IN THE MATTER OF: **Grievances filed by Darren Roy and the Seven Oaks Teachers` Association dated May 16, 2012 alleging improper denial of leave, contrary to Article 6.05 of the collective agreement.**

BETWEEN:

THE SEVEN OAKS SCHOOL DIVISION,

Employer,

- and -

THE SEVEN OAKS TEACHERS' ASSOCIATION of the MANITOBA TEACHERS' SOCIETY,

Union.

AWARD

Appearances

- Kris Gibson and Paul McDonald, Legal Counsel; Brian O'Leary, Superintendent; for the Employer.
- Tony Marques, Legal Counsel; Leslie Deck, Association President; Andrew Peters, Manitoba Teachers' Society Representative; for the Union.

Background to the proceedings

Every spring the Seven Oaks Teachers' Association ("SOTA" or "the Association") holds a Long Service Wine and Cheese Reception ("the Reception") to recognize retiring members

and members with 25 years of service in the Seven Oaks School Division ("the Division"). The event is a well established tradition and attracts wide participation not only from teachers but also administrators, trustees, superintendents and other Division officials. There was no dispute between the parties that the Reception is a necessary and worthwhile event that helps to build camaraderie and goodwill in the Seven Oaks education community. Hotel premises have sometimes been used but on many occasions the Division has consented to the use of school facilities, in which case formal permission has been given for a liquor permit to be obtained by SOTA. The 2012 Reception was held at Garden City Collegiate on May 31, 2012 after dismissal of classes.

The grievor Darren Roy ("Roy" or "the grievor") is a teacher at Ecole Leila North School and a Member at Large of the SOTA Executive. Under the SOTA Constitution (Ex. 3), Members at Large serve on the Member Services Committee and are assigned responsibility to organize the Reception, described as the "June wine and cheese long service, retirement and scholarship reception" (Article 6.04(iii)). In addition to honouring long service, the event is an opportunity for the Association to present scholarships to students who intend to pursue a career in teaching. SOTA also holds a fall Wine and Cheese reception to welcome new teachers and the Member Services Committee is responsible for the fall event as well.

On May 10, 2012, pursuant to Article 6.05 of the collective agreement (Ex. 65), the grievor applied for a half day (afternoon) Executive Leave as follows: "I am setting up for the SOTA Long Service Wine and Cheese at Garden City Collegiate" (Ex. 40). According to the Association, there is a lengthy and well known past practice whereby its Executive members have been granted leave under the agreement for this purpose. In this case, the request was denied by the grievor's principal and the Assistant Superintendent (Ex. 52). On May 16, 2012, grievances were filed by both Roy and SOTA (Ex. 63, 64).

The present board of arbitration was constituted on July 19, 2012 and the hearing took place on April 9-10, 2013. Members of the board each filed the required oath of office. No preliminary or jurisdictional issues were raised by the parties. A lengthy book of documents was tendered, including some items post-dating the grievances, on the express understanding that the exhibits therein were to be taken subject to admissibility, relevance and weight.

The Association submitted that the collective agreement is clear and unambiguous. An Executive member is entitled to leave when dealing with Association business that requires absence from school. The grievor's request for leave to set up for the Reception should have been granted. Leave is conditional on the availability of a satisfactory substitute teacher and the Association must cover the cost of the substitute. Neither of these latter requirements were in issue here. In the event of ambiguity being found, the Association argued that past practice should be utilized as an aid to interpretation. The practice reveals the mutual intent of the parties to allow for leaves of this kind.

Further in the alternative, if Article 6.05 did not provide a right to leave for Reception set-up, an estoppel should be applied against the Division for the duration of the current collective agreement, based on past practice. The term of the agreement is July 1, 2010 to June 30, 2014. SOTA said that the Division knew or ought to have known that leaves were being granted for many years in order to facilitate setting up both the fall and spring wine and cheese events. Had the Association known that these leaves would be refused in future, it would have bargained an amendment to the agreement during the last round of negotiations.

In response, the Division submitted that the onus of proof lies upon the Association. Article 6.05 sets out clear requirements for Executive Leave but setting up a bar for a wine and cheese reception falls outside the parameters of the clause. As for past practice, if leaves were previously approved, this was done by school principals without full knowledge of the

intended purpose of the leaves and without authority to act for the Division. Therefore the past practice evidence should not be considered. For the same reasons, no estoppel should be applied against the Division. Moreover there was no basis to impute knowledge to the Division in this case. The arbitral authorities require a long, consistent and open practice before a party will be fixed with constructive knowledge. According to the evidence, SOTA Executive members generally did not state the reason for seeking leave when working on receptions. Once the Division learned that leave was being used to set up a bar on school property during instructional hours, the grievor's request was denied.

Provisions of the collective agreement

Article 6.05 of the agreement states as follows:

> **6.05 Executive Leave**
>
> A teacher, being a member of the Manitoba Teachers' Society Executive Committee or of the Executive Committee of any branch thereof or any special committee of the Society, or being appointed an official representative or delegate of the Society, or any branch thereof, or being a Society appointee to a committee of the Department of Education, and being authorized by the Executive Committee of the Society to attend a meeting of the Committee of which he or she is a member or to act as a representative or delegate of the Society or any branch of the Society in a matter of Society business requiring absence from school shall have the right to attend such meeting or to act as such representative or delegate and shall be excused from school duties for such purposes on not more than a total of twelve (12) teaching days in any school year, provided that a substitute satisfactory to the Board can be secured and that the cost of providing said substitute is assumed by the Society and shall not be charged upon the Board concerned. No additional leave of absence shall be taken for the purpose mentioned above, except with the consent and approval of the Board.

Substantially the same language has been part of the collective agreement since at least 1951 when the Division was known as the School District of West Kildonan, although the maximum number of days was lower in prior years (Ex. 1, 2). The parties acknowledged that the clause is awkwardly worded and difficult to follow, but both insisted it is unambiguous.

Article 6.05 makes repeated reference to The Manitoba Teachers' Society ("MTS" or "the Society") and a "branch" of the Society. MTS is continued as a body corporate under *The Teachers Society Act*, C.C.S.M. c. T30 ("the Act") with objects that include promoting the cause of education in Manitoba, advancing and safeguarding the welfare of teachers in Manitoba, and enhancing the teaching profession in Manitoba (section 4). The Act requires that a division association shall be organized in each teachers' electoral division as established by the MTS provincial council (section 9). SOTA is the division association for Seven Oaks School Division. Section 13(3) of the Act provides as follows:

> **Powers of district association**
> 13(3) The division association in each teachers' electoral division may formulate a constitution, adopt by-laws and pass resolutions not inconsistent with this Act or the by-laws of the society, and shall carry on the work of the society within the boundaries of the teachers' electoral division in which the division association has been formed.

The SOTA Constitution states the following objectives (Article 2): furthering the aims of MTS; promoting and advancing the welfare and professional growth of teachers; fostering and developing quality education in Seven Oaks School Division; fostering and developing professionalism among teachers of the Association; promoting the cause of public education.

Returning to the language of the collective agreement, it is evident that Article 6.05 contains at least five discrete components: (1) an eligible pool of teachers; (2) an MTS authorization; (3) a required absence from school; (4) a satisfactory substitute; and (5) cost coverage by

MTS. In the present case, the dispute focussed primarily on two elements. Was the grievor properly authorized to obtain Executive leave? Was an absence from school duties necessary to set up for the Reception?

For convenience, the following segmented presentation of the contract language may be helpful:

> **6.05 Executive Leave**
>
> **[1] A teacher, being a member** of the Manitoba Teachers' Society Executive Committee
>
> or of the Executive Committee of any branch thereof
>
> or any special committee of the Society,
>
> **or being appointed** an official representative or delegate of the Society, or any branch thereof,
>
> or being a Society appointee to a committee of the Department of Education,
>
> and
>
> **[2] being authorized** by the Executive Committee of the Society **to attend a meeting** of the Committee of which he or she is a member **or to act as a representative or delegate** of the Society or any branch of the Society in a matter of Society business
>
> **[3] requiring absence from school**
>
> shall have the right to attend such meeting or to act as such representative or delegate and shall be excused from school duties for such purposes on not more than a total of twelve (12) teaching days in any school year,
>
> [4] provided that a **substitute satisfactory to the Board** can be secured and that

> [5] the **cost of providing said substitute is assumed by the Society** and shall not be charged upon the Board concerned.
>
> No additional leave of absence shall be taken for the purpose mentioned above, except with the consent and approval of the Board. (Emphasis added)

Reference was also made to the following provisions of the agreement, not for their specific content but for the fact that the parties recognized a distinction between MTS and SOTA for various purposes. Articles 6.06(1) and 6.06(2) provide for leave when a teacher in the Division is elected President or Vice-President of MTS or the Association respectively. Under Article 13.01, membership in MTS is a condition of employment as a teacher. Article 13.02 provides for deduction of MTS fees from teacher pay cheques and Article 5.03 requires pro rata deduction from substitute teacher pay. Association dues are addressed by Article 13.03. Payment is a condition of employment and deductions are made from teacher pay cheques.

The preamble to the collective agreement identifies the parties as follows: the Seven Oaks School Division and the Seven Oaks Teachers' Association of the Manitoba Teachers' Society.

The evidence

Witnesses

Two witnesses testified for the Association. The grievor **Darren Roy** has been teaching at Leila North since 2003 and currently is responsible for a multi-age classroom comprising grades 6-7-8. He joined the SOTA Executive as a Member at Large in 2008 and has assisted with the Reception and various other Association functions. **Leslie Deck** ("Deck") has been

a teacher in Seven Oaks since 1992 and has served as SOTA President since 2011. She was active as a school representative on Council, joined the Executive in 2005 as a Member at Large, and subsequently held a series of positions including Secretary, Vice President and Economic Welfare Chair.

