CITATION: Independent Electricity System Operator v. Canadian Union of Skilled Workers, 2011 ONSC 81
DIVISIONAL COURT FILE NO.: 78/10
DATE: 20110218

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

WHALEN, MOLLOY, AND SWINTON JJ.

B E T W E E N:	
INDEPENDENT ELECTRICITY SYSTEM OPERATOR	*Richard J. Charney and Daniel R. McDonald*, for the Applicant
Applicant	
- and -	
CANADIAN UNION OF SKILLED WORKERS, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059, ONTARIO LABOUR RELATIONS BOARD and ATTORNEY GENERAL OF ONTARIO	*Lorne Richmond and S. Prihar*, for the Respondent Unions *Leonard Marvy*, for the Ontario Labour Relations Board *Leonard P. Kavanaugh, Q.C.*, for the Intervenor Greater Essex County District School Board *Ronald Lebi*, for the Intervenor Provincial Building and Construction Trades Council of Ontario
Respondents	
	HEARD at Toronto: October 21 and 22, 2010

SWINTON J.:

Overview

[1] The Independent Electricity System Operator ("IESO") has brought an application for judicial review of a decision of the Ontario Labour Relations Board ("the Board") dated November 23, 2009, in which the Board refused to make a declaration that the IESO was a "non-

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construction employer" so that construction industry collective bargaining rights would no longer bind the IESO. The Board found that s. 127.2 of the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, as amended ("the *LRA*"), which allows an employer to bring an application to the Board for a declaration that it is a non-construction employer, violates the guarantee of freedom of association found in s. 2(d) of the *Canadian Charter of Rights and Freedoms* and is not saved by s. 1. Therefore, s. 127.2 was held to be inoperative in this case.

[2] At issue in this application for judicial review is the correctness of that decision. For the reasons that follow, I conclude that the Board erred in finding s. 127.2 of the *LRA* violates the *Charter*.

The Legislative Context

[3] The *LRA* contains detailed provisions governing collective bargaining, including certification and decertification of trade unions, the transfer of bargaining rights, the procedures governing collective bargaining, the content of collective agreements, the powers of grievance arbitrators, and the prohibition of unfair labour practices.

[4] In 1962, the Ontario Legislature enacted amendments to the *LRA* creating special provisions for the regulation of labour relations in the construction industry (S.O. 1961-62, c. 68). The reason for these changes was the Legislature's recognition that the distinctive nature of construction industry employment required a special labour relations regime.

[5] Unlike work in an industrial establishment, employment in the construction industry tends to be episodic. This was described in oft-quoted passages from *Arlington Crane Service Ltd. v. Ontario (Minister of Labour)* (1988), 56 D.L.R. (4th) 209 (H.C.J.) at pp. 217-18:

> The pattern of construction work is erratic. When any one project is complete, there is no guarantee that there will be another job for the contractors to move on to.
>
> The result of this erratic pattern of construction work is that it is uneconomical for large firms to develop a permanent work-force organized into departments of specialists each with its own supervision. From the point of view of the entrepreneur, while he might retain a small number of key employees, it makes more business sense to hire the bulk of his employees as and when he wins a new contract, keep them on his pay-roll while they do that specific work, but when that job is finished, terminate their employment. When a new job comes up, a new crew will be recruited, one which only by accident will be the same as on the previous project. Meanwhile that earlier crew has split up and has gone off to work for other trade contractors who have projects of their own.

[6] The Court in *Arlington Crane* went on to describe the special role of the union-member relationship in this industry (at pp. 218-19):

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> Since the relationship between employer and employee in construction is typically episodic rather than enduring in character, a special form of union organization has emerged to fill this vacuum. The major craft specialties have all developed their own trade unions; the union is the body with which the individual tradesman tends to have the most salient relationship in the industry. The union has often taken the lead in the development and operation of apprenticeship programmes which are necessary to train newcomers in the skills of the trade. As well, the union collects and administers the funds for the worker's vacation pay, health and welfare benefits, and retirement pensions (with the money coming from the numerous contractors for whom the tradesman may have worked during the year, at a defined contribution level for each hour worked).

[7] The special construction industry provisions of the *LRA*, now found in ss. 126 through 168, provide special rules to regulate certain aspects of construction industry labour relations that operate in addition to the general provisions and, for the most part, prevail over the general provisions in case of conflict. A definition of "construction industry" is found in s. 1 of the Act:

> "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site...

Only construction trade unions, as defined in s. 126, may make certification applications pertaining to bargaining units in the construction industry. "Trade union" is defined in s. 126(1) as "a trade union that according to established trade union practice pertains to the construction industry."

[8] In 1977, the *LRA* was amended to implement province-wide collective bargaining in the Industrial, Commercial and Institutional ("ICI") sector of the construction industry. As a result, collective agreements in that sector are entered into by certain designated or certified employer and employee bargaining agents, and they apply on a province-wide basis.

[9] Up until the enactment of amendments to the *LRA* in 1998 and 2000, the *LRA* provided that an employer "who operates a business in the construction industry" was bound by the construction industry provisions of the Act. The jurisprudence of the Board had given a broad interpretation to that phrase to include anyone who effected construction, whether by hiring employees directly or by engaging contractors (see, for example, *Board of Education for the City of Windsor*, [1983] OLRB Rep. May 831 at para. 10; *Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62; *Re City of Toronto and Carpenters' District Council of Toronto and Vicinity* (1980), 108 D.L.R. (3d) 141 (Div. Ct.) at para. 3; *Municipality of Metropolitan Toronto*, [1989] OLRB Rep. Mar. 279 at paras. 31-32). As a result, a number of employers, both in the private and public sector, were bound by the province-wide collective bargaining scheme in the ICI sector, even though their primary business was not construction, and they were not carrying on the construction business to make a profit. For example, school boards and municipalities had been found to be operating businesses in the construction industry.

