COURT OF APPEAL FOR ONTARIO

CITATION: Garcia v. Labourers' International Union of North America, Local 1059, 2015 ONCA 230
DATE: 20150408
DOCKET: C59265

Doherty, Gillese and Lauwers JJ.A.

BETWEEN

David Garcia

Applicant (Appellant)

and

Jim MacKinnon in his Capacity as Trustee
of the Liuna Local 1059 Members Benefit Trust,
Brandon MacKinnon in his Capacity as Trustee
of the Liuna Local 1059 Members Benefit Trust,
Tom Dool in his Capacity as Trustee
of the Liuna Local 1059 Members Benefit Trust
and Joe Liberatore in his Capacity as Trustee
of the Liuna Local 1059 Members Benefit Trust
and Global Benefit Plan Consultant Inc.

Respondents (Respondents)

David P. Jacobs and Steven G. Bosnick, for the appellant

Lorne Richmond and Charles Sinclair, for the respondents

Heard: February 5, 2015

On appeal from the order of Justice Alissa K. Mitchell of the Superior Court of Justice, dated July 23, 2014, with reasons reported at 2014 ONSC 4410.

Lauwers J.A.:

[1] This appeal and the underlying application are steps in an ongoing turf war between two rival trade unions in the Ontario construction industry. The appellant, David Garcia, is a member of the United Brotherhood of Carpenters and Joiners of America (the "Carpenters"), which is supporting this appeal. The respondents are associated with the Labourers' International Union of North America, Local 1059 ("Local 1059").

[2] Mr. Garcia was a long-time member of Local 1059 until he was expelled in 2012. He claims to be a beneficiary of a benefit trust and benefit plan administered by Local 1059, which are described in more detail below.

[3] Mr. Garcia applied for an order permitting him to make claims against the benefit plan after the termination of his union membership by Local 1059. The application judge dismissed his application. For the reasons set out below, I would dismiss his appeal.

A. FACTS

(1) The Context

[4] As aptly noted by the application judge, an understanding of the context of this case – the Ontario construction industry – is necessary to resolve the issues raised at trial and now on appeal. In *Arlington Crane Service Ltd. v. Ontario (Minister of Labour)*, (1988) 67 O.R. (2d) 225 (H.C.J.), Henry J. made a number

of apposite observations about the unique nature of the construction industry. In particular, at p. 234, he contrasted the episodic and erratic nature of employment in the construction industry with the long-term employment typical in other industrial contexts:

> There is no opportunity for the kind of tenured status which employees enjoy under most collective agreements outside of the construction industry. As well, there is no basis for the kind of enduring association which a group of employees can develop in an industrial bargaining unit. Any one job for the construction worker is usually short and fleeting, and he must be prepared to be highly mobile, shifting from project to project across a wide geographic area.

[5] Labour law in Ontario has adapted to the structure of the construction industry, as shown by the numerous provisions of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A ("*LRA*"), devoted especially to the industry. In particular, as described by Henry J. at pp. 234-35 of *Arlington Crane*, the unique nature of construction work has led to an equally unique form of union organization in the industry:

> Since the relationship between employer and employee in construction is typically episodic rather than enduring in character, a special form of union organization has emerged to fill this vacuum. The major craft specialties have all developed their own trade unions; the union is the body with which the individual tradesman tends to have the most salient relationship in the industry ... the union collects and administers the funds for the worker's vacation pay, health and welfare benefits, and retirement pensions (with the money coming from the numerous contractors for whom the tradesman may

> have worked during the year, at a defined contribution level for each hour worked).

[6] This allocation of responsibilities, whereby unions rather than employers administer benefits, is a unique feature of the construction industry, and is recognized in s. 150 of the *LRA*. In most other sectors, employers are responsible for the administration of employee benefits: George W. Adams, *Canadian Labour Law,* 2d ed. (loose-leaf, consulted on 23 February 2015), (Aurora: Canada Law Book, 1993), ch. 15 at para. 10. It is in this unique labour relations context that this case arose.

(2) The Dual Union Policy

[7] Mr. Garcia joined Local 1059 in 1999. On October 4, 2010, he also joined the Carpenters, following which time, he did no further work for employers bound by collective agreements with Local 1059.

[8] In early 2011, as part of its battle with the Carpenters over formwork in its territory, the membership of Local 1059 voted to adopt a "Dual Union Policy". Thereafter, no member of Local 1059 could also be a member of any affiliate of the Carpenters, on pain of expulsion from Local 1059.

[9] Contrary to the Dual Union Policy, Mr. Garcia did not resign his membership in the Carpenters. Instead, he supported the Carpenters in issuing a challenge to the validity of the Policy before the Ontario Labour Relations Board (the "OLRB").

[10] Local 1059 sought Mr. Garcia's expulsion from its membership before the Trial Board, the union's internal dispute mechanism. The board granted the expulsion on the basis that Mr. Garcia was in violation of his obligations under the Local 1059's Constitution: first, by maintaining his membership in the Carpenters, Mr. Garcia violated his obligation to abide by Local 1059's polices; and second, by allowing the Carpenters to challenge the policy before the OLRB, he violated his obligation to respect the right of the union to adopt and enforce such policies, and to refrain from interfering with Local 1059's performance of its lawful obligations.

[11] This decision was subsequently upheld by the union's internal Appellate Officer.

[12] On February 2, 2012, the OLRB dismissed the Carpenters' allegation that the Dual Union Policy violated s. 76 the *LRA*, finding that "it is not intimidation or coercion to expel a person from membership on the basis that they support another union." Rather, making and enforcing membership rules are "internal union matter[s] not the subject of Board supervision": *Carpenters (United Brotherhood of Carpenters and Joiners of America) v. Labourers International Union of North America*, 2012 CanLII 4286, at para. 27.

[13] Immediately after this OLRB decision, which confirmed Local 1059's authority to expel Mr. Garcia, Local 1059 suspended Mr. Garcia's benefits under its benefit plan, which I will now describe in more detail.

(3) The Benefit Trust and the Benefit Plan

[14] Local 1059 and two associations of employers are the settlors of a trust (the "Benefit Trust") created by the Agreement and Declaration of Trust Establishing the LIUNA Local 1059 Benefit Trust, dated May 10, 2007 (the "Trust Agreement"). It is substantially identical to the trust agreement to which Local 1059 was a party prior to 2007: the Labourers' Multi-Local Welfare Trust Fund of Ontario (the "LML Plan").

[15] The trustees of the Benefit Trust comprise two representatives of Local 1059 – Brandon MacKinnon, who is the President of Local 1059, and Jim MacKinnon, who is the Business Manager – and one representative from each affected employer association.

[16] The trustees adopted the LIUNA Local 1059 Benefit Trust, Benefit Plan Text, dated May 24, 2009 (the "Benefit Plan" or the "Benefit Plan Text").

[17] Explained in broad terms, the Benefit Trust and the Benefit Plan operate as follows: Employers bound by collective agreement with Local 1059 are required, by the terms of the collective agreement and the Trust Agreement, to contribute amounts, for each Local 1059 member whom they employ, to the

Benefit Trust. The contributed amounts are pooled and used by the trust administrator to purchase group insurance that provides members with entitlements under the Benefit Plan.

[18] The Benefit Plan administrator determines employees' eligibility for benefits using the accounting concept of a "Dollar Bank Account" for each employee. An employee's Dollar Bank Account tracks the contributions made by each employer for whom that employee has worked. This is the mechanism by which the administrator determines an employee's eligibility to obtain and maintain coverage under the Plan.

[19] The Dollar Bank Account is uniquely suited to the exigencies of the construction industry, in which workers experience short-term engagements and periods of little or no employment. To be eligible for benefits, an employee's Dollar Bank Account must have a positive balance by way of attributed employer contributions large enough to fund the employee's share of the monthly insurance premium. Since there is no cap on the amount that can be attributed to the employee's Dollar Bank Account, coverage can be maintained for periods of unemployment by the contributions made during periods of employment.

[20] To summarize, the Dollar Bank Account is a conceptual device used to determine eligibility for benefits; there is no *actual* Dollar Bank Account for any employee, nor are there segregated funds attributable to any particular employee

other than for the purpose of determining eligibility for benefits. Rather, all funds contributed by employers are at all times part of the general funds of the Benefit Plan.

[21] At the date of Mr. Garcia's expulsion from Local 1059, the notional balance in his Dollar Bank Account was about $20,000.

[22] The Benefit Plan administrator advised Mr. Garcia on July 5, 2012 that his benefits had been suspended effective February 3, 2012. Since that date, Mr. Garcia has not incurred any expenses that would ordinarily have been covered by the Benefit Plan as he has been covered by the equivalent Carpenters plan. He is, therefore, not out-of-pocket.

B. DECISION BELOW

[23] After his expulsion from Local 1059, Mr. Garcia brought an application before the Superior Court of Justice, seeking an order that he was permitted to make claims against the Benefit Plan for so long as he has an adequate balance in his Dollar Bank Account. In the alternative, he sought a cash payment in the amount of his Dollar Bank Account balance.

[24] The application judge dismissed Mr. Garcia's application. She concluded that Mr. Garcia ceased to be a beneficiary of the Benefit Trust upon his expulsion from Local 1059. He was therefore no longer eligible for coverage under the Benefit Plan, regardless of the balance in his notional Dollar Bank Account, nor

was he entitled to a return of the balance. In addition, the application judge held that Brandon MacKinnon and Jim MacKinnon were not in a conflict of interest and therefore did not breach their fiduciary duty as trustees in adopting and enforcing the Dual Union Policy.

[25] I discuss the reasons of the application judge in further detail in my analysis below.

C. ISSUES

[26] The appellant argues that the application judge made legal errors in her decision dismissing his claim, which distill into three issues:

1) Is Mr. Garcia a beneficiary of the Benefit Trust, entitled to claim benefits so long as there is an adequate positive balance in his Dollar Bank Account?

2) Did the trustees of the Benefit Trust give Mr. Garcia adequate notice that he would lose access to the Benefit Plan if he were expelled from Local 1059?

3) Did union officials Jim MacKinnon and Brandon MacKinnon breach their fiduciary duties as trustees under the Benefit Trust by adopting and enforcing the Dual Union Policy?

[27] I address each issue in turn.

D. ANALYSIS

(1) Is the Appellant a beneficiary of the Benefit Trust entitled to claim benefits so long as there is an adequate balance in his Dollar Bank Account?

[28] The appellant argues that unless the beneficiaries of the Benefit Trust are defined to include those, like him, "on whose behalf contributions have been made to the Trust", the Trust will be void for uncertainty of objects (beneficiaries). He argues that the need to refer to the Benefit Plan Text to identify the beneficiaries of the Benefit Trust imports a fatal uncertainty into the Trust because it makes eligibility under the Trust discretionarily amendable by the trustees. In other words, as the appellant asserts in his factum, "The Court cannot rely on an exercise of a power by the trustees in attempting to ascertain the beneficiaries of the trust because that would render that exercise of the power of the trustees beyond curial review."

[29] I disagree.

[30] The appellant is correct in asserting that the Trust Agreement gives powers to the trustees to determine the conditions of eligibility for beneficiaries, including when eligibility will terminate. Article 2.01 provides that the Trust will be administered by the trustees "for the purpose of providing Benefits in accordance with the terms of this Agreement and the Benefit Plan." Article 5.01(a) of the

Trust Agreement authorizes the trustees to adopt and administer the Benefit Plan. It specifically provides that the "Benefit Plan will set forth in writing the conditions of eligibility for the Benefits, the terms of payment therefore such other terms as the Trustees deem necessary". Further, paragraph (g) empowers the trustees "to adopt such procedures, by-laws, rules, and regulations consistent with the terms of this Agreement, deemed necessary or advisable to carry out the trusts conferred upon them". Articles 5.01 and 5.02 of the Benefit Plan Text implement these powers.

[31] In my view, contrary to the appellant's argument, it is permissible to read the Trust Agreement together with the Benefit Plan Text in order to determine the identity of the beneficiaries. The appellant concedes that it is entirely possible to identify the beneficiaries of the Trust with certainty, at any time, by applying the extended definition of "employee" in the Trust Agreement together with the termination provisions in the Benefit Plan text, as the application judge did. Therefore, there is no factual uncertainty about the identity of the beneficiaries at any point in time.

[32] I note that the appellant has provided no authority for his proposition that a fatal uncertainty is imported into the Benefit Trust simply because reference must be made to the Benefit Plan Text in order to identify the beneficiaries of the Benefit Trust.

[33] Therefore, the application judge did not err in reading the Trust Agreement and the Benefit Plan Text together to determine the beneficiaries of the Benefit Trust, and find that those who cease to be members of Local 1059 pursuant to article 5.01(a) of the Benefit Plan Text are no longer beneficiaries and, under article 5.02, the notional balance in the Dollar Bank Account attributed to them become "part of the general funds of the Plan." There is no conflict between the provisions in the Trust Agreement that confer benefits on Mr. Garcia, and the operation of articles 5.01 and 5.02 of the Benefit Plan Text that terminated his access to the benefits on the ending of his membership in Local 1059. (In reaching this conclusion, I do not rely on the application judge's unsupported finding, at para. 72, that the "corpus of the Trust would be quickly exhausted" if members of other unions were permitted to receive benefits from it).

(2) Did the trustees give Mr. Garcia adequate notice that he would lose access to the Benefit Plan if he were expelled from Local 1059?

[34] There is no merit to the appellant's argument that he did not receive adequate notice that he would lose access to the Benefit Plan if he were expelled from Local 1059. The evidence is that he was fully aware that his expulsion from Local 1059 would lead to this result. The crux of the appellant's complaint is that when the Dual Union Policy was adopted, it was "already too late for lawful notice" because, by that time, he had accumulated a positive balance in the

Dollar Bank Account, had an interest in those trust funds, and could not be deprived of that beneficial interest.

[35] I reject this submission for two reasons. First, article 2.03(b) of the Trust Agreement provides that no beneficiary "will have any right, title or interest in or to the assets of the Trust except as specifically provided by the Benefit Plan and the applicable rules and regulations thereunder adopted by the Trustees". No provision gives the appellant the beneficial interest he asserts in the balance of his Dollar Bank Account.

[36] Second, article 5.01 of the Benefit Plan Text replicates an equivalent provision from the LML Plan, under which the appellant worked for many years and accumulated a positive balance that was carried forward into the new Benefit Plan. Both plans always provided for the termination of benefits when a person ceased to be a union member. This feature of the Benefit Plan was not new.

[37] I would give no effect to the appellant's argument that the loss of benefits is inconsistent with the LIUNA Local 1059 Benefit Trust Members Booklet. Although the Booklet does not list termination of union membership as one of the reasons that a member's coverage would terminate, the Booklet does not purport to be exhaustive. It states clearly in the introduction that the Benefit Trust "was created ... for the Members" of Local 1059. Common sense suggests that the termination of employment ordinarily results in the loss not only of wages, but

also of employment benefits. Applying this logic to the employment structure in the construction industry suggests that termination of union membership – the gateway to employment in the industry – similarly results in the loss of employment benefits.

[38] I find the appellant's other submissions related to notice to be similarly unpersuasive. First, the appellant submits that, Jim MacKinnon's failure to respond, at the Trial Board hearing, to counsel's "proposition" that the appellant would not be "deprived of his earned benefits" if he were expelled, led the appellant to believe this would be the case. There is no legal entitlement that flows from this conduct.

[39] The appellant also points out that the OLRB hearing, after Jim MacKinnon had already directed the plan administrator to cease benefits to the appellant, Local 1059 "averred that Mr. Garcia's Dollar bank was 'still extant'." This proposition is literally true since, at that point, the Trial Board's decision was still under appeal and it remained open to the appellant to resign his membership in the Carpenters and return to the fold as a Local 1059 member. Under the terms of the Benefit Plan Text, he could have returned and reactivated his Dollar Bank Account for a limited time. Again, there is no legal entitlement that flows from this point.

[40] There is no doubt that the appellant could have avoided the claimed loss by staying with Local 1059; he was aware of that opportunity throughout and chose to forego it. Accordingly, there is no merit to his argument that he did not have adequate notice that he would lose his benefits if he were expelled.

(3) Did union officials Jim MacKinnon and Brandon MacKinnon breach their fiduciary duties as trustees of the Benefit Trust by adopting and enforcing the Dual Union Policy?

[41] The appellant argues that because of their status as trustees of the Benefit Trust, the MacKinnons were legally disabled from participating as union officials in three critical actions: adopting the Dual Union Policy; prosecuting the internal union charges against the appellant; and directing the Benefit Plan administrator "to confiscate Mr. Garcia's Dollar Bank."

[42] The appellant concedes that Jim's role in initiating charges against him and Brandon's role in adopting the Dual Union Policy were within their roles as members of Local 1059's executive. However, the appellant submits that these actions of the MacKinnons as union officials placed them in a conflict of interest when, as trustees, they used the Dual Union Policy to effect the confiscation of his Dollar Bank Account balance; the MacKinnons thereby breached their fiduciary duties to the appellant as a beneficiary of the Benefit Trust. In particular, the appellant asserts that "[t]rustees breach their duties to beneficiaries by

forcing a choice between a diminution of the rights they held on accruing their interest in trust funds and the loss of beneficial ownership of such funds."

[43] The application judge found that there was no conflict of interest, and that the functions of union management and benefit trust administration did not overlap in this factual context. In particular, she found, at para. 128, that the "adoption of the Dual Union Policy did not affect the administration of the trust, the terms of the trust documents, the nature or level of benefits, eligibility requirements or the funding of the Benefit Trust." Further, the application judge found, at para. 131, that Local 1059's "decision to bring proceedings against a member for violation or breach of the union's Constitution and by-laws does not relate in any way to the administration of the Benefit Trust by the trustees." Once Local 1059 decided to expel Mr. Garcia, it was the trust administrator's duty to terminate his coverage.

[44] In reaching her decision, at para. 123, the application judge paraphrased and relied on the approach to the conflict of interest issue taken by Cromwell J. in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, at paras. 197-98, 201. The appellant submits that the trial judge erred in relying on Cromwell J.'s "structural approach" as it differed from what he views as the majority "contextual approach" to the conflict of interest issue.

[45] For the reasons below, I find that the application judge's analysis and conclusion with respect to the conflict of interest contain no legal error. My analysis involves: (a) a short discussion of the *Indalex* decision; (b) a description of the contextual approach to deciding whether a conflict of interest exists; (c) a review of the relevant contextual factors in this case; and, (d), an application of the contextual approach to the facts of this case.

(a) The *Indalex* Decision

[46] Indalex found itself in financial difficulties and determined that it should seek protection from its creditors under the *Company's Creditors Arrangement Act*, R.S.C. 1985 c. C-36 ("*CCAA*"). Indalex was both the corporate employer and the administrator of two employee pension plans. Such a dual role is permissible under s. 8(1)(a) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), which also provides, in s. 22(4), that a plan administrator must not permit its interests to conflict with its duties in respect of the pension fund.

[47] A corporate decision to seek protection under the *CCAA* gives rise to the prospect that the corporate employer's financial interests could conflict with the interests of the pension beneficiaries, thus jeopardizing the corporate employer's ability discharge its fiduciary duties properly as the plan administrator.

[48] Acknowledgment of this permissible dual role which could potentially result in a conflict of interest, was the common starting point for all three *Indalex*

judgments. As Deschamps J. observed, at para. 64, the ability of a corporate employer to act as plan administrator "is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members." Cromwell and Lebel JJ. make similar observations at paras. 197-98 and 272, respectively.

[49] At bottom, *Indalex* was about the respective priorities of creditors and pension beneficiaries when an enterprise is no longer operating in the ordinary course of business, but is under the *CCAA* and heading for bankruptcy. The issue that divided the Supreme Court was the point at which Indalex was required to address the conflict between its corporate duties and its duties as pension administrator, and what it ought to have done to address the conflict.

[50] I agree with the appellant that the court must take a contextual approach to determine whether a conflict of interest arose that led to a breach of fiduciary duties. However, as I see it, this is the conventional approach to cases of this sort, to which *Indalex* made no relevant legal change.

[51] In my view, all three judgments in *Indalex* took a contextual approach. Each paid close attention to the statutory structure of the *PBA*, to the plan documents, and to the particular circumstances of the parties. Deschamps J. commented, at para. 69, "I would stress that factual contexts are needed to analyse conflicts between interests". Although Cromwell J.'s reasons are more

discursive on the conflict of interest issue, I do not detect a substantive difference between his reasoning and that of Deschamps J. that is relevant to the conflict analysis in this case.

[52] I therefore reject the appellant's argument that the application judge wrongly followed Cromwell J.'s "structural approach" rather than the "contextual approach" adopted by Deschamps and LeBel JJ.

(b) The Contextual Approach

[53] The duty of a fiduciary to avoid conflicts of interest may be modified by statute or agreement: *Indalex*, at para 186. Therefore, relevant statutory provisions and plan documents are important contextual factors in determining the extent of any such modification.

[54] *Indalex* provides a useful example. The *PBA* statutory scheme tolerates what this court described in *Indalex Ltd. (Re)*, 2011 ONCA 265, at para.128, as the "two hats" metaphor, to capture the duties of the corporate employer who is also the pension administrator. As this court explained, at para 129:

> The "two hats" analogy in Imperial Oil assists in understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer qua corporation must treat all stakeholders fairly when their interests conflict, the directors' ultimate duty is to act in the best interests of the corporation: see *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, at paras. 81-84. On the other hand, when

> acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

[55] In *Indalex*, Cromwell J. pointed out, at para. 198, that "[t]he employer, within the limits set out in the plan documents and the legislation generally, has the authority to amend the plan unilaterally and even to terminate it. These steps may well not serve the best interests of plan beneficiaries." The obvious inference arising from this statement is that by taking such permitted steps, the employer does not fall into a conflict of interest.

[56] The issue of unilateral amendment by the employer also arose in *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198, where the Pension Commission of Ontario permitted Imperial Oil to amend two employee pension plans to reduce the availability of enhanced early retirement benefits. The Commission noted, at para. 35, "Another way of looking at the matter would be to see that the power of amendment contained in the Plans is an express agreement that for the purpose of making amendments, Imperial Oil would be acting in its capacity as employer." The existence of such an agreement recognizes an employer's "two hats" and modifies the duty to avoid conflicts; this is part of the contextual approach and applies with necessary modification to this case.

[57] Nothing in the Supreme Court's *Indalex* decision contradicts this approach. I agree with Deschamps J.'s comment, at para 65, that once the conflict is plain

because the trust is heading toward termination, the "two hats" metaphor ceases to have utility – but that is not the situation here.

(c) The Context of this Case

[58] In alleging a conflict of interest, the appellant relies on *Indalex* to posit a sharp disjunction between the role of a union official in union business and the role of a trustee under a benefit trust. However, a number of important contextual factors differentiate this case from *Indalex* and are relevant to determining whether the MacKinnons were in a conflict of interest.

[59] First, unlike Indalex, which was facing bankruptcy proceedings, Local 1059 and the Benefit Trust were carrying out their respective functions in the ordinary course of business. In contrast to the situation in *Indalex*, there is no prospect of termination or shortfall in the present case; the Benefit Trust is not in extremis. Therefore, the "two hats" metaphor has reasonable application.

[60] Second, in this case, the statutory context is provided by the *LRA*. Local 1059 is a trade union within the meaning of the Act. Its main function is to bargain wages, benefits and working conditions collectively on behalf of its members. As a result, members' rights related to benefits are largely contractual. There is no statutory overlay in this case, as in *Indalex*, where the public policy goals of the *PBA* were in possible conflict with the goals of the *CCAA*.

[61] Third, and perhaps most importantly, in the unique context of labour relations in the construction industry, employees stand in a somewhat different relationship with the administrator of their benefits. Article 4.01(b) of the Trust Agreement stipulates that Local 1059 shall appoint its Business Manager and another individual as the two union-appointed trustees responsible for administering the Benefit Trust. The MacKinnons, as members of the Local 1059 leadership, were appointed as trustees pursuant to this provision.

[62] Since union members have democratic control over the union leadership, the usual power imbalance between an employer-administrator (like Indalex) and an employee is not truly reflected in the relationship between a union-administrator (like Local 1059) and a union member.

[63] Further, any collective agreement the union negotiates is subject to ratification by the membership, including the balance between the employer's contribution to wages on the one hand, and to benefits on the other. It is open to the union to negotiate collectively for wage and benefit improvements, and it is also open to the union to negotiate freezes or reductions in difficult economic times. In either case, benefits, while important, are only one part of the overall compensation package to be negotiated, and the union members collectively decide how they should be prioritized.

[64] Finally, unions have duties to their members which employers do not have toward their employees, including the duty of fair representation, the duty of fair referral, and the duty to refrain from intimidation and coercion: *LRA*, ss. 74-76. These duties, combined with the democratic power of union members over the union executive and the collective bargaining process, create a more balanced and non-adversarial relationship than that in the usual situation between employees and an employer that administers their benefits plan.

[65] Bearing these important contextual factors in mind, I now consider whether a conflict of interest arises in this case.

(d) The Application of the Contextual Approach to this Case

[66] To begin, I note that the conflict of interest issue in this case is, in general terms, a proxy for an inter-union rivalry. In legal terms, however, the dispute is between Mr. Garcia and Local 1059. That dispute has been exhaustively pursued through Local 1059's internal grievance process and the OLRB. The court should not be quick to take up the same fight couched in somewhat different terms.

[67] In any event, if the strict approach to conflicts of interest proposed by the appellant were to be followed, it is hard to see how a union could function in this area. However, the appellant and the Carpenters do not, and plainly would not, argue that union officials who are also benefit trust trustees are, by that fact

alone, disabled from collectively bargaining, even though benefits may be at risk in the bargaining process.

[68] Instead, the appellant argues, first, that the adoption of the dual union policy after he joined the Carpenters created a "clear conflict" because it would lead to his expulsion when he "had accrued the earnings in trust for him". However, as I explained, at para. 36 above, the appellant had no beneficial interest in the funds under the terms of the Trust.

[69] Second, the appellant argues that trustee Jim MacKinnon was legally disabled from laying charges and proceeding with the prosecution before the Trial Board because the appellant was a trust beneficiary. This is where the "two hats" metaphor has particular salience. I agree with the application judge's analysis, at para. 123:

> Where fiduciary obligations stem from a legal framework which allows or requires the same person or entity to hold dual roles, a conflict of interest or duty does not arise merely because the entity or individual makes a decision in its non-trustee role (for example as employer or, here, as business manager/trustee or union president) that could potentially affect the rights of plan beneficiaries. Rather, a conflict occurs "when there is a substantial risk that the [business manager/trustee's] representation of plan beneficiaries would be materially and adversely affected by the [business manager/trustee's] duties to the [union]", always bearing in mind that a trustee's fiduciary obligations to plan members do not exist at large, but arise only in relation to those tasks and duties stemming from the legal framework established by the trust documents and any

> applicable statutory scheme. [citing *Indalex*, at paras. 197-198, 201 per Cromwell J.; See also para. 70 per Deschamps J.]

[70] The functions of union management and benefit trust administration did not overlap in the factual context. Jim MacKinnon, as trustee, owed the appellant no specific and individualized duty that was engaged by his prosecution for violation or breach of the union's Constitution and by-laws. That prosecution did not relate in any way to the administration of the Benefit Trust by the trustees.

[71] Third, the appellant argues that trustee Jim MacKinnon was legally disabled from directing the trust administrator to "confiscate Mr. Garcia's Dollar Bank." The letter, dated February 3, 2012, provides:

> Please be advised that [David Garcia] is no longer a member of the Labourer's International Union of North America, Local 1059 therefore, please suspend his benefits effective this date and transfer the balance of his welfare bank to the Surplus Fund.

[72] The appellant submits that "[i]t was the responsibility of the Trustees, collectively, to decide what effect, if any, Mr. Garcia's expulsion from Local 1059 for joining the Carpenters' Union would have on his benefits", which they abdicated. I reject this argument. There is no doubt that the appellant was expelled by Local 1059 by a process, and with an outcome, that are not challenged before us. Therefore, I accept the OLRB's conclusion that Local 1059 was entitled to adopt and enforce the Dual Union Policy. Once the appellant was

properly expelled, the role of the trustees is limited; they have no overriding discretion to provide benefits to a person who is no longer a beneficiary.

[73] Fourth, the appellant submits that the Benefit Plan Booklet suggests that "ceasing to be a member of Local 1059 would not lead to the confiscation of his Dollar Bank"; this disabled the MacKinnons from participating in a decision of the trustees "to adopt a provision in the Benefit Plan purporting to have the opposite effect." I have already rejected this argument for the reasons set out at para 38.

[74] Finally, I observe that the consequences of any breach in this case are minimal. The appellant has experienced no shortfall of benefits and is not out-of-pocket in relation to benefits.

[75] In my view, the application judge did not err in taking the approach she did on the issue of conflict of interest. I agree with her that no conflict of interest existed on the facts of this case.

E. DISPOSITION

[76] I would dismiss the appeal with costs to the respondents fixed in the amount of $32,000, all inclusive.

P Lauwers JA

Released: DD APR 0 8 2015

I agree L Sharpe JA

I agree. R R Gillese JA