



ALRB Cite: *Stuart Olson v. Labourers' Local 92 et al.*
[1990] Alta. L.R.B.R. 210

STUART OLSON CONSTRUCTION LTD. and STUART OLSON LTD., Applicants and CONSTRUCTION AND GENERAL WORKERS', LOCAL 92, CONSTRUCTION AND GENERAL WORKERS', LOCAL 1111 and CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, LOCAL 924, Respondents. Board Files: GE-00235, GE-00233, GE-00264, RV-00044, RV-00052. May 16, 1990.

Andrew C.L. Sims, Q.C., Chair, K. Kreklewetz and F. Kuzemski, Members

For the Applicant: D. Ross, Q.C.

For the Respondent Unions: W. Johnson

Revocation - s. 50(5) - Company applying to revoke three construction certificates - Company claiming no employees in bargaining units - Unions objecting on basis that Company true employer of persons nominally on payroll of other related companies - Insufficient particulars provided in support of objections - Revocation applications granted.

Sale, Lease, Transfer - s. 44 - Application submitted following receipt of Officer's report on revocation applications - Application dismissed for want of particulars.

Practice and Procedure - s. 12(3) - Board Officer controlling conduct of investigation - Parties having no right to dictate form or manner of investigation.

Practice and Procedure - s. 13(2) - Union requesting discovery-like process - Whether Code empowers Board to subject a person to examination for discovery - Whether Board should adopt discovery procedure as matter of general policy.

Stuart Olson Construction Ltd. applied for revocation of three certificates. It claimed that it had not employed any bargaining unit employees for well over three years. The Unions objected to the applications, initially by requesting a determination that the Applicant was the true employer of employees nominally on the payroll of other related Stuart Olson companies. It also supplied a letter purporting to particularize its objections to the revocation applications. The Board Officer completed an investigation report, part of which contained the Employer's responses to questions raised by the Union in its letter of particulars. In addition, the report recommended that the three certificates be revoked and found that Stuart Olson Construction Ltd. was not an employer. The Unions then responded by filing a s. 44 successorship application and a s. 13 application for the Stuart Olson companies to produce an Officer for purposes of an

examination for discovery.

The objection that Stuart Olson Construction Ltd. was the true employer was rejected for lack of adequate particulars. Although the letters provided many details about the operations of the Stuart Olson group, there were no particulars suggesting that Stuart Olson Construction Ltd. exercised direction and control over specific workers or bore the ultimate responsibility for their wages. As a result, an Officer's investigation on that point should never have been undertaken. The s. 44 application that followed the receipt of the Officer's report was also dismissed for want of particulars. Absent from that application were allegations that might support the suggestion of a sale, lease or transfer from Stuart Olson Construction Ltd. to companies employing employees.

The request for an examination for discovery was rejected. Section 13(2) may give the Board power to directly order a discovery process, or the Board may exercise other statutory powers to fashion a discovery-like process. However, there are important policy reasons, including expense, delay and additional hearing time that militate against adoption of a judicial model of adjudication. Even if sufficient particulars had been provided to justify proceeding further, this was not the type of exceptional case warranting the ordering of a discovery process.

As a result, the applications to revoke the three certificates were granted.

REASONS FOR DECISION

Andrew C.L. Sims, Q.C., Chair: These matters began with several applications to revoke certificates under section 49 of the Labour Relations Code. Some were granted or withdrawn; three remain. All three concern companies within the "Stuart Olson" group of companies described below.

The three trade unions that remain involved each hold one certificate. They are:

The Construction and General Workers' Union, Local 92 ("Labourers 92")

The Construction and General Workers' Union, Local 1111 ("Labourers 1111")

The Cement Masons' International Association of the United States and Canada, Local 924 ("Cement Masons")

A series of corporate entities exists, related in some way, to these applications and Stuart Olson group of companies. Their names and corporate history will unfold below.

This decision concerns the sufficiency of certain objections and counter-applications filed in response to these revocation applications. It also concerns two of the Board's pre-hearing processes; the officer's report and the power to compel evidentiary production. The Unions seek an examination for discovery-like

process, which the Board has never granted before. The Employer opposes this request on jurisdictional and policy grounds.

1. The Applications

Three applications, each made May 25th, 1989, are still pending. They involve the following certificates, said to name Stuart Olson Construction Ltd.

Certificate No. 5-61: with the Labourers 92 for a unit of:- “Labourers when employed as dumpmen, tampermen, chippermen, mixermen, vibratormen, grinder operators, jackhammermen, breakermen, pump tenders, tubular scaffolders - General labourers, powerbuggy operators, pipe layers (non-metallic). Labourers tending all crafts including mixing, handling and conveying of all materials used by the crafts.”

Certificate No. 89-82: with the Labourers 1111, for a unit of:-”All employees when employed in construction as labourers and labourer foremen.”

Certificate No. 114-84: with the Cement Masons for a unit of:- “All employees when employed in construction as Cement Masons, Cement Mason Apprentices and Cement Mason Foremen.”

Much has happened to complicate these three applications. Before detailing the various objections, arguments and counter-applications, we will set out the statutory basis for the revocation requests. The provisions about the revocation of bargaining rights by employers or former employers read as follows:

48 In this Division, “bargaining rights” means those rights held by a trade union with respect to a unit of employees of an employer,

(a) arising out of a certification granted by the Board ...

49(1) An application to revoke bargaining rights may be made by the ... employer or former employer to whom the bargaining rights relate.

50(5) An application for revocation of bargaining rights may be made by an employer or former employer only if the employer or former employer and the bargaining agent have not bargained collectively for a period of 3 years

(a) after the date of certification, if no collective agreement has been entered into affecting the employer or former employer and the bargaining agent, or

(b) after the first date fixed for the termination of the collective agreement, if a collective agreement has been entered into affecting the employer or

former employer and the trade union.

51(1) Before granting an application for revocation the Board shall satisfy itself, after such investigation as it considers necessary, that

(a) the application is timely,

(b) in the case of an application by an employer or by the employees in the unit, the employees have voted, at a representation vote conducted by the Board, in favour of the revocation of bargaining rights of the trade union as their bargaining agent,

(c) in the case of an application by a former employer

(i) the bargaining agent has abandoned its bargaining rights, or

(ii) there have been no employees in the unit represented by the trade union for a period of at least 3 years.

