The Labour Relations Board
Saskatchewan

CONSTRUCTION WORKERS UNION (CLAC), LOCAL 151, Applicant v. TERCON INDUSTRIAL WORKS LTD., WESTWOOD ELECTRIC LTD., CANONBIE CONTRACTING LTD., WILBROS CONSTRUCTION SERVICES (CANADA) L.P., and PYRAMID CORPORATION, Respondent Employers

and

SASKATCHEWAN REGIONAL COUNCIL OF CARPENTERS, DRYWALL, MILLWRIGHTS AND ALLIED WORKERS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529, SASKATCHEWAN PROVINCIAL BUILDING TRADES COUNCIL, SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, LOCAL 1975, and LOCAL 01 SASKATCHEWAN OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS and the INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTWORKERS (BAC), Proposed Intervenors.

LRB File Nos. 097-10, 098-10, 116-10, 117-10 & 134-10; January 17, 2012
Vice-Chairperson, Steven Schiefner; Members: Mr. Jim Holmes and Mr. Mick Grainger

For the Applicant Union:	Mr. Richard F. Steele and Mr. David A. deGroot.
For the Respondent Employers,	
Tercon Industrial and Westwood Electric:	Mr. Larry F. Seiferling, Q.C. and Ms. Angela Giroux.
Canonbie Contracting and Willbros Construction:	Mr. Thomas W. R. Ross.
Pyramid Corporation:	Mr. Joseph H. Hunder.
For the Proposed Intervenors,	
Carpenters/Millwrights, IBEW, Local 529 and Bricklayers:	Mr. Drew Plaxton.
RWDSU and Provincial Building Trades Council:	Mr. Larry Kowalchuk.
S.G.E.U.:	Ms. Juliana Saxberg.

Practice and Procedure – Intervenor Status – Proposed intervenors seek standing to intervene in certification applications of another – Proposed intervenors represent various trade unions and a building trade council – Board determines that proposed intervenors do not have direct interest in proceedings – Board not satisfied that circumstances exist sufficient for granting exceptional intervenors status – Board determines that none of the issues that proposed intervenors wish to advance involve questions of public law for which the Board requires assistance or which have not already been determined by this Board – Intervenors standing denied.

The Trade Union Act, s. 19.

REASONS FOR DECISION – PROCEDURAL MATTERS

[1] **Steven D. Schiefner, Vice-Chairperson**: The Construction Workers Union (CLAC), Local 151 (hereinafter "CLAC") applied to the Saskatchewan Labour Relations Board (the "Board") to become the certified bargaining agent pursuant to *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*") to represent units of employees involving five (5) different employers in Saskatchewan.[1] The five (5) respondent employers sought to be certified by CLAC are Tercon Industrial Works Ltd. ("Tercon"), Westwood Electric Ltd. ("Westwood"), Canonbie Contracting Ltd. ("Canonbie"), Wilbros Construction Services (Canada) L.P. ("Wilbros") and Pyramid Corporation ("Pyramid"). Each of the respondent employers is an employer of employees in the construction industry in Saskatchewan.

[2] Commonly believing that it is not appropriate for the Board to certify CLAC to represent employees for the purpose of collective bargaining, various trade unions and a building trades council have applied to the Board seeking standing to intervene in CLAC's certification applications. The intervening parties[2] include the Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers (The United Brotherhood of Carpenters and Joiners of America, Local 1985 and United Brotherhood of Carpenters and Joiners of America, Millwrights Union, Local 1021) (collectively referred to as the "Carpenters Union"), the International Brotherhood of Electrical Workers, Local 529 ("IBEW"), Local 01 Saskatchewan of the International Union of Bricklayers and Allied Craftworkers ("Bricklayers Union"), the Saskatchewan Provincial Building Trades Council, Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ("RWDSU") and Saskatchewan Government and General Employees' Union ("SGEU"). In these proceedings, these parties have collectively been referred to as the "proposed intervenors".

[3] Not all of the proposed intervenors have sought standing in all five (5) of CLAC's certifications. For example, the Bricklayers Union, RWDSU and the Saskatchewan Provincial Building Trades Council have not sought standing to intervene in the certification applications involving Canonbie, Wilbros and Pyramid. However, all of the proposed intervenors were commonly opposed to this Board granting any certification rights to CLAC and the within five (5) certification applications were the first to have been received by the Board. As a consequence,

[1] See: LRB File Nos. 097-10, 098-10, 116-10, 117-10 & 134-10.
[2] The Canadian Union of Public Employees also filed, but later withdrew, its application to participate in the within proceedings.

the Board elected to hear all of the requests for standing in the within applications from all of the proposed intervenors concurrently.

[4] The Board heard the applications by the proposed intervenors on December 7 and 8, 2011 in Regina, Saskatchewan. These Reasons for Decision deal only with the procedural issue of whether or not the proposed intervenors, or any of them, should be granted standing to participate in the within applications and, if so, the nature of that right.

Background Facts:

[5] In July and August of 2010, CLAC applied to this Board to become the certified bargaining agent for employees of each of the respondent employers. In addition to seeking standing to participate in and oppose CLAC's certification applications, several (but not all) of the proposed intervenors also filed applications with this Board alleging that CLAC was "company dominated" and, thus, ineligible to represent employees for purposes of collective bargaining.[3]

[6] All of the company dominated applications were essentially the same. Each of the applications named CLAC as the "labour organization" which was alleged to have been dominated, and identified one of the respondent employers as the party allegedly dominating CLAC, except for the Bricklayers Union which did not name any particular employer as the dominating party. In response to the filing of these company dominated applications, a number of procedural actions were initiated, culminating in an application by CLAC and the respondent employers asking this Board to summarily dismiss all of the company dominated applications. The applications for summary dismissal were heard by this Board and, in a decision dated February 10, 2011, the Board summarily dismissed all of the company dominated applications on the basis that these applications as filed, together with the particulars provided with respect thereto, did not give rise to an "arguable case". See: *Tercon Industrial Works Ltd., Westwood Electric Ltd., Canonbie Contracting Ltd., Wilbros Construction Services (Canada) L.P., Pyramid Corporation, et. al. v. Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers, et. al.*, [2011] 195 C.L.R.B.R. (2nd) 1, 2011 CanLII 8881, LRB File Nos.: 103-10, 104-10, 107-10, 108-10, 121-10, 122-10 to 126-10, 139-10 to 142-10, 151-10, 152-10, 173-10, 174-10, 179-10 to 181-10, 199-10 to 207-10 and 211-10 to 213-10.

[3] See: LRB File Nos. 103-10, 104-10, 107-10, 108-10, 121-10, 122-10 to 126-10, 139-10 to 142-10, 151-10, 152-10, 199-10 to 201-10 and 211-10 to 213-10.

[7] While all of the proposed intervenors object to any certification rights being granted to CLAC in the within proceedings, none of the proposed intervenors purported to represent any of the employees sought to be included within any of bargaining units proposed by CLAC involving the respondent employers. Furthermore, none of the proposed intervenors have filed certification applications involving any of the employees that were the subject matter of CLAC's certification applications.

[8] Generally speaking, the proposed intervenors identified four (4) grounds they wished to advance in opposition to CLAC's certification applications and for which they sought standing to bring evidence and argument before the Board. These grounds included:

1. that CLAC is "company dominated" and, thus, not a "trade union" within the meaning of the *Act*;
2. that CLAC's certification applications were made in whole or in part on the advice of, or as a result of employer influence and, thus, ought to be dismissed by the Board pursuant to s. 9 of the *Act*; and
3. that the bargaining units sought to be certified by CLAC are not appropriate units for collective bargaining in the construction industry; and
4. that CLAC is not a "trade union" within the meaning of the *Act* and, thus, ineligible to represent employees for purposes of collective bargaining.

[9] Each of the proposed intervenors sought standing sufficient to cross-examine representatives of CLAC on their certification applications, to call witnesses, and to make full argument in opposition to CLAC's certification applications.

Argument of the Parties:

[10] Mr. Plaxton argued that his clients, the Carpenters Union, IBEW and the Bricklayers Union, had a "real" and "direct" interest in any certification application by CLAC because they believed CLAC will have a substantial and adverse impact on the building trades in this province. For example, Mr. Plaxton argued that CLAC's desire to represent employees in the construction sector on other than a craft basis would negatively impact the construction sectors in various ways but notably through a reduction in the number and level of skilled

workers in the construction industry, a decrease in industrial stability, and a reduction in the general safety at the construction site. To which end, the Carpenters Union, IBEW, and the Bricklayers Union each desire to present evidence and argument to the Board in support of their position that "all employee units" (or any bargaining unit description other than a craft unit) is inappropriate for collective bargaining in the construction sectors.

[11] Mr. Plaxton took the position that this Board's decision in *Communication, Energy and Paperworkers Union of Canada v. J.V.D. Mill Services*, [2010] 199 C.L.R.B.R (2nd) 228, LRB File No. 087-10 (hereinafter referred to as "*J.V.D. Mill Services #1*") was in error in two (2) respects. Firstly, Mr. Plaxton argued that the Board erred in adopting and then using three (3) categories to define a party's right to seek standing in an application before the Board. Secondly, Mr. Plaxton argued that the Board erred in only granting the proposed intervenors in that case limited standing as public law intervenors. Rather, Mr. Plaxton argued that the proposed intervenors in that case should have been granted full standing to call evidence and make argument in opposition to that particular certification application. Mr. Plaxton took the position that this Board compounded these errors in *Communication, Energy and Paperworkers Union of Canada v. J.V.D. Mill Services*, [2011] 192 C.L.R.B.R. (2d) 1, 2011 CanLII 2589, LRB File No. 087-10 (hereinafter referred to as "*J.V.D. Mill Services #2*"), when it went on to conclude that an "all employee" unit is an appropriate unit for collective bargaining in the construction industry. Mr. Plaxton argued that, precisely because the proposed intervenors in the *J.V.D. Mill Services #1* case were not granted full standing, the Board had inadequate information in making its determination in *J.V.D. Mill Services #2*, *supra*. Mr. Plaxton argued that, in the present applications, this Board should treat the issue of whether or not an "all employee" unit is appropriate for collective bargaining in the construction sector afresh and, in doing so, should grant full standing to his clients to tender evidence and make argument on that issue as they desired to do in *J.V.D. Mill Services #1*, *supra*.

[12] Mr. Plaxton argued that granting this clients standing would give the Board valuable assistance on a number of important issues related to the use of "all employee" units in the construction sector, including whether or not an "all-employee" unit in the construction sector can be "under-inclusive" (i.e.: exclude certain employees from the bargaining unit) and on the appropriate geographic scope for a certification order involving an "all employee" unit in the construction sector. Mr. Plaxton argued that none of these issues were adequately canvassed by the Board in *J.V.D. Mill Services #2, supra*.

[13] Mr. Plaxton also indicated that his clients wish to argue before this Board that CLAC was a company dominated organization and, thus, ineligible to be certified to represent employees pursuant to the *Act*. Although acknowledging that this Board had recently dismissed a number of applications alleging that CLAC was company dominated in *Tercon Industrial Works, supra*, Mr. Plaxton argued that his clients' allegations in the present application will be broader than those advanced in the applications that were summarily dismissed by the Board in *Tercon Industrial Works, supra*. For example, Mr. Plaxton indicated that his clients intend to argue that CLAC is/was dominated by a company or companies other than the respondent employers; an issue which Mr. Plaxton argued was not determined by the Board in *Tercon Industrial Works, supra*.

[14] Mr. Plaxton indicated that his clients also wish to advance the argument that CLAC's certification applications were made in whole or in part on the advice of, or as a result of employer influence and, thus, ought to be dismissed by the Board pursuant to s. 9 of the *Act*. Finally, Mr. Plaxton indicated that his clients wish to test CLAC on its assertion that it is a "trade union" within the meaning of the *Act*. Mr. Plaxton indicated that his clients wish to tender evidence and present argument that CLAC's primary purpose is not to represent employees but rather its function, if not its objective, is to subvert the traditional collective bargaining process. Mr. Plaxton argued that his clients could aid the Board in determining whether or not CLAC ought to be eligible to represent employees for purposes of collective bargaining and thus ought to be granted standing.

[15] For these reasons, Mr. Plaxton asked this Board to grant full standing to his clients, the Carpenters Union, IBEW and the Bricklayers Union, to participate in the within applications.

[16] Mr. Kowalchuk argued that his clients, RWDSU and the Saskatchewan Provincial Building Trades Council, also could provide assistance to the Board in determining whether or not CLAC should be certified to represent employees in collective bargaining. Mr. Kowalchuk's primary argument in seeking standing on behalf of his clients was that CLAC is not eligible to be certified to represent employees pursuant to the *Act*. Mr. Kowalchuk's specific allegations as to why CLAC was ineligible to be certified were broad-ranging, overlapping and obliquitous but the substance of which can be paraphrased as follows: that CLAC is a religious sect or at least an

organization derived from a religious base and that elements of CLAC's religious origins remain today and are incompatible with a trade union's duty of fair representation and Saskatchewan's Human Rights Code; that CLAC's constitution or at least its governance is under-democratic; that CLAC is company dominated or at least a "sweetheart" union that has voluntarily subordinated itself to the wishes of employers in an effort to obtain voluntary recognition; that CLAC has negotiated substandard collective agreements that are in violation of the *Act* and *The Labour Standards* Act, R.S.S. 1978, c.L-1; that CLAC's representation of its members falls below the standard expected of a "labour organization" by authoritative members of the labour movement, including the Canadian Labour Congress; and that CLAC openly raids the membership of other trade unions in an effort to grow its own ranks and has participated in public forums to educate workers on the procedures for decertifying an existing trade union and joining another; and that the skill and safety training offered by CLAC to its membership is inadequate relative to the kind and extent of training offered by the traditional craft unions in this province. Simply put, in Mr. Kowalchuk's words, CLAC does not have the credentials to "join the club" (i.e.: to be recognized as and granted the privileges afforded to real trade unions in Saskatchewan).

[17] Mr. Kowalchuk argued that his clients should not be in any way disadvantaged for having also filed company dominated applications with the Board. Mr. Kowalchuk argued that this Board's determinations in *Tercon Industrial Works, supra*, should not in any way prejudice his clients' rights to present evidence and argue that CLAC is company dominated in these proceedings. Mr. Kowalchuk argued that neither this Board nor Popescul J.[4] anticipated that this Board's determination on the company dominated applications in *Tercon Industrial Works, supra*, would prejudice his clients' capacity to challenge CLAC's certification applications and to advance the company dominated argument afresh in the within applications. In the alternative, Mr. Kowalchuk argued that, at most, this Board's decision in *Tercon Industrial Works, supra*, only decided whether or not CLAC was dominated by the respondent employers not whether or not CLAC was dominated by someone else (voluntarily or otherwise). In this regard, Mr. Kowalchuk relied upon the comments of Dickson JJ. (as he was then) in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses* Association, [1975] 1 S.C.R. 382, 41 D.L.R. (3d) 6, [1974] 1 W.W.R. 653, 1973 CanLII 191, as support for the proposition that "domination" of a labour organization by <u>any</u> employer is a sufficient basis for a finding of "company domination" within the meaning of the *Act*. Mr. Kowalchuk took the position that, if this Board's decision

[4] The Learned Chambers Judge in *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers, et. al, v. Saskatchewan Labour Relations Board, et. al.*, 2011 SKQB 380 (CanLII), Q.B.G. No. 472 of 2011.

answered the question of whether or not CLAC was dominated by the respondent employers (a conclusion he disputed), then his clients nonetheless wish to argue that CLAC is dominated by "other" employers or that it has voluntarily supplicated itself to the wishes of employers in general sufficient to satisfy the definition of company domination.

[18] Mr. Kowalchuk argued that his clients will ensure that CLAC's representatives are asked the right questions in cross examination and that evidence is properly before the Board with respect to CLAC's formation as an organization, its governance model, its history in and impact on the labour movement, and its practices in collective bargaining and representation of its members. Mr. Kowalchuk argued that, without his clients, the Board will suffer an information deficit in determining CLAC's certification applications and that granting standing to his clients is the best means to overcome that deficit. Finally, Mr. Kowalchuk argued that the delay that occurred in processing CLAC's certification application was the Board's fault in not combining his client's company dominated applications with CLAC's certification applications at the outset.

[19] For these reasons, Mr. Kowalchuk asked that his clients, RWDSU and the Saskatchewan Provincial Buildings Trade Council, be granted full standing to participate in the within applications. To which end, Mr. Kowalchuk estimated that it would take approximately five (5) days to call the evidence RWDSU and the Saskatchewan Provincial Building Trades Council wished to tender in support of their respective allegations and claims involving CLAC.

[20] Ms. Saxberg asked that her client, SGEU, also be granted standing to participate in the within applications. Ms. Saxberg conceded that her client does not represent employees in the construction sector. However, Ms. Saxberg noted that CLAC represents employees in more than just the construction sector and thus its jurisdiction overlaps with that of her client (albeit not in the present applications). Simply put, Ms. Saxberg described CLAC as "alternative unionism" and indicated that SGEU, as the largest public sector union in Saskatchewan, could provide valuable assistance to the Board on this important, new issue.

