CITATION: *EllisDon Residential Inc. v. Limen Group Const. (2019) LTD. et al.*, 2022 ONSC 1917
COURT FILE NO.: CV-22-00675010
DATE: 2022-03-30

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: ELLISDON RESIDENTIAL INC.

AND:

LIMEN GROUP CONST. (2019) LTD., BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA, LOCAL 1, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183, MASONRY COUNCIL OF UNIONS TORONTO AND VICINITY, JACK OLIVEIRA, JOHN MEIORIN, LUIS CAMARA, CESAR RODRIGUES, and FRANCESCA MERCURI

BEFORE: Koehnen J.

COUNSEL: *Dan J. Shields, Hendrik Nieuwland*, for the Defendant, Limen Group Const. (2019) Ltd.

Ian St. John, for the Plaintiff, EllisDon Residential Inc.

Lorne. A. Richmond, Louis Century, Geetha Philipupillai, for the Defendants, Bricklayers, Masons Independent Union of Canada, Local 1, Labourers' International Union of North America, Local 183, Masonry Council of Unions Toronto and Vicinity, Jack Oliveira, John Meiorin, Luis Camara, Cesar Rodrigues, and Francesca Mercuri

Patrick Groom, Victor Kim, for the Intervenor, 500 Bloor Street Commercial Partnership c/o Westbank Project Corp.

HEARD: March 22, 2022

ENDORSEMENT

Overview

[1] The plaintiff, EllisDon Residential Inc. alleges that the Defendant Unions have induced the defendant Limen Group to breach its contract with EllisDon and/or have intentionally interfered with the economic relations between EllisDon and Limen. EllisDon seeks an injunction against Limen which would oblige it to resume work on two construction

projects and an injunction against the Defendant Unions to enjoin them from inducing further breaches of contract or from further interfering with economic relations between EllisDon and Limen.

[2] The respondents submit that this court has no jurisdiction to grant the injunction because the subject matter of the dispute is one that is within the exclusive jurisdiction of the Ontario Labour Relations Board ("OLRB"). They ask that this action be stayed.

[3] The nub of the dispute is as follows: EllisDon is the general contractor on two projects in Toronto. Limen is a masonry contractor that hires only union labour from the Defendant Unions. Limen was hired to perform masonry work on the two projects. EllisDon also hires union masonry labour on other projects in Ontario from unions or locals other than the Defendant Unions.[1] The Defendant Unions directed Limen to stop performing any masonry work on the two EllisDon projects in Toronto unless EllisDon agreed in writing that it would retain masonry labour throughout Ontario only from the Defendant Unions. Limen complied. Masonry work on the projects has been stopped since November 2021.

[4] In my view, the essential character of this action is one that relates to labour relations over which the OLRB has exclusive jurisdiction. At heart, the action and the injunction involve an assessment of whether the conduct of the Defendant Unions is lawful within the statutory labour relations regime in Ontario; a regime over which the OLRB has exclusive jurisdiction. Even if, as EllisDon submits, the OLRB has no, or will not take, jurisdiction over the issue, the OLRB ought still to be permitted to at least address the issue in the first instance. As a result, I dismiss the motion for an injunction and stay the claim.

The Parties and the Projects

[5] The plaintiff, EllisDon is a leading construction and building services company with its head office in Mississauga, Ontario. As noted, EllisDon is the general contractor for the West Don Lands Project. The West Don Lands Project is a large-scale residential development project which is part of Toronto's overall waterfront revitalization plan. The residential development will include 2,500 rental apartment units, with approximately 30% of those units being affordable housing units.

[6] The defendant, Limen Group Const. (2019) Ltd. ("Limen") is a large masonry contractor with its head office in Toronto, Ontario. EllisDon has a longstanding relationship with Limen. Limen is one of the few masonry contractors that perform work for EllisDon on a regular basis.

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[1] There was some suggestion that EllisDon may hire masonry contractors who use bricklayers from different locals of the Defendant Unions. When I refer to the Defendant Unions in these reasons, I refer both to the union and to the particular local named as a defendant. When I refer to other unions, I refer to either other unions entirely or other locals of the Defendant Unions.

