



INTERNATIONAL UNION OF PAINTERS & ALLIED TRADES, LOCAL 739, Applicant v. PAFHQ CONSTRUCTION GP LTD., POINTS ATHABASCA FHQ CONTRACTING LP and ATHABASCA LABOUR SERVICES LTD., Respondents

LRB File Nos. 108-13 and 125-13; December 20, 2013

Vice-Chairperson, Steven D. Schiefner.; Members: Gloria Cymbalisty and Ken Ahl

For the Applicant Union:	Ms. Bettyann Cox
For PAFHQ Construction GP LTD. and Points Athabasca FHQ Contracting LP:	Mr. Larry F. Seiferling, Q.C.
For the Athabasca Labour Services Ltd.:	Mr. Larry B. LeBlanc, Q.C.

Certification – Employer – Trade union seeks to represent craft unit of painters working at large industrial site – Dispute arises as to identity of employer of employees – Board reviews criteria for identification of employer of employees.

Certification – Employer – Designation of Principal or Contractor – Trade union seeks to have principal designated as deemed employer of employees of contractor – Board not satisfied that principal exercises fundamental control over labour relations in the workplace – Board also not satisfied that a sound labour relations basis exists for designating principal to be deemed employer of contractor’s employees.

The Trade Union Act, ss. 2(g)

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** On May 3, 2013, the International Union of Painters and Allied Trades, Local 379 (the “Union”) filed an application with the Saskatchewan Labour Relations Board (the “Board”) seeking to represent a unit of employees who happened to be working at a large industrial site. See: LRB File No. 108-13. In its application, the Union named “*PAFHQ Construction GP Ltd., operating under the business name of Points Athabasca FHQ Contracting LP and/or Points Athabasca FHQ*” (hereinafter collectively referred to as “Points Athabasca FHQ”) as the employer of the subject employees. In its

application the Union sought to represent its typical craft unit; namely, a bargaining unit comprised of “*painters, painter apprentices, painter foremen and sand blasters involved in painting, coatings and preparatory work*” (hereinafter referred to collectively as “painters”).

[2] On May 9, 2013, counsel on behalf of Points Athabasca FHQ wrote to the Board indicating that it was not the employer of any of the subject employees and that the actual employer of the painters that the Union sought to represent was Athabasca Labour Services Ltd. (“Athabasca Labour Services”). On May 17, 2013, Points Athabasca FHQ filed a Reply with the Board to that same effect. On May 23, 2013, the Union amended its certification application to add “Athabasca Labour Services” as a named respondent, together with Athabasca FHQ. On June 4, 2013, Athabasca Labour Services filed a Reply to the Union’s certification application admitting it was the employer of the subject employers. Athabasca Labour Services also filed an objection to the conduct of the representational vote that was conducted by the Board on May 21, 2013. See: LRB File No. 125-13.

[3] On October 1, 2013, the Board began hearing the Union’s application for certification, together with the Objection to the Conduct of the representational vote filed by Athabasca Labour Services. At the outset of the hearing, the parties asked that the proceedings be bifurcated and that the Board first determine the identity of the employer of the subject employees (for the purpose of collective bargaining). The parties agreed that the remaining issues with respect to the conduct of the representational vote ought to be left for another day.

[4] In support of its application, the Union called its Business Manager, Mr. John Sedor, and Mr. Joseph Simon, a painter who was working at the subject workplace at the time the Union filed its application for certification. Athabasca Labour Services called its Executive Director, Mr. Robert D. Jenkins. Points Athabasca FHQ called Mr. Bradley Darbyshire. Evidence concluded on November 15, 2013.

[5] For the reasons that follow, we find that Athabasca Labour Services (and not Points Athabasca FHQ) is the actual employer of the employees that the Union seeks to represent. In its argument, the Union also advanced the position that Points Athabasca FHQ ought to be deemed the “true” employer of those employees by this Board pursuant to s. 2(g)(iii) of *The Trade Union Act*, R.S.S. 1978, c.T-17. For the reasons that follow, we are not satisfied

that this is an appropriate circumstance to designate Points Athabasca FHQ as the deemed employer of the subject employees for purposes of collective bargaining.

Facts:

[6] The employees that the Union sought to represent in its certification application all work(ed) at the Rocanville mine operated by the Potash Corporation of Saskatchewan Ltd. (“PCS”). They were recruited by Athabasca Labour Services and were dispatched to perform touch-up painting and related work, such as scaffolding.

[7] Mr. Joseph Simon was a journeyman painter who was hired to work at the Rocanville site and was a member of the unit of painters that the Union sought to represent. Mr. Simon testified that he was originally recruited by Mr. Wilton Angus to work at the Rocanville site and that, when he was hired, he spoke with a Mr. Ivan Doerksen. Mr. Simon testified that he understood that both of these individuals worked for Points Athabasca FHQ. Mr. Simon also understood (or assumed) that he would be an employee of Points Athabasca FHQ for the Rocanville project. Mr. Simon testified that this understanding was confirmed by the identification badge he was issued when he reported to the Rocanville site and by the fact that the name “Points Athabasca FHQ” was on the vehicles and equipment used at the workplace, as well as on several forms he used while working on this project. Mr. Simon testified that he didn’t see any identification in the workplace that would lead him to believe that he was employed by Athabasca Labour Services. In cross-examination, Mr. Simon agreed that his pay stub did include the name “Athabasca Labour Services” on it.