[21] Mr. Steele, on behalf of CLAC, opposed the granting of any standing to any of the proposed intervenors; describing all of the proposed intervenors as "complete strangers" to his client's certification applications and noting that none of the proposed intervenors purport to represent, or have applied to represent, any of the employees that are the subject matter of CLAC's certification applications. Mr. Steele indicated that what the proposed intervenors were

really afraid of is the loss of their monopoly on organized labour in the construction sector. Mr. Steele described the application by the proposed intervenors as merely another in the continuing and self-serving tactics of certain trade unions to delay and frustrate the legitimate desire of CLAC to represent employees in Saskatchewan. To which end, Mr. Steele cautioned that the proposed intervenors were more akin to "CLAC's competition" than "friends of the Board".

[22] Mr. Steele argued that none of the proposed intervenors satisfied any of the criteria for intervention adopted and described by this Board in *J.V.D. Mill Services #1*, *supra*. Firstly, Mr. Steele took the position that none of the proposed intervenors satisfy the criteria for "direct interest" intervenors as none purport to or have applied to represent any of the employees that are the subject matter of CLAC's certification applications. Secondly, Mr. Steele argued that none of the proposed intervenors satisfy the criteria for "exceptional" intervenors because none can establish the "special circumstances" necessary for the granting of such standing. Finally, Mr. Steele argued that none of the proposed intervenors should be granted standing as "public law" intervenors because there are no public law issues to be decided in CLAC's certification application, with all of the public law issues raised by the proposed intervenors having been previously decided by this Board.

[23] For example, Mr. Steele argued that the proposed intervenors are the same parties that filed the company dominated applications that were summarily dismissed by this Board in *Tercon Industrial Works, supra*; a decision that was upheld on judicial review. Mr. Steele argued that in seeking standing in CLAC's certification applications the proposed intervenors merely seek to re-litigate matters that have been previously decided. Mr. Steele argued the doctrines of *issue estoppel* and *abuse of process* applied prevented the proposed intervenors from re-litigating their unsuccessful company dominated applications both directly and indirectly. Mr. Steele argued that the allegations of "company domination" and "employer interference" by the proposed intervenors are one and the same thing and, as a consequence, granting standing to the proposed intervenors to re-litigate their company dominated applications under another name would also violate the principles of judicial economy and finality and would undermine the administration of justice. Mr. Steele argued that, to the extent that the proposed intervenors now wish to make a new form of "company dominated" application (i.e.: that CLAC is dominated by someone other than the respondent employers or has voluntarily subordinated itself to the wishes of employers generally so as to satisfy the definition of "company domination" in the *Act*), the Board should not permit it. Firstly, Mr. Steele argued that the proposed

intervenors were relying on a definition of company domination that has not been adopted by this Board. Secondly, Mr. Steele took the position that to grant standing to the proposed intervenors to argue a new angle on their previously failed "company dominated" argument would mean the Board was permitting litigation in installments; something which Mr. Steele argued would amount to an abuse of process. Simply put, Mr. Steele argued that the allegations that CLAC was company dominated has already been determined by this Board and there it would not be appropriate to grant standing to any of the proposed intervenors to re-litigate that issue.

[24] Mr. Steele noted that this Board has already determined that "all employee" units are appropriate for collective bargaining in *J.V.D. Mills Services #2, supra*; a decision that was upheld by this Board on reconsideration in *Communication, Energy and Paperworkers Union of Canada v. J.V.D. Mill Services*, [2011] 199 C.L.R.B.R. (2d) 241, LRB File No. 030-11 (hereinafter referred to as "*J.V.D. Mill Services #3*"). Furthermore, Mr. Steele noted that all of the concerns that the proposed intervenors wished to bring to the Board's attention in the within applications were before the Board in both *J.V.D. Mill Services #2, supra* and *J.V.D. Mill Services #3, supra*. Mr. Steele noted that this Board only granted limited standing to certain intervenors in *J.V.D. Mills Services #1, supra*, and the Board did so in that case because it was the first time this Board was required to interpret the changes to *The Construction Industry Labour Relations Act, 1992* following the passage of Bill 80[5]. Mr. Steele argued that, now that these determinations have been made, no further assistance from public law intervenors is required by the Board. Furthermore, Mr. Steele argued that, to the extent that any of these issues are still before the Board, the views, cautions, opinions, and innuendo of the proposed intervenors have already been clearly expressed to the Board and need not be repeated in these proceedings.

[25] Mr. Steele argued that the remaining matters are routine, do not engage any new public law issues, and/or are matters for which the Board does not require assistance. For example, Mr. Steele argued that this Board does not require assistance to determine whether or not CLAC is a "trade union" within the meaning of the *Act* as this is a routine matter for which the Board is uniquely well-suited to investigate and determine on its own initiative. In this regard, Mr. Steele argued that representatives of CLAC are willing to go through its constitution and demonstrate to the satisfaction of the Board that it is a "trade union" within the meaning of the *Act* in the same fashion that representatives of the Canadian Staff Union were required by the Board in *Canadian Staff Union v. Canadian Union of Public Employees*, 2011 CanLII 61200,

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[5] Being *The Construction Industry Labour Relations Amendment Act, 2009*, R.S. 2010, c.7.

LRB File No. 077-11. Mr. Steele noted that CLAC has been certified in many other provinces, as well as by the Canadian Industrial Relations Board, and it fully understood the obligations on a new trade union to prove itself to the Board before being certified in Saskatchewan. However, Mr. Steele reminded the Board that CLAC has already been certified in this province on a number of occasions and thus has already demonstrated to this Board that it is a trade union within the meaning of the *Act*. In this regard, Mr. Steele relied on this Board's decision in *Construction Workers Association (CLAC), Local 151 v. Salem Industries Canada Limited and Construction and General Workers Union, Local 180*, [1986] June Sask. Labour Rep. 69, LRB File Nos. 033-86 & 044-86.

[26] Mr. Steele also reminded the Board that his client's certification applications were delayed approximately six (6) months because of the time necessary for this Board to hear and determine the company dominated applications filed by the proposed intervenors, and were then delayed an additional nine (9) months while the proposed intervenors unsuccessfully sought to overturn this Board's determination on judicial review. Mr. Steele argued that the delay already experienced by his client is a factor that should be given particular weight by this Board in determining whether or not the proposed intervenors should be granted standing in CLAC's certification applications.

[27] Finally, Mr. Steele argued that granting standing (any standing) to the proposed intervenors would raise all of the concerns identified by the Saskatchewan Court of Appeal in *R. v. Latimer*, [1995] S.J. 101, 128 Sask. R. 1995 CanLII 3921, C.A. File No. 6515, without providing any assistance or value to the Board. To which end, Mr. Steele argued that none of the proposed intervenors should be granted any standing in the within applications. Mr. Steele provided a written argument, which we have read and for which we are thankful.

[28] All of the respondent employers argued that the proposed intervenors should not be granting standing to participate in CLAC's certification application and did so for many of the reasons expressed by Mr. Steele on behalf of CLAC. In addition, Mr. Seiferling argued that delay and uncertainty in resolution of CLAC's certification applications was negatively impacting the respondent employers, particularly so if this Board was inclined to allow the proposed intervenors to re-litigate their "company dominated" applications in another forum. In this regard, Mr. Seiferling strongly cautioned the Board against permitting the proposed intervenors to make a collateral attack on the Board's previous rulings in *Tercon Industrial Works, supra*, through

intervention in the within proceedings. Echoing Mr. Seiferling's concerns about delay, Mr. Hunder reminded the Board that part of our function as a tribunal is to promote the expeditious resolution of labour disputes and that the timely resolution of labour disputes was particularly important in the construction industry. Mr. Hunder took the position that the issues the proposed intervenors wished to advance in these proceedings were not issues of public law; rather Mr. Hunder described their concerns with CLAC as ideological and political, fueled by frustration at the provincial government over the passage of Bill 80.

[29] Written briefs of law were filed by Mr. Seiferling, Mr. Ross, and by Mr. Hunder, all of which have been read and for which we are thankful.

Relevant Statutory Provisions:

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

> *19(1) No proceedings before or by the board shall be invalidated by reason of any irregularity or technical objection, but the board may, at any stage of proceedings before it, allow a party to alter or amend his application, reply, intervention or other process in such manner and upon such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy in proceedings.*
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> *(2) The board may at any time and on such terms as the board may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*
>
> *(3) For greater certainty but without limiting the generality of subsections (1) and (2), in any proceedings before it, the board may, upon such terms as it deems just, order that the proceedings be amended:*
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> > *(a) by adding as a party to the proceedings any person or trade union that is not, but in the opinion of the board ought to be, a party to the proceedings;*
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> > *(b) by striking out the name of a person or trade union improperly made a party to the proceedings;*
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> > *(c) by substituting the name of a person or trade union that in the opinion of the board ought to be a party to the proceedings for the name of a person or trade union improperly made a party to the proceedings;*
> >
> > *(d) correcting the name of a person or trade union that is incorrectly set forth in the proceedings.*
>
> *(4) The board may at any time correct any clerical error in any order or decision made by the board or any officer or agent of the board.*

Analysis:

[31] In *J.V.D. Mills Services #1, supra*, this Board clarified its general approach to the granting of intervenor status in proceedings before the Board. In doing so, the Board reiterated the long standing principle that the granting of standing as an intervenor in any proceedings before the Board is a matter of discretion and that, generally speaking, the Board exercises its discretion based on the circumstances of each case, considerations of fairness (to the party seeking standing) and/or the potential for the party seeking standing to assist the Board (by making a valuable contribution or by providing a different perspective) without doing injustice to the other parties. The Board went on to identify and adopt three (3) forms of intervention recognized by this Board[6]. These three (3) forms of intervention are summarized as follows:

1. **A Direct Interest Intervenor**; where the applicant seeking standing has a direct interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be directly affected by the determinations of the Board.

2. **An Exceptional Intervenor**; where the applicant has a demonstrable and genuine interest in the answer to the legal question in dispute (i.e.: for example, if the party has a pending application before the Board on the same issue and thus has legal rights or obligations that may be affected by a binding precedent); and the applicant can establish the existence of "special circumstances" that differentiate it from others who may have a similar interest; and where that party can demonstrate that it can provide a valuable assistance to the Board in considering the issues before it.

3. **A Public Law Intervenor**; where the applicant has no legal rights or obligations that may be affected by the answer to the legal question in dispute, but can satisfy the Board that its perspective is different or that its participation would assist the Board in considering a public law issue before it.

[6] Citing with approval the analysis of Sheila M. Tucker and Elin R.S. Sigurdson in their article entitled *Interventions in British Columbia: Direct Interest, Public Law & 'Exceptional Intervenors', Canadian Journal of Administrative Law and Practice, Vol. 23, No. 2, June 2010.*

[32] The proposed intervenors seek standing under any of the identified forms. While some of the propose intervenors disputed the nomenclature and/or distinctions adopted by this Board in *J.V.D. Mills Services #1, supra*, we have organized our reasons around these three (3) forms of intervention.

Direct Interest Intervention

[33] While all of the proposed intervenors, save SGEU, argued that they have a "direct" interest in the within proceedings, their assertions in this regard represent an unwarranted extension of this Board's meaning of the term "direct". This Board saw no evidence and none of the proposed intervenors purport to represent any of the employees falling within any of the bargaining units sought to be certified by CLAC. Furthermore, none of the proposed intervenors have filed certification applications involving any of the employees that were the subject matter of CLAC's certification applications. In our opinion, none of the proposed intervenors are directly impacted by the within applications as no legal obligations can be imposed upon them; nor are any certification rights they currently hold or are seeking to obtain prejudicially affected by the within applications.

[34] For example, neither SGEU nor RWDSU represent employees in the construction industry. Similarly, the Saskatchewan Provincial Building Trades Council is not a trade union and, while affiliated with numerous building trades and craft unions in the construction industry, it does not purport to represent employees as a collective bargaining agent. While their respective counsel did not strenuously argue the point, for the purposes of clarity, clearly none of these parties have a "direct" interest in the within proceedings.

[35] The assertion that the Carpenters Union, IBEW and the Bricklayers Union had a direct interest in these proceedings was based on three (3) interrelated arguments; firstly, that they, as building trade unions, had an interest in any certification application in the construction sector involving certification by other than the traditional craft unions in this province; and secondly, that, prior to the coming into force of Bill 80, they would normally have represented the employees that CLAC now seeks to represent in its certification application; and thirdly, that they could, at some point in time, seek to organize and represent the employees that CLAC now seeks to represent.

[36] For the reasons succinctly stated by this Board in *Health Sciences Association of Saskatchewan v. Regina District Health Board*, [1995] 3rd Quarter Sask. Labour Rep. 131, LRB File Nos. 025-95 & 118-95, the first and third arguments provide no basis for a claim of a direct interest. For the reasons stated by this Board in *J.V.D. Mill Services #1, supra* and *J.V.D. Mill Services #3*, *supra*, the second argument provides no basis for a claim of a direct interest in the within proceedings. Simply put, a claim of standing based merely on the idea that a particular trade union has a pre-emptive or presumptive entitlement to bargain on behalf of certain kinds or groups of employees is not recognized by this Board. A claim of standing as a direct interest intervenor must flow from the potential that the subject proceedings could have a direct impact on the party seeking standing (for example, through the potential imposition of legal obligations upon them or an impact on certification rights they currently hold or are seeking to obtain). None of the proposed intervenors could establish this threshold.

Exceptional Intervention

[37] To qualify as an Exceptional Intervenor, the proposed intervenors must not only have a demonstrable and genuine interest to the legal questions in dispute in CLAC's certification application, but they must also satisfy the Board that an "exceptional circumstance" exists that differentiates them from others who may also share a similar interest in the outcome of proceedings before the Board and that they can assist the Board with the issues before its by providing a different perspective (such as the ability to bring probative evidence on matters directly in issue that would not necessarily be forthcoming from the parties). In *J.V.D. Mills Services #1, supra*, this Board cautioned that under this form of intervention an intervenor must demonstrate, as the name would imply, circumstances that are "exceptional". In recognizing this form of intervention, the Board was not expanding the grounds for intervention but rather was merely recognizing that there have been in the past (and can be in the future) exceptional circumstances that justify granting intervenor status to a party that does not qualify as either a direct interest intervenor or public law intervenor. While not elaborating, the Board in *J.V.D. Mills Services #1, supra*, noted that this basis for granting standing would only be applied in clearly "exceptional" circumstances. To which end, it is noted that none of the proposed intervenors in *J.V.D. Mills Services #1, supra*, were granted standing on this basis.

[38] The interest of the proposed intervenors in these proceedings flows from their objection to CLAC obtaining certification rights in this province and the negative impact they believe that CLAC will have on the construction sector. With all due respect to the clear desire of

the proposed intervenors to directly challenge CLAC's status as a trade union, such is not a sufficient interest for the granting of exceptional intervenor status without something more. Such are considerations for public law intervention; not as an exceptional intervenor. However, even assuming that these concerns were sufficient to demonstrate a genuine interest in CLAC's certification applications, we were not satisfied that the kind of exceptional circumstances were demonstrated by the proposed intervenors to justify intervention on this basis. Certainly none of the proposed intervenors, save the Carpenters Union, IBEW and the Bricklayers Union, were able to demonstrate that they had any greater interest in the proceedings than any other member of the labour movement in Saskatchewan that may oppose CLAC and/or the amendments to *The Construction Industry Labour Relations Act* contained in Bill 80. Furthermore, having considered the argument of the parties, the Board was not satisfied that the kind of clearly exceptional circumstances existed in these proceedings sufficient to qualify even the Carpenters Union, IBEW or the Bricklayers Union as exceptional intervenors.

[39] For reasons set forth later in these Reasons for Decision, most of the allegations of the proposed intervenors (including the allegations that CLAC is company dominated and the allegation that CLAC is under the influence of the respondent employers and the allegation that the kind of bargaining unit that CLAC seeks to represent is inappropriate for collective bargaining in the construction sector) have already been determined by this Board and thus the evidence that the proposed intervenors wish to bring to the Board is neither new nor exceptional. Furthermore, none of the evidence that the proposed intervenors seek to bring to this Board regarding CLAC's status as a trade union is relevant to this Board's determination on that issue[7]. In our opinion, most of the evidence that the proposed intervenors seek to present to the Board (the evidence they suggest would not be forthcoming from the parties themselves) involved allegations into matters which this Board does not concern itself, or that involved issues that are more properly resolved by employees (i.e.: in choosing the trade union they wish to be represented by)[8].

[40] The balance of the proposed intervenors' "assistance" would flow merely from their desire to cross-examine representatives of CLAC and/or the respondent employers and to subject them to a probing enquiry as to whether or not CLAC has the appropriate "credentials" to

[7] The Board's analysis on this issue is set forth later in these Reasons for Decision.
[8] The Board's analysis on these conclusions is set forth later in these Reasons for Decision.

join the "club"[9]. In our opinion, it would be an abuse of process for this Board to grant standing to a party to go on an evidentiary fishing expedition supported by little more speculation, innuendo and ideological conflict or into matters not relevant to the substance of the determination that we are required to make on a certification application.

[41] Simply put, having considered the arguments of the parties, we were not satisfied that any of the proposed intervenors have demonstrated sufficiently "exceptional" circumstances to justify their participation in CLAC's certification applications on the basis of this particular form of intervention.

Public Law Intervention

[42] The final basis for seeking standing (and the basis upon which the parties focused most of their arguments) was that CLAC's certification applications raised important matters of public law for which the proposed intervenors were uniquely situated to provide valuable assistance to the Board. In *J.V.D. Mills Services #1, supra*, this Board described its approach to applicants seeking standing as Public Law Intervenors in the following paragraphs:

> **[24]** *Public Law (or often called Public Interest) intervenor status is granted when a court "is satisfied that the participation of the applicant may help the court make a better decision".*[10] *Public Interest Standing has been recognized by the courts in Saskatchewan*[11]*. The principles to be applied in determining whether to grant status to a public interest intervenor were set out by the Saskatchewan Court of Appeal in R. v. Latimer:*[12]
>
> *a. Whether the intervention will unduly delay the proceedings?*
> *b. Possible prejudice to the parties if intervention be granted?*
> *c. Whether the intervention will widen the lis between the parties?*
> *d. The extent to which the position of the intervenor is already represented and protected by one of the parties? and*
> *e. Whether the intervention will transform the court into a political arena?*
>
> ***[25]*** *The Court in Latimer, supra, also noted that "[A]s a matter of discretion, the court is not bound by any of these factors in determining an application for intervention but must also balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the "lis".*

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[9] To use the nomenclature suggested by Mr. Kowalchuk.
[10] See: *Interventions in British Columbia: Direct Interest, Public Law & 'Exceptional Intervenors', Canadian Journal of Administrative Law and Practice, Vol. 23, No. 2, June 2010.*
[11] See: *Whatcott and Saskatchewan Human Rights Tribunal and Attorney General for Saskatchewan and Canadian Constitutional Foundation* [2008] SKCA 95 (CanLII) and *Ahenakew and Her Majesty the Queen and Canadian Jewish Congress* [2006] SKQB 110 (CanLII).
[12] [1995] CanLII 3921, 128 Sask. R. 195 at pp. 196-97

> ***[26]*** *The Board has also recognized that it must be cognizant of balancing the interests of the parties in having access to make representations to the Board and preserving the resources of the Board. As noted by the Board in Re: Merit Contractors Association[13] at [page 124/125]:*
>
> > *These statutes represent an embodiment of public policy, and a wide range of persons may have an "interest" in a broad sense, in bringing to our attention various issues which may arise in conjunction with the implementation of these policies. As both the courts and other tribunals like our own have concluded, however, some limits must be set in allowing the assertion of interests which are contingent in nature. In Canadian Council of Churches v. The Queen (1992), 88 D.L.R. (4th) 193, the Supreme Court of Canada expressed the concern in this way:*
> >
> > > *. . . I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the Courts and preserving judicial resources. It would be disastrous if the Courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.*

[43] CLAC and the respondent employers collectively voiced their objection to the granting of any standing to the proposed intervenors in the within applications. Their objections can be summarized in two (2) categories; firstly, that there are no public laws issues to be decided in the within application for which the Board requires any assistance; and secondly, that granting standing to any of the proposed intervenors would violate some or all of the cautions expressed by Court in *R. v. Latimer, supra*.

[44] We will examine each of the public law issues raised by the proposed intervenors in turn.

The Allegation that CLAC is "Company Dominated":

[45] The proposed intervenors (excluding the Bricklayers Union) collectively argued that CLAC is company dominated and did so for essentially the same reasons that they asserted in their respective company dominated applications that were summarily dismissed by this Board in *Tercon Industrial Works, supra*. In our opinion, this Board's decision in *Tercon Industrial Works, supra*, was wholly determinative as to the issue of whether or not CLAC is dominated by any of the respondent employers. In this regard it is noted that the Board's decision was upheld

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[13] See: *Merit Contractors Ass'n Inc. v. Saskatchewan Provincial Building and Construction Trade Council*, [1996] Sask. L.R.B.R. 119, LRB File No. 098-95.

on judicial review by the Saskatchewan Court of Queen's Bench. To grant standing for the purpose of allowing the same parties to argue the same issue again in these proceedings would be an abuse of process and would violate the principles of judicial economy and finality. See: *Barbara Metz v. Saskatchewan Government and General Employees' Union*, [2008] Sask. L.R.B.R. 654, 159 C.L.R.B.R. (2d) 231, 2008 CanLII 58436, LRB File Nos. 199-05 to 211-05. In our opinion, the issue of whether or not CLAC is dominated by any of the respondent employers is not a question of public law in these proceedings, having been previously determined by this Board.

[46] However, the proposed intervenors also indicate they wish to argue that CLAC is dominated by someone other than the respondent employers and/or that CLAC has so supplicated itself to the wishes of employers generally as to become voluntarily company dominated. The proposed intervenors argue that these particular allegations are new and were not determined by this Board in *Tercon Industrial Works, supra*. The proposed intervenors now seek standing to advance these particular allegations during consideration of CLAC's certification application. To which end, the proposed intervenors argue that they should not be prejudiced by this Board's determination in *Tercon Industrial Works, supra*, on at least these particular allegations; allegations the proposed intervenors argue were not fully developed or properly before the Board in the *Tercon Industrial Works* case.

[47] Both CLAC and the respondent employers caution this Board against permitting the proposed intervenors to now re-formulate their previously failed arguments for the purpose of seeking intervenor status in these proceedings. Counsel argued that to do so would be to permit the proposed intervenors to litigate their case through installments. Rather, CLAC and the respondent employers took the position that the onus was on the proposed intervenors to argue the totality of their case in their company dominated applications and, having now failed in those applications, ought to be prevented from reformulating their previous arguments in these proceedings.

[48] In our opinion, the applications alleging that CLAC was company dominated in *Tercon Industrial Works, supra*, provided ample opportunity for the proposed intervenors to prosecute all of the allegations they now wish to advance in CLAC's certification application regarding whether or not CLAC satisfies the definition of a company dominated organization as set forth in the *Act*. While most of the applicants alleging company domination in the *Tercon*

Industrial Works case named a corresponding employer as the party alleged to be dominating CLAC, not all did so. For example, the Bricklayers Union did not allege that CLAC was dominated by any of the five (5) respondent employers in its application. Rather, the impugned employer was unspecified in the Bricklayers Union's company dominated application. Furthermore, a review of this Board's decision in the *Tercon Industrial Works* case reveals that a component of at least some of the applicants' arguments in that case included the assertion that CLAC was dominated by "employers generally"; not just the respondent employers. This Board acknowledged in *Timothy Lalonde v. United Brotherhood of Carpenters and Joiners of America, Local 1985, et.al.* [2007] Sask. L.R.B.R. 201, C.L.R.B.R. (2d) 63, 2007 CanLII 68771, LRB File Nos. 099-05 to 100-05, that it is an abuse of process to permit a party to re-litigate matters in subsequent proceedings involving the same parties that could have been advanced in previous proceedings before the Board. In our opinion, this Board's concern about avoiding "litigation in installments" applies to the proposed intervenors' desire to now advance arguments that could have been argued before the Board in *Tercon Industrial Works, supra*.

[49] Furthermore, in light of this Board's jurisprudence with respect to company domination, it is not clear that it is possible for a trade union to be "dominated" in the fashion which the proposed intervenors now wish to assert. The proposed intervenors rely upon the comments of Dickson JJ. in *Nipawin District Staff Nurses, supra*, in support of their assertion that a trade union can be dominated by an employer without any direct relationship between that employer and the members of the subject bargaining unit. In our opinion, the comments of the Court in *Nipawin District Staff Nurses, supra*, do not assist the proposed intervenors to the extent they might have hoped.

[50] In *United Foods and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et al.,* [2009] 162 C.L.R.B.R. (2d) 1, 2008 CanLII 64399, LRB File Nos. 069-04 & 122-04 to 130-04, this Board considered the issue of company domination in some detail and determined that a nexus or relationship must exist between the employer that is alleged to have dominated a trade union (i.e.: through the provision of money or otherwise) and the members of the bargaining unit for which representation rights are being sought. In that case, the Board concluded that the purpose of the proscription against bargaining with a company dominated organization is to prevent the situation where a certified employer would be in control of the bargaining process by means of having assisted in the formation or administration of the very trade union representing its employees. In other words, this Board's decision in *Wal-Mart Canada, supra,* stands for the

proposition that domination of CLAC within the meaning of the *Act* can only occur if one of the respondent employers (or its agents) has dominated (or is dominating) CLAC and this issue has already been determined by the Board in *Tercon Industrial Works, supra*.

[51] Finally, the proposed intervenors indicated they also wish to argue that CLAC has so supplicated itself to the wishes of employers generally as to become voluntarily company dominated. In our opinion, the definition of a "company dominated organization" set forth in the *Act* is clearly aimed at the actions of an employer (or its agent) in the formation or administration of a labour organization. For this Board to utilize this provision to examine the ideological beliefs of a labour organization or its relative tenacity or militancy in collective bargaining relationships would be both an error of law and policy. Not only is this interpretation not supported by a plain reading of the *Act*, it would see this Board straying into decisions better left in the hands of employees and could potentially see this Board usurping the fundamental right of employees to be represented by the trade union of their own choosing; a right enshrined in s. 3 of the *Act*.

[52] In light of the delay which has already occurred in these proceedings, the cautionary considerations expressed by the Saskatchewan Court of Appeal in *R. v. Latimer, supra*, become an increasingly important consideration. In our opinion, all of the identified factors speak against granting standing to the proposed intervenors to advance arguments in these proceedings that have already been determined by this Board in previous proceedings involving these parties or that involve arguments that could have been raised in previous proceedings involving these same parties, particularly so in the case of arguments that appear to have little probability of success.

[53] Having considered the argument of the parties, we are not satisfied that the question of whether or not CLAC is company dominated gives rise to an issue of public law for which intervention by the proposed intervenors would be of assistance to the Board without doing injustice to the parties.

The allegation that CLAC's Certification Application ought to be dismissed pursuant to s. 9 of the Act:

[54] The proposed intervenors (excluding the Bricklayers Union) collectively argued that CLAC's certification applications were the result of employer influence or interference and thus ought to be dismissed pursuant to *s. 9* of the *Act*. With all due respect to the creativity of

the proposed intervenors, this assertion clearly does not give rise to an issue of public law for which intervention would be of assistance to the Board.

[55] Firstly, while the allegations of employer influence were not particularized by the proposed intervenors in their applications for intervention, during argument Mr. Plaxton (in his typical forthright fashion) confirmed that the means by which the proposed intervenors assert that CLAC's certification applications were the result of employer influence and interference are the same as the means by which the proposed intervenors assert that CLAC is company dominated. Having considered the argument of the parties, we are satisfied that the allegations that CLAC's certification applications were the subject of employer interference are essentially indistinguishable from the allegations of company domination that were before this Board in *Tercon Industrial Works, supra*. In our opinion, we would be permitting a collateral attack on this Board's decision in *Tercon Industrial Works, supra*, to grant standing to the proposed intervenors to re-brand their company dominated applications in the guise of an allegation of "employer influence".

[56] Secondly, s. 9 of the *Act* is the vehicle by which this Board ensures that applications by employees (typically "rescission" applications) are not the subject of employer influence or interference. In this regard, we note that the proposed intervenors are not alleging that the respondent employers exercised influence on or interfered with the subject groups of employees (i.e.: in the exercise of their rights under the *Act*); rather, the proposed intervenors assert that the employees should not be permitted to vote if CLAC is the representative choice because of employer influence on CLAC. It would appear to be an unwarranted expansion of the plain reading of s. 9 to utilize this provision of the *Act* as a vehicle for regulating employer influences on trade unions; particularly so when other provisions of the *Act* specifically address that concern. The proposed intervenors could cite no authority in support of the proposition that s. 9 of the *Act* could be used in the fashion they suggested.

[57] In our opinion, it would be an abuse of process to permit the proposed intervenors to launch a collateral attack on this Board's decision in *Tercon Industrial Works, supra*, by reformulating their previously failed allegations of company domination as a potential violation of s. 9 of the *Act*.

The Allegation that the Unit Proposed by CLAC is not appropriate for Collective Bargaining:

[58] The proposed intervenors (excluding RWDSU) collectively argued that the bargaining units proposed by CLAC in its certification applications are inappropriate for bargaining in the construction sector because they involve "all employee" units. The proposed intervenors seek standing to persuade this Board that it erred in *J.V.D. Mills Services #2, supra*, and that "all employee" units are inappropriate for collective bargaining in the construction sector.

[59] The issue of whether or not "all employee" units are appropriate for collectively bargaining in the construction sector was the central issue before this Board *J.V.D. Mill Services #2, supra*. In that case, as it was the first time this Board was called upon to determine that question following the enactment of Bill 80, standing was granted to the Carpenters Union and the Bricklayers Union as public law intervenors to provide assistance to the Board on the impact of the change in legislation[14]. In *J.V.D. Mill Services #2, supra*, this Board determined that "all employee" units are an appropriate unit for collective bargaining in the construction sector. All of the concerns now expressed by the proposed intervenors regarding the certification of "all employee" units in the construction sector (including whether or not an "all employee" unit can be "under-inclusive", the appropriate geographic scope for an "all employee" unit, the impact, if any, on traditional building trade unions, and the impact, if any on industrial stability and general safety at the construction site) were before this Board in *J.V.D. Mill Services #2, supra*. Furthermore, this decision was the subject of an unsuccessful application for reconsideration in *J.V.D. Mill Services #3, supra*, based on essentially the same grounds as the proposed intervenors now indicate they wish to argue in these proceedings.

[60] In our opinion, the use of "all employee" units in the construction sector is not a question of public law for which assistance from the proposed intervenors is required with this issue having been previously determined by this Board. Furthermore, whether or not the units sought by CLAC in its certification applications are "appropriate" is not an issue of public law for which this Board requires assistance from the proposed intervenors as such determinations fall within the exclusive jurisdiction of the Board and involve matters routine to all certification applications.

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[14] See: *J.V.D. Mill Services #1, supra.*

The Allegation that CLAC is not a Trade Union:

[61] The final allegation advanced by the proposed intervenors that was suggested to give rise to a question of public law was whether or not CLAC was a "trade union" within the meaning of the *Act*. The proposed intervenors wish an opportunity to cross-examine representatives of CLAC and to present evidence of their own in support of their assertions that CLAC's primary purpose is not to represent employees but rather it is to subvert the traditional collective bargaining process; that a religious element exists in CLAC's governance that makes it incompatible with collective bargaining; that CLAC's governance (if not its Constitution) is under-democratic; that CLAC has negotiated collective agreements in violation of the *Act* and/or *The Labour Standards Act*; that CLAC's representation of its members falls below the standard expected of a labour organization; and that CLAC openly raids the memberships of other trade unions. While counsel on behalf of the proposed intervenors passionately argued for the right to intervene in CLAC's certifications, none of the issues they wish to advance give rise to matters of public law.

[62] This Board has previously determined that the Construction Workers Association (CLAC), Local 151 was a "trade union" within the meaning of the *Act* and it has been certified as a bargaining agent in the province by this Board on a number of occasions[15]. Section 39 of the *Act* provides that no order of this Board shall be rendered void, terminated, abrogated or curtailed by reason only of, *inter alia*, a change in name of a trade union. We are satisfied that, for the limited purposes of these procedural matters, that a change of name has occurred and that the Construction Workers Association (CLAC), Local 151 is one and the same as the Construction Workers Union (CLAC), Local 151 named in these proceedings but for the change in name. Furthermore, in our opinion, whether or not a change in name has occurred is not an issue of public law for which assistance is required by the Board.

[63] A review of proceedings before this Board indicates that this is not the first time that CLAC's eligibility to be certified as a trade union has been called into question before this Board. In *Salem Industries Canada, supra,* a then competing trade union asked this Board to

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[15] For example, the Construction Workers Association (CLAC), Local 151 was certified by this Board in 1984 to represent a unit of employees of Monad Contractors Ltd. in LRB File No. 333-84; CLAC was certified by this Board in 1986 to represent three (3) units of employees of Salem Industries Canada Limited in LRB File Nos. 033-86, 041-86 & 086-86; CLAC was also certified in 1987 to represent a unit of employees of Alpha Sprinklers Ltd. in LRB File No. 237-87; CLAC was certified in 1989 to represent a unit of employees of Penn-Co Construction Ltd. in LRB File No. 097-89; CLAC was certified in 1990 to represent another unit of employees of Penn-Co Construction Ltd. in LRB File No. 187-89; and finally CLAC was certified in 1992 to represent a unit of employees of Ledcor Industries Limited in LRB File No. 261-91.

disallow the Construction Workers Association (CLAC), Local 151 (as it was known then) from representing a unit of employees that it sought represent. In dismissing the competing union's challenge to the Construction Workers Association (CLAC), Local 151's status as a trade union, the Board made the following comments:

> *Counsel for the intervenor submits that CLAC is a company dominated organization because the employer negotiated the terms and conditions of a collective agreement with CLAC before voluntarily recognizing it, and because the employer told the Iron Workers Union that it would likely be supplying iron workers for the project.*
>
> *The Board has no hesitation in finding that those circumstances do not justify a finding that CLAC is a company dominated organization. CLAC's status as a trade union within the meaning of The Trade Union Act was first accepted by the Board on October 3, 1984 when it was certified to represent employees of Monad Construction Ltd. (see LRB File No. 333-84). By negotiating a collective bargaining agreement with the employer, securing voluntary recognition, dispatching its members to the project, and applying for certification CLAC did nothing that the intervenor would not have done, and precisely what the Iron Workers Union attempted to do to secure the work for their members. Voluntary recognition is the accepted norm in the construction industry.*

[64] In our opinion, to the extent that CLAC is required to prove its change of name or even if CLAC is required to prove (or re-prove) its status as a trade union to the Board, the assistance of the proposed intervenors would not be required and/or the granting of standing for the purpose of advancing these arguments would violate the cautions identified by the Court of Appeal in *R. v. Latimer, supra*.

[65] Firstly, most of the issues the proposed intervenors wish to advance are not matters over which this Board concerns itself in an application for certification. As this Board stated in *Canadian Staff Union v. Canadian Union of Public Employees,* 2011 CanLII 6120, LRB File No. 077-11 at para. 11:

> **[11]** *The jurisprudence of this Board is to compel an applicant seeking to represent a group of employees, that has not previously been certified in this Province, to establish its status and, in particular, its standing to be certified to represent employees for the purpose of collective bargaining. See: Health Sciences Association of Saskatchewan v. University Hospital, [1965-74] Dec. Sask. L.R.B. Volume III, LRB File No. 225-72. Simply put, an applicant organization must satisfy the Board that it is a trade union with the meaning of The Trade Union Act. In this regard, it should be noted that this is not an enquiry into the relative strength or tenacity of the applicant organization in terms of achieving particular collective bargaining goals or its adherence to particular ideological beliefs. In this exercise, the Board is simply concerned with whether or not the organization is dedicated to advancing the interests of its members by*

> *means of collective bargaining and that its internal structure possess certain hallmarks of organizational legitimacy associated with a trade union. See: Board of Education Administrative Personnel Union v. Board of Education and Regina Collegiate Institute, [1978] June Sask. Labour Rep. 44, LRB File No. 380-77. See also: Regina Musicians Association, Local 446 v. Saskatchewan Gaming Corporation, [1997] Sask. L.R.B.R 273, LRB File No. 012-97.*

[66] Whether or not CLAC's genesis is from a religious base is not of a consideration for this Board on an application for certification; neither is the quality of past collective agreements that have been negotiated by CLAC; nor whether or not CLAC openly raids other trade unions to grow its membership. These are all issues for the employees within the bargaining unit to determine in deciding whether or not they wish to have CLAC represent them. It would represent a dangerous precedent indeed for this Board to examine the quality of a trade union in the fashion suggested by the proposed intervenors; for it is doubtful they would wish to be subject to that same level of scrutiny the next time they file a certification application with the Board. Simply put, proving ones status as a trade union is not a peer-review process aimed at ensuring that new members of the "club" have the kind of "credential" suggested by the proposed intervenors.

[67] Rather, in determining the status of an organization as a trade union, the Board is concerned with more basic thresholds. The Board looks to determine whether or not collective bargaining is among the purposes of the organization and whether its internal structures possess certain basic hallmarks of organizational legitimacy associated with a trade union. These are not difficult thresholds to satisfy and they do not involve probing enquiries of the nature suggested by the proposed intervenors. The Board does not concern itself with whether or not the applicant organization is optimal for collective bargaining or whether or not others in the labour movement approve of its activities. This Board's role is merely to determine that certain basic elements associated with a trade union are present.

[68] In our opinion, the ideological beliefs of a labour organization or its relative tenacity or militancy in collective bargaining relationships are more properly matters of employee choice. It is fundamental tenant of the *Act* (expressly recognized in s.3) that employees have the right to choose the trade union they wish to be represented by; not this Board. The *Act* does not require all trade unions to be homogeneous in terms of their organization, ideological beliefs or collective bargaining strategies. If anything, history has demonstrated that a broad diversity of trade unions have found success in collective bargaining relationships. For these reasons, the

proposed intervenors would be of very limited assistance to this Board in the further processing of CLAC's certification applications.

[69] As previously indicated, in light of the significant delay which has already occurred in these proceedings, the cautionary considerations expressed by the Saskatchewan Court of Appeal in *R. v. Latimer, supra*, become increasingly important considerations. In our opinion, all of the identified factors speak against granting standing to the proposed intervenors to advance arguments that have already been determined by this Board; that involve allegations into matters which this Board does not concern itself, or that involve issues that are more properly resolved by employees (i.e.: in choosing the trade union they wish to be represented by). Having considered the argument of the parties, we are not satisfied that the question of whether or not CLAC is a trade union gives rise to an issue of public law to which intervention by the proposed intervenors would be of assistance to the Board without doing injustice to the parties.

Conclusion:

[70] For the foregoing reasons, the applications of the proposed intervenors seeking standing to participate in CLAC's certification applications are dismissed. None of the proposed intervenors have a direct interest in these matters nor can they establish the kind of circumstances necessary for the granting of exceptional intervenors status. Finally, none of the issues that the proposed intervenors wish to advance involve questions of public law for which this Board requires assistance or which have not already been determined by this Board. Having considered the arguments of the parties, we were not persuaded to exercise our discretion to grant standing to any of the proposed intervenors to participate in CLAC's certification applications.

[71] Board Member Holmes dissents from these Reasons for Decision.

DATED at Regina, Saskatchewan, this **17th** day of **January, 2012.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson

Reasons for Dissent:

[72] **Mr. Jim Holmes, Board Member**: I have read the majority decision and, while I agree with some points, I would have allowed some of the proposed intervenors full standing to call and cross-examine witnesses, present evidence, and make argument in CLAC's certification applications.

[73] In the interest of efficiency, I would limit standing to the Carpenters Union and IBEW. It would appear that the Bricklayers Union participated much less in the earlier proceedings and their applications are less complete. The Building Trades Council is not, strictly speaking, a trade union. The nexus with the RWDSU and SGEU is weaker and they have less expertise in the issues in these cases. In my opinion, the value of the intervention by the other applicants is not offset by the time and procedural complexity their participation will add to the proceedings.

[74] Many of the issues in the present applications have been heard in other cases before this Board, notably *Tercon Industrial Works, supra* and *J.V.D. Mill Services, supra*. However, I note that in each of these cases the proposed intervenors were not allowed full status to call and cross-examine witnesses and to present their own evidence. These deficiencies were the basis for dissents by the labour representatives on the panels in both cases (i.e.: Board Member McDonald in *Tercon Industrial Works, supra*; and Board Member Cymbalisty in *J.V.D. Mill Services*).

[75] In my opinion, the decision to separate the company dominated application from the intervention on the certification hearing unnecessarily limited the scope of the inquiry before the Board in *Tercon Industrial Works, supra*. It also, in retrospect, added considerably to the delay in these proceedings. My reading of the decision of the Court in the judicial review of this Board's decision in the *Tercon* case, does not have any direct bearing on the current application in that the proposed intervenors continue to have the right to argue that CLAC may not be a trade union due to some inherent flaw or because of improper relationship to employers.

[76] While I find the limited nature of the hearing on the issue of the appropriateness of the bargaining unit less than totally satisfactory, it had been canvassed in three hearings before this Board and I agree a further hearing would not be desirable or productive.

[77] There are three reasons, as I understand it, the majority declined to grant standing to the proposed intervenors: (1) the proposed intervenors were unable to establish an arguable case in *J.V.D. Mill Services, supra*; (2) the proposed intervenors are strangers to these proceedings; and (3) CLAC has already established its legitimacy as a trade union before this Board and thus the scope of issues to be decided by the Board is narrow.

Arguable Case Issue:

[78] As I understand this principle, the party must present a case which, if proven, would result in the finding the party seeks. As I understand the proposed intervenors' applications and subsequent particulars, they allege that CLAC, as a matter of policy and practice, does not adequately represent its members in grievance processes; negotiates inferior collective agreements; is undemocratic; and colludes with employers or employers' agents to frustrate workers rights to choose trade unions. The Board's cases contain many examples of unions being required to remedy failures to fairly represent or to improve democratic processes, but that does not mean these labour organizations are not trade unions. The allegation in these proceedings is that these types of failures are inherent and integral to the nature of CLAC.

[79] While I can sympathize with CLAC's reluctance to have to defend itself from the spectrum of serious allegations alleged by the proposed intervenors, I would suggest that, in the long run, intervention would also provide an opportunity for CLAC to dispel these accusations and that this would be in CLAC's interest. On the other hand, in the event the allegations are proven true, it would clearly be in the public interest to have these allegations brought to hearing.

[80] The genesis for my concern is that a company dominated organization is in essence a deceit; it is the substitution of a compromised organization for a legitimate trade union. Like most deceits, it is unlikely to be open, easily uncovered, or readily admitted. It can take many forms. It is not necessarily domination or interference by the employer who is the subject of the certification application. See: *Nipawin District Staff Nurses Association v. Nipawin Union Hospital and Service Employees' Local Union No. 333*, [1973] 3 Dec. Sask. L.R.B. 274, LRB File No. 3113. Similarly, money received by a trade union from one employer may not compromise that Union in its application to certify another employer. See: *Wal Mart Canada Corp., supra*. Even a long history and diversity of a trade union might not be enough to save it from being found to be company dominated. See: *Canadian Union of Public Employees, Local*

1902 v. Bo-Peep Co-operative Day Care Centre, [1979] Feb. Sask. Labour Rep. 44, LRB File No. 189-78.

[81] The investigation for employer domination is not some conspiracy fantasy. The Board's history contains many examples of company dominated organizations; some involving highly respected organizations such as the "Saskatchewan Registered Nurses' Association" in the *Nipawin District Nurses* case or the "Dairy and Poultry Pool Employees' Cooperative Association" in *United Packinghouse Workers of America, Local 515 v. the Dairy and Poultry Producers Co-operative Marketing Association, et. al.*, [1953] Sask. Lab. Rel. Board Dec. Vol I (1945-1954) 274446, LRB File No. 1096. The Board's history also contains more examples of employer interference in rescission applications. If we accept that employer interference is a deceit, then it is highly unlikely the deceit will mirror an earlier case. It is more likely the connections will be hidden and unlikely they will be forthcoming from either the employer or the labour organization.

[82] If the certification applicant is company dominated, then the normal process of a certification process will not be sufficient to rectify the problem. In a normal certification process, the employer and the trade union will represent their interests and, from those competing interests, the Board will make a determination. If one of those parties is company dominated, then there is no real clash of competing interests. The Board's usual procedures to establish the *bona fides* of a trade union may not be adequate.

[83] The determination of the genuineness of the labour organization is determined by the Board based on the facts before it. To use the language of this Board in *Canadian Union of Public Employees v. University of Saskatchewan and Administrative and Supervisory Personnel Association,* [2001] Sask. L.R.B.R. 475, 75 C.L.R.B.R. (2d) 89, LRB File No. 154-00, "*without the intervention of "friends of the Board", so to speak, employer domination may not come to the attention of the panel hearing a case*."

[84] The *Latimer* case cited by the employer counsel illuminates the problem in another light. Unlike the situation in *Latimer, supra*, there is no Crown prosecutor at the Board to present the opposing case for the public.

[85] History is important evidence of legitimacy. For example, I note that most of the proposed intervenors have a history which precedes the establishment of this Board; some of them were active in this Province within a year of the Province coming into existence. Each of them has a very extensive history with this Board. But history is not determinative of ongoing standing as a trade union. Even very large and well established unions could be guilty of company domination (*Bo-Peep Daycare, supra*). In this respect and in my opinion, this Board erred in *University of Saskatchewan*, *supra*, in not granting standing to CUPE to challenge the relationship between the University of Saskatchewan and the Administrative and Supervisory Personnel Association merely because ASPA had been previously certified by the Board. In my opinion, prior certification is a strong indicator of legitimacy; but it is not an eternal guarantee.

Strangers to these Proceedings:

[86] Counsel for both CLAC and the respondent employers argued that the proposed intervenors are "strangers" to this application. The employers have a legitimate interest in the scope of the bargaining unit but that issue does not appear to be in contention in these proceedings. The employers have a legitimate interest and can valuable input into the appropriateness of the proposed unit. I agree with the majority that that issue cannot be productively be reopened.

[87] However, on the key issue of CLAC's legitimacy as a trade union, it is the employers who are the strangers. There is no application against the employer alleging a violation of s.11(1) of *The Trade Union Act*. The employers are not charged and cannot be found guilty of an unfair labour practice. The worst consequence of a finding that CLAC is not a legitimate trade union is that the employers will not be bound by a certification Order. Some employers might believe this would be the best possible outcome of a certification application.

[88] This is not to suggest that the employers should be excluded from full participation in the hearing. They clearly deserve the right to protect their reputations and certain evidence may only be available from them.

Prior Certifications:

[89] Unlike the proposed intervenors, the history of Construction Workers Union (CLAC), Local 151 (formerly the Construction Workers Association (CLAC), Local 151) before

this Board is quite short (1984-1992) and not very extensive (9 orders). These earlier certifications are important evidence of legitimacy but they are not an eternal guarantee.

[90] Complicating the issue is the fact CLAC has not had a certification order in this Province since April 1992 (Ledcor Industries Limited in LRB 261-91). Eighteen (18) years have lapsed before the current applications were filed with the Board. While arguably this absence is due to Bill 80, there is no evidence of any other CLAC affiliate filing in Saskatchewan during this time.

[91] Furthermore, only one (1) decision of this Board involved written Reasons for Decision. See: *Salem Industries Canada, supra.* In that case, the Board merely concluded that since voluntary recognition, existing collective agreements and hiring halls are typical of craft unions in the construction industry, they cannot be evidence of company domination. With respect, the Board missed the point. Voluntary recognition and an existing collective agreement are evidence of an accord between the company and the labour organization. A hiring hall is evidence of a labour organization supply of the workforce. What gives these provisions legitimacy is the history and context of membership support for the union.

[92] For an example of undemocratic voluntary recognition one need look no further than *Aramark Canada Facility Services Ltd. v. Hospital Employees' Union,* 2004 CanLII 65390 (BC LRB). The case contains a useful discussion of the perils of voluntary recognition.

[93] In these proceedings, the proposed intervenors alleged voluntary recognition and an existing collective agreement between CLAC and the employers. Neither counsel for CLAC nor any of the three (3) lawyers for five (5) companies denied it. While CLAC and company counsel both complained of delay of these hearings, none cited the typical prejudice which arises from delayed certification (for example, lack of a collective agreement; lack of union representation of employees; lack of dues income; uncertainty of labour costs; and the freezing of terms and conditions of employment under s. 11(1)(m) of the *Act*.)

[94] While of very limited value in the fast paced construction industry, there is record of a voluntary agreement between CLAC and Pyramid Corporation, one of the employers in these proceedings. See: *Martel v. Christian Labour Association of Canada, Local 151*, 2003

CanLII 62880, LRB File No. 185-02. Of course, voluntary recognitions do not normally leave a record with the Board.

[95] The conversion of voluntary recognition into certification is a very common event, but mainly within the bounds and the democratic traditions of the craft unions. Incumbency is a very strong determinative of electoral success. If the incumbency has been granted by the employer (the party who is supposed to have no say in the matter and who is prohibited from interfering in the selection of trade union) then there is a serious risk that the outcome of the vote will not be legitimate.

[96] How the conversion from voluntary recognition to certification takes place within a generic or all employee unit as proposed here is a matter on which the Board should have a full hearing and the Carpenters Union and IBEW could provide valuable assistance to this Board.

Summary:

[97] The Board properly uses its resources carefully and efficiently and denying intervenors status is part of that. In this case, because of the allegation of lack of legitimacy, possible employer interference, the possibility of the Board's process being inadequate for a full investigation, the eighteen (18) year absence of CLAC from Saskatchewan, the possible risks of conversion of voluntary recognition to certification, and the public interest in knowing that workers' right to chose their trade union is preserved, I would find for a full hearing and granting full intervenor status to the Carpenters Union and IBEW.

Jim Holmes, Board Member