The Labour Relations Board
Saskatchewan

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, Applicant v. J.V.D. MILL SERVICES INC., Respondent

LRB File No. 087-10; January 10, 2011
Chairperson, Kenneth G. Love, Q.C.; Members: Gloria Cymbalisty and Ken Ahl

For the Applicant Union:	Bruce Laughton, Q.C.
For the Respondent Employer:	Kevin Wilson, Q.C. & David J. Ross, Q.C.
For the Intervenors: Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers, the United Brotherhood of Carpenters and Joiners of America, Local 1985, and the United Brotherhood of Carpenters and Joiners of America (Millwrights Union, Local 1021)	Drew Plaxton
For the Intervenors: Local 01 Saskatchewan of the International Union of Bricklayers & Allied Craftworkers and its parent organization the International Union of Bricklayers & Allied Craftworkers (BAC)	R. Graeme Aitken
For the proposed Intervenor, Construction Workers Union, Local 151	Richard Steele

Certification – Applicant Union applies for "all employee" unit – Applicant Union not permitted to represent members of trades specified in Column 2 of Schedule to the *Construction Industry Labour Relations Act*, 1992.

Amendments to *Construction Industry Labour Relations Act* by Bill 80 – Interpretation of amendments and impact on existing bargaining unit descriptions.

Certification – "all employee" unit found to be appropriate unit within the construction industry – Board determines amendments to *Construction Industry Labour Relations Act* permit the Board to certify non-craft units where appropriate.

Appropriate Unit – Board determines that "all employee" unit appropriate in construction industry – Board adopts reasoning from British Columbia Labour Relations Council – Board follows previous Board jurisprudence regarding appropriate unit.

Appropriate Unit – Board reconsiders restrictions on designation of appropriate unit following amendments to the *Construction Industry Labour Relations Act*.

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** The Communications, Energy and Paperworkers Union of Canada ("CEP") applied to be certified as the bargaining agent for "all employees of J.V.D. Mill Services Inc. in Saskatchewan except office, sales managers and supervisors." The application alleged that this group of employees was an appropriate unit for the purposes of bargaining collectively within the meaning of clause 5(a) of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*").

[2] The process for certification of employees engaged in the construction industry in Saskatchewan was governed by *The Construction Industry Labour Relations Act, 1992* (the "*CILRA*"). Prior to July 1, 2010, certifications under the *CILRA* were to be made on a craft basis and employees covered by those certifications bargained through their certified bargaining agents with a certified employer group comprised of unionized employers. On July 1, 2010, amendments to the *CILRA* were proclaimed into law which permitted a union to apply pursuant to *The Trade Union Act* to be certified under that *Act* in an appropriate unit: Those amendments provided in part as follows:

> *4(2) Nothing in this Act:*
>
> *(a) precludes a trade union from seeking an order pursuant to clause 5(a), (b) or (c) of The Trade Union Act for an appropriate unit consisting of:*
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> > *(i) employees of an employer in more than one trade or craft; or*
> > *(ii) all employees of an employer; or*

[3] Prior to the filing of the present application for certification on July 19, 2010, CEP had applied for certification on June 10, 2019 (LRB File No. 058-09). In addition to requesting certification, the application challenged the constitutionality of *CILRA.* That previous application was withdrawn upon the proclamation of the amendments to *CILRA*. The intervenors applied to the Board for standing in the application, which application was granted giving them status as Public Law intervenors[1]. In its application, the intervenors also made an application alleging that

[1] See the Interim decision of the Board dated September 27, 2010.

the Employer was a related employer or a successor employer to employers already certified by the Board. However, prior to the hearing of this matter, that application was withdrawn.

[4] Upon the applications for successor or related employer being withdrawn, the applicant, in accordance with the Board's usual practice on applications for certification advised the Board that it intended to rely solely on the materials filed in support of its application for certification and intended to call no evidence in support of the application. Because this was the first application made to the Board under the amended provisions of the *Act,* the Board felt that it was appropriate to deviate from its previous practice and request the parties to present evidence regarding the application, particularly with respect to the appropriateness of the unit applied for. Being unprepared to call evidence, the parties sought and received an adjournment to allow them to provide evidence to the Board as requested.

[5] At the commencement of the hearing on November 27, 2010, the Construction Workers Union, Local 151 applied to the Board for intervenor status. After hearing the parties, the Board denied that application.

Facts:

[6] CEP is a trade union certified to represent employees employed by various employers in Saskatchewan. It applied to the Board to be certified in respect of "all employees of JVD Mill Services Inc. in Saskatchewan except office, sales managers and supervisors.

[7] JVD Mill Services Inc. is an Employer engaged in new construction work in Saskatchewan. It was engaged on two projects in Saskatchewan. One was at Esterhazy, Saskatchewan at the potash mine there, which project has now been completed. The other project, also at a potash mine, was at Belle Plaine, Saskatchewan. That project employs 200 – 205 people at present. At the time of the application to the Board there were 146 employees eligible to vote in accordance with s. 6(1) of the *Act*. A vote, by secret ballot was conducted by the Board on July 26 & 27, 2010. In accordance with the directions of the Board, all ballots cast were double enveloped and not counted pending the decision of the Board.

[8] According to the Statement of Employment, the Employer employs a variety of tradespersons, including, but not limited to, carpenters, pipefitters, electricians, scaffolders,

labourers, millwrights, ironworkers, bricklayers, and cement masons. The Employer also employs warehouse persons, instrument technicians, and heavy equipment operators.

[9] Mr. Josh Coles testified on behalf of CEP. His testimony revealed that CEP was formed from an amalgamation of (4) four major unions. In 1997, he was hired as a union representative and organizer for the British Columbia Council of Carpenters. The BC Council of Carpenters became involved in the Canadian autonomy movement which sought to end the traditional relationship of various craft unions with international parent bodies. The BC Council of Carpenters became autonomous from the International Union and later affiliated with CEP, which was a national Canadian union.

[10] In 2005 -06, CEP started organizing in the construction industry. According to Mr. Cole's testimony, CEP currently represents 5000 construction workers. CEP, however, does not represent any employees engaged in any of the trade divisions set out in column 2 of the Schedule to the *CILRA*.

[11] CEP represents employees in other provinces under what is known as a "wall to wall" or "all employee" designation rather than on a "craft by craft" basis. He testified that CEP negotiated a collective agreement with the Employer following a voluntary recognition of the Union by the Employer. He testified that the initial agreement which they negotiated was rejected by the employees, but a subsequent agreement was approved by majority vote. This collective agreement covers "all employees of the Employer when employed in construction as journeymen, apprentices, foremen, labourers and/or classified in Schedule "A" attached hereof except supervisors, management, office and clerical personnel."

[12] Schedule "A" to the Collective Agreement lists carpenters, pipefitters, electricians, scaffolders, labourers, millwrights, ironworkers, bricklayers, and cement masons and other craft designations. It also lists warehouse persons, instrument technicians, and heavy equipment operators and other positions.

[13] The Employer called Mr. Rod Schenk as a witness. He testified that the Employer's employees in Alberta and British Columbia were represented by CEP. He testified that in British Columbia the Employer is certified on an "all employee" basis, whereas in Alberta they are certified on a "trade by trade" basis. He also testified that in Alberta, provision is made

whereby the various “trade by trade” orders made by the Alberta Labour Relations Board may be consolidated so that an Employer may negotiate a common agreement with respect to all employees which have collective bargaining agents certified by that Board.

[14] He testified that the Employer preferred to be able to negotiate only one collective agreement to cover all of its employees rather than have to negotiate multiple contracts. He also testified that the Employer preferred to have the benefit of a stable workforce rather than having to rely upon more transient employees requisitioned from a traditional hiring hall maintained by the various craft unions. He testified that the Employer was able to maintain retain employees for a longer period. He noted as well that there were greater costs to the Employer for recruitment and safety training if there is a frequent change of crews requisitioned from the hiring halls. He estimated that cost to be $6,500 per person.

[15] He testified that there was nothing unusual in the makeup of the workforce currently employed in Saskatchewan. He also noted that the Employer continued to bid for work in Saskatchewan in order to keep its employees employed.

Argument of the Parties:

The Applicant’s Position

[16] The Applicant filed a written brief along with a book of authorities which we have reviewed. The Applicant argued that the unit applied for, being an “all employee” unit was an appropriate unit for collective bargaining which fits perfectly with the historical criteria used by the Board to determine appropriateness of a bargaining unit.

[17] It argued that the “all employee” unit recognizes the right of employees to organize in and join a trade union of their choice; satisfies the need for industrial stability; and permits collective bargaining to occur in a framework which allows for administrative efficiency and lateral mobility of employees.

[18] It further argued that all of the Board’s previous rulings regarding the appropriateness of “all employee” units in the construction industry were determined based upon the conclusion that such units were outside the scope of *the CILRA*. They argued that that concern has now been eliminated by the amendments to the *CILRA* made by Bill 80. Those

amendments, it argued, allowed other unions, not just those designated by the Minister in accordance with *the CILRA*, to now apply to be certified under the provisions of the *Act* in an appropriate unit of employees for collective bargaining.

[19] It also argued that the amendments to the *CILRA* did not preclude the Board from a finding that an "all employee" unit was an appropriate unit for collective bargaining in the construction industry.

[20] The Applicant argued that it need only apply for "an appropriate unit" not the "most appropriate unit" for collective bargaining. In support of that position it cited the following cases: *Energy and Paperworkers Union and Prince Albert Community Workshop Society Inc.*[2], *Re: Canadian Blood Services*[3], *Re: Regina School Division No. 4*[4], and cited Adams at para 7.150[5].

[21] It argued that the Board had previously recognized "all employee" units as being presumptively appropriate. It argued that this was not an unusual case with respect to the appropriateness of the unit of employees for collective bargaining. In making its determination, it argued the Board should consider the competing policies of industrial stability and access to collective bargaining. In support, it cited the Board's decision in *Re: Canadian Union of Public Employees, Local 5004 v. Saskatoon Housing Authority*[6].

[22] The Applicant also argued that the Board had a preference for and preferred "all employee" units. In support of that argument, it cited the Board's decisions in *Re: Custom Built AG. Industries Ltd. (Trail Tech)*[7], *Re: Stirling Newspapers Group (a division of Hollinger Inc.)*[8], and *Re: Ranch Ehrlo Society*[9].

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[2] [1995] S.L.R.B.D. No. 38, LRB File No. 019-95
[3] [2008] S.L.R.B.D. No. 10, LRB File No. 030-08
[4] [2009] S.L.R.B.D. No. 30, [2009] CLLC para 220=-61, 172 C.L.R.B.R. (2d) 307, LRB File No. 062-09
[5] Adams, *Canadian Labour Law*, Canada Law Book
[6] [2010] CANLII 42668, LRB File No. 048-10
[7] [1998] S.L.R.B.D. No. 54 at para. 78, LRB File No. 112-98
[8] [1998] S.L.R.B.D. No. 65 at para 25, LRB File No. 174-98
[9] [2008] S.L.R.B.D. No. 36 at para. 95, 161 C.L.R.B.R. (2d) 165, LRB File No. 108-07

[23] The Applicant cited benefits associated with an "all employee" bargaining unit as described by the Board in *United Assoc. of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the US and Canada and Marquart Mechanical Ltd.*[10].

[24] The Applicant argued that all of the factors mentioned in the Marquart Mechanical Ltd. decision were provided for in the Collective Agreement negotiated between the parties and resulted from one set of negotiations as distinct from many negotiations which would be required under *the CILRA*. They argued that the negotiated agreement presents no obstacles to lateral mobility in the workforce and further, allows for management to assign tasks to those employees who are qualified to perform the work. They postulated that the one agreement provides a common framework of employment conditions for all employees employed by the Employer, including vacations, statutory holidays, overtime, health, welfare and pension plans.

[25] The Applicant also suggested that the added benefit of the collective agreement covering "all employees" reduced the potential for strikes or lockouts because, they argued, that the existence of more than one bargaining unit increased the likelihood of job action.

[26] They also argued that the collective agreement that was achieved demonstrated that the interests of different trades and other employees can be dealt with in one set of negotiations (rather than multiple negotiations which occur under *the CILRA*). They cited as demonstrative of the Board's having commented on a similar situation involving employees having different skills the Board's recent decision in *Re: International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 and Linde Canada Limited*[11].

[27] In respect of the changes to the *CILRA* brought about by Bill 80, the Applicant pointed to the rights of employees to choose a bargaining agent of their choice enshrined in s. 3 of the *Act*. The argued that the amendments to the *CILRA* created a second option for employees who wished to choose a bargaining agent other than those Unions designated by the Minister pursuant to the *Act.*

[28] They argued that the amendments created this second option, which is that rather than being represented on a craft by craft basis, employees could now choose to form other

[10] [1994] S.L.R.B.D. No. 57, LRB File No. 181-94
[11] [2010] CANLII 1715, LRB File No.056-09

forms of appropriate units such as an "all employee" unit as proposed here. Furthermore, the amendments allowed the Board a blank slate as it were with respect to the choice of appropriate unit insofar as the Board was no longer restricted by the presumption that "craft units are the preferred bargaining unit in the construction industry" as the Board concluded in *K.A.C.R. (a joint venture) and The International Union of Operating Engineers, Hoisting Portable and Stationary, Local 870 et al*[12] *Central Mill Construction Ltd.*[13]*.*

[29] The Applicant argued that the intention of the legislature in enacting Bill 80 could be found in the ministerial statement by the Minister of Advanced Education, Employment and Labour speaking at the Standing Committee of Human Services when the Committee was considering the proposed amendments when he said:[14]

> *The amendments as introduced are meant to first allow a trade union to organize a company on a multi-trade or all-employee basis, as well as – and this is very important – as well as continuing on a craft or single-trade basis.*
>
> *…*
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> *The proposed amendments simply augment the current system, complement it by giving employers and employees the right to choose their form of representation.*

[30] The Applicant's argued that based upon the Minister's comments during the committee review of Bill 80, it is clear that Bill 80 intended to and did overrule the Board's previous jurisprudence such as *Central Mills Construction Ltd.*[15]. They argued that Bill 80 removed 3 critical elements of those decision, being:

1. the preference for craft units
2. the limitation of representation rights to only those trade unions designated by the Minister pursuant to *the CILRA*
3. the prohibition on "all employee" bargaining units.

[31] The Applicant pointed to decisions from British Columbia involving similar concerns over "all employee" units in the construction industry. They argued the Board should

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[12] [1983] 3 C.L.R.B.R. (NS) 60, LRB File No. 106-83
[13] [2001] S.L.R.B.R. No. 7, [2001] 73 C.L.R.B.R. (2d) 177, LRB File No. 250-00
[14] Hansard Verbatim Report of the Committee on Human Services, June 24, 2009 at p. 896 & 897
[15] *Supra* note 13

follow the logic developed by the British Columbia Board in *Cicuto and Sons Contractors Ltd.*[16] and other British Columbia decisions which followed.[17]

[32] They also argued that the unit certified as an all employee unit would continue to represent all employees regardless of any change in the makeup of the unit. In support for that proposition, they cited the Supreme Court of Canada decision in *Terra Nova Motor Inn Ltd. v. Beverage & Culinary Workers Union, Local 835*[18] as well as Board decisions which supported this view.[19]

The Employer's Position

[33] The Employer filed a written brief along with a book of authorities which we have reviewed. The Employer argued that the impact and effect of the changes made by Bill 80 were to break the monopoly enjoyed by the Unions and Representative Employer's Organizations designated by the Minister pursuant to *the CILRA*. Furthermore, they argued that the direction of the legislature is clear in the amendments that the Board may no longer presume that craft units are the most appropriate unit in the construction industry.

[34] They argued that as a result of the amendments that "clearly the landscape has changed" from a mandatory scheme of collective bargaining to one with more freedom of choice. The model for collective bargaining described by the Board in previous decisions[20] has been changed by the amendments in Bill 80. They argued that the amendments to the *CILRA* by Bill 80 "effectively reversed the findings in *Emerald Oilfield*[21] and the cases relied upon by that decision.

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[16] [1988] B.C.L.R.B.D. No. 271
[17] See *Re: Campbell Construction Ltd. [2005] B.C.L.B.D. No. B293 and cases referenced therein*
[18] [1975] 2 S.C.R. 749
[19] See *Saskatoon Middle Management Association,* [2002] S.L.R.B.D. No. 28
[20] See *Construction and General Workers Union 890 and International Erectors and Riggers, a Division of Newberry Energy*[1979] Sept. Sask Labour Rep. 37, LRB File No. 114-79, *International Union of Operating Engineers, Hoisting, Portable & Stationary, Local 870 and K.A.C.R, Supra* Note 12, *Emerald Oilfield Constructors Ltd.* [1994] S.L.R.B.D. No. 19, LRB File Nos. 019-94, 020-94 & 021-94, *Central Mills Construction Ltd., Supra* Note 13,
[21] Supra Note 20

[35] The Employer argued that the amendments do not have the effect of rendering the standardized units set out by the Board in *Newberry*[22] are no longer appropriate, but rather the amendments provide alternative options for certification in the construction industry.

[36] Like the Applicant, the Employer argued that the goal of the legislation, as set out in a backgrounder[23] provided when the Bill was introduced was to, *inter alia*

> *Allow a trade union to organize a company on a multi-trade, or "all-employee" basis, as well as on a craft (single-trade) basis*

[37] Furthermore, the Employer noted that one of the Reasons stated by the government for proposing the changes made through Bill 80 was a concern that the *CILRA* was "vulnerable to a constitutional challenge".[24]

[38] The Employer argued that the Board should be influenced by the rulings made by the British Columbia Labour Relations Board and the Alberta Labour Relations Board in respect of similar applications. It also cited *Cicuto*[25] and other cases cited by the Applicant in that respect.

[39] The Employer cited s. 3 of the *Act* in support of its argument that employee choice should be an important element in the Board's choice of appropriate unit. It argued that enhanced employee choice was in accordance with the Supreme Court of Canada decision in *Health Services and Support – Facilities Subsector Bargaining Assoc. v. British Columbia*[26] since the amendments supported enhanced employee choice of bargaining agent.

[40] The Employer argued that an "all employee" unit should be the gold standard for appropriate units. It argued that certification on an "all employee" basis would provide a third option for employment within the construction industry (as distinct from the current options which are employment on a union or non-union basis).

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[22] Supra Note 20
[23] See Exhibit E-1, page 1
[24] See Exhibit E-1, Page 2.
[25] *Supra* Note 16
[26] [2007] 2 S.C.R. 391

[41] The Employer argued that as a result of certification of an "all employee" unit jurisdictional disputes between competing craft locals on the job site would not be an issue. They argued that the Employer could assign work based on the needs of the construction project, not necessarily on the basis of rigidly drawn craft lines. They argued that this would contribute to administrative efficiency and industrial stability.

[42] The Employer also argued that an "all employee" bargaining unit would create opportunities for attracting and training a local workforce. They argued that the traditional craft unit model, where employees are dispatched through a hiring hall, may preclude employment near the worker's permanent residence. By contrast, they argue, an "all employee" unit would allow the Employer to draw employees from the local market.

[43] With respect to the appropriateness of "all employee" units, the Employer argued that the Board has on numerous occasions granted applications for "an appropriate unit", not necessarily the "most appropriate unit". It cited in support *Northern Lakes School Division No. 64*[27]*, Prairie South School Division No. 210*[28]*,* and *Ranch Ehrlo Society*[29] as well as cases referred to therein.

[44] The Employer suggested that the Board had not fixed the factors which it used to determine whether or not a unit is appropriate for collective bargaining, but cited several decisions where the Board had considered some of the factors it relied upon. In *Ranch Ehrlo*[30] , the Board referenced:

> *i. Facilitating the right of employees to organize in and join a union of their choice, a right enshrined in s. 3 of the Act;*
> *ii. the need for viable and stable collective bargaining structures; and*
> *iii. the avoidance of fragmentation and a multiplicity of bargaining.*

[45] Ranch Ehrlo noted as well that in *Hotel Employees and Restaurant Employees, Local 767 and Courtyard Inns Ltd.*[31], the board considered if:

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[27] [1996] S.L.R.B.D. No. 7, LRB File No. 322-95,
[28] [2008] S.L.R.B.D. No. 47, LRB File No. 149-07
[29] *Supra* at Note 9
[30] *Supra* at Note 9 at para 93
[31] [1988] Winter Sask. Labour Rep. 51, LRB File No. 116-88 at 51

> *the proposed unit would be viable, whether it would contribute to industrial stability, whether groups of employees have a particular community of interest, whether the proposed unit would interfere with lateral mobility among employees, historical patterns of organization in the particular industry, and other concerns of the employees, the union and the employer.*

[46] Ranch Ehrlo also cited factors referenced by the Board in *Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores Ltd.*[32].

> *…the Board must examine a number of factors, assigning weight to each as circumstances require. There is no single test that can be applied. Those factors include among others: whether the proposed unit can carry on a viable collective bargaining relationship with the employer; the community of interest shared by the employees in the proposed unit; organizational difficulties in particular industries; the promotion of industrial stability; the wishes or agreement of the parties; the organizational structure of the employer and the effect that the proposed unit will have upon the employer's operations; and the historical patterns of organization in the industry.*

[47] The Employer also noted that the Board prefers larger , all inclusive, bargaining units, as opposed to smaller, more specialized ones. They cited as authority for this proposition the *Ok Economy Stores Limited*[33]*, Prairie South School Division*[34] *and Sterling Newspapers Group*[35].

[48] The Employer argued that the factors identified by the Board in the cases referenced above mitigated towards the proposed unit being appropriate insofar as it would permit employees to join a union of their choice as signified by a secret ballot vote in favour of the Union; the unit would be viable and would avoid fragmentation since it would encompass all of the employees of the Employer; and the bargaining unit is one which the Board has preferred in industries other than construction.

[49] The Employer also argued that the proposed unit would tend towards industrial stability because it would minimize the incidence of work stoppages since there is only one Union; Nor, they argued would the unit interfere with lateral mobility of employees, but rather, it would facilitate employee's ability to move around within the Employer's organization. Also, they

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[32] [1990]Fall Sask. Labour Rep. 64, LRB File No. 264-89 at p. 66
[33] Supra Note 32 at p. 66
[34] Supra Note 28 at para 28
[35] Supra Note 8 at para 25

argued that the employees of the proposed unit would share a community of interest despite being members of different trades because they are all employees of a common Employer.

[50] The Employer argued as well that it should be noted that the Union and Employer are parties to a voluntary recognition agreement that covers all trades employed by the Employer. They argued as well that this shows a lack of organizational difficulty since the parties already have an existing relationship.

[51] The Employer acknowledged that the only factor which mitigated against the proposed unit was the historical organizational pattern in the construction industry. However, they argued that pattern was resultant from the *CILRA* and the changes effected by Bill 80 brought about changes to the *CILRA* that allowed the Board to deviate from that historic pattern.

Arguments by Intervenors:

[52] Mr. Plaxton, on behalf of the Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers et al (the "Carpenters"), filed a book of authorities which we have reviewed. He argued that the unit applied for was under inclusive, insofar as it made no reference to, nor was there any evidence with respect to whether or not there was office staff employed by the Employer, who were supervisors, etc. He argued that because it was under inclusive, the application should be dismissed.

[53] The Carpenters also argued that Bill 80 was not a perfect piece of legislative drafting. He argued that ss. 4(4) of the created an anomaly because it directed that the *Act* did not apply if an order was made by the Board under 2(a) or (b). That, he argued, created a circular argument which did not make sense. He argued that the rules of construction of statutes set forth by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*[36] must be applied by the Board in its interpretation of the amended provisions.

[54] They argued that a craft designation remained as the most appropriate designation within the construction industry, notwithstanding the amendments made by Bill 80. He argued that the logic employed by the Board in determining that craft certifications were more appropriate in the construction industry should continue to be followed by the Board. He cited,

[36] [1998] 1 S.C.R. 27

inter alia, in support for his position, *A.V. Concrete Forming Systems Ltd. and Carpenters Provincial Council of Saskatchewan*[37], *Central Mill Construction Ltd. and Allied Workers of Canada, Local 1-417*[38], *Dutch Industries Ltd. and I.A.B.S.O.I.W.U., Local 771*[39], *Emerald Oilfield Construction Ltd. and Canadian Iron, Steel and Industrial Workers Union, Local 3*[40], *K.A.C.R. (A Joint Venture) and I.U.O.E., Local 870*[41], *International Erectors & Riggers (A Division of Newberry Energy Ltd.), C.G.W.U., Local 890*[42].

[55] Mr. Plaxton further argued that the Board was charged, by s. 5(a) of the *Act*, to determine "whether the appropriate unit of employees for the purposes of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit". He argued that the evidence provided by the parties did not provide a full factual matrix for the Board to make such determination. He argued that a craft unit, however, should be the appropriate unit since a craft unit provided for province wide bargaining by designated agents. He argued that a craft designation provided the benefits of a hiring hall for employees as well as craft training for employees. He argued that the transient nature work and workers in the construction industry favours a province-wide craft unit designation as does the transient nature of employers in the construction field[43]. He also argued that to establish a parallel system for certification in the construction industry, as suggested by the Applicant would create chaos and cited the Board's decision in *Emerald Oilfield Construction Ltd. and Canadian Iron, Steel and Industrial Workers Union, Local 3*[44] in support.

[56] The Union argued that a "wall to wall" or "all employee" bargaining unit as proposed would be contrary to the stabilization goals of accreditation laws in the construction industry. He referenced in support of this proposition the comments of the Nova Scotia Labour Relations Board in *Construction and Allied Workers Union, Local 154 ("CLAC") v. 360 cayer ltee*[45] which were cited with approval in the Central Mill Construction[46] decision of this Board.

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[37] [1983] Nov. Sask. Labour Rep. 35
[38] *Supra* Note 13
[39] [1990] Sask. Labour Rep. 111
[40] *Supra* Note 20
[41] *Supra* Note 20
[42] *Supra* Note 20
[43] In support he cited *United Brotherhood of Carpenters and Joiners of America, Local 1985 and Patent Scaffolding Co. – Canada (A Division of Harsco Canada Limited)* [1993] 3rd Quarter Sask. Labour Rep. 98, LRB. File No.127-93
[44] *Supra* Note 20
[45] N.S. Labour Relations Board – Construction Panel, November 3, 2000
[46] *Supra* Note 20

He also pointed to the history of the construction industry and craft unionism as set out by Adams[47].

[57] He also argued that s. 7 of the *CILRA* should not be ignored by the Board in its consideration of the appropriateness of the unit. He argued that employee choice recommends a site certification since employees at another location would be denied the choice of a bargaining representative if the Employer obtained more work in the province. He cited the Board's decision in *Roca Jack's Roasting House and Coffee Co. and Retail, Wholesale and Department Store Union*[48] as support for a geographic limitation on the certification of the appropriate unit.

[58] They also argued that the Board could consider denying the application for certification and allowing the voluntary recognition agreement to continue to govern the relationship between the parties.

[59] He argued that since the challenge to the legislation under the Canadian Charter of Rights and Freedoms had been withdrawn, the Board should decline to make its decision based upon any charter arguments advanced by the parties.

[60] Mr. Aiken on behalf of Local 01 Saskatchewan of the International Union of Bricklayers, Allied Craftworkers and its parent organization the International Union of Bricklayers & Allied Craftworkers (BAC) endorsed the submissions of Mr. Plaxton. He suggested the Board should look to the spirit and intent of the Saskatchewan legislation and not to what occurs in British Columbia or Alberta.

[61] He argued that this was a "bread and butter" issue insofar as the main purpose of the Labour Relations Board is to determine the "appropriateness of a bargaining unit".

[62] He referred to the backgrounder[49] referenced by the Employer in its argument and the Hansard Report[50] at p. 896 which he interpreted as suggesting that the spirit and intent of Bill 80 was to provide freedom of choice for Employers, not employees.

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[47] Adams, *Canadian Labour Law (2nd ed).* Canada Law Book , Part VI
[48] [1997] S.L.R.B.D. No. 20, LRB File No. 016-97 at para 5 & 6
[49] *Supra* Note 24
[50] *Supra* Note 14

[63] He postulated that this was a “Noah’s Ark” certification which would deny the rights of all future employees to a choice of bargaining agent based upon the wishes of 6 trades present on the project at the present time. He argued that this “Noah’s Ark” approach flies in the face of the spirit and intent of the amendments. He suggested that this situation was worse than the traditional “Noah’s Ark” certification which normally is restricted to only one trade, whereas there are multiple trades impacted.

[64] He referenced the Ontario system which has a parallel system for designation of craft unions and for those outside the normal trade designations. He argued that under the *National Labor Relations Act*, which governs the United States federal jurisdiction, craft units have been determined to be an appropriate unit since 1944.

[65] He argued that the craft unions were not, as argued by the Applicant, not just trying to preserve a monopoly granted to them by the *CILRA*, but rather they were suggesting that the Board should give careful consideration to what should be an appropriate unit for province wide bargaining.

[66] He argued that there was no compelling reason to abandon the traditional units for collective bargaining. He argued that an “all-employee” unit was not an appropriate unit for bargaining province-wide based upon the evidence provided. He argued that the Board should not make assumptions either way regarding the appropriateness of a unit, i.e.: if a craft unit is not to be preferred, then the Board can’t prefer any kind of unit. He argued that future employees on other projects in the province should be given a choice as to their bargaining agent; it should not be imposed by the Board through a province-wide designation.

[67] He argued that if an all-employee unit is found to be appropriate, then the bargaining agent should take what they find on that site and not be granted the benefit of an automatic designation for future employees. He argued simply that you should not be entitled to get more employees than you organize. To do otherwise, he argued would be contrary to the spirit and intent of the legislation which is to provide employees the right to choose their own bargaining agent.

Applicant’s Reply:

[68] The Applicant responded that they were seeking to represent not the trades they found, but rather the employees of the Employer. He pointed to the definition of "Appropriate Unit" set out in the *Act* which says it is a "unit of employees appropriate for the purpose of bargaining collectively." He argued that the bargaining agent is the agent chosen by the majority of the employees within that appropriate unit.

[69] He argued that once certified a union does not have to continuously re-establish majority support every time an employee is added to or leaves the bargaining unit. In support of that position, he cited former Chief Justice Laskins' comments in *Terra Nova Motor Inn Ltd. v. Beverage Dispensers and Culinary Workers Union, Local 835.*[51]

[70] He argued that employees are provided choices under the *Act* if they are dissatisfied with their bargaining agent. They can encourage another union to conduct a raid; something which he argued is not available under *the CILRA*. Or, they may apply annually to the Board to rescind the certification order.

[71] The Applicant argued that the effects of the amendments to the *CILRA* were that a province-wide certification doesn't apply only to the craft based construction industry, but it also could apply to any certification done pursuant to the amendments to the *Act*. That is because of the nature of the construction industry where both employment and projects are transient in nature. Reference was made to the *Patent Scaffolding Co*[52]*.* decision cited by Mr. Plaxton.

[72] The Applicants responded that the evidence necessary to support the determination of an appropriate unit is minor. The central facts that support appropriateness are well known as noted in *Marquart Mechanical*[53]*.* He acknowledged that the onus fell upon the Applicant to show that the unit applied for was an appropriate unit, but argued that onus had been met.

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[51] *Supra* Note 18
[52] *Supra* Note 43
[53] *Supra* Note 10

[73] He also referred to comments made by the Intervenors regarding the chaos referenced by the Board in paragraph 55 of the *Central Mills*[54] case. He argued that the situation described by the Board in that case no longer exists. Bill 80, in his submission moves away from the centralized bargaining structure. That choice, he asserted was made by the legislature in enacting Bill 80 to provide greater freedom of choice for employees.

[74] With reference to s. 4(4) of the *CILRA*, the Applicants took the position that, if the Board certifies an employer under the *Act*, then the *CILRA* no longer applies to that employer or the employees of that employer.

[75] With respect to s. 7 of the *CILRA*, the Applicants took the position that it is a permissive provision, which allows the Board to make appropriateness determination based on relevant factors, including those listed in the section. The Board, it argued was not bound by those listed factors alone.

[76] The Applicant also pointed out that the Union has provincial jurisdiction, that is, its jurisdiction is not limited by any geographic element of its charter. Secondly, it pointed out that it has the ability to dispatch employees as needed on a hiring hall basis.

[77] In reply, the Employer took the view that the Intervenors had overreached the mandate granted to them as intervenors because the arguments they had presented were not public policy arguments, but were outside the normal public policy limits.

[78] The Employer speculated that the Board could look beyond *Newberry* and the other cases cited by the Intervenors because the legislature had permitted the Board to do so by the passage of Bill 80.

[79] The Employer noted that there were 14 job classifications employed by the Employer, including 9 different trades. In response to the "Noah's Ark" argument put forward by the Intervenors, he filed a supplemental brief which we have reviewed. He argued that based upon the Board's decisions in *Saskatchewan Liquor and Gaming Authority and Saskatchewan Government and General Employees Union and Judy Greensides*[55] and the *Terra Nova Inn*[56]

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[54] *Supra* Note 13
[55] [2001] S.L.R.B.D. No. 13, 73 C.L.R.B.R. (2d) 28, LRB File No. 037-95

decision of the Supreme Court of Canada, that once a certification order has been issued by the Board for an "all employee" unit, the certified union becomes the exclusive representative for all employees in the unit.

[80] The Employer also argued that the fact that there may be trades included in the "all employee" unit that were not employed on the date of the application is not relevant in the context of an application for an all employee unit and is, therefore not a valid reason for dismissing the application in this case.

[81] With respect to the geographic scope of the proposed unit being province-wide, the Employer referenced the Board's recent decision in *Teamsters, Local Union No. 395, v. Cal-Gas Inc.*[57].

Relevant statutory provision:

***The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c.C-29.11 (the "*CILRA, 1992*"), (as amended by Bill 80)**

> ***4****(1) Subject to subsections (2) and (3), the purpose of this Act is to permit a system of collective bargaining in the construction industry to be conducted by trade on a province-wide basis between an employers' organization and a trade union with respect to a trade division.*
>
> *(2) Nothing in this Act:*
>
> *(a) precludes a trade union from seeking an order pursuant to clause 5(a), (b) or (c) of The Trade Union Act for an appropriate unit consisting of:*
>
> *(i) employees of an employer in more than one trade or craft; or*
>
> *(ii) all employees of an employer; or*
>
> *(b) limits the right to obtain an order pursuant to clause 5(a), (b) or (c) of The Trade Union Act in the construction industry to those trade unions that are referred to in a determination made by the minister pursuant to section 9.*
>
> *(3) In exercising its powers pursuant to clause 5(a) of The Trade Union Act, the board shall make no presumption that a craft unit is a more appropriate unit in the construction industry than any other form of appropriate unit.*
>
> *(4) This Act does not apply to an employer and a trade union with respect to an order mentioned in clause (2)(a) or (b).*

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[56] *Supra* Note 18
[57] LRB File No. 135-10

> *(5) If, after the coming into force of this section, a unionized employer becomes subject to an order mentioned in clause (2)(a) or (b) with respect to its employees, the employer is no longer governed by this Act.*
>
> . . .
>
> ***7** If a trade union applies pursuant to The Trade Union Act for certification as the bargaining agent of the employees of an employer in the construction industry, the board shall determine the appropriate unit of employees by reference to whatever factors the board considers relevant to the application, including:*
>
> *(a) the geographical jurisdiction of the trade union making the application; and*
>
> *(b) whether the appropriate unit should or should not be confined to a particular project.*

***The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*")**

> *5 The board may make orders:*
>
> *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
>
> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*

Analysis and Decision:

Application for Intervenor Status by Construction Workers Union, Local 151:

[82] The Board considered the application for intervenor status made by the Construction Workers Union, Local 151, in accordance with its earlier decision in respect of the applications made by the intervenors in this case, and in accordance with the principles set out in *R. v. Latimer*[58] but denied that application. Brief oral reasons were given at the hearing as follows.

[58] See the Interim decision of the Board dated September 27, 2010 and [1995] CanLII 3921, 128 Sask. R. 195 at pp. 196-97

[83] The Board was not convinced that the participation of the Construction Workers Union, Local 151 would add anything to the proceedings. The lis between the parties is now simplified and can be adequately represented by the parties and those already granted status in this matter.

[84] The Board, in this matter is seeking, *inter alia,* to determine the appropriate unit in accordance with the amendments to the *CILRA* made by Bill 80. It would be inappropriate to presume that the facts, in cases to be heard with respect to applications made by the Construction Workers Union, Local 151 for certification, are similar or identical to the facts in this case.

[85] Furthermore, the Board is of the opinion that any policy issues surrounding the amendments to the *CILRA* can be adequately addressed by the parties who have already been granted Public Policy intervenor status in this matter.

A Brief Recent History of Construction Industry Collective Bargaining Legislation in Saskatchewan:

[86] In 1979, Saskatchewan enacted *The Construction Industry Labour Relations Act* [59] (the "*CILRA*, 1979").

[87] Section 4 of the *CILRA*, 1979 directed that it was to "be construed so as to implement bargaining collectively by trade on a province-wide basis between an employers' organization and a trade union in respect of a trade division". The *CILRA*, 1979 was repealed in 1983.

[88] There was no special legislation governing the Construction industry until the *CILRA* was re-enacted in 1992. It was re-enacted in substantially the same form as the *CILRA*, 1979[60]. Section 4 of the *CILRA* directed that it was to "be construed so as to implement bargaining collectively by trade on a province-wide basis between an employers' organization and a trade union with respect to a trade division". During the period between the repeal of the

[59] S.S. 1979 c. 29.1, assented to May 4, 1979
[60] The legislation was proclaimed effective September 22, 1992.

CILRA in 1983 and its re-enactment in 1992, Labour Relations in the Construction industry was governed by the *Act.*

[89] By Bill 80[61], the *CILRA* was amended in many ways. One of those was to repeal section 4 of the former *Act* and replace it with the provisions under consideration in this case. However, the previous provisions of s. 4 directing how the *Act* was to be construed were repealed and a new subsection 4(1) which established the purpose of the *Act* to be "[S]ubject to subsections (2) and (3), the purpose of this *Act* is to permit a system of collective bargaining in the construction industry to be conducted by a trade on a province-wide basis between an employers' organization and a trade union with respect to a trade division".

[90] The application by the Construction and General Workers' Local Union No. 890 in the Newberry case[62] was filed with the Board on April 4, 1979[63], which was one month prior to the date on which assent was given to *the CILRA*, 1979. However, by the time the decision in that case was issued on July 17, 1979, *the CILRA*, 1979 was in effect.

[91] The inter-relationship between the Board's decision in *Newberry*[64] and the collective bargaining scheme implemented by *the CILRA*, 1979 was discussed by the Board in its decision in *International Union of Operating Engineers, Hoisting, Portable, & Stationary, Local 870 and K.A.C.R.*[65] ("K.A.C.R.") as follows:

> *The Newberry Energy decision was based on the assumption that union certifications in the construction industry proceed along craft lines and the purpose of that decision was to permit the Board to certify according to standard unit descriptions, leaving it to the unions to resolve their own jurisdictional disputes. This Board has for many years accepted as appropriate and as a matter of policy has certified craft units in the construction industry. That is not to say however, that the Board cannot do otherwise. It can and will, deviate from the standard craft unit description if, in special circumstances established by appropriate evidence, it should appropriately do so.*

[92] However, in K.A.C.R. the Board concluded at p. 42 that an "all employee" unit was not appropriate under *the CILRA*, 1979, notwithstanding that the "Board's discretion to determine the appropriateness or the unit applied for under Section 5(a) of *The Trade Union Act*

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[61] See Bill 80, *The Construction Industry Labour Relations Amendment Act, 2009* s. 5
[62] Supra Note 20
[63] LRB File No. 114-79
[64] Supra Note 20
[65] Supra Note 20 at p. 40

remains intact". In reaching that conclusion, the Board determined that it would "consider any relevant factor that may be relevant". Among those factors was "the spirit and intent of *The Construction Industry Labour Relations Act* and the scheme of collective bargaining which it contemplates".

[93] The Board in K.A.C.R. also went on to say:

> *The CILRA clearly contemplates province-wide collective bargaining between all unionized employers in a trade divisions and an established construction craft union, and certification by craft units corresponds with the Act's spirit and intent. Any other form of representation would be disruptive of the overall scheme of province-wide collective bargaining.*

[94] Following the repeal of *the CILRA*, 1979, the Board returned to its former practice and certified both "all employee" units and craft units within the construction industry. During that period, the Board did not directly, in its written decisions, directly deal with the repeal of the legislation. In *International Brotherhood of Boilermakers et al v. Tanar Lloydminster Maintenance Ltd. and Energy and Chemical Workers Union, Local 649*[66], the Board dealt peripherally with the issue of craft vs. "all employee" units, but made its decision on special circumstances which it found to exist, including the special bargaining relationship at the upgrader project through the Allied Council.

[95] The *CILRA* was re-enacted in 1992 and was effective as of September 22, 1992. As noted above, section 4 of the *Act*, as passed in 1992 directed the Board that it "be construed so as to implement bargaining collectively by trade on a province-wide basis between an employers' organization and a trade union with respect to a trade division". The Board dealt with *inter alia* the provisions of section 4 in its decision in *Emerald Oilfield Construction Ltd.*[67]

[96] In its decision, the Board considered the conflict between the rights granted to employees pursuant to s. 3 of the *Act* for employees to "organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing…" vs. the "narrow choice of employees in the construction industry".[68]

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[66] [1992] S.L.R.B.D. No. 1, LRB File Nos. 255-91, 267-91, 274-91 & 3030-91
[67] Supra Note 20
[68] Supra Note 20, at page 6.

[97] At pp. 5 & 6, the Board described the conflict in these terms:

> *Counsel for Canadian Iron, Steel and Industrial Workers Union argued that the Board should refrain from interpreting The Construction Industry Labour Relations Act, 1992 in a way which is inconsistent with the fundamental principles set out in The Trade Union Act. He referred specifically to Section 3 of the Act, which has often been acknowledged by this Board as the foundation stone of the rights created for employees by the statute:*
>
> *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purposes or bargaining collectively.*
>
> *He argued that to interpret The Construction Industry Labour Relations Act, 1992 in the way proposed by counsel for the three building trades would confer on the building trades a monopoly of bargaining rights for construction employees and would deny to those employees the freedom of choice which is provided for in Section 3 of The Trade Union Act. The narrow choice of employees in the construction industry would be to support one of the building trade unions or to forego bargaining altogether. The usual choice among a number of trade unions would be closed to them. Trade unions which do not already enjoy the status of those named in the designation Orders defining trade divisions would be unable to organize within the Province of Saskatchewan unless they are able to obtain such a designation themselves.*
>
> *This is in many ways a compelling argument. This Board has always regarded the rights of employees contained in section 3 as being of considerable significance as a guide to the approach which should be taken to the interpretation and application of The Trade Union Act. We agree that an interpretation of The Construction Industry Labour Relations Act, 1992 which would place limitations on the freedom of choice of employees should not be made lightly.*

[98] The Board then turned to the legislature's direction regarding how the *CILRA* was to be construed in s. 4. In particular, it noted "[I]t is important, however, to note that Section 4 refers not only to 'an employers organization' but also to a 'trade union' as the parties which are to take part in collective bargaining in a trade division".

[99] At p. 7, the Board concluded as follows:

> *There is a price to be paid for whatever stability and effectiveness is achieved by means of this new system. On the employer side, individual unionized contractors are relieved of the responsibility of securing an agreement with their own employees, but they are bound by the provisions of the agreements which are arrived at through a process in which their involvement may be limited and their control negligible.*

> *For employees the objective of The Construction Industry Labour Relations Act, 1992 is to provide greater stability for bargaining and to ensure that the power employees are able to exercise through the bargaining agents which represent them is sufficient to put them on an equal footing with the collective organizations representing unionized employers.*
>
> *In the case of employees, the price for this seems to be a loss of total freedom of choice with respect to representation by one of a range of trade unions. In our view, the intent underlying the Act is that one trade union is to be identified as the representative of employees in a particular trade division and that the scheme does not provide room for additional trade unions to participate in bargaining, with the possible exception of a circumstance where a designation Order provides for representation of employees by more than one trade union.*
>
> *We have come somewhat reluctantly to this conclusion, since it does seem to place limits on the rights created under Section 3 of The Trade Union Act. It is our view, however, that a careful reading of The Construction Industry Labour Relations Act, 1992 leads to this interpretation.*

[100] In this case, the Board refused to certify the applicant trade union, Canadian Iron, Steel and Industrial Workers Union, Local No. 3 because it was not one of the unions designated by the Minister of Labour to bargain on behalf of employees within a designated trade division.

[101] In *Central Mill Construction Ltd.*[69], the Board confirmed its interpretation of the *CILRA* found in *Emerald Oilfield Construction Ltd.* Furthermore, the Board specifically ruled in *Central Mills* that "all employee" or wall to wall bargaining units were not appropriate in the Construction sector under *the CILRA*[70].

[102] This was the state of the Board's jurisprudence until the passage of Bill 80 and its proclamation on July 1, 2010.

Analysis of the Provisions of Bill 80

[103] Consistent with the frequent direction of all levels of Courts in Canada, we begin our analysis of the provisions of the amendments to the *CILRA* contained in Bill 80, and the impact of those amendments on the scheme of the *CILRA* by considering the Supreme Court of Canada's instructions regarding construction of Statutes contained in *Rizzo & Rizzo Shoes Ltd. (RE:)*[71] where Mr. Justice Iacobucci adopted the statement of the underlying principle of

[69] Supra Note 20
[70] Supra Note 20 @ para 55 – 58.
[71] [1998] 1 S.C.R. 27

statutory construction formulated by Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

[104] At paragraph 36 of that decision, the Court directed that 'benefits-conferring legislation … ought to be interpreted in a broad and generous manner." The benefits of that broad and generous interpretation was also extended to labour legislation by Madam Justice Abella in her dissent in *Plourde v. Wal-Mart Canada Corp.*[72]

[105] That direction is also echoed by the provisions of *The Interpretation Act, 1995*[73]*.* Section 10 provides:

> *Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects.*

[106] The scheme of the *Act* prior to the enactment of Bill 80 was as described by the Board in *Emerald Oilfield Construction Ltd. and Central Mill Construction Ltd.*[74]*.* That scheme was that the only trade unions who were able to represent employees in the construction industry were those trade unions designated by the Minister pursuant to s. 9 of the *CILRA*. Employees could not be represented by any other union whether they chose that union or not. Those unions named by the Minister were given a monopoly on representation of workers in the construction industry.

[107] Secondly, under the *CILRA* before Bill 80, the Board had determined that all certifications in the construction industry had to be done on a craft by craft basis. "All employee" or wall to wall certifications were not permitted. However, as noted by the Board in *Emerald Oilfield Construction Ltd.*[75] the traditional freedom of choice granted to employees by s. 3 of the *Act* was limited by this imposed scheme of bargaining.

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[72] [2009] 3 S.C.R. 465, 2009 SCC 54 at para. 126
[73] S.S. 1995 c. I- 11.2
[74] Supra Note 20
[75] Supra at paragraph 108

[108] The *CILRA* was amended in a number of significant respects by Bill 80. Those amendments, which are germane to this application are the following:

1. A definition of "appropriate unit" was added;
2. Section 4 of the *Act* was repealed and a new provision substituted therefor;
3. Section 7 of the *Act* was repealed and a new provision substituted therefor;

[109] The most significant of these changes were the changes to ss, 4 and 7. For ease of reference, I have set out below the previous provisions and the provisions substituted therefor.

4 *This Act shall be construed so as to implement bargaining collectively by trade on a province-wide basis between an employers' organization and a trade union with respect to a trade division.*		***4****(1) Subject to subsections (2) and (3), the purpose of this Act is to permit a system of collective bargaining in the construction industry to be conducted by trade on a province-wide basis between an employers' organization and a trade union with respect to a trade division.* *(2) Nothing in this Act:* *(a) precludes a trade union from seeking an order pursuant to clause 5(a), (b) or (c) of The Trade Union Act for an appropriate unit consisting of:* *(i) employees of an employer in more than one trade or craft; or* *(ii) all employees of an employer; or* *(b) limits the right to obtain an order pursuant to clause 5(a), (b) or (c) of The Trade Union Act in the construction industry to those trade unions that are referred to in a determination made by the minister pursuant to section 9.* *(3) In exercising its powers pursuant to clause 5(a) of The Trade Union Act, the board shall make no presumption that a craft unit is a more appropriate unit in the construction industry than any other form of appropriate unit.* *(4) This Act does not apply to an employer and a trade union with respect to an order mentioned in clause (2)(a) or (b).* *(5) If, after the coming into force of this*

		section, a unionized employer becomes subject to an order mentioned in clause (2)(a) or (b) with respect to its employees, the employer is no longer governed by this Act.
7 Where a trade union applies pursuant to The Trade Union Act for certification as the bargaining agent of the employees of an employer in the construction industry, the board shall determine the unit of employees that is appropriate for collective bargaining by reference to the geographical jurisdiction of the trade union applying, and the board shall not confine the unit to a particular project.		***7** If a trade union applies pursuant to The Trade Union Act for certification as the bargaining agent of the employees of an employer in the construction industry, the board shall determine the appropriate unit of employees by reference to whatever factors the board considers relevant to the application, including:* *(a) the geographical jurisdiction of the trade union making the application; and* *(b) whether the appropriate unit should or should not be confined to a particular project.*

[110] Section 4 no longer provides the direction to the Board described by the Board in *Emerald Oilfield Construction Ltd.*[76], and now provides that the "system of collective bargaining in the construction industry to be conducted by trade on a province-wide basis" is subject to new provisions inserted in the *CILRA* as subsections 4(2) and 4(3). This section, while preserving the previous scheme for collective bargaining under the *CILRA* allows unions who are not designated by the Minister under s. 9 to seek to represent employees in the construction industry by obtaining certification under the *Act* with respect to:

(i) employees of an employer in more than one trade or craft; or
(ii) all employees of an employer.

[111] Furthermore, subsection (3) provides that the Board is to make "no presumption that a craft unit is a more appropriate unit in the construction industry than any other form of appropriate unit". Subsection (4) then makes the provisions of the *CILRA* inapplicable with respect to any employer or trade union which is the subject of an order of the Board pursuant to subsection 2(a) or (b). Subsection (5) again makes it clear that an employer who becomes

[76] Supra Note 20

subject to an order under subsection 2(a) or (b) with respect to its employees, then that employer is no longer governed by the *CILRA*.

[112] The amendments to section 7 allow the Board greater latitude in determining the appropriate unit of employees. The Board is now permitted to determine the appropriate unit of employees "by reference to whatever factors the board considers relevant to the application". Those factors may include the "geographical jurisdiction of the trade union" making the application, as in the repealed provision and "whether or not the appropriate unit should or should not be confined to a particular project."

[113] We were urged by the Applicant's counsel and the counsel for the Employer to refer to Hansard[77] and a backgrounder[78] provided when the Bill was introduced as an extrinsic aid to the interpretation of the amended provisions and as a guide to the legislature's intent in passing the amendments. While open to us to do so[79], we respect, we do not think it necessary to do so. The wording of the amended provisions are clear and unambiguous and therefore, we believe it is unnecessary to make reference to any extrinsic evidence of the intention of the legislature in passing the amended provisions.

[114] Apart from counsel for the Carpenters alleging that somehow s. 7 of the *Act* conflicted with the other provisions of the *Act*, there was no other submission that the amended provisions were ambiguous or unclear in any way. What was at issue between the parties was whether or not the amendments had the effect of changing the scheme of the *CILRA* so as to allow for non section 9 designated unions to be eligible to certify employees in the construction field. Clearly, that is what the legislature intended and that is what the amendments do.

[115] The monopoly enjoyed by the section 9 designated unions in the construction field has been modified. The act and the scheme of bargaining under *the CILRA* continues as before between section 9 designated unions and section 10 designated employer associations. However, a new option has been introduced to allow employees to be represented by unions not designated by the Minister and to allow other than craft bargaining units as appropriate units in the construction industry.

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[77] Supra Note 14
[78] See Exhibit E-1, page 1
[79] See R. v. Morgentaler [1993] S.C.J. No 95, 3 S.C.R. 463, 107 D.L.R. (4th) 537, 85 C.C.C. (3d) 118 and S.F.L. v. Government of Saskatchewan 2010 SKCA 27 at para. 55.

[116] These amendments go to resolving the conflict felt by the Board as expressed by former Chairperson Bilson in *Emerald Oilfield Construction Ltd.*[80] wherein she recognized that there was a price to be paid by employees under the *CILRA*, which was "a loss of total freedom of choice with respect to representation by one of a range of unions". Employees now have the choice of being represented in a craft unit through a section 9 designated union or through a non designated union in and appropriate unit.

[117] These amended provisions also effectively overturn the Board's decision in *Central Mills Construction Ltd.* as they would now, allow for a union such as the Applicant in that case to seek certification under the Act on behalf of employees.

The Appropriate Unit:

[118] While there was agreement between the Applicant and the Employer as to the appropriate unit of employees for collective bargaining, this agreement was not shared by either counsel on behalf of the Carpenters or counsel on behalf of the Bricklayers. Both the Applicant and the Employer took the view that the appropriate unit was an "all employee" unit, while Mr. Plaxton on behalf of the Carpenters took the view that a craft designation remained appropriate, but the unit applied for was under inclusive. Mr. Aiken on behalf of the Bricklayers, took the view that this was a "Noah's Ark" certification and the certification, if allowed, should be limited to the employees found by the Union on that site and should not be extended to any new employees or trades that may come to be employed.

[119] With respect to the geographic scope of the unit, the Applicant and the Employer argued in favour of a province-wide certification and the Intervenors argued that the geographic scope should be limited to being site specific.

[120] By section 4(3) of the *CILRA* (as amended), the Board is instructed that it "shall make no presumption that a craft unit is a more appropriate unit in the construction industry than any other form of appropriate unit". This provision does not preclude the Board determining that a craft unit is an appropriate unit. Nor does it require the Board to favour any particular form of unit.

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[80] Supra Note 20

[121] The British Columbia Industrial Relations Council discussed the concept of what constitutes an appropriate bargaining unit in the construction industry in *Cicuto & Sons Contractors Ltd.*[81]. While care must be taken when considering jurisprudence from other jurisdictions where the legislative scheme under consideration may be different than the scheme under consideration in this case, the principles and analysis done by the Council in this decision is compelling.

[122] Beginning at page 21, the Board began its analysis of the concept of an appropriate unit. It says in the final paragraph on that page:

> *An "appropriate bargaining unit is a dynamic notion and we reject any proposition that what was an appropriate unit in the past in the construction industry is necessarily still appropriate. Among the many forms of bargaining unit descriptions that have been drawn and redrawn, perhaps the most constant is the "all employee" version. While we disagree with the proposition that it is the "perfect" unit, long experience has shown that it is the form which is the best vehicle through which to deliver the objectives of the Act. Anything less than a broad-based all employee unit is a compromise which requires drawing much finer distinctions between competing interests.*

[123] We endorse these remarks and find them appropriate given the changes to the scheme of collective bargaining in Saskatchewan enacted through Bill 80. We do not endorse the arguments of counsel for the Employer that an "all employee" unit is the "gold standard" by which all other units are to be judged. Rather, we concur with the B.C. council that an "all employee" unit, along with larger rather than smaller units can often be the best vehicle to deliver the objectives of the *Act*.

[124] The B.C. Council, at page 22, also endorsed the craft bargaining unit as an appropriate unit, recognizing it to be "an extraordinary form of unit which is specifically recognized in the *Act*", as it is in our *Act*.[82]. The Council also recognized, as our Board has, that craft units have been appropriate in the construction industry.

[125] In its analysis of the question, [I]s there any reason why the Council should not grant all employee units in construction, or should limit their application in some way?, the

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[81] Supra Note 16

Council formed a representative description[83] of the construction industry at pp. 22 & 23 as follows:

> *Construction projects are largely custom made on location. This mode of production determines the operational patterns of construction firms, the organization of workers and the structure of collective bargaining....*
>
> *On-site production requires a high degree of specialization. The coordination of the work on a project is usually the responsibility of a general contractor, who typically subcontracts most of the work to firms engaged in one of more than twenty trades. Some trades are further divided into specialties. Trade contractors marginally outnumber general contractors, but are smaller in size. General contractors work usually throughout a province or region and occasionally nation-wide, but firms engaged in trade work more often restrict their operations to a metropolitan area. A few specialty firms which require expensive equipment or serve a widely dispersed clientele operate throughout the country.*
>
> *Competition among contractors is intense. The bidding system lends itself to stiff rivalry; because of the differentiated nature of the product, quality of service is a significant factor in the competition. Cyclical instability, with swings of twice the magnitude that exist in manufacturing industry, compounds the financial difficulties of construction firms; profits fluctuate wildly.*
>
> *Construction is a labour-intensive industry, with a wage bill one-third larger in relation to total costs than that of the economy generally. The skills of construction workers closely correspond to the lines of contractor specialization. General contractors normally hire labourers, carpenters, operating engineers and members of one or two other trades, whereas subcontractors generally employ only a single trade. The majority of contractors engage fewer than fifteen workers.*
>
> *Trade unions have been established institutions in this sector of the building industry for three-quarters of a century. The difficulty of replacing skilled tradesmen, the financial weakness of small employers, and the limited geographical scope of product markets fostered organization....*
>
> *Job crews are formed and liquidated as the employer begins and completes projects. Workmen are generally hired for a single project; only a nucleus of key personnel enjoy permanent employment Employers are generally obliged to engage only union members, referred by the union hiring halls. The unions act as employment agencies aiding workers in their moves from job to job. In this way the craft unions permit flexible employment relationships while minimizing instability in the labour market as a whole....*
>
> *There are significant differences among contractors and workers engaged in the various trades, especially between the firms performing mechanical work and those engaged in more basic tasks. Within the mechanical group fall plumbing, electrical, sheet metal, boiler, insulation, and elevator work. The basic trades include carpentry, bricklaying, masonry, painting, plastering, and excavation operations. In recent years, the mechanical crafts, particularly the plumbing and electrical trades, have enjoyed by far the most rapid growth in work, while demand in some of the basic trades has actually dropped. The work of many of*

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[82] *The Trade Union Act, R.S.S. 1978* c. T-17, s. 5(a)

[83] This excerpt was taken by the Council from Brown, *The Reform of the Bargaining Structure in the Canadian Construction Industry (*1979), 3 Industrial Relations Law Journal 539 at pp. 541-44

> *the basic trades is twice as labour-intensive as the jobs performed by the mechanical group. Wages constitute a particularly small share of the total costs of plumbing, electrical, and a few specialty crafts. Since mechanical work requires great skill, workers in those trades must complete lengthy apprenticeship programs. Finally, the extent of union organization is almost fifty per cent greater among the highly skilled trades than in the basic crafts.*

[126] Apart from some of the statistical references in the piece, this description of the construction industry, while not totally complete, is nonetheless accurate even some 30 years later. There have, of course, been technological advancements over the years which have produced jurisdictional tensions in some areas, but the description of how the industry is organized remains appropriate.

[127] However, the pressures faced by the construction industry in British Columbia described by the Council in 1988 as being a "contraction of its markets; changes in methods and materials; savage competitive pressures; and the ascendancy of the non union sector as not as accurate. The industry in Saskatchewan at present however faces some of the issues described by the Council, those being a rise in the non union sector and changes in methods and materials. While competition in Saskatchewan remains strong, there is also a strong demand for construction in the province, a condition which the Construction Sector Council expects will moderate after 2012 with the completion of known major projects.[84] Similarly, there is a strong demand for trades people as well as entrants into the apprenticeship programs. However, some trades are experiencing greater difficulty than others in securing apprenticeships.[85]

[128] At p. 25, the Council identified 8 factors to be considered in determining the appropriateness of proposed bargaining units in construction. Those factors which they identified as appropriate for British Columbia are set out in bold below:

1. The use of standardized craft bargaining unit descriptions continues to be appropriate

[129] As noted above, this factor is also applicable in Saskatchewan under the amended provisions of *the CILRA*.

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[84] Construction Looking Forward, Saskatchewan 2010 - 2018, Construction Sector Council
[85] Construction Looking Forward, Saskatchewan 2010 - 2018, Construction Sector Council, Table 6

2. The freedom of choice of workers is not in itself determinative when assessing the appropriateness of a bargaining unit, whether the proposed unit is craft or all employee in character.

[130] This factor is also applicable in Saskatchewan. The Board has always considered many other factors with respect to appropriateness of a unit, including those outlined in its decisions. However, *Cicuto* was decided prior to the Supreme Court of Canada decision in *Health Services and Support – Facilities Subsector Bargaining Assoc. v. British Columbia*[86] which may mitigate towards this factor having greater weight. However, as noted above, the amendments to the *CILRA* tend, in our opinion, towards greater availability of choice of bargaining agent by employees and reduce the price paid by employees for sectoral bargaining under *the CILRA*.

3. The considerations behind the preference for large integrated bargaining units are present in the construction setting, but they must be tempered with other considerations which are unique in the construction sector

[131] The Council noted that while size is important, even in the construction industry, "it is only one of many considerations and it is not an immutable law".[87] This is equally true in Saskatchewan where large units are preferred, but that preference must be tempered by other equally important considerations in the context of choosing an appropriate unit.

[132] The fourth factor, being the impact of non-affiliation clauses is not of particular moment to the Board. Similarly it was only a factor which the B.C. Council wished to monitor to determine their effects on industrial stability in the Province.

4. Craft unions are not precluded from participation in the representation of construction workers by means of all employee bargaining units.

[133] This fifth factor is also available to craft unions in Saskatchewan under the amended *the CILRA*, even if those unions are designated by the Minister under section 9 of the *CILRA* from seeking an order of the Board under section 4 with respect to a unit comprised of "more than one trade or craft" or for an "all employee" unit. However, without making a determination on this point because it is not before us, nor was the question argued, it would appear that any applications by a designated union for the employee group for which it is

[86] [2007] 2 S.C.R. 391, 2007 SCC 27
[87] Supra Note 16 at p. 25

designated could not be made under s. 4, but must be made in accordance with the other provisions of *the CILRA*.

5. The Council will consider the application of the build-up principle when assessing the appropriateness of all employee units in construction.

[134] The Saskatchewan Board has only rarely considered the build up principle. In K.A.C.R[88]., the Board made the following comments regarding this principle, referencing in support of the statement *International Union of Operating Engineers Local 955 and Devon Sand and Gravel Ltd*[89].:

> *It is only rarely that the buildup principle has been applied in the construction industry by any jurisdiction in Canada …. The reason for that is clearly because the fluctuating nature of the work force as opposed to a rapidly expanding but relatively permanent work force in an industrial setting.*

6. When considering applications for certification from generic unions, the focus for the Council is on the appropriateness of a proposed bargaining unit; not on the appropriateness of the applicant union

[135] In its rational for this consideration, the Council took the view that "there are no compelling reasons arising out of labour relations considerations, for limiting workers in construction to choose only craft unions to represent them". With the focus on "employee choice" of their bargaining agent, notwithstanding item 2 above, where a unit is otherwise appropriate, employee choice would normally be respected by the Board notwithstanding that the employees have chosen to be represented by a non-traditional craft union, or another craft union. This is particularly true now that the *Act* has been amended to require secret ballot votes on applications for certification, which allows employees to support or withhold their support for an applicant union based upon their personal beliefs when casting their ballot.

7. In relation to voluntary recognition, arrangements involving employees in the construction setting, union, generic or craft, should not assume that Council will continue to sanction top-down organizing as has been done in the past.

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[88] Supra Note 20 at p. 42
[89] [1979] 3 Can L.R.B.R. 326

[136] This caution is appropriate in the Saskatchewan context as well. Under the previous scheme under the *CILRA*, it was often more convenient for trades to operate under the banner of a voluntary recognition and work under the provincially negotiated contract than to go to the trouble and expense of organizing the work site and applying for certification. Similarly, contractors with an existing relationship with a non-craft union in another province may, as in this case, enter into a voluntary recognition agreement and, as here, negotiate a collective agreement on behalf of the employees. As noted by the B.C. Council, the Board "must be satisfied that proper and adequate processes are employed to ensure that the democratic rights of workers affected by voluntary recognition arrangements are preserved and protected. Nothing less will be acceptable".

[137] In this case, we have evidence from Mr. Josh Coles that after the Union was voluntarily recognized by the Employer, they began to negotiate a collective agreement. The initial agreement which they proposed to the membership was not accepted and they returned to negotiations and were able to achieve the agreement which was finally ratified by the employees. Additionally, as noted above, the Board has supervised a vote, of all employees eligible to vote, as determined by the Board, by secret ballot. Employees have the choice of supporting the proposed union as their bargaining agent or withholding their support.

[138] After analyzing the factors noted above, the Council in *Cicuto* concluded that an "all employee" bargaining unit is appropriate in the Construction industry.

[139] Following the rational of the B.C. Council in *Cicuto*, and upon review of the amendments to *the CILRA*, we conclude that an "all employee" unit is an appropriate unit within the construction industry in Saskatchewan.

The Appropriate Unit in this Case:

[140] We are directed by section 4(3) of the *CILRA* that "the Board shall make no presumption that a craft unit is a more appropriate unit in the construction industry than any other form of appropriate unit". That interdiction does not, however, prescribe that a craft unit could not be the most appropriate unit in the construction industry. What that provisions directs is that, notwithstanding the Board's previous preference for craft units in the construction industry, the

Board must take a clean slate approach to its determination of the appropriate unit for collective bargaining.

[141] The Board recently undertook a review of its jurisprudence regarding the choice of an appropriate unit in *Ranch Ehrlo Society (Re:)*[90]. That case reviewed previous jurisprudence of the Board, including the very comprehensive review of the Board's past decisions in *Graphic Communications International Union, Local 75M v. Sterling Newspapers Group, A Division of Hollinger Inc.*[91]

[142] Mr. Plaxton argued that the unit applied for was under inclusive insofar as there was no reference to any possible administrative or clerical employees in the union. The Board in *Ranch Ehrlo*[92] distilled 5 factors to consider to determine if a proposed unit, being under inclusive, will not be an appropriate unit.

[143] The factors identified by the Board were:

1. there is no discrete skills or other boundary surrounding the unit that easily separates it from other employees;
2. there is an intermingling between the proposed unit and other employees;
3. there is a lack of bargaining strength in the proposed unit;
4. there is a realistic ability on the part of the Union to organize a more inclusive unit; or
5. there exists a more inclusive choice of bargaining units.

[144] These factors are no impediment to the proposed unit being appropriate. There are discrete skill, those being all employees who are employees of the Employer, except for office, sales managers and supervisors. We submit that there would not be as sufficient community of interest between the construction workers employed at the job site and administrative employees employed as described above so as to make the unit inappropriate.

[145] While there may be co-mingling with other employees (i.e. office and administrative employees) on the job site, again, if that occurred, it would, we submit be co-

[90] [2008] S.L.R.B.R. No 36, 161 C.L.R.B.R. (2d) 165, LRB File No. 108-07
[91] [1998] Sask L.R.B.R. 770, LRB File No. 174-98

incidental and again their would be limited community of interest between the two groups. Mr. Plaxton did not suggest that these administrative employees would don hard hats and boots and join their fellow employees in the construction project.

[146] There is no lack of bargaining strength. This was evident from the rejection of the initially proposed collective agreement and the return by the Union to negotiations on behalf of its members.

[147] While it is conceivable that the Union could organize the office employees as a part of the group, the Board has on many occasions certified groups of production employees in, for example, a industrial plant, but excluded administrative staff.

[148] As noted above, there could be a more inclusive group which included office and sales staff, however, as noted above, the Board has often found such inclusion within the appropriate unit to be unnecessary. As noted by the Board in *Canadian Blood Services (Re:)*[93]*:*

> *20 While it is likely beyond dispute that the most inclusive and therefore most appropriate unit would be an all employee unit of non nursing staff that is simply not the test on an application for certification. The Board is not to choose the most ideal or more appropriate unit, but rather determine whether the unit applied for is an appropriate one.*

[149] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores (a division of Westfair Foods Ltd.)*[94] the Board summarized the test for determining the appropriateness of a bargaining unit in the following terms:

> *This does not mean that large is synonymous with appropriate. Whenever the appropriateness of a unit is in issue, whether large or small, the Board must examine a number of factors assigning weight to each as circumstances require. There is no single test that can be applied. Those factors include among others: whether the proposed unit of employees will be able to carry on a viable collective bargaining relationship with the employer; the community of interest shared by the employees in the proposed unit; organizational difficulties in particular industries; the promotion of industrial stability; the wishes or agreement of the parties; the organizational structure of the employer and the effect that the proposed unit will have upon the employer's operations; and the historical patterns of organization in the industry.*

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[92] Supra Note 90 at para 99 et seq.
[93] [2008] S.L.R.B.D. No. 10, LRB. File No. 030-08 at para 20
[94] [1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89 at 66

> *The Board recognizes that there may be a number of different units of employees which are appropriate for collective bargaining in any particular industry. As a result, on initial certification applications a bargaining unit containing only one store may be found appropriate. That finding does not rule out the existence of other appropriate units and, accordingly, on a consolidation application, a larger unit may be found appropriate. There is no inconsistency between the initial determination of a single store unit with a municipal geographic boundary and a subsequent determination that a larger unit is appropriate.*

[150] Applying the factors identified in *O.K. Economy*, *supra*, the Board is satisfied that, a unit comprised of "all employees of J.V.D. Mill Services Inc. except office, sales managers, and supervisors" is an appropriate unit of employees for the purposes of bargaining collectively. We will comment later with respect to the geographic scope of the unit.

[151] Our conclusion with respect to the appropriateness of the unit is supported by analysis of the factors in *O.K. Economy, supra.* The first factor is community of interest. As noted above, there is a strong community of interest amongst all construction employees of an employer and limited community of interest between that group and the excluded employees (office, sales managers and supervisors).

[152] The unit is viable as shown by its success in negotiating a collective agreement with the Employer. It is a significant size (205 employees at the date of the hearing).

[153] The Employer's organizational structure is not particularly germane in this analysis, but the Employer cited administrative efficiencies in dealing with one union versus a multiplicity of unions through the usual the *CILRA* bargaining structures. In reality, however, apart from direct negotiations with the Employer, there is little difference when viewed from the employees' perspective.

[154] The historical patterns of organizing do not tend toward this unit, simply because of the scheme of collective bargaining implemented by both the *CILRA*, 1979 and the *CILRA*. However, by the amendments made through Bill 80, to the *CILRA*, the legislature has signaled that the preference for craft certifications in the construction industry should not be a factor in the Board's choice of an appropriate unit.

[155] In conclusion with respect to this segment, I would like to cite with approval, the comments of the B.C. Council in *Cicuto* at page 33:

> *…the applicants argued at some length that the spread of generic unions and all employee units in construction would destabilize labour relations in the industry on the scale of chaos, and in particular would bring about a return of the former jurisdictional disputes which plagued the industry years ago. …We are confident that the Council can cope with any problems that may arise.*
>
> *…the applicants directed many comments at the inappropriateness of allowing generic unions to intrude into the realm of representation of craft workers, including contentions that generic unions could not advance the interests of particular crafts and provide balanced representation. History may demonstrate that the Applicants were wisely prophetic, but from our present vantage point, we can only consider their contentions to be speculative. In any event, if all employee units continue to spread and the generic unions fail to adequately represent the workers in construction, there are two predictable consequences. First, no doubt the matter will come before the Council in the form of evidence of the shortfall in the performance of generic unions. This may bring the Council to add further considerations when determining the appropriateness of all employee units. Secondly, workers in construction will again reconsider their options in selecting or changing bargaining agents.*

[156] So far as we are aware, there has been no cataclysmic destabilization of the construction industry in British Columbia since the adoption of *Cicuto*. Rather, the principles enunciated in *Cicuto* have been applied consistently in British Columbia since that decision.

[157] However, if the events which are foretold by the Intervenors in this case as to the chaos which may ensue, or the generic unions fail to properly represent the employees for whom they have been certified to represent, the options set out by the Council with respect to the expected outcomes in British Columbia are equally available under the *Act* in Saskatchewan.

The Geographic Scope of the Unit:

[158] The Applicant has applied for a province-wide bargaining unit which is the norm in the construction industry. However, the Intervenors say that this would be inappropriate in the circumstances since it would deny the s. 3 rights of future employees to choose a bargaining agent at other future projects which the Employer may become engaged with.

[159] In answer to the Intervenors' concerns, both the Applicant and the Employer cited the Supreme Court of Canada decision in *Terra Nova Motor Inn Ltd.*[95]. In *Saskatoon Civic*

[95] *Supra* Note 18

Middle Management Assn. (Re:)[96], the Board considered comments made in *S.G.E.U. v. Saskatchewan Liquor and Gaming Authority*[97].

> *[41] In Sherwood Co-operative Association Limited, this Board found that no check of union support was required if the orders requested are "orders of the same general scope and nature". In our view, this position is consistent with the normal operation of an "all employee" bargaining unit which can include new groups of employees without testing employee support either in the group to be added or overall in the bargaining unit.*
>
> *…*
>
> *[44] As discussed above, "all employee" orders also capture new positions and new employees and are not restricted to those positions which existed at the time the order was issued, not to those employees who were then employed: see Terra Nova Motor Inn Ltd., supra. In most bargaining units, employees change frequently. New employees are hired, new classifications are added by the employer, new managerial classifications are created, and the like. However, these changes do not result in the creation of a "new" bargaining unit. It remains in the same form that was described in the original order, that is, as an "all employee" unit.*

[160] The rights regarding an "all employee" unit referenced above are equally applicable to the standard craft units which were prescribed by the Board in *Newberry*[98]. The benefit of a province-wide certification to a craft unit (or as restricted by the jurisdiction of the particular local of that craft union) has been enjoyed by those crafts certified by the Board since Newberry and it has been found to be effective.

[161] The geographic scope of a certification Order was considered by the Board recently in *Teamsters Local Union No. 395 v. Cal-Gas Inc.*[99]. In that case, the arguments against a province-wide certification were similar to those advanced in this case. After consideration of the cases cited to it, including *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc.*[100], the Board determined that a province-wide certification was appropriate.

[162] In the *Cal-Gas, supra,* case the Board commented as follows at paragraph 23:

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[96] *Supra* Note 19 at para 41
[97] [2001] Sask. L.R.B.R. 152, LRB File No. 037-95
[98] *Supra* Note 20
[99] LRB File No. 135-10
[100] [1996] Sask. L.R.B.R. 27, LRB File No. 274-95 & 275-95

> *For the reasons which follow, the Board agrees that a province-wide unit is appropriate in this case. However, this decision should not be considered as establishing an ongoing exception for certifications in the trucking industry. Determination of the appropriate scope (in geographic terms) for a bargaining unit is within the Board's discretion and will be determined by the Board based upon the facts in each case.*

[163] In this case, we have evidence that the Employer formerly engaged employees at a site near the potash mine at Esterhazy, Saskatchewan, but was currently operating only near the Belle Plaine, Saskatchewan potash mine. The Employer's evidence was that they continued to seek additional work in Saskatchewan.

[164] The *CILRA* adopted in s. 7 a recommendation of the Construction Industry Advisory Committee. That connection was noted by the Board in its decision in *Marquardt Mechanical Ltd.*[101] as follows:

> *... In the report presented by the Construction Industry Advisory Committee, a body whose recommendations are fairly clearly echoed in the Construction Industry Labour Relations Act, 1992, the Committee concluded that "both bargaining and certification should occur on a province-wide basis." The relevant draft provision which they recommended for inclusion in the stature read as follows:*
>
> > *4(2) Where a trade union applied for certification as bargaining agent of the employees of an employer, the board shall determine the unit of employees that is appropriate for collective bargaining by reference to the geographical jurisdiction of the trade union applying and it shall not confine the unit to a particular project.*

[165] This recommended provision was similar to section 7 of the *CILRA* prior to its amendment by Bill 80. As a result, the Board has been directed regarding the geographic scope of its Orders in the construction industry prior to Bill 80.

[166] However, as noted by Mr. Plaxton in his argument, there is an anomaly between section 7 and section 4(4) of the *CILRA* following the amendments by Bill 80. Should the Board be governed by section 7 in its determination of the geographic scope of the certification Order, or are those strictures no longer applicable given that section 4(4) makes the *CILRA* inapplicable to orders made under clause 2(a) or (b)?

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[101] *Supra* Note 10 at p. 4

[167] The answer to that question is resolved by reviewing the words of the *Act* "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act* and the intention of Parliament."[102] There is less ambiguity than there would seem at first blush. Section 4 provides for a "opt out" from the *CILRA*. Once that "opt out" is effective, then the provisions of the *CILRA* no longer applies with respect to that Order and the usual provisions of the *Act* prevail.

[168] Section 7 dovetails with that provision and speaks to applications under the *Act* to represent "employees of in the construction industry." That would include an application under s. 4, since all certification applications under the *CILRA* are, in reality, made under the *Act*. In determining those applications, the instructions contained in s. 7 must be regarded. However, once an Order is made by the Board, ss. 4(4) of the *CILRA* then makes the *CILRA* inapplicable with respect to that Order.

[169] In *Marquart Mechanical,*[103] the Board expressed the view that the provisions of s. 7 were to restrict the Board in its recognition of project agreements. Notwithstanding the correctness of that view, the section has now been amended to provide additional latitude to the Board in determining the geographical scope of the Order, including making an Order confining the certification to a particular project.

[170] Certification to the particular project in which the employees were engaged was a fall back position of the Intervenors. They took the view that by confining the certification to the particular project, again, the rights of future employees to choose a bargaining representative would be enhanced in keeping with s. 3 of the *Act*.

[171] In *Raider Industries*[104] the Board was reconsidering an earlier decision to confine the scope of a certification Order to a plant operated by the Employer in Drinkwater. When the Employer opened a new plant in Moose Jaw, the Board originally considered them to be separate entities and refused to include the Moose Jaw plant within the scope of the certification for the Drinkwater plant.

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[102] *Supra* Note 71
[103] *Supra* Note 10 at p. 5
[104] *Supra* Note 100 at

[172] On reconsideration, the Board determined that it had erred in its earlier determination and amended the certification order to include the Moose Jaw plant. In doing so, the Board ruminated how its discretion in formulating a bargaining unit in geographic terms. It discussed a number of the Board's earlier decisions regarding geographic scope, recognizing that "apart from bargaining units in the construction industry …the geographic area in bargaining unit descriptions should not ignore the actual scope of an employer's operations."[105]

[173] At page 34 of *Raider Industries*, *supra*, the Board made the following comments:

> *In delineating bargaining units the Board has often commented on our responsibility to ensure that the bargaining units which are created under our auspices are appropriate as vehicles for carrying out the policy objectives of The Trade Union Act. Counsel for the Employer suggested that there was nothing in the changes which have occurred which would render the continued existence of a separate unit at Drinkwater inappropriate, and we would have to agree with this; if this were the only choice available, there is no question that the Board would be reluctant to deny access to collective bargaining to the remaining employees at Drinkwater.*
>
> *As the Board has pointed out in the past, however, it is part of our responsibility to consider not only whether a proposed unit is an appropriate one, but whether there is a more appropriate way of defining the bargaining unit, one which will be more in keeping with the goals of the Act.*

[174] These considerations must also guide the Board in its determination of the geographic scope of this bargaining unit. Clearly, limiting the scope of the certification to the current job site could be considered appropriate. However, with respect, we do not believe that limiting the scope of the order in so narrow a fashion best achieves the goals of the *Act*.

[175] Province-wide bargaining has been the norm in the construction industry for many years now. Employees are accustomed to being able to move freely throughout the province without regard to changes that may occur in the nature of their bargaining relationship by virtue of a change in the location of their employment in the Province. It also allows employers to know with some certainty the terms on which they may tender for work throughout the Province and understand the various costs for manpower resultant therefrom.

[176] There is no compelling argument to confine this certification as suggested by the Intervenors. Certifications under the *CILRA* are generally province-wide and contracts

[105] *United Steelworkers of America v. Industrial Welding (1975) Ltd.*, [1986] February Sask. Labour Rep.

negotiated are similarly province-wide. Employees who are members of the Intervenor Unions have the benefits of province-wide mobility and stability in their employment situation. Construction workers in a non-trade union should enjoy that same mobility and stability of employment situation.

[177] For these reasons, subject to approval by the employees, by their secret ballot vote, the application is allowed. The Board hereby directs that the ballots of the employees be counted by the Board Agent and the results of that vote be made known to the parties and *in camera* to the Board for an appropriate Order to be made.

[178] Board Member, Gloria Cymbalisty, dissents from these Reasons for the attached reasons.

DATED at Regina, Saskatchewan, this **10th** day of **January, 2011.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

DISSENT

In my time as an employee representative on the Labour Relations Board, I have learned that in exploring the immediate issue before us, there may be on occasion the proverbial ‘smoking gun’. This is the first decision under the new legislation known as “Bill 80”. In this case, there is no secret. It is public knowledge that Bill 80 was introduced to welcome CLAC into Saskatchewan. There are a large number of outstanding CLAC cases before this Board which will be affected by our decision and it is my belief that this should matter in framing our decision.

The Board has the jurisdiction to issue a certification order for an appropriate unit. I take guidance from the legislation which includes the power of the Board to issue a craft unit certification. The history of our province has favoured and recognized that in the construction sector in particular, the public has been well served by the trade certification units reflected in *Newberry*. Since the Board has jurisdiction to exercise discretion to preserve such units, I would have chosen to do so.

In my view, the evidence was not sufficient to persuade me that the Board should alter, or begin to alter, the history of union organization in the Saskatchewan construction industry. It must be remembered that the evidence, such as it was, was untested by cross-examination by any person or party with a viewpoint opposed to the similar, if not identical, positions advocated by the applicant and the employer.