, and the decision of a majority of such Board shall be final and binding upon the parties hereto and the employee or employees concerned. If there is no majority decision, then the decision of the Chairman shall govern.

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18.8 Each of the parties hereto shall bear the cost of the arbitrator appointed by it, and the parties shall share equally the costs of the Chairman of the Arbitration Board.

18.9 For the purpose of applying the provisions of this Article, Saturdays, Sundays and Holidays are excluded.

(Emphasis added)

[55] The School Board is the "Contractor". The "Board" referred to in these articles is the local board. It is not disputed that as there was no local board. Therefore, the governing clause for referral to arbitration is contained in art. 17.2: "the difference may proceed directly to arbitration under the provisions set out in Article 18, within fourteen (14) regular working days from the date the grievance arose, but not later. Any time limits stipulated in this Article may be extended by mutual agreement of the parties in writing" (emphasis added).

[56] We conclude that on their plain meaning the words of art. 17.2 provide a timeline for referral of a grievance to arbitration [page466] at the Board that is mandatory. Specifically, we are persuaded by the inclusion of the words "but not later" and the reference to "extension by mutual written agreement of the parties", which indicate that the parties contemplated the issue of the extension, and agreed that timelines could not be extended without written agreement.

The referral to arbitration is mandatory not directive

[57] The Vice-chair concludes, at para. 53 of his reasons, that, even if the timeline for referral to arbitration within 14 days appears mandatory on its face, the words will be interpreted as directory if no consequence is provided for a failure to refer the matter to arbitration within the stated time. The Vice-chair suggests, at para. 55, that if "the time limits are directory only, an arbitrator may exercise his or her discretion to permit the referral of the grievance to arbitration if it is appropriate to do so".

[58] At para. 53, the Vice-chair outlines his reasoning:

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For many years, there has been a consensus among the vast majority of arbitrators that the provisions in a collective agreement regarding the steps in a grievance procedure and the referral of a grievance to arbitration are mandatory only if there are specific consequences that flow from the failure to take the required step, e.g. the grievance is deemed withdrawn or deemed to be settled on the basis of the employer's position or another provision that indicates a finality to the process (see Brown and Beatty, Canadian Labour Arbitration (4th edition) Canada Law Book, 2008) at pages 2-93 to 2-94).

[59] We disagree with the Vice-chair's conclusion that the timelines for referral to arbitration under the collective agreement are directory for two reasons.

-- First, there are clear consequences specified in the collective agreement if the timelines are not met. When the grievance timelines expired, there was nothing to refer to arbitration, and the OLRB had no jurisdiction to proceed.
-- Second, we are of the view that the Vice-chair has overstated the principle of when mandatory language may become directive. We disagree with his categorical statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive.

There are clear consequences if the matter is not referred to arbitration within 14 days

[60] Article 17.3 stipulates that "[a]ny grievance . . . that has not been carried through Article 17 -- Grievance Procedure Clauses and in accordance with the time limits specified, or [page467] mutually agreed to, will be deemed to have been settled satisfactorily by the parties to the grievance" (emphasis added).

[61] Article 18.5 confirms that "No matter may be submitted to arbitration which has not been properly carried through the proper steps of the Grievance Procedure."

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[62] The consequences outlined in art. 17.3 for failure to abide by the mandatory or agreed timelines can only be read as having application to both the initial grievance and settlement efforts, and referral to arbitration, both of which are outlined in art. 17.2, as confirmed in art. 18.5.

[63] Article 17.3, if engaged, brings the grievance and the referral to arbitration to an end through a deemed settlement. The jurisprudence of the OLRB holds that the effect of such a clause is that, once engaged, there is nothing left that could be referred to arbitration.

[64] This principle is outlined in Centro Masonry Ltd., [1997] O.L.R.D. No. 2267 (L.R.B.), where the OLRB in its consideration of the scope of s. 133 of the OLRA stated as follows [at para. 33]:

> In my view, the correct interpretation of section 133(2) is to permit the Board to accept a referral at any time while the matter constitutes a "grievance" as defined by the collective agreement. This is consistent with the language of section 133(1) which uses the category "grievance", to describe the thing which is referred under that section. While the matter is still considered "alive" for purposes of the collective agreement, it can be brought to the Board without exhausting the grievance procedure. This is why the process is considered to be an expedited one. Once the matter however is deemed to be abandoned, it no longer exists as a "grievance". At this point, according to the agreement there is nothing left to be referred "at any time". Without an extant "grievance", the Board has nothing with which to proceed.

