

**ONTARIO DIVISIONAL COURT CONFIRMS THE APPLICATION OF ESTOPPEL TO A
PROVINCIAL AGREEMENT UNDER *LABOUR RELATIONS ACT, 1995***

*International Brotherhood of Electrical Workers, Local 353 v. Jacobs Catalytic Industrial
Services Limited*, [2009] O.J. No. 420 (Div. Ct.)

by Laura Karabulut

In a recent decision, the Divisional Court confirmed that estoppel can apply to a union's rights under a Provincial Agreement notwithstanding section 162(2) of the *Labour Relations Act, 1995* ("*LRA*"), which states that any agreement or "other arrangement" contrary to a Provincial Agreement is "null and void".

The case before the Divisional Court involved a judicial review application by the International Brotherhood of Electrical Workers, Local 353 ("IBEW" or the "Union") of a decision of the Ontario Labour Relations Board ("OLRB" or the "Board") dismissing its grievances regarding two projects at a Petro-Canada oil refinery site.

The Facts and the Board's Decision

The matter before the Board concerned two grievances by the Union filed under s. 133 of the *LRA*. Each grievance alleged that a project performed by Jacobs Industrial Services Limited ("Jacobs" or the "Company") on the Petro-Canada site should not have been performed under the General Presidents' Maintenance Agreement (the "GPMA"). Rather, the Union argued, the work was construction and should have been performed pursuant to the collective agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the IBEW and IBEW Construction Council of Ontario. That collective agreement, known as the Provincial Agreement, is an agreement as defined in section 151(1) of the *LRA* and pertains to those employees employed in the industrial, commercial and institutional sector of the construction industry in the province of Ontario. According to section 162 of the *LRA*,

162(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) ...no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void. [Emphasis added]

The Union claimed that work on the two projects was construction work, not maintenance. As a result, alleged the Union, the employees who worked on the projects were underpaid because they should have received the higher rates payable under the Provincial Agreement rather than those payable under the GPMA.

Jacobs denied the grievances. It was the Company's position that the work in question was maintenance, properly performed under the GPMA. In the alternative, Jacobs submitted that the Union was estopped from claiming any relief under the Provincial Agreement on the basis of representations made by the Union that it would not challenge the Company's decision to perform the work in accordance with the GPMA, and the Company's reliance on those representations. In the further alternative, the Company submitted that if any relief was due to the Union, it should be significantly reduced by the late filing of the grievances.

The two grievances were heard together before the Board. A majority of the Board found that some of the work on the two projects was maintenance, properly performed under the GPMA, and some was construction which should have been performed under the Provincial Agreement.

With respect to the issue of estoppel, the Board was unanimous in its finding that the doctrine of estoppel applied to prevent the Union from enforcing whatever rights it may have had under the Provincial Agreement relating to the work that was deemed construction, notwithstanding section 162(2) of the *LRA*. The Board held, at para. 89:

...We accept that generally the doctrine of estoppel cannot apply against the application of the Act itself, particularly, as counsel for the GPMC argues, when public values, public policy considerations are at stake. One cannot waive fundamental rights one has under the Act, e.g. to organize a trade union, to apply for certification, etc. But the principle that estoppel does not apply to the operation of a public statute, where a public value is at stake, does not necessarily entail that estoppel cannot apply to an agreement concluded pursuant to the Act, including a collective agreement and a provincial agreement.

The Board determined that the doctrine of estoppel could preclude the application of the Provincial Agreement in the circumstances and held, at para. 96:

Accordingly, we are of the view that, if the elements of an estoppel establish an undertaking to suspend the exercise of certain rights under a provincial agreement in the construction industry, absent compelling public policy considerations, the Board may uphold the estoppel and apply the equitable doctrine. We are bolstered in this view by the Court's decisions in *Bucyrus Blades of Canada Ltd. v. McKinley* and *Better Beef Ltd. v. MacLean*, above.

Upon review of the facts, the Board determined that the Union represented to the Company that it would not challenge the Company's decision to perform the work on the two projects as maintenance under the GPMA, and not construction under the Provincial Agreement. The Board also found that the Company relied on those representations to its detriment. As a result, the Board held that the Union was estopped from asserting rights under the Provincial Agreement in the circumstances of this case and was, therefore, not entitled to any damages. The Board ultimately dismissed both grievances.

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Divisional Court

Upon judicial review to the Divisional Court, the Union argued that the Board's decision ignored the effect of s. 162 of the *LRA* which provides that there shall be only one provincial agreement between employer and employer bargaining agencies and that "...any collective agreement or other arrangement that does not comply with subsection (1) is null and void". The Union submitted that the arrangement between its business agent and the Company's representative was an impermissible attempt to avoid the Provincial Agreement.

In a unanimous decision, the Divisional Court dismissed the Union's application for judicial review. The Court determined that the Board's finding, properly construed, was not that there was a parallel collective agreement or "other arrangement" contrary to the scheme of the *LRA* and in breach of s. 162 thereof. Rather, the Board's finding was that the Union was estopped from claiming damages in the specific circumstances of this case. The Board's application of the doctrine of estoppel was found to be reasonable on the basis of the representations made by the Union to Jacobs, and Jacobs' reliance on those representations, and was upheld by the Court.

Comment

This decision confirms that the "null and void" aspect of section 162 of the *LRA* dealing with provincial agreements in the construction industry does not preclude the application of the doctrine of estoppel. In addition, the decision affirms that, in addition to contractual commitments set out in collective agreements, a party is not entitled to resile from representations, undertakings or commitments made and received in good faith, particularly where the other party acts in reliance upon same.

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