The Labour Relations Board
Saskatchewan

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 1-184, Applicant v. CABTEC MANUFACTURING INC., 101103492 SASKATCHEWAN LTD., O/A PRECISION WOOD PRODUCTS, Respondents

LRB File No. 153-07; May 30, 2008
Chairperson, Kenneth G, Love Q.C.; Members: Marshall Hamilton and John McCormick

For the Applicant: Peter J. Barnacle
For the Respondent: Scott Newell

Employer - Common employer - Board identifies and applies tests and guidelines for determining whether two respondents are common employers who should be treated as one employer pursuant to s. 37.3 of *The Trade Union Act* - Board finds that two respondents are carrying on associated or related businesses, but declines to declare respondents to be one employer within the meaning of s. 37.3 of *The Trade Union Act*.

***The Trade Union Act*, ss. 37 and 37.3.**

REASONS FOR DECISION

Background:

[1] The Industrial Wood and Allied Workers of Canada Local 1-184 was certified on August 6, 2002 as the bargaining agent for:

> *…all production employees of Cabtec Manufacturing Inc. in the City of Regina and within a 25 kilometer radius of Regina, except the President, Treasurer and Production Manager, and except those employees who are employed as office staff, computer systems staff, janitorial staff, design staff or installers…*

[2] The Industrial Wood and Allied Workers of Canada Local 1-184 later amalgamated with the United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union as Local 1-184 (the "Union"). Pursuant to s. 39 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), the Union became the certified bargaining agent for employees at Cabtec Manufacturing Inc. ("Cabtec").

[3] Cabtec is in the business of manufacturing custom kitchen cabinets and other custom wood pieces. Its business is conducted from a facility located at 1333 Park Street,

Regina, Saskatchewan. The building from which the manufacturing business is carried on is owned by Cabtec.

[4] The shareholders of Cabtec are Ken Kowalchuk and his brother, Kim Kowalchuk. In addition to being a shareholder, Ken Kowalchuk is the president of Cabtec and one of the directors. Kim Kowalchuk is, in addition to being a shareholder, the treasurer of Cabtec and the only other director. There are 100 common shares of Cabtec issued, with 50 of those held by Ken Kowalchuk and 50 held by Kim Kowalchuk.

[5] While there are a number of processes in the manufacturing of the cabinets and other wood products by Cabtec, the evidence of the witnesses focused on two aspects of the process. One was the sanding and the other the finishing of the products which consists of the application of spray coatings including stain, white or clear finishes.

[6] The evidence from both parties established that there were chronic shortages of workers who had the necessary skills to apply finishes to the wood products. In the Cabtec plant, finishes were applied by workers who sprayed those finishes onto the wood products by hand. Paint finishers (as those employees were classified in the collective agreement between the parties) usually had to be trained on the job. They usually began as sanders, within the finishing department, and graduated up to become sprayers. Sanding involved the preparation of the wood surfaces to accept the coatings to be applied. Spraying involved the application of the coatings manually to the wood surface using spray guns.

[7] The evidence established that the skill involved in the application of the coatings was not one that could be achieved by everyone. Two individuals who gave evidence for the Union, Corryna Masson and Robert Barkhouse had achieved a level of expertise in respect of application of finishes. Ms. Masson had left the employment of Cabtec prior to the filing of this application, leaving Mr. Barkhouse as the only full time sprayer at Cabtec.

[8] The evidence also established that Cabtec regularly and consistently was trying to hire more employees and, in particular, more persons who had experience as sprayers. Cabtec had little success in attracting qualified sprayers and, as noted above, tried to start people as sanders and train them to be finishers, with little success. Employment records provided by the Union and Cabtec establish considerable turnover in employees and an inability to attract and

retain a stable workforce.

[9] Cabtec had, at one time, a night shift which included finishers and employees who were able to do “simple” spraying. Those employees quit and could not be replaced with the result that, eventually, all of the spraying was left to Ms. Masson and Mr. Barkhouse to complete. When Ms. Masson quit, the whole of the workload fell to Mr. Barkhouse.

[10] In his evidence Ken Kowalchuk stated that he would like to hire at least another two full time sprayers to assist Mr. Barkhouse. It was also clear from both the testimony of Ken Kowalchuk and Mr. Barkhouse that there was no shortage of finishing work to be done at Cabtec. At times, Cabtec hired contract sprayers to assist with production.