(Emphasis added)

[65] Centro Masonry has been applied to dismiss late referrals to arbitration, such as in Don Cordingley Gradall Rental Ltd., [2007] O.L.R.D. No. 4219, 141 C.L.R.B.R. (2d) 191 (L.R.B.), where the OLRB confirmed as follows [at paras. 22 and 25]:

> . . . Article 6.5 of the Provincial Agreement provides that

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where steps are not taken within the time specified in Article 6 and 7 (or as extended by the parties in writing) the grievance "shall be deemed to have been abandoned and may not be re-opened". The Board has previously determined that where the applicable collective agreement deems the grievance abandoned because it was not referred to arbitration within the timeframe prescribed in the collective agreement there is no "grievance" left that can be referred to the Board under section 133 of the Act. (See: Centro Masonry Ltd., supra).

. . . . .

[T]his is not an appropriate case for the Board to exercise its discretion to relieve against the application of the time limit in the Provincial Agreement for the union to refer this grievance to arbitration. More importantly, under the Provincial Agreement the grievance is deemed abandoned so there is no [page468] grievance that can be referred to the Board under section 133 of the Act.

[66] Similarly, see the analysis, at paras. 10-11 of Ontario Power Generation, [2003] O.L.R.D. No. 1835 (L.R.B.) ("Ontario Power (2003)"), where the OLRB (chaired by the Vice-chair) confirmed that a provision providing that a grievance would be "deemed settled" in the absence of a response from the employer at a certain stage would, if engaged, mean that the grievance would become "ineligible for arbitration. That is, it does not progress further in the grievance procedure, but dies at that point" (emphasis added).

[67] In this case, the timelines for referral to arbitration were exceeded by nearly four months. By the application of the terms of arts. 17.3 and 18.5 of the collective agreement, the grievance is deemed to have been settled and no longer exists. Hence, there is no grievance left to refer to arbitration.

[68] We conclude that the terms of the governing collective agreement provide clear consequences if the mandatory time limits outlined in the grievance procedure are not met. The grievance is deemed to be settled and hence the OLRB had no jurisdiction to proceed with the arbitration on December 9, 2004. We therefore conclude that the interpretation by the

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Vice-chair of the wording of the collective agreement as directory without a consequence was unreasonable and cannot stand.

The Vice-chair has overstated the legal principle of when mandatory language in a collective agreement may become directive

[69] We conclude that the Vice-chair, in para. 53 of his reasons, unreasonably misinterprets and makes categorical the principle that mandatory language may become directory.

[70] When this occurs is factually dependent. Brown and Beatty [Donald J.M. Brown and David M. Beatty, Canadian Labour Arbitration, 4th ed. (Aurora, Ont.: Canada Law Book, 2008)] in 2:3126 merely confirm that

> [t]he more prevalent view . . . is that notwithstanding the imperative character of the word "shall", whether it is mandatory or directory ultimately will turn on the construction of each agreement. For example, where the agreement does not contain an express provision providing for a penalty or does not address the consequence of non-compliance, the provisions will more likely be construed as directory only.

(Emphasis added)

[71] This court has confirmed that the Brown and Beatty principles relied upon by the Vice-chair are guidelines and are not determinative: see, e.g., [page469] Dominion Consolidated Truck Lines Ltd. v. Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 141 (1975), 9 O.R. (2d) 195, [1975] O.J. No. 9 (Div. Ct.).

[72] These principles of interpreting mandatory language as directory provide guidance on how a collective agreement may reasonably be interpreted. They are not hard and fast rules. Ultimately, whether a given time limit or procedural requirement is directory or mandatory will, as Brown and Beatty acknowledge, "turn on the construction of each agreement". As noted above, in para. 57, in our view the wording of art. 17.2

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makes clear that time limits are mandatory.

[73] Indeed, Brown and Beatty go further to note in 2:3126 that language such as is present in this case will likely bar arbitration:

> However, where the collective agreement provides that "no matter may be submitted to arbitration which has not been properly carried through all previous steps of the grievance procedure", or "if a grievance is not submitted or advanced from one step to another within the time limits . . . the grievance shall be deemed to be abandoned and all rights of recourse to the grievance procedure shall be at an end", failure to comply with its terms will likely be held to be a bar to arbitration.

(Emphasis added)

[74] The wording in art. 18.5 is almost identical to the quotation above: "No matter may be submitted to arbitration which has not been properly carried through the proper steps of the Grievance Procedure."

[75] We conclude by the terms of the governing collective agreement that the grievance was deemed to be settled when the mandatory 14-day time limit was exceeded. The deemed settlement brought the grievance to an end, and the matter could therefore not be referred to arbitration on December 9, 2004.

Applicability of the Leisureworld Decision

[76] Section 48(16) of the OLRA provides ". . . an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, despite the expiration of the time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension" (emphasis added).

[77] Section 48(16) provides jurisdiction to extend time for the filing of a grievance, but not for referral of the grievance to arbitration.

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[78] The Vice-chair confirms, at paras. 51 and 54, that the language in this collective agreement is close to that considered in the Leisureworld decision and that, as in Leisureworld, the [page470] grievance and arbitration procedures provided in the agreement at issue are separate and distinct. We agree with this conclusion. The governing collective agreements in Leisureworld and in this case are strikingly similar.

[79] In Leisureworld, there was an article dealing with grievance procedures that stated [at para. 14], "[i]f arbitration of any grievance is to be invoked, the request shall be made by either party within fifteen (15) days after the date of the reply at Step 2" and "[i]f the Union or any of its representatives fails to observe any of the time limits set out under this grievance procedure, the grievance shall be considered as dropped". In this case, a similar article stated, "the difference may proceed directly to arbitration under the provisions set out in Article 18, within fourteen (14) regular working days from the date the grievance arose, but not later" and "[a]ny grievance submitted . . . that has not been carried through Article 17 -- Grievance Procedure Clauses and in accordance with the time limits specified, or mutually agreed to, will be deemed to have been settled satisfactorily by the parties of the grievance".

[80] In Leisureworld, there was an article that stated [at para. 14]: "No matter may be submitted to arbitration which has not been properly carried through all previous steps of the Grievance Procedure". In this case, there was a similar article that stated: "No matter may be submitted to arbitration which has not been properly carried through the proper steps of the Grievance Procedure." In Leisureworld, the Union conceded that the time limit in the collective agreement was mandatory, which was not conceded in this case.

[81] The Divisional Court in Leisureworld confirmed that an arbitrator has discretion to extend time limits with respect to grievance procedures in accordance with s. 48(16) (reproduced at para. 86 below), but an arbitrator has no discretion to extend time limits for referral to arbitration. McRae J.

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concluded [at para. 19]:

> The jurisdiction to grant relief from time limitations with respect to grievances cannot and should not be interpreted to also grant relief from the time limits for referral to arbitration. Section 48(16) is clear and unambiguous. To conclude otherwise would mean that the deletion of the words "or arbitration" from the 1995 legislation had no effect whatsoever. The words in the statute must be given their clear meaning. The Board had no jurisdiction to extend the time limit for referral to arbitration.

(Emphasis added)

[82] We agree with the conclusion of the Vice-chair that the Leisureworld decision applies, and that s. 48(16) of the OLRA is not available to extend the time for referral to arbitration. [page471]

James Bay General Hospital and 48(16) Not Applicable

[83] We disagree with the alternative reasoning of the Vice-chair. He suggests that, if Leisureworld does not apply, then relying upon the decision of James Bay General Hospital, there is authority to extend time for referral to arbitration pursuant to s. 48(16). The Vice-chair provides no analysis as to why James Bay may apply. Rather, after finding the processes in the governing collective agreement are separate in accordance with Leisureworld, he simply states, "If I am wrong in this finding, then the arbitration process is inextricably linked with the Grievance Procedure, as Arbitrator Devlin and the Divisional Court found in the James Bay General Hospital case, and subsection 48(16) applies to it" (para. 54).

[84] James Bay is distinguishable from this case by both the terms of the collective agreement in question and by the facts. In James Bay, the grievance and arbitration provisions in the collective agreement were clearly inextricably intertwined because referral to arbitration was specifically included as a "step" in the grievance procedure. As well, James Bay may be distinguished from this case on the basis that the equities were in that case persuasive: the union failed to file a grievance by four days due to the fact that the representative

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had "counted the deadline wrong", but the union had clearly expressed to the employer its intention to refer the matter to arbitration within the time limit.

[85] Moreover, the Vice-chair fails to conduct the required analysis as to why the discretion should be exercised, even if jurisdiction existed. See Becker Milk Co. and Teamsters Union, Local 647 (Re), [1978] O.L.A.A. No. 71, 19 L.A.C. (2d) 217 (Lab. Arb.); Greater Niagara General Hospital and Ontario Nurses Assn (Re), [1981] O.L.A.A. No. 2, 1 L.A.C. (3d) 1 (Schiff); Metropolitan Separate School Board and C.U.P.E., Local 1280 (Re), [1992] O.L.A.A. No. 82, 27 L.A.C. (4th) 154 (Brandt).

[86] Even if s. 48(16) of the OLRA applied in this case (which is not our conclusion), it was unreasonable for the Vice-chair to not consider the mandatory statutory criteria of s. 48(16) as to whether it was appropriate to exercise the discretion, given the extraordinary delays in this case.

[87] No reasonable grounds for the extension were identified and in our view there are none. Contrary to the Vice-chair's finding, the School Board would be significantly prejudiced. It has been relying in good faith upon the Regulation and the transition provisions pending a determination of the s. 1(4) and s. 69 applications, not just between the date the grievance surfaced on July 27, 2004 and the date of referral to arbitration in December 2004, [page472] but during the entire period that the matter was adjourned sine die by the Vice-chair until the matter was finally determined in January 2009.

Interpretation of Meaning of Section 133 of the OLRA

[88] The Vice-chair concluded that even if the terms of the collective agreement parallel those of Leisureworld, the OLRB still has jurisdiction to extend the time for the referral of a grievance to arbitration pursuant to s. 133 of the OLRA.

[89] At paras. 56-64, he accepts the argument made by the Union that the provisions of s. 133 give the Board the authority to accept the referral to arbitration regardless of the time limits contained in the collective agreement. The

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Vice-chair states, at para. 58, that "[t]he Board has generally taken the view previously that section 133(1) can be used to relieve a party from any and all requirements of the grievance and arbitration procedure, other than the need to file a grievance in the first place".

[90] We disagree with these conclusions.

[91] The relevant sections of 133 are:

Referral of grievance to Board

133(1) Despite the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 48, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

Requirements for referral

(2) A referral under subsection (1) shall be in writing in the prescribed form and may be made at any time after the written grievance has been delivered to the other party.

. . . . .

Board may refuse

(4) The Board may refuse to accept a referral.

Decision to accept or not

(5) In deciding whether or not to accept a referral, the Board is not required to hold a hearing and may appoint a labour relations officer to inquire into the referral and report to the Board.

Hearing, etc.

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(6) If the Board accepts the referral, the Board shall appoint a date for and hold a hearing within 14 days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing. [page473]

. . . . .

Jurisdiction of Board

(9) If the Board accepts the referral, the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 48(10) and (12) to (20) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

[92] We conclude that the interpretation of the Vice-chair as to the intended meaning of s. 133 of the OLRA giving wide discretion to the Board acting as arbitrator is unreasonable for several reasons:

-- The interpretation gives the Board the power to extend timelines but an interpretation giving the Board the power to extend timelines undermines the intended purpose of referring arbitration matters in construction grievances directly to the Board, namely, speedy resolution of disputes.

-- Established interpretations in prior cases confirm that s. 133 of the OLRA allows timelines to be truncated, not extended.

-- The Vice-chair's interpretation of s. 133 creates a two-tiered system of arbitration with different sets of rules for arbitration -- one with strict timelines that apply for consensual arbitration proceeding in accordance with the collective agreement and another with broad powers to extend timelines when the parties pursue arbitration before the OLRB.

