ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0838-16-R**

Labourers' International Union of North America, Ontario Provincial District Council, Applicant v **Govan Brown & Associates Limited** and/or Govan Brown Constructors Inc. and/or Govan Brown Enterprises Limited and/or Govan Brown Holdings Limited and/or Govan Brown Inc. and/or Govan Brown Management Inc., Responding Parties v Paul Power, Jackson Coffey, Dennis Galloway, David Gonsalez, Scott Patterson, Ian Strang, Neil Walker and Ron Whelan, and the Attorney General of Ontario, Intervenors

BEFORE: Bernard Fishbein, Chair

APPEARANCES: Andrea Bowker and Carlo Ricci for the applicant; Greg McGinnis and Sarah Paul for the responding parties; Sheryl L. Johnson, Sara Hickey and David Gonsalez for the employee intervenors; Jennifer Luong and Simon Gooding-Townsend for the Attorney General of Ontario

DECISION OF THE BOARD: August 18, 2016

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant ("the Union" or "the Labourers") elected to have dealt with under section 128.1 of the Act (the "Application"). This Application was filed with the Board on Sunday, June 19, 2016.

2. By decision dated June 27, 2016, the Application was directed to a Case management Hearing ("CMH") which was held on August 10, 2016.

3. There were a number of outstanding issues at the time of the CMH:

(a) the correct name of the responding party;

(b) whether the employees subject of this Application for certification were performing labourers or carpenters work on the date of application ("the bargaining unit question");

(c) an allegation that the conduct of the Union amounted to "gerrymandering" the schedule of employees to facilitate this application for certification, which it was alleged amounted to fraud or misrepresentation that should lead to the Application being dismissed ("the fraud issue");

(d) whether the Board jurisprudence in the construction industry about considering only the membership evidence of those at work in the bargaining unit on the day of application violated the *Canadian Charter of Rights and Freedoms* (the "*Charter*") in the circumstances of this case (the "*Charter* issue").

4. A group of employees had intervened to also oppose the Application and were represented by counsel at the CMH. As well, having been given notice of the *Charter* issue, counsel for the Attorney General of Ontario was also present.

The Correct Name of the Responding Party

5. The Union had filed the Application against Govan Brown & Associates Limited and five other Govan Brown named entities. The Union had invoked section 1(4) and asserted that all of the entities carried on associated and related activities under common control and direction within the meaning of the section 1(4) of the Act. A response had been filed by Govan Brown & Associates Limited ("Govan Brown" or "the employer") asserting that it was the only employer involved here. At the CMH, the parties agreed that this issue be deferred as it likely could be resolved among the parties when it became necessary to do so, without involving the Board.

Order of Proceedings – Which Issue first?

6. The parties next addressed the order in which the other issues ought to be dealt with. With the exception of Govan Brown, all of the parties agreed that the constitutional issue should be left to the end. Govan Brown asserted that the constitutional issue should be decided

first. I accepted the position of all of the other parties (again, with the exception of Govan Brown) that the constitutional issue be dealt with at the end, if necessary. I agreed with the other parties and, in particular, counsel for the Attorney General, that the constitutional question should be addressed only if necessary. Secondly, to the extent that there were facts in issue, or *viva voce* evidence would be required for the other issues, that evidence was more, as counsel for the Union put it, "time sensitive" or "memory sensitive" than any contested facts for the *Charter* issue (if there are any) and therefore those issues ought to be litigated more quickly. Lastly, the Attorney General was only involved to the extent of the *Charter* issues, and if the other issues were dispositive of the Application, not only would the *Charter* issue need not be addressed but counsel for the Attorney General had no desire to participate and would not need to be present. I therefore directed that the constitutional issue be determined after the other issues were determined.

The parties did agree that, in the event it was necessary to litigate the *Charter* issue, a further CMH would be scheduled to deal with how that issue would be dealt with.

