

2370-05-G International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers and its Local 736, Applicant v. **E.S. Fox Limited**, Responding Party.

BEFORE: Susan Serena, Vice-Chair, and Board Members John Tomlinson and Alan Haward.

APPEARANCES: Anne Cumming and Gary Charters for the applicant, Wm. McNaughton and J. Murray appeared for the responding party.

DECISION OF THE BOARD; January 11, 2006

1. This is a referral of a grievance to the Board pursuant to section 133 of the *Labour Relations Act, 1995* S.O. 1995 Ch. 1 (the "Act").
2. The applicant, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers and its Local 736 (the "Ironworkers" or the "union") allege that the responding party, E.S. Fox ("Fox" or the "company") violated the collective agreement between the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers and the Iron Workers District Council of Ontario and the Ontario Erectors Association Incorporated when it failed to provide to the union the information required under section 52(1) of the *Occupational Health and Safety Act, R.S.O. 1990, c.O.1* (the "Act") with respect to two workplace incidents.

3. Section 52(1) of the Act and section 9(1) of O. Reg. 213/91 provide as follows:

52(1) If a person is disabled from performing his or her usual work or requires medical attention because of an accident, explosion or fire at a workplace, but no person dies or is critically injured because of the occurrence, the employer shall, within four days of the occurrence, give written notice of the occurrence containing the prescribed information and particulars to the following:

1. The committee, the health and safety representative and the trade union, if any
2. The Director, if an inspector requires notification of the Director.

...

9(1) A notice under subsection 52(1) of the Act respecting an occurrence involving a worker shall set out,

- (a) the name, address and type of business of the employer;
- (b) the nature and circumstances of the occurrence and the bodily injury or illness sustained by the worker;
- (c) a description of the machinery or equipment involved;
- (d) the time and place of the occurrence;
- (e) the name and address of the worker involved;
- (f) the names and addresses of all witnesses to the occurrence;
- (g) the name and address of any legally qualified medical practitioner by whom the worker was or is being attended for the injury or illness;
- (g.1) the name and address of each medical facility, if any, where the worker was or is being attended for the injury or illness; and
- (h) the steps taken to prevent a recurrence.

Background Facts

4. The following facts are not in dispute:

- a) Fox employs Ironworkers and other construction trades.
- b) Workplace incidents of the nature described in section 52(1) of the Act occur from time to time.
- c) When such incidents occur the company does not provide the information required under section 52(1) of the Act to the Ironworkers (or any other trade union to which the company is bound).
- d) In particular, in July 2004 and August 2005, two members of the union suffered workplace injuries and the company failed to provide the union with the information required under section 52(1) of the Act even after the union learned of these incidents and requested the information from the company.
- e) An injured worker is provided with a copy of the Form 7 that the company submits to the Workplace Safety and Insurance Board.
- f) The company's failure to comply with subsection 52(1)1 of the Act was reported to the Ministry of Labour, however the Inspector did not issue an order to compel the company to supply the requisite information to the union.

Submissions and Argument

5. The company objects to providing the union with the personal and medical information required under section 52(1) of the Act on the basis that disclosure of this information is governed by the Personal Information Protection and Electronic Documents Act, 2000, c.5 ("PIPEDA"). The company submits when it obtains the information required by section 52(1) of the Act it is collecting information in the course of a commercial activity within the meaning of section 4(1) of PIPEDA and, as a result, the disclosure of this information to the union without the consent of the individual to whom the information belongs is contrary to PIPEDA, in particular clause 4.3 of Schedule A. The company submits that none of the exceptions contained in PIPEDA permit the disclosure of this information to the union without the consent of the worker and that by virtue of section 4(3) of PIPEDA, that Act overrides section 52(1) of the Act.

6. Further, the company asserts that under section 181(3) of the Workplace Safety and Insurance Act, S.O. 1997, c.16 (the "WSIA"), it is prohibited from either releasing a copy of the Form 7 or providing the information contained therein to the union, without the consent of the worker, and the information provided on the Form 7 replicates the information required to be disclosed under section 52(1) of the Act. The company disputes that the union has a legal obligation to represent the workers with respect to their compensation claims and there is no evidence that the workers, in this case, have authorized the union to represent them as required by the WSIA.