-- A regime of broad unfettered discretion available to the Board sitting as arbitrator creates uncertainty for both unions and employers in time-sensitive situations.

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The Vice-chair's interpretation that s. 133 may be used to extend time limits undermines the principle that direct referral to the Board is meant to promote speedy resolution of disputes

[93] A review of the legislative history and case law provides context for the interpretation of s. 133.

[94] The unique ability for parties in the construction industry to bring grievances directly to the Ontario Labour Relations Board for arbitration has been in place since amendments made to the OLRA effective on July 18, 1975 (Labour Relations Act, S.O. 1975, c. 76). The momentum for these amendments was that the grievance and arbitration procedures reflected in collective [page474] agreements were often too long and cumbersome to respond effectively to the pace of disputes in construction matters.

[95] As described by Jeffrey Sack, C. Michael Mitchell and Sandy Price in Ontario Labour Relations Board Law and Practice, 3d ed., vol. 2, looseleaf (Markham, Ont.: LexisNexis, 1997) at 10.173, "[b]ecause of the transitory nature of work projects in the construction industry, the normal grievance procedures found in collective agreements proved to be of little value to construction trade unions".

[96] The shortcomings of the grievance and arbitration remedy in the construction industry prior to these enactments had been examined in Report of the Royal Commission on Certain Sectors of the Building Industry (Toronto: Ministry of the Attorney General, Queen's Printer for Ontario, 1974) (also known as "The Waisberg Report"), which was released in December 1974 (volume 1, at p. 340):

Arbitration

> Both labour and management complained that current grievance and arbitration procedures are not suitable for the construction industry. There is obviously something wrong when we find that in Ontario the construction industry, which

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employs about 7 per cent of the total work force, generates only about 1 per cent of the arbitrations. . . . The unions, apparently frustrated by the slowness and expense of the arbitration procedures, have resorted to the use of wildcat strikes and work stoppages. Matters have now reached the stage where mere threats of such activities are sufficient. Decisions are reached on the basis of expedience.

[97] The Waisberg Report has been cited by the Board as evidence of the ills that the OLRA legislation may have been attempting to remedy: see, e.g., B.S.O.I.W., Local 700 v. Lummus Co. Canada Ltd., [1976] O.L.R.B. Rep. January 980 (L.R.B.) ("Lummus"). This decision emphasized the need for the OLRA to be interpreted in such a way as to emphasize expediency in the resolution of construction industry disputes, at para. 8: "We do not hold it consistent with the aims of the Legislation . . . that a grievor may malinger with impunity in bringing its dispute to a resolve. In our opinion, the Board would be duty bound to require a grievor to provide a reasonable explanation for any delay in the processing of a grievance before us."

[98] Discussion regarding the right to refer arbitration to the OLRB has since focused on the need for expediency in the resolution of these grievances.

[99] In Gottardo Masonry & Contracting Ltd., [1998] O.L.R.D. No. 2363, 44 C.L.R.B.R. (2d) 293 (L.R.B.), the OLRB confirmed the purpose of the s. 133 process as follows [at para. 17]: [page475]

In the construction industry time is of the essence as the duration of any job can be quite short. It has therefore been considered important to resolve any construction workplace issues as quickly as possible to properly preserve the rights of all parties to a dispute. This is the reason why the Act allows a party to a grievance in the construction industry to file an application for arbitration and to get a hearing 14 days from the date of application.

[100] Similarly, in Electrical Power Systems Construction

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Assn., [1990] OLRB Rep. March 243 (L.R.B.), the OLRB confirmed, at para. 51:

> Under the scheme of the Act, disputes in the construction industry that come before the Board are to be dealt with quickly. The Legislature has particularly recognized that expeditious resolution in this industry is to be encouraged, and this need for expedition is a major reason the legislature gave this Board jurisdiction to hear arbitrations. We need look no further than the provisions of section 124 [now s. 133] to observe the legislative directive for expedition; section 124(2) allows parties to apply to the Board immediately after delivery of the written grievance, notwithstanding any restrictions in the collective agreement in this regard, and further, requires the Board to hold a hearing within 14 days of receipt of the section 124 referral. Thus, sound labour relations policy considerations in the construction industry require that, in the absence of special circumstances, parties making referrals to the Board pursuant to section 124 must act expeditiously. To exercise our discretion otherwise would undercut the very purpose of this statutory arbitration scheme.

