

## COURT UPHOLDS THE OLRB'S RIGHT TO CONDUCT INFORMAL CONSULTATIONS

*International Brotherhood of Electrical Workers, Local 1739 v. International Brotherhood of Electrical Workers*, [2007] O.J. No. 2460 (Div. Ct.)

*By Valerie L. Fox*

The Divisional Court (the “Court”) recently ruled that the decision of the Ontario Labour Relations Board (the “Board” or “OLRB”) to proceed by way of an informal consultation was not patently unreasonable; nor was the decision itself patently unreasonable.

The applicant, the International Brotherhood of Electrical Workers, Local 1739 (the “Local”), was advised by the responding party, the International Brotherhood of Electrical Workers (“IBEW”), that its jurisdiction over a construction project was to be reassigned to another local, effective immediately. The Local brought an unfair labour practice complaint against the IBEW, claiming that the IBEW had unjustly assumed authority over the construction work and reassigned its jurisdiction, contrary to ss. 147 and 149 of the *Labour Relations Act, 1995* (the “Act”). The Local requested that the complaint be expedited. In turn, based on the urgency of the matter, the Board decided to proceed by way of an informal consultation conducted in accordance with expedited proceedings under Rule 41 of the Board’s *Rules of Procedure* (the “Rules”) rather than holding a full hearing. In making its decision, the Board relied on a substantial amount of material placed before it, including the parties’ submissions. The parties were not permitted to call *viva voce* evidence or to cross-examine the other parties on their allegations. The Board ultimately concluded that the IBEW had “just cause” to assume jurisdiction over the construction work.

The Local objected to the Board’s decision, as well as to the validity of the Board’s informal consultation procedure, on the grounds that it was contrary to natural justice.

The Court was left to decide on six issues:

1. Is Rule 41 *ultra vires*?
2. Did the Board deny the Local natural justice in proceeding by way of a consultation process and by failing to hold a full hearing?
3. Did the Board exceed its jurisdiction by making findings of fact in the absence of any evidence?
4. Did the Board deny the Local natural justice by failing to provide adequate reasons?
5. Was it patently unreasonable for the Board to proceed by way of a consultation process rather than by a full hearing?

6. Was it patently unreasonable for the Board to conclude that IBEW had just cause under subsection 147(1) of the *Act* to remove jurisdiction from the Local?

**1. Is Rule 41 *ultra vires*?**

The Local argued that Rule 41 was *ultra vires* for two reasons: First, the Chair improperly delegated its authority. Second, Rule 41 is inconsistent with the purpose of the *Act*. The Court focused on the necessity for procedural flexibility and the ability to meet the demands of each case, especially in cases that require expeditious rulings. The Court held that such informal decision making avenues must comply with the expedited proceedings under Rule 41.3 of the *Rules*. Rule 41 did not constitute impermissible sub-delegation of the Chair's rule-making authority. Further, Rule 41 was not found to be inconsistent with the scheme of the *Act*.

**2. Did the Board deny the Local natural justice in proceeding by way of a consultation process and by failing to hold a full hearing?**

The Local claimed the Board did not respect the *audi alteram partem* rule (the right to hear both sides), and in effect breached the rules of natural justice by denying the parties a full hearing. The Court concluded that the right to be heard did not necessitate a formal hearing with *viva voce* evidence and the right to cross-examine witnesses. The parties were given an opportunity to make both written and oral submissions and provide the Board with a substantial amount of record materials. Further, the Board understood the urgency of the matter and its inherent right to expedite proceedings in such cases, even if it meant limiting the opportunity for the parties to present oral evidence and engage in cross-examination. In fact, the Court held that if the Board had provided the opportunity to proceed with a full hearing, the construction project would have been long over and the delay caused would have been highly prejudicial to both parties. Lastly, the Court recognized that in this case there was a lesser need for procedural safeguards provided to the Local, as this matter involved a one-site transfer of jurisdiction, as opposed to a complete transfer or removal of its jurisdiction in the whole geographic area.

**3. Did the Board exceed its jurisdiction by making findings of fact in the absence of any evidence?**

The Local claimed that the Board came to its decision in the absence of cogent evidence. The IBEW counter argued that the only evidence not presented was *viva voce* evidence, and excluding one type of evidence cannot be understood to include a total absence of evidence. The Court concurred with the IBEW and concluded that the Board had enough evidence to support its decision. The Board was presented with pleadings, as well as with full oral and written submissions made by both parties over a two day period. The Court found that Rule 41.3 of the *Rules* clearly permits the Board to proceed with a consultation process if it is satisfied that the matter can be decided on the material before it, all the while taking into account the need for dealing with the dispute expeditiously.

**4. Did the Board deny the Local natural justice by failing to provide adequate reasons?**

The Local claimed the Board simply listed its conclusions and did not provide sufficient and adequate reasons to support its conclusions. The Court held that when an administrative tribunal

resolves a matter expeditiously, it often resorts to providing “bottom line” decisions and releasing its conclusions as quickly as possible. The Court held at paragraph 88:

The Board did intelligibly explain how and why it was reaching the decision it did. In doing so, it did provide a sufficiently adequate explanation of the process it engaged in, the conclusions it reached, on what it founded those conclusions, and the result of its conclusions. It did so with sufficient detail and clarity to more than adequately permit this Court to assess on this judicial review proceeding whether its decision was patently unreasonable.

The Court also did not side with the Local on this point because the Local failed to act on the possibility of obtaining further reasons or a reconsideration of the Board’s decision (s. 114(1) of the *Act*), and chose instead to commence a judicial review proceeding.

**5. Was it patently unreasonable for the Board to proceed by way of a consultation process rather than by a full hearing?**

The Local claimed that the Board’s decision to proceed by way of a consultation process did not properly “balance” expediency and the need for natural justice, arguing that a consultation does not provide for the greatest measure of procedural fairness. The Court concluded that it was not patently unreasonable for the Board to proceed by consultation, particularly when the consultation process is specifically contemplated by the *Act*. The Court held that a tribunal’s choice of procedure is entitled to deference, and as such there was no foundation for a finding that the Board’s decision to proceed via consultation was patently unreasonable.

**6. Was it patently unreasonable for the Board to conclude that IBEW had just cause under subsection 147(1) of the Act to remove jurisdiction from the Local?**

The Local claimed that the Board failed to consider the four underlying factors that constitute just cause for an alteration under s. 147(3) of the *Act*. These four factors include considering the trade union’s constitution, the ability of the trade union to carry out its duties under the *Act*, the wishes of the members of the trade union, and whether the alteration would facilitate viable and stable collective bargaining without causing serious labour relations problems. The Court held that in order to meet the “patently unreasonable” standard, more was required than boldly asserting that the Board failed to consider the s. 147(3) factors. Rather, the Local had to establish that the Board’s decision was “clearly irrational”, or suffered from a defect that is “immediately apparent, or so obvious that it demands intervention by the court on review”, that “once identified, can be explained simply and easily”. The Court concluded that the Local failed to meet the patently unreasonable standard, and further concluded that there was a rational basis for the Board’s decision.

**Conclusion**

In summary, the Court held that the function of the OLRB, or any other administrative tribunal, is to, in part, resolve matters in a speedy, efficient and effective manner. Tribunal decision makers are considered experts in their respective fields and their decisions are appealed in the

rarest of instances. When all the parties to a matter agree that the case needs to be resolved expeditiously, the Court will often defer to a tribunal's broad and inherent power.

*January 3, 2008*