[11] With this background of worker shortage and resulting diminished productivity at Cabtec, the Kowalchuks began to look at alternatives to assist with the product finishing at Cabtec. Cabtec regularly contracted finishing work out to other plants in Regina and even as remote as Edmonton.

[12] The Kowalchuks also began to look at the possibility of purchasing automated spray equipment. While attending trade shows, the Kowalchuks researched the possibility of purchasing automated spray equipment which would lessen the need for skilled personnel and automate the finishing process and provide greater throughput.

[13] Initially, the cost of automated equipment was beyond the Kowalchuks’ reach. However, as equipment manufacturers began to recognize a growing demand for automation by small and medium sized manufacturers, products became available which were affordable for the Kowalchuks. They began to pursue the possibility of having automated equipment with more intensity in 2006 and 2007.

[14] At first, the Kowalchuks proposed to purchase the equipment exclusively for Cabtec’s use. However, their business plan failed to demonstrate that Cabtec would have sufficient work to justify the capital cost of the equipment. According to Ken Kowalchuk, the equipment had a capacity which was twelve times the volume produced by Cabtec. As a result, the Kowalchuks were unable to obtain financing to purchase the equipment for Cabtec’s use alone.

[15] The Kowalchuks then moved to a different business model. They would establish a stand alone finishing operation which would be able to provide service to Cabtec but which would also provide service to other manufacturers, including some of Cabtec's competitors in the custom kitchen cabinet manufacturing business. That business model provided increased volumes of work over that which Cabtec alone could generate and which provided sufficient justification for the capital expenditures on automated equipment. The Kowalchuks were then able to obtain financing for the purchase of the automated equipment.

[16] 101103492 Saskatchewan Ltd. ("101103492") was incorporated on June 21, 2007. Ken and Kim Kowalchuk were the sole shareholders of 101103492 and they were the sole directors. Ken Kowalchuk became the president of 101103492 and Kim Kowalchuk became the vice president. 101103492 also purchased land adjacent to the land on which the Cabtec manufacturing facility was located.

[17] The automated spraying equipment was ordered and was installed in a vacant bay in the building situated on the lands owned by 101103492 at 1317 Park Street in Regina. After site preparation work and installation, power to the equipment was turned on in October of 2007.

[18] On October 2, 2007, 101103492 registered the business name Precision Wood Products ("Precision") and listed the nature of the business to be conducted by Precision as "finishing wood products."

[19] Employees of Cabtec and the Union became aware of the installation of the equipment at 1317 Park Street. Evidence from Ms. Masson and Mr. Barkhouse was that they had understood that this equipment was to have been installed at Cabtec. However, when they saw it being installed just a few doors away from the Cabtec premises, they inquired of the Union. The Union then wrote to Cabtec on September 7, 2007 and asked Cabtec to "clarify your intention with regard to the process of finishing the products and any potential effects there may be to your current manufacturing facility." No response was received by the Union to this letter.

[20] Having had no response to its letter, the Union sought legal counsel who conducted various searches at the Corporations Branch and Land Titles. Information from those searches revealed the facts that Cabtec and 101103492 were both owned by the Kowalchuks,

that Precision had been registered as a business name by 101103492 and that the facilities at both the Cabtec manufacturing facility and the facility where the new equipment was being installed were owned by the respective companies. The Union then instructed its counsel to write to Cabtec to:

> *demand that Cabtec acknowledge that Precision Wood Products which was owned by 101103492 Saskatchewan Ltd. is a common employer in its relationship with Cabtec pursuant to The Trade Union Act, and further that the bargaining rights of Local 1-184 and the existing collective agreement are accordingly binding on the Precision Wood Products operations and employees.*

[21] On November 30, 2007, counsel for Cabtec responded to counsel for the Union. In that letter, counsel advised that:

> *Precision Wood Products is a separate business from Cabtec Manufacturing Inc. ("Cabtec"). It was set up to provide paint finishing work for various clients, including Cabtec. The pain [sic] finishing work which is to be performed on behalf of Cabtec was previously contracted out. As such there has been no impact on bargaining unit work. Furthermore, none of Precision Wood Products' employees have any connection to Cabtec or the bargaining unit. If the Steelworkers wish to have the Cabtec collective agreement apply at Precision Wood Products they will need to seek relief from the Saskatchewan Labour Relations Board.*

[22] The Union then brought this application.