(Emphasis added)

[101] In Standard Underground High Voltage Ltd., [1997] O.L.R.D. No. 3479, [1997] OLRB Rep. September/October 936 (L.R.B.), the OLRB considered a request for it to exercise its discretion under s. 48(16) and noted the following, at para. 20:

> [T]he nature of the construction industry requires that parties conduct themselves in a manner that reflects considerably greater expedition than might otherwise be applied in an industrial context. As was noted by the Board (admittedly in another context, but with applicability to the instant proceeding) in ROBERT DUMEAH [1994] O.L.R.B. Rep. June 655, at para. 61:
>
> > . . . Employers in the construction industry must know quickly if challenge is to be made about the operation of their business. Unions must know quickly if a member is

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going to assert his referral to or discharge from an employer was improperly managed or instigated by the union. Eight months is too long to wait. Work in the industry is too fluid and occasional to impose on parties an industrial standard of "delay". In construction, both employer and union need to know where they stand, and to move on. To sanction disruption months after the event would be significantly disruptive to their relationship and unduly expensive and obstructive.

(Emphasis added)

The Vice-chair's interpretation of section 133 is contrary to precedent that allows the arbitrator to shorten time limits in a collective agreement, but not for time to be extended
[page476]

[102] The Vice-chair refers to the 1998 amendments to the OLRA, which added s. 133(4), (5) and (6), as a basis for his conclusion that s. 133 should be interpreted as giving the OLRB sitting as arbitrator broader powers of unfettered discretion quite different from the powers of an arbitrator appointed under a collective agreement. The Vice-chair concludes, at para. 60, that the effect of the addition of these subsections is that "[i]t appears . . . that the Act has moved in different directions for arbitrators acting under s. 48 and the Board acting as arbitrator under s. 133. Given the nature of the construction industry, discussed below, this makes good labour relations sense."

[103] The Vice-chair confirms that s. 133 should be interpreted very differently from the cases proceeding before arbitrators appointed pursuant to s. 48(16) of the OLRA. He reaches the conclusion, at para. 62, that the OLRB has wide jurisdiction and flexibility not available to s. 48 arbitrators:

> That unfettered discretion is consistent with the role that the Board has been given by the Act. The Act deals in far greater detail with the construction industry than any other. The construction industry provisions of the Act amount to 40% of the length of the statute, and of course the general

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portions of the Act apply to the construction industry unless specifically displaced. This reflects the volatility of the construction industry and the particular labour relations issues that are unique to it. The Board is given a wider jurisdiction under section 133 than arbitrators under section 48 because it needs the flexibility to be able to consider all of the issues that may arise and that are connected in real and practical terms that do not always fit neatly with in the general provisions of the Act. For that reason, I consider that the provisions of subsections 133(1) and (4) do give the Board the discretion not to accept a referral of grievance to arbitration on any grounds that are consistent with the proper administration of the collective agreement and the Labour Relations Act to the parties and to the industry as a whole. Delay and prejudice are clearly relevant, but other factors may be as well.

(Emphasis added)

[104] We disagree with these conclusions.

[105] There is an established line of cases that interprets the broad wording of s. 133 as simply empowering the OLRB to hear arbitrations on an expedited basis, without giving the OLRB broader or different powers to extend timelines stipulated in a collective agreement. These cases include Centro Masonry Ltd., supra ("Centro"), and Ontario Power Generation (2003).

[106] We conclude that s. 133 should be interpreted as simply providing the OLRB with jurisdiction to deal with referrals to arbitration according to the rules that apply to arbitrators appointed by the parties pursuant to the collective agreement. This is clear by the terms of s. 133(9). [page477]

[107] The OLRB as arbitrator may shorten time limits stipulated in the collective agreement where appropriate to respond to the need for speed in determining construction disputes. Time limits may only be extended where they form part of the grievance process as contemplated by s. 48(16) of the OLRA and Leisureworld.