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[10] In 1998 and 2000, the provincial Legislature amended the *LRA* to introduce the concept of a "non-construction employer". Subsection 126(1) now defines the term as follows:

> "non-construction employer" means an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person.

The subsection also defines an "employer", for purposes of the construction industry labour relations provisions of the Act, as "a person other than a non-construction employer who operates a business in the construction industry...".

[11] Section 127.2 permits a non-construction employer to bring an application to the Board for a declaration that a trade union no longer represents its employees employed in the construction industry. Section 127.2 reads:

> 127.2 (1) This section applies with respect to a trade union that represents employees of a non-construction employer employed, or who may be employed, in the construction industry.
>
> (2) On the application of a non-construction employer, the Board shall declare that a trade union no longer represents those employees of the non-construction employer employed in the construction industry.
>
> (3) Upon the Board making a declaration under subsection (2), any collective agreement binding the non-construction employer and the trade union ceases to apply with respect to the non-construction employer in so far as the collective agreement applies to the construction industry.
>
> (4) The Board may re-define the composition of a bargaining unit affected by a declaration under subsection (2) if the bargaining unit also includes employees who are not employed in the construction industry.

[12] The Board has adjudicated ten applications under the current definition. It granted three applications, including one respecting the intervenor, the Greater Essex County District School Board ("GECDSB"). That decision is discussed later in these reasons.

[13] Notwithstanding the amendments to the definition of "non-construction employer", unions continue to have the right to apply for bargaining rights for employees of non-construction employers pursuant to the general provisions of the *LRA* (see ss. 7-10, 16-17).

Factual Background

[14] The Independent Market Operator, now the IESO, was established by the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A as part of a restructuring of the electricity market in Ontario and a breakup of Ontario Hydro into separate entities. Under the terms of that Act, Ontario Hydro was reorganized into the entities known as Hydro One Inc., Ontario Power Generation Inc., the Ontario Electricity Financial Corporation, the Electrical Safety Authority and what is now the IESO.

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[15] The IESO's primary functions are to operate the wholesale electricity markets in Ontario and to direct the operation of the high-voltage transmission system in the province. Its objects are set out in s. 5 of the *Electricity Act* as follows:

> The objects of the IESO are,
>
> (a) to exercise the powers and perform the duties assigned to the IESO under this Act, the market rules and its licence;
>
> (b) to enter into agreements with transmitters giving the IESO authority to direct the operation of their transmission systems;
>
> (c) to direct the operation and maintain the reliability of the IESO-controlled grid to promote the purposes of this Act;
>
> (d) to participate in the development by any standards authority of standards and criteria relating to the reliability of transmission systems;
>
> (e) to work with the responsible authorities outside Ontario to co-ordinate the IESO's activities with their activities;
>
> (f) to collect and provide to the OPA [Ontario Power Authority] and the public information relating to the current and short-term electricity needs of Ontario and the adequacy and reliability of the integrated power system to meet those needs; and
>
> (g) to operate the IESO-administered markets to promote the purposes of this Act.

[16] The IESO acquired the employees, assets, liabilities, rights and obligations of Ontario Hydro that were related to the activities that had been carried on by Hydro's Central Market Operator ("CMO") business unit. It is a broader public sector employer and at this time is strictly a consumer of construction services.

[17] The International Brotherhood of Electrical Workers had acquired bargaining rights for a unit of electricians and related classifications at Ontario Hydro in 1949. In 1999, the Canadian Union of Skilled Workers ("CUSW") acquired those rights through a displacement application. The Labourers' International Union of North America, the Labourers' International Union of North America, Ontario Provincial District Council, and the Labourers' International Union of North America, Local 159 ("the Labourers") held bargaining rights for a bargaining unit of construction labourers and related classifications of Ontario Hydro since 1949.

[18] The CUSW and the Labourers will be described in these reasons as "the Unions". Their members performed construction work for Ontario Hydro both as direct employees of Ontario Hydro and as employees of subcontractors to Ontario Hydro.

[19] Following the restructuring of Ontario Hydro, the IESO recognized the bargaining rights of the Power Workers Union ("PWU") and the Society of Professional Engineers (the "Society") for those employees transferred to it from Ontario Hydro. The collective bargaining relationships with the PWU and the Society are regulated by the general provisions of the *LRA*. However, the

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IESO refused to recognize the Unions' bargaining rights in respect of construction workers it had never employed.

[20] In 2004, the IESO brought applications pursuant to s. 127.2(2) for a declaration that it is a non-construction employer within the *LRA*. In turn, the Unions brought successor rights applications under ss. 69 and/or 1(4) of the *LRA*.

[21] The Board heard the Unions' applications first and determined that there had been a sale of a business pursuant to s. 69 and, therefore, the Unions' bargaining rights relating to intermittent construction activities of the former CMO business unit were preserved, regardless of whether the IESO chose to perform construction work itself or contracted out that work. As a result, the IESO was bound to the collective agreements that had been binding on Ontario Hydro (*Ontario Electricity Financial Corporation and Independent Electricity System Operator*, [2006] OLRB Rep. July/August 594).

[22] As a result of the Board's decision, the IESO became bound to two province-wide agreements negotiated by employer bargaining agencies, one negotiated by the Electrical Power Systems Construction Association ("EPSCA Agreement") and the other the Labourers' Provincial Collective Agreement in the ICI sector of the construction industry.

[23] As well, the IESO and the Unions entered into direct negotiations for new collective agreements in respect of construction work performed by the IESO in the Electrical Power System ("EPS") sector, which accounts for the majority of IESO's construction work. During bargaining, the IESO stated that it did not intend to hire construction workers, but rather intended to contract out all of its construction work, and it wanted the flexibility to use the contractor of its choice.

[24] Two agreements were reached, one with the CUSW and one with the Labourers. Each allowed the IESO to use contractors or subcontractors subject to certain conditions. In general terms, contracting and subcontracting are permitted provided that the contractors or subcontractors are either in contractual relations with the Unions or agree to be bound by the terms of the applicable agreements when performing such work. The collective agreements contain the same types of provisions one would expect to find in many other collective agreements, including hours of work and overtime, health and safety, holidays, and grievance and arbitration procedures.

[25] From time to time, the IESO requires construction work in the nature of renovations or rearrangements at its Clarkson Control Centre. Since the conclusion of these agreements, the IESO has only engaged members of the Unions to perform work through contractors. It has never employed any members of the Unions directly. Instead, members of the Unions have performed their work as employees of subcontractors of the IESO.

[26] The amount of work performed by members of the Unions has been relatively small to date. According to the Board's decision, members of the Labourers have not performed any work for the IESO since 2002 (at para. 36). Members of CUSW performed approximately 1,000 hours of work for the IESO as employees of a subcontractor in 2007 and 2008. In the same

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period. CUSW members performed approximately 1.6 to 2 million hours of work for all other contractors (at para. 37).

[27] On March 3, 2008, the Board issued a decision determining that the IESO met the statutory preconditions for a declaration that it was a "non-construction employer" within s. 126(1) of the *LRA* (*Independent Electricity Market Operator v. Canadian Union of Skilled Workers*, [2008] OLRB Rep. March/April 210). In particular, the Board found that while the IESO performs construction work from time to time, it does no construction work for which it expects compensation from an unrelated person. However, the Board did not make the declaration sought by the IESO, instead referring the matter for a further hearing to determine the constitutionality of s. 127.2.

The Board's Decision on Constitutionality

[28] The Board has the jurisdiction to consider the constitutional validity of provisions of the *LRA*. While it has no jurisdiction to issue a formal declaration of invalidity respecting any provision, it can refuse to apply the provision in a particular case on the basis that the provision is unconstitutional (*Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)* (1991), 81 D.L.R. (4th) 121 (S.C.C.) at p. 130).

[29] In a 62 page decision, the Board concluded that the declarations required by s. 127.2 when an employer is found to be a non-construction employer substantially interfered with the process of collective bargaining, contrary to s. 2(d) of the *Charter*, and that infringement could not be saved by s. 1. Therefore, s. 127.2 was held to be constitutionally inoperative in the circumstances of this case.

[30] In coming to its decision, the Board focussed on the impact of the legislation on the rights of the particular Unions and their members before it. In a number of places in its reasons, the Board described the effect of a declaration under s. 127.2 on the Unions. For example, at para. 154, it said,

> The effect of the challenged provisions is to terminate collective agreements negotiated by the Unions in respect of the IESO and to put an end to the Unions' existing right to engage in future processes of collective bargaining with the IESO.

[31] At para. 160, the Board wrote,

> ...sections 127.2(2) and (3) of the Act have the effect of invalidating all provisions of collective agreements negotiated by the Unions in the past on behalf of their members. In addition, the provisions affect future collective bargaining by terminating the Unions' existing right to engage in collective bargaining on behalf of their members with the IESO after the declarations contemplated thereunder are made. The challenged provisions therefore both repudiate past collective bargaining processes relating to all issues negotiated between the parties by nullifying all gains achieved in bargaining to date and also affect future

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> processes by stripping the Unions of their right to have their representations considered by the IESO in a process of good faith bargaining following the issuance of the declarations mandated thereunder.

[32] The Board rejected an argument that there was no denial of freedom of association because the IESO did not employ any Union members directly (at para. 165). At para. 168, the Board described the association right as follows:

> In the present context, it is the right of the Unions' members to engage in collective bargaining through the Unions as their representatives to reach their common goals of ensuring work guarantees in the event of contracting out and to negotiate terms of employment in the event that they are employed by the IESO directly. [Emphasis in original]

[33] The Board concluded (at para. 175):

> In the present case, the evidence indicates that one of the most significant goals of the Unions' members is achieving employment security through the negotiation of contracting and subcontracting protections in their collective agreements with all those employers, including the IESO, with whom they have existing bargaining rights. The scope of the constitutional right to collective bargaining protects the *process* by which the Unions seek to achieve such goals on behalf of their members as well as the *process* by which they negotiate terms and conditions of employment in the event their members are employed. [Emphasis in original]

[34] The Board found an interference with the collective bargaining process between the Unions and the IESO (at para. 176), and concluded that the interference was substantial, as the declarations would not simply affect collective agreement provisions, but would terminate all existing provisions. At para. 182, the Board stated,

> In the circumstances, it is difficult to imagine what could be more discouraging to the Unions' members' interest in coming together to pursue common goals than the challenged provisions, which both annihilate all of the gains made by their chosen representatives in respect of their workplace goals to date and strip the Unions of the right to represent and bargain with the employer in the future. The Unions' members are thereby required to start all over again at square one by first re-establishing their right to even have their voices heard, and listened to, by the IESO.

[35] The Board concluded that the "issue is not whether the Unions' members will continue to have access to an adequate collective bargaining regime after the declarations are made" (at para. 183). There was a substantial interference with the collective bargaining process with the IESO by dispensing with it altogether. Moreover, the adjudicative process before the Board did not meet the requirement for good faith bargaining and consultation with the Unions (at para. 191).

