ONTARIO LABOUR RELATIONS BOARD

3325-04-HS Ministry of Health and Long-Term Care, Land Ambulance Programs, Applicant v. Canadian Union of Public Employees Local 2974.1 and R. Taggart, Inspector, Responding Parties v. County of Essex-Windsor, Intervenor.

0284-05-HS Canadian Union of Public Employees Local 2974.1, Applicant v. **Ministry of Health and Long-Term Care,** and R. Taggart, Inspector, Responding Parties v. County of Essex-Windsor, Intervenor.

BEFORE: Ian Anderson, Vice-Chair.

APPEARANCES: Lorne Richmond and Dave Thibodeau appeared on behalf of Canadian Union of Public Employees Local 2974.1; David Strang, Allan Duffin and Rick Smiles appeared on behalf of the Ministry of Health and Long-Term Care; Giuseppe Ferraro and Rick Taggart appeared on behalf of R. Taggart, Inspector; Jacqueline Lund, Brian Bildfell and Dean Wilkinson appeared on behalf of the County of Essex-Windsor.

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Introduction

1. These are two applications under section 61 of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended (“OHSA”).

2. These applications are with respect to the health and safety of paramedics in relation to the operation of the communications system which they are required to use. The paramedics are employees of the County of Essex-Windsor (“Essex”) and are represented in that employment relationship by the Canadian Union of Public Employees, Local 2974.1 (“CUPE”). It is common ground that pursuant to the *Ambulance Act*, R.S.O. 1990, c. A.19, as amended, sole and exclusive responsibility for the provision and operation of the communications system lies with the Ministry of Health and Long Term Care (“MOHLTC”).

3. While I have adopted the parties’ practice of identifying the MOHLTC as a party to these proceedings, it appears to me that the proper party is in fact the Crown in Right of Ontario. References to the MOHLTC should, therefore, be understood to be a reference to the Crown in Right of Ontario for the purposes of this decision.

4. Essex and CUPE consider the current communications system to be unsafe in several respects, to be detailed below. The MOHLTC has declined to make changes requested by Essex and CUPE, and refuses to permit Essex to make some of the changes on its own. The Inspector first made an order directing the MOHLTC to do so and then rescinded much of that order. The MOHLTC appeals the initial making of the order. CUPE and Essex appeal the rescission of the order.

5. Essex and CUPE assert that in relation to the provision and operation of the communications system used by the paramedics the MOHLTC has breached the obligations of an "employer" under section 25(1)(b), (2)(a) and (h) of the OHSA, the obligations of a "supervisor" under section 27(2)(a) and (c) and the obligations imposed on certain suppliers under section 31(1) of the OHSA. "Employer" and "supervisor" are defined terms under the OHSA. The relevant sections of the OHSA are set out in Appendix "A" to this decision.

6. The MOHLTC concedes that it is an employer within the meaning of the OHSA but denies that it is an employer of the paramedics, or that it is a supervisor. It concedes that it is a supplier of the communications system. It denies, in any event, that the communications system it has provided or its manner of operating that system poses any health and safety risk in general to the paramedics and in particular breaches any obligation it has as a supplier or would have if it were an employer or supervisor.

7. At the conclusion of the hearing, the Inspector argued that MOHLTC was an employer within the meaning of the OHSA, but not a supervisor. The Inspector argued that the MOHLTC had, as an employer, in some respects breached its obligations under the Act.

8. The hearing of this matter took 14 hearing days, in addition to several days spent in consensual mediation efforts, over the course of several years. The parties led evidence with respect to events that post-dated the applications without objection. By the conclusion of the hearing, CUPE and Essex had abandoned some remedial requests and redefined others. This appears to arise from two things. First, some of the problems which they had sought to address arose during the transition from the old communications system to the current communications systems and have since been resolved. Second, a greater understanding of the technological capabilities and limitations of the current system obtained through the course of the hearing. In the result, there were few material facts in dispute between the parties. Accordingly, the facts recited in this decision are not in dispute unless otherwise indicated.

9. Broadly speaking, the MOHLTC's sole and exclusive responsibility for providing the communications systems used by the paramedics gives rise to six issues over which the parties continue to disagree:

> a) The refusal of the MOHLTC to change the "scale of issue" of portable radios to paramedics from one per ambulance, each ambulance having a crew of two paramedics, to one per paramedic while on duty (referred to by the parties, and in this decision, as the "second portable" issue);
>
> b) The basis and frequency on which the emergency buttons on the portable radios used by the paramedics should be

tested, with the result that there is no regular testing of the buttons;

c) The refusal of the MOHLTC to permit its dispatchers to "flag" for paramedics addresses to which they are being dispatched as "known" to have potentially dangerous residents;

d) The lack of a preventative maintenance program by the MOHLTC for the communications equipment it supplies to paramedics for their use;

e) The functionality of the communications system provided by the MOHLTC to the paramedics, in relation to which CUPE and Essex now seek declarations and orders requiring the MOHLTC to inform the paramedics of known "defects"; and

f) The refusal of the MOHLTC to permit paramedics to use the "mike to mike" function on cell phones provided to them by the MOHLTC.

10. The parties called evidence through the following witnesses. CUPE called: Dean Wilkinson, Operations Manager for Essex-Windsor Emergency Medical Services; and Dave Thibodeau, a paramedic who had worked for Essex for 18 years as of the date of his evidence and who was, and had been, a worker Health and Safety representative on behalf of CUPE. Essex called: Brian Bildfell, Director of Land Ambulance Services, County of Essex-Windsor and City of Windsor. The MOHLTC called: Rick Smiles, Manager of Telecommunications Section, Health Services Cluster, IT Services, Management Branch, MOHLTC; Matt Landry, Supervisor for Communications, Windsor Central Ambulance Communication Centre ("Windsor CACC") (and as such a member of a bargaining unit of employees represented by OPSEU); Lou Battiston, Acting Deputy Director, Government Mobile Communication Project ("GMCP"); Beth Krauter, Manager of Windsor CACC; and Allan Duffin, Field Manager, Southwest Field Office, Emergency Medical Services Branch, MOHLTC. The Inspector called no witnesses. All of the witnesses gave their evidence in a straightforward and candid manner, to the best of their ability given their knowledge and expertise.

Historical Context

11. Prior to 1998 ambulance services were operated directly by the Province of Ontario. In 1998 responsibility for the provision of ambulance services, apart from the communications functions, was downloaded to upper tier municipalities ("UTMs") by the Province. Staff and equipment were transferred from the Province to UTMs, including Essex. As a result, Essex employs approximately 150 full time and part time paramedics and supervisory staff. It has 4 ambulance stations and 28 vehicles. It responds to approximately 50,000 calls per year.

Hazards Faced by Paramedics

12. The issues in dispute are seen by CUPE and Essex as responsive to certain hazards faced by the paramedics. It is useful, therefore, to review at the outset the nature of those hazards.

13. In the County of Essex-Windsor, approximately 90% of the calls responded to by paramedics relate to emergencies. These may be the result of illness or trauma from motor vehicle accidents, industrial accidents, other accidents or acts of violence. A significant number of the calls involve mental health issues. The paramedics may have little or no information about the nature of the problem or any attendant risks to their health and safety prior to arrival. (The amount of information provided to paramedics relates to one of the issues in these proceedings: flagging.)

14. Wilkinson (who gave his evidence in 2007) provided anecdotal evidence with respect to some potentially dangerous situations in which paramedics have found themselves. Paramedics were dispatched to a house where a female was having a seizure. The patient refused transport by the paramedics but her condition was such that the paramedics remained at the scene. Only upon the arrival of six police cruisers did the paramedics in question learn that the residence was owned by a notorious motorcycle gang. Weapons were located in the residence, including a knife under a pillow under the patient and a handgun in a wooden box on a coffee table next to the patient.

15. In 2006, paramedics were dispatched to a patient having a seizure on the street. The patient was placed in the ambulance where the paramedics attempted further treatment. The patient became violent. An emergency button in the ambulance was set off. Other ambulance crews arrived. It took five paramedics to restrain the patient. During transport the patient bit one of the paramedics.

16. Also in 2006, paramedics were dispatched to a residence where a patient was having abdominal pain. The patient met the crew in the street and was placed in the back of the ambulance for assessment. During the assessment, two police officers knocked on the rear door of the ambulance and asked the paramedics to which address they were responding. When the paramedics told the police officers, the police officers told the paramedics that in no circumstances were they to respond to that address in the future without police presence, as the residence in question was known to be a “crack house” at which there were known to be weapons. (Essex requested that MOHLTC “flag” this address, a concept discussed further below, but the request was denied.)

17. A report with respect to an incident in January 2002, under the previous radio communications system, was placed into evidence. Two paramedics were attending to an individual who appeared to be intoxicated and was subsequently found to be in possession of a quantity of crack cocaine. The paramedics decided to attempt to contact the Windsor Police Department using their portable radio. They were told that their attempted radio communication was unintelligible. One returned to the ambulance to use its radio. When he returned, he learned that there had been a scuffle between his partner and the patient. A further attempt to use the portable was also unsuccessful.

18. The incident which gave rise to the orders which are the subject of this application occurred on February 27, 2004. Incident reports filed by the ambulance crew involved were filed as exhibits, and additional evidence was given by Wilkinson and Thibodeau. An ambulance crew was dispatched to an address to attend to a patient with mental health problems. The police had also been dispatched to that address, but for reasons which were not before me that dispatch was cancelled. By the time the crew arrived, the patient had become agitated and drew a knife on them. The crew retreated to the ambulance where they locked the doors and awaited the arrival

of the Windsor police. The attending crew experienced difficulties in using their portable radio: there was no available channel, and they received a "bonk" signal (discussed further below). At the time of the incident FleetNet, which is the current communications system and is described in greater detail below, was still being rolled out in Essex and the emergency buttons on the portable radios had not yet been made operational.

19. In cross-examination, Wilkinson agreed that there is nothing to suggest that the ambulance crew members became separated during this incident. Thus, while this incident is some evidence of the hazards faced by paramedics in the course of their duties, and of the utility of a functioning portable radio and emergency button, it is less clear that it supports the need for both members of an ambulance crew being provided with their own portable radio.

20. Thibodeau, who has worked as a full time paramedic since 1989, testified that he has always responded to calls involving domestic violence, public violence, assaults, weapons, street fights and drunks, but the frequency of such calls is increasing. He testified that paramedics now respond to such calls on a daily basis. Further, he testified that two members of a paramedic crew becoming separated is not a chance event but rather a daily occurrence.

21. Thibodeau described an incident in which he and his partner were dispatched to a house where a couple had been arguing. The husband was unconscious with signs of a severe head injury, apparently as a result of the wife cracking a large crystal vase on his head. Thibodeau's partner, who was carrying the portable radio at the time, left the house to return to the ambulance for additional equipment. While Thibodeau was on his knees attending to the patient, the wife, who was drunk, started throwing items from a kitchen drawer at Thibodeau's back. One of the items thrown was a large kitchen knife. Thibodeau left the patient to restrain the wife until his partner returned. In cross examination he agreed that an emergency button would not have prevented the knife being thrown.

22. Incident reports in relation to an incident on September 2, 2007 were also placed into evidence and Thibodeau gave evidence with respect to discussions he had with one of the paramedics involved. A crew of paramedics was dispatched to an address. The patient was agitated and being held to the ground by family and friends. The paramedics were able to calm the patient, place him on a stretcher and move him to the back of the ambulance. After several minutes the patient suddenly became very agitated which quickly progressed to violence: the glasses of one paramedic were knocked off his face and destroyed and the other paramedic was kneed and kicked at a number of times. The paramedic with the portable was ultimately able to push an emergency button. The other paramedic did not have access to an emergency button or a radio by which he could convey additional information about the situation to dispatch. Police arrived some minutes later and the patient was subdued.

23. Wilkinson, who has over 37 years experience in provision of ambulance services, testified that it was common, on a daily basis, for the two members of a crew to become separated. As examples he listed motor vehicle accidents in which one crew member is attending to individuals on one side of an expressway and the other is attending to individuals on the other and dispatches to apartment buildings, where one crew member must return to the ambulance to retrieve some required piece of equipment. He also asserted that scuffles or fights with patients were becoming a daily occurrence in Essex-Windsor. This evidence was not challenged in cross-examination.

24. Landry testified as to one such incident involving a real emergency. A paramedic crew at the Windsor Casino was dealing with a patient who was reacting in an aggressive manner due to a diabetic incident. The crew hit the emergency button on the portable multiple times. The signal was relayed to dispatch by 4 or 5 different mobile/repeaters. The dispatcher canvassed all potentially affected ambulances. Two crews did not respond: the one at the Casino and one at a residence. Police were dispatched to both the Casino and the residence.

The MOHLTC's Role with respect to the Provision of Ambulance Services in Essex

25. Pursuant to the *Ambulance Act*, and regulations thereto, the MOHLTC performs essentially three types of functions in relation to the ambulance services provided by Essex: regulatory, funding and operational.

26. Certain provisions of the *Ambulance Act* are of particular note. Section 2 provides that the Minister of Health is responsible for the administration and enforcement of the Act. Section 4 gives the Minister the duty and the power "to ensure the existence throughout Ontario of a balanced and integrated system of ambulance services and communications services used in dispatching ambulances" (s. 4(1)(a)). The obligation to provide land ambulance services, however, is placed on UTMs by section 6(1) of the Act.

27. Section 4(3) of the *Ambulance Act* enables the Minister to make grants for the provision of services under the Act. As discussed in greater detail below, in order to be eligible for a grant, a UTM must meet certification criteria established by the MOHLTC. The MOHLTC funds approximately 40% of the cost of Essex's ambulance services.

28. The certification criteria for emergency medical service operators established by the MOHLTC pursuant to Part II of O. Reg. 257/00 to the *Ambulance Act* are set out in the Land Ambulance Service Certification Standards. They are comprehensive and include determination of whether or not the operator has in place policies covering the recruitment of staff, rest periods between the hours worked by staff, transportation of patients by staff, requiring staff to wear seat belts, and interactions with the CACC. Essex is subject to these criteria.

29. The Minister is given specific duties and powers in relation to those ambulance services. In particular, the Minister has the duty and power "to establish standards for the management, operation, and use of ambulance services and to ensure compliance with those standards" (s. 4(1)(d) of the *Ambulance Act*) and "to monitor, inspect, and evaluate ambulance services and investigate complaints respecting ambulance services" (s. 4(1)(e)).

30. Pursuant to the authority to establish standards, and Part II of O. Reg. 257/00, the Minister has promulgated a document entitled "Ambulance Service Patient Care and Transportation Standards". That document mandates standards with which each emergency medical service operator, and each emergency medical attendant and paramedic employed by the operator, are required to comply. (Emergency medical attendants and paramedics have different levels of qualification. The distinction is not relevant to the issues in this case and in the balance of this decision I have, as did the parties, used the term paramedic generically to refer to both.) Those standards specify the staffing levels of ambulances, the qualifications required to be held by ambulance staff and requirements for continuing education of paramedics. They prohibit smoking or the use of alcohol or drugs which might impair the function of paramedics. They also specify detailed required procedures with respect to communicable disease management and influenza control. Finally, those standards also require each paramedic to comply with directions

of communications officers employed by the MOHLTC with respect to the assignment of calls and the transportation of patients to facilities.

31. While Essex decides whom to hire as a paramedic, before the individual can begin to work a paramedic photo ID card must be issued by the MOHLTC. Prior to doing so, the MOHLTC reviews documentation concerning the individual submitted by Essex and conducts a criminal record and driver's licence check. The photo ID card is unique to Essex: if the paramedic works for another emergency medical service provider, another photo ID card must be obtained from the MOHLTC in relation to that work.

32. The communications and dispatch functions performed by the MOHLTC lie at the heart of the present applications. Pursuant to section 4(1)(c) of the *Ambulance Act*, the Minister has the duty and the power "to establish, maintain and operate communications systems, alone or in co-operation with others, and to fund such services". Thus, in providing communications and dispatch equipment and services to UTMs, the MOHLTC is performing an operational function.

33. I note, parenthetically, that while it is common ground that the MOHLTC's responsibility with respect to communications and dispatch functions is sole and exclusive, the statutory or regulatory basis for this conclusion was never made clear. I do note that section 13 of O. Reg. 257/00 to the *Ambulance Act* provides:

> If the operator of a land ambulance service also operates a communications service, the operator shall, on receiving notice from the Director, cease operating the communications service and shall,
>
> > (a) permit Ministry officials to do all things reasonably necessary to transfer control of the communications service to a new communications service;
> >
> > (b) ensure that all telephone numbers under the operator's control that are used to receive ambulance calls from the public or other agencies are assigned to the new communications service;
> >
> > (c) ensure that no other telephone lines under the operator's control are used for assigning calls to ambulances or emergency response vehicles; and
> >
> > (d) not advertise or hold out to the public any telephone number as being available to access ambulance or emergency response services except those assigned to the new communications service.

In any event, I have assumed for the purposes of these reasons that the MOHLTC has sole and exclusive authority in relation to communications and dispatch functions used by emergency medical services in the Province of Ontario. I turn now to a brief description of those functions.

34. Communications officers employed by the MOHLTC receive calls and dispatch Essex's paramedics to attend to those calls. The paramedics are under the direction and control of the communications officers from the beginning to the end of their shifts. In part, these interactions are governed by the "County of Essex, Emergency Medical Services, Deployment Plans", as discussed further below. These interactions relate not only to the one to two hundred calls that are dispatched per day, but to other communications relating to things such as the

positioning of ambulances and the taking of breaks. As noted above, the paramedics are required to comply with the directions of the MOHLTC communications officers.

35. The MOHLTC determines what information will be given to the paramedics in relation to those calls. In particular, as discussed further below, the MOHLTC refuses to "flag" addresses "known" to have potentially dangerous residents, and to provide this information to the paramedics.

