INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING & PORTABLE & STATIONARY, LOCAL 870, Applicant v. NORTH AMERICAN CONSTRUCTION GROUP INC., NORTH AMERICAN SERVICES INC., NORTH AMERICAN CAISSON LTD. and NORTH AMERICAN PIPELINE INC., Respondents

LRB File No. 051-13; September 18, 2013
Vice-Chairperson, Steven D. Schiefner; Members: Mr. Ken Ahl and Ms. Donna Ottenson

For the Applicant Union:	Mr. Larry W. Kowalchuk
For the Respondents, North American Construction Group Inc. and North American Services Inc.:	Mr. Larry F. Seiferling, Q.C.
For the Respondents, North American Caisson Ltd.:	Mr. Hugh J.P. McPhail, Q.C.

Successorship – transfer of business – Alleged predecessor is an operating subsidiary of larger composite corporate organization - Alleged predecessor certified in Saskatchewan in 1992 while performing foundation and piling work – Alleged predecessor ceases operating in Saskatchewan - Alleged successors begin operating in Saskatchewan – Alleged successors are subsidiaries within same corporate organization performing various forms of construction work in Saskatchewan – Union argues that all named companies are successors – Board reviews criteria for successorship - Board examines business activities of alleged predecessor in Saskatchewan – Board finds that one of the companies is carrying on business previously performed by predecessor in Saskatchewan – Board satisfied that there was a discernable continuity of business - Board declares one of the respondents to be a successor – Board dismisses application with respect to other named respondents.

Common Employer – Union asks Board to declare named companies as common employers for purposes of collective bargaining – Board reviews criteria for common employer designation – Board satisfied that named companies are operated under common direction and control - Board not satisfied that a sufficient labour relations purpose would be fulfilled by granting common employer designation – Board finds that too much time has passed since union became aware of multiple employers operating in its jurisdiction – Board concerned that common employer declaration could impose collective bargaining on new groups of employees who may not wish to be represented by the union.

The Trade Union Act, s. 37.
The Construction Industry Labour Relations Act, 1992, s. 18.

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson**: These proceedings involve successorship in the construction industry and the challenges that can arise in the application of the provisions of *The Construction Industry Labour Relations Act, 1992, S.S. 1992, c.C-29,* and *The Trade Union Act*, R.S.S. 1978, c.T-17, in the case of large, composite, corporate employers undergoing corporate reorganization.

[2] These proceedings were commenced by the International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 (the "Union"), who has applied to the Saskatchewan Labour Relations Board (the "Board") for various orders pursuant to either or both *The Construction Industry Labour Relations Act, 1992* or *The Trade Union Act*. The Union seeks an amendment to a certification Order[1] of this Board involving North American Construction Ltd. (NA Construction Ltd.) dated October 15, 1992. Specifically, the Union asks that the named respondents be added as employers to its certification Order relying on either successorship and/or common employer declarations in doing so.

[3] The Union's application was heard on August 12 & 13, 2013 in Regina. The Union called only one witness, Mr. Corey Cowley, the Union's Business Manager. The respondents did not call any witness; choosing instead to rely on the evidence contained in their respective Replies. However, at the request of the Union, counsel on behalf of North American Caisson Ltd. (NA Caisson) agreed to produce the deponent of its Reply, Mr. Jim Humphries, for cross-examination. Similarly, Counsel on behalf of North American Construction Group Inc. (NA Construction Group Inc.) also agreed to produce the deponent of its Reply, Mr. Jordan Slater, for cross-examination. Counsel on behalf of the Union elected to cross-examine Mr. Humphries but not Mr. Slater.

[4] For the reasons that follow, we find that the Union's application ought to be granted in part; but only in part. Specifically, we find that NA Caisson Ltd. is the successor to the

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[1] See: LRB File No. 172-82

collective bargaining obligations previously imposed by this Board upon NA Construction Ltd. However, in our opinion this Board's previous certification Order does not extend to the other named Respondents, nor would it be appropriate to name the other Respondents as common employers with NA Caisson Ltd.

Facts:

[5] These proceedings involve various corporate entities operating as part of, or within the corporate umbrella of, the "North American Group of Companies". The North American Group of Companies is the name historically given to and/or commonly used by a group of approximately twenty (20) related companies that work in the construction sector, including engineering, industrial construction, heavy construction, mining, road construction, general construction, piling and foundations construction, and site development, maintenance and servicing. Some of these subsidiaries are management companies, within which certain professional services are located, such as accounting, human resources, etc. However, most of the subsidiaries are operating companies, within which specific silos of knowledge and expertise are located. Through its various operating subsidiaries, the North American Group of Companies is capable and does operate in most areas of the construction sector. All of the operating subsidiaries operate under common direction and control of centralized management.

[6] At the present time, all of these corporate entities are subsidiaries of North American Energy Partners Inc., which is a large, publicly-traded international corporation. But the corporate records show that the corporate structure of the North American Group of Companies has changed on an almost annual basis and its corporate history is a little difficult to follow for an outside observer. It is sufficient to say that the current organizational structure of the North American Group of Companies is different from what it was in 1992 when NA Construction Ltd. came to Saskatchewan to install pilings and to perform foundation work for an apartment building in Regina.

[7] North American Energy Partners Inc. holds and controls a number of wholly-owned management subsidiaries, one of which was the North American Construction Group Inc. (NA Construction Group Inc.). In 2011, NA Construction Group Inc. held and controlled a number of wholly-owned operating subsidiaries, including NA Caisson Ltd., North American Construction Ltd., North American Pipeline Inc. and North American Services Inc. However, the status of these corporate entities has changed since that time. For example, in 2012, these

same operating subsidiaries reported to a managing company within the North American Group of Companies bearing the name “North American Construction Management Inc.” For reasons not explained during the hearing, these same operating subsidiaries now report to a holding corporation within the North American Group of companies known as “North American Construction Holdings Inc.”

[8] Of relevance to these proceedings, NA Construction Ltd. was originally incorporated in 1969 under the laws of the Province of Alberta. In 1988, that same company was registered (or continued) as a Federal corporation. During this period, NA Construction Ltd. operated as part of the North American Group of Companies, together with NA Caisson Ltd. which was incorporated in 1991. Other corporate entities also operated as part of the North American Group of Companies, including North American Road Inc. Although various subsidiaries of the North American Group of Companies have worked in Saskatchewan, only NA Construction Ltd. and NA Caisson Ltd. have performed piling and foundation work.

