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File No.: 95818

June 8, 2011

E-FILED

Ms. Kirsten Walli
Secretary
Ontario Energy Board
Suite 2700, 2300 Yonge Street (27TH Floor)
P.O. Box 2319
Toronto, ON
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Dear Ms. Walli,

Re: EB-2011-0106
Goldcorp's Section 92 Harry's Corner to Balmertown TS Transmission Line;
June 7th, 2011 Motion Hearing

In my Reply oral argument of yesterday afternoon which I delivered between 4:10 and 4:31 p.m., I made certain points which at the time I was not able to pinpoint, but I now wish to support with authority.

First, in response to Ms. Sebalj's argument about the Board's lack of jurisdiction to make the requested order, I said that the contemporary approach of courts to interpreting statutes like the *Ontario Energy Board Act, 1998* is not to give them a narrow or technical interpretation but to give them a purposive one. I said that the Supreme Court of Canada has told us that we now must apply a purposive interpretation to statutes. In *R. v. Kapp*, [2008] 2 SCR 483, the Supreme Court said as follows:

> 2.1.1 Interpretative Approach
>
> [82] Our Court has given great importance to the need for purposeful interpretations. In *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, Iacobucci J. gives a detailed explanation of the rules of statutory interpretation, showing that one must first consider the wording of the Act, then the legislative history, the scheme of the Act, and the legislative context.

I also made the point that Ontario's *Legislation Act* requires that Ontario statutes like the *Ontario Energy Board Act, 1998* should be interpreted liberally and purposefully. Section 62 of the *Legislation Act,* 2006, S.O. 2006, c. 21 reads as follows:

> Rule of liberal interpretation
>
> 64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

Second, I submitted that the Board's power to make interim decisions under section 21(7) of the *Ontario Energy Board Act, 1998* is supported by section 16.1 of the *Statutory Powers Procedure Act*. I referred to two decisions of the Ontario Labour Relations Board that were equal in authority to Mr. Leitch's *Arzen* decision of the Ontario Human Rights Commission. I submitted that the reasoning in the Labour Relations Board decisions is compelling, and would also support the view that section 21(7) of the *Ontario Energy Board Act* permits substantial interim orders. The two decisions of the Ontario Labour Relations Board that I was thinking of were *OPSEAU v. Ontario (Management Board of Cabinet)*, [1996] OLRB Rep. 780 and *Martin v. Tricin Electric Ltd.*, [2004] OLRB Dep. 823. I gave Mr. Leitch copies of those decisions and it will be recalled that he mentioned them.

The relevant passage from the *OPSEAU* case is found at paragraph 37 and reads as follows:

> 37. On balance, it appears to us that section 16.1 of the *SPPA* gives jurisdiction to tribunals, including his one, to make decisions or orders on an interim basis that relate to or derive from the tribunal's general or overall jurisdiction. Provided the tribunal acts generally within its jurisdiction, it has a largely unfettered discretion to make interim "decisions or orders" that it has the jurisdiction to make on a final basis, after a hearing on the merits, or that it considers necessary in order to ensure that the statutory rights it deals with are protected until a final decision issues.

The relevant passage from the *Martin* case consists of paragraphs 35 to 37 which reads as follows:

> 35. One of the Crown's arguments in response is that section 16.1 of the SPPA only deals with "procedural" powers, only granting tribunals the authority to make interim orders of a "procedural" or "process" nature. This argument replicates the Crown's argument as to the meaning of the word "procedural" in section 98 of the Act.
>
> 36. However, the word "procedural" is not found in section 16.1 of the SPPA, and as with the LAOUR RELATIONS ACT, 1995, there are found elsewhere in the SPPA specific "process" powers. To read the unrestricted "interim" power in section 16.1 as so limited would render the section largely redundant. As well, section 16.1(2) empowers a tribunal to "impose conditions on an interim decision or order". It appears even less likely that the "interim orders" envisaged in section 16.1 were only of a "process" nature, given this explicit power to attach conditions to such orders. This linkage suggests orders of a more significant nature than merely running a hearing. We note also that section 16.1 authorizes the making of interim "decisions", not only "orders", further buttressing the argument that a tribunal can make substantive decisions on an interim basis under section 16.1.
>
> 37. On balance, it appears to us that section 16.1 of the SPPA gives jurisdiction to tribunals, including this one, to make decisions or orders on an interim basis that relate to or derive from the tribunal's general or overall jurisdiction. Provided the tribunal acts generally within its jurisdiction, it has a largely unfettered discretion to make interim "decisions or orders" that it has the jurisdiction to make on a final basis, after a hearing on the merits, or that it considers necessary in order to ensure that the statutory rights it deals with are protected until a final decision issues.

For of whatever interest they may be, I enclose copies of the *OPSEAU* and *Martin* Decisions.

I also enclose a letter to me from MNR dated June 6, 2011, which was only brought to my attention upon my return to my office this morning. Had I known about it yesterday, I would have placed it in evidence at the hearing.

Please refer this letter and enclosures to the hearing panel as it is part of my reply argument.

Yours truly,

Gardiner Roberts LLP

Ian A. Blue

cc. David Leitch (by e-mail)
Kristi Sebalj (by e-mail)

Enclosures

TORONTO-#242389-v1-Walli June 8 2011

1996 CarswellOnt 5006, [1996] O.L.R.B. Rep. 780

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1996 CarswellOnt 5006, [1996] O.L.R.B. Rep. 780

O.P.S.E.U. v. Ontario (Management Board of Cabinet)

Ontario Public Service Employees Union, Applicant v. The Crown in Right of Ontario Represented by Management Board of Cabinet, Responding Party v. Association of Management, Administration and Professional Crown Employees of Ontario (AMAPCEO), Intervenor

Ontario Labour Relations Board

Robert Herman, Alternate Chair, and Board Members R.W. Pirrie and P.V. Grasso

Judgment: October 7, 1996
Docket: Doc. 3731-95-M

Counsel: *Donald K. Eady, Barbara Linds* and *Eileen Wesley* for the applicant.

D. Brian Loewen, Anna Hoad, Ed Farragher and *Lorey Simpson* for the responding party.

Gary Gannage, Steven Barrett, Cynthia Petersen, Gary Hopkinson and *Janet Ballantyne* for the intervenor.

Subject: Labour and Employment

Crown Employees Collective Bargaining Act — Employee — Interim Relief — Remedies — Union applying to have Board determine whether certain persons should be excluded from its bargaining units as result of Bill 7 changes to Crown Employees Collective Bargaining Act — Union also asking for interim order that disputed individuals not be excluded pending Board's determination of the issue — Board considering its jurisdiction to make interim orders and concluding that Bill 7 amendments only give Board power to make interim orders dealing with conduct of proceedings and related matters — Board also concluding that Statutory Powers Procedure Act ("SPPA") granting Board general power to grant interim orders and that that power prevails over conflicting provision in Labour Relations Act — Board indicating that it will exercise its SPPA interim order jurisdiction (where discharges and reinstatement requests are not in issue) in a manner similar to the approach previously utilized by the Board prior to Bill 7 — Board denying interim order request here because harm in granting or withholding interim order evenly balanced and because of union's stated inability to commence an adjudication on the merits for some considerable period.

Decision of *Robert Herman, Alternate Chair*, and *Board Member P.V. Grasso*:

Background

1 This is an application for interim relief brought by the applicant, Ontario Public Service Employees Union (OPSEU), relying upon the provisions of section 98 of the *Labour Relations Act, 1995* (the "Act") and 16.1 of the *Statutory Powers Procedure Act* ("*SPPA*"). It raises the question as to the Board's jurisdiction and approach, under the new interim relief section in the Act, and under the *SPPA*. This matter was heard on January 31 and February 1, 1996. In a short decision issued February 5, 1996, the Board unanimously decided that no interim relief would issue, with our reasons to follow at a later date. We now provide those reasons.

2 OPSEU is the bargaining agent with respect to six of the seven bargaining units, established by order of the Lieutenant Governor in Council, covering employees with the provincial Crown. The bargaining agent with respect to the seventh bargaining unit is the intervenor, the Association of Management, Administration and Professional Crown Employees of Ontario (AMAPCEO). Indeed, AMAPCEO initially filed its own applications, an application under section 114(2) of the *Labour Relations Act, 1995*, and a companion request for interim relief, both similar in kind to the applications filed by OPSEU. However, the three parties agreed that AMAPCEO would not proceed with its interim application, but would be added as an intervenor, with full participation rights, in the instant application.

3 The "merits" application (Board File No. 3730-95-M) is an application by OPSEU brought pursuant to section 114(2) of the *Labour Relations Act, 1995*. That section reads as follows:

> (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.

4 The application arises out of a dispute over the interpretation and application of new criteria for excluding employees from coverage under the *Crown Employees Collective Bargaining Act, 1993* ("*CECBA*"). Specifically, pursuant to section 13 of Bill 7, section 1.1(3) was added to *CECBA*. This section reads as follows:

> (3) This Act does not apply with respect to the following:
>
> . . . . .
>
> 9. Employees exercising managerial functions or employed in a confidential capacity in relation to labour relations.
>
> 10. Persons employed in a minister's office in a position confidential to a minister of the Crown.
>
> 11. Persons employed in the Office of the Premier or in Cabinet Office.
>
> 12. Persons who provide advice to Cabinet, a board or committee composed of ministers of the Crown, a minister or a deputy minister about employment-related legislation that directly affects the terms and conditions of employment of employees in the public sector as it is defined in subsection 1(1) of the *Pay Equity Act*.
>
> 13. Persons who provide advice to Cabinet, a board or committee composed of ministers of the Crown, the Minister of Finance, the Chair of Management Board of Cabinet, a deputy minister in the Ministry of Finance or the Secretary of the Management Board of Cabinet on any matter within the powers or duties of Treasury Board under sections 6, 7, 8 or 9 of the *Treasury Board Act*, 1991.
>
> 14. Persons employed in the Ontario Financing Authority or in the Ministry of Finance who spend a sig-

nificant portion of their time at work in borrowing or investing money for the Province or in managing the assets and liabilities of the Consolidated Revenue Fund, including persons employed in the Authority or the Ministry to provide technical, specialized or clerical services necessary to those activities.

15. Other persons who have duties or responsibilities that, in the opinion of the Ontario Labour Relations Board, constitute a conflict of interest with their being members of a bargaining unit.

5 Section 67 of Bill 7, dealing with the effective date of some of the amendments, reads in part as follows:

67.(1) This section applies with respect to bargaining units that include, on the day this section comes into force, persons to whom the old Act applied but to whom the new Act does not apply.

(2) A trade union that is the bargaining agent for employees in a bargaining unit that includes persons described in subsection (1) ceases to represent those persons 90 days after this section comes into force, and they cease to be members of the bargaining unit.

. . . . .

6 The effective date of the exclusions was February 8, 1996. Because of these amendments, the parties had a number of meetings to discuss the operation of the new exclusionary criteria and their application to particular individuals. OPSEU and the Crown, represented by Management Board of Cabinet, were in dispute over approximately 300 positions. The Crown maintained that these positions were to be excluded by the new amendments, and OPSEU asserted that the positions properly remained covered by *CECBA*, and therefore the employees remained members of one of the OPSEU bargaining units. All of these discussions took place in the context of the then pending strike by OPSEU. While OPSEU members had not yet held a strike vote, it was clear by early February that a strike might be imminent.

7 In terms of the merits, the Crown asserts that the employees to be excluded work in Cabinet Office, the Premier's Office, the Public Appointments Secretariat, Management Board, the Ontario Financing Authority, and the Ministry of Finance - Controllership and Taxation Data branches.

8 OPSEU does not challenge the proposed exclusion of employees working in Cabinet Office or in the Office of the Premier. It does however dispute the individuals sought to be excluded who work in the Public Appointments Secretariat, and it disputes the purported exclusion of certain individuals working in the Program Management and Estimates Division of Management Board Secretariat. By far the largest category of employees in dispute between the parties are those who work for the Ontario Financing Authority, most employed by the Province of Ontario Saving Office ("POSO"). As OPSEU put it, most of the people sought to be excluded are customer service representatives (bank tellers) performing clerical functions which have nothing to do with the statutory basis for exclusion; that is, those "who spend a significant portion of their time at work in borrowing or investing money for the Province or in managing the assets and liabilities of the Consolidated Revenue Fund..." (cf. *CECBA*, s. 1.1(3)14).

9 As the parties were not able to resolve these disputes themselves, OPSEU and AMAPCEO filed the applications referred to above, both the "merits" application filed pursuant to section 114(2) of the Act, and the instant application for interim relief in support thereof. In the interim application, OPSEU asks that the Board order that none of the challenged exclusions be excluded pending a decision on the merits. In response to these applications, the Crown took the position that the Board did not technically have jurisdiction under section 114(2) of the Act to consider the application, as the issue here does not raise a question as to whether a person is an employee or not, which question gives the Board jurisdiction under section 114(2), but only raises the question of whether a particular person or employee is now excluded from the applicability of the provisions of *CECBA*. The Crown noted that neither *CECBA* nor the *Labour Relations Act, 1995* give the Board jurisdiction to deal with such a question. Nevertheless,

the Crown consented to the Board dealing with the merits in the main application, on the basis that the parties need a resolution of the dispute, the Board is the appropriate adjudicative forum, and there is no apparent alternative available to the parties. The Crown does not, however, consent to the Board dealing with the dispute on an interim basis, pursuant to section 98 of the *Labour Relations Act, 1995* or section 16.1 of the *Statutory Powers Procedure Act*.