For the Division, testimony was given by Superintendent **Brian O'Leary** ("O'Leary) and Leila North principal **Scott Shier** ("Shier"). O'Leary has spent 22 years working for the Division including 12 years as Superintendent. He holds three university degrees including a Masters of Education. He leads a management team consisting of three Assistant Superintendents, the Secretary-Treasurer, the Assistant Secretary-Treasurer and several other staff. Scott Shier has been a teacher in the Division for 18 years and was appointed principal in 2011. Leila North has about 44 teachers on staff and an enrolment of about 600 students in grades 6-7-8. For most of the relevant time, **Duane Brothers** ("Brothers") was the Assistant Superintendent for Human Resources and he made the decision to deny Article 6.05 leave, triggering the present grievance. Brothers was not called as a witness. In November 2012, he was appointed as Superintendent in Louis Riel School Division.

Documentation for leaves of absence

For many years, the SO12 or "Certificate Covering Absence" was the only form used for leave applications, including sick leaves, vacation, personal, union and other types of leave. The SO12 was filled out by the teacher for approval by his or her immediate supervisor. It stated that the teacher will be or has been absent from duties. Where an outside organization was to be invoiced, as in cases of Article 6.05 leave, the SO12 provided space to fill in the meeting or conference name, the contact person and a box to check off the relevant organization (Manitoba Education, MTS, SOTA and others).

In September 2009, the Division adopted an on-line system called "Employee Connect" for dealing with pay and personnel issues including requests for personal leave days, but excluding sick leave or vacation. Employees were expected to register and to begin using the process for leaves (Ex. 47), replacing email and paper requests. A one month period of familiarization was contemplated. As it turned out, formal start-up was delayed until March 2010 (Ex. 48). At that time, the Division directed all staff to cease sending email and paper requests.

Under Employee Connect, employees enter a description of what the leave is for, the date and time required and the "rationale" ("provide details of the leave and the reason for your request" (Ex. 47). If a substitute teacher is required, the Subfinder program is accessed. Once the employee's entry is complete, it is sent electronically to the administrator and the Assistant Superintendent-Personnel for approvals. The administrator considers and responds first. If he or she approves, the request is forwarded on to the Superintendent level. The pamphlet provided to staff included a bold-face reminder notice stating that the SO12 is still to be completed in the usual manner after using Employee Connect to initiate a request. The Association noted in its evidence that the drop-down menu for type of leave included Executive Leave but no sub-categories. The Association was not consulted in the development of the Employee Connect screen pages.

O'Leary testified that originally the SO12 was used for union leaves but there "wasn't a lot of process to it". The Division never denied a union leave except in the current case. Leave was routinely taken for SOTA Executive retreats and the MTS AGM. Executive meetings were held after school hours. O'Leary said the SO12 was mainly an accounting form. The original was attached to the payroll month-end report. The first copy was kept at the school and the second copy went to the employee. Clerical staff would code and track each employee's absences. Where a budget was being charged for the cost, an entry was needed

to identify the proper source. However, many decisions were made at the school level and school budgets could be charged when necessary.

According to O'Leary, senior Division officials had little awareness of individual cases unless a Divisional budget was being accessed. In that case, the SO12 would come to a Superintendent or designate to be signed off, after which the form was sent to accounting. O'Leary acknowledged that principals received SOTA requests for leave and approved them routinely.

Employee Connect was part of an effort to move all employee records to electronic format. Assistant Superintendent-Personnel Brothers was the Human Resources authority for approval of personal leaves under the new system. The entire process was designed to function on-line. The employee request would be entered, the principal would review it on-line and approve or deny, the Superintendent would be copied and would consider whether to give his approval. According to O'Leary, the SO12 was supposed to be phased out but there was some confusion and it took longer to move the union-leave applications onto Employee Connect. It was not until late April 2012 that O'Leary and Brothers became aware of the fact that Association leave requests were still being handled through the SO12 and were not being processed via Employee Connect.

At that time, the parties were preparing for an interest arbitration to settle a new collective agreement, scheduled to be heard in June 2012 ("the interest arbitration"). The Association was contacting principals and requesting release for non-Executive members relating to the arbitration, citing "SOTA business" on their SO12 forms. Brothers wrote to SOTA President Leslie Deck (Ex. 45) to insist that Employee Connect be used instead of contacting administrators directly. Brothers observed that there was no basis in the collective agreement to grant leave to the individuals in question. The concern relayed to O'Leary and Brothers

by principals was that the requests were coming on short notice. Brothers directed Deck to stop filing leave requests with administrators.

Deck said in her testimony that this was surprising to her at the time because of the long past practice whereby principals were contacted for leaves and approved them. In any event, there was discussion with MTS staff about the problem and it was agreed that the new electronic system would be used henceforth (Ex. 46).

The foregoing was reflected in the grievor's experience with leave of absence documentation. For example, his application to be absent October 27, 2011 on Executive leave for the fall wine and cheese was submitted on an SO12 (Ex. 55). The SO12 was submitted the date of the event. The "Meeting/Conference Name" line was entered as "Union Duties" with no reference to the wine and cheese event itself or the fact that the grievor would be doing bar set-up. That year, the event was held in the Commons at Garden City Collegiate, with Board of Trustees approval (Ex. 38). There was also a letter from Deck to Shier dated October 18, 2011 (Ex. 39) asking that the grievor be excused for the afternoon of October 27, 2011 for "SOTA business".

The grievor's May 28, 2010 leave request on a SO12 was the same (Ex. 66). Deck testified that it was not unusual for teachers to submit their SO12 the same day or even after the day in question.

The requirements for wine and cheese set-up

The grievor stated that he has participated in SOTA wine and cheese events since 2003. They were well attended and he observed that people enjoyed the mingling and the acknowledgments. To him the receptions were intended to recognize new teachers (in the

fall) and long serving or retiring teachers (in the spring). These events were broadly advertized and open to all 900 teachers in the Division.

According to the grievor, the time required to handle all his Executive duties related to organizing the fall event was "easily five hours". He contacts the liquor commission, signs the agreement, picks up the wine and beer, ensures there is proper table and sound set-up at the venue, ensures that gifts are acquired as necessary for attendees and returns the unused alcohol items the next day on his own time. He was not responsible for advertizing or securing the site but did do liaison with the school custodial staff and the food service provider. He works along with the Association President to ensure that everything is in place for a successful event.

Deck testified that typically she has no role in set-up but arrives around 3:30 pm wearing a corsage in time to greet guests. She added that at school venues, committee members may put out tablecloths to enhance the event or may help carry in the catered food. Traditionally live plants are bought the day of the event and placed on the tables as centre pieces. Later they are offered as gifts to retiring teachers. Long service members receive a glass apple paperweight as a gift, also purchased prior to the event day. At the fall wine and cheese, new teachers are given books or similar items as a gift. The Committee shops for these items and places them on tables. As President, Deck arranges the guest speaker in advance and welcomes the speaker at the door.

The Reception takes place between 4 pm and 6 pm. School dismissal is at 3:30 pm. Generally the wine and cheese has been held at school sites but hotel space is sometimes rented.

The grievor testified that it would not be possible to set up the day prior to the event. This

would leave the alcohol unattended. Also there may be another event scheduled the previous day in the same location. He conceded that the liquor permit is usually arranged about two weeks in advance. He uses personal time both for the permit application and the post-event return of unused wine and beer. Basically his role on the day of the Reception is to coordinate work being done by others, such as the room set-up and the sound system. He also has to chill the beer and wine. He clarified that his estimate of five hours includes total time related to the event, not time spent on the day of the wine and cheese. When a hotel venue is used, there is no requirement for him to deal with a liquor permit, purchase of wine and beer, room set-up, food or sound. The hotel does everything.

In cross examination, it was suggested to Deck that the required set-up could be done between 3:30 and 4 pm, after school dismissal. She responded that teachers need travel time to get from their home school to the venue. There would be no time to be ready for guests. She agreed that when a hotel is used, the bulk of preparation is already done.

Past practice and the Division's awareness

Deck testified that Article 6.05 has a long history in the SOTA collective agreement and there is an established past practice of using the leave article to cover set-up functions for both the spring and fall wine and cheese receptions. In the last round of collective bargaining, neither side presented any proposals dealing with Article 6.05. She said from the Association perspective there was no need to do so. There were never any problems with the current language. The parties have agreed to continue the provision many times as the collective agreement has been periodically renewed. The Association would have negotiated amendments at the expiry of the prior agreement in 2010 had it known that leave would be denied in future.

Leave for Executive duties appeared in the 1951 collective agreement in substantially the same form as the present wording (Ex. 1). The maximum was five days per school year. Deck noted that the wine and cheese receptions are specifically listed in the SOTA Constitution as an undertaking of the Member Services Committee. While ostensibly social events, these receptions are seen as equal in importance to regular professional activities of the Association. The receptions build morale, acknowledge new teachers, honour long serving educators, connect junior members with more experienced colleagues and help to share a common vision. "The wine and cheese is one of the few events where we can do this," she said. Student scholarships are also presented as a way of encouraging young people to enter the teaching profession. The Division did not challenge any of the foregoing objectives and benefits. The Association filed a series of extracts from its newsletter going back to 1988 illustrating the importance of these receptions and the active participation of Division management and Trustees (Ex. 5, 6, 7, 8, 9, 10, 11). For the first decade, the wine and cheese was jointly sponsored with the Division but thereafter the event became a SOTA affair.

Deck outlined the process routinely followed over the years to organize and present the wine and cheese event. The SOTA President would contact the Superintendent and request Board permission to use a school in the Division as the reception venue, generally from 4pm to 6pm. The Trustees would formally consider the request and concur. Invitations would be extended to all Superintendents and Trustees (Ex. 12, 13). Deck said that to her knowledge permission was never refused. Attendance by Division representatives was always good.

It was also routine for the SOTA President to request permission in writing for a member to be excused from classroom duties on the afternoon of the wine and cheese in order to help do the set-up (Ex. 14, 19, 22, 23, 25, 27, 29, 30, 33, 35, 36, 39). On at least one occasion two teachers were released for set-up (October 29, 2009). Letters were written to the member's

principal and permission was always granted. However, there was only one example of a letter that specifically referenced set-up duties as the reason for a half-day absence. On September 24, 2004, the SOTA President wrote to Cathy Horbas, principal of Constable Finney School, asking that teacher Heather Oliver be excused from her classroom duties for the afternoon of October 6, 2004. "She will be helping to set up for the SOTA Fall Wine and Cheese" (Ex. 14, "the Oliver letter").