[9] In cross-examination, Mr. Humphries testified that he was an employee of North American Road Inc. when the North American Group of Companies received a piling installation contract from Action Drilling for the installation of foundation and pilings for an apartment building in Regina (a building then known as “Pioneer Tower”). Mr. Humphries testified that NA Caisson Ltd. was not registered to do business in Saskatchewan at that time and therefore the work was performed through and by NA Construction Ltd. The project took approximately one (1) month to complete and involved two (2) employees, an operator and a swamper.

[10] NA Construction Ltd. operated as a construction company in Western Canada for many years. While NA Construction Ltd. was in Saskatchewan performing work on the Pioneer Tower in 1992, it was organized by the Union and certified by this Board. The certification Order issued on October 15, 1992 (LRB File No. 172-92) by this Board reads as follows:

> *(a) that all operating engineers, and operating engineer foremen employed by North American Construction Ltd., in the Province of Saskatchewan, are an appropriate unit of employees for the purpose of bargaining collectively;*
>
> *(b) that International Union of Operating Engineers, Hoisting, Portable & Stationary, Local 870, a trade union within the meaning of The Trade Union Act, represents a majority of employees in the appropriate unit of employees set forth in paragraph (a);*

> *(c) North American Construction Ltd., the employer, to bargain collectively with the trade union set forth in paragraph (b), with respect to the appropriate unit of employees set forth in paragraph (a).*

[11] After completing its work on the "Pioneer Tower" project, NA Construction Ltd. ceased doing any business in Saskatchewan and thereafter all piling and foundation work in Saskatchewan was bid on and performed by NA Caisson Ltd. on behalf of the North American Group of Companies. Although NA Construction Ltd. continued to exist as a registered company in Saskatchewan, it performed no work and has had no employees in Saskatchewan since 1992.

[12] NA Construction Group Inc. is a respondent in these proceedings and is a wholly-owned subsidiary within the North American Group of Companies. Essentially, this subsidiary is a management company providing centralized management services to other subsidiaries within the North American Group of Companies. The only employees of NA Construction Group Inc. working in Saskatchewan appear to be at the management level, such as regional directors and/or vice-presidents of operating subsidiaries. Mr. Humphries testified that, when he was Vice-President of NA Caisson Ltd., he was an employee of NA Construction Group Inc. NA Construction Group Inc. does not appear to employ anyone who would fall within the scope of the Union's bargaining unit.

[13] NA Caisson Ltd. is a wholly-owned subsidiary within the North American Group of Companies. After its incorporation, NA Caisson Ltd. has operated as a piling contractor. NA Caisson Ltd. has performed work in Saskatchewan and is a signatory to the Union's collective agreement. In 2007, the North American Group of Companies acquired a non-union piling company operating under the name of Active Auger Inc. Since its acquisition, the business interests of Active Auger Inc. were rolled in with NA Caisson Ltd. and has also operated in compliance with the Union's collective agreement.

[14] NA Services Inc. is another wholly-owned subsidiary within the North American Group of Companies. The first time NA Services Inc. came to Saskatchewan was in 2009. At that time, it was performing construction work at the Co-op refinery near Regina. At the time of the hearing, NA Services Inc. was operating in Saskatchewan working in the construction sector performing pipeline work. NA Services Inc. is not a signatory to the Union's collective agreement and it has refused to recognize the Union as the bargaining agent for the operating engineers

that its employs. The Union has been aware that NA Service Inc. was operating in Saskatchewan since 2009.

[15] NA Pipeline Inc. was another wholly-owned subsidiary within the North American Group of Companies. However, in 2012, the assets of NA Pipeline Inc. were sold and the residual business interests therefrom were rolled in with NA Caisson Ltd. At the time of the hearing, NA Pipeline Inc. was not operating in Saskatchewan as a separate legal entity.

[16] Mr. Humphries was cross-examined at some length regarding the internal organization of the North American Group of Companies and, in particular, the relationship between NA Construction Ltd. and various other subsidiaries of the North American Group of Companies, including NA Construction Group Inc., NA Service Inc. and NA Caisson Ltd. Although not as clearly as the Board might have liked, the picture that emerged from Mr. Humphries' testimony was that NA Service Inc. and NA Caisson Ltd. were independent operating subsidiaries of North American Energy Partners Inc. receiving corporate support and managerial services from NA Construction Group Inc. Each of the operating subsidiaries appears to operate with a significant degree of independence within their respective fields of expertise, particularly with respect to day-to-day operations. While NA Construction Group Inc. provides centralized human resources functions, legal and accounting services to each of its subsidiaries, the operational decisions that would tend to affect the day-to-day working conditions of employees rests at the subsidiary level. However, strategic planning and senior management is centralized or, at least, highly coordinated within the North American Group of Companies.

[17] It was noted that the branch and regional managers of the operating subsidiaries appear to be employed directly by NA Construction Group Inc., rather than the particular subsidiary wherein their particular responsibilities lie. For example, when Mr. Humphries was the President and General Manager of NA Caisson Ltd, he was employed by and reported to NA Construction Group Inc. Although an employee of NA Construction Group Inc., Mr. Humphries testified that he had no authority or involvement with respect to any of the other subsidiaries. Each subsidiary appears to operate with a great deal of operational independence (particularly with respect to each other), but a clear chain of command exists from the management of each operating subsidiary to the principals of the North American Energy Partners Inc. and ultimately to its board of directors.

[18] With respect to collective bargaining, Mr. Humphries testified that, after 1992 (the year NA Construction Ltd. was certified in Saskatchewan), NA Caisson Ltd. voluntarily recognized the Union as the bargaining agent for its employees. Mr. Humphries indicated that, as NA Caisson Ltd. was the subsidiary of the North American Group of Companies that performed piling and foundation work, the next time NA Caisson Ltd. returned to Saskatchewan, it contacted the Union, signed the Union's collective agreement (for foundation and piling work), and has been a signatory to various successive collective agreements since that time. Mr. Humphries testified that NA Caisson Ltd. had been involved in collective bargaining with the Union for many years and that he believed that NA Caisson Ltd. had a good working relationship with the Union. The fact that the parties have experienced no grievances during the history of their collective bargaining relationship would tend to validate that statement.

[19] Mr. Humphries testified that, while he had authority with respect to the collective agreements signed by NA Caisson Ltd., he did not have independent authority to ratify its collective agreements with the Union. For example, during the last round of collective bargaining with the Union, final authority for ratification of that collective agreement rested with an executive committee comprised of Mr. Humphries, together with NA Construction Group Inc.'s Director of Human Resources and various managers and vice-presidents for particular divisions, including operations; health & safety; and estimating and supply chain.

[20] On March 22, 2013, the Union filed the within applications with the Board. Since that date, certain events have transpired bearing some relevance to these proceedings. For example, NA Caisson Ltd. was sold to Keller Group plc (Keller); a company unrelated to the North American Group of Companies. Mr. Humphries is no longer an employee of NA Construction Group Inc. or any company or subsidiary of North American Energy Partners Inc. Mr. Humphries is now an employee of Keller.

Relevant statutory provision:

[21] The relevant provision of *The Trade Union Act* is section 37, which provides as follows:

> ***37****(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board*

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

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

(a) determining whether the disposition or proposed disposition relates to a business or part of it;

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

(i) an employee unit;

(ii) a craft unit;

(iii) a plant unit;

(iv) a subdivision of an employee unit, craft unit or plant unit; or

(v) some other unit;

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

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

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

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

[22] The relevant provision of *The Construction Industry Labour Relations Act, 1992* is section 18, which provides as follows:

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

*(2) **Repealed**. 2000, c.69, s.11.*

> *(3) In exercising its discretion pursuant to subsection (1), the board may recognize the practice of non-unionized employers performing work through unionized subsidiaries.*
>
> *(4) The effect of a declaration pursuant to subsection (1) is that the corporations, partnerships, individuals and associations:*
>
> *(a) constitute a unionized employer in a specified trade division; and*
>
> *(b) are bound by a designation of a representative employers' organization pursuant to section 9.1 or 10 or by a determination of a representative employers' organization pursuant to section 10.3.*
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> *(5) The board may make an order granting any additional relief that it considers appropriate where:*
>
> *(a) the board makes a declaration pursuant to subsection (1); and*
>
> *(b) in the opinion of the board, the associated or related businesses, undertakings or activities are carried on by or through more than one corporation, partnership, individual or association for the purpose of avoiding:*
>
> *(i) the effect of a designation or determination of a representative employers' organization with respect to a trade division; or*
>
> *(ii) a collective bargaining agreement that is in effect or that may come into effect between the representative employers' organization and a trade union.*
>
> *(6) Where the board is considering whether to grant additional relief pursuant to subsection (5), the burden of proof that the associated or related businesses, undertakings or activities are carried on by or through more than one corporation, partnership, individual or association for a purpose other than a purpose set out in subclause (5)(b)(i) or (ii) is on the corporation, partnership, individual or association.*
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> *(7) An order pursuant to subsection (5) may be made effective from a day that is not earlier than the date of the application to the board pursuant to subsection (1).*

Applicant Union's argument:

[23] The Union seeks an amendment to the certification Order of this Board dated October 15, 1992 to alter the name of the employer stated therein; namely to add NA Construction Group Inc. together with NA Caisson Ltd., NA Services Inc. and NA Pipeline Inc.

[24] The Union takes the position that, when NA Construction Ltd. came to Saskatchewan in 1992 and was certified by this Board, it was a construction company that happened to be performing piling and foundation work at that time. The Union argued that it was not a piling and foundation company in 1992; it was a general construction company that happened to be performing a piling and foundation contract. Furthermore, the Union noted that the certification Order that was issued by this Board in 1992 did not limit the scope of the Union's

bargaining unit to piling and foundation work; rather the Board issued a standard “trade” certification that applied to all aspects of NA Construction Ltd.’s operations; not just its piling and foundation work.

[25] The Union noted that, after being certified, NA Construction Ltd. began a process of corporate reorganization and Counsel argued that the purpose, or at least the affect, of doing was to either defeat the Union’s certification Order or limit the impact of that Order on the other construction activities it was involved in. In support of this argument, counsel noted that NA Construction Ltd. was incorporated in 1969 and that its incorporation predated all of the other respondent corporations, including NA Construction Group Inc., which was incorporated (in the first instance) in 1988; and NA Caisson Ltd., which was incorporated in 1991; and NA Pipeline Inc., which was incorporated in 1991; and NA Services Inc., which was incorporated in 1998. The Union also pointed to the commonality of the officers and directors of each of these corporations. From these facts, the Union asked this Board to infer that NA Construction Ltd. was the parent company of each of these later corporate entities within the North American Group of Companies and to infer that the reason these corporate entities were created was to defeat and/or limit the application of the Union’s certification Order. The Union took the position that, after NA Construction Ltd. was certified, the company that returned to Saskatchewan, NA Caisson Ltd., had a far more limited scope of operation than that of NA Construction Ltd.

[26] For these reasons, the Union sought a declaration from this Board pursuant to s. 37 of *The Trade Union Act* that NA Construction Group Inc., together with NA Caisson Ltd., NA Services Inc. and NA Pipeline Inc., or any of them, are successors to the collective bargaining obligations previously held by NA Construction Ltd. Counsel argued that to do otherwise would be to defeat the full scope of the Union’s certification Order, which the Union believed was intended to apply to all aspects of NA Construction Ltd. operation and not just its piling and foundation work.

[27] In the alternative, the Union seeks a declaration from this Board pursuant to s. 18 of *The Construction Industry Labour Relations Act,* 1992 that NA Construction Ltd. and NA Construction Group Inc. together with NA Caisson Ltd., NA Services Inc. and NA Pipeline Inc. are all related or associated businesses operating under the common control and direction of NA Construction Group Inc. and/or North American Energy Partners Inc.

[28] In either event, the Union seeks an amendment to the certification Order of this Board dated October 15, 1992.

The arguments on behalf of the Respondents, North American Construction Group Inc. & North American Services Inc.:

[29] With respect to successorship, Mr. Seiferling, counsel on behalf of NA Construction Group Inc. and NA Services Inc., took the position that neither of these companies were successor employers within the meaning of s. 37 of *The Trade Union Act*. Firstly, counsel argued that this Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. and United Food and Commercial Workers Union, Local 1400*, [1995] 3rd Quarter Sask. Labour Rep. 140, LRB File Nos. 246-94 & 291-94, (the "*Yorkton O.K. Economy/Superstore*" case) stands for the proposition that the successorship provisions in s. 37 of *The Trade Union Act* do not apply to a re-organization within the same employer; in this case, a reorganization of work between the North American Group of Companies.

[30] Secondly, Mr. Seiferling argued that, even if s. 37 can apply to a transfer between subsidiaries within the North American Group of Companies, there had been no "transfer of a business" between NA Construction Ltd. and any of the named Respondents. Counsel argued that, after NA Construction Ltd. completed its work in Saskatchewan, it effectively went out of business and became nothing more than a shell of a company, with no employees in Saskatchewan and no assets. Counsel argued that the Union failed to tender evidence of the transfer of some kind of business or a going concern from NA Construction Ltd. to any of the subsidiary within the North American Group of Companies. Mr. Seiferling argued that there was no evidence that anything transferred from NA Construction Ltd. to any of the named Respondents. Similarly, Counsel disputed the Union's contention that the evidence establishes that NA Construction Ltd. was the parent company to any of the named subsidiaries.

[31] Finally, Mr. Seiferling argued that, if a transfer or disposition of a business had taken place, it was between NA Construction Ltd. and NA Caisson Ltd. and not any of the other named Respondents. To which end, counsel noted that granting the Union's request to amend its certification Order in the fashion suggested would result in a significant expansion of the scope of that Order. Counsel noted that, when NA Construction Ltd. was certified, it was merely conducting piling and foundation work in Saskatchewan. If, however, the Union's certification

Order was applied to NA Construction Group Inc. or NA Service Inc., it would include a number of new classes of employees unrelated to the piling and foundation industry. On the other hand, counsel noted that NA Caisson Ltd. was the subsidiary within the North American Group of Companies that performs piling and foundation work. Counsel argued that to add any of the other named Respondents to the Union's certification Order would expand the application of the Union's certification Order to a number of new employees without any evidence from the Union as to the wishes of those employees. In this regard, counsel noted the following passage from the decision of this Board in *United Brotherhood of Carpenters and Joiners of America, Locals 1805 and 1990 v. Cana Construction Co. Ltd., et. al.* [1985] Feb. Sask. Labour Rep. 29, LRB File Nos. 199-84, 201-84, 202-84 & 204-84, wherein then Chairperson Ball provided the following caution with respect to application of s. 37 of *The Trade Union Act*:

> *Finally, a most important factor to be considered is whether in the Board's view the application of Section 37 to any particular situation will preserve the union's legitimately acquired bargaining rights, or whether it will serve instead to expand those rights or create new ones. The Board will not permit a union to use the provisions of Section 37 as an instrument for acquiring new and expanded rights, or as a convenient substitute for organizing employees, obtaining certification and arriving at a collective bargaining agreement.*

[32] For these reasons, Mr. Seiferling argued that it would be inappropriate for this Board to find that either NA Construction Group Inc. or NA Services Inc. were successors to the collective bargaining obligations previously held by NA. Construction Ltd.

[33] With respect to the Union's desire for a common employer designation, Mr. Seiferling took the position that it is not possible for this Board to make a common employer designation involving NA Construction Ltd. because that corporation is now defunct. Counsel argued that a plain reading of s. 18 of *The Construction Industry Labour Relations Act, 1992* would indicate that a common employer designation can only be made with respect to companies that are "active" (i.e.: carrying on business) at the time of the application. Counsel noted that a common employer designation can only be made if the Board is first prepared to find that one (1) or more of the Respondents subsidiaries is a successor to the collective bargaining rights previously held by NA Construction Ltd. because they were the only companies that were carrying on business (that were active) at the time of the Union's application.

[34] Secondly, Mr. Seiferling noted that, although the Board has authority to make a common employer designation pursuant to s. 18 of *The Construction Industry Labour Relations*

Act, 1992 there must be a sound labour relations purpose or valid reason for doing so. To which end. Mr. Seiferling argued that, if NA Caisson Ltd. is found to be a successor to NA Construction Ltd.'s previous collective bargaining obligations, the Board would have no valid reason for making a common employer designation as NA Caisson Ltd. is the subsidiary within the North American Group of Companies that has carried on all of the work previously performed by NA Construction Ltd. in Saskatchewan. Counsel argued that to make a common employer designation involving any of the other Respondents would be to expand or extend the Union's certification to new employees involved in activities that NA Construction was not involved in when it was operating in Saskatchewan.

[35] Thirdly, Mr. Seiferling took the position that there was an obligation on the Union to act quickly upon learning that any of the alleged common employers were working in Saskatchewan. Counsel relied upon the decisions of the British Columbia Labour Relations Board in *Commonwealth Construction Company Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170*, 2013 CanLII 9500 (BC LRB), BCLRB No. 48/2013, and of the Ontario Labour Relations Board in *United Brotherhood of Carpenters and Joiners of America, Local Union 93 v. Acto Builders (Eastern) Limited*, 1979 CanLII 877 (ON LRB), [1979] OLRB Rep. June 465, as setting forth an obligation on trade unions to move quickly (i.e.: within months) upon learning that a potential successor or common employer is operating contrary to an existing certification Order. Counsel noted that the Union has been aware that NA Service Inc. was operating in Saskatchewan since 2009.

[36] Finally, Mr. Seiferling argued that there was no evidence that NA Construction Group Inc. had employed or was employing any operating engineers in Saskatchewan or anyone else that would fall within the scope of the Union's bargaining unit. In addition, counsel noted that the Union had filed and then later abandoned a previous application to this Board naming NA Construction Group Inc. As a consequence, Mr. Seiferling argued that it was an abuse of process for the Union to revive its previously abandoned claim involving NA Construction Group Inc.

[37] For these reasons, Mr. Seiferling argued that it would be inappropriate for this Board to make a common employer designation involving either of his two (2) clients.

[38] Counsel filed a detailed written brief of law on behalf of NA Construction Group Inc. and NA Services Inc., which we have read and for which we are thankful.

The arguments on behalf of the Respondents, North American Caisson Ltd. and North American Pipeline Inc.

[39] Mr. McPhail, counsel on behalf of NA Caisson Ltd. and NA Pipeline Inc., adopted much of the argument of Mr. Seiferling save for the assertion that NA Caisson Ltd. was the successor to the collective bargaining obligations previously held by NA Construction Ltd. To the contrary, counsel argued that it would be inappropriate for this Board to now name NA Caisson Ltd. as a successor because it has been operating in Saskatchewan for years, with the full knowledge of the Union. Counsel argued that it is now simply too late for the Union to bring a successorship application. To which end, counsel asked this Board to exercise its discretion and decline to grant the Union's successorship application involving NA Caisson Ltd.

[40] With respect to a common employer designation, Mr. McPhail agreed with Mr. Seifering that such a designation can only be made with respect to companies that are in business at the time of application. Counsel argued that, as NA Construction Ltd. is defunct and has been for years, it would be inappropriate for this Board to name either NA Caisson Ltd. or NA Pipeline Inc. as common employers with a now defunct company.

