COURT OF APPEAL FOR ONTARIO

CITATION: Greater Essex County District School Board v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, 2012 ONCA 482
DATE: 20120710
DOCKET: C54934

O'Connor A.C.J.O, Feldman and Ducharme JJ.A.

BETWEEN

Greater Essex County District School Board

Applicant (Respondent)

and

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552

Respondent (Appellant)

and

Ontario Labour Relations Board

Respondent (Respondent)

Ronald Lebi and Stephen Wahl, for the appellant

Leonard P. Kavanaugh and Suzanne M. Porter, for the respondent Greater Essex County District School Board

Leonard Marvy, for the respondent Ontario Labour Relations Board

Eli Gedalof, for the intervener Universal Workers Union Local 183 Labourers' International Union of North America

Heard: May 17, 2012

On appeal from the order of the Divisional Court (Justices Janet Wilson, Robert J. Smith and Alexandra Hoy), dated October 7, 2011, with reasons by Wilson J. reported at (2011), 107 O.R. (3d) 453, quashing decisions of the Ontario Labour Relations Board (V-Chair David A. McKee), dated January 5, 2009 and May 14, 2010, with reasons reported at [2009] O.L.R.D. No. 55 and [2010] O.L.R.D. 1938.

Ducharme J.A.:

A. INTRODUCTION

[1] This appeal involves another in a series of skirmishes between the Greater Essex District School Board (the "School Board") and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (the "Union"). The Union represents workers in the construction industry, while the School Board is bound to the Union's provincial collective agreement governing construction work (the "Collective Agreement").

[2] The narrow issue before us in this case is whether a grievance filed by the Union in July 2004, but not referred to arbitration until December 2004, four months beyond the 14-day time limit for referral of a matter under the Collective Agreement, is nonetheless arbitrable before the Ontario Labour Relations Board (the "Labour Board" or the "OLRB") by virtue of the powers vested in the Labour Board under s. 133 of its enabling statute, the *Ontario Labour Relations Act, 1995*, Sched. A, (the "Act"). (For easy reference, s. 133 and all other applicable statutory and Collective Agreement provisions are included at Appendix "A".)

[3] Section 133 allows a party to a collective agreement in the construction sector to refer a grievance to the Labour Board for final and binding arbitration; it also empowers the Labour Board to refuse to accept a referral. What is the scope of the Labour Board's powers under that section? Does it have the authority to accept a referral of any matter or difference between the parties to a collective agreement, including, for example, a grievance that is no longer a grievance? That is the larger issue overhanging and animating the narrower one relating to the particular July 2004 grievance in question.

[4] In January 2009, nearly five years after the filing of the grievance, the Vice-Chair of the Labour Board decided that the grievance and arbitration procedures set out in the Collective Agreement between these parties were “separate and distinct,” and that while the provisions relating to steps taken in the grievance procedure were mandatory, those relating to the referral of a grievance to arbitration were directory only. He commented upon the very broad language of s. 133(1), and went on to interpret the section in the very same fashion.

[5] In the Vice-Chair’s view, the Labour Board possesses essentially an unfettered authority to relieve any party – in this case, the Union – from any and all requirements of the grievance and arbitration procedure, other than the need to file a grievance in the first place. In a decision dated January 5, 2009, he concluded that, irrespective of the time limits in the Collective Agreement, he had

and would exercise the discretion to extend the time for referral of the grievance to himself for arbitration (the “Jurisdiction Decision”).

[6] In May 2010, sixteen months after releasing the Jurisdiction Decision, the Vice-Chair decided the grievance in the Union’s favour. He rejected the School Board’s only defence, an argument based upon the doctrine of promissory estoppel. He declared that the School Board had violated the Provincial Collective Agreement, and ordered an assessment of damages (the “Arbitration Decision”).

