Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **2275-20-U**

Ras-Con Group Inc., Applicant v Labourer's International Union of North America, Local 183, Masonry Contractors Association of Toronto, Masonry Council of Unions Toronto and Vicinity, and Bricklayers, Masons Independent Union of Canada, Local 1, Responding Parties v Toronto Residential Construction Labour Bureau, Intervenor

OLRB Case No: **2297-20-U**

Toronto Residential Construction Labour Bureau, Applicant v Labourers' International Union of North America, Local 183, and Masonry Contractors' Association of Toronto, Responding Parties v Ras-Con Group Inc., Intervenor

APPEARANCES: Carl Peterson, Diane Laranja, Natalie Garvin, Stephanie Nicholson, Lou Bada, Richard Lyall, Andrew Pariser, Mike Riccardi, Shawn Mio and others for the Toronto Residential Construction Labour Bureau, applicant/intervenor; Michael MacLellan, Jay Rider and Roberto Mangoni for Ras-Con Group Inc., applicant/intervenor; Lorne Richmond, Emily Li, Sara Ageorlo, Cesar Rodrigues, Leonardo Inacio and others for Labourers International Union of North America, Local 183, Masonry Council of Unions of Toronto and Vicinity, Bricklayers, Masons Independent Union of Canada, Local 1, and Cesar Rodrigues, responding parties; Jeffrey Murray, Daniel Gaspar and Joe DeCaria for Masonry Contractors' Association of Toronto and Joe DeCaria, responding parties

BEFORE: Bernard Fishbein, Chair

DECISION OF THE BOARD: March 4, 2021

Introduction

1. OLRB file No. 2275-20-U is an application under Section 96 (the "ULP") of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, ("the Act") filed by Ras-Con Group Inc. ("Ras-Con"). Ras-Con describes itself as "one of a number of "non-union" contractors engaged in the application of Exterior Insulation Finish Systems ("EIFS") and/or stucco for residential builders in Ontario", and asserts it is "one of the largest, if not the single largest, EIFS/stucco contactor in Ontario". EIFS and stucco are referred to and used interchangeably in this decision. The ULP was filed on January 7, 2021. The ULP alleges violations of sections 76, 79, 81 and 83 of the Act by Labourers International Union of North America, Local 183, Masonry Council of Unions Toronto and Vicinity, and Bricklayers Masons Independent Union of Canada, Local 1 (hereafter, for convenience's sake, collectively referred to as "the Labourers" or "the Union") and Masonry Contractors Association of Toronto ("MCAT") as well as two individuals Cesar Rodrigues ("Rodrigues") and Joe DeCaria ("DeCaria"). Rodrigues is a senior official and employee of the Labourers. DeCaria is an employee of MCAT—he is its General Manager.

2. OLRB File No. 2297-20-U is an application regarding an unlawful strike under Section 144 of the Act ("the unlawful strike application") filed by the Toronto Residential Construction Labour Bureau ("the Bureau" or the "Builders"). The unlawful strike application alleges violations of sections 76, 79, 81 and 83 of the Act by the Labourers, Rodrigues and MCAT in that they have threatened to engage or engaged in illegal strikes. It was filed on January 11, 2021.

3. At the first day of hearing it was agreed that Rodrigues and DeCaria could be deleted as personal responding parties.

4. Both applications sought overlapping, if not virtually the same, relief—including general cease and desist directions and declarations with respect to the alleged improper conduct of the responding parties as well as a declaration that the relevant portions of the collective agreement between the Labourers and MCAT that those responding parties might rely on to justify their actions are unlawful.

5. As both the ULP and the unlawful strike application alleged largely overlapping, if not the same, ongoing illegal strike activity, both were scheduled to be heard together, and, as is the Board's customary practice, they were scheduled on an expedited basis (as both Ras-Con

and the Bureau requested) and time lines for filing responses were abridged. The hearing was scheduled for Thursday January 14, 2021.

6. After hearing two days of submissions, by decision dated January 21, 2021, I dismissed a *prima facie* case motion brought by the Labourers and MCAT ("the *prima facie* decision") and directed that the applications proceed upon an expedited basis on dates agreed to by the parties failing which dates would be set by the Board. Ultimately the parties did agree on seven hearing dates commencing on January 27, 2021 and continuing throughout February of 2021. The Board heard seven witnesses—spread over four days of testimony. All the evidence was called by either the Bureau or Ras-Con. The Union and MCAT chose to call none. At the parties' request there was an order excluding witnesses. I will not repeat all of that evidence—only that necessary or relevant to this decision.

7. At the outset, the parties agreed it was not necessary to adduce the evidence about the general background and the Board could rely on the description contained in the *prima facie* decision which I set out again here:

> **What these applications are about—Generally**
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> 8. At this point it is not necessary to go through the allegations of Ras-Con or the Bureau in great detail but only briefly and sufficiently to understand the context. The Bureau (which, as its name suggests, is largely composed of low rise residential builders) and the Labourers have been and are bound by a collective agreement ("the Builders collective agreement"). MCAT, which as its name equally suggests is largely, if not entirely, composed of bricklaying and masonry contractors. Those masonry contractors receive much of their work by way of subcontracts from builders—from members of the Bureau but not necessarily exclusively. MCAT and the Labourers have been and are bound by a collective agreement ("the MCAT collective agreement"). Neither the Builders collective agreement nor the MCAT agreement initially explicitly covered EIFS or stucco work (and in particular by their respective subcontracting provisions)—although ironically both collective agreements had slightly different provisions whereby the Labourers could trigger the collective agreement being applied to EIFS and stucco work. In the summer of 2020 the Labourers notified MCAT (knowingly falsely Ras-Con alleges) that they had met the triggering

conditions to make the MCAT agreement applicable to EIFS and stucco work—Letter of Understanding Number Nine ("LOU #9) to the MCAT agreement. MCAT did not contest that assertion by the Labourers and now both MCAT and the Labourers agree that the MCAT collective agreement covers EIFS and stucco work. However the Labourers did not purport to trigger the slightly different provisions (they refer to a higher percentage of stucco contractors and higher percentage of their employees that the Labourers must represent) with respect to the Builders collective agreement. The Bureau and Ras-Con assert those bound to that agreement are free to subcontract EIFS or stucco work as they see fit—and they do and have done without regard to whether such EIFS or stucco contractor is bound to any collective agreement with the Labourers—in other words, like Ras-Con (although the Labourers do not necessarily concede this point in view of the now amended MCAT collective agreement to include EIFS and stucco work). This is contrasted to, *inter alia*, masonry and bricklaying work which is explicitly required by the Builders collective Agreement to be subcontracted only to those bound to agreements with the Labourers (like the MCAT collective agreement).

9. In these applications it is alleged that four residential builders, Deco Homes, Sorbara Group [or Sorbara Group of Companies or Sorbara Homes hereafter collectively referred to as "Sorbara" or "Sorbara Homes"], Fernbrook Homes and Mattamy Homes (not all are members of the Bureau—in particular, Mattamy Homes—and therefore not necessarily bound to the Builders collective agreement) have subcontracted masonry and bricklaying work to masonry contractors who are bound to the MCAT collective agreement (and therefore in compliance with the subcontracting provisions of the Builders collective agreement) at a number of their residential developments. At those sites (or in some cases other sites altogether), however, the EIFS and stucco work is not contracted to those masonry contractors but to "non union" EIFS or stucco contractors and, in particular, Ras-Con.

10. At such sites the masonry contractors have refused to attend or have ceased to attend to perform the masonry or bricklaying work the builders have awarded them. The masonry contractors have returned to the sites to perform the bricklaying work where the builder has stopped the stucco work, or ordered off or removed the non union stucco

contractor (Res-Con) from the site and/or terminated its contract. The Bureau and Ras-Con allege that there is an illegal "scheme" by the Labourers and MCAT to compel the non-union EIFS or stucco contractors, and in particular, Ras-Con, to enter into collective agreements with the Labourers and, in particular, the MCAT collective agreement and/or improperly expand the scope and coverage of the Builders collective agreement. There is no dispute that the Labourers have told those masonry subcontractors that they would file grievances against them under the MCAT collective agreement to which they are bound because of their attendance at sites where there is a non union EIFS or stucco contractor on the basis that violates their interpretation of MCAT Collective Agreement, including Letter of Understanding No. Eight ("LOU #8") of the MCAT collective agreement. MCAT does not appear to oppose or disagree with the Labourers' interpretation of the MCAT agreement or LOU #8. The Bureau and Ras-Con say that the LOU #8 on its face cannot be construed to be applicable in these circumstances or in any event is unlawful and contrary to public policy.

11. At this point it is noteworthy that these applications have not been filed by any of the builders or masonry contractors about whose job sites or developments these applications relate to, only the Bureau, and by Ras-Con, the non union stucco contractor on the sites who has either been told by the builders involved not to report to work or had its contracts for stucco work cancelled at some of these sites. In fact, in the midst of the second day of hearing the Board received a letter from Deco Homes saying it wished nothing to do with these applications and wished all reference to it to be removed from these applications. The Bureau agreed to do so (Deco was not referred to at all in the ULP) and accordingly none of the incidents or particulars involving Deco Homes will be referred to in these reasons……

12. Again, in addition to the summary above, I did explicitly review with the parties what was not in dispute:

(a) Both the Bureau and MCAT collective agreements have contained for some period of time (and for some number of previous collective agreements) subcontracting clauses restricting the bound employer parties' ability to subcontract some work—and no one was disputing the legality of such subcontracting arrangements (already

upheld in previous relatively longstanding jurisprudence);

(b) Both the Bureau and the MCAT collective agreements contained provisions allowing for the Labourers to trigger the coverage or applicability of the respective collective agreements to EIFS or stucco work (although they were different with different triggering criteria):

(c) The Labourers triggered that EIFS and stucco coverage in the MCAT agreement in the summer of 2020. It was not opposed or contested by MCAT. The Labourers and MCAT now agree that the MCAT collective agreement covers EIFS and stucco.

(d) The Labourers have not triggered such EIFS and stucco coverage pursuant to the provisions of the House Builders collective agreement. The House Builders collective agreement does not accordingly explicitly cover EIFS and stucco. The Labourers do not concede however that the House Builders collective agreement does not cover EIFS and stucco in that it may be covered by the terms "masonry" or "bricklaying" in that those terms are the final exterior layer applied to an exterior wall as is or is the same as EIFS or stucco (particularly in the context of the now altered MCAT agreement). However no such grievance has ever been filed by the Labourers (and certainly not in the circumstances of the ULP or the unlawful strike application) so its interpretation has never been tested.

8. Prior to the commencement of the hearing on the merits, the Board received a letter dated January 25, 2021, from CountryWide Homes, verbatim identical to the earlier letter from Deco Homes referred to in the *prima facie* decision, also indicating it wished to "remove [its] naming" from the unlawful strike application and that "at this time we are not looking to be named in this application, nor contribute to such filing". The significance of this (or lack of significance) will be discussed below. In any event, the Bureau agreed to the removal of those references to CountryWide Homes that suggested that CountryWide was an applicant or supporter of the unlawful strike application but not a few references which were merely facts that involved or referred to

CountryWide which would be established, in any event, by the evidence that the Bureau would adduce.

9. Also, perhaps not surprisingly, things did not remain static between the filing of these applications, their scheduling for hearings before the Board, the hearing of the responding parties' *prima facie* case motion, the issuing of the *prima facie* decision and the scheduling of these further hearings on the merits, particularly when the Bureau's allegations were based on a pattern or scheme of, in their view, improper conduct. In particular the Bureau filed allegations of other member builders, Regal Crest Homes, Aspen Ridge, Arista Homes, involving their sites, involving the same or different masonry contractors and the interruption of the performance of their contracted masonry services and its alleged relationship to the presence of non unionized stucco contractors like Ras-Con, or in the case of Fernbrook and Sorbara Group, the brief return or promised return of the masonry contractors and their subsequent failure to again attend to perform the contracted masonry work at their sites due to their continued participation or support of this unlawful strike application (and more specifically, their refusal to send a verbatim identical letter to the Deco or CountryWide Homes letter to the Board as demanded by the Union and Rodrigues). In addition Ras-Con filed particulars and declarations of the loss of already contracted or promised work by other non union stucco contractors when masonry work was disrupted at builders' sites where they were working or contracted to be working. The Labourers, supported by MCAT, objected to these "late" particulars (as they characterized them) as unfair and inappropriately expanding these applications and requested that they be summarily dismissed without any hearing. I heard the arguments of all the parties and ruled orally that I would hear these particulars of the Bureau but not Ras-Con, explaining the reasons for my ruling at that time. Since no party requested any written decision on these rulings, I do not propose to go into any great detail about those arguments here and the reasons for their acceptance or rejection other than to briefly note:

(a) that the proposed particulars of Ras-Con were essentially about the same loss of work from essentially the same non-unionized stucco contractors whom I had already denied status in an earlier ruling when they sought to intervene, *inter alia,* as opposed to file their own or become applicants in the ULP (which they never did);

(b) but the particulars of the Bureau were from builders (including the newly added ones) for whom there was no question of the representational authority of the Bureau to either speak or file proceedings on their behalf, they were akin and formed part or were other examples of the scheme that the Bureau was alleging from the outset, and leaving aside that in view of the expedited manner in which the Board virtually always schedules applications with respect to allegedly ongoing or continuing unlawful strikes so that it is not unusual for additional particulars to be filed shortly before and up to a hearing, the allegations were sufficiently particularized (or the invocation of other sections of the Act (i.e. Section 87(2)) was essentially another legal argument or characterization of the impugned conduct) and filed a least a number of days before the resumption of the hearings so that there was no substantial prejudice to the Labourers.