[7] The defendant Labourers International Union of North America, Local 183 ("Local 183") and the defendant Bricklayers, Masons Independent Union of Canada, Local 1 ("BMIUC Local 1") are independent trade unions as defined in the *Labour Relations Act, 1995*[2] (the "Act"). Local 183 represents construction workers in the Greater Toronto Area. BMIUC Local 1 is a province-wide union. The individual defendants are union officials implicated in the conduct at issue in this proceeding. For ease of reference, the two unions will be referred to in these reasons as the Defendant Unions when they are referred to collectively.

[8] The intervenor, 500 Bloor Street Commercial Partnership c/o Westbank Projects Corp. ("Westbank") is the developer of the Mirvish Village Project. The Mirvish Village Project involves the redevelopment of a large city block on the southwest corner of Bloor and Bathurst streets in the city of Toronto.

The Facts

[9] EllisDon entered into a contract with Limen to perform masonry work on the West Don Lands project. Westbank entered into a contract with Limen to perform masonry work on the Mirvish Village Project.

[10] EllisDon has other residential projects in Ontario, currently in Ottawa and London. On those projects, EllisDon is not using bricklayers from either Local 183 or BMIUC Local 1. EllisDon says it is using bricklayers from other unions on those projects. The evidence on this is not entirely clear. Westbank also has other residential projects in Ontario. It appears they may be using both other unions and non-union labour on those projects. For purposes of these reasons, it does not matter whether EllisDon and Westbank are using union or non-union labour on their other projects.[3]

[11] In November 2021, the Defendant Unions advised Limen that, pursuant to a series of agreements between Limen and the Unions, they considered EllisDon and Westbank to be non-union builders and therefore asked Limen pursuant to those agreements to cease doing masonry work on the West Don Lands and Mirvish Village projects and to move its employees to jobs with what the Defendant Unions considered to be union builders.

[12] The Defendant Unions gave Limen a copy of Minutes of Settlement for EllisDon and Westbank to sign which would rectify their non-union builder status. The minutes of settlement would require EllisDon and Westbank to use, throughout Ontario, only masonry contractors who had collective agreements with the Defendant Unions.

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[2] *Labour Relations Act*, 1995, SO 1995, c 1, Sch A

[3] As noted, I find that the essential character of the claim is one that deals with labour relations and is therefore within the jurisdiction of the OLRB. To the extent that EllisDon and Westbank are hiring union labour elsewhere in the province, it will be for the OLRB to decide whether the conduct of the Defendant Unions unfairly interferes with EllisDon's and Westbank's right to do so or interferes with the rights of those other unions/locals to contract with EllisDon and Westbank. To the extent that EllisDon and Westbank are hiring non-union labour, it will be for the OLRB to determine whether the union's conduct is improperly forcing EllisDon and Westbank into collective bargaining relationships by improperly circumventing the usual certification process.

[13] Between 50 and 100 other builders have signed similar minutes of settlement.

[14] EllisDon and Westbank declined to sign the minutes of settlement, as a result of which masonry work stopped on both projects in November 2021.

[15] On December 21, 2021, Westbank terminated its masonry contract with Limen on the Mirvish Village Project but has been unable to find replacement masons.

[16] EllisDon submits that the motion for an injunction involves a commercial agreement between itself and Limen which Limen is breaching by failing to work on the West Don Lands project. Westbank takes a similar position with respect to the Mirvish Village Project although its analysis becomes somewhat more complex given that Westbank terminated its agreement with Limen.

[17] The Defendant Unions submit that this issue falls squarely within the jurisdiction of the OLRB and ask that the action be stayed pursuant to Rule 21.01 (3) (a) and section 106 of the *Courts of Justice Act*.[4]

[18] Limen supports the Defendant Unions' position but also adds that it is essentially caught between a rock and a hard place.

The Test for Jurisdiction

[19] In *Weber* v. *Ontario Hydro,* the Supreme Court of Canada established the analytical framework to apply when determining whether a matter falls within the jurisdiction of an administrative tribunal:

a. the court hearing the motion should first determine the substance of the tribunal's jurisdiction;

b. the essential character of the dispute should then be examined to see if it falls within the tribunal's exclusive jurisdiction; and

c. even if the dispute does not fall within the tribunal's exclusive jurisdiction, the court should determine whether reason exists for the tribunal to determine the dispute nonetheless.[5]

(a) The Substance of The Tribunal's Jurisdiction

[20] Turning to the first branch of the test, the tribunal's jurisdiction is defined in the Act. The Act creates a comprehensive statutory scheme governing labour relations in Ontario. It gives the OLRB exclusive jurisdiction to exercise the powers conferred upon it under the

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[4] *Courts of Justice Act*, RSO 1990, c C.43

[5] *Weber v. Ontario*, [1995] 2 S.C.R. 929 as quoted in *Allarco Entertainment 2008 Inc. v. Rogers Communications Inc.*, 2009 CanLII 68464 (ON SC) at para 25.

Act and to determine all questions of fact or law that arise before it. The Act also gives the Board broad remedial powers to deal with breaches of the Act, including injunctive relief.[6]

[21] Sections 126 to 150 of the Act govern the construction industry specifically. Sections 150.1 to 150.6 create an even more specialized regime for the residential construction industry, the specific industry at issue here. The OLRB has created a special division of the Board to adjudicate construction disputes. As a result, Courts have recognized that when hearing construction labour relations disputes, the Board is not only acting in its area of general expertise in labour relations, but also "in a doubly specialized capacity relating to the construction sector, an area of responsibility it was entrusted to regulate in accordance with industry-specific legislative rules."[7]

[22] The Supreme Court of Canada has held, the legislature intended that "the ordinary courts would have but a small role if any to play in the determination of disputes covered by" the Act.[8] As a result of the Act's comprehensive labour relations regime, courts have consistently held that they do not have jurisdiction to preside over an action that raises allegations concerning matters that fall within the ambit of a collective agreement or the decision-making structure of the Act other than for purposes of judicial review.[9]

(b) The Essential Character of the Dispute

[23] The second branch of the *Weber* test calls on the court to examine the essential character of the dispute to determine whether it falls within the tribunal's exclusive jurisdiction. What matters for the purposes of this exercise is the true, essential nature of the dispute, regardless of the way in which the plaintiff has characterized it legally.[10] By way of example, in *Limen Group Ltd v Blair,* Firestone J. found that the essential character of the dispute involved labour relations even though the plaintiff pursued recovery for economic torts.[11]

[24] In my view, the essential nature of the dispute here is clearly one that involves labour relations. I come to this view through three avenues: (i) the various labour agreements

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[6] *Labour Relations Act, 1995*, S.O. 1995, Ch. 1., Sch. A, ss. 96, 98, 99, 111, 114, 116
[7] *International Brotherhood of Electrical Workers, Local 1739 v. International Brotherhood of Electrical Workers,* 2007 CanLII 65617 (ON SCDC) at para. 47 (application for leave to appeal denied, November 28, 2007 (ONCA)).
[8] *Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 SCR 1298 at para 50
[9] *Gendron* v. *Supply & Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 SCR 1298 at paras 60-61; *McConnell* v. *Altenburg*, [2001] O.J. No. 4668, paras 41-44; *Coleman v. Demers,* 2007 CanLII 7526 (ON SC) at paras 44-47; *Sidhu v. Affinia Canada Corporation,* 2010 ONSC 2829 at paras 29-31.
[10] *A.C. Concrete Forming Ltd. v. The Residential Low Rise Forming Contractors Association of Metropolitan Toronto and Vicinity,* 2008 ONCA 864; *Coleman v. Demers* 2007 CanLII 7526 (ON SC) at paras 22 and 47; *Limen Group Ltd. v. Blair*, 2014 ONSC 4004 at para 21, affirmed 2014 ONCA 680.
[11] *Limen Group Ltd. v. Blair*, 2014 ONSC 4004 at para 21, affirmed 2014 ONCA 680.

involved in the dispute; (ii) the arguments made in the plaintiff's factum; and (iii) jurisprudence involving cases with similar fact situations.

[25] Each of these avenues leads me to the same fundamental conclusion: the core issue here is whether the Defendant Unions were lawfully entitled within Ontario's labour relations regime to require Limen to remove its bricklayers from the West Don Lands and Mirvish Village projects or whether that conduct fell afoul of acceptable labour relations practices in Ontario. That question is squarely one for the OLRB to determine.

i. The Relevant Labour Agreements

[26] The conduct at issue here involves a number of related labour agreements to which EllisDon is connected.

[27] EllisDon is a member of the Metropolitan Toronto Apartment Builders Association ("MTABA"). MTABA is an accredited employers' organization as defined in the Act. The concept of an accredited employers' organization is unique to the construction industry. They are governed by sections 138 to 143 of the Act. The regime in effect provides that MTABA can negotiate collective agreements which bind all of its members, including EllisDon. Section 140 prohibits employers who are represented by an accredited employers' organization from bargaining individually in the accredited areas and sectors. Unions are also prohibited from bargaining with individual employers who are bound by an accreditation certificate.

[28] There is a significant benefit to members of an accredited employers' organization. Membership assures each participant that it will receive the same labour deal as all other members thereby leveling the playing field between members in matters of labour relations. MTABA has a longstanding collective bargaining relationship with Local 183. As a result, EllisDon is bound to the collective agreement between MTABA and Local 183.

[29] The collective agreement between MTABA and Local 183 requires EllisDon, among other things, to subcontract masonry work in the Toronto area to masonry subcontractors who are members of the Masonry Contractors Association of Toronto ("MCAT"). Limen is a member of MCAT.

[30] MCAT is in turn a party to a collective agreement with the Masonry Counsel of Unions Toronto and Vicinity (the "MCUTV"). The Defendant Unions are members of the MCUTV. The collective agreement between MCAT and MCUTV is also an accredited collective agreement which is subject to the regime set out in s. 138 to 143 of the Act.

[31] In addition to their collective agreement, MCUTV and MCAT have entered into Letter of Understanding Number 8 ("LOU 8"). LOU 8 is an agreement which purports to allow the Defendant Unions to require an MCAT contractor to delay performing work for a non-union builder and to prioritize work for a unionized builder instead. The Defendant Unions say that LOU 8 provides penalties for non-compliance by an MCAT contractor which include damages of $15,000 and further damages of $1,000 per calendar day.

[32] LOU 8 defines a non-union builder as: "a builder who is not bound to a collective agreement with Local 183 or BMIUC Local 1 are [sic] in the relevant area."

[33] The Defendant Unions take the position that EllisDon is not a union builder because it has sub-contracted its masonry work in London and Ottawa to subcontractors who are not members of MCAT. They take a similar position with Westbank.

[34] As noted earlier, the Defendant Unions are prepared to revoke their direction to Limen if EllisDon and Westbank sign minutes of settlement pursuant to which they agree to use only members of the Defendant Unions for masonry work throughout Ontario.

[35] MTABA is also a party to two further agreements, the Bricklaying Stability Accord and the Residential Stability Accord which affect the interpretation and application of the foregoing agreements. EllisDon is a party to those additional agreements by virtue of its membership in MTABA.

[36] EllisDon and Westbank submit that the Defendant Unions are trying to force them into a collective bargaining relationship with the Defendant Unions outside of Toronto without going through the usual process of certification of the masonry subcontractors to whom EllisDon on and Westbank give work outside of Toronto.

[37] The Defendant Unions submit that through this action, EllisDon is trying to indirectly:

(i) amend the MTABA-Local 183 Agreement for its own individual benefit and thereby ignore the statutory rule prohibiting individual bargaining;

(ii) amend the MCAT-MCUTV Agreement, so as to immunize itself, and no other builders, from the effects of LOU 8.

[38] The Defendant Unions further submit that EllisDon has agreed, through MTABA, to contract only with MCAT contractors, knowing that it would have no right to negotiate or challenge the terms of the MCAT-MCUTV Agreement. In those circumstances, the Defendant Unions say that EllisDon cannot now complain of unfairness when the Union and MCAT assert their rights under their collective agreement.

[39] In my view, the nub of the issue here is twofold: First, it involves the proper interpretation of the various collective agreements referred to above. Second, it requires a determination of whether the efforts of the union to have EllisDon and Westbank agree to contract masonry work throughout Ontario only to contractors who are part of the MCAT-MCTUV agreement is acceptable conduct in the labour relations context. Insofar as any of the facts could be seen as implicating the torts of inducing breach of contract or wrongful interference in economic relations, they do so squarely within the context of a labour relations dispute and squarely within the context of the interpretation of collective agreements.

[40] Disputes about the interpretation of collective agreements and the fairness of labour practices lie at the heart of the Board's jurisdiction.

[41] Section 96(4) of the Act confers extensive powers on the Board to remedy violations under the Act including findings of intimidation or coercion under Section 76 of the Act and unfair labour practices. This includes broad powers to "determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing." The Board has express powers to order that a union or employer "cease doing the act or acts complaint of" and/or "rectify the act or acts complained of." The obligation to rectify may include payment of damages or compensation to the wronged party.[12]

ii. The Plaintiff's Arguments

[42] The essential character of EllisDon's claim is best demonstrated by its own factum. The extracts below demonstrate that the essential nature of the claim is one that deals with collective bargaining and the degree to which the conduct of the Defendant Unions is fair or unfair under the Act:

> 21. These Minutes of Settlement, if executed, would require EllisDon to subcontract bricklaying and masonry work at residential projects throughout the Province of Ontario (as opposed to the defined Area 8 in the Toronto Apartment Builders' Collective Agreement) only to contractors bound to the Union. They further restricted EllisDon's ability to self-perform any bricklaying and masonry work.
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> 22. … This appeared to be an effort to unlawfully force those masonry contractors to compel general contractors to enter into direct agreements with the Union by threat of the withdrawal of their services.
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> 23. In the course of this litigation, Rodrigues [the union representative] explained the genesis of the Minutes of Settlement. Essentially, he explained that the Union wanted to expand the obligation for builders to use Union (specifically, Local 183, Local 1 and MCUTV) masonry contractors throughout the province of Ontario and not just in Board Area 8. … The purpose of this scheme was to force builders, owners and general contractors to enter into side agreements with the Union which effectively expanded the scope of the Masonry Collective Agreement throughout the province of Ontario, without actually bargaining for these rights.

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[12] In *FCI Concrete v Buttcon Limited*, 2017 ONSC 3326 at para 18.

> 25. Despite the fact that this tactic has been employed by Rodrigues to secure approximately 100 signatures on "Minutes of Settlement", the Union has not actually invoked any fines against masonry contractors under LOU 8.
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> 26. These builders have presumably faced the same impossible choice that EllisDon faces in this case: to succumb to the Union's threats and enter into burdensome side agreements which expand the scope of the Masonry Collective Agreement, or to have their masonry contractors abandon the project and breach multi-million dollar contracts, the remedies for which are costly and uncertain.
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> 28. When EllisDon inquired as to why Limen provided these Minutes of Settlement to EllisDon on behalf of the Union, Tony Lima, principal of Limen, advised that Rodrigues had threatened him that if his workers attended work at the EllisDon sites, that they would lose both their union membership and their pension plans.
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> 29. As a result of these direct threats from the Union, Limen advised EllisDon that it would immediately cease performing work on critical EllisDon residential projects, including the West Don Lands Project and the Mirvish Project. Limen has also advised that it intends to withhold its services from EllisDon until such time as EllisDon signs the "Minutes of Settlement".
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> 39. What has become clear through this litigation is that the motive for the Union's conduct actually relates to EllisDon's projects which are currently proceeding in London and Ottawa (the "Outside Projects"). EllisDon is not required to use masonry contractors bound to the Masonry Collective Agreement in those locations, and in fact has retained other unionized masons on the Outside Projects. While EllisDon is under no obligation to contract masonry work outside of Toronto to contractors bound by the Masonry Collective Agreement, the Union has made it abundantly clear that there will be consequences for EllisDon should it fail to do so. Specifically, the Union will invoke LOU 8 and issue fines or grievances to any contractors who attend at EllisDon's Toronto sites.

[43] West Bank made similar arguments in its factum and in oral argument.

[44] Despite the statements in its factum, EllisDon submits that whether the Union Defendants had the legal right to pull Limen off EllisDon's sites is irrelevant because the Union Defendants behaved as they did for the improper purpose of causing Limen to breach its commercial contract with EllisDon. That, according to EllisDon, is the unlawful conduct at issue on the injunction and has nothing to do with the interpretation of collective

agreements. I am not persuaded by this argument. As seen below, a series of cases has viewed similar allegations as being essentially labour relations cases that belong before the OLRB as opposed to being economic torts that belong in the courts.

iii. Jurisprudence Involving Similar Fact Situations

[45] Courts dealing with similar fact situations have almost uniformly held that they should be dealt with by the OLRB, at least at first instance.

[46] The significant deference accorded to the OLRB dates back to at least the 1980s. In 1986, the Supreme Court of Canada said in *St. Anne – Nackawic Pulp & Paper Co. v. C.P.U., Local 219*:

> The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.[13]

[47] More recently in *Limen Group Limited v. Blair*, Limen alleged that the defendant employer associations and unions had conspired to enter into an agreement that would eliminate the plaintiff's competitive advantage in its industry. In dismissing Limen's injunction based on allegedly anti-competitive torts, Firestone J. noted that,

> Though the plaintiffs are pursuing recovery for various economic torts, the essential character of the dispute is one of labour relations.[14]

That ruling was affirmed on appeal.[15]

[48] In *FCI Concrete v. Buttcon Limited*,[16] creditors of a bankrupt employer alleged that a union and two of its members had committed the torts of conspiracy to injure, unlawful interference with economic relations, and inducing breach of contract in order to coerce the employer to sign a collective agreement. That action was also stayed on the basis that its essential character involved allegations of unfair labour practices under the Act with the court holding that:

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[13] *St. Anne – Nackawic Pulp & Paper Co. v. C.P.U.,* Local 219, 1986 CarswellNB 116 at paras. 16, 19–20 (SCC); see also *Gendron v. Supply & Services Union of P.S.A.C.,* Local 50057, 1990 CarswellMan 205 at para. 56 (SCC) and *Weber v. Ontario Hydro*, 1995 CarswellOnt 240 at paras. 48, 56 – 59, (SCC).
[14] *Limen Group Limited v. Blair,* at para. 21.
[15] 2014 ONCA 680 at paras. 13–14.
[16] *FCI Concrete v. Buttcon Limited*, 2017 ONSC 3326 at paras. 31–33, aff'd 2018 ONCA 268

> Although framed as a tort action, the allegations against the Union defendants amount to assertions of misuse of the grievance process to gain a labour relations advantage to which it was not entitled by means prohibited by the *LRA*. To gain that advantage, it had to cause economic harm to SOCF. S. 76 of the *LRA* prohibits conduct by a union or other person that coerces anyone to continue to be a member of a union or from exercising a right under the Act to be free of the union. The alleged Union defendants' conduct appears to fit within the scope of this provision.[17]

[49] Coercive conduct by unions has been found to constitute an unfair labour practice under the Act. By way of example, in *Enka Contracting Ltd. v. Carpenters' District Council*,[18] the OLRB found that the primary goal of a union's threat to abandon its bargaining rights with one company was to pressure the related company to sign a voluntary recognition agreement with the union and held:

> We accept, as the employer suggests, that the primary goal or purpose behind Mr. Calligan's letter of March 25, 2004 was to expand the Union's bargaining rights by pressuring Enka to enter into a voluntary recognition agreement binding its related employer Malvern, to the Union.
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> On the basis of these findings of fact, we conclude that the Union has breached the provisions of Section 76 of the Act in that it has attempted to coerce and intimidate the employer – really by the threat of the loss of business, so as to achieve an objective that it is not otherwise entitled to.[19]

[50] The Supreme Court of Canada has also cautioned against using economic torts over aggressively in the labour relations context. In this regard Cromwell J. noted in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*,[20] at para. 34:

> A final consideration supports a limited scope for this tort: the risk inherent in the economic torts generally that they will undermine legislated schemes favouring collective action in, for example, labour relations and interfere with fundamental rights of association and expression. At one time, the common law of tort was ready — and many would say overready — to intervene to prevent economic coercion in the context of industrial disputes. The common law's approach in this area led to legislative intervention to grant greater

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[17] *FCI* at para. 33, aff'd 2018 ONCA 268 at para. 3.
[18] *Enka Contracting Ltd. v. Carpenters' District Council,* 2004 CarswellOnt 4665
[19] *Enka* at paras. at paras. 6, 15, 17, 19, 21, 25, 27, 29, 66, 84-85, 87, 89
[20] *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.,* 2014 SCC 12 (CanLII), [2014] 1 SCR 177 at para. 34

> freedom to labour unions by enacting immunities to specific economic torts, in legislation modelled on the U.K. Trade Disputes Act and successor legislation. Writing about the experience in England, Deakin, Johnston and Markesinis observe that despite the intention underlying the creation of these immunities, the courts at times expanded economic tort liability which had the effect of "'outflanking' the immunities provided by statute . . . . At times it has seemed that the courts . . . were engaged in a battle of wits with the parliamentary draftsman, to see which side could develop the optimal formula for widening or for narrowing liability respectively". This history draws attention to the risk that expanded liability for the economic torts may be used to undermine legislative choices and perhaps even constitutionally protected rights of expression and association. (Citations omitted)

(c) Should Courts Defer to the OLRB Even if it Does Not Have Exclusive Jurisdiction?

