



Superior Court of Justice  
 Divisional Court  
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## Facsimile Transmittal

To: John E. Brooks & Alan Freedman		416 - 362 - 9680
John L. Stout & Jo-Anne Pictel		416 - 964 - 5895
From:	ROMANA Jurankova	Date: Jan 05/07
RE:	Ont. Power Generation Inc. vs. Society of Energy Professionals & Owen B. Shine, Q.C.	
Court File No.:	513 / 05	Pages (including coversheet): 13
Cc:		

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NOTE: Please, find the written reasons for the  
 Judicial Application of the Honourable  
 Justices Cunningham, Chapman, Kealey  
 dated 5<sup>th</sup> January, 2007.



## **Background**

[2] Pos worked for OPG for 30 years. He suffers from a mild cognitive disorder. Because of this disorder, he was away from work on sick leave and was in receipt of sick benefits. OPG claimed that Pos was capable of returning to work assuming modified duties. Pos and the Society disagreed. OPG therefore terminated Pos's sick benefits. The Society has grieved this decision. The Society also sought an interim order reinstating Pos's sick benefits pending the resolution of the grievance.

[3] The arbitrator concluded that the jurisdiction to grant the interim award flowed from s. 48 (12) (i) of the LRA. He relied on this court's decision in *Ontario (Ministry of Labour) v. Ontario (Grievance Settlement Board)*, [1997] O.J. No. 427 (Div. Ct.), that the phrase "procedural matters" in s. 48 (12) (i) of the LRA was to be given a "broad meaning". He held that "procedural matters ought not be technically interpreted" but should be viewed in the grievance context to permit arbitrators to resolve interim matters fairly and equitably. Consequently, the power to make "interim orders on procedural matters" included the power to award interim "ex gratia" payments to the grievor in the amount of his terminated sick leave payments.

[4] In addition, the arbitrator held that the sentence "the arbitrator shall have the power to settle or decide such matters as are referred to him/her in a fair and equitable manner" in article 16.7 (i) of the collective agreement also gave him the power to make the interim award.

[5] Since Pos was a long-service employee with a disability and would be entitled to some form of remuneration regardless of who prevails in the grievance, the arbitrator concluded that it was fair and equitable that he receive "ex gratia payments from OPG in an amount equivalent to his sick leave payments, on a weekly basis" until the grievance was resolved.

[6] The arbitrator held further that the payments were not to be classified as sick pay, and that the payments were to be made on the condition that, depending on the ultimate outcome of the grievance, OPG could deduct those payments from any future remuneration Pos may receive.

## **Relevant Provisions**

[7] Clause 48 (12) (i) of the LRA states:

**Powers of arbitrators, chair of arbitration boards, and arbitration boards**

48. (12) An arbitrator or the chair of an arbitration board, as the case may be, has power,

...

(i) to make interim orders concerning procedural matters;

[8] Article 16.7 (i) of the collective agreement states:

The arbitrator shall have the power to settle or decide such matters as are referred to him/her in a fair and equitable manner, and the arbitrator's decision shall be final and binding. An arbitrator shall not have the

power to amend or terminate this Agreement, policies, or procedures save only any policies or procedures which may conflict with the terms of this Agreement.

### **Legal Issues**

[9] The following issues are relevant to this application for judicial review:

1. What is the appropriate standard of review?
2. Did the arbitrator err in concluding that s. 48 (12) (i) of the LRA gave him the jurisdiction to make the interim award?
3. Did the arbitrator err in concluding that article 16.7 (i) of the collective agreement gave him the jurisdiction to make the interim award?
4. Did the arbitrator err in his choice of award?