7. The company also contends that if the union requires the information contemplated by section 52(1), it can either obtain the worker's consent to permit the company to release this information or the union can request a copy of the Form 7 directly from the worker. If necessary to facilitate these requests, the collective agreement can be amended in order to require the company to provide prompt notice to the union of the name of a worker involved in a workplace incident and the date of the incident. The company contends any attempt by it to obtain the worker's consent to release information to the union could constitute interference by the company into the activities of the union.

8. The union takes the position that if the worker's consent is required in order for the company to disclose the information required by section 52(1) of the Act, then the company (as opposed to the union) is responsible for obtaining the worker's consent. The union points out that it may be unaware of the fact that a workplace injury has occurred and hence, of its need to obtain the worker's consent, while the company will have immediate notice of a workplace incident. Further, nothing in the Act compels union to obtain the worker's consent or requires the worker to supply the information in question to the union (e.g. by providing the union with a copy of the Form 7). Instead, the Act places the obligation to provide the information on the company.

9. The union also disputes that PIPEDA requires the company to obtain the consent of the worker in order to disclose to the union the information covered by section 52(1) of the Act. In particular, the union relies on section 3 and subsection 5(3) of PIPEDA in support of its position that the company can disclose this information because disclosure to the worker's union so the union can assist the worker with his WSIB claim is

disclosure for a purpose that “a reasonable person would consider appropriate in the circumstances”. The union also asserts that PIPEDA permits the collection of information without consent for the purpose of making a disclosure that is required by law (see: subsection 7(1)(e)(ii)). Personal information can also be disclosed, without consent, where the disclosure is required for the purpose of administering any law of a province (see: subsections 7(3)(c.1)(iii)). Finally, the union points out that under clause 4.3.1. of Schedule A of PIPEDA, if consent is required, the company should obtain the worker’s consent to use and disclose the information at the same time it collects the information from the worker.

Decision

10. For the reasons set out below, the Board finds that the company is legally obligated to comply with subsection 52(1) of the Act and provide to the union the information required by subsection 9(1) of O. Reg. 213/91.

11. It is beyond dispute that much of the information the company is required to provide to the union, under section 52(1) of the Act, is personal information that belongs to either the injured worker or the witness(es) to the incident. Subsection 2(1) of PIPEDA provides as follows:

“personal information” means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization.

12. More problematic is whether PIPEDA has any application to this information in these circumstances. In particular, is the company collecting this information in the course of a commercial activity as required by subsection 4(1)(a) of PIPEDA?

4(1) This Part applies to every organization in respect of personal information that

- (a) the organization collects, uses or discloses in the course of commercial activities; or
- (b) is about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.

Although the union did not seriously dispute the company's assertion that the information was being collected in the course of a commercial activity, ultimately it is unnecessary for the Board to determine this issue in order to dispose of this application. However, it would seem to the Board that PIPEDA has no application to the information at issue in this application.

13. Under subsection 4(1) of PIPEDA, Part 1 of that Act applies to personal information that the company collects, uses or discloses in the course of "commercial activities". PIPEDA defines "commercial activity" as follows:

"commercial activity" means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

Although the definition of commercial activity is quite broad and, as a result, subsection 4(1)(a) of PIPEDA would include the collection, use or disclosure by the company of the personal information of its employees' for commercial purposes, where the employees' personal information is being collected, used or disclosed for employment-related purposes, subsection 4(1)(a) does not apply. First, the collection, use or disclosure by an organization of the personal information of its employees solely for employment-related purposes cannot reasonably constitute a "commercial activity" under any logical interpretation of that phrase. The mere fact that an organization carries on a commercial activity cannot, on its own, render the collection, use or disclosure of employee personal information for employment-related purposes into a commercial activity. Furthermore, if subsection 4(1)(a) of PIPEDA is intended to include the employment-related collection, use or disclosure by an organization of the personal information of its employees, subsection 4(1)(b) of PIPEDA (under which Part 1 of PIPEDA applies to the personal information of the employees of federal works, undertakings or businesses) would be unnecessary. (See: *Re:*

McKesson Canada and Teamsters Chemical, Energy and Allied Workers Union, Local 424, 136 L.A.C. (4th) 102, G.F. Luborsky).