52(1) When the Board is satisfied with respect to the matters referred to in section 51(1) and satisfied, after considering any other relevant matter, that the bargaining rights of the trade union should be revoked, the Board shall grant a declaration that the trade union's bargaining rights are revoked, and revoke any certification.

(2) When the bargaining rights of a trade union are revoked,

(a) the employer is not required to bargain collectively with the trade union,

(b) any collective agreement in effect at the time of the revocation becomes void and of no effect with respect to that employer and his employees in the unit represented by that trade union, and

(c) the trade union shall not negotiate or enter into a collective agreement or apply for certification for the same or substantially the same unit with the employer to whom the bargaining rights relate for a period of 6 months from the date of the revocation of the bargaining rights.

Thus, four issues arise on a revocation application by a party claiming to be a former employer.

1. Does the applicant employ employees within the unit? If it does, then it is not a former employer, making a representation vote necessary.
2. Do bargaining rights exist between the applicant and the trade union respondent?
3. Is the application timely?

4. Has the Union abandoned its bargaining rights or, have there been no employees in the unit for at least three years?

The application, from Stuart Olson Construction Ltd., alleges:

1. The certificates exists;
2. Stuart Olson Construction Ltd. has not employed any bargaining unit employees for over three years;
3. Stuart Olson Construction Ltd. has not operated as a construction company for well over three years and is only an asset-holding company;
4. There has been no collective bargaining carried out by the Company, or by anyone else in respect of the Company, for well over three years.

On May 30th, 1989, the Board advised the affected trade unions of the applications by letters which included the following paragraphs:

Please forward in writing to the Board within 14 days from the date of this letter any comments and objections you may have to this application, giving full particulars of your objections.

If we do not hear from you within the 14 days, the Board may dispose of the matter as it sees fit.

All three trade unions retained the same Counsel. Between June 8th -13th, Counsel notified the Board that these Unions objected to the applications and that further particulars would be provided in due course. On June 14th, the Board received a letter on behalf of the unions saying:

... please be advised that their [the unions'] position is that Stuart Olson Construction Ltd. has been and continues to be the true employer of various employees employed in the construction industry by any one or more corporate entities that holds themselves out as "Stuart Olson" Companies. Pursuant to Sub-section 11(3)(b) [the unions] ask for a determination as to whether or not Stuart Olson Construction Ltd. is an employer.

The Director of Settlement's office told the Union's Counsel that this objection lacked particulars. Nonetheless, the Director appointed a Board officer to investigate. On July 4th, the officer got a lengthy letter from the Unions' Counsel reading:

With respect to the particulars, please be advised that there are the following corporate

entities that we understand hold themselves out under the single generic name of Stuart Olson:

1. Stuart Olson Construction Ltd.
2. Stuart Olson Construction Inc.
3. Stuart Olson Industrial Contractors Inc.
4. Stuart Olson Contracting Inc.
5. Stuart Olson Limited
6. T.M.C. Payroll Ltd.

From our review of the corporate records, each of the above companies is a separate company. Stuart Olson Construction Ltd. is the 100% shareholder in:

1. Stuart Olson Construction Inc.
2. Stuart Olson Industrial Contractors Inc.

The following companies have employed people in construction and/or paid the wages of employees in construction in the last 3 years on projects whereby the generic name "Stuart Olson" was utilized to represent the general contractor:

1. Stuart Olson Construction Ltd. (the last contribution to Funds Administrative Service was paid on June 29, 1986 for Leo Neault in May of 1986)
2. Stuart Olson Construction Inc.
3. Stuart Olson Industrial Contractors Inc.
4. T.M.C. Payroll Ltd.

The City of Edmonton has projects currently being performed by Stuart Olson Construction Ltd. and Stuart Olson Construction Inc.

Stuart Olson Construction Ltd. used to issue business cards that stated:

Stuart Olson Construction Ltd.
General Contractors/Engineers

Now the business cards state:

Stuart Olson
General Contractors/Engineers

Recently the Stuart Olson group of companies held a celebration of 50 years in business and their current business card refers to the 50 years, yet as corporate entities many of these companies are recent creations. It should be noted that at various construction sites the

“Stuart Olson” signs refer to the 50 years that Stuart Olson has been in business. Some of the locations of these signs are:

1. Toys-R-Us Building on White Mud Drive and Highway #2
2. LRT crossing in Edmonton
3. Groat Bridge Redecking in Edmonton wherein Stuart Olson Construction Inc. is described as the contractor
4. South Tunnel and Portal of Edmonton LRT wherein the contractor is described as Stuart Olson Construction Inc.

In the Bill 53 or CECBF Negotiations, Miller MacKinnon attended at negotiation meetings as a representative of the employers. Miller MacKinnon is an officer of Stuart Olson Contracting Inc. and his only known association with construction companies is with Stuart Olson. If Stuart Olson has not been negotiating for 3 years and/or has not been employing employees in the last 3 years, then one should question the presence of Miller MacKinnon at the bargaining table. Meetings that Miller MacKinnon attended are:

1. September 30, 1987
2. October 21, 1987
3. October 23, 1987
4. October 30, 1987

It should be noted that some of the companies described herein have held at various times other corporate names. The particulars are:

1. Stuart Olson Contracting Inc.
 - incorporated as 244011 Alberta Ltd. in 1980
 - changed name to HKM Industrial Ltd. in 1983
 - changed name to 244011 Alberta Ltd. in 1987
 - changed name to Stuart Olson Contracting Inc. in 1988
2. Stuart Olson Industrial Contractors Inc.
 - incorporated as The Triton Management Corporation Ltd. in 1969
 - changed name to Triton Management Corporation Ltd. in 1983
 - changed name to Stuart Olson Industrial Contractors Inc. in 1987
3. Stuart Olson Construction Inc.
 - incorporated as Stuart Olson Industrial Contractors Ltd. in 1982
 - changed to Stuart Olson Construction Inc. in 1986.

The companies use a common letterhead which is as follows:

Stuart Olson
General Contractors/Engineers
12836 - 146 Street, Edmonton, Alberta T5L 2H7
Telephone: 452-4260 Fax 455-4178 Telex: 037-3459

At the address described above, the name of the business is described as:

Stuart Olson Construction Ltd.
Triton Management Corporation Ltd.

There is no reference to the other companies.

The hiring hall of the locals has been contacted repeatedly for men by "Stuart Olson" and various of the corporate entities which requests have resulted in men being dispatched.

Stuart Olson Industrial Contractors Inc. and Local 92 have a project agreement for Champion Forest Products.

Stuart Olson Industrial Contractors Inc. and Stuart Olson Construction Inc. are both represented by the same individual, Robert Saskiw, in dealing with Local 92. On the Labatts Brewery Project he acted on behalf of Stuart Olson Construction Inc. On the Champion Forest Products project he acted on behalf of Stuart Olson Industrial Contractors Inc.

I am currently obtaining further particulars and shall supply the same to you in due course.

On July 18th, 1989, the Board received another letter from Unions' Counsel reading:

Further to my letter of July 4th, 1989, I enclose herein the following documents:

1. Excerpts from the incorporating documents of the Employers' Federation Society for Bill 53 Bargaining.
2. Excerpts of a mortgage from Stuart Olson Construction Ltd. to Alberta Treasury Branches for \$7 million.
3. Excerpts of a mortgage from Stuart Olson Construction Ltd. to Bank of Montreal for \$6 million.

In doing your inquiries please review the following:

1. Why did Miller MacKinnon utilize Stuart Olson Construction Ltd. as his address on the application.
2. Please note the numerous places that Miller MacKinnon signed on behalf of the various trade divisions.
3. The definition of Constituent Employer refers to valid subsisting bargaining relationships. Please determine if Stuart Olson Construction Ltd. was a constituent member and if so with what union did it express itself to have a valid subsisting bargaining relationship.
4. Please note that Miller MacKinnon was chairperson of the Council and that the Council was in charge of bargaining.
5. If Stuart Olson Construction Ltd. is just an asset holding company then why did it borrow \$7 million and \$6 million and for what purpose was the money utilized.

The Union's position is that Stuart Olson Construction Ltd. is an employer. This is because it is the true employer of persons nominally on the payroll of other Stuart Olson companies. The Union also says Stuart Olson Construction Ltd. employed Leo Neault within the 3 year period of importance under s. 51(1)(c). These letters give many details about the operations of the Stuart Olson group. However, cumulatively they say very little that suggests Stuart Olson Construction Ltd. is the true employer of employees working for other Stuart Olson companies.

The letters set out work being done involving various companies, although each company's role is unclear. They list projects, but there are no particulars saying Labourers' or Cement Masons' worked on this project at such and such a time. Similarly, there are no particulars suggesting Stuart Olson Construction Ltd. exercised direction and control over any such people, or bore the ultimate, if indirect, responsibility for their wages.

The objection concerning Leo Neault is clear. The remaining objection, that Stuart Olson Construction Ltd. is an employer is, at this point, insufficiently particularized. The letters, read together, seem only to say "Stuart Olson", as a group, does work, therefore this particular corporation within the group must be an employer. This is insufficient.

Nevertheless, the assigned officer sought information from the Employer for an officer's report. Stuart Olson Construction Ltd. had difficulty getting some of the requested information which delayed the matter until early October.

The Employer on certificate number 5-61, held by Labourers 92, was Stuart Olson Limited rather than Stuart Olson Construction Ltd. On October 6th, following discussion with the officer, the Employer's Counsel

wrote saying he meant to bring the applications on behalf of Stuart Olson Limited as well. The letter also said:

- Stuart Olson Limited is an active holding company;
- It has not been involved in the construction industry for well in excess of 20 years;
- Because of this inactivity, there are no records left from when it last operated in construction;
- Who holds shares and directorships in the company.

On October 12th, 1989, the Board sent the parties an officer's report covering all the applications. It recommended dismissing the one application (certificate 5-61) because Stuart Olson Construction Ltd. was not the employer. Rather than accept the employer's letter of October 6th as an amendment, the Board took it as a new application from Stuart Olson Limited. The parties then received a second officer's report, dealing with this new application, shortly after the one for Stuart Olson Construction Ltd.

The Stuart Olson Construction Ltd. report recited the bargaining relationships and then read:

THE COMPANY

Stuart Olson Construction Ltd., according to their solicitor, originally was engaged in employing union members on union jobsites. The last three years, however, Stuart Olson Construction Ltd. divested itself of employees covered under Certificate Nos. 21-75, 89-82 and 114-84. The Employer's records show that the last time employees were employed were as follows:

2. Re: Cement Masons Local 924 - the last time employees were employed in this unit was November 13, 1984. (Document #2).
3. Re: Labourers Local 1111 - the last time employees were employed in this unit was April 25, 1986. (Document #3).

The Company currently employees no employees at the present time.

The two major shareholders of Stuart Olson Construction Ltd. are Allen S. Olson who owns 99% and Vencap Equities who owns 1% of the Company. Counsel for the Employer states that the Employer currently holds property and assets which include buildings and equipment. In effect, Stuart Olson Construction Ltd. has become a holding company. During the investigation, the following are some of the questions raised and answers given:

1. Does Stuart Olson Construction Ltd. hold any property or assets? Was any

property or assets transferred from Stuart Olson Construction Ltd. to either of Stuart Olson Construction Inc. or Stuart Olson Industrial Contractors Inc.?

The Employer's answer to this question was that no transfer of property or assets occurred to either Stuart Olson Construction Inc. or Stuart Olson Industrial Contractors Inc.

2. Was any manpower transferred from Stuart Olson Construction Ltd. to Stuart Olson Industrial Contractors Inc. or Stuart Olson Construction Inc.?

The Employer's answer to this was that no employees were transferred between these companies and that Stuart Olson Construction Inc. wound down its operations and became a holding company.

3. Who owns Stuart Olson Construction Inc. and Stuart Olson Industrial Contractors Inc.?

Investigation has found that both these companies are owned by Stuart Olson Construction Ltd.

4. At this time who owns Stuart Olson Construction Ltd.?

Stuart Olson Construction Ltd. as of February 28, 1989, all shares were sold to the Churchill Group.

5. Does Stuart Olson Construction Ltd. have any direct ties to Stuart Olson Construction Inc. and Stuart Olson Industrial Contractors Inc.?

Investigation indicates that Stuart Olson Construction Ltd. owns all the shares of Stuart Olson Construction Inc. and Stuart Olson Industrial Contractors Inc.

6. Is either Stuart Olson Industrial Contractors Inc. or Stuart Olson Construction Inc. employing unionized employee?

Stuart Olson Industrial Contractors Inc. has and does employ unionized employees at the Syncrude site, Fort McMurray and the Diashowa Pulp Mill site in Peace River.

7. What is the status of Stuart Olson Construction Inc.?

Stuart Olson Construction Inc. does not have any bargaining unit employees employed in its operation. It is strictly a labour broker that supplies manpower to

Stuart Olson Industrial Contractors Inc.

8. Does Stuart Olson Contracting Inc. pay any of the expenses of Stuart Olson Construction Inc.?

Stuart Olson Contracting Inc. does not pay any expenses of Stuart Olson Construction Inc.

9. The Union, in its letter of objection, dated July 4, 1989, why a Mr. Miller MacKinnon, who acted on behalf of Stuart Olson Contracting Inc. was at the bargaining table during the Bill 53 negotiations if Stuart Olson has not been negotiating for three years and/or has not been employing employees in the last three years then one should question the presence of Mr. MacKinnon at the bargaining table.

Investigation indicated that Mr. MacKinnon was Chairman of the Construction Labour Relations - An Alberta Association at the time and in effect was acting on behalf of this Employer's organization bargaining with the affected construction trade unions.

10. The Counsel for the Union requested the Employer to provide details on a Mr. Leo Neault as the Union indicates that this employee of Local 92 had his contributions to the pension submitted on June 29, 1986 which may create a bar to this application regarding the Labourers.

Investigation indicates that this employee's last day of work was April 25, 1986, and the application for revocation regarding this employer occurred on May 5, 1989, thereby, falling within the three-year time line as stipulated under Section 50 of the Labour Relations Code.

11. Was any bargaining notice ever served on Stuart Olson Construction Ltd. by any of the affected Unions?

Counsel for the Employer states that no notice to commence collective bargaining was served by any of the affected Unions.

12. Explain why Stuart Olson companies carry on under the generic term "Stuart Olson".

The Employer's counsel stipulated that the generic is strictly used as a marketing tool.

TIMELINESS OF THE APPLICATION

Section 50 sets out the time when an application for revocation may be made. [The report set out s. 50(5)]. Given this, the application appears to be timely

The Board also has to be satisfied that there has been no employees in the unit for at least three years.

Investigation indicates the Union may not have abandoned its bargaining rights, but there has been no employees represented by the aforementioned Unions for a period of at least three years.

RECOMMENDATION

It would appear that the application is timely and there have been no employees in the bargaining unit represented by the above locals by a period exceeding three years. It is recommended that Certificates Nos. 21-75, 89-82 and 114-84 be revoked.

SECTION 11(3)(a) APPLICATION

This application was filed on June 14, 1989 and requested that the Board determine if Stuart Olson Construction Ltd. is an employer.

Section 11(3)(a) states:

11(3) The Board may decide for the purpose of this Act whether

- (a) a person is an employer.

As the revocation investigation indicated, Stuart Olson Construction Ltd. is not an employer and is strictly a holding company.

RECOMMENDATION

Investigation indicates that Stuart Olson Construction Ltd. is not an employer as defined in the Code.

This report went out to the unions on October 12th with the following covering letter:

Should you have objections to these findings, the nature of your objections should be filed, in writing, giving full particulars. Objections should be submitted to the Board prior to the

hearing.

The Board will proceed with a hearing scheduled for Monday, November 6, 1989 at 9:30 a.m., in the Board Room, Main Floor, 10808 - 99 Avenue, Edmonton, Alberta. The Officer's report will be in evidence before the Board at that time. Should you desire, you may have an agent or lawyer represent your interests at the hearing.

Please arrange to attend the hearing prepared to present evidence or argument in support of any position you may wish to take.

The material part of the officer's report about Stuart Olson Limited reads:

The Company

Stuart Olson Limited, according to their solicitors, originally was engaged in employing union members on construction sites. The last 20 years, however, Stuart Olson Limited divested itself of all employees including those covered under certificates numbered 95-61 and certificate number 5-61. Counsel for the employer indicates that, due to the inactivity of the employer for well in excess of 20 years, there are no records available with respect to the time it operated in the construction industry.

Shareholders/Directors of the Company are: [The report lists the individuals]

Stuart Olson Limited has become a holding company.

Timeliness of the application:

Section 50 sets out the time when an application for revocation may be made:

Given this, this application appears to be timely.

The Board also has to be satisfied that there has been no employees in the unit for at least three years. Section 51(1) states: [section reproduced]

Investigation indicates that the union may not have abandoned its bargaining rights, but there have been no employees represented by the aforementioned unions for a period of at least 20 years.

Recommendation

It would appear that the application is timely, and there have been no employees in the bargaining unit represented by the above locals for a period exceeding 20 years. It is

recommended that certificates number 95-61 and 5-61 be revoked.

Between October 24th and 27th, the Union responded to these two reports with:

1. An application under s. 44.
2. A letter objecting to Mr. Ross' continuing to act on the file because he had given evidence in the matter through the report.
3. An application under s. 13 for a Notice to Attend and Produce directed to the C.L.R.a.
4. An application said to be under s. 13 to have Stuart Olson Construction Ltd. and Stuart Olson Limited produce an officer compelled to attend and submit to an examination for discovery.

The application under s. 44 reads:

Please be advised that in response to the applications of Stuart Olson Limited and Stuart Olson Construction Ltd. for revocation of bargaining rights, please accept this as an application under Section 44 for the following declarations:

1. That there has been a transfer of business from Stuart Olson Limited to Stuart Olson Construction Ltd.
2. There has been a transfer of business from Stuart Olson Construction Ltd. to Stuart Olson Construction Inc. and to Stuart Olson Industrial Contractors Inc.

As a result, it is asked that the Labour Relations Board declare that all certificates referred to in the application for revocation apply to Stuart Olson Construction Inc. and Stuart Olson Industrial Contractors Inc. Pursuant to Sub-section 11(4), I ask that the various certificates be varied to recognize the appropriate employer.

On behalf of my clients, I ask that the Labour Relations Board order an investigation into the transfer of business.

Counsel for Stuart Olson Limited and Stuart Olson Construction Ltd. replied to all of these matters on November 1st. Their points were:

- The request that the CLRa attend concerned information that was irrelevant to any matters in issue.
- The section 44 application lacks particulars.
- The request that Mr. Ross no longer act because he had "given evidence" was without merit.

- That the Board should not order examinations for discovery in this, or any other, case.
- That the Unions were using every available legal response to frustrate and delay the applications.

The CLRa also objected to a Notice to Attend for a variety of reasons. The Board then set the matter down for hearing on the following basis.

- It denied the request to examine someone from the CLRa on the basis of relevance, but gave leave to re-address the issue at the hearing.
- The Director of Settlement refused the Section 44 application for want of particulars.
- It set the request for examination for discovery for argument at a hearing.
- It set the suggestion that Mr. Ross was no longer able to act for hearing.
- It adjourned the merits of the revocation applications pending the resolution of these preliminary matters.

The hearing on November 30th resolved the dispute about Mr. Ross' position, and heard argument on the remaining points. After the hearing, the Board wrote to the parties on December 4th saying, in part:

The Board wishes to resolve the question of particulars before dealing with the applications concerning evidence. This is the Board's usual approach in these matters, see *I.B.E.W. Local 424 v. Canem, Menac et. al.* [1987] Alta.L.R.B.R. 203.

Mr. Ross has already raised objections concerning particulars in his letter of November 1st, 1989. Mr. Johnson, on behalf of the Labourers and the Cement Masons, should reply to those objections in writing by Friday, December 8th. A copy is to go to Mr. Ross. In his reply Mr. Johnson should also particularize his section 44 and section 11 applications and any objections he wants to raise to the two officer's reports.

Mr. Ross, in turn, has until December 13th to raise any further argument about the absence of particulars so far, and to comment on any further particulars filed by Mr. Johnson. Mr. Johnson has until December 15th to forward any rebuttal.

By asking for particulars in this way, the Board is not rejecting Mr. Ross' application to deal with the applications on the basis of the particulars on file so far. The Board simply wants to move the matter along so, if we allow further particulars we will have them filed now rather than later.

The Board will decide the sufficiency of particulars question on the basis of the submissions

obtained through the process outlined above. The Board reserves its decision on the request concerning evidence until it decides the issue of particulars.

We will assess the question of particulars as of the Board's December 4th letter. The Union had, by then, ample time to particularize its position on the revocation application and to respond to the officer's reports sent out on October 12th. However, since the question of particulars is linked to how the Board handles revocation applications, and to what the Board expects of its officers in reporting on such cases, we will comment on these questions first.

2. Processing Revocation Applications

Certification and Revocation proceedings are, by statute and by Board practice, intended to be expedited. This case is not a success story in that respect. Section 51(3) says:

The Board shall conduct any representation vote and shall complete its inquiries into and consideration of an application for revocation of bargaining rights as soon as possible.

This section, and the Board's policies, make no exception to the expedited application principle simply because the application is from a former employer.

The Board's procedure on receipt of a revocation application is to notify the trade unions and invite objections within a specified time. The Board also appoints an officer to investigate the matters in issue. The officer can rely on certain presumptions. When the application is to revoke a certificate, the officer may investigate the matter on the basis that the certificate sets out the bargaining relationship in question.

Division 7 of the Labour Relations Code equips the parties with the necessary statutory tools to keep their bargaining rights and certificates up to date. It is not the officer's responsibility to go behind the certificate in question and canvass every possible sale, transfer, common employer situation or similar circumstance that might touch upon the bargaining rights shown by the Board's records.

This is not to say a trade union cannot raise such an issue in response to a revocation application. It may do so. However, in such cases, it is up to the Union to bring a properly particularized application which the Board will process in the usual manner. This usually does not involve an officer's report. Respondents cannot expect that, by merely raising the spectre of a sale, lease or transfer, a common employer situation, a true employer argument or some similar objection, the Board will appoint an officer to go out and explore whether any such situation exists.

Particulars may be hard to provide within the short time frames usually involved on revocation applications. However, the root cause of that problem is the earlier failure to act under Division 7 to update and enforce bargaining rights. This, in turn, may indicate a failure to keep abreast of what is happening to the employment situation in the field.

3. The Officer's Report

The Union objects that the officer's report is inadequate. The Board agrees with this submission to some extent. However, we do not find that inadequacy significant in this case. The only objection set out with enough particularity at the outset of the officer's investigation was that Leo Neault worked within the three years. The officer investigated that matter and adequately set out his findings. The Union raises no objection to his finding on that point and that objection is therefore resolved.

On the remaining objection, that Stuart Olson Construction Ltd. was the true employer, we find that the Union's original particulars were inadequate. As a result, an investigation on this point ought not to have been undertaken in the first place. It is for this reason we do not find any inadequacy in the investigation significant.

Notwithstanding this, we wish to emphasize several points about a Board Officer's role. We do so because of the number of times in this investigation when one side or the other raised issues about the proper manner of proceeding.

These comments are based on our general experiences with officer's investigations. They are not in any way intended as criticism of the very able counsel involved in this case. However, the diversity of views they express suggest some clarification of the officer's role, by the Board, would be helpful and timely.

The officer is an officer of the Board and is at all times an impartial Board representative. The officer is not there to lend support to one side's position or the other's. Officers carry out investigations using their own judgment. They must assess facts, decide the relevance of any issue and arrive at reasoned conclusions. The Board, through a panel or more frequently the Director of Settlement, may direct the officer as to what to investigate, but usually leaves the method of so doing to the officer's discretion.

Officers must frequently deal with the parties. The Board expects, and by s. 12(3) is entitled to expect, that the parties will give reasonable assistance to officers in carrying out their duties. It is for the officer, subject to the law and Board direction, to decide how the investigation is to proceed. The officer cannot let the parties, and the parties should not presume to direct the officer, in how to conduct the investigation. An officer's findings must be, and the Board takes them to be, based on the officer's own conclusions. The officer's report becomes evidence before the Board. However, it is evidence because it represents the results of the officer's investigation. It is not evidence in the sense that it makes the people to whom the officer spoke witnesses before the Board.

Officers should usually get the positions of both sides to identify issues and explore them in one comprehensive report. This avoids re-investigations. However, this is not a licence to inject new issues into the Board's process, piggybacking on an investigation into another matter. Obviously, the quality of an officer's report, particularly in an expedited process, depends upon the cooperation received from the parties and the degree to which the parties have the information necessary to address the issues. If either party is

less than fully informed or cooperative, the risk is that the officer's report may omit, or inadequately assess, that party's point of view. However, the remedy for that is to file a timely objection to the officer's report and adduce a different or supplementary view of the facts in issue at a hearing. It is not the parties right to insist on a particular type of investigation or re-investigation, or to try to cajole the officer down certain paths or into certain findings.

A question arises here about an officer's contact with Counsel. Officers may accept information advanced through Counsel, who are frequently most helpful in ensuring that matters are properly investigated. However, the officer has the authority and discretion to seek information directly from the parties and their representatives. Counsel, while entitled to represent the client, cannot insist on being the sole conduit through which all information must pass.

It is not uncommon for Counsel to correspond with the Board officer. When this is done, during an investigation, the Board treats such correspondence as a document on the file. It notifies the other side of its receipt (subject to employee confidentiality restrictions). On occasion, through inadvertence, this notification may be overlooked. This happened in this case with the Union's July 18th letter. This is a reason why the Board provides a list of the Record at the outset of each hearing. Where Counsel know other parties to a matter have representation, it helps the Board, and is a matter of courtesy for Counsel, to provide an immediate copy to those representatives.

When the Board sends out an officer's report, it advises the parties that if they have objections to the contents of the report, they must advise the Board of those objections, with full particulars of the matters in issue. If the Board receives such particularized objections, it affords the objecting party an opportunity to adduce evidence at a hearing. This may be to correct, supplement, or modify the officer's facts or conclusions.

What the Board does not accept are objections that simply object to a finding or recommendation without saying why. It is not unusual, since revocation reports contain a recommendation which may determine the application, that the losing side will object to the conclusion. Unless this objection is given some substance, the Board will act upon the report. Boilerplate "I disagree" objections will not do. The Board has set out its requirements for particulars on applications before. Much the same considerations apply to objections.

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Vikon Technical Services Ltd., et. al. (85-073, December 20, 1985, A. Sims, Chair)

... it is useful to make some general observations on the need for particulars in applications before this Board. When a party commences an application or complaint before us they must give particulars of what they are applying for, or why they are complaining. What this means is that in their initial correspondence they should set out in plain English a set of allegations of fact which, if accepted as true, would establish that the section of the Act in question may apply, or have been violated. They are not required to prove their allegations

in the initial application, they must just make them. It is not enough to recite the section in question and then say some other person has violated it. The Board, when reading a complaint, should get a clear understanding of when, how, and by whom, the Act was violated. When receiving an application the Board should get a clear understanding of how the facts alleged justify the use of the section of the Act referred to, and justify the granting of the order or remedy sought.

This requirement for particulars is not a request for a “legalistic” approach. A layman, reading a complaint or application should be able to get a clear understanding of what the matter is about and why the Board is being asked to use its powers. Most sections in the Labour Relations Act are not complex. The particulars should make it clear why the facts referred to make the section or sections of the Act applicable. This is not an onerous task. Applications that lack these basic particulars will not be accepted initially, and will not be processed further.

We insist on particulars in order to ensure fairness to all parties. We have broad powers given to us by the Legislature. The exercise of these powers may cause major inconvenience to the party complained against. Answers must be given, officer’s investigations cooperated with, records that would otherwise be confidential disclosed, hearings attended, and lawyers sometimes retained. We will only enter into or continue this process where there is an allegation that, if true, would lead us to believe that the legislation might apply or have been violated. If an applicant cannot even allege facts that would, if proven, result in a Board order or remedy, then there is no justification for the process being started.

The other aspect of fairness, and the other major reason for requiring particulars, is that the parties on the other side of an application or complaint are entitled to know, in general terms, what is alleged against them. This is so they can reply to the complaint or application clearly, and so that they can prepare their defence or reply knowing what it is they have to defend or reply to. We are going to expect the same degree of precision in replies as we are in complaints. Again, we expect the parties concerned to set out their defences or replied in English rather than that obnoxious form of legalism known as “boilerplate”; designed to raise every defence known to mankind and yet telling the Board and the applicant or complainant absolutely nothing about the real issues in dispute.

We require particulars, in part, to speed up the processing of cases before the Board. This object would be frustrated if the requirement for particulars was seen as an invitation to launch preliminary objections about the adequacy of each application. The initial assessment of the adequacy of any given application will more frequently be a matter of administrative review by Board staff than of adversarial jousting by the parties. Where a party legitimately requires more particulars from the other side in order to prepare their case, and this cannot be accomplished by informal discussion either directly or with the help

of a Board officer, then the Board will hear that question and make a ruling. However, where there is only a dispute about whether the Act does or does not apply, as a matter of law, to the matters alleged, then the Board will customarily not hold a preliminary hearing, and will hear the argument in the ordinary way at the formal hearing.

...

There is a further reason for requiring particulars to be clearly given by both applicants and respondents. The inevitable result if they are not given is an adjournment. If one party is taken by surprise by the other's raising a matter not alleged previously, and not reasonably to be expected as part of the case, this will almost invariably lead to a request for an adjournment. This is frustrating, expensive and unnecessary for all parties and for the Board.

Since the *Fish* decision, the Board has adopted Rules of Procedure, in particular Rules 22(1)(b), 23 and 34, but the basic principles remain the same.

4. The Particulars in this Case

We have already found the Union's original "true employer" objection lacked particulars. However, by December 4th, the Board also had a section 44 application and access to the further facts set out in the officer's report. An officer's report normally follows a particularized application. However, for this case, in particular the section 44 application, we will assume the Union is alleging any favourable facts in the officer's reports in support of its application.

The Board's review of this material convinces us that the Unions lacked information sufficient to show that Stuart Olson Construction Ltd. (or later Stuart Olson Ltd.) was still an employer. However, they felt there must be some ties between the Stuart Olson Companies now operating on Union projects and the one with which they had bargaining rights. They did not know if the situation involved a spin-off, a sale, lease or transfer or a labour broker or true-employer situation. Their approach seems to be that if they could get the Board Officer to conduct a full inquiry for them, they might be able to find out.

The officer ought to have declined to inquire into the Union's list of questions. However, he pursued them some way by asking them of the employer and recording the answers in the report. Had the Board independently directed an investigation into those issues, the report would be inadequate. It is obviously a conduit, simply passing on answers to questions, rather than a reasoned fact finding report based on the officer's own judgment. However, in most respects it was simply an effort to accommodate the Union's request. The Union cannot now complain about the thoroughness of the report, since there were initially insufficient particulars to justify any report in that area.

The allegations of fact show a group of companies operating together. They show work being done by companies within that group. There are allegations that suggest some of that work is being done with union

labour and some is not. What remains absent is any allegation about Stuart Olson Ltd. or Stuart Olson Construction Ltd.'s control, direction or remuneration of any employees, who might arguably fall within these bargaining units, sufficient to support a "true-employer" argument. Equally absent are the allegations that might support the suggestion of a sale, lease or transfer, within section 44, from the two original companies to company(ies) employing employees.

There are insufficient particulars to raise these suggestions beyond the realm of possibility or speculation. The allegations, at best, are consistent with a common-employer situation (which is neither alleged, nor permitted at the time of the application), or the formation of some new enterprises without sufficient ties to justify a statutory transfer of bargaining rights. Where the officer's report provides information, it largely rebuts, rather than supports, the Union's allegations.

As a result, the Board dismisses the Union's objections with respect to the revocation applications. The Board also dismisses the section 44 application for want of particulars. Given this ruling, it is unnecessary to comment on the further matters laid out after December 4th, 1990.

5. The Request for a Notice to Attend and for an Examination for Discovery

The decision to dismiss these matters makes the balance of the arguments academic. This is particularly so in light of the ruling in the Board's earlier decision in:

International Brotherhood of Electrical Workers, Local Union 424 v. Canem Systems Ltd., et. al. [1987] Alta.L.R.B.R. 203.

The principle running through these cases is the simple proposition that the process of compulsory production of documents, whether before or at a hearing is designed to allow a party to establish the case they have already set out, not to allow them to discover whether or not that case, or some other case exists. We fully accept that principle, and it is the reason why we firstly require particulars before proceeding, and secondly only grant notices to produce that are reasonably relevant to the question placed in issue by those particulars. There is inevitably a measure of discovery involved in this because documents, previously private, may be revealed whose existence was hitherto unknown. This is not a factor, however, that persuades us to abandon pre-hearing production. *[emphasis added]*

In this case the Unions seek two orders. The first is a Notice to Attend directed to the C.L.R.a. This was earlier rejected. It now comes forward as a request to reconsider as well as a re-argument as permitted by the original panel. Given the ruling on particulars, we deny this request.

Second, the applicant asks the Board to order an examination for discovery. This is to enable it to find evidence about the relationship between the various companies within the Stuart Olson group. This question raises two important questions.

Does the Board have the authority to subject a person or party to an examination for discovery?

If the Board has that statutory authority, should the Board, as a matter of general policy, adopt such a procedure?

While the question is academic in this matter, it is an important matter of Board authority and policy. It therefore merits some preliminary comments.

Both parties agree that the authority to order a discovery, or discovery-like process must be found in the statute. The Board's powers all derive from the Labour Relations Code, they are not inherent.

The Code provides:

11(2) The Board may, for the purposes of this Act

- (a) receive applications, references and complaints,*
- (b) conduct any inquiries or investigations that it considers necessary, either itself or through its officers,*
- (c) conduct any hearings that it considers necessary,*
- . . .*
- (e) make or issue any interim orders, decisions, directives or declarations it considers necessary pending the final determination of any matter before the Board,*
- (f) make or issue any orders, decisions, notices, directives, declarations or certificates it considers necessary,*
- (g) make rules of procedure for the conduct of its business, for the giving of notice, for the service of documents, for hearing and conducting inquiries and for any other matters it considers necessary, . . .*

12(1) The Board or an officer may

- (a) inspect and examine all books, payrolls and other records of an employer, an employee or any other person relating to employment or terms or conditions of employment;*

(b) by notice in writing demand the production of any books, records, documents, papers, payrolls, contracts of employment or other records relevant to employment or terms and conditions of employment or relevant to the membership or constitution of a trade union or employers' organization, either forthwith or at a time, date and place specified in the notice;

(c) take extracts from or make copies of books, records, documents, papers, payrolls, contracts of employment and any other records relating to employment or terms or conditions of employment;

(d) require an employer, employee or any other person to make, furnish or produce full and correct statements either orally or in writing respecting employment or terms and conditions of employment, and may require the statements to be made on oath or to be verified by statutory declaration;

(e) post or require any employer, trade union, employee or other person to post any notices or other communications of the Board at the locations that the Board or officer, as the case may be, considers advisable.

(2) For the purposes of this Act, an officer may, in the execution of his duties,

(a) enter, inspect and examine at all reasonable times any premises or other place, other than a private dwelling, in which he has reason to believe that a person is employed,

(b) make any examination and inquiry necessary to ascertain whether the provisions of this Act or any order, decision, directive, declaration or notice of the Board or any written instructions of the Chairman, a vice-chairman or an officer have been complied with, and

(c) question an employee, without his employer's being present, during the employee's regular hours of work or otherwise.

(3) An employers' organization, employer, trade union and employee, and any person acting on their behalf, shall give reasonable assistance to the Board and officers to enable them to do any of the things referred to in this section.