10. The purpose of these observations is to simply explain how the activities with respect to other builders than those originally named in the unlawful strike application came to form part of the evidence the Board heard.

The *viva voce* evidence

11. Notwithstanding my refusal to dismiss these applications on a *prima facie* case basis for, *inter alia,* the lack of a full evidentiary record, in hindsight, perhaps not surprisingly, now that I have heard several days of evidence, that evidentiary record is now marked as much by evidence or witnesses I did not hear. There was not evidence with respect to all of the allegations initially made (whether by choice or as a result of the letters the Board received from Deco and CountryWide Homes—obviously this decision deals only with the evidence actually adduced or what could properly be deduced or inferred from it. Again, the Board heard evidence from seven witnesses spread over some four days of testimony. All were witnesses called by the Bureau or Ras-Con. The Union and MCAT called none. Some filed "will say" statements which they adopted as their examination in chief. Others gave all their testimony *viva voce.* They were all extensively cross examined. Again

I do not propose to review all of their evidence in great detail—only where it is particularly relevant or salient to the conclusions I need to reach. In fact much of the evidence was similar and overlapping. It came from site superintendents (or in one case the vice president of one of the builders-Sorbara) for low rise housing projects (single detached homes or some townhouses) of individual builders where the already contracted masonry contractors, all bound to the MCAT collective agreement and therefore all in compliance with the subcontracting clause of the Housebuilders collective agreement, ceased to work performing the masonry work. Other than the bricklayers of the masonry companies, the employees of the other trades including the direct employees of the builders continued to attend work as scheduled. In many of the cases the masonry contractors left their equipment and supplies (e.g. scaffolding, forklifts, bricks etc.) on the sites as and after they failed to complete the bricklaying. The masonry work had commenced but was not completed. Photographs of the masonry work left incomplete were filed—units partially bricked and not closed off, walls half done etc. The sites had non-union stucco contractors engaged, like Ras-Con, or sometimes others. Some sites had no stucco work at all but those builders had other sites where there were non-union stucco contractors. By and large the site superintendents had no direct conversations with the Labourers—I will review those circumstances where there was evidence of direct conversations with the Labourers or their representatives. By and large what the site superintendents knew about why the bricklayers were no longer reporting for work at the sites, was what they were told by the working foremen of the masonry contractor (or an occasional bricklayer)—that they were directed not to report to return to work because of a dispute with the Union about the use of non-union stucco contractors—sometimes they said the direction came from the Union but they all conceded in cross examination that there would have been the direction from the superiors at the masonry contractor in any event—and there certainly was no dispute that the masonry contractor, the employer of the bricklayers, was aware that the bricklayers were not at these sites of the builders. No site superintendent indicated that there were any picket lines or that they had seen bricklayers "down tools" and suddenly "walk off the site" or heard any representative of the Labourers tell them to do so. None of the site superintendents knew exactly where the bricklayers had gone—mostly it seems they were told by the bricklayers' foremen that the bricklaying crews had been assigned or told to report to other sites by the respective masonry contractor although in an occasional case the site superintendents suspected (or may have been told—and it was not necessarily clear by whom) that a particular

bricklaying crew was sitting at home waiting for the resolution of the "stucco dispute"—only for sure the bricklayers had stopped reporting to their sites to do the already contracted masonry work, often in the middle of bricklaying an individual home. All of the site superintendents conceded that they did not (and most likely neither the working foremen with whom they had been speaking as opposed to someone more senior in management of the masonry contractor) determine the composition or assignment or the number of the bricklaying crews. That kind of decision or determination was done by the masonry contractor—unless there was a problem with the quality or pace of work by a particular bricklayer or crew in which case the site superintendent might order it redone—or more rarely pursue it with the masonry contractor.

12. Just by way of example, the Board heard testimony from Walter Fernandes ("Fernandes"), the site supervisor of a Regal Crest Homes project in Brampton ("Cleave View Estates") where the masonry contractor was Medi-Group Inc. ("Medi-Group"), bound to the MCAT collective agreement and where the stucco contractor was the non-unionized Artizan Interior & Exterior Finishings Inc. ("Artizan"), who had both already commenced working at the site. Fernandes recounted that he had been advised by the Medi-Group foreman that the bricklayers would be required to stop performing their work on the site because the stucco workers were not unionized and this was confirmed the next day in a conversation with two of the individual bricklayers on the site. Thereafter the Medi-Group bricklayers stopped reporting to the site leaving a number of homes in the midst of the bricklaying uncompleted as well as their equipment, including scaffolding. Several pictures of this were filed with the Board. None of Medi-Group's bricklayers have yet returned to the site. Similar evidence was given by Remi Boudreau, a site supervisor of Fernbrook Homes. Although there was no stucco work at Boudreau's site and accordingly no stucco contractor engaged (there were non unionized stucco contractors engaged at other sites of Fernbrook Homes), Boudreau was advised by the working foreman of Medi-Group on site, while dismantling the scaffolding, that the bricklayers were not returning to the site as instructed by Medi-Group because of "something to do with the Union" (which was confirmed in a subsequent conversation with superiors at Medi-Group "that the guys aren't coming because of the union issue with the stucco" even though there was no stucco at this site because there was an issue with Fernbrook "and the stucco"). Again bricklayers of Medi-Group did not return. Again pictures of unfinished bricklaying work commenced by Medi-Group's bricklayers were filed.

13. The Board heard evidence from Roberto Mangoni ("Mangoni"), the principal of Ras-Con. He was called to give some general background as well as the direct involvement of Ras-Con in these applications. He has been involved in the EIFS/stucco business for over 20 years primarily, but not exclusively, in the Greater Toronto area and to a very great extent in the low rise residential sector. In his view (and I say in his view, because these opinions were not necessarily shared or held as strongly or clearly when these same questions were put to other witnesses from the builders) the trend in in the industry was to the greater or increasing use of stucco or EIFS and less masonry (bricks) because it was more energy efficient. He said that masonry was in direct competition to stucco—although other allegedly "competing" exterior finishes such as siding were not really put to him nor did he explicitly say that stucco was necessarily cheaper (and in fact refused to say so saying he did not know although that was repeatedly put to him in cross examination). In his view and experience, the stucco and EIFS industry was largely non-union and he was only aware of two contractors that were bound to collective agreements with a union whereas he knew 40-50 that were not. The basis of this knowledge was never really explored and I would note that in Mangoni's view Ras-Con engaged or subcontracted to many "contractors" as opposed to direct employees, who from the little evidence I heard about them, and were this in issue—and it is not—(e.g. a certification application for Ras-Con itself) might arguably be characterized as employees of Ras-Con or at least dependent contractors within the meaning of the Act. For what it was worth, Mangoni did not recognize a number of purported stucco contractors that Labourers' counsel put to him in cross-examination. I would also note that neither Mangoni (nor any of the other parties for that matter) addressed the question of unionization of stucco contractors in terms of the International Union of Painters and Allied Trades ("the Painters"), whose intervention I had also dismissed in an earlier decision but who asserted they had stucco contractors under agreement, and certainly the single contractor that formed the basis, *inter alia*, of the Painters' intervention. The point of this is I do not necessarily take Mangoni's evidence about the state of the industry or the existence or number of union stucco contractors (with the Labourers or otherwise) as opposed to the number of non-union stucco contractors to be necessarily "expert" or definitive (nor did anyone purport to qualify him as such an expert) but rather largely shaped by his own experience.

14. In any event Mangoni testified that in the late fall of 2020 he began to receive telephone calls from builders inquiring about what he knew about the Labourers acquiring bargaining rights for EIFS and

Stucco contractors. Mangoni then had a number of telephone calls with Domenic Montemurro ("Montemurro"), a personal friend and a principal of Medi Group Inc. ("Medi-Group"), a larger masonry contractor bound to the MCAT collective agreement (and there is no dispute is a director of MCAT). Montemurro advised Mangoni that the Labourers had taken the position that they had obtained the requisite level of support to trigger EIFS/stucco coverage under the MCAT collective agreement and would be conducting a "blitz" against non union stucco contractors commencing January 4, 2021 (and that he perhaps "not go on vacation" January 4, 5 or 6).

15. On January 4, 2021 Mangoni received a letter from Elliot Shapero, a Vice President of Mattamy Homes (Greater Toronto East Division), for whom Ras-Con had a stucco contract at the Kleinberg Summit Phase 5 site advising that "Mattamy has no choice" but to terminate that contract:

> "Unfortunately, and despite our efforts to resolve this issue, Mattamy has been advised the Labourers International Union of North America, Local ("**Local 183")** that the bricklaying subcontractors engaged by Mattamy and bound to Local 183 will not report for or engage in their contracted work if Ras-Con, as non-local 183 stucco contractor, attends the Kleinberg Summit Phase 5 site to perform stucco work." (emphasis in original)

16. Mangoni then had a number of telephone calls with Montemurro again, to attempt to determine what was going on, and who, after originally volunteering to have Rodrigues call Mangoni without success, then suggested that Mangoni call Rodrigues at the Labourers and gave him Rodrigues' telephone number. Mangoni had a number of telephone calls with Rodrigues that and the next day. According to Mangoni, Rodrigues told him that the bricklayers had agreed that EIFS/stucco work was now covered by the MCAT collective agreement (and I cannot help but observe, not the Housebuilders agreement with the Bureau and the builders with whom Ras-Con actually dealt and subcontracted with—not the masonry contractors), if Ras-Con signed a collective agreement giving the Labourers bargaining rights within 48 hours (and explaining the administrative steps necessary to sign the collective agreement), Ras-Con would be able to go back to work for Mattamy. According to Mangoni, Rodrigues told him that other stucco contractors who did not have bargaining relationships with the Labourers would lose their work, which could be obtained by Ras-Con "since the early bird gets the worm". There were a number of

intervening telephone calls or texts with John DaSilva, another union representative whom Rodrigues has told Mangoni would be contacting him, about those administrative steps and when they would be completed (filing Ras-Con's incorporation documents), but when ultimately Mangoni told Rodrigues that Ras-Con was not yet going to sign an agreement with the Union but going to retain legal counsel first, Rodrigues discontinued the telephone call but not before pointedly telling Mangoni that he was speaking from the office of another senior Vice President of Mattamy Homes, Michael Veltri ("Veltri"), apparently the Mattamy official responsible for one of the biggest contracts that Ras-Con was about to start in Milton.

17. It should be noted that a number of the texts between Mangoni and Rodrigues during those days were made exhibits. Rodrigues texts put a slightly different spin on these events. In a text in the afternoon to Mangoni, Rodrigues texted:

> "I understand you need a legal opinion but shouldn't take all day. But take your time Was you that called to sign an agreement Not me that called you It's your decision Personally it doesn't make any difference if you sign or not My time line still stands from what we spoke this morning"

In response Mangoni texted:

> "…Btw the only reason why I called you was because you made Mattamy send a bullshit letter to get me terminated from a job that I'm actually working on. So say what you want and do what you need but I'm not a person that takes bullying very lightly…."

to which Rodrigues texted back:

> "No Roberto you got it all wrong I really don't care you sign or not .Local 183 already has enough unionized stucco companies to do the work You are welcome to come in or you can stay non union All I was trying to tell you is the early bird gets the worm"

Whatever the different spin, there can be no dispute that the conversations were about Ras-Con losing its stucco work for the builders (and not the masonry contractors with whom Ras-Con did not deal and whose collective agreement—the MCAT collective agreement—the Union and MCAT asserted now covered stucco work).

18. The next day Veltri advised Mangoni that Ras-Con's contract for the application of EIFS at the Mattamy site in Milton, Ontario was terminated because the bricklayer contractors had been told by the Labourers not to "show up on site" if Mattamy allowed Ras-Con to continue working there.

19. On January 7, 2021 Mangoni received yet another letter from Mattamy Homes (this time from Fatima Mohammed, Manager Contracts & Purchasing, GTW Division) again advising that Mattamy Homes "has no choice but to terminate its contract with Ras-Con" for another site because:

> "Unfortunately, and despite our attempt to resolve this issue, Mattamy has been advised by Labourers International Union of North America, Local ("**Local 183**")that the bricklaying subcontractors engaged by Mattamy and bound to Local 183 will not report for or engage in their contracted work if Ras-Con as a non-Local 183 contractor attends [the site] to perform stucco work" (emphasis in original)

20. Equally on January 10, 2021, Ras-Con was advised to cease all work for CountryWide Homes for whom it had already begun work on four sites. On January 11, 2021 Mangoni received an e-mail from CountryWide Homes attaching a letter dated January 8, 2021 signed by Claudio Mangoni, Vice President of CountryWide Homes stating in part:

> "Effective immediately we will not be using any Non Union stucco contractors on our job sites until this matter is resolved with our Non Union contractor we currently have under contract. This will enable us to continue using our contracted unionized bricklayers on our projects, as per production schedule"

Mangoni had contracts for stucco work at four sites of CountryWide Homes.

21. On January 20, 2021 Mangoni received an e-mail from Shawn Mio ("Mio"), Vice President-Low Rise Housing for Sorbara advising that Sorbara would not use any non union stucco contractors on any project "until outstanding issues with LIUNA Local 183 are resolved". Ras-Con was requested to refrain from attending or performing any additional work at a Sorbara job site in Aurora when the masonry contractor, Legacy Masonry ("Legacy"), refused to attend at the Aurora job site on January 20, 2021. Mio further advised Mangoni that Mio had been

assured by Rodrigues that if Ras-Con was removed from the site, Legacy and the bricklayers would return to work. Ultimately Ras-Con was permitted to return to this Aurora site by Sorbara on or about January 29, 2021. More about that later.

22. Other than Montemurro, Mangoni conceded that he had not spoken to any masonry contractors, and in particular, any of the masonry contractors involved in any of the sites where he had lost stucco work—then again he said he would have no reason to speak to them, not only because they and their service (i.e. exterior masonry) were his competitors in a sense, but his arrangements and contracts were with the builders and not masonry contractors.

23. The Board also heard evidence from Nino Masucci ("Masucci") and Marco DiMichele ("DiMichele"), the site superintendent or supervisor and the assistant site superintendent respectively of Sorbara Homes at its Aurora project. Ras-Con was the stucco contractor for that project and Legacy was the masonry contractor for that project—it is bound to the MCAT collective agreement. They both testified about a meeting with Leonardo Inacio ("Inacio'") a representative of the Labourers, on Monday January 4, 2021, who walked into the site trailer (Sorbara's office on site) while they were speaking to each other. By that time both Ras-Con and Legacy had already commenced their work at the project. Legacy in fact had two bricklaying crews at the site.

24. Inacio introduced himself, gave Masucci a business card and asked who was the stucco contractor for the site. Masucci indicated that it was Ras-Con. Inacio then told them that stucco work had been "in the agreement" for two years and words to the effect "if Ras-Con was not union by Friday (January 8), we would pull your bricklayers off the site". DiMichele corroborated these statements by Inacio. In cross examination Masucci specifically denied that Inacio had said Legacy would pull the bricklayers off the site and insisted that he had said "we". As well in cross examination it was suggested that Inacio would deny having made these remarks and that Masucci's version was incorrect, but Masucci stood steadfast by his version of the conversation. In any event, at that point Masucci left the conversation to do other work (and in particular to telephone Luciano Melchiorre ("Melchiorre"), the General Manager of Sorbara to advise him what he had just been told) but DiMichele continued the conversation with Inacio. DiMichele asked Inacio something to the effect of "how was pulling off the bricklayers supposed to get Ras-Con to sign"? According to DiMichele, Inacio did not respond but merely shrugged his shoulders, smirked and looked

down at the floor. In fact, whereas Masucci had indicated that he had never met Inacio before, Di Michele said he had. In cross-examination, Di Michele explained that he had met Inacio previously on another job site in Stouffville where Inacio had "pulled the same thing"—saying that if the "Tyvek" contractor (an interior membrane or covering or vapour barrier applied to a home before the bricks are installed) did not sign with the union he would "pull the bricklayers" and in which case, as DiMichele understood it, the "Tyvek" contractor did sign with the union. In any event, shortly thereafter Inacio left the site trailer in Aurora.

25. Two days later, on or about January 6, in a conversation with John Lopes ("Lopes"), a non working supervisor of Legacy and not one of the working foremen of its two bricklaying crews on site, Lopes advised Masucci that "there was a good chance that production will come to a halt" after Friday but he still needed to speak to his boss and would update him. The bricklaying crews of Legacy had been at work on the project daily and Masucci knew this not only because he would see them himself when walking about the site but because they had to sign in daily and complete "COVID" forms due to the pandemic. On Friday January 8, 2021 Lopes told Masucci that there would be no bricklaying crews on the site the following Monday because of the stucco problem with the Union. Since Monday January 8, 2021 there have been no bricklaying crews on the Aurora site continuing until at least the last day of hearing of these matters. All of this (including the interaction with Inacio) was recounted in an e-mail sent by Masucci to Mio, albeit a week later, which was produced to the Union in cross examination.

26. As noted above in the testimony of Mangoni, Ras-Con had its contract with Sorbara terminated and directed not to report to the Aurora site any longer. In a letter dated January 20, to the Union Sorbara agreed to not schedule any stucco work at its jobsites until the matter with the Union was resolved. Again, more about this later. As a result Masucci telephoned Lopes on January 21 to confirm that Legacy's bricklaying crews would be returning to the job site the next day. Lopes indicated the bricklaying crews would be returning on Monday January 25 although he would return the next day (Friday January 22) to fix the tarping that had been compromised since they left. Notwithstanding these assurances, neither the bricklaying crews of Legacy or Lopes returned to the Sorbara site as of the last date of hearing in these matters. Photographs were filed by Masucci of various homes that Legacy had left on the site without completing, or in the middle of bricklaying (together with its equipment including scaffolding).

27. To fill in more of the details with respect to the non attendance of the bricklayers of Legacy at Sorbara's Aurora site, the Bureau also called Shawn Mio ("Mio"), the Vice President of the low rise construction group at Sorbara (and who had the previously referred to conversations with Mangoni about cancelling Ras-Con's work at the Aurora job site and directing them off the project). Mio had overall responsibility for Sorbara low rise construction projects under construction at the time including the Aurora project. The exteriors of the houses varied upon their design (some were only brick and stone or some involved some combination also including stucco) but he estimated 70% involved some application of stucco. Legacy, the masonry contractor, had been on site since the late fall of 2020 (about the same time as Ras-Con had started) and Mio recounted that when the bricklayers of Legacy ceased attending at the site, some houses had been completely bricked, two were in the middle of being bricked and approximately 16-18 were waiting to be bricked.

28. In addition to the Aurora site, Sorbara also had sites being built in Stouffville and Fergus. The masonry contractor on those sites was Barcelos Masonry Inc. ("Barcelos"), also bound to the MCAT collective agreement. Barcelos had bricklayer crews on both sites in the first week of January 2021 with homes being bricked, or waiting to be bricked. Neither of those sites however involved any application of stucco—and accordingly there was no stucco contractor on either site. However at all sites, including the Aurora site as previously described by Masucci and DiMichele, the bricklaying crews of both Barcelos and Legacy ceased attending at the sites from Monday January 11, 2021. Mio said at all sites there were houses ready and waiting to be bricked.

29. The Union asked for production of all three masonry contracts with Sorbara. They were provided. The only one that was actually signed by both Sorbara and the masonry contractor was the one between Sorbara and Legacy with respect to the Aurora site, and that appeared to be dated and signed on February 5, 2021—after the dates of the events in question here and after the bricklayers of Legacy ceased reporting to the Aurora job. In fact it was suggested to Mio that Sorbara had only bothered to get the contract signed in February because of the events that had taken place, which Mio denied because in his view the contract was already in place whether unsigned or not. That the Barcelos' contracts were still unsigned was even true for the contract with Barcelos for the Fergus site which appeared to be prepared in April

2019. However there was no dispute that masonry work had been performed by the masonry contractors at these sites. Mio understood that Sorbara's contract administration personnel had inquired about the signing of the Barcelos contract and had been advised that the principal was not available. Mio was certain that Barcelos had been paid for its work on the Fergus site, less certain about the Stouffville site and Legacy not yet for the Aurora site because it had only invoiced Sorbara in January, 2021 and therefore would not be paid by Sorbara until February of 2021. There was no dispute that no contract provided any specific timeline—i.e. that the bricklaying of certain homes had to be completed by a certain date. However Mio indicated that would have been reviewed with each masonry contractor in a "pre-bid" or "tender review meeting" with each contractor (although conceding he was not present at the one for the Aurora site) before they submitted their bid to Sorbara. At that time, Sorbara's timelines and expectations and the schedule for the project and when and how many homes would have had to be bricked per month would have been made clear—what Mio referred to as the "velocity" of what had to be done per month. Although Mio conceded that the masonry contractors could fall behind for whatever reasons, they would be expected to "make it up" and maintain Sorbara's schedule or "velocity" that the masonry contractors had committed to in accepting the work from Sorbara.

30. Aside from what Sorbara knew about the Aurora site, as recounted in the evidence of Masucci and DiMichele, Mio indicated that the first information that he received that there was a problem with the bricklayers attending other job sites was when he received an e-mail (which was made an exhibit) in the early afternoon of January 11 from Seyed Moghadasi, ("Seyed"), Sorbara's site superintendent at the Fergus job site. It attached a copy of the text from the previous Saturday night Seyed had received from Touro, the bricklayers' foreman of Barcelos. Seyed advised Mio that Touro had indicated:

> "…they can not have anyone on site till they resolve the issue with the Union without any indication of resuming to work. While I asked them that I do not have any stucco on my site his respond [sic] was that it does not matter and I can not have brick layers. Please be advised as of this moment all of their equipment is on site and if they do not show up we will have problem closing homes…"

and asking Mio for his help. The text exchange between Touro and Seyed was even more blunt:

> "God [sic] night The union 183 stopped work at Fergus in Sorbara, we cannot work on Monday, is mandatory, any information I will inform again. Problem with the staco[sic]. We are forced o[sic] stop. Monday I will have more information maybe for two 2 days I'm not sure"
>
> "Thanks for letting me know Please keep me posted on Monday hopefully it will not take more than two days Just that you know I do not think we are union in Fergus"
>
> "Ok the union wants the staco [sic] crews sign with the union 183, nothing with the brick, but we are forced to stop. Sorry"

31. In an attempt to "get the bricklayers back", Mio reached out, by telephone call, and when unable to connect by telephone call by text, to Adam Batista ("Adam"), one of the principals of Barcelos. The Board was provided with texts between Adam and Mio. Mio conceded that Adam suggested, or it seemed to Mio, that Adam had no choice, that his "hands were tied" but Mio denied that Adam told him he was facing a grievance from the Union. Mio said Adam claimed not to know what was going on. Adam told Mio that he needed to speak to Rodrigues at the Labourers and provided Mio with Rodrigues' telephone number. Mio knew who Rodrigues was from a previous conversation with him in October 2020 when, as Mio described it, there was "similar action" when Sorbara "had lost its bricklayers" with respect to a "Tyvek" subcontractor and Mio had spoken to Rodrigues to understand "what was happening" and why.

32. Mio did manage to speak to Rodrigues, who, according to Mio, told him Sorbara did not have bricklayers because Sorbara was using a non-union stucco contractor and if Sorbara "wanted to get the bricklayers back", Sorbara would have to send Rodrigues a letter promising not to use non-union stucco contractors and to use stucco contractors bound to agreements with the Labourers. Rodrigues referred to an earlier letter dated January 7, 2021 that Deco Homes had sent to the same effect (which letter was made an exhibit and was actually addressed to Legacy, the masonry contractor, not the Union, but as was pointed out to me, preceded the date of the letter that Deco Homes sent to the Board in the midst of the *prima facie* motion purporting to withdraw from the unlawful strike application, referred to in paragraph 11 of the *prima facie* decision and paragraph 7 and 8 above). A text was filed from Mio to Rodrigues on January 19, 2021, asking Rodrigues to send him a copy of the letter Rodrigues wanted and a response from Rodrigues indicating his secretary would do that. An e-mail was

received from Rodrigues' secretary on the same day enclosing a blank draft letter addressed to the Labourers:

> "Effective immediately, [ ] will not be using any Non-Union Stucco contractors on our job sites until this matter is resolved with our Non-Union Stucco Contactors which currently, we have under the contract or alternatively [ ] will hire a Local 183 Union Stucco company. This will enable [ ] to use our unionized bricklayers on our projects as per current production schedules"

with instructions to fill in the blanks and it "must" be on a company letterhead. That wording is very similar to the wording of the letter that Deco Homes had already provided. I cannot help but observe that that at this point in time Sorbara had no matters to "resolve" with Ras-Con, its stucco contractor, and only on one job site. In fact, as Mangoni recounted in his testimony, Ras-Con was instructed to leave the Aurora job site. Mio testified that Ras-Con asked permission to finish the house they were working on which permission was denied because Mio wanted to "honour his commitment" to Rodrigues.

33. Mio had the letter completed in compliance with the instructions on Sorbara letterhead and sent it to Rodrigues on January 20, 2021 with a covering e-mail explicitly stating:

> "By way of this e-mail, I am also requesting that Legacy Masonry return to the Aurora Hills (Aurora) jobsite to pick up where they left off starting **tomorrow.**
> I trust all will find everything in order and look forward to Legacy Masonry's return to site." (emphasis in original)

Copies were sent to Legacy among others. In fact Mio and Adam of Barcelos exchanged texts with Adam confirming in the evening of January 20 "Boys will be on site tomorrow". This was also further clarified in the conversations between Masucci and Lopes of Legacy as outlined in the testimony of Masucci recounted above. Mio conceded that he did this because Sorbara was willing to agree not to use non-union stucco contractors at the time if it resolved the bricklaying problem and would allow Sorbara to continue production.

