

CITATION: Kinnear v. Hanley, 2017 ONSC 1165
COURT FILE NO.: CV-17-568927
DATE: 20170221

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bob Kinnear on his own behalf and on behalf of all members of Local 113 of the Amalgamated Transit Union, Plaintiff

AND:

Lawrence J. Hanley on his own behalf and on behalf of all members of the Amalgamated Transit Union (International), Defendant

BEFORE: Penny J.

COUNSEL: *Sean Dewart, Tim Gleason and Andrienne Lei* for the Plaintiff

Douglas Wray and Michael Church for the Defendant

HEARD: February 17, 2017

ENDORSEMENT

Overview

- [IJ] This is a motion for an interlocutory injunction. The Notice of Motion seeks orders:
- (a) authorizing the plaintiff to represent all members of Local 113 of the Amalgamated Transit Union, in this action;
 - (b) enjoining the defendant from imposing or carrying out a trusteeship over Local 113;
 - (c) enjoining the defendant from imposing any form of discipline or charges against any member of Local 113;
 - (d) requiring the defendant and others acting under the defendant's authority:
 - (i) to relinquish to the duly elected executive board of Local 113, possession and control of all the Local 113's assets;
 - (ii) to vacate premises owned or occupied by Local 113;
 - (iii) to cease acting or purporting to act as trustee of Local 113; and
 - (e) relieving the plaintiff in his personal capacity from the requirement of giving an undertaking as to damages and permitting that undertaking to be given by Local 113.

The Issues

[2] It is well established that a party seeking an interlocutory injunction has the onus of establishing that:

- (1) there is a serious issue to be tried;
- (2) irreparable harm will be sustained if the order is not granted; and
- (3) the balance of convenience favours granting the injunction, in the sense that the harm suffered if the injunction is not granted is likely to exceed any harm suffered if it is.

[3] Under Rule 40.03, a party seeking an interlocutory injunction must provide an undertaking to pay any damages suffered by the defendant as a result of the injunction if, at trial, it is determined that the injunction was not warranted. In this case, the plaintiff argues that the appropriate order for the undertaking in damages is that it be provided by Local 113 on behalf of all of its members.

[4] There is a subsidiary issue concerning the plaintiffs right to sue in a representative capacity. The test for a representative action under Rule 12.08 requires establishing that:

- (4) there is a proper cause of action;
- (5) the claims to be advanced raise common issues;
- (6) a representative action is the preferable procedure for the determination of the common issues; and
- (7) the proposed representative would fairly represent the interests of the members of the unincorporated association or trade union and does not have any interest in conflict with those members, *Ginter v. Gordon*, 2001 CanLII 28052 (ON SC).

[5] The plaintiff takes the position that he has met the three-part test for the granting of an interlocutory injunction. The plaintiff also says that he meets the test for a representative proceeding. The plaintiff also argues that, because these proceedings are to vindicate the rights and assets of Local 113, it is Local 113 that should give the undertaking in damages.

[6] The defendant takes the position that the plaintiff has not met any of the three parts of the test for an interlocutory injunction. The defendant also says that the plaintiff has not met the test for leave to act in a representative capacity. Finally, the defendant argues that Local 113 ought not to be required to give the requisite undertaking in damages.

Background

[7] International was established in 1892. It has 190,000 members in 240 local unions throughout the United States and Canada. There are approximately 30,000 members in Canada.

[8] Local 113 was formed in 1899 by a charter issued by International to 13 founding members. It is International's largest local, with 11,000 members. It has assets of approximately \$10 million.

[9] Relations between the members of Local 113 and International are governed by a Constitution. Its provisions include:

- (a) the president of each local is the chief executive officer with general supervision over the local's affairs;
- (b) there is an elected executive board for each local. In the case of Local 113, the board has 17 members;
- (c) a local may own property and real estate;
- (d) a local cannot withdraw from International as long as 10 members of the local object. In the case of Local 113, this represents .09% of the membership;
- (e) if a local withdraws or disaffiliates from International, the local's property is forfeited to International;
- (f) International may suspend the existing management of a local and place it in temporary trusteeship to, among other things, restore democratic procedures, carry out the legitimate objectives of International and enforce International's Constitution and Bylaws. This includes a local "willfully violating" the Constitution or acting "in antagonism" to International's welfare. If a temporary trusteeship is imposed, a hearing must take place within 30 days to determine whether the trusteeship is justified and should be continued;
- (g) union officials may be disciplined for "gross disloyalty" or "dual unionism, decertification or secession." When a charge alleges support for any other union or collective bargaining group with the purpose or intent of supplanting International, the charge must, in the first instance, be filed exclusively with the general executive board of International.

[10] Mr. Kinnear was first elected president of Local 113 in 2003 and has been re-elected for five consecutive terms. His current term expires in December 2018. According to Mr. Kinnear, there has been growing dissatisfaction with International within the membership of Local 113. This dissatisfaction is said to result from a disconnect between the substantial funds paid by Local 113 to International (about \$6,000/day) and the paucity of services or support received in return.

[11] The Canadian locals of International are members of ATU Canada. At its most recent conference in June 2016, delegates from Canadian locals unanimously passed a resolution demanding that a recent 25% increase in dues remitted to International be repatriated for the benefit of Canadian members.

[12] Mr. Hanley is the president of International. It is said that, following the Canadian delegates' resolution, Mr. Hanley, who was in attendance at the ATU Canada conference,

described the resolution as "ridiculous" and accused those who spoke in favour of it as being "disloyal" and "anti-union."

[13] According to Mr. Kinnear, these and additional events at the October 2016 International conference held in Toronto, fuelled the fires of Local 113 membership discontent with its parent union.

[14] Mr. Kinnear's evidence is that the issue of dis-affiliation from International was discussed at a number of Local 113 executive board meetings. At a meeting in October 2016, he and another former member of the executive board claim there was a show of hands and that the members of the Local 113's executive board authorized Mr. Kinnear to proceed with a process to leave International.

[15] This is a hotly contested fact. Thirteen of 17 members of the executive board now say the issue was never raised or discussed and that no such authorization was ever given to Mr. Kinnear.

[16] In any event, Mr. Kinnear formed the view that the majority of members of Local 113 support dis-affiliation. Mr. Kinnear says that he was keenly aware that limited options were available because of the International Constitution provisions authorizing International to put Local 113 in to trusteeship at the first sign of any discussion about dis-affiliation.

[17] As result, Mr. Kinnear took two actions which, again, are hotly contested. First, on February 1, 2017, Mr. Kinnear applied to the Canada Labour Congress. Both International and Local 113 are affiliates of the CLC. The CLC Constitution recognizes that union members may have valid reasons for changing their union. The CLC Constitution sets out a process for determining if there is any justification for a change in representation. This process involves mediation and an independent investigation, culminating in a vote of the membership if the investigator determines that a vote is justified. Mr. Kinnear invoked that process. Mr. Kinnear says he had authorization from the executive board to do so. International and most of the members of the executive board say he did not. Nevertheless, both Local 113 and International have now attorned to this process.

[18] Second, on February 2, 2017, Mr. Kinnear, on behalf of Local 113, served a Notice of Motion for an injunction to prevent International from imposing a trusteeship over Local 113, together with a Notice of Action seeking a declaration that certain provisions of the International Constitution are unconscionable and therefore unenforceable.

[19] Upon receipt of this information, International's general executive board convened an emergency meeting at which Mr. Hanley was given authority to impose a trusteeship on Local 113.

[20] He did so in the early hours of February 3, 2017, before the first return date, in Court, of Local 113's motion. International placed Local 113 into trusteeship and removed the entire executive board from office. A former member of Local 113's executive board, and now an International Vice President, Mr. Sforza, was appointed trustee. It is not contested that Mr. Hanley's sole reason for imposing a trusteeship was because of Mr. Kinnear's request filed with the CLC to investigate possible dis-affiliation and this litigation.

[21] Upon Local 113 being placed in trusteeship, the entire executive board was suspended including the five executive officers. However, the evidence is that the trustee has, since his appointment, reappointed 13 of 17 executive board members who continue to perform their functions in representing members and in the day-to-day operations of Local 113.

Interlocutory Injunction

[22] Because the request for an injunction is the main issue, and the issue engaging the facts and matters in dispute most comprehensively, I will start there.

Serious Issue to be Tried

[23] The threshold for a 'serious question to be tried' is a low one. The judge on the motion must make a preliminary assessment of the merits of the case and be satisfied only that the issue is neither vexatious nor frivolous, *RJR - MacDonald Inc. v. Canada (A.G.)*, [1994] 1 SCR 311 at p 337.

[24] Here, the 'issues' for trial are identified by the Notice of Action dated February 2, 2017.

[25] The Notice of Action seeks a declaration that sections 12, 13.4, 13.5, 13.17, 17, 21.7, 22.1, 22.2 and 27 of the International Constitution are void and of no force and effect. These provisions deal with the imposition of a trusteeship, the forfeiture of Local 113's property to International in the event it were to withdraw from International, the suspension of a local for "wilfully violating" the Constitution or "acting in antagonism to" International's welfare, a ban on any local withdrawing from International as long as 10 members object, prohibitions on the disclosure of "union business," the creation of charges of "gross disloyalty" and "dual unionism, decertification or secession," and the "exclusive" right of International and Local 113 to represent members for the purpose of collective bargaining.

[26] The Notice of Action also seeks a permanent injunction enjoining International or its general executive board from imposing or purporting to impose a trusteeship on Local 113, a permanent injunction enjoining International from imposing any form of discipline or union 'charges' on any member of Local 113, and damages for breach of contract in an amount later to be specified.

[27] At its core, Mr. Kinnear says members need to know, before there could be any vote to leave International, whether:

- (a) a vote to leave could be defeated by only 10 of 11,000 members voting the other way; and
- (b) the \$10 million of Local 113's assets will be forfeit to International if the membership decides to leave.

[28] Mr. Kinnear also argues that trusteeship and disciplinary proceedings against members for "disloyalty" or contemplating "secession" from International are calculated to suppress free speech and the democratic exercise of members' common law and statutory rights. Mr. Kinnear alleges, therefore, that all these provisions are unconscionable and should be declared invalid.

[29] I am satisfied, on a preliminary assessment of the merits, that the plaintiffs claims are neither frivolous nor vexatious; they raise, in other words, a serious issue to be tried.

[30] Since at least the Supreme Court of Canada decision in *Berry v. Pulley*, 2002 SCC 40, a trade union has been held to be an independent legal entity and that each member has a contractual relationship with the union itself (at paras. 46 and 48).

[31] Moreover, the contract between members and the union is essentially an adhesion contract. This is because individual members have effectively no bargaining power with the union. In many situations union membership is a prerequisite to employment leaving the individual with little choice but to accept the contract. In addition, a statutory labour relations scheme is superimposed over the contract between the member and the union and creates legal obligations. As Iacobucci J. wrote in *Berry v. Pulley*, *supra*, at para. 46:

...the statutory right of members to be represented by the union of their choice implies that the contract only exists as long as the members maintain that union as their bargaining agent, and *no penalty could be imposed by the contract against members for exercising this statutory right* [emphasis added].

[32] Because of the unequal bargaining power inherent in an adhesion contract, provisions of a contract that are unfair or disproportionate may be void for unconscionability. The Court of Appeal has articulated a two-part test for unconscionability:

- (i) a finding of inequality of bargaining power; and
- (ii) a finding that the terms of an agreement have a high degree of unfairness,

Birch v. Union of Taxation Employees, Local 70030, 2008 ONCA 809, at paras 45, 49 and 50.

[33] In this case, the plaintiff alleges at least three inequitable effects of the International Constitution:

- (i) any exercise of rights of dissent (including invoking the CLC justification process, to which both International and Local 113 are bound) results in immediate trusteeship and removal of the Local's leaders;
- (ii) a tiny minority of members of Local 113 can thwart the will of more than 99.91 % of the members should they wished to dis-affiliate; and
- (iii) if Local 113 dis-affiliates, the members will lose the benefit of all of Local 113's property.

[34] There is an arguable case that such results are grossly disproportionate and unfair as they may indenture the membership to International forever. It is likewise arguable, for example, that the looming threat of forfeiture of the assets will poison the democratic process that would otherwise permit union members to determine and pursue their collective interests.

[35] Members of unions have entrenched rights to dissent and to choose their representatives. The purpose section (s. 2) of the *Labour Relations Act, 1995*, includes the facilitation of collective bargaining through trade unions that are "freely designated representatives" of the employees. Section 5 of the LRA also guarantees the freedom to choose one's representative and to participate in its activities.

[36] The Court of Appeal's more recent decision in *Berry v. Pulley*, 2015 ONCA 449 at paras 57 - 59, held that the terms of the contractual relationship between the rank-and-file members and their union must be interpreted "in light of both the statutory right of union members to choose their union and the labour law principle affording a right to dissent to union members." The Court went on to state that:

the statutory right of members to be represented by the union of their choice implies that the contract only exists as long as the members maintain that union as their bargaining agent, *and no penalty could be imposed by the contract against members for exercising this statutory right* [emphasis added].

[37] International argues that Mr. Kinnear is off on a frolic of his own and that his claims of substantial support from the executive board and membership of Local 113 are either disproven or unproven. As noted earlier, there is conflicting evidence about the degree and extent of Mr. Kinnear's consultations with and support from the executive board for any of his actions. There is at least some evidence of dissatisfaction among the rank-and-file over the adequacy of the International relationship and utility of continuing that relationship. Given the low threshold for part one of the test, I do not think these evidentiary disputes constitute a bar to there being a serious issue raised.

[38] International also argues that the claim is premature as there is no pending "vote" and the court will not, in any event, grant declaratory relief "in the air" or merely to provide parties with a hypothetical "opinion" on the consequences of certain potential actions.

[39] At trial, these may ultimately be valid arguments but at this stage, the record is not sufficiently developed to say whether there is substantial support for an opportunity to withdraw from International, such that a vote is or is not likely, or that the declaratory relief sought is merely "hypothetical."

[40] International also argues that the purported withdrawal of Local 113 from International could not alter the bargaining rights in any event. International argues that if Local 113 purported to withdraw or dis-affiliate, it would cease to be a trade union, since its status as a trade union is based on it being a local chartered by International under the International Constitution.

[41] This too is hotly contested. The present record does not allow for any conclusive finding on this point, nor is one required. It is sufficient for the purposes of this motion that there is a serious issue to be tried. There is, I find, at the very least a serious issue over whether the membership of Local 113 could dis-affiliate with International and maintain the collective agreement and collective bargaining rights its members currently enjoy.

[42] For all these reasons, I find that the plaintiff has met part one of the test for an interlocutory injunction and that there is a serious issue to be tried.

Irreparable Harm

[43] "Irreparable" harm refers to the nature of the harm suffered rather than its magnitude. Harm is irreparable if it cannot be cured or meaningfully remedied with an award of money damages.

[44] The essence of the plaintiff's position is that an interlocutory injunction is required to preserve the democratic rights of the members of Local 113. Mr. Kinnear is the democratically elected president of Local 113. Local 113 and its members are faced with an immediate and crucial determination of their representation rights through the CLC justification process. Yet, the plaintiff argues, at this critical juncture the members of Local 113 have been denied their elected leadership and access to the assets and resources of the Local. These have been usurped, the plaintiff argues, by their very opponent in that process, International, through the imposition of a trusteeship. This interference with the members' democratic right to choose can only be suitably contained pending trial by restraining the trustee and returning Mr. Kinnear and others to office.

[45] The defendant argues that there is no "harm" to Mr. Kinnear or Local 113 at all because 13 of 17 members of the board have been restored to office. The defendant also points out that there will be a hearing within 30 days on whether to continue the trusteeship. Mr. Kinnear will be entitled to participate in that hearing with counsel paid for by Local 113. As well, the CLC investigation will be ongoing and Mr. Kinnear will have access to the investigator in that process.