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[36] The Board also concluded that s. 127.2 was not saved by s. 1 of the *Charter*. The evidence did not show that the objective of the legislation – the perceived unfairness of the application of the construction industry regime to non-construction employers – was of sufficient importance to override *Charter* rights (at paras. 224-5). Moreover, the legislation did not meet the minimal impairment test, for the following reason (at para. 240):

> The legislation does not simply remove them from the construction industry regime, it eliminates all of the fruits of their past collective bargaining processes and ends the existing requirement of the IESO to listen to them in future bargaining processes.

The Issues

[37] All the parties are agreed that the standard of review of the Board's decision is correctness, given that the Board was applying the *Charter* (*Cuddy Chicks, supra*, at p. 130). However, the Unions submit that the Board's factual findings regarding the effects of the impugned provisions on the process of collective bargaining "constitute the most expert view of the issues at stake and have particular cogency in this application" (Factum, para. 44).

[38] I acknowledge the Board's expertise in the area of labour relations, and particularly construction labour relations. However, this case turns on the application of *Charter* principles to the facts, and on the application of those principles, no deference is warranted.

[39] The only issue in this application, then, is the correctness of the Board's decision that s. 127.2 is unconstitutional.

The *Charter* and Collective Bargaining

[40] The leading case dealing with s. 2(d) of the *Charter* and its application to collective bargaining is *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia* (2007), 283 D.L.R. (4th) 40 (S.C.C.). In that case, the Supreme Court of Canada reversed its earlier jurisprudence and extended the scope of the guarantee of freedom of association in s. 2(d) to include protection of the right to engage in collective bargaining on fundamental workplace issues. Its conclusion about the scope of s. 2(d) is summarized at para. 19 of its reasons:

> We conclude that s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the *Charter: Dunmore*. (citation omitted)

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[41] The Court explained, in detail, that it is the *process* of collective bargaining that is protected by s. 2(d) (at paras. 20, 89), emphasizing that s. 2(d) does not guarantee a certain substantive or economic outcome; it confers only a procedural right (at paras. 66, 91).

[42] Moreover, s. 2(d) is violated only if there is "substantial interference" with associational activity (at para. 90). At para. 92, the Court described "substantial interference":

> To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment that we call collective bargaining. [Emphasis in original]

[43] The Court suggested two lines of inquiry to determine "substantial interference", a question that must be determined contextually (at para. 93):

> The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

[44] The legislation in issue in the *Health Services* case had been enacted to reduce costs and to facilitate efficient management of the workforce in the health sector in British Columbia (at para. 5). It was enacted quickly and without meaningful consultation with unions. The legislation enacted changes to transfers and multi-worksite assignment rights, contracting out, the status of employees on contracting out, job security programs and layoff and bumping rights. It invalidated important provisions of existing collective agreements and prevented future collective bargaining on matters governed by Part 2 of the Act.

[45] The Court found certain provisions of the legislation constituted a substantial interference with collective bargaining – namely, those dealing with negotiations related to contracting out and layoff and bumping rights (at para. 130). It is clear from the reasons that the Court was particularly concerned that the legislation not only nullified certain important provisions of existing collective agreements, but also precluded bargaining in the future on these key workplace issues.

[46] In contrast, the Court found that other provisions restricting rights after contracting out did not contravene s. 2(d). These provisions are described as follows (at para. 122):

> Section 6(3) sets out a more onerous definition of the employer-employee relationship under the *Labour Relations Code*, R.S.B.C. 1996, c. 244, making it less likely that a health sector employer will be considered the "true" employer owing duties to the union and its members if work is contracted out. Sections 6(5) and 6(6) prevent employees from retaining their collective bargaining rights

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> with the subcontractor, as they would otherwise have done under ss. 35 and 38 of the *Labour Relations Code* if work was contracted out.

The Court held that these provisions modified the statutory protections under the Code and did not deal with the entitlements of employees based on collective bargaining (at para. 123).

[47] With respect to the provisions limiting bargaining on contracting out, bumping and lay offs, the Court described the measures as a "virtual denial of the s. 2(d) right to a process of good faith bargaining and consultation" (at para. 135). Therefore, there was a substantial interference with the right to bargain collectively.

[48] The government met the pressing and substantial objective part of the analysis under s. 1 of the *Charter*, given that its goal was to improve delivery of health care services. However, the government failed to satisfy the Court that *Charter* rights were minimally impaired. For example, the Court stated at para. 153, "To forbid any contracting out clause completely and unconditionally strikes us as not minimally impairing". The Court also expressed its concern that there had been no consultation with the affected unions and no explanation as to why this particular approach was chosen (at para. 158).

The Board's Earlier Decision on the Constitutionality of s. 127.2

[49] The non-construction employer provisions of the *LRA* were first subject to a constitutional challenge before the Board in 2005, when the intervenor, the GECDSB, brought an application pursuant to s. 127.2 seeking a declaration that it was a non-construction employer and terminating the bargaining rights of the United Brotherhood of Carpenters and Joiners of America, Local 494 (the "Carpenters Union"). At that time, the Board determined that s. 127.2 did not violate s. 2(d) of the *Charter*, relying on the decision of the Supreme Court of Canada in *Dunmore v. Ontario (Attorney General)* (2001), 207 D.L.R. (4th) 193 (see *Greater Essex County District School Board*, [2005] OLRB Rep. March/April 281).

