COURT OF APPEAL FOR ONTARIO

CITATION: Independent Electricity System Operator v. Canadian Union of Skilled Workers, 2012 ONCA 293
DATE: 20120508
DOCKET: C53992

Winkler C.J.O., Lang J.A. and Pattillo J. *(ad hoc)*

BETWEEN

Independent Electricity System Operator

Applicant (Respondent)

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 (Appellants)

and

Provincial Building and Construction Trades Council of Ontario and Greater Essex County District School Board

Interveners

Lorne A. Richmond, for the appellants

Richard J. Charney and Daniel R. McDonald, for the respondent

Leonard P. Kavanaugh, Q.C., for the intervener Greater Essex County District School Board

Ronald N. Lebi, for the intervener the Provincial Building and Construction Trades Council

Heard: February 15, 2012

On appeal from the order of the Divisional Court (W. Larry Whalen, Anne M. Molloy and Katherine E. Swinton JJ.), dated February 18, 2011, with reasons by Swinton J. and reported at 2011 ONSC 81, [2011] O.L.R.B. Rep. January/ February 166, reversing the decision of the Ontario Labour Relations Board (Caroline Rowan V-Chair) dated November 23, 2009, with reasons reported at [2009] O.L.R.D. 4330.

Winkler C.J.O.:

[1] The appellants, a number of construction trade unions, challenge the constitutional validity of s. 127.2 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A. (the "LRA"). They allege that the provision violates s. 2(d) of the *Canadian Charter of Rights and Freedoms*.

[2] Section 127.2 permits a "non-construction employer" – essentially, an employer that does not sell construction services to third parties – to bring an application to the Labour Relations Board (the "Board") for a "non-construction employer" declaration. If an employer is found to be a non-construction employer, two things happen. First, the Board must declare that any trade union that represents, or may represent, construction employees of the employer, no longer represents them. Second, any collective agreement binding the employer and the trade union ceases to apply with respect to the employer insofar as it relates to the construction industry.

[3] In this case, the Independent Electricity System Operator ("IESO") brought a non-construction employer application. The Board concluded that

the IESO met the statutory preconditions for a declaration that it is a "non-construction employer": while it 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 a s. 127.2 declaration; rather, it referred the matter for a hearing by the Board to determine the constitutional validity of the provision.

[4] The Board declared s. 127.2 to be constitutionally inoperative in the circumstances of this case on the basis that s. 127.2 substantially interfered with the process of collective bargaining. The Board found that the provision was contrary to s. 2(d) of the *Charter* and that the infringement could not be justified under s. 1.

[5] The IESO brought an application for judicial review of that decision. The Divisional Court granted the application, set aside the Board's decision, and referred the matter back to the Board to issue a declaration in accordance with s. 127.2 of the LRA.

[6] The construction trade unions in this case appeal from the Divisional Court's decision: the Canadian Union of Skilled Workers ("CUSW"); the Labourers' International Union of North America; the Labourers' International Union of North America, Ontario Provincial District Council; and Labourers'

International Union of North America, Local 1059 (the final three parties collectively referred to as the “Labourers”).

[7] The Provincial Building and Construction Trades Council of Ontario (the “Council”) intervened before the Divisional Court and this court, advancing arguments in support of the appellants’ position. The Council represents some 150,000 construction workers throughout Ontario.

[8] The Greater Essex County District School Board (“GECDSB”), which has been involved in on-going s. 127.2 proceedings, also intervened before both courts, advancing arguments in support of the IESO’s position.

[9] I would dismiss the appeal from the decision of the Divisional Court. In my view, there is no reason to interfere with its decision. On the evidence in this case, a s. 127.2 declaration would not result in substantial interference with the rights of the appellants’ members as guaranteed by s. 2(d) of the *Charter*.

A. BACKGROUND

(1) Legislative Context

[10] Section 127.2 of the LRA provides as follows:

> 127.2(1) This section applies with respect to a trade union[1] 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.

[11] Section 126(1) defines "non-construction employer" as "an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person". CUSW and the Labourers (together the "appellants" or the "Unions") do not challenge this definition.

[12] These provisions fall within a part of the LRA that is tailored to the construction industry. Section 1 defines "construction industry" as "businesses that are engaged in constructing, altering, decorating, repairing or demolishing

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[1] Section 126(1) of the LRA defines "trade union" for the purposes of ss. 126.1 to 168 as being "a trade union that according to established trade union practice pertains to the construction industry."

buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site". Sections 126 to 168 establish specialized rules for the construction industry that operate in addition to the general provisions of the LRA and which, for the most part, prevail over the general provisions. These provisions were enacted in recognition that employment in the construction industry has distinctive features, including that work tends to be episodic.