[8] Mr. Simon further testified that, while working as a painter at the Rocanville site, he primarily dealt with Mr. Craig Lynch (regarding access to the workplace and his work assignments) and with Mr. Kevin Wienberger (regarding issues around his pay) and Mr. Dave Parker, who was his foreman. During his time at Rocanville, Mr. Simon testified that he was subject to discipline (for a minor infraction) and that this discipline was imposed by Mr. Parker and approved by Mr. Lynch. Mr. Simon’s employment at Rocanville was terminated on or about May 25, 2013. Mr. Simon’s notice of termination was approved by Mr. Lynch. Mr. Simon testified that he understood each of these individuals worked for Points Athabasca FHQ because that was the name he saw on their business cards.

[9] Mr. John Sedor testified that, when the Union was approached about the potential for certification of this workplace, the research they conducted pointed to Points Athabasca FHQ as being the employer of the subject employees; this research included internet searches that revealed several press releases, news articles and other information that indicated that Points Athabasca FHQ had been awarded a contract by PCS to perform touch-up paint services at the Rocanville mine site. In cross examination, Mr. Sedor admitted that the Union was aware that Athabasca Labour Services was operating in northern Saskatchewan, including at Cigar Lake. Mr. Sedor testified that he assumed that Athabasca Labour Services was merely acting as a payroll company when he saw that name on Mr. Simon's pay stub.

[10] Mr. Darbyshire testified that the work that was the subject matter of the Union's application was in relation to a series of contracts (initially one contract, followed by a number of extensions) that were awarded by AMEC Americas Ltd. (PCS's supervising engineer) to Points Athabasca FHQ. The work involved the painting of internal structures at the Rocanville mine site, together with any scaffolding work that may be required to complete the painting. However, as soon as Points Athabasca FHQ was awarded the contract to complete this work, it immediately subcontracted the work to Graham Industrial Services, who in turn subcontracted most of the work to Jardeg Construction Services Ltd., who in turn retained Athabasca Labour Services Ltd. to source and provide the requisite employees to perform the contracted services, including both supervision and labourers (i.e.: painters and scaffolders). Each of these contracts was awarded on a "cost plus" basis with the Athabasca Labour Services ultimately being responsible for provision of all employees necessary to perform the entire scope of the contract that had been awarded by AMEC Americas Ltd. on behalf of PCS, save contract management services, safety services, and payroll services that had been retained by Graham Industrial Services and/or Jardeg Construction Services. Certainly, Athabasca Labour Services supplied all the painters that the Union seeks to represent in its application.

[11] Mr. Darbyshire testified that Points Athabasca FHQ promoted itself to employers, such as PCS, on its ability to recruit and maintain a high percentage of Aboriginal employees. The contract that was awarded to Points Athabasca FHQ included a requirement to maintain a minimum proportion of Aboriginal workers. It is not apparent that this obligation was contained in its subcontracting arrangements that Points Athabasca FHQ made with Graham Industrial Services or was contained in either of the contracts that flowed to Jardeg Construction Services or to Athabasca Labour Services. Nonetheless, periodic reports were prepared by Athabasca

Labour Services regarding the composition of its workforce and, by all accounts, the contractual obligations regarding the Aboriginal content of the workforce on the project was satisfied.

[12] Mr. Darbyshire testified that he was both the Chief Executive Officer of Points Athabasca Contracting LP (“Points Athabasca”) and the acting general manager of Points Athabasca FHQ. It would appear that Mr. Darbyshire became the *defacto* general manager of Points Athabasca FHQ when that partnership was formed in late 2011 because there was really no one else around to perform this function. For purposes of clarity, Points Athabasca and Points Athabasca FHQ are different entities. Points Athabasca has been in operation for a number of years (2002); it operates primarily in northern Saskatchewan; and it **is not** the subject matter of the Union’s certification application. On the other hand, Points Athabasca FHQ is a recently formed partnership (2011); it is intended to operate in southern Saskatchewan; and it **is** the subject of these proceedings.

[13] Mr. Darbyshire testified that Points Athabasca is a limited partnership that was formed between Athabasca Basin Development LP (75%) and Graham Group Ltd. (25%). Mr. Darbyshire testified that Points Athabasca was formed for the purpose of promoting prosperity for northern communities and enhancing the economic lives and skill sets of persons of Aboriginal descent. The Athabasca Basin Development LP is an Aboriginal owned investment company made up of seven (7) northern communities in the Athabasca Basin in northern Saskatchewan. Mr. Darbyshire testified that, over the past thirteen (13) years, Points Athabasca has become a leading Aboriginal contracting company in Northern Saskatchewan. In the early days of this partnership, Points Athabasca relied on the Graham Group of Companies for both managerial services and operational expertise. In fact, until recently Mr. Darbyshire was an employee of Graham Industrial Services. However, as Points Athabasca grew and matured, it decided to provide its own managerial services and severed that portion of its relationship with the Graham Group of Companies. Mr. Darbyshire became the Chief Executive Officer of Points Athabasca in February or March of 2013. However, as noted, Mr. Darbyshire was not an employee of Points Athabasca. Rather, he was an employee of Athabasca Labour Services, who has been assigned to be the CEO of Points Athabasca. Athabasca Labour Services’ role in the hiring practices of other corporate entities will be discussed later in these Reasons for Decision.

[14] Explaining the difference between Points Athabasca and Points Athabasca FHQ, Mr. Darbyshire testified that Points Athabasca FHQ is a limited partnership formed between File Hills Qu'Appelle LP (50%), Graham Business Trust (33%) and Points Athabasca (17%). These three (3) partners came together to promote economic and employment opportunities for First Nations people in southern Saskatchewan. This partnership was modeled after Points Athabasca, which was seen as having been successful in promoting Aboriginal employment in northern Saskatchewan. Mr. Darbyshire testified that, in the north, Points Athabasca was a "preferred contractor" for several large employers, including both the Cameco Corporation and Areva (Resources Canada).

[15] Mr. Darbyshire testified that, following the success of Points Athabasca in the north, a decision was made to bring the same model to southern Saskatchewan and several First Nations communities in southern Saskatchewan were approached. Ultimately, a partnership was formed with the File Hills Qu'Appelle LP. The File Hills Qu'Appelle LP is the development arm of the File Hills Qu'Appelle Tribal Council, which is comprised of eleven (11) First Nation communities, all located in southern Saskatchewan. The result of this partnership was the formation of Points Athabasca FHQ, with the goal of promoting employment opportunities and skill enhancements for the member communities. Although a separate legal entity from Points Athabasca, the two (2) companies are clearly related. Points Athabasca FHQ is derivative from and modeled after Points Athabasca. The prime differences are that Points Athabasca FHQ is promoting Aboriginal employment and economic development for First Nation communities in southern Saskatchewan and it is still in its infancy as an organization; much as Points Athabasca was a decade ago. Both Points Athabasca and Points Athabasca FHQ operate on the assumption (if not agreement) that Athabasca Labour Services will supply all of its labour requirements, including management and supervisory personnel.

[16] Mr. Darbyshire testified that, much as Points Athabasca does in the north, Points Athabasca FHQ seeks out construction contracts for work in southern Saskatchewan wherein a high percentage of Aboriginal employment is desired. Simply put, Points Athabasca FHQ's goal is to become a recognized Aboriginal contractor in the south similar to the status Points Athabasca enjoys in the north. However, Mr. Darbyshire testified that Points Athabasca FHQ does not directly employ anyone (Aboriginal or otherwise). Rather, Points Athabasca FHQ seeks out contract work in the construction sector and then subcontracts that work to Athabasca Labour Services, who it knows has experience in the construction industry and who is able to

maintain the desired level of Aboriginal employment. However, the subcontracts to Athabasca Labour Services are run through the Graham Group of Companies, who provide contract administration services, together with a safety program and payroll services. In the present case, Graham Industrial Services subcontracted the work to Jardeg Construction Services Ltd. ("Jardeg"), who in turn retained Athabasca Labour Services. Mr. Darbyshire testified that, while there were many challenges with the Rocanville project (including difficulties in recruiting and retaining workers), the project was a success and Points Athabasca FHQ looks forward to obtaining more projects of a similar nature in the future.

[17] Mr. Jenkins testified that he was the Executive Director of Athabasca Labour Services, which is owned by the Athabasca Basin Development LP. Athabasca Labour Services is located in Saskatoon but that also has an office in Calgary, Alberta. Athabasca Labour Services was created by Athabasca Basin Development LP as an investment/development opportunity. Athabasca Labour Services has been operating for over a decade and is a supplier of largely Aboriginal workers to the mining and construction industries.

[18] Athabasca Labour Services provides a broad range of human resource services for a variety of companies and/or contractors, but that it typically works in conjunction with companies and/or contractors that Athabasca Basin Development LP has either created or invested in, including Points Athabasca, Athabasca Basin Security, Lonona Contracting, Points North Group of Companies, Team Drilling, West Wind Aviation and most recently Points Athabasca FHQ. Mr. Jenkins testified that the services that Athabasca Labour Services provides to these companies ranges from what he considered to be "full service" to just recruiting. In a full service arrangement, Athabasca Labour Services does not just recruit employees, but it also retains responsibility for their employment even after they had been deployed to the contracting company. In these situations, Athabasca Labour Services retains responsibility for supervision of its workers at the workplace up to and including discipline and dismissal. It does so by also supplying the supervisory staff responsible for these functions. In such arrangements, Athabasca Labour Services may even be supplying the management staff for the contracting company, including senior management.