36. The radio communications system currently provided by the MOHLTC is commonly referred to as FleetNet. The system was designed to specifications of the MOHLTC, and its partners in the Government Mobile Communications Project as discussed further below. FleetNet is large and complex and its technical capabilities and limitations are within the knowledge and control of the MOHLTC.

37. The MOHLTC determines what communications equipment is provided to the paramedics in relation to the performance of their duties. Of particular note in relation to this case, the MOHLTC has decided that the scale of issue of the portable radios provided for use by the paramedics will be one portable radio per ambulance. As each ambulance has a crew of two paramedics, this means that there is only one portable radio for them to share when outside of the ambulance. Repeated requests by Essex for a second portable radio per ambulance, and even offers by Essex to pay for such a radio, have been refused by the MOHLTC.

38. The MOHLTC also provides each crew of paramedics with a cell phone. This practice originated under the previous radio communications system and was designed, in part, to address "dead spots" in its coverage. However, as discussed further below, the cell phones are not a substitute for the portable radios, but serve a separate function. The decision as to whether or not to continue to provide the cell phones lies with the MOHLTC.

39. The MOHLTC also determines the manner in which the communications equipment it provides may be used. Of particular note, the agreement of the MOHLTC is required before the paramedics can test the emergency buttons on their portables. Thus far, the MOHLTC and Essex have not been able to reach an agreement on this issue, with the result that there is no regular testing of the emergency buttons on the portables. The MOHLTC has also set up the cell phones so that they may only be used to call pre-programmed numbers and has disabled the "mike to mike" function, by which one of the paramedics' cell phones could be used to call another.

<u>Whether the MOHLTC has obligations under the OHSA of an "employer" to the paramedics.</u>

Summary of the Parties' Arguments

40. CUPE asserts that the MOHLTC is an employer of the paramedics for the purposes of the obligations under sections 25(1)(b) and 25(2)(a) and (h) of the OHSA, or in any event has those obligations to them, and that it has breached those obligations in relation to the paramedics employed by Essex.

41. CUPE argues that Essex and the MOHLTC would be declared to be a common employer within the meaning of section 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, Sch. A, but for the provisions of the *Crown Employees Collective Bargaining Act, 1993*, S.O. 1993, c. 38, ("CECBA") which provide that section 1(4) does not apply. It notes, however, that

there is nothing in CECBA which ousts the application of the OHSA. It invites the Board to conclude that the MOHLTC is a common employer with Essex for the purposes of the OHSA.

42. CUPE argues that the MOHLTC employs one or more persons and therefore falls within the meaning of "employer" as defined by section 1(1) of the OHSA. It argues that the obligations which attach to an employer under section 25 of the OHSA relate not only to its own workers but the workers of other employers. It notes that the section refers to obligations which an employer has to "workers", not to "its workers". It argues that when the Legislature intended the obligations of a party to be so restricted it said so. It points to section 46 of the OHSA, which refers to "a constructor's or employer's workers". It argues that an employer of workers at a workplace is subject to obligations under the OHSA to ensure the safety of all workers at the workplace, citing: *R. v. Skyway Equipment Co*., [1997] O.J. No. 6074; *R. v. Wyssen*, (1992) 10 O.R. (3d) 193 (C.A.); *R. v. Structform International Ltd.*, [1992] O.J. No. 1711; *R. v. Grant Forest Products Inc*., [2002] O.J. No. 3374, affirmed [2004] O.J. No. 2250; *Ontario (Ministry of Labour) v. Pioneer Construction Inc.*, (2006), 79 O.R. (3d) 641; *Tembec Forest Products (1990) Inc*., [1994] O.O.H.S.A.D. No. 3; and *K. Winter Sanitation Inc.*, [1999] O.O.H.S.A.D. No. 162. The workplace of the paramedics, it argues, includes the dispatchers employed by the MOHLTC. It notes that the Court of Appeal has held that the OHSA is remedial legislation which should be interpreted in a generous manner consistent with its purpose of protecting the safety of workers: *Ontario (Ministry of Labour) v. Hamilton (City)*, (2002) 58 O.R. (3d) 37.

43. Essex argues that the MOHLTC exercises significant control over the ambulance services in general, and the employment of paramedics by the ambulance services in particular, and that it has complete control over the communications system. Essex notes that the OHSA binds the Crown. Essex notes that there is a statutorily mandated agreement between itself and the MOHLTC and argues that this constitutes the MOHLTC an employer within the meaning of the OHSA, relying on *R. v. Nova Scotia (Department of Supply and Services)* [1997] N.S.J. No. 496 (N.S. Prov. Court) and *Bell v. Quagliotti* [1918] B.C.J. No. 114 (B.C.S.C.). Essex concedes that there is nothing in the definition of employer under the OHSA which specifically addresses the issue of "downloading", but cites *R. v. 974649 Ontario Inc. c.o.b. as Dunedin Construction (1992)*, (2001) 206 D.L.R. (4th) 444 (S.C.C.) for the proposition that the law speaks continually once adopted with the result that the will of the legislature must be interpreted in light of prevailing rather than historical circumstances. It also argues that as the MOHLTC is an employer and the paramedics are workers, the MOHLTC is subject to the provisions of the OHSA in relation to the paramedics, relying upon *R. v. Iroquois Falls Hydro-Electric Commission*, unreported, December 19, 2001, O.C.J.

44. The Inspector also argues that the MOHLTC ought to be considered an employer with respect to the health and safety of the paramedics, but disagrees with some of the arguments advanced by CUPE and Essex. Specifically, the Inspector argues that the functions of the MOHLTC pursuant to the *Ambulance Act* and Regulations thereto are those of a regulator, and do not constitute it an employer of the paramedics. In this respect it cites *Abarquez v. Ontario*, [2005] O.J. No. 3504. The Inspector argues, however, that the MOHLTC is an employer in its own right and as such is responsible to comply with the OHSA in relation to the work carried out by workers of other employers, if the work of the other employers is contiguous or contingent upon the MOHLTC performing its work in accordance with the OHSA. In support of this proposition, it relies upon *Iroquois Falls*, *R. v. London Excavators & Trucking Ltd.*, [1998] O.J. No. 6437 (C.A.), *Wyssen* and *Structform International Ltd*.

45. The MOHLTC argues that it does not have the responsibilities of an employer under the OHSA *vis a vis* the paramedics, and that this makes good policy sense. The contrary conclusion, it asserts, would mean that an Inspector under the OHSA addressing the local demands in one upper tier municipality could make orders which would have negative health and safety consequences for the complex province wide communications system as a whole. It argues that its functions under the *Ambulance Act* and Regulations thereto are those of a regulator and do not constitute it an employer. It disputes that it has any supervisory authority over the paramedics. While it is an employer in its own right, and it supplies services to the paramedics, it argues that in order to have the responsibilities of an employer *vis a vis* the paramedics, it would have to supply services of one or more of its workers in the workplace of the paramedics. It argues that this proposition is supported by the case law and cites *K. Winter Sanitation*, *Wyssen* and *Pioneer Construction*. *Iroquois Falls*, it argues, is limited to instances in which the work is physically contiguous.

Analysis

46. The interpretative approach to be applied to the OHSA has been stated by the Ontario Court of Appeal in *Hamilton (City)*, (2002) 58 O.R. (3d) 37 as follows (at paragraph 16):

> The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

47. Section 1(1) of the OHSA defines "employer" as follows:

> "employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services

48. There is no dispute that the MOHLTC is an employer within the meaning of this provision. The question, however, is whether it owes the obligations of an employer under the OHSA to the paramedics. In this respect, I agree with CUPE that it is important to note that manner in which particular obligations are described.

49. Section 46 of the OHSA, referenced by CUPE, relates to the bilateral work stoppage provisions set out in section 45. Section 46(1) permits "a certified member at a workplace or an inspector who has reason to believe that the procedure for stopping work set out in section 45 will not be sufficient to protect a constructor's or *employer's workers* at the workplace from serious risk to their health and safety" to make an application to the Board for a remedy.

50. To this example, other sections can be added which, in some manner, expressly describe rights or obligations under the OHSA by reference to the employer's workers. Section 24(1)(c) imposes obligations upon a licensee to ensure the protection of the health and safety of

"*workers employed by employers* referred to in clause (b)". Clause (b) refers to "every employer performing logging in the licensed area for the licensee". That is, consistent with the purpose of the Act, a licensee is responsible to ensure the protection of the health and safety of all workers in its licensed area.

51. Section 27(1)(b) requires a supervisor to ensure that a worker "uses or wears the equipment, protective devices or clothing that the *worker's employer* requires to be used or worn". Similarly section 28(1)(b) requires a worker to "use or wear the equipment, protective devices or clothing that the *worker's employer* requires to be used or worn used". I note that arguably these provisions imply that the corresponding obligation imposed upon an employer by section 25(1)(a) to provide "the equipment, materials and protective devices prescribed" must be read as limited to its workers.

52. By contrast, the employer obligations relied upon by CUPE and Essex in this case are the following:

> 25. (1) An employer shall ensure that,
>
> ….
>
> (b) the equipment, materials and protective devices provided by the employer are maintained in good condition;
>
> (2) Without limiting the strict duty imposed by subsection (1), an employer shall,
>
> (a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;
>
> ….
>
> (h) take every precaution reasonable in the circumstances for the protection of a worker;

On their face, none of these obligations are restricted to the employer's workers.

53. The question is, therefore, in what circumstances does an employer have these obligations to a worker? Not surprisingly, the cases establish that an employer has these obligations when it is the, or one of the, employers of the worker. But the cases also suggest that given sufficient proximity, control and risk of harm, an employer owes these obligations to other workers as well.

54. In *R. v. Structform International Ltd.*, [1992] O.J. No. 1711 (OCJGD) at issue was an appeal from a conviction for failure to comply with what is now section 25(1)(c) of the OHSA:

> An employer shall ensure that,
>
> (c) the measures and procedures prescribed are carried out in the workplace;

The conviction related to a scaffold erected by Structform which collapsed, injuring one of its employees. The collapse was the result of actions taken by the employee of another employer. Structform argued that there was no evidence to show that it had failed to ensure that the scaffold was properly constructed. The court rejected this defence, stating:

> The case law is clear that one employer cannot point a finger at another employer who might be closer to the situation. *Every employer has a duty to see that the workplace is safe.* And in the complexity of construction it is important that every employer use knowledge, due diligence, etc., to ensure that the workplace is safe. An employer is not entitled to say it is someone else's responsibility. That is exactly the defence being put forward by this appellant. By the very wording of section [25](1)(c) of OHSA, there is an obligation on an employer to ensure that measures and procedures prescribed as in section 81 of Regulation 691 are carried out in the workplace. The appellant herein has agreed that the requirements of section 81 of Regulation 691 [with respect to the state of the scaffold at the time of the accident] were in fact not carried out. This court finds that there was sufficient evidence before the learned trial judge to convict under this strict liability offence created by OHSA, he being satisfied that the Crown had proved beyond a reasonable doubt that the offence had been committed. It was open to the defendant but it was under no obligation to do so, to offer defence evidence at trial but it chose not to do so and in the result it is apparent that no doubt was raised in the trial judge's mind.
>
> [*Emphasis* supplied.]

While not the subject of express comment, on the facts Structform was found to have this obligation in relation to one of its employees who was in the workplace. Nonetheless, the obligation was interpreted in a broad and purposive manner in order to ensure that the workplace was safe.

55. In *R. v. Wyssen*, (1992) 10 O.R. (3d) 193 (C.A.), the issue was the liability under the OHSA of Jake Wyssen, a window cleaner, for the death of Joseph Coutu. Wyssen had been contracted to clean the windows of four buildings. One of the buildings was beyond his capabilities and he subcontracted that work to Coutu. Coutu had the necessary expertise and provided his own equipment to perform the work. Coutu fell to his death and Wyssen was charged under what are now sections 25(1)(c) and 25(2)(h) of the OHSA. Section 25(1)(c) imposes obligations on “an employer” with respect to “the workplace”. Section 25(2)(h) imposes obligations on “an employer” with respect to “a worker”. Relying on the complete lack of supervision by Wyssen and independence of Coutu, the courts below had found that Wyssen was not an employer within the meaning of the OHSA and thus entered an acquittal on the charges. It is not clear from the decision whether Wyssen had any other employees.

56. The Court of Appeal reversed. Blair J.A., writing the majority opinion, with which Finlayson J.A. concurred, held that the obligation arose from a literal construction of the definition of “employer” under the Act: an employer is defined to include a contractor who subcontracted with an independent contractor, and the term “worker” is broader than “employee” and encompassed both employees and independent contractors. The Court also concluded that reading the OHSA as a whole compelled this conclusion. The Court stated that what is now section 25(1) “puts an employer virtually in the position of an insurer who must make certain that the prescribed regulations for safety in the workplace have been complied with before work is undertaken by either employees or independent contractors”, and that what is now section 25(2)(h) was “even more sweeping”. These provisions, the Court held, underlined the fact that: “The legislature clearly intended to make an “employer” responsible for safety in the “workplace”.” The Court of Appeal therefore directed a new trial.

57. In *Wyssen*, therefore, the contractor was an "employer" because the independent contractor was its subcontractor and therefore, pursuant to the definition of "employer", one of its workers. The contractor owed the obligations of an employer to a worker of whom it was the employer. Once again, however, the obligations imposed upon "an employer" were interpreted in a broad and purposive manner in order to ensure that the workplace was safe.

58. In *Grant Forest Products Inc.*, [2002] O.J. No. 3374 a manufacturer of forest products contracted with an employment agency to provide temporary staffing. One of the employees provided by the employment agency experienced a work related accident. Grant Forest Products was charged with breaching the obligations of "an employer" under sections 25(1)(a) and (c) of the OHSA in relation to the accident. The contractor argued that the definition of "employer" in the OHSA was overbroad and contrary to sections 2(b) and 7 of the *Charter of Rights and Freedoms*. Justice Bélanger of the Ontario Court of Justice rejected this argument in part because he was bound by *Wyssen*. In doing so he noted that while *Wyssen* held that a contractor had the obligations of an employer towards subcontractors, nothing in *Wyssen* suggested that the defence of due diligence was not available to the contractor with respect to a charge that it had failed to fulfill those obligations. Rather, the result in *Wyssen* was that a new trial was ordered. With respect to the argument that the definition of "employer" was overbroad because, unlike "owners", employers are denied the option of contracting out of the Act, Justice Bélanger concluded by stating:

> Unavailability of an option to contract out of employer responsibilities does not in my opinion make the legislation overbroad. Rather, as stated above, it appears to me to re-enforce a legislative objective to make workplace owners and employers conscious of their responsibilities to take prudent and effective measures to ensure the existence of a safe workplace.

59. An appeal from the decision of Justice Bélanger was dismissed by the Court of Appeal ([2004] O.J. No. 2250) in a four line endorsement which reads as follows:

> Substantially for the reason [sic] of Justice Bélanger we agree that the definition of "employer" in section 1 of the Occupational Health and Safety Act is not overbroad. Moreover, we see no reason to revisit this court's majority decision in *R. v. Wyssen*, (1992), 10 O.R. (3d) 193. The appeal is therefore dismissed.

60. I would note that *Grant Forest Products Inc.* serves to highlight that the degree of control exercised by an employer is relevant to the determination of whether or not such an "employer" has committed an offence when it has breached its obligations under the Act. The degree of control will also be relevant for the purposes of proceedings before this Board in relation the obligation under section 25(2)(h) of "an employer" to take every precaution reasonable in the circumstances for the protection of "a worker".

61. *Tembec Forest Products (1990) Inc.* [1994] O.O.H.S.A.D. No. 3 was an appeal under section 61 of the OHSA from an inspector's order in relation to an employer's failure to comply with a regulation concerning the proper loading of a truck used to haul logs. It is not clear from the decision under what section of the Act the order was made and in any event the order was rescinded. Prior to doing so, however, the adjudicator rejected an argument that Tembec was not the "employer" on site. Tembec had contracted the work to a subcontractor which in turn had subcontracted the work to an independent contractor who was performing the work in question.

Tembec argued that it had no contractual relationship with the sub-subcontractor and that the definition of employer did not capture this relationship. The adjudicator dismissed this argument on the basis that it could not have been the "intention" of the legislature that the obligations of an employer could be avoided by arranging one's legal affairs in such a way to create enough "legal distance" between the parties. In doing so, she cited the passage in *Wyssen* referenced above.

62. In *R. v. Skyway Equipment Co*., [1997] O.J. No. 6074, (O.C.J.(P.D.)) C. H. Heist contracted with Skyway Equipment Co. to provide scaffolding for a sandblasting and painting operation. Skyway in turn subcontracted part of the work to E & D Scaffold Services. E & D Scaffold Services erected the scaffold. An employee of C. H. Heist fell from the scaffold and sustained fatal injuries as a result of a defect in the scaffold. The defect in the scaffold was the result of an alteration not caused by Skyway. Skyway was charged with failing to meet the obligations of "an employer" under section 25(1)(c) and 25(2)(a) and (h) of the OHSA. The particulars of the charges referred to the deceased C. H. Heist employee. Skyway argued that it was not an employer but rather a supplier and thus the charges must be dismissed.

63. The Justice of the Peace noted that on the date of the accident, Skyway had an employee on site and further that its subcontractor, E & D Scaffold Services, had employees on site. The Justice of the Peace held that as a result Skyway was "an employer on site". Citing passages from *R. v. Wyssen* and *R. v. Structform*, the Justice of the Peace held, without further explanation or comment, that the "extended definition of "employer" in the *Occupational Health and Safety Act* is broad enough to satisfy this court that Skyway has been properly charged as an employer with responsibilities as such on the work site." Implicit was the conclusion that a subcontractor has the obligations of an employer to the employees of its contractor.

