

RECENT DEVELOPMENTS - INTERIM RELIEF

Introduction

This paper provides an overview of recent Federal, British Columbia and Ontario jurisprudence relating to interim relief for unions. It focuses mainly on labour board decisions, although a limited number of arbitration awards are referenced. Finally, it highlights some key policy issues of the various labour boards with respect to granting interim relief.

I. Canada

1. Canada Labour Code

Section 19.1 of the *Canada Labour Code*, R.S.C. 1985, c.L-2 (“Canada Code”) provides:

The Board may, on application by a trade union, an employer or an affected employee, make any interim order that the Board considers appropriate for the purpose of ensuring the fulfillment of the objectives of this Part.

Section 60 (a.2) of the Canada Code sets out the authority of arbitrators to grant interim relief:

An arbitrator or arbitration board has

...

(a.2) the power to make the interim orders that the arbitration board considers appropriate.

2. Labour Relations Purpose of Interim Relief

The labour relations purpose of interim relief is to stabilize the labour relations situation, i.e. to neutralize the potential harm of an alleged labour practice complaint pending its final determination: *Bell Canada (Re)*, [2001] CIRB No. 116 (J.M. Durette), para. 36.

Section 19.1 should be applied in a manner that reflects the intentions and objectives of the Canada Code: *Coach Canada (c.o.b. Trentway-Wagner Inc.) (Re)*, [2000] CIRB No. 57 (J.P. Lordon), para.37; reference may be made to the three stage common law test applied by the courts but the Canada Industrial Relations Board (the “Board”) must ensure that choosing to utilize such an analytical framework does not obscure its consideration of the primary question of whether the interim order is appropriate to achieve the objectives of the Canada Code: *Trentway-Wagner*, para.38.

Not an extraordinary remedy: *Bell Canada*, para. 40 (and s.19.1 of the Canada Code says nothing about exceptional circumstances).

The interim powers of the Board under s.19.1 are broad (and there is nothing in s.19.1 which limits the Board’s use of interim relief) - Board has broad discretion to “... make any interim order which the Board considers appropriate”: *Air Canada (Re)*, [2000] CIRB No. 96 (J.P.

Lordon), para. 38.

3. Circumstances under which the Canada Labour Board will exercise its discretion to grant an interim order

The test for interim relief (*Bell Canada*):

- a. is there an arguable or serious question to be tried (i.e. *prima facie* case);
- b. weighing the balance of convenience, or competing harms of either granting or refusing the relief;
- c. consideration of the labour relations purpose of interim relief, in light of the objectives of the Code (i.e., as set out in the Preamble, including that of free collective bargaining - *Bell Canada*, para. 36)

Bell Canada, para. 26

An interim order is appropriate to ensure the fulfillment of the Code's objectives: *Trentway-Wagner*, see para. 30, 37 and 38; and *Bell Canada*, para. 40.

An interim order will stabilize the labour relations situation and neutralize the potential harm of an (alleged) labour practice complaint: *Bell Canada*, para. 36.

Time is relevant: *Bell Canada*, para. 37 (note, however, that the Canada Code does **not** contain a requirement of urgency for the issuance of an interim order).

4. What is needed to establish a *prima facie* case?

It means sufficient evidence to entitle the tribunal to arrive legally at a particular determination of fact: *Golomb* (1986), N.S.S.C.

A case "which covers the allegations made which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent employer": *Canada AG v. Green (TD)*, [2000] FC 629.

Definition of "*prima facie*":

"Such as will suffice until contradicted and overcome by other evidence", "a case which has proceeded upon sufficient proof to the stage where it will support a finding if evidence to the contrary is disregarded": *Blacks Law Dictionary Rev.* (4th ed.) (1968), p.1353

“A *prima facie* case, then is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side ...”: *R. v. Reid*, [1980] NBJ No. 80

“At first view, before investigation”: *World Book Dictionary*, as referred to in *Cougar Helicopters* (1986), N.S.J. No.268

5. Recent Developments

- a. *Telecommunications Workers Union - and - TELUS Communications Inc.*, CIRB Order dated January 17, 2004 (M.A. Pineau). Attached.

The Board granted interim relief where an employer breached an undertaking not to communicate with employees.

The Canada Industrial Relations Board had cause to squarely address s.19.1 of the Code recently in the context of an unfair labour practice complaint brought by the Telecommunications Workers Union against TELUS Communications Inc.

The union was in the middle of conducting a strike vote when the employer communicated with bargaining unit members contrary to an oral undertaking it had given before Vice-Chairperson Pineau. The employer had agreed to refrain from raising collective bargaining or labour relations issues at any of its upcoming Team TELUS Talks or Front Line Forums (employee meetings) and from answering any questions in respect of such issues until the Board’s decision in the case then being heard was issued.

After the Board heard the parties’ submissions by teleconference at an expedited hearing, the Board found that the union established a *prima facie* case that the employer’s communications (specifically, TELUS issued a communication entitled “TELUS Responds with the Facts”) would likely interfere with the union’s holding of a strike vote. It also found that allowing the employer to continue such communications may cause serious and irreparable harm to the union’s ability to conduct a strike vote that could not be remedied before the Board could hear the merits of the complaint.

Accordingly, the Board ordered the employer to cease and desist from distributing “TELUS Responds with the Facts” to any bargaining unit employees, to remove any electronic or paper posting of the same, and to refrain from further such written communications and from holding any meetings concerning “labour negotiations, the union’s strike vote and labour relations issues”.

See related decision where the Board subsequently ordered the employer to offer the union binding arbitration to settle the terms of the collective agreement: CIRB Letter Decision No. 1004, dated January 28, 2004 (M.A. Pineau). Attached.

b. *Air Canada (Re)*, [2003] CIRB No. 225 (J.P. Lordon)

The union sought an interim order declaring notices of involuntary layoff to be invalid and of no force and effect. The Board declined to issue the order as the Ontario Superior Court of Justice had issued an order comprehensively staying all proceedings, suits and actions in respect of the employer under the Companies Creditors Arrangement Act.

c. *Canadian Broadcasting Corp. (Re)*, [2003] CIRB No. 250 (J.P. Lordon)

In the context of a representational campaign, the union brought an unfair labour practice complaint pursuant to s.94(1)(a) alleging the employer was deliberately blocking electronic communications between itself and its members. The union requested interim relief. The employer also alleged the union violated s.95(d) of the Code and similarly requested interim relief. The Board found that there was no violation of ss.94(1)(a) or 95(d) and so declined to grant the relief sought. See also related decision: *Canadian Broadcasting Corp. (Re)*, [2003] CIRB No. 251.

Cases referred to above

Bell Canada (Re), [2001] CIRB No. 116 (J.M. Durette) - union claimed employer's unilateral formulation and implementation of employee surplus policy regarding pension and severance issues contravened the collective agreement and sought an interim order preventing the employer from proceeding with the implementation of the policy prior to a hearing of the matter on the merits. The Board found that there was an arguable or serious issue, that the union would suffer substantial labour relations harm if the employer implemented the plan and that the balance of convenience or relative harm favoured the union.

Coach Canada (c.o.b. Trentway-Wagner Inc.) (Re), [2000] CIRB No. 57 (J.P. Lordon) - Union president and chief negotiator regarding new collective agreement was terminated. The Board granted an interim order of reinstatement as union alleged termination due to anti-union animus, and that termination made it impossible for negotiator to conduct his negotiations.

Air Canada (Re), [2000] CIRB No. 96 (J.P. Lordon) - Section 18.1 application pending before the Board regarding outstanding bargaining issues when the union applied for an interim order that the employer cease and desist from breaching a Memorandum of Understanding concerning work assignments it had entered into with the union. Board found it had jurisdiction and decided to grant the relief sought in order to allow for proper carrying out of its functions under s.18.1.

Arbitration Decisions

National Automobile, Aerospace, Transportation and General Workers Union (CAW Canada) Local 114 v. Securicor Canada Ltd., [2004] CLAD No. 72 (J.E. Dorsey) - union awarded an interim order to enforce the status quo, enforcing an agreement between the employer and the

union that the employer “will implement up to two routes with two man off crews”.

II. British Columbia

1. British Columbia Labour Relations Code

Section 133(5) of the B.C. Labour Code (the “Code”) gives the B.C. Labour Relations Board (the “Board”) the discretion to make interim orders as follows:

If an application or complaint is made under this section or the minister makes a direction under Part 6 the board may, in its discretion, after giving each party to the matter an opportunity to be heard, make an interim order or designation pending a final resolution of the application or complaint under this section or a designation under Part 6.

Section 92(1)(c) of the Code provides arbitrators with the discretion to grant interim orders:

An arbitration board may

...

(c) determine prehearing matters and issue prehearing orders ...

White Spot Limited, BCLRB No. 182/94 (J. Hall); *Pacific Newspaper Group -and- C.E.P., Local 2000*, [2001] BCCAAA No. 375 (R.S. Keras) (“Pacific Newspaper Group”), para.8 (Arbitrator denied the union’s application for an interim order to retain the disputed work (proposed reduction of 86 bargaining unit positions) with respect to employer’s Granville Square location)

2. Labour Relations Purpose of s.133(5) and Board’s Policy Regarding Interim Orders

The purpose of an interim order is to “prevent the effective frustration of the applicant’s rights in the period of delay between the filing of the application and the decision on the merits”: *RBA Canada Inc.*, BCLRB No. B31/97 (L. Parkinson), para. 23 (“RBA”) (Board granted the union an interim order that the employer pay into a trust account of its counsel an amount equivalent to the wages not paid to the employees within the bargaining unit from the effective date of the reduction in the wage rate to the end of the statutory freeze period as a way of maintaining the status quo until the matter was finally decided).

An interim order is not a definitive determination on the merits, but rather a ruling on the balance of interests that is only in effect until the merits of the dispute can be decided: *Health Employers’ Association of B.C.*, BCLRB No. B125/2001 (Kelleher, Q.C.), para. 32 (Reconsideration of BCLRB No. 118/2001 where the Board designated interim essential service levels on an interim basis).

“... [I]s a discretionary remedy and is intended to fill the gap between the time that a matter arises and the time required by the Board to deal with the matter on its merits”: *British Columbia Public School Employees’ Association (Re)*, BCLRB No. B56/2002 (Kearny), para. 24 (interim order regarding strike declaration complaint by employer; Board declining to exercise its discretion to issue an interim order except in relation to the statement in the RA Plan regarding the supervision and marking of district standardized tests).

Requires “rare and exceptional circumstances”: *87432 Ontario Limited (Comox Free Press)*, BCLRB No. (K. Oleksiuk) (“Comox”) p. 3(QL); *7-Eleven Canada Inc.*, BCLRB No. B453/99 (B. Junker), para. 12; *Kelley (Re)*, BCLRB No. B166/2003 (M. Fleming), para.8.

“As a matter of policy, the Board does not issue declarations in its interim orders”: *Health Employers’ Association of British Columbia*, BLCRB No. B93/2003 (O’Brien), para. 24 (employer application for interim relief in context of alleged illegal strike); *British Columbia Ferry Services Inc. (Re)*, BCLRB No. B436/2003 (O’Brien), para.9 (Board granted employer’s request for interim order directing employees back to work). See also on this issue: *British Columbia (Re)*, BCLRB No. B175/2002 (Hansen), para.9 (Board declined to grant interim relief sought by union in context of unfair labour practice complaint where “declarations sought by [the] Unions can be made regardless of whether the interim orders are granted”, para. 9).

3. Circumstances under which the B.C. Labour Relations Board will exercise its discretion to grant an interim order

The criteria considered by the Board when deciding whether to exercise its discretion to issue an interim order are well established and have been set out in numerous decisions. For example: *White Spot Restaurants Limited*, IRC No. C274/88 (R.S. Longpre); *Comox, supra*; *Greater Vancouver Transit Authority*, BCLRB No. B87/2001 (G.J. Mullaly); and others.

The Comox criteria for granting interim orders are as follows:

1. an adequate remedy would be unavailable at the final hearing without an interim order;
2. there is a strong link between an alleged breach of the Act (now the Code), the consequences of the breach and the interim relief sought;
3. the claim must not be frivolous or vexatious and must usually be based on a prima facie case;
4. an interim order must not penalize the respondent in a manner which will prevent redress if the application fails on the merits; and
5. an interim order must be consistent with the purposed and objects of the Act (now the Code).

“Urgency” is not a prerequisite for an interim order, but there must be some irreparable harm that will occur during the time it will take the Board to address the merits of the case: *Greater Vancouver Transit Authority*, BCLRB No. B87/2001 (G.J. Mullaly).

4. Recent Developments

a. *Greater Vancouver Regional District (Re)*, BCLRB No. B207/2002(O’Brien)

The Board considered the union’s application for interim relief in the context of a complaint that the employer has failed to bargain collectively in good faith; the union sought to prohibit the employer from implementing a new classification system for Utility Systems Operator until the employer has negotiated those matters with the union; the Board applied the criteria outline *Greater Vancouver Transit Authority*, BCLRB No. B87/2001 (similar to that outlined in *Comox*) to dismiss the application; the Board decided that there was no urgency to the matter as the employer had advised the union of its plan regarding the reclassification three years prior and an adequate remedy would be available to the union when the case is heard on its merits.

b. *British Columbia (Re)*, BCLRB No. B175/2002 (Hansen)

The unions filed an application against the employers seeking declarations that the employers had committed unfair labour practices in a variety of ways having to do with anticipated contracting out of services currently performed by union members; the Board applied the criteria outlined in *Greater Vancouver Transit Authority*, BCLRB No. B87/2001 to decline to grant the interim order. The Board found that an adequate remedy would be available to the unions at the final hearing without the interim orders because the unions were seeking a declaration. The Board also found there was no labour relations purpose for granting the orders and the unions had not established irreparable harm would occur if the interim relief was not granted.

c. *United Assn. of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, Local 170*, BCLRB No. B441/2003 (Southern)

The UA International had issued a decision restructuring the territory of Local 170 and Local 324; Local 170 appealed that decision; when that decision was upheld by the General Executive Board of the UA International, Local 170 made a further appeal and applied for interim relief prohibiting UA International and Local 324 from acting upon and enforcing the decision of the UA International pending final adjudication of its application. The Board applied *White Spot* to grant the interim order sought, finding, in particular, that irreparable harm would result if the order was not granted as the loss of representation rights cannot be undone after the fact (paragraph 28).

d. *Health Employers’ Assn. of B.C. (Re)*, BCLRB No. B90/2004 (M.J. Brown) -

The union applied for an order that the Board set interim essential service levels where those

levels have not been agreed to, or mediated, or adjudicated to final determination. Board must be convinced that an interim order would ensure the health, safety and welfare of patients. The Board decided it would be in a better position to ascertain whether an interim order is necessary after the Board reviews any agreements and after the mediators/adjudicators have commenced hearings with the parties.

Guidelines for Arbitrators

White Spot Limited, BCLRB No. 182/94 (J. Hall) establishes that arbitrators have jurisdiction to issue interim orders under s.92(1)(c) of the Code. In that decision the Board refrained from directing the approach arbitrators should take to the exercise of this authority, p.9 (QL):

The present application does not require a determination of the specific approach which arbitrators should take when asked to exercise their discretion under Section 92(1)(c) of the Code. Nor would we purport at this early stage to develop an exhaustive framework within which requests for interim orders should be considered. The matter is best left for formulation over time, in a manner consistent with principles of the Labour Relations Code. In this regard, we agree with the sentiments expressed recently by the Ontario Labour Relations Board in *Loeb Highland*, [1993] OLRB Rep. March 197 which emphasized that there is an obligation to develop criteria which are appropriate for labour relations. We hasten to add that this does not preclude the "fair question" standard (or some other threshold) being followed in the arbitral context -- the point is simply that, in fashioning an appropriate labour relations test, criteria found in other contexts should not be uncritically adopted; further, additional criteria may well be relevant.

Our only other observation at this juncture is a concern that the power to issue interim orders not detract from the original objectives of grievance arbitration -- that is, to provide an inexpensive and expeditious method for the resolution of collective agreement disputes. Resorting to interim proceedings as a matter of course would obviously give rise to the attendant spectre of two hearings in most grievances, with resulting cost to both parties. Likewise, an interim order should not be seen as an alternative to early hearing dates. A party seeking interim relief should generally be prepared to accommodate an expedited hearing on the merits. That is particularly so where such relief would create the potential for harm to the respondent.

Arbitrators have considered the following criteria when deciding whether to grant interim relief:

1. An adequate remedy would not be available to the applicant upon conclusion of the hearing into the merits of the case without an interim order.
2. The claim must not be frivolous or vexatious and must usually be based on a prima facie case.
3. An interim order must not penalize the respondent in a manner which will

prevent redress if the application fails on the merits.

4. An interim order must be consistent with the purposes and objects of the Code.

Luscar Ltd. -and- International Union of Operating Engineers, Local 115, [2001] BCCA AAA No. 52 (J. Kinzie), para.9

III. Ontario

1. Ontario Labour Relations Act

Section 98 of the Ontario *Labour Relations Act*, S.O. 1995, c.1, as amended (the “Act”) provides:

- (1) The Board may make interim orders concerning procedural matters on application in a pending proceeding and, with respect to the Board, the power to make interim orders under this subsection applies instead of the power under subsection 16.1 (1) of the *Statutory Powers Procedure Act*. 1998, c. 8, s. 10.
- (2) The Board shall not make an order under subsection (1) requiring an employer to reinstate an employee in employment. 1995, c. 1, Sched. A, s. 98 (2).

Sections 48(12)(i) and 48(13) of the Act address the authority of arbitrators to grant interim relief:

48 (12) An arbitrator or an arbitration board, as the case may be, has power,
...
(i) to make interim orders concerning procedural matters;

(13) An arbitrator or the chair of an arbitration board shall not make an interim order under clause (12) (i) requiring an employer to reinstate an employee in employment. 1995, c. 1, Sched. A, s. 48 (13).

2. Recent Developments

- a. *Ontario Public Service Employees Union v. Ottawa Community Care Access Centre et al.*, [2004] O.L.R.B. No. 425 (E. Cummings)

Addresses the Board’s policy regarding procedural v. substantive interim relief.

In the context of an unfair labour practice complaint, the union applied for interim relief, asking the Board to “stay” a request for proposals in respect of work being preformed by union members. The Board declined to grant the relief sought, but hinted at a softening of the line between procedural and substantive interim relief (para. 7, QL):

On the one hand, the Board must not, as the OCCAC cautions, give substantive relief in the guise of an order in respect of procedural matters. However, it may be appropriate to give interim relief in respect of the Board's proceedings, even though the order may touch on a process or activity outside of the Board's proceeding. In the appropriate case, the Board's interim relief powers may be exercised where the Board is satisfied that orders must be made to preserve the effectiveness of the Board's own proceedings and processes. While the order may affect an activity or process other than the Board's own proceeding, if the goal of the intervention is to protect the Board's proceeding, then the intervention will meet the requirements of section 98(1).

- b. *Universal Workers' Union, Labourers International Union of North America, Local 183 v. Labourers International Union of North America*, Decision dated March 17, 2004, (E. Cummings)

Held that interim relief could be granted to stay disciplinary proceedings under a union constitution.

Addresses an inter-union dispute between the International and the local union in the construction industry.

Local 183 brought a complaint alleging that the Labourers' International Union of North America ("LIUNA") interfered with the local without just cause contrary to s.149 of the Labour Relations Act, 1995 ("Main Application"). Local 183 also requested interim relief, seeking, in part, to delay the Special Hearings Panel until the hearing of the Main Application had concluded. The Board granted the interim relief with respect to the Special Hearings Panel on November 20, 2003, with reasons to follow. Prior to Board issuing its reasons, LIUNA made an application requesting the Board to vary the terms of the interim order as it believed it had taken steps in respect of how it would conduct the Special Hearings Panel that would alleviate the concerns expressed to the Board by the parties.

The background giving rise to the union's application are briefly summarized as follows. LIUNA had charged Local 183 under its constitution alleging that Local 183 had interfered with sister locals' organizing drives, had sought to organize workers outside its geographic area and had used another union to organize in ways that Local 183 is prevented from doing. The General President of LIUNA had empowered a Special Hearings Panel to investigate and to make findings of fact and recommendations regarding appropriate remedial measures. In response, Local 183 argued that its autonomy was being interfered with by it being unfairly singled out for harsh and inappropriate treatment and by it being denied the proper forum.

The Board considered several issues related to the Main Application. It declined to inquire into whether counsel for the OPDC and the charging locals were in a conflict of interest. It decided that various employer associations whose members hold bargaining rights with Local 183 should

be allowed to appear in the capacity as *amicus curiae* and not as parties.

The crux of argument between the parties addressed the issue of the Board's jurisdiction to grant the relief sought. The Act provides that the Board is only permitted to grant interim orders that are "procedural" in nature under section 98(1).

Local 183's position was that its application fell within the Board's jurisdiction under s.98(1) of the Code as the Board may make orders in addition to exercising the powers in s.111¹ and 114² to control its hearings and determine its own procedures. It further argued that delaying the Special Hearings Panel simply preserved the status quo that existed at the time of the application in the main hearing and as such, would not amount to a substantive order.

The employers' associations supported Local 183's application and focused on the impact on the collective bargaining process if the Special Hearings Panel was not delayed.

Most significantly, LIUNA, the OPDC and the charging Locals argued that the Board does not have jurisdiction to grant the orders sought. It said a request that the Special Hearings Panel be delayed can only be characterized as a substantive order in that the Board is being asked to impose its authority to stop the legitimate exercise of the General President's constitutional power. Such a request, it argued, is clearly not procedural. Moreover, the relief sought is more in the nature of a cease and desist order which, it further argued, is not available under s.98.

In order to grant interim relief the Board must be satisfied of three things: that it has the jurisdiction to grant the interim order sought; that the applicant has pleaded a prima facie or arguable case that it is entitled to the remedy sought; and that the balance of harm favours

¹**Powers and duties of Board, general**

111(1)The Board shall exercise the powers and perform the duties that are conferred or imposed upon it by or under this Act.

Specific

(2)Without limiting the generality of subsection (1), the Board has power,

- (a) to require any party to furnish particulars before or during a hearing;
- (b) to require any party to produce documents ...

²**Jurisdiction**

114(1)The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Same

(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

granting the remedy sought.

On the first aspect of the test for interim relief, the Board found it had the requisite jurisdiction. The Board agreed with Local 183's argument that s.98(1) creates jurisdiction to make orders that do not amount to substantive orders, but that provide more than orders in respect of procedural issues that arise in respect of the hearing, powers already granted to the Board under sections 111 and 114. The Board also rejected the proposition that the Board may never make orders pursuant to s.98(1) that temporarily interfere in the processes of others. The Board concluded that it had jurisdiction to grant relief under s. 98(1) which interfered with the processes of others where that interference could be grounded in the need to protect and enhance the Board's proceeding, or some other statutory objective.

Regarding the second criterion, the Board decided Local 183 made out a prima facie in the Main Application for the remedy about which it sought an interim order.

With respect to the third criterion, the Board was prepared to exercise its interim relief powers to establish an appropriate foundation on which to hear the complaint. The Board concluded that, on a balance, the harm that could come to Local 183, as a union and as a bargaining partner, if the Special Hearings Panel proceeds, outweighs the harm that could come to the responding parties if the Special Hearings Panel is delayed.

Finally the Board addressed LIUNA's request to vary the interim order. The Board found that although the amendments to the process of the Special Hearings Panel addresses some of the concerns of the parties, the Board should deny LIUNA's application on the basis that Local 183 should be able to proceed before the Board and have its complaint heard without the distraction of also participating in the Special Hearings Panel. The Board also noted that it was not appropriate to vary or amend the order while Local 183 was engaged in collective bargaining.

- c. *International Brotherhood of Electrical Workers, Local 105 -and - Kingsway Electrical Co.*, [2003] O.L.R.D. No. 4300 (McLean) (Upheld upon Reconsideration at [2003] O.L.R.D. No. 4502)

The Board granted interim reinstatement of employees discharged during an organizing campaign through a claim that their discharge had involved anti-health and safety animus reprisal under OHSA.

The Union brought a complaint pursuant to section 96 of the Labour Relations Act, 1995 alleging that two employees, Ray Martin and Byron Gamble were discharged by the Employer for exercising rights under the Act. The Union also brought an application under s.50 of the Occupational Health and Safety Act, R.S.O. 1990, c.0-1 as amended ("OHSA") which alleged that the employees were discharged for exercising rights under the OHSA. Finally, the Union applied for an interim order under section 16.1 of the Statutory Powers Procedures Act seeking to have the

employees reinstated pending a full hearing of the merits of the application under s.50 of the OHSA.

Contrary to the terms of the Statutory Powers Procedures Act which requires the respondent to file a response not later than 2 days after the application is delivered, the Employer failed to file a response to the Union's application for interim relief. Accordingly, the Board determined the application on the basis of the material filed before it and accepted that the facts as alleged were true pursuant to Rule 41.

The Board granted an interim order requiring the employer to immediately reinstate the employees to their employment the final decision of the Board in the s.50 application and ordered the employer to post the decision in the workplace.

Upon reconsideration, the Board concluded:

The Board disagrees with the responding party's position that it does not have the jurisdiction to order reinstatement on an interim basis. Section 98 of the LRA applies to procedures under the LRA. It is not one of the provisions which is captured by section 50 of the OHSA. Furthermore, there is not limitation to the Board's interim powers under the Statutory Powers Procedure Act. It may be that the Board ought not to grant reinstatement in connection with applications under the OHSA but that is a decision best made after a hearing where an application for an interim order has been properly responded to.

See also regarding application seeking an interim order where application under s.50 of the OHSA: *General Motors of Canada Ltd.* [2004] O.L.R.D. No. 416 (C.J. Albertyn) and related decisions including [2003] O.L.R.B. No. 4527.

- d. *Ontario Public Service Employees Union v. Ontario (Management Board Secretariat)* (Security Checks Grievance), [2003] O.G.S.B.A. No. 21 (Stewart)

The Ontario Grievance Settlement Board³ decided to grant interim relief in respect of the employer's security checks initiative.

The OPSEU and the AMAPCEO (the "Unions") filed grievances in respect to a security check initiative proposed to be implemented by the Ontario government (the "Employer"). The Unions sought an interim order prohibiting the Employer from proceeding with the process until such

³The *Crown Employees Collective Bargaining Act*, 1993 governs the process by which a trade union acquires bargaining rights and the procedures by which trade unions and employers engage in collective bargaining; the Act applies to Crown Employees (e.g. employees of the Ontario Public Service, the Workers' Compensation Board, the Liquor Control Board, etc.)

time as the Grievance Settlement Board disposed of the grievances on their merits.

The Employer's security initiative was aimed at protecting the integrity of its infrastructure and corporate systems and identity documentation such as drivers' licences, birth certificates and health cards that are electronically transmitted between different levels of government and within the province's ministries. The new policy would affect approximately 2000 employees, subjecting them variably, depending on the ministry they work in, to Canadian Police Information Centre checks, local police checks "to identify whether the employee is known to the police", fingerprint checks, national security checks and credit card checks. According to the government, "a satisfactory credit rating will indicate that employees/prospective employees have no serious financial circumstance that might make them vulnerable to using sensitive, private identity information for personal gain or to be in a position to be coerced into providing confidential identity information".

If an employee refused to consent to the security checks, he or she would be removed from the position designated as requiring security clearance. Similarly, if security clearance was not granted, the employee would not be allowed to remain in that position.

The employer argued that the Board was without jurisdiction to grant the order sought as the order was within the realm of "anticipated breach". The Board rejected the employer's submission, finding it had jurisdiction to grant an interim order in the circumstances as the initiative giving rise to the grievance was, in effect, a "fait accompli".

Applying the test for interim relief, the Board first determined whether the Unions had an arguable case. The Unions had filed a grievance objecting to the security initiative on the basis that it did not meet the test of reasonable rule pursuant to the management rights provisions of the collective agreements, that it did not accord with the provisions of the *Freedom of Information and Privacy Act*, and that it violated certain *Charter* rights. The Employer argued, on the other hand, that the Unions' position was without merit. On the Board's review of the authorities and submissions of the parties, it decided this part of the test for interim relief was met.

Secondly, the Board turned to the issue of the balance of convenience and potential harm. The Arbitrator decided that "on the information before me, concrete, immediate concerns are not readily apparent". In particular, she noted (at page 3, QL):

... there was no indication [that] the province's ongoing relationship with its federal counterparts is in any way in jeopardy if the status quo that has existed for many years in these Ministries continues pending the resolution of this dispute. In contrast, if the initiative is allowed to proceed, there is potential harm that could not be remedied by an award of damages, should the Unions ultimately be successful. There is no way to actually reverse the finger printing exercise. The displacement of employees removed from their jobs because of a refusal to consent to a security check or because of an unsatisfactory security check can be remedied on an going forward basis but not

retroactively. The questioned integrity of those who may be displaced because of an unsatisfactory credit card rating cannot be undone.

The Arbitrator concluded that the “privacy interests of employees represented by the Unions clearly outweigh the interests of the Employer in the particular circumstances of this case”.

Arbitration Decisions

See regarding recent statement of Board’s policy with respect to interim relief and employer ordered medical examinations: *Chatham-Kent Health Alliance -and- Ontario Public Service Employees Union (Liberty Shaw Grievance)*, [2004] OLAA No. 146 (R.J. Roberts); *Hastings and Prince Edward Counties Health Unit -and- CUPE, Local 3314 (Keeling Grievance)*, [2004] OLAA No. 57 (D.K.L. Starkman).