[108] This view of the limited purpose of s. 133 is confirmed

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in Jeffrey M. Andrew's Labour Relations Board Remedies in Canada, looseleaf, 2nd ed. (Aurora, Ont.: Canada Law Book, 2009) at 21:0100, where the OLRB's role is described:

> In the case of Ontario [s. 133], the board's power to arbitrate disputes under a collective agreement in the construction industry incorporates by reference provisions giving statutory power to arbitrators [s. 133(9)]. While the jurisdiction is statutory, rather than based on the agreement, the process is a form of grievance arbitration. The board's role is to fulfill the role of an arbitrator under the process set up by the parties under their agreement. The board looks primarily to the agreement, therefore, although it construes the agreement in light of statutory policy.

[109] We are of the view that the decisions of Centro and Ontario Power Generation (2003) correctly interpret the intended scope of s. 133 and the powers of the Board in the role of arbitrator under the OLRA. As stated in Centro, at para. 32:

> There is no doubt that one of the statutory purposes of section 133 is to provide an alternative process which is expedited in comparison with the consensual process contemplated by a collective agreement (note for example the 14 day time-frame for holding a hearing in section 133(2)). There is little justification however to permit the alternative expedited process to be used to delay or prolong disputes that would have been addressed in a more timely fashion if the provisions of the collective agreement were to have been adhered to.

(Emphasis added)

[110] In Ontario Power Generation (2003), at para. 14, the three-member panel of the OLRB concluded:

> Section 133(9) incorporates, among other sections, section 48(16). If section 133(1) meant that time limits are irrelevant, then there would be no need to incorporate section 48(16). The prejudice suffered by a responding party

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in having a grievance heard more quickly than it might have expected is small, unworthy of much protection, and easily dealt with by way of an adjournment, if necessary. The prejudice which may result from delay is not so easily dealt with and may be irreparable. We conclude that section 133 does not operate to eliminate or extend indefinitely any time limit in a collective agreement.

(Emphasis added)

[111] The Vice-chair relies upon another line of cases interpreting s. 133 more broadly, including Ontario Hydro, [1987] OLRB Rep. April 574 (L.R.B.) ("Ontario Hydro (1987)"), Lummus and [page478] Consomar [sic, Consamar] Inc., [1991] OLRB Rep. September 1021 (L.R.B.).

[112] He suggests Ontario Hydro (1987) supports the view that "[t]he Board has generally taken the view previously that section 133(1) can be used to relieve a party from any and all requirements of the grievance and arbitration procedure, other than the need to file a grievance in the first place" (para. 58).

[113] However, it appears that the Vice-chair has misinterpreted Ontario Hydro (1987). The case confirms that time limits may be shortened to facilitate the intended purpose of s. 133, but not extended. The passage quoted by the Vice-chair, taken from para. 22 of the Ontario Hydro (1987) decision, confirms that non-compliance with the timelines stipulated in the parties' collective agreement is still intended to have consequences:

Having regard to the expedition which section 124 [now s. 133] was intended to impose on the grievance and arbitration processes in the construction industry and on the parties to those processes, we are satisfied that the analysis in paragraphs 6 and 7 of the Lummus decision fully support the proposition that the opening words of subsection 124(1) relieve the referring party from compliance with any collective agreement requirements that steps be taken after the delivery of the written grievance before there can be a referral to arbitration. We are not satisfied, however, that

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either the need for expedition or the analysis in paragraphs 6 and 7 of Lummus support the proposition that the opening words of subsection 124(1) [now s. 133] should be taken to relieve the referring party from the consequences of non-compliance within an agreed time limit for the delivery of a grievance. . . . There is no inconsistency between the concern for expedition reflected in section 124 and the enforcement of the parties' own standards for expedition in delivering a written grievance. We conclude that the opening words of subsection 124(1) do not render a contractual time limit for the initial delivery of a grievance nugatory when the grievance is referred to this Board for arbitration under section 124. If the decision in Lummus holds otherwise, we respectfully decline to follow it.

(Emphasis added)

[114] Similarly, the reference to Lummus does not support the conclusion that time limits in a collective agreement may be superceded by s. 133. In Lummus, the Board found that s. 133 provides a separate procedure for the settlement of a construction dispute apart from the mechanisms that might be contained for referring a grievance to consensual arbitration under a collective agreement. In this sense, s. 133 does not require compliance with all steps of the grievance procedure to have been effected before a party will be entitled to bring an application for arbitration to the Board. The Act allows parties to proceed directly to the Board without proceeding first through the steps contemplated in the collective agreement [at paras. 6 and 8]: [page479]

The Board in its decision dated December 31, 1975 indicated "that the plain intent of section 112(a) of the Act is to establish a dispute settling mechanism separate and apart from any grievance and arbitration procedure provided under the terms of the subsisting collective agreement . . .". In making this ruling we were compelled by the clear and simple wording of the Legislation. Furthermore our ruling purports to reflect the underlying objective of the Legislation in providing a speedy process for resolving disputes arising out of the interpretation of collective agreements negotiated in the construction industry.

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. . . . .

The Board is satisfied that the Legislation contemplates the filing of a reference immediately after delivery of the grievance to the other party or at any stage of the grievance procedure if pursued under the terms of the agreement. . . . We do not hold it consistent with the aims of the Legislation, however, that a grievor may malinger with impunity in bringing its dispute to a resolve. In our opinion, the Board would be duty bound to require a grievor to provide a reasonable explanation for any delay in the processing of a grievance before us.

(Emphasis added)

[115] Lummus confirms that s. 133 allows a party to bypass the steps and timelines stipulated for grievance and arbitration in the collective agreement, but provides no authority for the extension of timelines. Therefore, Lummus is not supportive of the position taken by the Vice-chair.

[116] Finally, we are of the view that the decision of the OLRB in Consamar does not support the Vice-chair's interpretation of s. 133. Review of Consamar reveals that the parties did dispute what interpretation was to be given to the opening words of s. 124(1) (the predecessor to s. 133(1)), and whether the Lummus and Ontario Hydro (1987) determined that the collective agreement provisions could be discarded entirely: see paras. 6, 14. However, the OLRB found, at para. 27, that s. 44(6) (predecessor to s. 48(16)) was satisfied on the facts of the case, so it expressly declined to settle the issue of whether time limits remain relevant.

The interpretation by the Vice-chair creates a two-tiered system of arbitration and creates uncertainty

[117] The Vice-chair concluded that s. 133 gives to the Board broad discretion that the Union refers to as "superpowers" that may be used to override the terms of the parties' collective agreement. The jurisdictional restrictions imposed on a consensually appointed arbitrator by s. 48 of the Act under this view do not bind the jurisdiction of the OLRB when it is

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acting as construction-industry arbitrator. This interpretation creates a two-tiered system of arbitration that does not make sense and [page480] that will create uncertainty for unions and employers alike. This interpretation undermines the purpose of being able to expedite the arbitration process by direct referral to the Board.

[118] We conclude that the Vice-chair has misinterpreted the meaning of s. 133, and that his interpretation is unreasonable.

Conclusion

[119] As the Supreme Court made clear in Dunsmuir v. New Brunswick, supra, reviewing a decision for reasonableness requires the court to inquire into both to the process of articulating the reasons and to outcomes, to determine whether the qualities of justification, transparency and intelligibility are present.

[120] We conclude for the reasons that we have outlined that, although the Board is entitled to deference, the various components of the Jurisdiction Decision do not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[121] For all of the reasons outlined, we conclude that the Jurisdiction Decision is unreasonable as the OLRB had no jurisdiction to hear the grievance on any basis.

The Arbitration Decision

[122] In light of our conclusion that the Vice-chair did not have jurisdiction to hear the grievance for the reasons outlined, the Arbitration Decision is quashed for lack of jurisdiction.

[123] In light of our findings, we need not embark upon a detailed analysis of the reasonableness of the Arbitration Decision.

[124] We are of the view that, if the Jurisdiction Decision is upheld, the estoppel argument raised by the School Board probably must fail in light of the letter sent by counsel on

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June 14, 2004, referred to in para. 29 herein.

Costs

[125] The parties agreed that the successful party would be entitled to costs of this proceeding fixed in the amount of $10,000, inclusive of HST and disbursements. The Union shall pay this amount to the School Board. The OLRB is not seeking costs.

Application granted.

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