The Legislation

10 It is helpful to set out the legislation dealing with interim relief that was contained in Bill 40. Section 92.1 of Bill 40 read as follows:

> *92.1*-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

11 Subsequent to the passage of section 92.1 in Bill 40, the Legislature amended the *Statutory Powers Procedure Act*, to add the following sections:

> 16.1-(1) A tribunal may make interim decisions and orders.
>
> (2) A tribunal may impose conditions on an interim decision or order.
>
> (3) An interim decision or order need not be accompanied by reasons.
>
> 17. A tribunal shall give its final decision and order, if any, in any proceeding in writing and shall give reasons in writing therefor if requested by a party.
>
> (2) A tribunal that makes an order for the payment of money shall set out in the order the principal sum, and if interest is payable, the rate of interest and the date from which it is to be calculated.

12 As well, section 32 of the *Statutory Powers Procedure Act* reads as follows:

> 32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.

13 All of Bill 40 was repealed by Bill 7, including section 92.1, and the *Labour Relations Act, 1995* now includes the following section:

> *98.*(1) On application in a pending proceeding, the Board may make interim orders concerning procedural matters.
>
> (2) The Board shall not make an order under subsection (1) requiring an employer to reinstate an employee in employment.

14 Neither in section 98 or elsewhere did the Legislature provide that the provisions of section 98 were to apply despite anything in the *SPPA*.

The Board's Jurisdiction under section 98 of the Labour Relations Act, 1995

15 There were no background materials put before us to aid in our interpretation, and reference by the parties was made only to the Act, the prior provisions in Bill 40, and the *SPPA*. The Crown's primary argument is that section 98(1) only confers upon the Board powers to "make interim orders concerning procedural matters", and "procedural matters" are orders that touch only upon "procedural" issues. For example, asserts the Crown, this section gives the Board the power to make interim directions with respect to which parties proceed first, whether parties must produce documents or other material, whether parties must file certain particulars, and so on.

16 One difficulty with this interpretation of subsection 1 of section 98, and more specifically the phrase "concerning procedural matters" contained therein, is that all of these powers, and other similar "procedural" ones, are already contained elsewhere in the Act. Indeed, when Bill 40 was the law, the Board commented on its pre-existing ability to make (for example) production orders without resort to a specified interim power: see *Highland York Flooring Company Limited* [1993] OLRB Rep. July 607. In section 111(2) of the Act, the Board is given the power, for example:

> (a) to require any party to furnish particulars before or during a hearing;
>
> (b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing;
>
> (c) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce the documents and things that the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;
>
> (d) to administer oaths and affirmations;
>
> (e) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not;
>
> (f) to require persons or trade unions, whether or not they are parties to proceedings before the Board, to post and to keep posted upon their premises in a conspicuous place or places, where they are most likely to come to the attention of all persons concerned, any notices that the Board considers necessary to bring to the attention of such persons in connection with any proceedings before the Board;
>
> (g) to enter any premises where work is being or has been done by the employees or in which the employer carries on business, whether or not the premises are those of the employer, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any matter and post therein any notice referred to in clause (f);
>
> (h) to enter upon the premises of employers and conduct representation votes, strike votes and ratification votes during working hours and give such directions in connection with the vote as it considers necessary;
>
> •

. . . . .

17 When invited to suggest an example of a "procedural" matter that the Board would be without jurisdiction to order, but for the provisions of section 98(1) of the Act, the Crown was unable to do so.

18 It is also instructive to refer to the wording of section 98(2) of the Act in considering the meaning of section

98(1). Section 98(2) reads as follows:

> (2) The Board shall not make an order under subsection (1) requiring an employer to reinstate an employee in employment.

19 Here the legislative intention seems clear: the Board is not to make an interim order which "require[s] an employer to reinstate an employee in employment". What is instructive is that subsection (2) notes that the Board "shall not make an order under subsection (1)" to this effect. It follows that such an order of reinstatement would, but for subsection (2), arguably fall within the ambit of subsection (1), at least in the view of the legislative draftsman. This wording in subsection (2) might seem to suggest that orders under subsection (1) are not limited to strictly "procedural" matters, at least as so characterized by the Crown, but extend to the way parties must interact or behave in the workplace pending a "final" determination in the proceeding before the Board. To similar effect is the marginal note beside subsection (2), which says "exception", buttressing the point that the restriction set out in subsection (2) is a restriction upon the Board's authority otherwise contained in section 98(1).

20 Section 98(1) does not contain a specified power to issue "interim relief", as was contained in its predecessor, section 92.1, but only to grant "interim orders". The significance of this change is not clear. One might argue that the elimination of the power to grant "relief" by way of interim order suggests that the Legislature did intend to restrict the sorts of interim orders that the Board had been granting under Bill 40, that the word "relief" contains an aspect of "remedy" or "remedial direction" within it, while the word "order" does not. This argument is not particularly persuasive when one compares the language and ambit of section 98 to section 99, where one finds that the term "interim order" includes both "remedial" and substantive features.

21 Section 99 of the Act reads as follows:

> *99.*(1) This section applies when the Board receives a complaint,
>
> (a) that a trade union or council of trade unions, or an agent of either was or is requiring an employer or employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another;
>
> (b) that an employer was or is assigning work to persons in a particular trade union rather than to persons in another; or
>
> (c) that a trade union has failed to comply with its duties under section 74 or 75.
>
> (2) A complaint described in subsection (1) may be withdrawn by the complainant upon such conditions as the Board may determine.
>
> (3) The Board is not required to hold a hearing to determine a complaint under this section.
>
> (4) Representatives of the trade union or council of trade unions and of the employer or employers' organization or their substitutes shall promptly meet and attempt to settle the matters raised by a complaint under clause (1)(a) or (b) and shall report the outcome to the Board.
>
> (5) *The Board may make any interim or final order it considers appropriate after consulting with the parties.*
>
> (6) *In an interim order or after making an interim order, the Board may order any person, employers' organization, trade union or council of trade unions to cease and desist from doing anything intended or likely to inter-*

fere with the terms of an interim order respecting the assignment of work.

(7) *When making an order or at any time after doing so, the Board may alter a bargaining unit determined in a certificate or defined in a collective agreement.*

(8) If a collective agreement requires the reference of any difference between the parties arising out of work assignment to a tribunal mutually selected by them, the Board may alter the bargaining unit determined in a certificate or defined in a collective agreement as it considers proper to enable the parties to conform to the decision of the tribunal.

(9) Where an employer is a party to or is bound by two or more collective agreements and it appears that the description of the bargaining unit in one of the agreements conflicts with the description of the bargaining unit in the other or another of the agreements, the Board may, upon the application of the employer or any of the trade unions concerned, alter the description of the bargaining units in any such agreement as it considers proper, and the agreement or agreements shall be deemed to have been altered accordingly.

(10) A party to an interim or final order may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

(11) An order that has been filed with the court is enforceable by a person, employers' organization, trade union or council of trade unions affected by it and is enforceable on the day after the date fixed in the order for compliance.

(12) *A person, employers' organization, trade union or council of trade unions affected by an interim order made by the Board under this section shall comply with it despite any provision of this Act or of any collective agreement relating to the assignment of the work to which the order relates.*

(13) A person, employers' organization, trade union or council of trade unions who is complying with an interim order made by the Board under this section is deemed not to have violated any provision of this Act or of any collective agreement.

(emphasis added)

22 This is a new section in the Act, and at least in part can find its antecedents in the Act as it existed prior to Bill 40, and in Bill 40 itself. For example, under Bill 40, the Board was given the power to consider and deal with jurisdictional disputes (Bill 40, s. 93) by way of "consultation", and to make interim orders in such a proceeding or process. In the new Act, the Board's ability to consult and make interim "orders" is expanded to other types of complaints (i.e. section 74 and 75 complaints). Through section 99(5), the Board is given the power in dealing with such matters to "make any interim or final order it considers appropriate" after consulting. The language of section 99(5) is identical to that in Bill 40 (section 93(1.2)), except that the predecessor section granted interim powers after an inquiry as well as after a consultation.

23 Subsection (6) of section 99 states that an interim "order" can be in the nature of a "cease and desist" order (hardly a procedural matter that regulates a proceeding). Along with final orders, an interim "order" can be filed in the Ontario Court (General Division) and is then enforceable as such (section 99(10)). Section 99(12) states that interim orders issued under section 99 take precedence over provisions in the Act or a collective agreement which relate to the assignment of the work to which the interim order relates.

24 As is evident, substantive interim "orders" can issue under section 99, notwithstanding the use of the noun

"order", rather than "relief". It is difficult, given this language, to argue convincingly that the use of the word "orders" in section 98(1), and the deletion from Bill 40 of the word "relief", in reference to the interim power, demonstrates a legislative intention that the section 98 interim power have no remedial aspect, but is meant only to authorize the granting of lesser "orders".

25 What is of significance is that the express power to grant interim orders in section 99 is not modified by the adjective "procedural", as it is in section 98. The unmodified interim power granted in section 99(5) suggests that there is an intentional restriction on the interim power in section 98, that the authority granted there is limited to "procedural matters". And of course, the section 98 interim power applies to proceedings brought under section 99, even though it is difficult to posit an interim order the Board could make under section 99 (or section 111(2)) that it could not make but for section 98 (other than interim orders that are made when the Board has not first consulted with the parties).

26 Thus, the juxtaposition of sections 98 and 99 and the different language used therein, does suggest that the Legislature intended section 98 to be a grant of interim power different in kind than that granted in section 99, and that it intended the authority under section 98 to be limited to matters that are procedural (i.e. deal with the conduct of the proceeding).

27 This interpretation of section 98 does render the section somewhat redundant as a *grant* of power, and the words used in section 98 may not be the clearest expression of this purpose. Both of these points have been canvassed above. But this interpretation appears to reflect the intention of the Legislature in passing section 98. It is in looking at the history of the section, its language, and the other grants of the interim power in the Act that this interpretation seems the most likely.

28 Further buttressing this interpretation are the new provisions setting out the powers of *arbitrators* to make interim orders. Sections 48(12) and (13) read as follows:

> *48.*12) An arbitrator or the chair of an arbitration board, as the case may be, has power,
>
> (a) to require any party to furnish particulars before or during a hearing;
>
> (b) to require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing;
>
> (c) to fix dates for the commencement and continuation of hearings;
>
> (d) to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases; and
>
> (e) to administer oaths and affirmations,
>
> and an arbitrator or an arbitration board, as the case may be, has power,
>
> (f) to accept the oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not;
>
> (g) to enter any premises where work is being done or has been done by the employees or in which the employer carries on business or where anything is taking place or has taken place concerning any of the differences submitted to the arbitrator or the arbitration board, and inspect and view any work, material, ma-

chinery, appliance or article therein, and interrogate any person respecting any such thing or any of such differences;

(h) to authorize any person to do anything that the arbitrator or arbitration board may do under clause (g) and to report to the arbitrator or the arbitration board thereon;

(i) *to make interim orders concerning procedural matters*;

(j) to interpret and apply human rights and other employment-related statues, despite any conflict between those statutes and the terms of the collective agreement.

(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.*

(emphasis added)

29 The language of section 48(12)(i) and (13) is virtually identical to the relevant language in Section 98(1) and (2). The *SPPA* does not apply to arbitrators under the Act, and unlike the Board, arbitrators must find their authority solely within the *Labour Relations Act, 1995*. Section 48(12) speaks generally to the grant of powers to arbitrators to conduct hearings (and to apply certain statutes cf.s. 48(12)(j)). When one looks at sections 48(12) and (13) in this context, it appears as if these sections are intended to grant arbitrators the power to run hearings and to direct the conduct of the parties in the proceeding, not the conduct of the parties in the workplace unrelated in any way to the conduct of the proceeding. As the language in section 48(12) and (13) is so similar to the language in section 98(1) and (2), any interpretation of section 98(1) that concluded that the Board's power contained therein was substantially greater than orders dealing with matters of procedure would logically also govern arbitrators' powers. But it is difficult to interpret sections 48(12)(i) and (13) as granting arbitrators the right to make a wide variety of orders that govern workplace conduct and rights pending a final decision. Such an interpretation would no doubt be surprising to the arbitration community.

30 The wording of section 98 is somewhat ambiguous, but on balance we conclude that the Legislature intended in enacting section 98 that the Board only issue interim orders dealing with "procedural matters", that is, the conduct of the proceeding and related matters.

31 This conclusion, however, does not end our inquiry.

Jurisdiction under the Statutory Powers Procedure Act

32 The Board also has a separately-founded interim order authority under the *SPPA*. OPSEU and AMAPCEO submit that under the provisions of section 16.1 of the *SPPA*, the Board has the full range of interim powers that it enjoyed prior to the repeal of Bill 40 and the passage of section 98 of Bill 7. It will be easier to follow our analysis if we set out again the provisions of section 16.1, 17 and 32 of the *Statutory Powers Procedure Act*:

16.1-(1) A tribunal may make interim decisions and orders.

(2) A tribunal may impose conditions on an interim decision or order.

(3) An interim decision or order need not be accompanied by reasons.

17. A tribunal shall give its final decision and order, if any, in any proceeding in writing and shall give reasons

in writing therefor if requested by a party.

(2) A tribunal that makes an order for the payment of money shall set out in the order the principal sum, and if interest is payable, the rate of interest and the date from which it is to be calculated.

. . . . .

32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.