[46] These arguments are not, in my view, dispositive of the issue of irreparable harm.

[47] International stole a march on Mr. Kinnear by preemptively appointing a trustee on the morning of the very day Mr. Kinnear's motion was returnable in Court. Thus, the present "status quo" of Local 113 being under trusteeship and Mr. Kinnear being out of office was obtained in the face of Mr. Kinnear's request to the Court for relief to prevent the very advantage that has been obtained by International's preemptive action, Sharpe, Hon. Robert J., *Injunctions and Specific Performance*, looseleaf (Toronto: Thomson Reuters Canada, at para. 2.653); *Ruskin v. Canada All-News Radio*, [1979] O.J. No. 266 (HCJ).

[48] It is clear that the purpose of the trusteeship is to quell dissent. This is essentially admitted. Mr. Kinnear was elected in 2016 (as he was for four previous terms as well) by Local 113's democratic processes and in spite of International's interference in the last election. His removal from office manifestly deprives the membership of their duly elected leader.

[49] The reappointment of 13 of 17 members of the executive board, it seems to me, undermines, rather than strengthens, the defendant's position. If the vast majority of the executive Board is still in office, what purpose is served by the trusteeship at all but to influence improperly the democratic will of the members by suspending their duly elected president? I find that International has used the trusteeship to silence opposition and to spread misinformation to the members.

[50] More importantly, if the defendant is right and Mr. Kinnear does not enjoy the confidence or support of the duly elected executive board, they will act by resolution to end, or constrain, Mr. Kinnear's actions. This will be the result, however, of Local 113's democratic processes and not the result of the preemptive appointment of a trustee over Local 113's assets and undertaking.

[51] Irreparable harm also results from the fact that, by removing Mr. Kinnear from office as president, the trusteeship has prevented the plaintiff from effective communication with the members who elected him. International now controls all communications with the members and has the absolute power to dispose of, or silence, dissenters.

[52] The result of all these factors is to deprive the membership of open and informed debate on matters which the Supreme Court of Canada has said are clearly the right of members to discuss.

[53] For these reasons, I find Local 113, in its capacity as representative of all the members, will suffer irreparable harm unless the trusteeship is restrained.

[54] The plaintiff also seeks an injunction prohibiting International from exercising any of its disciplinary powers under the Constitution.

[55] There is no evidence that International has invoked any disciplinary powers by bringing "charges" against Local 113 members for "disloyalty, dual unionism, decertification or secession." The fact that these powers exist may well give rise to a finding at trial that they are unconscionable and unenforceable. More than the existence of these powers, however, is required for a finding of irreparable harm pending trial so as to warrant an injunction against the use of these powers. In this case, there is no evidence that International has laid any charges against Local 113 members under section 22 of the Constitution. I therefore decline to make any order in this regard. Were such charges to be brought, however, the Court might well take a very different view of the matter.

Balance of Convenience

[56] The balancing of convenience requires assessing whether the harm that would be suffered if the injunction is not granted is likely to exceed the harm that would be suffered if it is.

[57] The plaintiff says International will suffer no harm if the trustee is removed. The executive board could still overrule unilateral actions taken by the plaintiff. The executive board, however, unlike the trustee, is accountable to Local 113's membership and is to be preferred as the governing instrument.

[58] International says the trusteeship does not prevent the plaintiff from continuing with his action, provided he is authorized to do so, or participating in the 30 day review hearing or in the CLC justification investigation. The majority of the executive board has already stated it does not agree with the plaintiff's position on dis-affiliation.

[59] The real fight here is about who will control the administrative resources of Local 113 pending, or during, the CLC investigation, which may result in the exercise of member' common law and statutory rights on whether to remain with or leave International. I have found that the pre-trusteeship status quo ought to be preserved in order to permit this to happen.