### **Standard of Review**

[10] The Society's position is that the appropriate standard of review is patent unreasonableness. It submits that the arbitrator had to interpret both s. 48 (12) (i) of the LRA and article 16.7 (i) of the collective agreement in order to determine whether he had jurisdiction to make the interim award. The Society cites the recent decision of the Ontario Court of Appeal in *C.A.W.-Canada, Local No. 27 v. London Machinery Inc.* (2006), 264 D.L.R. (4th) 428 (Ont. C.A.) [*London Machinery*] to support its proposition that the most deferential standard of review applies to an arbitrator's award that is based on the interpretation of both a collective agreement and "inside" legislation (i.e. legislation that is close to the arbitrator's area of expertise).

[11] *London Machinery* dealt with the interaction of a collective agreement with provisions of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "ESA"). Sections 54 and 56 (1) (c) of the ESA exempt an employee on temporary lay-off from the statutory notice of termination requirements unless that employee is deemed terminated at law because the duration of his/her temporary lay-off exceeds 35 weeks. However, s. 54 (2) (c) of the ESA permits agreements that extend the duration of a temporary lay-off beyond 35 weeks. The union brought a grievance against the employer on behalf of an employee who was laid-off for 36 weeks, arguing that he was terminated at law and therefore entitled to termination pay. The employer alleged that the collective agreement extended the duration of the temporary lay-off of its employees beyond 35 weeks and therefore the employee was not terminated at law. The arbitrator had to interpret both the collective agreement and the ESA to make an appropriate award. All members of the Court of Appeal agreed that the standard of patent unreasonableness applies to an arbitrator's award that is based on the interpretation of a collective agreement and "outside" legislation (the ESA) that was intimately connected with the arbitrator's expertise (*London Machinery, supra* at paras. 24-38, 102-109).

[12] In my opinion, *London Machinery* is distinguishable. Section 99 of the ESA incorporates the Act's provisions into every collective agreement. The arbitrator in *London Machinery* was therefore tasked with interpreting statutory provisions and a collective agreement that were effectively combined. That situation is not encountered in the case at bar. I do not agree with the Society's characterization of the arbitrator's decision. The arbitrator did not treat the LRA and the collective agreement as somehow combining to create a single source of jurisdiction. On the contrary, the arbitrator outlined two independent sources of jurisdiction to make the interim award – the first being s. 48 (12) (i) of the LRA and the second being article 16.7 (i) of the collective agreement.

[13] OPG's position is that the appropriate standard of review is correctness. It submits that the arbitrator's decision was based predominantly on his interpretation of s. 48 (12) (i) of the LRA, and that if the arbitrator had found that the LRA did not give him jurisdiction to make the interim award, it is unlikely that he would have found that the collective agreement gave him jurisdiction.

[14] In my opinion, a plain reading of the arbitrator's decision undermines this submission. After concluding that the LRA gave him jurisdiction to make the order, the arbitrator plainly stated, at page 2 of his reasons, that the collective agreement also gave him the requisite jurisdiction:

Further, Article 16.7(i) of this Collective Agreement provides that "the arbitrator shall have the power to settle or decide such matters as are referred to him/her in a fair and equitable manner..." In my view, that proviso extends to making interim orders that are fair and equitable.  
(Emphasis added)

[15] This Court must determine the standard of review of three decisions – the first is the arbitrator's decision that s. 48 (12) (i) of the LRA gave him jurisdiction to make the interim award, the second is the arbitrator's decision that article 16.7 (i) of the collective agreement gave him jurisdiction to make the interim award, and third is the arbitrator's choice of award.

[16] In *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] 3 S.C.R. 77 at para. 14, the Supreme Court concluded that different standards of review might apply to different decisions made by a tribunal in the course of a proceeding.

**The standard of review of the arbitrator's interpretation of the LRA is reasonableness *simpliciter***

[17] In *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727 at paras. 16-19 [*Lethbridge*] the Supreme Court held that the standard of reasonableness *simpliciter* applied to a labour arbitrator's interpretation of a statutory remedial provision (s. 142 (2)) of Alberta's *Labour Relations Code* (the "Code").