The Bargaining Unit Work Question

7. This is an application for construction labourers. Govan Brown asserted that the work being performed on the date of application was not construction labourers work. There is no dispute that the only two people who were at work on the date of application are:

> Jonathan Oakes
> Khalid Said

8. However, with respect to them, Govan Brown simply asserted:

> "Oakes and Said were engaged on the application filing date removing a portion of a plywood structure covering the floor, which required them to unscrew brackets holding the structure together, remove the plywood and save the brackets for future use.
>
> The Responding Party submits that this is the work of a carpenter, not a construction labourer."

At the CMH, for clarity, Govan Brown indicated that the "plywood structure" was a lattice plywood arrangement or configuration for protecting the floor.

9. The Union submitted even if this were true, it was not enough to exclude the two employees from a construction labourers bargaining unit and that there was no point to inquiring into this any further. After hearing the submissions of the parties, I agreed with the Union orally at the CMH and indicated that I would provide written reasons subsequently. The following are those reasons.

10. For the purposes of this argument I assume that Oakes and Said were only engaged in that work as described by Govan Brown, *supra*, on the date of application which was not explicitly asserted (and which the Union disputes, not only asserting that they were doing many other things, but this was not what they spent the majority of their day doing). I am not prepared to hold that unscrewing brackets holding protective plywood to the floor is work that could only exclusively be performed by members of a carpenters craft bargaining unit. It could be that such work could be performed by carpenters, but that does not mean it cannot also be performed by labourers. Without disparaging anyone at all, this is not work involving a high degree of skill (nor did anyone attempt to argue that it was). It is not work that required any particular carpentry skills. There was no reason it could not be performed by construction labourers and, quite frankly, likely has been (as the Union asserted).

11. In fact no party really referred me to any authority that was helpful. Both the Union and Govan Brown did make reference to the Board's decision in *T.A. Andre and Sons (Ontario) Ltd.*, [1997] O.L.R.D. No. 302 which is one of many Board jurisdictional dispute cases between carpenters and labourers concerning formwork. I do not think that a jurisdictional dispute determination on a particular job between two disputing unions is necessarily helpful, let alone determinative, to a question of whether some work falls exclusively within a particular construction craft bargaining unit. Jurisdictional disputes are decided on a variety of criteria as they apply in a specific case to resolve the competing claims of two trade unions. That is not the same as a determination of whether particular work performed by employees on the date of application falls within the work claimed within a particular craft unit (to the exclusion of all others). In any event, the result in *T.A. Andre* confirmed a composite crew of labourers and carpenters to remove forms "once the hardware from the forms is released by carpenters". The decision elaborated on the work in dispute as follows:

> "… dismantling of the forms involves the removal of braces, strongbacks, the whalers, studs and plywood (in the case of built-in-place forms) and braces, strongbacks and whalers (in the case of prefabricated panel forms)".

The decision further noted that there was:

> "… no dispute that the release of the various clamps and wedges which hold the form in place had been properly assigned to members of the Carpenters, and that the stripping of forms which are not to be re-used has properly been assigned to members of the Labourers."

Regardless of the correctness of that jurisdictional dispute decision (and I have no basis to doubt its correctness), again, I find it of no assistance to me. As much as either of the parties wished to argue, I am unpersuaded that the "unscrew[ing] of brackets", "removing a portion of plywood structure covering the floor" (even if the brackets are saved for future use) is directly analogous to the release of various clamps and wedges holding forms in place. Moreover, even if there is an analogy, the result in the jurisdictional dispute between the Carpenters union and the Labourers union is not the same as characterizing into which bargaining unit an employee who an employer engages to perform certain work on a construction site falls. One cannot help but note that Govan Brown did not assert that it employed carpenters on this construction site or that the carpenters it employed were performing this work.

12. Govan Brown did file with the Board Schedule E of the Labourers' Provincial ICI Collective Agreement which, in respect to form removal, stated:

> "Form Removal: Once the reusable form panels have been released by loosening of the hardware, the removing, cleaning, oiling application or releasing agents and carrying to the next point of erection of all materials and panels, including flying forms, as well as the stripping of forms which are not to be reused and of forms on all flat arch work."

