

**The Labour Relations Board
Saskatchewan**

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. THE CANADIAN SALT COMPANY LIMITED, CARDINAL CONSTRUCTION CO. LTD. and PRODUCTION SERVICES (1990) LTD., Respondents

LRB File No. 047-10; November 10, 2010

Vice-Chairperson, Steven Schiefner; Members: Gloria Cymbalisty and Elma Shoulak

For the Applicant Union:

Mr. Drew S. Plaxton

For The Canadian Salt Company Limited:

Ms. Susan B. Barber, Q.C.

For Production Services (1990) Ltd.:

Mr. Brian J. Kenny, Q.C.

For Cardinal Construction Co. Ltd.:

Mr. Paul J. Harasen

Certification - Employer – Union files certification application for employees working at industrial plant. Union names three respondent employers - Board reviews status of respondent employers and concludes that two are employers of employees affected by certification application.

Certification - Employer - Common Employer – Board finds that two respondent employers are carrying on associated business or activity but concludes that Board is prevented from making common or related employer designation because association between respondent employers is “grandfathered” by temporal limits prescribed in *The Trade Union Act* for common or related employer designation.

Certification - Employer – Designation of Principal or Contractor – Board concludes that principal exercises fundamental control over labour relations in the workplace. Board satisfied that sound labour relations basis exists for designating principal to be employer of contractor’s employees.

Certification – Appropriate Bargaining Unit – Board concludes that two bargaining units exist in workplace. Board concludes that it has no authority to combine employees of two (2) employers into one bargaining unit absent common or related employer designation.

Certification – Practice and Procedure – Respondent employer argues that evidence of support filed with Union’s application failed to accurately describe identity of employer. Board concludes that support evidence was reasonably consistent with form of support evidence accepted by Board.

The Trade Union Act, ss. 2(g)(iii), 6 and 37.3.

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** On April 28, 2010, the United Food and Commercial Workers, Local 1400 (the “Union”) applied to the Saskatchewan Labour Relations Board (the “Board”) to be designated as the certified bargaining agent for a unit of employees working at the Windsor Salt plant operating near Belle Plaine, Saskatchewan. In its application, the Union named three (3) respondent employers; specifically, The Canadian Salt Company Limited (“Canadian Salt”), Production Services (1990) Ltd., and Cardinal Construction Co. Ltd. (“Cardinal Construction”). In its application, the Union sought certification of a unit of employees described as follows:

All employees of The Canadian Salt Company Limited and/or Cardinal Construction Co. Limited and/or Production Services (1990) Ltd., carrying on business as Windsor Salt, in Belle Plaine, Saskatchewan, except; the Facility Manager, Quality Control Manager, Works Accountant, Buyer Specialist, Production Supervisor, Northwestern Area Customer Care Manager, EHS Coordinator, Maintenance Supervisor, Lab Co-ordinator and other Laboratory Personnel.

[2] In the Union’s application, the identity of the employer was multifaceted and somewhat unfocused. Concurrent with its certification application, the Union sought an Order of the Board to have the three (3) named companies deemed to be related businesses under common direction and control and/or deeming one, some or all of the named corporations to be the “true” employer of the employees in the proposed bargaining. In the first instance, the Union alleged that Canadian Salt was the *de facto* employer of all employees in the proposed bargaining unit and alleged that neither Production Services (1990) Ltd. nor Cardinal Construction were employers within the meaning of *The Trade Union Act*, R.S.S. c.T-17 (the “Act”) of any of the affected employees. In the alternative, the Union alleged that Canadian Salt was the “true” employer of all employees working at the Windsor Salt plant, including any employees ostensibly employed by either Production Services (1990) Ltd. or Canadian Salt. To which end, the Union sought an Order pursuant to s. 2(g)(iii) of the *Act*. In the final alternative, the Union alleged that all of the respondent employers were collectively the employers of the employees for whom the Union sought certification on the basis that the respondent employers were related or common employers within the meaning of s. 37.3 of the *Act*. To which end, the Union alleged that all three (3) of the respondent employers should be treated by the Board as one (1) employer for purposes of the *Act*.

[3] In its reply, Canadian Salt acknowledged that it employed some of the employees in the proposed bargaining unit but denied that it was the employer, for purpose of the *Act* or otherwise, of any employees employed by either Cardinal Construction or Production Services (1990) Ltd. Canadian Salt denied that it was a related business or common employer with the other respondents within the meaning of s.37.3 and took the position that, even if it was, this was not an appropriate case for the Board to exercise its discretion pursuant to either s. 2(g)(iii) or s. 37.3 of the *Act*.

[4] In its Reply, Production Services (1990) Ltd. acknowledged that it employed some of the employees in the proposed bargaining unit but denied that it was the employer, for purpose of the *Act* or otherwise, of any employees employed by either Canadian Salt or Cardinal Construction; and denied that it was a related business or common employer with the other respondents within the meaning of s.37.3 of the *Act*.

[5] In its Reply, Cardinal Construction denied that it employed any employees within the proposed bargaining unit and denied that it was a related business or common employer with the other respondents.

[6] In addition, both Canadian Salt and Production Services (1990) Ltd. took the position that the Union's evidence of support for its certification application was defective.

[7] Evidence in the within application was heard by the Board in Regina, Saskatchewan, on August 3, 4 and 5, 2010. During the hearing, the following individuals testified under subpoena; Mr. Drew Waldo, the President of Cardinal Construction; Mr. Brian Bowes, the President and General Manager of Production Services (1990) Ltd.; Mr. Rodney Berkshire, Canadian Salt's Facility Manager of the Windsor Salt Plant near Belle Plaine, Saskatchewan; and Mr. Bill Hook, an employee working at the Windsor Salt plant. In addition, the Union called Mr. Christopher Dennis, Mr. Darren Piper, and Ms. Lily Olsen, all involved in the Union's organizing drive. Mr. Dennis and Ms. Olsen were both National Representatives and Mr. Piper was the Union's Coordinator of Organization.

Facts:

[8] The evidence relevant to these proceedings was not significantly in dispute and has been summarized below. However, we note that some of the evidence relevant to these proceedings involved events that occurred decades ago; events for which no witness had direct personal knowledge. As such, our findings of fact have been based on our appraisal of the totality of the evidence presented in these proceedings weighed on the crucible of common sense and probability. Where a witness has testified at variance with the findings of fact set forth herein, we have merely preferred other credible evidence.

[9] This application involves employees working at an industrial facility which is located near Belle Plaine, Saskatchewan, and which is commonly referred to as the “Windsor Salt” plant. The Windsor Salt plant¹ is owned and operated by Canadian Salt.

[10] Canadian Salt produces and sells various salt products, including consumer (food grade) salt, water softener salt and various other salt products used for agriculture and in industrial purposes. The raw material used by Canadian Salt at the Windsor Salt plant is obtained from an adjacent potash mine and arrives in the form of liquid slurry². The liquid slurry is piped directly to the plant from the adjacent facilities of the potash mine. Because the liquid slurry is the only source of raw material for the Windsor Salt plant (at Belle Plaine), operations at the plant are predicated on production activity at the adjacent potash mine producing the liquid slurry.

[11] In total, there are approximately forty (40) employees working at the Windsor Salt plant. These employees are involved in all aspects of operations at the plant, including refining, filtering and drying (through evaporation) the liquid slurry; to production, including pressing the processed salt into form; to testing and quality control; to warehousing and shipping of the finished product. Employees at the plant are also involved in administrative activities, such as marketing, accounting and payroll.

[12] While there was no dispute where the employees of the proposed bargaining unit worked (i.e.: as they all worked at the Windsor Salt plant), for whom they worked was in dispute, as was the proper application of the *Act* under the circumstances of this particular workplace. Three (3) separate, yet contractually-related, companies were named as respondent employers

¹ “Windsor Salt” is a brand name and Canadian Salt has other plants producing “Windsor Salt”. For purposes of this application, the reference to the “Windsor Salt plant” refers only to Canadian Salt’s plant located near Belle Plaine, Saskatchewan.

² Canadian Salt utilizes other methods of acquiring its raw material at other plants, including mining.

in the Union's application, namely Canadian Salt, Production Services (1990) Ltd., and Cardinal Construction. These three (3) companies have all been involved in the Windsor Salt plant for decades and each play a role in the employment of the employees in the proposed bargaining unit.

[13] Canadian Salt is an extra-provincially registered company operating in Saskatchewan, with its head office located in Pointe-Claire, Quebec. Canadian Salt is owned and controlled by Morton International Inc., with its head office located in the United States of America. Morton International Inc. is owned by international mining interests. Simply put, Canadian Salt is the Canadian subsidiary of a large international company involved in the mining and/or processing of salt products in Canada, with operations in various provinces.

[14] While none of the witnesses had direct knowledge of the history of Canadian Salt commencing operations in Saskatchewan, Mr. Berkshire testified as to his understanding that Canadian Salt commenced operations at Belle Plaine in the early 1960's, following the closure of a plant in Neepawa, Manitoba. Apparently, about the time the Neepawa plant was running out of salt, Canadian Salt became aware that the Saskatchewan Potash Corporation (as it was known then) had surplus salt associated with its potash mining operations. Canadian Salt built the Windsor Salt plant near Belle Plaine, Saskatchewan, and entered into an agreement with the potash mine to utilize and process their excess salt. It would appear that the commencement of operations at the Windsor Salt plant coincided with the closure of Canadian Salt's operations at Neepawa, Manitoba, as employees from the Neepawa plant were offered the opportunity to take up employment at Canadian Salt's then new plant at Belle Plaine, Saskatchewan. Canadian Salt has operated the Windsor Salt plant since construction and continued to operate the plant at the time of the Union's application.

[15] Production Services (1990) Ltd. is a Saskatchewan company and the corporate successor to Production Services Ltd. Production Services Ltd. was incorporated in 1964 by Mr. Earl Dokken and operated by Mr. Dokken from 1964 until 1990. In 1990, Mr. Bowes formed Production Services (1990) Ltd. and, through this new company, assumed control of the affairs and previous operations of Production Services Ltd. Simply put, Production Services (1990) Ltd. is a labour broker providing general labourers to work at the Windsor Salt plant, in much the same fashion as did its corporate predecessor, Production Services Ltd.

[16] Cardinal Construction is a well-known and long standing construction company located in Moose Jaw, Saskatchewan. Simply put, Cardinal Construction is a general contractor providing a broad range of construction services in Saskatchewan.

[17] While none of the witnesses had direct knowledge of the origins of Production Services Ltd.'s involvement at the Windsor Salt plant, Mr. Bowes and Mr. Waldo both testified as to their understanding that Cardinal Construction had been involved in providing construction services at the Windsor Salt plant either during or soon after initial construction of the plant. Through this connection, the then plant manager (at the Windsor Salt plant) approached Mr. Earl Dokken, then a principal and major shareholder of Cardinal Construction, about the potential of providing labourers to work at the Windsor Salt plant. Discussions between these individuals culminated with Mr. Dokken forming (incorporating) Production Services Ltd. in 1964 and with an arrangement whereby the newly formed company would supply general labourers to work at the Windsor Salt plant. These arrangements have continued for over forty (40) years, firstly with Production Services Ltd. under the direction and management of Mr. Dokken until 1990, and later with Production Services (1990) Ltd. under the direction and management of Mr. Bowes. At the time of the Union's application, Production Services (1990) Ltd. continued to supply labourers to Canadian Salt to work at the Windsor Salt plant.

[18] While Cardinal Construction had, from time to time, provided construction services to the Windsor Salt plant, such services were not the basis of it being named as a respondent employer in the Union's application. Rather, Cardinal Construction's involvement in these proceedings arose because of its close working relationship with Production Services (1990) Ltd. Cardinal Construction performs certain payroll services (i.e.: ranging from preparing paystubs and facilitating direct deposit for employees, to preparing payroll remittance and other statutory and required forms) for Production Services (1990) Ltd. In addition, Cardinal Construction provides clerical and office services for Production Services (1990) Ltd. The evidence indicated that these arrangements had been in place for decades and started when Mr. Dokken formed Production Services Ltd., at a time when he was also a principal in Cardinal Construction. These arrangements started with Production Services Ltd. and continued with Production Services (1990) Ltd. and were still in place at the time of the Union's application.

[19] Canadian Salt admitted to owning and operating the Windsor Salt plant and employing approximately twenty-four (24) employees at the plant, including sixteen (16)

employees included within the unit of employees the Union sought to represent. As indicated, Canadian Salt denied that it was the employer of the remaining employees working at the Windsor Salt plant; employees that the Union alleged to be in the unit of employees that it sought to represent. It was Canadian Salt's position that the remaining employees were employed by Production Services (1990) Ltd.

[20] Production Services (1990) Ltd. admitted to employing approximately eighteen (18) employees working at the Windsor Salt plant; all of which were included within the unit of employees the Union sought to represent.

[21] Cardinal Construction denied that it employed any of the employees working at the Windsor Salt plant.

[22] The evidence demonstrated that all employees working at the Windsor Salt plant worked side-by-side under the day-to-day direction and control of Canadian Salt's managers and officers. At one time, Production Services had certain management personnel at the plant but such had not been the case for many years and was not the case at the time of the Union's application for certification. Canadian Salt supervised and directed all work performed by all employees working at the Windsor Salt plant. In addition, Canadian Salt generally determined the conditions of employment for employees at the plant, together with the policies and procedures related to the operation of the plant. Canadian Salt unilaterally determined the rates of pay for all employees working at the plant, with all employees being paid based on the same pay schedule, but with the individual rates of pay varying depending on the hours worked and the type of equipment an employee may be assigned to operate.

[23] While all employees worked side-by-side and were indistinguishable in terms of where they worked (both groups of employees worked in all areas of the plant), the kind of work they did (both groups of employees were involved in all aspects of plant operations) and to whom they reported (all employees working at the plant ultimately reported to the local plant manager), there was evidence of two (2) groups of employees working at the Windsor Salt plant.

[24] Mr. Hook, a long term employee of the Windsor Salt plant, testified as to the nature of these two (2) groups. Mr. Hook said the first group was comprised of the "company men", being those employees who were directly employed by Canadian Salt. The second group

of employees received their paycheques from “Production Services” and these employees were not considered to be company men. Mr. Hook testified as to his understanding that Canadian Salt only hired a limited number of employees and that the remainder of the workforce at the Windsor Salt plant, including himself, was not hired by Canadian Salt. Mr. Hook referred to this latter group as “Cardinal” employees. The “Cardinal” employees worked side-by-side with “company” employees but had inferior benefits and were susceptible to layoff. Mr. Hook testified as to his understanding of the distinction between the two (2) groups of employees and his desired goal to become a “company” employee.

[25] Mr. Dennis, who was involved in the Union’s organizing drive, testified that he first became aware of confusion as to the identity of the employer during the organizing drive. Mr. Dennis testified that some of the employees that he approached didn’t seem to him to know who they worked for. For example, some of the employees working at the Canadian Salt plant were hired at Cardinal Construction’s office in Moose Jaw, dealt with Cardinal Construction for their paycheques, but were paid by Production Services (1990) Ltd.

[26] During the course of the organizing drive, it became apparent to Mr. Dennis that there were two (2) classes of employees; those who were hired by Canadian Salt, employees who received full benefits; and those who were not company employees and who did not receive the same benefits. Mr. Dennis saw this distinction between these two (2) groups of employees as “segregation” by Canadian Salt and inappropriate. In addition, those employees who were not hired directly by Canadian Salt were required to “*punch*” a time clock, whereas “company” employees did not have to do so. Mr. Dennis testified that “*punching a clock*” was an irritant for those employees who were required to do so.

[27] Through its contract with Canadian Salt, Production Services (1990) Ltd. supplied labourers to Canadian Salt to work at the Windsor Salt plant. The number of employees required for the plant was determined by Canadian Salt and depended on a variety of factors, primarily related to the pace of production at the plant. To satisfy his company’s contract with Canadian Salt, Mr. Bowes utilized the same process of recruitment that had been established by his predecessor, Mr. Dokken. Although Mr. Bowes testified that his company generally did not advertise for employees, it appeared to be general knowledge in Moose Jaw that Production Services (1990) Ltd. and/or Cardinal Construction periodically hired employees to work at the Windsor Salt plant, as individuals would periodically drop resumes off at Cardinal Construction’s

office in Moose Jaw. In addition, the Human Resources office at the plant had application forms for employment with Production Services (1990) Ltd. and provided a contact number for Production Services (1990) Ltd. (albeit a number that was answered by Cardinal Construction).

[28] In hiring employees, Mr. Bowes testified that he would interview prospective employees and would decide whether or not he believed any particular individual would be appropriate for working at the plant. If satisfied, Mr. Bowes would complete a security clearance (i.e.: Criminal record checks) and would have the prospective employee's doctor complete a medical clearance form. Upon satisfaction, Mr. Bowes would dispatch the new employee to the plant. Mr. Bowes acknowledged that Canadian Salt had the right to deny entry (and thus employment) to any employee even if determined to be appropriate by Mr. Bowes. Mr. Bowes testified that he would not hire anyone that was not acceptable to Canadian Salt. To which end, Mr. Bowes acknowledged that Canadian Salt had final approval of the employees that he hired.

[29] Once an employee was dispatched to the Windsor Salt plant, Mr. Bowes acknowledged that all day to day work direction was provided by Canadian Salt. In addition, Canadian Salt was responsible for providing all work assignments to his employees and for monitoring all aspects of their work performance, including hours of work, leave time, rates of pay and adjustments thereto commensurate with promotion and advancement. Similarly, Mr. Bowes testified that, if Canadian Salt became dissatisfied with any employee of Production Services (1990) Ltd., Mr. Bowes would terminate that employee. Mr. Bowes testified that such had been the case in the past when Canadian Salt had asked one of his employees to leave its premises and that he had been called to the plant to terminate that employee. Mr. Bowes admitted that, in one case, he didn't even know the reason why an employee had been dismissed; nonetheless, the employee was dismissed. Mr. Bowes testified that Production Services (1990) Ltd. was responsible for any severance or notice required to be given to employees.

[30] Production Services (1990) Ltd. maintained a separate payroll for its employees, albeit prepared in reliance upon the records completed by Canadian Salt. It was responsible for source deductions, including Employment Insurance and Income Tax remittances and any benefits provided to its employees. In this respect, Production Services (1990) Ltd. paid its employees in accordance with the pay rates and schedules determined by Canadian Salt. Furthermore, Canadian Salt unilaterally had the right to adjust wage rates for all employees

working at the plant and did so from time to time. In addition, Canadian Salt was responsible for determining individual work assignments for all employees, including employees of Production Services (1990) Ltd., which assignments affected rates of pay through promotions, advancements and temporary set-ups.

[31] For each pay period, staff in Canadian Salt's payroll department would transmit its records of hours worked, rates of pay and other related information to staff at Cardinal Construction. From these records, Cardinal Construction prepared Production Services (1990) Ltd.'s payroll and communicated directly with individual employees and/or staff at Canadian Salt in the event of discrepancies and/or corrections, should the need arise. For its services, Cardinal Construction was paid a flat monthly fee by Production Services (1990) Ltd.

[32] Mr. Bowes testified that Production Services (1990) Ltd. had only one (1) client; that being Canadian Salt. Mr. Bowes confirmed that his company did not supply labourers to any other worksite. Simply put, the *raison d'etre* of Production Services (1990) Ltd. (like its predecessor, Production Services Ltd.) was to supply labourers to work at the Windsor Salt plant. Mr. Bowes testified that his company's contractual arrangements with Canadian Salt predated his direct personal knowledge but that as far as he understood the arrangements had remained essentially unchanged for decades. Production Services (1990) Ltd. recruited, hired and retained a specified number of general labourers, with skills and experience appropriate for work at the Windsor Salt plant. While these employees were the general responsibility of Production Services (1990) Ltd., whether or not they worked, what work they performed, and how much they were paid was determined by Canadian Salt. While Production Services (1990) Ltd. adopted its own employment and workplace policies, such policies were intentionally derivative of Canadian Salt's employment and workplace policies.

[33] Mr. Bowes testified that he would periodically drop by the Windsor Salt plant but that he was not directly involved in any operations at the facility.

[34] Pursuant to its service contract, Canadian Salt was required to pay Production Services (1990) Ltd.'s direct remuneration costs for the employees it dispatched to the Windsor Salt plant, plus 31.5%. From this latter amount, Production Services (1990) Ltd. was responsible for all source deductions and any benefits it offered to its employees. In addition, Production Services (1990) Ltd. was responsible for liability insurance for its employees and the lump sum

paid to Cardinal Construction per month for payroll and other services it supplied to Production Services (1990) Ltd. From the remainder, Production Services (1990) Ltd. drew its profit.

[35] At the time of hearing, Mr. Berkshire had been the plant manager for the past two (2) years and testified that Canadian Salt's arrangements with Production Services predated his involvement with the plant. Mr. Berkshire confirmed that Canadian Salt continued to utilize employees from Production Services (1990) Ltd. at the Windsor Salt plant and his description of the nature of the interrelationships between the respondent employers was consistent with the testimony of Mr. Waldo and Mr. Bowes. In addition, Mr. Berkshire confirmed that Production Services (1990) Ltd. did not have any supervisors at the plant.

[36] While Canadian Salt had the ability to hire the additional employees directly, Mr. Berkshire confirmed that it had not done so and provided various reasons as to why the arrangements had continued during his tenure at the plant. Firstly, Mr. Berkshire testified that the arrangements with Production Services (1990) Ltd. were long standing and had been implemented under a previous plant manager. Mr. Berkshire indicated that he would require the approval of his head office to change these arrangements. Secondly, Mr. Berkshire believed the arrangements were beneficial to Canadian Salt in that it was cheaper for Canadian Salt to contract for these labourers, than to hire the employees directly (even after paying the 31.5% overhead). Mr. Berkshire testified that the net cost of hiring the additional employees directly would be greater than the amount of its service contract with Production Services (1990) Ltd. Thirdly, Mr. Berkshire testified that the arrangements provided "flexibility" to Canadian Salt to reduce its workforce in the event of production slow downs. Production at the plant was susceptible to slow downs and stoppages for many reasons beyond Canadian Salt's control, including the availability of liquid slurry from the adjacent potash mine. When production slowed down, the employees of Production Services (1990) Ltd. were laid off, whereas Canadian Salt's employees generally would continue working at the plant.

[37] Mr. Berkshire testified that, while Canadian Salt accepted application forms from members of the public, Canadian Salt generally hired its employees from Production Services (1990) Ltd. because they were already familiar with the plant and its operations. While Mr. Berkshire was aware of employees having moved from Production Services (1990) Ltd. to Canadian Salt, he was not aware of any employees moving from Canadian Salt to Production Services (1990) Ltd.

[38] Mr. Berkshire testified that Canadian Salt had one (1) other service contract with another company, Jacob's Catalytic, who supplied an individual by the name of Mr. Shawn Nestman. Mr. Nestman was a millwright. Mr. Nestman's position did not fall within the scope of the Union's proposed bargaining unit.

[39] With respect to the support evidence gathered by the Union, Mr. Dennis testified that, through the Union's research and until late in the organizing drive, the Union was only aware of two (2) companies involved with the employees working at the plant; namely, Canadian Salt and Cardinal Construction. When the Union's organizers prepared support cards for employees to sign, these cards only included reference to Canadian Salt and Cardinal Construction. Mr. Dennis testified that not until near the end of the organizing drive, did the Union obtain information that another company, Production Services (1990) Ltd., appeared to be involved with the employees. As a consequence of this additional information, the Union's application for certification included a reference to all three (3) employers. In cross-examination, Mr. Dennis admitted that, when the Union became aware that another corporation might be involved in the employment of the employees, the Union did not want to go back to the employees to have new or updated support cards signed.

[40] For its organizing drive, the Union used its standard boilerplate membership application form. The membership application form included the following statements, which were endorsed by each applicant employee by signing thereon:

I hereby make application for membership in the United Food & Commercial Workers International Union and affirm the above statements are true. I agree that all monies paid by me shall be forfeited and my membership declared void if they are not true. I authorize the United Food & Commercial Workers Local 1400 to represent me for the purposes of collective bargaining and handling of grievances and all other matters relating to my employment, either directly or through such local union as it may duly delegate. UFCW Local 1400 has policies and procedures to safeguard my privacy and protect my personal information. UFCW Local 1400 has commitment from third parties that receive personal information from the Union that my personal information will be safeguarded and protected from unauthorized use. By signing this form, I consent to the use of my personal information by UFCW Local 1400 for the purposes listed above, and I consent to the sharing of my personal information with third parties by the Union. My personal information will not be sold to third parties. I hereby authorize the employer to deduct from my wages and pay to the above Union, fees, as authorized by regular and proper vote of the membership for this Union.

[41] In addition, the boilerplate document used by the Union included a number of blanks for the purpose of inserting information to identify the individual employee, including blanks for the employee's social insurance number, name, email and civic address, date of birth, and home and cell phone numbers. The application form also included blanks for the purpose of identifying the "*Company*", the "*Department*" and the "*Classification*". Presumably, the latter two (2) blanks were for the purpose of identifying the position held by the individual applicant employees. Ms. Olsen testified that, in anticipation of the Union's organizing drive, she partially completed a number of application forms by inserting the words "*Windsor Salt (Canadian Salt and/or Cardinal Construction)*" in the blank for the name of the "*company*". The remaining blanks on these application forms were left to be completed by the signatory employees.

[42] Because a defect in the Union's support evidence was an issue in these proceedings, the Board agreed to review the evidence of support filed with the Union's application and to stipulate for the record limited information therefrom. In the blank for "Department", more than one (1) employee inserted the words "*Production Services*" and more than (1) employee inserted the word "*Production*". In the blank for "*Classification*", one (1) employee inserted the words "*Production Serv. Ltd.*".

[43] Finally, by the time of the hearing, a dispute existed between the parties as to whether or not one (1) individual continued to enjoy the status of "employee" and thus eligibility to vote in the representative question. The name of this disputed employee was Mr. Bob Wilder, who was a long term employee on medical leave and receiving Workers Compensation benefits. Both Mr. Bowes and Mr. Berkshire testified that Mr. Wilder had not been terminated and was an employee paid by Production Services (1990) Ltd. Mr. Wilder had been back at the workplace as recently as February of 2010, for an attempted return to work, which had been arranged by the Workers' Compensation Board. However, Mr. Berkshire testified that Mr. Wilder's return to work had not been successful and that there was no plan for Mr. Wilder to return to work in the near future. Mr. Wilder did not testify.

Argument of the Parties:

[44] The parties made oral arguments and provided written submissions to the Board on September 14, 2010.

The Union's Argument:

[45] The Union took the position that Canadian Salt had *de facto* control and responsibility over all employees working at the Windsor Salt plant and that its arrangements with Production Services (1990) Ltd. (and that company's corporate predecessor), when viewed objectively, was for the provision of little more than a basic payroll service. The Union argued that Production Services (1990) Ltd. had very little, if anything, to do with any employees and that the real seat of fundamental control over industrial relations and working conditions at the plant rested with Canadian Salt. The Union argued that Canadian Salt exercised all real direction and control over all employees working at the Windsor Salt plant, including those employees purportedly employed by Production Services (1990) Ltd.; that Canadian Salt bore the ultimate burden of remuneration; that Canadian Salt made all final decisions with respect to hiring new employees, including the employees hired by Production Services (1990) Ltd.; that Canadian Salt had ultimate authority to impose discipline (up to and including dismissal) of all employees; and that all of the employees knew that actual control of employment and working conditions rested solely with Canadian Salt.

[46] The Union took the position that the contractual arrangements between Canadian Salt and Production Services (1990) Ltd. were illogical (i.e.: were not capable of producing the benefits ascribed by Mr. Berkshire) and illusory (i.e.: were merely put in place for the purpose of projecting the image of separate employers). The Union argued that, while Production Services (1990) Ltd. has certain trappings of having a real and separate existence, a more critical evaluation of the functions it performs should lead the Board to conclude that it is merely an agent of Canadian Salt, performing specified contractual services, but having no real, separate existence. The Union suggested this arrangement was motivated by an anti-union animus on the part of Canadian Salt; specifically, a view to discouraging its workforce from organizing. The Union pointed to the evidence of Mr. Hook who testified that he and other co-workers speculated that Canadian Salt's real motivation in using a third-party (i.e.: Production Services (1990) Ltd.) to hire a portion of its workforce was to prevent "hourly" employees from going on strike. On this basis, the Union argued that the best explanation for Production Services (1990) Ltd.'s presence in this workplace was Canadian Salt's desire to discourage unionization.

[47] The Union urged the Board to find that one (1) bargaining unit exists in the workplace and that Canadian Salt is the actual employer of those employees, including any employees that were purportedly employed by Production Services (1990) Ltd. (and/or Cardinal

Construction). In this regard, the Union relied upon the decision of this Board in *Sheet Metal Workers' International Association, Local 296, and Modern Roofing (1978) Ltd. and Herb and Steve Roofing Ltd. and Custom Roofing Ltd.* [1986] June Sask. Labour Report 64, LRB File No. 297-85. As was the case in *Modern Roof, supra*, the Union argued that Production Services (1990) Ltd. has no real, separate existence and is completely directed, controlled and dominated by Canadian Salt. Under the circumstances, the Union argued that all employees should be deemed to be the employees of Canadian Salt for purposes of the *Act* in one (1) bargaining unit.

[48] In the event that the Board was to conclude that Production Services (1990) Ltd. and/or Cardinal Construction had a sufficiently separate existence from Canadian Salt and that one (or both) of them was the employer of some of the employees, the Union urged the Board to apply either s. 2(g)(iii) or s.37.3 of the *Act*.

[49] Firstly, the Union took the position that Canadian Salt has fundamental control over all aspects of the facility operations and industrial relations at the Windsor Salt plant and that this is an appropriate case to “pierce the corporate veil” pursuant to s. 2(g)(iii) of the *Act* and to declare the principal, Canadian Salt, to be the “true” employer of all the employees working at the plant, including any employees that may ostensibly be employed by either Production Services (1990) Ltd. or Cardinal Construction. The Union argued that it would make no industrial relations sense for the Union to bargain collectively with Production Services (1990) Ltd. or Cardinal Construction as the evidence demonstrated that these two (2) corporations played only a minor role in the employment of any employees at the Windsor Salt plant and that Canadian Salt had fundamental control over them on a day-to-day basis. The Union argued that the essential inquiry in the application of s. 2(g)(iii) is who has fundamental control over industrial relations in the workplace. To which end, the Union argued that Canadian Salt unilaterally determines the essential terms and conditions of all employees working at the plant and that the contribution of Production Services (1990) Ltd. and Cardinal Construction was little more than that of a payroll service, with neither exercising any control over the workplace. The Union argued that Canadian Salt, if not the “actual” employer, should be deemed by the Board to be the “true” employer of the contractor’s employees and that all employees should be included within one (1) unified bargaining unit.

[50] In the final alternative (if the Board was not prepared to declare Canadian Salt to be the employer of the subcontractor’s employees), the Union argued that the Board should

apply s.37.3 of the *Act* and that all three (3) employers should be deemed to be common or related employers and treated as one (1) employer for the purposes of the *Act*. In this regard, the Union relied upon this Board's decisions in *The Newspaper Guild Canada/Communication Workers of America, CLC, AFL-CIO, IFJ v. Sterling Newspaper Group, a Division of Hollinger Inc.*, [1999] Sask. L.R.B.R. 5, LRB File No. 187-98; and *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. The Union also relied upon the criteria identified by the Ontario Labour Relations Board in *Labourers' International Union of North America, Local 183 v. York Condominium Corporation, et. al.*, [1977] O.L.R.B. Rep. October 645 for determining which of two (2) or more parties is (or are) the employer(s) of certain employees.

[51] The Union took the position that only one (1) bargaining unit existed in the workplace and that any differences that may exist between groups of employees (i.e.: with some employees having different benefits than others) could be accommodated within the normal functioning of the bargaining unit. The Union argued that, even if the Board was to conclude that there were two (2) groups of employees at this workplace, they could co-exist within one (1) bargaining unit. To which end, the Union argued that two (2) bargaining units would be disruptive and harmful to labour relations and pointed to the evidence of Mr. Berkshire who expressed a similar preference; that being, if the workplace was certified, that Canadian Salt would prefer to deal with just one (1) bargaining unit.

[52] With respect to the status of Mr. Wilder, the Union argued that Mr. Wilder was absent from work for medical reasons and that he continued to intend to return to work and thus his employment status had not been severed. Relying on the decision of this Board in *Hotel Employees and Restaurant Employees Union, Local 602 v. 621692 Saskatchewan Ltd. (c.o.b. Country Inn and Suites)*, [1999] Sask. L.R.B.R. 184, LRB File No. 056-99, the Union took the position that Mr. Wilder maintained a sufficient connection with the workplace to maintain his eligibility to participate in the representative question.

[53] The Union argued that there was no defect in the evidence of support it filed with the Board. Firstly, the Union argued that the respondent employers were the authors of the confusion in the workplace as to the identity of the employer and that they should not now benefit (or, rather, the employees should not be punished) through use of what counsel described as a corporate shell game. The Union argued that the evidence of support it filed was sufficient to

satisfy the requirements of the *Act* and ought to be accepted by the Board. Secondly, the Union argued that any perceived confusion in the workplace as to the identify of the actual, true or appropriate employer of the employees will be resolved with the Board's decision herein, at which point, the employees in the bargaining unit will have an opportunity to express their views by means of secret ballot.

Canadian Salt's Argument:

[54] Canadian Salt argued that its contractual relationship with Production Services (1990) Ltd. was not only arm's length, but also long-standing; continuing uninterrupted since the 1960's. Canadian Salt noted that it shared no common officers, directors or shareholders with either Production Services (1990) Ltd. or Cardinal Construction. Canadian Salt argued that for decades it had a service contract (or rather a series of annually renewed service contracts) with Production Services (1990) Ltd. for the provision of additional labour at the Windsor Salt plant. Pursuant to this service contract, Production Services (1990) Ltd. entered into distinct employment contracts with (i.e.: hired) its employees and demonstrated an ongoing intention to maintain an employer relationship with those employees. Canadian Salt pointed to evidence that demonstrated that Production Services (1990) Ltd. maintained its own registrations as an employer under *The Workers' Compensation Act, 1979*, R.S.S. c.W-17.1; maintained its own registration for statutory payroll deductions with the Canada Revenue Agency; and maintained its own comprehensive general liability insurance policy for its employees.

[55] Canadian Salt argued that, in the context of the Windsor Salt plant, with its fixed location, production schedule and inter-related duties, Canadian Salt's day-to-day direction and control over the employees of its subcontractor was not indicative of which corporate entity is the "true" employer of those employees. While acknowledging that it has supervisory responsibility for all employees working at the Windsor Salt plant and that its authority over these employees included unilateral discretion with respect to hours of work, job duties and wage rates, Canadian Salt argued that the genesis for this authority and control is not as a result of a desire to establish fundamental control over labour relations in the workplace but rather this authority and control is merely the corollary of Canadian Salt's need to control production and to ensure safety at its facility. Canadian Salt argued that it never demonstrated an intention to form an employment relationship with Production Services (1990) Ltd.'s employees and that all employees working at the plant knew of the difference between being a "company" employee and not. Canadian Salt observed that Production Services (1990) Ltd. continued to have

unilateral discretion with respect to the benefits that it provided to its employees; benefits for which Production Services (1990) was solely responsible. Similarly, Production Services (1990) Ltd. (and not Canadian Salt) bears responsibility for statutory Income Tax, Employment Insurance and Canada Pension Plan deductions. For the foregoing reasons, Canadian Salt argued that Production Services (1990) Ltd. had a real and separate existence and that it was the actual and true employer of its employees.

[56] For similar reasons, Canadian Salt argued that this was also not an appropriate case for the Board to exercise its discretion pursuant to s. 2(g)(iii) of the *Act* to declare Canadian Salt to be the employer of Production Services (1990) Ltd.'s employees. Canadian Salt argued that the mischief that this provision was intended to prevent was corporations attempting to circumvent existing certification Orders by contracting out work. Canadian Salt argued that the circumstances where the Board has typically exercised its discretion pursuant to s. 2(g)(iii), has involved related corporations that altered the form of the employment relationship with employees by contracting out services but, in doing so, did not alter the substance of that relationship, such as in the case of *United Steelworkers of America, Local 8294 and Fairford Industries et al.*, June Sask. Labour Rep. 54, LRB File No. 136-86. In arguing that this is not an appropriate case for the Board to designate the principal as the employer, Canadian Salt relied upon this Board's decisions in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation and Marwest Food Systems Ltd.*, [1996] Sask. L.R.B.R., 523, LRB File No. 083-96.

[57] Canadian Salt argued that the burden of remuneration for the disputed employees rests with Production Services (1990) Ltd., as does responsibility for the provision and payment of any benefits that may be offered by Production Services (1990) Ltd. to its employees. Canadian Salt argued that, in the event that their paycheques were not forthcoming or were improperly calculated, the employees would turn to Production Services (1990) Ltd. Furthermore, Canadian Salt pointed to Mr. Bowes's admission that Production Services (1990) Ltd. bore the ultimate responsibility for the payment of severance for terminated employees in the event notice was improperly calculated by Canadian Salt.

[58] Canadian Salt also noted that the exercise of the Board's discretion pursuant to s. 2(g)(iii) has typically involved a colourable attempt to circumvent existing bargaining rights; whereas in the present case, the Union was seeking to acquire bargaining rights. As such,

Canadian Salt argued that its contractual relationship with Production Services (1990) Ltd., being the product of over forty (40) years of arms' length dealings, was not the appropriate basis upon which the Board ought to exercise its discretion to certify one (1) entity to be the "employer" of the employees of another corporation. Canadian Salt argued that there was no credible evidence before the Board that its arrangements with Production Services (1990) Ltd. were anything other than *bone fides*.

[59] Canadian Salt also noted that much of this Board's jurisprudence with respect to s. 2(g)(iii) predated the introduction of s. 37.3 to the *Act* in 1994 and that, prior to 1994, this Board had utilized s. 2(g)(iii) as authority to treat two (2) separate legal entities as one (1) employer for purpose of the *Act*. Canadian Salt relied upon this Board's decision in *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. P.S.P. Erectors Inc.*, [1995] 3rd Quarter Sask. Labour Rep. 64, LRB File No.083-95, for the proposition that, regardless of what jurisdiction the Board may have utilized to treat separate legal entities as one (1) employer prior to 1994, with the coming into force of s. 37.3 of the *Act*, the Board's jurisdiction is now confined to and defined by that section. To which end, Canadian Salt argued that s. 2(g)(iii) may not now be relied upon as authority for a common or related employer designation.

[60] Canadian Salt denied that it was a common or related employer with Production Services (1990) Ltd. and/or Cardinal Construction and relied upon the criteria for such a declaration as defined by this Board in *Wayne Bus Ltd, supra*. To which end, Canadian Salt argued that there was no evidence of common direction or control between these entities. Similarly, Canadian Salt argued that its right to supervise production at the facility did not amount to fundamental control over the terms and conditions of employment for the employees of Production Services (1990) Ltd. In addition, Canadian Salt argued that the Board's exercise of discretion pursuant to s. 37.3 should be remedial (i.e.: to arrest or discourage an employer seeking to circumvent collective bargaining rights) and cautioned the Board against utilizing this provision to extend collective bargaining rights across separate corporate entities when no collective bargaining rights currently exist.

[61] In addition, Canadian Salt argued that the temporal limitation in s.37.3(2) prevents the Board from making a common or related employer declaration on the basis that the relationship between Canadian Salt and Production Services (1990) Ltd. (and/or Cardinal Construction) existed prior to October 28, 1994. In support of this position, Canadian Salt

pointed to the evidence of Mr. Bowes that Production Services (1990) Ltd. was formed in 1990 and that Production Services (1990) Ltd. took over the prior contractual relationship with Canadian Salt at that time, with that contractual relationship continuing uninterrupted through to the present application. Again, relying upon this Board's decision in *P.S.P. Erectors, Supra*, Canadian Salt took the position that, regardless of what jurisdiction the Board may have utilized to treat separate legal entities as one (1) employer prior to 1994, with the coming into force of s. 37.3 of the *Act*, the Board's jurisdiction is now confined to and defined by that section. In other words, even if the Board was to conclude that a common or related employer relationship existed, the Board was precluded from making such a declaration because of the limitation prescribed by ss.37.3(2) of the *Act* and because the Board is no longer able to look to other authority in the *Act* to make such a declaration as it may have in the past.

[62] In support of its position that this is an inappropriate case for the Board to exercise its discretion to make a common or related employer declaration pursuant to s.37.3 or otherwise, Canadian Salt also relied upon this Board's decision in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184 v. Cabtec Manufacturing Inc. et. al.*, [2008] Sask. L.R.B.R. 169, LRB File No. 153-07.

[63] Finally, Canadian Salt argued that the Union's application was fatally flawed in that it attempted to combine the employees from multiple employers into one (1) bargaining unit. To which end, Canadian Salt argued that the Union's application for certification ought to be dismissed.

Production Services (1990) Ltd.'s Argument:

[64] Production Services (1990) Ltd. argued that it was the employer of approximately eighteen (18) employees in the unit of employees that the Union sought to certify. Production Services (1990) Ltd. adopted and/or echoed the argument of Canadian Salt with respect to who was the actual or true employer of the disputed group of employees, as well as the proper application of s. 2(g)(iii) and s.37.3 of the *Act* and did so for much the same reasons and on the basis of similar authority.

[65] Production Services (1990) Ltd. also advanced a new argument; that being the evidence of support filed with the Union's application was defective; fatally so in the opinion of

Production Services (1990) Ltd. Counsel argued that the Union’s evidence of support did not comply with the express requirements of s.6(1.1) and 6(1.2) of the *Act* because the support evidence did not match the Union’s application, with only some of the cards mentioning “Production Services” and none accurately describing Production Services (1990) Ltd. by its correct corporate name. Production Services (1990) Ltd. argued that, with the amendment to the *Act* in 2008³, the Board is now required to carefully scrutinize support evidence (more so than previously) to ensure that support evidence meets certain minimum standards. Production Services (1990) Ltd. argued that the references to the employer in the Union’s support evidence were confusing, inconsistent and defective.

[66] Production Services (1990) Ltd. argued that, to meet the mandatory minimum threshold specified in the *Act*, the Union’s support evidence must demonstrate written support from at least 45% of the employees in the proposed bargaining unit. Production Services (1990) Ltd. cautioned the Board not to accept any evidence of support not properly naming their employer. Production Services (1990) Ltd. argued that it was the Union’s obligation to get their support evidence in order and, when their organizers became aware that Production Services (1990) Ltd. was an employer of some of the employees in the workplace, the onus was on the Union to go back to the employees and obtain new, corrected support evidence naming the correct employer.

[67] Production Services (1990) Ltd. argued that the Union’s application for common or related employer declaration does not cure the defect in the Union’s application. Furthermore, counsel argued that the conduct of a representative vote will not cure the defect in the Union’s support evidence. To which end, Production Services (1990) Ltd. argued that any attempt by the Board to “correct” or overlook the defect in the Union’s application would do violence to the *Act*.

[68] In conclusion, Production Services (1990) Ltd. argued that the Union’s application was fatally flawed and ought to be dismissed (at least with respect to the certification of its employees).

Cardinal Construction’s Argument:

[69] Cardinal Construction denied that it employed any employees within the proposed bargaining unit and denied that it was a related or common employer with the other respondents.

³ *The Trade Union Amendment Act, 2008, S.S. Ch.26, s.3.*

Cardinal Construction noted for the Board that no evidence had been led that Cardinal Construction was an employer of any of the employees and argued that the Union erred in maintaining Cardinal Construction as a respondent upon learning that it was not an employer of any of the employees. To which end, Counsel asks the Board to award costs against the Union.

Relevant Statutory Provisions:

[70] The relevant provisions of *The Trade Union Act* are as follows:

2 *In this Act:*

(g) "**employer**" means:

- (i) an employer who employs three or more employees;
- (ii) an employer who employs less than three employees if at least one of the employees is a member of a trade union that includes among its membership employees of more than one employer;
- (iii) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;

and includes Her Majesty in the right of the Province of Saskatchewan;

...

6(1) Subject to subsections (1.1) and (2), in determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board must direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.

(1.1) No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application.

(1.2) The board must require as evidence of each employee's support mentioned in subsection (1.1) written support of the application, as prescribed in the regulations made by the Lieutenant Governor in Council, made within 90 days of the filing of the application.

(2) Where a trade union:

- (a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and
- (b) shows that 45% or more of the employees in the appropriate unit have within 90 days preceding the date of the

application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining; the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:

- (c) **Repealed. 2008, c. 26, s. 3.**
- (d) *has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.*
- (3) **Repealed. 1983, c. 81, s.5**

...

37.3(1) On the application of an employer affected or a trade union affected, the board may declare more than one corporation, partnership, individual or association to be one employer for the purposes of this Act if, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through those corporations, partnerships, individuals or associations.

(2) Subsection (1) applies only to corporations, partnerships, individuals or associations that have common control or direction on or after October 28, 1994.

Analysis:

[71] The Union's application was multifaceted and various interrelated issues arose during these proceedings. We have organized our reasons around the following questions.

1. Are Production Services (1990) Ltd. and/or Cardinal Construction the actual employer of any of the employees working at the Windsor Salt plant?
2. Are Canadian Salt and Production Services (1990) Ltd. related or common employers within the meaning of s.37.3 of the Act?
3. Is this an appropriate circumstance for the Board to exercise its discretion to declare the principal (Canadian Salt) to be the "employer" of the contractor's employees?
4. What is the description of the appropriate bargaining unit(s)?
5. Was there any defect in the Union's application?
6. What is the status of Mr. Wilder with respect to the representative question?

Are Production Services (1990) Ltd. and/or Cardinal Construction the actual employer of any of the employees working at the Windsor Salt plant?

[72] The Union argued that Canadian Salt was the actual employer of all employees working at the Windsor Salt plant and that Production Services (1990) Ltd.'s and Cardinal Construction's status as an "employer" was illusory, as these corporations were merely agents for Canadian Salt in establishing employment relationships with a portion of its workforce.

[73] At the Windsor Salt plant, there are two (2) groups of employees; the “*company men*”, who are employed by Canadian Salt (and for whom the identity of the employer was not in dispute); and the “disputed employees”, who received their paycheques from Production Services (1990) Ltd. The identity of the actual employer of the disputed employees was at issue in these proceedings.

[74] In our opinion, Cardinal Construction is not the employer of any of the disputed employees. Simply put, Cardinal Construction’s relationship with the employees was that of an agent of Production Services (1990) Ltd. and its involvement with those employees was neither intended nor sufficient to form an employee/employer relationship. The real issue in these proceedings is whether or not Production Services (1990) Ltd. is the employer (actual or otherwise) of the disputed employees.

[75] Having considered the evidence and argument presented herein, we find that Production Services (1990) Ltd. is the actual or *de jure* employer of the disputed employees. Firstly, we are satisfied that Production Services (1990) Ltd. has a real and separate corporate existence from Canadian Salt. Furthermore, we are satisfied that the contractual arrangement between Canadian Salt and Production Services (1990) Ltd. is *bona fide* as there was no compelling evidence that this arrangement was for anything other than the mutual benefit of the contracting parties. Mr. Hook admitted that his statement about Canadian Salt’s motivation for its arrangement with Production Services (1990) Ltd. was based on speculation among co-workers over drinks. With all due respect, speculation is not evidence.

[76] Secondly, the evidence demonstrated a corporate intent on the part of Canadian Salt to obtain a portion of its workforce from third-party suppliers; with Production Services Ltd., and later Production Services (1990) Ltd., being one (1) third-party supplier and with Jacob’s Catalytic being another. Canadian Salt’s arrangements with Production Services Ltd., and subsequently with Production Services (1990) Ltd., have been in place for over forty (40) years and have remained largely unchanged during that period. Mr. Berkshire’s explanation for these arrangements was commercially reasonable.

[77] Thirdly, the evidence demonstrated that Production Services (1990) Ltd. recruited, hired and retained a portion of the employees working at the Windsor Salt plant. The Board saw

evidence of the practical application of Production Services (1990) Ltd.'s employer status in the facts that it maintained its own registration as an employer under *The Workers' Compensation Act, 1979, supra*; maintained its own registration for statutory payroll deductions with the Canada Revenue Agency; and maintained its own comprehensive general liability insurance policy for its employees. The Board also saw evidence in communications from Mr. Bowes to his employees of intent on the part of Production Services (1990) Ltd. to maintain and clarify its identity as the employer of its employees.

[78] In our opinion, the fact that these employees were recruited, hired and retained for the express labour needs of Canadian Salt's plant, does not change the fact that they were recruited, hired and retained by Production Services (1990) Ltd. and not by Canadian Salt. Similarly, the fact that Canadian Salt demonstrated control over most aspects of labour relations at the Windsor Salt plant does not change the identity of the actual employer of the disputed employees. Such circumstances often arise in contracting and subcontracting situations and may well have significance in the application of s. 2(g)(iii) and s. 37.3 of the *Act*, but these factors are not determinative in defining that actual employer of the disputed employees. The real issue for the Board in determining the identity of the actual employer is; with whom did the employees enter into their contract of employment? In our opinion, the evidence pointed to Production Services (1990) Ltd., and not Canadian Salt, as the actual or *de jure* employer of the disputed employees. When all else is stripped away, the employees entered into their employment contract with Production Services (1990) Ltd. and, in the event of a dispute for unpaid wages, wrongful dismissal, or any other breach of that contract, it is in Production Services (1990) Ltd. that the disputed employees would find their remedy and not with Canadian Salt.

Are Canadian Salt and Production Services (1990) Ltd. related or common employers within the meaning of s.37.3 of the *Act*?

[79] In its application, the Union sought a declaration from the Board that Canadian Salt, Production Services (1990) Ltd. and/or Cardinal Construction are related or common employers. In our opinion, while the association between Canadian Salt and Production Services (1990) Ltd. may satisfy the criteria for such a declaration, this aspect of the Union's application must fail because of the temporal limits imposed by s. 37.3(2) of the *Act*.

[80] In *Amalgamated Transit Union v. City of Regina, supra*, this Board outlined both the criteria required for a related business declaration under s. 37.3 and the circumstances under

which the Board will exercise its discretion in the event the enumerated criteria have been fulfilled. Specifically, at pp. 148 and 149 the Board wrote:

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.*

However, once these requirements have been fulfilled the Board must determine whether to exercise its discretion to treat the entities as one employer for the purposes of the Act. This discretion will be exercised where there is a valid and sufficient labour relations value, interest or goal contemplated by the Act that will be served by making a single employer declaration. Absent such a purpose, the discretion to make the declaration will not be exercised.

[81] In our opinion, Canadian Salt and Production Services (1990) Ltd. are two (2) corporations that are engaged in an associated business or activity (i.e.: the operation of the Windsor Salt plant) and that, for the purposes of that activity, are under common direction and control (i.e.: the fundamental direction and management of Canadian Salt). Production Services (1990) Ltd.'s dependency upon its contractual relationship with Canadian Salt for its corporate existence; together with the limited scope of Production Services (1990) Ltd.'s authority over its employees at the Windsor Salt plant; together with the extent of functional interdependence that exists in the workplace; together with the fundamental control over labour relations exerted by Canadian Salt with respect to all of the employees in the workplace, including the employees of Production Services (1990) Ltd.; are all indicative of common or related employer designation.

[82] Nonetheless, the Union's application for a common or related employer designation must fail. The evidence in these proceedings demonstrated that the corporate relationship between Canadian Salt and Production Services (1990) Ltd. predated the temporal limits prescribed by s.37.3 of the *Act*, namely October 28, 1994. Mr. Bowes assumed control of Production Services (1990) Ltd. in 1990 and the contractual arrangements, which started in the 1960's with Production Services Ltd., continued essentially unchanged with Production Services (1990) Ltd. until the date of the Union's application. As a consequence, this Board is precluded from making a designation pursuant to s.37.3 of the *Act* because of the temporal limits

prescribed therein. Simply put, the arrangements between these two (2) corporations are grandfathered and may not now form the basis of a common or related employer designation by this Board.

[83] In addition, for the reasons stated by this Board in *P.S.P. Erectors Inc., supra*, with the coming into force of s. 37.3 of the *Act*, this Board's jurisdiction regarding the designation of common or related employers is now confined to and defined by that section. As a consequence, this Board may not now rely upon other jurisdiction in the *Act*, as it may have done prior to 1994, to make a common or related employer designation for corporations that have been "grandfathered" pursuant to s.37.3(2).

Is this an appropriate circumstance for the Board to exercise its discretion to declare the principal (Canadian Salt) to be the "employer" of the contractor's employees?

[84] Section 2(g)(iii) of the *Act* permits the Board to designate the principal (i.e.: the business or person to whom a contractor provides its services) to be the designated employer of a contractor's employees for purposes of collective bargaining. While the contractor continues to be the "actual" employer of those employees for most purposes (source deductions, Labour Standards, Workers Compensation, insurance, etc.), the principal is deemed by the Board to be the "employer" of the employees for purpose of application of *The Trade Union Act*. In such case, the principal is described (somewhat inaccurately) as the "true" employer.

[85] This Board has previously been called upon to make determinations as to whether the principal or the contractor is the "true" employer of a unit of employees pursuant to s. 2(g)(iii) of the *Act*. In doing so, the Board has first focused its examination on which party exercises "fundamental control" over labour relations at the work place. In other words, who has effective control over the essential aspects of the employment relationship? The Board has previously adopted several (non-exclusive) criteria to assist in this determination, which criteria include an examination of the following aspects of the relationship between the parties:

1. *The party exercising direction and control over the employees performing the work;*
2. *The party bearing the burden of remuneration;*
3. *The party imposing discipline;*
4. *The party hiring the employees;*

5. *The party with the authority to dismiss the employees;*
6. *The party who is perceived to be the employer by the employees; and*
7. *The existence of an intention to create the relationship of employer and employee.*

[86] The next stage of the Board's inquiry is for the Board to determine whether or not it ought to exercise its discretion in the circumstances of the particular case before it. As previously stated by this Board, a determination made pursuant to s. 2(g)(iii) involves the exercise of an extraordinary authority on the part of the Board and thus the Board's discretion must be based on a sound labour relations footing. See: *Wayne Bus Ltd., supra*, and *Canadian Union of Public Employees, Local 4836 v. Lutheran Home of Saskatoon, Regina Lutheran Care Society Inc. and Broadway Terrace Inc.*, 2009 CanLII 54774, LRB No. 043-09.

[87] As noted by this Board in *Wayne Bus Ltd., supra*, applications seeking to designate the principal as the "true" employer of employees of a contractor often involve circumstances of a "melded status", where the affected employees have relationships with more than one corporate entity, with each entity exhibiting some characteristics of an employer. Such is the case in the present application.

[88] Having reviewed the evidence and argument of the parties in these proceedings, we are satisfied that the circumstances of this particular workplace and the relationship between Canadian Salt and the employees of Production Services (1990) Ltd. satisfy the criteria for designating the principal as the "true" employer of the contractor's employees. Furthermore, we are also satisfied that this is an appropriate circumstance for the exercise of the Board's discretion.

[89] The evidence demonstrated that the party exercising day-to-day direction and control over the employees at the Windsor Salt plant, including the disputed employees, was Canadian Salt. While Canadian Salt argued that it did so out of necessity, taking into consideration the operational and safety needs of the plant, we are satisfied that Canadian Salt's management reach extended beyond safety and operation needs. The evidence leads to the conclusion that Production Services (1990) Ltd. had effectively delegated all of its primary managerial functions over its employees to Canadian Salt. Production Services (1990) Ltd. did not maintain even a cursory managerial function at the plant. Furthermore, Production Services

(1990) Ltd.'s contractual arrangements with Canadian Salt (being on a cost plus basis) effectively transferred the burden of remuneration to Canadian Salt, leaving little residual risk with Production Services (1990) Ltd. Furthermore, Canadian Salt's practical authority over discipline, hiring and dismissal of employees, together with its unilateral authority in relation to the essential conditions of employment at the plant, are all factors in the Board's conclusion that the seat of fundamental control over industrial relations involving the disputed employees rests with Canadian Salt.

[90] As indicated, s. 2(g)(iii) of the Act grants an extraordinary authority to the Board and, in our opinion, this authority must be cautiously exercised on a sound labour relations footing. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation and Marwest Food Systems Ltd.*, [1996] Sask. L.R.B.R. 523, LRB File No. 083-96, the Board described the situations where the exercise of the Board's discretion is appropriate, at 530-531:

In determining the criteria that should apply to a determination under s. 2(g)(iii), we must be mindful that in designating a principal as the "employer", the Board is "separating the responsibility for bargaining collectively with respect to wages from the responsibility for paying them" (Cana Construction, supra, at 48). Before doing so, the Board must be convinced that the separation of responsibility is based on a sound labour relations footing. In past decisions, the Board has been influenced by factors indicating that the principal dominates the financial affairs of the contractor to such an extent that the setting of wage rates and other working conditions does not affect the financial health of the contractor. For instance, in the Cana Construction case, supra, the Board held that "finding Pan-Western responsible for negotiating wage rates for carpenters on the Y.M.C.A. project will not as a practical matter remove whatever control Buchner Construction Inc. may have over its own financial affairs." It seems to this Board that the designation of a principal as "employer" under s. 2(g)(iii) can be made where it will enhance the collective bargaining process by requiring the party effectively controlling the purse strings to sit at the bargaining table. In these circumstances, the ability of the union and the contractor to negotiate and conclude a collective agreement may be frustrated by the formal absence of the principal from the bargaining table. If the principal plays an invisible role at the table, in the sense that the contractor cannot conclude an agreement without consulting with and obtaining tacit approval of the agreement from the principal, then the collective bargaining process is well served by requiring the principal to actually engage in formal collective bargaining with the union. There are different types of relationships that may fall within the scope of this provision, including contractors who provide labour services on a cost plus basis. In many cases the principal will effectively determine the terms and conditions of work for employees, such as their hours of work, work assignments, and the like, as well as determining wages and the other costs. The provision, however, is not limited to the labour broker relationship. Each case requires an examination of a number of factors to ensure that an assessment is made of the labour relations gains to be

achieved by separating the responsibility for negotiating a collective agreement from the responsibility for paying wages.

[91] In light of Canadian Salt’s control over wages and its financial arrangements with Production Services (1990) Ltd. (being on a cost-plus basis), separating the responsibility for the payment of wages from the responsibility for collective bargaining will have little negative impact on the contractor. While Production Services (1990) Ltd. may be the actual employer of its employees, its capacity to effectively bargain with the Union (in the event the Union should be certified) would be undermined by Canadian Salt’s fundamental control over both the purse strings and most aspects of labour relations at the workplace. Simply put, designating Canadian Salt as the “true” employer will put the party having effective control over industrial relations at the bargaining table.

What is the description of the appropriate bargaining unit(s)?

[92] The Union argued that only one (1) bargaining unit existed in this workplace and that any differences that may exist between the two (2) groups of employees could be accommodated within the normal functioning of that unit. With all due respect, we are not persuaded by this argument. While the employees working at the Windsor Salt plant work side-by-side and under the singular management of Canadian Salt, they nonetheless are employed by two (2) separate employers. The fact that we have exercised our discretion to declare Canadian Salt to be the “true” employer of Production Services (1990) Ltd.’s employees does not alter the reality that there are two (2) actual employers and thus two (2) groups of employees working at this plant; those employees who are employed by Canadian Salt; and those employees who are employed by the contractor, Production Services (1990) Ltd. These two (2) groups of employees have existed and worked side-by-side for decades. While the Board’s normal preference is for larger, more inclusive units, in our opinion, having concluded that s.37.3 of the *Act* is not available, it would be inappropriate for the Board to combine the employees of two (2) employers into one (1) bargaining unit.

[93] Section 37.3 is the vehicle by which the employees of two (2) or more corporate entities may be combined into one (1) bargaining unit. Having found that the relationship between Canadian Salt and Production Services (1990) Ltd. is grandfathered and thus s.37.3 is unavailable, this Board has no residual authority to combine the two (2) groups of employees into one (1) bargaining unit. In coming to this conclusion, we are mindful that the formation of

two (2) bargaining units in this workplace is not ideal; nor was it desired by the parties. However, the formation of two (2) bargaining units is the necessary consequence of the unique circumstances that we have found to exist at the Windsor Salt plant and, in our opinion, while not ideal, these (2) units are nonetheless appropriate for the purposes of collective bargaining.

[94] The description of the two (2) bargaining units shall be as follows:

Bargaining Unit #1 – Canadian Salt’s employees: being all employees of The Canadian Salt Company Limited, employed at the Windsor Salt plant, located near Belle Plaine, Saskatchewan, except:

- (i) employees of Production Services (1990) Ltd.; and
- (ii) the Facility Manager, Quality Control Manager, Works Accountant, Buyer Specialist, Production Supervisor, Northwestern Area Customer Care Manager, EHS Coordinator, Maintenance Supervisor, Lab Coordinator and laboratory personnel;

Bargaining Unit #2 – Production Services (1990) Ltd.’s employees: being all employees of the Production Services (1990) Ltd., employed at the Windsor Salt plant, located near Belle Plaine, Saskatchewan, except:

- (i) employees of The Canadian Salt Company Limited;
- (ii) the President of Production Services (1990) Ltd.; and
- (iii) the Facility Manager, Quality Control Manager, Works Accountant, Buyer Specialist, Production Supervisor, Northwestern Area Customer Care Manager, EHS Coordinator, Maintenance Supervisor, Lab Coordinator and laboratory personnel;

Was there any defect in the Union’s application?

[95] Both Canadian Salt and Production Services (1990) Ltd. argued that defects existed in the Union’s certification application.

[96] Canadian Salt argued that the Union’s application was defective because it attempted to gain certification of two (2) bargaining units, involving the employees of two (2) separate employers, in one (1) application. Canadian Salt argued that the Union’s application ought to be dismissed and two (2) new certification applications submitted; one for each of the respective employers. With respect, we are not persuaded by this argument. The fact that the

Union's application has resulted in the formation of two (2) bargaining units is not a defect in the Union's application but rather a result of determinations by this Board.

[97] As this Board has already noted, many applications seeking a declaration from the Board pursuant to either s. 2(g)(iii) or s.37.3 involve what has been described as a "melded status", with confusion as to the identity of the employer. The Union discovered such a "melded status" during its organizing drive at the Windsor Salt plant and the Union's explanation for the form of its application was reasonable under the circumstances. If Canadian Salt's argument was successful, any trade union seeking to represent one or more groups of employees in circumstances where the identity of the employer was confused by the type of melded status found at the Windsor Salt plant would be required to submit multiple versions of its certification applications or correctly anticipate the Board's determinations as to the identity of the actual employer and/or correctly anticipate whether or not the Board would exercise its discretion pursuant to s. 2(g)(iii) or s. 37.3. The purpose of s.19 is to avoid such technical objections, particularly so where no prejudice has been suffered. The formation of two (2) bargaining units was a reasonably foreseeable outcome of the Union's application.

[98] It is hard to imagine that any of the respondent employers have suffered any prejudice as a result of the proceedings unfolding as they have. Certainly, all of the respondent employers had a fulsome opportunity to respond to all aspects of the Union's application in both evidence and argument. To the extent that there was a defect in the Union's application, in our opinion, it is the kind of irregularity that this Board is empowered to cure pursuant to s.19 of the *Act*.

[99] Production Services (1990) Ltd. argued that the support evidence submitted with the Union's application was defective because it did not include express reference to Production Services (1990) Ltd. or, alternatively, because there was an insufficient number of support cards identifying Production Services (1990) Ltd. as their employer to satisfy the threshold requirements of s. 6(1.1) and s. 6(1.2) of the *Act*. As a result, Production Services (1990) Ltd. took the position that the Union's application ought to be dismissed.

[100] For its organizing drive, the Union used boilerplate membership application forms that were partially completed by inserting the words "*Windsor Salt (Canadian Salt and/or Cardinal Construction)*". The membership application forms were otherwise completed by the

individual employees. The Board's review of the completed application forms which were submitted by the Union as evidence of support reveals that an insufficient number of the disputed employees identified Production Services (1990) Ltd. as the name of their employer. If accurately describing the identity of the employer is a minimum requirement of support evidence, then the argument of Production Services (1990) Ltd. (that the Union's application is defective) has some traction. However, we do not believe that this argument ought to prevail.

[101] In our opinion, the Union's evidence of support contained the minimum requirements expected by this Board, namely; that the evidence of support was contained in individual documents that were individually signed by supporting employees; that each document contained a written expression, or by necessary implication, authorization for the Union to bargain collectively on behalf of that employee; and that each document was signed not more than ninety (90) days prior to the date the application was filed with the Board. See: *International Woodworkers of America v. Beaver Lumber Company Limited*, [1977] May Sask. Labour Rep. 30, LRB File No. 112-77. While support evidence must correlate to a particular employer, the support cards are not the only means of establishing the necessary relationship and the Board may consider extrinsic evidence to find the requisite correlation. See: *United Food and Commercial Workers, Local 1400 v. Dude Management Ltd.*, [1987] September Sask. Labour Rep. 31, LRB File No. 213-86.

[102] Production Services (1990) Ltd. argued that the change in the legislation that occurred in 2008 requires this Board to more carefully scrutinize support evidence than it has in the past because now the Board is statutorily prohibited from directing a vote if the minimum level of support prescribed in the *Act* is not obtained by an applicant. While it is true that s.6(1.1) of the *Act* prevents this Board from directing a vote if we are not satisfied that the applicant enjoys the minimum threshold of support, until such time as the form such evidence must take is prescribed by Regulation pursuant to s. 6(1.2), the Board continues to have discretion as to the form of evidence we will accept.

[103] In our opinion, any inaccuracy by signatory employees in describing the identity of their actual employer is not fatal to the Board's acceptance of the support evidence for a number of reasons. Firstly, accurately describing the "employer" is not a necessary ingredient for support evidence for purpose of s.6(1.1), particularly so in the kind of "melded status" present at the Windsor Salt plant where multiple employers have a relationship with the affected

employees. The essential question is whether the signatory employees want the Union to represent them for purposes of collective bargaining; not their capacity to correctly identify the name of their employer (ie. be that their “actual” or “true” employer). Secondly, in light of this Board’s determination to designate Canadian Salt as the employer of Production Services (1990) Ltd.’s employees pursuant to s. 2(g)(iii) of the *Act*, while an insufficient number of employees identified their actual employer, a sufficient number did correctly identify their “true” employer. Finally, having been satisfied that the Union’s evidence of support satisfies the minimum requirements of the *Act*, in our opinion, any uncertainty that may have existed as to the employees’ real intentions will be resolved by the conduct of a representative vote as now required by s.6 of the *Act*.

[104] Until such time as the form of support evidence is prescribed by Regulation pursuant to s. 6(1.2), the Board continues to have discretion as to the form of evidence we will accept. In our opinion, the evidence of support filed with the Union’s application satisfies the requirements of the *Act* and, on the basis of this evidence, the Board is satisfied that a sufficient percentage of employees in each of the two (2) bargaining units, which we have determined to be appropriate, support the Union’s application. As a consequence, votes shall be conducted by secret ballot of members of each of the two (2) bargaining units to determine the representative question.

What is the status of Mr. Wilder with respect to the representative question?

[105] Finally, with respect to Mr. Wilder, we were not satisfied that Mr. Wilder’s current condition is sufficient to maintain his eligibility to participate in the representative question. With all due respect to the argument advanced by the Union, the evidence tended to suggest a low probability that Mr. Wilder would return to the workplace. Despite the fact that Mr. Wilder’s employment had not been terminated, the evidence indicated that he has been off work for a considerable period of time and there appeared to be little prospect for his return to work. As a consequence, Mr. Wilder’s continued connection with the workplace is tenuous and insufficient to maintain his entitlement to participate in the representative question. In our opinion, Mr. Wilder’s circumstances are distinguishable from the circumstances observed by the Board in *621692 Saskatchewan Ltd. (c.o.b. as Country Inn and Suites)*, *supra*, where it was anticipated that the disputed employee in that case would soon be cleared by her doctor and able to return to work in the near future.

Conclusion:

[106] For the foregoing reasons, we have concluded that two (2) units of employees are appropriate for collective bargaining at the Windsor Salt plant, described as follows:

Bargaining Unit #1 – The Canadian Salt Company Limited’s employees: being all employees of The Canadian Salt Company Limited, employed at the Windsor Salt plant, located near Belle Plaine, Saskatchewan, except:

- (i) employees of Production Services (1990) Ltd.; and
- (ii) the Facility Manager, Quality Control Manager, Works Accountant, Buyer Specialist, Production Supervisor, Northwestern Area Customer Care Manager, EHS Coordinator, Maintenance Supervisor, Lab Coordinator and laboratory personnel.

Bargaining Unit #2 – Production Services (1990) Ltd.’s employees: being all employees of the Production Services (1990) Ltd., employed at the Windsor Salt plant, located near Belle Plaine, Saskatchewan, except:

- (i) employees of The Canadian Salt Company Limited;
- (ii) the President of Production Services (1990) Ltd.; and
- (iii) the Facility Manager, Quality Control Manager, Works Accountant, Buyer Specialist, Production Supervisor, Northwestern Area Customer Care Manager, EHS Coordinator, Maintenance Supervisor, Lab Coordinator and laboratory personnel.

[107] The Canadian Salt Company Limited shall be the “true” employer of the employees of Production Services (1990) Ltd. pursuant to s. 2(g)(iii) of the *Act*.

[108] The Board shall appoint an agent to conduct votes of the employees of each of the above captioned bargaining units. In our opinion, these votes ought to be conducted as soon as possible.

[109] Finally, with respect to Cardinal Construction’s request for costs, in light of our determination that Cardinal Construction is not the employer of any of the employees affected by the within application, we have sympathy for Cardinal Construction’s plea for costs, particularly so in light of its efforts to be removed earlier in the proceedings. However (and without determination as to whether or not authority exists for the Board to grant costs), we would not be inclined to exercise any discretion we may have in light of the very close relationship that existed between Cardinal Construction and Production Services (1990) Ltd. and the “melded status” that

this Board has found to exist at the Windsor Salt plant. Simply put, in light of the confusion that existed as to the roles played by the respective employers at this particular workplace, we are satisfied that the Union had, at least, a *prima facie* case for alleging that Cardinal Construction had potential status as an employer.

DATED at Regina, Saskatchewan, this **10th** day of **November, 2010**.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson