

# **Providing an Overview of Unionization in Ontario**

a presentation by

**BARRY KURETZKY**  
**(Kuretzky Vassos Henderson <sup>LLP</sup>)**

to

**Board of Directors**  
**COTAPSA, Inc.**

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**Kuretzky Vassos Henderson LLP**  
BARRISTERS & SOLICITORS

SUITE 1404  
151 YONGE STREET  
TORONTO, ONTARIO  
M5C 2W7

TELEPHONE: (416) 865-0504  
FAX: (416) 865-9567  
[www.kuretzkyvassos.com](http://www.kuretzkyvassos.com)  
Barry Kuretzky (ext. 302)  
E-MAIL: [kuretzky@kuretzkyvassos.com](mailto:kuretzky@kuretzkyvassos.com)

## PRESENTATION NOTES FOR COTAPSA MEMBERS (September 29, 2009)

### Pros and Cons of Unionizing

#### CONS

- **Loss of Control over Terms and Conditions of Employment**
  - Unionized employees are not permitted to negotiate terms and conditions of employment on an individual basis
    - I.e. No possibility of “opting out” of union
- **No Choice Regarding Strikes**
  - If you work in a position that is included in the bargaining unit, you must participate in a strike
    - (see *Certification Process*)
- **Payment of Union Dues**
  - Unions gain revenue through the payment of union dues, which is deducted directly from employees’ paycheques
  - Union dues are the same for every employee
- **Union Controls Arbitration Process – Not Grievor**
  - Individual employee does not have right to refer a grievance to arbitration
  - If the Union does not take the case to arbitration, the grievor cannot seek recourse to another forum to resolve the dispute
    - Only available recourse is to file a Duty of Fair Representation complaint at the Labour Board
      - But, these are successful approximately 5% of the time
- **Downside of Seniority System**
  - Benefits only most experienced employees
    - Often results in younger employees working less desirable shifts, for example

- Since promotions are based to varying degrees on level of seniority, promotions are not always offered to most deserving employees
- **No Access to Human Rights Tribunal**
  - If it is appropriate for an arbitrator to resolve a dispute that involves an alleged human rights violations, the Human Rights Tribunal will defer to the arbitration process
    - May deprive unionized employees of the benefits – particularly with respect to general damages – generally available to non-unionized employees

## PROS

- **Seniority**
  - Backbone of the unionized environment
  - Seniority provides both opportunities and protections in unionized environment
    - Eg. Job posting selections and promotions determined at least in part according to seniority
    - Eg. Employees with highest level of seniority protected from layoffs; cannot be bumped into lower-level job
- **No Termination Without Just Cause**
  - Unionized employees cannot be terminated with notice, like non-unionized employees
  - Layoff system to be agreed upon, but determined by seniority system; laid off workers subject to recall
  - More seniority = more difficult to terminate for cause
  - Results in some unionized employees having greater job security
    - However, in situations where it was justifiable, COTAPSA has financially supported civil litigation actions against the City of Toronto where the member has been wrongfully dismissed

- Although civil courts cannot reinstate employees, as arbitrators can, realistically even unionized employees are paid off when cause is alleged

- **Access to grievance arbitration**

- Disputes resolved first internally through agreed-upon grievance procedure
- If cannot be resolved internally, union has access to grievance arbitration regime, whereby neutral third party (arbitrator) makes binding decision
- Arbitration available both for individual grievances and “group” or “policy” grievances on important issues for many employees
- Decision of arbitrator can only be disturbed by court upon judicial review; decision generally given high degree of deference by courts
- Arbitrators have jurisdiction to resolve any dispute arising through the employment relationship; i.e. may resolve issues related to human rights, workplace safety, even claims for tortious activity

- **Union Representation at Meetings**

- Employer not permitted to hold certain types of meetings with employees without a representative from the union present – usually when disciplinary in nature
- Disciplinary action resulting from failure to include union representative may nullify discipline

- **Right to Strike**

- Union and employer set terms and conditions of employment by drafting mutually acceptable collective agreement
- If the employer and union reach an impasse when bargaining terms and conditions, union has a right to withhold its labour from the employer by going on strike
- Strike puts economic pressure on employer to meet union’s demands
- Note: union forbidden from going on strike during the term of a collective agreement

- **Fringe Benefits**

- Many unionized employees can expect to get better benefits than they were offered before unionization
- Potential benefits include health and dental insurance; participation in a pension plan; paid vacations and holidays; paid and unpaid leaves of absence
  - However, employees at COTAPSA already receive most, if not all, of these benefits
  - Would be fighting an uphill battle for gains it may not even end up realizing

## Who's In, Who's Out?

- True “managers” are out
  - o Those employees who only exercise supervisory authority are more likely to be in
- Section 1(3)(b) of the *Ontario Labour Relations Act* deems that a person who “exercises a **managerial function** or is employed in a **confidential capacity** in matter relating to labour relations” is not an “employee” under the *Act*, and accordingly cannot be represented by a union
- The Ontario Labour Relations Board defines employees exercising “managerial functions” as those who make **effective recommendations** in areas that materially affect the economic lives of employees
  - o “Materially affecting the economic lives of employees” = persons who can change an individual’s status as an employee, including power to:
    - discipline and discharge
    - give labour relations input
    - Hire, promote and demote
- Key is that recommendations must be effective – i.e. decisions or recommendations must be taken seriously and/or acted upon by management
  - o Where a person merely puts the decisions of others into practice, they are generally considered supervisors, and not managers

## CASE EXAMPLE

- *Children’s Aid Society of Ottawa-Carleton*, [2001] O.L.R.D. No. 1234
- One of the last cases in which the Ontario Labour Relations Board was called upon to determine an application to certify a unit of supervisors
  - o Older cases include:
    - *Ford Motor Co.*, [1993] OLRB Rep. Jan. 1;
    - *E.B. Eddy Forest Products Ltd.*, [1997] O.L.R.D. No. 3311;
    - *Consumer’s Glass Ltd.*, [1996] O.L.R.D. No. 3279;
    - *Ford Motor Co.*, [1993] OLRB Rep. Jan. 1;
    - *Stanley Precision Inc.*, [1981] OLRB Rep. Nov. 1631;
    - *Chrysler Canada Ltd.*, [1976] OLRB. Rep. Aug. 396.

- \*\*\*\*\* **In all but one of these cases, the Board found that the supervisors in question for the most part exercised managerial functions**
- FACTS: The Canadian Union of Public Employees (CUPE) sought to certify a group of persons employed in various supervisory positions, who were previously part of a staff association
  - o Very similar circumstances to those of COTAPSA
  - o **Board found that the supervisors did perform managerial functions, and were accordingly excluded as “employees” under the Act**
- Supervisors were defined as front-line managers who supervised employees in the bargaining unit directly
- The Ontario Labour Relations Board framed the issue to be determined as whether units made up of persons who supervise employees are permitted to bargain collectively in Ontario
  - o The parties agreed that the Board would base its decision regarding the managerial exclusions question on the testimony of two particular employees who held disputed positions
- Based on their testimony, the type of work performed by supervisors included the following:
  - o Some independence in the hiring of new employees, though recently human resources staff had been playing a larger role in this respect
  - o Made recommendations to human resources and performed reference checks
  - o Performance reviews completed by supervisors, which were used to fill positions internally
  - o Supervisors carried out the agency’s performance review program
  - o Supervisors carried out the agency’s attendance review program
  - o Supervisors would not impose formal discipline without consulting their directors, and often human resources as well
  - o Supervisors scheduled employees, assign them cases, and approved overtime and vacation leave requests

- Some supervisors participated in grievance procedure concerning unionized employees
- The Board emphasized that a determination as to the managerial status of an employee must **turn on the facts of the individual case**, although it did articulate some **factors** to be taken into consideration, including:
  - The nature of the industry;
  - The nature of the particular business;
  - The individual employer's organizational scheme;
  - The size of the employer's operation;
  - The nature of the managerial or administrative structure adopted in the workplace (i.e. consensus vs. hierarchical decision-making)
  - The ratio of managers to employees
- The Board also emphasized that mere "paper powers" – such as a job description or a "managerial" job title – are not determinative; what matters is the employee's actual day-to-day responsibilities
  - The Board will accordingly look for **affirmative evidence** that the employees sought to be excluded in fact exercise managerial functions
  - **Onus** on the party seeking to exclude the employee to prove its case
- The Board found that the supervisors in this case did in fact perform managerial functions, based on the following factors:
  - Supervisors played an important role in the **hiring of casual and contract staff** and the **promotion of staff to permanent positions**
    - Had a meaningful input into the selection of staff based on the particular needs of the organization, and not just general suitability
    - The Board did not discount hiring and promotion decisions just because they were reached by consensus; no requirement to be completely independent from senior management
    - Would not be the case if the supervisors' decisions were regularly overruled by human resources, directors or executive directors



- Supervisors had essentially **complete control over the formal performance review program**; had ability to deliver reviews to employees before they were signed by directors
- Supervisors played a significant role in **monitoring employee performance** and imposing discipline
  - Not necessary that supervisors have **decisive managerial authority** in order to be excluded
- Supervisors were engaged in **full-time supervisory work** and did virtually **no bargaining unit work**
  - Distinguished from cases with opposite result in which supervisors did bargaining unit work
- KEY: The Board attempts to avoid making a determination which would result in an unusual organizational subdivision
  - Supervisors must be undivided in their loyalties
  - The Board will not create a situation in which an employee's capacity as a bargaining unit member conflicts with his/her capacity as a representative of the employer

**CONTRAST WITH:**

- *Int'l Association of Machinists and Aerospace Workers v. Univar Canada Ltd., 2005 CanLII 30152)*
- Consider a case in which Board found the supervisors in question did not perform managerial functions:
  - Did not respond to formal grievances or participate in grievance meetings;
  - Did not effectively determine the fate of probationary employees
  - Did not discipline employees
  - Did not have access to employees' personnel files
  - Had no authority to approve a full day's absence
  - Did not independently determine whether employees should be paid for hours not listed on their time cards; and

- Did not receive training in human resources matters or strategize about matters such as collective agreement proposals, strike strategies and downsizing initiatives

## Certification Process

### - Evidence of Membership

- When a Union applies for certification, it must supply the Labour Board with a list of names of union members in the proposed bargaining unit and evidence of membership
- Evidence must be written and signed by the individual union member
- Once application received by the Labour Board, the employer may propose an alternative bargaining unit
- If the Labour Board determines that 40% or more of the individuals in the proposed bargaining unit appear to be members of the union at the date of filing the application, it must direct that a representation vote be taken
- During this time, the employer must “freeze” all working conditions; it would be considered an “unfair labour practice” to change a key element of the employment relationship during this time
  - KEY PROBLEM FOR LABOUR RELATIONS: nature of proposed bargaining unit
    - In COTAPSA’s case, there will be a significant legal battle over the makeup of the bargaining unit
    - The City will likely propose a bargaining unit significantly different from that proposed by the union
    - This process will take a substantial period of time, as the Labour Board looks at significant evidence for each side
    - Could take years to resolve – 1600 supervisors, all of whom have a view to present on the matter
      - Most of case law in these types of cases involved 500 or less members – way less complex, and still took years
    - This process invariably causes a real fracturing among supervisors
      - Some will be included in the bargaining unit and some will not, even if their jobs are fairly similar

- Causes tremendous discontent among members generally – you saw how some members were happy with the CUPE strike this summer, while others were very displeased

#### - **Results of Representation Vote**

- The Board will then direct that a vote be held within 5 days after the application is filed
- If 50% or less of the ballots are cast in favour of the union, the Board will not certify the union, and the Board is barred from considering another application for certification for one year
- Where more than 50% of the ballots in the representation vote are cast in favour of the union, the Board must certify the union as the exclusive bargaining agent for these employees
- Where the employer has committed an unfair labour practice, and as a result the true wishes of the employees in the bargaining unit were not likely reflected in the representation vote, the Board may order another vote, along with a variety of conditions
- In some circumstances, the Board even has discretion to certify the union *without* another vote, where no other remedy would be sufficient to counter the effects of the employer's contravention

#### - **Collective Bargaining**

- Following certification, the trade union will give the employer “notice to bargain”
- The parties are expected to meet shortly thereafter with the goal of reaching a collective agreement
- During this process, both parties are required to negotiate **in good faith** and make a reasonable effort to effect a collective agreement
- A conciliation officer or mediator can be called in by either party to help the parties negotiate effectively, following which the Minister of Labour may appoint a conciliation board made up of a chair, an employer nominee and a union nominee to attempt to reach a collective agreement
- If no settlement is reached at this stage, the parties may agree to refer all outstanding issues to final, binding arbitration

- During this time, the employer is prohibited from altering the working conditions of the employees
- If the parties reach an impasse in negotiations, the employer has the right to lock-out the workers, and the union has a right to strike
  - Because unionism is a collective process, the end result will naturally be a compromise
    - There will only be one collective agreement for all supervisors included in the bargaining unit, which applies to every member whether they like it or not
    - Will leave many members – even those in favour of the union – unhappy with the changes to their terms and conditions of employment