34. But events did not unfold that way. Bricklayers of Barcelos did return to their sites at least for the following days of January 21 and 22. No bricklayer of Legacy did. Late in the day on January 21, 2021

the Board released the *prima facie* decision dismissing the Labourers' *prima facie* case motion and directing these applications proceed to these hearings. Later that evening Mio, among others (including Fernbrook Homes) received an e-mail from Rodrigues:

> "Now that an agreement has been reached with the Masonry Contractors Please remove your name from the board so we don't need to waist [sic] anymore time and money As you see on the letter attached other contractors that were name have also removed their names Send the letter direct to the board or send it to me and I will send it to the board Thank you"

It was never made clear to what, if any, agreement with the Masonry Contractors that the e-mail purported to refer. The e-mail attached the letter dated, January 18, 2021, which the Board had received from Deco Homes during the unsuccessful argument of the *prima facie* motion of the Labourers—again referred to in Paragraphs 7 (quoting, *inter alia,* paragraph 11 of the *prima facie* decision) and 8 above wherein Deco Homes sought to remove itself from these proceedings.

35. This time Mio did not send the requested letter. He tried to reach Rodrigues the next day by telephone and text. Ultimately they connected on the next day January 22, 2021. Immediately before they spoke Mio received another e-mail from the Union "sent on behalf of Cesar Rodrigues" which attached again attached Rodrigues' e-mail from the evening before. This time it attached a draft letter to the Board to be completed and put on company letterhead with instructions on how to file the letter electronically (together with the Board's electronic transmittal form). Mio and Rodrigues spoke by cell phone approximately at 3 p.m. shortly after Mio received this second e-mail.

36. According to Mio, he asked Rodrigues why he was asking him to send this second letter—he had already done everything Rodrigues had asked of him. Again according to Mio. Rodrigues asked why Sorbara was part of the unlawful strike application—"everyone else was backing out" and unless Sorbara provided this letter, Sorbara "would be left alone". Mio told Rodrigues that he could not make that decision for Sorbara—they were part of a larger group—and he would have to "take it to the lawyer first". Again according to Mio, Rodrigues told him if Sorbara refused to submit this letter, Sorbara would "lose their bricklayers again". Mio conceded that he was quite upset and may have used some profanity as he felt Rodrigues had already "put a gun to his head" and he had already complied. Mio asked Rodrigues what came

next, "what else would he want me to do"—but Rodrigues was clear—Sorbara would lose their bricklayers again if Sorbara did not submit this letter. In Mio's view, there had been no prior discussion about withdrawing from the Board proceedings as part of any earlier "deal" and Rodrigues was simply "changing the goal posts". Mio vigorously resisted the suggestions put to him in cross examination that this was simply a disagreement between him and Rodrigues about what they had previously agreed. According to Mio, he believed and told Rodrigues that Rodrigues was "just going to do what he wanted to do anyway so he should just do it". Rodrigues then hung up the phone. Mio did not send this second letter Rodrigues had demanded. Mio was vigorously cross examined but essentially stood by his version of events and what was said in the conversations. Among other things, Mio explicitly denied that he had spoken to the Bureau before his exchange with Rodrigues or that Sorbara was refusing to send the letter to the Board Rodrigues wanted because Sorbara was complying with the Bureau's desire that Sorbara remain involved in and support the unlawful strike application.

37. Later that evening Mio received an e-mail from Melchiorre, Sorbara's construction manager, that another site superintendent had received a telephone call from "one of his masonry crews" that evening and "they were told by the owners of Barcelos Masonry to remove all scaffolding/ materials from the job site". In fact the bricklayers of Barclelos did so and notwithstanding the bricklaying Sorbara expected them to do had not been completed, have not returned to any sites of Sorbara since. Of course neither have any bricklayers in the employ of Legacy.

38. Mio testified that Sorbara had not initially replaced Ras-Con as the stucco contractor in Aurora because there had not been enough time to have the work priced and quoted in accordance with Sorbara's procedures—but he did receive a telephone call from someone who identified himself as Yusef from Anatolia Stucco who told him that he had gotten Mio's telephone number from Rodrigues and Rodrigues had told Yusef that Yusef should call Mio because Sorbara could need some stucco work done. Ultimately Sorbara did instruct Ras-Con to return to the Aurora job site after an absence of some 4-5 days. In Mio's view, as Sorbara was not getting the bricklaying work done, it might as well get the stucco work done.

39. The Board also heard testimony from Mario Iaboni ("Iaboni"), the site superintendent for Fernbrook Homes ("Fernbrook") at its Westham Park project in Oakville where Fernbrook is building

approximately 60 detached single family estate homes. The exterior of the homes largely consists of a combination of brick/stone and stucco. Fernbrook's masonry contractor at this project was Uni-Tri Masonry ("Uni-Tri") which was bound to a collective agreement with the Union in the area covering the project. The stucco contractor at the project was supposed to be Tri Stucco Contractors ("Tri Stucco") which was not bound to any agreement with the Union in the area covering the project. Uni-Tri had already commenced working at the project (with two bricklaying crews—one of its own direct hourly employees and another which it had subcontracted the work to) but Tri Stucco had not.

40. On Monday January 11, 2021, there were no bricklaying crews on site as they had been previously and were expected to be. Iaboni called Mauro Castellano ("Mauro"), the foreman of the bricklaying hourly crew. Mauro told Iaboni that the bricklayers were told "not to show up" by Mauro's boss at Uni-Tri, Mike. Mauro may have told Iaboni that his crew was working elsewhere that day (at Wasaga Beach). Mauro was unaware whether the subcontracting crew was working elsewhere that day—or at all. Iaboni got hold of Mike of Uni-Tri later that morning. In response to why the bricklayers were not on site that morning, Mike told Iaboni it was because "the Union is trying to get the stucco people to join the Union" or words to that effect and they were told by the Union "not to come in". It certainly does not appear that Uni-Tri was unaware that the bricklaying crews were not at the Fernbrook project.

41. Between Monday January 11, 2021 and Wednesday January 20, 2021 no bricklaying crews attended at the project to perform any bricklaying work.

42. Iaboni identified a letter dated letter January 21, 2021 on the letterhead of Fernbrook, from Mike Riccardi ("Riccardi"), identified on the letter as "VP, Construction" of Fernbrook to the Union with the reference line "RE: Stucco". Iaboni said Ricccardi had shown him the letter and he had sent it to the Union confirming that Fernbrook would "use Union stucco contractors to get the bricklayers to come back to work". The letter was almost identical (if not verbatim) to the letter Mio had sent as demanded of him by Rodrigues—and not dissimilar to the letter that Deco Homes had sent that Rodrigues had referred to in his conversation with Mio. The Union objected to the admission of the letter through Iaboni insisting Riccardi should be called in order for the letter to be admitted. I rejected that objection and advised the Union if it questioned the contents, the receipt of the letter or whatever (and it was never really made clear to me what exactly the Union actually

questioned-other than the letter was not being tendered through Riccardi), that could go to the weight I should give the letter or the Union could call any evidence it wished about the letter.

43. However, again events did not unfold exactly as Fernbrook may have wished. On January 21, the bricklaying crew that was the subcontractor of Uni-Tri, headed by one of the owners of the subcontractor, Alexandre ("Alex") Marcos Oliviera, did return to the site. On the next day the hourly bricklaying crew led by Mauro also returned to the site. Mauro told Iaboni that it was "done" and "everything was good with the Union for them to return" or words to that effect.

44. But on Monday January 25, 2021 no bricklaying crews again attended at the job site to perform any bricklaying. In fact one of the crews was taking down their scaffolding. Iaboni spoke to Mike of Uni-Tri to ask why and was told by Mike that it was because Riccardi and Fernbrook had "appealed the court case" and "they can't come because of that" or words to that effect. It should be noted that Fernbrook was also one of the recipients of the e-mail that Rodrigues had sent Mio from Sorbara demanding the letter to the Board withdrawing from the unlawful strike application and which, like Mio. Fernbrook did not send. Iaboni also spoke to Marcio Alacantara ("Marcio"), Alex's partner with respect to the subcontractor bricklaying crew on January 28, 2021, and again asked why the bricklayers were not returning to the job site. Marcio told Iaboni (although in cross-examination Iaboni was confused whether his conversation was with Alex or Marcio) that the Union told Marcio (and again in cross examination Iaboni was confused if the conversation with the Union was with Alex or Marcio) that they can't be there" and "the bricklayers can't come to that site". Marcio indicated to Iaboni that when he got the direction from the Union, he had called Joey, one of the principals of Uni-Tri to complain that they could not continue doing this because they were now starting to lose money and Joey indicated that if they wished, he (Joey) could get or find another job site for this bricklaying crew to work. Marcio told Iaboni the bricklaying crew would come back to the job site "once everything is finalized". Pictures of the started but not finished bricklaying work that Uni-Tri left were filed.

45. Again the Union asked for the masonry contract between Fernbrook and Uni-Tri for the site be produced. It was (or the contract made by the Fernbrook equivalent corporate entity specifically incorporated for this site). Again there was no dispute that the contract

required subcontractors to coordinate their work with other subcontractors, precluded subcontractors form assigning work to another subcontractor without the permission of Fernbrook, required Uni-Tri to give written notice of any delay in completion of the work for which Fernbrook could remove Uni-Tri, and allowed Fernbrook to take away or increase the number of homes given to Uni-Tri to do. Significantly, although it referred to a schedule to perform the work, no such schedule was attached.

46. When Uni-Tri ceased attending at the site, they were in the middle of bricking two houses and of the 14 houses on the site, there were still seven to be bricked.

47. Again the Union and MCAT called no evidence. The only evidence that I have before me is as recounted above—uncontradicted and unchallenged except as qualified in cross examination.

The positions of the Parties

(a) The Bureau

48. The Bureau extensively reviewed all the evidence from many perspectives including chronologically overall regardless of from which witness the evidence was elicited or the order in which they testified. What the Bureau said the evidence made crystal clear is that any suggestion initially put forward by the Union in the *prima facie* motion that what was happening here was simply bricklayer contractors making individual choices about where to send their crews, which clients to serve when, or simple free market capitalism in the face of a possible grievance from the Union making their own business decision to avoid, was a complete sham and utter fabrication. What had really happened here was a systematic organized scheme by Rodrigues and the Union to acquire bargaining rights for stucco contractors like Ras-Con by pressuring builders to not use Ras-Con by improperly forcing masonry contractors and their employees to refuse to perform masonry work they had contracted to perform for the builders at various sites—and then even further to continue to do so against those builders who refused to withdraw from the unlawful strike application. In counsel's words Rodrigues was the "puppet master" and the masonry contractors and their employees were the "puppets".

49. The Bureau said what at the outset may have arguably (and not really or seriously at that) appeared to have been coincidental, rising to

circumstantial, had become even clearer so there could be no doubt as more and more evidence was adduced and the pattern emerged—with Rodrigues and the Union at the centre:

- Stories of a campaign by the union to organize the stucco contractors and a "blitz" to commence in January 2021;

- Mangoni and Ras-Con losing his stucco contracts (some already started) from his unionized builder clients explicitly (both verbally and in writing) telling Mangoni and Ras-Con it was necessary because they had been told by the Union that the builders' already contracted and unionized bricklaying contractors would not attend or continue to attend to perform their contracted bricklaying work at their sites because of the presence of Ras-Con (or a non unionized stucco contractor) thereby disrupting the production (in the winter a particularly vulnerable time to close in or brick houses);

- Rodrigues specifically telling Mangoni that he could avoid all this by Ras-Con signing an agreement with the Union ("the early bird gets the worm");

- masonry companies not attending at work job sites where they had already accepted contracts and where they had generally already commenced, but nor yet completed the work, sometimes stopping attending in the middle of bricking a house and leaving their equipment and materials behind;

- the masonry foremen and/or the individual bricklayers advising builders' site superintendents that they were forced or prohibited from attending by the Union because of disputes about using non union stucco contractors;

- ultimately the union representatives themselves telling the builders they would "pull the bricklayers" (Inacio to the Sorbara Homes superintendents in Aurora and, if that somehow was not clear enough, Rodrigues to Mio, the Vice President of Sorbara);

- Moreover in the midst of all of this was Rodrigues, in charge, who was providing draft letters for the builders to complete on their letterhead about no longer using non-union stucco contractors—certainly for Sorbara and in strikingly similar language for Countrywide and Deco Homes;

- If that somehow was not blatant enough, when particular builders (Mio at Sorbara and apparently Fernbrook) "dared" not withdraw from the unlawful strike application as Rodrigues demanded (as Deco and CountryWide Homes had in the middle of these proceedings) in the form of a draft letter that Rodrigues provided for them to complete and send to the Board (remarkably identical to the letters the Board already received from Deco and CountryWide Homes) again their bricklayer contractors ceased attending at the sites (after briefly returning to the sites—or providing assurances that they would—after already providing the first letters indicating they would not use non union stucco contractors first demanded) to complete the bricklaying they had started just as Rodrigues had threatened would happen and did. This clearly was a reprisal for participating in a proceeding under the Act contrary to Section 87 (2) of the Act.

50. The notion that this was the result of independent or voluntary or autonomous decisions of masonry contractors due to some potential threat of a grievance by the Union was equally a sham asserted the Bureau. LOU #9 clearly demonstrated the Union's interest and intention to attempt to organize stucco contractors (which was not disputed by the Union which made the same point in its submissions). Even the most cursory examination of LOU #8 of the MCAT agreement, the purported basis of such a grievance, the Bureau asserted immediately demonstrated how ridiculous the assertion was. I was pointed to LOU #8 itself:

LETTER OF UNDERSTANDING NUMBER 8

WORKING FOR NON-UNION BUILDERS or CONTRACTORS

In the Matter of a Collective Agreement between:

Masonry Contractors' Association of Toronto
("MCAT")

and

Bricklayers, Masons Independent Union of Canada, Local 1
("Local 1")
Labourers' International Union of North America, Local 183
("Local 183") and
Masonry Council of Unions Toronto and Vicinity("MCUTV")

And In the Matter of a Collective Agreement between:

Masonry Contractors' Association of Toronto
("MCAT")

Bricklayers, Masons Independent Union of Canada, Local 1
("Local 1")

WHEREAS Local 1, Local 183 and the MCUTV and MCAT are bound to a collective agreement applicable to the residential sector of the construction industry in Ontario Labour Relations Board Geographic Areas 8, 9, 110, 11, 18 and that portion of Ontario Labour Relations Board Area No. 12 west of the Trent Severn Waterway ("the MCUTV collective agreement").

AND WHEREAS MCAT and Local 1 are also parties to a collective agreement applicable to all types of construction throughout the Province of Ontario, save and except those persons covered by the MCUTV Collective Agreement ("the Local 1 collective agreement").

AND WHEREAS the parties have discussed the importance of ensuring that house builders bound to a collective agreement with LIUNA Local 183 or BMIUC Local 1 ("unionized builders") have access to skilled workers to perform bricklaying and masonry work, and concerns that some unionized builders are facing delays while unionized bricklaying companies and crews perform work for non-union builders;

NOW THEREFORE the parties agree as follows:

1. If requested by the Union or MCAT's Board of Directors a main contractor shall withdraw his forces from working for a non-union builder, meaning a builder who is not bound to a collective agreement with LIUNA Local 183 or BMIUC Local 1 are in the relevant area ("non-union builder(s)"), or where appropriate delay performing work for the non-union builder, and perform work for a unionized builder, subject to the following conditions:

    a. The request must be in writing, and delivered by email, fax or by hand;

    b. The unionized builder requiring a bricklaying contractor must be prepared to pay a fair market price for the work; and

    c. The main contractor shall be permitted to delay departure by up to five (5) days to complete a house which has already been partially bricked;

    however

    d. It is understood that no main contractor shall be requested to withdraw their forces under this Letter of Understanding where a non-union builder has contracted or subcontracted all bricklaying and masonry work (on all of their current projects in the Province of Ontario) to a company, or companies, which are signatory to the Brick 1 collective agreement or the MCUTV collective agreement.

2. If advised by the Union or MCAT's Board of Directors that a main contractor bound to this collective agreement requires subcontractors, any subcontractor bound to the Local 1 collective agreement or the MCUTV collective agreement who is working for a non-union main contractor, shall withdraw his forces from working for the non-union contractor, and perform work for the unionized main contractor under the terms of the applicable collective agreement.

3. This Letter of Understanding shall apply to any residential masonry construction work falling within the scope of the Local 1 collective agreement, or the MCUTV collective agreement. It shall not apply to work under the Local 1 collective agreement in the industrial, commercial and institutional sector of the construction industry.

4. This Letter of Understanding is effective immediately, and shall remain in effect until April 30, 2022.

Signed and dated at Toronto this *5th* day of *July,* 2019

As the Bureau pointed out it is patently obvious that LOU #8 is directed at a situation where the masonry contractor is required to remove and reassign its forces away from a non-union builder to a union builder—not at all even remotely the situation here where all these builders were union builders bound to the Housebuilders collective agreement. The masonry contractors were being directed away from the sites of union builders—and that assumes that LOU #8 was lawful (which the Bureau and Ras-Con asserted initially in their applications it was not on its face—although in argument the Bureau stated it was not necessary that I determine this question to entitle the Bureau to the relief it sought). An argument that somehow there was a potential grievance by the Union against any builders under the Housebuilders collective agreement was equally ridiculous when stucco was not explicitly listed and had never been in the quite extensive subcontracting language of the Housebuilders agreement and the Union had never even attempted to trigger the stucco coverage under the (different terms) of the Housebuilders agreement.

51. But most importantly of all, there simply was no real evidence of any such grievance at all—either having been filed or even really having been threatened to be filed.

52. As it had in the *prima facie* case motion, the Bureau essentially referred me to the same authorities—*Domglas Ltd.,* [1976] O.L.R.B. Rep. 569 (Carter, Ade, Boyer); *Empress Graphics Inc. v. G.C.I.U., Local 500M*, [1989] O.L.R.B. Rep. 587 (MacDowell); *Associated Freezers of Canada Ltd. v. Warehousemen & Miscellaneous Drivers, Local 419*, [1972] O.L.R.B. Rep. 445 (O'Shea, Hodges, Wightman); *Sarnia Construction Assn. v. U.A.*, [1996] O.L.R.B. Rep. 488 (Surdykowski); *Horton CBI Ltd.*, [1985] OLRB Rep. 880; *Lafarge Canada Inc. v. Teamsters, Local 141*, [2001] O.L.R.B. Rep. 1031 (McKee); *Canada Elevator Manufacturers v. I.U.E.C., Local 90*, [1975] O.L.R.B. Rep. 353 (Adams, Bell, Hodges); *Brandon General Contractors Ltd. v. K.W. Building & Construction Trades Council*, [1972] O.L.R.B. Rep. 900 (Brown, O'Keeffe, Robinson); *Inteva Products Canada ULC v. Unifor, Local 1090*, [2019] O.L.R.D. No. 575 (Fishbein); *State Contractors Ltd. v. U.A., Local 552*, [1985] O.L.R.B. Rep. 1304 (Furness); *Kirkwall Construction Ltd. and Vancouver General Hospital, Re*, [1984] BCLRBD

No. 20 (BC LRB); *UGCW v Domglas Ltd.* (1978), 19 OR (2d) 353 (Ont. Div. Ct.); *Monarch Fine Foods Co.*, [1986] OLRB Rep. 661; *CWA Local 204 v Kingston Whig-Standard (The)* (1995), 51 L.A.C. (4th) 137; *Beer Precast Concrete Ltd., Re*, [1969] OLRB Rep. 1108; *Ben Plastering Ltd.*, [1987] OLRB Rep. 1347; *Dover Corp. (Canada),* [1972] OLRB Rep 435; *Bay-Tower Homes Company Ltd.* 1988 CanLII 3739 (ON LRB).

53. The Bureau said this was more than enough evidence to warrant my making declarations and issuing orders against the Union and Rodrigues under Sections 79, 81 and 83 of the Act. In the view of the Bureau these were classic "recognition" strikes to improperly pressure the builders to either recognize the Union for stucco work (in effect amending the Housebuilders agreement—either its recognition or subcontracting clause—mid term to achieve something not yet achieved by the Union in negotiating the Housebuilders agreement to which the Bureau and its members were bound) or the builders to pressure the non union stucco contractors, like Ras-Con, to recognize the bargaining rights of the Union for which there was no basis under the Act.

54. The Bureau stressed that in construction industry cases, the Board has always been sensitive and never wilfully blind to the reality of what was actually happening on the ground in the construction industry whether it was a picket line on a job site (see *Horton CBI, supra* at paras 16, 17 and 20; *Brandon General Contractors, supra*) or for that matter any contractual language that purported to enable a trade union employees to withdraw their services during the operation of a collective agreement (see *Empress Graphics, supra,* at paragraphs 18-23 and the cases reviewed there including some construction industry cases). As well, anticipating the arguments that the Union had already put forward at the *prima facie case* motion*,* based on *Baycliffe Homes,* 2021 CanLII 2843 (ON LRB) and *Wharton Industrial Developments Ltd,* [1982] OLRB Rep. July 1105, 1982 CanLII 942 (ON LRB), the Bureau, as it had at the *prima case* motion, noted that the fact that an employer assigned employees to other work after an illegal strike had occurred did not negate or excuse the fact that an illegal strike had occurred—see *State Contractors Ltd. supra*, at paragraph 9:

> 9. If a strike did occur on the job on August 6, 1985, it was clearly during the term of the provincial collective agreement. Section 72 provides that where a collective agreement is in operation no employee bound by the collective agreement shall strike. Section 1(1)(o) provides:

> "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;
>
> Did Mr. Deroche and Mr. Smith engage in an unlawful strike on the job on August 6, 1985? In the opinion of the Board they did engage in an unlawful strike. Their refusal to work on the job amounted to a refusal to work in combination or in concert or in accordance with a common understanding and was also concerted activity designed to restrict or limit output. Counsel for the respondents relied on the decision of the Board in *Wharton Industrial Developments Ltd.,* [1982] OLRB Rep. July 1105, as establishing the principle that where an employer schedules other work there has not been a cessation of work and that therefore a strike has not occurred. The factors in *Wharton Industrial Developments Ltd., supra,* are quite different from the facts in the instant application. In *Wharton Industrial Developments Ltd., supra,* the sub-contractors *of their own volition* decided not to schedule certain work and the Board decided that accordingly there was no cessation of work. In the instant application Mr. Cossarini, on behalf of the applicant, required work to be performed at the job and the refusal constituted a strike within the meaning of section 1 (l)(o). Such a strike was unlawful. The fact that Mr. Cossarini was prepared to make alternative work available to the two men did not nullify their earlier refusal to work at the job. The work which they were initially expected to do at the job was not done and there was no suggestion that such work was being performed on the date of the hearing of this application. An employer's flexibility in providing other work at a different location does not, having regard to the nature of the construction industry, mean that a strike did not occur. The scheduled work at the job was not performed while the applicant clearly required and continued to require such work to be performed….

(b) The position of Ras-Con

55. Ras-Con adopted the submissions of the Bureau with respect to the violations of Section 79, 81 and 83 of the Act. But Ras-Con went further and said the evidence demonstrated a violation of Section 76 of the Act—that the Union (with the coordination with MCAT) sought by intimidation and coercion to compel Ras-Con and Mangoni to recognize

and 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.

56. In support of this position, Ras-Con pointed me to *Christian Labour Association of Canada,* [1977] CanLII 475 (ON LRB) where a work stoppage had occurred at a construction project due to the presence of a contractor bound to a collective agreement with CLAC and which work stoppage ceased when that contractor was replaced with another contractor bound to a collective agreement with a member of the local Building Trades Council. Specifically the Board stated at paragraph 7:

> 7. Indeed, although the Board was deprived of the benefit of Mr. Martin's evidence, he did indicate in his argument that the respondents were seeking to enforce "the no sub-contracting clause" contained in its collective agreement with E.A. Martin, the general contractor. The Board asked Mr. Martin to explain the reason why members of the Building Trades Council would not have recourse to the arbitration of its dispute with the general contractor under section 112(a) of the Act, a procedure designed to provide immediate relief for alleged wrongdoings of this nature. Mr. Martin replied that he, in his capacity as a member of The Ministry's Construction Industry Review Panel, had no confidence in the efficacy of that remedy. The obvious inference to be concluded by the Board from Mr Martin's remarks was that recourse to illegal activity of a coercive nature was more effective in achieving the respondent's objectives. Through the co-operation of the respondent con-tractors, namely E.S. Martin (Ontario) Ltd. and V.A. Mechanical Ltd., Local 593 has been able to attain its objectives of denying members of the applicant trade union the freedom to join a trade union and participate in its legal activities. The Board simply cannot condone these patently illegal activities, designed to deprive the citizenry of this Province of the representative rights enshrined in The Labour Relations Act.

57. Ras-Con, as it had in the *prima facie* case motion, also referred me to *Enka Contracting Ltd.* [2004] OLRB Rep. September/October 926; 2004 CanLII 30575 (ON LRB) and in particular paragraphs 84-89:

> 84. We have already indicated our finding that the primary purpose behind the union’s proposed abandonment of bargaining rights was to coerce the employer into a

voluntary recognition agreement extending existing bargaining rights to cover Malvern. Having heard the submissions of the parties, we also accept and find that the union has determined that it is not in its members' interests to maintain a collective bargaining relationship with Enka, if it cannot also represent employees of Malvern. This would seem, however, to be the alternative outcome sought by the union if it could not obtain its primary objective.

85. Coming on the heels of the Board's decision in the union's earlier application under sections 1(4) and 69 of the Act, the union was clearly attempting to use the threat of withdrawal of bargaining rights in order to obtain something that it could not otherwise obtain under the Act.

86. Conversely, the position maintained by Enka in refusing to enter into a collective agreement covering Malvern, is one to which it would seem to be entitled, based on the Board's decision in the earlier matter.

87. 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. There is something quite inappropriate about the union's conduct where it has sought a related employer declaration from the Board, the request has been denied, and then the union threatens the employer with loss of business if it does not give in to its demand.

88. On the other hand, we find nothing inappropriate in the union's conclusion that a continuing collective bargaining relationship with Enka is not in the interests of its membership. The union is entitled - in fact obliged - to make such decisions about what is or is not in the interests of its members. Whether or not the Board would come to the same conclusion is not the question. Certainly the union's decision on this point cannot be said to be irrational or obviously unreasonable.

89. We conclude that the union's primary purpose, that being to coerce Enka into a collective agreement that would extend bargaining rights to Malvern is a breach of the Act. We also find that the union is quite properly entitled to discontinue its bargaining relationship with Enka where it

> has determined that the relationship was no longer in the interests of its members.

58. Lastly, although admittedly in completely different factual contexts than here, for the notion that economic threats could constitute intimidation and coercion withing the meaning of Section 76, Ras-Con referred me to *Chinook Chemicals Company* [1989] OLRB Rep. October 1021 at paragraphs 24-25; *Atlas Specialty Steels,* [1991] OLRB Rep. June 728 at paragraph12; and *Purple Heart Film Corporation,* [1979] CanLII 1006 (ON LRB) at paragraphs 35 and 36.

59. Ras-Con sought declarations and orders like the Bureau—but also sought damages, although it was agreed that the Board would remain seized with respect to any quantification of damages if owing.

(c) The position of the Union

60. Not surprisingly, the Union stated that I should look at this from a completely different perspective—there simply was no "strike" within the meaning of the Act that had been established on the evidence—and in that sense this case was no different from the recent decision (perhaps not coincidentally contested by some of these same parties) in *Baycliffe Homes* 2021 CanLII 2843 (ON LRB) either in analysis or result—as it had argued in the *prima facie* case motion.

61. The Union said I needed to fully appreciate the context. First this case had nothing to do with the Housebuilders collective agreement—only the MCAT collective agreement, the only agreement under which an illegal strike was allegedly being conducted. Moreover the Housebuilders collective agreement only applied in Board Area 8—so some of the projects (e.g. the Sorbara project in Fergus) were beyond its geographic scope and therefore effectively were "non union" if that really mattered.

62. Second because of the chaotic nature of the bricklaying industry, particularly in the residential sector, and particularly in very busy times when the house building industry was "on fire" (which really no one disputed at least in the GTA) when the demand for residential bricklayers could greatly exceed the supply, the MCAT and the Union had agreed to what had to be conceded to be (and the Bureau did not dispute the characterization) in Article 15 an extraordinarily lengthy, elaborate, complex and sophisticated regime to deal with subcontracting. It provided for, *inter alia,* lead contractors, secondary lead contractors (defined terms), who could be turned to for the

payment of delinquent union remittances and contributions, elaborate notice provisions in different circumstances, elaborate qualifying restrictions depending, *inter alia*, number of bricklayers employed, geographic areas and circumstances prevailing in those areas, different amounts of liquidated damages (in varying significant amounts calculated on a daily basis and per house), different enforcement provisions (some almost "lien like") open to and in the control of the union and other unique provisions. To this complex "stew" was added LOU #8 and #9.

63. The Union did not resile from the fact that it sought to organize stucco contractors as it had long openly done (and perhaps notoriously) with respect to other types of contractors in other aspects of residential construction. In LOU #9 the Union and MCAT had agreed that stucco work was covered by the MCAT agreement and the agreement would apply to that work. That was not in dispute—and certainly not between MCAT and the Union, the parties to the MCAT agreement. All that LOU #9 had additionally done was delay the application of some of the provisions of Article 15 (the subcontracting provisions) until certain triggering provisions were met (the Union advising it represented 65% of contractors employing 65% of stucco employees) and even then prior subcontracts could be honoured up to December 31 2021.

64. LOU #8 (reproduced above) was not specifically or exclusively related to stucco. It was a system agreed to by MCAT and the Union, which either could trigger, to give preference or priority to Union builders over non union builders particularly when there was a shortage of bricklayers. It did not stipulate that the work for those non union builders would not be completed, merely delayed and performed after the work for Union builders (or the "good builders" as the Union characterized them) or even non-union builders if all of their bricklaying and masonry work was contracted or subcontracted to someone bound to the MCAT collective agreement—and now the MCAT agreement was amended by LOU #9 to include stucco work. So, in the Union's view, non-union builders could be "put further back in the queue" to have their work done—and now with LOU #9 a builder could be non union pertaining to its stucco work just as it could be non union outside Board Area #8 (the limited geographic scope of the Housebuilders collective agreement). LOU #8 did not contemplate a strike at all—merely a priority of work. Moreover, unlike many of the provisions of Article 15, there was no consequence or penalty specified—so if a contractor refused to comply, maybe the contractor would face a grievance by the Union, but it certainly was not clear what the remedy

would be—certainly whether any damages were payable was questionable. The Union conceded that its interpretation had not been upheld in any grievance yet—no one had challenged or tested the Union's interpretation yet. In the Union's view this was good for the unionized industry—and certainly MCAT had agreed to it—and this was regardless of the views of the builders and certainly of the non-union stucco contractors like Ras-Con. In fact it appeared that some builders, Deco, CountryWide and Mattamy Homes at least now shared that view—they had decided "non union stucco contractors were not worth it" if it meant losing their priority.

65. But in the Union's view, I need not and should not interpret LOU #8 (or #9 or the MCAT agreement, for that matter)—there was no masonry contractor here to argue the opposite side in some specific set of facts in some grievance and whatever these proceedings were, they were not a "test case" of LOU #8 or #9. For purpose of these applications, it was enough that I be aware that the Union had an arguable case interpreting the unique language that the Union and MCAT (not the Bureau or Res-Con) had crafted.

66. What mattered was there was no strike—not a single project or site had been "shut down", there was no picket line, there was no disruption of the work of other employees, no employees had "downed tools" and left the job site. There was no mystery that the Union wished to have stucco work done union—apparently everyone understood that—the builders' site superintendents, the masonry contractors, the bricklaying crews' foremen, and the bricklayers—all the witnesses—but that did not make a strike. Essentially they all conceded that the bricklaying crews were at other sites because they had been directed or assigned there by their own employers (the masonry contractors) as was within the purview or the right of any masonry contractor—particularly here where even when there were actually signed contracts that could be pointed to, none had any specific schedule requiring any particular bricklayer to be working on any particular house at any particular time. There was no cessation, refusal or disruption of work by the bricklayers for their employer, the masonry contractor, albeit the bricklayers might not be at a particular site a particular builder wanted when the particular builder wanted it. Moreover how could the work that the bricklayers were doing at other sites "be designed to restrict or limit output"? Certainly the masonry contractors' output was unaffected—it just was not at a particular site that a particular builder wanted at a particular time. To the extent there were some suggestions that this was at the direction of the Union or Rodrigues, I should not be

surprised—who more easy for a supplier working elsewhere facing an unhappy customer or client to blame than the Union? The Union pointed out that not a single masonry contractor (or bricklayer for that matter) was called as a witness—how hard would it have been to summons one to a hearing and simply ask them if their bricklayers were on strike, had refused to go to work where or when they were instructed, or had somehow restricted or limited their output?

67. Again the Union referred me to *Baycliffe Homes*, both for its analysis of the law and the cases, which it said was indistinguishable (at least in any significant way) from what had transpired here:

> 59. The most important of the statutory provisions is the definition of strike found at subsection 1(1) of the Act. A plain reading of the subsection makes it clear that it pertains to the actions of employees, not the actions of an employer. In order for there to be a strike, there must be a "cessation of work, a refusal to work or to continue to work **by employees**" or a "slow-down or other concerted activity **on the part of employees**" (emphasis added).
>
> …
>
> 62. To begin, CJM had performed no masonry construction work at Ajax prior to November 18, 2020. CJM had moved its forklift and scaffold onto the site, and had brick and stone delivered, but the construction work had not commenced before Mr. Carone made the first impugned telephone call that morning.
>
> 63. There is no need to parse the details of the telephone conversations that took place that day and were described in testimony. The net result is that Mr. Dantas made a business decision not to start work at the Ajax site after hearing what Mr. Carone and Mr. Rodrigues had to say, after speaking with his lawyer. 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.
>
> 64. The testimony of Mr. Dantas makes it clear that he never assigned any employee of CJM to start work at Ajax, and that he changes work assignments on a daily basis as

exigencies warrant. There was simply no employee that ceased to work, refused to work or refused to continue to work at Ajax. As such, there was no strike.

…

66. Mr. Dantas would have liked to work on the Ajax site. He had told employees there might be work there. However, he never told anyone specifically to report to work there and never explained to any of them why the Ajax "job was not ready". Once again, he made a business decision not to start work there. An employer's business decision is not a strike by employees.

…

70. As the parties provided the Board with extensive case law, the Board will review it. However, the unique facts of this case make almost all of it distinguishable.

71. In *Domglas, supra*, employees walked off the job to protest the federal anti-inflation legislation of the time. Therefore, it is not similar at all. Likewise, in *Inteva, supra*, employees walked off the job to protest the announced closure of the local GM Plant. There were many proofs of the Union's role in promoting the strike including pamphlets, sit-ins and press conferences.

72. In *Horton CBI, supra*, and *Associated Freezers, supra*, employees were honouring a union picket line. Again, nothing similar is present on the facts of this case. In *Ben Plastering, supra*, and *Dover Construction, supra*, employees were heeding directions from the affected union not to perform work. In this case, Local 183 and Mr. Rodrigues have not communicated with the employees (to the extent there are any, as work at Ajax had never started). Their only communication has been with the employers, CJM and Baycliffe.

73. In *Empress Graphics, supra,* employees present in the workplace were refusing to perform certain work. Here, there are no employees in the workplace. Some allegedly affected employees are on lay-off while others are continuing to work at the site at which they have always worked. This is not the same at all.

74. As noted above, *Beer Precast, supra*, concerns both completely different issues and legislation. Therefore, it does not help Baycliffe.

75. There is no need to discuss the British Columbia "hot cargo" jurisprudence mentioned by both parties. None of it is applicable to the facts of this case.

76. Two cases provided by Local 183 are of some assistance, at least in the sense of articulating the applicable principle that in an illegal strike application the Board is concerned with the actions of employees and not the actions of employers.

77. In *Wharton, supra*, a picket line was involved. At paragraph 8 of the decision, the Board makes it clear that an employer's decision not to schedule work does not constitute an illegal strike:

> The question of whether there was a cessation of work, a refusal to work or to continue to work requires consideration of the circumstances surrounding the maintenance of the picket line. The representatives of the sub-contractors who employed the respondents learned of the imminence or presence of the picket line from representatives of some of the trade unions, from supervisors on the site and from some of the respondents. The subcontractors immediately adopted measures to re-assign their workforces. Whenever possible employees were directed to other projects, permitted to take vacations, given work at a subcontractor's residence or, rarely, sent home for a few days. The Board finds that, in anticipation of the picket line or upon being informed of its existence, the sub-contractors did not schedule work so as to work on the project. It appeared to the Board that a great deal of empathy existed in the sub-contractors towards the situation of Sikora and the members of Local 46 of the UA. The Board finds that since the subcontractors decided not to schedule work during the maintenance of the picket line there was no cessation of work, refusal to work or to continue to work by the respondents. Accordingly, the respondents have not engaged in a strike within the meaning of section 1(1)(o) of the Act.

> 78. In *Eastern Construction, supra*, the relevant passage is set out in paragraph 18 thereof, which provides:
>
> > As for Mr. Humphreys engaging in a strike, he is not an employee who refused to continue to work. Rather, he was obviously working for his employer (Local 663) when he was in the trench. Finally, the alleged work stoppage continued for, at best, 45 minutes. Once Eastern had instructed its subcontractor to cease working, the applicant's members were no longer expected to engage in work. Clearly, their alleged work stoppage did not continue during their lunch period, when they would not be working in any event. In my view, employees cannot be participating in a strike when their employer either directs or permits them to stop performing work. The members of the applicant resumed working after Mr. Humphreys and Eastern agreed that they would do so pending a review of the situation and a decision by Eastern over the work assignment that afternoon. Even if there was a strike by the labourers, which I am satisfied there was not, it was over in about 45 minutes, which would be another reason not to grant declaratory relief.
>
> The salient observation for present purposes is that there can be no strike where the relevant employer directs or permits the employees to stop performing work.
>
> 79. In this case, there was no issue of CJM directing employees to stop performing work. The work at Ajax had never started. What CJM did was not schedule work in light of what Mr. Dantas heard from Local 183 and in discussions with his lawyer. Simply put, CJM made a business decision. The illegal strike provisions of the Act are directed at actions of employees and not actions of employers, so they are not engaged on these facts. 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.

68. Whatever their motivation, whether the Union advised them of a potential grievance under LOU #8 (even if the evidence was at best or highest equivocal on this point), the bricklayers reported to other sites in accordance with the instructions of the masonry contractors. It was their "business" decision and this could not be a strike. The Union, as the Board had for the most part in *Baycliffe,* distinguished the cases

the Bureau relied upon as not being applicable to the facts here, The Union also referred to the following cases: *Eastern Construction Limited*, 1999 CanLII 19497 (ON LRB); *Wharton Industrial Developments Ltd*., 1982 CanLII 942 (ON LRB); *Metric Contracting Services Corporation*, 2008 CanLII 29403 (ON LRB); *The Art Gallery of Ontario*, 1989 CanLII 3260 (ON LRB); *Ecodyne Limited*, 1979 CanLII 859 (ON LRB); *Ontario Hydro*, 1986 CanLII 1490 (ON LRB); *Vanbots Construction Corporation*, 2008 CanLII 20800 (ON LRB); *Williams Contracting Ltd*., 1980 CanLII 895 (ON LRB); *The Plan Group Inc*., 2003 CanLII 13082 (ON LRB); *Kenaidan Contracting Ltd*., 2005 CanLII 42929 (ON LRB).

69. Accordingly, the Union submitted that the unlawful strike application should be dismissed.

70. The Union submitted that Ras-Con's ULP should meet the same fate—only this time the route was much simpler. Section 76 which Ras-Con alleged was being violated provides:

> **Intimidation and coercion**
>
> **76** No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act. 1995, c. 1, Sched. A, s. 76.

To the extent that intimidation or coercion was prohibited by Section 76, it had to be for a specified purpose. The only possible purpose that could apply to Ras-Con was "to refrain from exercising any rights under the Act or from performing any obligations under this Act". What possible right under the Act was Ras-Con (and not its employees) being precluded from exercising? The right to carry on business as a non-union stucco contractor? Ras-Con could identify no such right—the right of its employees to choose their bargaining agent was not a right of Ras-Con (or for Ras-Con to purport to invoke). Even assuming it was actually factually correct to say Ras-Con was precluded from somehow carrying on business (and it was not—Ras-Con could and was choosing to refuse to sign a collective agreement with the Union and it still could carry on business, even arguably in a unionized environment as it had returned to the Sorbara site in Aurora), whatever recourse Ras-Con may or may not have in any other forum, this was not a right under the Act enforceable at the Board. Moreover there was no intimidation or

coercion by the Union—the only contact that Ras-Con had with Rodrigues was initiated by Ras-Con and Rodrigues merely asked Ras-Con to voluntarily sign a collective agreement (and tried to explain why he thought that would be advantageous to Ras-Con) which Ras-Con was free to refuse to do and did. Asking an employer to sign a collective agreement voluntarily is not a violation of the Act.

71. The cases Ras-Con pointed to were in no way applicable to the facts here—and were quoted out of context in any event. The *CLAC* case clearly related to a work stoppage at a site where the contractor bound to the CLAC agreement tried to work and, in any event, related to coercion of the employees (members of CLAC) to prevent them from selecting CLAC (the applicant in the case—not any particular contractor) as their bargaining agent. Equally *Enka Contracting, supra,* to the extent it was comprehensible (and the Union strongly suggested it was not and ought not to be followed—the Board found the union engaged in prohibited coercive conduct which was remedied by just waiting for six months for the union's conduct to take effect?), it seemed motivated by the Board's disdain over the union having sought a section 1 (4) declaration, losing that application, and then having its voluntary recognition agreement rejected, then attempting to deprive the employer the results of its successful outcome to litigation before the Board. Whatever the merits of that reasoning, it was not at all applicable here. Neither case clearly precluded in any way the dismissal of Ras-Con's ULP.

(d) The position of MCAT

72. MCAT adopted the position of the Union and in particular whether any of the employees of the bricklayer contractors were "scheduled" to be at work at the builders' sites when they did not attend and thereby were engaging in a strike. To the extent that it was not clear that the bricklayers were not at those builders' sites but at other sites in accordance the instructions of their employers, the masonry contractors (and in MCAT's view it was clear), it was mere speculation by the Bureau which I ought not engage in. It mattered not why they did what they did (i.e. not send their bricklaying crews to certain builders' sites), only that they did it—whether perhaps because of their sense of solidarity, their disdain for "brokers" of stucco like Ras-Con, their fear of a grievance (and there was no real evidence of that) or, as probably most likely, it was the path of least resistance—all the masonry contractors appear to have told their crews to be elsewhere (and certainly were aware they were).

73. Most importantly there was no evidence of any involvement of MCAT or anybody from MCAT with any of this. MCAT albeit an accredited employers' organization was an entity that represented bricklaying contractors in collective bargaining—it did not employ bricklayers and certainly did not accept work on their behalf or assign crews to sites. MCAT did not somehow bear responsibility or somehow incur liability for such decisions of its members particularly in the complete absence of any evidence that it in any way participated in such decisions. Certainly MCAT had agreed to add stucco to the collective agreement—but it was free to do so—even if there might be some question of its enforcement against any contractor other than MCAT members (i.e. masonry contractors bound only pursuant to the accreditation). Other than it was a party to the MCAT agreement (and LOU #8 and #9)—and there was no evidence of how or why those came to be negotiated—there was no evidence touching upon MCAT or anyone from MCAT other than Mangoni telephoning Montemurro of Medi-Group (who happens to be a director of MCAT) and who was his friend to try to find out what was going on and essentially was told to call Rodrigues—which Mangoni did. For these reasons alone both the unlawful strike application and the ULP should be dismissed against MCAT.

74. Lastly the Board should not grant the relief that the Bureau was seeking and in particular orders that specified masonry contactors return to specified sites of specified builders and complete the bricklaying contracts there. MCAT said that for a number of reasons.

75. First any such relief rested on a false assumption that certain masonry contractors were required to work for certain builders to complete certain houses at certain times. That was not supported by the evidence—as the Union had reviewed and which review MCAT agreed with.

76. Second even if that "false assumption" was somehow tenable here (and it was not), such relief was inappropriate here since none of those masonry contractors had been made a party to these proceedings. Merely giving them notice of these proceedings was insufficient particularly when these unusual intrusive orders were sought. See *Montres Rolex SA v Balshin,* 1992 CarswellNat 155 (FCA) at paragraphs 22-26; *Coca Cola Ltd. v Sports Network,* 1992 CarswellOnt 753 (Gen Div) at paragraphs 8-10; *Morelli v Resolute Products,* [2016] OLRD No 398 at paragraph 19; and *Tomas v Limen Group Ltd,* 2019 CanLII 4161 (ON LRB) at paragraph 3, for the

proposition that if one wants specific relief against a party then they should be made a party to the litigation.

77. Third such relief essentially amounted to specific performance of commercial contracts which courts (and also the Board) were loath to do, especially for building and/or construction contracts. That was because there would inevitably be problems with specificity—precisely what it was that was supposed to be done—and supervision –how the order would be enforced. In the end such orders were not only burdensome but more likely to add to the litigation, not resolve or end it. See *Pro Swing Inc. v. ELTA Golf Inc,*2006 SCC 52 at paragraphs 23-24; John D. McCamus, *The Law of Contracts,* 3rd ed (Toronto: Irwin Law Inc. 2020) at pp 1108-1112 and *Chan v. Chadha Construction & Investments Ltd,* 2000 BCCA 198 at paragraphs 9. The relief the Bureau sought would inevitably fall into those pitfalls.

78. Lastly cease and desist relief was normally in the nature of ordering employees to return to work, not ordering contractors to perform specific jobs.

Decision

79. I have not attempted to review every bit of evidence or address every single argument or authority referred to me—only what is relevant, salient or necessary for the conclusions I have reached. This is even more so because of the need to get a decision to the parties relatively quickly because of the complained of activity is still continuing and the applicants wished the hearings to take place on an expedited basis—which the Board did its best to comply with while still accommodating the scheduling preferences of the parties and affording every party every opportunity to call whatever evidence they wished or to fully cross examine such evidence that was called.

(a) Some comments on the evidence generally

80. As I have indicated the Board heard evidence of many witnesses over many days of hearing. The witnesses were only those called by the Bureau and Ras-Con. The Union and MCAT called no evidence—as is clearly their right. This is not really a credibility case. All the witnesses in my view gave their evidence in a forthright manner—bearing in mind they were testifying to events at least weeks before and admitting what they did not recall, were unsure of or did not know. However, in some aspects the gaps in the evidence adduced (clearly either deliberate or

tactical) raised as many questions as it answered about what actually happened. Clearly the evidence of the witnesses I heard is uncontradicted (even if it may have been challenged in cross examination, but the witnesses denied such challenges and remained steadfast and consistent in their testimony). It was urged upon me that I draw an adverse inference from the failure to call some evidence or some witnesses as it would not support or corroborate a differing account than those of the witnesses called. That is fair and I do so when appropriate as explained below.

81. However, that is no panacea to cover over every shortfall in the evidence of the applicants. The violations of the Act alleged by the Bureau and Ras-Con are still for them to establish both factually and legally. However, that is on a civil standard of proof not a criminal one. I need only be satisfied on a balance of probabilities not beyond a reasonable doubt. There is no reverse burden of proof or onus like Section 96 (5) at play here. The Union and MCAT are not necessarily required to explain their conduct—other than what it may lead to or assist me correctly inferring or deducing from the other evidence on a balance of probabilities what they assert happened. 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.

(b) MCAT

82. Both the unlawful strike application and the ULP as against MCAT are dismissed. As against MCAT, as MCAT, in my view, correctly argued, there were no specific allegations, let alone, evidence of any improper conduct or wrongdoing on its part other than, as both the Bureau and Ras-Con ultimately had to concede, "ownership" of or that it was a party to the MCAT collective agreement, and, in particular, LOU #8 and #9. I heard absolutely no evidence from either of the applicants about how or why it was negotiated (let alone unlawfully)—only the general assertions that they were on their face unlawful and should be declared as such, which although made at the outset, in the end were not particularly or extensively argued to me (or at all—e.g. the invocation of LOU #9 was false because the Union did not meet its

triggering criteria)—which, to be blunt, is the only reason I suspect they were made responding parties in the first place. For the reasons I explain below, I do not regard it appropriate and am not prepared to interpret those provisions in this unlawful strike application or the ULP. Accordingly there is nothing at all left against MCAT, and these proceedings against them must be dismissed.

(c) Was there a strike within the meaning of the Act?

83. There is no dispute that bricklayers stopped performing bricklaying work at a number of sites of a number of builders—even if suddenly or unexpectedly (although that is really not what happened even in the applicants' view). Is that sufficient to establish an unlawful strike has occurred contrary to section 79 of the Act. Somewhat reluctantly I conclude that the Bureau and Ras-Con have failed to establish that.

84. I say that because I believe *Baycliffe Homes,* as argued by the Union, reached the proper result in the circumstances of that case and is a correct statement of the law. Strikes as defined by the Act "pertains to the actions of employees, not the action of an employer" and "there can be no strike where the relevant employer directs or permits the employees to stop performing work". I do not think that inconsistent with *State Contractors, supra,* to which the Bureau referred me—that the fact that an employer assigns employees to other work after an illegal strike occurs (even if only briefly) does not excuse or condone an illegal strike. But first there must still be an illegal strike.

85. I appreciate that the facts here are somewhat different than in *Baycliffe Homes*—there the particular job had not even started (making it easier for the Board to conclude that the employer had not directed or assigned its bricklayers to perform work at the time the strike was alleged to be ongoing) and most importantly, the actual bricklayer contractor explicitly testified in *Baycliffe* that he had not assigned his bricklayers to commence the work at the project, and had instructed them not to, because of his own "business" decision after discussions with the Union (in fact Rodrigues) and his own lawyer. But that does not change the definition of strike or that there cannot be one where the employer directs or permits the employees to stop performing the work—nor the fact that this is an application by the Bureau and Ras-Con and therefore incumbent on them to prove the essential elements of a strike.

86. There was no dispute that the bricklayer contractors were independent contractors—separate and different employers from the builders. There was no dispute that the bricklayer contractors were free to assign and determine the composition and locations (where and when) of their bricklaying crews. There was no evidence that the bricklayer crews were "scheduled" by their employer to be at the particular sites on the days in question—even if they were expected to be by the builders and had been there before. In fact, the actual contracts between the bricklayer contractors and the builders (all of which appear to be the builders' standard contracts) contained no "schedule" at all—even when they were signed or referred to a schedule being attached. There was no dispute that the bricklayer contractors were aware that their bricklaying crews were not at the builders' sites. I heard no evidence from any bricklayer contractor that they had directed their bricklaying crews to attend at the times in question and their employees refused to do so—and the Union did make much of how hard would it have been to summons one of them and simply ask them if their employees had refused to perform work they had been instructed to do or were on strike. In fact all the evidence from the site superintendents repeating what they were told by the bricklayer contractors, the bricklayer working foremen, or sometimes the bricklayers themselves, was the bricklayers were told by their employers (the masonry contractors) not to be at the builders sites on the particular sites and for the most part appear to have been assigned or scheduled to work elsewhere at other sites (even if some also suggested that the Union also may have wanted that or there was a dispute with the Union about the use of non-union stucco).

87. As a result, regardless of how suspicious I may or may not be of the total circumstances, I am unable to stretch the limited evidence before me to conclude, nor the applicants have established, that the relevant bricklayers (the only employees who could be alleged to be engaging in an unlawful strike) were actually assigned, scheduled or required by their employer to be at work at the builders' sites on the relevant dates—and therefore cannot obviously be engaged in refusing to work or continue to work in combination or concert to reduce output (as opposed to being directed or permitted by their employer not to be, or assigned, or directed to be elsewhere—whatever the motivation) which is necessary to make out a strike and a violation of Section 79 of the Act. I would note that the definition of strike in the Act (as opposed to the definition of lock out—a distinction repeatedly pointed out in the jurisprudence) does not have a motive element to it and that a violation of section 79 of the Act does not require any

particular animus—just a refusal to work in combination or concert to reduce or limit output (for example see the many cases that have found that political strikes or demonstrations can still constitute unlawful strikes).

(d) Is that the end of the Matter?—Not so fast.

88. The Union asserted that if there was no strike (and therefore no unlawful strike) that was the end of the matter and the unlawful strike application should be dismissed. However the Bureau and Ras-Con also explicitly alleged in the unlawful strike application and made submissions about violations of Section 81 and 83 (1) of the Act:

> **Unlawful strike**
>
> **81** No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike. 1995, c. 1, Sched. A, s. 81.
>
> **Causing unlawful strikes, lock-outs**
>
> **83** (1) No person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

These were not explicitly addressed by the Union. It is apparent on the face of the statute that there is a violation of the Act for a union or an officer, official or agent of a union to threaten to call or authorize an unlawful strike, and no person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person will engage in an unlawful strike. In other words, the Act is violated by the threat or the performing of an act the reasonable and probable consequence of which is an unlawful strike—even if the unlawful strike does not occur. I conclude on the evidence before me that the Union (at least through the conduct and actions of Inacio and Rodrigues) has violated sections 81 and 83 (1) of the Act.

89. Bearing in mind what I said previously about the Board being the province's specialized tribunal for labour relations and the Board should not ostrich like stick its head in the sand and ignore what is

really happening on the ground, especially in the construction industry, I may have been prepared to conclude that on the totality of the circumstantial evidence before me, including:

- the undisputed desire of the Union to organize stucco contractors and a campaign to do so;

- the seeming undisputed rumours and knowledge of everyone (builders, masonry contractors, bricklayers, the foreman, the site superintendents, Mangoni and Ras-Con) of this;

- the sudden disappearance or cancellation of Ras-Con's work or contracts by builders who explicitly told them it was because of the Union and in order to not have the bricklaying on their sites disrupted;

- the sudden signing of builders of letters committing to the non use of non-union stucco contractors and those contractors then not having their bricklaying work disrupted on their sites (or at least those who also agreed to withdraw from the unlawful strike application which the Union appears to have subsequently demanded); and

- the use of virtually identical template letters if not drafted by the Union itself certainly provided by the Union to the builders to complete on their letterhead.

But I need not go that far. The threats and acts can be specifically attributed to the Union and their representatives—Inacio telling Masucci and DiMichele that "we would pull the bricklayers" at Sorbara's Aurora site if the stucco contractor was not union by the end of the week, and even more telling, Rodrigues' conversations with Mio explaining why Sorbara had "lost its bricklayers" and that the only way Sorbara could get the bricklayers back, at first, if Mio signed a letter that Rodrigues provided to be put on Sorbara letterhead that Sorbara committed to use only union stucco contractors , and after that was done and the bricklayers returned or promised to return for a day or two, the only way Sorbara could get the bricklayers back again was to sign a letter that again Rodrigues provided for Sorbara to sign withdrawing from the unlawful strike application just as Deco and CountryWide Homes had (in

retrospect, suspiciously) in the midst of these proceedings. These witnesses were extensively cross examined but did not retreat from this testimony even if suggested that Union witnesses would deny or have a different version of events. But no such contrary evidence was called by the Union. The evidence is therefore uncontradicted. Any suggestions in cross examination that if Inacio or Rodrigues were called to testify, they would have differing versions of events (which again the witnesses steadfastly denied) is meaningless and of no value to me. As urged upon me by the Bureau and Ras-Con, I draw the adverse inference that the evidence of either Inacio or Rodrigues would not have contradicted this testimony (see for example, *Consolidated Bathurst Packaging Ltd.,*1983 Can LII 970 (ON LRB) at paragraph 52).

90. There is simply no other plausible way to interpret this evidence other than threatening an unlawful strike or at least doing something the reasonable and probable consequence of which would be an unlawful strike. The Union, certainly in the *prima facie* case motion, if less so in the argument here, suggested that the bricklaying contractors were acting in response to a warned/threatened grievance under LOU # 8 of the MCAT agreement which is all the Union was doing. The difficulty with that argument is that in the end there is no actual evidence to support that. That is certainly not evidence incumbent on the applicants to adduce in their unlawful strike application. Again, the Union called no evidence. At most the Union could point to the cross examination of Mio about his conversations with Adam of Barcelos and I simply do not think it went anywhere near that far (at best that "his hands were tied" or that he had "no choice"—Mio denied that he said anything about a grievance). But again, if that were not enough (and in my view it is) there is also the conversations with Rodrigues almost immediately after the release of the *prima facie* decision. Rodrigues demanded that Sorbara now also send a letter to the Board withdrawing from the unlawful strike application (which Rodrigues conveniently has prepared for them to be put on letterhead and not surprisingly is virtually verbatim to the letters the Board had already received from Deco and Countrywide Homes—which Rodrigues also conveniently provided) otherwise Sorbara will "lose" its bricklayers again—which does happen at least to Sorbara and Fernbrook Homes. The Union sought to characterize this as merely a dispute between Mio and Rodrigues about what they had previously agreed or settled. That is not at all persuasive. What had they previously settled or agreed upon?—only that Sorbara would commit to not use non union stucco contractors "to get their bricklayers back"—already a threat of an illegal strike. Now there was just a further threat that the bricklayers would again not

return without the second letter—and they did not. Perhaps the masonry contractors on their own decided not to assign their bricklayers to Sorbara or Fernbrook Homes sites. But that does not change the threats that Rodrigues made—and since it is explicitly and on its face for Sorbara to withdraw from the unlawful strike application that Sorbara has participated in, it is a clear and blatant violation of section 87(2) of the Act as well.

91. The Union did spend some time in arguing that it had it had a plausible argument with respect to its interpretation of LOU# 8 but in the end said I should not interpret LOU #8 in this case. In that regard I agree with the Union. This is not a grievance under the MCAT agreement or LOU #8 (let alone a "test case" as the Union characterized it). There is no responding party masonry contractor/employer to argue against a grievance here—let alone the specific facts or scenario or context to argue such a grievance and interpret the contractual language. Moreover the Bureau and Ras-Con are strangers to the MCAT agreement and may very well have no status to participate in any such grievance. Although both the Bureau and Ras-Con in their applications asserted that I should declare LOU #8 unlawful as part of the relief they wished, ultimately that was not seriously or extensively argued before me (some parts not all, e.g. the alleged falseness of the Union asserting it met the triggering criteria of LOU #9 to make the MCAT agreement cover stucco)—in fact the Bureau suggested that I really did not need to determine that question, other than the Bureau suggesting that I not accept the Union's characterization or interpretation and arguing that a possible grievance was not a credible explanation of what had transpired here. Most importantly, even if there was a potential grievance, warned, threatened, or suggested, the merits (or lack of merits) of such a grievance is not what this case is about—it is about an unlawful strike and whether it was threatened or something was done the reasonable and probable consequence of which was an unlawful strike. Grievances (even arguably non-meritorious ones) may be filed or threatened to be filed—they do not excuse or condone unlawful strikes or threats of them.

(e) The ULP—intimidation and coercion

92. I also conclude that the ULP must be dismissed—no violation of the Act has been made out. Intimidation and coercion are prohibited by section 76 if they are for a purpose specified in section 76. The only purpose at all relevant here is "to refrain from exercising any other rights under the Act or performing any other obligations under the

Act". Ras-Con has simply not demonstrated any such right or obligation under the Act.

93. Leaving aside the Union's mocking of any asserted right under the Act of Ras-Con to carry on business as a non union stucco contractor, the fact that Ras-Con may suffer commercial damage or loss of business as a result of arrangements made by other parties does not in and of itself establish a violation of the Act (regardless of, and without comment on, whatever remedies Ras-Con may have in others forums). Simply to prove the point, no one disputed that if the Housebuilders agreement contained a sub-contracting prohibition that applied to stucco (or more specifically if the Labourers had triggered the provision already in the Housebuilders agreement to make it apply to stucco) and that resulted in a loss of business to or contracts previously made by Ras-Con, that would not in any way result in a violation of the Act or intimidation or coercion prohibited by Section 76 (and again without commenting on any remedies Ras-Con might have elsewhere). That is a construction industry business reality. This is longstanding jurisprudence of the Board which everyone recognized and no one even attempted to challenge here.

94. To the extent that Ras-Con pointed to the *CLAC* or *Enka Contracting* cases, *supra,* as standing for any different proposition, I simply do not agree. As the Union argued (see paragraphs 69 and 70 above) and with which I agree and accept, they are distinguishable on their facts and/or the words taken out of context, and/or, if somehow applicable, are not particularly reasoned in any comprehensive manner and ought not to be followed. The *CLAC* case simply does not say what Ras-Con wants it to say (and in a different factual context) and to the extent that *Enka Contracting* appears to come closer (again in a very different factual context), it is not clear to me how if something constitutes intimidation and coercion contrary to section 76 of the Act (the abandonment by the Union of its bargaining rights in that case which the Board ultimately found to be lawful), that is cured by permitting it but giving the employer six months notice (i.e. waiting six months for the abandonment to be effective) which appears to be the bottom line result in *Enka*.

(f) Remedy and Relief

95. As indicated above I have concluded that the applicants have failed to establish that a strike took place and therefore there is no violation of section 79 of the Act. Accordingly there is no relief that can

be ordered pursuant to that section. I feel compelled to add that I would have been reluctant to order the broad and unique relief sought by the Bureau and in particular ordering certain masonry contractors to attend certain projects of the builders and perform certain work by certain times. Certainly no one provided me any precedent or authority where this has been done by the Board. I say this for all of the reasons argued to me by MCAT, *supra* (see paragraphs 73-6), but especially because the Board would be most reluctant to direct masonry contractors in a fashion beyond the contractual arrangements that the builders themselves appear to have chosen not to make with the masonry contractors.

96. However I have found that the Union (at a minimum through the conduct of Inacio and Rodrigues) has threatened an *unlawful* strike and committed acts that it ought to have known the reasonable and probable consequence of which is that other people will engage in an unlawful strike and I am prepared to so declare and order the Union cease and desist. Equally the conversations between Mio and Rodrigues to compel Sorbara to withdraw from the unlawful strike application violated section 87 (2) of the Act. However what I wish to make perfectly clear is this is not any kind of prohibition on the Union from filing (or subsequently settling) any kind of grievance under the MCAT agreement (LOU #8 or otherwise)—or indicating that it will do so. Filing a grievance or indicating a grievance will be filed is not a violation of the Act—it is the procedure the Act specifically envisages for resolving such disputes—threatening an unlawful strike ("or pulling the bricklayers") is not. However, although I recognize that I cannot direct anyone to contest or dispute or not settle any such grievance, I do not wish to be unduly naïve nor do I wish this relief I grant here to be merely illusory and not come to the attention of the appropriate participants in the construction industry. Accordingly in addition to making the declaration and the order, I am directing that the Union post them in the appropriate union halls and on its website, deliver copies to both MCAT and the Bureau (for them to disseminate as they see fit) and either (and the Union can choose either of these options) deliver copies to each and everyone bound to the MCAT and the Housebuilders agreement or place a notice of appropriate size containing a copy of these orders and declarations in the Daily Commercial News for two consecutive editions within ten days of this decision.

97. As I indicated earlier the ULP is dismissed.

98. Accordingly I:

(a) declare that Labourers International Union North America, Local 183, the Masonry Council of Unions Toronto and Vicinity and Bricklayers, Masons Independent Union of Canada, Local 1 (hereinafter collectively "the Union") has threatened an unlawful strike or committed acts the reasonable and probable consequence of which is others will engage in an unlawful strike contrary to sections 81 and 83 of the *Labour Relations Act, 1995* ("the Act") and, in particular, those employees ("the bricklayers") covered by the collective agreement between the Union and the Masonry Contractors Association of Toronto ("MCAT");

(b) declare that the Union has violated section 87(2) of the Act in that it sought to impose a penalty, and, in particular on Sorbara Homes, for participating in a proceeding under the Act, and, in particular, this unlawful strike application;

(c) order that the Union cease and desist from threatening or committing acts the reasonable and probable consequence of which are that others, in particular the bricklayers covered by the Union's collective agreement with MCAT, will engage in an unlawful strike. This does not prevent the Union from filing any grievances pursuant to its collective agreement with MCAT or advising of its intention to actually do so;

(d) order that the Union cease and desist from penalizing or seeking to penalize anyone because they participated in the unlawful strike application;

(e) post a copy of these declarations and orders on all relevant notice boards (or equivalent locations) at its offices where this might come to the attention of the bricklayers, on its website, and provide copies on the Union's letterhead to the Toronto Residential Construction Labour Bureau ("the Bureau") and MCAT; and

(f) provide copies of these declarations and orders on its letterhead to all members of MCAT and the Bureau as well as all those bound to the Union's collective agreements with the Bureau and MCAT, or (at the option of the Union) place a notice of appropriate size containing these declarations and the orders in the next two consecutive editions of the Daily Commercial News within ten days of the date of this decision.

"Bernard Fishbein"
for the Board