In addition, one SOTA letter stated as a fact that the teacher (Melonee Collins) would be leaving for the last period of the day to do set-up and had arranged for class coverage (Ex. 19, dated October 22, 2007, for the October 25, 2007 event, "the Collins letter"). It was common ground that this latter absence was not an Article 6.05 leave but rather an informal school-based accommodation. All other requests by SOTA for absences referred generically to "Association business", "SOTA business" or "union duties" and followed a standard format. The letters also stated that the SO12 should indicate SOTA responsibility for the substitute expense. None of these letters were sent to a Superintendent or other Division official. There was never a problem.

The Association searched its files and tendered everything it could find dealing with leave for wine and cheese (Ex. 14-39) but Deck pointed out there are also old floppy disk files that could not be accessed. There may be more relevant documentation. This is all that could be produced.

Why was there not specific reference to wine and cheese set-up in these letters? Deck explained that it never occurred to her. The absences were never questioned. Like presidents before her, she checked the file for the form of the letter and reproduced it with the new dates and teacher name. "I just followed the past practice." She testified that there was no intent to keep information from the Division. At no time did the Association try to hide what it was

doing. In her view, this was release time that was required to carry out a SOTA function and it was covered by the collective agreement. The Division invoiced SOTA for Executive leaves under Article 6.05 including the grievor's wine and cheese leave on October 27, 2011 (Ex. 42). Deck agreed that nothing on the invoice indicated Division awareness that the October 27 leave was for wine and cheese. A handwritten note on the invoice ("w/c") was Deck's or the SOTA Treasurer's addition after receipt of the invoice. The SO12 submitted by the grievor for October 27, 2011 (Ex. 55) said only "union duties".

Before the 2012 denial now being challenged, said the grievor, he was regularly granted leave to work on wine and cheese functions as a member of the set-up committee. The Association filed Division records listing the grievor's leave requests (Ex. 53, 54) but they did not match with all the wine and cheese events the grievor said he worked on. He used the SO12 form and generally he would write "union duties" as the reason for absence. Initially the grievor testified that he "often" identified the wine and cheese event specifically in his documentation but subsequently he acknowledged that he was unable to produce any such example. The grievor said it was his practice to ask permission from his principal in advance and then fill out the SO12. He would mention the wine and cheese set-up and list the tasks involved. He could not recall specifically what he said to principals he dealt with over the years or what they said to him.

It was the grievor's perception that principals were aware of the nature of his activity and were supportive. "The leave would not have happened otherwise." The Division objected to this evidence on the basis that the grievor could not know what was in the mind of principals. After hearing submissions, the Board allowed the testimony. It is evidence of the grievor's understanding, which may or may not accurately reflect what principals actually knew at the time. The grievor insisted that he never tried to conceal what he was doing.

Deck testified that to her, "it is incomprehensible that the Division would not know time was needed to set up for such professionally organized events, that turned out so well." The wine and cheese was always very high profile. Trustees often commented to her in favourable terms. Everyone knew the reception started at 4 pm. They must have known teachers were working on set-up during the afternoon, she said.

For his part, O'Leary was adamant that he and the senior administration of the Division did not know. Asked why the Division did not inquire further into SOTA leave requests, he replied, "We are not short of things to do." When new developments arose relating to personal leave requests, such as when destination weddings became common, the Division would ask questions. But O'Leary said that there was no reason to delve into the set up for wine and cheese receptions. He knew the school's contract caterer would do the food. Custodial staff would do the physical set-up. All schools have a sound system and people who can operate it. He assumed that the wine and beer would be delivered in advance, stored and cooled as necessary on site, and brought out after dismissal for the event. He didn't really know. He never received any information on the subject. He was aware of the liquor permits issued. He never realized that the bar was being set up prior to dismissal.

Responding to Deck's testimony that the Division must have known teachers were being released to do set-up, O'Leary stated, "We probably should have known but we didn't." SO12's never reached the Superintendents. He did not monitor SO12's but did receive periodic reports on individual employee absence status. SOTA leave requests went to principals, not the Division office. In essence the principals were granting approval. O'Leary agreed that they had authority to do so although ultimately the principal reports to the Superintendent level. He said that the Division has never probed the leave requests submitted by the Association. The only exception would be where a teacher had a significant level of absenteeism and union leave was part of the picture. In such a case, the principal

would initiate a discussion with the teacher. O'Leary could think of two cases but the response was counseling and a request that consideration be given to the needs of students.

O'Leary would not concede that principals knew the purpose of these requests was to do wine and cheese set-up. Commenting on the evidence as filed, he said that all the requests were for union leave, except for the Oliver letter in September 2004. Wine and cheese was not mentioned. He agreed the receptions were well publicized and principals knew when they were scheduled. Based on the comments he heard in the spring of 2012 relating to the interest arbitration requests, however, O'Leary said principals seemed to think they had no discretion and were obligated to approve SOTA leave requests.

As for the Collins letter in October 2007, it was not a 6.05 leave but simply an informal arrangement made at the school, which would not involve the Division. O'Leary said it would be preferable if a teacher taking a period off would use prep time rather than teaching time, but this is up to the principal. In his view, the Collins example demonstrated that it was unnecessary to book off the entire afternoon. She took only the final period of the day and the reception tasks were still done.

O'Leary had no concern with alcohol being in the school overnight as long as it was secured. In his experience, there was always "a soft four o'clock start" to the reception. "It was not a boozy event, people had a glass of wine or a beer or two." He only became aware of the manner in which leaves were being processed in the spring of 2012 as a result of the releases being requested for the interest arbitration. "We should have known but we did not." Then Shier specifically objected to the grievor's leave request "to set up a bar".

Denial of leave for the May 31, 2012 Reception set-up

The grievor testified that his request for leave in May 2012 for the spring wine and cheese was his first application using Employee Connect. He filed the request electronically on May 10, 2012 (Ex. 52). The reason stated for the leave was "Union duties - SOTA". The rationale was as follows: "I am setting up for the SOTA Long Service Wine and Cheese at Garden City Collegiate." He spoke with his principal, Scott Shier, who asked whether someone else could do it. Shier expressed concern about an absence from class for this particular purpose. They had never previously talked about using Executive Leave for the wine and cheese. But the grievor was already named on the liquor permit and no one else was available. The grievor said that Shier never responded further before the issuance of the formal denial. When he received the Division's answer, the grievor contacted Deck, who said to do the set-up at the end of the regular school day.

Cross examined about the impact of his absence from the classroom in these instances, the grievor agreed that continuity is important but rejected the suggestion that a substitute would have trouble taking over his class. The grievor said he has a good attendance record and is proud of his commitment to his students.

Shier had received a letter the previous year from Deck (Ex. 39) asking to excuse the grievor from teaching responsibilities for the afternoon of October 27, 2011, the date of the fall wine and cheese reception. The letter did not identify wine and cheese set up or make any reference to a reception. Deck merely wrote that the grievor would be attending to SOTA business. Shier testified that when he received the letter, he filed it with his other SOTA correspondence and simply took it for granted that the leave was for SOTA duties. There was also an SO12 filled out for October 27, 2011 (Ex. 55) but Shier never saw it. His vice-principal signed the SO12.

Under cross examination, Shier admitted that the reception was highly publicized and he probably would have known the reason for the request at the time. He had several SOTA Executive members in his school and often received hard copy requests. He was approving all SOTA requests at that time, not checking with the Division and assuming that all requests were for proper SOTA duties.

Shier said that he had no discussion with the grievor about the October 27, 2011 absence but the grievor was openly talking about the wine and cheese around the school. At the time, Shier and two other administrators felt a concern about the absence and while they discussed it among themselves, no action was taken. In his evidence, Shier described the grievor as "conscientious" about his paperwork. Many teachers just leave it for the clerical staff to do. Beyond that, the grievor has a good attendance record and is "a great teacher". Shier testified that the grievor never tried to hide the fact that he was off for an afternoon setting up for the wine and cheese.

Later in 2011, Shier and the other administrators had another discussion about SOTA leaves, precipitated by an unusual number of requests. It was an anomaly that year. "We didn't have an answer, it's in the collective agreement." They did ask the teachers concerned to be more consistent in their choice of substitutes.

The concern arose again in 2012 when more leave requests reached Shier, this time referring to "bargaining". At that point he began to query the applications. Once Employee Connect was in regular use, there were better reasons provided for each application. Asked who was approving leave requests before this point, Shier answered, "I don't know."

When Shier saw the grievor's request for May 31, 2012 and the reason entered in Employee Connect, he questioned it. He contacted Brothers and expressed that he was uncomfortable

with the request (Ex. 51). He asked Brothers if it was appropriate to deny leave. Brothers responded that Shier should indicate disapproval and he (Brothers) would refuse the request. Shier testified that he felt the grievor should not be away from class in order to "stack boxes and bring in wine". As a result, the leave request was denied (Ex. 52).

Asked at the present arbitration hearing to articulate his reasons for the denial, Shier stated that "Darren should be teaching his class". He emphasized the importance of the teacher in a multi-age classroom. It is important to keep a consistent presence as the class covers several different curricula. Even aside from the multi-age aspect, said Shier, he felt that teachers should be in class and teaching their students during school hours. In his opinion, "stacking boxes is not union duties of a teacher". When it first came up, he asked the grievor whether someone else could do set-up but the grievor just shrugged. Shier said he didn't know whether that meant someone else could have done it or not.

In his testimony, O'Leary said there is a long tradition of the Association being judicious in its requests and the Division not questioning the nature of the activity. However, "we didn't see this as Association business, setting up for a social function, the agreement contemplates MTS business for meetings at a time that cannot be avoided. There were other ways to do the set-up here."

O'Leary acknowledged that sometimes the classroom teacher will have to be absent and agreed that substitutes can do a good job filling in, but "we prefer to minimize it". It is a general concern with reducing the school day. "If we can move meetings outside the school day, we try." For example some curriculum workshops have been held in the evening with a light supper rather than during the school day, with good success. He disagreed that the collective agreement "grants 12 days of SOTA leave". This is a maximum and it is rarely reached. There is no target by either side to reach 12 days.

