	CITATION:

ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)
CIVIL ENDORSEMENT FORM
(Rule 59.02(2)(c)(i))

BEFORE	**Judge/Case Management Master**	**Court File Number:**
	Myers J	**CV-21-667065**

Title of Proceeding:

DE HAVILLAND AIRCRAFT OF CANADA LIMITED
Plaintiff/Moving Party Plaintiff(s)

-v-

JERRY DIAS, SCOTT MCILMOYLE AND DAVID MOLENHUIS as representatives of all members of UNIFOR LOCAL 112 AND UNIFOR LOCAL 673 Defendants(s)

Case Management:	☐ **Yes**	If so, by whom:	**X No**

Participants and Non-Participants:*(Rule 59.02(2)((vii))*

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1) Plaintiff	**Peter W. G. Carey and Howard Levitt**	**pcarey@lscslaw.com; hlevitt@levittllp.com**		**Y**
2) Defendants	**Sean Dewart and Tim Gleason**	**sdewart@dgllp.ca; tgleason@dgllp.ca**		**Y**

Date Heard: *(Rule 59.02(2)(c)(iii))*	**August 17, 2021**

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

X	Motion	☐ Appeal	☐ Case Conference	☐ Pre-Trial Conference	☐ Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ In Writing	☐ Telephone	**X** Videoconference	☐ In Person

If in person, indicate courthouse address:

Relief Requested: *(Rule. 59.02(2)(c)(v))*

An interlocutory injunction to prevent illegal picketing during a lawful strike.

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

Order to go prohibiting the defendants, and any other person having notice of the order, from interfering with, blocking, obstructing, or delaying. in any way whatsoever, the entry of vehicles or people into the East Gate to the Bombardier and De Havilland facilities at Downsview Airport.

In addition to not obstructing entry, informational picketers whom those in control of Downsview Airport allow to attend on Downsview Airport land, shall not come within a radius of 20 metres of the East Gate turnstiles. As an exception, only once every five minutes, a single picketer may walk across the entrances and exits that make up the East Gate provided that the picketer does so walking continuously and completes crossing the entrances or exits within one minute.

Order to go requiring the Sheriff to enforce this order and the Toronto Police Service to provide assistance to the Sheriff to do so.

The plaintiff may submit a Costs Outline and no more than three pages of submissions to my Judicial Assistant by August 25, 2021. The defendants may respond with their own Costs Outline and no more than three pages of submissions delivered to my Judicial Assistant by September 1, 2021.

Costs: On a **As above** indemnity basis, fixed at $ are payable by to [when]

Brief Reasons, if any: *(Rule 59.02(2)(b))*

Unifor Locals 112 and 673 are engaged in a lawful strike against their employer De Havilland.

On Tuesday, August 3, 2021 the two locals commenced a blockade of the employer's premises at Downsview Airport. Since then, union picketers will not allow any person, vehicle, or goods, in or out. When six people were flown into the airport site to ready a plane for delivery to a buyer, union members from the shared Bombardier premises as well as De Havilland striking employees blockaded the plane with their vehicles so it could not take off and they blockaded some of the replacement workers in an office.

The defendants admit that their actions are illegal. Their own union literature makes clear that the striking members are not allowed to blockade the employer's site or to use force to prevent others from accessing or leaving the site if they choose to do so.

The defendants admit that the plaintiff has established a sufficiently strong case to justify the granting of an injunction to stop the defendants from blockading the site pending the trial of the action.

The defendants also admit that if the blockade continues, the plaintiff will suffer irreparable harm – harm that cannot be compensated by an award of money damages after trial. The union's witnesses agreed that the plaintiff's planes require regular maintenance to keep their regulatory authorization to fly. That includes the planes on the ground at the work site and the planes sold to third parties by the plaintiff previously. No one contested Mr. Poirier's evidence that the plaintiff is already off-side its regulatory maintenance requirements and that several of its customers' planes need work as well to avoid being grounded. Mr. Poirier testified that some maintenance tasks are required weekly. I am satisfied that there is a serious and real risk to the plaintiff's business reputation if it cannot deliver planes its has sold or provide required maintenance and repair to its planes and to planes it has sold. Its market share in its maintenance services business is also at risk if customers are required to look elsewhere for maintenance and the plaintiff is put into breach of its contractual and warranty commitments.

The defendants also admit that the plaintiff's "reasonable efforts to obtain police assistance, protection and action to prevent…obstruction of or interference with lawful entry or exit from the premises in question or breach of the peace have been unsuccessful" as required by s. 102 (3) of the *Courts of Justice Act*, RSO 1990, c C.43.

