ONTARIO LABOUR RELATIONS BOARD

3089-04-HS Humberline Packaging Inc., Applicant v. Joe Zaher, Inspector, Responding Party.

BEFORE: David A. McKee, Vice-Chair.

DECISION OF THE BOARD; February 22, 2005

1. This is an appeal of an Order made by an Occupational Health and Safety Inspector, brought pursuant to section 61 of the *Occupational Health and Safety Act*, R.S.O. 1990, ch O-1 (the "Act"). The Ministry of Labour has written to the Board asking that the matter be held in abeyance until at the latest, November 8, 2005. It does so on the basis that it may decide within that time to lay a charge under the Act, and submits that if that were to occur, the Board ought to await the outcome of the prosecution that would ensue. The applicant, Humberline Packaging Inc., opposes this request in its entirety and requests that no decision be made until at least after the settlement meeting set for March 14, 2005.

2. It is not apparent to me that this matter ought to be adjourned. Any application before the Board should proceed with as much expedition as the Board and the parties can provide. There will be times when other considerations outweigh the value of the overall goal of expedition. It does, however, require a consideration of the various competing interests. Since it is the Ministry that seeks to render a process less expeditious than what the Board can provide, it is incumbent on the Ministry to explain what value it seeks to protect by delay and why this is of greater importance than expedition.

3. The Ministry has not attempted to do so. It cites two cases, which it argues, stand for the proposition that the Board will adjourn all cases similar to this one as a matter of course. Neither case stands for that proposition, and indeed, the particular facts of the two decisions are different from this case in significant ways. In *M & I Air Systems Engineering* [1997] OOHSAD No. 225, the Ministry sought an adjournment over the objection of the employer on the grounds that there was a prosecution pending in the Ontario Court of Justice arising out of the same industrial accident. It was not simply contemplating charges; it had laid them. In the other case cited by the Ministry, *Pioneer Construction Inc*. [2001] OOHSAD No. 34, the Board did grant an adjournment while the Ministry contemplated laying charges. As the Board said on that case: "This request appears to go somewhat beyond what was considered in *M & I Air Systems Engineering…*". In an exceedingly brief decision it granted the adjournment where the employer made no submissions whatsoever. That is not the case here.

4. However, the question the Board must address is not whether or not the details of particular cases are substantially similar to the facts of this case. Rather, it is whether those previous decisions contain a rationale that would be appropriate to apply to this case. Sometimes a single factor is determinative. For example, there have been a number of cases where the Board has adjourned an appeal under the Act at the request of the employer, in the face of pending or threatened prosecution. The potential prejudice to the employer is obvious: it would be required to present evidence that might form part of the case against it in the Ontario Court of Justice. To require the employer to proceed with its appeal before this Board would deprive the employer of

its right to remain silent. In this case the employer is prepared to run that risk. It obviously does not lie in the mouth of the Ministry to rely on a potential prejudice to the applicant in this case when the applicant is prepared to bear that burden. When the motion is made by an employer, such cases are adjourned, not because one is automatic in similar circumstances, but because one party (the employer) is able to demonstrate a prejudice that is of greater consequence than the loss of expedition in the Board's process.

5. In *M & I Air Systems Engineering, supra,* counsel for the Ministry submitted that "there is a risk that the applicant will raise some objection in the prosecution that relates to the manner in which these proceedings unfold". The Board was persuaded that there was some risk to the prosecution and adjourned the case. The Board did not in that decision identify what it found to be the prejudice to the subsequent prosecution in that case. It cited a case where a coroner had adjourned an inquest on the following grounds:

> "Is it fair, therefore, to thoroughly discuss these issues in this inquest without somehow prejudicing the information in later court hearings? This concern is of major importance and it is my position that justice would be better served without the dry-run at the inquest. The key issues of this inquest must be litigated freshly and without bias or partiality in court proceedings. The inquest can follow at a later time."

6. Whatever the process is before a coroner holding an inquest under the *Coroners Act*, it is not self evident that there would be any prejudice to the Ministry as prosecutor in any trial that might be scheduled, if it were forced to respond to an appeal at the Board before trial. The Ministry is not losing any right to remain silent. Indeed it would gain some idea of the defence that the defendant proposed to make. I assume that there are some sort of disclosure requirements on the prosecution in a charge under the Act. If that obligation to disclose is somehow unfairly enlarged by dealing with an appeal before the Board, the Ministry has not provided any explanation about how that could occur.

7. An appeal under the Act before a panel of this Board and a prosecution before a judge of the Ontario Court of Justice are different processes and have their own different procedural requirements. It is not clear to me that the conduct of one process could prejudice the operation of the other. Neither the Board nor the Court sits in review of the other's process or decisions. Whatever needs to be done in one forum is not dependent on what may or did happen in the other.

8. The mere fact that the same witnesses would give the same evidence about the same incident (and perhaps more or less evidence about other matters relevant only to one proceeding), is not, in and of itself, prejudice. If both matters proceed, that will be the case in any event. The question is whether the order matters. It will matter for an employer, and it may choose to rely on that fact to request an adjournment. It is not self evident that there is any prejudice to the Ministry if the appeal proceeds first.

9. The prospect of an adjournment in these circumstances also raises issues with respect to the Board's process independent of any prejudice to the parties. Pursuant to section 69 of the Act, the Ministry has one year to lay a charge. In theory, every case might have to wait one year while the Ministry decided whether or not to lay charges. Given that an employer must comply with the order in the interim, that period of time may well make the appeal an academic matter by the time it is able to proceed. While the Board may suspend an order, it does so under relatively narrow circumstances. If all cases must wait one year before the litigation can commence, the Board might well have to re-examine its policy with respect to the granting of a suspension of an order pending the outcome of the application. The test for granting a stay is well known and

represents an appropriate balancing of the competing interests and issues relevant to a request to suspend an order. It would be unfortunate if the Board were to be required to re-evaluate the criteria in light of a likely one-year delay in virtually every case.

10. In its submissions, the Ministry made no attempt to identify any prejudice, but rather assumed that it was entitled to an adjournment as of right while it was thinking about whether or not to proceed with a prosecution. That assumption was wrong, and in the absence of any other submissions, the request for an adjournment is denied. I am not seized of this application.

"David A. McKee"
for the Board