INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS, LOCAL UNION NO. 771, Applicant v. MATRIX LABOUR LEASING LTD AND 101059035 SASKATCHEWAN LTD., CARRYING ON BUSINESS AS PINNACLE INDUSTRIAL SERVICES, Respondents

LRB File No. 090-17 and 124-17; December 17, 2018
Chairperson, Susan C. Amrud, Q.C.; Members: Bert Ottenson and Allan Parenteau

For the Applicant Union:	Gary Caroline Lyndsay Watson
For the Respondent, Matrix Labour Leasing Ltd.	Thomas W. R. Ross
For the Respondent, 101059035 Saskatchewan Ltd., carrying on business as Pinnacle Industrial Services	Daniel P. Kwochka

Application for bargaining rights – Employer alleged abuse of process and issue estoppel based on Letter of Understanding it argued prevented application – Letter of Understanding did not address certification – No abuse of process or issue estoppel established.

Application by Union to name Pinnacle as true employer of 3 employees supplied by labour services company granted – Pinnacle had fundamental control over employees – Sound labour relations reasons for Board to exercise its discretion.

Voters list – Names contested by Union removed from list as three were not ironworkers and no evidence before Board that other ten were employed by Pinnacle - Ballots of three ironworkers contested by Employer held in abeyance pending resolution of Union's unfair labour practice application respecting why they left the worksite.

REASONS FOR DECISION

[1] On May 26, 2017 the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local Union No. 771 ["Union"] filed an Application for Bargaining Rights for all ironworkers, ironworker apprentices, ironworker journeymen, ironworker foremen and ironworker general foremen employed in the field by Matrix Labour Leasing Ltd. ["Matrix"] in

Saskatchewan[1]. The application indicated there were three employees in the proposed bargaining unit. On June 6, 2017, Matrix filed a Reply that denied that it employed any employees in the proposed bargaining unit.

[2] On June 20, 2017 the Union filed an Application for Bargaining Rights for all ironworkers, ironworker apprentices, ironworker journeymen, ironworker foremen and ironworker general foremen employed in the field by Pinnacle Industrial Services in Saskatchewan[2]. The application indicated there were 27 employees in the proposed bargaining unit[3]. On June 28, 2017 the Board ordered a vote by all eligible employees who were employed, as of June 20, 2017, within the unit applied for by the Union. The list of eligible voters set out in the Notice of Vote issued by the Board Returning Officer contained 42 names. The vote was held and the ballot box continues to be sealed.

[3] Pinnacle filed a Reply to the Application for Bargaining Rights in LRB File No. 124-17 on July 11, 2017 indicating that there were approximately 39 employees in the proposed bargaining unit on June 20, 2017. It stated that on or about April 20, 2017, Pinnacle and the Union entered into a Letter of Understanding ["LOU"] respecting work to be performed by Pinnacle at the Evraz Steel Plant in Regina. Pinnacle stated that the effect of the LOU was to preclude the Union from seeking a certification order and that it would be an abuse of the Board's processes to allow the Union to seek a certification order. In the alternative, if the certification order is granted, it should be confined to the Evraz Degasser Expansion Project at the Evraz Steel Plant.

[4] Pinnacle filed an Amended Reply on September 27, 2017 which again called into question the number of employees in the proposed bargaining unit, stating:

> *If Pinnacle is the true employer of the employees of Matrix Labour Leasing Ltd., which is not admitted and is specifically denied, Pinnacle states there would be approximately another 10 similarly situated employees in the proposed bargaining unit.*

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[1] LRB File No. 090-17.

[2] LRB File No. 124-17.

[3] An amended application was filed on June 29, 2017 and, after a telephone conference call hearing on August 31, 2017, the Board issued reasons on September 11, 2017 permitting the amendments. The amendments changed the name of the employers in the application to 101059035 Saskatchewan Ltd. o/a Pinnacle Industrial Services ["Pinnacle"] and Matrix, and increased the number of employees to 30.

A. ABUSE OF PROCESS AND ISSUE ESTOPPEL

Background

[5] On July 5, 2018 the Board held a hearing to consider the issues of abuse of process and issue estoppel. At the conclusion of the hearing the Board deliberated, and then advised the parties of their unanimous decision:

(a) Extrinsic evidence (including Joe Wollner-Kallis's affidavit) was not required to decide these issues; and

(b) The onus being on Pinnacle, the Board found that it had not satisfied the grounds for either abuse of process or issue estoppel.

[6] Pinnacle's application to dismiss the certification application was dismissed. These are the reasons for that decision.

[7] The question before the Board was, should the Application for Bargaining Rights filed by the Union be dismissed on the basis of the LOU it entered into with Pinnacle. The LOU reads as follows:

> *Letter of Understanding*
>
> *Union Local 771 Iron Workers and Pinnacle Industrial Services*
>
> *Address:*
>
> *The employer and Union 771 enter into a Letter Of Understanding (LOU) with respect to the EVRAZ Degasser Expansion Project.*
>
> *The purpose of the LOU is to ensure harmony between parties on the project.*
>
> *The Union 771 recognizes that Pinnacle Industrial Services has secured their contract at the EVRAZ Degasser Expansion Project prior to entering discussions of recognition with the Union.*
>
> *Intent & Agreement:*
>
> *Both parties, Union 771 and Pinnacle Industrial Services agree that work will continue under the terms and conditions Pinnacle Industrial Services has initially negotiated with EVRAZ for this project.*
>
> *Union 771 recognizes that Pinnacle Industrial Services requires the ability to select and hire employees possessing Ironworker skills to perform its contractual obligations to the client.*

> *Both parties understand that there is to be no remittance of dues or wage schedule change to what is already in place.*
>
> *This LOU does not create a collective bargaining relationship between Pinnacle Industrial Services and Union 771, nor does it constitute voluntary recognition of the Union.*
>
> *Both Pinnacle Industrial Services and Union 771 agree that if they are unable to resolve any dispute over the interpretation or administration of this LOU, those disputes will be submitted to arbitration under Saskatchewan's The Arbitration Act, 1992 before an arbitrator that both parties agree to at such time.*
>
> *Union 771 further agrees to assist Pinnacle Industrial Services and the Union 771 represented employees, where agreed to, in industry training that would add value to the safe and productive completion of the project.*
>
> *The Parties, Pinnacle Industrial Services and Union 771 recognize and agree that, in the highly competitive business of the Employer, and the business in respect of which the employees are engaged, personal contact is of primary importance in securing and retaining employees and, therefore, the Union hereby covenants and agrees that it will not, during the term of the Project, or for a period of Twelve (12) months after the Project has ended, approach, employ, solicit or make an offer to enter into any type of relationship with the Union (Including the international representation) to any employee, agent, officer or consultant of the Employer. The aforementioned only applies to employees who are not already members of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers.*
>
> *This agreement executed, by all parties, will constitute a full, original and binding agreement for all agreed purposes. Copies may be executed either in original, faxed, or electronic form, provided that any party executing by fax or electronic form will promptly forward an original signed copy of this agreement upon request.*

[8] Pinnacle raised a preliminary issue respecting whether the Board has jurisdiction to hear this matter. Pinnacle is of the view that the Board clearly has jurisdiction in respect of this dispute. The Union agrees. Relying on the analysis of the Board in *Modern Niagara Western Inc. v UA, Local 179*, 2016 CarswellSask 20 (SK LRB), 2016 CLLC 220-022, 277 CLRBR (2d) 86 ["*Modern Niagara Western*"], the Board also agrees that it has jurisdiction to hear this matter. The essential character of this dispute is not a breach of contract but an issue raised in the context of an application for bargaining rights, a jurisdiction granted exclusively to the Board.

Argument by Pinnacle

[9] Pinnacle argues that, by applying for certification after specifically agreeing it would not, the Union's application is an abuse of process. It relies on two decisions of the Supreme Court of

Canada that it says describe proceedings that are an abuse of process as "unfair to the point that they are contrary to the interest of justice"[4] or "(1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency"[5]. It also referred to *Saskatchewan Beach (Resort Village) v Collins*, [2013] SKCA 12, which described abuse of process as:

> *. . . a relatively flexible doctrine that engages the inherent power of a court to prevent the misuse of its procedures, either in a fashion which would be clearly unfair to a party or which would otherwise bring the administration of justice into disrepute (para 30).*

[10] The Board considered this issue in *Modern Niagara Western*, and dismissed the union's application for certification as an abuse of process on the basis of an agreement it had signed with the employer that Pinnacle describes as not materially different from the LOU. Pinnacle argues that it would be unfair to it and a misuse of the Board's procedures for the Board to hear the Union's certification application. It states that since it relied on the LOU when it hired Union workers, the Union's application for certification is an abuse of the Board's process and should be dismissed.

[11] With respect to estoppel, Pinnacle argues that the LOU expressly prohibits the certification application. Referring to *Modern Niagara Western*, it argues that all of the elements of estoppel have been established: the Union agreed not to enforce its legal right to apply for certification and Pinnacle relied on that representation, to its detriment.

[12] Pinnacle's view is that the LOU unambiguously establishes that the true intention of the parties was to prevent an application for certification from being made by the Union. It argues that the Board does not need to look beyond the LOU to see that. The language in the LOU may be clumsy but what is clear is that Pinnacle was concerned about representation.

[13] Pinnacle relied on the Union's agreement that it would not apply for certification when it hired Union members to work on the Evraz Degasser Expansion Project.

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[4] *R v Power,* [1994] 1 SCR 601 at p. 616. The full sentence in which that phrase appears reads as follows: "To conclude that the situation 'is tainted to such a degree' and that it amounts to one of the 'clearest of cases', as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice".

[5] *R v Scott,* [1990] 3 SCR 979 at para 70. This comment appears in the dissenting judgment.

[14] Pinnacle suffered detriment when the Union breached the LOU and applied for certification, because it did not want to be unionized. For an employer to have its workforce organized when it does not want it organized is not a benefit. There is an economic detriment to being organized in terms of time and energy. Pinnacle says it suffered a detriment when the Union breached the LOU in terms of business reasons, time and energy detriment and economic detriment.

[15] Pinnacle's view is that the true intention of the parties is plain and obvious, so the Board does not need to look beyond the LOU. However, if the Board is of the view that there is ambiguity, extrinsic evidence of surrounding circumstances is admissible to assist the Board. Pinnacle argues that the Board could in that circumstance admit and rely on the affidavit of Joe Wollner-Kallis to determine the true intention of the parties. It argues that *United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd.*, [1993] 2 SCR 316 and *Modern Niagara Western* provide support for its argument that subsequent conduct is relevant in interpreting an agreement.

Argument by Union

[16] In the Union's view the Board should focus solely on the LOU in determining this preliminary application. It argues that the affidavit of Joe Wollner-Kallis is neither admissible nor relevant. It circumvents the parol evidence rule, which the Supreme Court of Canada has described as follows:

> *[59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (King, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and Eli Lilly & Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129, at paras. 54-59, per Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316, at pp. 341-42, per Sopinka J.).*
>
> *[60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.*[6]

[6] *Sattva Capital Corporation v Creston Moly Corporation,* 2014 SCC 53 (CanLII).

[17] Since the LOU contains what the Union refers to as an entire agreement clause (the final paragraph), Pinnacle's attempt to suggest that there was a different or additional agreement should be disallowed. It disagrees that the LOU prevented it from filing this application. Accordingly, no abuse of process has been proven.

[18] Turning to issue estoppel, the Union relies on the following passage from *Halpape v Bank of Montreal*, 2017 SKQB 23:

> *[25] Similarly, in Canadian Superior Oil Ltd. v Paddon-Hughes Development Co., [1970] SCR 932, Martland J. described the elements of estopped [sic] by representation (at page 939):*
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> > *The essential factors giving rise to an estoppel are I think:*
> > *(1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made*
> > *(2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.*
> > *(3) Detriment to such person as a consequence of the act or omission.*
>
> *[26] Similarly, in Ryan v Moore, 2005 SCC 38, [2005] 2 SCR 53 [Ryan], Bastarache J. described estoppel by representation as follows:*
>
> > *5 Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it (Page v. Austin (1884), 10 S.C.R. 132, at p. 164).*

[19] In the Union's view, nothing in the LOU can be construed as preventing a certification application. There was no detrimental reliance and no prejudice. This means the elements of issue estoppel have not been proven.

[20] In *CLAC Local 63 v Transline Ltd.*, 2003 CarswellAlta 413, [2003] Alta.L.R.B.R. 39, the Alberta Labour Relations Board made the following comments that the Union argues are relevant to the interpretation of the LOU:

> *[22] Brown & Beatty in Canadian Labour Arbitration reviews the proper construction of collective agreements and the use of extrinsic evidence. At page 4-36 they state:*

> *It has often been stated that the fundamental object in construing the terms of a collective agreement is to discover the intention of the parties who agreed to it. As one arbitrator, quoting from Halsbury's Laws of England, stated in an early award:*
>
> > *The object of all interpretation of a written instrument is to discover the intention of the author, the written declaration of whose mind it is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit.*
>
> *And further:*
>
> > *But the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention.*
>
> *Accordingly, in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions.*

[21] The Union also relied on *CJA, Local 397 v Schollig*, 2002 CarswellOnt 8918, [2002] OLRB Rep. 952, in which the Ontario Labour Relations Board made the following findings:

> *9. The express recital of fact set out in the voluntary recognition agreement provides, in my view, the complete answer to counsel's argument about the intention of the responding party. His intention at the time he signed the voluntary recognition agreement, to the extent that it is contrary to the express words used in the agreement, is irrelevant. There is no basis for making any enquiry into the intention of the responding party as the express recital set out in the voluntary recognition agreements stipulates that at the time the agreement was signed the facts necessary for a valid voluntary recognition agreement existed. The Board should not, in my view, permit a party that has signed an agreement in which that party acknowledges the existence of certain facts that are clearly set out in that agreement to call evidence at a later date for the purpose of contradicting those facts. To permit parties to written agreements to engage in such manoeuvres would undermine their certainty and reward chicanery.*

[22] *Seymour Building Systems Co. and UBCJA, 26 Locals, Re*, 1989 CarswellBC 2793, a decision of the British Columbia Industrial Relations Council includes the following comment:

> *25 Turning to the second issue, the Panel concludes there is insufficient evidence to establish either an agreement or an estoppel based on promises or representations which precludes the Carpenters' application for certification of the proposed unit of Seymour's employees. At the outset, it must be recognized that an agreement to forego the employees' fundamental right to participate in collective bargaining under the Act must be established by clear and convincing evidence. In Heaae Construction Ltd., BCLRB No. 137/86, the Board dealt with the employer's assertion that the applicant unions were*

> *estopped from bringing an application for certification based on the terms of an agreement reached during discussions between the employer, its solicitor and the Building Trades Council. The Board faced conflicting testimony with respect to the existence of such an agreement and no party had specifically raised the matter of certification. Emphasizing that the employer sought to deny the fundamental right of an employee to organize and bargain collectively (see, Sections 3(1) and 3(3)(b)), the Board held that a union could be estopped from applying for certification but only in very clear circumstances.*

[23] The Union argues that, based on these three cases, Pinnacle has not proven issue estoppel and its application should be dismissed.

Relevant Legislative Provisions

[24] The Union drew the following provision of *The Saskatchewan Employment Act* ["Act"] to the Board's attention in considering these issues:

> ***Right to form and join a union and to be a member of a union***
> *6-4(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*

Analysis and Decision

[25] The first issue for the Board to determine is whether the Affidavit of Joe Wollner-Kallis is admissible in determining the appropriate interpretation of the LOU. It is the Board's decision that the affidavit is inadmissible. The parol evidence rule precludes admission of evidence that is meant to "add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing" or to speak to "the subjective intentions of the parties"[7]. The intention of the parties must be gathered from the LOU. The Board must determine what the parties meant by the words they used. Pinnacle may wish that the LOU said something different, and it may have intended that the LOU say something different but evidence of that intention is inadmissible and irrelevant. Extrinsic evidence is unnecessary to show that nothing in the LOU prevented the filing of a certification application. While it might be argued that some portions of the Affidavit might have been admissible as extrinsic evidence of surrounding circumstances, the Board determined that it is irrelevant. Whether or not there were discussions of the issue of whether the Union had intentions to organize the Pinnacle worksite is not relevant here when the LOU so clearly does not address that issue.

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[7] Supra, footnote 6.

[26] The Board agrees with the Union that the final paragraph of the LOU means that the LOU contains the parties' entire agreement.

[27] The next issue is abuse of process. The Board does not rely on the two decisions of the Supreme Court of Canada referred to by Pinnacle. They both concern prosecutions of criminal offences and whether the courts should second-guess the exercise of prosecutorial discretion, a highly different circumstance than the subject case. The Board notes, however, the Supreme Court's admonishment in both cases that abuse of process will be used to prevent proceedings only in the clearest of cases. The Board finds that this standard is particularly applicable in this case, where the employer is challenging its employees' right to engage in collective bargaining.

[28] There is nothing in the LOU that satisfies the Board that the Union agreed not to make a certification application with respect to Pinnacle. The Board finds that Pinnacle has not proven that the certification application is an abuse of the Board's procedures or would otherwise bring the administration of justice into disrepute.

[29] Lastly, to be successful on the application for estoppel, Pinnacle must prove three elements:

(a) An unambiguous representation was made by the Union in the LOU that it would not make an application for certification respecting Pinnacle, with the intention that Pinnacle would act on it.
(b) The representation was relied on by Pinnacle.
(c) Pinnacle acted on the representation to its detriment.

[30] As noted above, the Board agrees with the Union that the LOU does not contain an unambiguous representation that it would not apply for certification. This is even more obvious when the paragraph in the LOU relied on by Pinnacle is compared to the paragraph the Board relied on in *Modern Niagara Western*:

> LOU
> *The Parties, Pinnacle Industrial Services and Union 771 recognize and agree that, in the highly competitive business of the Employer, and the business in respect of which the employees are engaged, personal contact is of primary importance in securing and retaining employees and, therefore, the Union hereby covenants and agrees that it will not, during the term of the Project, or for a period of Twelve (12) months after the Project has*

> *ended, approach, employ, solicit or make an offer to enter into any type of relationship with the Union (Including the international representation) to any employee, agent, officer or consultant of the Employer. The aforementioned only applies to employees who are not already members of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers.*
>
> Modern Niagara Western
> *The Union agrees that it will not apply for certification of employees or take any other action, such as a common employer application, to have the Company designated as a Union Contractor either during the currency of the MOU or for 6 months after the expiry of the MOU.*

[31] The Board does not agree with Pinnacle that these provisions are not materially different.

[32] Given there was no representation, it is unnecessary to consider the other two elements of issue estoppel.

[33] Pinnacle bore the onus in these issues. They did not make out a case for abuse of process or issue estoppel and accordingly, their application to dismiss the certification application was dismissed.

B. TRUE EMPLOYER

Background

[34] On August 22 and 23, 2018, the Board reconvened to consider the issues of true employer and voters list. With respect to the true employer issue, the question before the Board was who was the true employer of three ironworkers: Rathahonni Diabo, William McGregor and Wayne Smoke. Evidence on this issue was provided by Michael Trudel, Construction Manager for Pinnacle at the Evraz Degasser Expansion Project[8] and Michael Legault, Vice President of Operations for Matrix[9].

[35] According to its website, Matrix is a "full-service human resources agency specializing in the placement and administration of the skilled trades workforce all across Canada". According to Mr. Legault, when they obtain a contract to supply personnel, they have some employees that they use for this purpose, but they also source people through partnerships with other labour

[8] Mr. Trudel was subpoenaed by the Union.
[9] The evidence of Mr. Legault was heard on May 16, 2018, at a hearing otherwise devoted to pre-hearing issues.

suppliers. Matrix, in partnership with Canadian Workforce Connection ["CWFC"], entered into an agreement with Pinnacle on May 10, 2017 to provide Pinnacle with "qualified Workers in the number requested to perform the Scope of Work as described herein". The qualified workers requested included three ironworkers. Since Matrix had no ironworkers of its own to provide, it recruited them through Rockies Construction Solutions Inc. ["Rockies"].

[36] The evidence provided by Mr. Legault was that Rockies' role was to: source quality candidates; pay them; pay required remittances[10]; and arrange and pay for the employees' travel and housing. Pinnacle was responsible for: giving direction on site, scheduling, authorizing overtime and dealing with attendance issues.

[37] Matrix did not provide supervision on the Pinnacle worksite. Matrix did not train, discipline, evaluate, assign duties to or pay the three employees. Rockies did not train, discipline, evaluate or assign duties to the three employees. Matrix entered into evidence unsigned employment agreements that the three ironworkers purportedly entered into with Rockies. It also filed a Record of Employment issued by Rockies for each of these ironworkers that showed the last day for which they were paid as June 4, 2017.

[38] Mr. Trudel identified three of the people on the Voters List as being the ironworkers supplied by Matrix: Diabo, McGregor and Smoke. His evidence with respect to these three ironworkers was that, as with all other workers on this project, he was given their resumes for review and approval. He had the authority to reject workers proposed by Matrix, and did so in some cases on this project, but approved these three ironworkers, who were then hired. He treated them in the same way as he treated his other employees; he scheduled them in the same way as the others; he gave them the same kind of work. They were fully integrated into the workforce. He had full authority over them. They did not use Pinnacle timesheets but he reviewed and approved their timesheets, which were then sent to Pinnacle head office. He had daily contact with them. While no discipline was required for these three, he had full authority to discipline them. When they were approached about certification by the Union, they came to him, as their employer, because they did not know what to do. He testified that he advised them that, as their employer, he would not get involved and could not interfere. By text dated May 31, 2007, Matrix asked that he give them layoff notices. Since he had no reason to lay them off, he declined to do so. Instead,

[10] For example, for employment insurance, Canada Pension Plan, income tax.

they went on days off then and never came back. Neither Mr. Legault nor Mr. Trudel could explain what happened to them.

[39] As noted previously, on September 27, 2017 Pinnacle filed an Amended Reply that stated:

> *If Pinnacle is the true employer of the employees of Matrix Labour Leasing Ltd., which is not admitted and is specifically denied, Pinnacle states there would be approximately another ten similarly situated employees in the proposed bargaining unit.*

[40] On cross-examination, Pinnacle's lawyer asked Mr. Trudel about these other people. Mr. Trudel described them as one-man corporations that would invoice Pinnacle for their work, and Pinnacle would pay their invoices. He testified that he considered these people to be in his employ and under his direction. Pinnacle provided no direct evidence at the hearing respecting who these other people were or the terms of their engagement.

[41] All three parties referred the Board to *United Food and Commercial Workers, Local 1400 v. Canadian Salt Company Limited*, 2010 CanLII 65961 (SK LRB) ["*Canadian Salt*"]. In that case the Board made the following findings in its determination of whether it should designate someone other than the "actual" employer as the "true" employer for labour relations purposes:

> *[84] Section 2(g)(iii) of the Act permits the Board to designate the principal (i.e.: the business or person to whom a contractor provides its services) to be the designated employer of a contractor's employees for purposes of collective bargaining. While the contractor continues to be the "actual" employer of those employees for most purposes (source deductions, Labour Standards, Workers Compensation, insurance, etc.), the principal is deemed by the Board to be the "employer" of the employees for purpose of application of The Trade Union Act. In such case, the principal is described (somewhat inaccurately) as the "true" employer.*
>
> *[85] This Board has previously been called upon to make determinations as to whether the principal or the contractor is the "true" employer of a unit of employees pursuant to s. 2(g)(iii) of the Act. In doing so, the Board has first focused its examination on which party exercises "fundamental control" over labour relations at the work place. In other words, who has effective control over the essential aspects of the employment relationship? The Board has previously adopted several (non-exclusive) criteria to assist in this determination, which criteria include an examination of the following aspects of the relationship between the parties:*
>
> *1 The party exercising direction and control over the employees performing the work;*
> *2 The party bearing the burden of remuneration;*
> *3. The party imposing discipline;*
> *4. The party hiring the employees;*

> *5. The party with the authority to dismiss the employees;*
> *6. The party who is perceived to be the employer by the employees; and*
> *7. The existence of an intention to create the relationship of employer and employee.*
>
> *[86] The next stage of the Board's inquiry is for the Board to determine whether or not it ought to exercise its discretion in the circumstances of the particular case before it. As previously stated by this Board, a determination made pursuant to s. 2(g)(iii) involves the exercise of an extraordinary authority on the part of the Board and thus the Board's discretion must be based on a sound labour relations footing. See: Wayne Bus Ltd., supra, and Canadian Union of Public Employees, Local 4836 v. Lutheran Home of Saskatoon, Regina Lutheran Care Society Inc. and Broadway Terrace Inc., 2009 CanLII 54774 (SK LRB), 2009 CanLII 54774, LRB No. 043-09.*

Argument by the Union

[42] Based on these criteria, the Union argues that Pinnacle is the true employer of the Matrix ironworkers. Pinnacle exercised day-to-day direction and control over them; they were fully integrated into the workforce; they performed the same work as the other ironworkers, that was exclusively assigned, directed and supervised by Pinnacle. Hiring, pay and discipline were all within Pinnacle's control. In other words, Pinnacle was the one who exercised fundamental and effective control over these employees. Matrix's role was just to recruit them; they were entirely hands off. Rockies was merely a payroll company. While Rockies issued their pay, Pinnacle ultimately bore the burden of their remuneration. Mr. Trudel testified that the reason Pinnacle turned to Matrix for ironworkers was because of the difficulties it was encountering in finding a sufficient number. Pinnacle's intention was that they would join Pinnacle's workforce.

[43] The Union argued that Pinnacle should be at the bargaining table because it effectively controls the purse strings. In addition, these three employees were fully integrated into Pinnacle's workforce. Rockies and Matrix effectively delegated all their managerial functions over these employees to Pinnacle.

Argument by Pinnacle

[44] Pinnacle argues that there is no value in having Pinnacle at the bargaining table with respect to these three employees; they only worked on the project for two weeks. With respect to the seven criteria set out in *Canadian Salt*, Pinnacle agrees that it exercised direction and control over the employees at the worksite – a labour broker cannot practically do that. It does not believe that any other criteria were met. Pinnacle did not bear the burden of remuneration: if the ironworkers were not paid they would sue Matrix or Rockies. Pinnacle did not impose discipline.

Pinnacle approved employees for the purpose of working on their project, but they did not hire them. Pinnacle could have excluded them from the worksite, but they would continue to be employed by Rockies. The ironworkers perceived Rockies to be their employer – that is who provided them with their T4s and Records of Employment. Rockies had employment agreements with each, with an intention to procure work for them.

[45] Pinnacle's view is that the test for true employer has evolved since the *Canadian Salt* decision was issued. Pinnacle argued that the Board should follow the reasoning in *PAFHQ Construction GP Ltd. v. IUPAT, Local 739*, 2013 CarswellSask 890, which found that the real issue is with whom did the employees enter into a contract of employment. The answer to that question is Rockies. There is no labour relations reason to treat Pinnacle as the true employer of these three ironworkers.

Argument by Matrix

[46] Matrix argues that the true employer is either Rockies or Pinnacle, it is not Matrix; Matrix was just a middle man.

[47] Matrix does not meet any of the criteria in *Canadian Salt*. They had no control over, supervision of or even communication with these employees. Rockies set up their accommodation and transportation, hired them, paid them and could terminate them. The employees' legal relationship was with Rockies. Pinnacle had day-to-day control. This situation is similar to the situation in *Canadian Salt*, where the role played by Canadian Salt Limited was similar to the role played here by Pinnacle; the role of Rockies is similar to Production Services (1990) Ltd. and the role of Matrix is similar to Cardinal Construction Co. Ltd. In that case, the Canadian Salt Company Limited was found to be the true employer. The issue for the Board to determine is who had fundamental control over these workers, and whether that is Rockies or Pinnacle, it is definitely not Matrix.

[48] Matrix referred the Board to the decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 568 v K-Bro Linens Systems Inc.*, 2014 CanLII 63989 (SK LRB) as support for its argument that fundamental control is the key issue for the Board to determine.

[49] Matrix also referred the Board to *Canadian Union of Public Employees, Local 4836 v Lutheran Sunset Home of Saskatoon (Luthercare Communities)*, 2009 CanLII 54774 (SK LRB) where, before reviewing the *Canadian Salt* criteria, the Board emphasized the following purpose for examining those criteria:

> *With respect to the application of s. 2(g)(iii), this Board has previously been called upon to make determinations as to whether the principal or the contractor is the "true" employer within the meaning of the Act (i.e. for purposes of collective bargaining). In doing so, the Board has focused its examination on which party exercises "fundamental control" over labour relations at the work place. In other words, who has effective control over the essential aspects of the employment relations?*[11]

Relevant Legislative Provisions

[50] Subclause 2(g)(iii) of *The Trade Union Act*, which was relied on by the Board in *Canadian Salt*, is now found at subclause 6-1(1)(i)(iii) of the Act:

> ***Interpretation of Part***
> *6-1(1) In this Part:*
>
> *(i) "employer" means:*
>
> *(iii) with respect to any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may determine for the purposes of this Part;*

Analysis and Decision

[51] The Board will first address the issue of whether Matrix is the "true" employer of Diabo, McGregor and Smoke. It is not. As Matrix argued, it was just a middle man with no control over or input into any aspect of their employment or labour relations circumstances.

[52] The real issue is whether Rockies or Pinnacle is their "true" employer. In *Pointe-Claire (City) v Quebec (Labour Court)*, [1997] 1 SCR 1015, the Supreme Court of Canada stated that identifying the real employer in a tripartite relationship can be difficult because the personnel

[11] At para 88.

agency and its client each have some of the traditional attributes of an employer vis-á-vis the employee[12]. The same situation exists here.

[53] In *Pointe-Claire* the Quebec labour commissioner and Labour Court found that a temporary employee hired by the city through a personnel agency was included in the bargaining unit of the union that represented the city's permanent employees. The Supreme Court upheld that decision. At paragraph 49 it cited with approval the following approach to determination of this issue:

> *In applying collective labour relations legislation that is similar to that in Quebec, Canadian administrative agencies have also dealt with how to identify the real employer in a tripartite relationship. Most of the decisions of those agencies, and specifically the Ontario Labour Relations Board ("OLRB") and the Canada Labour Relations Board ("CLRB"), have noted that the essential test for identifying an employer-employee relationship in a tripartite context is that of fundamental control over working conditions. The application of the fundamental control test leads to an analysis of which party has control over, inter alia, the selection, hiring, remuneration, discipline and working conditions of temporary employees and to a consideration of the factor of integration into the business*.

This analysis points to a decision that Pinnacle exercised fundamental control over these three employees.

[54] The Board does not agree with Pinnacle's submission that *PAFHQ* is comparable to the case before us. In *PAFHQ*, Athabasca Labour Services was the actual employer. While Points Athabasca FHQ looked like an employer, the Board found that it was "merely the vessel through which a partnership of companies bids on construction projects"[13]. The following paragraph clearly delineates the differences between the operations of Points Athabasca FHQ and the operations of Pinnacle:

> *[42] With respect to the present application, we were not satisfied that Points Athabasca FHQ had fundamental control over labour relations in the workplace (or more importantly, that Athabasca Labour Services did not have effective control over the essential aspects of the employment relationship involving the subject employees). Athabasca Labour Services hired the subject employees, set their wages (albeit within a range established by someone else), and provided for the onsite supervision of these individuals. In our opinion, the circumstances of this case are distinguishable from the circumstances before this Board in Canadian Salt, supra. In that case, the Board found that, once the disputed employees were dispatched to the workplace, the principal (in that case, Canadian Salt) exercised day-to-day direction and control over the employees that had been dispatched by the contractor (in that case, Production Services) to the extent that the contractor had effectively delegated all of its primary managerial functions over its employees to the*

[12] At para 18.
[13] At para 34.

> *principal. The principal (and not the contractor) had authority over day-to-day work assignments, over most conditions of employment, and with respect to remuneration, discipline, and dismissal. In our opinion, the facts in the present application do not reasonably lead to the conclusion that Points Athabasca FHQ had that same kind of control with respect to the subject employees.*

[55] Pinnacle, like the principal in *Canadian Salt*, exercised day-to-day direction and control over the employees dispatched by Rockies. Rockies effectively delegated all of its primary managerial functions over these employees to Pinnacle. Pinnacle had authority over work assignments, over most conditions of employment, and with respect to remuneration and discipline. The issue of who had authority to dismiss these employees is an open question. According to Mr. Trudel, Pinnacle had that authority. The fact that Matrix asked Mr. Trudel to issue them layoff notices suggests that Matrix shared that view. Mr. Legault testified that he thought Rockies would have authority to terminate them. However, neither Mr. Trudel nor Mr. Legault could explain why they ceased working at the Evraz Degasser Expansion Project.

[56] In *PAFHQ*, in deciding whether there was a sound labour relations footing on which the Board should exercise its discretion to name Point Athabasca FHQ as the "true" employer, the Board noted that Points Athabasca FHQ was not the only contractor for whom Athabasca Labour Services supplied workers, and that if Points Athabasca FHQ was designated as the true employer "it would be necessary to limit the scope of that designation to only those employees that were assigned by Athabasca Labour Services to work for Points Athabasca FHQ"[14]. In that case such a designation would have caused a significant practical problem. In this case, that is exactly the order that the Union is seeking.

[57] Based on the seven criteria in *Canadian Salt*, the Board is satisfied that Pinnacle exercised fundamental control over Diabo, McGregor and Smoke and the essential aspects of their employment:

- Pinnacle exercised day-to-day direction and control over them and the performance of their work.
- Pinnacle was responsible for their pay. Pinnacle reviewed and approved their timesheets before Matrix's invoice would be paid. Pinnacle paid Matrix an hourly rate per employee for their hours worked. According to the contract entered into by Pinnacle with Matrix and CWFC, this billing rate ($60/hour) included all "wages,

[14] At para 48.

source deductions, contributions, WCB premiums, insurance and benefits. Travel and lodging costs, etc.".

- While no discipline was required with respect to these three ironworkers, Pinnacle was the party that would have imposed it.
- Pinnacle had total control over whether they were hired for this project.
- When they had interpersonal issues on the worksite they turned to Mr. Trudel, the person they perceived as their employer.
- The seventh criterion is unclear in terms of whose intention is to be analyzed. Suffice to say, these three were treated as Pinnacle employees.

[58] The Board is further satisfied that this is an appropriate case in which to exercise its discretion and designate Pinnacle as the true employer. The role played by Pinnacle with respect to these three ironworkers is the role of principal as described in the following passage from *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation and Marwest Food Systems Ltd.*, [1996] Sask. L.R.B.R. 523, at p. 530-531:

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

[59] This passage was relied on by the Board in *Canadian Salt*:

> *[91] In light of Canadian Salt's control over wages and its financial arrangements with Production Services (1990) Ltd. (being on a cost-plus basis), separating the responsibility for the payment of wages from the responsibility for collective bargaining will have little negative impact on the contractor. While Production Services (1990) Ltd. may be the actual employer of its employees, its capacity to effectively bargain with the Union (in the event the Union should be certified) would be undermined by Canadian Salt's fundamental control over both the purse strings and most aspects of labour relations at the workplace. Simply put, designating Canadian Salt as the "true" employer will put the party having effective control over industrial relations at the bargaining table.*

[60] Designating Pinnacle as the "true" employer will put the party having effective control over industrial relations at the bargaining table. Pinnacle had fundamental control over both the purse strings and labour relations at the workplace. Therefore, Pinnacle is designated as the true employer of Rathahonni Diabo, William McGregor and Wayne Smoke.

C. VOTERS LIST

The Notice of Vote included the following list of Eligible Voters:

Anderson, Samantha	Andres, Roque
Balas, George	Barwell Josh
Binnie, Andrew	Brow Michael
Chmelyk, Ashley	Diabo, Rathahonni
Harder, Tyson	Hynes, Patrick
Johnson, Jeff	Kessir, Dylan
Kohnke, Brent	McGregor, William
McKenna, Cailen	Mihalyko, Kenton
Moroz, Vladimir	Nesbitt, Cameron
Nesbitt, Stan	Otway, Dave
Robbins, Eric	Robinson, Paul
Roellchen-Pfohl, Benjamin	Sapinsky, Jeremy
Savage, Jared	Saxton, Jadon
Segouin, Martial	Shewchuk, Adam
Smoke, Wayne	Sund, Carl
Trudel, Shawn	Turgeon, Travis
Uzeloc, Kevin	Warner, Yancy
Wookey, Mike	Windrum, Nic
Xainakhone, Joy	Yashinski, Adam
Young, Howard	Yurkoski, John
Izaiah, Zaphe	Zapisotsky, Oleksandr[15]

[15] These are the names as they appeared on the list of Eligible Voters, which differed in some cases from the spellings on the T-4s submitted as evidence. Notably, Zaphe Izaiah's name is actually Izaiah Zaphe.

Argument by Union

[61] The Union objected to 13 of these names for a variety of reasons including none of them were employed in the proposed bargaining unit, seven were not employed at the date of the Application for Bargaining Rights or as of June 28, 2017 (the date of the Direction for Vote/Notice of Vote)[16] and two were managerial employees[17]:

Harder, Tyson	Hynes, Patrick
Johnson, Jeff	Nesbitt, Cameron
Nesbitt, Stan	Robbins, Eric
Robinson, Paul	Savage, Jared
Sund, Carl	Uzeloc, Kevin
Wookey, Mike	Young, Howard
Zaphe, Izaiah	

[62] The Union's position was confirmed by the evidence of Mr. Trudel, Pinnacle's construction manager, who had full authority over the Evraz Degasser Expansion Project and daily contact with the ironworkers on that project. Mr. Trudel was asked to review all of the names on the Voters List. He did not recall working with any of the following ten people:

Harder, Tyson	Hynes, Patrick
Johnson, Jeff	Robbins, Eric
Robinson, Paul	Savage, Jared
Sund, Carl	Uzeloc, Kevin
Wookey, Mike	Young, Howard

He testified that Cameron Nesbitt and Stan Nesbitt were pipefitters and that Izaiah Zaphe was a labourer. No evidence was provided to the Board that the 13 people challenged by the Union were employed by Pinnacle as ironworkers.

[16] Hynes, Johnson, Robbins, Robinson, Savage, Sund, Uzeloc.
[17] Wookey, Young.

Argument by Pinnacle

[63] Pinnacle argues that there is a presumption that the list is accurate and it is up to the challenger to prove it is not. In argument it suggested that the ten people unknown to Mr. Trudel were working as ironworkers for Pinnacle elsewhere in Saskatchewan.

[64] It submitted that the three Matrix/Rockies employees should not be included because they were no longer employees on June 20, 2017, the date designated in the Direction for Vote. According to their Records of Employment, the last day for which they were paid was June 4, 2017.

Relevant Legislative Provisions

[65] Section 6-11 of the Act sets out the responsibility of the Board on an application for certification:

> ***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;*
>
> *…*
>
> *(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*

[66] Section 6-12 of the Act sets out the requirement for a vote to be held on a certification application:

> ***Representation vote***
> *6-12(1) Before issuing a certification order on an application made in accordance with section 6-9 or amending an existing certification order on an application made in accordance with section 6-10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.*

[67] Subsection 6-64(1) establishes the purpose of Division 13 of Part VI of the Act:

> ***Purpose of Division***
> *6-64(1) The purpose of this Division is to permit collective bargaining to occur in the construction industry on the basis of either or both of the following:*
>
> *(a) by trade on a province-wide basis;*
>
> *(b) on a project basis.*

[68] *The Saskatchewan Employment (Labour Relations Board) Regulations* contain the following provisions that apply to the conduct of a vote:

> ***Required information - conduct of vote***
> *22(1) On filing an application pursuant to the Act and these regulations respecting a matter for which the board is authorized or required by the Act to conduct a vote, the registrar may issue a written direction to an employer of employees whom the registrar considers affected by the application requiring the employer to file with the registrar the employer's payroll records respecting those employees.*
> *(2) The payroll records mentioned in subsection (1) must identify the names, positions and classifications of employees who are employed in the unit or units of employees specified by the registrar in the written direction as at the date specified by the registrar in the written direction.*
> *(3) In addition to the payroll records, an employer to whom a written direction pursuant to subsection (1) is issued shall also file with the registrar the following additional information:*
> *(a) the location of any workplaces at which the employees mentioned in subsection (1) are employed;*
> *(b) any safety restrictions respecting access to the workplaces mentioned in clause (a);*
> *(c) the hours of work of the employees at the workplaces mentioned in clause (a).*
> *(4) An employer to whom a written direction pursuant to subsection (1) is issued shall file the payroll records required by this section within three business days after being served with the written direction.*
>
> ***Conduct of votes***
> *23(1) In this section, "agent" means a person appointed pursuant to subsection (3).*
> *(2) On the filing of an application respecting a matter for which the board is authorized or required to conduct a vote pursuant to the Act or these regulations, the board may:*
> *(a) if the board considers it to be appropriate, direct that a vote of employees be conducted by secret ballot before the application is heard by the board; and*
> *(b) provide any directions respecting the conduct of the vote that the board considers appropriate.*
> *(3) The board may appoint as its agent the registrar or any other person who the board is satisfied is independent from the parties to the application to conduct a vote required or authorized by the Act.*
> *(4) If the registrar is appointed by the board as its agent:*
> *(a) the registrar may delegate to one or more other persons the exercise of any of his or her powers, or the fulfilling of any of his or her duties, as agent pursuant to this section and impose any terms and conditions on the delegation that the registrar considers appropriate; and*
> *(b) the exercise of any powers or the fulfilling of any duties by a delegate mentioned in clause (a) is deemed to the exercise of those powers or the fulfilling of those duties by the registrar.*

(5) An agent shall:

(a) act as the returning officer for the vote;

(b) comply with any directions given by the board respecting the vote;

(c) establish a list of employees who are eligible to vote;

(d) determine the form of the ballot to be used in the vote;

(e) determine whether the vote is to be conducted:

(i) at one or more polling places; or

(ii) using a mail-in balloting procedure;

(f) if the vote is to be conducted at one or more polling places, determine the place or places where the vote is to be conducted, together with the dates and hours for conducting the vote;

(g) if the vote is to be conducted using a mail-in balloting procedure, determine the date by which completed ballots must be returned to the returning officer;

(h) prepare a notice of vote in accordance with Form 20 (notice of vote) and issue directions to the employer respecting posting the notice of vote;

(i) appoint any persons whom the agent considers necessary as deputy returning officers and poll clerks; and

(j) if the vote is to be conducted at one or more polling places, invite the employer, any other person and the union named in the application to appoint one scrutineer for each polling place establish pursuant to clause (f) and allow those scrutineers to be present at the polling place during the hours the vote is conducted;

(k) if the vote is to be conducted using a mail-in balloting procedure, determine the place for counting of the ballots and invite the employer, any other person and the union named in the application to appoint one scrutineer to be present while the ballots are counted.

(6) An agent may issue any directions or instructions that the agent considers necessary respecting the conduct of the vote.

(7) No person shall:

(a) fail to comply with any directions or instructions given by an agent respecting the conduct of the vote; or

(b) if the vote is to be conducted at one or more polling places:

(i) interfere, or attempt to interfere, with a person who is voting;

(ii) attempt to obtain information at a polling place as to how a person has voted or is about to vote;

(iii) canvass or solicit votes within 20 metres of a polling place while the vote is being conducted; or

(iv) display, distribute or post a campaign sign, button or other similar material within 20 metres of a polling place while the vote is being conducted.

(8) In counting ballots, the agent:

(a) shall reject every ballot on which anything is written or marked that identifies the person voting or on which no vote is marked; and

(b) shall accept a ballot if the employee has marked the ballot in a manner that clearly indicates the choice of the employee and notwithstanding that the employee may have marked his or her vote out of, or partly out of, its proper space or with a mark other than an "X".

(9) On completion of the vote, the agent shall:

(a) if there is no direction of the board to the contrary and if there is no impediment to doing so, promptly count the ballots and complete Form 21 (Report of Agent of the Board Respecting the Conduct of Vote and Counting of Ballots); or

(b) if the agent does not count the ballots promptly after the vote, complete Form 22 (Report of Agent of the Board Respecting the Conduct of Vote).

(10) Immediately after completing Form 21 or 22 as required by subsection (9), the agent shall file a copy of the completed Form with the registrar and the registrar shall give a copy of the completed Form to an employer, to a union directly affected by the vote and, if the applicant who filed the application is not an employer or union, to the applicant.

> *(11) An employer, other person or union directly affected by the vote that intends to object to the conduct of the vote or the results from the counting of the ballots shall file an application in Form 23 (Objection to Conduct of the Vote) within three business days after the conduct of the vote or the counting of the ballots, as the case may be.*

Analysis and Decision

[69] Pinnacle chose not to call any witnesses. If the allegations argued by Pinnacle[18] are true, Pinnacle was the party with access to this evidence, and could have put it before the Board. Since Pinnacle chose not to do so, the only evidence before the Board on this issue came from Mr. Trudel, its construction manager.

[70] The role of the Board in reviewing a proposed bargaining unit is to determine whether it is appropriate for collective bargaining. Pinnacle suggested that the bargaining unit be restricted to the Evraz Degasser Expansion Project but did not provide the Board with any argument respecting why the proposed bargaining unit would not be appropriate. The Board is satisfied that the bargaining unit proposed by the Union is appropriate for collective bargaining.

[71] The Board orders that the ballots that were received and are currently sealed by the Registrar be counted, subject to the following directions. Before the ballots are counted, any ballots received from the 13 people challenged by the Union are to be removed:

- The evidence before the Board was that Cameron Nesbitt and Stan Nesbitt were pipefitters and that Isaiah Zaphe was a laborer. Accordingly, they do not meet the criteria to be members of the proposed bargaining unit.

- With respect to the other ten (Tyson Harder, Patrick Hynes, Jeff Johnson, Eric Robbins, Paul Robinson, Jared Savage, Carl Sund, Kevin Uzeloc, Mike Wookey and Howard Young) there was no evidence before the Board that they were ironworkers employed by Pinnacle at the applicable time.

[72] The situation with respect to the three Matrix/Rockies ironworkers is more complicated. Since they left the worksite before June 20, 2017, the date designated by the Board in the Direction for Vote, normally they would not qualify to vote. However, the evidence before the Board raises a serious question about why and at whose instigation they left when they did. The

[18] That the ten people unknown to Mr. Trudel were working as ironworkers for Pinnacle elsewhere in Saskatchewan.

Board orders that the votes of Diabo, McGregor and Smoke not be counted but, if any of them submitted a ballot, those ballots be preserved pending a hearing and decision by the Board respecting the Union's Unfair Labour Practice Application, LRB File No. 125-17.

[73] The Board has reviewed all of the written briefs and case authorities provided by the parties and found them helpful in addressing the various issues raised in this matter.

[74] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **17th** day of **December, 2018**.

LABOUR RELATIONS BOARD

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Susan C. Amrud, Q.C.
Chairperson