[50] As a result of the Board's finding that the GECDSB was a non-construction employer, the Carpenters Union and its members were denied access to their preferred bargaining structure – that is, to the province-wide ICI agreement relating to the carpentry trade. However, the Board concluded that the legislation did not infringe the right to freedom of association, since it was not satisfied that the Board would not certify a bargaining unit of carpenters under the general provisions of the *LRA* (at paras. 47 and 49). In reaching that decision, the Board stated (at para. 44):

> As the Supreme Court of Canada said in *Deslisle, supra,* and *Alberta Reference, supra,* section 2(d) of the Charter is not violated when certain groups are excluded from a particular bargaining structure or regime, nor when a legislative scheme denies access to some of the products of modern labour relations, such as the right to strike. The freedom of association in section 2(d) has only been found to have been violated when a particularly vulnerable group of workers is entirely excluded from any state-sanctioned organizing structure and where the group laid a strong evidentiary foundation showing the profound effect of such historical

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> exclusion, particularly when compared with the gains made during a short period of inclusion (see *Dunmore, supra*). [Citations omitted]

[51] Despite the Board's decision, the Carpenters Union still holds bargaining rights with respect to the carpenters employed by the GECDSB outside the construction industry provisions of the *LRA* through voluntary recognition of its bargaining rights by the GECDSB.

The Constitutionality of s. 127.2

[52] When the present case came before the Board, the Unions recast the argument to submit that the negative effect on their collective agreements and collective bargaining rights was challenged, in light of the more recent decision of the Supreme Court in *Health Services*. Given their arguments, the Board distinguished the *Greater Essex* case as a positive rights case - that is, a claim for access to a particular bargaining regime. It treated the present case as a negative rights case, focusing on the impact of the legislation on collective bargaining relationships and collective agreements.

[53] I do not find this characterization of the claim to be helpful. The task for this Court is to determine whether s. 127.2, either in its purpose or effect, substantially interferes with the process of collective bargaining (*Fraser v. Ontario (Attorney General)*, 2008 ONCA 760, at para. 60). Therefore, the first question, in analyzing the constitutionality of s. 127.2, is to determine the purpose of the legislation. If the purpose of s. 127.2 is to interfere with the process of collective bargaining, and the result is a significant interference, then there would be a violation of s. 2(d). In the alternative, I will consider the effect on the process of collective bargaining to determine if the effect is substantial interference.

Is the purpose of the legislation to interfere with the process of collective bargaining?

[54] Before this Court, the Provincial Building and Construction Trades Council of Ontario, an intervenor, argued that the legislation is directed at the employer's obligation to bargain collectively. To quote para. 34 of its factum,

> By extinguishing the unions' bargaining rights and the collective agreements, the impugned law denies and forecloses the very process of collective bargaining. This constitutes a clear breach of the s. 2(d) freedom of association.

[55] I disagree with this characterization of the provision. As the Board correctly held in the *Greater Essex* case, the purpose of the provision is to remove certain places of employment from the regime for construction industry labour relations because the employer is not engaged in the construction business for profit. The legislation amended the definition of employer for purposes of the construction industry parts of the *LRA* to remove those who had been added by Board jurisprudence, but who are not engaged in construction activity for profit. Employees in those places of employment can still seek to bargain collectively under the general regime in the *LRA*. In other words, s. 127.2 does not seek to prevent collective bargaining by the employees of non-construction employers; rather, it provides that the bargaining relationship will be subject to the

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general provisions in the *LRA*, rather than the specialized regime developed for the construction industry.

[56] The Hon. Chris Stockwell, Minister of Labour, said the following in the Legislature about the purpose of the 2000 amendment to the definition of non-construction employer:

> If passed, they would:
>
> - Allow employers who do not sell construction services such as municipalities and school boards to remove themselves from the construction provisions of the Act. This would enable them to tender projects to both union and non-union contractors. (November 2, 2000)

[57] The Supreme Court has made it clear that the right to freedom of association in s. 2(d) does not give the right to a particular statutory regime, a particular model of labour relations or a specific bargaining method (*Health Services* at para. 91). As it said in *Health Services*, "What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals" (at para. 19).

[58] As the Board found in *Greater Essex*, and as the Board member agreed in the present case, the employees of IESO or any other non-construction employer can still organize under the general provisions of the *LRA*. This is not a case like *Dunmore, supra*, where the Court found that the evidence showed a vulnerable group of workers in the agricultural sector would be unable to exercise their right to freedom of association without positively recognizing a right of access to a statutory regime (*Health Service* at para. 34).

[59] The IESO argues that the Supreme Court of Canada has already found legislation with the same effect as s. 127.2 to be constitutional. In *Health Services*, the Court concluded that ss. 6(5) and 6(6) of the *B.C. Health Improvement Act* did not substantially interfere with collective bargaining. The effect of those provisions was to terminate existing collective bargaining rights for individuals on contracting out. In other words, the legislation modified the successor rights protection given to employees. In the present case, the IESO argues, s. 127.2 is similar, in that it terminates construction industry collective bargaining rights when an employer ceases to be a construction industry employer, as defined by the Act.

[60] I do not find this part of the *Health Services* decision determinative in the present case, although it is instructive. There is a difference between the legislation in *Health Services* and in the present case. In *Health Services*, the legislation restricted the extent to which individuals could retain their collective agreement rights with the subcontractor - a different employer. In the present case, employees can lose their right to collective agreement terms negotiated with the employer with whom they continue to work. As well, bargaining rights are terminated by the Board's declaration, although the employer remains the same.

[61] That was the case in *Greater Essex*, where employees of the school board, represented by the Carpenters' Union under the construction industry provisions, ceased to be covered by the province-wide collective agreement. However, they were able to bargain under the general

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provisions of the *LRA*, and the school board voluntarily recognized the Carpenters' Union to represent the employees working as construction carpenters.

[62] In sum, I conclude that the purpose of the legislation was not to prevent the employees of non-construction employers from bargaining collectively, nor was it meant to "break the Unions". Therefore, I must consider the effect of the legislation on the process of collective bargaining.

Is the effect of s. 127.2 to substantially interfere with the process of collective bargaining?

[63] That brings me to the Unions' argument that the effect of s. 127.2 is to substantially interfere with collective bargaining, given the termination of collective agreement provisions and acquired bargaining rights. The Board held that there was such interference, both retrospectively (because of the repudiation of existing collective agreements) and prospectively (by terminating the Unions' existing rights to engage in collective bargaining on behalf of their members).

[64] As I noted earlier in these reasons, the Board approached the constitutional issue solely on the basis of the effects of a declaration under s. 127.2 on the bargaining rights of the respondent Unions in relation to the IESO. However, the legislation is not aimed at any particular bargaining relationship, as was the legislation in *Health Services, supra*. Therefore, in determining whether the legislation has the effect of interfering with the process of collective bargaining, one would normally consider its effects on a variety of bargaining relationships. Here, however, the evidentiary record really only allows an examination of the impact on the IESO and the respondent Unions, with some further assistance from the GECDSB materials.

[65] In order to determine whether the declaration sought by IESO would substantially interfere with collective bargaining, it is important to keep in mind the way in which the Supreme Court of Canada framed the right to freedom of association in *Health Services*. The right is not that of the union. Rather, it is the right of an individual to associate with others to pursue workplace goals through a process of collective bargaining (at para. 3). Sometimes the Supreme Court describes it as a right of employees, sometimes as a right of workers, and sometimes as a right of union members. However, it is a right of individuals, not of the union as an institution.

[66] Moreover, the focus of the discussion in *Health Services* was on the right of individuals to join together to engage in collective bargaining on the terms of their employment with their employer. At para. 89, the Supreme Court described the right as follows:

> Based on the principles developed in *Dunmore* and in this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(d) does not guarantee the particular objectives sought through this associational

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> activity. However, it guarantees the process through which those goals are pursued. It means that the employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve work-related goals. Section 2(d) imposes corresponding duties on government employers to agree to meet and discuss with them.

[67] As a result, the question in this case is whether the legislation has significantly and adversely affected the process of voluntary, good faith collective bargaining between employees and their employer (*Health Services* at para. 92). According to the Supreme Court, that inquiry is contextual and fact-specific.

[68] When one turns to the particular facts before the Board, it is difficult to see the basis for a finding that s. 2(d) has been violated. The IESO has never had employees working in the construction industry. While it is bound to collective agreements negotiated under the construction industry provisions of the *LRA*, those agreements arose as a result of a successor rights application and decision by the Board. At no time has any person employed by or engaged to provide services to the IESO ever participated in any vote to have CUSW or the Labourers certified as collective bargaining agents in respect of dealings with the IESO. The Unions hold their bargaining rights for the IESO only because of an administrative decision of the Board.

[69] Therefore, had the Board granted the declaration sought by the IESO, no employee of the IESO would have been affected by the termination of the collective agreements and the termination of the bargaining rights of the Unions.

[70] Moreover, the IESO has indicated that it does not intend to carry on construction in the future using its own employees. Based on that evidence, no future employee of the IESO will be denied benefits under these collective agreements.

[71] The Board acknowledged that the IESO had no plans to carry on construction through direct hires, but nevertheless held that the legislation interfered with collective bargaining because the IESO *may* employ construction workers in the future (at para. 174). In my view, the Board erred in finding a breach of the *Charter* based on the possibility that the IESO might some day in the future have employees doing construction work. The onus was on the Unions to prove a *Charter* breach, and it could not do so by simply speculating on the way in which the IESO might operate in the future (see *Gosselin v. Quebec (Attorney General)*(2002), 221 D.L.R. (4th) 257 (S.C.C.) at para. 66). There was no evidentiary basis for finding substantial interference with the rights of IESO employees based on the bare possibility that there might be direct hires at some future time.

[72] The IESO argues that employment is a condition precedent for a collective bargaining process protected by s. 2(d) of the Charter. I need not decide that issue here. Indeed, the concept of "employee" has been extended to include union members who belong to a hiring hall in the context of an illegal strike (*International Longshoremen's Assn. v. Maritime Employers' Assn.* (1978), 89 D.L.R. (3d) 289 (S.C.C.)). However, in that case, an employment relationship was deemed to exist only after employers had requisitioned the services of union members from the hiring hall.

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[73] On the facts of this case, there is no evidence to support the conclusion that any employee or potential employee of the IESO would be denied access to the process of collective bargaining or lose the benefits of terms of collective agreements were a declaration made under s. 127.2.

[74] In the alternative, the Board found a substantial interference with collective bargaining because of the impact on the Unions' members. At para. 175, the Board stated,

> In any event, the Unions' current right to negotiate the terms and conditions under which the IESO's subcontractors must employ them and to negotiate workplace goals on behalf of their members in a general sense will, of course, also be lost whether or not any members are ever employed directly. In the present case, the evidence indicates that one of the most significant goals of the Unions' members is achieving employment security through the negotiation of contracting and subcontracting protections in their collective agreements with all those employers, including the IESO, with whom they have existing bargaining rights. The scope of the constitutional right to collective bargaining protects the *process* by which the Unions seek to achieve such goals on behalf of their members as well as the *process* by which they negotiate terms and conditions of employment in the event their members are employed. [Emphasis in original]

[75] As the Board shows in this passage, the Unions in this case were frank about their objectives. Their goal is to protect work opportunities for their members through the application of their collective agreements, which will have the result that construction work for which IESO contracts must be done by the Unions' members. In other words, they seek to ensure that contractors with the IESO are either unionized by them or willing to abide by their collective agreement terms.

