

YOU CAN STILL RUN AND HIDE BUT AT LEAST NOW YOU HAVE TO PAY

By Michael C. P. McCreary

When the legislature empowered the Labour Board to adjudicate grievances in the construction industry it had no way of envisioning that unions would use that power almost exclusively to collect unpaid wages and benefits. In fact in quick review of the last ten years worth of grievance referrals in the construction industry shows that over 90% of them were collection grievances. Not satisfied with the quick (and by and large successful) referral process of the Labour Board construction unions over the years have developed their own adjudicated system for collecting benefits.

For example, about four years ago the Drywallers in Ontario developed an expediated arbitration system. The Toronto Drywall Local 675 was concerned about employers short changing the trust funds and embark on a program to try and realize all unpaid benefits. Not only was Local 675 interested in ensuring that its members received all the benefit they worked for but the trust funds were equally behind (some would say in front of) this initiative. Also the employer association was concerned that the good contractors were being under cut by the bad contractors and supported the program whereby the playing field was leveled.

Grievances were filed against over 40 contractors in an effort to determine whether the correct benefits have been submitted to the trust funds. Some employers co-operated in this process however as expected an number of employers fought tooth and nail to delay and stonewall the union from prosecuting the grievances. Without exception the employers that fought the most owed the most. The union was faced with a dilemma on two occasions where contractors were unco-operative which resulted in high legal accounting and arbitration costs. These two contractors threaten to go bankrupt thus leaving the union with the responsibility to pay those costs. The program was set up such that if a contractor was found guilty the contractor bore the responsibility of paying all of the costs of prosecuting the grievance.

Mr. Herman in *Blackfield Drywall and Drywall Acoustic Lathing and Insulation Local 675*, (2008) unreported solves the foregoing dilemma by allowing the union's motion for security for costs. This is the first time an arbitrator in the construction industry in Ontario has made such an order. There was a decision by Mr. Rayner about 10 years ago in the industrial sector. Other than those two awards arbitrators have not acceded to an union's request for costs in advance of adjudicating a grievance.

The significance of Mr. Herman's decision cannot be undervalued. Unions should be well advised to consider asking the Labour Board for an arbitrator to make an employer "pay up front" when the union suspects an employer is impecunious and the union is about to embark on a process of litigation with significant costs.

The collection of benefits is admirable if not essential to a construction union's duty to its members and a trust funds duty to the beneficiary of the trust. However there have been circumstances in the past where unions have shyed away from pursuing an employer for unpaid benefits where it felt that the costs of collection may not be recovered. Mr. Herman's award takes that fear away.