[60] I am not satisfied that International is exposed to any harm as a result of this process. If members want to remain with International, the status quo will continue. If the Court were to grant the relief sought in the action, and members voted to leave, International also would have suffered no "harm" in the sense necessary for weighing the balance of convenience.

[61] If the injunction is not granted, however, the members of Local 113 will suffer a deprivation of free and open debate on a matter of keen interest.

[62] In addition, the imposition of the trusteeship is likely more disruptive of Local 113's day-to-day operations than the pre-trusteeship status quo.

[63] As a result, I find that the balance of convenience favours upholding the status quo before the imposition of the trusteeship - in other words, that the balance of convenience favours granting the injunction.

Undertaking in Damages

[64] Rule 40.03 provides that the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

[65] In this case, Mr. Kinnear is seeking to vindicate rights of the membership at large, not rights personal only to himself. Whether he enjoys the support of the membership and the executive board or not in this matter may become apparent quite quickly.

[66] In all the circumstances, it seems to me appropriate that the undertaking be given by Local 113.

Representative Proceeding

[67] Mr. Kinnear's Notice of Motion sought a representation order under Rule 12.08 of the Rules of Civil Procedure.

[68] At the hearing of the motion, however, counsel for Mr. Kinnear submitted that it was unnecessary to decide this issue on the injunction motion, other than meeting the 'serious issue for trial' test (in other words, whether Mr Kinnear's claim to be a representative passed the frivolous and vexatious test - in my view it does). Mr. Dewart submitted that the issue of whether Mr. Kinnear meets the test for granting a representation order in connection with the future prosecution of this action should be left for another day.

[69] In the circumstances, I am prepared to grant Mr. Dewart's request. I come to this conclusion in part because neither party, in their motion records or factums, came to grips with what seems to me to be the central question: does the plaintiff have an interest that is in conflict with the interests of other members?

[70] Mr. Kinnear is the elected president of Local 113. His action alleges that the impugned provisions of the International Constitution are unconscionable and, therefore, unenforceable. He seeks to clarify this issue for the purpose of enabling members to vote on whether or not to leave International with a clear understanding of the legal consequences of that vote, whichever side were to prevail.

[71] The current record is less than clear but suggests there are members who agree with Mr. Kinnear that the impugned provisions are unconscionable and members who do not.

[72] There is also a question, it seems to me, about whether it is appropriate for the president to use the authority of his office to advance a dis-affiliation agenda where it appears to be opposed by a significant majority of the board of Local 113.

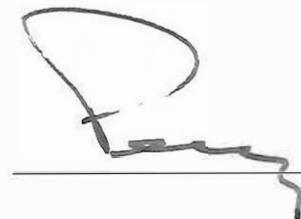
[73] I do not think the evidentiary material, or the legal submissions, adequately address the representation order question. Is the fact that there may be different views of the desired outcome dispositive or is that concern overtaken by the fact that all members have an interest in knowing whether the impugned provisions of the International Constitution are enforceable, regardless of which view they take of the merits of the matter? In these circumstances, I find myself in the position of being unable to make a final order on the representation issue. For this reason, therefore, I have taken up Mr. Dewart's invitation to defer this issue to another day, to be dealt with on a better record.¹ For obvious reasons, however, this issue should be addressed promptly.

Conclusion

[74] In conclusion, I grant an interlocutory injunction until trial in the terms of paragraphs (e) and (g) on p. 2 of the plaintiffs Notice of Motion, as well as an order that Local 113, as opposed to the plaintiff personally, shall give the undertaking as to damages.

Costs

[75] If the parties are unable to agree on the disposition of the costs of this motion, anyone seeking costs shall do so by filing a brief, typed double-spaced written submission of no more than one page together with a Bill of Costs within seven days of the release of these Reasons. Anyone wishing to respond to such a request may file a written submission, subject to the same page limit, within a further seven days.

 :r.
Penny J.

Date: February 21, 2017

¹ As I am about to start a lengthy trial in another matter, it is not practicable that I remain seized. Management of this case should be addressed with the Civil team leader, The Honourable Mr. Justice Tom McEwen.