[18] *Lethbridge* is not, however, the final word on the standard of review to be applied to any labour arbitrator's interpretation of his or her empowering statute. The Ontario Court of Appeal

in *Teamsters Union, Local 938 v. Lakeport Beverages* (2005), 77 O.R. (3d) 543 at para. 32 (C.A.) [*Lakeport*], pointed out that the legislative framework encountered in *Lethbridge* is not exactly the same as the framework established under Ontario's LRA. Therefore, the level of deference that the Alberta Legislature intended to give to Alberta arbitrators' interpretation of the Code may not be the same level of deference the Ontario Legislature intended to give to Ontario arbitrators' interpretation of the LRA. The only way this court can discern the Ontario Legislature's intent is by employing a pragmatic and functional analysis (*Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology* (2006), 80 O.R. (3d) 1 at para. 32 (C.A.) [*Seneca College*]).

[19] The pragmatic and functional approach requires consideration of four contextual factors: the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and the nature of the question – law, fact or mixed law and fact (*Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at 238).

[20] In my opinion, the interplay of the four contextual factors indicates that the Ontario Legislature intended to give deference to an arbitrator's interpretation of the LRA, but not the highest degree of deference. The standard of review is therefore reasonableness *simpliciter*.

**(i) The presence or absence of a privative clause or statutory right of appeal**

[21] The arbitrator is protected by a stronger privative clause (s. 48 (1) of the LRA) than the one found in Alberta's Code (see *Lakeport, supra* at para. 32), which suggests a more deferential standard of review.

**(ii) Expertise**

[22] This contextual factor also suggests that the arbitrator is entitled to deference. In *Lethbridge, supra* at para. 17, the Supreme Court held that deference was warranted because interpreting the Code was intimately connected to the arbitrator's mandate. The words of Laskin J.A. in *Seneca College, supra* at para. 67, echo this point: "If the statute is linked to a board of arbitration's mandate, and frequently encountered by it, then its interpretation and application of the statute warrants deference from a reviewing court."

**(iii) The purposes of the legislation and the provision in question**

[23] The broad purpose of the LRA is to secure prompt, efficient, final and binding settlement of workplace disputes, which countenances deference. However, in my opinion the purpose of s. 48 (12) (i) suggests less deference is owed.

[24] Like s. 142 (2) of Alberta's Code, s. 48 (12) (i) of the LRA has both remedial and jurisdictional purposes (*Lethbridge, supra* at para. 18). It is only the jurisdictional aspect of s. 48 (12) (i) that is relevant at this time.

[25] The provision's jurisdictional aspect limits an arbitrator's jurisdiction to make interim orders by requiring that such orders only address "procedural matters". The Society specifically asked the arbitrator to award interim relief by ordering the reinstatement of the grievor's sick leave payments pending the resolution of the grievance. The arbitrator responded by making an interim award for "*ex gratia*" payments to the grievor equal to the amount of his sick leave payments. At this point we are not concerned with whether s. 48 (12) (i) supports the form of the award (the "*ex gratia*" payments), which would relate to the remedial aspect of the s. 48 (12) (i). Rather we are concerned with whether s. 48 (12) (i) gives an arbitrator the jurisdiction to award the interim relief requested because such an order relates to "procedural matters". On this issue the arbitrator is not entitled to deference. As Iacobucci J. held in *Lethbridge, supra* at para. 18, the "jurisdictional aspect of the provision attracts less deference, as administrative bodies are entirely statutory and thus must be correct in assessing the scope of their mandate".

**(iv) The nature of the question**

[26] The nature of the question involves the legal interpretation of s. 48 (12) (i) of the LRA that will certainly have precedential value in future arbitrations under the LRA. As Iacobucci J. said in *Lethbridge, supra* at para. 19, less deference is owed to the arbitrator where the nature of the question involves the legal interpretation of a general statutory remedy power and where that interpretation has greater precedential value, even if the interpretation "presupposes an understanding and analysis of labour law issues".

