CONSTRUCTION AND GENERAL WORKERS' UNION, LOCAL 180, Applicant v. AECON CONSTRUCTION GROUP INC., Respondent, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 870, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2038, INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ALLIED WORKERS, LOCAL 119, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, MILLWRIGHT LOCAL 1021, and UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Interested Parties.

LRB File No. 031-14; July 29, 2014
Vice-Chairperson, Steven D. Schiefner; Members: Joan White and Maurice Werezak

For the Labourers, Local 180:	Mr. Gary Caroline
For Aecon Construction Group Inc.:	Mr. Larry F. Seiferling, Q.C.
For the Operating Engineers, Local 870:	Mr. Gary Bainbridge & Mr. Alex Anderson
For IBEW, Local 2038:	Ms. Crystal L. Norbeck
For the Insulators Union, Local 119:	Mr. Larry Kowalchuk
For IBEW, Local 529, the Carpenters Union, Local 1985 and the Millwright Union, 1021:	Mr. Drew Plaxton
For the Pipefitters Union, Local 179:	Mr. Rick Engel, Q.C.

PRACTICE AND PROCEDURE – Certification - Amendment - Trade union files application to amend existing certification Order on basis of successorship – Employer's representative advises Board that employer has "no objection" to union's successorship application – Trade union's certification Order is amended naming employer as successor - Employer believes Board erred in how employer and/or bargaining unit was described in amended certification Order – Employer files application to further amend certification Order to correct the name of employer and/or description of bargaining unit – Trade union seeks to summarily dismiss Employer's amendment application – Board concludes that application to amend is not appropriate vehicle to ask the Board to correct an alleged error in an Order issued by the Board – Board concludes that Employer ought to have filed an application for reconsideration – Board not satisfied that it is possible to amend Employer's application to cure defect – Board grants trade union's application and summarily dismisses Employer's amendment application.

***Trade Union Act*, s. 5(j), (k) & 18(p).**

***Saskatchewan Employment Act*, s. 6-111(p) & 6-112**

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** These proceedings involve an application by the Construction and General Workers' Union, Local 180 (the "Labourers") to summarily dismiss an application by Aecon Construction Group Inc. (the "Employer") to amend a certification Order that was recently issued (amended) by the Saskatchewan Labour Relations Board (the "Board"). The subject certification Order found the Employer to be a successor following an uncontested application by the Labourers. Believing that this certification Order contains an error as to the identification of the employer or, more accurately, as to the description of the bargaining unit, the Employer filed an application[1] to amend the Board's Order approximately fourty-nine (49) days after the amendment in favour of the Union was granted. The Labourers now seeks to have the Employer's amendment application summarily dismissed.

[2] Both the International Union of Operating Engineers, Local 870 (the "Operating Engineers") and International Brotherhood of Electrical Workers, Local 2038 (IBEW 2038) were granted intervenor status in these proceedings because the Employer has also filed applications to amend certification Orders that were recently amended by this Board in favour of these unions following similarly uncontested applications in successorship. The International Association of Heat & Frost Insulators & Allied Workers, Local 119 (the "Insulators"), the International Brotherhood of Electrical Workers, Local 529 ("IBEW 529"), the United Brotherhood of Carpenters and Joiners of America, Local 1985 (the "Carpenters"), the United Brotherhood of Carpenters and Joiners of America, Millwright Local 1021 (the "Millwrights"), and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 (the "Plumbers") were granted intervenor status in these proceedings because they each have applications to amend their respective certification Orders on the basis of successorship and these application also name Aecon Construction Group Inc. as the successor employer.

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[1] See: LRB File No. 335-13.

[3] For the reasons that follow, we find that the application for summary dismissal brought by the Labourers is well founded. In our opinion, the Employer's application to amend the Labourers' certification Order is both untimely and has no reasonable chance of success because the Employer's application does not demonstrate that a material change in circumstance has occurred since the subject Order was issued. Simply put, absent a material change in circumstances, there is no basis (let alone necessity) for amending an Order properly issued by this Board. The essence of the allegations contained in the impugned application of the Employer is that this Board erred in amending the subject certification Orders in the manner it did. The proper vehicle to ask the Board to correct an alleged error in an Order of the Board is an application for reconsideration. However, the Employer has not filed an application for reconsideration and it is not possible to merely treat the Employer's application as an application for reconsideration; nor is it possible for the Employer to amend its application to cure the defects therein. In our opinion, the Employer's application is patently defective and has no reasonable change of success.

[4] On the other hand, we recognize that there are multiple applications pending before this Board involving the very error that the Employer alleges is contained in certification Orders that were recently amended by this Board in favour of the Labourers, the Operating Engineers and IBEW 2038. Should the Employer be successful in convincing this Board in these applications that the business (or businesses) that was (were) previously conducted by the predecessor employer(s) in Saskatchewan is (are) now wholly contained within one or more of the divisions of the Employer's operations and that such divisions are an appropriate unit for the purpose of collective bargaining and that the Board ought to exercise its discretion to grant a certification Order describing bargaining units differently than that which was recently granted in the amended certification Orders of the Labourers, the Operating Engineers and IBEW 2038, the Employer may revisit that issue during the next ensuing open period.

Facts:

[5] Some background is helpful in placing the Labourer's summary dismissal application in context.

[6] In the fall of 2013, IBEW 2038, the Operating Engineers and the Labourers each made application alleging that the Employer was the successor to collective bargaining obligations arising out of certification Orders that had previously been issued by this Board. The

Operating Engineers were the first to file and their application[2] was filed with the Board on September 3, 2013. In their application, the Operating Engineers alleged that the Employer was the successor to Lockerbie and Hole Company Limited and Adam Clark Co. Ltd. These two (2) employers had been previously named in certification Orders granted by this Board in favour of the Operating Engineers. The first Order[3] was dated October 24, 1984 and the second Order[4] was dated July 2, 1991.

[7] In their application, the Operating Engineers particularized their understanding of the alleged transfer of a business(s) first from Adam Clark Co. Ltd. to Lockerbie & Hole Eastern Inc. and then from that company to Aecon Construction Group Inc. In their application, the Operating Engineers provided various documents in support of their assertion that the Employer was the successor employer to the collective bargaining obligations in Saskatchewan.

[8] The Board's records indicate that our Registrar contacted Mr. Archambault, Senior Project Manager of Aecon Mining Construction Services in Branford, Ontario, by email on or about September 6, 2013. On or about September 25, 2013, Mr. Archambault replied to the Board's Registrar. Mr. Archambault's email read as follows:

> *Good Morning Fred,*
>
> *Sorry for the late response but I have had some constraint getting response from our Senior Executives but I am happy to announce that we have [n]o objection to the amendment.*
>
> *Regards*
>
> *Roger Archambault*

[9] On September 25, 2013, an *in camera* panel of the Board granted the Operating Engineers' application in successorship, rescinded both of the union's previous certification Orders, and issued a new certification Order identifying the employer as "*Aecon Construction Group Inc."* and describing the subject bargaining unit as "*all operating engineers and operating engineer foremen employed by Aecon Construction Group Inc*.".

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2 See: LRB File No. 224-13.
3 See: LRB File No. 357-84.
4 See: LRB File No. 134-91.

[10] Soon thereafter, both IBEW 2038 and the Labourers filed successsorship applications similar to that which had been filed by the Operating Engineers. IBEW 2038 filed its application[5] on October 7, 2013 and alleged that the Employer was the successor employer to Adam Clark Co. Ltd. and Aecon Constructors. These two (2) employers had been named in previous certification Orders of this Board; the first Order[6] dated August 5, 1997 and the second Order[7] dated April 10, 2010. The Labourers filed their application[8] on October 9, 2013 and alleged that the Employer was the successor employer to Lockerbie and Hole Company Limited, the named employer in their certification Order[9] dated January 11, 1991.

[11] Both of these applications were processed by the Board in much the same manner as the application filed by the Operating Engineers had been processed. The Employer was served with the applications but did not file Replies. Rather, in response to both of these applications, Mr. Archambault indicated to the Board's staff that the Employer did not object to the unions' applications in successorship being granted. As a consequence, the previous certification Orders of the unions were rescinded and new certification Orders were issued. In the case of IBEW 2038 the employer was identified as "*Aecon Construction Group Inc."* and the bargaining unit was described as "*all Journeymen Electricians, Electrical Apprentices, Electrical Workers, and Electrical Foreman employed by Aecon Construction Group Inc. in the Province of Saskatchewan South of the 51st parallel*". In the case of the Labourers, the employer was identified as "Aecon Construction Group Inc." and the bargaining unit was described as follows:

> *All construction labourers and labour foremen employed by Aecon Construction Group Inc. with the boundaries of the 49th and 51st parallels in the Province of Saskatchewan when employed as or engaged in general construction work including, but not limited to, the following: from setting and leadmen (streets and sidewalks), concrete placers and finishers (steel trowel and power float), pipelayers (including final alignment and grouting), tending of all crafts including mixing, handling and conveying of all materials, form stripping and material cleaning, scaffold erection and dismantling, the complete operation of all hand and power tools and equipment necessary for the performance of the work described above.*

[12] Soon thereafter, two (2) things happened. Firstly, the Insulators, IBEW 529, the Carpenters, the Millwrights, and the Plumbers each filed applications in successorship naming

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5 See: LRB File No. 268-13.
6 See: LRB File No. 228-97.
7 See: LRB File No. 031-10.
8 See: LRB File No. 269-13.
9 See: LRB File No. 196-90.

the Employer as the successor to their respective certification Orders. Secondly, the Employer modified its position on the issue of successorship.

[13] The Employer filed Replies to each of the new successorship applications taking the following position:

> *The business formerly known as Lockerbie & Hole is a separate division of Aecon Construction Group Inc. The former Lockerbie & Hole Industrial Inc. was acquired by Aecon Group in 2009. It initially operated under Aecon Lockerbie Industrial Inc., but the name was subsequently changed to Aecon Industrial Western Inc., and later rebranded as Aecon Industrial Western, a division of Aecon Construction Group Inc. It has its own management, operations and operates independently of all other divisions of Aecon Construction Group Inc. The amendment request would be an expansion of a bargaining union already acquired by the Applicant Union. The application is not in time, if there is going to be an expansion, and does not contain appropriate documentation to expand into Aecon Utilities, Aecon Mining, Aecon Mining Construction Services and Aecon Foundations. All of those divisions are separate business divisions operating in their own sectors with own management as separate businesses.*

[14] The Employer also filed applications to amend the three (3) certification Orders that had previously been issued to the Operating Engineers, IBEW 2038 and the Labourers. These applications were essentially the same and were based on the following facts as alleged by the Employer:

> *Aecon Constructors Group Inc. applies to correct orders made by the Labour Relations Board, which did not name Aecon Constructors Group Inc. by the division in which the employer operated. This method of certification was the method of certification used by the Labour Relations Board to properly identify the employer covered by the orders of the Labour Relations Board prior to the orders of the Labour Relations Board on September and October 2013.*
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> *The orders sought to be amended under 5(j) to include the name of the division of Aecon Construction Group, are orders relating to the International Brotherhood of Electrical Workers, Local 2038, issued October 15th, 2013; the International Union of Operating Engineers, Hoisting and Portable and Stationary, Local 870, issued September 23rd, 2013; and the Construction and General Workers Union, Local 180, issued October 15th, 2013.*
>
> *The applications upon which the changes were made to existing certification orders were applications to amend, which appeared to attempt to ensure that name changes of the divisions of the company would not affect the certification orders of the Union. Aecon Construction Group Inc. has no objection to the name changes in divisions being carried forth into orders of the Labour Relations Board, however, the name changes that have been granted extend the orders for the divisions. Aecon Construction Group Inc. has operated through a number of divisions, only one of which is the division which was covered by the orders*

referred to and the orders granted by the Labour Relations Board on September 23rd, 2013 and September 25th, 2013, and October 15th, 2013.

The Operating Engineers Order that was sought to be amended was dated August 22nd, 2012 and listed Lockerbie & Hole Eastern, a division of Aecon Construction Group Inc. The order granted expands rights beyond the division to other divisions of the company, which the Applicant say is inappropriate and not timely. The division that was certified to the Operating Engineers has now undergone a name change to Aecon Mining Construction Services, a division of Aecon Construction Group Inc. Aecon construction Group Inc. has the following divisions that operate in Saskatchewan.

1) *Lockerbie & Hole Eastern Inc. was formerly a company known as Adam Clark. In 2009, Lockerbie & Hole Eastern became a division of Aecon Construction Group Inc. In 2013, for branding purposes, the business unit was renamed **Aecon Mining Construction Services**, a division of Aecon Construction Group Inc. This business continues to operate as a separate stand-alone business unit under the same management as prior to the acquisition and continues to perform the same work (industrial work on mine sites).*
2) *Aecon Industrial was formerly a business known as Nicholls Radtke, operated in Cambridge, Ontario and is an industrial contractor. That company is now a separate operating division of Aecon Construction Group, known as **Aecon Industrial**. The formal name is Aecon Industrial, a division of Aecon Construction Group Inc. It has been certified separately as a division of Aecon Construction Group Inc. in Saskatchewan.*
3) *Aecon Mining is a business that was formerly known as Cow Harbour, and was formed in Alberta in 1987, to perform overburden removal work in the oil sands. It became **Aecon Mining**, a division of Aecon Construction Group Inc. This division operates its own business with its own stand-alone management and business operation.*
4) *Aecon Industrial Western, a division of Aecon Construction Group Inc., was formed by a name change from Aecon Industrial Western Inc. to a division known as **Aecon Industrial Western** in 2012. It continues to operate as a stand-alone business with its own management and operations.*
5) *In 2012 Aecon formed a new division **Aecon Foundations**, a division of Aecon Construction Group Inc., to perform piling and foundation work through Western Canada, primarily on mine sites. It has its own stand-alone management and operation.*
6) ***Aecon Utilities**, a division of Aecon Construction Group Inc., was a company known as Cliffside Utility Contractors; it operates now as Aecon Utilities, a division of Aecon Construction Group Inc. It has its own stand-alone management and operation.*
7) ***Aecon Constructors**, a division of Aecon Construction Group Inc., is a business that arose out of the foundation Company of Canada. They are involved in heavy civil construction.*

In each of the above orders, the Labour Relations Board order did not reflect the division of Aecon that was going to be affected by the order.

The order on the Labourers was for orders granted in divisions, now known as Aecon Mining Construction Services and Aecon Industrial.

*(**Emphasis in original)***

[15] In its applications, the Employer seeks to amend the certification Orders of the Operating Engineers, IBEW 2038 and the Labourers as follows:

> *a) The order relating to the Operating Engineers should state that the employer is Aecon Constructors, a division of Aecon Construction Group Inc. There was no change in that division.*
> *b) The order relating to the IBEW should state that the employer is Aecon Constructors, as there has been no change to this division from the April 13th, 2010, order that was made.*
> *c) The order relating to the Labourers should state the employer is Aecon Mining Construction Services, a division of Aecon Construction Group Inc.*

[16] On February 20, 2014, the Labourers filed the within application seeking to have the Employer's amendment application summarily dismissed.

[17] To round out the factual matrix surrounding these proceedings, we note that both the Insulators and the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771 (the "Ironworkers") have filed certification applications with this Board seeking to represent employees of the Employer.

The Labourers' Arguments:

[18] Counsel on behalf of the Labourers advanced three (3) substantive reasons why the Employer's application to amend the Labourers' certification Order ought to be summarily dismissed. Firstly, Counsel argues that the Employer's application is incapable of satisfying the test for an amendment established by this Board. Relying on this Board's decision in *United Food and Commercial Workers Union, Local 1400 v. Sobey's Capital Inc. (o/a IGA Garden Market)*, (2006) 127 C.L.R.B.R. (2d) 42, 2006 CanLII 62943 (SK LRB), LRB File No. 016-05, the Labourers note that this Board has clarified that an applicant seeking to amend an existing Order of the Board must demonstrate a material change in circumstances since the issuance of the Order that is the subject matter of the amendment application. The Labourers note that the Employer's amendment application does not mention any change in circumstances. Counsel argues that, absent a material change in circumstances, the Employer's application to amend the Labourer's certification Order has no reasonable chance of success. In addition, the Labourers note that the Employer's application for an amendment was filed outside of the open period.

[19] Secondly, Counsel for the Labourers argues that, even if the Board were to generously treat the Employer's amendment application as an application for reconsideration,

the Employer's application continues to be defective because it does not meet the test established by this Board for reconsideration applications. Relying on this Board's decision in *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp., et. al.*, (2010) 176 C.L.R.B.R. (2d) 56, 2009 CanLII 60425 (SK LRB), LRB File No. 194-06, the Labourers note that this Board has determined that it ought to sparingly exercise its authority to reconsider its prior decision. The Labourers note that this Board has restricted the circumstances wherein we will entertain applications for reconsideration to six (6) specific circumstances and, even then, only in the "*clearest and most compelling of cases*". The Labourers argues that the material filed by the Employer in support of its applications does not satisfy or even allege any of the grounds for reconsideration accepted by this Board. Counsel argues that, even if the Employer's application is treated as an application for reconsideration, it has no reasonable chance of success.

[20] Thirdly, Counsel for the Labourers argues that the Employer is attempting to resile from the position it previously adopted when its representative advised the Board that it had "no objection" to the Labourers' application to name the Employer as the successor employer in its certification Order. Counsel argues that the need for finality in the Board's proceedings prevents the Employer from modifying its position and then attempting to re-litigate proceedings that have already been completed.

[21] For these reasons, the Labourers ask that the Employer's application to amend its certification Order be summarily dismissed.

Arguments on behalf of the Intervenors:

[22] Each of the intervenors adopted the position of the Labourers and agreed that the Employer's application to amendment the Labourers' certification Order ought to be summarily dismissed. The intervenors stressed that the need for finality in the Boards proceedings ought to prevent the Employer from resiling from its previous position and attempting to re-litigate matters that have already been determined by the Board.

Employer's Arguments:

[23] Counsel argues that none of the Employer's amendment applications should be summarily dismissed unless the Board is wholly satisfied that they have absolutely no chance for success. To which end, counsel for the Employer notes that, while this Board may have

indicated that there must be a material change in circumstances before this Board will entertain an amendment application, the empowering legislation does not prescribe such a test. Rather, the prescribed test is merely that the Board be satisfied that the amendment is "*necessary*". Counsel argues that these proceedings are unique and not anticipated by this Board's previous jurisprudence. Rather, counsel argues that the circumstances of the Employer's amendment applications are unique because the Board now has five (5) applications before it (more if you count the certification applications) wherein the Employer is disputing the identification of the successor employer and/or the divisions of the Employer that ought to be subject to the Board's certification Orders. Rather than summarily dismissing its applications, counsel for the Employer argues that it make more sense to leave the Employer's amendment applications pending until after these other applications are concluded. Counsel argues that the Employer's desired amendments to the certification Orders of the Operating Engineers, IBEW 2038 and the Labourers may well be found by the Board to be "necessary" if the Employer is successful in convincing the Board that these certification Orders should be limited to particular divisions of the Employer.

[24] The Employer asks that the Labourer's application for summary dismissal be dismissed.

Relevant statutory provision:

[25] All of the applications that are named in these proceedings were filed pursuant to the provisions of *The Trade Union Act*, R.S.S. 1978, c.T-17 and prior to the coming into force of *The Saskatchewan Employment Act, S.S. 2013, c.S-15.1*, which occurred on April 29, 2014. As a consequence, both statutes are relevant to this determination.

[26] The provisions of *The Trade Union Act* governing amendments to certification Orders are:

> ***5****. The board may make orders:*
>
> *(j) amending an order of the board if:*
>
> *(i) the employer and the trade union agree to the amendment; or*
>
> *(ii) in the opinion of the board, the amendment is necessary;*

> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> > *(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
> >
> > *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> . . .
>
> ***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;*

[27] The provisions of *The Saskatchewan Employment Act* governing the Board's authority to summarily dismiss an application and dealing with technical irregularities in applications that have been filed with the Board are:

> ***6-111**(1) With respect to any matter before it, the board has the power:*
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or not arguable case;*
>
> . . .
>
> ***6-112**(1) A technical irregularity does not invalidate a proceeding before or by the board.*
>
> *(2) At any stage of its proceedings, the board may allow a party to amend the party's application, reply, intervention or other process in any manner and on any terms that the board considers just, and all necessary amendments must be made for the purpose of determining the real questions in dispute in the proceedings.*
>
> *(3) At any time and on any terms that the board considers just, the board may amend any defect or error in any proceedings, and all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*
>
> *(4) Without limiting the generality of subsections (2) and (3), in any proceedings before it, the board may, on any terms that it considers just, order that the proceedings be amended:*

> *(a) by adding as a party to the proceedings any person that is not, but in the opinion of the board ought to be, a party to the proceedings;*
>
> *(b) by striking out the name of a person improperly made a party to the proceedings;*
>
> *(c) by substituting the name of a person that in the opinion of the board ought to be a party to the proceedings for the name of a person improperly made a party to the proceedings; or*
>
> *(d) by correcting the name of a person that is incorrectly set out in the proceedings.*

Analysis:

Test for Summary Dismissal:

[28] The test for summary dismissal was restated by Chairperson Love in *International Brotherhood of Electrical Workers, Local 529, et. al. v. KBR Wabi Ltd., et. al.*, (2013) 226 C.L.R.B.R. (2d) 48, 2013 CanLII 73114 (SK LRB), as follows:

> *[**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.*

[29] While the decision of Chairperson Love involved the provisions governing summary dismissal set forth in *The Trade Union Act*, in our opinion, the test for summary dismissal and this Board's authority with respect thereto remains unchanged following the coming into force of *The Saskatchewan Employment Act*. Therefore, to be successful in their application, the Labourers must clearly establish that the Employer's amendment application has no reasonable chance of success. In making our determination, we must consider only the Employer's application (and concomitant material) and must assume that the allegations of fact contained therein are true (or at least provable). If, having done so, we are inescapably drawn the conclusion that the Employer's application can not succeed (typically because of a patent defect therein), we have the authority and a compelling reason to dismiss that application. On

the other hand, if after reviewing the impugned application, we are left with some doubt as to whether or not the subject application should be summarily dismissed, that doubt should be resolved in favour of the applicant and the matters in dispute therein should proceed to hearing.

The Employer's Application to Amend the Union's Certification Order:

[30] The Employer takes the position that an applicant seeking to amend a previous Order of this Board need not demonstrate a material change in circumstances. Rather, the Employer argues that, if there is a chance we might later agree that it would be appropriate to amend the subject certification Orders following a full hearing of the Employer's evidence and argument, then its application(s) should not be dismissed. With all due respect, we are not persuaded by the Employer's argument. All of the Employer's applications to amend are brought pursuant to s. 5(j)(ii) of *The Trade Union Act* and all applications seek to amend Orders of this Board. Other than amendments in the nature of consolidation of bargaining units[10], this Board has consistently held that a material change in circumstances is an essential element of any application seeking to amend an existing certification Order of this Board. See: *United Food and Commercial Workers Union, Local 1400 v. Sobey's Capital Inc.*, [2006] Sask. L.R.B.R. 115, 127 C.L.R.B.R. (2d) 42, 2006 CanLII 62961, LRB File No. 016-05. See also: *Prince Albert Firefighters Association, IAFF Local 510 v. Prince Albert (City of)*, (2012) 206 C.L.R.B.R. (2d) 50, 2011 CanLII 78523 (SK LRB), LRB File No. 192-10.

[31] In this regard, it should be noted that in the *Sobey's Capital Inc.* case, this Board canvassed in some detail the rights of certified employers and trade unions to return to the Board to seek a change or amendments to an existing certification Order. In this decision, the Board noted that parties may seek to amend an existing Order and may do so either pursuant to s. 5(j)(ii), in the case of applications file outside of the open period, or pursuant to s. 5(k), in the case of applications filed during the open period. In both types of applications, the applicant bears the onus of demonstrating that a material change in circumstance had occurred to justify the desired amendment[11]. The difference between the two (2) applications being that applications filed outside of the open period pursuant to s. 5(j)(ii) ought to be limited to more pressing circumstances where the applicant could establish, not only that a material change in circumstances had occurred, but that the amendment was "necessary"; meaning that the parties

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[10] For example, as was the case in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 558 v. Canadian Linen and Uniform Service Co.*, (2005) 106 C.L.R.B.R. (2d) 115, 2004 CanLII 65625 (SK LRB), [2004] Sask. L.R.B.R. 69, LRB File Nos. 062-02 & 090-02.

could not wait for the open period and that time was of the essence in resolving the matters in issue in the amendment. In other words, the Employer's applications must not only demonstrate a material change in circumstances has occurred in the intervening period since the subject certification Orders were issued, but, because the Employer's application was filed outside of the open period, these applications must also demonstrate a "necessity" sufficient to justify intervention by this Board prior to the occurrence of the next ensuing open period.

[32] While this Board's jurisprudence regarding amendment applications was developed under the provisions of *The Trade Union Act*, in our opinion, the requirement that an applicant demonstrate a material change in circumstances remains unchanged following the coming into force of *The Saskatchewan Employment Act*.

[33] In its application, the Employer has not plead that a material change in circumstances has occurred. Rather, the substance of the Employer's allegations is that an error occurred in the Orders that were issued by this Board either as to the identity of the employer or the proper description of the scope of the respective unions' bargaining units. With all due respect, an amendment application is not the appropriate vehicle to ask this Board to reconsider a decision that is alleged to be issued in error. If the Employer believes that an error has occurred in the issuance of the certification Orders recently issued by this Board, the appropriate vehicle to revisit those Orders is an application for reconsideration. As indicated, the consistent jurisprudence of this Board (save one exception not relevant to these proceedings) has been that a material change in circumstances is an essential element of an application seeking to amend a certification Order pursuant to either s. 5(j) or s. 5(k). As such, the Employer's application to amend the Labourers' certification Order is patently defective.

[34] Furthermore, because the Employer seeks to amend the subject certification Orders outside of the open period and without the consent of the respondent trade unions, it must demonstrate, not only a material change in circumstances, but also a "necessity" to justify intervention by this Board prior to the next ensuring open period. As this Board noted in the *Sobey's Capital Inc.* case, this Board's authority pursuant to s. 5(j)(ii) (now contained in s. 104(g) of *The Saskatchewan Employment Act*) is reserved for applicants that can demonstrate both a material change in circumstance **and** a compelling reason why it would be undesirable or

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[11] Except in the case of consolidations applications of the kind dealt with by the Board in *Canadian Linen and Uniform Services Co., supra*.

impracticable for the applicant to wait for the next ensuring open period. Rather than pleading necessity, the position of the Employer appears to be based on convenience. The Employer argues that we should leave its amendment applications pending because, if it is successful in convincing this Board in other applications that are now pending before the Board that we should describe the other similar bargaining units differently than that which was recently contained in the amended certification Orders of the Labourers, the Operating Engineers and IBEW 2038, we may desire to also amend the certification Orders of the Labourers, the Operating Engineers and IBEW 2038 so that all of the bargaining units have similar descriptions. As indicated, the motivation for the Employer's applications is not really necessity; it's more about contingent utility.

[35] The essence of the Employer's desire to amend the subject certification Orders is its belief that these Orders were either issued in error or contained errors. As we have indicated, the proper vehicle to determine issues of this nature would be an application for reconsideration.

Is it Possible to Treat the Employer's Application as a Reconsideration Application?

[36] Even if we treat the Employer's amendment applications as reconsideration applications, the Employer's material continue to be defective in two (2) respects. Firstly, the Employer's application does not allege an evidentiary basis for the conclusion that Mr. Archambault did not have authority to consent to the amendment applications of the Operating Engineers, IBEW 2038 or the Labourers; nor does the Employer's application allege that the "*no objection*" provided to the Board was based on a misunderstanding of the nature of the applications of the applicant trade unions or the nature of the certification Order that was likely to result from those applications. The Employer's applications do not even mention Mr. Archambault. In light of Mr. Archambault's involvement on behalf of the Employer in the applications that resulted in the certification Orders that the Employer now seeks to correct, the Employer's failure to even mention him is both confusing for this Board and problematic for the Employer's desire to revisit the recent Orders of this Board. It is entirely possible that Mr. Archambault did not have authority to speak on behalf of the Employer; or that he misunderstood the nature of the applications before this Board or that he misunderstood the nature of the Orders that were likely to result from the unions' applications. However, the onus is on the Employer to plead such evidence; not for this Board to infer that such evidence may exist.

[37] Secondly, the Employer's applications do not mention any of the criteria used by this Board to justify an application for reconsideration, commonly referred to as the *Overwaitea* criteria[12]. As this Board noted in *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp., supra,* in every application for reconsideration, this Board must simultaneously balance both the need to correct errors in our Orders and decisions and the importance of finality in our decision-making process in promoting stability in labour relations. To achieve this balance, the Board has adopted and relies on the *Overwaitea* criteria as the framework for considering applications for reconsideration. We do acknowledge that the Employer's applications allege certain facts that could support the application of one or more of the *Overwaitea* criteria; namely that divisions exist within the Employer's operations; that the recent certification Orders issued by this Board ought to have been confined to particular divisions of the Employer (and not to the entire operations of the Employer); and that certification Orders as recently amended expands bargaining rights to divisions of the Employer that are not appropriate. However, the Employer has not plead any of the *Overwaitea* criteria and thus has not correlated any of its alleged facts to any of the particular criteria; leaving the Employer with a patently defective application for reconsideration.

Would it be Appropriate to Permit the Employer to Amend its Applications to Cure the Defects?

[38] The Employer has not filed an application for reconsideration; it has filed a series of amendment applications. While this Board has generous authority[13] to permit a party to amend technical defects or errors in any proceeding for the purpose of determining the real question or issue raised by the proceedings, we are not satisfied that it would be possible for the Employer to merely "amend" its applications to cure the defects contained therein. The Employer has filed the wrong type of application. In our opinion, it would be very difficult to cure the defects in the Employer's application by amendment; the required amendments would be extensive and new supporting material would be required. For all intents and purposes, to cure the defects we have identified would require the Employer to file entirely new applications. While this Board may have generous authority to permit an applicant to cure defects in an application, we are not satisfied that permitting the Employer to amend its application in the extensive manner that would be necessary in the present applications would be an appropriate exercise of that discretion.

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[12] The criteria set forth by the British Columbia Labour Relations Board in *Overwaitea Foods v. United Food and Commercial Workers No. 86/90*, [1990] B.C.L.R.B.D. No. 83; criteria adopted by this Board. See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp., et. al.*, (2010) 176 C.L.R.B.R. (2d) 56, LRB File No. 194-04 (Decision: November 3, 2009).

Conclusions:

[39] In our opinion, the applications by the Employer to amend the certification Orders that were recently issued by this Board are patently defective and can not be cured by amendment. As a consequence, we find that the Labourer's application for summary dismissal in the within proceedings is well-founded. If the Employer believes that this Board erred in amending the certification Orders of the Labourers, the Operating Engineers and IBEW 2038 in the manner it recently did, the proper vehicle to bring those concerns forward for determination are applications for reconsideration, together with appropriate material in support thereof.

[40] On the other hand, we note that the proper description of the employer and/or the bargaining unit are live issues in the successorship applications of the Insulators, IBEW 529, the Carpenters, the Millwrights, and the Plumbers currently pending before this Board. In addition, these same issues may also arise in the certification applications of the Insulators and Ironworkers, which are also pending before this Board. Only time will tell whether or not the Employer will be successful in convincing this Board in one of the many named applications pending before this Board that the business (or businesses) that was (were) previously conducted by the predecessor employer(s) in Saskatchewan is (are) now wholly contained within one or more of the divisions of the Employer's operations. Similarly, whether or not the Employer will be successful in convincing this Board that such divisions are an appropriate unit for the purpose of collective bargaining and that we ought to exercise our discretion to grant a certification Order describing bargaining units differently than that which was recently granted in the amended certification Orders of the Labourers, the Operating Engineers and IBEW 2038, are unanswered questions.

[41] While some may have wished that our decision to grant summary dismissal in the within proceedings would provide answers for these questions, with all due respect, we have not. In our opinion, the proper description of the employer and/or the bargaining unit remain live issues in the successorship applications of the Insulators, IBEW 529, the Carpenters, the Millwrights, and the Plumbers and the certification applications of Insulators and Ironworkers. Should the Employer be successful in these other applications pending before this Board, the

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[13] Now set forth in section 6-112 of *The Saskatchewan Employment Act*.

Employer also has the option of seeking to amend the certification Orders of the Labourers, the Operating Engineers and IBEW 2038 during the next ensuing open period.

[42] Board Members Joan White and Maurice Werezak both concur with these Reasons for Decision.

DATED at Regina, Saskatchewan, this 29th day of July, 2014.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson