**SASKATCHEWAN BUILDING TRADES COUNCIL, Applicant v. CONSTRUCTION WORKERS UNION, CLAC LOCAL 151, Respondent and LEDCOR INDUSTRIAL LIMITED, Respondent**

LRB File No. 012-18; March 26, 2018
Chairperson, Susan C. Amrud, Q.C.; Members: Mike Wainwright and Aina Kagis

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| For the Applicant: | Greg D. Fingas |
| For the Respondent Union: | Richard F. Steele |
| For the Respondent Employer: | Michael J. Phillips |

**Practice and Procedure – Notice of Certification Application properly given by Registrar's office to potentially interested persons, as authorized by *The Saskatchewan Employment (Labour Relations Board) Regulations*, s. 20.**

**Intervenors – Board finds intervenor meets tests for exceptional intervenor and public interest intervenor status, if Board decides to consider build-up principle in determination of the Certification Application.**

## REASONS FOR DECISION – PRELIMINARY MATTERS

**Background:**

**[1] Susan C. Amrud, Chairperson:** On January 3, 2018, Construction Workers Union, CLAC Local 151 ("Local 151") filed an Application for Bargaining Rights[1] with the Saskatchewan Labour Relations Board ("Board") for a unit of employees of Ledcor Industrial Limited ("Employer") described as follows:

> *All employees of Ledcor Industrial Limited in Saskatchewan, except the general manager, office manager, office and sales staff and management personnel* ("Certification Application").

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**[2]** The Certification Application indicated that there were approximately six employees in the unit.

**[3]** On January 4, 2018 an employee in the Board's office provided notice of the Certification Application to the Employer and to a number of other persons, including the Saskatchewan Building Trades Council ("Council").

**[4]** The Certification Application was not opposed by the Employer, who did not file a Reply.

**[5]** On January 10, 2018, the Board issued a Direction for Vote:

> *That a vote by secret ballot be conducted among all eligible employees, who were employed within the unit as applied for by the Applicant as of January 4, 2018, to determine whether or not the said employees wish to be represented by the Union, for the purpose of bargaining collectively with their Employer;*

**[6]** The Direction for Vote also stated:

> *Upon the completion of the vote the Agent of the Board shall seal the ballot box and retain possession thereof until such time as the Board directs the Agent to file a report in accordance with The Saskatchewan Employment (Labour Relations Board) Regulations, Section 23.*

**[7]** On January 16, 2018, the Council filed an Application to Intervene in the Certification Application. Local 151 and the Employer each filed a Reply opposing the Council's Application to Intervene.

**[8]** On March 13, 2018, the Board heard the Council's Application to Intervene. Written Memoranda of Law and copies of Case Authorities relied on were filed by all three parties, all of which have been read and for which we are thankful.

**Argument on Behalf of the Parties**:

**A) Preliminary Issue: Notice by Board**

**[9]** Local 151 raised a preliminary issue suggesting the Board exceeded its jurisdiction, and acted unreasonably, in providing notice of the Certification Application to the Council. It based this position on the provisions of section 19 of *The Saskatchewan Employment (Labour*

*Relations Board) Regulations* ("Regulations"). Local 151 argued that, under section 19, the Board Registrar may only provide notice to a party having a "direct interest" in the application, and that the act of providing notice cannot be delegated by the Board Registrar. In response to a question from the Board Chairperson at the hearing, Local 151's counsel acknowledged that he had not considered section 20 of the Regulations.

**[10]** In oral argument, counsel for the Council indicated that whether or not Local 151's arguments on this issue were valid, they would not affect the Council's right to make an Application to Intervene. The Council argued that they could reasonably be seen as having an interest in this matter. They also noted that the delegation of the administrative act of providing notice to potential intervenors has no effect on the application, as it does not affect the ultimate authority of the Board to determine the application. They also suggested that the provision of notice by the Board in this matter expedited the hearing of the Application to Intervene and, accordingly, the consideration of the Certification Application.

**B) Application for Intervention**

**[11]** The Council takes the position that, given the decisions of the Board in *Construction Workers Union (CLAC), Local 151 v Technical Workforce Inc.*, 2016 CanLII 44644 and of the Court of Queen's Bench in *Technical Workforce LRB: Construction Workers Union, Local 151 v Saskatchewan Labour Relations Board and Technical Workforce Inc*., 2017 SKQB 197, there is currently a vacuum in the law with respect to the application of the build-up principle to all-employee bargaining units in the construction sector. The Council submits that the current Certification Application is a test case for this issue. As a result, the Council argues, it is appropriate for the Board to grant them intervenor status to ensure that this important policy decision is based on a full factual record and full argument as to the proper application of the build-up principle.

**[12]** The Council argues that it would qualify as an intervenor in either of the following categories:

a) As an exceptional intervenor "on the basis that the impact of the within matter upon its Affiliates and their members as craft unions in the construction industry results in its holding a demonstrable and genuine

interest in the application of the build-up principle" (Council Brief of Argument para. 6.a.);

b) As a public law intervenor "on the basis that the Council's proposed evidence and argument will provide this Board with a different and distinct perspective which will assist in deciding the issues before it, and particularly in setting its policy respecting the application of the build-up principle to all-employee bargaining units in the construction industry" (Council Brief of Argument para. 6.b.).

**[13]** Local 151, on the other hand, argues that the build-up principle is not an issue in the Certification Application and that, therefore, there is no basis on which the Council can establish that its intervention would be of assistance to the Board. In opposing the Council's assertion that it meets the test for an exceptional intervenor, it stated that the Council cannot show a demonstrable and genuine interest in the legal questions in dispute because "the build-up principle is not in issue in the Certification Application" (Brief of Argument, para. 34). It also states that "The Board does not require a building trade union witness to take the stand to address the building trade hiring hall system" (Brief of Argument, para. 35). Local 151, in its Brief of Argument and oral argument, also opposed, in detail, the Council's assertion that it satisfies the test for a public law intervenor (Brief of Argument, paras. 36 – 40).

**[14]** The Employer also opposes the Council's Application to Intervene. It argues that there are no public law issues to be considered by the Board in the Certification Application. It asserts that the issue of the application of the build-up principle is a routine matter, within the Board's expertise. The Employer noted that the Board recently applied the build-up principle in *Re K-Bro Linen Systems Inc. and UFCW, Local 1400*, 2015 CarswellSask 266 (SLRB) ("*K-Bro*"), without the assistance of intervenors. It argued that there is no uncertainty or confusion to be addressed in the consideration of the Certification Application that requires the Council's perspective.

**Relevant Statutory Provisions**:

**A) Preliminary Issue: Notice by Board**

**[15]** The following provisions of *The Saskatchewan Employment (Labour Relations Board) Regulations* provide guidance with respect to this issue:

> *Registrar to provide copies of applications*
> *19 On the filing of an application mentioned in Part II, the registrar shall:*
> *(a) make efforts that the registrar considers reasonable to determine the identity of any employer, other person, union and labour organization that is referred to in the application or has a direct interest in the application; and*
> *(b) provide a copy of the application to the employers, other persons, unions and labour organizations identified pursuant to clause (a).*
>
> *Intervention*
> *20(1) In this section:*
> *(a) "application to intervene" means an application in Form 17 (Application to Intervene);*
> *(b) "original application" means an application made to the board pursuant to the Act and these regulations that is the subject of an application to intervene.*
> *(2) An employer, other person, union or labour organization that is served with a copy of an application pursuant to section 19 and intends to intervene in the proceedings before the board shall file a reply in Form 18 (Reply).*
> *(3) An employer, other person, union or labour organization that is not served with a copy of an application pursuant to section 19 and that intends to intervene in the proceedings before the board shall file an application to intervene.*
> *(4) All replies and applications to intervene must be filed within 10 business days after the date a copy of the original application was given to the employer, person, union or labour organization by the registrar.*
> *(5) The registrar shall provide a copy of every reply and every application to intervene to:*
> *(a) the party that filed the original application;*
> *(b) in the case of an application to intervene, any other party that filed a reply; and*
> *(c) any other employer, person, union or labour organization that is directly affected by the application to intervene.*

**[16]** The following provisions of *The Interpretation Act, 1995* also apply:

> *Interpretation*
> *2 In this Act:*
> *"enactment" means an Act or a regulation or a portion of an Act or a regulation;*
> *"public officer" includes a person in the public service of Saskatchewan:*
> *(a) who is authorized by or pursuant to an enactment to do or enforce the doing of an act or thing or to exercise a power; or*
> *(b) on whom a duty is imposed by or pursuant to an enactment;*

*Public officers*
*23.2(1) Where an enactment directs or empowers a public officer to do an act or thing, or otherwise applies to the public officer by the public officer's name of office, a reference in that enactment to the public officer:*

*(a) includes a person acting for the public officer or appointed to act in the office;*

*(b) includes his or her deputy or a person appointed as his or her acting deputy; and*

*(c) applies to the person for the time being charged with the execution of the powers and duties of that office.*

*(2) This section applies whether or not the office of a public officer is vacant.*

**B) Application for Intervention**

**[17]** The following provisions of *The Saskatchewan Employment Act* are relevant to this application:

***Determination of bargaining unit***
*6-11(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:*

*(a) if the unit of employees is appropriate for collective bargaining;*

*(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.*

*(7) In making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:*

*(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and*

*(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:*

*(i) the geographical jurisdiction of the union making the application; and*

*(ii) whether the certification order should be confined to a particular project.*

*. . .*

*6-112(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**:

**A) Preliminary Issue: Notice by Board**

**[18]** The first issue to be addressed is the preliminary issue raised by Local 151, in which it suggested the Board exceeded its jurisdiction, and acted unreasonably, in providing notice of the Certification Application to the Council. This issue is fully addressed by section 20 of the Regulations. That is the section that addresses intervention applications.

**[19]** Section 19 of the Regulations imposes an obligation on the Board Registrar to identify and provide a copy of certain applications to persons, including the employer, who have a direct interest in the application. Subsection 20(2) provides that a person served with an application pursuant to section 19, who intends to intervene in the matter, shall file a document called a Reply. Subsection 20(3) provides that persons not served pursuant to section 19 (*i.e.*, persons not identified by the Registrar as having a direct interest), who intend to intervene in the matter shall file an Application to Intervene. Subsection 20(4) provides a deadline for filing a Reply or an Application to Intervene of "10 business days after the date a copy of the original application was given to the employer, person, union or labour organization by the registrar". While section 20 could have been drafted to provide guidance to the Registrar respecting when it would be appropriate to provide a copy of the application to persons who do not have a direct interest, it instead has left this issue to the discretion of the Registrar. However, subsections 20(3) and (4) clearly contemplate that this will occur. It should be noted that this is not a new practice. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. 617400 Saskatchewan Limited (Sobeys)* 2006 CanLII 62956 (SK LRB), the Board noted, in paragraph 16, that, with respect to certification applications in the construction industry, the Registrar's standard practice was to give notice to several organizations and unions in the construction industry.

**[20]** Section 23.2 of *The Interpretation Act, 1995* establishes the authority for the Registrar to delegate duties.

**[21]** Accordingly, the Board finds there is no merit to this argument and dismisses the request of Local 151 to dismiss the Application to Intervene on the basis that the notice was improper.

**B) Application for Intervention**

**[22]** In *C.E.P. v. J.V.D. Mill Services*, 2010 Carswell Sask 896, 199 C.L.R.B.R. (2d) 228 ("*JVD Mill Services*"), this Board clarified its general approach to the granting of intervenor status in proceedings before the Board. This approach was summarized by the Board as follows in *Construction Workers Union (CLAC), Local 151 v. Tercon Industrial Works Ltd*, 2012 CanLII 2145 (SK LRB) ("*Tercon*"), at paragraph 31:

> *In J.V.D. Mill Services #1, supra, this Board clarified its general approach to the granting of intervenor status in proceedings before the Board. In doing so, the Board reiterated the long standing principle that the granting of standing as an intervenor in any proceedings before the Board is a matter of discretion and that, generally speaking, the Board exercises its discretion based on the circumstances of each case, considerations of fairness (to the party seeking standing) and/or the potential for the party seeking standing to assist the Board (by making a valuable contribution or by providing a different perspective) without doing injustice to the other parties. The Board went on to identify and adopt three (3) forms of intervention recognized by this Board[6]. These three (3) forms of intervention are summarized as follows:*
>
> *1. **A Direct Interest Intervenor**; where the applicant seeking standing has a direct interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be directly affected by the determinations of the Board.*
>
> *2. **An Exceptional Intervenor**; where the applicant has a demonstrable and genuine interest in the answer to the legal question in dispute (i.e.: for example, if the party has a pending application before the Board on the same issue and thus has legal rights or obligations that may be affected by a binding precedent); and the applicant can establish the existence of "special circumstances" that differentiate it from others who may have a similar interest; and where that party can demonstrate that it can provide a valuable assistance to the Board in considering the issues before it.*
>
> *3. **A Public Law Intervenor**; where the applicant has no legal rights or obligations that may be affected by the answer to the legal question in dispute, but can satisfy the Board that its perspective is different or that its participation would assist the Board in considering a public law issue before it.*

**[23]** The Board has followed these principles in a number of subsequent decisions (*Construction Workers Union (CLAC), Local 151 v Tercon Industrial Works Ltd., Westwood Electric Ltd., Canonbie Contracting Ltd., Wilbros Construction Services (Canada) L.P. and Pyramid Corporation*, 2012 CanLII 2145 (SK LRB) at para. 31; *Saskatchewan Building Trades Council v International Association of Heat and Frost Insulators and Asbestos Workers, Local 119, Westcor Services Limited, Steeplejack Industrial Insulation Ltd and Brock Canada Inc*,

2015 CanLII 80543 (SK LTB), at para. 23; *Re Saskatchewan Government Employees' Union*, 2016 CanLII 74494 (SK LRB), at paras. 5 and 7; and *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial v. International Brotherhood of Electrical Works, Local 2038*, 2017 CanLII 6027 at paras. 14 and 15). The Board continues to endorse them in making this decision.

**[24]** The Council acknowledges that the first form of intervention (direct interest) does not apply in this situation.

**[25]** With respect to the second form of intervention (exceptional intervenor), *Tercon* summarized the test to be met as follows, at para. 31:

> *Where the applicant has a demonstrable and genuine interest in the answer to the legal question in dispute (i.e.: for example, if the party has a pending application before the Board on the same issue and thus has legal rights or obligations that may be affected by a binding precedent); and the applicant can establish the existence of "special circumstances" that differentiate it from others who may have a similar interest; and where that party can demonstrate that it can provide a valuable assistance to the Board in considering the issues before it.*

**[26]** The application of this test requires first an analysis of the question: what is the legal question in dispute in the Certification Application? The Council asserts that the question in dispute on which they propose to provide assistance to the Board is the application of the build-up principle to all-employee units in the construction industry. Local 151 asserts that there is no question in dispute in the Certification Application. With respect, as Local 151's counsel acknowledged during the hearing, this is a question for the Board to determine. On the face of the material currently before the Board, it appears that the build-up principle may be a live issue in this case. It is plausible that the Board may determine that, as one of the factors to consider during its determination of whether the unit applied for is "appropriate for collective bargaining", as required by section 6-11 of *The Saskatchewan Employment Act*, that it should consider whether it is appropriate to apply the build-up principle in this situation. If that were to occur, the Council, as the representative of the building trades unions would have a demonstrable and genuine interest in the answer to that question.

**[27]** The second question is whether there are special circumstances that differentiate the Council from others who may have a similar interest. In paragraph 32 of its Brief of Argument, the Council establishes this special circumstance: "The Council's interest in this Board's policy

toward certification applications within the construction industry arises out of the interest of each of its Affiliates as the unions which represent trade divisions pursuant to Part VI, Division 13 of the SEA, and which supply labour to unionized employers through a hiring hall system", and again in paragraph 33: "the Council is the representative of the Affiliates who operate under that [hiring hall] model, and is ideally suited to present that evidence".

**[28]** The third question is whether the Council can demonstrate that it can provide a valuable assistance to the Board in considering the issues before it. As the Council represents all but one of the craft based unions that operate in the construction industry in Saskatchewan, they are well placed to answer any questions about how those unions operate and the effect on them of the Board's decision with respect to the application of the build-up principle in the construction industry.

**[29]** The Board finds that the Council satisfies the test to be granted exceptional intervenor status.

**[30]** The Board also considered the issue of whether the Council satisfies the test to be granted public interest intervenor status. In that case the Council would need to satisfy the Board that its perspective is different or that its participation would assist the Board in considering a public law issue before it.

**[31]** The Council certainly has a perspective that is different from both Local 151 (which states that the build-up principle is not in issue in this case) and the Employer (which takes no position on the issue). Would the Council's participation assist the Board in considering a public law issue before it? Neither Local 151 nor the Employer can provide the Board with evidence respecting craft unions that operate under Part VI, Division 13 of the Act or the full impact of applying or failing to apply the build-up principle to this or similar certification applications in the construction sector. Given their stated positions on the issue, they cannot be expected to provide the Board with arguments in favour of the application of the build-up principle in this matter.

**[32]** In *J.V.D. Mill Services*, this Board described its approach to applicants seeking standing as public interest intervenors in greater detail in the following paragraphs:

> **[24]** *Public Law (or often called Public Interest) intervenor status is granted when a court "is satisfied that the participation of the applicant may help the*

> *court make a better decision".**[10]** Public Interest Standing has been recognized by the courts in Saskatchewan**[11]**. The principles to be applied in determining whether to grant status to a public interest intervenor were set out by the Saskatchewan Court of Appeal in R. v. Latimer:**[12]***
>
> *1. Whether the intervention will unduly delay the proceedings?*
> *2. Possible prejudice to the parties if intervention be granted?*
> *3. Whether the intervention will widen the lis between the parties?*
> *4. The extent to which the position of the intervenor is already represented and protected by one of the parties? and*
> *5. Whether the intervention will transform the court into a political arena?*
>
> ***[25]** The Court in Latimer, supra, also noted that "[A]s a matter of discretion, the court is not bound by any of these factors in determining an application for intervention but must also balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the "lis".*
>
> ***[26]** The Board has also recognized that it must be cognizant of balancing the interests of the parties in having access to make representations to the Board and preserving the resources of the Board. As noted by the Board in Re: Merit Contractors Association**[13]** at paragraph 20:*
>
> > *These statutes represent an embodiment of public policy, and a wide range of persons may have an "interest" in a broad sense, in bringing to our attention various issues which may arise in conjunction with the implementation of these policies. As both the courts and other tribunals like our own have concluded, however, some limits must be set in allowing the assertion of interests which are contingent in nature. In Canadian Council of Churches v. The Queen (1992), 88 D.L.R. (4th) 193, the Supreme Court of Canada expressed the concern in this way:*
> >
> > > *. . . I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the Courts and preserving judicial resources. It would be disastrous if the Courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.*

**[33]** Addressing each of the *Latimer* principles in turn, the first principle is whether the intervention will unduly delay the proceedings. The Board would note that the Application for Intervention was filed on January 16, 2018, just 13 days after Local 151 filed its Certification Application. The Council proposes in its Brief of Argument to call "only minimal evidence", to not "duplicate any other party's evidence or argument" and "only make arguments which reflect its own distinct perspective and are relevant to the issue of the application of the build-up principle" (para. 45).

**[34]** With respect to the second principle, the Council intends to avoid any prejudice to the other parties by making “all reasonable efforts to work with any dates which are convenient to the parties” (para. 44).

**[35]** With respect to the third principle, the Board agrees that the intervention will not widen the *lis* between the parties. The application of the build-up principle in this case is a factor that the Board may decide to take into account as part of its consideration of whether the proposed unit is appropriate for certification.

**[36]** With respect to the fourth principle, the position of the Council is not already represented and protected by one of the parties. Local 151 argues that the build-up principle is not in issue in this matter. The Employer indicates that it takes no position on the issue.

**[37]** With respect to the fifth principle, the intervention would not transform the Board hearing into a political arena. It is proposed for the purpose of assisting the Board in making a determination on a legal issue potentially before the Board.

**[38]** Taking these five factors into account, and balancing them against the interests of the parties, and considering the resources of the Board, leads the Board to the conclusion that the Council has satisfied the tests for a public interest intervenor.

**[39]** Part of the function of the Board as a tribunal is to promote the expeditious resolution of labour disputes; the timely resolution of labour disputes is particularly important in the construction industry. Given how quickly the Application to Intervene was filed and considered, the Board is satisfied that granting limited intervenor status to the Council will not interfere with the timely resolution of this matter.

**[40]** When the Board considers the Certification Application, it may determine that the build-up principle should be considered and/or applied. All parties referred the Board to *K-Bro*. The Board applied the build-up principle in that case, where there were eight employees in the proposed unit at the time of the application for certification, but the workforce was expected to grow to 131 employees. In the Certification Application in this matter, the proposed unit comprises six employees, and the Council asserts that number is expected to grow to as many as 100 – 150 employees. While Local 151 and the Employer each denied this statement in its Reply to the Application to Intervene, neither provided any contrary information to the Board.

Therefore it is not clear at this point what the expected buildup of employees will be at the Chinook Power Station project, or for any other projects of the Employer in Saskatchewan.

**[41]** For the reasons set out above, there will be an Order as follows:

> If the Board decides that the build-up principle should be considered as one of the factors in its determination of the Certification Application, the Saskatchewan Building Trades Council is granted leave to intervene in order to provide the Board with:
>
> (a) Evidence as to the circumstances of the Chinook Power Station currently being constructed by SaskPower in Swift Current, Saskatchewan and the STG/ACC Mechanical & Water Treatment work for Phase 2 of that project relevant to the application of the build-up principle, as well as the distinction between craft and non-craft bargaining units in the construction industry;
>
> (b) Argument as to the proper application of the build-up principle based upon the evidence before the Board; and
>
> (c) Any further evidence or argument that the Board shall direct.

**[42]** This is a unanimous decision of the Board.

**DATED** at Regina, Saskatchewan, this **26th** day of **March, 2018.**

**LABOUR RELATIONS BOARD**

Susan C. Amrud, Q.C.
Chairperson