[41] With respect to NA Pipeline Inc., counsel noted that this company no longer has a separate existence. Counsel noted that in 2012 NA Pipeline was rolled in with NA Caisson Ltd.

[42] Counsel asked the Board to dismiss the Union's application with respect to both NA Caisson Ltd. and NA Pipeline Inc.

Analysis:

[43] The Union seeks an amendment to the certification Order of this Board dated October 15, 1992 to alter the name of the employer stated therein; namely to add NA Construction Group Inc. together with NA Caisson Ltd., NA Services Inc. and NA Pipeline Inc. The Union relies on s. 37 of *The Trade Union Act* for a finding that one or more of the named Respondents are successors to NA Construction Ltd.'s collective bargaining obligations and s. 18 of *The Construction Industry Labour Relations Act, 1992* for a declaration that one or more of

the named Respondents are common employers. We will deal with each of these arguments in turn.

The Successorship Analysis:

[44] The legislative purpose behind Saskatchewan's successorship legislation has been outlined in a number of previous decisions of this Board, including *Saskatchewan Government Employees' Union v. Saskatchewan Institute of Applied Science and Technology*, [1989] Summer Sask. Labour Report. 51, LRB File No. 131-88, and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation & Moose Jaw Exhibition Association Company Ltd.*, [2001] Sask. L.R.B.R. 751, LRB File Nos. 163-01 & 164-01. A similar but more recent articulation can also be found in the decision of this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Charnjit Singh and 1492559 Alberta Inc*., [2013] 223 C.L.R.B.R. (2d) 136, 2013 CanLII 3584 (SK LRB), 196-10 at paras 40 & 41 (the "*Swift Current Howard Johnson* case") as follows:

> ***[40]*** *Successorship in labour relations is a legislative creation that provides for the transfer of collective bargaining obligations from the owner of a certified business to another party upon the disposition of that business or a part therein. Without legislative intervention, changes in the ownership of a business would generally have the effect of undermining and/or dislocating the collective bargaining rights of the employees of that business. However, thanks to specific provisions in labour legislation, collective bargaining rights now tend to survive and flow through changes in the ownership of a business (provided there is some sense of continuity of that "business"). Through legislative intervention, it is the "business", not a particular employer to which the collective bargaining rights are seen to have attached and, if that business ends up in the hands of a new owner, previous collective bargaining obligations tend to flow with the transaction through to that new owner.*
>
> ***[41]*** *Like so many other areas of labour legislation, the statutory provisions dealing with successorship are policy laden and represent an attempt to balance competing interests; in this particular case, the right of owners to freely dispose of their property and the expectation of employees that their collective bargaining rights will have some reasonable permanency irrespective of changes in ownership of their workplace. The legislative rationale for s. 37 of Saskatchewan's Trade Union Act was succinctly stated by the Board in Hotel and Restaurant Employees, Local 767 v. 603195 Saskatchewan Ltd., (1995) 25 C.L.R.B.R. (2d) 137, [1994] 3rd Quarter, Sask. Labour Rep. 136, LRB File Nos. 125-94, 130-94 & 131-94, at 139:*
>
> > *Section 37 of The Trade Union Act provides for a transfer of collective bargaining obligations when a business or part of a business changes hands. It represents an effort on the part of the legislature to safeguard the protection which employees have*

> *achieved through the exercise of their rights under the Act, when the enterprise in which they are employed is passed on as a result of negotiations or transactions in which they have no opportunity to participate. The protection provided by Section 37, however, does not apply to all cases where an employer disposes of his business, and the determination as to whether the means by which a business has changed hands brings the new entity under the obligations which flow from Section 37 is often a matter of some complexity.*

[45] As was noted by this Board in the *Cana Construction* case, in making a determination pursuant to s. 37, it is not necessary that we find that there has been a transfer or sale of a business in a strict legal sense. Rather, in determining whether there has been a sale, transfer or disposition of a business (or part thereof), the practice of the Board has been to look to see whether there is a discernable continuity in the business formerly carried on by the predecessor employer and subsequently carried on by the successor employer. The vital consideration for the Board is whether or not the effect of the transaction (whether it be a sale, transfer or other disposition) was to put the transferee into possession of the essential elements of a business. To make a finding of successorship, the issue is not so much the legal or technical nature of how the transfer took place but rather whether or not the Board is satisfied that the new owner acquired the essential elements of a business and that those business interests can be traced back to the business activities of the previously certified owner. In other words, the fundamental question is whether there is evidence of a discernable continuity of the subject business (or part thereof). See also: *Canadian Union of Public Employees, Locals 832-02 & 832-03 v. Conseil Scolaire Fransaskois de L'Ecole Saint Isidore*, [1995] Sask. Labour Rep. (3rd Quarter) 184, LRB File No. 110-95.

[46] As this Board noted in *Canadian Union of Public Employees Local 1975-01 v. Versa Services Ltd.*, [1993] 1st Quarter Sask. Labour Rep. 174, LRB File No. 170-92 (and in many other cases), there is no exact criteria or checklist for determining whether or not a transfer of obligations has taken place within the meaning of s. 37. Rather, labour relations boards across Canada, including this Board, have resigned themselves to the conclusion that such determinations are heavily dependent upon the facts of each particular case. Often the issue to be determined is whether or not the transferring transaction involved the essential elements of a business or whether it merely involved the sale of an idle collection of assets; with the former giving rise to successorship but not the later. See: the *Swift Current Howard Johnson* case. However, in the present application, the more difficult issue is identifying the nature of the

business that was being conducted by NA Construction Ltd. and determining to whom, if anyone, that business was transferred.

[47] While the concept of successorship for employers operating in the construction sector is the same as in any other industries, the indicia of successorship in the construction industry can be very different; that's because there are certain features of companies operating in the construction sector that are unique to that industry. For example, some employers carry on business with very few tangible assets. In the construction sector, the key asset of an employer may simply be the skill, knowledge and expertise of its principals or its key personnel, together with that employer's reputation and credibility. As a consequence, labour boards have recognized that the movement of these key personnel from one employer to another in the construction sector can be indicative of the transfer of a business or part thereof, particularly so where one business is wound down and a new employer established to carry on that same work. See: *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Graham Construction and Engineering Ltd. et.al.*, [2003] Sask. L.R.B.R. 471, LRB File Nos. 014-98 & 227-00.

[48] To begin our consideration of the successorship issue, we note that, other than the date of incorporation, the evidence did not support the contention that NA Construction Ltd. was a parent company to any of the named Respondents. Rather, we have concluded that NA Construction Ltd. was merely an operating subsidiary within a larger collection of companies when it was certified by this Board in 1992. Mr. Humphries testified to the existence of other operating subsidiaries when NA Construction Ltd. came to Saskatchewan in 1992. He testified that, when "they" received the contract from Action Drilling to install pilings and perform foundation work in Regina, he was working for "North American Roads" but that his expertise was in foundation work and the installation of piles. Mr. Humphries testified that, because NA Caisson Ltd. was not yet registered, "they" did the work through NA Construction Ltd. Mr. Humphries went on to testify that, when "they" next returned to Saskatchewan to perform other foundation and piling work, the subsidiary that returned to perform this work was NA Caisson Ltd. Mr. Humphries testified that "they" were aware that "they" were a certified employer in Saskatchewan and, immediately upon returning to the province to perform more foundation and piling work, "they" contacted the Union. NA Caisson Ltd. has been a signatory to the Union's collective agreement for years and, by all accounts, has been fully compliant therewith ever since. It was apparent from Mr. Humphries' testimony that the principals and/or corporate

interests at that time were larger than NA Construction Ltd. The reasonable inference therefrom is that NA Construction Ltd. was merely an operating subsidiary in 1992 when it came to Saskatchewan and that it was not the parent company.

[49] In our opinion, there can be little doubt that NA Caisson Ltd. is a successor to the business activities previously carried on by NA Construction Ltd. in Saskatchewan in 1992 (when it was certified) and thus it is a successor to NA Construction Ltd.'s collective bargaining obligations. There is a clear nexus between the business previously carried on by NA Construction Ltd. in Saskatchewan in 1992 and the work subsequently performed in Saskatchewan by NA Caisson Ltd. in the transfer of key personnel from one subsidiary to another. Mr. Humphries' testimony established a clear continuity of business activity, together with his own movement from NA Construction Ltd. to NA Caisson Ltd.

[50] Counsel on behalf of the Respondents argued that the decision of this Board in the *Yorkton O.K. Economy/Superstore* case stands for the proposition that the successorship provisions in s. 37 of *The Trade Union Act* do not apply to a re-organization within the same employer. In our opinion, the *Yorkton O.K. Economy/Superstore* case is distinguishable. In that case, the Board was dealing with different divisions within the same corporate employer operating in the retail sector. In the present case, NA Construction Ltd. and the Respondents are not divisions within the same corporation; they are separate corporations operating under common direction and control. Furthermore, the *Yorkton O.K. Economy/Superstore* case did not involve employers in the construction industry. Employers in the construction sector may not always be present in the province. It may be years between projects and, during these periods of absences, corporate reorganization can take place for a certified employer. When these reorganized employers return to the province to work again, they may have changed dramatically and yet the technological change provisions contained in s. 43 of *The Trade Union Act* would be of little assistance. Finally, unlike the *Yorkton O.K. Economy/Superstore* case, in the present application the Union is seeking to amend its certification Order and, provided it is not sweeping in any new employees, it need not tender evidence of support with such an application. In our opinion, this Board's decision in the *Yorkton O.K. Economy/Superstore* case does not stand as a bar to intervention by this Board in the present application.

[51] As we have indicated, in our opinion, NA Caisson Ltd. is a successor to the collective bargaining obligations previously held by NA Construction Ltd. The more difficult

question is whether or not any of the other named Respondents are successors as well. The Union took the position that all of the named Respondents are successors because they are all general construction companies that are now working in Saskatchewan and that the construction activities of these Respondents also flows from or finds their genesis in the business previously carried on by NA Construction Ltd. Counsel for the Union argued that it would be inappropriate for this Board to narrowly examine the nature of the business that NA Construction Ltd. was involved in 1992 when it was certified. Rather, the Union asks that, in determining the continuity of business interests, we should simply look to the scope of the Union's certification Order and broadly consider the predecessor's business interests not just within Saskatchewan but outside as well. In other words, we should define the business activities of NA Construction Ltd. based on the kind of work it could have become involved in had it stayed in Saskatchewan.

[52] In a successorship application, the first matter to be determined is the nature of the business of the alleged predecessor. The second step is then to determine whether there is a discernable continuity of that business, or a part thereof, into the hand of an alleged successor as a result of a disposition of some form. While it may be possible to define the business interests of an alleged predecessor as broadly as that suggested by the Union, in our opinion, it would be inappropriate doing so in the present application. There was no evidence in these proceedings that NA Construction Ltd. was involved in any other kind of construction activities in Saskatchewan when it was operating. NA Construction Ltd. may well have been engaged in more than foundation and piling work in other jurisdictions, but in Saskatchewan, in 1992 that was the extent of their business activities. All parties agreed that, if NA Construction Ltd. had stayed and continued to work in Saskatchewan, the Union's certification Order would have applied to all of its activities thereafter not just the piling and foundation work it may have done. But that's not what happened and NA Construction Ltd. did not return to Saskatchewan.

[53] When "they", the North American Group of Companies, returned to Saskatchewan to work, there were three (3) different operating subsidiary; namely, NA Caisson Ltd., NA Pipeline Inc. and NA Services Inc. Of these, only NA Caisson Ltd. has been involved in the kind of work that NA Construction was performing in Saskatchewan. NA Caisson Ltd. is the operating subsidiary within the North American Group of Companies that is responsible for the performance of piling and foundation work and we are satisfied that it has been the recipient of the business activities previously being carried on in Saskatchewan by NA Construction Ltd., which in 1992 (when it was certified) was piling and foundation work. The kind of work now

being performed by NA Service Ltd. is significantly broader than the work previous performed by NA Construction Ltd. in this province. Furthermore, NA Services Ltd. has been openly operating on a non-union basis in Saskatchewan and the Union has been aware of their presence since at least 2009. As a consequence, to find that NA Service Ltd. is now a successor would be to dramatically expand the Union certification Order and would sweep in a whole new group of employees.

[54] Section 37 is the legislative instrument that prevents a successor employer from avoiding its collective bargaining obligations. However, as indicated by this Board in the *Cana Construction* case, s. 37 may not be used as an instrument for acquiring new or expanding existing rights. This Board has a number of discretionary powers in s. 37, including the authority for this Board to direct that a vote be taken amoung eligible employees if the affect of a successorship application would be to sweep in a number of new employees. In our opinion, applying successorship as broadly as the Union suggests would offend the caution expressed by this Board in *Cana Construction, supra* precisely because it would sweep in a number of new employees. In our opinion, it would be inappropriate to add NA Services Ltd. to the Union's certification Order without a representational vote being conducted by the employees of that company. While in some successorship applications, it may be appropriate for the Board to order that a vote be conducted, in light of the delay in the Union's bringing the within application, we find that it would not be appropriate in the present case. In our opinion, if the Union desires to represent the employees of NA Services Ltd., it must now organize those employees through a certification application or provide evidence of support with its amendment application.

[55] With respect to NA Construction Group Inc., we saw no evidence that this subsidiary of the North American Group of Companies acquired any of the relevant business interest of NA Construction Ltd. Furthermore, NA Construction Group Inc. appears to be a management company and we saw no evidence that it employs anyone falling within the scope of the Union's bargaining unit in Saskatchewan.

[56] Finally, with respect to NA Pipelines Inc., we saw no evidence that it acquired any of the relevant business activities of NA Construction Group. Furthermore, this company appears to no longer have a separate existence.

[57] It should be noted that a component of our conclusion regarding the successorship issue is that we were not persuaded that the corporate re-organization that occurred within the North American Group of Companies was motivated by an anti-union animus. The fact that NA Caisson Ltd. voluntarily recognized the Union and became signatures to the Union's collective agreement upon returning to Saskatchewan is inconsistent with the allegation the North American Group of Companies was trying to defeat the Union's certification Order; as is the fact, that when Active Auger Inc. was acquired in 2007, it too became a unionized operation. On the other hand, we do note that the corporate reorganizations that occurred may have had the affect of limiting the Union's certification Order to the kind of work NA Construction Ltd. was performing at the time it was certified. The Union argues that this result ought to be deemed anti-union as well. With all due respect, we can not agree. Employers are not required to continue operating after certification. They have the right to cease conducting business. They also have the right to reorganize their corporate affairs into specific silos of responsibility. We are not satisfied that it was anti-union for the North American Group of Companies to reorganize its subsidiaries after the certification of NA Construction Ltd. in Saskatchewan even if the affect of doing was to confine its collective bargaining obligations to its piling and foundation work in Saskatchewan. As this Board has repeatedly stated, the purpose of s. 37 of *The Trade Union Act* is to prevent employers from disregarding the collective bargaining rights that have been earned by a group of employees and granted by this Board. Section 37 does not guarantee that the membership of a trade union will automatically expand if an employer chooses to compartmentalize its operations. Of significance to this determination is the fact that piling and foundation work is a recognized sector within the construction industry. This sector negotiates its own separate collective agreement with its bargaining agents and has done so for decades. If the North American Group of Companies had attempted to reorganize itself around some artificial boundary or some less recognized distinction, our view of the situation may well have been different.

[58] For the foregoing reasons, we are satisfied that NA Caisson Ltd. is the successor to the collective bargaining obligations previously imposed by this Board on NA Construction Ltd. On the other hand, we were not satisfied that any of the other named Respondents were successors within the meaning of s. 37 of *The Trade Union Act*. The Union's certification Order shall be amended accordingly.

<u>Common employer designation</u>:

[59] As indicated, the Union also seeks a declaration from this Board pursuant to s. 18 of *The Construction Industry Labour Relations Act,* 1992. In light of our determination that NA Caisson Ltd. is the successor to the business interests previously carried on by NA Construction Ltd. in Saskatchewan and in light of the fact that NA Pipeline Inc. is no longer in existence, the issue left to be resolved is whether or not NA Construction Group Inc. and/or NA Services Inc. ought to be declared a common employer with NA Caisson Ltd.

[60] In response to the complex and often murky realities of corporate organization, most Canadian jurisdiction have enacted legislation that authorizes labour boards to pierce the corporate veil and find that two (2) or more related businesses ought to be treated as one (1) common employer for the purposes of labour relations. Saskatchewan has such a provision for the construction industry in s. 18 of *The Construction Industry Labour Relations* Act, 1992. Many corporations operate in an associated or related fashion and these corporations may be operated under common direction and control for a variety of legitimate business reasons. However, if the purpose or effect of a corporate organization or reorganization is to avoid collective bargaining obligations (for example, by permitting the transfer of work that would normally be completed by a unionized company to a non-union a related company operated under common direction and control – a practice commonly known as “double breasting”), then this Board has authority pursuant to s. 18 to pierce the corporate veil, so to speak, and declare both employers to be one (1) for the purposes of collective bargaining. The affect of a common employer designation is to cause the employees of both the union and non-union employers to fall within the scope of a trade union’s bargaining unit. Obviously, it is a powerful tool granted by the legislature for the purpose of achieving a particular remedial effect.

[61] In the case of *Walters Lithographing Company Co. Ltd.,* [1971] O.L.R.B.Rep. 406, the Ontario Labour Relations Board set forth a number of indicia or criteria for determining when two (2) or more employers are related and operated under common control. These factors have been common excepted by labour boards (and courts) across Canada and are as follows:

1. whether or not there is common ownership and/or financial control;
2. whether or not there is common management;
3. whether or not there is an interrelationship of operations, including the transfer of employees;
4. whether or not there is centralized control of labour relations; and

5. whether or not the employers represent themselves to the public as a single integrated enterprise.

[62] In considering a common employer application, it is very important to be mindful that a finding that two (2) or more employers are related and operating under common direction and control, is not determinative of the issue. Even if we are satisfied that the subject companies are related and operating under common direction and control, the question still remains as to whether or not that board should exercise its discretion to make a common employer declaration. Such declarations are not automatic. Rather, they are only granted if there is a valid labour relations reason for doing so and that the benefit of making such a designation outweighs the mischief it is likely to cause.

[63] Like so many other areas of labour legislation, labour boards must balance potentially competing interests in making a common employer declaration. In the first instance, labour boards must be mindful of the need to protect and preserve the collective bargaining rights of a group of organized employees by not permitting the erosion of their rights through transfer of work (and thus employees) to a related, non-union company. On the other hand, labour boards must also be careful not to unilaterally impose collective bargaining upon a group of employees who may not wish to be represented by a trade union. Just as successorship provisions are not a vehicle for trade unions to avoid organizing new employees, neither is a common employer designation. These considerations were well articulated by the Ontario Labour Relations Board in the case of *Farquhar Construction Limited v. United Brotherhood of Carpenters and Joiners of America, Local 2486*, [1979] 1 Can L.R.B.R. 72, [1978] O.L.R.B. Rep. Oct. 914, 1878 CanLII 595 (ON LRB) in the following paragraphs:

> *In emphasizing the importance of a trade union acting promptly – when confronted with a multi-employer situation – the Board's concern is not simply to avoid the situation where bargaining rights may be acquired by another trade union – a concern expressed in Industrial Mine. Because the application of section 1(4) may involve an accretion to an existing bargaining unit, the Board has been increasingly concerned to avoid imposing bargaining rights on employees who may desire to remain unrepresented, or perhaps to be represented by another trade union. Where a union moves to protect its bargaining rights with dispatch, the need for stability in collective bargaining must take precedence over the wishes of the new employees. In such circumstances, the position of the new employees may be likened to that of employees hired as a result of a post-certification build-up of an employer's workforce. They may not wish collective bargaining; but that is the structure which has been established to govern their employment relationship – at least until such time as an application for termination becomes timely. Where, however, a union chooses to sleep on*

> *its bargaining rights and allows an employer to carry on with an unorganized workforce, the rights of the unorganized employees must be considered. …*
>
> *The Board recognizes that the erosion of a union's bargaining rights may occur gradually and that there will be cases where the erosion is not immediately apparent. For that reason, we will be careful to avoid imposing upon applicants a standard of diligence which is unduly onerous. Where, however, a union does not seek relief within a reasonable period from the time at which it becomes (or ought reasonable to become) aware that its bargaining rights are being eroded, the Board will decline to exercise its discretion and will insist that it proceed by way of the normal certification procedures.*
>
> *….*
>
> *The converse to the principle that the bargaining rights of a union should be protected from erosion by employer manipulation of the corporate form is that the appearance of a new corporate entity should not be the occasion for an expansion of bargaining rights into a previously unrepresented area. That is, without a showing by the applicant that it has the support of a majority of the employees in the new grouping.*

[64] The Ontario Labour Relations Board then went on to apply the above criteria to the facts before it in that case:

> *There can be no doubt that the union in this case has not acted with reasonable dispatch. The evidence indicates that the applicant knew of the activities of Enterprize in the North Bay area by the summer of 1977, if not before. The applicant did not, however, seek relief from the Board until March of this year. Whether this was because it was prepared initially to allow Enterprize to operate outside of the framework of its collective agreement with Farquhar, as argued by counsel for the employer, or whether it was through simple ignorance of the need to act promptly, the fact is that the applicant now seeks to assert bargaining rights in respect of a group of employees who have been unrepresented for a period of some two years. In these circumstances, the Board has concluded that it would not be a sound exercise of its discretion to treat the two corporations as one. If the union wishes bargaining rights for the employees of Enterprize, it must proceed by way of the normal certification procedures.*

[65] While the purpose to be served by a common employer declaration is the protection and preservation of established collective bargaining rights, because of the potential for imposing collective bargaining upon a group of employees who may not wish to be represented, a trade union must move to enforce its rights with reasonable dispatch if it believes that an erosion of its bargaining rights is occurring because of the operations of a suspected common or related employer. Simply put, the longer the delay and the greater the number of employees that could potentially be unilaterally swept in, the more likely a common employer declaration will do more labour relations harm than good.

[66] While we are satisfied that NA Caisson Ltd., NA Construction Group Inc. and NA Services Inc. are operated under common direction and control[2] and while they operate in related fields of construction[3], we were not satisfied that there is a valid and sufficient labour relations reason that would be served by making a declaration pursuant to s. 18. In 1992, the Union organized a unit of employees that were performing foundation and piling work and NA Caisson Ltd. is the operating subsidiary within the North American Group of Companies that performs that work. As a result of our determination that NA Caisson Ltd. is the successor to NA Construction Ltd.'s collective bargaining obligations, the Union's bargaining rights have been preserved. In other words, the Union now represents the same group of employees that it represented in 1992 when NA Construction Ltd. was certified.

[67] Even if we were satisfied that the corporate reorganization within the North American Group of Companies had the affect of eroding the scope of the Union's certification Order (which we weren't), in our opinion, there has been too much delay on the part of the Union is seeking a common employer declaration with respect to NA Services Inc. and there is a not-insignificant risk that a common employer designation would impose collective bargaining upon a group of new employees who may not wish to be represented by the Union. The Union has been aware that NA Services Inc. was operating in Saskatchewan on a non-union basis since 2009. The Union now seeks to assert bargaining rights in respect of a group of employees who has been unrepresented for a period of over three (3) years. In these circumstances, we are not satisfied that it would be a sound exercise of our discretion to treat NA Caisson Ltd. and NA Services Inc. as one (1) employer for the purposes of collective bargaining. If the Union wishes bargaining rights for the Employees of NA Services Inc., it must tender evidence of support from these affected employees with its amendment application (which it hasn't) or it must proceed by way of the normal certification procedures.

[68] With respect to NA Construction Group Inc., we saw no evidence that this subsidiary of the North American Group of Companies employed anyone falling within the scope of the Union's bargaining unit. Little utility and certainly no labour relations purposes would be

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[2] There was evidence that overall control of the operating subsidiaries of the North American Construction Group rested with centralized management, including financial control and control with respect to human resources and labour relations.

[3] While there was some evidence of the integration of activities of the operating subsidiaries of the North American Construction Group within the construction sector, in light of our other determinations, we need not decide whether or not these companies are "related" within the meaning of s. 18 of *The Construction Industry Labour Relations Act*.

served by declaring NA Construction Group Inc. and NA Caisson Ltd. to be one (1) employer for the purposes of labour relations. On the other hand, doing so would expand the scope of the Union's certification Order and thus would not be an appropriate use of the discretion that has been granted this Board.

[69] For the foregoing reasons, the Union's request for a common employer designation pursuant to s. 18 of *The Construction Industry Labour Relations Act, 1992* is denied.

Conclusion:

[70] For the foregoing reasons, we find that the Union's application ought to be granted in part; but only in part. Specifically, we find that NA Caisson Ltd. is the successor to the collective bargaining obligations previously imposed by this Board upon NA Construction Ltd. The Union's certification Order shall be amended accordingly. With respect to the other named Respondents, we are not satisfied that they are successors nor do we find that it would be appropriate to name the other Respondents as common employers with NA Caisson Ltd. As a consequence, the Union's application is dismissed with respect to NA Construction Group Inc., NA Pipeline Inc. and NA Services Inc.

DATED at Regina, Saskatchewan, this 18th day of September, 2013.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson