

ONTARIO LABOUR RELATIONS BOARD

1174-11-HS Dollarama L.P., Applicant v. Lourdes Marcelo and Yvonne Moy, Inspector, Responding Parties.

2106-10-HS Dollarama L.P., Applicant v. Patricia Sobczuk, Inspector, Responding Party.

2837-10-HS Dollarama L.P., Applicant v. Marianne Johnson and David Whitney, Inspector, Responding Parties.

2839-10-HS Dollarama L.P., Applicant v. Kristen Kane and Janice Doyle, Inspector, Responding Parties.

2841-10-HS Dollarama L.P., Applicant v. Bonnie Krispanis and Cynthia Bacchus, Inspector, Responding Parties.

BEFORE: Susan Serena, Vice-Chair.

DECISION OF THE BOARD: March 14, 2012

1. These are appeals under section 61 of the *Occupational Health and Safety Act* (“the Act”) which raised related issues and have all been scheduled to be heard on March 26, 2012.

2. The Board is in receipt of a letter dated February 27, 2012 from counsel for the applicant in these files. Counsel indicates that the applicant has requested production of the following documents (“the documents”) from the responding parties and that the responding parties have declined asserting, *inter alia*, privilege:

- (a) notes made by the inspectors during their visits on the dates the Orders were issued or any subsequent attendances related to the Orders under appeal;
- (b) photographs taken [by the inspectors] during such visits; and
- (c) documents provided by Dollarama to the inspector(s) at the latter’s request or demand.

3. Pursuant to the Board’s direction in these matters dated February 28, 2012 the parties have filed written submissions regarding the above request for the pre-hearing production of documents.

4. The Ministry of Labour, on behalf of the responding parties, opposes the applicant's request for the pre-hearing production of the documents on the basis that ordering the production of the requested documents would violate section 63(3) of the Act because the documents sought by the applicant clearly constitute evidence that an inspector cannot be compelled to provide pursuant to section 63(3) of the Act. In support of its position the Ministry relies on the decision in *McNaught (Re)* [1997] O.O.H.S.A.D. No. 22 which determined a hearing under section 61 of the Act is a proceeding caught by section 63(3) of the Act and *General Motors of Canada*, [1984] OLRB Rep. March 459 and [1985] OLRB Rep. 262 where the Board quashed a summons issued to an inspector on the basis that section 63(3) prevented an applicant from compelling an inspector to provide evidence similar to that which the applicant seeks in this case.

5. The applicant submits it is entitled to the requested documents because they are relevant to the issues in dispute and the decisions relied upon by the Ministry of Labour deal with the compellability of the inspector to testify and not the issue of pre-hearing production of documents.

6. There is no assertion the documents sought by the responding party are not arguably relevant. The fact that the proceeding before the Board is a hearing *de novo* does not mean that the requested documents are not relevant to the issue of whether the orders issued by the inspectors are appropriate under the Act.

7. There is also no dispute that a hearing before the Board under section 61 of the Act is a proceeding to which section 63 applies. Rather the Ministry of Labour asserts that disclosure of the documents would be contrary to subsection 63(3) of the Act, which reads as follows:

(3) An inspector or a person who, at the request of an inspector, accompanies an inspector, or a person who makes an examination, test, inquiry or takes samples at the request of an inspector, is not a compellable witness in a civil suit or any proceeding, except an inquest under the *Coroners Act*, respecting any information, material, statement or test acquired, furnished, obtained, made or received under this Act or the regulations.

8. Subsection 63(3) of the Act deals solely with the issue of whether an inspector (or certain other person) is compellable as a witness to testify at a hearing with respect to any information, material, statement or test made or received under the Act. Subsection 63(3) of the Act does not go so far as to prevent documents that have been prepared or collected by the inspector from being disclosed or subject to a production order.

9. In both of the *General Motors of Canada, supra*, decisions relied upon by the Ministry of Labour the issue being addressed was whether the inspector could be compelled to testify at a hearing and not whether certain documents were subject to production. In these decisions a summons to witness served upon the inspector was quashed for the following reasons:

Accordingly, we rule that Mr. Iacovoni cannot be compelled to testify in respect of any of the aforementioned matters, and he is hereby released from the summons served upon him by the complainant.

Having considered the submissions of the parties, it is our ruling that Mr. Iacovoni is not a compellable witness in respect of any of the matters identified by Mr. Swartz in his able submissions. We agree with Ms. Dietrich's submission that the hearing of this complaint is a 'proceeding'

within the meaning of section 34(2) of the Act. The broad scope of the phrase "civil suit or any proceeding" is apparent not only from the use of the word "any", but also from the express exclusion of an inquest under the *Coroners Act*. If the words "any proceeding" did not include administrative hearings, then that exclusion would be unnecessary. (See, generally, *Re Dorothea Knitting Mills Ltd. (1975)*, 9 OR. (2d) 378, and *Re Harry Woods Transport Ltd. (1980)*, 25 L.A.C. (2d) 60.) Moreover, we are satisfied that the evidence which the complainant seeks to compel Mr. Iacovoni to give is evidence respecting information, material, statements or tests acquired, furnished, obtained, made or received under the Act or regulations. The alleged statements by supervisory personnel clearly fall within the ambit of statements received under the Act. The issuance of the report was one of the official functions which Mr. Iacovoni was performing on the premises and was itself information furnished by Mr. Iacovoni under the Act. Finally, we would note that there are sound policy reasons for upholding Ms. Dietrich's objection. If an inspector is to be able to properly perform his important functions under the Act, he must be able to freely obtain information from persons in the workplace and carry out his other tasks in a context in which neither he nor the persons with whom he speaks will feel constrained by the possibility that he may subsequently be compelled to testify at the instance of one of the parties to proceedings such as a complaint under section 24 of the Act. Thus, we are satisfied that the objects of the Act are best served by the aforementioned construction of section 34(2), which we feel to be of the type permitted and encouraged by section 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides:

Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

Accordingly, we rule that Mr. Iacovoni cannot be compelled to testify in respect of any of the aforementioned matters, and he is hereby released from the summons served upon him by the complainant.

10. Both subsections 63 (1)(a) and 63(4) of the Act recognize that documents prepared or obtained by an inspector can be disclosed. In the face of these provisions the Board cannot interpret section 63(3) in the manner sought by the Ministry of Labour to prevent the pre-hearing disclosure of the documents sought by the applicant. Subsections 61(1)(a) and 63(4) read as follows:

63. (1) Except for the purposes of this Act and the regulations or as required by law,

- (a) an inspector, a person accompanying an inspector or a person who, at the request of an inspector, makes an examination, test or inquiry, shall not publish, disclose or communicate to any person any information, material, statement, report or result of any examination, test or inquiry acquired, furnished, obtained, made or received under the powers conferred under this Act or the regulations;

...

(4) A Director may communicate or allow to be communicated or disclosed information, material, statements or the result of a test acquired, furnished, obtained, made or received under this Act or the regulations.

11. For the reasons set out above, the Board directs the responding parties in these matters to produce to the applicant by no later than March 20, 2012 the following documents:

- (a) notes made by the inspectors during their visits on the dates the Orders were issued or any subsequent attendances related to the Orders under appeal;
- (b) photographs taken [by the inspectors] during such visits; and
- (c) documents provided by Dollarama to the inspector(s) at the latter's request or demand.

12. I am not seized with these matters.

“Susan Serena”
for the Board