O'Leary rejected the suggestion that a few half days for wine and cheese receptions were insignificant in the big picture. The Division is always alive to interruptions of student education. "We manage it the best we can but we want to minimize it." He observed that there is an increasing list of entitlements that take teachers away from the classroom, such as workplace safety and health responsibilities. There are protocols to reduce and monitor employee absenteeism in individual cases. During the interest arbitration period, SOTA got release for individuals outside the executive. "There was potential to creep, we don't want it to." He agreed that for years, the arrangement for Association leaves went along without a hitch. "It became an entitlement."

O'Leary was asked whether the Division investigates a typical request for SOTA executive to attend a meeting at the MTS office. Does a Superintendent ask questions to determine whether the absence is necessary? "We haven't." Neither have any questions been asked in the past about absence for wine and cheese.

O'Leary said he learned about the denial from Brothers and was advised of Shier's concerns. This was the first time he ever turned his mind to the notion that Article 6.05 would be used by SOTA for setting up its wine and cheese receptions. O'Leary's own concern related to freeing up a teacher to prepare for a social event in the school while 1,400 students were still in class. He had personally attended many SOTA receptions and had assumed the teachers involved came to the venue from their home schools right after dismissal or else had earlier dismissals.

Under cross examination, O'Leary readily accepted the worthwhile role of the SOTA wine and cheese receptions. He has participated many times over the years. Neither did he object to school facilities being used. He assumed the interval between dismissal and the start time would serve to clear the area of most students, although there are still some students and

student activities in the school after 4 pm. It was a question of the degree of exposure. O'Leary distinguished between students seeing teachers consuming alcohol at the event after 3:30 pm and seeing a teacher doing bar set-up during class hours. "It doesn't take a chunk of the school day to set up some wine and beer coolers." His objection to the grievor's leave was based on both grounds - the time was not required, it would be inappropriate to set up a bar in the school during the instructional day. He said that if students see a teacher working on the bar set-up during class time, there's "a buzz" and then someone has to explain it. It becomes a disruption to the school day. It never occurred to him that this was going on.

O'Leary noted that in the fall of 2012, in approving the fall wine and cheese reception to be held at Garden City Collegiate on October 25, 2012, the Board of Trustees amended their approach. If a cash bar was to be held, the event must now begin no earlier than 5 pm (Ex. 58). Trustees wanted either an alcohol free event or a longer separation between dismissal and the commencement of the event. Some trustees took the position that there should be no alcohol allowed in schools at all. It was a sensitive issue.

The Association argued in the present case that there was conflict between the parties in April 2012 during preparations for the interest arbitration and said that this lead to the denial now in dispute. Deck testified that as the interest arbitration approached, the mood became tense and charged. She described it as a definite deterioration in the parties' relationship. She had no direct evidence connecting the grievor's denial of leave and the collective bargaining dispute. The Division objected to this testimony but it was allowed by the Board. We held that it is a matter for argument whether, on the evidence, the denial of leave was affected by events related to the arbitration.

In reply to Deck, O'Leary testified that the Division took great care not to impede the Association's ability to put in their arbitration case. The complaint from principals was that

they were having trouble securing substitutes on short notice but all leave applications were granted. After discussion, SOTA agreed to start using Employee Connect and the Division agreed to approve the leaves, even though Article 6.05 did not strictly apply. "We agreed to allow some latitude." But he did not concede that there was acrimony between the parties. They were apart in their positions. There was a pattern of settlements and SOTA was unwilling to accept it. The Division left its offer on the table and was disappointed that interest arbitration was required, but all this had nothing to do with Darren Roy's leave application being refused, he said.

O'Leary was pressed in cross examination. No Association request for Executive leave had ever been denied before May 2012. The tense atmosphere and Deck's demand for additional releases in April 2012 must have been a factor. O'Leary denied it. He noted that prior to the current case, no SOTA request was ever presented to the Division as specifically for the purpose of wine and cheese set-up. He maintained that the grievor's request was rejected for the reasons given.

Post grievance evidence

The Association stated that subsequent to denial of the grievor's requested leave for May 31, 2012, Article 6.05 leave has been approved for purposes of wine and cheese set-up. The Division noted its objection for the record but allowed the evidence to be heard subject to weight.

An Employee Connect request was filed on May 14, 2012 by Elisha Dahl ("Dahl") listing the afternoon of May 31, 2012 and citing "union duties" (Ex. 60). Approval was recommended by the principal on May 18, 2012 and given by Brothers on June 25, 2012, long after the date in question. Neither Brothers nor Dahl testified. O'Leary had no personal knowledge of the

circumstances but said "it slipped through, the teacher took the leave". He assumed that Brothers was just cleaning it up after the fact. Asked to admit that everyone knew this was for wine and cheese set-up, O'Leary disagreed. He acknowledged that in the Dahl case and all the others, except for the grievor's rejected request, the Division has never asked the Association to detail the "union duties" referenced in its leave requests.

Another Employee Connect request was filed by Dahl on October 22, 2012 citing "Meeting with the President" on October 25, 2012 in the afternoon. Brothers issued both levels of approval the same day the request was made (Ex. 61). Deck testified that Dahl met with her to review preparations for the fall wine and cheese held that day and also to deal with other SOTA business. Dahl was Association Secretary and there were certain issues relating to Council sign-in sheets.

Under cross examination, Deck said that Dahl came to her office in the afternoon to pick up a list of expected guests for the reception and confirm what needed to be done. Teachers are notorious for not responding to invitations until the last minute. Dahl picked up the new member gifts and already had the centre pieces. They also discussed sign-in sheets. Deck was challenged to admit that she instructed Dahl to write "union duties", rather than "wine and cheese set up", to avoid another denial. Deck denied it.

O'Leary testified that Brothers approved Dahl's request for October 25, 2012 but he himself would also have approved it, had it come to him in this form. He would not necessarily have connected the request with the SOTA wine and cheese reception. "It doesn't say that." Pressed further, he said, "If I connected the dots, I would know."

In current practice, the Division continues to approve SOTA leave requests presented as "union duties", said O'Leary. The Division accepts this as a sufficient reason. If there was

short notice and the school program would be jeopardized, the request could be refused. In the grievor's case, questions were asked about the necessity of absence from the classroom. O'Leary said the Division would ask again in future should a similar case arise and defended this position as reasonable.

Association final argument

On behalf of the Association, Mr. Marques identified three issues to be addressed. First, is Article 6.05 capable of interpretation without ambiguity? If so, this interpretation should be adopted. The Association submitted that the article is clear and supports the grievor's claim to Executive Leave for setting up the Reception. Second, if ambiguity exists, is there extrinsic evidence that assists in construing the article? In this regard, the Association said that the long past practice of granting leave to prepare for the wine and cheese event should be considered in support of its position. Third, if the article is clear but does not provide for leave as claimed, should the Division be estopped from relying on its strict legal rights under the collective agreement, and for how long?

On the first issue, the Association noted that Article 6.05 was first negotiated more than 50 years ago and while not easy to read, is nevertheless capable of interpretation without extrinsic evidence. Given the provisions of the Act and the Association's relationship with MTS, the two entities are essentially one and the same for purposes of carrying out the objectives of MTS. Section 13(3) of the Act mandates SOTA to do the work of MTS within the boundaries of Seven Oaks. The reference in Article 6.05 to "a matter of Society business" means local association business carried out on behalf of MTS. The preamble to the collective agreement describes SOTA as being a component of MTS. In this respect, the Association has a unique status compared to most union arrangements. When SOTA acts, it is inherently doing so with the authority of MTS and on behalf of MTS.

Viewed in this manner, argued the Association, the Reception constitutes Society business. There was no dispute in this case about the worthwhile nature of the event. What about the activities necessary to set up for the Reception? In explaining his opposition to granting leave, O'Leary indicated concerns over teacher absence from the classroom and the exposure of students to alcohol. Shier said that stacking boxes is not a union activity of a teacher. The Association responded that great care must be taken in analyzing the Division's position in this respect.

As a general proposition, the Division must not be allowed to determine what activity qualifies as Society business. It can become a slippery slope. Unions have an array of interests and functions, far beyond simply collective bargaining and grievances. They must be allowed to survive and thrive. This was the purpose of including Executive Leave in the collective agreement. The Association therefore submitted that the article clearly applies to the grievor's requested half day leave. It was intended for authorized Society business. The real issue was whether an absence from school was required in this instance, which is a factual question limited to this particular case.

Nothing in the wording of the article defines the meaning of "requiring absence from school". The Association submitted that the language is mandatory. The Division does not have discretion to inquire into a leave request and decide for itself whether an absence is necessary. Theoretically any meeting or activity could be scheduled at a time outside regular school hours, but this approach would negate the whole effect of the article. As long as the meeting or activity is reasonable and *bona fide* SOTA business, there is an entitlement to Executive Leave, which includes preparatory work for the meeting or activity. The Association conceded that it would have been possible to do Reception set-up in advance or outside of school hours, but the test for leave is not "impossibility". The parties agreed that SOTA executive members would each have up to 12 days per year available for Society and

Association business. It was never intended that such business would be confined to off hours, with leave granted only when it was impossible to avoid the school day.

The Society cited the principles of interpretation as reviewed in *Re Hylife Foods and U.F.C.W., Local 832 (Statutory Holiday Grievance)*, [2011] M.G.A.D. No. 30 (Wood) at para. 64-75. The intention of the parties is derived from the language of the agreement. Words are to be given their plain and ordinary meaning. In the present case, there is a statutory context and the relationship between MTS and SOTA is relevant. However, based on a plain reading, the wine and cheese set-up was Society business and the grievor was entitled to the requested leave. There is no ambiguity.

On the evidence, the Association submitted that the grievor's denial was related to the strained collective bargaining atmosphere in the spring of 2012, notwithstanding O'Leary's denial that this was a factor. For many years, half-day leave was granted to a teacher, occasionally two teachers, to prepare for wine and cheese. The Division paid little attention to the practice. The parties were quite content with the arrangement. The 4 pm timing was well known and it must have been understood that some of the set-up would take place while students were still in the school. Then the Association's request for additional releases related to interest arbitration precipitated a reaction from Brothers. Soon afterward came an unprecedented denial of leave for the May 31, 2012 Reception.

In the alternative, the Association asked that extrinsic evidence be considered as an aid to construction of the article. This would include the SOTA constitution and its policy relating to committees, past collective agreement clauses and past practice. The Association agreed that Article 6.05 is in need of attention and updating, but the language is clear when considered in light of the extrinsic evidence. The principles were set forth by Arbitrator Hamilton in *Re Parkland Regional Health Authority and Manitoba Nurses' Union (Peterson*

Grievance), [2001] M.G.A.D. No. 60 at para 222:

> It is important to bear in mind the characteristics of a past practice as distilled in the seminal case of *Re International Association of Machinists, Local 1740 and John Bertram and Sons Co. Ltd.* (1967) 18 L.A.C. 362 (P. Weiler) at p. 368 (hereinafter sometimes referred to as the "Bertram tests"). After noting that the doctrine of past practice should be carefully employed, Arbitrator Weiler stated:
>
> ...there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the collective agreement as seen in their labour relations context ...; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union and management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.
>
> The Bertram tests have been consistently applied by arbitrators over the years and, to the extent we are required to address "past practice", we will use these tests. A past practice must be a uniform one, preferably surviving several negotiations, and be one that has been "...openly and without surreptition carried out... for a long period" [*HEPC of Ontario* (1963) 14 L.A.C. 46 (Thomas)]. When past practice is relied upon as an interpretive aid, it should only be used "...to assist in the definition of existing contractual rights; it does not create new rights" [*Re British Columbia Forest Products Ltd. (Caycuse Logging) and IWA Loc. 1-80 B*.C.L.R.B. No. 72/80 (MacIntyre) at p. 4]. Evidence of past practice "...must go beyond being compatible with a particular interpretation of the collective agreement; it has to disclose a consensus between the parties with respect to the issue in dispute..." (our emphasis) [*Re National Grocers Co. and Teamsters Union, Local 91* (1991) 20 L.A.C. (4th) 310 (Bendel) at p. 314].

The Association noted that the jurisprudence on estoppel has evolved to allow for imputed or constructive knowledge as the basis for finding acquiescence in a past practice: *Nor-Man Regional Health Authority v. M.A.H.C.P.*, [2011] S.C.J. No. 59; *Re Manitoba Family*

Services and Housing and C.U.P.E., Local 2153, [2005] M.G.A.D. No. 55, (2005) 142 L.A.C. (4th) 173 (Peltz); *Re Agassiz School Division No. 13 and The Agassiz Teachers' Association of the Manitoba Teachers' Society*, [1997] M.G.A.D. No. 61 (Graham). The same approach should be adopted in applying part 3 of the *Bertram* test for past practice evidence, especially in the present case where there was wilful blindness on the Division's part. SOTA executive members were always open in their use of leave for set-up and the event itself was widely publicized. If the Division did not actually know about the practice, it should have known, as O'Leary himself testified. There was acquiescence by the Division.

Beyond this, the evidence showed that principals were routinely making leave decisions. In reality they exercised the authority to grant Article 6.05 leave, another point conceded by O'Leary in his testimony. Part 4 of the *Bertram* test was met insofar as principals were the ones with "real responsibility" in practice and they must have known they were approving release time for wine and cheese set-up.

The Association argued that human nature being what it is, people talk and word gets around, so that it is "incomprehensible" that the Division was unaware of the practice. There was no suggestion that SOTA tried to hide anything. While the description on SO12 forms and request letters typically said "union duties" without further elaboration, this was consistent with the accepted approach for SOTA leaves in general, whatever the purpose. On at least two occasions (the Oliver letter and the Collins letter), the event was specifically mentioned. The Association asked for a finding that the Division knew leave was being granted for wine and cheese set-up. Alternatively the Division ought to have known. The evidence showed that Division managers were not concerned with the kind of Executive Leave being taken. The total amount of leave was not considered excessive. There was no tracking by the Division and SO12's were just filed away. O'Leary was definitive in saying that he didn't know but he should have known.

Based on the foregoing, the Association argued that the test for extrinsic evidence was met and that the evidence revealed a common intention that Article 6.05 was available for wine and cheese reception set-up activities.

In the final alternative, an estoppel should apply against the Division based on imputed knowledge of the practice and failure to advise the Association of any contrary position: *Nor-Man, Manitoba Family Services*, and *Agassiz*, all *supra.* The court in *Nor-Man* emphasized that arbitrators have broad latitude to adapt legal doctrines and fashion remedies that are fair and appropriate to the circumstances (para. 45). The present case calls for a suitable remedy given the Division's wilful blindness to a longstanding and open practice under Article 6.05.

Finally the Association accepted that it bears the ultimate onus of proof but relied on *Re Surrey School District No. 36 and B.C. Teachers' Federation (Severance Pay Grievance)*, [2009] B.C.C.A.A.A. No. 27 (Korbin) for the principle that where an agreement requires interpretation, neither party bears any special onus of proof. The *Wire Rope* line of cases was not followed (para. 37). The arbitrator's role is to determine the mutual intention of the parties after considering the competing interpretations advanced by the parties. The Association acknowledged that there is mixed authority on this point but submitted that *Surrey School District* reflects the better view.

Division final argument

On behalf of the Division, Mr. McDonald framed the issues as follows. First, was the grievor entitled to leave under Article 6.05? The onus lies on the Association to prove the affirmative. Second, if the grievor was not entitled, is the Division estopped from relying on the terms of Article 6.05? Again the Association bears the onus and must prove the affirmative in order to succeed in this case.

The language of the collective agreement must be interpreted in its plain and ordinary sense. If the grievor had a right to the requested leave, the entitlement must be found in the words of the article. The grievor was a member of the potentially eligible pool of candidates since he was a branch executive member. But his role in helping with Reception set-up did not fall within any of the listed categories of executive duties for which leave is available. He was not an official representative or delegate of MTS or SOTA. There was no meeting at which he could appear in a delegated or representative role. He acted essentially alone. At best, he was an extra set of hands.

Beyond these defects, the grievor was not authorized by the MTS executive to carry out the function in question relating to the Reception. Neither was the wine and cheese set-up a matter of MTS business. The Division argued that these are conjunctive requirements under the article. In addition, there was no requirement on the facts for the grievor to be absent from school in order to do set-up. On all these grounds, the grievance fails.

According to the evidence, the Reception and the set-up were solely SOTA matters. MTS had nothing to do with the wine and cheese event and did not authorize anyone in the Association to work on it. The Division noted that there are a number of separate and distinct references in the collective agreement to the Society and the Association. This indicates that the parties were alive to the difference. Meaning must be given to the words chosen. For example, the pool under Article 6.05 was expanded by including representatives or delegates of a branch, and there are other distinct references in Articles 5.03, 6.06, 13.01, 13.02 and 13.03. However, the plain wording of Article 6.05 limits executive leave eligibility to teachers who have been authorized by the MTS executive and who are dealing with MTS business. The parties could have used more generic language (“the union”) or could have added “branch” throughout the clause, but they did not. The language may be old but the intended distinction between the Society and the Association remains clear.

The Division recognized that in practice, extending for many years, MTS authorization has not been demanded before granting SOTA executive members leave under the article as it stands to deal with SOTA business. Therefore the Division undertook not to deny leaves on this basis under the current collective agreement. However, bargaining for a new contract will take place in 2014 and the Division said the parties need the arbitration board's interpretation on this point in order to conduct effective negotiations. By advancing this argument now, the Division said it was "throwing a challenge flag" while still agreeing to live by the past practice in the interim.

According to the evidence, there was no requirement for the grievor to be absent from school. This was a fundamental flaw in the grievance. The Division said that these words of the article reflect the agreed balance between teaching responsibilities and union activity. The words must be given meaning. If a teacher has been properly authorized to engage in a union activity (as listed) but cannot do so while still meeting his or her teaching obligations, then the teacher is entitled to take up to 12 days of leave during the school year. If the absence is not necessary to perform the function, no leave is due. This is the negotiated bargain.

The Division insisted that the wine and cheese event could be presented without any teachers taking an afternoon of leave. In fact, on May 31, 2012, despite denial of leave, the Reception was held and there was no evidence of a problem. The Division cited this as the best evidence that an absence was not required.

The facts in this regard were straightforward. Custodians did the room set-up. Liquor could be picked up in advance and stored. Live plants could be purchased a few days before and would survive until the event. Teachers in the school venue could be enlisted to monitor the set-up and handle last minute issues after dismissal and prior to the start of the event.

Nothing in the Association's evidence proved that the grievor required an absence from his classroom. Balanced against these facts, the need of students for teaching continuity should prevail, especially in a multi-age classroom.

Finally, setting up a bar for a wine and cheese reception was not by any definition a part of MTS business. Even considering the Act, the objectives of MTS and the SOTA constitution, the grievor's activities fell outside the ambit of Article 6.05 leave.

Based on all the foregoing, the Division asserted that the collective agreement is clear and the grievor's request for leave was properly denied. Past practice evidence is not admissible.

In the alternative, if there is ambiguity, the established test for resort to past practice has not been met. There was no indication of a consensus or mutual understanding between the parties that Article 6.05 leave is available for wine and cheese set-up. To the contrary, the Division was unaware of the cases in which principals approved release time for SOTA members working on the event. For the same reason, an estoppel should not be applied against the Division's strict legal rights. To constitute a representation by silence, there must be clear and compelling evidence that the Division would not deny a leave for the wine and cheese. On analysis, the evidence fall far short.

Between October 2004 and May 2012, a span of eight years with two receptions per year, there were 12 letters written to principals seeking leave for the day of the wine and cheese. The Association did not show a continuous stream of letters despite a thorough search of its records. Ten of the 12 letters refer only to "union business". The Oliver letter in October 2004 did mention set-up for the fall wine and cheese. The Collins letter in October 2007 did as well but this was not a leave under Article 6.05,only an informal arrangement to take the last period off. The Division submitted that on the evidence, there was only a single instance

of a principal receiving an explicit request to approve leave for wine and cheese set-up, and this was more than seven years before the grievance. Shier testified that until the fall of 2011, he was unaware of the fact that leaves were being used for set-up. O'Leary was never informed until the current grievance arose. On such a meager record, no finding can be made to justify past practice as an aid to interpretation or representation by silence to support an estoppel.

The arbitral authorities cited by the Union on imputed knowledge all included a lengthy and open practice, unlike the present case. Here the Association repeatedly wrote letters of request that did not state the actual purpose of the leave being sought. The Division did not argue that SOTA tried to hide its intentions over the years but did ask why there was never a reference to wine and cheese (except once) if the Association and its executive wanted to be honest and open. As soon as an explicit reference was made to wine and cheese on the Employee Connect form, the request was flagged by Shier, discussed with Brothers and refused.

Responding to the Association's point that O'Leary admitted he should have known about the leaves, the Division said that O'Leary was simply being "unnecessarily self critical". He was speaking with the benefit of hindsight. The grievor himself had difficulty sorting out his records and verifying his recollection of leaves granted. There was no evidence that principals themselves knew they were approving leaves for set-up and no proof that particular principals attended a reception for which they had just granted a leave, such that they should have "connected the dots". In any event, principals are members of the teacher bargaining unit and are not part of Division management. They cannot bind the employer.

In this overall context, O'Leary's lack of actual knowledge was understandable and reasonable. It was inaccurate to describe this as wilful blindness, as the Association did.

There was no reason for senior managers to be inquiring into union leaves and such intrusion would have been unwelcome. The Division trusted SOTA to limit its leaves to *bona fide* business. The Division was not obligated to run "spot checks" on Executive Leave.

As for the suggestion that the denial of leave was retaliation by the Division over the collective bargaining dispute, there was no evidence to support this theory. The chain of events was triggered by Shier, a person with no involvement in bargaining. It was evident that he objected based on the full disclosure provided under Employee Connect. The reasons given by the grievor referred to wine and cheese set-up instead of the generic phrase "union business". During preparation for the interest arbitration, O'Leary accommodated the Association's request for extra releases. He stretched Article 6.05 so that there would be no sense of unfairness on the part of SOTA.

The Division cited the following authorities dealing with union leave of absence: *Re Vancouver Island Regional Library and C.U.P.E., Local 401 (Reaume Grievance)* (2011), 106 C.L.A.S. 12 (Love); *Re Atco Lumber Ltd. and I.W.A.-Canada, Local 1-405* (2001), L.A.C. (4th) 273 (Munroe); *Re Montebello Packaging and U.S.W.A., Local 8952* (2001), 65 C.L.A.S. 19 (Frumkin). The facts differed from the present case but these awards show there must be a reasonable nexus between the union's business and the proposed activity for which leave is sought. Employers are allowed to look behind the request and assess the merits.

In *Vancouver Island Library*, the agreement referenced time off for "union courses" and leave was not to be unreasonably withheld. The grievor asked to attend a library association conference. The arbitrator recognized that a broad and liberal approach should be taken to union leave clauses. Contemporary trade unions engage in an array of activities beyond simply bargaining and grievances (para. 68-69, 76). *Re Hamilton-Wentworth Catholic District School Board and Ontario English Catholic Teachers' Association (Release Time*

Grievance), [1999] O.L.A.A. No. 671 (Herlich) was cited for the following principles:

> ... I accept the suggestion which surfaces in some of the cases referred to that something does not become "union business" or a "union activity" merely on the union's say so. But so long as there is some arguable nexus between the purpose of the intended leave/release and the general objects and legitimate activities of the trade union, it ought not to be for employers in general, or this Board in particular, to impose restrictions on the pursuit of those activities or to impede reliance upon negotiated collective agreement provisions designed to enhance that pursuit.

Despite the liberal approach, it was still necessary for the union to prove eligibility on the facts, keeping in mind the wording of the article, and in *Vancouver Island* there was "no apparent connection to union business" (para. 78). It was unnecessary to consider whether approval had been unreasonably withheld. In the present case, the Division similarly argued that wine and cheese set-up does not qualify as Association business just because SOTA says so. The nexus and the required absence must be proven. The Division was entitled to examine the request and consider whether leave was available in the circumstances.

In *Atco Lumber*, the union leave article was broader than the present case: "The Company will grant leave of absence to Employees who are elected as representatives to attend union meetings ... in order that they may carry out their duties ..." (p. 274). The language did not give the union "an unreviewable right to demand a leave of absence for anyone it might designate to do something which in the union's view is connected with its business or purposes" (p. 283). Even with past practice, the words of limitation in the article must be given effect. Past practice cannot "effectively rewrite the agreement", said the arbitrator (p. 283). In the present case, the Division reiterated that it was allowed to look behind the grievor's application and was not bound to approve it.

Finally in *Montebello Packaging*, union executive members attended a monthly meeting on their days off but requested leave on work days, in essence to compensate them for their attendance (para. 9). The employer's denial was upheld: "Where leave of absence is not required for the particular purpose for which it is sought, the right to leave of absence cannot be said to exist and the Employer would be justified in refusing to grant it" (para. 12). Even adopting a liberal interpretation, leave was not owed "for the simple reason that no union business was conducted on the days for which the leave of absence was sought" (para. 18). The Division argued that the same reasoning applied in the present case. On the facts, leave was not required for set-up and no SOTA business was conducted during the afternoon preceding the Reception.

On estoppel, the Division cited the following authorities: *Re Smitty's Family Restaurant and U.S.W.A.* (1998), 72 L.A.C. (4th) 437 (Freedman); *Re Hendriks Your Independent Grocer and U.F.C.W., Local 175* (2006), 149 L.A.C. (4th) 368 (Baxter); *Re Kawartha Pine Ridge District School Board and E.F.T.O. (Summer School Staffing Grievance)* (2012), 113 C.L.A.S. 213 (Sheehan); *Re Inglis Ltd. and C.W.C., Local 595,* [1992] O.L.A.A. No. 81, (1992) 27 L.A.C. (4th) 146 (Brandt); *Re City of Winnipeg and A.T.U. (Sick Leave Severance Credits Grievance)* (1989), 16 C.L.A.S. 75 (Baizley).

In *Smitty's*, it was noted that promissory estoppel should be applied with great care because the effect is a result different from what the parties agreed in writing. The evidence must be "very clear and compelling that there was a meeting of the minds" (p. 447). In *Hendriks*, it was recognized that silence may constitute a representation for purposes of estoppel, but the silence must be "both informed and deliberate" (p. 390). A union steward failed to object when the company announced a student minimum wage, but estoppel was rejected because the employer position was not communicated to the steward "in an unambiguous and cogent way, so that he could clearly understand that the Employer was introducing something that

would, or could change the legal relations between the parties" (p. 391). Moreover it was not proven that the steward had authority to bind the union (p. 393). In the present case, the Division submitted that its silence was neither informed nor deliberate with respect to leave for wine and cheese set-up. Moreover the principals who approved it from time to time lacked authority to bind their employer.

No estoppel was applied in *Kawartha* where summer school teachers were paid the wrong rate for nine years without any complaint. The local union was unaware of the practice. However the employer argued that with reasonable diligence, the union could have discovered the problem. The employer never hid the manner in which summer teachers were paid. However, the arbitrator held that the program was "so narrow, and limited in scope, in terms of the overall operations of the Employer, it would not be surprising that the intricacies associated with the program, including the rate of pay for the teachers involved, did not register beyond the realm of those directly involved with the program" (para. 28).

The Division in the present case said that the same reasoning applies here. Reception set-up leave was requested a handful of times over may years and was never brought to the attention of a Superintendent until 2012. Given the complexity of running a large school division, it would be unreasonable to impute knowledge of such a minor matter as a half day leave, taken twice per year and approved at the school level.

In *Inglis*, the employer tried to cancel a posting after interviews had been held and the grievor had been notified he would be awarded the position. Arguing for an estoppel against the union, the employer said that posting cancellations had not been grieved in the past. The arbitrator analyzed the evidence and concluded that there was only one similar instance where the union failed to grieve, about four years earlier. It was held as follows (para. 33-34):

> I am reluctant to find an estoppel on the basis of this evidence. The doctrine of estoppel by conduct requires that there be conduct on the part of one party that is sufficiently clear and unambiguous to justify the other party in believing that the party estopped will not insist on strict compliance with the collective agreement. The only relevant prior conduct in this case is the failure to grieve the cancellation of the December, 1987 ...
>
> ... In my view the ability to seek enforcement of rights under the collective agreement cannot be lost by reason of a single, isolated failure to grieve a similar alleged violation on a prior occasion.

Similarly, said the Division, in the present case there was only a single instance of a leave request presented for the purpose of wine and cheese set-up.

Finally, in *City of Winnipeg*, retirees were paid sick leave cash out 119 times over a three year period on the basis of the employer's calculation, but even this was insufficient to found an estoppel against the union (para. 29). The arbitration board declined to find that the union knew or ought to have known how the collective agreement was being applied.

Union reply argument

The Association submitted that the language of Article 6.05 is antiquated and this must be taken into account in construing the agreement. The article refers to a "branch" of the Society but nowhere else in the collective agreement is this terminology used. In practice leave is granted to SOTA to carry out its activities and MTS authorization is not required. Reimbursement under the article comes from the Association, not MTS. The Division bills SOTA, not MTS, although the article refers to payment by the Society. For obvious reasons the Division has not sought to prevail using the supposed lack of authorization. But beyond that, the relationship between MTS and the Association must be appreciated. The Association pursues the objectives of MTS within Seven Oaks and the grievor was delegated

to act for the Association by preparing for a major SOTA event. He was a delegate or representative in the ordinary sense of these words. It was not necessary that there be a formal meeting convened in order to qualify for leave.

The Reception took place in May 2012 despite the denial of leave but this does not prove a leave was unnecessary, as argued by the Division. The collective agreement provides for leave up to 12 days per year in order to deal with union business. The test is not impossibility. On that basis, leave might never be granted, as it might always be possible to do the work at some other time. If the Association activity or function is reasonably set during school time, an executive member is entitled to leave in order to participate.

The Association reiterated its position that knowledge of the practice should be imputed to the Division. O'Leary's testimony was not qualified in the manner suggested by the Division during final argument. He did not say that in retrospect, he should have known. He stated directly that he probably should have known how leaves were being granted. The practice was open for anyone to see, if they looked. The Division didn't want to know. It was a true case of wilful blindness.

The Association distinguished the Division's authorities on their facts. Several of the estoppel decisions are outdated. However, the principles stated in *Vancouver Island Library* were endorsed by the Association. Union leave clauses should be given a liberal and balanced approach. As long as there is "some arguable nexus" between the purpose of the leave and the union's legitimate objects and activities, employers should not impede the union's work (para. 69). Applying that test to the facts of the present case, the leave should have been allowed. The Reception was held because the event advanced the welfare and professional growth of teachers, and supported the cause of public education in Seven Oaks Division, all SOTA objectives. Release time was necessary to prepare and present such a

major undertaking. The nexus was sufficiently clear and the Division was not entitled to deny leave under Article 6.05.

Analysis and conclusions

Interpreting union leave clauses

The present dispute arose from the denial of a half day leave requested by the grievor in order to prepare for a wine and cheese reception. Beyond the specific refusal under Article 6.05 of the collective agreement in this case, both parties expressed concern about larger issues looming in the background. For the Association, the integrity and autonomy of its work as the representative of Seven Oaks teachers was placed in question. Union leave is essential from time to time as part of SOTA activities in a number of spheres. As a matter of principle, the Association believes it must defend its right, as reflected in Article 6.05, to obtain release time when an absence is required for union business. Decisions about how and when SOTA pursues its goals and objectives must be made by the Association and not the employer. For this reason, counsel urged the board to be especially cautious in preparing its award in this case.

From the Division's perspective, the concern relates to maintaining instructional continuity for the benefit of students without undue interruption. Teachers may need to be absent from the classroom for a variety of reasons. Union leave is only one example but the Division prefers wherever possible to minimize the loss of teacher contact with students. In the collective agreement, the parties have agreed on several union-related leave provisions. When administering these arrangements, the Division recognizes the need to avoid interference, or the appearance of interference, in substantive union affairs.

Despite their differences, the parties were largely *ad idem* at the level of general principle. Article 6.05 has been part of the agreement for over 50 years and this is apparently the first dispute that has arisen concerning the refusal of a requested leave. During bargaining, the parties have not felt the need to negotiate changes, other than to raise the maximum number of days, suggesting relative satisfaction with the operation of the article on both sides. The evidence indicated that SOTA is judicious in its requests. The cap of 12 days per school year is rarely reached. Time away from the classroom is only sought for *bona fide* Association functions which are taking place during the school day. For its part, the Division does not probe individual leave requests and has long accepted the generic description "union duties". O'Leary testified that in current practice, this continues to be the Division's approach. Union leave has not been perceived as being a problem.

In summary, the parties have adopted a liberal and balanced approach, which as stated in *Vancouver Island Regional Library, supra*, is the prevailing arbitral view as well (para. 67, 76). A union cannot simply assert that an activity is union business and thereby make it so. There must be an "arguable nexus" between the purpose of the intended leave and the union's objectives (para. 69). The board endorses and adopts this approach. So did both parties. In argument, the Division cited and approved the analysis in *Vancouver Island Library* and the Association indicated its agreement in reply. Even apparently mandatory clauses are not unreviewable (*Atco, supra*, p. 283).

It is heartening to note that the present parties seem to have reached a consensus in this regard. Hard cases may arise, of course, and this is one of them. When necessary an arbitration board will resolve the dispute. But nothing we heard during the current proceedings suggested any intention to depart from the responsible approach that has generally prevailed. SOTA is measured in asking for leave. The Division avoids intrusive inquiry. It is basically a trust relationship, somewhat bruised by recent events but still intact.

Is Article 6.05 ambiguous as applied to the present case?

Collective agreement language is ambiguous in the legal sense if the words are capable of two meanings and neither alternative can be assigned to the words after applying the accepted principles of interpretation. Both parties submitted that Article 6.05 is clear and unambiguous. We agree. There is no need to resort to extrinsic evidence as an aid to interpretation. The fact that the parties have conflicting positions on how the article applies on the facts of the present case does not render the language ambiguous. In the reasons that follow, the board sets out its interpretation of the article and renders a decision on the grievance.

The conditions for receiving Executive Leave

For convenience, the segmented version of Article 6.05 is presented again. As summarized earlier, the five parts of the article address (1) the pool of eligible teachers, (2) MTS authorization, (3) required absence, (4) satisfactory substitute and (5) cost coverage.

> **6.05 Executive Leave**
>
> **[1] A teacher, being a member** of the Manitoba Teachers' Society Executive Committee
>
> or of the Executive Committee of any branch thereof
>
> or any special committee of the Society,
>
> **or being appointed** an official representative or delegate of the Society, or any branch thereof,
>
> or being a Society appointee to a committee of the Department of Education,
>
> and

> **[2] being authorized** by the Executive Committee of the Society **to attend a meeting** of the Committee of which he or she is a member **or to act as a representative or delegate** of the Society or any branch of the Society in a matter of Society business
>
> **[3] requiring absence from school**
>
> shall have the right to attend such meeting or to act as such representative or delegate and shall be excused from school duties for such purposes on not more than a total of twelve (12) teaching days in any school year,
>
> [4] provided that a **substitute satisfactory to the Board** can be secured and that
>
> [5] the **cost of providing said substitute is assumed by the Society** and shall not be charged upon the Board concerned.
>
> No additional leave of absence shall be taken for the purpose mentioned above, except with the consent and approval of the Board. (Emphasis added)

Part 1 of the article was met in this case because the grievor was a teacher and a member of the SOTA executive.

Part 2 (MTS authorization) was disputed but ultimately not in issue. As noted by the Division, on a plain reading this part requires authorization by the MTS Executive to attend a meeting or represent a branch in a matter of MTS business. Nevertheless the parties have long considered that MTS authorization was not necessary. SOTA authorization has been sufficient for SOTA business. Therefore the Division did not insist on compliance for the purposes of this case or any other application under the current collective agreement. The Division requested a clarifying decision on this point to assist the parties in the upcoming round of bargaining. However, given the extensive past practice to treat SOTA authorization as adequate, it is evident that the parties themselves deem the current arrangement to be

workable and acceptable. It is up to the parties whether they wish to update or amend Article 6.05. If they choose to do so, the general comments of the board in this award will be available for consideration.

The Division did argue that the grievor's work doing reception set-up was outside the scope of a "representative or delegate" role. The Association responded that the Reception was accepted as a legitimate union event and therefore preparing for the event qualified under the article. Taking a liberal approach and applying the arguable nexus test, the board tends to the view that the Association is correct, but a formal determination is not necessary. The Division also asserted that the Reception was not Society business. The collective agreement distinguishes between MTS and a branch for various purposes and this must be given meaning. For its part, the Association pointed to the integrated relationship between MTS and SOTA, maintaining that SOTA business is also MTS business. Again the Association may be correct under a liberal interpretation. There need be only an arguable nexus with Society business. But the board declines to make a formal ruling.

Part 3 (required absence) was highly contentious and a board determination is necessary on this point. Based on its concern over potential employer interference in SOTA's internal workings, the Association argued for a presumptive entitlement to leave upon request, as long as the activity is reasonable and *bona fide* SOTA business. The employer should have no discretion to look behind a leave request and decide for itself whether an absence is required. While we have endorsed a broad and liberal approach to the application of the article, the actual words chosen by the parties cannot be ignored. Part 3 is cast as an objective requirement for absence, not a subjective one. It is not enough that the Association is engaging in a reasonable and *bona fide* union activity that in its view requires an absence. There must be an objective requirement for the teacher to be away from his or her classroom.

As the Association said, the test is not "impossibility". The fact that the Reception was successfully held without the grievor receiving leave does not decide the issue. The Division cannot render the article nugatory by demanding that any and all SOTA meetings and activities be moved to off hours, simply because it would be theoretically possible to do so. But if the intended activity can clearly be undertaken outside of school hours, without any jeopardy to the Association's goals and objectives, and without causing inappropriate intrusion by the Division in SOTA's operation, then an absence is not required.

It was not disputed that the Association bears the onus of proof. On the evidence, the Association did not show that the grievor was required to be absent from school on the afternoon of May 31, 2012 in order to set up for the Reception. Room set-up, food and sound were done by others. Wine and beer could easily be delivered in advance and secured on site, ready for the event. Gifts and other finishing touches generally were done before the final afternoon in any event. If hotel premises had been used, there would have been even less justification for release time. Making these preparations outside of school hours would not involve any jeopardy to SOTA goals and objectives as a union. Nothing about the Division's response to the grievor's application resulted in an inappropriate intrusion into the domain of SOTA internal operations.

The result might be different if the Association was dealing with collective bargaining, grievance matters, member welfare, professional issues or a range of other sensitive subjects for which it rightly claims the need to maintain operational autonomy or confidentiality. We affirm that the list of protected subject matters "should not be restricted merely to the basic and fundamental trade union collective bargaining pursuits" (*Hamilton-Wentworth Catholic School, supra*, para. 12), a point emphasized by SOTA counsel. Here the question was how and when to set up the bar and other amenities for a social event.

Part 4 was not in dispute. A satisfactory substitute was available.

Part 5 was not in dispute. The Association was prepared to pay for the substitute and the Division normally billed SOTA rather than MTS.

There was no evidence to support the Association's theory that the grievor's leave was denied in retaliation for, or as fall-out from, the collective bargaining conflict that occurred earlier in the spring of 2012. O'Leary denied the relationship was strained at all. Deck said it was badly stressed. It would be unrealistic to believe that there were no significant tensions during such a period. But proof is needed on a balance or probabilities and none was presented. Shier's first reaction when approached by the grievor was to express concern about an absence from class for this purpose and to ask whether someone else could do it. It was not an inappropriate response by an administrator. True, this was the first ever refusal but it was also the first time a Superintendent had been told that Article 6.05 leave was going to be used for wine and cheese set-up. As O'Leary explained, there are legitimate Division concerns about liquor in schools, student exposure to alcohol-related activities and potential disruption during the instructional day. Overall there is no basis for a finding that the Division was motivated or affected by an improper purpose such as retaliation.

In conclusion, the meaning of the relevant parts of the article is ascertainable and unambiguous. On the facts, the grievor was not entitled to Executive Leave for the afternoon of May 31, 2012.

Should the Division be estopped from relying on its legal rights?

The Association argued that despite the Division's asserted lack of actual knowledge of past practice in allowing Executive Leave for wine and cheese set-up, knowledge should be

imputed and the board should find there was a representation by acquiescence or silence. The Division was wilfully blind to the practice. Principals were allowed to deal with SOTA leaves and they always approved them. Superintendents could have inquired but they chose not to do so. The Association relied on the Division's silence when it entered the last round of bargaining believing that Article 6.05 would continue to be accepted for leaves as in the past. There was detriment because the Association lost the opportunity to negotiate an amendment.

In *Manitoba Family Services, supra*, cited by the Association, the rationale for equitable estoppel was reviewed, as follows (para. 37-41):

> ... Equitable estoppel has been a feature of our common law for nearly 60 years and has been applied in a labour relations context for at least two decades. The elements of the doctrine are well known and were addressed by the parties in the present case. There must be a representation by words or conduct, which may include silence, which is intended to be acted upon by the recipient party. There must be reliance by the recipient party in the form of some action or inaction. Finally, the recipient party must suffer some detriment as a result of its reliance. As noted above during the discussion of the arguments advanced by the parties, the specific issue arising in this case was whether the Union's failure to object earlier amounts to a representation by silence. The Union did not directly contest the Employer's claim that, during the previous round of collective bargaining, there was reliance on the acceptability of the practice and a consequent decision by the Employer not to seek revisions to Article 15.03(a). Further, there was no dispute that such reliance during bargaining is a lost opportunity which can qualify as detriment under the doctrine of equitable estoppel.
>
> The Employer relied on Arbitrator Graham's review of the authorities in *Agassiz* and in particular his conclusion that despite the Teachers' Association's lack of actual knowledge, *imputed* knowledge of the practice may be found where the Association could have made itself aware by reasonable inquiry. Thus, union silence in *Agassiz* was not *really* silence, it was actually a representation or assurance to the Division that the longstanding pay practice was in accord with the

collective agreement.

As noted in *Agassiz* (at para. 44), Arbitrator Graham had to face an additional argument, even after finding imputed knowledge, namely, was the Association's assurance intended to alter legal relations? Understandably, counsel for the teachers submitted that the requisite intention to affect legal relations between the parties could not exist when the union itself was not even aware of the Division's practice. As I understand *Agassiz*, this point was resolved by applying equity as an overriding consideration (see para. 41). Regarding intention to affect legal relations, the board held as follows:

> ... I do not accept that argument. As indicated above, I have concluded on the basis of the authorities referred to that it would be unfair to allow the Association to immediately assert its rights under Article 3.07, given the 25 year practice of the Division. The Association could have known, and arguably should have known of the Division's practice. In essence, I am ruling that the Association had constructive notice of the Division's practice, and their acquiescence in the practice has had the effect of altering the legal relations between the parties with respect to Article 3.07. In my view this sufficiently fulfills the intention requirement.

...

... I am prepared to adopt the principles utilized by the board in *Agassiz*. In so doing, I am cognizant of the caution that should be exercised by an arbitrator in considering an estoppel argument. After all, it must be remembered that the doctrine of equitable estoppel allows a party to avoid the legal effect of a contract. ... This remarkable outcome is permitted by courts and arbitrators only because a higher purpose is being served: maintaining fairness and equity between the parties. In labour relations, where the parties by definition have a close ongoing relationship, arbitrators have been very concerned that fundamental fairness should prevail.

Agassiz and *Manitoba Family Services* were followed in *Nor-Man Regional Health Authority and M.A.H.C.P. (Plaisier Grievance)*, [2008] M.G.A.D. No. 30 (Simpson), and ultimately

Nor-Man was upheld by the Supreme Court of Canada: [2011] S.C.J. No. 59. The court held (para. 45) that labour arbitrators "may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized."

In the present case, there is no basis to doubt the Division's claim that it was unaware of the Article 6.05 practice. Deck said it was incomprehensible that senior managers would not connect the dots and realize that teachers must be taking a half day to make the wine and cheese events a success. This was her honestly held opinion but it was uncorroborated. She assumed that principals always knew when leave was requested for a reception day. She expected that word would get around and reach the Division. No witness confirmed these speculations.

In his testimony, O'Leary responded that he never really gave the matter any thought and was "not short of things to do." SO12's were treated as accounting forms and filed away without review by Superintendents. Employee Connect called for greater disclosure but it was not implemented for SOTA leaves until early 2012. The board accepts O'Leary's evidence. Doing spot checks on SOTA leave applications would not rank high on the priority list, especially given the context described earlier in these reasons. There was a trust relationship between the parties and union leave was not perceived by the Division as a problem area.

The Association relied on O'Leary's remark in testimony that he did not know but probably should have known about the practice. It was submitted that in essence, this was an admission of constructive knowledge and made the case for estoppel. The Division sought to explain away O'Leary's admission by saying he was being "unnecessarily self-critical"

and speaking with the benefit of hindsight. That may or may not be so. It was certainly a candid observation. However, this evidence must be weighed in light of the reality that the Association expected forbearance from scrutiny when it presented Executive Leave requests. Most applications stated only the generic reason "union business". The Association stressed in its evidence and argument that Executive members were always open about the leave practice and never tried to hide anything from the Division. The Division did not challenge these assertions and the board accepts them. At the same time, SOTA expected the Division to respect union autonomy and grant leave on the basis of a bare declaration. It would be inconsistent in this context to find wilful blindness by the Division and found an estoppel on constructive knowledge.

The Division cited arbitral authority that silence must be informed and deliberate before it can be taken as a representation for purposes of estoppel. The Division also argued that there was only one informative letter of request sent to a principal over the years and said this was insufficient to create an estoppel. The Association countered that principals were allowed to act for the Division in granting leaves. At the school level, the practice was known or ought to have been known. The board does not find it necessary to resolve these arguments. As stated in *Manitoba Family Services* (para. 41), given the ongoing close relationships between parties, arbitrators are concerned that fundamental fairness should prevail. In the present case, which has many unique features, it would not be equitable to deprive the Division of its legal rights under the collective agreement based on a non-interventionist approach to Executive Leave that was supported by the Association.

For these reasons, the board exercises its discretion and declines to apply an estoppel against the Division.

Award and Order

The grievances are denied.

DATED September 26, 2013.

_____

ARNE PELTZ, Chair

I agree.

_____

ROBERT SIMPSON, Nominee of the Division

I dissent and my reasons are attached.

_____

SAUL LEIBL, Nominee of the Association

Dissent

I do not agree with the majority and would allow the grievance. The majority found that the Association did not show that the grievor was required to be absent from school for the afternoon that the leave was requested. Because all the preparations seemed to get done and “making the preparations outside of school hours would not involve any jeopardy to SOTA goals and objectives as a union”, denying the grievance say the majority did not result in “an inappropriate intrusion into the domain of SOTA internal operations”.

In keeping with the principle set out in *Hamilton-Wentworth Catholic School* that a union’s need to maintain operational autonomy or confidentiality should extend beyond basic trade union pursuits, the grievance should be allowed. The grievor was a Member-at-Large of the Member Services Committee. As indicated by the witness, Ms Deck, the duties of the Member Services Committee are listed in the SOTA constitution. The Long Service Wine and Cheese is specifically listed. The Constitution directs the Member Services Committee to ensure it takes place annually. To the Association it is clearly more than a mere social event. It is a duly constituted part of its annual operations. There is definitely a connection between the purpose of the leave and the general objects and activities of the union. There is an arguable nexus as set out in *Vancouver Island.*

The duties of the Member Services Committee are set out in the constitution just as are the duties of the Economic Welfare and Professional Issues committees. It is not the

board's place and certainly not the employer's place to determine the value of this particular event to the union, or how to best carry out its duty to ensure it takes place, any more than it is the employer's place to determine if an absence from school is required for a member of the collective bargaining committee to prepare for bargaining.

Indeed, as indicated by the majority, the event happened even though the leave was denied, just as collective bargaining would take place even if no leaves were granted for the purposes of preparation. But this is too narrow a view to determine if an absence from school was required. It certainly does not fall within the parameters of a truly broad and liberal approach. In my view the Association made its case that the Long Service Wine and Cheese is a bona fide part of SOTA's union business and the denial of the leave was a direct intrusion into the domain of SOTA internal operations and did put in jeopardy its ability to appropriately fulfill its goals and objectives.

ESTOPPEL

Even if I agreed with the majority to deny the grievance I would apply an estoppel against the Division. While few of the applications for leave over the years cited this specific union activity (Long Service Wine and Cheese) the evidence showed that it was a long standing, widely advertised, well attended event. Certainly at the school level principals and vice principals who administered leaves on behalf of the Division would be aware that leaves requested for the very day that the event took place would be for purposes related to that event. O'Leary's testimony that he should probably have known about the practice should be given significant weight. Surely the parties to the

agreement have an obligation to monitor how it is being administered. The Division may have chosen to adopt a non-interventionist approach, but it was not prevented from looking into the practice more closely. If the senior administration was unaware of the practice it was because they chose not to look. O'Leary's remarks that they probably should have known confirm that there was constructive knowledge. The Association relied on the Division's acquiescence or silence. If it had been made known to SOTA that the Division would refuse leaves in the future it would have had the opportunity to bargain an amendment to the collective agreement. Therefore I would apply the estoppel against the Division for the duration of the current agreement.

Respectfully submitted,

Saul Leibl