

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

ED MIRVISH ENTERPRISES LIMITED AND 1 KING WEST INC.

Applicants

- and -

**STINSON HOSPITALITY INC., DOMINION CLUB OF CANADA CORPORATION
AND HARRY STINSON**

Respondents

**SECOND SUPPLEMENTARY MOTION RECORD
OF THE RECEIVER**

(Re: Motion by Union)

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TAB 1

**ONTARIO
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Applicants

- and -

**STINSON HOSPITALITY INC., DOMINION CLUB OF CANADA CORPORATION
AND HARRY STINSON**

Respondents

**SECOND SUPPLEMENTARY FIFTH REPORT OF IRA SMITH TRUSTEE &
RECEIVER INC.**

**in its Capacity As Court-Appointed Receiver Of
Stinson Hospitality Inc., Dominion Club Of Canada Corporation,
The Suites At 1 King West Inc. and
2076564 Ontario Inc. (the "Debtor")**

(Re: Motion by Union)

1.0 UNITE HERE LOCAL 75

1.1 Introduction

In its Fifth Report, the Receiver advised the Court that the Union had brought a motion returnable on February 4, 2008 for an Order granting the Union leave, if required, to apply to the Ontario Labour Relations Board (the "OLRB") to be certified as the exclusive bargaining agent for certain of the Debtors' employees, or in the alternative, an Order varying the stay provisions

of the Appointment Order to require the Receiver to abide by the terms of the Neutrality Agreement.

As the Receiver advised in the Fifth Report, it has not adopted the Neutrality Agreement between the Union and SHI and the Receiver recommended that lifting or modifying the stay of proceedings to allow the Union's application before the OLRB would not be in the best interests of the stakeholders, including the employees. The Receiver still intends to contest the Union's motion on a number of grounds, as set out in the Fifth Report, as well as the grounds set out below.

1.2 Status of The Motion

During February 2008, the Receiver and Union attempted to negotiate a possible settlement of the Union's motion. The parties reached a general agreement on the identification of terms that should be addressed in a settlement agreement. Despite further negotiations, the parties did not reach an agreement, and on March 3, 2008, counsel for the Receiver and Union attended at Court to argue the motion.

Just prior to the commencement of the hearing on March 3, 2008, the parties agreed to attempt further negotiations. With the approval of the Court, the commencement of the hearing was delayed for a few hours to allow the Receiver and Union to attempt to reach a final agreement on the terms of the proposed settlement. The parties reached agreement on virtually all terms, save and except one issue.

The Union then requested an adjournment on the basis that Union's counsel needed more time to attempt to persuade the Union to accept the final terms of the settlement agreement proposed by

the Receiver. The Union's counsel advised the Court of this basis for the adjournment, and the Receiver consented to an adjournment until March 28, 2008, on this basis.

On March 12, 2008, the Union filed a Supplementary Motion Record, consisting of two further affidavits in support of its motion. The affidavits were sworn by Ross Vasil and Tony Pulice, two employees of the hotel. The affidavits allege that they these employees have raised certain concerns in the workplace that have not been addressed.

On March 19, 2008, the Receiver's counsel, Goodmans LLP, wrote to the Union's counsel advising that it would need additional time to investigate the allegations contained in the employee affidavits, to arrange for cross examinations on the affidavits, and to prepare its response. A copy of the letter is attached as Appendix "A".

The parties attended at Court on March 26, 2008, to seek direction regarding the Union Supplementary Motion Record and the adjournment, and the Court ordered the motion adjourned until April 9, 2008.

1.3 The Termination for Cause Of Tony Pulice

The Receiver has been advised that one of the affiants, Tony Pulice, was terminated for just cause following an angry outburst and threatening behaviour directed at other employees. Mr. Pulice admitted to his misconduct, and provided a written apology for it, confirming that he would refrain from such activities in the future. However, several employees have expressed their concern over Mr. Pulice's threatening behaviour, and management has decided not to reinstate Mr. Pulice.

The Union has now threatened to file an unfair labour practice complaint unless Mr. Pulice is reinstated. The Receiver reviewed the facts surrounding Mr. Pulice's termination and is satisfied that management acted appropriately. The Receiver can also advise the Court that management was unaware that Mr. Pulice had filed an affidavit at the time the decision was made to terminate his employment, and that there is a bona fide basis for his termination unrelated to his union involvement, particularly given his admission of wrongdoing and apology. The Receiver's office and email server is located in Concord, Ontario, not at the hotel. The Receiver did not tell anyone in the operational management of the hotel business that it had received affidavits from employees. Furthermore, the Receiver had not made any inquiries with management concerning the allegations contained in the affidavits nor concerning the affiants prior to the termination of Mr. Pulice's employment. The decision to terminate Mr. Pulice's employment was made on an independent basis by management of the hotel who had no knowledge of the existence of Mr. Pulice's affidavit.

1.4 Response to Issues Raised in Employee Affidavits

The Receiver has now investigated the workplace issues raised in the employee affidavits. The affidavits basically set out two kinds of issues: (i) workplace issues that allegedly have not been addressed by management of the hotel, and (ii) opinions expressed by the employees who filed the affidavits regarding the need for a union at the hotel.

In investigating these allegations, the Receiver spoke with Lidia Mastrolacasa, the Director of Human Resources at the hotel, and was provided with documentation that was relevant to the issues raised. Based upon its discussions with Ms. Mastrolacasa, and its review of the relevant documentation, virtually all of the workplace issues have already been addressed by management

of the hotel. It also appears that the opinions expressed by the employees who have filed their affidavits are not shared by the other employees, and in fact are contradicted.

1.4(a) Ross Vasil Affidavit

Ross Vasil is a food and beverage server who is employed by the Ontario Club, which is now located at the hotel. He has been employed in this position for approximately 20 years.

In his affidavit, Mr. Vasil only raised one workplace issue relating to the calculation and distribution of gratuities that Mr. Vasil was entitled to receive. The Receiver reviewed this issue with Ms. Mastrolacasa, and determined that Vasil's alleged concern regarding this issue was not raised by Vasil, or any other employee, prior to the filing of his affidavit. Mr. Vasil did raise this issue however in a meeting with the Director of Food and Beverage, on March 25, 2008. Basically, Mr. Vasil indicated that there appeared to be a discrepancy between the amount of gratuities collected and amount he was paid, as confirmed on by his payroll record. The Director reviewed this issue and provided an explanation to Mr. Vasil – essentially that, while 100% of the gratuities are collected and pooled for all servers, they are then paid out pro rata, based not only on the number of employees, but also on the hours worked for each employee during a pay period. This explanation was provided to Mr. Vasil on March 27, 2008, two days after he raised this issue, at which time he indicated that he understood and was satisfied. This is the only workplace issue that was raised by Mr. Vasil in his affidavit.

In his affidavit, Mr. Vasil also expressed his opinion, that a union was needed at the Hotel to “assist in the rapid resolution of problems” such as the gratuities issue above. However, as noted above, this issue was in fact resolved in two business days without the involvement of the Union.

1.4(b) Tony Pulice Affidavit

Tony Pulice was employed as a cook at the hotel. He has been employed by the hotel for approximately one year and five months. He was initially hired as a part-time cook in November 2006, and began working full-time in May 2007.

The workplace issues that Mr. Pulice raised are as follows:

- (i) that he had been demoted,
- (ii) that the hotel was understaffed and that Pulice was forced to work in other areas and cover other responsibilities,
- (iii) that there are errors in his pay and that employees were not receiving proper pay for statutory holidays,
- (iv) that shifts were not being assigned according to “seniority”, and
- (v) that there is much confusion and fear amongst employees regarding the receivership, particularly amongst employees who were recent immigrants and who did not speak English as their first language.

The Receiver has reviewed all of these issues with Ms. Mastrolocasa. It appears that all of the issues have either already been addressed, or are unfounded.

Regarding the alleged demotion, Ms. Mastrolocasa has confirmed that Pulice was neither demoted nor downgraded. There was a reclassification of all of the cook classifications during the summer of 2007. Prior to the reclassification Pulice was a “Cook” as confirmed on the

payroll records he received. Following the reclassification, he was "Cook II". There was no reduction in his compensation, nor any change in his duties and responsibilities. It appears that, with the exception of Mr. Pulice's affidavit, he never raised any alleged concern regarding this issue, nor does he suggest that he ever did. Based on a review of the documentation provided by Ms. Mastralocasa, this issue appears to be completely unfounded.

Regarding the alleged understaffing at the hotel, and Mr. Pulice's allegation that he is being "stretched and overworked", Ms. Mastrolocasa has indicated that the hotel is sufficiently staffed. Pulice typically works a 7:00am to 3:00pm shift. During slow times, he is asked, but not forced, to assist in the Bistro Kitchen which he refers to as "on the line". He has never been required to cover the duties of the Garde Manger, and in fact, the employee that currently occupies this position has reported that when she has asked Pulice to assist, he typically refuses and states that "it is not my job". The Head Chef has also reported that Mr. Pulice is not flexible in his availability to work outside of his regular 7:00am to 3:00pm shift.

Regarding the issue of payroll errors and payment for statutory holidays, this issue was identified by management of the hotel in the Fall of 2007. In October of 2007, a new system was established to rectify this issue. The system now automatically calculates the amount of statutory holiday pay. Such errors are addressed as soon as possible, and it is not uncommon for the hotel to issue a manual cheque to correct a small error immediately.

As the employees' hours are tracked and inputted into the payroll system through a hand scanner whereby they "punch in" and "punch out", this can result in payroll errors if the employee is late or leaves early. Once such errors are discovered, they are addressed promptly by management.

The Receiver notes that Mr. Pulice even admits in his affidavit, at paragraph 4(c), that "...these problems [with the payroll] have been ultimately dealt with on these particular occasions...".

Regarding the issue of shifts not being assigned to employees in accordance with seniority, the hotel is not required by law to assign shifts by seniority. Seniority is a concept that is borne out of the "seniority" provisions that can be contained in a collective agreement. In this case, as there is no collective agreement, there is no such requirement. That said, Ms. Mastralocasa has advised the Receiver that the hotel does generally assign shifts in accordance with seniority. Virginia Cruz did raise this issue in January 2008 and the Chef explained that as she was in a different position than another employee who had less seniority, such that their respective scheduling could not be based on seniority alone. Mr. Pulice was present during this discussion with Cruz and she has not raised this issue ever again. Accordingly, this issue was addressed by management of the hotel some time ago.

Mr. Pulice has also alleged that there are discrepancies in the wage rates paid to different employees. There is no legal requirement to pay all employees in one classification at the same rate. Once again, while this is a concept that can be dealt with in a collective bargaining context, it is simply not applicable to the hotel. Furthermore, the rates of pay provided to employees, while generally within a range for each classification, are confidential. Ms. Mastrolocasa has been advised that Pulice has approached several employees asking that they disclose their rate of pay, and that several employees have complained to management regarding Mr. Pulice's inquiries. That said, the hotel recently undertook a complete wage review for each position in January 2008 and has established salary guidelines for new hires moving forward. Accordingly, this issue has already been addressed.

Regarding the alleged confusion and fear amongst employees, which Mr. Pulice alleges results in the employees refusing to take breaks, Ms. Mastrolocasa advised that the management of the hotel has met with employees to discuss the receivership on several occasions. The Receiver understands, as is typical, that some employees are concerned about the hotel's ongoing operations in light of the current receivership, which is understandable. Employees are always encouraged to raise any concerns with management. Ironically, in investigating this issue, Ms. Mastrolocasa learned that some employees have actually raised concerns about racial comments made by Mr. Pulice, but did not raise them earlier as they were fearful of him.

In all, none of the issues raised by Mr. Pulice present a pressing need to divert scarce resources of the insolvent Debtors by becoming engaged in Labour Board proceedings at this time while the receivership is in the throes of the sales process with the identification of a new owner being a few months away.

1.5 Union Interference with Receivership

The Receiver has also been advised by management of a complaint by an employee regarding the Union's activities. The employee, a member of the kitchen staff, advised management that she felt "harassed" and "threatened" by the Union's representatives. The employee reported that, despite advising the Union that she did not want to speak with them, two union representatives repeatedly attempted to contact her, including visiting her personal residence on more than one occasion.

The Receiver has written to the Union to request that the Union cease and desist such activity. A copy of the Receiver's correspondence is attached as Appendix "B".

The Receiver is also aware of other incidents involving the Union that have been unnecessarily disruptive to the on-going operation of the business and not in the best interests of the employees or the receivership. On February 15, 2008, a newly appointed representative of the Union, David Sanders, contacted Ms. Mastrolacasa, by email. Therein he alleged that the hotel's recently adopted incentive program for housekeeping staff, which had been universally well received by the housekeeping employees, was in fact an attempt to "circumvent the rights of our members by unilaterally making changes to the working conditions of our members without respecting the negotiations process required under the OLRA". Mr. Sanders threatened to file an unfair labour practice complaint with the OLRB. A copy of Mr. Sanders email is attached as Appendix "C".

The Receiver was advised of this complaint by management of the hotel and in turn, management advised that it had in fact involved the Union's previous representative in the establishment of the incentive program. Apparently, Mr. Sanders, as the newly appointed Union representative, had not been advised of this. Management confirmed this with the Union, and the Union agreed that the incentive program should remain in place, and that further, it would not file an unfair labour practice as against the hotel.

1.6 Conclusion and Recommendation

Overall, the Receiver feels that it has made significant efforts to attempt to reach a reasonable settlement with the Union that addresses all of the Union's practical concerns, and also preserves, as much as possible, both the union's opportunity to organize employees during the receivership and its right to pursue a certification application against an eventual purchaser post-receivership.

The Receiver is currently in the midst of the sales process and is currently reviewing seven LOI's that it received on March 31, 2008. If the Receiver is required to respond to a certification application at this time, it will only further disrupt and detract from the sales process and the Receiver's overall mandate.

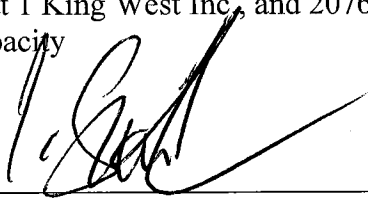
Accordingly, the Receiver respectfully recommends that the Union's motion be dismissed. The Receiver is not opposing the Union's exercise of its right to initiate certification proceedings before the OLRB against the ultimate owner of the business. If the sales process fails, the employees will suffer the failure of the business. The Union has not demonstrated a basis for a

certification proceeding to be advanced at this time. If the Union is seeking some kind of leg-up against the ultimate purchaser, that very fact creates a risk to the sales process that the Receiver seeks to avoid.

IRA SMITH TRUSTEE & RECEIVER INC.

solely in its capacity as the Court-Appointed Receiver of Stinson Hospitality Inc., Dominion Club of Canada Corporation, The Suites at 1 King West Inc. and 2076564 Ontario Inc. and not in its personal capacity

Per:



Ira Smith, President

APPENDIX “A”



Barristers & Solicitors

250 Yonge Street, Suite 2400
Toronto, Ontario Canada M5B 2M6

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fmyers@goodmans.ca

March 19, 2008

Our File No.: 070060

Delivered Via E-mail

Charles Sinclair
Sack Goldblatt Mitchell LLP
20 Dundas St. W.,
Suite 1100
P.O. Box 180
Toronto, Ontario M5G 2G8

Dear Mr. Sinclair:

Re: Stinson Hospitality Inc. et al ats. Ed Mirvish Enterprises Limited et al

I am writing with respect to your letter of March 12, 2008.

On March 3, 2008, after attempting to settle all morning, I told you that my client was not prepared to further adjourn your client's motion seeking leave to move before the Ontario Labour Relation Boards for certification. We only agreed to adjourn your client's motion on the basis of your express representation to us and then to the Court that the purpose for the adjournment was to allow you more time to bring your client to the settlement position of the Receiver.

As such, we were disappointed and somewhat taken aback when we received your letter of March 12, 2008 serving us with a Supplementary Motion Record of the Union, purporting to adduce further evidence (the affidavits of Ross Vasil and Tony Pulice) in connection with very motion the Union adjourned for the purpose of settlement. While we understand that you cannot require your client to settle, the motion was not adjourned to allow further evidence to be delivered and our consent was not given on the basis that your client would seek to bolster the evidence.

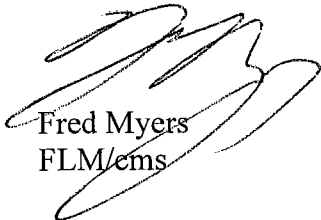
In light of the Union's new evidence, the Receiver will require additional time to investigate the allegations contained in the affidavits, including scheduling the appropriate cross-examinations of Messrs. Vasil and Pulice. If the affidavits stand, we will also require additional time to prepare the appropriate response.

Accordingly, we do not believe that March 28, 2008 remains feasible for proceeding with your client's motion and propose the motion be adjourned *sine die*.

We would appreciate hearing from you by Monday, March 24, 2008, failing which we will arrange to attend before Madam Justice Pepall at a 9:30 appointment to speak to the matter of a further adjournment.

Yours very truly,

GOODMANS LLP



Fred Myers
FLM/cms

cc: Ira Smith Trustee and Receiver Inc.
Joseph Latham
Lauren Butti

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APPENDIX “B”



Barristers & Solicitors
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Toronto, Ontario Canada M5B 2M6
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Direct Line: 416.597.4203
jmorrison@goodmans.ca

April 1, 2008

Our File No.: 070060

Delivered Via E-mail

Charles Sinclair
Sack Goldblatt Mitchell LLP
20 Dundas St. W.,
Suite 1100
P.O. Box 180
Toronto, Ontario M5G 2G8

Dear Mr. Sinclair:

Re: Stinson Hospitality Inc. et al ats. Ed Mirvish Enterprises Limited et al

Further to our telephone conversation of Friday, March 28, 2008, we are writing to confirm our concerns regarding a recent employee complaint involving your client.

In particular, one of the female employees employed in the kitchen, has complained that she feels, in her words, "harassed" and "threatened" by several union representatives. The employee advised management that two union representatives have been constantly attempting to contact her, insisting that she speak with them regarding internal matters of the business and the need for a union. She had advised them that she did not wish to speak with them. However, the union representatives then proceeded to make several uninvited visits to the employee's home address. As the employee was understandably concerned about these uninvited visits, she approached management on her own initiative to express her concerns.

We appreciate that your client is attempting to obtain additional support for its organization. As you are aware, the Receiver has maintained a neutral role with respect to the union's organizing efforts that commenced prior to the receivership and have continued during the receivership. However, such uninvited visits to an employee's personal residence raise some serious concerns. They may be in breach of both trespass laws and labour laws. To the extent that the union has used confidential employee information to determine an employee's address, they may also be in breach of privacy laws.

As the Receiver, to the extent that employees raise concerns that they feel "threatened" or "harassed" by such activities, and/or certain activities become disruptive to the business, our client has a duty to report and, with the assistance of management of the debtor company, to attempt to address these

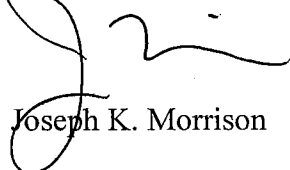
concerns. Accordingly, as we requested during our telephone conversation on Friday, March 28, 2008, we have asked that you speak to your client regarding this matter and that you confirm that your client has agreed not to continue any such activities in the future. To be clear and just so that there is no misunderstanding, we are requesting that the union refrain from any harassing and/or threatening activities, including but not limited to any uninvited visits to an employee's personal residence, without the employee's prior consent.

If you have any questions regarding this matter, please contact me.

Yours very truly,

GOODMANS LLP

Per:



Joseph K. Morrison

JKM/emm

cc: Ira Smith Trustee and Receiver Inc.
Joseph Latham
Fred Myers
Lauren Butti

APPENDIX “C”

From: David K. Sanders [<mailto:davidksanders@yahoo.com>]
Sent: Friday, February 15, 2008 4:21 PM
To: Lidia Mastrolacasa
Cc: Paul Clifford
Subject: introduction & housekeeping concern

Ms. Lidia Mastrolacasa
Director, Human Resources
The Suites at 1 King West
1 King St. W.
Toronto, ON
M5H 1A1
FAX: 416/548-8205

Delivered by both FAX & e-mail

Dear Ms. Mastrolacasa,

My name is David Sanders. I am an Organizing Director of the UNITE HERE International Union based here in Toronto with our Local 75.

I am writing for a couple reasons:

* I wanted to introduce myself to you and the rest of the One King West management team. I believe that you have already been informed that I will be taking over responsibility for our relationship with your property from my colleague, Lisabeth Pimentel. Please let me know if there is any time that might be convenient for me to come by the hotel and introduce myself in person. I am hoping that we will have a good and productive relationship.

* I am concerned about some recent developments at the hotel. As you know, UNITE HERE Local 75 is the certified bargaining agent for the housekeeping department at One King West. In recent weeks, the hotel has sought to circumvent the rights of our members by unilaterally making changes to the working conditions of our members without respecting the negotiations process required under the OLRA.

To be clear, it is our position that any efforts by management to make changes to any wages and or/working conditions - or any efforts to solicit some kind of approval from our members for any such changes independent of the union representation our members secured when they were certified - are illegal under the OLRA.

Should management continue in these efforts, we will have no option but to file unfair labour practice charges under the OLRA.

I am sure that this is all some kind of misunderstanding. Please call me so that we can arrange a time to discuss this in person. I trust that management will not continue with any independent discussions or changes in the meantime.

Yours sincerely,

David

David K. Sanders
Organizing Director
Hotel Workers Rising!
UNITE HERE Local 75
Cell: 416/795-1789
e-mail: dsanders@unitehere.ca

cc. President Paul Clifford, UNITE HERE Local 75

Jocelyn Cuasay, Housekeeping Department, One King West

**ED MIRVISH ENTERPRISES
LIMITED AND 1 KING WEST INC.**

and

**STINSON HOSPITALITY INC.,
DOMINION CLUB OF CANADA
CORPORATION AND HARRY
STINSON**

Court File No: 07-CL-6913

Applicants

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**ONTARIO
SUPERIOR COURT OF JUSTICE
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Proceeding commenced at Toronto

**SECOND SUPPLEMENTARY MOTION
RECORD OF THE RECEIVER
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