[76] In their factum, the Unions emphasize the importance of contracting out provisions in construction industry collective agreements, both to ensure ongoing employment opportunities for union members and also to minimize the significant threat of subcontracting to a union's bargaining rights (Factum, para. 19). That threat is described in H.D. Woods, *Labour Policy in Canada* (Toronto: Macmillan of Canada), p. 255):

> The system of subcontracting which operates in the construction industry may also threaten the bargaining rights of a union and the work security presumed to have been acquired through a collective agreement signed by a union and a contractor. If the contractor is free to subcontract part of the work, or all of it, to others whose employees are not represented by the union, the original bargaining unit can be largely, or completely, replaced by employees represented by no union or by one other than the union which signed the original agreement. In either case, what the union achieved through bargaining has been lost through the subcontracting system.

[77] Given that a declaration would terminate collective agreements and bargaining rights of the Unions, the interests of the Unions' members would be negatively affected because of the

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potential loss of future employment opportunities. However, to show a violation of s. 2(d), the Unions must demonstrate that the interference with collective bargaining compromises the essential integrity of the process of collective bargaining (*Health Services* at para. 129) – that is, it must seriously undermine collective action by workers to negotiate workplace terms and conditions of employment. In my view, the declaration under s. 127.2 would not substantially interfere with the process of collective bargaining so as to give rise to a violation of s. 2(d).

[78] The Unions argue that the capacity of their members to come together and pursue common goals would be entirely destroyed if a declaration were granted. I do not accept that proposition. A declaration in this case would not nullify other collective agreements that the Unions have with construction contractors and subcontractors. Members of the Unions will continue to be either direct employees of construction industry contractors or subcontractors, or they will be hired from Union hiring halls by those entities. Moreover, a declaration does not prevent the Unions from seeking to organize the employees of other construction industry contractors.

[79] The individuals who will be detrimentally affected by the declaration sought are the Unions' members employed by contractors who seek contracts with the IESO to do construction work. If the Unions' collective agreements continue to apply, only Union members will be allowed to do the construction work.

[80] The effect of the Board's decision is to protect the collective agreements and acquired bargaining rights of the Unions and their members *under the construction industry provisions*. In doing so, the Board protected their access to their preferred bargaining structure and the particular outcomes of bargaining. That was an error in law, as the guarantee of freedom of association in s. 2(d) of the *Charter* does not extend constitutional protection to a preferred process or a particular substantive outcome; rather, it protects the collective bargaining process from substantial interference.

[81] The Board rejected an argument that there could be substantial interference only where legislation affects the content of future collective agreements as well as past agreements (at para. 181). In my view, the Board erroneously applied the *Health Services* decision. What was significant to the Supreme Court of Canada in that case was the legislated interference with the terms of existing collective agreements between the employers in the health sector and the unions with which they had negotiated those terms, as well as the prohibition on bargaining important issues such as contracting out, bumping and layoff. The annulment of existing terms and the prohibition on future bargaining with respect to these important issues caused substantial interference with the process of collective bargaining.

[82] In the present case, there is a termination of collective agreements and bargaining rights acquired under the construction industry provisions, but not because the Legislature seeks to prevent collective bargaining on certain issues. Rather, those rights are terminated because the employer is no longer a construction industry employer, and the Legislature has determined that those specialized provisions of the *LRA* are not appropriate for a non-construction industry employer. However, the employees of the employer are still free to seek certification or voluntary recognition under the general provisions of the *LRA*. There is no statutory restriction

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on their ability to bargain collectively on terms and conditions of employment with their employer in the future.

[83] Again, the effect of the declaration is to terminate collective agreements and bargaining rights under a particular statutory regime. However, employees of the non-construction employer continue to have the right to organize and bargain with their employer under the general provisions of the *LRA*. While the IESO has no construction employees, in workplaces where construction employees are affected by a declaration, they continue to have the right to organize under the *LRA* and to bargain collectively (as in *Greater Essex*, for example). Therefore, I conclude that there has not been substantial interference with the process of collective bargaining.

[84] However, even if there had been substantial interference with the collective bargaining, I would still not find a violation of s. 2(d). The Supreme Court in *Health Services* concluded that s. 2(d) would not be violated, despite a substantial interference with collective bargaining, if there were good faith negotiations or consultation with the unions before the legislation was enacted.

[85] In *Health Services*, there were identifiable unions affected by the legislation which had negotiated the collective agreements rendered redundant. The Supreme Court commented on the lack of good faith consultation by the government before the legislation was enacted.

[86] In the present case, we are not dealing with legislation changing particular collective agreements with known bargaining agents. Here, the legislation covers employers who come within the definition of "non-construction employer" and provides a process for removing them from the construction industry bargaining regime only if there has been a determination by the Board that a particular employer is a non-construction employer. Therefore, the acquired rights of unions and their members can be terminated only after an adjudicative process before the Board to determine whether labour relations in the place of employment are properly subject to the specialized regime. The Board's case law shows that the test for removal is a rigorous one, and a number of employers have failed to meet it. This is further evidence that the legislation does not substantially interfere with the process of collective bargaining; rather, it regulates the process of bargaining and allows some employers to move into the general provisions because of the nature of their business.

[87] In my view, the present legislation does not constitute a substantial interference with the rights of individuals to engage in the process of collective bargaining, particularly given the facts of this case, where the IESO has never had employees doing construction work. Therefore, I find there has been no violation of s. 2(d) of the *Charter*.

[88] The conclusion that I have reached is consistent with decisions in Quebec and Alberta dealing with legislation that has changed bargaining rights. In two cases, the Superior Court of Quebec found that there was substantial interference with the bargaining rights of existing employees. In *Confédération des syndicats nationaux c. Québec (Procureur général)*, 2007 QCCS 5513, the Superior Court found that legislation drastically reducing the number of bargaining units in the health care sector violated s. 2(d). Of significance in this case was the

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fact that the legislation had grouped job classes together in units where there was a history of conflicting interests between them.

[89] In *Confédération des syndicats nationaux c. Québec (Procureur général)*, 2008 QCCS 5076, the Superior Court of Quebec held that s. 2(d) had been violated by legislation that took away the employee status of certain home care providers and child care workers, with the result that they could not unionize and they lost the benefit of collective agreements and union representation. The result was to deny these workers access to the collective bargaining regime under which they had previously bargained.

[90] In *Alberta Health Services (Re)*, [2010] A.L.R.B.D. No. 9, the Alberta Labour Relations Board rejected a constitutional challenge to legislation which dealt with the impact on collective bargaining rights of a government decision to amalgamate nine regional health authorities into a province-wide health region. The legislation provided for four functional bargaining units, as well as a mechanism for the Board to determine the union that would have bargaining rights and the collective agreement that would be operative initially. It also required the parties to meet and bargain in good faith on amendments to that collective agreement. The Board held that the impugned provisions did not substantially interfere with the process of collective bargaining, even though some unions would cease to represent employees and some collective agreements would cease to have effect. That decision that was upheld on judicial review (*Alberta Union of Provincial Employees v. Alberta Health Services*, 2010 ABQB 344).

Section 1 of the Charter

[91] If there has been a violation of s. 2(d) of the *Charter*, s. 127.2 of the *LRA* is nevertheless constitutional, as it is a reasonable limit within s. 1 of the *Charter*.

[92] The onus is on the IESO in this case to show that s. 1 applies, using the test from *R. v. Oakes*, [1986] 1 S.C.R. 103:

- Is the limit prescribed by law?
- Does the legislation meet a pressing and substantial government objective?
- Is there a rational connection between the objective of the law and the means chosen to obtain that objective?
- Does the legislation minimally impair the *Charter* right?
- Is there proportionality between the objective and the measures adopted by the law – that is, between its salutary and deleterious effects? (*Health Services* at para. 138)

[93] The legislation is clearly prescribed by law. Its purpose is to relieve non-construction employers from the specialized labour relations regime for the construction industry, a regime which was not designed to govern the type of enterprise in which they are engaged. Thus, it draws a distinction between purchasers of construction services and sellers of those services, removing from the construction industry labour relations regime those places of employment which the Legislature concluded are not appropriately within it. As well, the legislation would

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allow the employers that do not sell their construction services to tender their union work to both union and non-union contractors, thus promoting competition in tendering for construction contracts, particularly in the public sector, and providing job opportunities for members of other unions and non-union workers.

[94] Deference is owed to the policy choices made by a legislature in designing a labour relations regime, where there are difficult policy choices to be made between the interests of employers and employees and different unions. In my view, the legislation serves a pressing and substantial objective.

[95] As well, the legislation meets the rational connection test, a test that is not particularly onerous (*Health Services* at para. 148). The provisions of s. 127.2 provide a Board-supervised mechanism to determine if an employer is a non-construction employer and if that determination is made, to remove the employer from the specialized construction industry regime.

[96] The legislation also meets the minimal impairment test, which is satisfied, in cases involving complex social issues, if the legislature has chosen one of several reasonable alternatives (*R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 160). A declaration can be obtained only if the Board is satisfied that the employer is no longer working in the construction industry for compensation from an unrelated person. At that point, the specialized provisions of the construction industry regime cease to apply, but any employees of the affected employer may seek access to collective bargaining under the general provisions. Thus, the legislation is tailored only to remove non-construction employers from the construction industry labour relations scheme.

[97] When the deleterious effects of the legislation are weighed against its salutary effects, it appears that the proportionality test is met. At most, the members of the Unions lose the benefit of the subcontracting provisions in the agreements binding the IESO, which may lead them to lose work opportunities with contractors hired by the IESO. However, no employees of the IESO will lose their existing representation or right to bargain collectively in the future with the IESO.

[98] While the Unions will lose the right to bargain with the IESO in the construction industry regime, they maintain their right to compete for any work opportunity created by the construction needs of the IESO or other consumers. Moreover, in the absence of s. 127.2, it appears that the IESO and other consumers of construction services would be bound forever by construction industry bargaining rights without any democratic mechanism to remove them.

Conclusion

[99] For these reasons, the application for judicial review is granted, and the decision of the Board is set aside. The matter is referred back to the Board to issue a declaration in accordance with s. 127.2 of the *LRA*.

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[100] The Intervenors and the Board do not seek costs. If the IESO and the Unions cannot agree on costs, they may make brief written submissions within 30 days of the release of this decision through the Divisional Court office.

K. Swinton J.
Swinton J.

"Whalen J." per K. Swinton J.
Whalen J.

Molloy J.

Released: February 18, 2011

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CITATION: Independent Electricity System Operator v. Canadian Union of Skilled Workers, 2011 ONSC 81
DIVISIONAL COURT FILE NO.: 78/10
DATE: 20110218

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

WHALEN, MOLLOY and SWINTON JJ.

BETWEEN:

INDEPENDENT ELECTRICITY SYSTEM OPERATOR

Applicant

– and –

CANADIAN UNION OF SKILLED WORKERS, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059, ONTARIO LABOUR RELATIONS BOARD and ATTORNEY GENERAL OF ONTARIO

Respondents

REASONS FOR JUDGMENT

SWINTON J.

RELEASED: February 18, 2011

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THE MEMBERS OF THE PRESIDING PANEL OF JUDGES