64. On appeal, ([1998] O.J. No. 5989, OCJ (PD)) the issue of whether Skyway was an employer was not squarely raised. The Provincial Court did, however, state:

> 22. In relation to the timing, Defence submits that the relevant time for consideration of the employer's duty and whether it was met was prior to any alteration or tampering by Heist employees or persons unknown with the grates and hoppers.
>
> 23. Madam Justice Gotlib in *R. v. Structform International Limited* [1992] O.J. No. 1711 (Ont. Ct. Gen. Div.) September 26, 1991, addresses the issue of the relevant time in that case, indicating that an employer is required to ensure that the workplace complies with the prescribed standards "At all times the worker is working"…. Since Skyway had the status of "employer" in relation to the workers and the work was ongoing at the time of the accident, Skyway's duties and responsibilities to ensure workplace safety continued to be operative.

It is not clear whether the court was stating that Skyway had the obligations of "an employer" to the deceased C. H. Heist employee because the court considered that it was "the employer" of the C. H. Heist employee or because the court considered that as an "an employer" on site it had the obligations of "an employer" to workers of other employers on site. It is to be noted that the former approach would require giving the definition of "employer" an expansive reading so that not only is a contractor the employer of the workers of its subcontractor, but the subcontractor is the employer of the workers of its contractor.

65. In *R. v. London Excavators & Trucking Ltd.*, [1998] O.J. No. 6437 (C.A.) a general contractor, Cooper Corporation Limited, subcontracted with London Excavators & Trucking Limited to excavate a construction site. Cooper advised London that the site was clear of any services. A backhoe operator employed by London struck concrete. A supervisor employed by Cooper advised him that it was safe to proceed and directed him to do so. The concrete encased a hydro duct and when the backhoe cut through it there was an explosion. London was charged and convicted of failing to meet the obligations of "an employer" under section 25(1)(c) of the OHSA in relation to, it appears, the backhoe operator who was its own employee.

66. On appeal to the Court of Appeal, London argued that while both it and Cooper were "employers" within the meaning of the OHSA, Cooper had ultimate supervisory responsibility for the excavation, and thus it was objectively reasonable for London to have relied upon Cooper's directions. The Court of Appeal dismissed the appeal, stating:

> It was not objectively reasonable for the appellant to continue to rely, without further inquiry, upon the direction of the general contractor once an unexpected concrete obstacle had been encountered in a location the general contractor had pronounced safe to excavate. At that point, it was incumbent upon the appellant, in the interest of safety of its employees *and others who might be exposed to risk of harm*, to ensure that the prescribed measures and procedures designed to protect their safety had been carried out in the workplace.
>
> [*Emphasis* supplied.]

67. I think it is important to note that, strictly speaking, the emphasized comment by the Court of Appeal was *obiter dicta* since the issue was not whether London Excavators owed the obligations of an employer to the employees of another employer, rather it was whether it was objectively reasonable for it to rely on the representations of another employer in fulfilling its obligations to one of its employees. Thus, it was not necessary for the Court of Appeal to determine whether or not London Excavators owed the obligations of an employer to the workers of another employer. However, the *obiter* comment in *London Excavators* can be understood in one of two ways. First, it can be understood as suggesting that the definition of employer includes a subcontractor in relation to the employees of its contractor, since on the facts of that case the only other employees referred to were the employees of the contractor. Second, it can be understood as suggesting that as an "an employer" on site it had the obligations of "an employer" to workers on site of which it was not "the employer" but who might be exposed to risk of harm by its actions or inactions.

68. The meaning to be ascribed to the emphasized words in *London Excavators* was the subject of comment in *R. v. Iroquois Falls Hydro-Electric Commission*, unreported, December 19, 2001, O.C.J. In that case, the Town of Iroquois Falls contracted separately with Iroquois Falls Hydro-Electric Commission ("IFHEC") and another company, Claybelt, to install a three phase transformer on a pole (IFHEC's responsibility) in order to run electricity from the transformer into a local arena (Claybelt's responsibility). Notably, there was no contractual relationship between IFHEC and Claybelt and in particular they did not stand in the relationship of contractor and subcontractor to each other. IFHEC ordered an appropriate transformer. No one noticed that a different transformer, of significantly higher voltage, was in fact received. IFHEC connected the transformer. An employee of IFHEC advised employees of Claybelt that the transformer was "live" and asked if anyone had a voltage meter or tester. An employee of Claybelt had a tester

which he used to perform a test. Because the wrong transformer had been installed, the employee of Claybelt sustained an injury.

69. IFHEC was charged with failing to meet the obligations of "an employer" under section 25(2)(a) and (h) of the OHSA in relation to the Claybelt employee. A Justice of the Peace acquitted on the basis that IFHEC owed no duty to the worker at the time of the accident. On appeal from the acquittal, the Provincial Court upheld the appeal and remitted the matter for fresh trial. The court stated (at p. 9):

> The responsibility of the employer does not extend only to its employees but to all workers on a project whose safety may be compromised if they do not receive the appropriate information or precautions, reasonable in the circumstances for their protection.
>
> In the case at bar, the respective spheres of operation of the defendant and Claybelt were contiguous, that is to say, the work of Claybelt picked up where the work of the defendant left off, and it was therefore incumbent upon the defendant to alert Claybelt and its employees to the voltage being provided.
>
> [Catzman J.A.] for the Ontario Court of Appeal in [*R. v.*] *London Excavators and Trucking Limited* put it this way.
>
>> At that point, it was incumbent upon the appellant in the interests of the safety of its employees and <u>others who might be exposed to risk of harm</u> (emphasis mine) to ensure that the prescribed measures and procedures designed to protect their safety had been carried out in the workplace.

70. Like *London Excavators*, the finding in *Iroquois Falls*, can be understood in one of two ways. First, it can be understood as suggesting that the definition of employer includes a subcontractor in relation to the employees of another subcontractor of a shared contractor: that is, the subcontractor is "the employer" of such workers. Second, it can be understood as suggesting that as an "an employer" on site, the subcontractor had the obligations of "an employer" to workers on site of which it was not "the employer" but who might be exposed to risk of harm by its actions or inactions. In either event, the obligation arises because of the potential for harm the subcontractor's actions, or inactions, posed to the employees of the other subcontractor.

71. In *Pioneer Construction*, (2006), 79 O.R. (3d) 641, the defendant had contracted with P.D. Brooks, a common carrier, to deliver sand and salt to its work site. A truck driver employed by P.D. Brooks delivered a load of sand and salt to the site. The sand and salt was offloaded onto a conveyor belt system called a Uniloader. Responsibility for the flow of sand and salt onto the Uniloader and the Uniloader's operation was that of an operator employed by Pioneer Construction, not the truck driver. The Uniloader operator absented himself to make a phone call. The driver noticed that the flow of sand and salt from the truck box to the Uniloader had ceased and used a sledge hammer to hit the box of the truck. He did not shut off the Uniloader before doing so because he did not think it was his place to do so. A large portion of sand fell onto the conveyor belt in such a way that the driver's foot was caught and he fell onto the conveyor belt and was injured. Pioneer Construction was convicted of failing to meet the obligations of "an employer" under sections 25(1)(a) and 25(2)(a). It appealed on several grounds, including the argument that it was not the employer of the driver.

72. The portion of the Court of Appeal's reasons addressing this issue in *Pioneer Construction* are sufficiently short that it is worth setting them out in their entirety:

> Did the appeal justice err in upholding the trial judge's decision that Pioneer was the "employer" of a non-employee driver, who was directly employed by P.D. Brooks, a common carrier that was delivering sand to the M.T.O. yard?
>
> [19] The reasons in *R. v. Wyssen* (1992), 10 O.R. (3d) 193, [1992] O.J. No. 1917 (C.A.) are dispositive of this issue and we see no reason to revisit them. There was no dispute that Pioneer had contracted for Mr. Carr's services through his immediate employer, P.D. Brooks. Just as a contractor who hires the services of a tradesperson through another employer (a subcontractor) assumes responsibilities as an employer for that tradesperson while that person is working in a workplace under the control of the contractor, so Pioneer became the employer of Mr. Carr when he was working in a workplace controlled by Pioneer providing services to Pioneer. The narrow definition of "employer" advanced by Pioneer is inconsistent with a purposive interpretation of the statute. This ground of appeal also fails.

73. In *Pioneer Construction*, then, the Court of Appeal held a person which contracts for the services of a common carrier has the responsibilities of an employer to an employee of that common carrier "while that person is working in a workplace under the control of the contractor". It appears that the Court reached the conclusion based on an expansive reading of the definition of employer. One way to understand this decision is to consider that Pioneer and P.D. Brooks were in the relationship of contractor and subcontractor in relation to the provision of common carrier services, and that as a contractor Pioneer owed the duties of an employer to the employees of its subcontractor. Even on this interpretation *Pioneer Construction* is arguably an extension on the application of the principles recognized in *Wyssen* since in that case the duties were found only in relation to a subcontractor of the contractor, not an employee of the subcontractor. It is also worth considering whether the result should have been any different had the contract between Pioneer Construction and P.D. Brooks been for the provision of sand and salt, rather than the provision of common carrier services.

74. In *K. Winter Sanitation Inc.*, [1999] O.O.H.S.A.D. No. 162, the issue was the standing of K. Winter Sanitation Inc., a supplier of toilet and clean up facilities to a construction site, to appeal an order under section 61 of the OHSA made against Richard & B.A. Ryan Ltd., the constructor responsible under the OHSA to ensure that appropriate toilet and clean up facilities were available on the site. The responding parties took the position that as the order was made against Ryan and not K. Winter, K. Winter lacked standing to bring the appeal. The Board noted that K. Winter was a person which employed workers and thus was an employer within the meaning of the OHSA (at paragraph 16). At the same time, K. Winter was "not an employer on the Ryan construction project against whom the order was issued" (paragraph 22). The Board noted, however, that section 61 permits, *inter alia*, "any employer … which considers itself aggrieved by an order made by an inspector under this Act" to appeal an order to the Board, and on that basis concluded that K. Winter had standing to bring the appeal. As the case was concerned with the scope of the term "considers itself aggrieved" as it applied to "any employer", I do not find it of assistance on the issue before me.

75. The final decision to touch upon the issue of employer obligations provided by the parties is *Abarquez v. Ontario*, [2005] O.J. No. 3504 (SCJ). *Abarquez* concerned a claim in negligence brought by a number of nurses against the Crown in relation to the SARS crisis. The

statement of claim alleged, among other things, a duty of care on the part of the Crown towards the nurses on the basis that Directives issued by the MOHLTC rendered the Crown an employer or supervisor of the nurses within the meaning of the OHSA. The Superior Court struck the claim based on the assertion that the MOHLTC was an employer of the nurses, but did not strike the claim that the MOHLTC was a supervisor (the claim that the MOHLTC was a supervisor was subsequently struck by the Court of Appeal, as discussed further below). The Superior Court's reasons for striking the claim that the Crown was an employer of the nurses were as follows (at paragraph 16):

> Although the definition of "employer" has been extended since its first enactment, and the trend of the authorities is to construe the definition broadly, I see no basis for a finding that the Crown was an employer of the nurses. Public hospitals are corporations and are the employers of the nurses. The inclusion of contractors, and subcontractors in the definition indicates that a worker may have more than one employer for the purposes of the statute, but each such employer must fall within the definition. It has not been suggested that hospitals perform functions assigned or delegated to them by the Crown.

76. The issue put to the Superior Court was whether based on the nurses' pleadings the Crown was an employer of the nurses. The Court quite clearly determined that the Crown did not, for this purpose, fall within the definition of employer. It is not clear, however, what the significance of the last sentence in the paragraph is to this determination. It is also not clear whether the Court was called upon to determine whether even if the Crown was not an employer of the nurses it nonetheless had the obligations of an employer to the nurses in the circumstances of the case. It may be that in stating that it "had not been suggested that hospitals perform functions assigned or delegated to them by the Crown", the Court was stating that if such a suggestion had been pled then it would have been arguable that the Crown had the obligations of an employer to the nurses and that the pleadings would not have been struck.

77. What emerges from this review of the case law is that an employer has the obligations of "an employer" to "a worker" not only to its own employees but to employees of other employers whose respective spheres of operation are contiguous when the safety of those workers might be exposed to risk of harm by a failure on the employer's part to ensure that the prescribed measures and procedures designed to protect their safety had been carried out in the workplace. What is less clear is the basis for these obligations. Does it arise because an employer is an employer of the workers in question? Or does it arise because the obligations in question are not restricted to an employer's workers but may in some circumstances apply to other workers?

78. Clearly, as highlighted by *Wyssen*, the definition of employer contained in the OHSA makes a person an employer of workers in an expanded set of circumstances. As the employer of a worker, a person has all of the obligations of an employer in relation to that worker, regardless of the degree of control or supervision which the person has over the worker in a particular circumstance. Thus, in *Wyssen*, a contractor was the employer of a subcontractor, and had the obligations of an employer to that subcontractor, notwithstanding the complete lack of supervision or control exercised.

79. Some of the cases, however, are difficult to understand on the basis that the person was an employer of the workers, notwithstanding the expanded definition of employer contained in the OHSA. While it is relatively easy to find that the definition makes a contractor the employer of the employees of its subcontractors (*Grant Forest Products* and, arguably, *Pioneer*

Construction), it becomes progressively more difficult to reach this conclusion with respect to: a contractor in relation to a subcontractor of its subcontractor (*Tembec Forest Products*); a subcontractor in relation to employees of its contractor (*Skyway Equipment*); or a subcontractor in relation to the employees of another subcontractor with which it has no contractual relationship (*Iroquois Falls*).

80. Further, the findings that the obligations of an employer existed in some of these cases appear to be predicated on the fact that the employer in question had some element of control over the workers to whom the obligations were owed. Thus, in *Pioneer Construction*, the contractor had the obligations of an employer to an employee of one of its subcontractors "while that person is working under the control of the contractor". In *Iroquois Falls*, a subcontractor had the obligations of an employer to employees of another subcontractor because their operations were "contiguous" and they were "workers on a project whose safety may be compromised if they do not receive the appropriate information or precautions, reasonable in the circumstances for their protection". These cases are inconsistent with *Wyssen* which, it will be recalled, held that an employer was "virtually in the position of an insurer" regardless of the degree of control over the workers or the workplace, unless the reason for finding an obligation in *Pioneer Construction* and *Iroquois Falls* is not that the employer in question was an employer of the workers.

81. These cases, therefore, are better understood as holding, that unless the context requires otherwise, obligations imposed upon "an employer" to "a worker" under section 25 of the OHSA are not restricted to the employer's workers, but extend to other workers working under its control and, where its sphere of operations are contiguous with that of a second employer, to the workers of the second employer whose safety may be compromised if they do not receive appropriate information or precautions from it. It is the "risk of harm" and the need to ensure the safety of workers, to paraphrase *London Excavators*, which gives rise to the obligation. Given this, I reject the MOHLTC's assertion that this obligation is necessarily limited to "physically" contiguous spheres of operation.

82. Such an approach has the virtue of being self limiting. While a worker's employer will always have the obligations of an employer to the worker, other employers will only have those obligations to the extent that they have control of the worker or are engaged in contiguous spheres of operation which pose a risk of harm to the worker in relation to the obligation in question. Such an approach also answers the real question posed when it is alleged that a person has breached an obligation by "an employer" to "a worker". That question is not does the person fall within the definition of "employer". That will rarely be at issue. The real question is whether as an employer it owes the obligation to the worker or workers in question.

83. The applicability of this approach is well illustrated by the realities of construction projects, although in saying so I do not suggest that it is limited only to construction projects. There is no reason why two subcontractors performing completely separate tasks, even contemporaneously, should owe the obligations of an employer to each other's employees. Indeed, finding that they did owe the obligations of an employer to each other's employees in such a circumstance would result in duplication of effort and the potential for competing directives to those workers. However, if one subcontractor exercises control over the employees of another subcontractor or engages in contiguous activities which pose a risk of harm, including latent harm, then it is subject to the obligations of an employer in relation to those workers with respect to that exercise of control or that risk of harm.

84. The question, therefore, is whether the MOHLTC owes obligations of an employer to the paramedics either because it is an employer of the paramedics or because it exercises control over the paramedics or engages in contiguous activities which pose a risk of harm to the paramedics in relation to the obligations at issue.

Is the MOHLTC an "employer" of the paramedics?

85. CUPE and Essex argue that the MOHLTC is an employer of the paramedics because the MOHLTC has entered into a contract for their services with Essex or because the paramedics are its employees.

Has the MOHLTC entered into a contract for the services of the paramedics with Essex?

86. Presumably having regard to the portions of the definition of employer that include a person who "contracts for the services of one or more workers" and subcontractors and contractors, both CUPE and Essex argue that the nature of the relationship between Essex and the MOHLTC is contractual.

87. CUPE points to the County of Essex Emergency Medical Services Deployment Plans, signed by Bildfell, as Director, Land Ambulance Services, on behalf of Essex, and with places for the signatures of Krauter, as Manager, Windsor CACC, and Duffin, as Field Manager, Southwest Field Office, Emergency Health Services Branch, MOHLTC, and to the Local Operational Agreement between the Windsor CACC, which has places for the signatures of the Senior Field Manager, Southwest Field Office, Emergency Health Services Branch, the Manager, Windsor CACC, and the Land Ambulance Director for the County of Essex.

88. Essex also relies on the Deployment Plans and the Local Operational Agreement. Essex notes that s. 16 of O. Reg. 257/00 to the *Ambulance Act* mandates an agreement between itself and MOHLTC and argues that this renders the MOHLTC an employer within the meaning of the OHSA, presumably on the basis that the agreement renders Essex a subcontractor of MOHLTC. It argues that it is trite law that an agreement between a party and the Crown is a contract, citing *Bell v. Quagliotti*, [1918] B.C.J. No. 114.

89. Part VII of O. Reg. 257/00 provides in part as follows:

> **15.** In this Part,
>
> > "applicable enterprise" means a communications service or any base hospital program or land ambulance service that receives funds directly from the Province of Ontario on an ongoing basis but does not include a communications service or land ambulance service that is operated by the Ministry.
>
> **16.** On and after January 1, 2001, the operator of an applicable enterprise shall be a party to an agreement with the Ministry for the provision of ambulance or communications services or the operation of a base hospital program, as the case may be.

90. I agree with the MOHLTC that an agreement under section 16 of O. Reg. 257/00 does not relate to the provision of ambulance services by a UTM: the UTM is already statutorily required to provide those services by section 6(1) of the *Ambulance Act*. Rather, an agreement

pursuant to section 16 relates to the exercise by the Minister of his/her discretion under section 4(3) of the *Ambulance Act* to provide funding for those services. This is quite clear from the definition of "applicable enterprise", set out above, and an examination of Part VII as a whole. Part VII is concerned with financial accountability by an "applicable enterprise" for funds, equipment or supplies provided by the Province of Ontario, not with the provision of the ambulance services per se.

91. Accordingly, the evidence does not establish that the relationship between the MOHLTC and Essex is contractual.

Are the paramedics employees of the MOHLTC as well as Essex?

92. There is no dispute on the evidence that Essex has the power to hire, fire, discipline, and promote the paramedics, schedule work, grant leaves of absence, determine how much they are paid and deal with employee complaints, all in accordance with a collective agreement between itself and CUPE to which the MOHLTC is not a party. Other than as described in what follows, the MOHLTC does not have the power to do any of these things. Essex is the employer of the paramedics. CUPE and Essex argue, however, that the MOHLTC is also an employer of the paramedics, in common with Essex.

93. A difficulty with this argument is that there is no common employer provision in the OHSA. I note, however, that the doctrine of "common employer" is now well established at common law: see for example *Downtown Eatery (1993) Ltd. v. Ontario*, (2001) 54 O.R. (3d) 161 (C.A.). Thus, it is arguable that where an individual was under the common direction and control of more than one entity, that individual could be the employee of both with the result that both could be found to be the "employer" of the individual within the meaning of the OHSA, notwithstanding the absence of an equivalent to section 1(4) of the *Labour Relations Act, 1995*.

94. In considering this argument, however, I have been mindful of the decision of the Court of Appeal in *Ontario Legal Aid Plan v. Ontario Public Service Employees Union*, (1991) 6 O.R. (3d) 481. In that case, the Court noted that not every relationship of dominance constitutes the dominant party a common employer of the subordinate party's employees. More, particularly, dominance which is but a consequence of a relationship contemplated by a regulatory and funding scheme does not constitute the dominant entity a common employer, at least not for the purposes of what is now section 1(4) of the *Labour Relations Act, 1995*.

95. Essex notes that *OLAP* concerned the interpretation of the *Labour Relations Act,* and argues that is not consistent with the manner in which the OHSA should be interpreted. It argues that the Crown was not subject to the provisions of the predecessor of the *Labour Relations Act, 1995* at the time that *OLAP* was decided. By contrast, section 2(1) of the OHSA specifically states that it binds the Crown or any agency, board, commission or corporation that exercises any function assigned or delegated to it by the Crown. Further, it argues that this case arises not from any regulatory function of the MOHLTC, but rather from its operation of the communications services.

96. CUPE notes that section 2(2) of the OHSA provides: "Despite anything in any general or special Act, the provisions of this Act and the regulations prevail." It argues that in the result it is "no defence" that the MOHLTC does everything pursuant to the *Ambulance Act*. Further, it argues that the MOHLTC is not simply a funder or a regulator of the emergency medical services provided by Essex through the work of its paramedics. Rather, the MOHLTC has a day-to-day,

even minute-to-minute presence in the workplace of those paramedics through the dispatchers, who are employees of the MOHLTC. It argues that it seeks orders against the MOHLTC not as a funder or regulator but as provider of the communications services and with authority over the paramedics through its dispatchers.

97. These arguments may be addressed as follows.

98. First, in my view it is helpful to distinguish between different types of functions imposed by regulation or statute. For the purposes of this case, MOHLTC performs three different types of such functions: regulatory, funding and operational.

99. Second, there is no dispute that the OHSA binds the MOHLTC, or more properly the Crown of which the MOHLTC is a ministry. (I note in response to one of Essex's arguments that equally the *Labour Relations Act* bound OLAP: the fact that the *Labour Relations Act* did not, at the time, bind the Crown is irrelevant.) This, however, does not transform a regulatory or funding function mandated by regulation into a managerial function such as would give rise to an employment relationship. That is the ratio of the *OLAP* decision. Nor is there any consequential inconsistency between the *Ambulance Act* and the OHSA in which the OHSA must be given precedence.

100. Third, it is correct that MOHLTC has not only regulatory and funding functions mandated by regulation in relation to the emergency medical services, but also an operational role with respect to the provision of those services. The difficulty is that many of the indicia of control pointed to by CUPE and Essex as giving rise to an employment relationship clearly arise not from the operational role, but from the regulatory and funding role. In particular, the Ambulance Service, Patient Care and Transportation Standards and the Land Ambulance Service Certification Standards, referenced in Part II of O. Reg. 257/00 with which Essex and its paramedics are required to comply are a product of this regulatory relationship. Similarly the certification of the paramedics themselves and the issuance by the MOHLTC of a Paramedic Identification Card, which paramedics require in order to work, is another product of this regulatory relationship. To the extent that the Minister is exercising regulatory and funding functions, I agree with the MOHLTC and the Inspector that the relationship of dominance between the MOHLTC and Essex, and the paramedics employed by Essex, does not give rise to an employment relationship.

101. CUPE and Essex also argue, however, that the operational functions performed by the MOHLTC, in providing communications equipment and dispatch functions, render it an employer within the meaning of the OHSA. These functions are described in greater detail below in relation to the question of whether the MOHLTC owes the obligations of an employer to the paramedics notwithstanding the fact that it is not their employer. In my view, however, these functions alone are not sufficient to render the paramedics employees of the MOHLTC so as to render it their employer, in common with Essex, within the meaning of the OHSA.

Does the MOHLTC have obligations of an employer under of the OHSA to the paramedics even though it is not an employer of the paramedics?

102. The Inspector argues that while the MOHLTC is not an employer of the paramedics it has the obligations of an employer to the paramedics. CUPE and Essex also advance this argument as an alternative position.

103. For the reasons stated above, notwithstanding my finding that it is not an employer of the paramedics, in my view, the MOHLTC has some of the obligations of an employer to the paramedics if and to the extent that it exercises control over the paramedics or is engaged in contiguous sphere of operations with Essex such that its activities pose a risk of harm, including latent harm, to the paramedics in relation to that obligation.

104. The Inspector, CUPE and Essex rely on the obligation of paramedics, and Essex, to comply with directions given by Windsor CACC in its performance of these operational functions.

105. I note that there is a degree to which this obligation to comply with operational directions can be seen as a product of regulatory and funding functions. As noted, section 6(1) of the *Ambulance Act* makes UTMs responsible for the provision of ambulance services. However, in order to provide these services itself, a UTM must obtain a certificate from the MOHLTC as an operator of ambulance services: section 8(1). In order to be certified, a person must complete the certification process: section 8(2). Certificates must be renewed periodically: section 8(3). In order to complete the certification process, a person must demonstrate that they meet the certification criteria prescribed in regulations to the Act: section 8(5). An operator is required to be in compliance with the requirements of the *Ambulance Act*, regulations thereto and the certification criteria at all times: section 11(1). The Director may order an operator to complete the certification process within a specified time frame: section 11(1)(b). Failure to do so results in revocation of the operator's certificate: section 11(3). The Director's order is subject to appeal to the Heath Services Appeal and Review Board: section 14. Decisions of that Board may be appealed to the Divisional Court: section 16.

106. The regulations specify that the certification criteria are set out in the "Land Ambulance Certification Standards" published by the MOHLTC, as that document is amended from time to time: O. Reg. 257/00 s. 3(1). The Land Ambulance Certification Standards in turn provide in part:

> (h) No employee of the applicant/operator's land ambulance service shall refuse or disregard the direction of a communications officer in regard to any request for ambulance service.

Thus refusal of Essex or one of its paramedics to comply with a direction from a communications officer (i.e. a dispatcher) could in theory result in Essex losing its certification as a land ambulance service.

107. I make two comments in relation to the significance of the fact that the operational directions can be seen as a product of regulatory and funding functions. First, to the extent that this is true in my view the obligations under the OHSA still prevail. We are not concerned here with whether regulatory or funding functions constitute the MOHLTC a common employer: they do not for the reasons stated above. We are concerned with whether regulatory or funding functions under another Act can be used to compel workers to perform unsafe work. To state the question is to answer it. That is why section 2(2) of the OHSA provides that despite anything in any general or special Act, the provisions of the OHSA and the regulations to it prevail.

108. Second, and in any event, the control the MOHLTC exercises over the paramedics in relation to communications and dispatch is at best only incidentally a product of this regulatory and funding function. Rather, it arises from the practical necessity of integrating the communications and dispatch functions retained by the MOHLTC with the provision of service

functions which were transferred to Essex in 1998. This necessity would exist whether or not the certification criteria required Essex and its paramedics to comply with directions from dispatchers employed by the MOHLTC. While the MOHLTC is required by statute to operate the communications and dispatch functions, in performing those statutory functions per se the MOHLTC is performing no regulatory function in relation to Essex.

109. The integration of the communications and dispatch functions performed by the MOHLTC with the provision of service functions performed by Essex is reflected in large part by the County of Essex Emergency Medical Services Deployment Plan. This document addresses, among other things: minimum staffing levels in different parts of the County to be maintained by the "ACO", i.e. Ambulance Communications Officers, which includes call takers and dispatchers, employed by the MOHLTC at the CACC; procedures for "up-staffing", which require approval from the on duty CACC Supervisor/Manager; the period of time during which the dispatchers, in their discretion, are to schedule lunch periods for paramedics; the procedures to be followed by call takers and dispatchers with respect to violent or potentially violent patients, including what information is to be conveyed to the paramedics (this issue is discussed in greater detail below under "flagging"); the circumstances in which an Advanced Life Saving (ALS) unit is to be dispatched by the CACC to back up a Basic Life Saving (BLS) unit; maximum permissible delays for the CACC in dispatching an ambulance in certain circumstances; which of Essex's ambulance vehicles are to be considered "specialty ambulance service vehicles" by the CACC; which EMS staff may be dispatched by the CACC to "Boblo Island", which apparently is accessible only by private ferry; during which hours dispatchers may assign EMS in different areas to perform "transfers" or other low priority calls, as opposed to responding to emergency calls; limitations on the ability of dispatchers to assign certain types of calls to paramedics if it will result in a "shift overrun"; circumstances in which the CACC is to notify the police, the fire department or Windsor Airport Security in connection with the provision of emergency medical services by Essex; the basis on which emergency coverage will be re-established in the event that it has been compromised or depleted; the circumstances in which an ambulance crew will be considered to have only "Conditional Availability" (as distinct from being required to be immediately available); approved call back time response times for an ambulance crew, failing which the CACC is to dispatch the next closest on-site vehicle; the manner in which ambulance crews will be paged while at base (i.e. one of several ambulance stations); disaster response protocols; and radio procedures when 3 or more units have been dispatched to a single scene.

110. This level of integration carries with it a concomitant level of control by the MOHLTC. The paramedics are under the constant direction and control of its CACC from the beginning to the end of their shifts. Thibodeau testified that the first thing that a paramedic does at the beginning of the shift is to contact a dispatcher at the CACC to be logged onto the communications system. If the paramedic is not logged on he or she literally cannot work. Further, the provision of emergency medical services by Essex simply would not work if paramedics did not follow the CACC's directions. To suggest that this arises only as a product of the regulatory and funding functions of the MOHLTC proper is to deny the operational reality. While the CACC has no power to discipline or discharge a paramedic, it does report paramedics who fail to comply with its directions to Essex. Krauter, the Manager of the Windsor CACC, conceded that she would expect a paramedic who did not comply with direction to be subject to discipline by Essex.

111. A great deal of hearing time was spent on the proper characterization of the Deployment Plan. The MOHLTC argues that the Plan constitutes instructions from Essex to the Windsor CACC as to how to dispatch Essex's ambulances and crews. It relies on the fact that on its face the document originates from Essex and is signed by the Director of Land Ambulance

Services for Essex. It also relies on the fact that the document states: "Deployment and scheduling of ALS resources is based on service scheduling patterns that are determined by the service operators in accordance with the provisions of their respective collective agreements." The MOHLTC notes that Essex, and not the MOHLTC, is a party to those collective agreements.

112. In my view the Deployment Plan is more accurately characterized as a joint document of Essex and the Windsor CACC. I note, in this respect, the following evidence. First, the original County of Essex Deployment Plan was in fact the deployment plan used by the MOHLTC prior to the downloading of services. Second, there are a number of instances in the portions of the Deployment Plan which were placed into evidence in which the "CACC Manual of Practice", a MOHLTC document, is cited as a reference. Third, the Deployment Plan is subject to approval by the Manager of the CACC and authorization by the Southwest Region Field Office of the MOHLTC. Fourth, the evidence suggested that the Deployment Plan was a product of negotiation between the County of Essex, Director, Land Ambulance Services and the Manager of the Windsor CACC. Fifth, the Manager of the Windsor CACC testified that in any event the Windsor CACC would not follow the Deployment Plan if it was contrary to directives which she received from the MOHLTC. In particular, she testified that she would not "flag" an address, even if the Deployment Plan directed the Windsor CACC to do so, because she had been directed by the Southwest Field Office of the MOHLTC that flagging is not acceptable. This is borne out by the fact that the section of the Deployment Plan dealing with Violent or Potentially Violent Patients (Section 4.5) replicates the Local Operational Procedure adopted by the Windsor CACC on February 16, 2006, as discussed further below under the discussion of flagging.

113. Other than in the most formalistic of senses, the Deployment Plan does not, therefore, constitute a set of directions from Essex to the Windsor CACC. Rather it is a product of negotiations necessitated by the degree of integration of the functions performed by Essex and the Windsor CACC in which the MOHLTC has at least an equal if not dominant role.

114. As noted earlier in this decision, in addition to performing the dispatch functions through its CACC, the MOHLTC also: determined which communications system will be used by the paramedics and the functionality of that system; determines what communications equipment will be provided to the paramedics in relation to the performance of their duties, and notably has determined to provide only one portable radio per ambulance crew, as well as, for now at least, one cell phone; and determines the manner in which that communications equipment can be used, notably when and whether the emergency buttons on the portables may be used, restricted use of the "mike to mike" functions on the cell phones and precluded use of the communications system to "flag" potentially hazardous addresses.

115. The question then remains whether the MOHLTC's absolute control over the provision of communications equipment and the necessary integration of the dispatch functions performed by its CACC, in conjunction with the EMS functions performed by Essex, is sufficient to impose upon it the obligations of an employer in relation to the paramedics. In my opinion it is. The dispatch functions of the MOHLTC are not simply contiguous with the EMS functions of Essex they are highly integrated with those functions. Further, as will shortly be seen, a failure by the MOHLTC to ensure that certain measures and procedures designed for the safety of the paramedics have been carried out exposes them to a risk of harm. First, however, I wish to address another issue.

<u>In the alternative, whether the MOHLTC is a "supervisor" of the Paramedics</u>

Introductory Note

116. In the event that I am wrong that the control exercised by the MOHLTC and the contiguity of its sphere of operations in relation to the paramedics with those of Essex impose upon it the obligations of an employer in relation to the paramedics, then, for the reasons that follow, I conclude that they constitute it a supervisor of the paramedics within the meaning of the OHSA.

Summary of the Parties' Arguments

117. CUPE argues that the MOHLTC is a supervisor. It cites *R. v. Walters*, [2004] O.J. No. 5032 (S.C.J.) and *R. v. Adomako*, [2002] O.J. No. 3050 (O.C.J.). Essex adopts its arguments on this issue.

118. The Inspector acknowledges that the definition of "supervisor" refers to a person, and that in law a "person" has included corporate entities. But he asserts that there is no case in Ontario which has found a non-natural person to be a supervisor under the OHSA and argues that a non-natural person could not carry out the functions of a supervisor under the OHSA.

119. Like the Inspector, the MOHLTC argues that as a non-natural person it cannot be a supervisor under the OHSA because a non-natural person cannot carry out the functions of a supervisor under the OHSA. It makes reference to sections 26(1)(l), 28(1)(c) and (d) and 45(1), as well as section 25(2)(c). It also argues that the OHSA contemplates a hierarchy of relationships in which employers may be corporate but are charged with employing competent supervisors. This obligation, it submits, is to retain an individual who is competent to direct the workforce.

Is the MOHLTC a "supervisor" of the paramedics?

120. Supervisor is defined by the OHSA as follows:

> "Supervisor" means a person who has charge of a workplace or authority over a worker;

121. There is a relational aspect to this definition: thus, a person is only a supervisor to the extent that the person has charge of a workplace or authority over a worker.

122. The arguments of the Inspector and the MOHLTC that a non-natural person cannot be a supervisor require consideration of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F. Section 87 of the *Legislation Act, 2006* provides: "In every Act and regulation … "person" includes a corporation". Thus, the *Legislation Act, 2006* provides a basis for concluding that a corporation may be a supervisor.

123. The Inspector, however, relies upon sections 46 and 47 of the *Legislation Act, 2006*. Those sections provide:

> 46. Every provision of this Part applies to every Act and regulation.
>
> 47. Section 46 applies unless,
> (a) a contrary intention appears; or
> (b) its application would give to a term or provision a meaning that is inconsistent with the context.

The Inspector also refers to *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 41 for what he asserts are the interpretative principles applicable to the meaning of the term "supervisor":

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Inspector argues that the ordinary meaning of supervisor is a person, and more specifically an individual who supervises, and that therefore supervisor as used in the OHSA means an individual. Further, the Inspector notes that section 25(3) of the OHSA uses the words "himself or herself" in reference to a supervisor, as do numerous regulations under the OHSA. The Inspector argues that these gender specific terms can only apply to individuals. Finally, the Inspector references various duties imposed upon supervisors by the regulations which a supervisor is incapable of doing personally or at all unless done through an individual.

124. These arguments are not persuasive. First, *Rizzo & Rizzo Shoes* is not an invitation to ignore definitions set out in the subject Act or the *Legislation Act, 2006* and substitute some preferred "ordinary" meaning. Indeed, to do so would clearly be to ignore the intention of the Legislature, contrary to the cited principle. Second, it does little to advance the issue to argue that a supervisor must be a person or be able to act personally given that a supervisor is defined under the OHSA as a person and the *Legislation Act, 2006* in turn defines person as including a corporation. A corporation is, therefore, able to act personally. Third, it is not correct to say that the use of gender specific terms in the OHSA, and regulations thereto, compel the conclusion that a supervisor must be an individual. Section 68 of the *Legislation Act, 2006* provides: "Gender-specific terms include both sexes and include corporations." Fourth, by contrast to the definition of "person" contained in section 86 of the *Legislation Act, 2006* as including corporations, section 87 of the *Legislation Act, 2006* provides that the term "individual" means a natural person. If the Legislature had intended supervisors to be restricted to natural persons, the definition of supervisor would have referred to individuals, not persons.

125. Nor am I persuaded by the argument of the Inspector and the MOHLTC that because only a natural person can fulfill some of the roles or duties of a supervisor under the OHSA, it follows that only a natural person can be a supervisor. The same argument could be made with respect to an employer, which is also defined as a "person", and many of the roles or duties imposed upon "employers" under the OHSA. Indeed, section 28(1)(c) and (d), relied upon by the MOHLTC in its argument, impose duties upon a worker to report certain matters to an "employer or supervisor". The apparent conundrum is resolved by the fact that corporate persons ultimately act through natural persons. The fact that a corporation would need to appoint individuals to discharge some of its responsibilities as a supervisor, and that the individuals appointed might also be considered supervisors of the workers in question, is not a reason to conclude that a corporation cannot be a supervisor.

126. The Inspector argues that certain provisions in regulations to the OHSA point to the conclusion that a supervisor must be an individual. Reference was made to section 14 of O. Reg.

213/91, section 33(4) of O. Reg. 67/93, sections 10, 16(1) and 64(2) of O. Reg. 854 and sections 6(b), 12(7) and 13(9) of O. Reg. 629/94. I acknowledge that some of these regulatory provisions appear to contemplate the appointment of an individual as a supervisor. Further, these regulatory provisions form part of the context within which the meaning of provisions of the OHSA must be interpreted. Regulations, however, are subordinate to statutory language. In any event, the fact that some regulations contemplate the appointment of individuals as supervisors does not mean that all supervisors must be individuals.

127. Finally, I note that not only is an interpretation of the OHSA which holds that a supervisor may include a non-natural person consistent with the legal meaning given to the word "person", it is consistent with a broad and purposeful interpretation of the OHSA, in particular if the exercise of authority over a worker or control of the workplace is not sufficient to impose upon such a non-natural person the obligations of an employer in relation to the worker as described above.

128. Accordingly, I conclude that the MOHLTC could be a supervisor within the meaning of the OHSA, notwithstanding the fact that it is not a natural person.

129. Whether the MOHLTC is a supervisor also requires consideration the decision of the Superior Court of Justice in *Abarquez v. Ontario*, [2005] O.J. No. 3504 (SCJ), and of the subsequent appeal of that decision to the Ontario Court of Appeal, [2009] O.J. No. 1814, leave to appeal refused [2009] S.C.C.A. No. 297. As the Court of Appeal decision was released subsequent to the conclusion of the hearing in this matter, the parties were provided with an opportunity to make post hearing submissions on this decision.

130. As noted above in the discussion of "employer", *Abarquez* concerned a claim in negligence brought by a number of nurses against the Crown in relation to the SARS crisis. The statement of claim alleged, among other things, a duty of care on the part of the Crown towards the nurses on the basis that Directives issued by the MOHLTC rendered the Crown an employer or supervisor of the nurses within the meaning of the OHSA. The Superior Court struck the claim based on the assertion that the MOHLTC was an employer of the nurses, but did not strike the claim that the MOHLTC was a supervisor, stating (at paragraph 17):

> On the other hand, I do not consider it plain and obvious that the Crown, through the Ministry of Health and Long-Term Care was not acting as a "supervisor" in the circumstances of this case where the Ministry issued directives that governed not only the equipment – such as the masks – and clothes nurses were to use or wear but also contained extensive and detailed precautionary measures they were required to take when attending – and after attending – to patients. For the purposes of this motion, I am not prepared to exclude the possibility that the Crown would be found at trial to be a supervisor to whom the statutory duties and standards [under the OHSA] applied.

Implicit in the Superior Court's reasons is the conclusion that the mere fact that the Crown is not a natural person was not sufficient to compel the conclusion that it could not be a "supervisor" within the meaning of the OHSA.

131. The Crown appealed from the decision of the Superior Court not to strike the claim that it was acting as a supervisor within the meaning of the OHSA towards the nurses in relation to the SARS directives. No cross appeal was taken from the decision of the Superior Court striking the claim that the Crown was acting as an employer within the meaning of the OHSA.

The Court of Appeal struck the claim that the Crown was acting as a supervisor. The Court of Appeal stated:

> [33] The hospitals that employed the nurses, supervised their day-to-day working conditions and bore immediate responsibility for the safety of their workplace are autonomous entities under the *Public Hospitals Act*, R.S.O. 1990, c. P.40. I agree with Ontario's submission that it is plain and obvious that the Directives issued during the SARS crisis could not alter the legal autonomy of the hospitals or amount to an assumption of control by Ontario over their day-to-day operation. The general power to mandate standards for the control of infectious diseases simply cannot be equated with the kind of direct involvement in the day-to-day management of employees that being an employer or supervisor entails. The Directives to the hospitals may well have had an impact upon workplace safety but that is far removed from taking "charge" over a workplace or assuming employer-like "authority" over a worker. Ontario is simply is too far removed from the day-to-day operation of the hospitals and the day-to-day working conditions of nurses to be a supervisor under the OHSA.
>
> [34] Having "charge of a workplace" so as to become a supervisor involves "hands-on authority" akin to that exercised by an employer: *R. v. Walters*, [2004] O.J. No. 5032, 67 W.C.B. (2d) 838 (S.C.J.), at para. 18; *R. v. Adomako*, [2002] O.J. No. 3050, 55 W.C.B. (2d) 266 (C.J.) ("*Adomako*"), at paras. 17-18. Having "authority over a worker" so as to become a supervisor includes the authority to promote workers, discipline workers, schedule work, deal with employee complaints, grant employees' leaves of absences and determine how an individual is paid: *R. v. Furtado*, [2007] O.J. No. 3122, 2007 ONCJ 368, at para. 25; *Adomako*, at para. 17. It is not pleaded that Ontario exercised functions of this nature and quality in relation to the plaintiffs.

132. I note first that the Court of Appeal left unchallenged the implicit conclusion that a non-natural person could be a supervisor. Indeed, in stating that the “hospitals that employed the nurses, supervised their day-to-day working conditions” the Court appears to have contemplated that the hospitals, non-natural persons, were the nurses’ supervisors.

133. Second, I do not understand the Court of Appeal in *Abarquez* to be stating that a person must have all of the enumerated instances of authority in order to be a supervisor within the meaning of the OHSA. While a supervisor has to have authority akin to that of an employer, a supervisor is not an employer and thus need not have all of the characteristics of an employer. For example, a person who does not have the authority to promote or grant a leave of absence to a worker may still exercise sufficient authority over a worker to be a supervisor within the meaning of the OHSA.

134. I note in this respect that the definition of supervisor under the OHSA does not reference “managerial functions”: that is, the definition of supervisor under the OHSA was not modelled on the long standing language of the *Labour Relations Act* with respect to managerial “exclusions”. The reason for this is, of course, that the OHSA and the *Labour Relations Act* serve different purposes. The *Labour Relations Act* is concerned with excluding from bargaining units individuals who have the power to materially affect the terms and conditions of employment of their fellow employees, on the basis that they would be in a conflict of interest. The OHSA, on

the other hand, is concerned with whether a person has sufficient authority over a worker or control of the workplace that they may affect the health and safety of the worker.

135. I am strengthened in this conclusion by the fact that one of the cases relied upon by the Court of Appeal in *Abarquez* is *R. v. Walters*. In that case a "lead hand" of a four person City of Toronto grounds crew was found to be a supervisor within the meaning of the OHSA on the basis that he assigned work, answered questions, had influence over who was assigned to him and was expected to address safety issues in the workplace. There was no suggestion, and it appears unlikely given his role and the employer in question, that he had for example the power to hire, fire, discipline or promote. The court in *Walters* found that the person in question had sufficient authority over the workers, or in the alternative had charge of their workplace, so as to constitute him a supervisor within the meaning of the OHSA.

136. Further, in my view, for the purposes of the OHSA a supervisor of a worker need not necessarily be an employee of the same employer of which the worker is an employee. This follows from the expanded definition of employer under the OHSA. If, for example, a contractor is the employer of a worker who is an employee of a subcontractor with which it has undertaken to perform work or supply services, then an employee of that contractor may be a supervisor, for the purposes of the OHSA, of that worker. Thus, a site superintendent of a general contractor on a construction project has the responsibilities of a supervisor to all of the workers on the site, notwithstanding the fact that most will not be employees of the general contractor. Indeed, *R. v. London Excavators & Trucking Ltd.*, discussed earlier, is illustrative of this kind of fact scenario. It is also noteworthy in this respect that while such a supervisor has powers "akin" to those of the employees' employer, such powers are indirectly exercised: a site superintendent employed by a general contractor may advise a subcontractor that one of its employees is barred from the site, with the result that the subcontractor may terminate, reassign or lay off the employee in question.

137. In addition, there is nothing on the face of the definition of "supervisor" which would limit it to a person whose employer stands in the relationship of employer to the workplace or worker in question. For convenience, I set it out again:

> "Supervisor" means a person who has charge of a workplace or authority over a worker;

Thus, the definition of supervisor is broad enough to encompass a person with "authority over a worker" or "who has charge of a workplace", whether or not that person's employer stands in the relationship of employer to the worker or workplace in question, or indeed whether or not the person has an employer themselves. That is, the question is not the source of the authority, but the nature of the authority exercised. A person employed by the worker's employer in a supervisory capacity will, by virtue of that relationship, have the requisite authority. But it may be, in rare cases, that a person not employed by the worker's employer might nonetheless exercise such authority over the worker that they will be a "supervisor" of the worker for the purposes of the OHSA. I note that this conclusion, too, is implicit in the decision of the Superior Court in *Abarquez*, and was not challenged by the decision of the Court of Appeal in that case.

138. Given that the MOHLTC is not employed as a supervisor by Essex, the issue is whether it otherwise has the requisite "authority" over the paramedics or "charge" of their workplace in order to fulfill the obligations of a supervisor under the OHSA in relation to the paramedics.

Does the MOHLTC have "charge of the workplace" of the paramedics so as to render it a supervisor within the meaning of the OHSA?

139. "Workplace" is itself a defined term under the OHSA:

> "Workplace" means any land, premises, location, or thing at, upon, in or near which a worker works.

I agree with the MOHLTC that this definition is describing a physical place.

140. CUPE argues that the workplace of the paramedics is the ambulances which they drive. There is no dispute that the ambulances are owned, maintained and operated by Essex. The MOHLTC staff are not physically present in the ambulances. Thus, to the extent that the MOHLTC has charge over the workplace of the paramedics this comes from the authority it exercises over the paramedics, which is the second part of the definition of supervisor.

Does the MOHLTC have "authority over" the paramedics so as to render it a supervisor within the meaning of the OHSA?

141. For the reasons stated above with respect to the MOHLTC as employer of the paramedics, to the extent that the MOHLTC's authority over the paramedics is an exercise of its funding or regulatory functions, it cannot constitute the MOHLTC a supervisor within the meaning of the OHSA. Thus, the conclusion that the MOHLTC is a supervisor of the paramedics within the meaning of the OHSA must be founded, if at all, in its operational functions with respect to communications equipment and dispatch services.

142. There is, in any event, another reason why only the operational functions of the MOHLTC are relevant to the determination of whether or not it is a supervisor in this case. As stated above, in my view there is a relational component to the definition of supervisor: the MOHLTC is a supervisor, if at all, only in relation to the authority that it exercises over the paramedics. Thus, to find that the MOHLTC has the obligations of a supervisor to the paramedics with respect to a specific issue requires the conclusion that it has authority over the paramedics with respect to that issue.

143. Broadly speaking, there are six issues over which CUPE and Essex assert that the MOHLTC has the obligations of a supervisor in relation to the paramedics:

> (a) provision of a second portable radio;
>
> (b) control of the testing of the emergency button on the portable radios;
>
> (c) the functionality of the communications system provided;
>
> (d) deciding whether to provide a preventative maintenance program for the radios;

(e) control of the use of the mike to mike function on the cell phones; and

(f) use of the communications system to "flag" potentially hazardous addresses.

144. There is simply no question that the MOHLTC exercises complete and exclusive control over the communications system which it requires the paramedics to use. The MOHLTC provides the communications system in its operational capacity and its exclusive responsibility in this respect means that it effectively requires the paramedics to use it. More particularly, the MOHLTC exercises complete and exclusive control with respect to the provision of a second radio to the paramedics: Essex's offer to pay for a second radio was rebuffed. Similarly, the MOHLTC exercises complete control over whether and when the emergency button on the radios will be tested. The functionality of the communications system provided is a product of the GMCP of which the MOHLTC, and not Essex, is a partner.[1] If one were required, the provision of a preventative maintenance program for the radios would also have been a matter within the exclusive control of the MOHLTC or the GMCP. The MOHLTC has determined that the mike to mike function on the cell phones will not be used. Finally, the MOHLTC has determined that the communications system will not be used to flag potentially hazardous addresses, even as a conduit of information provided by Essex, or the police.

145. The issue, as described by the Court of Appeal in *Abarquez*, is whether this control is akin to the kind of authority over a worker exercised by an employer. In my view it is. With respect to the communications system, a critical tool integral to the paramedics' work throughout the course of their shifts, the MOHLTC has determined which system they must use, which specific tools will be provided, whether enough tools (i.e. portable radios) will be provided so that each paramedic has one while working, whether parts of the system will be maintained or tested and how the system will be used, in the sense of what information may be transmitted over it. This control is "hands on". It is direct. It is day-to-day. Further, it is not simply that the MOHLTC has the effective power of discipline over paramedics in relation to this communications system and its uses, but the paramedics literally cannot work unless they use that communications system. Perhaps most importantly, this control over the paramedics is exclusive: there is nothing that their employer, Essex, or any of its employees, can do about it. If an employee of Essex exercised this degree of control over the paramedics, surely there could be no question that he or she was a supervisor of the paramedics within the meaning of the OHSA. In the unusual circumstances of this case, the fact that the MOHLTC is not the employer of the paramedics, or employed by an employer of the paramedics, does not detract from the very real work related authority which it exercises over them.

146. Finally, I note that I do not accept the suggestion in the submissions of the MOHLTC that the facts in this case can be analogized to the facts in *Abarquez*. In *Abarquez*, the Court of Appeal held that the fact that the MOHLTC had exercised its "general power to mandate standards" to issue Directives to hospitals during the SARS crisis could not constitute it a supervisor of nurses employed by the hospitals. While the MOHLTC has a regulatory power in relation to Essex, and other ambulance service operators, and indeed has exercised it to mandate detailed standards with respect to communicable disease management and influenza control in the "Ambulance Service Patient Care and Transportation Standards" as discussed earlier in this

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[1] I note again in this respect that while I have adopted the parties' practice of identifying MOHLTC as the party to these proceedings, the proper party is the Crown in Right of Ontario. Thus, while the GMCP is not coterminous with MOHLTC, both are part of the Crown in Right of Ontario.

decision, the control at issue here arises not from the MOHLTC's regulatory functions over the paramedics, and Essex, but from its operation of the communications system.

147. In the result, if I am wrong that the MOHLTC has the obligations of an employer in relation to the paramedics as described above, I conclude that the MOHLTC has the obligations of a supervisor under the OHSA to the paramedics in relation to the communications system it has provided to them and requires them to use, and the manner in which it permits it to be used in communications with the paramedics.

Has the MOHLTC breached obligations as an employer under the OHSA in relation to the paramedics?

Introduction

148. The Inspector, CUPE and Essex argue that the MOHLTC has breached its obligations as an employer in relation to the paramedics under sections 25(1)(b), (2)(a) and (h) of the OHSA with respect to a number of issues. For convenience, I set those sections out again:

> 25. (1) An employer shall ensure that,
>
> ….
>
> (b) the equipment, materials and protective devices provided by the employer are maintained in good condition;
>
> (2) Without limiting the strict duty imposed by subsection (1), an employer shall,
>
> (a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;
>
> ….
>
> (h) take every precaution reasonable in the circumstances for the protection of a worker;

149. I turn now to consider each of the issues raised by the Inspector, CUPE and Essex in turn.

The FleetNet Radio Communications System

150. CUPE and Essex argue that the MOHLTC has breached its obligations as an employer of the paramedics by failing to inform them of known "defects" in the communications system. They seek a declaration and an order directing the MOHLTC to provide the Occupational Health and Safety Committee with a summary of all known "defects" in the system that "may cause paramedics to lose their ability to communicate and a summary of all investigations being undertaken by the contractors responsible for the communications system and the results of such investigations quarterly".

151. As discussed above, the MOHLTC provides the communications system in its operational capacity and its exclusive responsibility in this respect means that it effectively requires the paramedics to use it. There is complete integration of the spheres of operation of the MOHLTC and Essex in this respect. As it bears as well on some of the other issues to be discussed, it is useful to describe this system in some detail.

