

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**LISABETH PIMENTEL on her own behalf and on behalf of all members
of LOCAL 75 UNITE HERE**

Plaintiff

and

**DONALD TAYLOR on his own behalf and on behalf of the members of
UNITE HERE (INTERNATIONAL)**

Defendant

**FACTUM OF THE DEFENDANT, THE RESPONDENT,
DONALD TAYLOR ON HIS OWN BEHALF AND ON BEHALF OF THE
MEMBERS OF UNITE HERE (INTERNATIONAL)**

MOTION FOR AN INTERIM INJUNCTION (JANUARY 4, 2018)

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PART I: INTRODUCTION

1. This motion arises from a proposed trusteeship of Local 75 of UNITE HERE ("Local 75" or the "Local") by its parent ("the International" or "UNITE HERE"). A trusteeship was requested by a majority of Local 75's elected Executive Board in April 2017 because of a bitter internal conflict that started in September 2016. The International spent months investigating many of the 65 plus complaints it had received from various individuals within Local 75, meeting with representatives of Local 75, and trying to forge a resolution and a path forward that would allow Local 75 to carry on in a coherent and fair manner without the imposition of a trusteeship. Unfortunately, despite these significant efforts, that took place over almost a year, the situation at Local 75 continued to deteriorate and those responsible to represent the interests of approximately 8,000 workers in some of the most difficult and low wage jobs in Ontario are locked in endless disputes, causing Local 75 to become chaotic and dysfunctional. Faced with these unresolved conflicts within the leadership of Local 75, which unfortunately also involve a split along racial and ethnic lines, and with crucial rounds of collective bargaining with major employers scheduled to commence in early 2018, the International made the difficult decision to authorize the imposition of a trusteeship over the affairs of Local 75 in accordance with the applicable provisions of the governing Constitution.

2. The trusteeship has not yet been imposed. The Plaintiff, who represents a faction within Local 75, and who until she orchestrated the removal of 12 elected Executive Board members the same day this motion was served was supported by a minority of the

members of Local 75's Executive Board, does not represent the interests of all of the members of Local 75 as she purports to do in her Notice of Action. The Plaintiff has also failed to provide the undertaking as to damages required by Rule 40.03 of the *Rules of Civil Procedure*. Local 75 cannot provide this undertaking on her behalf. The Plaintiff is adverse in interest to the majority of the elected Executive Board and to both the Local's Secretary-Treasurer and Vice President, who along with the Plaintiff are the other two elected officers of Local 75.

3. There is no serious issue to be tried. The Constitution is binding and it has been followed. There is also no irreparable harm. The balance of convenience favours the Defendant and this motion for an interim injunction until the motion for an interlocutory injunction can be heard on June 8, 2018 should be dismissed. This is not a case where it is necessary or appropriate for this Honourable Court to intervene. The International needs the opportunity to stabilize a situation at one of its locals that has become increasingly unstable. It is in the best position to ensure that the cohesion and fairness necessary to strongly represent the interests of the affected workers in the coming months can be achieved. If the International takes action that is in breach of the Constitution or acts in a manner that is otherwise unlawful then the Plaintiff can raise these issues at her motion on June 8, 2018, but there is no evidence that it has or will breach the Constitution.

PART II: SUMMARY OF FACTS**A. The International and its Affiliate Local 75**

4. The International is a trade union that represents approximately 275,000 workers in more than 100 local unions across North America in the hotel, gaming, food service, manufacturing, textile, distribution, laundry, transportation and airport industries. In Canada, UNITE HERE represents approximately 20,000 members. The proposed representative Defendant is the President of the International.¹

5. Local 75 is an affiliate of the International and represents approximately 8000 workers across the Greater Toronto Area. Ms. Pimentel, the proposed representative Plaintiff, is Local 75's President.²

6. Local 75 is governed by an executive board ("Executive Board"), composed of three elected officers (President, Secretary-Treasurer and Vice President) and 25 rank and file members. All Executive Board members are democratically elected to be the voice of Local 75's membership.³

7. Members of UNITE HERE, including Local 75, are predominantly women and people of colour.⁴

¹ Affidavit of Donald Taylor [hereinafter "Taylor Affidavit"], Defendant's Motion Record, Tab 1A, pp. 1-2, paras 3-4.

² Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 2, para 7.

³ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 2, para 8.

⁴ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 2, para 10.

B. Local 75's Chaos, Dysfunction and Bitter Internal Conflict

8. Local 75 has been embroiled in a debilitating internal conflict between two factions for more than a year. On one side is Ms. Pimentel and a minority of the elected Executive Board and on the other side are the other two officers – Nuredin Bulle (Secretary-Treasurer) and Valrie Lue (Vice-President) -- and a majority of the elected Executive Board. Many amongst the Local's membership are divided along these fault lines. Sadly, these fault lines also divide along race and ethnic lines with the majority of members who support Ms. Pimentel's faction being predominantly white and of Filipino descent and the majority of members who support the Mr. Bulle's faction being predominantly black and brown and of African and Caribbean descent.⁵

9. Local 75's internal conflict, which began shortly after the Local's September 2016 election, has caused the Local to become non-functional on an almost daily basis. Staff members are refusing to speak to other staff members, and many are outwardly attacking each other in the office, in Executive Board meetings which break down into shouting matches, and in membership meetings.⁶

10. Furthermore, and as a result of the conflict, the business of the Local has been regularly frustrated for the better part of the year. For example:

- (a) At the membership meeting on April 11, 2017 the monthly financial reports from October 2016 through March 2017, the audited finances for 2016, and

⁵ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 3, para 11.

⁶ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 3, para 12.

the approval of the Executive Board minutes from January through March 2017 were rejected by the Local's membership;

- (b) At the regular monthly Executive Board meetings on May 11, August 3, September 13, and October 5 2017, motions relating to the Local's regular business, including motions to approve the Local's financial transactions, were not carried;
- (c) No motions were passed at the regular monthly Executive Board meetings on November 2 and December 7, 2017; and
- (d) Cheques are either not being signed or are delayed in being signed causing the business of the Local to be adversely affected.⁷

11. In addition to Local 75's regular business being frustrated, UNITE HERE has also received over 65 complaints from many individuals between February and December 2017. Almost all of these complaints relate to allegations of undemocratic practices and racism, discrimination, harassment and bullying.⁸

12. With respect to the complaints alleging undemocratic practices, almost all of them were made by the majority of the Local's Executive Board against the Plaintiff. The particulars of these allegations are voluminous. They relate, broadly speaking, to efforts by the Plaintiff and her supporters to disempower the majority of the Executive Board who are opposed to her in interest. They also relate to the Plaintiff's decision to ban the Local's Secretary-Treasurer from certain hotels where the Local represents workers

⁷ Taylor Affidavit, Defendant's Motion Record, Tab 1A, pp. 3-4, para 13.

⁸ Taylor Affidavit, Defendant's Motion Record, Tab 1A, pp. 4-5, para 14, and Tab A, pp. 23 – 437.

without due process. Finally, the allegations relate to the Plaintiff's decision to hire five staff members without the approval or recommendation of the Local's other two officers or the Executive Board.⁹

13. The many complaints relating to racism, discrimination, harassment and bullying are particularly troubling. As previously noted, members of the International, including Local 75, are predominantly women and people of colour. Most of these complaints allege that black leaders and staff are treated unfairly, differently and/or in a disrespectful manner.¹⁰

14. Finally, the conflict and deep divisions within the Local are rapidly escalating. On October 2, 2017, charges were filed against Mr. Bulle, the elected Secretary-Treasurer, and another member of the Executive Board, Yosief Ogbasellasi. The Plaintiff appointed a trial board (and selected its members) to hear these charges on November 14 and December 1, and the trial board concluded that both Mr. Bulle and Mr. Ogbasellasi contravened the International's Constitution. The trial board further concluded that Mr. Bulle should be removed from office.¹¹

⁹ Taylor Affidavit, Defendant's Motion Record, Tab 1A, pp. 5-9, para 15.

¹⁰ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 9, para 16.

¹¹ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 9, para 17.

C. The International's Efforts to Avoid a Trusteeship

15. Over the past year senior leaders in the International have been working tirelessly to address and resolve the internal conflict in Local 75. The International has also expended significant financial resources to deal with the Local's bitter infighting.¹²

16. For example, the Defendant Mr. Taylor travelled to Toronto in December 2016 and again in February and April 2017. On each occasion, he met with the Local's officers, leaders and Executive Board members with the aim of assisting them and convincing both factions to resolve their differences. He also met with the Local's officers and leaders in the United States on numerous occasions throughout the year. According to the Defendant, time and time again he made it clear that the Local's conflict and the resulting chaos severely threatens the Local's continuity and the ability of the Local and the International to effectively bargain on behalf of its members in 2018, when the collective agreements with nearly every hotel company with which Local 75 and most other UNITE HERE affiliates have an agreement are all set to expire.¹³

17. In addition, the Defendant assigned Scott Cooper, the International's Director of Operations, to work with the Local's leadership to help them resolve their conflict and to help them focus on the upcoming 2018 bargaining. Between February and May 2017, Mr. Cooper made five trips to Toronto.¹⁴

¹² Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 10, para 19.

¹³ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 10, para 20.

¹⁴ Taylor Affidavit, Defendant's Motion Record, Tab 1A, pp. 10-11, para 21.

18. Unfortunately, during this time period, the divisions and infighting within the Local only intensified.¹⁵

19. Shortly after the April 11, 2017 general membership meeting, where the members voted down all the regular business of the Local, the Defendant travelled to Toronto to meet with the Plaintiff (and others in the Local). During that meeting the Defendant advised the Plaintiff that a majority of the members of the Executive Board had signed a letter asking the International to place Local 75 in trusteeship. The Defendant did not believe that a trusteeship was appropriate and in the best interests of the Local and the International at that point in time.¹⁶

20. As a result, the Defendant encouraged the Plaintiff, and then Mr. Bulle, to agree to a voluntary supervision under Article 4 (the trusteeship article), Section 7 of the International's Constitution, which states, in part, as follows:

If in the opinion of the Executive Committee, an affiliate is at risk for government intervention, possible trusteeship...the Executive Committee may impose supervision of the affiliate... . (emphasis added)¹⁷

21. Both factions agreed to a voluntary supervision.¹⁸

¹⁵ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 11, para 22.

¹⁶ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 11, para 23.

¹⁷ Taylor Affidavit, Defendant's Motion Record, Tab 1A, pp. 11-12, para 24 and UNITE HERE Constitution, Plaintiff's Motion Record, Exhibit B, p. 73.

¹⁸ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 12, para 25.

22. Subsequently on May 18, 2017 the Executive Committee of the International adopted a resolution placing Local 75 under supervision and appointing Mike Casey, a senior leader in UNITE HERE, to be the supervisor. The text of the resolution states as follows:

Political instability in Local 75 has reached a critical point. The Executive Board is not cooperating with the President and refuses to approve any expenditure the President proposes to make. Members of the Executive Board have filed internal charges against the President alleging that she has prevented the Executive Board from making motions at its meetings, in addition to other things. There are other charges and countercharges of racism, favoritism and inadequate performance.

President Taylor has attempted to reconcile these differences so that Local 75 can resume normal operations but he has determined that correcting the existing disarray will require significantly more time than he can devote. A majority of the Executive Board has called for a trusteeship but the President is not in agreement. The President of Local 75 has requested that [*sic*] a supervisor (albeit by "mutual agreement"). Clearly, everyone in authority at Local 75 recognized that the present situation cannot continue without extreme jeopardy to the interests of our members. Therefore, President Taylor recommends placing Local 75 under supervision with Mike Casey as the supervisor.

THEREFORE, THE EXECUTIVE COMMITTEE OF UNITE HERE resolves to place Local 75 under supervision for three months and appoint Mike Casey to be the supervisor, subject to earlier termination if Brother Casey reports that Local 75 has been restored to sound administration.¹⁹

23. The International's supervision of Local 75 started at the end of May and lasted for three months. During the supervision, Mr. Casey travelled to Toronto on ten occasions, where he met with members, staff and rank and file leaders during his visits, which lasted between 2 and 4 days each time.²⁰

¹⁹ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 12, para 26, and Tab B, p. 439 and Tab C, p. 441.

²⁰ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 13, para 27.

24. For a very brief period in early July it appeared that Local 75's internal conflict was finally waning. Regrettably, Local 75's internal conflict did not wane and matters only worsened.²¹

25. Many of the disputes within Local 75 relate to competing interpretations of the Local's Bylaws. Particularly controversial are questions about whether the Plaintiff can hire and fire employees without the approval of the Executive Board, whether certain expenses are "non-routine" requiring Executive Board approval, and whether the Executive Board has the authority to set policies about where union meetings will be held. In an attempt to resolve these disputes, and with the hope of preventing any further escalation, the Defendant provided an interpretation of the Local's Bylaws to the Plaintiff and Mr. Bulle.²²

26. The Defendant also recently assigned Bill Granfield, another senior leader in UNITE HERE, to oversee the International's staff based in Toronto. As described in Mr. Taylor's affidavit, he did this in part to prepare the International's staff for the upcoming 2018 hotel negotiations and also to address several complaints that the International's staff were involving themselves in the Local's internal politics. Mr. Granfield has been working in this role since early October.

27. Finally, in addition to assigning senior leaders in UNITE HERE to assist Local 75 with its internal conflict, the Defendant also authorized two investigations – one focussed

²¹ Taylor Affidavit, Defendant's Motion Record, Tab 1A, pp. 13-14, paras 28-29.

²² Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 14, para 30, and Tab G, pp. 456 - 465.

on the allegations of undemocratic practices and the other focussed on the allegations of systemic racism and discrimination -- to address many of the 67 complaints that the International received between February and December 2017. Both of these investigations, which are being conducted by separate lawyers, commenced in October and both of them are ongoing.²³

28. Despite all of the above efforts, Local 75's debilitating internal conflict has raged on for more than a year and the situation has only worsened with every passing day.²⁴

D. Trusteeship Decision

29. On December 6, 2017, the International's 20-member Executive Committee -- the highest governing body of the International in between conventions -- met in executive session to discuss matters pertaining to Local 75. After a serious and lengthy discussion, the Executive Committee unanimously voted to impose a trusteeship at Local 75 on a future date to be decided at the Defendant's discretion, and in response to a request from the Local 75 elected Executive Board, pursuant to Article 4, Section 3 of UNITE HERE's Constitution, which states as follows:

When, in the opinion of the three-quarter (3/4) of the Executive Committee, excluding the Executive Vice President in whose representational council the affiliate subject to trusteeship belongs, any delay would pose a clear and immediate threat to the affiliate, or where the executive board of the affiliate requests the imposition of a trusteeship, a Trustee who is a member in good standing of UNITE HERE may temporarily take charge and control of the affairs and property of such affiliate, with all the powers set forth in Article

²³ Taylor Affidavit, Defendant's Motion Record, Tab 1A, pp. 14-15, para 32.

²⁴ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 15, para 33.

4, Section 5, prior to a hearing (which shall be scheduled promptly and may not be delayed by UNITE HERE) but after service of such notice of charges. (emphasis added)²⁵

30. Local 75's Executive Board's request for the International to impose a trusteeship was signed by 17 members of the Executive Board between April 20 and May 1, 2017. The elected Executive Board has never rescinded this request.²⁶

31. The International's decision to impose a trusteeship was not made lightly. As set out above, the International took many steps, including placing Local 75 in a voluntary supervision, before it made its trusteeship decision. Ultimately, however, the International determined that the chaos, dysfunction and bitter internal conflict had reached a tipping point and that no other option but a trusteeship existed in order to restore stability in the Local and ensure that the crucial rounds of collective bargaining with major employers scheduled to commence in early 2018 are not compromised.²⁷

E. Recent Events: More Chaos, Dysfunction and Bitter Internal Conflict

32. After circulating the International Executive Committee's December 6, 2017 trusteeship decision to Local 75's Executive Board, the Defendant directed the Plaintiff to attend a meeting in Chicago on December 12th. The Plaintiff attended the meeting with

²⁵ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 15, para 34. A copy of the Executive Committee decision imposing a trusteeship is included in the Pimentel Affidavit as Exhibit "H". See, also, UNITE HERE Constitution, Plaintiff's Motion Record, Exhibit B, p. 72.

²⁶ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 16, para 35, and Tab H, pp. 467-469.

²⁷ Taylor Affidavit, Defendant's Motion Record, Tab 1A, pp. 16-17, paras 36-38.

David Sanders, who is an Organizing Director employed by the International, assigned to Local 75.²⁸

33. At this meeting, the Defendant asked the Plaintiff and Mr. Sanders whether they intended to cooperate with the trusteeship or whether they would oppose it. The Plaintiff refused to commit to a cooperative solution and left the meeting to reflect upon the conversation.²⁹

34. Less than two full days later, on December 14th, the Plaintiff called a special meeting of the Executive Board with less than 24 hours' notice. At this meeting, the Plaintiff purged her opposition under dubious circumstances by announcing that she had removed 12 elected members of the Executive Board who were aligned with Mr. Bulle's faction and she recommended filling the vacant positions with 12 new members she had selected, which the remaining Executive Board members who are aligned in interest with the Plaintiff accepted. The new Executive Board, half of whom are not elected, then approved the trial board's decision (the trial board that had been selected by the Plaintiff) to remove Mr. Bulle, the elected Secretary-Treasurer, from office. The new Executive Board then passed a motion to oppose any trusteeship. The Plaintiff subsequently proposed an amendment to the Local's Bylaws to hold an election for the Local's officers

²⁸ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 17, para 39.

²⁹ Taylor Affidavit, Defendant's Motion Record, Tab 1A, pp. 17-18, para 40.

and Executive Board members in March 2018, right in the middle of UNITE HERE's crucial collective bargaining negotiations with major employers in the hotel sector.³⁰

35. Following the December 14th meeting (and the same day this motion for an injunction was served) the Plaintiff effectively barred the elected officers and anyone else opposed to her in interest from the Local's office by changing the locks, while she and her supporters retained access.³¹

PART III: THE ISSUES AND THE LAW

36. This motion raises the following three issues:

- (a) Whether a representative action is properly brought by 'the proposed representative Plaintiff?
- (b) Whether the Plaintiff has given an appropriate undertaking as to damages?
- (c) Whether the Court should impose terms pending the return of the Plaintiff's interlocutory injunction motion scheduled for June 8, 2018?

A. The Plaintiff is Not an Appropriate Representative

37. The Plaintiff purports to act on behalf of all members of Local 75. Simply put, she does not. The Plaintiff ought to be limited to pursuing her action on her own behalf.

³⁰ Taylor Affidavit, Defendant's Motion Record, Tab 1A, pp. 18-19, para 41.

³¹ Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 19, para 42; Affidavit of Valrie Lue, Defendant's Motion Record, Tab 2, pp. 475-476, paras 2-6; Affidavit of Monica McKenzie, Defendant's Motion Record, Tab 3, pp. 484-486, paras 2-7.

38. To be entitled to a representative order under Rule 12.08, the Court must be satisfied that the proposed representative plaintiff would fairly represent the interests of the members of the trade union and does not have any interest in conflict with those interests.³²

39. For example, in *Ginter*, which similarly dealt with a trade union trusteeship, the Court refused to grant the representation order in one of the actions before the court because, amongst other reasons, three of eleven executive board members did not wish to be parties and there was no evidence that the other members wished to be represented.³³

40. In the case at bar, the Plaintiff has not established that she was authorized to file the Notice of Action and the Notice of Motion by the Local's other two elected officers or the elected Executive Board – the governing body of the Local between regular meeting. The reason for this is obvious given that 17 of the 25-member Executive Board requested UNITE HERE to impose a trusteeship, the very action that the Plaintiff seeks to enjoin. In these circumstances, the Plaintiff's interest is clearly in conflict with the interest of the majority of the elected Executive Board.³⁴

³² *Ginter et al. v. Gardon*, 2001 CanLII 28052 (ON SC) at para. 14 ["*Ginter*"].

³³ *Ibid.* at paras 16, 18, 21.

³⁴ Later in our factum we address Ms. Pimentel's removal of 12 Executive Board members on December 14, 2017 and the new Executive Board's December 14th motion purporting to rescind the elected Executive Board's trusteeship request.

41. Furthermore, there is no evidence whatsoever that the Plaintiff has the authority to represent the membership of Local 75 or that she has their support in this proceeding. The Plaintiff has not tendered any evidence to show that at least some of the members she purports to represent consent to the representation.

42. Finally, the division, conflict and dysfunction described above and more fully in the Defendant's affidavit are the very reason why it would not be appropriate for the Plaintiff to be named as a representative of the members of Local 75. In fact, these divisions, conflict and dysfunction are so severe that no single person in Local 75 could meet the test for a representative order pursuant to Rule 12.08 of the *Rules of Civil Procedure*.

43. In light of the foregoing, the words "and on behalf of all members of Local 75 of UNITE HERE" ought to be struck from the style of cause.

B. No Undertaking as to Damages

44. Rule 40.03 provides that the moving party shall, unless the Court orders otherwise, undertake to abide by any order concerning damages that the Court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.³⁵

45. In a recent decision, this Court held that "[t]he undertaking as to damages is an essential condition to or prerequisite for an injunction..." and "[t]he party giving the

³⁵ Rule 40.03 of the *Rules of Civil Procedure*.

undertaking is obliged to disclose whether it or its principals have sufficient assets to recover any reasonable award of damages...".³⁶ (emphasis added)

46. The Plaintiff has failed to give any undertaking as to damages, which is fatal to this motion.

47. Instead, the Plaintiff has sought an order relieving her in her personal capacity from providing an undertaking in damages.

48. Leaving aside the Plaintiff's failure to provide any undertaking as to damages, the Defendant submits that it would be inappropriate to relieve the Plaintiff from providing an undertaking in damages in her personal capacity. The Defendant relies on the above submissions that the Plaintiff is not an appropriate representative in support of his position.

49. Consequently, should the Plaintiff wish to pursue her motion for an injunction on June 8, 2018, she ought to be required to give an undertaking as to damages in her personal capacity and disclose whether she has sufficient assets to cover any reasonable award of damages in order to comply with Rule 40.03 and satisfy this essential condition to an injunction.

³⁶ *Guelph Taxi v. Guelph (City) Police Service*, 2016 ONSC 2671 (CanLII) at paras 16 and 15.

C. No Terms Should Be Imposed Prior to June 8, 2018 Injunction Motion

50. To determine whether terms should be imposed prior to the Plaintiff's June 8, 2018 interlocutory injunction motion, this Court ought to consider whether the Plaintiff satisfies the test for an injunction to warrant granting interim relief.

51. The test for an injunction is well established. In order to obtain an injunction, the Plaintiff bears the onus of satisfying the following three criteria:

- (a) A serious issue to be tried;
- (b) Irreparable harm if the injunction is refused; and,
- (c) That the balance of convenience favours granting an injunction.³⁷

1. No Serious Issue to be Tried

52. Although the standard for establishing that there is a serious issue to be tried is low, it nevertheless requires the judge to make a preliminary assessment of the merits of the case.³⁸ An assessment of the merits in the case at bar reveals that the Plaintiff's case is frivolous and stands no chance of success.

53. In determining whether the implementation of a trusteeship is valid, a court will consider whether: (a) the constitution provides for the authority to impose a trusteeship;

³⁷ *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para. 43. This case is included in the Plaintiff's Authorities.

³⁸ *Ibid*, at pp. 34-35.

(b) whether the constitution provisions provide for natural justice; and (c) whether the parent has strictly followed the constitutional provisions.³⁹

54. The International's Constitution clearly provides for the authority to impose a trusteeship.⁴⁰ Indeed, the Plaintiff in her factum points to the specific provision in the Constitution which states that a trusteeship is appropriate "where a local has 'systematically' conducted its affairs in a 'grossly incompetent manner that poses a direct and immediate threat to the viability' of the local."⁴¹ However, this is not the only circumstance where a trusteeship may be imposed. A trusteeship may also be imposed where it is "necessary to correct ongoing corruption or restore democratic procedures." (emphasis added)⁴²

55. The International's Constitution also clearly provides for the authority to appoint a trustee before a hearing in circumstances where the executive board of the affiliate requests the imposition of a trusteeship:

When, in the opinion of the three-quarter (3/4) of the Executive Committee, excluding the Executive Vice President in whose representational council the affiliate subject to trusteeship belongs; any delay would pose a clear and immediate threat to the affiliate, or where the executive board of the affiliate requests the imposition of a trusteeship, a Trustee who is a member in good standing of UNITE HERE may temporarily take charge and control of the affairs and property of such affiliate, with all the powers set forth in Article 4, Section 5, prior to a hearing (which shall be scheduled promptly

³⁹ *Flaherty v. Callahan*, 2017 CanLII 24257 (NL SCTD) at paras 38-40, 51 ["*Flaherty*"].

⁴⁰ UNITE HERE Constitution, Plaintiff's Motion Record, Exhibit B, p. 71-74.

⁴¹ Plaintiff's factum at para. 72.

⁴² UNITE HERE Constitution, Plaintiff's Motion Record, Exhibit B, p. 71.

and may not be delayed by UNITE HERE) but after service of such notice of charges. (emphasis added)⁴³

56. The question thus becomes whether there was conformity with the Constitution and accordance with the rules of natural justice in this instance.

57. The answer is yes. The International clearly conformed with the Constitution in making its trusteeship decision because:

- (a) as detailed in Mr. Taylor's affidavit, the International took many steps, including placing the Local in a voluntary supervision, before it decided that no other option but a trusteeship existed to address the chaos, dysfunction and bitter internal conflict and to restore stability and democratic practices in Local 75;
- (b) in accordance with Article 4, Section 3 of the Constitution (set out above), the International's 20-member Executive Committee – the highest governing body of UNITE HERE in between conventions -- unanimously voted to impose a trusteeship at Local 75 on a future date to be decided at the President's discretion, and in response to a request from the Local 75 elected Executive Board; and
- (c) the request for a trusteeship was signed by 17 members of the Executive Board between April 20 and May 1, 2017, and it was sent to the Defendant via email on May 2, 2017.

⁴³ UNITE HERE Constitution, Plaintiff's Motion Record, Exhibit B, p. 72.

58. With respect to the rules of natural justice, the Constitution plainly adheres to the requirements of natural justice when a trusteeship is imposed and there is no suggestion to the contrary. In particular, Article 4, Section 3 requires the prompt scheduling of a hearing after the trustee temporarily takes charge and control of the affiliate. Furthermore, Article 4 Section 4 states that a trusteeship hearing must be held in accordance with certain provisions in Article 16, and that an affiliate may appeal an adverse ruling in accordance with various other provisions in that same Article.⁴⁴

59. Despite the above, the Plaintiff argues that there is a serious issue to be tried because the International's decision to impose a trusteeship on December 6, 2017 was a breach of its Constitution for two reasons. First, the Plaintiff argues that the majority of the Executive Board's request for the imposition of a trusteeship was a secret petition and not an act of, or request by, the Executive Board. Regardless, the Plaintiff further argues that any such request was rescinded by the membership of Local 75 at the July 11, 2017 general membership meeting where a resolution passed opposing "any request made by anyone" that a trusteeship be imposed.

60. Second, the Plaintiff argues that the International did not suggest or establish that Local 75 has "systematically" conducted its affairs in a "grossly incompetent manner that poses a direct and immediate threat to the viability" of the Local.

61. The Plaintiff's first argument is overly formalistic. The request for a trusteeship by 17 members of the Executive Board was never a secret, nor did it come out of the blue.

⁴⁴ UNITE HERE Constitution, Plaintiff's Motion Record, Exhibit B, p. 72.

The request was made roughly seven months into Local 75's internal dispute and immediately after the April 11, 2017 general meeting where the Local's membership frustrated the Local's business. The Defendant advised the Plaintiff of this request later in April, which ultimately led to the imposition of a voluntary three month supervision. Moreover, the Plaintiff had countless opportunities to introduce a motion to rescind this request at the many monthly Executive Board meetings or at any special meeting of the Executive Board, but she chose not to do so because the majority of the elected Executive Board was opposed to her in interest. Simply put, the suggestion that the request for a trusteeship was not an act of, or request by, the Executive Board places form over substance and ought to be rejected. There is no dispute that a substantial majority of the elected Executive Board requested a trusteeship.

62. The argument that the Local's membership rescinded the trusteeship request at the July general membership meeting should also be rejected. The language in Article 4 Section 3 of the Constitution makes it clear that only the "executive board of the affiliate" can request the imposition of a trusteeship, and nowhere does it say that the affiliate's general membership may rescind any such request. Accordingly, under the Constitution the executive board alone is vested with the power to request a trusteeship and only the executive board may rescind a trusteeship request.

63. No doubt the Plaintiff will argue that the Executive Board rescinded any request for a trusteeship at the December 14th special Executive Board meeting. This was the meeting where the Plaintiff removed 12 elected members of the Executive Board who were opposed to her in interest and had them replaced with 12 "friendly" unelected

members. According to the Plaintiff, she removed these 12 individuals because they were absent from three consecutive meetings (a general membership meeting and two regularly scheduled Executive Board meetings), with the result that their offices were forfeited. The Local's Bylaws, however, state that "The office of any Executive Board member absent for three consecutive board meetings without valid reason shall be deemed vacant." (emphasis added)⁴⁵ Given that one of the three missed meetings was a general membership meeting and not a board meeting, and considering that the Plaintiff has not introduced any evidence to show that she inquired into whether these elected Executive Board members missed any of the three consecutive meetings for valid reasons (i.e., illness, childcare responsibilities, etc.), the Plaintiff's purging of her opposition was clearly politically motivated and improper, and any motion passed at the December 14th meeting is invalid.

64. Regarding the Plaintiff's second argument, the Constitution does not require the International to suggest or establish the reason for its decision to impose a trusteeship in its initial communication with its affiliate advising of its trusteeship decision. All that the Constitution requires is that the notice of charges be served on the local prior to the trustee temporarily taking charge and control of the local at which point the International's reasons for imposing a trusteeship will be clear if they are not already clear.

65. Where a parent union acts within its constitutional authority, and that authority accords with public policy, its actions will be accorded deference by the Court.⁴⁶ As

⁴⁵ By-Laws of Local 75 UNITE HERE, Plaintiff's Motion Record, Exhibit A, p. 31.

⁴⁶ *Flaherty, supra* at para 49.

demonstrated above, the International clearly acted within its constitutional authority in making its trusteeship decision and there is no suggestion that the terms of the Constitution are contrary to public policy. Consequently, the Plaintiff has failed to establish a serious issue to be tried.

2. No Irreparable Harm

66. On this motion, the irreparable harm is restricted to an assessment of what harm, if any, will occur for the period between January 4, 2018 to June 8, 2018 – and nothing else.

67. In support of her position, the Plaintiff claims irreparable harm on behalf of the members of Local 75. However, as argued above, the Plaintiff cannot claim to represent the membership in this motion – she is not a suitable representative.

68. Furthermore, and even though the Plaintiff does not allege that she will personally suffer irreparable harm if terms are not imposed until June 8, 2018, her removal from office would not constitute irreparable harm in any event, because success at the trusteeship hearing would result in reinstatement and compensation for any financial loss.⁴⁷

69. Consequently, the Plaintiff has failed to establish irreparable harm and her motion ought to be dismissed as a result.

⁴⁷ *Flaherty, supra* at paras 61 – 64.

70. Should the Court find that the Plaintiff is a suitable representative, the Defendant nevertheless submits that irreparable harm has not been established.

71. First, a trusteeship would not deprive the members of their right to choose their bargaining agent as alleged by the Plaintiff. Such is the case where workers want to disaffiliate or secede and be represented by another union, but that is not the case here. In the event of a trusteeship, members of Local 75 would continue to be represented by their chosen bargaining agent – UNITE HERE. Regardless, a trusteeship would in no way prevent the members of Local 75 from signing up as members of another trade union or from bringing an application to terminate Local 75's bargaining rights.

72. Second, and somewhat related, the references to chosen bargaining agents in the Plaintiff's factum do not clothe the choice of a particular individual to hold a particular office with constitutional protection. The case law relied upon by the Plaintiff holds that protection is provided to the choice of bargaining agent, not who is elected to represent that bargaining agent or who is hired to provide staff support to that bargaining agent. The Plaintiff has confused the selection of a bargaining agent with the identity of a particular office holder.

73. Third, the Plaintiff argues that if the International takes control of the Local, it will be able to foreclose the exercise of certain rights under the *Labour Relations Act, 1995* ("Act") either by signing a collective agreement or seeking the appointment of a conciliation officer. These claims are purely speculative harms for which there is no

evidentiary support and therefore falls short of establishing irreparable harm.⁴⁸ Moreover, the Plaintiff's claims about the *Act* are false. A local under trusteeship cannot sign a collective agreement on behalf of the local, as any agreement must be ratified by a majority of the membership voting.⁴⁹ Furthermore, while a trustee local can apply for conciliation, before going on strike a majority of the membership voting must authorize a strike.⁵⁰ In sum, the Plaintiff's assertions of harm in relation to the *Labour Relations Act* are without any foundation—a trusteeship does not change the statutory obligations and does not take away the rights and obligations with respect to membership votes.

74. Finally, a trusteeship will not deprive the members of Local 75 the right to participate in the affairs of the International. As set out in the Defendant's affidavit, he advised the Plaintiff at their meeting on December 12, 2017 that a trusteeship would not prevent the Local from seating delegates at the next International Union Convention.⁵¹ There is therefore no harm, let alone irreparable harm, that will materialize.

3. The Balance of Convenience Favours the Defendant

75. The balancing of convenience requires a determination of the following question: Will the Plaintiff suffer greater harm if terms are not granted prior to the June 8, 2018 interlocutory injunction motion than the Defendant if terms were granted?

⁴⁸ *Toronto Mas Bands Association v. Festival Management Committee*, 2015 ONSC 3806 (CanLII) at p. 5.

⁴⁹ *Labour Relations Act*, 1995, SO 1995, c 1, Sch A, s. 79

⁵⁰ *Ibid.*

⁵¹ Taylor Affidavit, Defendant's Motion Record, Tab 1A, pp. 17-18, para 40.

76. As demonstrated in the previous section, the Plaintiff will not suffer any harm if terms are not granted prior to the June 8, 2018 motion.

77. The opposite is true for the Defendant and its affiliate Local 75 if the Court prevents the International from imposing a trusteeship before June 8, 2018.

78. As detailed throughout the Defendant's affidavit, Local 75 has been embroiled in over a year-long bitter conflict between two factions in the Local causing the Local to become non-functional. A majority of the elected Executive Board and the Local's elected Secretary-Treasurer and Vice President are at odds with the Local's President and a minority of the elected Executive Board. This conflict has frustrated the Local's regular business and has caused cheques not to be signed. It has also exposed divisions along racial and ethnic lines and has led to staff members refusing to speak to other staff members and others outwardly attacking each other in Local 75's office, in Executive Board meetings which break down into shouting matches, and in membership meetings. Democratic procedures within the Local have also been regularly undermined or ignored, and between February and early December the International received over 65 complaints from many individuals as a result of the infighting. Local 75 is in crisis and it has reached a tipping point. It is by no means an exaggeration to state that the Local's viability will be seriously undermined unless the International is able to restore stability and democracy.

79. Furthermore, Local 75's conflict severely threatens the wages, benefits and terms and conditions of employment of virtually every member of UNITE HERE and its affiliated local unions. Specifically, the conflict threatens the ability of the International and every

one of its locals to bargain on behalf of its members for good contracts in 2018. In 2018, the collective agreements with every hotel company with which Local 75 and most other UNITE HERE locals have an agreement are all set to expire. The contracts in Toronto are the first to expire, so that the fight begins in Toronto. Should Local 75 continue to be in total disarray, as it will be without a trusteeship, it and UNITE HERE will be at a grave disadvantage against these companies from the outset – in Toronto and everywhere else. This is a disadvantage that could not be regained at a later date.⁵²

80. In addition, there are two other reasons why the balance of convenience favours the Defendant. The first reason is that the Plaintiff has failed to provide any undertaking as to damages, as noted earlier in this factum.

81. The second reason is that the Plaintiff comes to Court seeking an equitable remedy with unclean hands, which is problematic.⁵³ As previously noted, on December 14th, the very same day that the Plaintiff served her Notice of Motion, she removed under dubious circumstances 12 elected members of the Executive Board who were opposed to her in interest and had them replaced with 12 "friendly" unelected members. This new unelected Executive Board subsequently approved the removal of the elected Secretary-Treasurer from office and then passed a motion to oppose any trusteeship. On this same day, the Plaintiff also effectively barred the elected officers and anyone else opposed to her in interest from the Local's office by changing the locks while she and her

⁵² Taylor Affidavit, Defendant's Motion Record, Tab 1A, p. 17, para 38.

⁵³ *General Motors of Canada Limited v. Canadian Auto Workers Union, Local 222 et. al.*, 2008 CanLII 28750 (ON SC) at paras 7, 20.

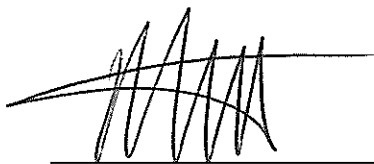
supporters retained access. Having purged her opposition and fundamentally altered the political landscape the same day she brought her motion for an injunction, the Plaintiff now asks this Court to preserve the status quo, which deprives Local 75 of almost half of its elected representatives, and ensures that the Executive Board cannot make any further requests to the International for the imposition of a trusteeship.

82. The Defendant submits that the above conduct collectively demonstrates that the Plaintiff cannot claim to be acting in the interests of "democracy", and her own self-serving conduct must be taken into account in assessing the balance of convenience which, the Defendant further submits, militates against granting any terms prior to the June 8, 2018 interlocutory injunction motion.

PART IV: ORDER REQUESTED

83. The Defendant requests that the Motion be dismissed with costs, payable by the Plaintiff in her individual capacity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF JANUARY 2018.



Michael D. Wright



Elichai Shaffir

SCHEDULE "A"**LIST OF AUTHORITIES**

1. *Ginter et al. v. Gardon*, 2001 CanLII 28052 (ON SC)
2. *Guelph Taxi v. Guelph (City) Police Service*, 2016 ONSC 3671 (CanLII)
3. *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311
4. *Flaherty v. Callahan*, 2017 CanLII 24257 (NL SCTD)
5. *Toronto Mas Bands Association v. Festival Management Committee*, 2015 ONSC 3806 (CanLII)
6. *General Motors of Canada Limited v. Canadian Auto Workers Union, Local 222 et. al.*, 2008 CanLII 28750 (ON SC)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Rules of Civil Procedure, RRO 1990, Reg 194, r. 12.08, 40.03

PROCEEDING BY UNINCORPORATED ASSOCIATION OR TRADE UNION

12.08 Where numerous persons are members of an unincorporated association or trade union and a proceeding under the Class Proceedings Act, 1992 would be an unduly expensive or inconvenient means for determining their claims, one or more of them may be authorized by the court to bring a proceeding on behalf of or for the benefit of all.

.....

UNDERTAKING

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

.....

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, s. 79

Strike or lock-out

79 (1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

No agreement

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

(a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 122 (2) to have released to the parties the report of a conciliation board or mediator; or

(b) 14 days have elapsed after the day the Minister has released or is deemed pursuant to subsection 122 (2) to have released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board.

Mandatory strike vote

(3) If a collective agreement is or has been in operation, no employee shall strike unless a strike vote is taken 30 days or less before the collective agreement expires or at any time after the agreement expires and more than 50 per cent of those voting vote in favour of a strike.

Same

(4) Subject to section 79.1, if no collective agreement has been in operation, no employee shall strike unless a strike vote is taken on or after the day on which a conciliation officer is appointed and more than 50 per cent of those voting vote in favour of a strike.

Exceptions

(5) Subsections (3) and (4) do not apply,

(a) to an employee in the construction industry; or

(b) to an employee performing maintenance who is represented by a trade union that, according to trade union practice, pertains to the construction industry if the employee or any of the other employees in the bargaining unit the employee is in were referred to their employment by the trade union.

Threatening strike or lock-out

(6) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

Strike or ratification vote to be secret

(7) A strike vote or a vote to ratify a proposed collective agreement or memorandum of settlement taken by a trade union shall be by ballots cast in such a manner that persons expressing their choice cannot be identified with the choice expressed.

Right to vote

(8) All employees in a bargaining unit, whether or not the employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement or memorandum of settlement.

Opportunity to vote

(9) Any vote mentioned in subsection (7) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots. If the vote taken is otherwise than by mail, the time and place for voting must be reasonably convenient.

LISABETH PIMENTEL on her own behalf and on behalf of
all members of LOCAL 75 UNITE HERE
Plaintiff

-and- DONALD TAYLOR on his own behalf and on behalf of the
members of UNITE HERE (INTERNATIONAL)
Defendant

Court File No. CV-17-588225

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE DEFENDANT, THE RESPONDENT,
DONALD TAYLOR ON HIS OWN BEHALF AND ON
BEHALF OF THE MEMBERS OF UNITE HERE
(INTERNATIONAL)

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