

**NEW DEVELOPMENTS IN THE COLLECTION OF
PENSION BENEFITS IN THE CONSTRUCTION
INDUSTRY IN ONTARIO**

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I. Introduction

In the years leading up to the Drywall Acoustic Lathing and Insulation Local 675 ("Local 675" or the "union") strike in 1995, wage and benefits rates paid to employees were often below the rates set out in the collective agreement, creating systemic violations of the collective agreement that were acquiesced by the union. The situation created an atmosphere where employees lacked the confidence that the union could or would protect them. As a result, employees were entering into private bargains with drywall contractors, adding to the problem instead of attempting to correct it.

In 1995, following the Local 675 strike, the first expedited arbitration protocol was created as part of the Residential Agreement between the Interior Systems Contractors Association of Ontario ("ISCA") and Local 675. The protocol was created with the intention of correcting the wage and benefits rates problem and building confidence in the union among its members. Although the use of the expedited arbitration protocol created a temporary positive change, systemic violations of the collective agreement soon returned.

Why did the first expedited arbitration protocol fail in correcting contractors' behaviour of "cheating" on wages and benefits? As a specialty sub-trade, the drywall industry contains a large number of contractors who compete directly with one another. To develop an advantage over its other competitors and to increase its profit margins, a drywall contractor would need to save on the cost of materials or on labour rates. Since the cost of materials is relatively standard, an

employer who pays its employees below the collective agreement rate is at an advantage over the other drywall contractors.

Before long, the practice of “cheating” on wages and benefits, which began with a handful of drywall contractors, spread throughout the industry. The attitude was that for the sake of profit a contractor can “cheat” on wages and benefits. Hence, while the expedited arbitration protocol “punished” some contractors by requiring them to pay the monies owed to the union and its trust funds, the protocol failed to create a long-term solution because it did not succeed in changing contractors’ attitudes in the drywall industry.

During the most recent round of bargaining between ISCA and Local 675 the parties agreed to implement another expedited arbitration protocol. The Residential Agreement was amended to include a protocol similar to the one implemented nine years prior. However, this time both parties acknowledged that the protocol must be more than merely a “band-aid solution”. It must be enforced strictly and zealously, and must change attitudes within the industry. Shortly thereafter, during bargaining negotiations between the Carpenters’ District Council of the United Brotherhood of Carpenters and Joiners of America, the Acoustical Association of Ontario and ISCA, the parties agreed to implement an expedited arbitration protocol as an amendment to Schedule “D” of the Drywall Appendix, Article 6, Local 675, of the Provincial Collective Agreement between the Carpenters’ Employer Bargaining Agency (E.B.A.) and the Carpenters’ District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (C.D.C.) (the “Carpenters’ Provincial Collective Agreement”). Both protocols were introduced as an alternative to referring a grievance with respect to unpaid wages and unremitted benefits to the Ontario Labour Relations Board (the “OLRB”) under section 133 of the *Labour Relations Act, 1995* (the “Act”), to provide a more expeditious process to resolve the systemic problem

and to return monies owed for wages and benefits to Local 675 and its trust funds.

II. The Expedited Arbitration Protocols

The expedited arbitration protocols under the Residential Agreement and the Carpenters' Provincial Collective Agreement are strikingly similar. This paper, therefore, will refer to the protocols as a single protocol, highlighting the different article numbers when necessary.

The process under the expedited arbitration protocol is complaint-driven. It is triggered when a union member complains that a contractor has not paid the proper wages, has not remitted the proper benefits or has hired non-union workers to perform bargaining unit work. Once a grievance is sent to the employer, a party can unilaterally refer the grievance to arbitration. Since this protocol was created to process grievances for unpaid wages, unpaid benefits or for hiring non-union workers only, the referring party will always be the union. The protocol further provides that counsel, if retained by the responding party, must be able to accommodate the hearing date set by the Arbitrator (Article 23.04.5 of the Residential Agreement protocol and Article (v) of the Carpenters' Provincial Collective Agreement protocol).

The Arbitrators appointed under the protocol have all the powers of an arbitrator under the *Labour Relations Act, 1995* (the "LRA") and under each collective agreement (Article 23.10 of the Residential Agreement protocol and Article (viii) of the Carpenters' Provincial Collective Agreement protocol). Therefore, the Arbitrator's decisions are as enforceable as any other decision made by an arbitrator appointed under the LRA.

To ensure that the process remains an expedited one, the protocol provides that hearings may be scheduled not only during business hours, but also during evening hours or on weekends. To date, most hearings under the protocol have been heard after business hours.