152. The current radio communications system is commonly referred to as FleetNet. It is a product of the Government Mobile Communications Project (GMCP), for which the Government Mobile Communications Office (GMCO) is responsible. The GMCP was approved by Management Board of Cabinet in 1998. It was a joint project of the affected ministries, including the MOHLTC. The objective of the GMCP was to create a province-wide common communications network for all Ontario based public safety organizations, including hospitals and emergency medical services, the Ontario Provincial Police, and some functions of the Ministry of Transportation, the Ministry of Correctional Services and the Ministry of Natural Resources. This was done by entering into agreements with private sector partners. Bell Mobility Radio was the prime contractor, and FleetNet is the name which it attaches to the communications system.

153. The system as a whole is a complex undertaking. Smiles testified that the total cost of this project, across all participating ministries, was probably over $100 million. Battiston testified that there are about 172 tower sites, 30 to 40 dispatch systems, and approximately 20,000 vehicle units in the system. Duffin testified that there were approximately 1,200 ambulances across the province using the system and another 350 to 400 emergency response vehicles. Duffin also testified that in 2007 there were approximately 1.2 million calls dispatched to emergency medical services across the province.

154. I pause to note that, as alluded to above in the summary of the parties' arguments on the employer issue, the MOHLTC argues that the complex, interrelated nature of the communications system, and its province wide scope, are a reason not to make an order, since the order will have only local application (i.e. apply only to Essex). Parts of this argument rest on a premise that I have rejected: that the Minister's functions under the *Ambulance Act* are purely regulatory. As discussed above, in my view it is more useful to describe the functions as regulatory, funding and operational. The functions at issue here are operational. In addition, I do not accept as a proposition of law that complexity, interrelatedness or the province wide scope of a system exempts such a system from the application of the OHSA. That is not to say that such considerations are irrelevant. But their relevance is a question of fact, not law. Therefore, it is to the facts in evidence before me that I return.

155. FleetNet was rolled out across the Province over a number of years commencing in or about 2002, replacing existing, or "legacy" systems. Some of the evidence addressed problems with the legacy system in Essex and transitional problems with the introduction of FleetNet which have been resolved. As such they are no longer relevant to any order that this Board might make and I note that none of the final submissions of the parties addressed these issues. Only passing reference to these problems will be made to address the concern of CUPE and Essex that they represent "defects" in the system.

156. FleetNet is a "trunked" communications system. This means that instead of a particular channel in an area being assigned to a particular group of users, e.g. the emergency medical services or the police, all channels are pooled and available to all users. This is based on the theory that not all users will need to use the radio at the same time and communications will be of short duration. Users are grouped into "TalkGroups". Thus, Essex paramedics are grouped into various TalkGroups, for example, there is a TalkGroup for Windsor City proper, another TalkGroup reserved for tactical operations etc. All users in a particular TalkGroup operate on the same channel at a particular point in time. However, because of the trunked nature of the system, they will not necessarily use the same channel at each point in time. The channel which they use

is selected by the system on each transmission from the available channels shared with other users of the system. If there is no available channel at the time of a transmission then they would hear a "bonk" signal, indicating that access has been denied.

157. The issue of access denial resulted in CUPE and Essex leading some evidence which reflected their understanding that the Ontario Provincial Police were given priority access to available channels. That is, CUPE and Essex believed that one reason paramedics were getting "bonk" signals was that the Ontario Provincial Police was being given priority. Technical evidence led by the MOHLTC suggested that this is not the case. In particular, the technical evidence indicated that while priority access is given to some users over other users to available channels, the distinction is not on the basis of police over, for example, paramedics, but on the basis of front line users over administrative users. Paramedics and police are both considered front line users and get the same top priority access to available channels.

158. Each ambulance is equipped with a mobile radio, a "vehicular repeater" (both of which are affixed to the vehicle) and, at present, one portable radio, with attached lapel speaker/microphone, which one member of the crew carries with him or her when the crew exits the ambulance. (In this decision, I have, as had the parties, used the term "portable" to refer to both the portable radio and the attached lapel speaker/microphone unless the context suggests otherwise.) The mobile radio communicates with the CACC, or dispatch, by VHF signals. The portable sends a UHF signal to the vehicular repeater, which converts it to a VHF signal and sends the signal to the CACC through the mobile.

159. The portable and the mobile are on different signals (i.e. UHF and VHF respectively) in order to minimize the possibility of interference between them. VHF signals are capable of transmission over a greater distance than UHF signals.

160. The current system represents an improvement over the previous system in a number of respects, the most notable of which is that the portables are now equipped with emergency buttons, both on the portable itself and on the remote speaker/microphone attached to the portable and designed to be worn in the lapel area. Pressing the emergency button results in a UHF signal being sent to a repeater, where it is converted to a VHF signal and transmitted to dispatch by a mobile. (There are also two emergency buttons located in the ambulance itself.)

161. When FleetNet was first rolled out in Essex, the emergency buttons were not activated for a variety of technical reasons. The fact that the emergency buttons were not initially operational was one of the transitional issues. It has been resolved with the activation of the emergency buttons.

162. It is also worth noting at this point that a separate channel is reserved on the trunked communications system for emergency signals: that is, transmission of emergency signals is not dependent on one of the pooled channels on the trunked communications system being available.

163. Problems can arise when a UHF signal is sent by a portable or an emergency button on the portable or attached speaker/microphone. The signal is received by the repeaters on all ambulances within the transmission range. If two or more repeaters were to attempt to transmit the same signal to dispatch at the same time technical problems can occur. In particular the mixing of the two signals, or heterodyning, results in interference, or "noise" in the transmission. This was a problem with the portables in the legacy system.

164. Accordingly, the FleetNet system was designed to reduce the frequency of this happening. As I understand it, this is accomplished essentially in two ways. First, the mobile/repeaters in the ambulances have two modes: "mobile" mode and "system" mode. Only when a mobile/repeater is in system mode does it attempt to retransmit a signal from a portable to the CACC. Ambulance crews are instructed to leave their radios in mobile mode unless at an incident scene. Second, the FleetNet system has a contention algorithm called the Simulcast Prevention Algorithm (SPA). In essence, when more than one repeater in system mode receives signals from a portable radio, the SPA causes all of the affected repeaters to attempt to communicate with each other and to automatically elect one unit to be the "master" or "prime", on the basis of, among other things, strength of signal. The master is allowed to transmit on the repeater channel, while the others are not. The master unit is determined on each transmission.

165. There are still problems with the FleetNet system. Of particular concern to CUPE and Essex is the fact that the signal sent by a portable or the emergency buttons on the portable is identified when received by the CACC not with the portable but with the repeater/mobile unit which forwarded the signal to dispatch (there is a unique four digit vehicle code associated with each repeater/mobile unit). The operation of the SPA means that the repeater/mobile which forwards the signal is not necessarily the repeater/mobile located in the ambulance to which the crew is assigned. This is particularly problematic when the emergency button is being used for two reasons. First, for the purposes of receiving an emergency button signal, all mobiles/repeaters in the transmission area, currently set at about 1.7 kilometres, that can pick up the signal act as if they are in system mode. This could include an ambulance driving through the area whose crew had their mobile/repeater in mobile mode. Thus, one of a number of ambulances other than the one whose crew sent the signal may be identified as the source of the emergency signal which has been forwarded to the CACC.

166. Second, when an emergency button on a portable is used, the portable radio awaits an "acknowledgement" that the signal has been received by a repeater. If it does not receive that acknowledgement within several seconds, it automatically resends the emergency signal. If an acknowledgement is not received with respect to the resent signal, the portable will then override the SPA so that all repeaters in the area can receive the signal. If this were to happen, from the perspective of the CACC it could appear that there were multiple emergency alarms coming from multiple repeaters.

167. Ideally an emergency signal would be associated with the portable radio from which it was sent. CUPE and Essex consider this to be another "defect" in the system. However, the uncontradicted evidence of the MOHLTC was that it has been advised by existing suppliers that this cannot be done based on current technology.

168. In addition, the problem of heterodyning can still occur with FleetNet. One situation in which this can occur is when a portable can transmit to two repeaters, but the two repeaters are unable to transmit to each other, with the result that the SPA does not operate to prevent heterodyning. This can happen, for example, if a crew with the portable is on an upper floor of a high rise building in an area with a number of other buildings. The portable has a clear line of transmission to each repeater but the presence of the other buildings impedes the transmission between repeaters.

169. This problem could be compounded by the possibility that the mobile/repeater in an ambulance can be placed in system mode without the crew in that ambulance having done so. The portables have a button which if pushed places all repeater/mobiles in transmission range on

system mode. In these circumstances, unlike when an emergency button temporarily overrides the SPA and in effect places all repeater/mobile in system mode, the repeater/mobile remains in system mode until reset by the crew in the ambulance.

170. In my view, the problems identified are not properly described as "defects" in the system. Rather they are technological limitations of the system. There is no basis for concluding that the communications system as a whole has not been "maintained in good condition". Accordingly, I find no breach of section 25(1)(b).

171. However, ensuring the paramedics understand the technological limitations of the communications system which they are required to use is a reasonable precaution in the circumstances for ensuring their health and safety. I note that the MOHLTC has attempted to explain the system, and its limitations, to the paramedics in the past through training sessions, albeit the MOHLTC's own understanding of the system and its limitations has also evolved and it is not clear that the paramedics have been updated in this respect. To the extent that MOHLTC has provided training to paramedics, however, it has been a product of its own goal of ensuring that the paramedics know how to use the system.

172. I find that pursuant to its obligations as an employer under section 25(2)(a) to provide information, instruction and supervision to a worker to protect the health and safety of the worker, the MOHLTC is required to ensure that paramedics understand the technological limitations of the communications system which it requires them to use by providing appropriate training or otherwise. I also find that the MOHLTC is obliged to do this pursuant to its obligations as an employer under section 25(2)(h) of the OHSA to take every precaution reasonable in the circumstances for the protection of a worker.

Preventative Maintenance of the Radios

173. CUPE and Essex MOHLTC argue that the MOHLTC has breached its obligations as an employer in relation to the paramedics by failing to inform them that there is no preventative maintenance program for the communications equipment. They seek a declaration and an order directing the MOHLTC to arrange for a program of preventative maintenance of all communications equipment used by the paramedics.

174. It is correct that the MOHLTC has no program of preventative maintenance on the lapel microphones, portables, mobiles or repeaters. However, none is suggested by the manufacturers of these items.

175. Further, there was no evidence of any problem with the communications system which a preventative maintenance program would address. The system and its components either work or do not work. The issue is not one of preventative maintenance but of periodic testing and examination of the components for obvious defects. In this respect Landry gave evidence that there is an exposed part of the lapel microphone/speaker which is subject to wear or damage. If this happens, it makes it easier for the emergency button on the lapel microphone/speaker to be activated by accident, causing false alarms. In 2007, 10 – 12 lapel microphone/speakers were replaced for this reason.

176. Accordingly, based on the evidence before me, I decline to make an order with respect to the preventative maintenance of the communications system used by the paramedics.

Testing of Emergency Buttons

177. The Inspector, CUPE and Essex argue that the MOHLTC has breached its obligations as an employer in relation to the paramedics by failing to provide for the testing of emergency alarm buttons. CUPE and Essex seek a declaration and an order directing the MOHLTC to develop a protocol for the daily testing of all emergency buttons at, or close to, the commencement of each shift.

178. As noted in the description of the communications system, there is an emergency button on the lapel microphone attached to the portable, an emergency button on the portable proper, and two emergency buttons in each ambulance. Pushing an emergency button should result in it sending a signal over a particular frequency. These devices have a reference oscillator alignment which aligns the signal with the desired frequency. The only way to ensure that the emergency button is sending the signal at the desired frequency is to test it.

179. The MOHLTC does not take the position that there is never any need for testing of the emergency button. Indeed, both the Acting Deputy Director of the GMCP and the Field Manager of the Southwest Field Office, EMS Branch of MOHLTC, testified that the emergency buttons should be tested. Rather it takes the position emergency button testing is properly the subject of local protocol to be agreed upon by each emergency medical service and the CACC with which that emergency medical service works. It appears that the MOHLTC has delegated this responsibility to the Windsor CACC.

180. Bildfell, the Director of Land Ambulance Services, County of Essex-Windsor and City of Windsor and Krauter, the Manager of the Windsor CACC have been unable to reach an agreement on a protocol. Krauter, on behalf of the Windsor CACC, proposed that testing only be initiated by the ambulance service fleet supervisor and the ambulance service health and safety representative in cooperation with the CACC Supervisor and that testing would not be allowed to interfere with the "normal operational activities" of the CACC. Bildfell testified that he did not sign the agreement because in his view a paramedic should have the right to test an emergency button at any time in conjunction with the CACC dispatcher.

181. While the MOHLTC has recognized the desirability of the testing of the emergency buttons, the parties have been unable to reach an agreement as to a protocol. These discussions, however, have taken place on the premise that the MOHLTC does not have an obligation under the OHSA to ensure testing of the emergency buttons. In my view, it does.

182. The ability of the paramedics to test the emergency buttons is controlled by the MOHLTC as part of its operational functions. Accordingly, the MOHLTC has the obligations of an employer in relation to the testing of the emergency buttons. Failure to test the emergency buttons gives rise to an actual or potential danger that the emergency buttons will not work. In my view, an employer which prohibits the testing of a component of equipment which it has provided is not ensuring that the component is maintained in good condition. Accordingly, I find that in refusing to permit the testing of the emergency buttons on the radios provided to the paramedics, the MOHLTC is violating its obligations under section 25(1)(b) of the OHSA. Failure to have in place a proper protocol for the testing of the emergency buttons also constitutes a failure to take every precaution reasonable in the circumstances. I find that pursuant to section 25(2)(h), the MOHLTC has this obligation in relation to the paramedics.

183. I also note that as an employer, Essex has obligations under the OHSA which parallel these obligations of the MOHLTC in relation to the testing of the emergency buttons.

184. In my view, it is appropriate to remit the development of a protocol for the testing of the emergency buttons to the MOHLTC and Essex so that they may attempt to reach an agreement based on the understanding that they share legal responsibility under the OHSA for developing such a protocol as a reasonable precaution for the health and safety of the paramedics. To assist them in those discussions, I also note that in my view the operational difficulties for the CACC associated with the testing of the emergency buttons form part of the circumstances within which the reasonableness of such a precaution is to be assessed.

185. Accordingly, I direct the MOHLTC and Essex to attempt to reach an agreement on a protocol for the testing of the emergency buttons on the radios provided to the paramedics by the MOHLTC within thirty (30) days of this decision and to advise the Inspector of any agreement reached. In the event that the parties are unable to reach an agreement, they are to advise the Board within sixty (60) days of this decision, failing which this aspect of the application will be deemed to have been resolved. If the parties advise the Board that they have failed to reach an agreement, further directions may be given with respect to an expedited hearing process to determine this issue. The parties are advised that any such decision may be issued based on evidence and submissions already before the Board. I remain seized for this purpose.

The Second Portable

186. The Inspector, CUPE and Essex argue that the MOHLTC has breached its obligations as an employer pursuant to section 25(2)(h) to "take every precaution reasonable in the circumstances for the protection of a worker" by failing to provide each paramedic on duty with a portable radio with a working emergency button. CUPE and Essex seek a declaration and an order directing the MOHLTC to provide each paramedic on duty with a portable radio that has a working emergency button within 60 days. As noted at the outset of this decision, for the most part, during the hearing and in their submissions the parties used the short hand expression of the "second portable" to refer to this issue, and I have generally employed the same short hand.

187. The Inspector takes the position that the only thing which could relieve the MOHLTC of the responsibility to provide a second portable would be physical impossibility arising from limitations on the availability of additional channels. He seeks an order directing the MOHLTC to make suitable inquiries as to whether additional channels would be required prior to any order being made.

188. It should be noted that portable radios were first provided to ambulance crews in or about 1981. Prior to that time, ambulance attendants (as they were then called) did not have radio communication with their dispatchers once they left their vehicles. Further, the scale of issue of portables under the legacy system was also one portable per ambulance.

189. Each portable, along with associated spare batteries, licensing, programming costs etc. costs approximately $1,500. Approximately 35 additional portable radios would be required in order to ensure that every paramedic in Essex had a portable while on shift. The cost of doing so would be approximately $52,500.

190. The issue of a second portable has been the subject of joint recommendations of the Occupational Health and Safety Committee of the County of Essex Emergency Service since 2002. Essex, as employer, has concurred with this recommendation and requested that the

MOHLTC provide a second portable. The MOHLTC has declined. Further, the MOHLTC has refused Essex's offer to provide or pay the cost of providing a second portable to its paramedics.

191. The rationale for the provision of a second portable radio is strongly, although not exclusively, linked to the availability of emergency buttons to each of the paramedics on a crew: if each crew member has his or her own portable radio, then each crew member has two emergency buttons (one on the portable and one on the speaker/microphone) on his or her person. Conversely, at present the paramedic not carrying the portable radio has no emergency buttons on his or her person. Essex and CUPE argue that paramedics face potential violence on a daily basis and that equipping each paramedic with a portable, and associated emergency buttons, is a reasonable safety precaution in the circumstances. The MOHLTC argues that the evidence shows that on the current scale of issue, the emergency button has worked and that there is no evidence that a second portable radio would help.

192. The MOHLTC notes that in the incident involving the Windsor Casino, which was the most complex situation, it took only 35 seconds from receipt of the emergency signal at the CACC until police were dispatched and that in a more ordinary situation, where the emergency signal is only associated with one ambulance the evidence was that it would take only 10 to 15 seconds on average to dispatch police.

193. The hazards faced by the paramedics were reviewed earlier in this decision. I am satisfied that in the ordinary course of their duties paramedics may be, and are, dispatched to calls where the patient or other individuals on site may become violent and pose a risk to the health and safety of the paramedics. I am also satisfied that in the course of their duties paramedics may, and do, become separated so that the paramedic not carrying the portable radio will not have access to an emergency button. I am further satisfied that in the event of an altercation involving the paramedic with the portable radio, that paramedic's ability to disengage him or her self in order to depress the emergency button may be, and has been, impeded, a problem which would be addressed if the other paramedic on the crew were present and also had a portable radio.

194. I also note that a second portable mitigates risk not simply by providing each paramedic with a set of emergency buttons, but in several other ways. First, the second portable may also be used for oral communications, in order to provide information about the emergency situation faced by the paramedics. Second, the second portable effectively acts as a spare: as noted earlier, during the discussion of the fact that no preventative maintenance program is indicated for the radio communications system, its components either work or do not work. Thus, in the event that one portable does not work, the portable carried by the other crew member could be used.

195. Thus, I am satisfied that a second portable would reduce the risks to the health and safety of the paramedics. In my view, however, it does not automatically follow that a second portable must be provided to the paramedics. The MOHLTC's obligation as an employer pursuant to section 25(2)(h) is to "take every precaution reasonable in the circumstances for the protection of a worker". In interpreting this obligation, the Board made the following statement, with which I agree, in *Ontario (Ministry of Transport),* [2006] OLRB Rep. Mar./Apr. 196:

> 146. There is surprisingly little case law on what the word "reasonable" in s. 25(2)(h) means. However, on the face of the provision the word "reasonable" clearly modifies the words "take every precaution in the circumstances". Therefore, it is not every precaution which must be taken, but only reasonable precautions. Determining

> what is reasonable involves balancing the benefit to be gained by taking the precaution against all other relevant factors. These factors could include, among other things, the cost of the precaution and its effect on efficiency.

In this case, however, for the reasons that follow I am satisfied that the reasonableness of the precaution of providing a second portable has been recognized by the MOHLTC through its treatment of funding proposals in relation to this issue.

The Significance of the Funding Proposals

196. Management Board establishes funding priorities for the Government of Ontario through a process referred to as "Results Based Planning". Each Ministry solicits funding requests from its branches and evaluates and prioritizes them. The Ministries in turn submit their funding requests to Management Board which evaluates and prioritizes them. Not all requests receive funding.

197. Several documents were filed on consent relating to requests in the Results Based Planning exercise for a second portable radio. While he had no direct knowledge, Duffin, the Field Manager for the Southwest Field Office of the Emergency Medical Services Branch of the MOHLTC, testified that these documents indicate that a request for funding for a second portable was made by the MOHLTC to Management Board or by the Emergency Health Services Branch to higher levels within the MOHLTC. The documents establish that essentially identical requests were made in the 2003/4 and 2004/5 Results Based Planning exercises. The text of the 2004/5 request is as follows:

> **2004/05 RBP Risk Template**
>
> Operational requirements of Ontario's emergency medical services requires changing the scale of issue from one portable radio to two portable radios assigned to each emergency ambulance. This need was echoed in a recent inquest jury recommendation (Whitmore/2002). The purchase and supply of communication (radio) equipment is a legislated responsibility of the Province.
>
> Each emergency ambulance is staffed by two paramedics but with only one portable radio assigned to each ambulance, only one of the paramedics has immediate access to portable emergency communications with dispatch. Frequently crew members are apart when attending multiple patients; should a patient become violent or need additional medical assistance, the paramedic without a radio is unable to radio for help.
>
> Implications of Risk:
> - Failure to comply with an inquest recommendation (likelihood 100%);
> - At cross-purposes with ministry's land ambulance Response Time Improvement strategy (likelihood 50%);
> - Jeopardize public health and safety and the safety of paramedics. Without immediate radio access, the delayed activation of emergency assistance when required greatly increases the likelihood of injury or

> loss of life to the paramedic or patient. As call volumes increase, so does the likelihood of this risk materializing. Any injury or loss of life to a paramedic or patient affects family, co-workers, and public confidence and, if shown to be directly linked to a lack of portable radio assignment, will seriously reflect negatively upon the government (likelihood 30%).
>
> Mitigating Strategies:
> Instruct crew members to maintain line of sight or stay within voice range, or commit additional ambulances in response to each emergency call.
>
> Neither solution is practical in the long term and both increase operational costs. In addition, the dispatching of multiple ambulance [sic] to a single call would rapidly deplete municipal ambulance resources with a corresponding increase in overall ambulance response times to emergencies.

The cost of purchasing a second portable for all ambulances in the province was estimated by these documents at just under $1.5 million, with ongoing costs of approximately $67,000 per year.

198. CUPE and Essex point to these documents as virtual admissions by the MOHLTC that failure to provide each paramedic with a portable radio "greatly increases the likelihood of injury or loss of life to the paramedic", to use the language of the funding proposals. Counsel for the MOHLTC concedes that in putting forward this budget submission the MOHLTC must have considered that money on a second portable radio would be "usefully spent". He argues, however, that other than reference to the inquest recommendation there is no indication in the budget submission of any actual problem which would arise from continuing to have a scale of issue of one portable radio per ambulance. Thus, he argues, the MOHLTC's request for a second portable is based on little more than speculation or opinion that a second portable may be of assistance in addressing health and safety issues in an unforeseen set of circumstances.

199. I am not persuaded by this argument. It may be that the assessment of risk to the paramedics associated with the failure to provide each of them with a portable radio can be understood as nothing more than speculation or opinion on the part of the MOHLTC. This, however, is not the most reasonable explanation, as one would hope that funding requests to cabinet are based on something more than speculation. At the very least the explanation offered by counsel for the MOHLTC is only one of several inferences that can be drawn as to why the statement was made in the funding request. An alternative inference is that the MOHLTC, or the EMS Branch of the MOHLTC, concluded based on its own assessment that failure to provide each paramedic with a portable represented a reasonable enough risk to their health and safety that a request for funding to Management Board should be made. In these circumstances, the failure of the MOHLTC to adduce evidence as to why this specific request was made gives rise, in my view, to this alternative adverse inference.

200. The nature of this document, however, raises the issue of whether a decision of the Board, or of an Inspector, under the OHSA can or should interfere with government decisions on funding priorities. The MOHLTC argues that the decision not to fund a second portable radio constitutes a "considered government decision" with respect to the expenditure of $1.5 million, and on this basis urges the Board not to disturb this decision.

201. In reply, the Inspector argues that the GMCP is not a creature of statute, in particular as it relates to the provision of a second portable radio, noting that there is nothing in the statute or the regulations which directs the MOHLTC with respect to how many portable radios it should be issuing. Essex and CUPE argue that in running the communications system, MOHLTC is engaged in an operational function. In any event, they note that section 2(1) of the OHSA provides that it binds the Crown and that section 2(2) of the OHSA provides that despite anything in any general or special Act, the provisions of the OHSA and its regulations prevail.

202. The lack of fuller argument on this point caused me great concern. In the end, I have concluded that the mere fact that the government has made what is arguably a policy decision not to expend funds to provide a second portable does not deprive this Board of jurisdiction to order it to do so. I note in this respect, first, that the MOHLTC did not argue that the Board could not override this decision, only that it should be cautious about doing so, and in its submission should not do so.

203. Second, there are cases in which the government has been ordered to take precautions under the OHSA notwithstanding the fact that the decisions had budgetary implications. (See for example: *Ontario (Ministry of the Solicitor General and Correctional Services)*, [1998] O.O.H.S.A.D. No. 199 (Wacyk) (ordered, inter alia, to increase staffing complement, provide equipment, including a communications system to enable emergency calls to the police, to correctional officers escorting inmates at various correctional facilities); *Ontario (Ministry of the Solicitor General and Correctional Services)*, [1997] O.O.H.S.A.D. No. 2 (Muir) (ordered to increase staffing complement in "control module" at the Sault Ste. Marie Jail); see also *Ontario (Ministry of the Solicitor General and Correctional Services*, [1997] O.O.H.S.A.D. No. 319 (Cummings), where the adjudicator was prepared to order the government to buy additional portable radios in order to ensure that there was sufficient supply to provide every correctional officer at the Sault Ste. Marie Jail with one while on duty.)

204. Third, the Crown is expressly made subject to the OHSA. In doing so, the OHSA makes no distinction between policy and operational activities of the Crown. That is not to say that the fact that the Crown has made a policy or funding decision will be irrelevant to determinations under the OHSA. In particular, in determining whether the Crown has taken "every precaution reasonable in the circumstances for the protection of the worker", the nature of the Crown activity is one of the circumstances to be considered. As stated above, the benefit to be gained by taking the precaution must be balanced against all other relevant factors. In this case, however, the only evidence before me was that the MOHLTC, or its Emergency Medical Services Branch, considered provision of a second portable necessary in order to redress the "greatly" increased likelihood of injury or loss of life to the paramedic if only one portable per crew was provided. There is no evidence what so ever as to why this funding request was rejected. Nor, as argued by Essex, was there evidence of competing priorities.

205. I also note that there was some suggestion in the evidence that providing a second portable radio could cause an increase in radio traffic which could result in degradation of overall communications service or could result in the need to obtain additional transmission capacity. If an increase in transmission capacity were required in an international border area, such as Essex, then a lengthy approval process involving Industry Canada and its counterpart in the United States of America, the Federal Communications Commission, would need to be followed. This evidence was, however, entirely speculative: the MOHLTC has done no studies to determine whether or not any such problems would occur. Further, the fact that the MOHLTC, or at the

very least its EMS Branch which has responsibility for that communications service, requested a second portable for paramedics across the province, including in Essex, significantly undercuts the argument that this was seen as an actual problem.

206. In the result, I conclude that in failing to provide sufficient portable radios so that each paramedic in Essex may carry one while on duty the MOHLTC has breached its obligation as an employer pursuant to section 25(2)(h) of the OHSA to take every precaution reasonable in the circumstances for the protection of the paramedics. The MOHLTC is directed to provide sufficient portables to the paramedics employed by Essex within 60 days of the date of this decision.

Flagging of Potentially Dangerous Addresses

207. "Flagging", as the term was used in these proceedings, means identifying an address as one at which potentially dangerous individuals reside or may reside to paramedics dispatched to that address. Examples of such addresses were said to be a notorious motorcycle gang's club houses or "crack houses". The MOHLTC refuses to flag addresses.

208. CUPE and Essex take the position that the MOHLTC's failure to flag addresses is contrary to its obligations under the OHSA, but did not indicate which of the MOHLTC's asserted obligations it specifically breached. They seek a declaration and an order directing the MOHLTC, within sixty (60) days of the date of this decision, to incorporate into its ambulance dispatch service a system of flagging addresses which the Occupational Health and Safety Committee of the County of Essex Emergency Service deems to be potentially hazardous. They also seek to ensure that dispatch advises paramedics of the flagged addresses and the details of the flagging when sent to such an address.

209. The Inspector takes the position that the potential for violence constitutes a "hazard in the workplace". Accordingly, the Inspector takes the position that the MOHLTC has an obligation under section 25(2)(d) of the OHSA to "acquaint" the paramedics with this hazard. The Inspector argues that despite the paramount value assigned to health and safety, the OHSA carves out exceptions when it is necessary to protect the life of another person. Accordingly, the Inspector argues that the parties should be directed to go back and determine how best to use the system that exists to "flag" addresses.

210. It is perhaps useful to emphasize two things at this point. First, no party to these proceedings took the position that paramedics dispatched to an incident were not entitled to determine what action to take, or not take, based on their assessment of the risk of potential violence associated with responding to a particular call. In particular, the right of paramedics to decide to stand by and await the arrival of police assistance was not an issue in these proceedings. The locus of dispute was on the right of paramedics to make this decision based on anything other than "current" information. Second, flagging an address does not necessarily mean that the paramedics would always await the arrival of police assistance, only that they would be provided with address specific historical information which they would consider in deciding whether to await the arrival of police assistance or whether to enter the premises but proceed with caution. Indeed, I heard evidence of paramedics going into what they believed to be potentially violent situations without waiting for the police if they also believed that there was imminent danger to the life of the patient.

211. The issue of flagging requires some consideration of what information is currently available and provided by Windsor CACC dispatchers to paramedics with respect to potential dangers at a particular address to which they are being dispatched.

212. Calls are received by call takers at the CACC. The call takers assess the situation using a call taking protocol tool known as the Dispatch Priority Card Index. The Windsor CACC also has a set of Local Operational Procedures (LOPs) which its personnel are expected to follow. All calls to or from the CACC are recorded. In addition, call takers enter certain information into the Ambulance Report Information System (ARIS) as they are talking to the caller. A computer record for each call is created by address as a result. This information can be retrieved by clicking on a history icon. Clicking on the history icon shows the history of calls for the particular address: that is it allows access to past records of all calls for the particular address. The computer screen also has a caution icon. Unlike the information under the history icon, which must be "called up", any information entered under the caution icon is automatically displayed on a section of the screen in front of the dispatcher once the associated address is entered. The caution icon is currently used by the CACC to denote physical or environmental hazards, such as the presence of PCBs at a power station or directions on how to enter an industrial site with physical obstructions or hazards.

213. Dispatchers have five or six computer monitors in front of them at their positions. At the dispatch positions with six monitors, three monitors are used for ARIS, to record incoming call information. One monitor displays a map of Essex-Windsor County and shows the location of each ambulance within the County (the AVL screen) and, by scrolling to a different screen, the status of each hospital in the County. One is for the "phone switch". The evidence was unclear as to which of these monitors was missing from the positions with only five monitors, but the final monitor at all dispatch positions is a "Gold Elite" console which is used for dispatch. As I understand the evidence, information with respect to a specific address under the history icon is available to the dispatchers and if information in relation to that address has been recorded under the caution icon, then it will also automatically appear on one of their monitors.

214. By means of a January 6, 2006, memorandum to Windsor CACC staff, Krauter directed that:

> Call takers and dispatchers are to refrain from indicating on the call or broadcast the information "wait for police".
>
> Responding crews are to be provided with <u>all</u> available information of the call, including any potential hazard so that they can assess for themselves scene safety and whether to delay approaching any scene.
>
> (Emphasis is original.)

215. The directive that responding crews be provided with all available information was a pre-existing part of the Windsor CACC's policies. Indicating on the call or broadcasting the information "wait for police" was not part of Windsor CACC's pre-existing policies, but it was part of its practice.

216. The evidence established that the policy to provide crews with "all available information" also needs to be qualified in several respects. The Windsor CACC will not provide

paramedics with information available under the history icon with respect to a particular address. Windsor CACC has also declined to "flag" particular addresses, through the use of the history icon, the caution icon or otherwise, at the request of the police or Essex EMS. If, however, in the context of responding to a particular incident the police told Windsor CACC that the ambulance crew should not enter without the police, that information would be passed on. This would have a similar effect to flagging that address, but is dependent on the police having been contacted with respect to the particular incident at the address, and the police having flagged the address in their own system.

217. This of course then raises the question of when the CACC will contact the police in relation to a call. The CACC will contact the police when the call taker has determined that there is a situation of potential danger to the patient and/or paramedics. Prior to February 16, 2006, the LOP listed the following "guidelines" as "indicators" that call takers were to use in assessing the situation for potential danger to the patient and/or EMS crew:

- Patient history of violence and/or aggression;
- Abusive, threatening and/or violent behaviour;
- Patient uncooperativeness;
- Determine if the [sic] is any other individual at the scene or in the vicinity of the call that may pose a hazard at scene;
- Determine if any weapons are involved or present at the scene.

As of February 16, 2006, the LOP was amended to delete the reference to "patient uncooperativeness" from the list. Krauter testified that she made this change because she did not think that uncooperativeness per se was necessarily a good indicator of potential violence.[2]

218. It would seem to follow from Krauter's evidence that the effect of removal of "patient uncooperativeness" from the list of guidelines of potential danger is that police would not be contacted if the patient was simply uncooperative. Krauter testified, however, that she still expected call takers to note and pass on to dispatchers, and dispatchers to advise paramedics, that a patient was being uncooperative, in the sense of, for example, refusing treatment.

219. Duffin testified as to the origins of the MOHLTC's policy of not flagging addresses where there has been a violent patient in the past. He testified that in the mid to latter 1970's what was then known as the ambulance services branch of the MOHLTC would "blacklist" certain addresses, based, for example on a history of repeated, frivolous calls to a residence. Calls from blacklisted addresses might be assigned low priority or not responded to at all. He testified that there was a case in the Barrie area where someone lost their life when an ambulance was not dispatched to a blacklisted address. The branch determined at that time that the practice had to cease.

220. Duffin testified as to the difficulties inherent in ensuring that information with respect to a particular address was current. He expressed concern about "poisoning crews' minds by setting up doubt or concern that is not justified" with respect to responding to a call at a particular address. He also testified as to the practical difficulties a call taker would face in reviewing the history in relation to a particular address while at the same time trying to respond to incoming calls. He noted that particular addresses, e.g. large apartment buildings, may have a history of dozens of calls which would need to be reviewed. He also testified that it would be possible for

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[2] As noted earlier in this decision, the Windsor CACC's LOP with respect to Violent or Potentially Violent Patients, as amended February 16, 2006, has been incorporated into the County of Essex Deployment Plan.

Essex to install computers in the ambulances which could be used to provide the crews with any address specific information it wished to provide, as has been done by another upper tier municipality with respect to its emergency medical services.

221. In cross examination, Duffin conceded that history of police incidents at a particular address could be entered in the "caution" screen. In my view, this is clearly one option. Notwithstanding his comment about "poisoning crews' minds", he also conceded in cross examination that going to a residence of a notorious motorcycle gang or to a drug den would be a "cause for caution" on the part of an ambulance crew, and that if the address in question continued to be used for this purpose, that would be "good to know" on the part of a responding ambulance crew.

222. The MOHLTC argues that Windsor CACC's refusal to flag a particular residence is sensible because there is no way of knowing whether the individuals at a particular address at the time of a given call are the same as those who were present, and created a risk, at the time of a historical incident. This may be correct, but it appears to be at odds with the overall approach of the CACC that the ambulance crews are best suited to assess the risk in a particular situation, particularly given that, as Krauter conceded, historical information may be relevant to that assessment.

223. I accept that this issue raises a number of difficulties. For example, an address which may have been a motorcycle gang's club house in the past may no longer be a club house at the time of the dispatch. There is, thus, a question of the currency of the information with respect to the use made of the address. Even if the use of the address remains the same, the individual or individuals who were potentially dangerous may no longer reside, or at least be present, at the address at the time of the dispatch. In addition, there is a question of the extent to which an individual who is potentially dangerous in one context will be potentially dangerous in the context of a request of emergency medical services for themselves or another individual at the address.

224. The issue, however, is one of risk. There is no dispute on the evidence that going to an address at which a potentially dangerous individual is present elevates the risk to the health and safety of the paramedics. Wilkinson testified that there were only 3 or 4 addresses which Essex sought to have flagged. He testified, however, that the situation was dynamic and that it changes on an irregular basis. One approach would be to assume that each address in the County of Essex-Windsor has an equal likelihood of being risky on the theory that which addresses are risky at a given point in time is the result of some random phenomenon. In my view, however, it is more reasonable to assume that an address which historically has been risky is more likely currently to be risky than an address which historically has not been risky. That is not to say that such an address necessarily poses an actual risk to the health and safety of paramedics, only that the history of an address is relevant information to the assessment of the risk that it may. How useful that information is will of course depend directly on the degree to which an effort is made to ensure that it is current.

225. Given that there are only 3 or 4 addresses at issue, there were times during the hearing when it appeared that the dispute between Essex and the MOHLTC was not so much over whether addresses should be flagged, but rather which of them should be responsible for doing so. The underlying dispute appeared to be about which might bear any liability in the event that paramedics made a decision based on such information to stand by and await police assistance and a patient died as a result. Indeed, in final submissions the MOHLTC and Essex accused each

other of being motivated by this concern. Thus, there was evidence and argument directed to: whether Essex could advise the paramedics of flagged addresses by way of word of mouth, postings at ambulance stations, or cards to be distributed to the paramedics and kept in the cabs of the ambulances; whether such techniques were effective and as current as flagging by the MOHLTC dispatchers; and whether postings or cards might give rise to improper dissemination of the information to members of the public who were in the stations or ambulances. To the extent that this evidence and argument appeared to be addressed to an underlying issue of liability as opposed to communication of risk to the paramedics, it was of some concern to me because it ought to have been an irrelevant consideration.

226. These concerns, however, have been assuaged somewhat by the form which CUPE's remedial request on this issue took in final argument, which appeared to be adopted by Essex. CUPE requests that the MOHLTC be ordered to "incorporate into its ambulance dispatch service in Windsor a system of flagging addresses which the Occupational Health and Safety Committee of the County of Essex Emergency Service deems to be potentially hazardous and to ensure that dispatch advises paramedics of the flagged addresses and the details of the flagging when sent to such addresses". That is, CUPE and Essex seek to use the MOHLTC's communications system as a conduit of information for which they would be responsible.

227. The MOHLTC's argument in response to this suggestion is of significance. The MOHLTC argued that it was responsible for ensuring delivery of effective emergency medical services in the province, and that accordingly it would not act as a conduit for information which it was not reasonably satisfied was necessary to that end. This position speaks to the issues of control and authority addressed earlier in this decision in determining whether or not the MOHLTC has the obligations of an employer (or a supervisor) within the meaning of the OHSA.

228. The MOHLTC argues that the specific request that it be directed to flag addresses deemed potentially hazardous by the Occupational Health and Safety Committee of the County of Essex Emergency Service is ill conceived because the obligation to ensure the health and safety of the paramedics lies with Essex and cannot be delegated. I agree. The OHSA does contemplate that when a workplace requires a joint health and safety committee, the committee may make recommendations to the employer for the improvement of the health and safety of workers (section 9(18)(b)), to which the employer is required to respond in writing. The employer, however, may either respond providing a timetable for implementation (section 9(20)) or respond that it does not accept the recommendation and set out its reasons (section 9(21)). Ultimately the decision is that of the employer, subject to an order by an Inspector or this Board.

229. The evidence before me allows me to reach only three conclusions on this issue. First, that in principle flagging of addresses is a reasonable precaution in the circumstances for the protection of the health and safety of the paramedics. Second, that this is an obligation which both Essex and the MOHLTC share under the OHSA pursuant to section 25(2)(h): Essex as the employer of the paramedics and the MOHLTC as an employer of the paramedics having control of them with respect to this issue in its operation of the communications system. Third, to the extent that the MOHLTC is aware of the existence of a potential danger to the paramedics at an address, as an employer it is also obliged pursuant to section 25(2)(a) of the OHSA to advise the paramedics of this information.

230. When, however, addresses should be flagged is not an issue that I can determine based on the evidence before me, other than to observe that if, as I understand to be the case, the police are themselves flagging a given address there is no apparent sensible reason why this information

should not be provided to the paramedics. Accordingly, I direct the MOHLTC and Essex to attempt to reach an agreement on a protocol with respect to flagging, addressing among other things the mechanism by which addresses will be flagged within thirty (30) days of the date of this decision and to advise the Inspector of any agreement reached. In the event that the parties are unable to reach an agreement, they are to advise the Board within sixty (60) days of this decision, failing which this aspect of the application will be deemed to have been resolved. If the parties advise the Board that they have failed to reach an agreement, further directions will be given with respect to an expedited hearing process to determine this issue. I remain seized for this purpose.

The Mike to Mike Function on the Cell Phones

231. CUPE and Essex argue that the MOHLTC has breached its obligations as an employer in relation to the paramedics by failing to allow them to have use of the mike to mike functions on the cell phones. They seek a declaration and an order directing the MOHLTC to unlock the mike to mike capacity on all cell phones used by the paramedics within sixty (60) days of the date of this decision.

232. Whether the mike to mike capacity is enabled or disabled is within the exclusive control of the MOHLTC in its operation of the communications system.

233. I note in passing that there was some suggestion during the adducing of evidence that the MOHLTC considered cell phones to be a substitute for a second portable as a safety device for the paramedics. This position was not, however, advanced by the MOHLTC in final argument. In any event, I am satisfied that a cell phone is not a substitute for a second portable as a safety device: there is no emergency button on a cell phone and oral communication requires retrieving the cell phone from where ever it may be stored and dialling a number rather than simply depressing a button as on the portable.

234. The "mike to mike" function on the cell phones permitted crews of paramedics to speak to each other through their cell phones: the FleetNet communications system is designed only for brief radio transmissions, on average 5 seconds or less, and is not suited to this purpose. The MOHLTC disabled this function, and the dialling capacity on the cell phones. Instead, the cell phones can only be used to call one of approximately 30 pre-programmed numbers. These numbers include the Windsor CACC, the base hospitals, all road supervisors for Essex, ambulance stations and "911". There were two reasons why the MOHLTC disabled the mike to mike function. First, as a result of concerns about abuse: the regular monthly charges for each cell phone were $42/month and the MOHLTC was receiving bills in excess of $200. (It is important to note that Essex was charged by the MOHLTC and agreed to pay for the excess charges.) The second stated reason was that the MOHLTC was concerned to have recordings of communications in relation to a given dispatch. Only calls from the cell phones to the Windsor CACC and the base hospitals are recorded at the Windsor CACC (in the latter instance, as the result of the use of a "diverter box" located at the Windsor CACC): mike to mike communications are not so recorded.

235. CUPE and Essex see the mike to mike function as a mechanism by which paramedics can alert each other to potential dangers at addresses to which they are being dispatched. They argue that it should be enabled until such a time as the paramedics are provided with a second portable and the MOHLTC flags dangerous addresses for the paramedics.

236. The MOHLTC argues that the mike to mike function should not be permitted because of the potential for abuse and the desirability of recording all communications in relation to a particular incident.

237. I accept the argument by CUPE and Essex that enabling the mike to mike function would constitute a precaution for the paramedics in relation to potentially dangerous addresses, as it would permit crews to exchange information with respect to such addresses. The circumstances within which the reasonableness of that precaution must be considered include the current lack of an agreement between Essex and the MOHLTC for flagging those addresses on the one hand and the MOHLTC's concerns about abuse and recording of communications on the other. The MOHLTC's concern about recording communications is undercut by the fact, as CUPE points out, that there are many other communications in relation to a particular incident which are not recorded (for example, communications between the paramedics while in the cab of the ambulance or while at the scene). The issue of potential abuse may be addressed by appropriate discipline.

238. However, the reasonableness of this precaution must also be assessed in light of the orders I have made with respect to the flagging of addresses. An agreement with respect to the flagging of addresses significantly undercuts the rationale for enabling the mike to mike function as a health and safety precaution. Further, the fact that CUPE and Essex sought to have the mike to mike function enabled within sixty (60) days of this decision suggests that it is not possible to enable the mike to mike function as an interim measure pending the adoption, or imposition, of a protocol on the flagging issue. Accordingly, I decline to make any order with respect to this issue at this time.

In the alternative, has the MOHLTC breached its obligations as a supervisor under the OHSA in relation to the paramedics?

239. For reasons stated above, if I am wrong that the MOHLTC has the obligations of an employer in relation to the paramedics, I conclude that the MOHLTC has the obligations of a supervisor under the OHSA to the paramedics in relation to the communications system it has provided to them and requires them to use, and the manner in which it permits it to be used in communications with the paramedics. In that event, my conclusions with respect to whether the MOHLTC has breached its obligations as a supervisor towards the paramedics with respect to the matters at issue are as follows.

The FleetNet Radio Communications System

240. For the reasons stated with respect to the MOHLTC's obligations as an employer, the problems identified with FleetNet are not properly described as "defects" in the system. Rather they are technological limitations of the system. It is a stretch to describe these limitations as constituting a "potential or actual danger" to the health and safety of the paramedics. Accordingly, I find no breach of section 27(2)(a) of the OHSA by the MOHLTC with respect to this issue. However, ensuring the paramedics understand the technological limitations of the communications system which they are required to use is a reasonable precaution in the circumstances for ensuring their health and safety. Accordingly, I find that the MOHLTC is required to ensure that paramedics understand the technological limitations of the communications system which it requires them to use by providing appropriate training or otherwise in fulfillment of its obligations under section 27(2)(c) of the OHSA.

Preventative Maintenance of the Radios

241. For the reasons stated with respect to the MOHLTC's obligations as an employer, based on the evidence before me, I decline to make an order with respect to the preventative maintenance of the communications system used by the paramedics.

Testing of Emergency Buttons

242. The ability of the paramedics to test the emergency buttons is controlled by the MOHLTC as part of its operational functions. Accordingly, I find that the MOHLTC has the obligations of a supervisor in relation to the testing of the emergency buttons. For the reasons stated with respect to the MOHLTC's obligations as an employer, failure to test the emergency buttons gives rise to an actual or potential danger that the emergency buttons will not work. I find that pursuant to section 27(2)(a), the MOHLTC has an obligation to advise the paramedics of this danger. Failure to have in place a proper protocol for the testing of the emergency buttons constitutes a failure to take every precaution reasonable in the circumstances. I find that pursuant to section 27(2)(c), the MOHLTC has this obligation in relation to the paramedics.

The Second Portable

243. For essentially the reasons stated with respect to the MOHLTC's obligations as an employer, I conclude that in failing to provide sufficient portable radios so that each paramedic in Essex may carry one while on duty the MOHLTC has breached its obligation as a supervisor pursuant to section 27(2)(c) of the OHSA to take every precaution reasonable in the circumstances for the protection of the paramedics.

Flagging of Potentially Dangerous Addresses

244. For essentially the reasons stated with respect to the MOHLTC's obligations as an employer, the evidence before me allows me to reach only three conclusions. First, that in principle flagging of addresses is a reasonable precaution in the circumstances for the protection of the health and safety of the paramedics. Second, that this is an obligation which both Essex and MOHLTC share under the OHSA: Essex pursuant to its obligations as the employer of the paramedics pursuant to section 25(2)(h); MOHLTC pursuant to its obligations as a supervisor of the paramedics pursuant to section 27(2)(c). Third, to the extent that MOHLTC is aware of the existence of a potential danger to the paramedics at an address, as a supervisor of the paramedics it is also obliged pursuant to section 27(2)(a) of the OHSA to advise the paramedics of its existence.

The Mike to Mike Function on the Cell Phones

245. For the reasons stated with respect to the MOHLTC's obligations as an employer, I decline to make an order for the unlocking of the mike to mike function of the cell phones.

Orders

246. In the result, if I am wrong that the MOHLTC has the obligations of an employer in relation to the paramedics, the orders I make against the MOHLTC as a supervisor are *mutatis mutandis* the orders I have made against the MOHLTC as an employer.

Obligations of the MOHLTC as a Supplier of Communications Equipment to the Paramedics

247. The MOHLTC conceded at the outset of the case that it is a supplier within the meaning of the OHSA of communications equipment to the paramedics. While it did not directly advert to the obligations of a supplier in its argument, its position appears to be that it has fulfilled those obligations. CUPE and Essex directed no argument to how these obligations were breached. The Inspector referenced these obligations only for the purposes of arguing that they did not give rise to an obligation on the part of the MOHLTC to implement a preventative maintenance program for the radios.

248. Section 31(1) of the OHSA provides:

> Every person who supplies any machine, device, tool or equipment under any rental, leasing or similar arrangement for use in or about a workplace shall ensure,
>
> (a) that the machine, device, tool or equipment is in good condition;
> (b) that the machine, device, tool or equipment complies with this Act and the regulations; and
> (c) if it is the person's responsibility under the rental, leasing or similar arrangement to do so, that the machine, device, tool or equipment is maintained in good condition.

249. It is not apparent to me how this section can give rise to any obligations with respect to provision of a second portable, flagging of addresses or the disablement of the mike to mike feature on the cell phones. For reasons stated above, in my view the FleetNet communications system as a whole does not have defects, rather it has technological limitations. There was no evidence that the communications system as a whole was not in "good condition" within those technological limitations.

250. This leaves the issue of testing of the emergency buttons. In my view, a supplier which prohibits the testing of a component of equipment supplied is not ensuring that the component is in good condition. Accordingly, I find that in refusing to permit testing of the emergency buttons on the radios provided to the paramedics the MOHLTC is violating its obligations under section 31 of the OHSA. Any other order I might make with respect to this issue, however, is subsumed by the order I have made directing the MOHLTC as an employer in relation to the paramedics and Essex as the employer of the paramedics to attempt to reach an agreement with respect to an appropriate protocol for such testing.

Summary of Declarations, Orders and Directions

251. For the reasons given, the Board:

(a) Declares that the MOHLTC has the obligations of an employer under the OHSA to the paramedics in relation to their use of the communications system it operates, provides to them and requires them to use in the course of their duties for Essex.

(b) Declares that the MOHLTC has breached its obligations under section 25(1)(b) of the OHSA by refusing to permit the testing of the emergency buttons on the radios used by the paramedics.

(c) Declares that the MOHLTC has breached its obligations under section 25(2)(h) of the OHSA by:

 (i) failing to provide sufficient portable radios so that each paramedic may carry one while on duty;

 (ii) failing to have in place a protocol for the testing of the emergency buttons on the radios used by the paramedics; and

 (iii) refusing to recognize the principle that flagging of addresses is a reasonable precaution in the circumstances for the protection of the paramedics and that this is an obligation which it shares jointly with Essex.

(d) Declares that MOHLTC has an obligation pursuant to sections 25(2)(a) and (h) of the OHSA to ensure the paramedics understand the technological limitations of the MOHLTC communications system which they are using.

(e) Declares that the MOHLTC has breached its obligations under section 25(2)(a) of the OHSA by:

 (i) failing to advise the paramedics that failure to test the emergency buttons exposes them to a potential or actual danger; and

 (ii) failing to advise the paramedics of any potential dangers of which it is aware at addresses to which paramedics are dispatched.

(f) Declares that the MOHLTC has breached its obligations under section 31 of the OHSA by refusing to permit testing of the emergency buttons on the radios provided to the paramedics.

(g) Orders the MOHLTC, within sixty (60) days of the date of this decision, to provide sufficient portable radios to the paramedics of Essex so that each paramedic may carry one while on duty.

(h) Directs:

(i) The MOHLTC and Essex to attempt to reach an agreement on a protocol for the testing of the emergency buttons on the radios provided to the paramedics by the MOHLTC within thirty (30) days of this decision and to advise the Inspector of any agreement reached. In the event that the parties are unable to reach an agreement, they are to advise the Board within sixty (60) days of this decision, failing which this aspect of the application will be deemed to have been resolved. If the parties advise the Board that they have failed to reach an agreement, further directions may be given with respect to an expedited hearing process to determine this issue. The parties are advised that any such decision may be issued based on evidence and submissions already before the Board. I remain seized for this purpose.

(ii) The MOHLTC and Essex to attempt to reach an agreement on a protocol with respect to flagging, addressing among other things the mechanism by which addresses will be flagged within thirty (30) days of the date of this decision and to advise the Inspector of any agreement reached. In the event that the parties are unable to reach an agreement, they are to advise the Board within sixty (60) days of this decision, failing which this aspect of the application will be deemed to have been resolved. If the parties advise the Board that they have failed to reach an agreement, further directions will be given with respect to an expedited hearing process to determine this issue. I remain seized for this purpose.

"Ian Anderson"
for the Board

Appendix "A"
Relevant Provisions of the OHSA

1. (1) In this Act,

….

"employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;

….

"supervisor" means a person who has charge of a workplace or authority over a worker;

….

25. (1) An employer shall ensure that,

….

(b) the equipment, materials and protective devices provided by the employer are maintained in good condition;

(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

(a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;

….

(h) take every precaution reasonable in the circumstances for the protection of a worker;

27. (2) Without limiting the duty imposed by subsection (1), a supervisor shall,

(a) advise a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware;

….

(c) take every precaution reasonable in the circumstances for the protection of a worker.

31. (1) Every person who supplies any machine, device, tool or equipment under any rental, leasing or similar arrangement for use in or about a workplace shall ensure,

(a) that the machine, device, tool or equipment is in good condition;

(b) that the machine, device, tool or equipment complies with this Act and the regulations; and

(c) if it is the person's responsibility under the rental, leasing or similar arrangement to do so, that the machine, device, tool or equipment is maintained in good condition.