[7] The School Board applied for judicial review of both decisions. In Reasons for Judgment released on October 7, 2011, the Divisional Court (J. Wilson, R. Smith, and Hoy JJ.), 2011 ONSC 5554, 107 O.R. (3d) 453, held that the Jurisdiction Decision was unreasonable on the ground that the Labour Board had no jurisdiction to hear the grievance on any basis. In the light of that conclusion, the Divisional Court considered it unnecessary to undertake a detailed analysis of the Arbitration Decision, and it too was quashed for lack of jurisdiction.

[8] In this appeal, the Union claims chiefly that the Divisional Court improperly applied the “reasonableness” standard in assessing the Vice-Chair’s Jurisdiction Decision, and erred in finding that his interpretation of s. 133 was wrong or unreasonable.

[9] For the reasons that follow, I conclude that the Divisional Court did not err in declaring the Vice-Chair's Jurisdiction Decision to be unreasonable, and I would dismiss the appeal accordingly.

B. BACKGROUND

[10] The School Board was created on January 1, 1998, to replace the former Essex County Board of Education and the former Board Of Education for the City of Windsor. The merger in 1998 was government-mandated and accomplished by way of the *Public Service Labour Relations Transition Act, 1997*, S.O. 1997 c. 21, Sch B.

[11] Before the merger, the City of Windsor School Board was bound by provincial collective agreements with the Union and other construction unions, but the Essex County Board of Education was not. Thus, while the Windsor Board was restricted to hiring workers bound to provincial collective agreements, the Essex Board was free to hire both unionized and non-unionized workers, as it saw fit.

[12] Following the merger, and for at least another six years, the School Board's hiring practices relating to construction industry workers did not change. In other words, construction industry work within the geographic areas of the old City of Windsor Board was subject to the Union's bargaining rights; this same work in the geographic areas of Essex County beyond Windsor was not.

[13] All the while, tensions between the parties simmered and grew. In June 2004, the Union formally took the position that the School Board was bound by the Collective Agreement for all construction work performed in the merged School Board. In August 2004, the School Board responded by filing an application seeking a declaration pursuant to s. 127.2 of the Act that it was not an employer in the construction industry.

[14] The Union fired back. It and several other construction trade unions applied to the Labour Board under s. 1(4) of the Act for a declaration that the School Board was a “single employer” under the Act. On January 4, 2006, the OLRB granted the Union's application and declared that the City of Windsor School Board and the Essex County Board of Education were one employer for all purposes under the Act, retroactive to the date of merger in 1998. The School Board's application for judicial review of that decision was dismissed. In the result, the former Essex County Board of Education is now bound by the Collective Agreement, as well as by provincial collective agreements with various other construction unions, to the same extent as the former City of Windsor School Board.

[15] About three years later, in February 2009, the OLRB dismissed the School Board's s. 127.2 application for a declaration that it was a non-construction employer. The School Board's application for judicial review of this decision was also dismissed by the Divisional Court.

[16] I turn again to the matter of the Union's grievance of July 27, 2004, which of course pre-dated all these latter machinations between the parties before the OLRB and the courts. The grievance initially alleged that the Board had hired workers who were not bound by the Collective Agreement to do work at two schools. Though the grievance was later amended to include other alleged infractions of the Collective Agreement, the Union did not refer the grievance to arbitration before the OLRB until December 9, 2004, more than four months beyond the 14-day time limit for referral of a matter to arbitration under the Collective Agreement.

[17] The OLRB Vice-Chair to whom the grievance was referred adjourned the grievance *sine die*, pending resolution of the other proceedings between the parties.

[18] In 2005, the School Board tendered three contracts in the area of the former Essex Board to contractors employing non-unionized workers. On August 19, 2005, the Union amended the July 27, 2004 grievance to include the three projects.