33 As will be seen, section 16.1 gives all tribunals to which the *SPPA* applies, an independent authority to make interim decisions and orders; moreover, pursuant to section 32, should there be any conflict between provisions of the *SPPA* and other provincial statues, the provisions of the *SPPA* are to prevail (in this regard, see *Thompson and Lambton County Board of Education*, [1972] 3 O.R. 889, upheld on appeal at [1973] 1 O.R. 766). Section 110(21) of the Act (newly enacted in Bill 7) is an example of such "override":

110. (21) Rules made under subsection (18) apply despite anything in the *Statutory Powers Procedure Act.*

34 There is no dispute that the provisionsof the *SPPA* apply to the Board, unless explicitly exempted in the *Labour Relations Act, 1995*, as was done in section 110(21). OPSEU and AMAPCEO thus argue that the effect of any limitation on interim powers contained in section 98 of the Act cannot stand in the face of the generally unlimited jurisdiction to grant interim relief granted to tribunals, such as the Board, in section 16.1 of the *SPPA*. Section 16.1 overrides or subsumes any limitations on interim powers in section 98. The Legislature must be taken to have been aware of the *SPPA* at the time it passed Bill 7, submit OPSEU and AMAPCEO, both because of the general presumption to this effect, and because the new section 110(21) it enacted explicitly recognizes the *SPPA*, and states that certain rules made under section 110 are to apply "despite anything in the *Statutory Powers Procedure Act.*" It must follow, they argue, that the *Labour Relations Act, 1995* was passed with an actual awareness of the content and meaning of the *SPPA*.

35 One of the Crown's arguments in response is that section 16.1 of the *SPPA* only deals with "procedural" powers, only granting tribunals the authority to make interim orders of a "procedural" or "process" nature. This argument replicates the Crown's argument as to the meaning of the word "procedural" in section 98 of the Act.

36 However, the word "procedural" is not found in section 16.1 of the *SPPA*, and as with the *Labour Relations Act, 1995*, there are found elsewhere in the *SPPA* specific "process" powers. To read the unrestricted "interim" power in section 16.1 as so limited would render the section largely redundant. As well, section 16.1(2) empowers a tribunal to "impose conditions on an interim decision or order". It appears even less likely that the "interim orders" envisaged in section 16.1 were only of a "process" nature, given this explicit power to attach conditions to such orders. This linkage suggests orders of a more significant nature than merely running a hearing. We note also that section 16.1 authorizes the making of interim "decisions", not only "orders", further buttressing the argument that a tribunal can make substantive decisions on an interim basis under section 16.1.

37 On balance, it appears to us that section 16.1 of the *SPPA* gives jurisdiction to tribunals, including this one, to make decisions or orders on an interim basis that relate to or derive from the tribunal's general or overall jurisdiction. Provided the tribunal acts generally within its jurisdiction, it has a largely unfettered discretion to make interim "decisions or orders" that it has the jurisdiction to make on a final basis, after a hearing on the merits, or that it considers necessary in order to ensure that the statutory rights it deals with are protected until a final decision issues.

Reconciling section 98 of the Act and section 16.1 of the SPPA

38 Given this conclusion, the Board's powers granted under section 16.1 of the *SPPA* would appear inconsistent with the far more restrictive interim powers granted under section 98 of the Act. The two cannot stand together, and do not merely overlap. The former grants a general jurisdiction to grant interim orders, while the latter grants the authority to make interim orders that deal with the conduct of the proceeding only.

39 Since there is an inconsistency between the two statutory provisions, we must have resort to section 32 of the *SPPA*, the override provision. While the application of that section does not depend on awareness of its content, it must be taken that the Legislature was fully cognizant of the *SPPA* and its override provisions, since it explicitly exempted the application of the *SPPA* in section 110(21) of the Act. The Legislature did not, however, direct that the provisions of section 98 of the Act were to apply despite the *SPPA*. Under section 32 of that Act, therefore, the provisions of the *SPPA* (here, section 16.1) prevail over the provisions of the *Labour Relations Act, 1995* (section 98), since the two provisions conflict.

40 We conclude in the result that the Board has a general power to grant interim orders, as long as the orders are within or relate to the Board's general jurisdiction.

The Board's Approach to Considering Interim Orders or Decisions

41 We must now consider the issue of the approach to bring to questions of interim relief under section 16.1 of the *SPPA*.

42 To answer this, it is helpful to describe the approach that the Board took to dealing with interim relief up until the legislative amendments. Generally speaking, the Board began by adopting a two-step approach, first assessing whether the application set out an arguable case for the relief requested, and if so, balancing the harm that would result from granting the relief requested against the harm that would flow if the relief was not granted. (see, for example, *Loeb Highland*, [1993] OLRB Rep. Mar 197; *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019; *Vistamere Retirement Residence*, [1994] OLRB Rep. Sept. 1274.) That approach derived from the statutory context, as it is the statutory mandate which guides all Board administrative and adjudicative decisions. The Board looked to the rights and obligations in its constituent statute (then Bill 40), and was guided and directed by the charge placed upon it by the Legislature.

43 As the Board gained more experience in dealing with applications for interim relief, as it confronted more factual contexts in which such relief was sought, it became apparent that there were many factors that the Board ought to, and did, consider in determining whether to issue relief. Factors that were significant included the delay in filing the application (for example: *Morrison Meat Packers Ltd.* [1993] OLRB Rep. Apr. 358), the stage of the relationship or the underlying dispute (*Fort Erie Duty Free Shoppe Inc.* [1993] OLRB Rep. Dec. 1307), the nature of the particular work site or sector and a consideration of how the relative harm to the parties will impact in the specific context (*Price Club* [1993] OLRB Rep. July 635), and whether granting an interim order would have, in the circumstances, effectively determined the substantive issues between the parties (*Fort Erie Duty Free Shoppe, supra*).

44 As can be seen, *Loeb Highland* represented the beginning of an evolutionary approach that still continues. As the Board phrased it in *Ombudsman Ontario* [1994] OLRB Rep. July 885:

. . . . .

> 9. The Board's approach to interim relief applications has been to avoid as much as possible prejudicing the merits of the main application (which in the case of an "intended proceeding" may not even be formally before the Board). However, there will inevitably be some connection between the interim application and the main application such that some assessment of at least the apparent merits of the main application must inevitably be

made.

10. In the result, a two-pronged "test" has emerged in the Board's interim relief jurisprudence to date. First, assuming the applicant's assertions to be true, is there an arguable breach of the *Labour Relations Act* (or presumably any other legislation with respect to which the Board plays an adjudicative role) for which there is a remedy which the Board is arguably empowered to give? Second, if so, does the balance of *labour relations* harm favour the granting of interim relief?

11. In *Tate Andale Canada Inc., supra*, the Board observed, in paragraph 52, that:

> ...where the employer bears the legal onus of establishing that it has *not* contravened the Act, it is hardly surprising that the union request that the "pre-discharge" status quo be maintained until the employer meets the statutory onus cast upon it. If the employer is obliged to establish that its removal of the employees from the workplace was *not* unlawful, there is nothing counter-intuitive about keeping them there until it does so...
>
> (emphasis added)

This comment must be read in the context of the situation before the Board in that case: namely, the discharge during an organizing campaign of employee organizers, and not as a suggestion that the onus in interim proceedings necessarily lies with the party which bears the onus in the main application - which may not even have been brought. There is nothing which absolutely prohibits discharges or layoffs prior to certification, before a first collective agreement, or between collective agreements. Nor is there anything which requires that a discharged or laid off employee must be reinstated on an interim basis in such circumstances.

12. The two-pronged test developed by the Board suggests that at least the initial onus is on an applicant for interim relief to satisfy the Board that interim intervention is appropriate. Consequently, an applicant must plead an arguable or *prima facie* case. This is not a particularly onerous hurdle since an applicant should be able to describe its allegations in a manner which suggests that it may have something to complain about. Further, an applicant must establish that interim relief is appropriate; namely, that it will suffer some substantial labour relations harm unless the Board intervenes pending the disposition of the application it has pleaded on its merits. This is not terribly onerous either, since it only requires an applicant to explain why it seeks interim relief and what labour relations harm will occur if it does not obtain the interim relief it seeks. In determining whether interim relief is appropriate, the Board also looks to the responding party's assertion of harm to see whether there is any countervailing labour relations harm which makes interim relief inappropriate. That is, the Board weighs the respective harms and assesses whether interim relief is appropriate.

13. Because of the wide variety of proceedings and circumstances in which interim relief may be sought, a flexible approach to the two-pronged test is indicated, so that the appropriate labour relations result may be achieved in each case.

. . . . .

(And see *Westbury Howard Johnson Hotel* [1994] OLRB Rep. Aug. 1166 where the Board also assessed the relative merits of the parties' positions and arguments, and not only whether the applicant had pleaded an arguable case.)

45 It is difficult to attempt to list the myriad factors that the Board considers when dealing with applications for interim relief, for one can fairly describe the approach as an attempt to take into account all the relevant circumstances, including, as *Ombudsman* indicates, the interests of the responding party. Those circumstances include a consideration of the nature of the specific remedy sought, and the fact that an interim order is an extraordinary rem-

edy and ought not to be granted without consideration for the appropriateness of granting such relief before a hearing on the merits. Interim intervention in a bargaining relationship, or a potential one, may itself bring negative consequences for the relationship between the parties. Thus, the Board on occasion has dealt with applications of this nature by deferring consideration of the interim application and scheduling the merits to be heard in an expedited fashion.

46 Should this approach be changed now? Should the Board adopt an approach different in nature because we now exercise our power under the *SPPA*, and because of the restriction contained within section 98(2) of the Act?

47 Turning first to the effect of section 98(2) of the Act (which as noted above, has not affected the Board's *jurisdiction*), the short answer is that the question of whether the Board ought ever to reinstate an employee to employment on an interim basis does not fall to be resolved in the instant case. No discharges are part of the factual context before the Board, and resolution of this difficult issue is best left to a case in which it arises, where the parties before the Board will have full opportunity to argue the point, and where the Board will have the benefit of a context in which to assess how best to respect the legislative intention expressed in both statutes.

48 Where discharges and reinstatement requests are not in issue, should the Board continue with the approach begun in *Loeb Highland*? The approach that the Board has heretofore adopted did arise under a different statutory context, the *Labour Relations Act* as it then was, and was developed with deference to and derivation from that statutory regime. That statute has now changed in some fundamental respects. And the power we exercise in this area, beyond orders dealing with the conduct of the proceeding is now founded on a jurisdiction granted under a statute of general application.

49 Nevertheless, we consider it appropriate to exercise our jurisdiction in this area in a manner similar to the the approach previously utilized by the Board. Although our authority now derives from a statute of general application, the general interim power granted to the Board, and other tribunals, through the *SPPA*, is in our view a plenary authority to make interim orders that are related to the tribunal's constituent statute, and the rights, obligations and duties contained therein.

50 The *SPPA* does not give a tribunal a general inherent power to make interim orders of any nature and for any purpose. It gives an interim power that is not defined within the *SPPA*, but which must be exercised in a manner responsive to and with a view towards the purpose, function and powers of the tribunal in question, as defined by the statutory enactment setting up or regulating the tribunal. It is still to the *Labour Relations Act* (now the new Act) that the Board must look to give it guidance as to how it ought to exercise any interim relief powers that it might have. This remains true where the power itself is granted elsewhere. The defining of and the parameters of that power reside in the *Labour Relations Act, 1995*.

51 When we look to the Act, many of the statutory rights that led the Board to develop its previous approach to the exercise of its interim powers still exist. The section numbers may have changed, but there still remains, for example, the right of employees to exercise their rights under the Act, and employee rights continue to include the right to support or oppose a union, to join or not to join a union, to be active or be passive in the determination of the issues, and to be free from undue influence in the exercise of their rights. Unions still enjoy the right to seek to represent employees, free from any unlawful interference by an employer, or others acting on its behalf and employers still enjoy the rights they enjoyed before the new Act; for example, the right to deal with the exclusive bargaining agent, or the right to insist on no work stoppages during the tenure of the collective agreement.

52 The similar statutory context leads the Board to conclude that a similar approach to dealing with interim relief is appropriate, one that finds substance from the rights contained in the Act, one of continuing development and refinement, and one which continues to recognize the extraordinary nature of interim relief, and the caution with which the Board must approach remedial relief in this area. The Board will remain cognizant of the potential for

abuse, and remain aware that interim relief will often be a second-best alternative to a hearing on the merits. But where exercised with sensitivity, it is a power and approach that has served the community well, both union and employer.

53 For example, in *New Dominion Stores*, [1993] OLRB Rep. Aug. 783, the Board had to deal with competing claims by two trade unions with respect to bargaining rights in respect of over 200 different employers in the retail grocery industry. This dispute between the two unions arose in the context of a merger between two unions, which was contested by a rival union. The two resulting unions then engaged in a war of sorts as to who ought to have the bargaining rights with respect to a large number of stores across the province, involving a considerable number of employers.

54 It was apparent that some considerable time would pass before a decision could issue determining which union held bargaining rights for which employees. Throughout this time, neither the employers, the two unions, nor the employees at any of the stores could have reliably known which union was their bargaining agent. This would have effectively prevented all participants from dealing with each other in any meaningful fashion, and from exercising the rights that some or all of them might have enjoyed under the Act, because the scheme of the Act is premised on there being a single exclusive bargaining agent. The Board granted interim relief which preserved the status quo at the time; that is, particular employers were required to deal with whichever union they had been dealing with prior to the eruption of this dispute. The net effect was that rights and obligations under the Act continued until such time as the Board could deal with the application on the merits. While the interim orders made in that case issued under Bill 40, they provide an example of both the merit of the Board's approach and of orders that could, in our view, still appropriately be made.

Whether to grant Interim Relief here

55 Should the interim relief requested here be granted? We begin with the observation that, but for the consent of the parties, it is not apparent that this Board would have jurisdiction to deal with this type of application on the merits. As noted by the Crown, the question before the Board in the main application is whether the individuals in dispute are excluded from coverage by *CECBA*. The application does not raise the question of whether a particular person is a "employee" under the Act or not. Section 114(2) of the Act is said to give the Board jurisdiction, but it is limited to this latter question (with respect to the issues here).

56 At the same time, the Crown concedes that the Board can and should deal with this matter on the merits, and although it takes the contrary position with respect to the granting of interim relief, we recognize that with a little artful creativity, this matter could have come before us in a form that would give us unquestionable jurisdiction. However, in the result, we need not base our decision in any respect on this point.

57 When we consider the merits of the parties' positions, it seems likely that some of the people or positions in dispute might well be excluded at the end of the day, as asserted by the Crown. Similarly, some will likely be found to not fall within the new *CECBA* exclusions. Any interim order might therefore deprive employees of significant statutory rights they enjoy. Employees covered by *CECBA* and the *Labour Relations Act, 1995* have the "right to strike", those excluded do not. Were we to grant the interim relief sought by OPSEU, and through an interim order direct that individuals claimed by the Crown to already be excluded by operation of law are not to be excluded pending a Board decision on the merits, the effect of our order would be to continue to place those employees in a position where the provisions of *CECBA* applied to them, and where they would be entitled to strike, and subject to the pressures and consequences of being in the bargaining unit. If they were ultimately excluded, our order would directly and irretrievably deny their statutory rights. The converse is also true. If through interim relief we exclude these employees (or more accurately, uphold their exclusion by operation of law), but they should properly never have been excluded, we would be depriving them of their right to vote, and if duly authorized, to strike. The harm that might result from any interim order is irreparable, and it is difficult to estimate whether the harm will be greater or less if interim relief is granted or not.

58 There were other examples of harm asserted by OPSEU, but such harm appears fully correctable once the result in the main application is known. The Crown undertook to fully compensate all employees found to be covered by *CECBA*, who had been improperly excluded, and to make full redress, so that those employees would be in the same position as if they had always been included. Any wage differentials, job postings or classification changes, and so on, can later be amended to fully reflect the eventual adjudicated result.

59 Of significance are the specific legislative provisions at issue. Under Bill 7, as of February 8, 1996, all persons falling within, for example, section 1.1(3)14 of *CECBA*, were deemed excluded. If we were to grant interim relief preventing the Crown from treating any of these individuals as excluded until such time as the application on the merits was heard, and any of them were subsequently determined to have properly been excluded (which, as noted, we consider not unlikely), through our interim power we would have effectively nullified the effect of section 67(2) of Bill 7.

60 Ultimately, there was one factor which we found compelling in deciding not to grant interim relief: OPSEU's stated inability to commence an adjudication on the merits for some considerable period. On January 11, 1996, OPSEU received a list of employees from the government of those employees that the government concluded ought to be excluded pursuant to the new amendments. This application was filed on January 25, 1996. At the hearing on the interim application, the Board indicated that it was prepared to deal with the merits through expedited scheduling, and it inquired of the parties when they might be able to proceed on the merits. Given the importance of the rights at issue, the imminence of any strike, and the problems with dealing with such disputes through interim relief, special resources devoted to adjudication on the merits made some sense.

61 The Crown indicated it could be prepared to proceed on the merits within two weeks. OPSEU indicated it could not begin to have the Board deal with the merits of the application for at least two months. While preparation for litigation would be extensive, given the number and variety of disputed positions, it still seemed to the Board that the time necessary should have been considerably less than two months. We concluded that OPSEU preferred to have the matter dealt with on an interim basis, rather than on the merits. OPSEU's unwillingness to have the matter heard on the merits in an expeditious fashion, without reasonable excuse, alone led the Board to conclude that no interim relief ought to be granted in the circumstances.

62 For all these reasons, the Board issued the decision that it did on February 5, 1996.

Decision of *Board Member R.W. Pirrie*:

1 I concur with the decision not to grant the interim relief sought by OPSEU for the reasons set out in paragraphs 60 and 61 above.

2 That said, I must distance myself from the balance of the reasoning in this decision.

3 The effect of Bill 7 was to return the Province's labour relations legislation to what it had been prior to the NDP Government having enacted in Bill 40. It eliminated all of those provisions which the newly elected conservative government felt tilted the balance of power in favour of trade unions and away from employers. At the same time it attempted to empower employees in the process. There can be no question as to the government's intention with respect to interim orders. It was to limit, and indeed to curb the granting of interim orders by the Board.

4 At paragraph 26 above, the majority of the panel acknowledges that indeed section 98 of the *Labour Relations Act* does limit the Board to granting interim orders in procedural matters only. The majority, however, then goes on to find that through section 16.1 of the SPPA, the OLRB in fact retains its power to make interim orders which go beyond procedural matters.

5 My first difficulty is with the notion that the Board can use the SPPA, which in its entirety is given over to procedural matters, as an avenue to reclaim the jurisdiction to make non-procedural interim orders.

6 My second difficulty is that the majority at paragraph 50 above takes that jurisdiction by reference back to the *Labour Relations Act*, but in doing so totally ignores section 98 of that very Act, which speaks directly to its jurisdiction vis-a-vis interim orders.

7 It may be the case that in order to have certainty, the drafters of Bill 7 should have exempted section 98 of the *Labour Relations Act* from the SPPA. Indeed, in order to have absolute certainty, the drafters of the legislation should have removed section 16.1 from the SPPA entirely. That said, there is no doubt in my mind as to the legislation's intention regarding the scope of the Board's authority in granting interim orders, and I find this decision wrong in its reasoning and excessive in the extreme.

8 In conclusion I add the following comments by way of obiter. The majority of this panel, and more correctly in this instance the alternate chair of the Board, having made this precedent ruling that the Board has the jurisdiction to grant interim orders beyond mere procedural matters, goes on to discuss the approach the Board should use, vis-a-vis, section 16.1 of the SPPA. He reviews the approach the Board took under the Bill 40 interim order provision. I find it interesting that these comments lean heavily on what might be termed the more thoughtful rulings and reasoning about the use of interim orders during the Bill 40 period. That said, it is my view that no matter how well-intentioned some of the authors of the Board's Bill 40 jurisprudence may have been, the major thrust of that jurisprudence, and the process which accompanied it, was blatantly biased against the employers.

9 In my opinion, paragraph 52 above is almost a dream wish. The author starts by suggesting for the Board a similar approach to dealing with interim relief as was utilized under Bill 40. He uses terms such as the continued recognition of interim relief as an extraordinary measure, the need to remain cognizant of the potential for abuse, that interim relief will often be a second-best alternative to a merits hearing, that with the exercise of sensitivity, interim relief has the power to serve the community well, both union and employer.

10 I know both the current alternate chair and I were at the Board throughout the Bill 40 period. I can only say that my experience was that the interim relief provisions of the Act were never viewed by the majority of the Board, and more particularly, the overwhelming majority of the vice-chairs and the then chair, as anything but a very ordinary measure, that there was blatant abuse of the process which was never corrected, that interim relief was seldom denied in lieu of a merits hearing, and that sensitivity in granting interim relief was not a hallmark of the jurisprudence. I cannot recall many cases in my Bill 40 experience where the employer was well served by a Board's interim order. It is precisely for these reasons that the current government took the Board's interim order power away from it. Had the Board acted more judiciously in the exercise of its interim order authority, had the Board truly approached the authority as suggested in paragraph 52, it might well have retained its authority legitimately through the current *Labour Relations Act*.

11 I would have no reason to believe that the vice-chairs who were at the Board during the Bill 40 era, and who are still at the Board, will take any different approach to interim orders under the SPPA than was done under Bill 40.

12 Lastly, I note the majority at paragraph 47 does not deal with the reinstatement issue. If as the majority have decided, the Board derives its authority to grant interim orders beyond procedural matters from the SPPA, and so decides in the face of section 98(1) of the *Labour Relations Act*, it follows that that authority must extend to reinstatement. If the Board is going to ignore the legislative direction in section 98(1) it is going to ignore the direction in section 98(2).

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Martin v. Tricin Electric Ltd.

Ray Martin, Applicant v. Tricin Electric Ltd., Responding Party

Ontario Labour Relations Board

McLean V-Chair

Judgment: August 10, 2004
Docket: 1465-04-M

Counsel: Ron Lebi, Ray Martin, Bill Martindale, Richard Soroka, for Applicant

Ian St. John, for Responding Party

Subject: Labour and Employment; Public

Labour law --- Labour Relations Boards — Jurisdiction — General principles.

Labour law --- Discipline and termination — Remedies — Reinstatement — Interim order for reinstatement.

Cases considered by *McLean V-Chair*:

A.T.U., Local 1731 v. McIntosh Limousine Service Ltd. (2000), [2000] O.L.R.B. Rep. 249, 2000 CarswellOnt 5767 (Ont. L.R.B.) — considered

I.B.E.W., Local 105 v. Kingsway Electric Co. Ltd. (2003), 100 C.L.R.B.R. (2d) 317, 2003 CarswellOnt 6207 (Ont. L.R.B.) — considered

McNaught v. Toronto Transit Commission (November 16, 1998), Doc. 2704-98-OH (Ont. L.R.B.) — considered

Nault v. Inco Metals (1984), [1984] O.L.R.B. Rep. 1464, 1984 CarswellOnt 1109 (Ont. L.R.B.) — considered

O.P.S.E.U. v. Ontario (Management Board) (1996), [1996] O.L.R.B. Rep. 780, 1996 CarswellOnt 5006 (Ont. L.R.B.) — considered

O.P.S.E.U. v. Ontario (Management Board of Cabinet) (2002), [2002] O.L.R.B. Rep. 176, 2002 CarswellOnt 4341, (sub

nom. *Ontario (Management Board of Cabinet) v. O.P.S.E.U.)* 83 C.L.R.B.R. (2d) 237 (Ont. L.R.B.) — followed

Power Workers' Union, Local 1000 v. I.B.E.W. (1996), 1996 CarswellOnt 5011, [1996] O.L.R.B. Rep. 826, (sub nom. *I.B.E.W., Local 1788 v. I.B.E.W.)* 97 C.L.L.C. 220-032 (Ont. L.R.B.) — considered

U.F.C.W. v. Shirlon Plastics Inc. (1994), [1994] O.L.R.B. Rep. 1086, 1994 CarswellOnt 1496, [1994] L.V.I. 2620-6 (Ont. L.R.B.) — referred to

U.F.C.W., Local 175/633 v. 810048 Ontario Ltd. (1993), [1993] O.L.R.B. Rep. 197, (sub nom. *810048 Ontario Ltd. v. U.F.C.W., Local 175/633)* 18 C.L.R.B.R. (2d) 248, (sub nom. *U.F.C.W., Local 175/633 v. Loeb IGA Highland)* 93 C.L.L.C. 16,055, 1993 CarswellOnt 1342 (Ont. L.R.B.) — followed

U.F.C.W., Local 175/633 v. 988421 Ontario Inc. (1993), [1993] O.L.R.B. Rep. 744, 1993 CarswellOnt 1421 (Ont. L.R.B.) — referred to

U.S.W.A. v. Tate Andale Canada Inc. (1993), [1993] O.L.R.B. Rep. 1019, 94 C.L.L.C. 16,017, (sub nom. *Tate Andale Canada Inc. v. U.S.W.A.)* 20 C.L.R.B.R. (2d) 128, 1993 CarswellOnt 1453 (Ont. L.R.B.) — considered

Universal Workers Union, L.I.U.N.A., Local 183 v. L.I.U.N.A. (2004), [2004] O.L.R.B. Rep. 338 (Ont. L.R.B.) — referred to

Vancouver City Savings Credit Union, Re (June 14, 1999), Doc. B228/99 (B.C. L.R.B.) — referred to

Statutes considered:

Labour Relations Act, R.S.O. 1990, c. L.2

Generally — referred to

s. 92.1 [en. 1992, c. 21, s. 37] — referred to

s. 92.1(1) [en. 1992, c. 21, s. 37] — referred to

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

Generally — referred to

s. 98 — referred to

s. 98(1) — referred to

s. 110 — referred to

s. 110(16) — considered

s. 111 — referred to

s. 114 — referred to

s. 116 — referred to

Labour Relations Amendment Act, 2000, S.O. 2000, c. 38

Generally — referred to

Occupational Health and Safety Act, R.S.O. 1990, c. O.1

Generally - - - referred to

s. 50 — pursuant to

s. 50(1) - - referred to

s. 50(2) — considered

s. 50(4) — considered

s. 50(7) - - referred to

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22

Generally — referred to

s. 16.1 [en. 1994, c. 27, s. 56(32)] — pursuant to

Decision of the Board*McLean V-Chair*:

1 Board File No. 1465-04-M is an application under section 16.1 of the *Statutory Powers Procedure Act* (the "SPPA") for an interim order reinstating Mr. Martin to his employment and for a posting, advising employees of their rights under the Occupational Health and Safety Act ("OHSA"). This application is filed in connection with an application filed under section 50 of the OHSA as Board File No. 1465-04-OH.

2 By decision dated July 30, 2004 the Board set the interim order application down for hearing on Thursday, August 5, 2004. A hearing took place on that date during which time the Board heard the arguments of the parties with respect to the application. This decision determines the interim application.

The Facts

3 The responding party, Tricin Electric Ltd. ("Tricin" or the "employer") is a construction industry electrical contractor and employer. The applicant is an electrician. Although not specifically mentioned in the proceeding it is notable that the International Brotherhood of Electrical Workers, has applied for certification to represent the employees of the responding party. A representation vote was held and the matter is currently before the Board.