[27] Overall, the first two contextual factors suggest that deference is owed to the arbitrator, while the remaining two factors suggest that less deference is owed. In my opinion, the Legislature intended that some deference should be given to an arbitrator's interpretation of what is meant by "procedural matters" in s. 48 (12) (i) of the LRA, but not the highest degree of deference. The appropriate standard of review is reasonableness *simpliciter*. The arbitrator's decision should only be overturned if it was unreasonable.

[28] In *Ryan v. The Law Society of New Brunswick*, [2003] 1 S.C.R. 247 at paras. 55-56, the Supreme Court explained what is meant by an "unreasonable decision":

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.

This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather

whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[29] For the reasons that I will set out below, I conclude that it was unreasonable for the arbitrator to decide that s. 48 (12) (i) of the LRA gave him the jurisdiction to make the interim award. This aspect of his decision must be quashed.

[30] This does not end the standard of review analysis. As I mentioned above, the arbitrator concluded that there were two independent sources of jurisdiction to make the interim award – the LRA and the collective agreement. Therefore it is necessary to determine the appropriate standard of review of the arbitrator’s interpretation of article 16.7 (i) of the collective agreement.

**The standard of review of the arbitrator’s interpretation of a collective agreement is patent unreasonableness**

[31] It is now settled law in Ontario that the patent unreasonableness standard of review applies to an arbitrator’s interpretation of a collective agreement (*Lakeport, supra*).

[32] The arbitrator’s conclusion that article 16.7 (i) of the collective agreement gave him the jurisdiction to make the interim award will only be overturned if his interpretation is “clearly irrational” (*Seneca College, supra* at para. 70).

[33] For the reasons that I will outline below, I conclude that it was not clearly irrational for the arbitrator to decide that article 16.7 (i) of the collective agreement gave him the jurisdiction to make the interim award.

**The standard of review of the arbitrator’s choice of award is patent unreasonableness**

[34] Since I have alluded to the unreasonableness of the arbitrator’s interpretation of the LRA, I need now only determine the standard of review of the arbitrator’s choice of award in light of the remedial authority provided to him in article 16.7 (i) of the collective agreement. In my opinion, the appropriate standard of review is patent unreasonableness.

[35] As already mentioned, the arbitrator is protected by a relatively strong privative clause (s. 48 (1) of the LRA). Arbitrators have recognized expertise in the interpretation and application of collective agreements (*Lethbridge, supra* at para. 41). The purpose of the arbitration scheme under the LRA is to secure prompt, efficient, cost-effective and final settlement of disputes arising out of the interpretation and application of a collective agreement (*Lethbridge, supra* at para. 18; *Lakeport, supra* at para. 29). In addition, the purpose of article 16.7 (i) is to provide the arbitrator with broad power to settle disputes. This is evidenced by the wide discretion given to the arbitrator to resolve all matters referred to him in a “fair and equitable manner”. Finally, the nature of the question is one of mixed fact and law – the arbitrator was tasked with fashioning a

“fair and equitable” remedy given the particular facts of the case before him. As Iacobucci J. said in *Lethbridge, supra* at para. 54, “arbitrators [must] be liberally empowered to fashion appropriate remedies, taking into consideration the whole of the circumstances”.

[36] Taken together, in my opinion all of the contextual factors indicate that the Legislature intended that a labour arbitrator’s choice of award would be given the highest level of deference by a reviewing court. The appropriate standard of review is patent unreasonableness. The arbitrator’s choice of award will only be set aside if it is “clearly irrational” (*Seneca College, supra* at para. 70).

[37] For the reasons set out below, I conclude that the arbitrator’s decision to award interim “*ex gratia*” payments to the grievor was not clearly irrational.

### **Analysis**

#### **The arbitrator’s interpretation of s. 48 (12) (i) of the LRA was unreasonable**

[38] The arbitrator, by his own admission, did not provide extensive reasons. Outside of stating that s. 48 (12) (i) should be liberally interpreted and viewed in the context of grievance arbitration and collective bargaining (both principles being generally accepted and not controversial), he relied primarily on the Divisional Court’s judgment in *Ontario (Ministry of Labour) v. Ontario (Grievance Settlement Board)*, [1997] O.J. No. 427 (Div. Ct.) [*Nield*] to support his conclusion that s. 48 (12) (i) gave him jurisdiction to make the interim award. In my opinion, the arbitrator’s exclusive reliance on *Nield* provided an insufficient base to support his decision. Consequently, his interpretation of s. 48 (12) (i) was unreasonable and must be set aside.

[39] In *Nield*, the Divisional Court heard a judicial review application of an interim order granted by the Grievance Settlement Board (the “GSB”). The issue in the grievance was whether the Ministry of Labour was entitled to require an Occupational Health and Safety Inspector to divest his ownership interest in an auto body shop on the basis that the ownership interest placed him in a conflict of interest. The union requested an interim order enjoining the employer from requiring divestment of the grievor’s ownership interest. The GSB found that the question of whether the grievor should be permitted to retain his interest pending determination of the merits of the grievance was a “procedural matter”.

[40] The Court found at para. 1 that GSB’s interim order dealt with “procedural matters” because it did not resolve the key issue of whether the grievor had a conflict of interest. The Court then stated at para. 2 that “the legislature gave broad meaning to the words ‘procedural matters’ in s. 48(12)(i).”

[41] In my opinion, the Court’s statement in *Nield* simply reiterates the accepted principle that remedial provisions in the LRA should be liberally interpreted. *Nield* does not stand for the proposition that s. 48 (12) (i) permits any form of interim order. Nor does *Nield* relieve an adjudicator from his or her obligation to employ the various tools of statutory interpretation to discern the meaning of a remedial provision.

[42] One interpretive tool available to the arbitrator was to look at the legal meaning of “procedural matters” (Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 47). A “procedural matter” is a matter of “procedure”. “Procedure” relates to how a proceeding is conducted. *Black’s Law Dictionary*, 8th ed., defines “procedure” as “1. A specific method or course of action. 2. The judicial rule or manner for carrying on a civil lawsuit or criminal prosecution.” (Emphasis added). The legal meaning of “procedural matters” therefore does not include substantive relief.

[43] In addition, one of the most powerful tools available to the arbitrator to help him interpret the meaning of “procedural matters” in s. 48 (12) (i) was to look at the legislative evolution of that provision (Sullivan, *supra* at 218).

[44] In 1993, Bill 40 amended the LRA to provide arbitrators with broad powers to make interim orders. Paragraph 45 (8) 4 read as follows:

45. (8) An arbitrator or arbitration board shall make a final and conclusive settlement of the differences between the parties and, for that purpose, has the following powers:

4. To grant such interim orders, including interim relief, as the arbitrator or arbitration board considers appropriate. (Emphasis added)

[45] However, in 1995, Bill 7 repealed Bill 40 and replaced s. 45 (8) 4 with s. 48 (12) (i). These amendments curtailed the power of arbitrators to make interim orders by explicitly removing their ability to grant “interim relief”, by removing their ability to make orders that they “consider appropriate”, and by limiting the scope of interim orders to “procedural matters”. In my opinion, this suggests that the Ontario Legislature did not intend that an “interim order concerning procedural matters” would include interim relief that an arbitrator considers appropriate in the circumstances.

[46] The Society asked for interim relief (namely the reinstatement of the grievor’s sick leave benefits), and the arbitrator provided it in the form of an order for *ex gratia* payments to the grievor which he considered “fair and equitable” in the circumstances. In doing this under the auspices of s. 48 (12) (i) of the LRA, the arbitrator acted contrary to the intent of the Legislature. Not only was this decision unreasonable, I find that it was also incorrect. This aspect of the arbitrator’s decision must therefore be set aside.

**The arbitrator’s interpretation of article 16.7 (i) of the collective agreement was not patently unreasonable**

[47] At the hearing, counsel for OPG conceded that a collective agreement could provide an arbitrator with the power to grant interim relief notwithstanding the restriction on interim orders under s. 48 (12) (i) of the LRA. OPG submitted, however, that article 16.7 (i) of the collective agreement did not provide the arbitrator with the power to make the interim award. I disagree. Article 16.7 (i) gives the arbitrator very broad authority “to settle or decide such matters as are referred to him/her in a fair and equitable manner”. I agree with the Society’s submission that it

would take much clearer language to conclude that the parties intended to exclude the power to grant interim relief from the scope of article 16.7 (i). Therefore it was not clearly irrational for the arbitrator to conclude that this provision gave him the power to make the interim award.

**The arbitrator's choice of award was not patently unreasonable**

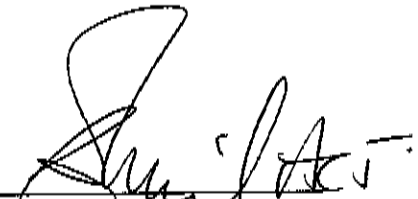
[48] The arbitrator found that the grievor was a long-service employee with a disability and that he would be entitled to some form of remuneration regardless of the ultimate outcome of the grievance. He therefore concluded that it was "fair and equitable" that the grievor receive interim remuneration on the condition that the moneys provided to him be deducted from any future sums owing to the grievor upon the disposition of the grievance. He chose to classify the interim payments as "*ex gratia*" rather than "sick pay" so as to avoid pre-judging the merits of the case. Given the broad power afforded him by article 16.7 (i) of the collective agreement, and the circumstances of the case as he found them, I cannot conclude that this choice of award was clearly irrational.

**Disposition**

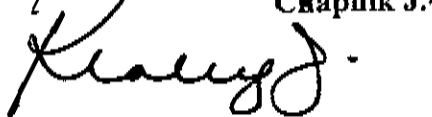
[49] For the aforesaid reasons, while I find it was unreasonable for the arbitrator to conclude that s.48(12)(i) of the *Labour Relations Act* gave him jurisdiction to make the interim award, it was not patently unreasonable for him to do so under article 16.7(1) of the collective agreement. Consequently his interpretation of s.48(12)(i) is set aside and his interpretation of the collective agreement is upheld. Furthermore, in my view, the decision to award "*ex gratia*" payments to the grievor was not patently unreasonable and the interim award is upheld.

**Costs**

[50] The parties are not seeking costs.

  
Cunningham A.C./J.S.C.

  
Chapnik J.

  
Kealey J.

Released: JAN 05 2007

COURT FILE NO.: DV-513-05  
DATE: 20070105

ONTARIO  
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM A.C.J.S.C., CHAPNIK, AND  
KEALEY JJ.

APPLICATION UNDER the *Judicial Review*  
*Procedure Act*, R.S.O. 1990, c.J.1.

B E T W E E N:

ONTARIO POWER GENERATION

Applicant

- and -

SOCIETY OF ENERGY PROFESSIONALS AND  
OWEN B. SHIME, Q.C. (ARBITRATOR)

Respondent

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REASONS FOR DECISION

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ONTARIO POWER GENERATION INC.

-and-

SOCIETY OF ENERGY PROFESSIONALS and OWEN B. SHIME, Q.C.

Respondents

Applicant

Court File No.: 513/05

DIVISIONAL COURT  
BEFORE ACS. LUNNINGHAM / CHAPNIK. J. / KEALEY. J.

DATE Thursday OCT 12. 2006

DISPOSITION - THIS APPEAL

APPLICATION IS dismissed for written reasons  
delivered today.



JAN 05 2007

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)

Proceeding commenced at Toronto

APPLICATION RECORD OF ONTARIO  
POWER GENERATION INC.

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