Court File No.: CV-23-00703933-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

QUALITY RUGS OF CANADA LIMITED

Applicant

- and -

WAYGAR CAPITAL INC., AS AGENT FOR NINEPOINT CANADIAN SENIOR DEBT MASTER FUND L.P.

Respondent

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF QUALITY RUGS OF CANADA LIMITED AND THE OTHER COMPANIES LISTED IN SCHEDULE "A" HERETO (THE "APPLICANTS")

SUPPLEMENTARY BOOK OF AUTHORITIES OF LIUNA LOCAL 183

October 4, 2023

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TO: THE SERVICE LIST

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ONTARIO LABOUR RELATIONS BOARD

0981-02-G Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America ("Local 675"), Applicant v. **Alcor Investment Group Inc. c.o.b. as Alcor Interiors** and Tony Klinakis, Responding Parties.

2002 CanLII 40933 (ON LRB)

BEFORE: David A. McKee, Vice-Chair.

APPEARANCES: Michael McCreary for the applicant; no one appearing for the responding parties.

DECISION OF THE BOARD; September 19, 2002

1. This is a referral of a grievance to arbitration pursuant to section 133 of the *Labour Relations Act, 1995*, S.O. 1995, ch. 1 (the "Act"). In most respects, it is a typical "collection" grievance. That is, the applicant (hereinafter the "Union") asserts that Alcor Investment Group Inc. c.o.b. as Alcor Interiors ("Alcor" or the "Employer") employed certain members of the Union and has paid them the hourly portion of their wage package each week, but has failed to make other payments as part of the wage package. Specifically, the Employer is obliged on a monthly basis to remit to the administrator of a number of trust funds, payments for the following:

(1) Vacation and Holiday Pay.
(2) Health and Welfare Funds.
(3) Pension Funds.
(4) Supplementary Unemployment Insurance Benefits.
(5) Employer Association Funds.
(6) Union Administration Funds, Supplementary Union Dues, Apprenticeship Training Fund, and Promotional Fund.

All of these contributions are set out in Scheduled "D" to the collective agreement and are described as part of the basic wage package.

2. Alcor did not make these payments. Neither Alcor nor Anthony Klinakis filed a Notice of Intent to Defend/Participate in this referral. That is, Alcor knows what the Union is alleging and has chosen not to dispute it. As set out below, the grievance succeeds against the Employer, Alcor, and it is obliged to pay the sum of $7,256.54 to the Union in trust for its members in those trust funds.

3. The unusual feature of this referral is that it also seeks an order requiring Anthony Klinakis, as a Director of Alcor, to pay the same amount. Mr. Klinakis is not personally a party to the Collective Agreement. He is the sole officer and director of the corporation which is a party to the Collective Agreement. The Union seeks relief against Anthony Klinakis personally in his capacity as a director pursuant to either or both of section 131 of the *Ontario Business Corporations Act*, R.S.O. 1990, ch. B.16 ("the OBCA") and section 81 of the *Employment Standards Act, 2000*, S.O. 2000, ch. 41 ("the ESA"). The Union asserts that section 131 of the

OBCA and section 81 of the ESA are "employment-related statutes" within the meaning of section 48(12)(j) of the Act, and as a board of arbitration, this Board has the authority to interpret and apply either or both of those statutes.

4. In the end, I find the Board has no jurisdiction to require Mr. Klinakis to pay any of these amounts under the OBCA, and only the vacation and holiday pay under the ESA.

Grievance Against the Corporation

5. As noted above, this is not seriously a matter of dispute. Alcor is bound to the Carpenters' Provincial Collective Agreement by virtue of a voluntary recognition agreement dated February 26, 1999. During the months of April and May 2002, Alcor employed individuals who were members of the Union pursuant to the Collective Agreement. Although Alcor did pay weekly wages to these employees, calculated on the basis of the hourly rates set out in the Collective Agreement, it did not pay any of the contributions referred to in paragraph 1 of this decision, which it was obliged to do pursuant to sections 6.08 and 9 of the Collective Agreement.

6. The Union filed a grievance against Alcor, which it did not answer, and referred this matter to the Board for arbitration.

7. The Union tendered as proof of the monies owing by Alcor the statement filed with the Trust Fund administrator for the month of March 2002 and asked the Board to draw the conclusion that the same number of hours had been worked by employees of Alcor in April and May 2002. This is a possible conclusion, if not necessarily the most likely one if there were any other evidence to suggest otherwise. However, Alcor did not respond to the grievance. The director of the corporation, Mr. Anthony Klinakis, was present as a witness called by the Union. He did not dispute these amounts. Accordingly, the Board finds that Alcor has failed to pay the sum of $5,507.54 with respect to the contributions owing for the months of April and May 2002. Further, pursuant to Article 9.18 of the Carpenters' Collective Agreement, the Union seeks $1,000.00 costs for pursuing this grievance. That provision of the Collective Agreement clearly applies to this situation and clearly enables this Board to award costs. In the circumstances, it is entirely appropriate to do so. Finally the Union seeks reimbursement of its filing fees pursuant to section 133 (13) of the Act. Again, this is appropriate in the circumstances of this case.

8. Therefore, the Board orders Alcor to pay to the Union the sum of $7,256.54 in trust for its members.

Relief Against Anthony Klinakis

9. Anthony Klinakis is the sole officer and director of Alcor. He is listed as such in the corporation profile report produced March 12, 2002 which, pursuant to section 8(2) of the *Business Names Act*, R.S.O. 1990 ch. B-17 is admissible as proof of the contents thereof.

10. Alcor did not file a response to this referral. However, the Union caused Mr. Klinakis to appear as a witness in this proceeding. Under questioning from the Union, he acknowledged that he is the sole officer and director of Alcor. Mr. Klinakis also produced a copy of a letter from Alcor's bank dated July 21, 2000 requiring him to liquidate his outstanding loan and line of credit within 30 days. He stated that Alcor was unable to do so.

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11. The grievance dated July 3, 2002 was filed against Alcor only. This was appropriate, as the grievance is primarily against the Corporation, not Mr. Klinakis. It was delivered to Alcor's offices and Mr. Klinakis acknowledged receipt of it.

12. The referral of grievance to arbitration pursuant to section 133 names both Alcor and Anthony Klinakis as responding parties. It clearly sets out the assertion that Alcor has violated the Collective Agreement and has thereby caused damage to the Union and to its members. It asserts that Alcor is unable to pay the wages owed and seeks, in those circumstances, recovery from Mr. Klinakis. The referral also contains extensive submissions by the Union as to why Mr. Klinakis should be bound to such an order. No one reading the document could be mistaken as to the nature of the Union's claim. The referral was delivered to Alcor's offices and to Mr. Klinakis personally. Mr. Klinakis acknowledged receipt of the referral. He further admitted that Alcor is not able to pay the sum owing. He understood that the Union sought payment from him personally for these funds.

13. The Union's proposition is easily stated. It asserts that Mr. Klinakis is liable for the payment of the wages that Alcor cannot pay, by virtue of section 81 of the ESA or alternatively section 131 of the OBCA. It asserts that this Board, sitting as a Board of Arbitration has the authority to enforce that payment in this referral by virtue of section 48(12)(j) of the Act.

General Principles

14. The Union relies on section 48 (12)(j) of the Act which provides:

> **48.** (12) An arbitrator or the chair of an arbitration board, as the case may be, has power,
>
> (j) to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.

The first question then is whether these two statutes are "employment-related statutes".

15. There is no question that the ESA is an employment-related statute. In its entirety, it deals with nothing but employment matters. The lengthy history of the ability of arbitrators to apply statutes to collective agreement disputes began with a decision of the Supreme Court of Canada, *McLeod v. Egan*, [1975] 1 SCR 17, which dealt with a predecessor version of the ESA. Section 48(12)(j) refers, if nothing else, to that statute.

16. The OBCA is hardly the sort of statute that the phrase "employment-related statute" brings to mind. On the other hand, section 131 deals with the payment of wages for work performed. It provides:

> **Directors' liability to employees for wages**
>
> **131.** (1) The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the *Employment Standards Act*, and the regulations thereunder, or under any collective agreement made by the corporation.

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Limitation

(2) A director is liable under subsection (1) only if,

(a) the director is sued while he or she is a director or within six months after ceasing to be a director; and

(b) the action against the director is commenced within six months after the debts became payable, and

(i) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part, or

(ii) before or after the action is commenced the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the *Bankruptcy Act* (Canada), or a receiving order under the *Bankruptcy Act* (Canada) is made against it, and in any such case, the claim for the debts is proved.

Idem

(3) Where execution referred to in clause (2) (b) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Rights of director who pays debt

(4) Where a director pays a debt under subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings, the director is entitled to any preference that the employee would have been entitled to, and where a judgment has been obtained the director is entitled to an assignment of the judgment.

Idem

(5) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

Payment of wages is as essential to "employment-related" issues as one could imagine. I conclude that section 131 of the OBCA and the ESA are employment-related statutes and that the Board, sitting as an arbitrator, has the power to interpret and apply them.

17. Second, this is clearly a dispute that arises from a collective agreement. The agreement provides that employees are to be paid certain amounts for the work performed. They have performed the work. They have not been paid for those wages. Accordingly, the dispute is one which is central to the application and interpretation of the Collective Agreement and arises from a dispute about a violation of that agreement.

18. Third, it is clear that both statutes express a public policy that payment of wages to employees (or "debts" to employees arising out of employment in the case of the OBCA) is a statutory duty imposed on directors of corporations. It represents one "piercing of the corporate veil", and imposes an obligation on a director to be responsible personally for liabilities arising out of a contract between a corporation and its employees, to which contract the director was not himself or herself a party. The intent of such legislation would seem to be: (a) to ensure that directors have a personal incentive to ensure the payment of wages by their corporations and (b) to ensure that employees' wages are paid in spite of the insolvency of a corporation. There is no countervailing statutory policy, and no reason not to hold the director liable for wages to the extent defined in the two statutes.

19. Fourth, this is the arbitration of a grievance filed under a collective agreement. The authority of the Board, sitting as an arbitrator, arises from the terms of that collective agreement. In addition to the contractual terms, section 48 of the Act (incorporated by section 133(9) of the Act into hearings under section 133) supplies certain statutory authority and power to an

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arbitrator, which would not otherwise arise from the collective agreement. Section 48(12)(j) is one of them. This section has been used by arbitrators to interpret and apply statutory rights which have a connection to a dispute arising under a collective agreement, even where the right in the statute is not reflected in or incorporated into the collective agreement. (e.g. *Municipality of Metropolitan Toronto,* (1993) 35 LAC (4th) 357, *442952 Ontario Inc*. (1993) 35 LAC (4th) 345, *Placer Dome Inc*., (1993) 39 LAC (4th) 54, *Crown in the right of Ontario (Ministry of Health*) (1996) 61 LAC (4th) 284, *Advanced Metal Products Ltd*. (2000) 93 LAC (4th) 171.) Certainly, payment of wages is one issue which arises squarely from the collective agreement.

The Position of a Director

20. However, in this case, the issue is the authority of the Board sitting as an arbitrator under a Collective Agreement over a third party who is legally a stranger to the Collective Agreement. The director did not sign the Collective Agreement. It is one thing to interpret and apply the terms of an employment-related statute to the agreement made by two parties. Leaving aside issues of enforcement mechanisms, it is not inappropriate to presume that parties who have entered into a contract did so in the expectation that their agreement complied with the general laws of the province. However, it is quite another matter to apply the provisions of a statute in a contractual dispute resolution process to a party who is not a party to the contract or Collective Agreement.

21. There are two recent decisions of the Divisional Court and the Ontario Court of Appeal on this point. In *Remembrance Services Inc. v. UFCW Local 175 and Levinson* (Divisional Court, 2001 OJ No. 2247, April 5, 2001), the Divisional Court dealt with whether or not an arbitrator had the authority to make a declaration under section 1(4) about two employers: the party to the collective agreement and an allegedly related employer. The Court concluded that the arbitrator lacked that jurisdiction. The decision of the Court is based primarily on the wording of section 1(4), which refers to "the opinion of the Board" (i.e. the Ontario Labour Relations Board). However, the Court also alluded to what it obviously saw as a serious conceptual problem. The Court said:

> 16. It was the position of the Union that the policy grievance alleged an accretion to the bargaining unit, that Remembrance Services had violated the recognition clause, article 2.01 of the collective agreement, by refusing to recognize the Union as the bargaining agent for employees of Trillium, whom, in the submission of the Union, constituted employees of Remembrance Services in Metropolitan Toronto and Mississauga, Ontario, within the meaning of article 2.01.
>
> 17. It was submitted that article 2.01 provided the collective agreement nexus and context to rely on section 48(12)(j) of the *Labour Relations Act* to interpret and apply section 1(4) of the Act to pierce the "corporate veil". It was further submitted that, absent the invocation of the jurisdiction of the Ontario Labour Relations Board, an arbitrator, in adjudicating a *bona fide* grievance under a collective agreement, had jurisdiction to exercise powers that "parallel" those granted to the Board.
>
> 18. We do not agree. Trillium was not a party to the collective agreement: the parties were Remembrance Services and the Union. Were the Union's position to prevail – beyond the jurisdictional stage – the result would be that the Union would become the bargaining agent of the non-unionized employees of Trillium, without those employees having been afforded an opportunity to express their choice of union representation.

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22. The Ontario Court of Appeal faced this issue more squarely in *London Life Insurance Company v. Dubreuil Brothers Employees Association*, (2000) 49 O.R. (3d) 766. In that case, the parties were bound to a collective agreement which incorporated the terms of a group benefit insurance contract into the collective agreement. The arbitrator concluded that the employee was entitled to benefits under the terms of the policy incorporated into the collective agreement. On that basis, the arbitrator asserted jurisdiction over the insurer and required the insurer to pay the benefits to which he found the employee was entitled. The Ontario Court of Appeal quashed that decision, stating:

> 27. In my view, *Pilon* makes no change to the law as enunciated by the Supreme Court of Canada in *Weber, O'Leary* and *Regina Police Assn. Inc.* In *Pilon*, the issue before this court was whether the employee was entitled to bring an action against the insurer for long-term disability benefits or whether he must resort to arbitration under the collective agreement. That agreement provided that long-term disability benefits were to be provided by an insurer through a plan administered by the employer and paid for by the employees. The terms of the benefits handbook, setting out among other things the level of those benefits and the eligibility criteria, were incorporated by reference into the collective agreement.
>
> 28. The court based its decision on the law as set out in *St. Anne Nackawic* and *Weber*, in particular that where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, the jurisdiction to resolve it lies exclusively with the arbitrator. The court reached two conclusions. First, that the essential character of this dispute did indeed arise out of the collective agreement and therefore was within the exclusive jurisdiction of the arbitrator. Second, that the employee could therefore not sue the insurer.
>
> 29. I need not comment further on the second of these conclusions except to note that the reasons of the court make no reference to s. 318 of the Insurance Act, R.S.O. 1990, c. I.8.
>
> 30. The first conclusion addresses the exclusive jurisdiction of the arbitrator and is entirely consistent with the legal principles I have recited. The Brown and Beatty categories I referred to earlier are helpful in determining the essential character of the dispute. In essence, the court in *Pilon* found that these facts are aptly described by category four. It held that the terms of the policy were incorporated by reference into the collective agreement and therefore became an obligation of the employer. The essential character of this dispute concerned the employee's entitlement to long-term disability benefits pursuant to the terms incorporated into the collective agreement. The court's view was that this collective agreement clearly contemplated such a factual situation and conferred on the employee the right to claim against the employer for breach of its obligation. The dispute was therefore properly within the exclusive jurisdiction of the arbitrator.
>
> 31. *There is no suggestion in the reasons of the court that it contemplated that the arbitrator would adjudicate the issue of the insurer's obligation to the employee under the terms of the policy. Such a conclusion would constitute a root and branch change in the law relating to labour arbitration. It would require the arbitrator to resolve a dispute not between the parties to the collective agreement, but between an employee and a stranger to that agreement. It would also require him to adjudicate a dispute arising not from the collective agreement, but from the insurance policy. Such a conclusion would fly in the face of the intention of the legislature as seen in s. 48(1) of the Labour Relations Act, 1995*. (emphasis added)

See also *Sun Life Assurance Company of Canada v. CAW*, [2000] (OJ 2608).

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23. Thus, to the extent that an arbitrator has authority over a stranger to the collective agreement, such as a director of the corporation, that authority must be found in a statute (other than the *Labour Relations Act*) rather than in the collective agreement. What the collective agreement says is very important, but two parties contracting together may not bind a third party without the third party's express consent. Any authority to bind a third party must come from a statutory provision rather than from the collective agreement. Section 48(12)(j) of the Act is rooted in the collective agreement process and does not, in and of itself, give the Board any authority over third parties who are strangers to the collective agreement.

Statutory Authority of the Arbitrator under the OBCA and the ESA

24. The authority granted by these two statutes is very different. The OBCA makes no reference to arbitration or collective agreements at all. Section 131(2) contemplates collection by a process of civil action against the director and the corporation. It is, however, a statute that relates to employment matters. Section 48(12)(j) gives an arbitrator the power to interpret and apply this section in an arbitration concerning the application, administration or an alleged violation of the collective agreement. It does not grant any authority beyond that. As will be seen below, the OBCA lacks any provision which would give an arbitrator the ability to bind a third party to his or her interpretation and application of the statute.

25. The ESA is at the opposite end of the spectrum. Section 99(1) states:

> **99.** (1) If an employer is or has been bound by a collective agreement, this Act is enforceable against the employer as if it were part of the collective agreement with respect to an alleged contravention of this Act that occurs,
>
> (a) when the collective agreement is or was in force;
>
> (b) when its operation is or was continued under subsection 58 (2) of the *Labour Relations Act, 1995*; or
>
> (c) during the period that the parties to the collective agreement are or were prohibited by subsection 86 (1) of the *Labour Relations Act, 1995* from unilaterally changing the terms and conditions of employment. 2000, c. 41, s. 99 (1).

Further, the extent of enforcement mechanisms created by the ESA and carried out by the Employment Protection Branch are denied to persons covered by a collective agreement:

> **99.** (2) An employee who is represented by a trade union that is or was a party to a collective agreement may not file a complaint alleging a contravention of this Act that is enforceable under subsection (1) or have such a complaint investigated. 2000, c. 41, s. 99 (2).
>
> (3) An employee who is represented by a trade union that is or was a party to a collective agreement is bound by any decision of the trade union with respect to the enforcement of this Act under the collective agreement, including a decision not to seek that enforcement. 2000, c. 41, s. 99 (3).
>
> (4) Subsections (2) and (3) apply even if the employee is not a member of the trade union. 2000, c. 41, s. 99 (4).

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(5) Nothing in subsection (3) or (4) prevents an employee from filing a complaint with the Board alleging that a decision of the trade union with respect to the enforcement of this Act contravenes section 74 of the Labour Relations Act, 1995. 2000, c. 41, s. 99 (5).

The policy expressed in section 99 is that all rights and obligations created by or governed by the ESA, which apply to employees in a collective bargaining situation, are to be enforced through the arbitration process under a collective agreement and not through the statutory process prescribed by the ESA.

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Employment Standards Act

For what payments is a Director liable?

26. If one looks only at the Collective Agreement, there is no question that the Collective Agreement provides that all of the contributions and remittances are wages for all purposes under the Collective Agreement. Article 6 of the Master Portion of the Collective Agreement and Article 6 of the Acoustic and Drywall Appendix to that agreement make it clear that wages as defined by that Collective Agreement include all of the contributions listed in paragraph 1 of this decision. Article 6 of the Master Portion states as follows:

6.01 The wages for employees shall be those set out in the schedules.

6.08 The wage schedules are set forth in Schedule D which forms part of this agreement.

Article 6 of the Acoustic and Drywall Appendix provides:

6(a) Article 6.01 to and including 6.07 of the Master Portion of this agreement shall apply equally to this Appendix.

Moreover, the parties have explicitly addressed the issue of a director's liability in Article 9.21 of the Collective Agreement. This provides:

The parties recognize that the payments to the various trust funds are part of a total wage package. For the purposes of directors' liability to employees under the *Ontario Business Corporations Act* and the *Canada Business Corporations Act*, the wages set out in this collective agreement are the total wage packages set out in Article 6, Schedule D of the collective agreement. All employer contributions, with the exception of the Employer Association administration funds, are to be considered as forming part of the employee's total wage package. …

As far as the Collective Agreement is concerned, these are all wages for the purposes of directors' liability, as well as the liability as the corporate employer.

27. However, the director is personally a stranger to the Collective Agreement. As noted above, the Board has jurisdiction over the director only to the extent that the ESA gives it that authority. Section 100(3) of the ESA is very explicit:

100. (3) An arbitrator shall not require a director to pay an amount, take an action or refrain from taking an action under a collective agreement that the director could not be ordered to pay, take or refrain from taking in the absence of the collective agreement. 2000, c. 41, s. 100 (3).

That is, to the extent that I rely on the ESA as giving the Board jurisdiction to order the director to pay wages that were not paid by the corporation, those wages must meet the definition of "wages" in the ESA, and not those found in the Collective Agreement.

28. Section 81(3) of the ESA specifies the wages for which a director may be liable:

> **81.** (3) The wages that directors are liable for under this Part are wages, not including termination pay and severance pay as they are provided for under this Act or an employment contract and not including amounts that are deemed to be wages under this Act. 2000, c. 41, s. 81 (3).

That is, they are:

(1) Wages (a term defined in section 1 of the ESA)

(2) But not termination or severance pay;

(3) And not any other payment which falls outside the definition of "wages" in section 1, but which are deemed to be wages for limited purposes by other sections of the ESA, for example, section 60(3), 62(2), and 42(5).

29. The applicant asserts that the phrase "as they are provided for under … an employment contract" in section 81(3) (which term clearly includes a collective agreement) incorporates the collective agreement definition of "wages" into the ESA. Counsel therefore asserts there is a conflict between section 100(3) and section 81(3). I disagree. In section 81(3), the phrase in question modifies the term "termination pay or severance pay"; it does not create a separate category or definition of wages. Accordingly, I do not find a conflict between the two subsections as alleged by counsel, and there is no need to resolve any such contradiction or limitation.

30. Hence, if these contributions are to be made payable by the director, they must be found within the definition of "wages" in section 1. The definition of "wages" in section 1 is as follows:

> "wages" means,
>
> (a) monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied,
>
> (b) any payment required to be made by an employer to an employee under this Act, and
>
> (c) any allowances for room or board under an employment contract or prescribed allowances,
>
> but does not include,
>
> (d) tips and other gratuities,

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(e) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency,

(f) expenses and travelling allowances, or

(g) subject to subsections 60 (3) or 62 (2), employer contributions to a benefit plan and payments to which an employee is entitled from a benefit plan; ("salaire")

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31. In applying this definition to the various monies claimed by the Union in this case, I conclude there is a distinction to be drawn between monies owing in respect of vacation pay and holiday pay, and monies owing as contributions to the other benefit funds. I deal with the latter group first.

(i) Other Benefit Funds

32. The issue here is paragraph (g), i.e. whether these contributions are “employer contributions to a benefit plan and payments to which an employee is entitled from a benefit plan”. If they are, they are excluded form the definition of “wages” for which the director is liable. The term “benefit plan” is also defined in section 1 as:

> “benefit plan” means a benefit plan provided for an employee by or through his or her employer.

The union argues that the contributions which it seeks in this grievance are not excluded from the definition of “wages”, and particularly paragraph (g). Counsel sets forth several grounds, none of which I am able to accept.

33. First, the Union argues that the benefits plans described in this collective agreement are different from the “benefit funds” as defined in section 1. Counsel argues that the payment of benefits is made by the trust fund, independently of the employer. Therefore, the benefits are not made “by or through” an employer. I cannot accept that argument. The money comes from the Employer, pursuant to a collective agreement negotiated by its statutory agent, and they represent contributions to a Trust Fund which provides benefits. If the Union’s argument were correct, it would make redundant the words in paragraph (g) of the definition of wages: “employer contributions to a benefit plan”. This type of transaction is clearly what “through an employer” refers to.

34. The union also suggests that the wording of section 43 of the ESA can be used to demonstrate a narrow interpretation of “benefit plan” in section 1. To do so would be to lift section 43 out of context. Part XIII of the ESA (sections 43 and 44) prohibits certain kinds of differentiation in the administration of a benefit plan. The purpose of the expansive definition in section 43 is to widen the definition of employer to include an association which is not the employer but which acts for the employer in relation to certain types of plans. It broadens the number of types of employer and employer organizations whose actions are governed by the section. It does not change the nature of the benefit plans described.

35. Second, counsel argues that the amendment to the exclusion, which is now paragraph (g) had the effect of narrowing the exclusion contained in the former Act (the *Employment Standards Act*, R.S.O. 1990, ch. E-14, hereinafter the “old ESA”). The change in wording is substantial. Under the old ESA, the exclusion definition read as follows:

> "wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,
>
> (a) tips and other gratuities,
>
> (b) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,
>
> (c) travelling allowances or expenses,
>
> (d) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies;

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Part X of the Old ESA provided as follows:

PART X
BENEFIT PLANS

> **33.** (1) This Part applies to a fund, plan or arrangement provided, furnished or offered or to be provided, furnished or offered by an employer to the employees,
>
> (a) under a term or condition of employment; or
>
> (b) in which an employee may elect to participate or not and to which the employer contributes or does not contribute,
>
> that directly or indirectly provides benefits to the employees, their beneficiaries, survivors or dependants, whether payable periodically or not, for superannuation, retirement, unemployment, income replacement, death, disability, sickness, accident, or medical, hospital, nursing or dental expenses, or other similar benefits or benefits under a deferred profit sharing plan in which employees participate in profits of the employer where the profits accumulated under the plan are permitted to be withdrawn or distributed upon death or retirement or upon contingencies other than death or retirement.

Paragraph (g) of the definition of wages under the ESA, and section 33 of the Old ESA certainly contain very different words. Counsel argues that the Board should infer an intention to change the substance of this section in such an extensive revision. However, the *Interpretation Act*, R.S.O. 1990, ch. I-11, directs an adjudicator not to draw an inference solely from the fact that there has been a change:

> **Amendment of Act not a declaration of different state of law**
>
> **18.** The amendment of an Act shall be deemed not to be or to involve a declaration that the law under the Act was or was considered by the Legislature to have been different from the law as it has become under the Act as so amended.

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36. Indeed, it is apparent that the primary reason for the amendment lies elsewhere in the Act. The definition of wages in the Old ESA incorporated a definition of "benefits" found in section 33 (now section 43) of that statute. The definition of "benefit" for the purposes of section 33 was narrowed somewhat in the re-drafting of what is now section 43 of the ESA (it now excludes unemployment benefits and deferred profit sharing palns). The ESA now defines an exclusion to the definition of "wages" in paragraph (g) which is not linked to any other section of the Act. If one were to posit an intention on the part of the legislative draftsperson, one might say that the narrowing of section 43 of the ESA was not to be replicated in the definition of "wages" or the exceptions therefrom. More simply, the draftsperson may have found the linking of the two sections clumsy or have decided that there was no need to link them at all. Although fewer words are used in paragraph (g), than in the old section 33, I find it difficult to read the new paragraph (g) as narrower than the old exclusion in section 33 of the old ESA. It appears to be simply a case of using a few broad and general words rather than a long list of specific and narrow terms.

37. In my view, the term "benefit plan" in section 1 is to be given a general reading using the plain, ordinary meaning of the words used. It is not tied to the more specific definition of "benefit plans" in section 43. Contributions to be made under the Collective Agreement are made to benefit plans which provide, for example, pension benefits, medical benefits, and payments to the Union which are clearly to the collective benefit of all members of the Union.

38. The Union made two further arguments: that the parties had in fact defined "wages" in the collective agreement to include these amounts, and that the remedial purpose of the ESA requires an expansive interpretation of directors' liability. To some extent, I have already dealt with the first of these with reference to section 100(3). Further, section 99 does not deem the collective agreement to be incorporated into the ESA. It states that the Act is enforceable "as if it were a part of the collective agreement". That is, the enforcement mechanism is the grievance under the arbitration process found in the collective agreement. That is substituted for the enforcement process of the ESA. That fact alone does not empower the parties to the collective agreement to extend the jurisdictional reach of the statute that is being enforced by the collective agreement process.

39. Parties are, of course, free to negotiate higher and better standards in an agreement than those provided in the ESA. The ESA is only a minimum standard. The difficulty arises here, because the Union seeks to fix liability on the director, who is not a party to the Collective Agreement. Two parties to a collective agreement can negotiate standards much higher than those in the ESA and may also agree on enforcement mechanisms that are much more vigorous. If they agree on this, they are competent to do so. However, the limit of this power to bargain remains the limit of the parties to the agreement. They may not agree to bind a third party to anything without that third party's consent.

40. In this case, the authority to find the director liable comes from the statute, with the grievance and arbitration process of the Collective Agreement grafted unto it. That is, it does not arise from the Collective Agreement with the enforcement process of the ESA grafted onto it. Liability may be extended by the statute. However, even where the enforcement mechanism is taken from a collective agreement, those parties are not able to exercise what would be legislative authority to extend the reach of the statute. I find, therefore, that the liability of directors under the ESA does not extend to the contributions sought in this grievance.

(ii) Vacation Pay and Holiday Pay

41. I conclude that vacation pay and holiday pay are a different matter. A pension plan receives contributions which generate some sort of entitlement to a pension benefit. If the fund restricts membership to persons who have contributed longer than two years (not the case with this fund) there will be no benefit. The level of benefit will depend on the financial health of the fund. The total amount of pension paid out will depend on the date of death of the beneficiary and his or her spousal status. Typically a Heath and Welfare fund uses the monies collected to purchase as much insurance benefit as it can afford. What that amounts to may change from year to year depending on costs and experience ratings. An employee may rely heavily on those benefits or not at all.

42. The Vacation Pay and Holiday Pay funds operate in a different manner. They are simply a convenient way of collecting and distributing money. The fund collects the money owing from one or more employers to the member of the Union who was its or their employee, and distributes exactly the totals of those sums to the employee at regular intervals. The fund is simply a means of transmission of the money.

43. The definition of "wages" includes "any payment required to be made by an employer to an employee under this Act". The obligation to pay vacation pay is found in section 35 of the Act:

> **35.** An employer shall pay vacation pay to an employee who is entitled to vacation under section 33 equal to at least 4 per cent of the wages, excluding vacation pay, the employee earned during the 12-month period for which the vacation is given.

The obligation to pay holiday pay, in the circumstances of the terms of this collective agreement is found in section 29(3):

> 29(3) An employer and an employee may agree that, instead of complying with subsection (1), the employer shall pay the employee public holiday pay for the public holiday, and if they do subsection (1) does not apply to the employee

44. Thus the ESA requires the employer to pay these sums to the employee. The trust fund serves as the agent for collecting and transmitting those funds. It does not change the amount or the character of those funds. Therefore I find that these amounts are wages under the ESA for which directors may be personally liable.

Preconditions to Enforcement

45. Once the director is found to be liable for some wages, it is necessary to deal with the enforcement process to determine whether or not the ESA enables a union to proceed against the director for unpaid wages. Section 81(1) sets a requirement that one of four preconditions be met. These are:

> (a) the employer is insolvent, the employee has caused a claim for unpaid wages to be filed with the receiver appointed by a court with respect to the employer or with the employer's trustee in bankruptcy and the claim has not been paid;
>
> (b) an employment standards officer has made an order that the employer is liable for wages, unless the amount set out in the order has been paid or the employer has applied to have it reviewed;

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(c) an employment standards officer has made an order that a director is liable for wages, unless the amount set out in the order has been paid or the employer or the director has applied to have it reviewed; or

(d) the Board has issued, amended or affirmed an order under section 119, the order, as issued, amended or affirmed, requires the employer or the directors to pay wages and the amount set out in the order has not been paid.

46. The difficulty with applying them in this context is that it is tied to the enforcement process of the ESA (i.e. orders by an Employment Standards Officer, or review by the OLRB under section 119 of the ESA). Employees represented by a trade union are denied access to that enforcement mechanism by section 99; the collective agreement process is designed to substitute for it.

47. Read literally, there is a conflict between section 99 and section 81(1). In the absence of a formal bankruptcy, an employee cannot file a complaint with an Employment Standards Officer, nor can an arbitrator enforce a right under the statute which requires an order of an Employment Standards Officer or an order of the Board sitting on review of an Employment Standards Officer's order. Such absurd results are to be avoided in interpreting a statute: in this case an employee should not be worse off under minimum employment standards legislation if they are represented by a bargaining agent. Indeed, section 100(3) makes it clear that the ESA does not contemplate that result.

48. The appropriate reconciliation of section 81(1) and section 99 is this. Section 81 creates a substantive right. Section 99 substitutes the enforcement mechanism of a collective agreement for that of the ESA. Therefore, the conditions set out in section 81(1)(a)-(d) are displaced by section 99. The enforcement mechanism is the arbitration process.

49. However, it is also appropriate to fashion an enforcement mechanism that reflects the policy concerns of the ESA. That policy is that the corporation is primarily liable and the director is liable only if the corporation cannot pay in any reasonable time. The OBCA provides a mechanism for actions in court. The ESA is more informal; presumably, the discretion of an Employment Standards Officer determines whether or not she or he issues an order under subsections 81(1)(b) or (c). It is incumbent on the Board to ensure that the corporation is not able to pay before an order is issued against the director.

50. In this case, that determination is easy. The director was called as a witness and acknowledged that the corporation owes the money and cannot pay it.

Business Corporations Act

For what Payments is a Director liable?

51. The responsibility for the payment of wages by a director is much greater under section 131 of the OBCA. The terms of the OBCA are very broad:

131. (1) The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the *Employment Standards Act*, and the regulations thereunder, or under any collective agreement made by the corporation

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52. The directors of a corporation are jointly and severally liable to the employees of a corporation "for all debts not exceeding six months' wages". In *Zavitz v. Brock, et al* (1974) 3 OR (2d) 583, the Ontario Court of Appeal treated the word "debt" as synonymous with wages, but gave the term a wide meaning. It found that commissions payable to an employee sales representative were included. Recently the Ontario Court of Appeal revisited the issue and concluded that the term "debts" was not synonymous with "wages", as the term is generally defined. In *Proulx v. Sahelian Goldfields Inc.* (2001) 55 OR (3d) 775, the Ontario Court of Appeal found that the type of debt referred to in section 131 was not restricted in any way. The reference to wages and vacation pay which follow the word "debt" in section 131 are used to define the maximum quantum of the debt to be recovered, but do not define the type of debt that may be recovered. In that case, the Court found the directors liable to reimburse employees for travel expenses incurred during their employment.

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53. I find therefore that the "debts" referred to in section 131 encompass all of the Union's claims under this grievance.

Preconditions to Enforcement

54. The difficulty in enforcing this right at arbitration in the manner sought by the Union, arises from the nature of the parties against whom the relief is sought. Once again, the director is not a party to the collective agreement. Any substantive right created by section 131 can be enforced against any party to the collective agreement. To extend beyond the boundaries of the collective agreement to include third parties, however, requires the authority of a statute.

55. The Union asserts that the director of a corporation may be held liable as a party by virtue of section 48(18) of the Act. That section provides:

> **48.** (18) The decision of an arbitrator or of an arbitration board is binding,
>
> (a) upon the parties;
>
> (b) in the case of a collective agreement between a trade union and an employers' organization, upon the employers covered by the agreement who are affected by the decision;
>
> (c) in the case of a collective agreement between a council of trade unions and an employer or an employers' organization, upon the members or affiliates of the council and the employer or the employers covered by the agreement, as the case may be, who are affected by the decision; and
>
> (d) upon the employees covered by the agreement who are affected by the decision,
>
> and the parties, employers, trade unions and employees shall do or abstain from doing anything required of them by the decision.

Counsel argues, correctly, that the reference to "parties" in paragraph (a) of section 48(18) must of necessity mean something other than the "trade union", "employer" and "employees" referred to in paragraphs (b) and (d). He refers to two examples of cases where the Board or a board of

arbitration has found that intervenors who were not parties to a collective agreement were nonetheless bound to the order made.

56. In cases such as *Consamar Inc.*, [1991] OLRB Rep. Sept. 1021, the Board, sitting as a board of arbitration under section 133, dealt with a grievance about work assignment. Another union intervened, since its members had been assigned the work. The Board ultimately exercised its discretion under section 44(6) of the Act (as it then was) to extend the time limits under the applicant's collective agreement so that the matter might be resolved. The intervening union was bound by that result. The consequence for the employer and the intervenor union was that there was a grievance that might be found to be a claim for work pursuant to the jurisdictional dispute provisions of the Act.

57. The Board frequently gives intervenor status to parties who have legal rights which may be affected by the results of the Board's determination. The fact that strangers to the collective agreement are bound by the result does not make them parties to the collective agreement, nor does it make them liable for any dispute arising under the collective agreement. To grant intervenor status to a party has two effects on the intervenor. First, when the Board grants intervenor status to a party, it is generally because the Board concludes that a determination of a legal issue between the two principal parties may impact on rights of the intervenor which exist independently of the litigation between the two principal parties. By giving the intervenor status, the intervenor will not be entitled (or need to try to) relitigate the issue of the rights as between the two principal parties. Second, while the intervenor is bound by the result, it has the opportunity to influence the outcome of that result through its participation in the litigation. In the end, however, the result adjudicates rights as between the main parties to the litigation, not as between them and the intervenor.

58. The Union also referred to promotion cases, where an incumbent employee is given status in a proceeding and will be bound by the result. That result may mean that the incumbent employee loses a job which he or she had successfully obtained. This example is less compelling. Section 48(18)(d) makes the decision of an arbitrator explicitly applicable to employees covered by the collective agreement. This is an example of a statute which makes parties who are not parties to the collective agreement subject to the arbitrator's jurisdiction. Indeed, were it not so, collective agreements which deal with collective rights and sometimes with competing claims to the same right by different employees under a collective agreement, would be impossible to enforce. It is trite to note that section 48(18) does not refer to principals or directors of an employer.

59. I have found that Mr. Klinakis is a "party" to this proceeding, for the purposes of the enforcement of provisions of the ESA. That alone does not make him a party for all purposes. His status as a party is limited to his liability as a director under the ESA. With respect to the OBCA, he is not a responding party until it can be demonstrated that the OBCA gives the Board some jurisdiction over him. It is not enough simply to name a person as a party to the proceeding, and then to argue that they are "parties" referred to in section 48(18)(a) of the Act. It is necessary to establish that they are proper parties to the proceeding. Mr. Klinakis is not properly a party to this referral, as a responding party, until the applicant can demonstrate some jurisdictional basis for making him a party.

60. Had he chosen to do so, Mr. Klinakis might have sought intervenor status on the basis that if the Board determined the liability of the corporation, he might be foreclosed from contesting the quantum owed by Alcor if the Union then proceeded to commence an action under the OBCA. In that case he would be a party, i.e. an intervenor, to the proceeding before the

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Board. He would be bound to the result, in the sense that he could not later dispute the quantum of debt owed by the corporation to the employees and the Union. That is different from bound in the sense of being liable, as a responding party, for the obligations of Alcor.

61. More narrowly, there is also a difficulty in "applying" the terms of section 131 of the OBCA. Subsection 131(2) provides certain preconditions before the director may be made liable:

> (2) A director is liable under subsection (1) only if,
>
> (a) the director is sued while he or she is a director or within six months after ceasing to be a director; and
>
> (b) the action against the director is commenced within six months after the debts became payable, and
>
> (i) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part, or
>
> (ii) before or after the action is commenced the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the *Bankruptcy Act* (Canada), or a receiving order under the *Bankruptcy Act* (Canada) is made against it, and in any such case, the claim for the debts is proved.

Unlike the ESA, there is nothing in the OBCA which substitutes the grievance and arbitration procedure for an action under the *Courts of Justice Act*. Nor may an arbitrator "interpret" the statute to give the words "sue" (subsection 2(a)) or "action" (subsection 2(b)) that meaning. Indeed, section 30 of the *Interpretation Act* states:

> 30. The interpretation section of the Courts of Justice Act extends to all acts relating to legal matters.

The *Courts of Justice Act* itself defines "action" as follows:

> "**1.** In this Act,
>
> action" means a civil proceeding that is not an application and includes a proceeding commenced by,
>
> (a) claim,
>
> (b) statement of claim,
>
> (c) notice of action,
>
> (d) counterclaim,
>
> (e) crossclaim,
>
> (f) third or subsequent party claim, or
>
> (g) divorce petition or counterpetition; ("action")

Under section 133, the Board sits only as an arbitrator, not as a judge of the Superior Court of Justice or of the Ontario Court. The statutory preconditions for a director's liability cannot be satisfied through the arbitration procedure. Thus, even if the Board had the jurisdiction to bind a

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director (which is does not), it would be impossible for the Union to demonstrate that it had fulfilled the prerequisites of section 131(2).

62. In considering the ESA, I concluded that the prerequisites for establishing the liability of a director in section 81(1) were supplanted by the arbitration process in a collective agreement due to a conflict between section 81(1) and section 99 which would otherwise lead to an absurd result. There is no such conflict in the provisions of the OBCA; there is no reference to any other form of securing rights created by the statute. This does not lead to an absurdity, but simply sets out a single method by which unpaid wages may be recovered from a director.

63. Quite frankly, there seems to be no particular policy reason why this is so. As the Union points out, a collective agreement may not be made the subject of an action in court (*Rights of Labour Act*, R.S.O. 1990, ch. R-33, section 1(3)) and *Young v. C & R*, [1931] 1 DLR 645 (Privy Council). Except in certain very limited circumstances, the union must establish a violation of the collective agreement at arbitration. Section 131 of the OBCA clearly covers all of the types of debts at issue in this grievance. The utility of requiring a union to commence a separate action against the director after obtaining this decision from the Board is not apparent to this Board. The director obviously had his opportunity to dispute the quantum before the Board in this proceeding, and would likely be prevented from doing so in any action in court. It is difficult to see what defenses or procedural rights a director would be deprived of (assuming the corporation is insolvent) since set-off is unlikely to be an issue, and if there were more directors than one, all of them would be jointly and severally liable and could all be made parties to a decision of the Board.

64. Further, it is obvious that the legislature finds it appropriate to have the Ontario Labour Relations Board or an arbitrator deal with the issue of director's liability for certain types of wages. Why liability for the vacation and holiday pay of $2.78 per hour should be determinable by this Board, but liability for the $3.65 per hour in Heath and Welfare payments or the $3.10 per hour for Pension Plan contributions should only be determinable in a court, is not a question to which there is an obvious answer.

65. It is however clear that when the legislature turned its mind to the issue in the ESA it made that choice in section 100(3). Further, the OBCA is clear as to where the rights created by section 131 must be enforced and any disputes about those rights litigated: in the Ontario Court or the Superior Court of Justice. This Board has no jurisdiction in such matter.

Interest

66. The Union claimed interest on the amounts for which the various parties were liable. It did not provide any rates or calculations. I will remain seized of this request in the event the Union chooses to pursue the matter, now that it knows the amounts and relevant dates.

Conclusion

67. The Board therefore issues the following relief:

(1) The Board declares that Alcor is bound to the Provincial Collective Agreement between the Carpenters Employer Bargaining Agency and the Carpenters' District Council of Ontario.

(2) The Board finds that Alcor has violated the Collective Agreement.

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(3) The Board finds that the damages arising from this violation are $5,507.54.

(4) The Board orders that Alcor reimburse the applicant pursuant to subsection 133(13) of the Act for its fees, being $749.00.

(5) The Board orders Alcor to pay the costs of the applicant in the amount of $1,000.00 pursuant to Article 9.18 of the Carpenters' Provincial Collective Agreement.

68. Finally, the Board finds that it has jurisdiction to order Anthony Klinakis, as a director of Alcor, to pay for amounts owing in respect of vacation pay and holiday pay. This amount is $636.93 in respect of vacation pay and holiday pay. The obligation to pay costs under Article 9.18 of the collective agreement does not meet the definition of wages under the ESA and, as Mr. Klinakis is not a party to the collective agreement, I have no jurisdiction to award that amount against him. However, Mr. Klinakis is properly a party to this proceeding to the extent of his liability under the ESA and is therefore a responding party for the purposes of Section 133(13). Since he did not appear as a party in these proceedings, section 133(13) is applicable to him, and he is liable for that amount as well.

69. It must be stressed, however, that Mr. Klinakis is jointly and severally liable with Alcor for the payment of these amounts. Any recovery from Alcor relieves him of that obligation. Since Mr. Klinakis appeared as a witness and indicated that Alcor was unable to pay its debts, I see no need to place any restriction on the union's ability to collect this money (if it can) immediately. In another situation, conditions might be imposed (see for example a decision of this date in Board File No. 0763-02-G, *1258170 Ontario Inc. o/a Rubican Construction*).

70. In summary then, the Board orders Alcor Investment Group Inc. c.o.b. as Alcor Interiors to pay to the applicant the sum of $7,256.54. The Board further declares that Anthony Klinakis is jointly and severally liable with Alcor to pay a part of that sum, namely $1385.93, and orders Anthony Klinakis to pay that sum to the Union forthwith. The Board remains seized of any claim for interest by the Union.

"David A. McKee"
for the Board

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WAYGAR CAPITAL INC., AS AGENT FOR NINEPOINT CANADIAN SENIOR DEBT MASTER FUND L.P.
Applicant

and

QUALITY RUGS OF CANADA LIMITED et al.
Respondents

Court File No.: CV-23-00703292-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

SUPPLEMENTARY BOOK OF AUTHORITIES OF LIUNA LOCAL 183

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