[19] On January 4, 2006, the Labour Board issued its decision on the Union's related-employer application, and in that decision granted the Union bargaining rights retroactive to amalgamation. As a result, the Provincial Collective Agreement was made applicable to construction work performed by the School

Board within its geographic jurisdiction retroactive to January 1, 1998, which now included, for the first time, construction work performed within the geographic jurisdiction of the former Essex County Board of Education. The related-employer application having been decided, the July 27, 2004 grievance was re-listed for arbitration, which brings us back to the decisions under review on this appeal.

C. DECISIONS BELOW

(i) Vice-Chair's Decisions

[20] The Vice-Chair noted that the December 9, 2004 referral of the July 27, 2004 grievance was untimely, because the Collective Agreement provided only for a 14-day period during which a grievance may be referred to arbitration. The relevant provisions in the Collective Agreement are as follows:

> ARTICLE 17 – GRIEVANCE PROCEDURE
>
> 17.2 . . . .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 any of the employees, or any 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, shall not have been satisfactorily settled by the Board under the provisions of Article 17 – Grievance Procedure – hereof, the matter may be referred to 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.

18.5 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.

[21] It was common ground that, because the grievance had not been referred to the "Board," and because the 14-day time limit had not been extended by mutual agreement of the parties in writing, the 14-day time limit in Article 17.2 was the applicable time limit. But the Vice-Chair rejected the School Board's submission that the time limit for referral of the grievance to arbitration in Article 17.2 was mandatory and that, if it were not complied with, as in this case, it gave an arbitrator no jurisdiction to hear the matter.

[22] In deciding that he had the authority to hear the July 27, 2004 grievance, the Vice-Chair concluded that in the Collective Agreement the arbitration process is entirely separate from that of the grievance procedure, and that, as a consequence of that finding, the 14-day time limits in Article 17.2 and in Article 18.1 were directory only, not mandatory. Thus, according to the Vice-Chair, he had the discretion to extend the time for the referral to arbitration if he considered it appropriate to do so.

[23] Alternatively, the Vice-Chair found that s. 48(16) of the Act applied to extend the time for referral of the grievance to arbitration. Subsection 48(16) provides in part:

> [A]n 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.

[24] Finally, the Vice-Chair determined, in the further alternative, that even if the grievance had been referred to the Labour Board outside the time limits set out in the Collective Agreement, and even if the time limits were mandatory, he had the authority under s. 133 of the Act to hear the Union's grievance.

[25] In May 2010, the Vice-Chair heard the grievance on its merits. He rejected the School Board's only defence – the argument that the Union was estopped from relying on the strict terms of the Collective Agreement – declared that the

School Board had breached the Collective Agreement when it let certain construction contracts to non-union contractors, and ordered an assessment of damages.

(ii) Divisional Court's Decision

[26] The Divisional Court focused all, or virtually all, of its attention on the Labour Board's Jurisdiction Decision, noting first and correctly that the applicable standard of review of that Decision, as well as of the Arbitration Decision, was one of reasonableness.

[27] The court began its analysis with a careful reading of Articles 17 and 18 of the Collective Agreement. It noted, at para. 52, that:

> [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.

[28] The Divisional Court concluded that, on their plain meaning, the words of Article 17.2 provide a mandatory timeline for referral of a grievance to arbitration at the Labour Board. The court added, at para. 56:

> 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.

[29] The Divisional Court thus obviously disagreed with the Vice-Chair's reasoning or conclusion that the timelines for referral to arbitration under the Collective Agreement are discretionary. The court observed, at para. 59, that "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."

[30] The Divisional Court took special note of the meaning and effect of Articles 17.3 and 18.5 of the Collective Agreement. Article 17.3 provides that "any grievance … that has not been carried through Article 17 – Grievance Procedure Clauses and in accordance with the time limit specified, or mutually agreed to, *will be deemed to have been settled satisfactorily by the parties to the grievance*" (emphasis added). 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*" (emphasis added). According to the Divisional Court, the only reasonable, rational conclusion to be drawn from Article 17.3, even on the OLRB's own jurisprudence, including, for example, its decision in *Centro Masonry Ltd.*, [1997] O.L.R.D. No. 2267, is that, once the clause is engaged, it "brings the grievance and the referral to arbitration to an end through a deemed settlement. … there is nothing left that could be referred to arbitration."

[31] Regarding s. 133 of the Act, the Divisional Court concluded, at para. 92, that the interpretation given to it by the Vice-Chair was unreasonable for the following 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 section 133 of the OLRA allows timelines to be truncated not extended.
>
> • The Vice-Chair's interpretation of section 133 creates a two-tiered system of arbitration with different sets of rules for arbitration – one with strict time lines 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.

[32] In summing up, the Divisional Court alluded to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and remarked that "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" [*sic*]. The Divisional Court held 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" (at para. 120). In the panel's view, "the OLRB had no jurisdiction to hear the grievance on any basis." The Divisional Court therefore quashed the Jurisdiction Decision, and, in light of its reasons for quashing the Jurisdiction Decision, it also quashed the Arbitration Decision without any further analysis of the reasonableness of that latter decision.

D. ISSUES AND PARTIES' SUBMISSIONS

[33] The Union raises two issues on appeal: First, did the Divisional Court effectively apply a correctness standard of review? Second, did the Divisional Court err in concluding that the Vice-Chair's decisions were unreasonable?

[34] The Union submits that the Divisional Court improperly applied the reasonableness standard by determining that there was only one correct interpretation of s. 133 of the Act, and by substituting its view of "good public policy" for that of the Labour Board.

[35] The Union further submits that the Divisional Court erred in finding the Vice-Chair's decision to be unreasonable. The Union points to s. 133(1), which provides that a grievance under a collective agreement may be referred to the Labour Board "despite the grievance and arbitration provisions in a collective agreement." The Union also highlights s. 133(2), which states that a "referral …

may be made *at any time* after the grievance has been delivered to the other party" (emphasis added). So, too, the Union relies upon s. 133(4), which provides the Labour Board with statutory discretion to refuse to accept a referral, and s. 133(9), which grants the Labour Board "exclusive jurisdiction" to determine the grievance.

[36] The Divisional Court erred, the Union says, in failing to explain how s. 133 could be read to entrench the Collective Agreement's time limits over the statutory time limit.

[37] In the Union's submission, the Divisional Court also erred in determining that the expeditious resolution of construction-industry grievances was the only policy animating s. 133 of the Act and that there should not be a two-tiered system of arbitration.

[38] In short, the Union contends the Divisional Court erred in concluding that the Labour Board's jurisdiction decision was unreasonable.

[39] The Universal Workers Union Local 183 Labourers' International Union of North America (the "Intervener") supports the Union's position that the Divisional Court erred in applying the reasonableness standard and erred in finding the decision to be unreasonable.

[40] While the Labour Board takes no position on the reasonableness of the Vice-Chair's decision, it submits that the Divisional Court erred in applying the reasonableness standard and that, in fact, it applied a correctness standard.

[41] The respondent School Board submits that the Divisional Court made no error. According to the School Board, the Divisional Court properly applied the reasonableness standard before concluding, at para. 120 of its Reasons for Judgment, that the OLRB's decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[42] In the School Board's view, the Divisional Court was correct to find that the Vice-Chair acted unreasonably when he decided that he had the authority pursuant to s. 133 to refer to arbitration a grievance that under the clear terms of the Collective Agreement could not be referred to arbitration. The School Board argues that, for s. 133 to apply, there must be a live grievance as of the date of referral. In this case, given the terms of the Collective Agreement, there was no grievance to refer to arbitration.

[43] The School Board further submits that the Divisional Court was alive to the fact that the Labour Board's interpretation of s. 133 effectively undermined the policy or purpose informing the provision: direct referral to the OLRB of construction-industry grievances, for the sake of their speedy resolution. In the School Board's submission, s. 133 merely provides parties to a collective

agreement in the construction industry with another forum in which to arbitrate a grievance. The section does not cloak the Labour Board with any special warrant that may be used to override the bargained-for terms of the parties' Collective Agreement. Section 133, indeed, is nothing without the Collective Agreement, so it cannot provide the OLRB with jurisdiction to resuscitate a dead grievance, a grievance settled or deemed to be settled, and then to extend the time for the referral of the settled grievance to arbitration.

[44] The School Board notes that s. 133(9) of the Act expressly incorporates s. 48(16) of the Act*,* and it argues, in concert with the conclusion reached by the three-member panel in *Ontario Power Generation*, [2003] O.L.R.D. No. 1835, that if s. 133(1) meant that time limits are irrelevant, there would be no need to incorporate s. 48(16) into s. 133(9).

[45] In summary, the School Board contends that s. 133 does not provide the OLRB with "superpowers," does not operate to eliminate or extend indefinitely any time limit in the collective agreement, and may not be used by the Labour Board to override or ignore the terms of this Collective Agreement.

E. ANALYSIS

[46] The parties agree that the Divisional Court articulated the appropriate standard of review. However, as I have said, the Union, the Labour Board and

the Intervener contend that the Divisional Court erred in applying the reasonableness standard.

[47] In my view, some of the language used by the Divisional Court in its reasons is inappropriate when the court is performing a reasonableness analysis. To the extent that the language of the decision may suggest that the Divisional Court applied the correctness standard, rather than merely determining whether the Vice-Chair's decision-making process was reasonable, transparent, justifiable, or within a range of acceptable outcomes, the court erred. The first sentence of para. 106 of the Reasons for Judgment illustrates the problem. There, the Divisional Court writes: "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." [Emphasis added.]

[48] However, while I do not embrace all of the Divisional Court's analysis, I agree without reservation with its ultimate conclusion that the Vice-Chair's Jurisdiction Decision is unreasonable and cannot stand.

[49] The question at the heart of this appeal, and the question with which the Divisional Court was fully engaged, is whether the Vice-Chair's interpretation and application of s. 133 of the Act was reasonable in the circumstances of this case.

[50] Context is everything. As the Supreme Court of Canada observed in *Bell ExpressVu Limited v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, citing Elmer Dreidger, *Construction of Statutes* (Toronto: Butterworths, 1983) at 87, "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[51] In this case, the exercise in statutory interpretation thus begins with the words of the relevant provision. Section 133 provides in part as follows:

> 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.
>
> 133.(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.
>
> 133.(4) The Board may refuse to accept a referral.
>
> 133.(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.
>
> 133.(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.

> 133.(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. [Emphasis added.]

[52] The Vice-Chair set out his interpretation of s. 133 at paras. 56 to 64 of his Jurisdiction Decision. He noted that s. 133 (1) contains very broad language, and then, at paras. 59 and 60, he provided the following short statutory history of the section:

> Both what are now sections 133(1) and (9) and subsection 48(16) were added to the Act in 1975, S.O. 1975, c. 1. Aside from changing the word "notwithstanding" to "despite" and the section numbers referred to in subsection 133(9), there was only one substantive amendment to either section. In 1995 (S.O. 1995, c.1, Schedule A), section 48(16) was amended to remove the words "or arbitration procedure". However, virtually the same words were not removed from subsection 133(1). Both the arbitrators and the panels of the the Divisional Court in *Leisureworld* and *James Bay* decisions placed great emphasis on the fact that subsection 48 (16) had been amended to delete the words “and arbitration procedure” to draw the distinction between extending the time for performing acts under the Grievance Procedure as opposed to referring the matter to arbitration.
>
> Not only was the language not changed in subsection 133(1), the Legislature revisited the issue in 1998 and added what are now subsections 133(4), (5) and (6) giving the Board even greater discretion to deal with grievances referred to it and leaving section 133(1) untouched. It appears then that the Act has moved in different directions for arbitrators acting under section 48 and the Board acting as arbitrator under section 133.

> Given the nature of the construction industry, discussed below, this makes good labour relations sense.

[53] The Vice-Chair concluded, at para. 61, that the grievance and arbitration provisions in a collective agreement:

> include the time limits, be they mandatory or directory. To make subsection 133(1) subject to those time limits would be to add words to the subsection that are clearly inconsistent with the opening phrase. The discretion of the Board to deny a grievance on the basis of delay is found … in subsection 133(4).

[54] According to the Vice-Chair, the Labour Board as arbitrator is given a broader unfettered jurisdiction under s. 133 than that afforded to arbitrators under s. 48 because, as he put it, at para. 62, the Labour Board "needs the flexibility to be able to consider all of the issues that may arise and that are connected in real and practical terms [in the construction industry] that do not always fit neatly within the general provisions of the Act."

[55] The Vice-Chair acknowledged, at para. 63, that there are OLRB decisions directly contrary to the interpretation he arrived at in this case. One of those decisions, *Ontario Power Generation*, was a unanimous decision of a three-person panel of the Board of which he was the Chair. In that case, the panel concluded, at para. 14, as follows:

> If a grievance were referred to arbitration one day after it was filed with the Employer, the Board would not likely reject it as premature, despite the terms of the

> grievance process in the Collective Agreement (see ARLINGTON CRANE SERVICES LIMITED, [1986] OLRB Rep. Bpr.417). It may override the choice of forum for arbitration contained in the Collective Agreement (e.g. KENNEDY MASONRY LTD., [1998] OLRB Rep. Aug. 622). That does not mean the reverse is true. 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) … We conclude that section 133 does not operate to eliminate or extend indefinitely any time limit in a collective agreement.

[56] In *Centro Masonry*, a different Vice-Chair of the Board was called upon to decide essentially the same issue as in this case: the question of the referability of a grievance in the construction industry pursuant to s. 133. In that case, one of the relevant provisions of the collective agreement dealing with grievance and arbitration procedures was the following:

> 5.08(c) If advantage of the provisions of Articles 4 and 5 is not taken within the time limits specified therein or as extended in writing, as set out above, the grievance shall be deemed to have been abandoned and may not be re-opened.

[57] The Vice-Chair in *Centro Masonry* observed that through the use of the term “shall” in Article 5.08 (c) the parties clearly “intended that grievances which were not processed in a timely fashion were to be deemed to be abandoned and not re-opened” (at para. 21). In *Centro Masonry*, in other words, the Vice-Chair found that a grievance not processed through the grievance procedure as

contemplated by the relevant provisions of the collective agreement, and not referred to arbitration in accord with the time limits set out in the collective agreement, was deemed to be abandoned. At that point, the grievance ceased to exist in any form and was not therefore capable of referral to arbitration.

[58] However, in this case, the Vice-Chair declined to follow this line of authority, and, in short, construed s. 133 as investing the Labour Board with the wide-open discretion to ignore or override the Collective Agreement. Thus, according to the Vice-Chair, the Labour Board has the authority to deal with any matters it likes, including past grievances deemed to have been settled under the Collective Agreement.

[59] In my view, the Divisional Court was correct to find that such an interpretation of s. 133 is unreasonable. The Labour Board has broad discretion to accept or to refuse accept a grievance for referral, but there can be nothing to accept or refuse if there is no grievance. The grievance is the *sine qua non.*

[60] In this case, there was no live grievance at the time of the referral under the relevant terms of the Collective Agreement. There is nothing ambiguous about the meaning and intent of Articles 17.2, 17.3, 18.1, 18.5, and 18.6. The simple fact is that the July 2004 grievance, as amended, was referred to the Labour Board well beyond the 14-day time limit in the Collective Agreement

when it was already deemed by the clear language of 17.3 to have been settled by the parties to the Collective Agreement.

[61] To interpret in s. 133(1) the words “despite the grievance and arbitration provisions in the collective agreement” as somehow giving the Labour Board the authority to decide whether any matter is arbitrable, even a grievance that no longer exists, is to read that phrase in isolation without consideration of the function of s. 133 as a whole. Indeed, it was open to the Legislature to craft a very different s. 133(1), one that might have included language such as the following: “… may refer a grievance, including a grievance already adjudicated, settled, deemed to be settled, or abandoned.”

[62] The point I wish to emphasize is that s. 133 requires “a grievance”. It is only a grievance that animates the section and makes it meaningful. Section 133 provides a useful forum for the prompt resolution of construction industry grievances, a forum not available for grievances outside of the construction industry, but if there is no grievance, then the section is not engaged. In this regard, the view of the Vice-Chair in *Centro Masonry*, as expressed at para. 33, is most apt:

> 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.

[63] In this case, the position of the Vice-Chair and the Union, if correct, would mean that s. 133 casts upon the Labour Board the right to ignore the express terms of the Collective Agreement dealing with grievance and arbitration, including applicable time lines.

[64] In my view, that cannot be so. Subsection 133(9) expressly incorporates s. 48(16) which provides as follows:

> 48.(16) Except where a collective agreement states that this subsection does not apply, 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.]

[65] In the context of this case, the emphasis in s. 48(16) should fall upon the words “for the taking of any step *in the grievance procedure under a collective agreement*.” The provision permits an arbitrator to extend the time for the taking

of any step *in the grievance procedure under a collective agreement*, as opposed to any step in an arbitration procedure: *Service Employees International Union, Local 204 v*. *Leisureworld Nursing Homes Inc.* (21 Nov. 21 1995) (Arb.), aff'd (1997), 99 O.A.C. 196 (Div. Ct.), aff'd [1997] O.J. No. 4815 (C.A.). And, as I noted earlier in addressing the OLRB's decision the *Ontario Power Generation* decision, "[i]f section 133(1) meant that time limits are irrelevant, then there would be no need to incorporate 48(16)" (at para. 14).

[66] In my view, therefore, the Vice-Chair's interpretation falls outside the range of acceptable outcomes, because he concluded that he had the authority to refer to arbitration and to decide a grievance when there was in fact no grievance. His interpretation pays little or no heed to, trivializes, and renders inconsequential the mandatory timelines agreed upon by the parties to the Collective Agreement.

[67] The Labour Board has no inherent jurisdiction. Expert as it may be in the understanding and application of its empowering statute, it possesses only the powers delegated to it by its statute, and by the collective agreement. Thus, when the Labour Board sits as arbitrator under s. 133 it must respect, not ignore, the language of the collective agreement. Section 133 cannot reasonably be interpreted to mean that the OLRB may in its own unfettered discretion revive a dead grievance by extending the parties' agreed-upon time limits for referral to arbitration.

[68] For these reasons, I conclude that the Divisional Court was correct in finding that the Labour Board's Jurisdiction Decision was unreasonable, and I would dismiss the appeal.

[69] The parties have agreed on the issue of costs.

Released: July 10, 2012 “DOC”

“Edward Ducharme J.A.”

“I agree D. O’Connor A.C.J.O.”

“I agree K. Feldman J.A.”

Appendix "A"

Ontario Labour Relations Act, 1995, S.O. 195, c. 1, Sched. A

48.(16) Except where a collective agreement states that this subsection does not apply, 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.

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.

133.(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.

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

133.(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.

133.(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.

133.(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.

Applicable Collective Agreement

1.11 "Board" means a Local Joint Conference Board as provided for in Article 15 hereof.

ARTICLE 17—GRIEVANCE PROCEDURE

17.2 Any difference arising directly between the Zone 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 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, 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.

18.5 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.