The defendants argue however that an injunction should be denied because the balance of convenience favours them. The balance of convenience is a comparison of the harm to the plaintiff if it is denied an injunction pending trial as against the harm that will be inflicted on the defendants if they are subjected to an injunction pending the trial.

On a related point, the defendants submit that the court always has a discretion to refuse to order an injunction where granting the order would not be just or equitable. They ask the court to decline to grant relief to the powerful employer who seeks to weaponize this court's jurisdiction as a tool against the vulnerable employees.

The defendants make essentially two arguments. First, they say that they plaintiff is not negotiating with them in good faith. Mr. Gleason links together several facts to argue that the employees' jobs are at real risk and the plaintiff is not being forthright with them about it.

It is common ground that De Havilland has to leave the Downsview Airport as the land is being redeveloped by its owner. In February of this year, De Havilland issued a glossy news release to reassure the market that its future was sound. Although the plane manufacturing industry has been "ravaged" by the pandemic., De Havilland expects market demand for its Dash 8 line of planes to recover. It says it is investing capital in customer service and support, design upgrades and modifications, cabin refurbishment features, and innovative product improvements.

The news release continues:

> **New Aircraft Production Pause**
>
> Given that prevailing industry circumstances have hindered the ability to confirm new aircraft sales, De Havilland Canada will not produce new Dash 8-400 aircraft at its Downsview site beyond currently confirmed orders. This is a responsible and prudent measure that reflects current industry conditions, and will limit strain on the market and De Havilland Canada's supply base as the pandemic recovery occurs. Approximately 500 employees will be affected by the production pause.
>
> De Havilland Canada's objective is to resume new aircraft delivery at the earliest possible time, subject to market demand.
>
> **Downsview Production Site**
>
> The Downsview production site was sold by the previous owner Bombardier in 2018, with deadlines for the site and runway to be decommissioned. Pursuant to Bombardier's sale agreement, the Dash 8 program's current site lease expires in 2021. ***Accordingly, De Havilland Canada has begun preparing to leave the site over the latter part of the year. There are a number of excellent production site options in Canada, and the company will be ready to meet new aircraft demand as the industry recovers.*** [Emphasis added.]

The employer's evidence at the hearing is that it has not taken steps to truly analyze any specific new locations or even to create a short list. It says that the location for its new premises will turn on, among other things, the number of new orders it receives. This does

not seem consistent with the company's commitment to be ready to meet demand as the industry recovers after having identified "a number of excellent production site options in Canada."

Under the current, expired collective bargaining agreements, both locals had some protections in case the business premises move. The agreements would continue to apply if the new premises are in Toronto in the case of one local and within 80 km of Toronto in the case of the other. In the event that the new premises are outside these boundaries, the agreements provide a small allowance to help defray travel costs for any employee who wishes to move to work at the new plant. Their seniority, exact jobs, and rights under the collective bargaining agreements are also protected.

Prior to the strike being declared, De Havilland says that it offered to increase the territory overed in the Toronto agreement to the same 80 km radius as the other agreement. The parties negotiated terms in late July to try to avert a strike. After three days of negotiations, the employer representatives on the negotiating committee apparently told the union that they had no authority to make a formal offer. They invited the union to make an offer and said that they would respond within 24 hours.

The union made an offer essentially to increase the radius of coverage of the collective agreements to 110 km. The union wanted to negotiate on that offer right away and into the weekend. The employer reps responded that they thought that the offer was a positive step that they could work with. Instead of responding with a counter-offer within 24 hours, they advised that senior executives with authority to negotiate were coming to Toronto from BC to do so.

There is a disagreement in the evidence as to whether the parties agreed to meet on the next Tuesday, August 3, 2021, or whether the employer said only that they would call the union on the 3rd to say when the senior executives would be here, briefed, and ready to meet. The union believed the latter as they told De Havilland that their national president would come to Toronto to participate in the final negotiations on Tuesday the 3rd. De Havilland reiterated on Friday July 30, 2021 that they were not planning to meet on the 3rd.

The union views this chain of events as indicative of bad faith bargaining by the employer. They spent three days negotiating an "idea" because the employer representatives on the committee had no authority to make an offer. Then when they said that people with authority were coming to meet, they quickly pulled back the date of the meeting. Instead of bargaining all weekend and getting a deal done on Tuesday next, the employer was offering a possible telephone call to set up a possible meeting date.

The union then went on strike on Sunday August 1, 2021. On August 3, 2021, it declared a blockade on the premises before the employer called to discuss the timing of a meeting with senior executives. On August 5, 2021, the employer flew six replacement employees into the premises to ready a plane for its scheduled delivery to a buyer. With assistance from Bombardier employees, members of the two striking locals broke through the fence and

blocked the customer plane in the hangar. Mr. Dewart says his clients thwarted the employer's efforts "to liberate" the plane as if they were holding it and the replacement employees prisoners.

Mr. Gleason argues for the defendants that the employees see an employer who is planning to move away and eliminate their jobs and who will not come clean about it. The employer was ragging the puck in negotiations. It told the public that it has excellent sites for relocating but it will not empower its representatives at the bargaining table to present an offer or negotiate on relocation and job security. Then it delayed and then cancelled a planned meeting and then it brought in replacement workers. Messrs. Gleason and Dewart argue that this is bad faith and abuse of power by the employer.

The employer's representatives put a different spin on the same facts. They say the union's offer was good enough to get the senior executives to agree to come in from BC to negotiate the final strokes. They had already offered to increase the geographic coverage of one of the collective bargaining agreements. They were about to negotiate to further increase them both. They told the union they needed a couple of days and instead of waiting, the locals declared a strike and then declared an illegal blockade. Of course the employer would not deal with the locals while they were engaging in a knowingly illegal blockade.

I do not need to decide whose characterization is closer to the truth. It is the role of the Ontario Labour Relations Board to assess whether bargaining is being conducted in good faith. Both sides make uncharitable assumptions about the other. But, even if the locals are correct or more correct, I still do not see how that entitles them to conduct an illegal blockade or how it helps them on an assessment of the balance of convenience in relation to an interlocutory injunction.

Without an injunction pending trial, the employer is left without access to its premises, subject to ongoing brazenly illegal acts, and suffering harm that the defendants admit is irreparable. No one suggests that the union members have the ability to pay damages that they may inflict on the employer if it loses even one sale.

On the other side of the balance, if the defendants are enjoined, they remain in a legal strike position with all of their lawful rights under the *Labour Relations Act*. They remain fully entitled to exercise their collective bargaining power and to associate and communicate to the fullest in accordance with the employees' rights under the *Charter of Rights* and consonant with *Charter* values.

An injunction will prevent the locals from using the blockade to try to exert pressure on the employer either to decide to relocate nearby or to improve its offer of job of protections closer to 110 km radius sought. Mr. Dewart does not want me to weaponize the court. But it is his clients who are using illegal means as a weapon. The case law is not in doubt. There is no *Charter* right to obstruct an employer's premises in a strike.

The *Charter* rights of association and expression and the values favouring robust collective bargaining in Canadian society do not include physically blocking all access to an employer's premises or imprisoning people, vehicles, or goods.

The court is being asked to do what courts do – to apply the law to the facts. The locals know the applicable law here. Unifor's own literature is as clear as can be. The Court is not being weaponized by the employer. The court has no part in the resolution of the job security issues. I am not putting my thumb on the collective bargaining scale. All parties maintain their collective bargaining rights in full. Each can go to the OLRB if they have legitimate concerns as to the conduct of collective bargaining process. The court is enforcing the law of the land that applies to the defendants as to everyone else.

The balance of convenience does not favour the deliberate commission of illegal acts. The defendants suffer no cognizable harm by being enjoined from committing illegal acts pending trial.

The defendants argue though that the court should still decline relief due to the employer's lack of forthrightness as to its plans and due to improper evidence they say it adduced. I disagree. I am not the right person to try to decide if the employer is bargaining properly. The Legislature has assigned that task exclusively to the OLRB. I find the submissions of Messrs. Gleason and Dewart concerning the evidence adduced by the employer hyperbolic. Mr. Poirier's evidence that nine planes, "are either waiting delivery or are to be delivered in the near future" was not correct. As set out clearly in his next affidavit, four of them are due to be delivered imminently. Three are sold and are scheduled to be delivered next June. Two were sold but the buyer has reneged. They are actively for sale. As Mr. Poirier explained in cross-examination, the process of customizing a plane and readying it for sale takes several months. So while he said the union was preventing delivery of nine planes, it is really just preventing delivery of four. It is preventing the others from being readied for later delivery and two for sale. While four is not nine, it is a distinction without a difference. One would be bad enough. This is not the stuff of fundamental misrepresentation or contempt of court.

Similarly, immediately after the defendants blockaded the airplane and replacement employees on August 5, 2021, someone briefly posted and then removed a picture on the Facebook page used by De Havilland employees showing someone accessing a Dash 8's landing gear nacelles. Mr. Poirier took the picture to be a threat to the security of the nine planes on site that are just sitting out in the field unprotected. He immediately wrote to his security people. His contemporaneous emails leave no doubt that, rightly or wrongly, he was concerned for the security of the unprotected planes.

Looking at the Facebook posting and the wording that accompanied the picture leaves very plausible alternative meanings. Mr. McIlmoyle contacted the person in whose name the Facebook post was made to confirm that the picture was in fact fairly old and had been posted elsewhere on Facebook before. It is telling though, that Mr. McIlmoyle did not ask the fellow whether he was the person who posted the picture on the De Havilland page after the locals successfully thwarted the plaintiff's airplane liberation or, if he did so, what he intended.

There is no affidavit from the person who posted the picture.

I understand that labour relations can involve extreme emotions and extreme behaviour. I also understand that in labour injunction cases, misrepresentation of evidence amounts to contempt of court under s. 102 (9) of the *CJA*. The fact that in the calm light of a 20:20 dispassionate re-telling, the picture on Facebook might have a more innocent spin, does not mean that Mr. Poirier did not receive it as a threat or that he misrepresented the facts in swearing to his perception.

Moreover, even if I agreed that these two facts were lies, I still do not see how that would disentitle the plaintiff from an injunction in equity. I have quite recently denied an injunction for "unclean hands". I understand the point that a wrongdoer can be disentitled to the benefit of discretionary relief that is founded in fairness. But here, the alleged wrongdoing does not bear at all on the underlying conduct. If Mr. Poirier misrepresented the degree of threats made by an employee who posted a picture and the imminence of delivery of sold planes, that does not make fair or right the blockade of premises by the union locals. Denying an injunction would also not right the misstatements of evidence. It would not address the justice of the case. The clean hands doctrine is not premised on penalizing just any act of misconduct. It denies relief to a party who does not deserve relief because his misconduct reverses the equities or the underlying sense of justice of the case. That is not the case here at all.

I note that even in the precedent on which the defendants rely, in which the court found the employer's behaviour to be deceitful, an injunction was still granted. *General Motors of Canada Limited v CAW Local 222 et al.*, 2008 CanLII 28750 (ON SC). I see nothing near deceit here. It should not have been alleged.

In my view, the plaintiff is entitled to the remedy it seeks. It is also important to deal with the precise terms of acceptable delay by picketers conveying information so as to prevent constitutionally protected expression from being used to cover a *de facto* blockade.

Mr. Dewart argues that in a draft picket line protocol discussed among the parties, the employer had agreed to 15 minute delays. But the defendants' evidence is clear that they never agreed to the protocol. It bans blockades. If the defendants had respected the draft protocol, 15 minute delays in good faith might have been possible. But with a business with potentially hundreds of people, 15 minute delays would prevent lawful work from being done (would that the employer was inclined to try to replace a number of strikers). To move one plane, six people were required. It is not reasonable for 90 minutes to be taken at both ends of the day just for obstruction and not to truly communicate information meaningfully. There is another plane to be delivered next week and another next month. At 15 minutes each, getting 18 people in and out of the premises would be impossible. Plus staff will be required to perform maintenance on all the planes that are at the premises and to move goods, parts, and data out to plane owners whose planes need maintenance or are grounded.

For the reason set out above, like DM Brown J. in *Brookfield Properties Ltd. v. Hoath,* 2010 ONSC 6187, order to go prohibiting the defendants, and any other person having notice of the

order, from interfering with, blocking, obstructing, or delaying. in any way whatsoever, the entry of vehicles or people into the East Gate to the Bombardier and De Havilland facilities at Downsview Airport.

As was ordered by Salmers J in the *GMCL* case, in addition to not obstructing entry, informational picketers whom those in control of Downsview Airport allow to attend on Downsview Airport land, shall not come within a radius of 20 metres of the East Gate turnstiles. As an exception, only once every five minutes, a single picketer may walk across the entrances and exits that make up the East Gate provided that the picketer does so walking continuously and completes crossing the entrances or exits within one minute.

Like Brown J., I order the Sheriff to enforce this order and the Toronto Police Service to provide assistance to the Sheriff to do so.

Additional pages attached: ☐ Yes **X** No

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August 17, 20 **21**

Date of Endorsement *(Rule 59.02(2)(c)(ii))*

Signature of Judge/Case Management Master *(Rule 59.02(2)(c)(i))*