CLR CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF SASKATCHEWAN INC., Applicant v. INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 119, Respondent

LRB File No. 094-15; May 25, 2016

Chairperson, Kenneth G. Love, Q.C.; Members: James Holmes and Allan Parenteau

For the Applicant: Mr. Dwayne Chomyn, Q.C.
For the Respondent Ms. Crystal Norbeck

Construction Industry – Registered Employer Organization ("REO") files Unfair Labour Practice application against Union for entering into a labour supply agreement with non-unionized contractor performing work normally performed by unionized contractors who were members of the REO. Application alleges that non-unionized contractor required to bargain with Union through REO. Board reviews and interprets section 6-65 and section 6-70 of the *SEA.*

Unfair Labour Practice – REO for trade division alleges that Union has bargained with non-unionized employer for supply of union members contrary to Part VI, Division 13 of the *SEA*. Board reviews statutory provisions and finds unfair labour practice.

Unfair Labour Practice – REO for trade division alleges that union guilty of unfair labour practice by refusing to provide information requested by REO respecting agreement with non-union employer for provision of labour during collective bargaining.

Remedies – REO requests that Board order for monetary loss arising from unfair labour practice by union – Board finds that no monetary loss proven, but in any event, Board would decline to make compensatory order

Remedies – Board discusses general authority to provide remedies for unfair labour practices.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: CLR Construction Labour Relations Association of Saskatchewan Inc. ("CLR") by virtue of Section 6-127(9) of *The Saskatchewan*

Employment Act[1] (the *"SEA"*) is certified as the Representative Employers Organization ("REO") for *inter alia* the Insulator Trade Division. The International Association of Heat and Frost Insulators and Asbestos Workers, Local 119 (the "Union") is a trade union certified to represent employees of employers operating within the Insulator Trade Division.

[2] This matter arose out of the Letter of Understanding for a Labour Supply Agreement entered into between the Union and Kaefer Industrial Services Ltd. ("Kaefer") dated February 18, 2015 (the "LOU").

[3] For the Reasons that follow, we have granted the application in part.

Facts:

[4] The parties provided an Agreed Statement of Facts and Exhibits which was supplemented by *viva voce* testimony from several witnesses. The Agreed Facts were as follows:

> *1. This Agreed Statement of Facts and Exhibits are agreed to and admitted without the need for further proof.*
>
> *2. Nothing in this Agreed Statement of Facts and Exhibits [Exhibit #1] shall limit the ability of either part to argue issues of relevance related to the facts and exhibits in this Agreed Statement of Facts and Exhibits.*
>
> *3. The parties reserve the right to submit additional evidence at the Labour Relations Board Hearing.*
>
> *4. Pursuant to a Ministerial Order dated December 2, 1992, the insulator trade division (the "Insulator Trade Division") "in the commercial, institutional and industrial sector, the residential sector, the sewer, tunnel and water main sector, the pipeline sector, the road building sector and the power line transmissions sector of the construction industry", was determined to be an appropriate trade division pursuant to section 9 of the Construction Industry Labour Relations Act, 1992 [Exhibit #2].*
>
> *5. The Insulator Trade Division consists of "all unionized employers in respect of whom the trade union, the International Association of Heat and Frost Insulators and Asbestos Workers has established the right, in the Province of Saskatchewan, to bargain collectively on behalf of unionized employers" in the various sectors described above.*
>
> *6. In 1993, the CLR was designated the Representative Employers' Organization (the "REO") for the Insulator Trade Division.*

[1] S.S. 2013 c. S-15.1

7. Since 1993, the CLR has negotiated successive collective agreements with the Union covering the Insulator Trade Division.

8. The CLR and the Union were parties to a provincial collective agreement covering the commercial and institutional sector for a term of February 27, 2011 to October 31, 2014 (the "Commercial Collective Agreement") [Exhibit #3]. That agreement has since been renewed [Exhibit #4]. The CLR and the Union were also parties to a provincial collective agreement covering the industrial sector, for a term of January 21, 2011 to April 30, 2014 (the "Industrial Collective Agreement") [Exhibit #5]. Likewise that agreement has since been renewed [Exhibit #6].

9. On or about April 8, 2014, the CLR and the Union commenced collective bargaining in regard to the Industrial Collective Agreement and on or about October 23, 2014 in regard to the Commercial Collective Agreement (collectively referred to as the "Insulator Collective Agreements").

10. The bargaining committees of the respective parties consisted of the following:

CLR Bargaining Committee	***Union Bargaining Committee***
*Warren Douglas ("Douglas"), Executive Director Business Manager of the CLR and Chief Spokesperson *	*Chuck Rudder ("Rudder"), Business Manager for the Union and Chief Spokesperson*
*Shaun Ekert, Fuller Austin Inc.**	*Leon Levesque **
*Wayne Bell, Insulation Applicators Ltd. **	*Brad Vandale*
Pat Desmarias, Insulcana Contracting Ltd	
Dale Milne, LML Industrial Contractors Ltd	
*Brina Surkan, CLR **	
**Commercial Table participant*	**Commercial Table participant.*

11. On or about January 29, 2015, the parties participated in a conciliation session. All the CLR and Union bargaining committee members were present. During the session, Rudder stated that the Union had secured work at the K & S Potash Canada legacy site near Bethune, Saskatchewan (the "Project") to which he could easily send his entire membership.

12. On February 4, 2015, Douglas received an email from Rudder attaching 48 hour strike notices for the Insulator Trade Division [Exhibit #7].

13. On or about February 18, 2015, the parties participated in a further conciliation session. Rudder, Brad Vandale, Leon Levesque, Douglas, Wayne Bell, Shaun Ekert and Jim Jeffery, the appointed conciliator, were present. Some conversations occurred and the Board will likely hear viva voce evidence respecting those conversations. There is a disagreement -~ regarding the content of those discussions.

14. Following the meeting, Douglas sent a letter dated April 8, 2015 to Rudder [Exhibit #8]. The letter states in part:

Lastly, at our conciliation meeting of February 18th, 2016, you indicated that there were a number of other contractors who are/were working in the province under the Insulator Agreement(s) with whom I was unfamiliar. In reviewing our records, I have noted that the union has not been supplying the CODC with the monthly employer hours report required under Articles 21:04 of both the industrial and commercial collective agreements. The CLR relies on this information to ensure both compliance to the collective agreement as well as awareness of which employers are active in a trade division at any given time. At this point in time, the CLR is only aware of those contractors who are submitting reports pursuant to the collective agreement.

The CLR is formally requesting that Local 119 provide the CODC with the proper monthly reports for the period of January 2014 to the present by the end of the business day on Friday April 17, 2015. Going forward, the CLR will expect the union to implement systems to ensure it continues to provide those reports on a monthly basis and in a timely fashion.

15. On April 14, 2015, Rudder sent Douglas an email in regard to bargaining [Exhibit #9]. The email did not respond to Douglas' inquiry as per his letter dated April 8, 2015.

16. On April 16, 2015, Douglas responded by email to Rudder's April 14, 2015 email [Exhibit #10]. In the email, Douglas inquires again about the contractor information stating:

In order to have a productive meeting, the CLR needs to have the information requested in my letter of April 8, 2015. As stated in the letter, we need to have a solid understanding of which employers are active in the province and under which collective agreements they are operating. From our discussion on Thursday of last week, you indicated that you were compiling the information requested in the letter and therefore I am looking forward to receiving it by the end of business on Friday as originally requested.

Further, we also need to be made aware of any specific terms and conditions, enabled or otherwise, where the collective agreement has been adjusted between an individual contractor and the union. For starters, kindly supply any relevant documentation to this effect for the time period of January 2014 to present.

Once we receive this information, our committee will review the holistic situation and determine the best course forward.

17. On or about mid-April, 2015, it came to the attention of Douglas that the Union had entered into a labour supply agreement with Kaefer Industrial Services Ltd. ("Kaefer") in regard to the Project and Union members were dispatched to work for Kaefer on the Project. [Exhibit #11]. Attached as Exhibit #12 is a copy of the Labour Supply Agreement.

18. Kaefer is a contractor who provides insulation work in the commercial and industrial sector of the construction industry.

19. Since entering into the Labour Supply Agreement, the Union has supplied union members to Kaefer who Kaefer has employed to work on the Project.

20. On April 17, 2015, Douglas received an email from Rudder attaching a letter [Exhibit #13]. The letter included an attachment setting out the hours for the

employers subject to the Insulator Collective Agreements. The list included no hours for Kaefer. Rudder further stated in the letter:

In addition, the only relevant documents required for negotiations are the Provincial Industrial and Commercial Agreements, and the last offers by both parties; all of which you have available to yourself and your committee.

On a side note, I find it unfathomable that the CLR and their employers would rather try to pick a fight with the union and its members, than sit down and conclude the negotiations. And in particular, I find it reprehensible that the CLR would be a party to this course of action, and in so doing, failing in its duty to the industry by not taking the lead role that it has been charged with, that being Construction industry Labour Relations!

21. On April 23, 2015, Douglas received an email from Rudder inquiring about scheduling dates for negotiations [Exhibit #14].

22. On April 24, 2015, Douglas responded to Rudder's April 17 and 23, 2015 emails [Exhibit #15] stating, in part, as follows:

In reviewing your letter of April 17, 2015, am I to interpret that the union is declining to provide the information regarding enabling or other agreements that the union has entered into with individual contractors as requested in my email of April 16, 2015? The CLR would be disappointed if this is in fact the union's position. This is information that the CLR is entitled to in its role as the Representative Employers' Organization and bargaining agent on behalf of the Insulator Trade Division.

I restate my request that you provide me with the above information and ask that you provide it by the end of business on Tuesday April 28, 2015.

23. On April 24, 2015, Douglas and Rudder had a telephone conversation in regard to CLR's request for information. During the conversation, Douglas requested copies of the Labour Supply Agreement. Douglas further inquired about the dispatch request posted by the Union and whether the Union was supplying labour to the non-union sector. Rudder replied that the Union did have a labour supply agreement with Kaefer. Further comments were exchanged but the parties do not agree on what was said. The Board may hear viva voce evidence with respect to this conversation.

24. During the April 24, 2015 telephone conversation, Douglas stated that if Kaefer had voluntarily recognized the Union, it was covered by the Insulator Collective Agreements and the CLR was the designated REO. Rudder replied that he did not agree and again confirmed that he was not prepared to provide the information requested. Douglas indicated that he would discuss the Union's position with the bargaining committee and get back to him in a week.

25. On April 29, 2015, Douglas received an email from Rudder inquiring as to the discussions with the bargaining committee [Exhibit #16].

26. On April 29, 2015, Douglas responded to Rudder's email [Exhibit #17] as follows:

The CLR has been and continues to be willing to meet with a view to reaching a new collective agreement.

> *We remain concerned, however, in regard to the Union's refusal to provide information that is relevant to the process. The Union's failure to disclose the information that we have requested certainly impacts the decision making process of our committee. We are currently considering our position with respect to the Union's decision to withhold this relevant and material information.*
>
> *In the meantime, if you wish to proceed with scheduling a meeting, please advise as to the Union's potential availability. I will then reach out to our committee about possible meeting dates.*
>
> *27. On May 21, 2015, the CLR filed the unfair labour complaint against the Union. As of that date, the Union had not provided the information requested.*
>
> *28. On May 28 and 29, 2015, the parties reached a settlement in regard to the Insulator Collective Agreements.*

[5] In addition to the Agreed Statement of Facts, the Board heard oral testimony from several witnesses. We will refer to that testimony, as necessary, during our analysis of the issues raised by the parties.

Relevant statutory provision:

[6] Relevant statutory provisions are as follows:

> ***6-1****(1) In this Part:*
>
> *(d)* ***"collective agreement"*** *means a written agreement between an employer and a union that:*
>
> *(i) sets out the terms and conditions of employment; or*
>
> *(ii) contains provisions respecting rates of pay, hours of work or other working conditions of employees;*
>
> *(e)* ***"collective bargaining"*** *means:*
>
> *(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;*

(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;

(iii) executing a collective agreement by or on behalf of the parties; and

(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union;

. . .

6-63*(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*

. . .

(h) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to a union or an employee.

. . .

6-65 *In this Division:*

. . .

(h) ***"unionized employer"****, subject to section 6-69, means an employer:*

. . .

(ii) who has recognized a union as the agent to engage in collective bargaining on behalf of unionized employees working in a trade for which a trade division has been established pursuant to section 6-66.

. . .

6-70*(1) When an employers' organization is determined to be the representative employers' organization for a trade division:*

(a) the representative employers' organization is the exclusive agent to engage in collective bargaining on behalf of all unionized employers in the trade division;

(b) a union representing the unionized employees in the trade division shall engage in collective bargaining with the representative employers' organization with respect to the unionized employees in the trade division;

(c) a collective agreement between the representative employers' organization and a union or council of unions is binding on the unionized employers in the trade division;

. . .

> ***6-104****(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
>
> *. . .*
>
> *(b) determining whether an unfair labour practice or a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board is being or has been engaged in;*
>
> *(c) requiring any person to do any of the following:*
>
> *(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;*
>
> *(ii) to do any thing for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board;*
>
> *. . .*
>
> *(e) fixing and determining the monetary loss suffered by an employee, an employer or a union as a result of a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;*

Applicant's arguments:

[7] The Applicant provided a written brief which we have reviewed and found helpful. In their written brief and oral argument, the Applicant raised the following issues for determination by the Board.

1. Did Kaefer become a "unionized employer" as defined by section 6-65(h) of *The Saskatchewan Employment Act* by virtue of the terms of the Letter of Understanding for a Labour Supply Agreement entered into with the Union dated February 18, 2015?

2. If Kaefer is a "unionized employer"', can Kaefer and the Union engage in collective bargaining outside of the registry/accreditation system set out in Part VI, Division 13 of the *SEA* and exclude the CLR, the designated REO for the Insulator Trade Division, from the process?

3. Do the actions of the Union in negotiating the Letter of Understanding for a Labour Supply Agreement and purporting to operate outside of the registration/accreditation system constitute a breach of the *SEA*

which give rise to an unfair labour practice pursuant to section 6-63(1)(h)?

4. Do the actions of the Union in refusing to provide the information requested by the CLR during bargaining of the Provincial Agreements and negotiating the Letter of Understanding for a Labour Supply Agreement constitute a breach of its duty to bargain in good faith?

5. What remedies are available to the CLR should the Board find that the actions of the Union constitute a breach of the *SEA* and an unfair labour practice, as well as bargaining in bad faith?

[8] The Applicant argued that Kaefer was, because of the nature of the registration/accreditation system implemented through the *SEA*, a "Unionized Employer" as defined therein. The Applicant argued that this registration/accreditation system was implemented in the construction industry to level the playing field for contractors in their negotiations with building trades in the construction sector. The Applicant argued that by the terms of the LOA, the Kaefer became a "Unionized Employer" and that the Union committed an unfair labour practice by negotiating directly with Kaefer for terms and conditions of employment for union members within the trade division which were different from the terms and conditions contained within the provincial agreement between CLR and the Union.

[9] The Applicant argued that as a result of the union's breach and because it had committed an unfair labour practice, that the Board should provide the following remedies:

1. A declaration the Kaefer was, at all material times a "unionized employer".

2. A declaration that the Union committed an unfair labour practice by negotiating the LOA and failing to recognize the CLR as the exclusive bargaining agent of the Insulator Trade Division.

3. A declaration that the Union breached its duty to bargain in good faith.

4. An order that the Union cease and desist from this behavior.

5. Damages in the sum of $10,000.00.

6. Such other remedies as the Board considers appropriate in the circumstances.

Respondent's arguments:

[10] The Union argued that voluntary recognition, while it may have some effect in strictly contractual terms, it has no status under labour relations statutes. The Union argued that voluntary recognition did not afford standing to enforce the statutory union security provisions. The Union also argued that voluntary recognition was contrary to the established rights of employees to organize into a union of their own choosing and was inherently invalid or unlawful.

[11] The Union also argued that the LOA could be classified as a project collective agreement under section 6-67 of the *SEA*. Under the terms of that provision, the CLR, as REO was only required to be involved in negotiations "if applicable".

[12] The Union argued that the LOA constituted a "get to know you" or "try me" agreement which was both permitted by the *SEA* and the provincial collective agreement.

[13] The Union argued that there was a basic flaw in the Applicant's argument concerning "unionized employer" insofar as the use of the words in section 6-70(1)(b) does not lead to the interpretation espoused by the Applicant such that the result would be that Kaefer's employees would be classified as "unionized employees" until the point when the LOA was signed.

[14] The Union noted that during the consideration of the *SEA*, in committee, prior to its passage by the legislature, a provision dealing with voluntary recognition was deleted from the Bill. This, the Union argued, shows that voluntary recognition was not a feature of the *SEA*.

[15] In respect of remedy, the Union argued that the Applicant should have filed a grievance under the collective agreement regarding whether or not Kaefer should be considered a "unionized employer". It also argued that no formal demand was made to Kaefer by CLR for provision of information related to the LOA.

[16] The Union argued that the application arose out of a difficult round of bargaining between the parties. The Union argued that there was no unfair labour practice committed, merely hard bargaining. It argued that the difficulties arose out of different interpretations of the law, which law is far from settled, particularly when lay persons are attempting to interpret its meaning.

[17] The Union argued that while the Board has the authority to award damages in this instance, that no evidence of damages had been provided by the Applicant.

Analysis:

[18] This application raises the issues set out in paragraph [7] above. We will deal with each of them in turn.

> **Is Kaefer a "unionized employer" as defined by section 6-65(h) of *The Saskatchewan Employment Act* by virtue of the terms of the Letter of Understanding for a Labour Supply Agreement entered into with the Union dated February 18, 2015?**

[19] Mr. Andrew C.L. Sims Q.C[2]. provided an Affidavit to the Board which was entered into evidence. While he was not qualified as an expert witness, his Affidavit evidence was not challenged by the Union. In his Affidavit, Mr. Sims describes the nature of registration/accreditation system adopted almost uniformly in Canada for collective bargaining in the construction industry. He notes that the system of collective bargaining in the construction industry arose out of the "Goldenberg-Crispo" report[3]. He notes that this "report led to the adoption of the registration/accreditation provisions [by legislation] in other jurisdictions, including Saskatchewan."

[20] In Mr. Sims Affidavit, he summarized the system and its ramifications for unions, employers and competition in the industry as follows:

> 1. The core essence of a registration/accreditation scheme is that for unionized contractors operating in the same market are bound to adopt a common bargaining position and advance that position through an agent obligated to bargain on their behalf;
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> 2. The system results in wages that apply equally to all unionized contractors;
>
> 3. The system is mandatory;
>
> 4. Registration/accreditation eliminates or reduces the competition that resulted where trade unions dealt with each employer individually and used one employer to "leap frog" over another;
>
> 5. Registration/accreditation was designed to reduce a unionized employer's vulnerability to union bargaining power; the 'quid pro quo"

[2] Mr. Sims served as Chairperson of the Alberta Labour Relations Board for nine (9) years and as a Vice-Chairperson of that Board for an additional 21 years.
[3] *Construction Labour Relations, Canadian Construction Association*, H. Carl Goldenberg and John H.G. Crispo, editors, 1968

> is that unionized employers are not free to individually negotiate wage rates with a trade union directly, and therefore, improved its competitive position in relation to its competitors who have a relationship with the same union.

[21] Mr. Sims went on to note at paragraph 10 of his Affidavit that:

> *10. Registration/accreditation systems are desirous to both employers and owners because of the particular vulnerability or an employer in a competitive industry. Without the registration/accreditation system, nothing would prevent a union from settling with one employer only or negotiate more favourable terms and conditions which then places that employer in a better position to obtain work than its competitors. Similarly, an employer who holds out for more advantageous terms may find itself frozen out of work because others have agreed upon terms. Strikes may be staged sequentially so as to expose one employer after another to economic pressure. Collectively, such practices have been described as "whipsawing" or "leap frogging". Registration protects unionized employers from such targeted union tactics, evening out the power imbalance between the large craft unions and the more diverse and sometimes smaller employers bound to bargain with that union.*
>
> *11. To permit trade unions subject to a registration/accreditation system to negotiate directly with employers and maintain different terms and conditions than those bargained by the REO would run contrary to the very purpose of a mandatory registration/accreditation system, and would allow employers to obtain an unfair competitive advantage over their fellow contractors.*

[22] The rationale postulated by Mr. Sims must be considered in the context of the construction industry. Work in the construction industry has several unique characteristics.[4] One of those features is the transitory nature of the work locations, being project which has a beginning and an end. Another is the specialization within the construction industry resulting in an array of craft trade unions and related specialty contractors. One of the institutional manifestations of these two characteristics is the role of the hiring hall in construction industry labour relations. Because the work sites and the work at those sites are not permanent, employers typically hire employees only when necessary and those employees are employed only for the duration of the work available. Once work at one site is concluded, the employee is released and may well be re-employed by a competitor of his former employer for another project.

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[4] For a more complete description of the unique character of the construction industry, please refer to *Canadian Labour Law*, 2nd edition, George W. Adams at chapter 15.10

[23] As noted by Mr. Sims, the nature of work in the construction industry and the nature of the collective bargaining system resulted in a unique scheme for collective bargaining in the construction industry throughout Canada. This unique scheme in the Saskatchewan context is embodied in Division 13 of Part VI of the *SEA*.

[24] The provisions of Division 13 are not new to the law of Saskatchewan. Prior to the enactment of the *SEA*, bargaining in the construction industry was regulated by *The Construction Industry Labour Relations Act, 1992*[5]. However, this legislation was not the first legislation in Saskatchewan which regulated collective bargaining in the construction industry. A previous statute, *The Construction Industry Labour Relations Act,* was passed in 1979, and repealed in 1983.

[25] At issue here is the impact of the provisions of Division 13 with respect to non-certified contractors, such as Kaefer, resultant from entering into the LOA with the Union. The Applicants argue that as a result of entering into the LOA, Kaefer becomes subject to the construction industry bargaining scheme and must negotiate with the Union through the REO. The Union argues against this interpretation.

[26] For ease of reference, we will repeat the provisions of section 6-65(h). It reads:

> *(h)* ***"unionized employer"****, subject to section 6-69, means an employer:*
>
> > *(i)* *with respect to whom a certification order has been issued for a bargaining unit comprised of unionized employees working in a trade for which a trade division has been established pursuant to section 6-66; or*
> >
> > *(ii)* *who has recognized a union as the agent to engage in collective bargaining on behalf of unionized employees working in a trade for which a trade division has been established pursuant to section 6-66*

[27] This provision differs somewhat from the definition contained within the repealed provisions of the *Construction Industry Labour Relations Act, 1992*. That definition reads as follows:

> *2(s)* ***"unionized employer"*** *means an employer in a trade division with respect to whom a trade union has established the right to bargain collectively on behalf of the unionized employees in that trade division:*

[5] S.S. 1992 c. C-29.11 (repealed)

> *(i) pursuant to an order of the board made pursuant to clause 5(a), (b) or (c); or*
> *(ii) as a result of the employer's having recognized the trade union as the agent to bargain collectively on behalf of those unionized employees.*

[28] Notwithstanding the differences in the words used, the provisions both recognize that an employer may fall under the definition of "unionized employer" in two ways. Firstly, an employer would become a "unionized employer" upon certification of the employer by this Board. Secondly, an employer may fall under the definition if that employer recognizes the union as the bargaining agent for unionized employees within that trade division.

[29] The purpose for subsection (ii) in the definition is to insure that collective bargaining in the construction sector is balanced and is not subject to "leap frogging" or "whipsawing" as described by Mr. Sims in his affidavit. The purpose behind the bargaining scheme in the construction industry is to ensure that all contractors who deal with a union representing workers in a particular trade jointly bargain with that union. If individual contractors who had not been certified for collective bargaining were permitted to make individual bargains with the Union for the supply of workers, the whole system would fail to achieve its intended purpose.

Has Kaefer Recognized the Union in accordance with Section 6-65(h)(ii)?

[30] It will be necessary to consider whether Kaefer has recognized the union as the agent to bargain collectively on behalf of "those unionized employees" in our determination of whether Kaefer falls under the provisions of Section 6-65(h)(ii). One aspect of that determination is whether or not the LOA meets the definition of "collective bargaining" in section 6-1(1)(e) of the *SEA*. Under that definition there are four components. These are (1) negotiations in good faith, (2) putting the terms of the agreement in writing, (3) executing the agreement, and (4) negotiating from time to time settlement of disputes.

[31] The LOA meets all of these criteria. Mr. Rudder testified as to the negotiations between the parties that lead to the agreement. Those negotiations were intended to and did result in the provision of qualified tradesmen to Kaefer, through the Union Hall hiring process for Kaefer to complete its contract at the K & S Potash project. The result of those negotiations was a "collective agreement" as that term is defined in section 6-1(1)(d) of the *SEA.*

[32] The LOA is clearly a collective agreement insofar as it sets out the "terms and conditions of employment"[6] and "contains provisions respecting rates of pay, hours of work or other working conditions of employees".

[33] The LOA also is a written agreement as required by section 6-1(1)(e)(ii) and is executed by the parties as required by section 6-1(1)(e)(iii). Additionally, while there was no evidence that there had been any ongoing disputes, the Provincial Agreement which was adopted by reference contained provision for ongoing dispute resolution.

[34] We therefore conclude that the LOA was a collective agreement and that by its negotiation and execution Kaefer recognized that the Union was the bargaining agent of the employees dispatched to work on that project by the Union. This is clear from the terms of the LOA, especially in respect of the departure from the Provincial Agreement insofar as wage rates were concerned, but also in respect to the provision of the LOA where the Union agreed that its members would not strike and Kaefer agreed that those employees would not be locked out.

[35] A second aspect of the definition which must be examined is the provision that the recognition referenced above must be in respect of "unionized employees". The Union argues that the workers dispatched to Kaefer could not be "unionized employees" because Kaefer was not certified as a unionized employer at the relevant times.

[36] "Unionized employee" is defined in Section 6-65(g) as being:

> *(g) "**unionized employee"** means an employee who is employed by a unionized employer and with respect to whom a union has established the right to engage in collective bargaining with the unionized employer;*

[37] The circularity of this definition is notable insofar as each of the definitions relies upon the other. However, using the modern rule of statutory interpretation set out by the Supreme Court of Canada in *Rizzo v. Rizzo Shoes*[7] there is little difficulty in resolving the circularity in the definitions.

[38] The purpose for the provisions respecting collective bargaining in the construction sector as set out above, is to insure that there is a balance in the ability of contractors to bargain

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[6] By incorporating by reference, the terms of the Provincial agreement between the Union and CLR
[7] [1998] 1 SCR 27, CanLII 837 (SCC)

with the Union. That balance can only be maintained when there can be no end run or side deals made by the union to undermine the contract which it has already made with a group of unionized contractors who have been certified by this board to bargain collectively with the Union in accordance with those provisions.

[39] The intention of the legislative provisions is to ensure that there is one contractor voice at the table in negotiations with the Union, that being the CLR. However, the legislation does not stop there. It makes provision in subsection (ii) to insure that the bargaining relationship remains exclusive. It requires persons who wish to negotiate for the supply of labour from the Union through the exclusive bargaining agent, which is the CLR. This provision, to use the words of former Justice of the Supreme Court, Mr. Justice Rand, insures that there are no "free riders" who have the benefit of the work and effort of CLR in negotiating a contract without any cost to them.

[40] The circularity in definition can also be resolved by an examination of the terms of the definition of "unionized employee". That term is, we believe, sufficiently broad to cover this situation. In order to be dispatched to Kaefer, the employees in question would have to be a member of the Union. Under the terms of the scheme of collective bargaining in the construction industry, those employees would, normally, be dispatched only to unionized contractors. They would not be dispatched to non-unionized employers who would have to hire workers otherwise than through the union hiring hall.

[41] Any tradesperson who is a union member, normally dispatched to unionized employers would, in our opinion, be a "unionized employee". In reaching this conclusion, we are mindful of the unique nature of the construction industry insofar as there are no permanent employees employed by contractors. They are hired as the job dictates and are laid off when no longer required. However, they are, by reason of the bargaining scheme, employees who normally work for unionized employers as required by the definition.

[42] We conclude, therefore, that Kaefer, by virtue of the LOA fell under the provisions of section 6-65(h)(ii) and was a unionized employer, at the relevant time, under that definition.

Did the Union Commit an Unfair Labour Practice?

[43] CLR submits that the Union committed two unfair labour practices. Firstly, it failed to negotiate in good faith in failing to provide the information requested by them in respect of the LOA, contrary to section 6-63(1)(c) of the *SEA*. Secondly, CLR argues that the Union failed to recognize it as the sole and exclusive bargaining agent pursuant to section 6-70 of the *SEA*.

Was there a breach of Section 6-63(1)(c)?

[44] The duty to bargain in good faith is one of the paramount provisions of the *SEA.* That duty was well described by the Supreme Court of Canada in its decision in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*[8]. At paragraphs 41 and 42, the Court said:

> *41. Every federal and provincial labour relations code contains a section comparable to s. 50 of the Canada Labour Code which requires the parties to meet and bargain in good faith. In order for collective bargaining to be a fair and effective process it is essential that both the employer and the union negotiate within the framework of the rules established by the relevant statutory labour code. In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions.*
>
> *42. Section 50(a) of the Canada Labour Code has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.*

[45] In *Saskatchewan Government Employees' Union v. Government of Saskatchewan.*[9], the Board dealt with the requirement to disclose requested information in the context of collective bargaining. In that decision, at paragraph 58, the Board noted that it is generally accepted that the following classes of information must be disclosed when requested:

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[8] [1996] 1 S.C.R. 369, CanLII 220 (SCC)

1. Information respecting existing terms and conditions of employment;
2. Pertinent information needed to adequately comprehend a proposal or response at the bargaining table;
3. Information which would inform the party of decisions already made which will be implemented during the term of the collective agreement and which may have a significant impact on the bargaining unit;
4. Honest answers regarding possible changes that are likely to be implemented during the term of the collective agreement.

[46] In this case, CLR requested information in respect of the LOA. Mr. Douglas testified that he was able to obtain that information from Kaefer verbally (they read the agreement to him over the phone), but provision of a copy by the Union was resisted. The Union finally relented and provided the information. The collective agreement was reached shortly after a copy of the LOA was provided to CLR.

[47] In its arguments, CLR took the view that the provision of this information was essential to the settlement of the collective agreement. However, we can find no evidence of this other than the timing of the provision of the information and the conclusion of negotiations. There was no evidence provided as to why this information was necessary for the process of collective bargaining between the parties. We had evidence showing that the scheduling of negotiations was impacted by the failure to provide the requested information, but nothing to show that the CLR needed the information to resolve any issues in collective bargaining.

[48] In *Re: Regina Exhibition Assn. Ltd.*[10] the Board described the purpose behind the disclosure requirement.

> *70 The purpose of the disclosure requirement is to enable parties to bargain matters that may impact on the bargaining unit over the term of the agreement that is under negotiation. It is also designed to foster rational discussion of the bargaining issues. In order for collective bargaining to work effectively without mid-contract disruptions, a union must be kept informed during bargaining of the initiatives that the employer is planning over the course of the collective agreement. The union is also entitled to use its economic weapons in order to*

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[9] [1989] Winter Sask. Labour Rep. 52
[10] [1997] S.L.R.B.D. No. 66

> *negotiate provisions to protect its members from the effects of the employer's initiatives.*

[49] In fairness to CLR, they were under a strike notice from the Union during the period of negotiations. The LOA certainly would assist it to determine the impact on Kaefer from any strike action. Additionally, it would provide some insight into wage terms settled with Kaefer which presumably the Union would agree to. Once disclosed, the ability to "leap frog" using the Kaefer agreement was avoided.

[50] However, the fact is that CLR knew the terms of the LOA from Kaefer orally prior to its release in written form by the Union. No evidence was advanced to show that the provision of this information in writting (as distinct from having it read to them) was essential and that it was required to inform bargaining or to foster rational discussion of the bargaining issues. In short, the information did not fall within the purpose described in *Regina Exhibition*.

[51] For these reasons, we decline to find a violation of section 6-63(1)(c) of the *SEA* in the failure to supply a copy of the LOA as requested by CLR.

Did the Union Breach section 6-70?

[52] Based on our conclusion reached concerning Kaefer's status under section 6-65(h)(ii), it follows that in negotiating directly with Kaefer for the supply of unionized employees to Kaefer, the Union breached section 6-70 of the *SEA* and failed to recognize CLR as the exclusive bargaining representative.

[53] In its defence, the Union argued that the breach should be viewed as a technical breach, because this is a complex legal issue, which is being interpreted by laymen. That argument will be considered in the remedy section of this decision.

Remedy and Orders

[54] The Applicant requested the following orders:

1. A declaration the Kaefer was, at all material times a "unionized employer".

2. A declaration that the Union committed an unfair labour practice by negotiating the LOA and failing to recognize the CLR as the exclusive bargaining agent of the Insulator Trade Division.

3. A declaration that the Union breached its duty to bargain in good faith.

4. An order that the Union cease and desist from this behavior.

5. Damages in the sum of $10,000.00.

6. Such other remedies as the Board considers appropriate in the circumstances.

[55] The requested declaration that Kaefer was, at all material times, a "unionized employer" is granted.

[56] The requested declaration that the Union committed an unfair labour practice by negotiating the LOA and failing to recognize the CLR as the exclusive bargaining agent of the Insulator Trade Division is granted.

[57] The requested declaration that the Union breached its duty to bargain in good faith is denied.

[58] CLR requested that they be compensated pursuant to section 6-104(2)(e) of the *SEA* for the monetary loss suffered as a result of the contravention by the Union of any of the provisions of Part VI of the *SEA.* Such an award of monetary loss is discretionary.

[59] We decline to make the requested award of monetary loss for several reasons, the principal one being that we have no evidence to support any claim of losses. While in some circumstances the Board has made a declaration and allowed the parties to determine the quantum of the loss, with recourse to the Board if they are unable to agree, we would not follow that procedure either.

[60] As noted above, we had no evidence that any loss had been suffered, let alone quantified. Neither of the witnesses for CLR suggested that CLR has suffered any loss occasioned by the Union's position on this matter. As noted above, this is a complex area in which there is limited jurisprudence directly on point. The Union argues that, in addition, these provisions were being interpreted by laypersons. Given that this is the first time that the Board

has had occasion to deal directly with this type of issue under the *SEA*, we have some sympathy with this argument. That is an additional reason why no monetary loss would be ordered.

[61] Finally, on the issue of monetary loss, we would note that section 6-104(2)(e) does not provide the Board with the ability to sanction behavior and to impose penalties for that behavior. That provision is to provide the ability for persons who have suffered monetary loss to seek compensation for that loss. It is usually, but not exclusively, used in conjunction with section 6-104(2)(d) where the Board orders re-instatement of employees who have been wrongfully terminated.

[62] For these reasons there will be no order respecting monetary loss.

[63] No other relief was sought and nothing further is required. An appropriate order will accompany these reasons.

[64] Member Jim Holmes dissents from these reasons as follows.

DATED at Regina, Saskatchewan, this **25th** day of **May, 2016.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

Dissent of Employee Side Representative Jim Holmes

1. I agree with the Majority Award that the Letter of Understanding ("LOU") was a Collective Agreement between Kaefer International ("Kaefer") and the International Association of Heat and Frost Insulators and Asbestos Workers, Local 119 ("the Union") and that it was evidence of voluntary recognition. I also agree voluntary recognition brings the parties under the provisions of Division 13 of the SEA and in particular Section 6-65 (h).

2. I respectfully disagree with the determination that the Union committed an Unfair Labour Practice by entering into the LOA with Kaefer.

3. The Union and the Construction Labour Relations Association of Saskatchewan Inc. ("CLR") included an explicit exception in the Collective Agreement to the rule that union members work only for union contractors.

4. The LOU at the last page of the 2011 to 2014 Collective Agreement explicitly allowed the Union to supply union members to "any contractor that it targets, for organizing."

5. Mr. Rudder, the Business Manager of the Union, testified that it is the Union's policy to always attempt to certify non-Union worksites where it had members working. More importantly, in this instance, the Union did apply for, and was successful in certifying Kaefer.

6. The Employer argued that the LOU was only meant for situations where the Union sent a small number of members to organize a worksite ("salting") and where the Contractor is opposed to unionization. There is no wording in the LOU to support this narrow interpretation. It would be surprising if the Union would not send members to support the certification of a Contractor who was not opposed to the Union. It would also be surprising if the Union did not send as many members as possible to support the certification drive.

7. Union organizing is beneficial to the members of the CLR because it increases the number of employers who are members of CLR who compete based on performance rather than on labour costs.

8. There *would* have been a detrimental impact on the CLR members had the LOU between the Union and Kaefer been reached *before* bidding on the K+S Mine contract was complete.

9. It was Mr. Rudder's uncontradicted evidence that Kaefer approached the Union only *after* it had won the contract. There was no undermining of CLR members ability to bid against Kaefer for the K+S Mine project. The CLR members who bid on that project had already lost that competition before Kaefer approached the Union.

10. The LOU specified it only applied to the K+S Mine (Article 6.1). The LOU could not be used by Kaefer to compete against CLR members bidding on any other project.

11. The LOU did not whipsaw the CLR members. The Union was in a very strong bargaining position with Kaefer, who had a contract but no workers. Yet the Union only proposed a wage increase equal to the increase already in effect with the other unionized construction trades. Further, the LOU provided that the wages and terms of that agreement would be the same as the Provincial Agreement as soon as the Provincial Agreement was signed (Article 7-1).

12. The LOU clearly did not provide a base for leap frogging the Provincial settlement.

13. The LOU did provide Kaefer with a no strike / no lock out provision (Article 7.2). Of course, a no strike / no lock out provision was available to the CLR as soon as it completed a renewal agreement with the Union.

14. In *Modern Niagra* (LRB File No. 089-15) this Board unanimously decided that a LOU created an estoppel that prevented the Union from applying for certification. The Union had agreed that it would not apply for certification for the duration of a 'try me' agreement in which the Employer voluntarily recognized the union for a specified period. The Union members enjoyed all the rights of the Union Agreement for the specified period.

15. This case is comparable to *Modern Niagra* in that the CLR created an estoppel by agreeing the Union could supply labour to a non-Union Employer for the purpose of organizing that Employer.

16. The LOU with Kaefer did not whipsaw the CLR. It did not form a base for leap-frogging and it did not provide Kaefer with a competitive advantage to bid on other construction contracts. The Union's application for certification did bring Kaefer permanently into the CLR membership long before this case was heard.

17. The LOU was an agreement between two parties. The CLR knew the details of the LOU by April 6, 2015. Yet, in this case, the CLR filed an Unfair Labour Practice first against the Union on May 21, 2015 (LRB File No. 094-15). It was not until four (4) months later, September 21, 2015 that CLR filed against Kaefer (LRB File No. 213-15).

18. In addition to the gap between the two filings, it is also significant that the Employer asked this Board to fashion a remedy for the breach. The majority decision outlines why those remedies are not appropriate.

19. The *Saskatchewan Employment Act* (SEA) contains an explicit remedy for a collective agreement between a Union and a unionized Employer outside of the Provincial Agreement.

    a. *6-70 (e) a collective agreement respecting the trade division that is made after the determination of the employers' representative organization with any person or organization other than the representative employers' organization is void.*

20. This remedy was not requested by the CLR. Yet, this remedy would have provided a complete remedy to all the concerns of the CLR. It would have voided the no strike / no lock out provisions Kaefer enjoyed. It would have voided the higher wage rate the Union negotiated. It would also have voided the Union Recognition Article in the LOU, but it would not have altered the fact that Kaefer had voluntarily recognized the Union. This voluntary recognition would still have brought Kaefer under the provisions of Section 13 of *The SEA.*

21. The estoppel created by the LOU concerning organizing would not shield Kaefer from an Unfair Labour Practice. It was not a signatory of the LOU.

22. It would be inequitable to find the Union guilty of an Unfair Labour Practice for launching an organizing campaign that was explicitly allowed by the LOU. It is possible to understand how the CLR membership might have felt threatened by the LOU. In fact, there was no threat or detriment. Also in fact, the action of the Union worked to the benefit of both the CLR and the Union by expanding their memberships.

Jim Holmes, Board Member