[51] EllisDon and Westbank submit that the Board's jurisprudence demonstrates that it either declines to assume jurisdiction over cases like the one at bar or offers no remedy for them. They rely principally on *Baycliffe Homes*[21] and *Ras-Con Group Inc.*[22] for that proposition. Both of those cases deal with the same unions, the same collective agreements and roughly similar fact patterns as here.

[52] I do not read those cases as broadly as the plaintiff and intervenor do. In my view, any ambiguity about the effect of those cases only demonstrates further that the OLRB should be given the first opportunity to decide the issues the plaintiff raises.

[53] In *Baycliffe*, the applicant based its complaints solely on the allegation that there had been an illegal strike. The Board carefully reviewed the facts of that case and concluded that there had been no illegal strike as the term is defined in the Act. Rather, the Board found that the party in Limen's position in *Baycliffe* had simply made a decision in its self interest to re-allocate work as the union asked given the overall shortage of bricklayers in Ontario. In doing so, the Board made the following comments:

> 63. It is not the place of the Board to second guess an employer's business decision or to speculate on the potential application of Letter of Understanding No. 8. The Board does note that there is no reference whatsoever to a "$5,000 fine" in Letter of Understanding No. 8, but there is no need to go any further than that.
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> 69. In these circumstances, there is no need for the Board to consider or apply Letter of Understanding No. 8 of the MCAT

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[21] *Baycliffe Homes*, 2021 CanLII 2843 (OLRB).
[22] *Ras-Con Group Inc.*, 2021 CanLII 18122 (OLRB)

> Agreement. The issue of its legality can be left to another case where the facts require such a determination.
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> 79. Whatever one may think of the actions of Local 183 and Mr. Rodrigues and the merits of Letter of Understanding No. 8 of the MCAT Agreement, the facts of this case do not make out an illegal strike.

[54] In other words, the Board made a decision based on the very specific complaint raised before it, did not address the legality of LOU 8 and did not address the union's overall conduct.

[55] In *Ras-Con,* the applicant did not retain union labour at all and argued that the union was really trying to compel the employer to accept the bargaining rights of the Union which bargaining rights the Union had not lawfully obtained (or even attempted to lawfully obtain) under the Act.[23]

[56] On the facts before it in *Ras-Con*, the Board found that the union's conduct amounted to a threat of an unlawful strike and ordered the union to cease and desist. In doing so, the Board noted:

> I also appreciate that the Board is the specialized tribunal in the province with respect to labour relations and has no shortage of history or experience in dealing with unlawful strikes. As that specialized tribunal the Board cannot innocently or naively close its eyes (or ostrich like stick its head in the sand) to what is really happening on the ground (just as the Board has repeatedly recognized what the true effect and reality of a picket line is) and especially in the construction industry. I have tried to be mindful of all of that here.[24]

[57] Two factors emerge from *Baycliffe* and *Ras-Con* that are relevant to the jurisdictional question. The first is that the results of cases before the Board, like the results of cases before courts, are fact specific. Cases of first instance should not be read as overarching, sweeping generalizations that pre-determine the results of cases yet to come regardless of their facts. The second is that the Board recognizes that its duty is to look at the underlying realities of a situation and make determinations based on those realities, not based solely on the legal characterizations the parties may wish to ascribe to them. Those factors lead me not to accept the plaintiff's more sweeping submission that the Board will not accept jurisdiction over its complaint or will not provide a remedy.[25]

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[23] *Ras-Con* at para 55.
[24] *Ras-Con* at para. 81.
[25] I hasten to add that an administrative tribunal's decision not to provide a remedy does not automatically give the court jurisdiction. The court's jurisdiction will depend at least in part on why the tribunal in question has decided not to grant a remedy.

[58] It strikes me that there are a number of factual differences between this case and both *Baycliffe* and *Ras-Con* that may give EllisDon arguments that were not raised in those cases. By way of example, if in fact EllisDon was using unionized labour in London and Ottawa, the conduct of the union in trying to force or persuade EllisDon to use only the Defendant Unions/locals, may interfere with the rights of EllisDon in London and Ottawa or may interfere with the rights of the Ottawa and London unions/locals. Moreover, the Board's conclusion that there was the threat of an unlawful strike in *Ras-Con* may be of assistance to EllisDon before the Board. In addition, there may be an interpretive issue relating to LOU 8. The Defendant Unions say that EllisDon is not a union builder because it is not bound by a collective agreement with Local 183. It may be that EllisDon is so bound by virtue of its membership in MTABA and the collective agreement between MTABA and Local 183.

[59] If anything, the different results in *Baycliffe* and *Ras-Con* demonstrate that the Board should at least be given the opportunity to make a decision about the factual circumstances of this case; at the very least in the first instance.

[60] As Sharpe J. (as he then was) put it in *International Union of Bricklayers and Allied Craftworkers v. Coelho:*[26]

> This court is bound by the statutory framework to defer to the specialized expertise of the OLRB when asked to review its decisions after they have been made. It seems to me even more important that this court avoid pre-empting the OLRB's jurisdiction by pronouncing upon the very issues that the OLRB is asked to decide before the OLRB has been given a chance to decide them. On this point, I adopt the statement of MacPherson J. in *Ontario Hydro v. Kelly* (1995), 39 O.R. (3d) 107 at 115 (Gen. Div.):
>
> > It seems to me that, as a matter of logic, if deference is to be paid to the actual decision of a tribunal, then deference should also be paid to the jurisdiction of the tribunal to make that decision. If the factors of specialization, policy-making role, and limiting overlapping jurisdiction protect the actual decision of a tribunal, those same factors, if present in a particular fact situation, should also protect the integrity of the jurisdiction of the tribunal to make the decision.[27]

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[26] *International Union of Bricklayers and Allied Craftworkers v. Coelho,* [1998] O.J. No. 5449
[27] *Coehlo* at para. 20

[61] Even though the court may have residual jurisdiction to grant injunctions, that authority should be used with restraint even if it merely risks infringing on the jurisdiction of a specialized tribunal. As Firestone J. noted in *Limen Group Ltd. v. Blair*, [28]

> [26] Given the exclusive jurisdiction of the OLRB as outlined above, the interim relief available to the plaintiffs from the OLRB must be exhausted. Notwithstanding that this court retains its inherent jurisdiction to grant injunctive and interim relief, its discretion to consider granting such relief should not be exercised given the exclusive jurisdiction of the OLRB over the matters in this action and given the stay that has been imposed.
>
> [27] As Sharpe J. (as he then was) stated, at para. 18 of Coelho: "[t]he fundamental problem, as I see it, is that if I were to grant the interim orders sought by the plaintiffs, my interim order would determine an important, indeed, central issue of the dispute between these parties that is before the OLRB. In my view, that result should be avoided."
>
> [28] The same reasoning applies in this case. Here, the plaintiffs have not brought any proceedings to the OLRB regarding the issues for determination in this action. It is not in the interests of justice to invoke this court's inherent jurisdiction to consider granting interim or interlocutory relief given that the very issues for determination are within the exclusive jurisdiction of the OLRB, which is a specialized tribunal with special expertise in labour relations. Such decision is in keeping with the principles and method of procedure set forth in Weber.

[62] In addition to the foregoing, the warnings about the use of economic torts in labour relations cases give me further reason to defer to the OLRB. At a minimum, before granting injunctive relief for alleged economic torts arising in a labour relations context, it would be helpful to have the Board's view about the propriety of the conduct at issue within Ontario's labour relations regime.

The Representation Order

[63] The Defendant Unions submit that this action should be stayed or dismissed under Rule 21.01(3)(b) because a representation order against the unions was neither sought nor obtained.

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[28] *Limen Group Ltd. v. Blair*, 2014 ONSC 4004; affirmed 2014 ONCA 680.

[64] Pursuant to s. 3(2) of the *Rights of Labour Act*, an action brought against a union without a representation order is a nullity.[29]

[65] The Defendant Unions agreed during oral argument that I could grant a representation order *nunc pro tunc* and that they would not oppose such an order. I therefore grant the representation order *nunc pro tunc* and declare the proceeding to have been validly brought against the Defendant Unions.

Conclusion and Costs

[66] For the reasons set out above I grant the motion of the Defendant Unions to stay this action for want of jurisdiction. That relief is without prejudice to the plaintiff's or intervenor's ability to move to revive the action depending on the outcome of any proceedings before the Board and the nature of any decision the Board may make.

[67] If the parties cannot agree on costs, any party seeking costs may make written submissions limited to 5 pages (plus a bill of costs) within 10 days of release of these reasons. Any responding submission will be delivered 7 days later with a further 3 days for reply.

Koehnen J.

Date: 2022-03-30

[29] *Pal v. Powell*, 2009 CanLII 6630 (ON SCDC).