13(1) For the purposes of this Act, officers and members of the Board may administer oaths.

(2) Subject to subsection (3), the Board may, by order, summon and enforce the attendance

of witnesses and compel them to give oral or written evidence on oath and to produce the documents and things the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record may in civil cases.

(3) If any person fails to comply with a Board order made under subsection (2), or conducts himself in a manner that may be in contempt of the Board or its proceedings, the Board may apply to the Court for an order directing compliance with the Board's order, or restraining any conduct found by the Court to be in contempt of the Board or its proceedings.

(4) On an application under subsection (3), the Court may grant any order that, in the opinion of the Court, is necessary to enable the Board to carry out its duties.

(5) The Board

(a) may accept any oral or written evidence that it, in its discretion, considers proper, whether admissible in a court of law or not, and

(b) is not bound by the law of evidence applicable to judicial proceedings.

The Unions argue that s. 13(2) gives the Board power to order a discovery process since the Rules of Court authorize such a procedure in civil cases, the Union say the Board can do the same. This presumes that such a process comes within the words:

... summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce the documents and things the board considers requisite to the full investigation and consideration of matters within its jurisdiction.

The Respondent's answer to this proposition is as follows. They say this application is solely under s. 13, not under the Board's other powers. They argue that discovery is a separate process from the giving of evidence before a Court. They argue that examination for discovery is not a common law right, only one created by statute. If the Board does have the power to craft a discovery process, they would expect the Board to do so through its rule-making power. This has not been done. They also argue that discovery is a substantive, not a procedural, matter. They question the Board's authority to make rules extending beyond procedural matters.

We do not believe this question falls to be decided on the basis of a historical analysis of discovery in the civil process. If discovery, as practised in the civil courts, is not within the words of section 13(2), the Board nonetheless has the power, under the other sections cited above, to fashion a process so similar that the distinction would lack significance. For example, the Board might use its section 12(1)(d) powers for this purpose.

Assuming such bare statutory power exists, it by no means follows that the Board should avail itself of that power. The real question is whether the Board should allow a discovery-like process. The wording in the Labour Relations Code is enabling. It does not compel the Board to use such a process.

We see nothing in the Labour Relations Code, or the reports leading up to it, that suggests the Legislature directly intended the Board to adopt a discovery process. Indeed, the general tenor of the reforms brought about by the Code were to expedite the Board's hearing processes. A discovery process holds very little promise of expedition.

The Labour Relations Code structures the Board as a quasi-judicial independent tribunal with the power to make final and binding decisions. It has control over its own procedure. In processing applications before it, the Board must follow the constraints of the statute and may exercise the powers conferred by the statute to attain its purposes. Grafted onto that is the fundamental requirement of fairness. What we are really being asked to do in this application is to follow the judicial model of adjudication. For several reasons, we are not persuaded that this is appropriate.

Expense. To allow discovery adds inevitably to the expense of a proceeding before the Board. It would mean that parties would often have to attend, before hearing, for examination. A transcript would follow. This would need to be available to all parties. Extracts would be presented to the Board, and arguments would follow, as they do in Court, about relevance and admissibility.

Delay. Discoveries take time. Parties argue about their available dates. They cancel appearances and so on. This requires a system where hearings would wait until discoveries were over and undertakings complied with. This would mean the Board losing control over its schedule.

Diversion. Some argue that discovery narrows the issues in dispute. The Board doubts this would be the effect of discovery in labour relations. Unions and Employers deal with each other on a number of fronts. There is all too much opportunity in such close and continuing relationships for the parties to use discovery for ulterior motives. This might be to advance some other aspect of their relationship, like pursuing a grievance issue. It might be political posturing with the parties' constituents. It might be putting on pressure for, or gleaning information for, bargaining.

Additional Hearing Time. Discovery in the Civil Courts is now a matter of right. The Board's evidentiary powers are discretionary, as confirmed in several cases. Whether as of right or not, there in any event needs to be control over who examines who and when. Emergency matters like an illegal strike or lockout afford no time for discovery processes. If this is the case, where does one draw the line? Should the Board allow discovery on certification applications, for example? The Board could become embroiled in frequent disputes as to whether discovery was desirable in any given case. This time would be better expended getting on with the hearing process itself.

Underneath all this is the assumption that the civil court model is somehow the benchmark model for decision making. There is an implication in the arguments that a process that can be shown to fall short of

the civil trial process lacks justice, or is inferior. We do not accept this view. The civil court procedure works well for some forms of litigation. Even then, it is not without its detractors and particularly so with respect to discovery.

Where the Court style civil process may not always work well is where emotional parties have to continue dealing with each other, where third party interests are vulnerable if the principle parties have poor relations, where the area involves specialized expertise and where speed is important. In these situations processes like those used by the civil courts often prove cumbersome.

We do not believe it sensible or required that we frame our processes by reference to the procedure adopted in the present day civil courts (let alone by the processes referred to in some of the historical material cited to us). The Board must hear and determine applications of the type set out in the Labour Relations Code. In so doing, we must be fair and follow the rules of natural justice. However, these rules are not, and never have been, set solely by comparison to the rules of procedure in civil cases. They are based on more universal principles. Indeed, if the rules in civil cases were the benchmark, where discovery is a highly prized right, much of criminal law might fall, since it too lacks examinations for discovery.

We have not been referred to any similar tribunal using a discovery process as part of its method of adjudication. Perhaps such a method is open to the Board. However, if we are to adopt such a practice, we will only do so after consultation with the parties and a thorough assessment of our statutory mandate and the policy considerations involved.

If the basic statutory power exists, it is possible a panel may craft such a process to meet the needs of some exceptional case. We are not persuaded that this case presents such a circumstance. Even if particulars had been sufficient to justify proceeding further, we are not, in any event, persuaded to fashion a discovery process in these circumstances.

For these reasons, it is the decision of the Board to dismiss the application under s. 44 and the application to reconsider the decision not to grant a Notice to Attend directed to the C.L.R.a. Given the officer's report before the Board and the lack of particularized objections, the Board grants the application to revoke certificates 5-61, 89-82 and 114-84.