[19] Mr. Jenkins testified that several companies contracted for full service from Athabasca Labour Services, including Points Athabasca for whom Athabasca Labour Services supplied approximately 186 employees working at several locations, including Cigar Lake and

Rabbit Lake. Mr. Jenkins testified that these employees included carpenters, plumbers, electricians and supervisory staff. For example, although Mr. Darbyshire was an officer with both Points Athabasca and Points Athabasca FHQ, he was not employed by either of these entities. Rather, Mr. Darbyshire was an employee of Athabasca Labour Services. Mr. Darbyshire testified that, when he was recruited to be the CEO of Points Athabasca, he was in fact hired by Athabasca Labour Services and then dispatched to be the CEO of Points Athabasca. While Points Athabasca's goal was to be in a position that it could directly hire all of its management staff, at the time of the hearing, such was not the case and Mr. Darbyshire continued to be an employee of Athabasca Labour Services.

[20] At the time of the hearing, Mr. Jenkins testified that, in total, Athabasca Labour Services had approximately 293 employees working for various contracting companies, including the painters that it supplied to work Points Athabasca FHQ's contract at the Rocanville mine.

[21] Mr. Jenkins testified that its arrangement with Points Athabasca FHQ was to provide full services, including recruiting, screening, drug testing, and hiring of the painters necessary to complete its contract at Rocanville. Mr. Jenkins testified that the first person they hired was Mr. Craig Lynch and his job was to determine the requirement for the project at Rocanville. A range of wages had been determined by Mr. Darbyshire on behalf of Points Athabasca FHQ, with the assistance of staff from Graham Construction. Mr. Jenkins testified that, using the requirements determined by Mr. Lynch and the wage range determined by Mr. Darbyshire, Athabasca Labour Services began recruiting the workers necessary to complete the Rocanville project. This recruiting campaign included meetings with File Hills communities and employment counselors, as well as placing job postings on the internet. Athabasca Labour Services set up drug and alcohol testing for the applicants and made arrangements for any required training through the Saskatchewan Indian Institute of Technologies, as well as arranged accommodations for the workers who were hired for the project. Mr. Jenkins testified that no one from Points Athabasca FHQ was involved in the selection and hiring of the workers or in any of the pre-employment arrangements.

[22] Mr. Jenkins testified that Mr. Lynch was responsible for the day-to-day supervision of its painters working at Rocanville and, in his opinion, Mr. Lynch had full authority to discipline and/or dismiss employees. Mr. Jenkins testified that Athabasca Labour Services provided pension and other benefits to the employees it sent to Rocanville, just as it did to all of

its employees that were dispatched to other employers. Mr. Jenkins testified that Athabasca Labour Services was a participating employer in both a group retirement savings plan and a health and welfare plan.

[23] Mr. Jenkins testified that the employees who were responsible for recruiting the painters for the Rocanville project were Mr. Wilton Angus and Mr. Ivan Doerksen. Both of these individuals are employees of Athabasca Labour Services. In response to Mr. Simon's understanding that he was an employee of Points Athabasca FHQ, Mr. Jenkins testified that he could have been mistaken although all employees should have been told that, although they would be working on a project for Points Athabasca FHQ at Rocanville, they would be employees of Athabasca Labour Services. Mr. Jenkins testified that the identification badges of employees and the business cards used by its staff said "Points Athabasca FHQ" because it was the prime contractor. Mr. Jenkins indicated that employees working in the construction sector typically receive new identification badges for each project they are working on. These badges are provided so that the owner and/or site manager can control access to the workplace. Mr. Jenkins testified that the name indicated on these identification badges is not necessarily the name of their employer; it indicates the name of the party to whom the contract has been awarded. Mr. Jenkins testified that, from PCS's perspective, the Rocanville painting contract was awarded to Points Athabasca FHQ and, thus, access to its workplace will be limited to those areas of the workplace where that work is being conducted and to those individuals who had been authorized to work on that contract. Mr. Jenkins testified that most of its employees would have different identification badges for each of the projects they have worked on in the past. Mr. Jenkins testified that the same considerations apply to business cards and that many of its employees would have a stack of different ones at home.

[24] Mr. Jenkins testified that some of its operational needs were obtained by contract from the Graham group of companies and Jardeg Construction Services. For example, Athabasca Labour Services' payroll functions, its contract administration services and its safety program were all obtained through an arrangement with Graham Construction Services. Jardeg Construction Services supplied all the tools and equipment used for the Rocanville project. Mr. Jenkins testified that Graham Construction deployed two (2) employees to work at the Rocanville site to administer payroll and to deal with any issues associated with the administration of Points Athabasca FHQ's contract. These employees included Mr. Kyle Weinberger and Mr. Evan

Clark. Mr. Jenkins testified that neither of these individuals was an employee of Athabasca Labour Services.