4 At this time there are few, if any, other "facts" before the Board. However, the parties have, in accordance with the Board's rules concerning interim applications, filed "declarations" and pleadings with respect to the interim application. The applicant has also filed a detailed application in connection with the section 50 application which essentially mirrors the ma-

terials filed in the interim application. The responding party's response in the section 50 application was not due until the day after the Board held the interim application hearing and accordingly a response was not filed before the hearing of this interim application.

5 The facts alleged by the applicant are as follows.

6 Mr. Martin was an employee of Tricin since April 14, 2004 as a fifth year apprentice electrician. Mr. Martin was discharged from his employment on July 12, 2004. At the time of his discharge Mr. Martin was working at the employer's York University job site. The parties agreed that the York University project will be completed on Saturday, August 14, 2004.

7 Mr. Martin's declaration indicates that he was concerned about safety issues on the job site. He complained about the state of the toilets to Tricin supervisors and managers. Nothing was done. Accordingly, on or about June 30, 2004 Mr. Martin complained to a supervisor of the general contractor on the project. He rectified the situation. After Mr. Martin made these complaints, the Tricin supervisors/managers appeared to be hostile and cold to him.

8 Mr. Martin was also concerned about the air quality at the worksite and about whether the ladders supplied by Tricin were safe. Mr. Martin complained about these issues to the general contractor supervisor.

9 Mr. Martin was also concerned that Tricin employees were not wearing their hardhats while on the job site. Mr. Martin brought his concerns to the attention of his fellow employees and to Tricin supervisors. Despite his concerns, and his efforts to achieve compliance, Mr. Martin declares that employees continued to not wear hardhats. Mr. Martin complained about this to the general contractor supervisor.

10 On June 28, 2004 Mr. Martin was disciplined (through a written warning) for allegedly overstaying his break by ten minutes. He declares that other employees who had done the same thing were not disciplined.

11 On or about June 29, 2004 Mr. Martin was concerned that unregistered electrician apprentices were, contrary to regulation, pulling cables into a live splitter box and a live 600-volt disconnect. Furthermore, the system upon which they were working had not been subject to proper lockout procedures. Mr. Martin closed the splitter box and went to speak to a Tricin supervisor to voice his concerns. He also spoke to the general contractor supervisor.

12 On June 30, 2004 Mr. Martin and other employees on the jobsite, were advised that Mr. Martin was Tricin's "employee of the month".

13 On July 12, 2004 Mr. Martin declares that he was given a written warning for allegedly "leaving his post" prior to break. Mr. Martin denied this assertion and refused to sign the employer's written warning provided to him. Mr. Martin tried to explain his side of the story and the Tricin supervisor became extremely upset. The supervisor said "Get off this site. You are fired". There followed a heated discussion about Mr. Martin's termination papers in which Mr. Martin declares that the supervisor called Mr. Martin a "piece of shit" and threatened to call the police.

14 Before Mr. Martin left the site one of the general contractor's supervisors came over and asked what was going on. Mr. Martin replied that he was fired "probably because of all the health and safety issues that he raised." None of the Tricin supervisors who were present denied the suggestion.

15 Mr. Martin declares that there were no excess of workers at the York University job site. In fact, he declares Tricin was behind schedule on the project. He received no complaints about his work performance and no warning that he would be discharged.

16 Mr. Martin also declares that Tricin was well aware of his safety concerns. So were his fellow employees many of

whom asked him questions about safety issues and asked him to raise their safety concerns with the employer, which he did.

17 The employer filed a brief declaration with its response to the application for interim relief. I quote it in full:

> **Declaration:**
>
> I, Ann Wagmaister am the Administrator of the Responding Party. I hereby confirm that if the Interim Relief Application is granted, the Responding Party will suffer the following harm:
>
> 1. If the Applicant is reinstated to his former position on an interim basis, it will have a deleterious effect in the workplace. Mr. Martin was a disruptive force in the workplace and disobeyed the directions of management on numerous occasions. He was warned in writing of his workplace misconduct and I fear that reinstatement will indicate to other workers that they are free to dispute the directions of management and otherwise be a disruptive influence, both of which have the potential of compromising Tricin's business and the employment of other employees currently employed by Tricin.
>
> 2. If Mr. Martin is compensated financially for wages after his termination, we will have an extremely difficult time recovering those wages after the allegations outlined in the Complaint are proven false. The recovery of those wages will necessitate that we file suit to recover the amounts, thereby incurring further legal expenses.
>
> 3. If a Board Order is posted in the workplace advising that reinstatement can occur in the workplace in the absence of an established breach of the Occupational Health and Safety Act, it will encourage all employees to refuse work for whatever reason and lead to serious difficulties with the employer's ability to perform its functions.
>
> This declaration has been prepared by me or under my instruction and I hereby confirm its accuracy.
>
> "Ann Wagmaister" — July 26 2004
> Ann Wagmaister, Administrator — Date

18 The Board notes that counsel for the applicant suggested in oral argument that Ms. Wagmaister was employed in Tricin's office and not on the jobsite. Tricin did not disagree with this assertion. No declarations were filed by any of the persons who were directly involved in the applicant's alleged health and safety complaints or the termination of the applicant's employment.

19 The response to this interim application does not provide a detailed reply to the factual allegations made by the applicant. It simply denies the allegations made by the applicant and asserts that the termination of the applicant's employment was for just cause unconnected to any health and safety concerns which may or may not have been made by the applicant. Tricin's response provides only some hints of its case on the facts. It pleads that the applicant was terminated after being provided with two or more warnings for leaving his work area, that he did not acknowledge the written warnings and did not modify his conduct after receiving the written warnings.

20 Tricin also specifically denies each of the allegations that it did not maintain safety standards. However, Tricin indicates that its detailed response to the factual allegations will be contained in its response to the section 50 application.

21 The employer suggested, although never strictly asserted, in its argument that the reason it had not filed a more extensive declaration was that it did not have time to do so. It is appropriate that the Board comment on this aspect of the case at this point.

22 The Board's rules require that a responding party file a response to an interim order within 2 days of the date the ap-

plication for an interim order is delivered. The Board acknowledges that there are circumstances where these rules can be onerous. The Board also recognizes that the 2 day response requirement can appear to a responding party to have an element of unfairness. That is because the applicant is not bound by any timetable in the way it files its application. So, in this case, the applicant, who is an experienced section 50 litigant, had his employment terminated on July 12, 2004 and filed this application for an interim order ten day later, on July 22, 2004. The responding party then had 2 days to file its response.

23 Having said that the Board notes the following. First, the application in this case was filed on a Thursday and was delivered directly to counsel. The employer therefore actually had 4 days, two of which were business days, to file a response. Second, it is always open to a responding party to request that the time limits for its response to be filed be extended. That was not done in this case. Third, it is open for a responding party to ask that it be permitted to file declarations late, including on the day of the hearing. That too was not done on this case. Fourth, the Board's time limits are not inconsistent with the process in Court injunctions. Finally, the employer did have time as part of its response to file 40 paragraphs of detailed legal argument with respect to the Board's jurisdiction and other issues.

Jurisdiction

24 The first issue is the Board's jurisdiction to give an applicant substantive interim relief. The responding party asserts that the Board does not have such jurisdiction. The applicant asserts that the Board does.

25 The applicant argues that the Board's jurisdiction to grant interim relief, including substantive interim relief, arises from SPPA. Section 16.1 of the SPPA states:

> 16.1(1) *Interim decisions and orders* — **A tribunal may make interim decisions and orders.**
>
> (2) *Conditions* — **A tribunal may impose conditions on an interim decision or order.**
>
> (3) *Reasons* — **An interim decision or order need not be accompanied by reasons.** 1994, c. 27, s. 56(32).

26 The applicant relies on the Board's decisions in *O.P.S.E.U. v. Ontario (Management Board of Cabinet)*, [2002] O.L.R.B. Rep. 176 (Ont. L.R.B.). In that decision the Board stated:

> . . .
>
> 7. The parties acknowledged that the Board has the power to make interim orders in relation to substantive matters under section 16.1 of the STATUTORY POWERS PROCEDURE ACT, R.S.O. 1990, c. S.22, as am. (the "SPPA") since this proceeding is an application under section 50 of the OHSA and not a proceeding to which the LRA applies. The limitation on the Board's interim relief power found in section 98 of the LRA has no application to the Board in proceedings under section 50 of the OHSA.

27 The applicant also relies on *I.B.E.W., Local 105 v. Kingsway Electric Co. Ltd.*, [2003] O.L.R.D. No. 4502 (Ont. L.R.B.) in which the Board stated:

> 6. 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 no 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.

28 The applicant in the *Kingsway Electric Co.* case was the same as in this case.

29 The applicant recognizes that there is a "history" with the Board's interim relief power. That history will be described in more detail below. The applicant's position is that nothing about that history has taken away the Board's jurisdiction to grant interim relief, including substantive interim relief, in applications brought under section 50 of the OHSA. In fact that legislature has had opportunities to change the Board's jurisdiction but has not done so.

30 The employer's argument in brief is that the Board is precluded by section 98 of the *Labour Relations Act* (the "LRA") from granting substantive interim relief. Section 98 states:

> 98. (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*.
>
> (2) The Board shall not make an order under subsection (1) requiring an employer to reinstate an employee in employment.

31 The employer argues that the restriction contained in section 98 of the LRA is imported into the OHSA by section 50 of the OHSA. The relevant sections of section 50 are as follows:

> 50. (1) No employer or person acting on behalf of an employer shall,
>
> (a) dismiss or threaten to dismiss a worker;
>
> (b) discipline or suspend or threaten to discipline or suspend a worker;
>
> (c) impose any penalty upon a worker; or
>
> (d) intimidate or coerce a worker, because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.
>
> (2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Board in which case any rules governing the practice and procedure of the Board apply with all necessary modifications to the complaint.
>
> . . .
>
> (4) On an inquiry by the Board into a complaint filed under subsection (2), sections 110, 111, 114 and 116 of the *Labour Relations Act, 1995*, apply with all necessary modifications.

32 The employer relies on *A.T.U., Local 1731 v. McIntosh Limousine Service Ltd.*, [2000] O.L.R.B. Rep. 249 (Ont. L.R.B.) where, in the context of an application for interim relief brought in an application under the LRA, the Board dismissed an application for substantive interim relief brought under the SPPA. In doing so the Board stated:

> 72. Let me begin by observing that the union's proposed interpretation of section 98 is not entirely without foundation, looking only at the words of the new section 98, read in isolation. It is POSSIBLE to argue that section 98 is still only "about" PROCEDURE, and that the reference to the SPPA is insufficient to oust section 16.1 except insofar as it may

encompass interim orders on PROCEDURAL MATTERS - leaving the Board with the SUBSTANTIVE interim relief powers under the SPPA that the Board had before. It may thus be POSSIBLE to conclude that the reference to the SPPA was limited in impact - although it is beyond me why the Legislature would bother to do that, since such change in wording would not seem to have any operational effect. It is POSSIBLE, in other words, to conclude that Bill 31 changed the words of section 98 of the LABOUR RELATIONS ACT but did not actually change the law - whatever the Legislature may have intended to do. Or one might postulate that the legislative draftsperson may have simply erred, or only imperfectly captured the legislative intention. And the fact that the draftsperson did not use the precise words of section 32 of the SPPA, or specifically distinguish "procedural" from "substantive" interim relief, may perhaps bolster that argument.

73. However, in my view, that is not the MOST PROBABLE interpretation of the new section 98; and to reach that conclusion the Board would have to be wilfully blind to: the way in which the Board was exercising its interim relief power under earlier statutory incarnations; the direction of legislative change; and the legislative and labour relations context in which successive changes to section 98 were made. The Board would also have to ignore the obvious fact that an innovative and decisive policy shift in one direction (Bill 40), has been replaced by a policy shift in the other direction - in effect, reflecting a form of legislative reconsideration and retrenchment in this area.

74. Not to put too fine a point on it: the Legislature has successively changed the statute so that the Board's power to grant interim relief is much less robust than it was in the "Bill 40 era". What the Legislature has intended to do, has attempted to do, and has now in fact done (however imprecisely) is restrict the Board's power to grant substantive interim relief under the LABOUR RELATIONS ACT, and, at the same time, deprive the Board of the power to grant substantive interim relief under the STATUTORY POWERS PROCEDURE ACT. Insofar as the LABOUR RELATIONS ACT is concerned, the Legislature has substituted the "procedural" provisions of section 98, for the power to grant BOTH procedural and substantive orders under section 16.1 of the STATUTORY POWERS PROCEDURE ACT. In the result, the Board's "general" interim relief powers under the new section 98 the LABOUR RELATIONS ACT, are more limited than those under section 61(3.4) of the OCCUPATIONAL HEALTH AND SAFETY ACT, or section 37(7) of the PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT (Bill 136), or even section 99(5) of the LABOUR RELATIONS ACT itself.

75. It seems to me that this is both the linguistic and the "labour relations sense" of the successive changes that have been introduced in an environment of debate, experiment, and obviously shifting government policy objectives. However, it is also the conclusion that, in my view, flows from more traditional approaches to statutory interpretation.

76. It is now well established that the evolution of legislation may be relied upon to assist in its interpretation. The meaning or purpose of a provision is often clarified by viewing it in its original context, then tracing it through successive versions. It can also be presumed that amendments to the wording of a legislative provision are made for some intelligible purpose: to clarify the meaning, to correct a mistake, or to change the law. A Legislature would not go to the trouble of amending a provision without reason; and I think it can also be presumed (although perhaps less strongly) that the purpose of amending legislation is to bring about a substantive change. Moreover, when successive versions of a provision are compared to one another, it is often apparent that a substantive change was intended (see generally: DRIEDGER ON THE CONSTRUCTION OF STATUTES, 3rd edition at pp. 449-459).

77. Conversely, I do not think that one should lightly conclude that a legislative change has had no effect at all - in this case, that the changes to section 98 effected by Bill 31 really had no impact whatsoever on the Board's powers under section 98. That, in my view, is simply not a plausible proposition in the present case, given the way in which the Board approached the former version of section 98, and what certainly appears to be a legislative response - adding an express reference to the SPPA, when, as the Board had noted in the IBEW and MANAGEMENT BOARD cases, the statute was silent about the SPPA before.

. . .

80. As an independent, quasi-judicial tribunal, the Board must operate at arm's length from both the legislative and executive branches of government. However, the Board is also a specialized tribunal, with particular labour relations expertise and particular sensitivity to developments in the labour relations community - including the policy debates and policy shifts, that are implicit in legislative change. The Board cannot, and in my view should not, set aside that specialized knowledge, and read its home statute like some wholly uninformed reader of words, with a dictionary in one hand and copy of Driedger in the other.

81. On the contrary, the Board has to adopt an interpretation which is fair to both the language and policy of the statute, to the general labour relations background, and to the particular context under review. And here the background to the present controversy is a broadening of remedial authority under the provisions of Bill 40, and a subsequent retrenchment - first pursuant to Bill 7, then, later, pursuant to Bill 31.

82. Against that background, I do not think the Board should lightly conclude that there was no change at all - or that the Legislature tried to change the impact of section 98, but simply failed to use the right words to accomplish that objective. If there is a reading of the statute which sensibly captures the apparent legislative intent, that is the reading that should be preferred - whatever one might think about the underlying policy shift.

83. Like the panels in INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS and CROWN IN RIGHT OF ONTARIO, I think that the Bill 7 amendments eliminated the Board's power to grant substantive interim relief under the LABOUR RELATIONS ACT - as the Board held in those two cases. But these statutory changes did not eliminate the Board's power to grant substantive interim relief altogether, because (as the Board also held) the Board retained the right to apply section 16.1 of the STATUTORY POWERS PROCEDURE ACT. So, in my view, the Legislature stepped in again, to make it clear that the Board's powers were confined to procedural matters, and also that those powers - to GRANT PROCEDURAL RELIEF ONLY - were applicable INSTEAD OF the broader provisions found in the SPPA.

84. The language may not be as precise as it could be. But it seems to me that the meaning and intention are clear - particularly when the current section 98 is compared with the Board's interim relief powers under earlier versions of section 98, and with the interim relief powers available under other labour relations statutes that the Board administers.

85. It is clear that the words added to section 98 are intended to be limiting; and in my view, the limitation is described above: the Board can now give only procedural, not substantive, interim relief.

[emphasis added]

33 The employer also relies on *McNaught v. Toronto Transit Commission*, [1998] O.L.R.D. No. 4030 (Ont. L.R.B.) where the Board rejected, while giving extremely brief reasons, which do not make it clear whether the application was made under the SPPA, an interim relief claim brought in connection with an application under section 50 of the OHSA and stated:

> As a result of the Bill 7 and Bill 31 amendments to the LABOUR RELATIONS Act, 1995, the Board's interim relief jurisdiction is restricted to procedural matters. The interim relief requested by the applicants is substantive, not procedural. That request is therefore dismissed.

34 The Board's interim relief history is well known in the labour relations community. In 1993 section 92.1 of the then LRA came into effect as part of the "Bill 40" amendments. Section 92.1 then stated:

> **92.1**-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

35 The Board interpreted section 92.1 in a broad way. Many applications were filed and many were granted or settled. It is not a stretch to suggest that the interim application law was one of employers' biggest complaints about the law at the time.

It is also worth noting, however, that the law also provided a mechanism where the merits of the unfair labour practice complaints under which the interim application had been filed could be heard very quickly. Therefore, to the extent there were any interim reinstatements of employees that were not "justified", that situation could be remedied quite quickly.

36 The LRA was significantly amended in 1995. While the Board retained the power under the new LRA to make interim orders, that power was restricted to procedural matters only. Perhaps as a reflection of the employer community's unhappiness with the previous law, the legislature reinforced the restriction on the Board's authority by making the LRA specifically provide that the Board did not have the jurisdiction to reinstate an employee to his former employment on an interim basis.

37 In 1994 the SPPA was amended to include the current section 16.1.

38 Despite the amendment to the LRA, trade unions brought interim applications to the Board to have employees reinstated pending applications. In *Power Workers' Union, Local 1000 v. I.B.E.W.*, [1996] O.L.R.B. Rep. 826 (Ont. L.R.B.) and *O.P.S.E.U. v. Ontario (Management Board)*, [1996] O.L.R.B. Rep. 780 (Ont. L.R.B.) the Board found that, as a result of section 98(1) of the LRA, the Board no longer had the right under the LRA to reinstate an employee on an interim basis. However, the Board found in each of those cases that it did have the jurisdiction to grant substantive interim relief (neither case involved an application to reinstate employees on an interim basis) under section 16.1 of the SPPA. In the 1996 *Ontario (Management Board)*, *supra* case the Board explained its conclusion:

> 32. The Board also has a separately-founded interim order authority under the SPPA. OPSEU and AMAPCEO submit that under the provisions of section 16.1 of the SPPA, the Board has the full range of interim powers that it enjoyed prior to the repeal of Bill 40 and the passage of section 98 of Bill 7. It will be easier to follow our analysis if we set out again the provisions of sections 16.1, 17 and 32 of the STATUTORY POWERS PROCEDURE ACT:
>
> > 16.1 (1) A tribunal may make interim decisions and orders.
> >
> > (2) A tribunal may impose conditions on an interim decision or order.
> >
> > (3) An interim decision or order need not be accompanied by reasons.
>
> 17. (1) *Decision* - A tribunal shall give its final decision and order, if any, in any proceeding in writing and shall give reasons in writing therefore if requested by a party.
>
> . . .
>
> 32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.
>
> 33. As will be seen, section 16.1 gives all tribunals to which the SPPA applies, an independent authority to make interim decisions and orders; moreover, pursuant to section 32, should there be any conflict between provisions of the SPPA and other provincial statutes, the provisions of the SPPA are to prevail (in this regard, see THOMPSON AND LAMBTON COUNTY BOARD OF EDUCATION, [1972] 3 O.R. 889, upheld on appeal at [1973] 1 O.R. 766). Section 110(21) of the Act (newly enacted in Bill 7) is an example of such "override":
>
> > 110. (21) Rules made under subsection (18) apply despite anything in the STATUTORY POWERS PROCEDURE ACT.

34. There is no dispute that the provisions of the SPPA apply to the Board, unless explicitly exempted in the LABOUR RELATIONS ACT, 1995, as was done in section 110(21). OPSEU and AMAPCEO thus argue that the effect of any limitation on interim powers contained in section 98 of the Act cannot stand in the face of the generally unlimited jurisdiction to grant interim relief granted to tribunals, such as the Board, in section 16.1 of the SPPA. Section 16.1 overrides or subsumes any limitations on interim powers in section 98. The Legislature must be taken to have been aware of the SPPA at the time it passed Bill 7, submit OPSEU and AMAPCEO, both because of the general presumption to this effect, and because the new section 110(21) it enacted explicitly recognizes the SPPA, and states that certain rules made under section 110 are to apply "despite anything in the STATUTORY POWERS PROCEDURE ACT." It must follow, they argue, that the LABOUR RELATIONS ACT, 1995 was passed with an actual awareness of the content and meaning of the SPPA.

35. One of the Crown's arguments in response is that section 16.1 of the SPPA only deals with "procedural" powers, only granting tribunals the authority to make interim orders of a "procedural" or "process" nature. This argument replicates the Crown's argument as to the meaning of the word "procedural" in section 98 of the Act.

36. However, the word "procedural" is not found in section 16.1 of the SPPA, and as with the LABOUR RELATIONS ACT, 1995, there are found elsewhere in the SPPA specific "process" powers. To read the unrestricted "interim" power in section 16.1 as so limited would render the section largely redundant. As well, section 16.1(2) empowers a tribunal to "impose conditions on an interim decision or order". It appears even less likely that the "interim orders" envisaged in section 16.1 were only of a "process" nature, given this explicit power to attach conditions to such orders. This linkage suggests orders of a more significant nature than merely running a hearing. We note also that section 16.1 authorizes the making of interim "decisions", not only "orders", further buttressing the argument that a tribunal can make substantive decisions on an interim basis under section 16.1.

37. On balance, it appears to us that section 16.1 of the SPPA gives jurisdiction to tribunals, including this one, to make decisions or orders on an interim basis that relate to or derive from the tribunal's general or overall jurisdiction. Provided the tribunal acts generally within its jurisdiction, it has a largely unfettered discretion to make interim "decisions or orders" that it has the jurisdiction to make on a final basis, after a hearing on the merits, or that it considers necessary in order to ensure that the statutory rights it deals with are protected until a final decision issues.

RECONCILING SECTION 98 OF THE ACT AND SECTION 16.1 OF THE SPPA

38. Given this conclusion, the Board's powers granted under section 16.1 of the SPPA would appear inconsistent with the far more restrictive interim powers granted under section 98 of the Act. The two cannot stand together, and do not merely overlap. The former grants a general jurisdiction to grant interim orders, while the latter grants the authority to make interim orders that deal with the conduct of the proceeding only. 32.

39. Since there is an inconsistency between the two statutory provisions, we must have resort to section 32 of the SPPA, the override provision. While the application of that section does not depend on awareness of its content, it must be taken that the Legislature was fully cognizant of the SPPA and its override provisions, since it explicitly exempted the application of the SPPA in section 110(21) of the Act. The Legislature did not, however, direct that the provisions of section 98 of the Act were to apply despite the SPPA. Under section 32 of that Act, therefore, the provisions of the SPPA (here, section 16.1) prevail over the provisions of the LABOUR RELATIONS ACT, 1995 (section 98), since the two provisions conflict.

40. We conclude in the result that the Board has a general power to grant interim orders, as long as the orders are within or relate to the Board's general jurisdiction..

39 The legislature then passed Bill 31. Bill 31 amended the LRA to its current form. Bill 31 appeared to make it clear that the Board no longer had the jurisdiction to grant substantive interim relief at least in applications under the LRA. Bill 31

did not, however, repeal section 16.1 of the SPPA. Moreover, Bill 31 amended the OHSA to specifically give the Board a broad power to make interim orders in appeals of inspector's orders.

40 The conclusion that the Board no longer had the power to grant substantive relief in LRA matters was confirmed by the Board in *McIntosh*, supra. Despite the Board's statement in *McIntosh* which is set out above (and underlined in the excerpt) and relied upon by the employer, it is clear from a reading of the full decision that its assessment of its jurisdiction was limited to LRA proceedings. Indeed, the Board commented that it has the jurisdiction to grant substantive interim relief in other applications under the LRA (i.e. in jurisdictional disputes) and in applications brought under other statutes.

41 Since *McIntosh* the Board has decided the two cases which are cited above, the 2002 *Ontario (Management Board of Cabinet)* and *Kingsway Electric*. The Board also decided a case not referred to by the parties, *Springs Canada Inc.*, dated June 3 2004, in which the parties agreed the Board had jurisdiction. However, the Board did not grant interim reinstatement. In each of these cases the Board found that it did have jurisdiction to grant substantive interim relief in connection with applications under section 50 of the OHSA. However, in the 2002 *Ontario (Management Board of Cabinet)* the employer agreed that the Board had jurisdiction and in *Kingsway*, the employer's argument was made in a request for reconsideration which was dismissed by the Board without a hearing. It is fair to say, therefore, that this is the first occasion when parties have extensively argued the point.

42 The employer has two primary and related arguments. The first is that the Board does not have jurisdiction to grant substantive interim relief because section 50(2) of the OHSA requires that the Board's rules and procedures apply to a complaint made under section 50. One of the rules or procedures the Board has is a "practice" of not reinstating employees on an interim basis. I reject this argument. The Board's rules do not describe the Board's powers on interim applications. (Although, I note that the Board's form for interim order applications specifically mentions the SPPA). In addition, even assuming section 50(2) compels that any Board practices generally be applied (which I doubt since the section refers to *rules* governing the practice and procedure of the Board) the Board does not have a "practice" of "not reinstating an employee on an interim basis". The Board does not reinstate on an interim basis in LRA matters, not because of any Board practice, but because the LRA specifically precludes it. In non-LRA matters there is very little "practice" in this area. However, to the extent there is any practice at all, it is reflected in the *Springs Canada Inc.* and the *Kingsway Electric* decisions.

43 The employer's second primary argument is that the Board does not have jurisdiction because it has the jurisdiction to exercise those powers conferred on it by the LRA and it "must accept those powers (which the Responding Party concedes are broad and far reaching) with all of the corollary limitations on those powers specified in the LRA. The difficulty with this argument is found in section 50(4) of the OHSA. Section 50(4) makes sections110, 111, 114 and 116 of the LRA applicable to section 50 complaints. It does not, however, (at least specifically) import section 98 of the LRA. I am therefore not persuaded that in section 50 applications the Board has all of the powers and the restrictions on powers found in the LRA. In my view it only has the powers and restrictions set out in section 50 and any other applicable legislation like the SPPA. That conclusion is not affected by the fact that the Legislature in Bill 31 specifically gave the Board broad interim order power with respect to appeals of inspector's orders.