[13] In 1998 and 2000, the Legislature introduced a number of amendments to the LRA. Prior to the amendments, the LRA stipulated that an employer "who operates a business in the construction industry" was bound by the construction industry provisions of the Act. In a series of cases, the Board interpreted that phrase broadly so as to include anyone who effected construction, whether by hiring employees directly or by engaging contractors: see, for example, *Windsor (Board of Education for the City of)*, [1983] O.L.R.B. Rep. May 831; *Municipality of Metropolitan Toronto*, [1980] O.L.R.B. Rep. Jan. 62; *Re City of Toronto and Carpenters' District Council of Toronto and Vicinity* (1980), 108 D.L.R. (3d) 141 (Ont. Div. Ct.); *Municipality of Metropolitan Toronto*, [1980] O.L.R.B. Rep. March 279.

[14] This broad interpretation meant that employers who strictly consumed construction services, but did not provide any construction services to third

parties, were caught by the specialized labour relations regime for the construction sector. This had a number of implications for those employers. For instance, a number of private and public sector employers were bound by the province-wide collective bargaining scheme in the industrial, commercial and institutional ("ICI") sector of the construction industry. Collective agreements in the ICI sector are entered into by designated or certified employer and employee bargaining agents and apply on a province-wide basis. These agreements also invariably contain subcontracting clauses that prohibit the employer from subcontracting to non-union companies.

[15] The "non-construction employer" provisions were originally introduced by Bill 31, the *Economic and Development Workplace Democracy Act, 1998*. Bill 31 defined a "non-construction employer" as "a person who is not engaged in a business in the construction industry or whose only engagement in such a business is incidental to the person's primary business." The Bill provided a mechanism by which those non-construction employers who were already unionized in the construction industry could apply to the Board to end their collective bargaining obligations with the trade unions in respect of their construction industry employees.

[16] In introducing Bill 31, the Minister of Labour, the Honourable Jim Flaherty, described the purposes of the proposed non-construction employer provisions:

> Passing the *Economic Development and Workplace Democracy Act* would also address a long-standing issue. It would ensure that only employers in the construction industry are covered by the special construction provisions of the *Labour Relations Act*. This means that employers whose primary business is not construction, for example, retail employers, municipalities and school boards, can negotiate agreements specific to the circumstances of their sector. This corrects the situation of these employers being bound by the province-wide agreements that they have little opportunity to influence: Ontario, Legislative Assembly, *Official Report of Debates (Hansard),* 36th Parl., 2nd Sess., (4 June 1998), at p. 1116 (Hon. Jim Flaherty).

[17] At the Bill's third reading, the Labour Minister noted that the Bill did "not exempt those [non-construction] employers from the *Labour Relations Act*. It just treats them the same as other employers in the province": Ontario, Legislative Assembly, *Official Report of Debates (Hansard),* 36th Parl., 2nd Sess., (23 June 1998), at p. 1785 (Hon. Jim Flaherty).

[18] The Minister also noted that one of the objectives of the non-construction employer provisions was to open up the tendering process so that both non-union and union contractors could bid on work, thus increasing economic competitiveness: Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 36th Parl., 2nd Sess., (23 June 1998), at p. 1785 (Hon. Jim Flaherty).

[19] The "non-construction employer" provisions of the LRA were subsequently amended by Bill 139, the *Labour Relations Amendment Act, 2000.*

[20] During second reading of Bill 139, Joseph N. Tascona, the Member of Provincial Parliament for Barrie-Simcoe-Bradford, highlighted the problems that the amendments were meant to address: "non-construction employers were unfairly bound by construction agreements over which they have no control and which do not relate to their businesses." The proposed changes were aimed at "prior labour relations decisions" and were meant to clarify the true "intent of the construction industry (regime), which is to deal with construction companies that are paid for their work because of the construction work they do": Ontario, Legislative Assembly, *Official Report of Debates (Hansard),* 37th Parl., 1st Sess., (14 November 2000), at p. 5420-5421 (Joseph N. Tascona).

(2) Factual Context

[21] The evidentiary record in this case focuses on the impact of s. 127.2 on the IESO and the Unions, and to a lesser extent the GECDSB.

[22] The IESO was established by the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A., as part of the restructuring and break-up of Ontario Hydro into separate entities. The IESO's primary functions are to operate the wholesale

electricity markets in Ontario and to direct the operation of the province's high-voltage transmissions system.

[23] The IESO acquired the employees, assets, liabilities, rights and obligations of Ontario Hydro that were related to the activities previously carried out by Ontario Hydro's Central Market Operator business unit.

[24] Following the restructuring of Ontario Hydro, the IESO recognized the bargaining rights of the Power Workers' Union and the Society of Professional Engineers for all non-management employees that were transferred from Ontario Hydro. The collective bargaining relationships with the two unions are regulated by the LRA's general provisions, not the construction industry provisions.

[25] The IESO refused to recognize the bargaining rights of the two appellant construction Unions. CUSW had acquired its bargaining rights in 1999 through a displacement application. It displaced the International Brotherhood of Electrical Workers, which had acquired bargaining rights for a unit of electricians and related classifications at Ontario Hydro in 1949. The Labourers acquired bargaining rights for a bargaining unit of construction labourers and related classifications of Ontario Hydro in 1949.

[26] The IESO refused to recognize the long-standing bargaining rights enjoyed by the Unions on the basis that it was strictly a consumer of construction services and employed no members of either union.

[27] In 2004, the IESO brought non-construction employer applications pursuant to s. 127.2. The Unions brought, in turn, successor rights applications pursuant to s. 69 and s. 1(4) of the LRA.

[28] The Board heard the Unions' applications first. It concluded that there had been a sale of business and that the IESO was bound by the collective agreements that had been binding on Ontario Hydro: *Ontario Electricity Financial Corp. and Independent Electricity System Operator*, [2006] O.L.R.B. Rep. July/August 594.

[29] 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 Agency and the Labourers' Provincial Collective Agreement in the ICI sector of the construction industry.

[30] The IESO and the Unions also entered into direct negotiations for new collective agreements in respect of construction work performed by the IESO in the Electrical Power System sector, which accounts for the majority of the 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. It wanted the flexibility to use the contractor of its choice.

[31] The IESO reached an agreement with CUSW and the Labourers. Both agreements permitted the IESO to use contractors or subcontractors, provided that the subcontractors and contractors were in contractual relations with the Unions or agreed to be bound by the terms of the applicable agreements when performing such work.

[32] Contracting and subcontracting provisions such as these are commonly found in collective agreements in the construction industry. Hiring hall provisions are also common. These provisions are designed to ensure work opportunities for union members, who typically go from job to job and project to project as their services are required. On this appeal, the Unions and the Provincial Building and Construction Trades Council emphasized the importance of such provisions as the economic lifeline for construction workers.

[33] Since the collective agreements were reached, the IESO has never employed any members of CUSW or the Labourers directly. Rather, members of the Unions have performed work for the IESO as employees of IESO subcontractors. The amount of worked performed by the Unions' members has been minimal.

B. DECISIONS BELOW

(1) Board's Decision

[34] In a 62-page decision, the Board concluded that s. 127.2 substantially interferes with the process of collective bargaining contrary to s. 2(d) of the *Charter* and the infringement cannot be justified under s. 1.

[35] The Board described the effect of s. 127.2 as interfering with past and future collective bargaining:

> **160** In the present case, 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 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….
>
> **161** While the legislation does not prevent future representations from being made, as noted at paragraph 114 of *Health Services*, "the right to collective bargaining cannot be reduced to a mere right to make representations." Without any obligation on the IESO to listen in future to the Unions' representations regarding its members' shared workplace goals and the

> nullification of all terms of past collective agreements negotiated by the Unions on their behalf, the effect of section 127.2 is to interfere both with past collective bargaining processes and future ones.

[36] In the Board's view, s. 2(d) protects the process by which the Unions' members seek to achieve their goals of employment security as well as the process by which they negotiate terms and conditions of employment if they are employed. At para. 175, the Board stated:

> 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.]

[37] The Board rejected the argument that there was no denial of freedom of association because the IESO employed no Union members directly:

> **165** The fact that the IESO does not now employ any of the Unions' members directly, nor has it ever employed them directly since the re-organization of its predecessor, Ontario Hydro, does not further affect my finding that the provisions in issue interfere with the process of collective bargaining in the circumstances before me. It is, in my view, far too narrow a conception of the right to a process of collective bargaining to

> suggest that what is protected is only the ability of trade union members to negotiate terms and conditions of employment with their direct employer.

[38] The Board found that s. 127.2 discourages the Unions' members from coming together to pursue common goals:

> **180** Given the importance of the collective agreement and the significant job security protections contained within it to the scheme of collective bargaining, the legislative nullification of every single provision negotiated by the Unions during past processes of collective bargaining as is contemplated under s. 127.2, in my view, affects matters of sufficient importance to be likely to discourage the Unions' members from coming together to pursue common goals.
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> …
>
> **182** The legislation in this case, in any event, also goes a step further by ending the Unions' existing right to negotiate on behalf of their members in future processes unless bargaining rights can be re-established through certification or voluntary recognition. 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 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. [Emphasis added.]

[39] The Board noted that the question to be decided was whether there was substantial interference with the process of collective bargaining. The question was not whether the Unions' members continued to have access to an adequate collective bargaining regime under the general provisions of the LRA: para. 183.

[40] Moreover, a Board hearing to determine whether the IESO met the statutory definition of a non-construction employer was "hardly the same as good faith negotiation or consultation", since the provisions "eliminate any possibility of meaningful consultation": para. 190.

[41] Finally, the Board found that the breach of s. 2(d) was not justified under s. 1 of the *Charter*. The objective of the legislation was not of sufficient importance to override *Charter* rights. And, even if it were, s. 127.2 did not satisfy the minimal impairment test and its salutary effects did not outweigh its deleterious effects.

(2) Divisional Court's Decision

[42] In reasons written by Swinton J., the Divisional Court defined the issue to be decided as whether s. 127.2, either in its purpose or effect, substantially interferes with the process of collective bargaining: para. 53.

[43] The court concluded that the purpose of s. 127.2 is not to prevent collective bargaining, nor is it meant to "break the Unions". Rather, the

purpose is to remove non-construction employers from the labour relations regime tailored for the construction industry. As the purpose of s. 127.2 is valid, the provision's validity turns on whether its effect is to substantially interfere with the process of collective bargaining.

[44] The court found that, on the facts, it was difficult to find a violation of s. 2(d): para. 68. The IESO has never had employees working in the construction industry. At no time has any person employed by, or engaged by, 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. Had the Board granted a s. 127.2 declaration, no employees of the IESO would have been affected by the termination of the collective agreements and the Unions' bargaining rights. Furthermore, the IESO has indicated that it does not intend to carry on construction in the future using its own employees. Accordingly, no employees or potential employees will be denied access to the process of collective bargaining or lose the benefits of a collective agreement. The fact that the IESO may employ construction workers in the future does not constitute a sufficient evidentiary basis for finding substantial interference with the Charter rights of IESO employees.

[45] While the IESO argued that employment was a condition precedent for s. 2(d) protection of the collective bargaining process, the court found that it was

unnecessary to decide that issue. Rather, the Divisional Court considered the effect a s. 127.2 declaration would have on the Unions' members in the circumstances of the case:

> **78** 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. [Emphasis in original.]

[46] The Divisional Court concluded, at para. 83, that there was no substantial interference with s. 2(d) rights in this case:

> … 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.

[47] Even if there were substantial interference with the collective bargaining process, the court still would have declined to find a violation of s. 2(d). In *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, the Supreme Court held that s. 2(d) would not be violated, despite substantial interference with collective bargaining, if there were good faith negotiations or consultation with the unions before the legislation was enacted: 2007 SCC 27, [2007] 2 S.C.R. 391. Relying on that principle, the Divisional Court affirmed, at para. 86, that there was no breach of s. 2(d):

> **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.

In the view of the court, the legislation regulates the process of collective bargaining and allows employers that do not do business in the construction industry to operate under the general LRA scheme.

[48] Finally, the court concluded that, even if there were a violation of s. 2(d) of the *Charter,* the infringement was justified under s. 1.

C. ISSUES ON APPEAL

[49] The appellants raise two main issues on appeal: does s. 127.2 comply with s. 2(d) of the *Charter* and, if not, is the breach justified by s. 1 of the *Charter*?

[50] In arguing that there is a breach of s. 2(d), the appellants make three main submissions. First, they contend that the Divisional Court's decision is inconsistent with the Supreme Court of Canada's decisions in *B.C. Health Services, and in Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. In particular, they submit that nullifying collective agreements and

terminating bargaining rights constitutes substantial interference with collective bargaining.

[51] Second, and central to the appellants' argument that s. 127.2 breaches s. 2(d) of the *Charter,* is their contention that the Divisional Court erred in restricting s. 2(d) constitutional protection to direct employment relationships. In their view, s. 2(d) should be interpreted broadly and generously to protect the Unions' members who are not employed by the IESO.

[52] Third, the appellants submit that the Divisional Court erred in finding that there was no substantial interference with the process of collective bargaining on the basis that any future direct-hire IESO construction employees could seek to organize under the general provisions of the LRA.

[53] If there is a breach of s. 2(d), the appellants submit that the breach is not justified under by s. 1.

D. ANALYSIS

[54] All of the parties agree that the standard of review of the Board's decision is correctness, since the Board was applying the *Charter: Cuddy Chicks Ltd. v. Ontario (Labour Relations Board),* [1991] 2 S.C.R. 5.

(1) Is the decision inconsistent with *B.C. Health Services* and *Fraser*?

[55] In my view, the Divisional Court committed no error in articulating and applying the governing principles from *B.C. Health Services* to this case. The decision below is also consistent with the decision of the Supreme Court in *Fraser*, which was released after the Divisional Court's decision, as the majority decision in *Fraser* reaffirms the Supreme Court's earlier decision in *B.C. Health Services*.

[56] The Divisional Court recognized that s. 2(d) protects "the right of employees to associate in a process of collective action to achieve workplace goals, but does not ensure a particular outcome in a labour dispute or guarantee access to any particular statutory regime": *B.C. Health Services*, para. 19. I agree with the Divisional Court that freedom of association, as guaranteed by s. 2(d), is enjoyed by individuals, not by unions.

[57] As *Fraser* clarifies, at para. 54, *B.C. Health Services* "affirms a derivative right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion."

[58] For there to be a breach of s. 2(d) there must be "substantial interference" with associational activity. The Divisional Court relied on the articulation of the substantial interference test as set out at paras. 92-93 of *B.C. Health Services*:

> 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 with their employer that we call collective bargaining….
>
> Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. 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. [Emphasis in original.]

[59] The substantial interference test is spelled out in *Fraser,* at para. 47, in the following terms:

> What is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(*d*) right is established, and the onus shifts to the state to justify the limit under s.1 of the *Charter*.

[60] The threshold for establishing substantial interference with the process of collective bargaining is a high one. “In every case”, writes the majority *Fraser* at para. 46, “the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals.”

[61] The Divisional Court determined that, on the evidentiary record before the court, there was no substantial interference with the Union members' s. 2(d) rights. In its view, the facts in this case are distinguishable from those in *B.C. Health Services*. I agree.

[62] As explained by the Divisional Court at para. 81, a key difference is that in *B.C. Health Services* there was a prohibition on future bargaining with respect to important issues:

> 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.

[63] While s. 127.2 requires the termination of collective agreements and bargaining rights acquired under the construction industry provisions if an employer is found to be a non-construction employer, the bargaining rights and rights under the agreements are terminated because the employer is no longer a construction employer.

[64] The Legislature has determined that the specialized construction provisions are not appropriate for a non-construction industry employer. Were

the Unions not already certified to represent IESO construction employees under the construction provisions of the LRA, they would be ineligible to do so under current LRA provisions. However, without s. 127.2, the Unions would be entitled to remain under the construction regime in perpetuity.

[65] Employees of a non-construction employer are still free to seek certification or voluntary recognition under the general provisions of the LRA. *B.C. Health Services and Fraser* make it clear that s. 2(d) does not guarantee access to any particular statutory regime.

[66] That construction employees of non-construction employers are still able to engage in a process of collective bargaining is evidenced by the GECDSB's experience. In 2004, the GECDSB brought a s. 127.2 application, seeking to terminate the bargaining rights of the United Brotherhood of Carpenters and Joiners of America, Local 44 (the "Carpenters") under the construction regime. The Board allowed the application, finding the GECDSB to be a non-construction employer. However, the school board chose to voluntarily recognize the Carpenters' bargaining rights under the general LRA regime on behalf of carpenters employed by the GECDSB.

[67] Moreover, as I explain below, the Unions' members will continue to enjoy other aspects of the freedom of association.

(2) Are non-employees entitled to a constitutional right to bargain collectively?

[68] The appellants submit that the Divisional Court erred in failing to recognize constitutional protection for the process of collective bargaining between the IESO and the Unions on behalf of their members who are not, and may never be, employed by the IESO. I cannot accede to this submission.

[69] The Divisional Court found it difficult to see how there would be interference with any associational activity if a s. 127.2 declaration were to be granted, since the IESO has never had any employees working in the construction industry and given the following additional facts:

- While the IESO is bound to collective agreements negotiated under the construction provisions of the LRA, those agreements arose as a result of a successor rights application and a 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. Therefore, if the IESO were declared to be a non-construction employer, no employee would be affected by the termination of the collective agreements and the Unions' bargaining rights.

- The IESO has indicated that it does not intend to carry on construction using its own employees, and so no future employees will be denied benefits under the collective agreements.

- The interests of the Unions' members could be negatively affected because of the potential loss of future employment opportunities. However, s. 2(d) protects the process of collective bargaining, not the fruits of bargaining or a particular bargaining method.

- If a non-construction employer declaration were granted, the Unions' members could still come together and pursue common goals. They will continue to be either direct employees of construction contractors or subcontractors, or they will be hired from union hiring halls by those entities. A declaration in this case would not nullify other collective agreements with construction contractors and subcontractors.

- The Unions can still seek to organize the employees of other construction industry contractors.

[70] The Unions submit that the Divisional Court accorded diminished value to its members' s. 2(d) rights because they were achieved under a successor rights provisions. However, as I read the Divisional Court's reference to successor rights, the point the court was making was that s. 2(d) *Charter* rights are enjoyed by individuals. Here, the appellants cannot point to any individuals who have joined together to have CUSW or the Labourers certified as their bargaining agent with respect to the IESO.

[71] As noted above, the Divisional Court found that it was unnecessary to address the IESO's submission that employment is a necessary pre-condition for constitutional protection of the collective bargaining process.

[72] I agree that it was unnecessary for the Divisional Court to decide whether employment is a necessary pre-condition to engage s. 2(d) protection of collective bargaining in all cases. This court's task is not to consider issues in the abstract but to decide whether, on the facts before it, the Divisional Court erred in finding that there was no substantial interference with the s. 2(d) rights of the Unions' members who are not employed by the IESO.

[73] The appellants point to two cases in making the argument that s. 2(d) protection should extend to the Unions' members, none of whom are employed by the IESO: *International Longshoremen's Assn., Local 273 v. Maritime Employers' Assn.*, [1979] 1 S.C.R. 120; *Blouin Drywall Contractors v. United Brotherhood of Carpenters and Joiners of America, Local 2468* (1975), 8 O.R. (2d) 103 (C.A.). Relying on these cases, the appellants submit that the Divisional Court failed to recognize the protections afforded to union members who are not direct-hire employees.

[74] These cases do not, in my view, assist the appellants' submission. Both cases turn on their particular facts.

[75] In the *Longshoremen's* case, the question was whether there could be said to be a strike when union members requisitioned by the employer from the union hiring hall refused to cross a picket line set up by another group of unionized workers. The union took the position that the union members were

not employees and thus the refusal to report did not constitute an unlawful strike.

[76] The court held that the union members did not technically become employees until they reported for work. However, the set-up under the hiring hall regime agreed to by the parties overcame this so that the failure to honour the call to report amounted to a strike. The court was satisfied that references in the collective agreement to "employees" referred to those workers covered by the agreement, commencing from the effective date of the agreement. In determining that the union members were employees for strike purposes, the court considered the intentions of the parties in the context of the particular circumstances of that case: that the employer could only employ union members and that the union would supply them when requisitioned.

[77] *Blouin Drywall* arose in the construction industry context. Under the collective agreement between the parties, preference in hiring was given to union members who were made available through the union's hiring hall. The union brought a grievance claiming damages after the company hired non-union carpenters when there were union members available.

[78] The arbitration board awarded the union damages for lost earnings suffered by the non-employee members of the union as a result of the company's breach of the collective agreement. On appeal before this court,

the issue was whether the arbitration board exceeded its jurisdiction in making the award, since the LRA does not extend the binding effect of a collective agreement or award beyond “employees”.

[79] The court concluded that the arbitration board had not exceeded its jurisdiction under the LRA since the relevant provisions did not preclude the parties from agreeing to confer rights or benefits on non-employee union members and such rights may be the subject of the grievance procedure.

[80] In my view, it is wrong to read these two cases too broadly. They do not stand for the proposition that all workers who are members of a construction union are employees of all employers in that industry, notwithstanding that the workers have never been and never will be employed by a particular employer. Nor do they support the appellants’ argument that the benefits enjoyed by unionized employees in a hiring hall setting necessarily extend to all fellow union members.

[81] Rather, as I have stated, the cases turn on their particular facts and, more specifically, on the terms of the collective agreements in question. The agreements obligated the union to supply and the employer to obtain employees through a hiring hall. The court in each case was satisfied that the parties intended to bind and benefit the union members in question, even though they were not employed by the employer at the relevant time. The

courts had to provide remedies in the context of circumstances in which agreements were breached. The decisions did not create employment relationships where none existed.

[82] Moreover, it is significant that the two decisions are labour relations cases, not constitutional cases. As *Fraser* reminds us, this different context is significant. In *Fraser,* the court was careful to distinguish between what is meant by a process of collective bargaining for s. 2(d) *Charter* purposes from what collective bargaining entails in a statutory labour relations context.

[83] The appellants' submission that its members should enjoy s. 2(d) protection for collective bargaining with the IESO does not, however, strictly rely for support on these labour relations decisions. The appellants submit that the Divisional Court erred in restricting its inquiry to, and focusing solely on, the impact of s. 127.2 on direct hires, thus adopting a non-contextual, technical and unduly narrow approach to the s. 2(d) issue. In their submission, the Divisional Court's decision ignores the reality of the construction industry in which workers are dependent for their employment opportunities on the industry as a whole rather than on a particular employer. The ability of such workers to freely negotiate hiring hall and subcontracting provisions is fundamental to the process of collective bargaining in the construction industry.

[84] In my view, there is no merit to this submission. It is clear from the Divisional Court's reasons that it was mindful of the unique features of labour relations in the construction sector and considered the effect a s. 127.2 declaration would have on the Unions' members: see paras. 78-79.

[85] The court simply found that the appellants had not demonstrated that s. 127.2 makes it impossible to meaningfully exercise the freedom to associate due to substantial interference. As recognized by the Divisional Court, the Unions' members are able to continue to bargain with their construction employers and to seek to organize more construction employers. They are free to organize under the general provisions of the LRA. The Divisional Court recognized that the interests of the Unions' members could be negatively affected because of the loss of future employment opportunities were a s. 127.2 declaration to be made. However, s. 2(d) does not extend constitutional protection to employment opportunities.

[86] Rather, the guarantee of freedom of association under s. 2(d) provides protection against substantial interference with the freedom to associate to achieve collective goals. Section 2(d) is said to protect a right to collective bargaining in a derivative sense in that "[l]aws or government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association, by making it pointless" (emphasis in original): see *Fraser*, at para.

46. The court in *Fraser* reiterated the description of good faith bargaining from *B.C. Health Services* as requiring the parties to meet and engage in meaningful dialogue, and, while not dictating any particular model or process, requiring an employer to consider employee representations in good faith.

[87] It is difficult to see why a constitutional obligation should be placed on the IESO to bargain workplace issues with the Unions on behalf of its members, who are not employed by the IESO and who are employed by other employers.

[88] The Board, in the instant case, found that "the scope of the constitutional right to collective bargaining protects the *process* by which the Unions seek to achieve" their key goals of "achieving employment security through the negotiation of contracting and subcontracting protections in their collective agreements" as well as the process by which they negotiate terms and conditions of employment in the event their members are employed.

[89] *Fraser*, however, makes it clear that s. 2(d) does not protect access to a particular statutory process or the fruits of bargaining. I agree with the Divisional Court's observation that 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": para. 80 (emphasis in original).

(3) Is there substantial interference where there is access to the general LRA regime?

[90] In the appellants' submission, the effect of a s. 127.2 declaration – the nullification of the current collective agreements between the Unions and the IESO and the termination of the Unions' bargaining rights – constitutes a breach of s. 2(d). The appellants further contend that the fact that any future construction workers employed by the IESO are able to seek to organize under the general provisions of the LRA does not negate the *Charter* breach.

[91] In effect, the appellants say that the Divisional Court's reasoning is that no constitutional right will be found to exist (and there will be no breach) where there is a possibility that an individual can mitigate the effect of challenged statutory provisions or government action. I disagree with this submission.

[92] In *B.C. Health Services*, the Supreme Court did not find that every challenged statutory provision breached s. 2(d). Rather, it took issue with those provisions that both nullified significant collective provisions and then prohibited future bargaining on specific important issues.

[93] In this case, the Divisional Court recognized that the Unions' members have access to the construction labour relations regime when working for construction employers and the general LRA regime when working for non-construction employers. The issue is not that the Unions' members ought to

"mitigate" the effects of a s. 127.2 declaration. Rather, the point is that s. 127.2 only restricts access to the construction industry regime, which is not protected by the *Charter*.

[94] The appellants argue that this reasoning is flawed. If the IESO hires construction workers in the future, they will be a different group of employees entirely, because the Unions' members will have lost access to work with the IESO. In effect, only non-union employees can possibly re-certify.

[95] I do not accept this submission. Construction contractors bound to the Unions' bargaining rights (the actual employers of the Unions' members) maintain the right to bid on construction services required by the IESO, if any. If the Unions' members are hired by the IESO in the future, there is a collective bargaining process open to them.

[96] In conclusion, a s. 127.2 declaration would not make it impossible for the Unions' members to meaningfully exercise the freedom to associate. There is no breach of s. 2(d) based on the evidentiary record in this case.

(4) Is the Board process a substitute for good faith consultation/negotiation?

[97] The appellants assert that the Divisional Court erred in holding that a process of adjudication before the Board is a substitute for good faith negotiation.

[98] It is unnecessary to decide this issue given my conclusion that the appellants have failed to demonstrate substantial interference with s. 2(d).

(5) If there is a breach, is it justified under s. 1?

[99] While I have found that there is no breach of s 2(d), for the sake of completeness I will briefly consider whether, if there were a breach, it would be justified under s. 1 of the *Charter*.

[100] The Supreme Court of Canada articulates the s. 1 *Oakes* test at para. 138 of *B.C. Health Services*:

> A limit on *Charter* rights must be prescribed by law to be saved under s. 1. Once it is determined that the limit is prescribed by law, then there are four components to the Oakes test for establishing that the limit is reasonably justifiable in a free and democratic society (*Oakes*, at pp. 138-40). First, the objective of the law must be pressing and substantial. Second, there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve the objective. Third, the impugned law must be minimally impairing. Finally, there must be proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law….

[101] The appellants submit that in this case: (i) there is no evidence of a pressing and substantial objective; (ii) s. 127.2 does not minimally impair *Charter* rights; and (iii) there is no proportionality between the effects of s. 127.2 and its objectives.

[102] Section 127.2 was part of a larger package of reforms intended to modernize Ontario's construction industry labour relations regime. According to the legislative debates, a primary purpose of the non-construction employer provisions was to reverse a line of Board cases. In its view, the Board had unduly expanded the scope of the construction industry regime to include employers who did not operate in the construction industry or provide construction services but instead utilized construction services for their own purposes. The Legislature determined that the specialized labour relations scheme had, because of this Labour Board jurisprudence, become too broadly applied and over-inclusive.

[103] The non-construction amendments were meant to permit employers whose primary business was not construction – for example, retail employers, municipalities and school boards – to negotiate agreements specific to the circumstances of their sector. A related purpose was to free these employers from being bound by province-wide agreements that they had little opportunity to influence.

[104] The Legislative debates reveal that another goal was to facilitate economic competition and work opportunities for unionized and non-unionized workers by opening up the tendering process.

[105] I reject the appellants' argument that the Divisional Court owed deference to the Board's determination that the evidence did not support a finding that the purpose of s. 127.2 is pressing and substantial. Rather, as noted by the Divisional Court, 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 legislative record supports the Divisional Court's conclusion that the objectives of s. 127.2 are pressing and substantial.

[106] The appellants do not dispute that the rational connection test is met.

[107] Moving then to the next prong of the *Oakes* test, the appellants contend that the Divisional Court erred in holding that s. 127.2 meets the minimal impairment test, as s. 127.2 not only removes non-construction employers from the construction industry regime but it also terminates its members' bargaining and collective agreements. Recertification under the general provisions of the LRA is illusory, say the appellants, since certification is not possible without direct hires.

[108] As noted by the Divisional Court, legislation will meet the minimal impairment test, 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.

[109] Under s. 127.2, an employer seeking a declaration that it is a non-construction employer must bring an application to the Board and show that it does no construction work for compensation from an unrelated person. I note that in a number of cases decided under the current definition of "non-construction employer", the Board has refused the employer's s. 127.2 application on the basis that it did not satisfy that definition.

[110] If a declaration is made, the specialized provisions of the construction industry regime cease to apply; the collective agreement bargained under that regime by a construction trade union on behalf of construction workers ceases to apply in so far as that employer is concerned; and the bargaining agent no longer has bargaining rights on behalf of the employer's construction employees. However, any employees of the non-construction employer are entitled to seek access to statutory protection for collective bargaining under the general LRA regime. Union members employed by other construction employers maintain their rights under the construction industry provisions. In my view, the minimal impairment test is met.

[111] Finally, the appellants submit that the Divisional Court erred in concluding that the salutary effects of the provision outweigh its deleterious effects. I see no reason to interfere with the Divisional Court's analysis on this point, at para. 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.

[112] In conclusion, if there is a breach of s. 2(d), the *Oakes* test is satisfied.

E. DISPOSITION

[113] The appeal is dismissed. The respondents may make submissions as to costs in writing within 10 days of the release of these reasons. The appellants have 10 days to respond. There shall be no costs for or against the interveners.

Released: May 8, 2012 (“WKW”)

“W.K. Winkler CJO”
“I agree S.E. Lang J.A.”
“I agree L.A. Pattillo J. *(ad hoc)*.”