Govan Brown wanted me to note that even in this jurisdictional clause (at least "for reusable form panels"), the Labourers recognize that the "releasing and loosening of hardware" was beyond its jurisdictional claim. Again, I am not sure that this is particularly helpful, let alone persuasive. First of all, in addition to everything else I have observed

here, Schedule E of the Labourers' provincial agreement is entitled "Work Claimed **But Not Limited To**" [emphasis added]. Secondly, that is the ICI collective agreement and the Labourers have other collective agreements (in particular the agreement with the Formwork Council of Ontario) where the jurisdiction of the Labourers is much broader than it might be in the ICI sector.

13. To me, the complete response to this is what the Board wrote in *GMP Contracting*, 2015 CanLII 33175 (ON LRB), in dealing with a similar motion (in a case ironically involving dismantling formwork), at paras. 16-17:

> 16. **In the context of an application for certification the Board does not embark upon a jurisdictional dispute or determine the jurisdictional limits as to which trade has a better claim to the work performed, i.e. the Labourers or the Carpenters. It would not be appropriate for the Board to do so.** Rather, the Board must ask the question could the work be the work of a carpenter. In this regard, it is clear that the designated employee bargaining agency for carpenters in the ICI sector claims the "removal or dismantling of forms, falsework and accessories". The fact, that this is not a Carpenters' certification, but rather a CCWU certification, is irrelevant to the fact, of which the Board is well aware, namely, carpenters claim and perform, from time to time, the removing and dismantling/stripping of forms on ICI projects. As such, the removing and dismantling of formwork, could be the work of a carpenter.
>
> 17. The Board is also of the view that none of the cases relied on by the applicant are directly on point. None of the cases deal with a prima facie motion in which the Board determines that the removing and dismantling of forms is solely construction labourers work and is not the work of a carpenter. The vast majority of the cases stand for the proposition that, in the context of a Labourers' certification, the stripping of forms has been found to be the work of a construction labourer. This is not surprising as the Board, in numerous jurisdictional disputes, has had to deal with overlapping jurisdictional claims made by Labourers and Carpenters concerning formwork duties.
>
> [emphasis added]

14. In the end I am not persuaded that construction labourers could not perform this work, or equally claim it (and perhaps win such a claim) in a jurisdictional dispute (if such a jurisdictional dispute has not already taken place). Accordingly, even assuming this allegation of what the work performed was correct, it would not preclude the Board from certifying people performing that work in a construction labourers bargaining unit. There was no need to inquire further into this allegation.

The Fraud Allegation

15. Although Govan Brown and the other parties referred to this argument as a "gerrymandering" allegation for convenience, that is not really accurate – moreover, for it to have any legal impact, it must amount to fraud or misrepresentation – and by the Union.

16. Again, there is no dispute that there were two people at work on the date of application. However, a third, Sean St. Cyr, originally was supposed to be as well. In this regard, Govan Brown's allegation (adopted by the intervening employees) is as follows:

> Khalid Said was not scheduled to work on June 9, 2016. Instead, an individual named Sean St. Cyr, who was working at the Holt Renfrew site through a personnel staffing agency, Nationwide, was scheduled to be onsite performing work for Govan Brown together with Jon Oakes.
>
> Oakes did not typically perform work at that site; St. Cyr did. On Friday June 17, Oakes and St. Cyr exchanged text messages about the work on Sunday.
>
> …
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> On the evening of Saturday, June 18, St. Cyr messaged Oakes to advise him that he would not be able to arrive at the job site at 7 AM because of the bus schedule. Oakes responded that he would see him when he got there.
>
> St. Cyr left his home at about 6 AM on June 19 to travel to work. At about 7 AM, Oakes texted St. Cyr's phone (which his wife was keeping at that time), asking what time he would arrive at the job site. His wife responded that he would arrive at approximately 7:30 AM. Oakes did not respond.