[23] The Union's application was for the following:

> (a) *A Declaration that 101103492 Saskatchewan Ltd. and Precision Wood Products, a sole proprietorship of 101103492 Saskatchewan Ltd. are associated or related businesses or undertakings carried on under common control or direction of Cabtec Manufacturing Inc. pursuant to section 37.3 of The Trade Union Act*;
>
> (b) *An Order that the Collective Agreement between Cabtec Manufacturing Inc. and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184, applies to 101103492 Saskatchewan Ltd and Precision Wood Products and their business operations within the scope of the bargaining unit set out in the Board's Order of August 2, 2007 and Article 3 of the Collective Agreement;*

(c) *An order that Cabtec Manufacturing Inc., 101103492 Saskatchewan Ltd and Precision Wood Products comply with all terms of the Collective Agreement, including, but not limited to, the posting of all positions at Precision Wood Products as job vacancies; and*

(d) *An Order that the United Steelworkers, Local 1-184 and its membership employed at Cabtec during the material time be made whole, including:*

i. *Payment by Cabtec manufacturing Inc. of compensation with interest for any work lost by members of the bargaining unit due to the Precision Wood Products operations, or continues to be lost pending the implementation of the Board's Orders in this matter;*
ii. *Payment by Cabtec Manufacturing Inc. of compensation to the union with interest in the amount of all union dues it would have received with respect to Precision Wood Products operations during the material period;*
iii. *Any such other Orders as may be sought by the union at the hearing in this matter as required to make the union and its membership whole.*

Statutory Provisions:

[24] The relevant statutory provisions of the *Act* in issue include:

37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.

(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:

(a) determining whether the disposition or proposed disposition

relates to a business or part of it;

(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:

- *(i) an employee unit;*
- *(ii) a craft unit;*
- *(iii) a plant unit;*
- *(iv) a subdivision of an employee unit, craft unit or plant unit; or*
- *(v) some other unit;*

(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);

(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);

(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;

(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).

37.3(1) If, in the board's opinion, associated or related businesses, undertakings or other activities are carried on by or through more than one corporation, partnership, individual or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Act and grant any relief, by way of declaration or otherwise, that the board considers appropriate.

(2) Subsection (1) applies only to businesses, undertakings or other activities that become associated or related after the coming into force of this section.

Analysis & Decision:

Common Control and Direction

[25] The Board discussed the requirements for a finding of common control and direction in *Amalgamated Transit Union, Local 588 v. City of Regina and Wayne Bus Ltd.,* [1999] Sask. L.R.B.R. 238, LRB File No. 363-97. In that decision, the Board adopted the following as the criteria needed to establish common control and direction for the purposes of s. 37.3 at 281, as follows:

> *Section 37.3 of the Act describes three requirements for its application:*
>
> *1. There must be more than one corporation, partnership, individual or association involved;*
>
> *2. These entities must be engaged in associated or related businesses, undertakings or other activities; and*
>
> *3. These entities must be under common control or direction.*

[26] It is unnecessary for the Board to make a finding with respect to these criteria. In argument to the Board, counsel for Cabtec acknowledged that these requirements were satisfied in the present case. While acknowledging that, he neverthless argued that s. 37.3 provided the Board with discretion with respect to making an order under s. 37.3 and that discretion should be exercised in favour of Cabtec and 101103492 in this instance.

The Board's Discretion under s. 37.3

[27] As noted in *City of Regina, supra:*

> *[124] One of the primary purposes of common employer legislation is to prevent the erosion or undermining of existing bargaining rights, as may occur, for example, when work is diverted from a unionized employer to an associated non-union entity. Historically, the most common example of this erosion has been the creation by unionized contractors of non-unionized "spin-offs" in the construction industry. In Saskatchewan The Construction Industry Labour Relations Act, 1992, c. C-29.11, contains specific provisions applicable to the construction industry; s. 37.3 of the Act applies to all other sectors.*

[28] In *City of Regina, supra*, the Board also quoted from in *Lumber and Sawmill Workers Union, Local 2995 v. J.H. Normick Inc.,* [1979] OLRB Rep. Dec. 1176, where the Ontario Labour Relations Board discussed the purpose of s. 1(4) of the *Ontario Labour Relations Act*,

which is analogous to s. 37.3 of the *Act*, at 1184-1185:

> *Section 1(4) recognizes that the business activities which give rise to the employer-employee relationships regulated by the Act, can be carried on through a variety of legal vehicles or arrangements; and it may not make "industrial relations sense" to allow the form of such arrangements to dictate, and possibly fragment, the collective bargaining structure. In order to have orderly and stable collective bargaining, the bargaining structure must have some permanence and accord with underlying economic and industrial relations realities. Where two employers are nominally independent but are functionally and economically integrated, the essential community of interest between them and the employees employed by one or both of them may make it appropriate to treat them as one employer for some or all collective bargaining purposes. This is not to say, however, that common economic control of related business activities will automatically cause the Board to issue a section 1(4) declaration. The Board, having satisfied itself that the businesses or activities before it are under common control or direction, is given a discretion as to whether or not to issue a section 1(4) declaration. If the scheme of the Act would be better served or the collective bargaining structures placed on a sounder footing by refusing to make a section 1(4) declaration the Board will exercise its discretion accordingly. (See Zaph Construction Ltd. [1976] OLRB Rep. Nov. 741 and Ellwall and Sons Construction Limited [1978] OLRB Rep. June 535.) In view of the broad language of the section which extends to cover such a wide range of business relationships, the labour relations considerations which govern the exercise of the Board's discretion are paramount in determining whether the Board should declare two or more businesses or activities to be one employer for purposes of The Labour Relations Act.*

and *Retail, Wholesale and Department Store Union, Local 414 v. Penmarkay Foods Limited, et al*, [1984] OLRB Rep. Sept. 1214, where the Ontario Board described three of the purposes of the common employer provision as follows, at 1231:

> *1. To prevent the erosion of established bargaining rights, for example, by the redirection of work by a unionized employer to another enterprise.*
>
> *2. To remove obstacles to viable structures for collective bargaining, for example, the inclusion of the employees of two entities in a single unit.*
>
> *3. To ensure that the union representing employees is able to deal directly with the entity possessing real economic control over them rather than with an entity that is their employer in name only.*

The Board in *City of Regina, supra,* agreed with this statement of policy objectives - which the

Board suggested "is not necessarily exhaustive - as being among those intended by the legislature in enacting s. 37.3 of the *Act*."

[29] The Board also went on to state at 274 that:

> *[126] The jurisprudence regarding common employer provisions illustrates, that unions should not be allowed to use such provisions to extend or enhance, as opposed to preserve, bargaining rights. However, we do not view the Union's application in this case as one seeking to enhance its bargaining rights. It simply seeks to establish that the City and Wayne Bus satisfy the requirements of s. 37.3 of the Act for the reasons referred to above, that there are good labour relations reasons for making an order so that the collective bargaining structure will accord with the economic and industrial relations realities of the situation.*
>
> *[127] Accordingly, while it is clear that s. 37.3 of the Act is intended to ensure that legal form will not be allowed to obscure economic and collective bargaining substance, it creates collective bargaining structures which significantly modify common law notions of privity of contract and corporate veil to achieve this purpose. Section 37.3 of the Act is very broadly worded and may arguably refer to a nearly unlimited range of corporate structures and relationships. However, in the opinion of the Ontario Board, the grant by the legislature of the broad and over-riding discretion to grant or withhold relief indicates that the legislature intended the Ontario Board to consider the labour relations policy imperatives in each situation. In Energy and Chemical Workers Union, Local 300 v. Ethyl Canada, Inc., [1982] OLRB July 998, the Ontario Board stated, at 1007:*
>
> > *However, while the language of section 1(4) is very broad, the section is not intended to apply in every case which in a general or linguistic sense meets its statutory criteria. The Board has a discretion concerning the application of section 1(4) and, in the past, it has exercised that discretion carefully, in light of the circumstances of each case, and labour relations policy consideration.*

[30] However, as stated at 291 of *City of Regina, supra:*

> *[E]ven if the other prerequisites of the test under s. 37.3 of the Act are satisfied, the Board will not exercise its discretion to declare multiple entities to be treated as a single employer unless a valid and sufficient labour*

relations purpose will be served.

[31] The Board discussed, at length, the principles derived from cases from other jurisdictions, having provisions similar to s. 37.3, in which the Board's discretion not to make an order under s. 37.3 would be exercised. In each case, the jurisprudence shows that an order under s. 37.3 is remedial in nature, that is, it is to arrest or discourage an employer seeking to circumvent the collective bargaining rights of a union by the establishment of another similar business enterprise doing work similar to the work of the employees within the certified bargaining unit. Section 37.3 seeks to address this mischief or interference with the collective bargaining rights obtained by the union through certification.

[32] However, the Board and boards in other jurisdictions recognize that an order under s. 37.3 is inappropriate in some cases. In *Canadian Union of Postal Workers v. Muir's Cartage Ltd. and Canada Post Corporation* (1992), 17 CLRBR (2d) 182, a decision of the Canada Labour Relations Board, the Canada Board quotes (at 209) with approval its earlier decision in *The Canadian Press et al.* [1976] 1 Can LRBR 354, which it says has "shaped all of its subsequent decisions" on the issue:

> *It should be re-emphasized that the Board has discretionary powers in declaring two or more employers to be a single employer carrying out, for purposes of the Code, a single federal work, undertaking or business. Even if all criteria used by the Board in its evaluation are met, the Board is under no obligation to make such a declaration. The Board's discretion is exercised on the basis of ensuring the rights of employees to be represented by the trade union of their choice in a bargaining structure conducive to "effective industrial relations" and "sound labour-management relations." There may indeed be circumstances where a declaration made possible under s. 133 would be inappropriate and not only not supportive of the objectives of the Canada Labour Code, but contrary to them. If, for example, there were existing bargaining rights which might be infringed upon by the Board exercising its powers or if the impact of such declaration on the parties involved, or indeed other parties, would be demonstrably deleterious, the Board would certainly hesitate to act, no matter what the weight of the evidence concerning commonality of undertaking.*

[33] The decision of the Canada Board in *Muir's Cartage, supra*, also noted another of its decisions in *Murray Hill Limousine Service Ltd. et al.* [1988] 74 di 127 (CLRB no. 699) where it said:

> *…the Board noted that the motive behind an employer's decision to resort to the use of another employer is decisive in deciding whether a single*

> *employer declaration is warranted. Overall, section 35 is there to prevent the erosion of bargaining rights.*

[34] In *Telephone Worker's Union v. British Columbia Telephone Company and Canadian Telephones and Supplies Ltd. and Society of Telephone Engineers and Managers* [1978] 1 Can LRBR 236, 78 CLLC 16,122, the Canada Board found as follows, at 249:

> *Section 133 is not intended to interfere with entrepreneurial [sic] or corporate behaviour. The creation of second, spin-off or double breasted companies is not prohibited. But if they serve to defeat the freedoms or rights of employees and trade unions, section 133 is a remedial avenue. Its very existence should diminish the expectations of employers that unilateral manipulation will defeat the intent of the Code.*

[35] The Canada Industrial Relations Board also dealt with the exercise of discretion under the provisions of the Canada Labour Code dealing with common employer in *Canadian Union of Postal Workers v. S.V.N. Enterprises Ltd., (c.o.b. S & K Trucking)*, [2003] CIRB No. 219, C.I.R.B.D. No 9. In discussing the discretion to grant an order under s. 35 of the Canada Labour Code, the Canada Board said at paragraph 54 that:

> *[T]he Board will only grant a declaration under section 35 if the declaration will serve a labour relations [page 8] purpose. The Board's decision in Air Canada et al (1979), 79 di 98, 7 CLRBR (2d) 252 and 90 CLLC 16,008 (CLRB no. 771) provides useful guidance when considering whether a labour relations purpose would be served by a single employer declaration:*
>
> > *The purpose of section 35 has always guided the exercise of the Board's discretion in these matters. That purpose is aimed at preventing the undermining or evading of bargaining rights through corporate or business arrangements (See British Columbia Telephone Company and Canadian Telephones and Supplies Ltd., supra, and Beam Transport (1980) and Brentwood Transport Ltd. (1988), 74 di 46 (CLRB no 689)).*
> >
> > *Section 35 is not aimed at enhancing existing bargaining rights (British Columbia Telephone Company and Canadian telephones and Supplies Ltd., supra). Its purpose is remedial in nature. It is* designed to ensure that employers only distinct in appearance do not succeed in circumventing their obligations under the Code by resorting to corporate restructuring or other types of business arrangements:

> *"…It was, after all, to prevent a management from escaping collective bargaining obligations owed under one corporate entity by transferring work to another controlled entity that Parliament put section 133 [now section 35] into the statute…*
>
> *(Bradley Services Ltd. et al. (1986) 65 di 111; 13 CLRBR (NS) 256; and 86 CLLC 16,036 (CLRB no. 570), pages 126; 272; and 14,432)"*
>
> *Section 35 is not aimed at exempting a bargaining agent from having to organize an otherwise genuinely distinct group of employees. In some cases, the issuance of a declaration by the Board addresses the issue of discretion, the question ceases to be whether common control exists; it becomes whether common control contributes to the erosion of bargaining rights.*

[36] The question that the Board must therefore determine is whether or not the opening of Precision Wood Products was a legitimate entrepreneurial activity on the part of the Kowalchuks or whether it represented a colourable attempt to circumvent the bargaining rights of the Union.

[37] To answer that question, it is necessary to refer further to the testimony of the witnesses who testified at the hearing.

[38] Mr. Barkhouse, a current employee of Cabtec and Ms. Masson, a former employee of Cabtec, testified for the Union. Craig Bartlett testified for the respondents. The evidence of these witnesses was consistent and was that, while some of the spraying which had previously been done at Cabtec (principally the work which had been done by the night shift) was being done at Precision Wood Products, there was no shortage of work for the sprayers at Cabtec. While Ms. Masson was employed at Cabtec she lost no hours nor did Mr. Barkhouse.

[39] Mr. Bartlett, who had only recently taken over responsibility as the manager in charge of the finishing areas at Cabtec (in addition to other responsibilities) and Ken Kowalchuk both testified as to the difficulty Cabtec was having in hiring additional finishers. They were consistent in their evidence that Cabtec was regularly advertising for new employees and that new

employees were hired regularly with the intention to train them to become finishers at Cabtec. Ken Kowalchuk provided, in Exhibits R-7 and R-8, evidence of the employees hired by Cabtec who had quit or were dismissed and who Cabtec had tried to train to become finishers since August 2007.

[40] Mr. Bartlett and Ken Kowalchuk also provided evidence that they had hired sub contractors to come into the Cabtec plant to spray items due to staff shortages at Cabtec.

[41] Mr. Barkhouse, who was the only remaining person at Cabtec with the training and ability to spray items, testified that he had ample work. It was noted by Mr. Bartlett that a customer had specified that the work on the customer's cabinets was to be done specifically by Mr. Barkhouse who had done work for that customer previously and the customer been pleased with Mr. Barkhouse's work.

[42] Mr. Barkhouse seemed to feel that the work he was doing was now mainly repair and warranty work or work that was to correct mistakes made at Precision, while the evidence of Mr. Bartlett and Ken Kowalchuk varied from that to some degree. While recognizing that Mr. Barkhouse was indeed doing that kind of work, he was also, as noted above, responsible for custom work that required his particular skills and ability.

[43] What was clear was that there was no shortage of work for Mr. Barkhouse, the sole finisher at Cabtec, and that both Mr. Bartlett and Ken Kowalchuk were concerned about the ability of Mr. Barkhouse to do all of the work that was available for him to do. Cabtec was genuine in its desire to hire additional qualified finishers. The evidence of Ken Kowalchuk was that Cabtec was seriously behind in the work that had been taken on and that the hiring of additional finishers would allow Cabtec to process that work in a more timely fashion.

[44] There was no evidence to support the Union's contention that work was being shifted from Cabtec to Precision. In the past, Cabtec had been forced to contract out some of its finishing work due to a lack of finishing capacity. The level of work at Cabtec remained constant or even increased and the shortage of qualified finishers was impacting markedly on Cabtec's ability to service its customers.

[45] There was, in our opinion, a *bona fide* purpose in establishing Precision as a separate entity from Cabtec and it was not established merely for the purpose of escaping collective bargaining obligations owed under one corporate entity by transferring work to another controlled entity.

[46] However, it should be noted that the establishment of Precision is at an embryonic stage of its development. Ken Kowalchuk testified that the automated spraying equipment was not as yet fully functional and that the supplier was working to correct problems with the equipment (to the extent of replacing one whole section of the automated equipment). As a result, it may be too early to determine if some erosion of the work performed at Cabtec may result when the automated equipment becomes fully operational. At this stage the Board is prepared to exercise its discretion and not make an order under s. 37.3 at this time, with the understanding that that may change should the nature of the work at Cabtec be impacted by the operations at Precision.

Conclusion:

[47] For the reasons outlined above, the Board declines to make an order under s. 37.3 declaring Cabtec Manufacturing Inc. and 101103492 Saskatchewan Ltd. to be common employers for the purposes of the *Act.*

[48] Therefore, the Board does not find a violation of s. 37 and the application is dismissed.

DATED at Regina, Saskatchewan this **30th** day of **May, 2008.**

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.,
Chairperson