14. Therefore, assuming that the company was only collecting, using and disclosing the personal information of the employees who are the subject matter of this application for an employment related purpose, the Board concludes that PIPEDA does not apply to this information.

15. Even if the above interpretation of section 4(1) is incorrect, for the reasons set out below, the Board is still satisfied that nothing in PIPEDA prevents the company from complying with section 52(1) of the Act.

16. Subsection 4(3) of PIPEDA provides as follows:

(3) Every provision of this Part applies despite any provision, enacted after this subsection comes into force, of any Act of Parliament, unless the other Act expressly declares that that provision operates despite the provision of this Part.

[Note: Subsection 4(3) in force January 1, 2001]

The Act has been in force since long before 2001 and Subsection 52(1)1 has remained unchanged since at least 1990. Accordingly, even if the reference to an “Act of Parliament” in subsection 4(3) of PIPEDA includes legislation passed by a provincial legislature, under subsection 4(3) Part 1 of PIPEDA does not override section 52(1) of the Act.

17. Clause 4.3 of Schedule 1 of PIPEDA provides as follows:

The knowledge and consent of the individual are required for the collection, use or disclosure of personal information, except where inappropriate.

Section 5 and Subsections 7(1),(3) and (5) of PIPEDA state:

5(1) Subject to sections 6 to 9, every organization shall comply with the obligations set out in Schedule 1.

(2) The word “should” when used in schedule 1 indicates a recommendation and does not impose an obligation.

(3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances.

...

7(1) For the purposes of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may collect personal information without the knowledge or consent of the individual if

...

(e) the collection is made for the purpose of making a disclosure

- (i) under subparagraph (3)(c.1)(i) or (d)(ii), or
- (ii) that is required by law.

(3) For the purposes of clause 4.3 of Schedule 1 and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if disclosure is

...

(d) it was collected under paragraph 1(a),(b) or (e).

...

(i) required by law

18. Unfortunately, neither of the parties addressed the application of subsection 7(3)(i) of PIPEDA to the information at issue in this application. However, the union did point out that subsection 7(1)(e)(ii) permits the company to collect the information required under section 52(1) of the Act without obtaining the consent of the individual because the collection is for the purpose of making a disclosure that is required by law. The Board agrees with that assertion.

More importantly however, the Board finds that under subsection 7(3)(i) of PIPEDA, the company is permitted to disclose the information listed in section 9(1) of O. Reg 213/91 to the union, without the consent of the individual(s), because this disclosure is “required by law”. There can be no dispute that subsection 52(1)1 of the Act specifically directs the company to disclose the information at issue to the union. Accordingly, the disclosure of this information to the union in order to comply with section 52(1) of the Act must be the type of disclosure contemplated and permitted by subsection 7(3)(i) of PIPEDA. PIPEDA permits disclosure, without the knowledge or consent of the individual, where the disclosure is “required by law” and such disclosure is “required by law”, namely the *Occupational Health and Safety Act*.

19. In conclusion, PIPEDA specifically recognizes and permits the collection and disclosure of information without the consent of the individual(s) to whom it pertains where the information is required to be disclosed by law and section 52(1) of the Act specifically directs the company to disclose to the union the information at issue in this case. Accordingly, assuming that PIPEDA even applies to this information, under PIPEDA this information may be disclosed to the union, without the knowledge or consent of the worker(s), because the disclosure of this information is required under section 52(1) of the Act.

20. For the reasons set out above the grievance is granted and the company is directed to disclose to the union the information required by subsection 52(1)1 of the Act.

“Susan Serena”

for the Board