[25] Mr. Jenkins testified that, as Executive Director of Athabasca Labour Services, he reported to Mr. Geoff Gay, who is the Chief Executive Officer of Athabasca Basin Development LP. However, Mr. Gay was not an employee of Athabasca Basin Development LP; rather he was an employee of Athabasca Labour Services, who was assigned by Athabasca Labour Services to be the CEO of Athabasca Basin Development LP. In response to a question from the Board regarding this arrangement, Mr. Jenkins confirmed that his boss (Mr. Gay) was also one of his employees.

Relevant statutory provision:

[26] The definition of “employer” is set forth in clause 2(g) of *The Trade Union Act* and reads as follows:

2 *In this Act:*

(g) *“employer” means:*

(i) *an employer who employs three or more employees;*

(ii) *an employer who employs less than three employees if at least one of the employees is a member of a trade union that includes among its membership employees of more than one employer;*

(iii) *in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;*

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

Argument on behalf of the Union:

[27] Counsel on behalf of the Union argued that Points Athabasca FHQ (and not Athabasca Labour Services) was the actual employer of the subject employees. In other words, the Union was seeking to represent all painters working for Points Athabasca FHQ in the province of Saskatchewan. In the alternative (i.e.: in the event we were to find that Athabasca Labour Services was the actual employer of the subject employees), the Union argued that

Points Athabasca FHQ ought to be deemed the “true” employer of the employees by this Board pursuant to s. 2(g)(iii) of *The Trade Union Act*.

[28] In the first instance, the Union argued that we should discredit the testimony of both Mr. Darbyshire and Mr. Perkins as to the identity of the employer. The Union disputed the assertion that neither Points Athabasca nor Points Athabasca FHQ had any employees. The Union pointed to the suggestion that Mr. Darbyshire wasn't even an employee of the company at which he indicated that he was the CEO. The Union also pointed to the testimony of Mr. Darbyshire that, in Points Athabasca's fourteen (14) year history, it had obtained approximately Five Hundred, Million Dollars (\$500,000,000) in contracts and had successfully performed all of this work flowing from these contracts with no employees. Rather, the Union argued that these assertions ought to be considered very carefully by the Board. The Union argued that it would be more reasonable for the Board to infer from the evidence that Athabasca Labour Services was merely a personnel agency responsible for recruiting and referring employees for both Points Athabasca and Points Athabasca FHQ. If such was the case, then Points Athabasca FHQ (and not Athabasca Labour Services) would be the actual employer of the employees that it sought to represent.

[29] In the alternative, the Union argued that, even if Athabasca Labour Services (and not Points Athabasca FHQ) was the employer of the subject employees, then the arrangement that had been put in place by the Respondents amounted to nothing more than a façade. The Union took the position that, because of the constraints placed on it by the other parties in the contract chain, Athabasca Labour Services had little ability to affect the conditions of employment for the employees it deployed to Points Athabasca FHQ. The Union argued that one of the consequences of the arrangements that had been put in place by the Respondents (intentional or otherwise) was to obscure the identity of the employer. The Union pointed to the corporate structure of Points Athabasca FHQ and its partners and the rather complex contractual arrangements that were put in place to perform the work at the Rocanville site. The Union took the position that these arrangements were put in place to frustrate unionization.

[30] Although acknowledging that there was a multiplicity of parties involved, the Union argued that it was Points Athabasca FHQ (and not Athabasca Labour Services) that exercised direction and control over the employees performing the work at the Rocanville site. Similarly, the Union argued that it was Points Athabasca FHQ (and not Athabasca Labour Services) that

bore the true burden of remuneration for the wage of the subject employees. The Union argued that, in this particular workplace, the party who was responsible for imposing discipline was far from clear, as was the party who hired the employees, and the party having the authority to impose discipline or dismiss an employee. The Union argued that undoubtedly the public and the employees perceived that Points Athabasca FHQ (and not Athabasca Labour Services) was the employer of the employees. Finally, the Union argued that, through its hiring hall, it could provide all the same services that Athabasca Labour Services was currently providing to Points Athabasca FHQ.

[31] In support of its argument, the Union relies upon this Board's decisions in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation and Marwest Food Systems Ltd.*, [1996] Sask. L.R.B.R. 523, LRB File No. 083-96; in *Amalgamated Transit Union, Local 588 v. City of Regina and Wayne Bus Ltd.*, [1999] Sask. L.R.B.R. 238, LRB File No. 363-97; and in *United Food and Commercial Workers, Local 1400 and the Canadian Salt Company Limited, Cardinal Construction Co. Ltd. and Production Services (1990) Ltd.*, [2011] 191 C.L.R.B.R. (2) 29, 2010 CanLII 65961 (SK LRB), LRB File No. 047-10.

Argument on behalf of Points Athabasca FHQ:

[32] Counsel on behalf of Points Athabasca FHQ argued that the evidence pointed to Athabasca Labour Services as being the actual employer of the subject employees. Furthermore, Counsel argued that, contrary to the Union's assertions, the evidence did not demonstrate that Points Athabasca FHQ had fundamental control over industrial relations affecting the employees or any effective control over the essential aspects of the employment relationship for the subject employees. Counsel noted that the circumstances wherein this Board has found a principal to be the "true employer" of the employees of a contractor were substantially different than those present in this application. Simply put, counsel argued that there was no basis in law or logic upon which Points Athabasca FHQ could be seen as the true employer of the subject employees. Furthermore, doing so would not aid in collective bargaining.

Argument on behalf of Athabasca Labour Services:

[33] Counsel for the Athabasca Labour Services agreed that the evidence pointed to Athabasca Labour Services (and not Points Athabasca FHQ) as the employer of the subject employees. Counsel also agreed, for many of the same reasons advanced by Points Athabasca FHQ, that there was no evidence that Athabasca Labour Services did not have effective control over labour relations involving the subject employees. Counsel also agreed that designating Points Athabasca FHQ as the deemed employer for the purpose of collective bargaining would merely frustrate and confuse labour relations.

Analysis:

[34] For the reasons that follow, we find that Athabasca Labour Services is the actual employer of the employees that the Union seeks to represent. However, it is not surprising that the Union was confused as to the identity of the employer of the subject employees. Points Athabasca FHQ looks like an employer; it purports to be an employer; and many outside observers would assume that it was an employer. However, such is not the case. Rather, it is merely the vessel through which a partnership of companies bids on construction projects in pursuit of the laudable goal of Aboriginal employment. Further compounding the confusing nature of this situation is the fact that the companies that formed this partnership operate within a highly complex organizational structure, with numerous related companies that are differentiated by subtle distinctions not particularly apparent to an external observer. Furthermore, these corporate entities appear to operate with a high level of compartmentalization at an operational level while maintaining some ongoing form of integration (officially and unofficially) at a strategic and/or management level. Simply put, Points Athabasca FHQ's operating model tends to place a cloak of simplicity around a very complex organizational relationship; the true nature of which is only apparent upon a much deeper examination.

[35] Nonetheless, having considered the evidence in these proceedings, we are satisfied that Athabasca Labour Services is the actual employer of the subject employees. As this Board noted in the *Canadian Salt* case, the real issue for the Board in determining the identity of the actual employer is; with whom did the employees enter into their contract of employment? In the present case, having sifted through a not-insignificant amount of evidence, we are wholly satisfied that the subject employees entered into their contract of employment with Athabasca Labour Services. We are not satisfied that Points Athabasca FHQ employed any of these individuals. In fact, it is not apparent that this entity was capable of employing anyone or of delivering any of the services it purports to contract for; save through its operational

relationships with its partners and subcontractors. In our opinion, the identity of the actual employer of the subject employees is Athabasca Labour Services. There can be little doubt the painters for the Rocanville project were recruited, interviewed, and selected by Athabasca Labour Services; but, more importantly, it was Athabasca Labour Services that hired them, that trained them, and who was responsible for the terms and conditions of their employment. They were not hired by Points Athabasca FHQ and, at no point, did Points Athabasca FHQ become responsible for their employments status. For example, in the event of non-payment of wages or a claim for wrongful dismissal, it would surely be Athabasca Labour Services to whom they would turn for remedy and not Points Athabasca FHQ.

[36] In coming to this conclusion, we were not satisfied that the evidence of either Mr. Darbyshire or Mr. Jenkins ought to be discredited. Their testimony was delivered in a clear and forthright manner both in chief and in cross-examination. More importantly, their evidence was not inconsistent with any other evidence tendered during these proceedings, save Mr. Simon's evidence as to whom he believed his employer to be. In our opinion, Mr. Simon's belief as to the identity of his employer (although understandable) does not overcome the evidence as to how and by whom he was hired and the kind of control that Athabasca Labour Services maintained over his working conditions and supervision at Rocanville.

[37] The question that was the primary focus of argument by the parties was whether or not this Board ought to exercise its discretion pursuant to s. 2(g)(iii) of *The Trade Union Act* to designate Points Athabasca FHQ as the deemed employer of the subject employees. Having considered the evidence in these proceedings and the fulsome argument of able counsel, we were not satisfied that this is an appropriate circumstance to designate Points Athabasca FHQ (or any of the other employers in the PAFHQ Group) as the deemed employer for purposes of collective bargaining. Furthermore, we were not satisfied that making the designation sought by the Union would serve a legitimate or sound labour relations purpose. In fact doing so, may well create more problems than it solves.

[38] It should be noted at the outset of our analysis that s. 2(g)(iii) of *The Trade Union Act* grants this Board an extraordinary authority. As this Board noted in *Canadian Salt, supra*:

[84] Section 2(g)(iii) of the Act permits the Board to designate the principal (i.e.: the business or person to whom a contractor provides its services) to be the designated employer of a contractor's employees for purposes of collective

bargaining. While the contractor continues to be the “actual” employer of those employees for most purposes (source deductions, Labour Standards, Workers Compensation, insurance, etc.), the principal is deemed by the Board to be the “employer” of the employees for purpose of application of The Trade Union Act. In such case, the principal is described (somewhat inaccurately) as the “true” employer.

[39] This Board has previously been called upon to make determinations as to whether the principal or the contractor is the “true” employer of a unit of employees pursuant to s. 2(g)(iii) of the Act. See: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation and Marwest Food Systems Ltd.*, [1996] Sask. L.R.B.R. 523, LRB File No. 083-96; *Amalgamated Transit Union, Local 588 v. City of Regina and Wayne Bus Ltd.*, [1999] Sask. L.R.B.R. 238, LRB File No. 363-97; *Canadian Union of Public Employees, Local 4836 v. Lutheran Home of Saskatoon, Regina Lutheran Care Society Inc. and Broadway Terrace Inc.*, 2009 CanLII 54774, LRB No. 043-09; and *Canadian Salt*, *supra*.

[40] In each of these cases, the Board’s first step was to determine which party exercised “fundamental control” over labour relations at the work place. In other words, who had effective control over the essential aspects of the employment relationship for the subject employees? To assist in answering this first question, the Board examined the employment relationships that existed in the workplace by considering the following (non-exclusive) criteria adopted from the decision of the Ontario Labour Relations Board in *Labourers’ International Union of North America, Local 183 v. York Condominium Corporation, et. al.*, [1977] OLRB Rep. October 646:

1. *The party exercising direction and control over the employees performing the work;*
2. *The party bearing the burden of remuneration;*
3. *The party imposing discipline;*
4. *The party hiring the employees;*
5. *The party with the authority to dismiss the employees;*
6. *The party who is perceived to be the employer by the employees; and*
7. *The existence of an intention to create the relationship of employer and employee.*

[41] After determining the kind of control that was being exercised by the principal in the workplace, the next stage of the Board’s inquiry was then to consider whether or not it ought

to exercise its discretion in the circumstances of the particular case before it. As indicated, s. 2(g)(iii) of the *Act* grants a discretionary authority to the Board and, as such, the exercise of this discretion must be based on a sound labour relations footing. In *Saskatchewan Gaming Corporation and Marwest Food Systems Ltd.*, *supra*, the Board described the kind of situations where the exercise of this authority was thought to be appropriate in the following terms:

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

[42] With respect to the present application, we were not satisfied that Points Athabasca FHQ had fundamental control over labour relations in the workplace (or more importantly, that Athabasca Labour Services did not have effective control over the essential aspects of the employment relationship involving the subject employees). Athabasca Labour Services hired the subject employees, set their wages (albeit within a range established by someone else), and provided for the onsite supervision of these individuals. In our opinion, the circumstances of this case are distinguishable from the circumstances before this Board in

Canadian Salt, supra. In that case, the Board found that, once the disputed employees were dispatched to the workplace, the principal (in that case, Canadian Salt) exercised day-to-day direction and control over the employees that had been dispatched by the contractor (in that case, Production Services) to the extent that the contractor had effectively delegated all of its primary managerial functions over its employees to the principal. The principal (and not the contractor) had authority over day-to-day work assignments, over most conditions of employment, and with respect to remuneration, discipline, and dismissal. In our opinion, the facts in the present application do not reasonably lead to the conclusion that Points Athabasca FHQ had that same kind of control with respect to the subject employees.

[43] In our opinion, Points Athabasca FHQ is not an employer; rather, it is the vehicle through which a group of partners obtain construction contracts. The services that were the subject matter of the contract obtained by Points Athabasca FHQ was delivered partly through members of the partnership (i.e.: Graham Construction for contract management services, a safety program and payroll services) but mostly through subcontractors. In the present case, the subcontractors included Athabasca Labour Services (for labour and human resource services, including supervision) and Jardeg Construction Ltd. (for equipment and site services).

[44] Secondly (any maybe even more importantly), we were not satisfied that designating Points Athabasca FHQ was necessary to enable collective bargaining to occur with the Union. In the present case, while someone other than Athabasca Labour Services set a range of wages that was used by it, the evidence established that it was Athabasca Labour Services (and not Points Athabasca FHQ) that determined the terms and conditions for the painters working at the Rocanville site. Certainly, it was not apparent that Points Athabasca FHQ controlled the purse strings or otherwise dominated the financial affairs of Athabasca Labour Services. We saw no evidence from which we could infer that Points Athabasca FHQ's presence at the bargaining table would be necessary for collective bargaining to occur or that it would somehow play an "invisible" hand at the table if it was not designated as the "true" employer. In fact, it is difficult to see how a hollow vessel, such as Points Athabasca FHQ, would be able to engage in meaningful labour relations in its current form. If anything, its limited depth of managerial staff and absence of an internal human resource capacity would be more likely to create an impediment to collective bargaining than it would make sense to require it to be at the bargaining table.

[45] The Union also argued that we should infer an anti-union animus from the organizational structure and the circuitous contractual arrangements utilized by the Respondents. The Union argued that these contractual and organizational arrangements were put in place by the Respondents to undermine the ability of the employees working at Rocanville to organize in a trade union of their own choosing for purposes of collective bargaining.

[46] In our opinion, the mere fact that the contractual arrangements and corporate organization of the parties is complex is not indicative of an anti-union animus. Certainly, in the commercial sector it is not unusual for large employers to operate through subsidiaries (or holding companies) or to have related corporate entities. See: *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v. North American Construction Group Inc. et. al.*, [2013] CanLII 60719 (SK LRB), LRB File No. 051-13. It is also not unusual for a subsidiary within a larger corporate structure to supply management staff (even CEO's) to the parent company; or, conversely, for the parent company to supply management staff to a subsidiary. There may be a variety of reasons for these types of arrangements and it is not a violation of *The Trade Union Act* for an employer to have a complex organizational or corporate structure.

[47] The issue for this Board is whether or not these arrangements have been created for the purpose, or have the affect, of undermining the rights and privileges granted to workers pursuant to *The Trade Union Act*. In the present case, we can make no such finding. Simply put, we were not satisfied that an anti-union animus was demonstrated or could be inferred from the evidence in this application. When the Union sought to certify the painters who were working at the Rocanville site, council on behalf of Points Athabasca FHQ promptly advised the Union as to the identity of the employer of the subject employees. While Athabasca Labour Services may have concerns regarding the conduct of the representational vote, it did not dispute that it was the employer. Furthermore, it is not apparent that the confusion as to the identity of the employer (even if that confusion was the practical or inevitable result of the complex arrangements put in place by the Respondents) affected the right of the painters working at the Rocanville site to organize and join a trade union. The right to form and join a trade union is a collective right because it flows from a decision of the majority of employees of a particular employer; it is not an individual right. In this case, either the majority of the employees of the employer wish to be represented by the Union or they don't. The fact that we have found the employer to be someone other than the Union may have thought (or would have desired) does

not alter the organizational right of the employees. Assuming the Union's application is otherwise compliant with the *Act*, the determination as to unionization will be made by a majority of employees in the unit in which the subject employees belong (and the Board determines to be appropriate).

[48] Finally, we would like to note that there is at least one (1) significant practical problem¹ associated with the Union's desire to designate Points Athabasca FHQ as the deemed employer of Athabasca Labour Services' employees; that being that Points Athabasca FHQ is not the only contractor or company (or in this case partnership) for whom Athabasca Labour Services provides human resource services and/or dispatches workers. This Board heard evidence that Athabasca Labour Services supplied workers, including painters, to contractors and companies other than Points Athabasca FHQ. If the Union's request was granted, it would be necessary to limit the scope of that designation to only those employees that were assigned by Athabasca Labour Services to work for Points Athabasca FHQ. Such limitation would be necessary as how could Points Athabasca FHQ meaningfully engage in labour relations with the Union over employees that were deployed to other contractors and companies? Obviously, it can't. Another alternative would be to limit the Union's certification Order to the painters working at the Rocanville project. However, since that project is almost complete, it is doubtful that doing so would achieve the long term goal desired by the Union (assuming that such a unit would be found to be appropriate unit by the Board).

[49] In exercising the discretion granted pursuant to s. 2(g)(iii) of *The Trade Union Act*, the Board must be alert to unintended consequences. In our opinion, granting the designation desired by the Union would appear to create more problems than it would solve. As this Board noted in the *Canadian Salt* case, the ability to designate the principal (i.e.: the business or person to whom a contractor provides its services) as the deemed or "true" employer of a contractor's employees is an extraordinary discretionary power. It displaces the actual employer (the party to whom a group of employees have an employment relationship) with another party; a party who then becomes responsible for collective bargaining with employees on behalf of the actual employer. As such, the exercise of this discretion must be based on a sound labour relations footing. In our opinion, the evidence in the present case did not demonstrate that

¹ A problem in addition to the fact that Union did not plead s.(2)(g)(iii) of *The Trade Union Act* in its application (as amended). And in addition to the fact that Points Athabasca FHQ did not have a direct contractual relationship with Athabasca Labour Services and, thus, the former may not have been the principal of the latter.

making such a designation was necessary for collective bargaining to occur or that it would serve a valid labour relations purpose.

[50] For the foregoing reasons, we find that the identity of the employer of the employees whom the Union seeks to represent is Athabasca Labour Services. The Union's application to designate Points Athabasca FHQ as the designated employer of these employees for purposes of collective bargaining is dismissed.

DATED at Regina, Saskatchewan, this 20th day of December, 2013.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson