

Cited as:

R.J. Wilcox Partitions & Ceiling Systems Inc.

Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America, Applicant v. R.J. Wilcox Partitions & Ceiling Systems Inc. and Wilcox Interior Inc. and Tanya Ruth Ann Genest c.o.b. as Westboro Construction and Wilcox Diversified Inc., Responding Parties

[2001] O.L.R.D. No. 3562

File No. 0268-00-R

Ontario Labour Relations Board

BEFORE: Laura Trachuk, Vice-Chair, and Board Members J.G. Knight and G. McMenemy

August 28, 2001

(19 paras.)

Appearances:

Peter **Shklanka**, for the applicant.

Tanya Genest, for Westboro Construction.

DECISION OF THE BOARD

1 This is an application under subsection 1(4) and section 69 of the LABOUR RELATIONS ACT, 1995, S.O. 1995, c. 1, as amended (the "Act"). The applicant (referred to as the "union") alleges that the responding parties carry on associated or related businesses or activities pursuant to section 1(4) of the Act. The union also claims that there has been a sale of a business from R.J. Wilcox Partitions and Ceiling Systems Inc. (referred to as "R.J. Wilcox") and Wilcox Interior Inc. to Tanya Ruth Ann Genest c.o.b. as Westboro Construction (referred to as "Westboro") and to Wilcox Diversified Inc.

Facts

2 Ms. Genest was the only witness who testified with respect to this matter. Randall Wilcox Sr. was subpoenaed but did not attend.

3 The following are the relevant facts. R.J. Wilcox is a party to the Carpenters' Provincial Collective Agreement. Randall Wilcox Sr. was the owner of R.J. Wilcox. R.J. Wilcox was a drywall contractor in the construction industry. Westboro is described as carrying on business as a contractor specializing in drywall installation, door frame installation, ceilings and hardwood floors.

4 R.J. Wilcox was working on the renovation for Goodlife Fitness Centres (referred to as "Goodlife") in Ottawa in June 1998. It had done work for Goodlife Fitness Centres before. Mr. Wilcox Sr. was the construction coordinator for Goodlife as well as the owner of R.J. Wilcox. It was in both of those capacities that he was supervising the work at the Ottawa club. His sons were doing the work. (One of his sons is also named Randall Wilcox. However it was not apparent whether Randall Wilcox Jr. had been involved in the construction business.) While supervising the renovation of the Goodlife Fitness Centre in Ottawa, Mr. Wilcox Sr. met Tanya Genest. Ms. Genest was the manager of the club. A few months later Mr. Wilcox Sr. and his wife separated. In September 1998, Mr. Wilcox Sr. began living with Ms. Genest. On September 30, 1998 he resigned as president of R.J. Wilcox and his wife and Randall Wilcox Jr. became directors. R.J. Wilcox finished the Goodlife job in Ottawa in December 1998 and then ceased operating. In March 1999, Mr. Wilcox Sr. ceased being the construction coordinator for Goodlife Fitness clubs. He also signed over his proprietary interest in R.J. Wilcox to his wife. At that time Mrs. Wilcox changed the name from R.J. Wilcox to Wilcox Diversified Inc.

5 In February 1999, Westboro Construction was registered as a business. Ms. Genest is registered as its sole proprietor. Her evidence is not wholly consistent. She testified that she started Westboro with a loan from her father. She kept her job as a Goodlife Fitness Centre manager until March 1999. At that time Westboro embarked on the construction of a Goodlife Fitness Centre in Windsor. Ms. Genest said that she was asked to do the Windsor job after one of the principals of Goodlife had a disagreement with one of Mr. Wilcox Sr.'s sons and R.J. Wilcox (or Wilcox Diversified Inc.) was therefore not going to do it. She said that Goodlife gave her a cheque for \$50,000 and told her to get started. The Windsor job involved the construction of a 70,000 square foot club. Westboro did the demolition and walls. Ms. Genest testified that she also helped coordinate and supervise some of the other construction. Ms. Genest claimed that Mr. Wilcox Sr.'s only role during the Windsor job was putting up drywall. She said that she arranged for the labourers for Westboro. However, she also said that the first ones they hired were the people who delivered the drywall and they were approached by both Ms. Genest and Mr. Wilcox. Ms. Genest acknowledged that Mr. Wilcox had experience with a job that size and that she did learn from him. She learned how to purchase supplies and what to purchase. She said that Mr. Wilcox advised her which supplier to go to in London but that she opened the account. She said that Mr. Wilcox sometimes picked up supplies but that more often she bought them or they were delivered. She agreed that she learned how to price jobs from him. Two of Mr. Wilcox Sr.'s sons worked for R.J. Wilcox and then started working for Westboro. Two other former employees of R.J. Wilcox also worked for Westboro. The address for Westboro was the same as the home address of Mr. Wilcox Sr. and Ms. Genest. Mr. Wilcox Sr. carries a business card which includes both his name and Westboro.

6 Ms. Genest was involved in Westboro in a very hands on fashion and she claims that it was under her care and control and not that of Mr. Wilcox Sr. Ms. Genest testified that Mr. Wilcox was just an employee of Westboro although she called him a key employee. She explained that her pre-

vious experience with construction was her involvement in the design when her club was being renovated in Ottawa. She also said that she learned how to cost the jobs because she bought materials from Home Depot for a house renovation she was doing with Mr. Wilcox Sr. She also explained that she had a computer programme which would do the costing. She did not cost labour as she planned to do the work herself. She did expect that Mr. Wilcox would teach and assist her. She said that although Mr. Wilcox Sr. was with her on the Windsor job she did the paper work. She said that the building inspector helped her with that. She said she never gave quotes on the Goodlife jobs but invoiced as the work was completed. Westboro was involved almost exclusively in building and renovating Goodlife Fitness Centres until the date of the hearing.

7 Mr. Wilcox Sr. has never been paid by Westboro. He did not have a personal bank account but had signing authority on Westboro's account. Any of his personal needs were paid out of that account. Ms. Genest said that Mr. Wilcox Sr. may have signed one or two business related cheques but that she most often signed them.

8 At the end of her testimony Ms. Genest candidly explained that "we" (she and Mr. Wilcox) started Westboro because of his separation and that they thought it was prudent to put everything in her name.

9 The Board heard no evidence about Wilcox Interior Inc. However, the application included a voluntary recognition agreement between that company and the union which was signed by Randall Wilcox Sr. as president in 1995. No response was received from Wilcox Interior Inc. and as noted above. Mr. Wilcox Sr. did not testify or even attend the hearing.

10 Mary Wilcox wrote to the Board in response to the application and advised that Wilcox Diversified Inc. had ceased operating and that it would not be participating in this hearing. Westboro purchased a drill and laser beam from Wilcox Diversified Inc. on September 30, 1999. Prior to that it rented the equipment from Wilcox Diversified Inc. whenever it was required.

Decision

11 Subsection 1(4) and section 69 of the LABOUR RELATIONS ACT, 1995 provide as follows:

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

69.(1) In this section,

"business" includes a part or parts thereof; ("entreprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 16 or 59, sells his, her or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 16 or 59, as the case requires.

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

12 This is a case in which the interrelationship of the responding party companies meets the criteria of both subsection 1(4) and section 69 of the Act. It has not been denied that Mr. Wilcox Senior had control and direction of R.J. Wilcox and Wilcox Interior Inc. Ms. Genest does deny that he had control and direction of Westboro. However, while Ms. Genest certainly was a full time participant in that company she could not have started it without Mr. Wilcox who was actively involved as partner in fact, if not in name. Ms. Genest had no construction experience, she was the manager of a fitness club. Mr. Wilcox knew the business and the suppliers. He had been performing the construction work for Goodlife Fitness Centres in both the capacity of construction manager and owner of R.J. Wilcox for some time. It is naïve to think Goodlife would have given the work to Ms. Genest

without Mr. Wilcox. Mr. Wilcox effectively never ceased doing jobs for Goodlife, he merely started using a different company name and a different partner.

13 The timing of the events in this case are significant. Mr. Wilcox resigned as president of R.J. Wilcox in September 1998. He did not sign over his ownership however. He remained construction manager for Goodlife and therefore presumably responsible for the project in Ottawa which ended in December 1998. In February 1999 Ms. Genest registered Westboro. In March 1999 Mr. Wilcox signed over ownership of R.J. Wilcox and Mary Wilcox changed the name. Also in March 1999 Westboro started doing the next job for Goodlife. It continued to do jobs for Goodlife until the hearing. It appears that Wilcox Diversified Inc. has not had any further involvement in the construction industry at all. It is clear that the commencement of Westboro was related to the end of Mr. Wilcox's involvement with R.J. Wilcox and that company's involvement with Goodlife. Goodlife continued to give business to Mr. Wilcox Sr. regardless of the name of the company he was using.

14 Ms. Genest says that Mr. Wilcox merely puts up drywall but she also acknowledges his involvement in other aspects of the business, especially with respect to teaching her. However, Mr. Wilcox is clearly not an employee but a partner in the business as he receives no pay cheque and has signing authority on the account into which receivables are paid. It is from that account that he provides for his personal needs. It was apparent from Ms. Genest's testimony that she and Mr. Wilcox Sr. were a team and Westboro was a joint venture.

15 Mr. Wilcox was a "key person" of both R.J. Wilcox and Westboro Construction. When he moved from R.J. Wilcox to Westboro he took the business, which was essentially performing construction work for Goodlife Fitness Centres, with him. The Board therefore finds that there was a sale of business from one to the other.

16 The Board also finds that R.J. Wilcox and Westboro Construction are related employers pursuant to subsection 1(4) of the Act. Mr. Wilcox Sr. exercised direction and control of R.J. Wilcox as well as Westboro. Ms. Genest may be a much more hands on partner than Mr. Wilcox's wife who did the books for R.J. Wilcox. Nevertheless, Mr. Wilcox Sr. had direction and control of Westboro because he was the one who knew the business, the suppliers, what supplies were needed and how many labourers were needed for a particular job, at least until Ms. Genest had the opportunity to learn the business and the work. The decision to abandon R.J. Wilcox and start Westboro, although not intended for that purpose, would have the effect of eroding the union's bargaining rights if a declaration were not issued. That is the result that subsection 1(4) is intended to avoid.

17 Wilcox Diversified Inc. is R.J. Wilcox with a new name and has, therefore, always been bound to the collective agreement. Although Mr. Wilcox may have taken the dynamic aspect of the business with him, R.J. Wilcox was still an existing company whose shares could be transferred and whose name could be changed. Section 1(4) specifies that two businesses need not carry on associated or related businesses simultaneously. It appears that Wilcox Diversified Inc. is not active and that it does not currently carry on associated or related activities with Westboro although at one time (as R.J. Wilcox) it did. Therefore while Wilcox Diversified Inc. is a related employer for the purposes of the Act and both companies are therefore bound to the provincial collective agreement, they are not responsible for any liabilities incurred by each other under that agreement. As Wilcox Diversified Inc. is the same company as R.J. Wilcox it is not necessary to find a sale from one to the other.

18 Wilcox Interior Inc. did not participate in this matter and therefore has never denied any of the facts asserted with respect to it. The Board therefore takes those facts to be agreed. They indicate that Randall Wilcox Sr. was also the president of Wilcox Interior Inc. which performed work in the ICI sector and on whose behalf he entered a voluntary recognition agreement with the applicant. Wilcox Interior Inc. was therefore under the same direction and control as R.J. Wilcox and is therefore a related employer with the other responding parties pursuant to subsection 1(4) of the Act.

Declarations and Order

19 The Board hereby makes the following declarations:

- a) that R.J. Wilcox Partitions & Ceiling Systems Inc. and Wilcox Interior Inc. and Wilcox Diversified Inc. and Tanya Ruth Ann Genest c.o.b. as Westboro Construction constitute one employer for the purposes of the LABOUR RELATIONS ACT, 1995;
- b) that Tanya Ruth Ann Genest c.o.b. as Westboro Construction is bound to the Provincial Collective Agreement between the Carpenters Employer Collective Bargaining Agency (E.B.A.) and the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (C.D.C.);
- c) that there has been a sale of a business from R.J. Wilcox Partitions & Ceiling Systems Inc. to Tanya Ruth Ann Genest c.o.b. as Westboro Construction.

cp/s/qlamc

---- End of Request ----

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