Since the process is complaint-driven, the union is aware of few facts and particulars with respect to the alleged violations. The union will typically know nothing more than that the wages or benefits were not paid on time. As a result, the union will need to conduct a payroll review to prove its case. To facilitate the payroll review, the protocol provides that once a hearing is scheduled, the referring party may request the Arbitrator to order pre-hearing production (Article 23.04.4 of the Residential Agreement protocol and Article (iv) of the Carpenters' Provincial Collective Agreement protocol). Although it is not required, the union first requests production of documents from the employer. If the employer refuses or simply ignores the union's request, the union may request that the Arbitrator order pre-hearing production. The employer shall file a response to the request by 5:00 p.m. on the next business day. The union then has an opportunity to reply to the employer's response. If there is no response by the employer, and the Arbitrator finds that the documents requested are arguably relevant to the grievance, the Arbitrator will order the production of documents. In practice, employers rarely respond to the union's request for pre-hearing production. As well, employers rarely file a response to a request for an order for pre-hearing production. Typically, then, an order for pre-hearing production of documents will be made within two business days of the union's request.

Once the Arbitrator makes a pre-hearing production order, one of three scenarios might occur. First, the employer may provide all of the documents ordered by the Arbitrator. The union will then conduct a payroll review of the company and

determine whether the quantum owing to the union or its trust funds. Second, the employer may dispute the order for pre-hearing production or the contents of the order. In this case, the parties will make submissions to the Arbitrator who will ultimately decide whether the order was properly made or whether the contents of the order are arguably relevant. Third, the employer may ignore the order for production and/or might not appear at the hearing. In this case, the union will turn the Arbitrator's order into a judgment of the Superior Court of Justice, as it is entitled to do under subsection 48(19) of the Act, and proceed with a contempt of court motion against the employer.

Of the three scenarios, the second scenario occurs more often. An employer will likely challenge the Arbitrator's order or the contents of the order. However, once a hearing is held and another order is issued against the employer, the employer usually provides its payroll documents to the union and the payroll review is conducted.

The payroll review typically reveals that the employer failed to pay the proper wage rates to employees, that the employer failed to remit the proper benefits to the union's trust funds or that the employer hired non-union employees. The union's accountant then generates a report and determines a sum that the employer owes the union. Typically, once a payroll review is completed, an employer will pay the amount it owes to the union and its trust funds willingly. On rare occasions, the employer disputes the accountant's findings, and the matter is decided by the Arbitrator at a hearing. If an employer fails to pay the sum ordered by the arbitrator, the union may commence garnishment or other collection proceedings against the employer.

III. Have the Protocols Been Effective in Achieving Their Intended Results?

Approximately one year has passed since the expedited arbitration protocols have been implemented. To date, grievances have been filed against 34 drywall contractors and referred to arbitration. Every employer against whom a grievance has been filed and referred to arbitration has produced its payroll documents to the union; every employer of whom a payroll review was completed has been found to have violated the collective agreement; and every employer who was found to have violated the collective agreement has paid, in part or in full, the amounts owed to the union and its trust funds. To date, over \$787,000.00 has been collected from these contractors.

In addition, throughout the whole process there were no costs to Local 675 and the trust funds. Article 23.06.1 of the Residential Agreement protocol and Article (vi) of the Carpenters' Provincial Collective Agreement protocol provide that the Arbitrator has the power to make the Arbitration costs payable by the employer to the union. As a result, to date all union investigation costs, arbitration costs, legal costs and accounting costs were paid to Local 675 by employers upon final settlement.

It appears that the process might be achieving its greater goal of changing attitudes among drywall contractors. It has been made clear to employers that the union will continue to grieve and collect unpaid wages and benefits from employers until its payroll reviews begin to show that employers are no longer cheating. As a result, employers are less resistant to this process now than they were a year ago.

IV. Conclusion

It appears that the success of the protocols in the Residential Agreement and the Carpenters' Provincial Collective Agreement is slowly getting the attention it deserves. Recently, the International Union of Painters and Allied Trades, the Ontario Council of the International Union of Painters and Allied Trades - District Council 46 (Local Union 1891) ("Local 1891") implemented its own expedited arbitration protocol to claim wages and benefits owed to the union and its trust funds. Local 1891's expedited arbitration protocol is similar to the protocols used by Local 675, and although it has only been in use for a short period of time, it has been achieving similar results.

It is hoped that other unions in the construction industry will follow suit and claim the unremitted benefits and wages that are owed to the union and its trust funds.