44 I disagree, for the reasons already stated, that the Board in *McIntosh*, supra, made a finding that the Board generally has no power to reinstate on an interim basis under an application brought under any statute. As for *Toronto Transit Commission*, supra, it appears that the applicants in that case did not rely on the SPPA. Moreover, the decision is so short and devoid of analysis that it is of little assistance. I am not persuaded that it ought to have any influence on the Board's contemplations in this case.

45 Finally, the employer asserts that the Board has no jurisdiction because of section 110(16) of the LRA which is incorporated into section 50 complaints by section 50(4) of the OHSA. Section 110(16) states:

> **110.** (16) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions.

46 Tricin argues that the requirement imposed on the Board to give the parties to any proceeding the opportunity to present their evidence and make their submissions means that the Board cannot reinstate employees on an interim basis without giving the responding party a full opportunity to present evidence on the merits of the complaint. I also disagree with this argument. In my view section 110(16) says nothing about the Board's jurisdiction to reinstate employees to their employment on an interim basis. At most, it may govern the procedures the Board is to use when deciding such interim applications. But that is the subject of a later section of this decision.

47 In my view, the Board in the 1996 *Ontario (Management Board)* case was correct in its conclusion that section 16.1 of the SPPA gave the Board the jurisdiction to make substantive interim orders. That power was taken away by the Bill 31 amendments in LRA matters only. It would have been easy for the legislature to include section 98 in the list of those sections of the LRA applicable to section 50 complaints. However, the legislature did not do so. The absence of section 98 from the list contained in section 50(4) of the OHSA compels a finding that section 16.1 is available to the Board in applications, among others, under section 50 of the OHSA.

The Test

48 The applicant urged the Board to apply to this case the test the Board developed in connection with interim order applications under the Bill 40 version of the Act. That test has two parts and was first developed in *U.F.C.W., Local 175/633 v. 810048 Ontario Ltd.*, [1993] O.L.R.B. Rep. 197 (Ont. L.R.B.):

1) Has the applicant pleaded an arguable case for a remedy in the main application.

2) What is the respective harm to the parties of granting or not granting the application.

49 As for the first branch of the test, the applicant argued that the Board should, in assessing whether there was an arguable case, rely only on the material filed by the applicant. He relies on, among other decisions, *U.F.C.W., Local 175/633 v. 988421 Ontario Inc.*, [1993] O.L.R.B. Rep. 744 (Ont. L.R.B.) [hereinafter East Side Mario's].

50 The argument on the second branch of the test is crucial. The applicant acknowledges that if the harm the Board is to consider is only the harm to the applicant then the interim order ought not to be granted. That is because the applicant's harm can mainly be remedied by an order for reinstatement and the payment of monetary damages after any hearing into the merits of this matter. The applicant argues, however, that it is not just his harm that should be considered. The Board should also take into consideration, as it did with reinstatement cases under Bill 40, the harm to health and safety (or in the case of the Bill 40 cases labour relations) in the workplace more generally. The applicant's argument was complex and multi faceted but it can be boiled down to this simple statement: the fact that an employee can be discharged for exercising (or even long after exercising) rights under the OHSA will cause other employees in the workplace to be afraid to exercise their own health and safety rights. This could lead to workplace injuries or deaths.

51 The employer argued, although not particularly strenuously, that the Board ought to apply a different test than it had in the past. It proposes that the Board should determine that the applicant discharge a "strong prima facie breach of the Act" before granting any substantive interim relief. It agrees with the second part of the test, that being balance of harm. It argues that an assessment of that branch of the test ought not to be made without oral evidence being called. In any event, it asserted that an assessment of the second branch of the test must lead to a finding for the employer's position. In large measure that is because, in the employer's submission, the Board ought to compare the harm of reinstatement to the employer to the harm to the individual applicant, and not to the workforce generally.

52 Because of my finding on the first branch of the test (which is set out below) and the arguments made by the parties it is unnecessary for me to determine whether the appropriate test is that proposed by the applicant, that proposed by the employer, or some other test. However, the Board does note the following:

1) The Board has consistently applied the test proposed by the applicant since 1993. As recently as March 17, 2004 the Board used the same test in deciding to grant procedural interim relief. (See *Universal Workers Union, L.I.U.N.A., Local 183 v. L.I.U.N.A.*, [2004] O.L.R.B. Rep. 338 (Ont. L.R.B.)).

2) Other Labour Boards, including the Saskatchewan Labour Relations Board and the Canada Industrial Relations Board have adopted the test proposed by the applicant in at least the decisions to which I was referred.

3) The British Columbia Labour Board at least arguably may apply a test more akin to that used by the Courts in injunction cases. That is, that one of the criteria is whether an adequate remedy would be available to the applicant at the hearing on the merits if there was no interim order granted (see *Vancouver City Savings Credit Union, Re*, [1999] B.C.L.R.B.D. No. 228 (B.C. L.R.B.)). On the other hand it may well be that such considerations form part of the analysis of the relative balance of harm under the test that has been applied in the Ontario cases.

Must the Board Hear Oral Evidence?

53 I will first consider the employer's argument that the Board ought not to, because of the requirements of section 110(16) of the LRA which apply to this case, make any substantive interim order without first giving the parties an opportunity to present oral evidence.

54 The applicant's response is that 110(16) of the LRA does not require that the Board give the parties an opportunity to present oral evidence. He relies on *Ontario College of Teachers*. That case was a judicial review brought after the Board required a party to a LRA proceeding to make its argument on its best facts. The Board denied the party's request to call oral evidence. On judicial review, the Court upheld the Board's decision and stated the following:

> It is noted that section 110(16) does not say that a party shall be given the opportunity to "call" evidence, rather, it provides that the party is to have the opportunity to "present" evidence. Here the evidence was presented in submissions and the Board accepted, as proven, all the submissions made. Since even on that basis, the Board was not satisfied that the three Secretaries should be excluded from the bargaining unit, there was no purpose in hearing the evidence from the witnesses. In such circumstances, there is, in my view, no denial of natural justice for the Colleges has, in fact, been heard.

However, the facts under consideration by the Divisional Court were quite different than those before the Board in this and most other section 50 applications. I have doubt whether the Court's decision can be read as broadly as suggested by the applicant.

55 In my view it is not necessary for me to determine this issue in this case. I come to that conclusion for two reasons: first, assuming, without finding, that section 110(16) compels the Board to permit oral evidence in all proceedings (except those where such is specifically not required), that requirement does not mean that a party must be permitted to call evidence on issues other than those which are at issue in the proceeding. In an interim application proceeding the issue before the Board is whether the applicant has a prima facie case (or, depending on the test to be applied, an arguable or strong prima facie case), which is generally to be determined only examining the material filed by the applicant (see *East Side Mario's*, supra), and whether the balance of harm/convenience favours granting the application. To suggest otherwise would turn every application for interim relief into a hearing on the merits. That cannot be the meaning to be given to section 16.1 of the SPPA.

56 As noted, there is a second aspect to the conclusion that I do not have to decide whether the employer must be permitted to call evidence. That aspect is that even if a party must be permitted to call evidence in theory, before that right can be exercised in reality, the party must have complied with the Board's rules regarding its assertions of evidence or obtain leave of the Board. This is the case, at least in part, because of section 50(2) of the OHSA which makes the Board's rules apply to

these applications. In this case the employer simply has not filed a declaration or pleaded facts which would permit it to lead the kind of evidence which it seeks to lead even assuming that such evidence must be permitted and is relevant to the issues before the Board in this interim relief application. I also note that the employer only sought to lead its own evidence; it did not request the Board to compel the applicant to lead evidence.

Application of the Test to This Case

57 Whether the test to be applied is an arguable case, a strong prima facie case or something else I find that the applicant has satisfied the first branch. The applicant's story is compelling. He says he was a good employee (good enough to allegedly be named employee of the month 12 days before he was discharged) who complained about health and safety issues on a regular basis both to management of Tricin and to Tricin's "boss", the general contractor on the site. He was given a written warning for a fairly minor offence and was fired when he objected. While these allegations are not proven, if they are ultimately found to be close to the truth they will at least demand a compelling explanation from the employer. In the face of that story the employer decided not to plead or put to the Board, through declaration(s), a detailed version of its story. Instead the employer pleaded generalities and filed a declaration that does not state with any specificity why the applicant's employment was terminated.

58 That leaves the second branch of the test. Apart from its arguments regarding whether the Board must hold a full hearing, the employer's argument was that to reinstate the applicant would or could cause it significant harm. Part of Tricin's argument was an assertion that the applicant "could" be incompetent or a health and safety risk. Of course such an assertion is not mentioned in the declaration filed by the employer nor is there any suggestion that the applicant's incompetent act or risk as a safety hazard formed any part of Tricin's decision to terminate his employment. Accordingly, and while such assertions if properly put before the Board may lead to the conclusion that an interim reinstatement order should not issue (see *U.F.C.W. v. Shirlon Plastics Inc.*, [1994] O.L.R.B. Rep. 1086 (Ont. L.R.B.)), I reject the employer's argument in this case.

59 The allegations of harm which may be suffered by Tricin which are set out in the declaration are not particularly compelling and, to be fair, did not form much, if any, of Tricin's argument at the hearing. There is no factual basis set out in the declaration for the assertion that the applicant was a "disruptive force in the workplace" and that he disobeyed the directions of management on "numerous occasions". In any event, I seriously doubt any other employee would feel, because of an interim reinstatement, that they are free to disregard management's directions and otherwise be a disruptive influence as declared by Ms. Wagmaister.

60 As for the applicant he should be aware that the Board can take into account his conduct following interim reinstatement in fashioning a remedy or in exercising its discretion under section 50(7) of the OHSA, if applicable.

61 I also do not find the declaration about the potential for financial harm to be meritorious. There is no claim for an interim order for back wages. After any interim reinstatement Tricin would only have to pay the applicant for work he actually performed. Such wages are not recoverable by the employer whether or not the section 50 application fails, because of the Employment Standards Act and for other reasons. Therefore, it will not be necessary for the employer to file lawsuits to recover wages.

62 The final assertion of harm contained in Ms. Wagmaister's declaration is that if a Board Order is posted in the workplace it will encourage employees to refuse work "for whatever reason". This claim is not at all persuasive.

63 In short, based on the declarations filed, I find that little harm will occasion to the employer if the applicant is reinstated on an interim basis. That is not say that an interim reinstatement is a neutral event for an employer. The Board recognizes that it is a blow to its authority in the workplace which, particularly as a non-union employer, it enjoys. Such an event would be particularly galling to this employer which, as a result of the application for certification filed, has already had its freedom of action restricted by virtue of the statutory freeze and other provisions. However, I also note that section 50 of the OHSA places the onus on the employer to prove that it did not discharge Mr. Martin for improper health and safety related

reasons. Interim reinstatement is not inconsistent with such a regime.

What harm, if any, would or could be suffered if the application is not granted?

64 After careful consideration, I am satisfied that in answering this question the Board can have regard to the impact of the termination of the applicant's employment and what a failure to reinstate would mean to the workplace generally and not just the effect on the applicant personally.

65 The OHSA is an important piece of legislation in that the rights and duties contained in it exist to prevent injury and death in the workplace. The Legislature has recognized through section 50 of the OHSA that not all employers are equally prepared to accept their responsibilities under the OHSA. Combined with its role regarding the appeal of inspectors' orders and an inspector's decision not to make an order, it is clear that the Board has a significant role in the province's health and safety system.

66 While complaints under section 50 of the OHSA have more recently been viewed as an exercise of individual rights that has not always been the case. There are at least four decisions of the Board involving applications under section 50 of the OHSA or its predecessor where the Board has, as a remedy, ordered the employer to post a notice to employees in the workplace. Such a remedy is recognition of how the discharge of an employee for improper health and safety reasons may cause other employees to hesitate in the exercise of their own health and safety rights. As the Board stated in one of those decisions, *Nault v. Inco Metals*, [1984] O.L.R.B. Rep. 1464 (Ont. L.R.B.):

> 10. The *perception* [emphasis in original] created by the sequence of Mr. Riskie's handling of the situation on August 5, in violation of the Act, and Mr. Nault's precipitous re-assignment on August 8th, continue to trouble us, however, and makes the posting of an adequate Notice all the more significant in this case. But there is, in this case, nothing to suggest to us that the more senior levels of management have anything less than a proper regard for the objectives and requirements of the *Occupational Health and Safety Act*, nor would seek in any way to discourage employees from reporting what they have reason to believe are violations of that Act. We accordingly see no reason at this point why it cannot be left to management and the trade union representing Mr. Nault and his fellow employees to agree on the terms and posting of a Notice which will confirm such sentiments to all of the employees in the South Mine, in order that the isolated events occurring with respect to Mr. Nault not be misunderstood. The Board will remain seized of the matter, and should we be advised that the employer and the trade union have been unable to reach an accommodation on the
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> 11. wording and terms of posting of such a Notice by October 19, 1984, the Board will issue a direction in the more standard form of detail.

67 With perhaps one exception, the Board can think of no reason (and none was suggested by the employer in this case) why the Board's assessment of harm should be any different in an interim application brought in connection with section 50 applications than that which occurred in interim applications brought under the LRA when the Board had the power to order substantive interim relief. The Board's analysis of its process in those cases is well described in *U.S.W.A. v. Tate Andale Canada Inc.*, [1993] O.L.R.B. Rep. 1019 (Ont. L.R.B.):

> 52. In the instant case, there is not much doubt that the applicant meets that threshold. Where the union's two key organizers are unexpectedly discharged at the height of the organizing campaign, there is a prima facie case of a breach of the Act, and there is reasonable cause for employees to believe that an unfair labour practice has occurred; moreover, in cases of this kind, where the employer bears the legal onus of establishing that it has NOT contravened the Act, it is hardly surprising that the union requests that the "pre-discharge" status quo be maintained until the employer meets the statutory onus cast upon it. If the employer is obliged to establish that its removal of the employees from the workplace was NOT unlawful, there is nothing counter-intuitive about keeping them there until it does so. However, quite apart from the question of legal onus or the strength of the union's case, we are satisfied from the material before the Board that there really are reasonable grounds for the employees TO BELIEVE that Cake and Sweetman were discharged be-

cause of their trade union activities (whether they were or not); and that that situation is likely to persist unless the Board intervenes, and until the employer establishes that these terminations were not in fact tainted by any anti-union motivation. [emphasis added in upper case text]

53. In other words, whether or not the employer is ultimately successful on the main application, the sequence of events under review is likely to inhibit the free exercise of employee rights, unless there is some positive and tangible assurance that those statutory rights will be protected. If an outsider regards these discharges as at least suspicious, an employee in the workplace would reasonably fear the consequences of his/her involvement with the union. And that, in fact, was Sweetman's experience when he approached individuals who had previously expressed some interest in collective bargaining. Thus, whatever the motive for these discharges may actually have been, there is likely to be an adverse impact in the workplace until the aggrieved employees 'rights are resolved through impartial adjudication.

54. The question, though, is whether some interim direction is appropriate to address these concerns, and, if so, what form it should take.

55. In answering that question, we do not think it is very helpful to consider what a Court might do on an application for an interim injunction. For the reasons already outlined, we see no reason to import common/civil law considerations into the interpretation or administration of the Labour Relations Act (i.e., the Rules of Equity, undertakings as to damages, etc. - again, see the comments of Laskin, C.J.C. in Tomko, supra). On the other hand, we do think it is necessary to consider what "harm" may occur if an interim order is not granted, and what "harm" may occur if it is granted; moreover, that assessment should be made from a labour relations perspective, having regard to the scheme and purpose of the Act, of which section 92.1 is a part. In our view, the interests to be considered include those of the employer, the union, the aggrieved employees, and other employees in the workplace who may be effected by the conduct under review. However, we also think we should consider what may be described as a "general" or "public" interest in ensuring that the statutory objective is achieved, insofar as possible, in accordance with the administrative process prescribed, without protracted litigation. To the extent that the early intervention can have a moderating or prophylactic effect, that course is to be considered.

56. What is the "harm" potentially suffered by the union, the employees, and the process, if interim relief is not granted - that is, if the Board does not reinstate the grievors, or otherwise take steps to restore the labour relations status quo prevailing at the time of their discharge? Least significant, we think, is the potential wage loss to the aggrieved employees, which is fully recoverable (if they are successful) within a few weeks, and, in Sweetman's case, is moderated by the fact that he has already received some severance pay. More important, in our view, is the likely impact on other employees, who may have had an appetite for collective bargaining, but have just seen the union's two principal proponents summarily removed from the workplace in the midst of the organizing campaign. This is not a neutral event, and it would be totally unrealistic to expect employees to regard it that way.

57. It is one thing for lawyers to be confident in the efficacy of the legal process to vindicate statutory rights. It is quite another to expect employees to have such confidence, or to still the nagging suspicion that relative economic power might influence the result. Nor is this idle speculation, for even among sophisticated labour law practitioners there is an ongoing debate about the utility of Board remedies, and since the early 1970's the Statute has been amended on several occasions to broaden the remedial options - suggesting, we think, some Legislative doubts about the effectiveness of what was there before. And unless the Board does so, there may be no authoritative voice to reassure employees of their statutory right to join a union, or not, free from improper interference.

58. For most employees, the law is an unfamiliar, even alien abstraction. The reality is the employer's economic power and the "right" (or at least opportunity) to move unilaterally to deprive them of their livelihood. Accordingly, the most effective way to counteract the "message" of a summary discharge is an equally speedy reinstatement - ACCOMPANIED BY FORMAL NOTIFICATION TO EMPLOYEES OF THE TERMS AND LIMITS OF SUCH TEMPORARY REINSTATEMENT, AS WELL AS A SUMMARY OF THEIR STATUTORY RIGHTS, in order (to use the words of the panel in Radio shack) to "take account of the economics and psychology permeating the situation at issue" [emphasis

> added in upper case text]. Indeed, in the context of an organizing campaign, where the certification application has not yet been disposed of, that Board response is particularly attractive, unless there are compelling employer interests that point in some other direction. During this sensitive period, labour relations realities commend this prophylactic approach. The Board had similar statements in *Bay-Kingston (Re)*, [1993] OLRB Rep. December 1350:
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> 59. Section 92.1 was added to the Act in January 1993 and, on its face, gives the Board a new and independent power to "grant such interim ORDERS, INCLUDING INTERIM RELIEF, as it considers appropriate on such terms as the Board considers appropriate" [emphasis added in upper case text]. That power is broad and undefined. There is nothing in the statutory language that suggests that the Board cannot make an interim Order (like an interim custody order or an interim injunction) which resembles the final order to which a party might be entitled at the end of the day; moreover, the breadth of the language suggests that the Board should bring its experience and labour relations judgement to bear upon the particular problem put before it. The Statute permits the Board to respond flexibly to the labour relations problems, to take a forensic approach, and to tailor the result to the particular mix of facts and the private and public interests at play. As the Board said in Morrison Meats Ltd., [1993] OLRB Rep. Apr. 358: "An interim order represents, in part, an evaluation by the Board, in the face of a conflict, and in response to a request by one of the parties, as to the preferred labour relations circumstances to be preserved or created during the course of the litigation of the main application".

68 The one area where there may be a difference between the exercise of rights under the two statutes is the public element. While the Board recognizes that information flows quickly among employees in a workplace, even on a construction site, the fact is that employee awareness of union organizing campaigns and the exercise of rights under the OHSA may be quite different. Union organizing campaigns, by necessity, involve at least fairly substantial employee awareness. By the end of a campaign, at least 40% of the employees in the workplace will have to be approached about signing a union card. As a result it is the Board's experience that employees and, indeed employers, are frequently aware of union organizing at an early stage.

69 On the other hand raising a safety concern or making a complaint about a safety issue may be quite a private affair. There is no particular reason why anyone but the complaining employee and the complained to supervisor need be involved or even aware. In assessing the balance of harm, the Board must be aware of this difference and keep it in consideration when evaluating potential harm.

70 However, that being said, there is little doubt, at least on the material before me, that employees were generally aware of the applicant's health and safety activities. The applicant declares that he was the "sounding board" for other employees' health and safety concerns. The Board can also draw inferences from the alleged public and heated nature of the termination of the applicant's employment. Neither of these assertions was contradicted in the declaration filed by the employer.

71 I also note that the applicant declares, which declaration was not contradicted by the employer's declaration, that the employer did not have a safety representative and did not hold safety meetings. Therefore, there is no employer behaviour (at least as set out in a declaration) which could demonstrate the positive way in which it handled health and safety issues and thereby reduce the Board's concerns about the effect of the applicant's discharge on the other employees.

72 Based on the material before me, I am satisfied that the balance of harm favours reinstating the applicant to his employment on an interim basis. As noted there is little potential harm to the employer that was presented to the Board in the way required by the Board's rules, which is the only information the Board may consider. On the other hand, in the circumstances of this case, there is a risk that employees will be, or have been made, afraid to exercise their OHSA rights by the termination of the applicant's employment and that injury or even death could result.

73 Finally, throughout the hearing the employer raised the spectre that if the Board grants this application it could lead to a flood of such applications. Indeed, not only is it possible and even likely that there will be an interim reinstatement application with nearly every application under section 50 of the OHSA. It is also predictable that parties will file section 50 applications in order to have access to interim reinstatement and that interim applications will be brought in connection with other

applications to which section 16.1 of the SPPA applies.

74 Of course, the employer's fears have not been realized to date. Section 16.1 of the SPPA has been the law since 1994 and there have been few interim applications of any sort. Moreover, the *Kingsway* decision was released in December of last year, and this application is only the second interim application brought in the eight or so months since then.

75 Having said that, I do not dismiss the employer's concern completely. I think it is a possibility. However, I note two things. First, that the test the Board will use is not settled by this decision and the test that is ultimately determined may have an impact on whether interim applications are filed. Second, the employer in this case chose not to file substantive declarations. Employers in other cases may well not adopt that strategy and the Board will have to decide in those cases what to do when faced with two contradictory versions of the facts.

Orders

76 For all of the foregoing reasons, the Board hereby directs the responding party Tricin Electric Ltd. to reinstate the applicant, Ray Martin, to his former employment pending the disposition of Board File 1464-04-OH. The Board further orders Tricin Electric Ltd. to post the Notice, which is attached to this decision, in a prominent place in the workplace where it is most likely to be seen by its employees. The Notice shall remain posted for 30 consecutive days or until the York University project is complete.

77 The application in Board File No. 1464-04-OH is referred to the Registrar to be scheduled to be heard during a month in 2004, excluding August 2004, to be selected by the employer.

Appendix

Labour Relations Act
NOTICE TO EMPLOYEES
Posted by Order of the Ontario Labour Relations Board

This notice is posted in compliance with a direction of the Board, issued after a hearing in which the company and the union had the opportunity to make submissions.

The Board has ordered Tricin Electric Ltd. to reinstate Ray Martin ON AN INTERIM BASIS until the Board considers the reasons for his discharge. In the near future the Board will hold a full hearing to determine why Ray Martin was discharged.

THE BOARD HAS MADE NO FINDING OF IMPROPER CONDUCT BY THE COMPANY. If the Board ultimately determines that Ray Martin was discharged for poor work performance, or for insubordination or other disciplinary reasons, and health and safety issues had nothing to do with it, the temporary reinstatement order will be revoked, and the company will no longer be required to employ him.

If the Board ultimately finds that Ray Martin's discharge occurred because he raised health and safety concerns or exercised any other rights under the Occupational Health and Safety Act, the Board may confirm his reinstatement, and direct that he be compensated for all earnings and benefits lost as a result of his discharge.

Employees in Ontario have these rights and duties which are protected by law:

> AN EMPLOYEE HAS THE RIGHT to exercise rights and duties under the Occupational Health and Safety Act without reprisal or penalty.

AN EMPLOYEE HAS THE DUTY to work in compliance with the provisions of the Occupational Health and Safety Act and its regulations

AN EMPLOYEE HAS THE DUTY to report to his/her employer the absence of or defect in any equipment or protective device of which the worker is aware and which may endanger himself/herself or another worker

AN EMPLOYEE HAS THE DUTY to use or wear the equipment, protective devices or clothing that the worker's employer requires to be used or worn.

AN EMPLOYEE HAS THE DUTY to report to his/her employer any contravention of the Occupational Health and Safety Act or the Regulations or the existence of any hazard of which he/she knows.

. . . . .

This Notice must remain posted for thirty days or until Tricin Electric Ltd.'s involvement in the York University project is complete.

END OF DOCUMENT

Ministry of Natural Resources

227 Howey Street
PO Box 5003
Red Lake, ON P0V 2M0

Ministère des Richesses naturelles

PH : 807-727-2253
Fax : 807-727-2861
http://www.mnr.gov.on.ca

Ontario

June 6, 2011

Mr. Ian A. Blue
Gardiner Roberts LLP
Scotia Plaza, 40 King Street West, Suite 3100
Toronto, ON M5H 3Y2

Subject: Goldcorp's Red Lake Gold Mine's 115kV Transmission Line; Notice of Motion

Dear Mr. Ian Blue:

The following letter is intended to clarify Red Lake District MNR's participation in Goldcorp Red Lake Gold Mine's 115kV Transmission Line project. We understand that Goldcorp has provided materials before the Ontario Energy Board in support of its request to commence interim work on the proposed transmission line. In our view there are three points in the submission that might benefit from further clarification. We have referenced each point below and provided comments on each.

#5. Goldcorp's ability to carry out construction continuously prior to September 1, 2011 is constrained by the following MNR chart of seasonal restrictions.

First, MNR has not identified any restrictions pertaining to Caribou, as Caribou are not of concern in the area to be crossed by the proposed transmission line. Second, MNR does not impose general restrictions to protect habitat for 'breeding birds', 'migrating birds' and 'ground breeding birds', especially if there is not a known presence of these species. Instead, where the MNR is aware of such species, it provides guidance on how to mitigate appropriately in the particular circumstances, rather than through the imposition of 'blanket' timing restrictions. The restrictions outlined in the chart do not originate with the MNR, and may come from elsewhere.

#7. With respect to Bald Eagle nests, Goldcorp's biologist has found two on the right-of-way of the proposed 115kV transmission line. Due to MNR rules, clearing and grubbing may not be carried out within 1km of those nests until September 1st, 2011. Clearing and grubbing may be carried out on the rest of the right-of-way until mid-May and after mid-July.

The restrictions on work in the proximity of the Bald Eagle nests were proposed by SNC Lavalin in the Environmental Study Report. MNR endorsed this proposal, and still favours it, although it is not strictly required under the Forest Management Plan guidelines governing forestry work in proximity to Bald Eagle nests.

#8. It expects all required permits from MNR by around April 26, 2011.

Before MNR makes a decision on these permits, it needs to be satisfied that appropriate consultation with potentially affected First Nations and Metis concerning the Project has occurred. In MNR's view, consultation in this regard is ongoing.

If you wish to discuss this further, please contact Pamela Dittrich, District Planner at (807) 727-1328 or by email at pamela.dittrich@ontario.ca.

Sincerely,

Graeme Swanwick
District Manager
Red Lake District