> At about 7:15 AM, St. Cyr messaged his wife and asked her to text Oakes to say that he would be at the job in approximately 45 minutes. She texted Oakes to that effect. Oakes did not respond.
>
> St. Cyr arrived at the jobsite at about 7:50 AM. He went to the gathering area and did not see any bags, knapsacks or reflective vests suggesting that anybody from Govan Brown was there. He called out to see if anyone was around and did not hear any response. He then walked upstairs, pushed his head through the door and yelled out. He continued to look around for about 15 minutes. Not seeing or hearing anyone, he left and returned home.
>
> Meanwhile, at **7:45 AM, Oakes texted Dave Rahikka, Site Supervisor, to say that St. Cyr had not shown up** but should be there at 8 o'clock.
>
> **At 7:50 AM, Oakes called Rahikka and told him that St. Cyr was not available**, and that he needed help with the work he was performing that day. **This is not accurate**, because St. Cyr was actually on site at around that time looking for Oakes. **Rahikka did not know this**, and told Oakes to call around and see who would be available, **and to get back to him. He did not authorize Oakes to select the particular individual who would work**.
>
> However, at 9:47 AM, Oakes texted Rahikka stating, "*his name is Khalid and he started at 9*". **Oakes selected Said to work at that site without Rahikka's without [sic] permission**. [italics in original]
>
> Numerous times in the previous weeks, Oakes had had [sic] sent text messages to Rahikka that he and Said were looking for opportunities to work on weekends.
>
> [emphasis added]

17. Govan Brown also pointed me to at least three previous applications for certification, filed by the Union, where Oakes was involved. See *Gary Ulias & Associates Inc.*, 2015 CanLII 12157 (ON LRB) at paragraph 11; *Trisect Construction Corporation et al.*, OLRB Case No. 2553-15-R and *Pegah Construction Ltd., Format Group Inc. et al.*, (an unfair labour practice filed by the Union with respect to another application for certification) – all to demonstrate that Oakes was not unfamiliar with certification applications before the Board.

18. Based on all of this, Govan Brown alleged that the Union and Oakes,

> "gerrymandered the list of employees working on the application filing date to ensure that the applicant had two members working on that date".

19. At the CMH (and in previous written submissions), the Union asserted that this allegation should also be dismissed without any further inquiry or hearing because it does not make out any violation of the Act or any contravention of the Board's Rules or jurisprudence. As the Union put it, there was no dispute that the two individuals were at work on the date of application, working for Govan Brown, paid for such work, which work had now been determined by the Board to be work capable of being within the Labourers' bargaining unit. In those circumstances, what basis could there be to discount either their membership evidence or dismiss this Application for certification?

20. The Union's motion was opposed by both Govan Brown and the intervening employees. They argued that this conduct on the part of the Union amounted to either fraud or misrepresentation. Section 128.1(5) (and this is an application made under section 128.1 of the Act) provides:

> (5) Nothing in subsection (4) prevents the Board from considering evidence and submissions relating to any allegation that section 70, 72 or 76 has been contravened **or that there has been fraud or misrepresentation**, if the Board considers it appropriate to consider the evidence and submissions in making a decision under this section.
>
> [emphasis added]

No one disputed that "fraud or misrepresentation" for these purposes can be freestanding allegations independent of the enumerated sections of the Act, sections 70, 72 or 76, listed in section 128.1(5). At a minimum, both Govan Brown and the intervening employees asserted that Oakes, not a stranger to certification applications involving the Union at the Board, knowingly and falsely told Rahikka that St. Cyr was not available (even before the time that St. Cyr said he would arrive at the site) and without permission hired Said (whom he had been trying to get on the job on the weekend) and told him to report to work – which evidence the Union then relied on to have the bare legal minimum to support an application for certification.

21. The Union responded by asserting that the fraud or misrepresentation referred to in section 128.1(5) had to be fraud **on the Board** and whatever the nature of the allegations made by Govan Brown they did not constitute any kind of fraud or misrepresentation to the Board or on the Board – perhaps to the employer (and even that the Union still disputed) but not the Board.

