The Labour Relations Board
Saskatchewan

LRB File Nos. 188-12, 191-12, 192-12, 193-12, 198-12, 199-12, 200-12 & 201-12

International Brotherhood of Electrical Workers, Local 529; International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870; Construction and General Workers' Union, Local No. 180; International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771; United Association of Journeyman & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179; International Union of Painters and Allied Trades (AFL-CIO-CLC), Local 739; United Brotherhood of Carpenters and Joiners of America, Local 1985 and United Brotherhood of Carpenters and Joiners of America, Millwright Union, Local 1021, Applicants

- and -

KBR Wabi Ltd., Construction Workers Union, Local 151, KBR Canada Ltd., and KBR Industrial Canada Co., Respondents

May 10, 2013;
Chairperson, Kenneth G. Love., Q.C., Members: Mr. Greg Trew and Maurice Werezak

KBR Wabi Ltd.	Larry Seiferling, Q.C.
KBR Canada Ltd.	Kevin Wilson, Q.C.
KBR Industrial Canada Co.	Christopher Lane
The International Union of Operating Engineers, Local 870; The United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 179; The International Union of Painters and Allied Trades, Local 739; The United Brotherhood of Carpenters and Joiners of America, Local 1985; The United Brotherhood of Carpenters and Joiners of America, Local 1021	Larry Kowalchuk
The International Brotherhood of Electrical Workers, Local 529	Drew Plaxton
The Construction and General Workers' Local Union 180; The International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771	Gary Caroline and Joanna Gislason

Summary Dismissal – Employers apply to the Board to summarily dismiss successorship and amendment applications made respecting former Employer that Unions claim (1) one or more of the Employers named is the successor – Board reviews previous jurisprudence in light of *obiter dicta* comments made in judicial review application of previous summary dismissal applications.

Summary Dismissal – On consideration of comments by Court Board determines to restate how it will exercise its authority granted pursuant to sections 18(p) and (q) of the *Act*. – Board restates *Soles* tests.

Summary Dismissal – Board reviews the essential elements necessary to prove successorship to determine if those elements have been plead sufficiently by the parties to meet an "arguable case" – Board determines that an "arguable case" has been raised.

Practice and Procedure – Board reviews procedure for Summary Dismissal – Determines that separate application for Summary Dismissal required to be filed – Board determines practice of making request for Summary Dismissal as a part of Reply should not be supported.

Practice and Procedure – Board reviews its authority under section 18(p) and (q). Finds that the first determination made by the Board is whether or not the matter is one which should or could be practicably be dealt with *in camera* - If Board determines matter should not be determined *in camera* then the matter would proceed to a *viva voce* hearing – If matter determined to be eligible to be determined *in camera*, then the parties would be invited to provide written submissions to the Board for review and determination.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C.: In this decision, we have shortened the names of the various parties to this matter as follows:

"Wabi" for KBR Wabi Ltd.

"Canada" for KBR Canada Ltd.

"Industrial" for KBR Industrial Canada Co.

"Local 870" for the International Union of Operating Engineers, Local 870

"Local 179 for the United Association of Journeymen And Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 179

"Local 739" for the International Union of Painters and Allied Trades, Local 739
"Local 1985" for the United Brotherhood of Carpenters and Joiners of America, Local 1985
"Local 1021" for the United Brotherhood of Carpenters and Joiners of America, Local 1021
"Local 529" for the International Brotherhood of Electrical Workers, Local 529
"Local 180" for the Construction and General Workers' Local 180
"Local 771" for the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 771

[2] Wabi, Canada and Industrial will collectively be referred to as either the "KBR Companies" or the "Applicants". Local 870, Local 179, Local 739, Local 1985, Local 1021, Local 529, Local 180, and Local 771 will collectively be referred to as either the "Unions" or the "Respondents".

[3] In this matter, the Unions have made application to the Board to either amend certification Orders or to be named as successors in respect of various certification Orders of the Board granted to the Unions in respect of an Employer named Brown & Root Ltd.

[4] Details of the various applications and certification Orders impacted are as follows:

LRB File No.	Application Type	Date of Application	Applicant	LRB Order	Named Respondent(s)
188-12	Successorship	1/11/2012	Local 529	344-84	KBR Companies
191-12	Amendment	5/11/2012	Local 870	067-60	KBR Companies
192-12	Amendment	5/11/2012	Local 180	044-70	KBR Companies
193-12	Amendment	5/11/2012	Local 771	076-60	KBR Companies
198-12	Amendment	16/11/2012	Local 179	080-60	KBR Companies
199-12	Amendment	16/11/2012	Local 739	111-88	KBR Companies
200-12	Successorship	16/11/2012	Local 1985	164-86	Wabi
201-12	Successorship	16/11/2012	Local 1021	114-84	Wabi

[5] In the alternative, the Unions also alleged in all files that the KBR Companies were related or common employers. However, in Files 200-12 & 201-12, the applications did not name any other companies than Wabi. Some of the applications[1] also alleged that CLAC was a "company dominated organization" as defined in Section 2(e) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act*").

[6] In their Replies (where Replies were filed), the Applicants alleged that the applications were without merit and should be summarily dismissed. However, none of the Applicants filed a separate and distinct application for summary dismissal.

[7] Notwithstanding the lack of separate and distinct applications for summary dismissal, following a hearing convened on March 22, 2013, the parties agreed that a hearing would be held on April 5, 2013 for the Board to hear argument regarding the KBR Companies applications to have the various applications by the Unions summarily dismissed by the Board.

Decision:

[8] For the reasons that follow, the applications for summary dismissal are dismissed.

Facts:

[9] The Board's procedure, as outlined in its seminal decision in *Beverley Soles v. Canadian Union of Public Employees, Local 4777 and Parkland Health Region*[2]*,* (hereinafter "*Soles*") is to rely upon the facts stated in the application to determine if those facts, if proven, disclose an arguable case against the respondent. At paragraph [27], the Board said:

> *As stated, in the case before us, it is necessary to examine whether the application discloses an arguable case such that it should not be dismissed without an oral hearing. At this stage, we do not assess the strength or weakness of the Applicant's case, but simply determine whether the application and/or written submission discloses facts that would form the basis of an unfair labour practice or violation of the Act that falls within the Board's jurisdiction to determine.*

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[1] Local 529 filed a separate application with respect to company domination, being LRB File No. 187-12, which was subsequently withdrawn.
[2] [2006] Sask. L.R.B.R. 413, LRB File No. 085-06.

[10] Therefore, in the determination of this matter, we have reviewed the facts alleged in the applications filed with the Board. No particulars of those allegations were sought or provided. The factual background varies between the applications as filed. Those filed by Local 870, Local 180, and Local 771 are the most complete and we have therefore relied upon one of those applications (192-12) with respect to the recitation of the alleged facts for the purposes of this application as follows:

> *6. This application was triggered by an application for certification filed by the Construction Workers Union, Local 151 (CLAC) (LRB File No. 177-12). The applicant in that case named KBR Wabi Ltd. as the employer of six workers apparently working at the Cameco Rabbit Lake mine site. The Construction Workers Union applied for a unit of all employees of KBR Wabi Ltd. in Saskatchewan save and except the usual exclusions. The named employer in that case has not filed a reply at the time of writing.*
>
> *7. Until CLAC's application, this applicant was unaware that KBR was active in the province.*
>
> *8. In its reply, the CGWU Local 180 requested the dismissal of the application for certification as the Construction and General Workers' Local Union 180 and others have pre-existing bargaining rights with the employer, KBR. By this application, CGWU Local 180 seeks to protect the bargaining rights it has acquired with the parent company of KBR Wabi Ltd., previously known as Brown & Root Ltd.*
>
> ***The employers***
>
> *9. KBR, Inc. (KBR) is a very large engineering, procurement and construction company based in Houston, Texas (Tab 3). It has undergone name changes over the years from Brown & Root to Kellogg Brown & Root to its present day "KBR" (Tab 4).*
>
> *10. It has 27,000 employees world wide. The origins of KBR are in Brown & Root. Halliburton acquired Brown & Root in 1962 and developed it into a major construction industry general contractor. In the late 1990s, Halliburton purchased Dresser Industries and its engineering and fabricating arm, M.W. Kellogg leading to the change of name to Kellogg Brown & Root (KBR). In 2007, KBR divested itself of Halliburton control and operates as a separate company.*
>
> ***KBR***
>
> *12. KBR is a highly centralized corporate entity. While it may operate in various regions and sectors through business units, subsidiaries and operating groups, these entities are all creatures of the parent company. They are wholly owned, responsible to and ultimately directed by the Houston based officers of the company. Any of its units, subsidiaries, regional or sector groups trade and depend on the KBR brand. The parent company provides services to its subsidiaries and regional or*

sectorial entities. Those entities rely on the global resources of the parent company including its financial assets.

13. *There is only one website for all of KBR's operations. There is no separate site for the KBR Wabi Ltd. or the other Saskatchewan registered corporations.*

14. *The KBR website (http://www.kbr.com) describes the history of the company (see Tab 4).*

Corporate Information
History

> *...When Halliburton purchased Brown and Root in 1962, its reputation as a leading offshore rig builder, road construction company and general contractor was assured. M.W. Kellogg underwent numerous acquisitions and name changes from 1944, and into the late 80s when it was acquired by Dresser Industries, a provider of integrated services and project management for the oil and gas industry. Ten years later, Dresser was purchased by Halliburton, where it was combined with M.W. Kellogg and Brown and Root, creating new, larger subsidiary: Kellogg Brown & Root (KBR).*
>
> *In 2007, KBR reached a major milestone as it separated from Halliburton and became a stand-alone company. Today, KBR employs approximately 27,000 people globally and is considered one of the world's premier engineering, construction and services companies. KBR supports the civil infrastructure, hydrocarbon, government and defense and power and industrial sectors and services its clients with a broad range of products and services through its Downstream; Gas Monetization; Infrastructure & Minerals; International Government, Defence and Support Services; North American Government and Logistics; Oil & Gas; Power & Industrial; Services; Technology; and Ventures business units. [extracts]*

15. *Persons who work for KBR are described by the corporate website as being employees of the parent KBR and not of a subsidiary or business unit.*

16. *When the application for certification was filed by CLAC on October 12, 2012 there were only two KBR entities registered in Saskatchewan, "KBR Canada Ltd." and "KBR Industrial Canada Ltd.". On October 15, 2012 KBR Wabi Ltd. was registered in Saskatchewan.*

17. *KBR has two offices in Canada; one in Edmonton and that of KBR Wabi in New Liskeard, Ontario.*

18. *To the applicant's understanding, KBR has not performed any work in the province which would fall within the scope of the applicant's bargaining rights since 1992.*

KBR Canada Ltd.

19. *KBR Canada Ltd. was first incorporated provincially in 1970 as Brown & Root Management Ltd. Its name was changed to its current iteration in 2009 (Tab 5).*

20. Its corporate registration describes its business as the "construction, installation, repair, renovation, and replacement services" for a broad range of structures and facilities. It appears to be KBR's primary operating arm in Canada.

21. Its registered office and mailing address is that of MacPherson Leslie & Tyerman LLP in Regina. This law firm is also appointed as its power of attorney in Saskatchewan, a requirement of the The Business Corporations Act imposed on extra-provincial corporations without a resident director. MacPherson, Leslie & Tyerman LLP was also the registered office and attorney for Brown & Root (Tab 6).

22. KBR Canada is also registered extra-provincially in several other jurisdictions (Tab 7).

23. The officers and directors of KBR Canada are described as being residents of either Alberta or Texas. Its only shareholder is Kellogg Brown & Root LLC. Its president is listed as being David Zimmerman of Houston, Texas. Mr. Zimmerman is a corporate officer of the parent company and currently the Group President for Australia and Asia (Tab 8).

KBR Industrial Canada Co.

25. KBR Industrial Canada is a Nova Scotia company registered in Saskatchewan as an extraprovincial corporation. Until 2010, its name was Kellogg Brown & Root (Canada) Company (Tab 9).

26. It has no office in Saskatchewan but has appointed MacPherson Leslie & Tyerman LLP as its attorney. The nature of its business is described as "engineering and construction services and related complementary matters".

28. All but one of its officers and directors are residents of Texas. The sole exception is Mr. Williams of Alberta. Its president, Darrell Hargrave is a corporate officer of KBR. In 2009 he was senior vice president of KBR Industrial Services (Tab 10). His current position is unknown to the applicant. One of KBR Industrial Canada's officers, Robert Bell is also an officer of KBR Canada.

