**The Labour Relations Board**
**Saskatchewan**

**INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTWORKERS, LOCAL 1, Applicant v. DELTA MASONRY LTD., GUILIAN BENEVELLI and G. MASONRY, Respondents**

LRB File No. 113-04; June 16, 2005
Vice-Chairperson, Wally Matkowski; Members: Maurice Werezak and Joan White

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| For the Applicant: | Rick Engel |
| For the Respondents, Guilian Benevelli and G. Masonry: | Mark Carson |

**Successorship – Transfer of business – Section 37 of *The Trade Union Act* – Economic life of certified employer and new company flowed from one individual who was controlling mind of both entities – Board's certification process in construction industry would be rendered meaningless if individual could exit one corporate entity and resume same business through another corporate entity – Board concludes that new company successor to certified employer.**

***The Trade Union Act*, ss. 32 and 37.**

## REASONS FOR DECISION

**Background:**

**[1]** International Union of Bricklayers & Allied Craftworkers, Local 1 (the "Union"), is certified as the bargaining agent for a unit of employees of Delta Masonry (the "Employer") by an Order of the Board dated August 29, 1996 (the "certification Order"). The union filed an application pursuant to s. 18 of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11 (the "*CILRA, 1992*"), seeking a declaration that the Employer and Guilian Benevelli are under common control or are sufficiently related that they should be treated as one employer pursuant to the certification Order.

**[2]** The Union subsequently amended its application seeking, in the alternative, an order pursuant to s. 37 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), that the masonry business of the Employer was transferred to either Guilian Benevelli or to a corporation controlled by Mr. Benevelli, G. Masonry. The Union alleged that G. Masonry or Mr. Benevelli

was subject to the certification Order and the collective agreement which had been applicable to the Employer and that, as a successor employer, G. Masonry or Mr. Benevelli owed the Union back dues and benefit premiums. In the Union's amended application, it sought "a monetary order for the payment of all dues and assessments required under s. 32 to be paid to the union for each hour worked of the employees of the successor employer since April 1, 2004."

**[3]** Mr. Benevelli filed a reply wherein he acknowledged that he had performed some masonry work, but only after the demise of the Employer.

**[4]** The application was heard in Saskatoon on January 11, 2005. Following the hearing, Mr. Carson asked for and was granted the opportunity to file a written argument with the Board on or before February 1, 2005. Mr. Engel was given the opportunity to respond to Mr. Carson's written argument but, in a letter to the Board dated February 16, 2005, Mr. Engel advised the Board that he would not be filing a written response to Mr. Carson's written argument, but would rely "upon our final submissions made at the hearing." In his letter dated February 16, 2005, Mr. Engel further indicated:

> *On the issue of damages, the union first requests a ruling on successorship and/or related-employer status. If the union is successful, we request an Order directing the Board's Investigating Officer to conduct an investigation to determine all hours worked by all employees of Mr. Benevelli from April 1, 2004 until the present.*

**Facts:**

**[5]** Clarence Medernach, the Union's president and secretary-treasurer, testified on behalf of the Union. He was the individual who was involved, on behalf of the Union, in obtaining the certification Order. Prior to the Union obtaining the certification Order, Mr. Medernach met with Mr. Benevelli at a job site where the Employer was working and obtained Mr. Benevelli's signature to the Union's provincial collective agreement. The signatory page (Exhibit U-2) is dated July 26, 1996 and is signed by Mr. Medernach, on behalf of the Union, and Mr. Benevelli, on behalf of "Delta Masonry, 126 Appleby Drive, Saskatoon, Sask. S7M 4B5."

**[6]** Mr. Medernach testified that Mr. Benevelli said to him on July 26, 1996 that "you got me," and that the Union then obtained the certification Order naming Delta Masonry, relying on the information given to Mr. Medernach by Mr. Benevelli.

**[7]** From that date forward, the Employer paid all dues and remittances "like clockwork." Mr. Medernach often visited job sites where the Employer was present. Mr. Medernach was only aware of the one business entity, Delta Masonry, and was never made aware that any members of the Union were not paying union dues.

**[8]** The Union received employer's report of contribution forms from the Employer's accountants that set out the applicable dues and remittances made by the Employer. In July 2000, Mr. Medernach received a request from the Employer's accountants that the Employer be deemed "dormant," as the Employer had no employees to report for.

**[9]** From July 2000 to approximately February 2001, Mr. Medernach monitored job sites to see if the Employer or Mr. Benevelli was doing any work in the industry. Mr. Medernach's observations were that the Employer was no longer an active entity. On February 16, 2001, Mr. Medernach caused the following letter to be sent to the Employer's accountants:

> *We have received authorization from the International Union of Bricklayers & Allied Craftworkers, Local 1(SK) to consider your account dormant until such time as you have contributions to report. Please notify the Local Union or the Fund office as soon as you hire employees and have contributions to report.*

**[10]** Mr. Medernach testified that, during the time period 1996-2000, other than his dealings with the Employer's accountants, he only dealt with Mr. Benevelli on behalf of the Employer and Mr. Benevelli was the controlling or directing mind of the Employer. Mr. Medernach did not deal with Mr. Benevelli's spouse.

**[11]** Mr. Medernach testified that, following his review of a number of project information sheets in 2004, he came to the conclusion that the Employer was back in business. Mr. Medernach attended at one of the job sites listed on the project information sheets and saw Mr. Benevelli working at the site. He approached Mr. Benevelli and was met with an unpleasant greeting from Mr. Benevelli. Mr. Benevelli advised Mr. Medernach that he "wasn't union" and that he was with a "different company." Mr. Medernach asked for the name of the company, but Mr. Benevelli refused to provide him with the name. Rather than have the situation escalate into something unpleasant, Mr. Medernach left the job site.

**[12]** Mr. Medernach attended at a different job site (he became aware of this site from project information sheets) and talked to a bricklayer, Arnie Uhrn, who advised Mr. Medernach that he was working for "Delta Masonry." Mr. Uhrn was not hired through the Union's hiring hall.

**[13]** Mr. Medernach testified that another member of the Union, Les Markwart, contacted him and asked whether or not he could work for Mr. Benevelli, to which Mr. Medernach replied "yes, he's union." Mr. Medernach warned Mr. Markwart that there could still be a dispute with Mr. Benevelli in that regard, because Mr. Benevelli was not recognizing the Union, which could affect Mr. Markwart's pension contributions. Mr. Medernach advised Mr. Markwart that, if work became available from his regular employer who recognized the Union, Mr. Markwart could leave Mr. Benevelli and return to his regular employer.

**[14]** Mr. Markwart did, in fact, leave Mr. Benevelli's employment shortly thereafter, causing Mr. Medernach to receive a phone call from Mr. Benevelli. Mr. Benevelli complained that Mr. Medernach had taken all his bricklayers away and said that he needed a bricklayer. Mr. Benevelli advised Mr. Medernach that he would pay union rates for one person only, but for no one else. Mr. Medernach advised Mr. Benevelli that he would not send him any bricklayers until Mr. Benevelli recognized the Union and that Mr. Benevelli was bound by the provincial collective agreement. Mr. Medernach testified that Mr. Benevelli was upset as a result of the conversation.

**[15]** Mr. Medernach testified that he conducted a Corporations Branch search in April 2004 relating to the Employer, which listed the Employer's name as Delta Masonry Ltd., and revealed that the corporation had been struck off as inactive. The registered office of the Employer was 126 Appleby Drive, Mr. Benevelli and his spouse were listed as directors and Mr. Benevelli's spouse was listed as the sole shareholder (the corporate search result was entered as an exhibit before the Board).

**[16]** The Union's amended application, sworn by Mr. Medernach, provides that the Union became aware in August 2004 that Mr. Benevelli was operating his masonry business under a business corporation called G. Masonry. The Union filed a Corporations Branch search result for G. Masonry which listed Mr. Benevelli as the owner, at the same address as the registered office of the Employer.

**[17]** Mr. Benevelli testified on his own behalf and stated that he has been a bricklayer for 47 years and that, at different times prior to 1988, he was both a member of the Union and a business owner in the masonry industry. The Employer was incorporated by Mr. Benevelli in 1988, with his spouse being the sole shareholder. Mr. Benevelli acknowledged that Delta Masonry Ltd. and the Employer are one and the same company and that he personally still lives at 126 Appleby Drive.

**[18]** Mr. Benevelli agreed with Mr. Medernach's testimony that the Employer was certified in 1996 and that the Employer followed the Union's provincial collective agreement from 1996-2000.

**[19]** Mr. Benevelli testified that, in July 2000, the Employer became dormant and he started doing work on his own. He testified that he did not need any bricklayers and that he used family members as labourers. Mr. Benevelli testified that, from 1988-2000, he did small jobs on his own.

**[20]** With respect to the assets of the Employer, Mr. Benevelli testified that the Employer rented most of its equipment and that the only remaining physical asset from the Employer was a power saw, that he still uses. Mr. Benevelli testified that there were no remaining contracts of the Employer and no remaining employees.

**[21]** Mr. Benevelli testified that, in spring 2004, he incorporated G. Masonry, as a sole proprietorship and his spouse had no connection with G. Masonry.

**[22]** During cross-examination, Mr. Benevelli discussed three projects that G. Masonry performed in 2004. He stated that, at a project in Regina, he used a bricklayer and that, for two other projects, he used bricklayers borrowed from other corporations. Mr. Benevelli acknowledged that people in the industry usually say that they work for "Guilian," and that he himself has never paid union dues for work that he performed with the Employer.

**[23]** Mr. Benevelli testified during cross-examination that he was running the business of the Employer and that his spouse has worked for another employer for the last 5 to 10 years. Prior to this time, Mr. Benevelli's spouse had been a homemaker.

**Relevant statutory provisions:**

**[24]** Relevant sections of the *Act* include ss. 32 and 37 of the *Act* and s. 18 of the *CILRA, 1992*, which read as follows:

> *32(1) Upon the request in writing of an employee, and upon request of a trade union representing the majority of employees in any bargaining unit of his employees, the employer shall deduct and pay in periodic payments out of the wages due to the employee, to the person designated by the trade union to receive the same, the union dues, assessments and initiation fees of the employee, and the employer shall furnish to that trade union the names of the employees who have given such authority.*
>
> *(2) Failure to make payments and furnish information required by subsection (1) is an unfair labour practice.*
>
> *37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.*
>
> *(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:*
>
> > *(a) determining whether the disposition or proposed disposition relates to a business or part of it;*
> >
> > *(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:*
> >
> > *(i) an employee unit;*
> > *(ii) a craft unit;*
> > *(iii) a plant unit;*
> > *(iv) a subdivision of an employee unit, craft unit or plant unit; or*

*(v) some other unit;*

*(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);*

*(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);*

*(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;*

*(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).*

*18(1) On the application of an employer or a trade union affected, the board may declare more than one corporation, partnership, individual or association to be one unionized employer for the purposes of this Act and The Trade Union Act where, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through those corporations, partnerships, individuals or associations.*

*(2) Repealed.*

*(3) In exercising its discretion pursuant to subsection (1), the board may recognize the practice of non-unionized employers performing work through unionized subsidiaries.*

*(4) The effect of a declaration pursuant to subsection (1) is that the corporations, partnerships, individuals and associations:*

*(a) constitute a unionized employer in a specified trade division; and*

*(b) are bound by a designation of a representative employers' organization designated pursuant to section 9.1 or designated by the minister pursuant to section 10.*

*(5) The board may make an order granting any additional relief that it considers appropriate where:*

*(a) the board makes a declaration pursuant to subsection (1); and*

*(b) in the opinion of the board, the associated or related businesses, undertakings or activities are carried on by or*

> *through more than one corporation, partnership, individual or association for the purpose of avoiding:*
>
> > *(i) the effect of a designation of a representative employers' organization with respect to a trade division; or*
> >
> > *(ii) a collective bargaining agreement that is in effect or that may come into effect between the representative employers' organization and a trade union.*
>
> *(6) Where the board is considering whether to grant additional relief pursuant to subsection (5), the burden of proof that the associated or related businesses, undertakings or activities are carried on by or through more than one corporation, partnership, individual or association for a purpose other than a purpose set out in sub clause (5)(b)(i) or (ii) is on the corporation, partnership, individual or association.*
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> *(7) An order pursuant to subsection (5) may be made effective from a day that is not earlier than the date of the application to the board pursuant to subsection (1).*

**Union's arguments:**

**[25]** Counsel for the Union argued that Mr. Benevelli is running the same business in 2004 that he was running from 1996-2000 and that, pursuant to s. 37 of the *Act*, there has been a transfer of the business. Counsel argued that the Board's decision in *International Brotherhood of Electrical Workers, Local 529 v. Mudjatik Thyssen Mining Joint Venture*, [2000] Sask. L.R.B.R. 332, LRB File No. 140-99, was directly on point. Counsel argued that s. 18 of the *CILRA, 1992* was also applicable.

**Respondent's arguments:**

**[26]** Counsel for Mr. Benevelli and G. Masonry argued that the certification Order "has been allowed to become empty of any substantive consequences," that the Employer is no longer a unionized employer and that neither party is entitled to rely upon the collective bargaining rights contemplated by the certification Order. Counsel argued that, even if the Board made the determination that the Employer was a unionized employer, the evidence does not disclose that G. Masonry is a successor to the Employer. Counsel argued that if the Union is entitled to a monetary order, that the Board should assess the amount at $253.75, based on the number of hours worked by Mr. Markwart.

**Analysis:**

**[27]** The Union relied on s. 37 of the *Act* to argue that G. Masonry is a successor employer and is subject to the certification Order binding Delta Masonry to the Union's provincial collective agreement.

**[28]** In *Mudjatik*, *supra*, the Board stated at 345 and 346:

> *[48] In United Brotherhood of Carpenters and Joiners of America, Locals 1805 and 1990 v. Cana Construction Co. Ltd. et al., [1985] Feb. Sask. Labour Rep. 29, LRB File Nos. 199-84, 201-84 & 202-84, the Board set out the test for determining if an employer is a successor employer under s. 37 of the Act in the following terms:*
>
> > *In order to determine whether there has been a sale, lease, transfer or other disposition of a business or part thereof, the Board will not be concerned with the technical legal form of the transaction but instead will look to see whether there is a discernable continuity in the business or part of the business formerly carried on by the predecessor employer and now being carried on by the successor employer. The Trade Union Act does not contain a statutory definition of "business" and the Board recognizes that it is not a precise legal concept but rather an economic activity which can be conducted through a variety of legal vehicles or arrangements. It has given the term "business" a meaning consistent with the comments of the Ontario Labour Relations Board in Canadian Union of Public Employees v. Metropolitan Parking Inc., [1980] 1 Can. L.R.B.R. 197, at 208:*
> >
> > > *A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a dynamic activity, a "going concern", something which is "carried on". A business is an organization about which one has sense of life, movement and vigor. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets. This notion is implicit in the remarks of Widjery, J. in Kenmir v. Frizzel et al., [1968] 1 All E.R. 414 . . .*
> >
> > *Widjery, J. took the same approach as that adopted by this Board, concentrating on substance rather than form, and stressing the importance of considering the transaction in*

> *its totality. The vital consideration for both Widjery, J. and the Board is whether the transferee has acquired from the transferor a functional economic vehicle.*
>
> *In determining whether a "business" has been transferred, the Board has frequently found it useful to consider whether the various elements of the predecessor's business can be traced into the hands of the alleged successor business; that is, whether there has been an apparent continuation of the business - albeit with a change in the nominal owner.*

*[49] In applying the test to a transfer in the construction industry, the Board commented as follows at 41:*

> *In the Board's opinion, the "economic life" of a construction company may therefore depend upon the availability of a combination of component parts at a cost the market will bear and which include, among other things, the availability of skilled labour, managerial expertise, ownership of or access to necessary equipment, and (especially in the commercial, institutional and industrial sector) sufficient capital and financial stability.*

**[29]** In this case, the “economic life” of both the Employer and G. Masonry flowed from Mr. Benevelli. Mr. Benevelli possessed the skill, experience and “know how” in the masonry business. Mr. Benevelli, by his own admission, was the controlling mind of the Employer and is the controlling mind of G. Masonry. His spouse did not play an active role in the business of the Employer.

**[30]** The Board’s certification process in the construction industry would be rendered meaningless if Mr. Benevelli could exit from one corporation and resume the same business through another corporate entity. As such, based on the facts of this case, the Board finds that G. Masonry is a successor employer. Given the Board’s finding under s. 37, it is not necessary to determine if G. Masonry and the Employer are related employers within the meaning of s. 18 of the *CILRA, 1992*.

**Conclusion:**

**[31]** The Board finds that G. Masonry is a successor employer to the Employer and is bound by the certification Order issued by the Board to the Union and the Employer and to any collective agreement in force between the Employer and the Union.

**[32]** As stated earlier, the Union sought a monetary order for all dues and assessments that should have been paid to the Union for each hour worked by the employees of G. Masonry from April 1, 2004 to the present. Counsel for the Union advised the Board that the Union was only interested in having dues and assessments paid in relation to the commercial projects performed by G. Masonry. Counsel for Mr. Benevelli and G. Masonry, in his brief of law, fixed this amount at $253.75, based on the number of hours worked by Mr. Markwart. Counsel for Mr. Benevelli and G. Masonry attached a schedule to his brief outlining how these hours were calculated. The calculation of this schedule has not been subject to cross-examination by the Union and the Union has not been provided with information in relation to what jobs were performed by G. Masonry from April 1, 2004 to the present.

**[33]** Given that the Union has not filed an unfair labour practice application pursuant to s. 32 of the *Act* and that the Board has not heard any evidence in relation to this issue, the Board will not appoint a Board agent to assist the parties in reaching an agreement on monies that are owing to the Union by G. Masonry for dues and assessments. It is, of course, the Board's preference that the parties will resolve this issue without the Union filing an unfair labour practice application pursuant to s. 32 of the *Act*.

**DATED** at Regina, Saskatchewan, this **16th** day of **June, 2005**.

**LABOUR RELATIONS BOARD**

Wally Matkowski,
Vice-Chairperson