22. However, no party referred me to any Board jurisprudence in support of their respective position.

23. In *GMP Contracting*, *supra*, the Board stated:

> 11. In determining the no *prima facie* case motion the Board must assume that all of the material facts stated in the responding party's status submissions are true and provable. Further, the Board has stated that its discretion to dismiss an application on the grounds that it does not disclose a *prima facie* case **should only be exercised in the clearest of cases** (see *J. Paiva Foods Ltd.* [1985] OLRB Rep. May 690 at page 691). In *IPAC Paving Ltd*., [2014] O.L.R.D. No. 1555, at paragraph 26, the Board stated the following: "**[T]he question in this motion is not whether one side or the other is likely to win its status argument. The question is whether the facts the employer asserts in its December 11, 2013 submissions, are such that it is plain an obvious that it will not succeed**."
>
> [emphasis added]

24. Although I have serious doubts whether Govan Brown or the intervening employees can establish this allegation, either factually or legally, I cannot say at this point in time that it is sufficiently plain or obvious to me that it cannot possibly succeed. As the Board noted in *Care Partners*, 2015 CanLII 73888 (ON LRB) (a case which the Board subsequently did dismiss on the merits, having heard the evidence) at para 24:

> 24. ... The facts before the Board in this case constitute a sufficiently novel circumstance that it would not be appropriate to determine this matter on a preliminary basis. In reaching this conclusion, we have regard to the cautionary words of the Supreme Court of Canada in *Hunt v. Carey Canada Inc*., 1990 CanLII 90

(SCC), [1990] 2 S.C.R. 959, cited in *L.P. Masonry v. MBIU, Local 1,* 2012 CarswellOnt 15287:

> As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

Accordingly, notwithstanding the very able argument of counsel for the Union, these allegations will be allowed to proceed to hearing.

25. However, I am still concerned that this allegation not be allowed to unduly prolong the determination of this application. Accordingly, although not really discussed at the CMH (where I reserved my decision whether to grant the Union's motion not to inquire any further into the allegation), I direct that Govan Brown and the intervening parties file with the Board and deliver to the other parties "will say" statements of any witnesses they intend to call with respect to this allegation no later than **September 16, 2016**. The Union will have until **September 30, 2016** to similarly file "will say" statements of any witnesses it wishes to call. Govan Brown and the intervening employees will have until **October 14, 2016** to provide "will say" statements of any witnesses they plan to call in reply. No other witnesses (or evidence outside of that indicated in the "will say" statements, at least in examination-in-chief) will be permitted without leave of the Board. In fact, with the full and detailed potential evidence before the Board, the Union may even consider whether to renew its no *prima facie* case argument at the commencement of the hearing (upon, of course, providing proper notice).

26. Accordingly, there will be hearings scheduled at the Board's premises, 505 University Avenue, 2nd Floor "Board Room", Toronto, Ontario on **November 18 and 28, 2016,** which dates were agreed to by all the parties to deal with these issues. As these are allegations of Govan Brown, it will proceed first with its evidence.

27. There had been some issues between the parties with respect to production requests prior to the CMH. I was advised that the parties would review what production requests, if any, were still necessary in view of the determinations made at the CMH. I cautioned the parties that the Board would take a dim view of production

requests, under the guise of "arguably relevant" evidence which were really thinly-masked fishing expeditions to review a union's organizing campaign to determine whether there was a case to be made, particularly on the novel arguments being put forward here. In any event, if there are outstanding disputes about production that have not been resolved between the parties, the parties should write to the Board no later than **September 9, 2016** and the Board will deal with those production disputes before the hearing.

28. The constitutional question will be deferred pending the determination of the fraud issue since it may become moot, depending on the outcome of that issue. In the event the constitutional issue does become necessary to litigate, a new CMH, specifically to deal with the constitutional question, will be scheduled by the Board as agreed upon by the parties.

"Bernard Fishbein"
for the Board