29. KBR Industrial Canada was also the registered owner of Kellogg Brown & Root for the year the latter company was registered provincially from 2003 to 2004. Kellogg Brown & Root's power of attorney was also MacPherson Leslie & Tyerman LLP (Tab 11).

KBR Wabi Ltd.

30. Wabi Development Corporation was a medium sized fabrication and construction company based in Northern Ontario until it was purchased by KBR in 2008 (Tab 12). The purchase price was US$19.5 million and its revenues in the year ending July 31, 2007 were $124 million (Tab 13). Wabi Development Corporation also had a "Wabi Development Ontario Corp" (Tab 14) and "Wabi Development Saskatchewan Corp." (Tab 15). Both companies were incorporated on June 11, 2002. KBR's website describes what happened to Wabi after its acquisition by KBR (Tab 13).

KBR Acquires Wabi Development Corporation

> *Houston, Texas - October 06, 2008 - KBR (NYSE:KBR) today announced that it has acquired Wabi Development Corporation (Wabi) for approximately US$19.5 million. Wabi, a privately held Ontario, Canada-based general contractor, services the energy, forestry and mining industries. The company will be integrated into KBR's Services Business Unit. Wabi currently employs over 350 people, providing maintenance, fabrication, construction and construction management services to a variety of clients in Canada and Mexico and generated revenue of approximately C$124 million for its fiscal year ended July 31, 2007. [emphasis added]*

33. *As can be seen, Wabi Development Corporation was integrated into a unit of the parent company. KBR Wabi Ltd. has no public existence separate or distinct from KBR. KBR Wabi Ltd. is at best a wholly owned unit of KBR. KBR describes how things work; KBR gets a contract for construction work and assigns its performance to an operating unit.*

    KBR was awarded a General Works Contract for phase two construction at a raw gas processing and compression facility near Dawson Creek, British Columbia. KBR's Canadian subsidiary, KBR Wabi, will execute construction and related site support for the expansion of the facility, increasing the existing capacity to 100 million standard cubic feet per day.
    (http://www.kbr.com/Newsroom/Press-releases/2012/10/24/KBRAnnounces-Third-Quarter-2012-Results)

34. *Following the purchase by KBR, Wabi Development Ontario Corp. (Tab 14) and Wabi Development Saskatchewan Corp. (Tab 15) were both dissolved; Saskatchewan on October 1, 2009 and Ontario on March 24, 2010. Wabi Development Corporation (Tab 16) was then amalgamated with an entity created by KBR, 2186194 Ontario Inc. (Tab 17) effective October 3, 2008.*

35. *KBR Wabi Ltd. was incorporated in Ontario on January 1, 2010 (Tab 18). Its mailing address is KBR's office in Edmonton. Its "registered office" is described as being in New Liskeard but to the attention of Hope Hatherly. At all material times, Ms. Hatherly has been the controller of KBR Canada and employed by KBR, Inc. There are only two directors listed and no officers, Brian Cole and David Zimmerman. As described above, Mr. Zimmerman is an officer of the parent corporation and president of KBR Canada. Mr. Cole is or was KBR Canada's vice president of operations and an Alberta resident.*

36. *KBR Wabi Ltd. was registered in Saskatchewan as an extra-provincial corporation on October 15, 2012, three days after the certification application was filed by CLAC (Tab 19). Its registered office is "KBR Wabi Ltd." in New Liskeard. Its mailing address is that of MacPherson Leslie & Tyerman LLP in Regina which is also the company's appointed attorney.*

37. *Its corporate registration contains director but no officer information; Roy Oelking of Texas and Melvin Peddie of Ontario. Mr. Oelking is the Group President of Hydrocarbons for KBR Mr. Peddie was a co-owner of Wabi Development and is now Vice President of Operations for KBR Wabi.*

38. Job opportunities for KBR Wabi are listed on the KBR website.

39. Assuming the information about KBR Wabi's job at Rabbit Lake to be correct, it represents KBR Wabi's first endeavour in the province. KBR Wabi's client at Rabbit Lake is Cameco Corporation, an international client of the parent corporation.

History with KBR

40. Over the years, Brown & Root has had several large construction projects in the province for which they employed members of the applicant and the other building trades unions with which it has bargaining relationships.

41. In 1987, Brown & Root began a series of construction projects for the Consumers Cooperative Refinery Limited in Regina and at the Husky Energy Heavy Oil Upgrader in Lloydminster. The work lasted well into 1992.

42. Prior to the advent of trade division bargaining in 1993, the applicant bargained directly with Brown & Root through its Edmonton offices.

43. In 1970, the International Union of Operating Engineers, Local 870 filed an application for certification in respect of operating engineers employed by Cantilever Construction Ltd. (Tab 20). The application was withdrawn when Brown & Root conceded that it owned and operated Cantilever Construction (Tab 21). Cantilever's registered office and mailing address was that of MacPherson Leslie & Tyerman LLP in Regina.

44. During the summer of 2009, Kevin Wilson of MacPherson Leslie & Tyerman LLP made inquiries of the Board on behalf of Brown & Root and Cantilever Construction (Tab 22). The applicant is unaware of the nature of those inquiries but notes that it was after KBR had acquired Wabi.

Attempt to avoid the consequences of trade division bargaining

45. Both before and after KBR's purchase of Wabi, the only bargaining rights for KBR employees in Saskatchewan are held by the applicant and several other building trades unions. These unions hold craft unit certifications, the Construction Workers Union has no pre-existing bargaining rights. The obligations KBR has to bargain collectively through the CLR are with the applicant and the other certified bargaining agents.

46. KBR is a highly centralized company controlled and directed by the corporate parent in Houston. There is no evidence of any real or separate existence for KBR Wabi or KBR Canada and KBR Industrial for that matter. It is the centre which provides life and resources to its various units. The entities it has incorporated such as the named employer respondents were created as a means to structure the operations which it conducts as an integrated entity.

47. Into this setting comes KBR Wabi, registered in this province only after CLAC's certification application. With an unregistered employer of allegedly six persons in a remote location, CLAC was apparently able to gather membership evidence in support of its application for an all employees, province wide certification order. We suggest that KBR was involved and actually invited CLAC to organize its employees at Rabbit Lake. Given the pre-existing bargaining rights held by the building trades and the KBR attorney's inquiries of the Board in 2009, it is the submission of this applicant that KBR is supporting CLAC's application for the purpose of avoiding the effect of the CILRA and the applicant's collective agreement with the CLR.

Conclusion

48. It is the applicant's position that KBR Canada Ltd., KBR Industrial Canada Co. and KBR Wabi Ltd. are the successors of or are related to Brown & Root Ltd. They are therefore bound to the collective agreements between the applicant and the CLR and are obliged to hire members of the Union at Cameco's Rabbit Lake project.

49. It is the applicant's position that there has been a sale of business between KBR Canada Ltd. and or KBR Industrial Canada Co. to KBR Wabi Ltd. or that they have been carrying on associated or related business or activities under common direction and control within the meaning of section 37.3 of the Act.

50. The applicant requests that its application be heard together with the application for certification filed by CLAC (File No. 177-12). The applicant relies both on the material facts

[11] This recitation of alleged facts, sprinkled with some argument, is supported by various exhibits referenced in the body of the alleged facts. These exhibits include, *inter alia*, corporate searches, website screen shots and press releases attributed to the KBR Companies as referenced in the recitation above.

[12] In their Replies to this application, the KBR Companies provide the following:

Wabi

4. The following is a concise statement of the material facts which are intended to be relied upon in support of this Reply:

Common or Related Employer Application

(a) KBR Industrial Canada Co. (Industrial) is a general construction contractor with its head office and senior management located in Edmonton, Alberta. It is not subject to any certification orders in Saskatchewan.

(b) The Application fails to provide any meaningful particulars to support the bald allegation that the business of Industrial is carried on in common with the other named companies. In any event,
Industrial has no involvement in the operations of KBR Wabi Ltd. (Wabi). It does not share employees with Wabi. It has had no involvement in securing work for Wabi in Saskatchewan. It has
never performed work in Saskatchewan.

(c) Even if Industrial and the other named entities were carrying on business under common control or direction (and they aren't), this Board should not exercise its discretion to grant a common employer declaration. There is no labour relations purpose to granting such a declaration. The purpose suggested by the Union is the suggestion that Wabi is being "used" to circumvent whatever bargaining rights the Union has in Brown & Root Ltd. ("Brown & Root"). However, by the Union's own account, Brown & Root ceased doing work in Saskatchewan in 1992. How can it be said then that Wabi is being used to avoid bargaining rights which have not been engaged for 20 years?

Successorship

(d) The Application alleges that Industrial is a successor employer to Brown & Root. No particulars are provided to support this allegation and, as a result, Industrial is unable to provide a meaningful reply.
(e) The Application also alleges that there has been a sale of a business from Industrial and/or KBR Canada Ltd. to Wabi. No particulars are provided to support this allegation and, as a result, Industrial
is unable to provide a meaningful reply.

Canada

4. The following is a concise statement of the material facts which are intended to be relied upon in support of this Reply:

1) KBR Canada is in the business of construction management and construction support services. It does not employ trades people. Its operations are based in Edmonton, Alberta.

2) KBR Canada is wholly-owned by Kellogg Brown & Root LLC, a limited liability corporation incorporated pursuant to the laws of Delaware.

3) KBR Canada is not subject to any certification orders issued by the Saskatchewan Labour Relations Board (the "Board") in relation to its employees in Saskatchewan.

4) The Union relies upon a certification order dated July 8, 1960 certifying it to represent certain employees of Brown & Root Ltd.

5) Corporate searches indicate that Brown & Root Ltd. was merged with Halliburton Canada Inc. in 1991. That company amalgamated into Halliburton Group Canada Inc. It is no longer a part of the KBR organization.

6) KBR Wabi Ltd. ("KBR Wabi") is a business corporation extra-provincially registered in Saskatchewan. KBR Wabi is wholly-owned by KBR Canada.

7) KBR Wabi has been actively and independently engaged in the construction business in Canada since 1991. It was purchased by KBR Canada in 2008.

8) KBR Industrial Canada Co. ("KBR Industrial") is a business corporation extra provincially registered in Saskatchewan. KBR Industrial is wholly-owned by Kellogg Brown & Root Netherlands B.V.

9) KBR Canada, KBR Industrial and KBR Wabi all have uniquely constituted boards of directors and officers. All of KBR Canada, KBR Industrial and KBR Wabi operate as distinct entities, independent of one another.

10) There has been no sale of business and/or assets between KBR Canada and KBR Wabi. 11) KBR Canada states that the Union has provided no basis on the allegations as pleaded to support a finding of common employer/successorship. KBR Canada asks that the application be summarily dismissed.

12) Section 37 of The Trade Union Act is inapplicable to any issues raised by the Union in its application as there has been no sale, lease, transfer or other disposal of a unionized business in Saskatchewan or a part thereof.

13) Further, s. 37.3 of The Trade Union Act and s. 18 of The Construction Industry Labour Relations Act, 1992 have no application to KBR Canada as none of the entities alleged by the Union to be common/related employers are unionized in Saskatchewan or share a sufficiently integrated existence so as to justify a finding that they are common or related
employers pursuant to s. 37.3 of The Trade Union Act or s. 18 of The Construction Industry Labour Relations Act, 1992.

Industrial

4. The following is a concise statement of the material facts which are intended to be relied upon in support of this Reply:

Common or Related Employer Application
(a) KBR Industrial Canada Co. (Industrial) is a general construction contractor with its head office and senior management located in Edmonton, Alberta. It is not subject to any certification orders in Saskatchewan.

(b) The Application fails to provide any meaningful particulars to support the bald allegation that the business of Industrial is carried on in common with the other named companies. In any event, Industrial has no involvement in the operations of KBR Wabi Ltd. (Wabi). It does not share employees with Wabi. It has had no involvement in securing work for Wabi in Saskatchewan. It has never performed work in Saskatchewan.

(c) Even if Industrial and the other named entities were carrying on business under common control or direction (and they aren't), this Board should not exercise its discretion to grant a common employer declaration. There is no labour relations purpose to granting such a declaration. The purpose suggested by the Union is the suggestion that Wabi is being "used" to circumvent whatever bargaining rights the Union has in Brown & Root Ltd. ("Brown & Root"). However, by the Union's own account, Brown & Root

> *ceased doing work in Saskatchewan in 1992. How can it be said then that Wabi is being used to avoid bargaining rights which have not been engaged for 20 years?*
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> *(d) The Application alleges that Industrial is a successor employer to Brown & Root. No particulars are provided to support this allegation and, as a result, Industrial is unable to provide a meaningful reply.*
>
> *(e) The Application also alleges that there has been a sale of a business from Industrial and/or KBR Canada Ltd. to Wabi. No particulars are provided to support this allegation and, as a result, Industrial is unable to provide a meaningful reply.*

The KBR Companies' Arguments:

Wabi

[13] Mr. Seiferling, as counsel for Wabi, filed a written argument which we have reviewed and found helpful. Counsel also advised that in addition to these arguments, it accepted and relied upon the arguments made by counsel for Canada and Industrial.

[14] Wabi's counsel took the position that there were no allegations made by the Applicants, which, if proven, would show it to be a successor to Brown & Root Ltd. or that it was a common employer with some other entity.

[15] Wabi's counsel argued that the Board should dismiss these applications because they failed to disclose an arguable case as set out in *Soles.*[3] They also relied upon the Board's decision in *Tercon Industrial Works Ltd. et al. v. Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers et al.*[4] as support for their arguments that the principles that the Board will consider in determining whether an application has set out the minimum facts in order to establish and arguable case are:

- It is necessary for an Applicant to state with some precision the nature of the accusations which are being made to afford the Respondent a fair hearing.

[3] [2006] Sask. L.R.B.R. 413, LRB File No. 085-06.
[4] [2011] CanLII 8881 (SKLRB).

- That a party against whom a complaint or application is made should be able to read the Applicant's pleadings and get a clear understanding of when, how and by whom the *Act* was alleged to have been violated.

- It is necessary that the applicant make it clear what conduct of the Respondent is the subject of the complaint.

- The allegations of fact should be set out in plain English, which facts, if accepted as true, would establish that the section of the *Act* in question may apply or have been violated.

- It is not enough to recite a provision of the *Act* and then say some other person has violated it.

[16] Relying upon *Wilson v. Access Transit Ltd.*[5] and *W.W. Lester (1978) Ltd. v. U.A., Local 740,*[6] Wabi argued that it was necessary that the facts, as alleged by the Unions, showed that there was a disposition of a business. They argued that absent such facts, there was no factual foundation for the application of section 37 of the *Act*.

[17] Wabi's counsel also relied upon the British Columbia Labour Relations Board decision in *Commonwealth Construction Company Ltd. et. al. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 et. al.*[7] in support of its arguments that insufficient facts to establish a successorship had been alleged by the Unions.

[18] It also relied upon the Board's decision in *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 v. Monad Industrial Constructors Inc. et. al.*[8] to support its argument that there must be a transfer of assets or some part of a business for a successorship to occur. Wabi argued that there was no facts alleged that provided any basis for there having been a transfer of assets or some part of the business of Brown & Root Ltd.

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[5] [1992] 4th Quarter Sask. Labour Rep. 127, 17 CLRBR (2d) 283, LRB File No. 223-92.
[6] [1990] 3 S.C.R. 644, 91 C.L.L.C. 14,002, 76 D.L.R. (4th) 389.
[7] [2013] CanLII 9500 (BCLRB), BCLRB No. B48/2013.

[19] Counsel for Wabi argued that the Common Employer provisions of Section 37.3 of the *Act* were not applicable in this case because Brown & Root Ltd. had ceased work in Saskatchewan well before the *Construction Industry Labour Relations Act* ("*CILRA*") was enacted. It further argued that the replies of Wabi, Canada and Industrial show these companies to be operating independently of one another, not under common control or direction.

[20] Wabi also again relied upon the *Commonwealth Construction*[9] case, *supra*, from British Columbia's Labour Relations Board in support of its position that there had been undue delay in bringing the application for successorship or amendment.

[21] Finally, Wabi argued that Section 18(3) of the *CILRA* provided discretion to the Board regarding a common employer designation under that *Act*. Wabi argued that discretion should be exercised in this case as there was no labour relations purpose in making a common employer designation.

Canada

[22] Mr. Wilson, as counsel for Canada, filed a written argument which we have reviewed and found helpful. Counsel also advised that in addition to these arguments, it accepted and relied upon the arguments made by counsel for Wabi and Industrial.

[23] Counsel for Canada agreed that the proper test for summary dismissal was found in the *Soles*[10] decision of the Board. Counsel also referenced both the Board's decision in *Tercon,*[11] *supra,* wherein the test was further discussed.

[24] Counsel for Canada argued, based upon *Re: P.A. Bottlers Ltd. (c.o.b. P.A. Beverage Sales and Sascan Beverages)*[12] that the applications disclosed no arguable case. They argued that the onus is on the applicant to provide a level of detail

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[8] LRB File Nos. 132-12, 160-12 & 161-12.
[9] [2013] CanLII 9500 (BCLRB), BCLRB No. B48/2013.
[10] [2006] Sask. L.R.B.R. 413, LRB File No. 085-06.
[11] [2011] CanLII 8881 (SKLRB).
[12] [1997] S.L.R.B.D. No. 22, LRB File No.: 017-97.

concerning its claim, including clear statements of the conduct of the respondent which is the subject of the claim.

[25] Counsel for Canada argued that the pleadings failed to show a sale, lease, transfer or other disposal of a business or part thereof as required by Section 37 of the *Act*. In support, Canada cited both *United Brotherhood of Carpenters and Joiners or America, Locals 1805 and 1990 v. Cana Construction Co. Ltd.*[13] and *Wilson Access Transit Ltd.*[14]

[26] Counsel for Canada argued that the common control provisions of the *Act* or the *CILRA* are inapplicable to Canada for a number of reasons. Firstly, it argued that there was no reverse onus on Canada pursuant to Section 18(6) of the *CILRA*. Secondly, it argued that Section 37.3 of the *Act* would be inapplicable to Canada because Brown & Root Ltd. ceased to operate in Saskatchewan prior to 1993. Furthermore, they argued, there were not two entities engaged in work in Saskatchewan, nor had there been any finding that at least one of these entities was subject to an existing certification Order.

[27] Canada argued that s. 37.3 operated in the present whereas s. 37 operated with respect to the past. Different findings and evidence would be required in respect of each section. Section 37 deals with the continuation of bargaining rights from the past, whereas s. 37.3 deals with erosion of present rights by virtue of another business entity operating to diminish existing rights.

[28] Counsel for Canada argued, based upon comments made in the Queen's Bench decision[15] of the Union's appeal of the Board's decision in *Tercon,*[16] *supra*, that there was no need for the second prong of the Soles,[17] *supra*, to be engaged by the Board. It argued that once the Board has determined that there is no arguable case, that was the end of the inquiry and the application should be dismissed.

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[13] [1985] Feb Sask. Lab. Rep. 29, L.R.B. File Nos. 199-84, 201-84 & 202-84.
[14] [1992] 4th Quarter Sask. Lab. Rep. 29, 17 CLRBR (2d) 283, L.R.B. File No. 223-92.
[15] [2011] S.J. No 671, 2011 SKQB 380, 378 Sask. R. 82, 210 C.L.R.B.R. (2d) 35 at paragraph 108.
[16] [2011] CanLII 8881 (SKLRB).
[17] [2006] Sask. L.R.B.R. 413, LRB File No. 085-06.

Industrial

[29] Mr. Lane, on behalf of Industrial, also filed a written argument which we have reviewed and found helpful. Counsel also advised that in addition to these arguments, it accepted and relied upon the arguments made by counsel for Wabi and Canada.

[30] Counsel for Industrial also agreed that the test for summary dismissal was as set out by the Board in *Soles.*[18] Industrial argued that the applications by the Unions failed to provide any substantive particulars which could give rise to a finding by the Board that there had been any disposition of a business as required by s. 37 of the *Act*. In support, Industrial relied upon a decision of the Alberta Labour Relations Board in *Re: Stuart Olson Construction et al and CGWU Local 92 et al.*[19] and a decision of the Ontario Labour Relations Board in *Sault Ste. Marie (City) v. LIUNA, Local 1026.*[20]

[31] Counsel for Industrial also relied upon the *Tercon*[21] decision, *supra*, in support of its arguments that there was no factual foundation for the successorship or amendment applications or for the applications for common employer declarations. It also relied upon a British Columbia Labour Relations Board decision in *Re: Santa Buddies Productions Inc.*[22]. In their submission, "the particulars in the Applications … do not plead facts which would raise the suggestion of successorship 'beyond the realm of possibility or speculation'."

[32] Industrial's counsel also argued, as had counsel for Canada, that s. 37.3 must consider present facts, not matters which occurred in the past. In support, counsel relied upon the Alberta Labour Relations Board decision in *Re: IBEW, Local 424 and 248048 Alberta Ltd. et al.*[23] and the British Columbia Labour Relations Board decision in *Re: D & W Warehousing Ltd. et al. and Teamsters Local 31.*[24]

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[18] [2006] Sask. L.R.B.R. 413, LRB File No. 085-06.
[19] [1990] Alta L.R.B.R. 210, 8 C.L.R.B.R. (2d) 108.
[20] [2012] CLB 12370 No. 2.
[21] [2011] CanLII 8881 (SKLRB).
[22] [2009] BCLRBD No. 215.
[23] [1987] Alta. L.R.B.R. 232.
[24] [1997] BCLRB No. B114/95, 35 C.L.R.B.R. (2d) 275.

[33] Industrial argued that there were insufficient facts alleged to show common control or direction by any of the parties and that the applications should therefore be summarily dismissed. They pointed to the Alberta Labour Relations Board decision in *Re: Kiewitt Industrial Canada Ltd. and UBCJA, Local 1325*[25] as an example of a case where the Alberta board had summarily dismissed an application for a common employer declaration based upon what Industrial argued were similar facts to the present case. It also cited *Finning International Inc. et al. and International Association of Machinists and Allied Workers, Local 99*[26] in support.

[34] It argued that this was an appropriate case to summarily dismiss the applications. It argued that the current applications required a large number of applicants to respond to the applications as considerable cost to those parties.

The Unions' arguments:

Local 180 & Local 771

[35] Mr. Caroline, on behalf of Locals 180 and 771, also filed a written argument which we have reviewed and found helpful. Counsel also advised that in addition to these arguments, it accepted and relied upon, the arguments made by counsel for the other unions.

[36] Mr. Caroline also argued that the test to determine if a summary dismissal should be granted was whether or not the applicants had shown an "arguable case". He argued that that standard is not the same as a weak case or an uncertain case, but rather there must be no possibility that the applications could succeed, even if all the facts alleged were proven. He supported his arguments in this regard with the Court of Queen's Bench decision[27] on the judicial review of *Tercon,*[28] *supra*.

[37] Mr. Caroline argued that an applicant should be denied a hearing only in the clearest of cases. He further argued that the application plead specific facts that, if proven, would satisfy each of the necessary elements to establish a successorship.

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[25] [2001] CLB 14438.
[26] [2005] Alta. L.R.B. 356.
[27] [2011] S.J. No 671, 2011 SKQB 380, 378 Sask. R. 82, 210 C.L.R.B.R. (2d) 35 at para. 108.
[28] [2011] CanLII 8881 (SKLRB).

[38] Mr. Caroline also argued that the facts, if proven, established all of the necessary elements for a finding that Wabi, Canada and Industrial were common employers. He further argued that the Board, upon a declaration that Wabi, Canada and Industrial are common employers, could order additional relief under s. 18(5) of the *CILRA*, if it finds that the common employers have structured their operations for the purpose of avoiding trade division bargaining. Mr. Caroline further argued that s. 18(6) of the *CILRA* invoked a reverse onus on the employers to show that they are doing business through multiple entitles for a reason other than avoiding trade division bargaining. He argued that the applications also supported a finding that the KBR Companies are using related businesses to evade bargaining through the trade divisions.

Local 870, Local 179, Local 739, Local 1985 & Local 1021

[39] Mr. Kowalchuk, on behalf of Locals 870, 179, 739, 1985 and 1021 also filed a written argument which we have reviewed and found helpful. Counsel also advised that in addition to these arguments, it accepted and relied upon the arguments made by counsel for the other unions.

[40] Mr. Kowalchuk argued that the Applicants had failed to satisfy the onus upon them that the applications should be summarily dismissed. He noted that the Board has a discretion with respect to the issuance of orders under s. 18 of the *Act*.

[41] Mr. Kowalchuk further argued that the facts established that the changes were merely a change of name, filed by one of the counsel for the Applicants and as a result, the certification Orders made by the Board should flow to the Applicants. He noted that none of the KBR Companies provided any notice to the Board that Brown and Root Ltd. had ceased operations or changed its name.

[42] Mr. Kowalchuk also argued that the public corporate records filed with the applications showed a clear link between the companies. He argued that it would be contrary to public policy for those records not to be relied upon.

[43] Mr. Kowalchuk argued that the applications raised a number of policy issues that should be resolved by a hearing before the Board and should, therefore, not be summarily dismissed.

Local 529

[44] Mr. Plaxton, on behalf of Local 529, also filed a written argument which we have reviewed and found helpful. Counsel also advised that in addition to these arguments, it accepted and relied upon the arguments made by counsel for the other unions.

[45] Mr. Plaxton argued that summary dismissal was an extraordinary remedy which requires that the applicants meet stringent criteria. In support, he relied upon the Court of Queen's Bench decision[29] on the judicial review of *Tercon,*[30] *supra.*

[46] He also argued that, while the Board is not obliged to follow the jurisprudence in the Courts, he submitted that assistance could be gained by reference to a number of judicial authorities, including *Canada (Attorney General) v. Inuit Tapirisat of Canada,*[31] *Sagon v. Royal Bank of Canada (Sask. C.A.),*[32] *Anderson v. Gorrie*[33] and *Zakerson v. Jubilee Residences.*[34]

[47] He further argued that among the issues raised by the Applicants were issues of law, such as the timing of the common employer relationship. He argued that an application to strike should not be allowed where the sufficiency of the pleadings depends upon the determination of a point of law.

[48] Mr. Plaxton argued that the application was premature based upon his submission that the true complaint of the Applicants was a lack of particulars rather than a substantive lack of facts in the application. He argued that the Applicants should have applied for the provision of particulars rather than bringing these applications for summary dismissal.

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[29] [2011] S.J. No 671, 2011 SKQB 380, 378 Sask. R. 82, 210 C.L.R.B.R. (2d) 35 at para. 108.
[30] [2011] CanLII 8881 (SKLRB).
[31] [1980] 2 S.C.R. 735.
[32] [1992] S.J. No. 197.
[33] 36 Solicitors' Journal 256.
[34] [1985] S.J. No. 891.

[49] Mr. Plaxton also argued that the matters complained of were within the knowledge of the Applicants. He argued that prior to any summary dismissal of the applications, the Unions should be permitted to receive disclosure of documents and things from the Applicants.

[50] He submitted that normal requirements do not apply insofar as the Applicant's claim that the Union's pleadings must disclose "when, how and by whom" the *Act* is alleged to have been violated. He argued that this information is not necessary for the employer to identify the transaction complained of which meets the allegations of successorship. In any event, he submitted, Local 529 had met any burden of showing an arguable case exists.

Relevant statutory provisions:

[51] Relevant statutory provisions of *The Trade Union Act* are as follows:

> *2 In this Act:*
>
> *(g) "employer" means:*
>
> *(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;*
>
> . . .
>
> *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.*

37(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).

. . .

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

37.3(2) Subsection (1) applies only to corporations, partnerships, individuals, or associations that have common control or direction on or after October 28, 1994.

[52] Relevant statutory provisions of the *Construction Industry Labour Relations Act ("CILRA")* are 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:

(a) 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 association; or

(b) a corporation, partnership, individual or association is sufficiently related to a unionized employer that, in the opinion of the board, they should be treated as one and the same.

18(2) Subsection (1) applies only to corporations, partnerships, individuals and associations that commence carrying business, undertakings or other activities in the construction industry after the coming into force of this Act.

18(3) In exercising its discretion pursuant to subsection (10, the board may recognize the practice of non-unionized employers performing work through unionized subsidiaries.

18(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 by the minister pursuant to section 10 or a determination of a representative employers' organization pursuant to section 11.*

18(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 of the minister or an order of the board determining an employers' organization to be the 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.

18(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.*
>
> *18(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).*

Analysis:

The Soles Process

[53] The *Soles*[35] process for summary dismissal of an application has been utilized by the Board since 2006 when that decision was made by the Board. The development of the process was the result of amendments made to the *Act* in 2005 to grant the Board a series of powers similar to those held by the Canada Labour Relations Board.

[54] The test for determination of whether the Board should commence the process for summary dismissal is whether or not an arguable case has been presented in the facts and allegations contained in the application, the rely, and the written submission of the parties. At paragraph 30 its decision, the Board says:

> *In order to determine whether the Applicant has established an arguable case under s. 25.1 of the Act, we must examine the facts and allegations contained in the application, reply and written submissions of the parties. In the application that was declared by the Applicant in the presence of legal counsel who represented the Applicant at the time the application was filed, the Applicant only alleges that the Union "terminated [her] for reporting elder abuse." The Applicant has essentially refused to provide particulars to the Union concerning her basis for claiming that the Union failed to represent her in the manner required by s. 25.1 of the Act, stating that such particulars would only be provided at a hearing with her lawyer present.*

[55] Decisions under the *Soles* process are normally undertaken by the Board without a hearing being held (*in camera*). If the Board determines that the facts and allegations contained in the application, the reply and the submissions of the parties does not give rise to an arguable case, it has developed, in fairness to the parties involved, a two step process. The second step was intended to provide the applicant whose

application is subject to summary dismissal with the opportunity to make submissions as to why the application should not be summarily dismissed by the Board.

[56] This second step was taken not only as a matter of fairness to the Applicant, but also because the Board's authority under Section 18 is discretionary. While the Board has the power "to summarily decide any matter before it without holding and oral hearing,"[36] it is not mandatory that that authority be exercised. Therefore, the Board takes the additional step as a check as to whether or not this discretionary power should be exercised.

[57] In his decision on judicial review[37] of the Board's decision in *Tercon,*[38] *supra*, Mr. Justice Popescul (as he was then) commented on the Board's use of this two stage process. At paragraphs 108 - 110 he says:

> *[108] The power to summarily dismiss and the power to decide matters without oral hearing are two distinct powers that are not necessarily dependent on one another. It appears that the panel in Re Soles mistakenly confused the concepts of summary dismissal and deciding matters without granting an oral hearing. The former relates to dismissing summarily due to "no arguable case" or "lack of evidence", whereas the latter permits the board to decide matters without an "oral hearing" (i.e. the SLRB may choose to accept only written submissions on an issue). Consequently, I question whether this second prong of the Re Soles test is necessary and constitutes an accurate interpretation of the enabling legislation. Once the SLRB finds that an application does not "establish an arguable case", is it necessary to go the additional step and decide whether it is an "appropriate case to summarily dismiss the applicant's application without oral hearing" – or has that already been decided when determining the first prong? However, given that the parties have not had an opportunity to squarely address this issue and given that the outcome of this case does not turn on this point, whether or not the second prong of the test set out in Re Soles is necessary can be decided at another time. In any event, the Chair Love Panel determined that the second prong of the test had also been satisfied even though taking this step, in my view, was unnecessary. The bottom line is that the result is not affected.*
>
> *[109] Also, Re Soles suggests that the material that must be assessed when deciding whether the application discloses an "arguable case"is "... the application and/or written submission", however considering written submissions as part of the assessment process is troubling. To do so would lead to a commingling of "pleadings" with "arguments" that could cause confusion and uncertainty. Having the "submissions" of counsel, be it written or oral,*

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[35] [2006] Sask. L.R.B.R. 413, LRB File No. 085-06.
[36] See section 18(q) of *The Trade Union Act* R.S.S. 1978 c. T-17.
[37] [2011] S.J. No 671, 2011 SKQB 380, 378 Sask. R. 82, 210 C.L.R.B.R. (2d) 35 at para. 108
[38] [2011] CanLII 8881 (SKLRB)

> *morph into a pleading upon which parties rely to define the issues would be an unjustifiable distraction that could lead to unfairness. A more conceptually appropriate approach, at this stage, might be to restrict the assessment analysis to considering the applications, the particulars, documents referred to therein and other documentation of this kind. Here, however, the nature and scope of what was considered is without significance because the Chair Love Panel interpreted the "written submissions filed" to be the "particulars". At para. 166, he states that the SLRB will base its assessment on "... the application and/or written submissions filed (in this case the particulars) ...".*
>
> *[110] Accordingly, notwithstanding the misgivings that I have in relation to the precise way the summary dismissal test was stated, even though the parties expressly agreed that it was the "correct test", it was stated sufficiently such that any misstatements respecting the test do not affect the outcome of this decision.*

[58] These comments require that the Board re-examine its procedures for summary dismissal. Mr. Justice Popescul has noted that the Board's authority to "summarily refuse to hear a matter for lack of evidence or no arguable case"[39] and its authority "to decide any matter before it without holding an oral hearing"[40] are discrete authorities and need not be utilized in tandem.

[59] *The Canada Labour Code*[41] also contains authority for the Canada Board to summarily dismiss applications,[42] or to determine matters without a public hearing.[43] The wording of *The Canada Labour Code* differs from that set out in the *Act* regarding summary dismissal. For comparison, those provisions are as set out below:

> *16. The Board has, in relation to any proceedings before it, power*
>
> *(i) to summarily refuse to hear, or dismiss, a matter for want of jurisdiction or lack of evidence…*
>
> *. . .*
>
> *18 The board has, for any matter before it, the power:*
>
> *(p) to summarily dismiss a matter if there is a lack of evidence or no arguable case;*

[39] See Section 18(p) of *The Trade Union Act* R.S.S. 1978 c. T-17.
[40] See Section 18(q) of *The Trade Union Act* R.S.S. 1978 c. T-17.
[41] RSC 1985 c. L-2.
[42] Section 16 (o.1).
[43] Section 16.

[60] The power in the Canada Code is restricted to the Board summarily dismissing an application where there is a "lack of evidence."[44] The provision in the *Act* provides expressly for this power to be summarily utilized either if there is a lack of evidence or if there is "no arguable case".

[61] The *Soles* process focused only on the second of the two powers granted to the Board to summarily dismiss an application. Given the comments of Mr. Justice Popescul and the necessity to review the process based upon those comments as well as a more fulsome analysis of the powers granted to the Board, we have determined to review the *Soles* process and provide better guidance to the labour relations community with respect to the utilization of that process.

[62] Additionally, there have been some procedural issues regarding how the process should be invoked by parties to a matter. The Board, in the past, has favoured that the process be initiated by a separate application requesting that the Board summarily dismiss an application. However, a practice has evolved among some labour practitioners, similar to what occurred in this case, that requests for summary dismissal of an application is contained within the replies filed by respondent parties.

[63] In *Soles*, the Board reviewed the process whereby the provisions in the *Act*, which replicated many of the provisions of *The Canada Labour Code*. At paragraph [19] the Board commented as follows:

> *This the first occasion on which the Board has been required to interpret and apply ss. 18 (p) and (q) since the amendment made to s. 18 in 2005. The Union is correct in its submission that it appears that the Legislature replicated many of the powers of the Canada Board as contained in s. 16.1 of the Code when it amended s. 18 of the Act to specifically enumerate the powers of the Board. The original Bill to amend the Act simply incorporated by reference the companion provisions contained in s. 16.1 of the Code, however, prior to third reading, the proposed amendments to s. 18 of the Act were amended to specifically enumerate the Board's powers within the section, utilizing almost identical language to that contained in s. 16 of the Code. While arguably, the Board had these powers prior to the 2005 amendment, the specific enumeration of the powers makes it abundantly clear.*

[64] At paragraph [22], the Board went on to say:

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[44] It should be noted that *The Trade Union Act* incorporates the power to dismiss on jurisdictional grounds to a separate provision in Section 18(o).

> *The Union submitted that s. 18(p) may provide a statutory rationale or ground for the application of s. 18(q). We agree with that proposition except to say that there may be other rationale or grounds for the application of s. 18(q). In other words, the Board may "decide any matter before it without holding an oral hearing" on some basis other than "lack of evidence" or "no arguable case." As it is possible to dispose of this application through our consideration of whether the application should be summarily dismissed without an oral hearing because there is a lack of evidence or no arguable case (as urged upon us by the Union), we will not speculate on any other possible grounds that might form the basis of a respondent's application to summarily dismiss without an oral hearing.*

[65] In this paragraph, the Board recognized that the power to summarily dismiss an application for lack of evidence or no arguable case was not necessarily exercised solely in concert with the power to dismiss without an oral hearing, that is, as pointed out by Mr. Justice Popescul these powers are discrete powers.

[66] However, Mr. Justice Popescul also expressed his misgivings that the test, as enunciated in *Soles* was not the correct test, he was satisfied that "it was stated sufficiently such that any misstatements respecting the test do not affect the outcome of this decision".

Refinement of the *Soles* Test

[67] It is clear from the analysis above that the power to dismiss an application summarily for "lack of evidence" or disclosing "no arguable case" and the power to dismiss an application without an oral hearing are discrete powers granted to the Board. That having been said, the Board's procedures have also acknowledged, the power to summarily dismiss can be utilized by the Board with, or without an oral hearing being held.

[68] In *Soles*, after the Board had adopted the two part test, it began its analysis of whether or not an arguable case existed by reference to its practice and procedure with respect to interim applications. The Board later restated its two part test at paragraph [27] as being "whether the application discloses an arguable case such that it should not be dismissed without an oral hearing". With respect, this comment is what leads to the concerns enunciated by Mr. Justice Popescul.

[69] The Courts have the inherent jurisdiction to dismiss actions. That inherent jurisdiction is set out in Rule 173 of *The Queen's Bench Rules of Court*. The jurisdiction of the Courts is far greater than the jurisdiction provided to the Board in the *Act*. The

Saskatchewan Court of Appeal, in a judgment[45] authored by a former Chairperson of this Board, Mr. Justice Sherstobitoff, the Court says:

> *In determining whether a claim should be struck as disclosing no reasonable cause of action, the test is whether, assuming the plaintiff proves everything alleged in his claim, there is nevertheless no reasonable chance of success, or to put it another way, no arguable case. The Court should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the court is satisfied that the case is beyond doubt: Marshal v. Saskatchewan, Government of, Petz and Adams (1993), 20 Sask. R. 309 (C.A.); The Attorney General of Canada v. Inuit Tapirsat, [1980] 2 S.C.R. 735. The Court may consider only the statement of claim, any particulars furnished pursuant to demand, and any document referred to in the claim upon which the plaintiff must rely to establish his case: Balacko v. Eaton's of Canada Limited (1967), 60 W.W.R. 22 (Sask. Q.B.); Lackmanec v. Hoffman (1992), 15 Sask. R. 1 (C.A.)*

[70] As noted above, the powers given to the Board under section 18 are discretionary powers, as are the powers of Courts to dismiss either through their inherent jurisdiction or pursuant to Rule 173. The jurisdiction exercised by the Courts is to be exercised only in plain or obvious cases and where the court is satisfied the case is beyond doubt. That same principle should guide the Board.

[71] Mr. Justice Popescul also cautioned the Board against inclusion of submissions from the parties which could lead to a "commingling" of 'pleadings with arguments'". This caution must also be observed. The inclusion of "written submissions" also derives from the *Soles* decision. In paragraph [27] of *Soles*, the Board references written submissions as something it can consider in determining whether or not an arguable case exists. Again, with respect, to put this reference in context, that comment must be viewed as a part of the Board's connecting this process to the process of determination of a matter without an oral hearing, which process would require the Board to have reference to written submissions as a part of the process.

[72] Additionally, the Board must take care not to attempt to interpret legislation in isolation. In *Re: Rizzo v. Rizzo Shoes Ltd.,*[46] the Supreme Court of Canada adopted

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[45] *Sagon v. Royal Bank of Canada* [1992] S.J. No. 197, 105 Sask. R. 133.
[46] [1998] CanLII 837 (SCC); 36 OR (3d) 418; 154 DLR (4th) 193; 33 CCEL (2d) 173; 106 OAC 1.

the following as best encapsulating the approach to interpretation relied upon by the Court. At paragraph 21, they say:

> *Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:*
>
> > *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

[73] It is, therefore, essential that we not view the power to summarily dismiss an application for failing to show an arguable case absent from a reading of the enabling power, in its entire context and in grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the Legislature.

[74] One of the provisions of the *Act* which provides guidance to the Board is s. 19, which provides broad powers to the Board to "amend any defect or error in any proceedings, and all necessary amendments shall be made for the purposes of determining the real question or issue raised by or depending on the proceedings." Nor is the Board bound by the strict evidentiary rules applied by the Courts.[47]

[75] The scheme of the *Act* must also be considered, in this case, the intent of the provisions of the *Act* which deal with successorship and common and related employers are important.

[76] In *Amalgamated Transit Union, Local 588 v. City of Regina and Wayne Bus Ltd.,*[48] (*"Wayne Bus"*) the Board discussed the purpose for s. 37.3 of the *Act.* It said:

> *[124] One of the primary purposes of common employer legislation is to prevent the erosion or undermining of existing bargaining rights, as may*

[47] Section 18(e) of the *Act.*
[48] [1999] Sask. L.R.B.R. 238, LRB File No. 363-97.

> *occur, for example, when work is diverted from a unionized employer to an associated non-union entity. Historically, the most common example of this erosion has been the creation by unionized contractors of non-unionized "spin-offs" in the construction industry. In Saskatchewan The Construction Industry Labour Relations Act, 1992, c. C-29.11, contains specific provisions applicable to the construction industry; s. 37.3 of the Act applies to all other sectors.*

[77] Also, in *Wayne Bus*, the Board quoted from the Ontario Labour Relations Board decision in *Lumber and Sawmill Workers Union, Local 2995 v. J. H. Normick Inc.,*[49] as follows:

> *Section 1(4) recognizes that the business activities which give rise to the employer-employee relationships regulated by the Act, can be carried on through a variety of legal vehicles or arrangements; and it may not make "industrial relations sense" to allow the form of such arrangements to dictate, and possibly fragment, the collective bargaining structure. In order to have orderly and stable collective bargaining, the bargaining structure must have some permanence and accord with underlying economic and industrial relations realities. Where two employers are nominally independent but are functionally and economically integrated, the essential community of interest between them and the employees employed by one or both of them may make it appropriate to treat them as one employer for some or all collective bargaining purposes. This is not to say, however, that common economic control of related business activities will automatically cause the Board to issue a section 1(4) declaration. The Board, having satisfied itself that the businesses or activities before it are under common control or direction, is given a discretion as to whether or not to issue a section 1(4) declaration. If the scheme of the Act would be better served or the collective bargaining structures placed on a sounder footing by refusing to make a section 1(4) declaration the Board will exercise its discretion accordingly. (See Zaph Construction Ltd. [1976] OLRB Rep. Nov. 741 and Ellwall and Sons Construction Limited [1978] OLRB Rep. June 535.) In view of the broad language of the section which extends to cover such a wide range of business relationships, the labour relations considerations which govern the exercise of the Board's discretion are paramount in determining whether the Board should declare two or more businesses or activities to be one employer for purposes of The Labour Relations Act.*

[78] The *CILRA* also contains provisions in s. 18 related to powers granted to the Board two declare “more than one corporation, partnership, individual or association to be one unionized employer”. The purpose for those provisions is similar to the purpose outlined by the Ontario Board in *Lumber and Sawmill Workers Union, Local 2995* above.

[79] Taking all of this into consideration, we adopt the following as the test to be applied by the Board on the exercise of its authority under s. 18(p) of the *Act*.

1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.

2. In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.

[80] However, the *Soles* case, *supra*, also provided for summary dismissal without an oral hearing pursuant to s. 18(q) of the *Act*. While we recognize that these two powers need not be exercised together, there are occasions when the Board may determine that a matter may be better dealt with through written submissions, without an oral hearing. This was the procedure contemplated by *Soles*.

[81] However, the utilization of the Board's powers under 18(p) and (q) has in our view, been confused and requires some further comment. In our opinion, the powers of the Board should be utilized *seriatim* rather than collectively. That is, when an application for summary dismissal is received by the Board and it is referred to an *in camera* panel or the Executive Officer of the Board, the first question to be determined is whether or not this matter is one that should be dealt with by the Board through written submissions rather than through an oral hearing process utilizing the Board's authority in s. 18(q). The second question, which is whether an arguable case exists or there is a lack of evidence, would then be dealt with either by way of written submissions or through oral argument at a hearing.

[82] In the *Tercon* case, *supra*, it was determined that it would be more efficient and fairer to the parties to have the Board conduct an oral hearing of the matter. In that case, as pointed out by Mr. Justice Popescul in his decision, only one question needed to

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[49] [1979] OLRB Rep. Dec. 1176 at 1184-1185.

be answered by that Board in that case, which was whether or not an arguable case existed.

[83] By this analysis, the *Soles* process remains as a two step process. The steps, however, are discrete steps which do not require the Board to analyze both steps upon an application coming before it.

[84] This then leads to a discussion concerning the procedures the Board will adopt to deal with summary dismissal applications.

Revised Procedures for Summary Dismissal Applications

[85] As noted in paragraph [63] above, there have been some procedural issues surrounding the use of applications for summary dismissal. For the benefit of the Labour Relations community, we believe that it is important that, along with the restatement of the *Soles* test as outlined above, we provide guidance regarding how an application for summary dismissal should be made.

[86] Given the procedure outlined above, it is clear that the *Soles* process is intended to be an *in camera* process, with the first hurdle being a determination that the matter is one that the Board thinks can conveniently be dealt with *in camera*. If the Board determines that the matter is not one that can conveniently be dealt with *in camera*, then the application for summary dismissal would require a *viva voce* hearing before a panel of the Board and the application under s. 18(q) would be dismissed.

[87] However, the practice of some counsel, in simply making reference to summary dismissal in their Reply to the application will no longer suffice to bring the matter before the Board. It will require an additional application (Motion), that will be required to address the facts in support, and the arguments as to why the applicant believes the matter can be dealt with by the Board *in camera.*[50] The respondent to that application will be afforded an opportunity to reply to that application, before the matter is considered by an *in camera* panel for determination. If the Board agrees with the applicant that the matter may be conveniently dealt with *in camera*, it will then request

[50] See section 18(q) of *The Trade Union Act,* R.S.S. 1978 c. T-17.

submissions from the parties on the issue of whether or not the matter in the original matter should be summarily dismissed.

[88] If the *in camera* panel determines that the matter is not one that can be conveniently dealt with *in camera*, then the Board will schedule the application for summary dismissal[51] as a preliminary matter to the hearing of the main application. Alternatively, rather than go through the initial step of requesting the determination regarding summary dismissal to be conducted *in camera*, the parties may, by additional application (Motion), give notice that they wish to raise the issue of summary dismissal as a preliminary matter at the opening of the main hearing of the matter.

[89] This process, in our opinion, creates the necessary separation of the powers given to the Board under s. 18(p) and (q) as noted by Mr. Justice Popescul in *Tercon,*[52] *supra.*

Analysis and Decision

[90] There were five (5) groups of applications filed with respect to this matter. Those were the applications filed by Mr. Caroline on behalf of Local 870, Local 180 and Local 771. One application was filed by Ms. Norbeck on behalf of Local 179. One application was filed by Ms. Cox on behalf of Local 739. Two (2) applications were filed by Mr. Olson on behalf of Local 1985 and Local 1021. One application was filed by Mr. Plaxton on behalf of Local 529. Mr. Kowalchuk took over carriage of the applications filed by Ms. Cox, Mr. Olson and the Local 870 application filed by Mr. Caroline.

[91] For ease of reference, the test, as outlined above has been restated to be as follows:

> 1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on

[51] See section 18(p) of *The Trade Union Act* R.S.S. 1978 c. T-17,
[52] [2011] S.J. No 671, 2011 SKQB 380, 378 Sask. R. 82, 210 C.L.R.B.R. (2d) 35 at para. 108.

this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.

2. In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.

[92] No particulars were requested, or furnished. We are therefore left with an examination of the applications made to determine if the claims should be struck as disclosing no arguable case. That will entail an examination of each of the five (5) groups of applications filed.

The Caroline Applications

[93] Paragraph 10 sets out the form of the three (3) applications filed by Mr. Caroline on behalf of Local 870,[53] Local 180, and Local 771, which also incorporated numerous exhibits by reference.

The Olson Applications[54]

[94] These applications were as follows:

3. With respect to the said application:

a) KBR Wabi Ltd., is actively engaged in the construction industry in the province of Saskatchewan;

b) The Applicant seeks to amend the Board Order issued pursuant to LRB File Nos. 043-70 and 164-86 regarding the Applicant's certification as the union representative of all journeyman carpenters, carpenters, carpenter apprentices, and carpenter foremen employed by Brown & Root Ltd. within the Province of Saskatchewan, to effect the necessary change, if any, to the name of the employer therein, and further a declaration that KBR Wabi Ltd., or any sufficiently related corporate name legally existing as the same employer in all but name, is the successor to or sufficiently related to Brown & Root Ltd.

c) In addition, the Applicant states herein that since that time, the Applicant has represented, as bargaining agent, all carpenters in the

[53] File later taken over by Mr. Kowalchuk
[54] Files also taken over by Mr. Kowalchuk

employ of Brown & Root Ltd. (or any of its other corporate or business names) whenever the company operated within the province requiring workers in this trade.

d) This Applicant is furthermore the bargaining agent on behalf of the carpenter trade division as set forth in the CILRA and designations pursuant to same.

e) This Applicant states further that it is the certified bargaining agent of the within trade divisions for corporately related employers that are legally succeeded by or sufficiently related to KBR Wabi Ltd. in the province of Saskatchewan.

f) This Applicant says the employer within, KRB Wabi Ltd., is therefore a successor employer to the employer legally bound to bargain with the Applicant, and asks for an order to said effect pursuant to s. 37 of The Trade Union Act and/or a declaration that KBR Wabi Ltd. (or any other derivative effectively representing the same employer) is the same employer of employees already governed and represented by this Applicant.

g) Further, or in the alternative, this Applicant says the employer possesses corporations that are related businesses or common employers and seeks a declaration that they be treated as one employer for the purposes of The Trade Union Act and The Construction Industry Labour Relations Act, 1992 pursuant to s. 37.3 of The Trade Union Act and s. 18 of The Construction Industry Labour Relations Act, 1992.

4. In addition to the above, the Applicant reserves its rights to rely upon further and other relevant information, evidence and argument presented to this Board as may apply or be relevant to the within application as may be filed and presented by our brother unions seeking the same or similar applications given the actions and intentions of CLAC in respect of these matters, subject as always to the discretion and permission of the Board.

The Cox Application

[95] That application, which also incorporated numerous exhibits by reference was as follows:

4. The reasons why the applicant submits that the said order or decision ought to be amended are as follows:

(a) The Applicant is the successor trade union to the Brotherhood of Painters & Allied Trades, Local 1996, pursuant to a voluntary merger of the charter for Painters Local Union 1996 into Painters Local Union 739, which merger was duly approved by the General Executive Board and became effective on January 1, 1996. A copy of correspondence dated December 13, 1995, from then General Secretary-Treasurer James A. Williams, advising of the approval of the merger by the General Executive Board is attached as Exhibit "A" to this Application.

(b) The Brotherhood of Painters & Allied Trades, Local 1996 ("Local 1996") was certified by the Board on June 24, 1988, to

represent all painters, painter apprentices and painter foremen employed by Brown & Root Ltd. in the Province of Saskatchewan. A copy of the Certification Order issued by the Board (LRB File No. 111-88) is attached as Exhibit "B" to this Application. The Applicant relies upon section 39 of The Trade Union Act (the "Act") in respect of its voluntary merger with Local 1996 of the Brotherhood of Painters & Allied Trades and its consequent acquired certification rights. An amendment to the existing Order is necessary to accurately reflect both the proper name of the trade union and the employer.

(c) Pursuant to The Construction Industry Labour Relations Act, 1992 (the "CILRA"), the Minister has determined "Painter" to be an appropriate "Trade Division" and has designated the CLR Construction Labour Relations Association of Saskatchewan Inc. (the "CLR") as the representative employers' organization for each of the unionized employers in the Painter Trade Division of the construction industry and on whose behalf the CLR is required to bargain collectively with the Applicant. Since its merger with Local 1996 in 1996 and thereby obtaining jurisdiction for Saskatchewan, the Applicant has bargained collectively with the CLR. Local 1996 bargained collectively with the CLR following on the enactment of the CILRA and the regulated expiry of its existing collective agreements with unionized employers on April 30, 1993. A copy of the current province-wide Collective Agreement between the Applicant and the CLR is attached as Exhibit "C" to this Application.

(d) In 1988 when Local 1996 filed with the Board its certification application for painters, painter apprentices and painter foremen employed by Brown & Root Ltd. (the "employer") in the Province of Saskatchewan, the employer was contracted to and engaged in carrying-out a series of construction projects for Consumers Cooperative Refinery Limited in Regina and the Husky Energy Heavy Oil Upgrader in Lloydminster. Other building trades unions within the province had existing bargaining relationships with the employer at the time Local 1996 was certified and subsequently entered into a provincial collective agreement with the employer.

(e) The Applicant first became aware of the employer again contracting construction work in Saskatchewan as a result of the certification application filed on October 12, 2012, by the Construction Workers Union, Local 151 (CLAC) (LRB File # 177-12). In its application, CLAC identified the employer as KBR Wabi Ltd. and is seeking to represent an all employee unit of the employer in Saskatchewan with certain noted exceptions. CLAC indicates there are approximately six (6) employees. Although the location of the work is not indicated in its application and at the time of writing the Applicant has not seen the employer's Reply to CLAC's application, nor a Statement of Employment, the Applicant is aware that the employer has contracted construction work at Cameco's Rabbit Lake mine site.

(f) The Applicant filed a Reply to CLAC's application (LRB File # 177-12) as a result of the potential impact on its existing

certification Order (LRB File # 111-88), as well as on other building trades unions that have existing certification orders with the employer, and has asked that CLAC's application be dismissed.

(g) The Applicant submits that KBR Wabi Ltd., which was not registered in Saskatchewan's Corporate Registry until October 15, 2012, operates under the control and direction of its parent company, KBR. The history of KBR is contained on KBR's website: http://www.kbr.com, the two (2) page summary of which is attached as Exhibit "D" to this Application. The Corporate Registry Profile Report for KBR Wabi Ltd. is attached as Exhibit "E" to this Application. Roy B. Oelking of 601 Jefferson Ave., Houston, Texas is listed as a Director of KBR Wabi Ltd, Mr. Oelking is listed in a KBR 2012 Fact Sheet on the KBR website, which shows the corporate profile, as the Group President - Hydrocarbons, The corporate office address for KBR, Inc. is shown as 601 Jefferson St., Houston Texas. Attached to this Application as Exhibit "F" is the KBR 2012 Fact Sheet, previously referred to.

(h) The KBR website further describes the acquisition of Wabi Development Corporation in 2008, when it became "a member of the KBR group of companies". Attached as Exhibit "G" to this Application is the "KBR Wabi" page printed from KBR's website. It further states;

> *"From its inception in 1991, KBR Wabi has served its customers with project management, direct hire construction, construction management, construction, maintenance services, maintenance turnaround, and fabrication solutions." A website for Wabi Development Corporation (http://wabinew.nordev.com) identifies the corporation as a KBR Company and under the Company History, indicates that "Wabi was incorporated in 1991" and "In October 2008 KBR acquired Wabi", as set out on the page printed from the website and attached to this Application as "Exhibit "H". Upon its acquisition of Wabi Development Corporation (Wabi), KBR issued a press release which is still contained on KBR's website. The press release describing the acquisition is attached to this Application as Exhibit " I " , and states that "The company [Wabi] will be integrated into KBR's Services Business Unit".*

(i) KBR Canada is listed under KBR's Services group. The 2012 Fact Sheet for KBR, attached as Exhibit "F", identifies Ivor Harrington as the Group President, Services and further identifies Karl Roberts as the Senior Vice-President, Canada Operations. The Fact Sheet provides the following description for KBR Canada:

> *One of Canada's foremost provides of construction, fabrication, turnarounds and industrial services, KBR has executed some of the most complex construction*
> *projects in Canada. The company provides general construction and construction management, as well as*

> *turnarounds, shutdowns and outages. With three fabrication facilities - a 74,000 square-foot fabrication shop and 46-acre module assembly facility in Edmonton, and two shops in Ontario totaling 21,500-square feet – KBR also executes pipe fabrication and module assembly.*

(j) KBR Canada Ltd. is registered as a business corporation in Saskatchewan and the Corporate Registry Profile Report, attached as Exhibit "J" to this Application, shows an incorporation date of June 9, 1970. Included in the Director/Officer/Shareholder information is the name of Karl Roberts, who is listed as holding the Officer position of Senior Vice-President. The President is still listed on the Profile Report as David Zimmerman who served as Group President, Services from 2007 to 2012, but currently serves as Group President, Australia-Asia. The current Group President, Services with responsibility for Canada Operations, among other things, is Ivor Harrington, according to the profile reports for these individuals contained on KBR's website, copies of which profiles are attached to this Application as Exhibit "K", The only share-holder listed is Kellogg Brown & Root LLC. The Profile Report, which reports events subsequent to the corporate registry conversion on September 10, 1999, reports a name change for the corporation on May 14, 2009, from Brown & Root Management Ltd. to KBR Canada Ltd.

(k) The KBR website also reports on KBR Industrial - Canada, a copy of which report is attached as Exhibit " L " to this Application. The summary of KBR Industrial – Canada includes the following information:

> *Since the establishment of KBR in Canada in 1951, we have worked on most of the large-scale chemical and energy projects in the province of Alberta. KBR has played a major role in the construction of some of the largest projects in Canadian history, including the Syncrude and Suncor Plants in Fort McMurray, petrochemical plants in Fort Saskatchewan, and a refinery and styrene plant in Scotford, Alberta. With offices in Edmonton and projects across the country, KBR Canada has developed a strong track record of delivering successful construction projects through a highly trained, multi-craft workforce and the use of the latest and most effective construction technologies. KBR Industrial's range of services includes direct hire construction, construction management, maintenance services, turnarounds, shutdowns and emergency outage response.*

Of particular note is the reference to having been established in Canada since 1951. The Corporate Registry Profile Report for Brown & Root Ltd., attached as Exhibit " M " to this Application, identifies the incorporation/amalgamation date in the home jurisdiction of Alberta as May 9, 1951. It further reports Brown & Root Ltd. as being amalgamated into Halliburton Canada Inc.,

which is consistent with the information contained in KBR's "History", attached as Exhibit "D" to this Application, whereby KBR notes "in 2007 reaching a major milestone as it separated from Halliburton and became a stand-alone company".

(l) The Saskatchewan Corporate Registry also reports that Wabi Development Saskatchewan Corp. incorporated as a Saskatchewan Corporation on June 11, 2002, but was dissolved as of October 1, 2009. Attached to this Application as Exhibit "N" is the Corporate Registry Profile Report for Wabi Development Saskatchewan Corp. Melvin Peddie of New Liskeard, Ontario is listed as a Director and holding the position of Vice President/Secretary. The dissolution of the Corporation follows on the acquisition of Wabi Development Corporation by KBR in October of 2008. Mr. Peddie is also listed as a Director of KBR Wabi Ltd. Additionally, the named Powers of Attorney for KBR Canada Ltd., KBR Industrial Canada Co., and KBR Wabi Ltd., are all the same in the Saskatchewan registrations.

(m)Since the completion of the construction projects in or about 1992 - 1993 for which Local 1996 obtained its Certification Order in 1988 for painters, painter apprentices and painter foremen employed by Brown & Root Ltd., in the Province of Saskatchewan, this is the first that the Applicant is aware of KBR (formerly Brown & Root Ltd.) actively performing construction work in Saskatchewan. The Applicant submits that the attached Exhibits establish that KBR Wabi Ltd. is not a stand-alone entity but is controlled and directed by the parent company KBR. The Applicant submits further that both before and subsequent to the acquisition of Wabi Development Corporation, the exclusive bargaining rights of employees of KBR working in the Province of Saskatchewan are those issued to the various unions including the Applicant along craft lines pursuant to Orders of the Board. The existing Order of the Board (LRB File #111-88) should be amended to reflect both the amalgamation of Local 1996 with the Applicant and the change in name of the Employer. (n) The Applicant states that KBR through its "service entities" of KBR Canada Ltd., KBR Industrial Canada Co., and KBR Wabi Ltd., are associated and/or related businesses and/or jointly or severally successors of Brown & Root Ltd. Consequently, as a unionized contractor within the trade divisions, they are bound to the existing provincial agreements between the Applicant, and other building trade unions with existing certification orders, and the CLR as the designated representative employers' organization, and are required to, among other things, hire members of the Applicant for work being performed within its trade jurisdiction at Cameco's Rabbit Lake project.

(o) The Applicant states further that insofar as the Progressive Contractors Association of Canada (the "PCA") is known for welcoming CLAC certification in Saskatchewan, as reflected in the statement issued by it Executive Director, Paul de Jong, on March 16, 2012, a copy of which statement is attached to this Application as Exhibit "O", and that Wabi Development Corporation - Edmonton - A KBR Company and Wabi Development Corporation - New Liskeard - A KBR Company are

both listed as members in the Member Directory of the PCA, a copy of which Member Directory is attached to this Application as Exhibit "P", it is reasonable to conclude that KBR is supporting and/or has invited the certification application of CLAC (LRB File # 177-12) in an effort to supplant the provisions of the CILRA and avoid KBR's obligations as an existing unionized contractor bound by the Provincial Agreements with the CLR.

(p) The Applicant states further that prior to rendering a decision in LRB File # 177-12, this Board needs to decide this Application and the Applications of other building trades unions who are asserting existing bargaining unit rights with the employer. As a result, the Applicant seeks to have this Application heard together with the Applications of other building trades unions asserting existing bargaining unit rights with this Employer in advance of or together with the Application being LRB File # 177-12.

The Norbeck Application[55]

[96] This application was as follows:

4. The reasons why the applicant submits that the said order or decision ought to be amended are as follows:

a) UA Local 179 applies, pursuant to sections 5(j), 37 and 37.3 of The Trade Union Act ("TUA") and section 18 of The Construction Industry Labour Relations Act ("CILRA") for amendments to existing certification orders and for declarations and orders that KBR Canada Ltd., KBR Industrial Canada Ltd. and KBR Wabi are successor and or related employers to Brown & Root Ltd., commonly known as KBR.

b) The within Applicant holds two certification orders to represent certain employees employed by Brown & Root Ltd., in the Province of Saskatchewan. Since that time, the Union has represented the plumbers, pipe fitters steam fitters, pipe welders and apprentices employed by Brown & Root Ltd. each time the company had a project in the province of Saskatchewan requiring workers in the trades specified.

c) UA Local 264 was merged into UA Local 179 on December 4, 1989.

d) Pursuant to CILRA, the within Applicant has been and continues to be in a collective bargaining relationship with ten Construction Labour Relations Association of Saskatchewan ("CLR") which represents the construction labourer trade division. All bargaining rights since that time have been acquired through the CLR.

[55] Mr. Kowalchuk also assumed responsibility for this file.

e) UA Local 179 bargains four (4) province wide collective agreements with the CLR; one for the industrial sector, one for the commercial sector, one for the refrigeration sector and one for the sprinkler sector.

f) The within application was triggered by the certification application of Constructions Workers Union, Local 151 ("CLAC") in LRB File No. 177-12. In that matter, CLAC named KBR Wabi Ltd. as the employer of six workers working at the Cameco Rabbit Lake Mine site. CLAC applied for an all employee certification of employees of KBR Wabi Ltd. in the province of Saskatchewan, save for the named exclusions.

g) To date, the named employer, KBR Wabi Ltd., has not filed a reply in LRB File No. 177-12.

h) KBR Inc is a large engineering, procurement and construction company based in Houston, Texas. It has undergone several name changes over the years from Brown & Root to Kellogg Brown & Root to its present day incarnation of KBR.

i) It is clear that the origins of KBR are in Brown & Root. A review of the company's website traces its origins from Brown & root, through Haliburton, then to Kellogg Brown & Root and in 2007, KBR separated from Haliburton and operated as its own company.

j) All subsidiaries of KBR are all creatures of the parent company. They are wholly owned and responsible and directed by the Houston based officers of the company. There is only one website for KBR for all of its operations (www.kbr.com).

k) Employees of subsidiary companies are employees of KBR and not of any named subsidiary.

l) KBR Canada Ltd. was first incorporated provincially as Brown & Root Management Ltd. and its name was changed to the current name in 2009. Attached hereto and marked as Exhibit "C" is the corporate search identifying the same.

m) Brown & Root was first registered in Saskatchewan in February, 1991. Attached hereto and marked as Exhibit "D" is the corporate search identifying the same. It was again registered in February, 2003 and later struck. Attached hereto and marked as Exhibit "E" is the corporate search identifying the same.

n) Wabi Development Saskatchewan Corp. was registered in Saskatchewan in June, 2002. Attached hereto and marked as Exhibit "F" is the corporate search identifying the same. KBR acquired Wabi Development Corporation in 2008.

o) Wabi Development Corporation was integrated into the parent company of KBR. KBR Wabi Ltd. has no public existence separate and distinct form KBR, it is at best a wholly owned subsidiary of KBR.

p) Wabi Development Saskatchewan Corp. was dissolved in October, 2009 following the purchase by KBR.

q) KBR Wabi Ltd. was registered in Saskatchewan as an extra-provincial corporation on October 15, 2012,three days after the certification application in LRB File 177-12 was filed. Attached hereto and marked as Exhibit "F" is the corporate search identifying the same.

r) If the information provided by CLAC is correct, KBR Wabi's project at Rabbit Lake would be KBR Wabi's first project in the province of Saskatchewan.

s) Over the years Brown & Root had several construction projects for which UA Local 179 asserted its bargaining rights to represent employees within the trades specified. At all material times, UA Local 179 asserted it bargaining rights when Brown & Root had projects within the province of Saskatchewan.

t) Before and after KBR's purchase of Wabi, the only bargaining rights for KBR employees in Saskatchewan are held by the within Applicant and several other building trade unions. The unions hold craft unit certifications and the obligations KBR has to bargain collectively through the CLR are with the within Applicant and the other certified bargaining agents.

u) The within Applicant requests that the within application be heard together with the application for certification filed by CLAC (LRB File No. 177-12).

The Plaxton Application

[97] This application was as follows:

12. In support of its application to intervene this applicant submits other relevant facts touching the originating application and this notice as follows:

(a) This applicant is the bargaining agent on behalf of the Electrical Trade Division as set forth The Construction Industry Labour Relations Act, and designations pursuant to same in relation to that area of the Province, North of the 51st parallel and therefore has a direct interest in the application within. If a certification were allowed as sought, it would interfere with the union's representational rights in the Province of Saskatchewan.

(b) Further by virtue of an order of this Honourable Board dated the 24th day of October, 1984, on LRB File No. 344-84, this applicant is the certified bargaining agent for all journeymen electricians, electrician apprentices, electrician workers, and electrician foremen employed by Brown & Root Ltd., within the Province of Saskatchewan, North of the 51st parallel.

> *(c) This applicant is aware of a number of other trade unions with existing certification orders binding Brown & Root Ltd in relation to their respective crafts.*
>
> *(d) This applicant and Local 2038 of IBEW have negotiated a number of provincial collective bargaining agreements with the Construction Labour Relations Association of Saskatchewan Inc., which negotiates on behalf of unionized employers in the electrical trade division in the province, the last of which bears effective dates from the 26th of December 2010 to the 30th of April, 2014.*
>
> *(e) In this application, CLAC claims KBR Wabi Ltd. is the employer in question in the province. This matter appears to be under dispute. This applicant seeks a declaration determining who the present actual employer is.*
>
> *(f) This applicant says KBR Wabi Ltd. and / or the actual employer is a related business or common employer with Brown & Root Ltd. and this applicant seeks a declaration that they be treated as one unionized employer for the purposes of The Trade Union Act and the CILRA pursuant to s. 37.3 of The Trade Union Act and s. 18 of the CILRA.*
>
> *(g) Further, or in the alternative, this applicant says a business or part thereof is being or has been sold, leased, transferred or otherwise disposed of from Brown & Root Ltd. KBR Wabi Ltd. and / or the actual employer, and it (or they) is a successor employer to Brown & Root Ltd. and is bound by the above noted certification order and asks for an order to said effect pursuant to s. 37 of The Trade Union Act, and further, asks for an order that KBR Wabi Ltd. and / or the actual employer is bound by all collective agreements, orders of the Board and all proceedings had and taken before the Board in relation to the said bargaining unit.*

[98] What amounts to an arguable case has been extensively reviewed by the Courts. They have used the term somewhat interchangeably with "no reasonable chance of success,"[56] having a "cause of action that might succeed,"[57] no "*prima facie"* case"[58] or "a reasonable possibility of success at trial."[59] Tied to that was a requirement that the Court would assume that the "plaintiff proves everything alleged in his claim" in making its determination.[60]

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[56] Holland v. Saskatchewan (Minister of Agriculture, Food and Rural Revitalization), 2006 SKQB 99 (CanLII); *Markwart v. Prince Albert (City),* 2010 SKQB 312 (CanLII).
[57] *Wuttunee v. Merck Frosst Canada Ltd.,* 2007 SKQB 29 (CanLII).
[58] *International Capital Corp. v. Schafer, 1996 CanLII 6845.*
[59] *Wellington (Rural Municipality No. 97) v. Ligtermoet, 2002 SKQB 474.*
[60] *C & J Hauling Ltd. v. Mistik Management Ltd., 2010 SKQB 60 (CanLII); Chisum Log Homes & Lumber Ltd. v. Investment Saskatchewan Inc., 2007 SKQB 368 (CanLII).*

[99] In the Board's recent decision in *Tercon,*[61] *supra,* the Board was also dealing with applications for summary dismissal of applications by various unions that alleged that the Construction Workers Union, Local 151 was a company dominated organization. In that case, quoting from the Board's jurisprudence in *P.A. Bottlers Ltd* o/*a P.A. Beverage Sales and Sascan Beverages v. U.F.C.W., Local 1400*[62] and the Alberta Board's decision in *Vikon Technical Services*[63] at paragraphs 162 and 163, the Board said:

> *[162] In P.A. Bottlers Ltd., the Board alluded to its earlier comments in the WaterGroup case and placed those comments in the context of other factors which must also be considered by the Board, at 251:*
>
> > *The Board has thus made it clear that it is necessary for an applicant to state with some precision the nature of the accusations which are being made, both in terms of the specific events or instances of conduct which are considered objectionable, and of the provisions of the Ad which have allegedly been violated. The Board has linked this requirement with the capacity to provide a fair hearing to a respondent.*
> >
> > *On the other hand, the Board must balance the requirement for a fair hearing with other values which are also of pressing importance to the Board, including those of expedition in the hearing of applications, and maintaining relative informality in Board proceedings. Whatever might be the case in a civil court, the nature of the proceedings before this Board cannot accommodate extensive pre-hearing or discovery processes without running the risk that the ability to respond in a flexible and timely way to issues which arise in the time-sensitive context of industrial relations will be seriously impaired.*
> >
> > *We do not interpret the requirement for the provision of sufficient particulars, in any case, to contemplate a complete rehearsal of evidence and argument in the exchange between the parties prior to a hearing. What is necessary is that an applicant make it clear what conduct of the respondent is the subject of their complaint, and how this conduct, in the view of the applicant, falls foul of the Act. In assessing the degree to which an applicant has met this requirement, the Board must be guided not only by our desire to ensure a fair hearing, but by the demands placed upon us by the objectives of efficacy and timeliness in our proceedings.*
>
> *[163] In addition, the Alberta Labour Relations Board, in the case of Vikon Technical Services supra, articulated a helpful policy explanation for the need for an applicant to provide reasonable particulars in support of his/her application:*

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[61] *[2011] CanLII 8881 (SKLRB).*
[62] *[1997] Sask. L.R.B.R. 249, LRB File No. 017-97 at para. 6.*
[63] *Alberta LRB File Nos. L.R. 174-F-11, 174-V-6 and 174-W-19.*

> *Before turning to the particulars given in this case it is useful to make some general observations on the need for particulars in applications, before this Board. When a party commences an application or complaint before us they must give particulars of what they are applying for, or why they are complaining. What this means is that in their initial correspondence they should set out in plain English a set of allegations of fact which, if accepted as true, would establish that the section of the Act in question may apply, or have been violated. They are not required to prove their allegations in the initial application, they must just make them. It is not enough to recite the section in question and then say some other person has violated it. The Board, when reading a complaint, should get a clear understanding of when, how, and by whom, the Act was violated. When receiving an application the Board should get a clear understanding of how the facts alleged justify the use of the section of the Act referred to, and justify the granting of the order or remedy sought.*
>
> *This requirement for particulars is not a request for a "legalistic" approach. A layman, reading a complaint or application should be able to get a clear understanding of what the matter is about and why the Board is being asked to use its powers. Most sections in the Labour Relations Act are not complex. The particulars should make it clear why the facts referred to make the section or sections of the Act applicable. This is not an onerous task. Applications that lack these basic particulars will not be accepted initially, and will not be processed further.*
>
> *We insist on particulars in order to ensure fairness to all parties. We have broad powers given to us by the Legislature. The exercise of these powers may cause major inconvenience to the party complained against. Answers must be given, officer's investigations cooperated with, records that would otherwise be confidential disclosed, hearings attended, and lawyers sometimes retained. We will only enter into or continue this process when there is an allegation that, if true, would lead us to believe that the legislation might apply or have been violated. If an applicant cannot even allege facts that would, if proven, result in a Board order or remedy, then there is no justification for the process being started.*

[100] In that case, the claims made in the initial applications were found by Vice-Chairperson Schiefner to disclose nothing but "contain little more than a bare allegation and no supporting facts. As such they are in violation of the procedural expectations of the Board and stand vulnerable to an application for summary dismissal."[64]

[101] In the *Tercon* case, *supra*, particulars were provided to supplement the applications as filed. The Board considered, *seriatim*, the particulars provided by the

[64] LRB File No. 162-10, 163-10 & 164-10 (November 10, 2010) at para 35.

various applicants. Those particulars, the Board found, contained assertions, conjecture, facts unrelated to the issue, and statements, even which if proven to be true, did not support a finding of company domination. In summary, the Board found that the applications did not meet the test of establishing an arguable case, and the applications were dismissed. That decision, as noted above, was supported, on judicial review, by the decision of Mr. Justice Popescul.

[102] The *Tercon* decision, *supra*, made it clear that there must be some underlying facts alleged (as distinct from assertions, conjecture), facts unrelated to the issue, or statements, even which, if proven to be true, did not support a finding of company domination. However, the Board in that case also noted at paragraph [164] that:

> *The requirement for facts that raise and arguable case…is not an onerous task. It is, however, a necessary procedural requirement of proceedings before the Board. A party against whom a complaint or application is made must be able to read the applicant's pleadings and, by that reading, get a clear understanding of when, how and by whom, the Act was alleged to have been violated and why the Board is being asked to exercise its powers.*

[103] In the *Tercon* case, *supra*, the Applications, even when supplemented by particulars failed to meet this basic threshold and raise an arguable case. It was plain and simple in that case to determine that the pleadings were insufficient.

[104] The Saskatchewan Court of Appeal in *Sagon v. Royal Bank*[65], in addition to establishing the test for striking statements of claim for disclosing no reasonable cause of action, cautioned that the Court's power to strike on this ground should only be exercised in "plain and obvious cases where the court is satisfied that the case is beyond doubt.

[105] In *Odhavji Estate v. Woodhouse,*[66] the Supreme Court relied upon the test set out by Wilson J. in *Hunt v. Carey Canada Inc.*[67] as follows:

> *. . . assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim*

[65] [1992] S.J. No. 197.
[66] [2003] 3 S.C.R. 263, CanLII 69.
[67] [1990] 2 S.C. R. 959, CanLII 90 at p. 980.

> *discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect . . . should the relevant portions of a plaintiff's statement of claim be struck out . . . .*

[106] The Court then went on to say at paragraph 15:

> *The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also Attorney General of Canada v. Inuit Tapirisat of Canada, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735.*

[107] The Court then analyzed the constituent elements of the alleged tort in that case. At paragraph 33 it says:

> *As outlined earlier, on a motion to strike on the basis that the statement of claim discloses no reasonable cause of action, the facts are taken as pleaded. Consequently, the primary question that arises on this appeal is whether the statement of claim pleads each of the constituent elements of the tort.*

<u>The Essential Elements of Successorship</u>

[108] In order to succeed, the Applicant Unions will be required to show that KBR Wabi is the successor to Brown and Root Ltd. As noted by Vice-Chairperson Schiefner in *RWDSU v. Chamjit Singh et al,*[68] at paragraph [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*

[68] LRB File No. 196-10, [2013] CanLII 3584 (SK LRB)

> *in the hands of a new owner, previous collective bargaining obligations tend to flow with the transaction through to that new owner.*

[109] In order for a successorship to be declared by the Board, there must be a sale, lease, transfer or other disposition of a business or part thereof which is subject to a certification Order by this Board which requires it to bargain collectively with the bargaining agent (union) chosen by the employees to represent them.

[110] In reaching its conclusion as to whether a sale, lease, transfer or other disposition of a business or part thereof has occurred, the Board will not be concerned with the technical legal form of the transaction but instead will look to see whether there is a discernable continuity in the business or part of the business formerly carried on by the predecessor employer and now being carried on by the successor employer.[69]

[111] All of the applications allege that KBR Wabi is the successor to Brown and Root Ltd. The Applications for Local 180, Local 870 and Local 771 all succinctly set out the alleged trail of transactions which lead to the alleged successorship. In paragraphs 11 and 30 of their application, the applications allege a sequence of events as follows:

1. Brown and Root Ltd. was certified in Saskatchewan by this Board;
2. Haliburton acquired Brown and Root Ltd. in 1962;
3. Haliburton acquired Dresser Industries and its engineering and fabrication arm, M.W. Kellog. The name is changed to Kellogg Brown & Root (KBR) in the late 1990's; and
4. In 2007 KBR becomes independent from Halliburton; and
5. KBR purchases Wabi Development Corporation in 2008 and transformed into KBR Wabi, which was registered in Saskatchewan on Oct. 15, 2012.

[112] Assuming these facts to be true, they satisfy the essential elements of section 37 of the *Act*. There is, therefore, an arguable case that KBR Wabi is the successor to Brown and Root Ltd.

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[69] See *United Brotherhood of Carpenters and Joiners v. Cana Construction* L.R.B. File Nos. 199-84, 201-84, 202-84 & 204-84.

[113] Local 739 sets out a similar history in Exhibit "D" to its application. Again, assuming the facts set out therein are true, they satisfy the essential elements of section 37 of the *Act*. There is an arguable case that KBR Wabi is the successor to Brown and Root Ltd.

[114] Local 179 sets out a similar history in paragraph i) and o) of its application. The linkages are not as clearly set out as was the case in the applications dealt with above, again, assuming the facts set out therein are true, they satisfy the essential elements of Section 37 of the *Act*. There is an arguable case that KBR Wabi is the successor to Brown and Root Ltd.

[115] Local 529 does not provide the specifics mentioned above with respect to the corporate trail linking KBR Wabi to Brown & Root Ltd. At paragraph (g) of that application, the application merely alleges that a business or part thereof has been "sold, leased, transferred or otherwise disposed of" from Brown & Root Ltd. KBR Wabi Ltd. and/or the actual employer. On its own, this allegation, which is a mere recitation of the provisions of s. 37, would not be sufficient to satisfy the essential elements of s. 37 of the *Act*.

[116] However, as noted by the Ontario Labour Relations Board in *Sault Ste. Marie (City) v. LIUNA, Local 1036:*[70]

> *The Board accepts and agrees with the principle put forward by the applicant and supported by the Board's case law that applicant trade unions in related/successor employer proceedings often have limited information, such that the standard for determining the sufficiency of the pleadings must be a relatively low one: Toronto Dominion Bank [1999] O.L.R.D. No. 1348; Richmond Tile Limited (2008) CanLII 12442 (March 12, 2008); Johnson Controls LP 2011 CanLII 24625 (April 28, 2011); Silmar Management Inc. 2012 CanLII 17090 (March 30, 2012)*

[117] Arguably, this principle has application to all of the applications here and justifies, at least insofar as related/successor applications, a lower standard should be applied. The argument which underlies this principle is that Unions are often at a disadvantage since they are not privy (unless they have negotiated something into their

[70] [2012] CLB 12370 No. 2 at para. 11.

collective agreements) to the various corporate gyrations that business entities regularly engage in for tax or other purposes.

[118] We can accept this principle in this case since our authority under section 18(p) is discretionary. Since 4 of the applications by other unions have met the test, and it is likely that the remaining 3 will "tag on" to this evidence, we would not exercise our discretion to dismiss this application.

[119] The remaining two applications, by Local 1985 and Local 1021 are in the same position as the application filed by Local 529. However, in para. 4 of those applications, they state:

> *In addition to the above, the Applicant reserves its rights to rely upon further and other relevant information, evidence and arguments presented to this Board as may apply or be relevant to the within application as may be filed and presented by our brother unions seeking the same or similar applications …… subject as always to the discretion and permission of the Board.*

[120] It is not generally good practice to rely upon materials which may (or may not) be filed by others in an application, we can, being generous, take this comment as incorporating by reference the provisions of the other applications made on this matter.

[121] Alternatively, we would, for the reasons set out above with respect to the Local 529 application, exercise our discretion not to dismiss the application at this time.

[122] In the second alternative, the Board has remedial authority given to it is section 19 of the *Act* to relieve against irregularities or technical objections. We would utilize that authority, if necessary, to allow Local 529, Local 1021 and Local 1985 to amend their applications to allege facts as set out in the application which we have found to have meet the test of an arguable case.

Common or Related Employer

[123] The Board has identified the following factors with respect to an application under s. 37.3 of the Act:[71]

> *(a) There must be more than one corporation, partnership or association involved;*
>
> *(b) These entities must be engaged in associated or related businesses, undertakings or other activities; and*
>
> *(c) These entities must be under common control or direction.*
>
> *(d) The provision only applies to corporations, partnerships, individuals, or associations that have common control or direction on or after October 28, 1994.*

[124] Again, the most detailed recitation of facts in the applications is found in the applications made by Local 870, Local 180, and Local 771. Those applications outline the corporate history of KBR Inc., KBR Canada Ltd., KBR Industrial Canada Co. and KBR Wabi Ltd. in addition to KBR Wabi Ltd.

[125] In paragraph 6 of the above applications, each of these unions asks for, "in the alternative, a declaration that KBR Canada Ltd., KBR Industrial Canada Co. and KBR Wabi Ltd. are common or related employers within the meaning of s. 37.3 of the *Act.*"

[126] While the applicant unions have attempted to sort out the corporate maze outlined in there applications, they cannot be expected to know with particularity[72] all of the interrelationships between the various entities and their function within the corporate empire of the KBR Companies. However, from what they have presented, there is, in our opinion, an arguable case that these companies are sufficiently intertwined so that the requirements for a finding of common employer under s. 37.3 may be founded on those allegations.

[127] All of the other applications also seek similar relief under s. 37.3, but do not set out with as great particularity the alleged inter-relationship between the various corporate entities. However, as noted above, we would not exercise our discretion to

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[71] See *United Steel Workers Union, Local 1-184 v. Edgewood Forest Products Inc, and C & C Wood Products Ltd.* L.R.B. File No. 011-12, [2013] CanLII 15714 (SK LRB) at paragraphs 57 & 58.
[72] [2012] CLB 12370 No. 2 at para. 11.

dismiss summarily these applications under s. 37.3 for the reasons set out above with respect to the application for successorship. While greater precision in drafting these applications would have assisted the Board and the other parties to this matter, the applications by Local 870, Local 180, and Local 771 raised an arguable case to which the other applicants can cling in this instance.

[128] Alternatively, we would exercise our jurisdiction under section 19 of the *Act* to permit the other applicants to adopt the pleadings of Local 870, Local 180, and Local 771 in this regard.

Section 18 of *The Construction Industry Labour Relations Act*

[129] Section 18 of the *CILRA* is a more robust provision similar to s. 37.3 of the *Act*. The factors which must be proven under this provision are not, however, dissimilar to the factors which the Board will review under s. 37.3 of the *Act.* The wording of section 18(1) of the *CILRA* is virtually identical to the wording of s. 37.3(1) of the *Act.*

[130] Since we have already determined that the applications raise an arguable case under s. 37.3, it follows that a similar determination is appropriate under s. 18 of the *CILRA*.

Decision

[131] For the reasons set out above, the applications for summary dismissal are denied and the applications dismissed.

DATED at Regina, Saskatchewan, this **10th** day of **May**, **2013.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson