UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Applicant v. RELIANCE GREGG'S HOME SERVICES, a DIVISION OF RELIANCE COMFORT LIMITED PARTNERSHIP, Respondent

LRB File Nos. 234-17, 235-17 & 236-17, December 18, 2018

Vice-Chairperson, Kenneth G. Love, Q.C.; Members: Jim Holmes and Allan Parenteau

For the Applicant:	Greg Fingas
For the Respondent:	Eileen v. Libby, Q.C.

Certification – Union applies to represent bargaining units under Division 13 of *The Saskatchewan Employment Act*. Board reviews applications and factual background – Board finds Division 13 bargaining units not appropriate – Board certifies units under section 6-11 of *The Saskatchewan Employment Act*.

Certification – Board reviews previous jurisprudence suggesting that when employer engaged in construction activity in any way that construction unit under Division 13 available. Board distinguishes decision based upon scheme of Construction Industry bargaining and additions to statutory scheme not present when case decided.

Construction Industry Bargaining – Board reviews scheme of *The Saskatchewan Employment Act* with respect to appropriateness of bargaining units,

REASONS FOR DECISION

Background:

[1] The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 ("U.A. 179" or the "Union") brought 4 applications involving Reliance Gregg's Home Services, a Division of Reliance Comfort Limited Partnership (Gregg's"). 3 of those were applications[1] to be certified as the

[1] LRB File Nos. 234- 236-17

bargaining agent for various groups of employees of Gregg's. The fourth[2] was an Unfair Labour Practice Application. Gregg's also filed an Unfair Labour Practice application[3] against U.A. 179.

[2] All of the files were dealt with in a single hearing by the Board. The hearing commenced with Vice-chairperson Mitchell acting as the Chairperson of the hearing panel. However, between the time the evidence had been heard, but before final argument was made by the parties, he was appointed as a Justice of the Court of Queen's Bench. By the agreement of the parties, Kenneth G. Love Q.C., the former Chairperson of the Board, and newly appointed as the Vice-chairperson of the Board, to assist with the transition of matters such as this, undertook to review the Board's recordings of the proceedings, to hear final argument and to replace now Justice Mitchell in the decision with respect to each of the 5 matters under consideration by the Board.

[3] The 5 matters before the Board can be neatly placed into 3 overall categories. The first is the certification applications by U.A. 179 (3), the second is the Unfair Labour Practice application by U.A. 179, and the last is the Unfair Labour Practice application by Gregg's. The facts and Board's jurisprudence with respect to these 3 categories is somewhat different and for that reason, the Board has determined to provide 3 separate decisions with respect to each of the 3 overall categories. These reasons are in respect to the certification applications made by U.A. 179.

[4] U.A. 179 filed 3 separate applications for different bargaining units. We will describe the units with greater particularity later in these reasons, however, in simple terms, the units applied for by U.A. 179 were (a) a "Newbery unit" of employees which the Union alleged were within Division 13 of *The Saskatchewan Employment Act* (the "*SEA*") as the work these employees performed was construction work. The second unit was for employees engaged in "maintenance" work under Division 13 of the *SEA*, except for supervised employees, and the third was for a unit of those supervised employees excluded from the second unit applied for.

[5] There is also a related matter with respect to the certifications which is the eligibility of one employee to vote in respect of the proposed certification.

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[2] LRB File No. 250-17
[3] LRB File No. 254-17

Facts:

[6] The following is a summary of the evidence heard from the numerous witnesses called by the parties as well as the many documents filed by the parties. Other material facts will be referred to, as necessary, during the analysis portion of these reasons.

[7] Gregg's was a family owned business operating in the City of Saskatoon and surrounding communities. The family owned business was acquired by Reliance Comfort Limited Partnership (the "LP") and was operated by the LP under the business name Reliance Gregg's Home Services. Immediately following the acquisition of Gregg's by the LP, the business continued to be operated by the former owner. The former owner was later replaced by another former employee, Kathy Ziglo, who in turn, was replaced by Mr. Shea Weber as general manager. Mr. Weber took over as general manager around the time the applications for certification were filed by U.A. 179. Other members of the Gregg family also continued to work in the business. Mr. Eric Gregg was the Sales Manager at the time of the applications and his brother, Brett Gregg was employed as a selling tech and install tech.

[8] Gregg's operates within the residential sector in the City of Saskatoon and the surrounding area. The LP also acquired another plumbing company in Regina about the same time it acquired Gregg's, which operates independently of the Gregg's operation. The Union's applications relate solely to the Saskatoon based operations of Gregg's.

[9] Gregg's operationally is divided into 4 sectors. The first is a construction group which is engaged in the installation of heating, ventilation and air conditioning systems ("HVAC") in new homes as well as plumbing installations for these same homes. The HVAC installations involve the installation of new air conditioning units and furnaces along with the necessary ducting for those systems. The plumbing portion involves installation of necessary piping for water supplies and waste disposal as well as installation of the necessary fixtures and equipment for those systems.

[10] Gregg's provides its services as a subcontractor to the new home contractor. It bids for such work on an annual basis. At the time of the application, Gregg's had been the successful bidder for new home construction undertaken by Dream Homes, a major developer in the Saskatoon area. However, they did not obtain that contract again in 2018 and performed

considerably less of this type of work. Mr. Whalen testified that they had only one contract for 4 homes with a builder in Saskatoon in 2018.

[11] The work in this sector is performed by journeymen plumbers, apprentices and helpers as well as sheet metal fabricators, installers and duct cleaners employed by Gregg's. Gregg's also employs a journeyman carpenter[4] and journeymen electricians.

[12] A second sector of business for Gregg's is an "Install and Small Projects division". This division is responsible for installation of fixtures and equipment into existing homes such as air conditioning units, new furnaces, new plumbing fixtures etc.

[13] Lastly, there is a group of employees responsible for ongoing service contracts between Gregg's and its customers. Gregg's provides a service to its customers (for a fee), that provides for ongoing service and maintenance of a customer's equipment and fixtures as well as provision for discounted fees should additional work be required. Associated with this division is a group of selling technicians who, in addition to their other duties as service technicians, are permitted to sell additional services and equipment to customers.

[14] In the Notice of Vote posted by the Board, the Board identified 20 employees within the proposed bargaining units. One of those employees, Brandon Heintz was challenged by Gregg's with respect of his eligibility to vote on the certification question. We will deal with this issue later in this decision.

[15] By comparing that list with Exhibit E-11, we have, excluding Mr. Heintz, eight (8) employees in the New Home Construction division, five (5) employees in the Install and Small Projects division and six (6) within the Service Division.

Relevant statutory provisions:

> ***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; or*
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> *(b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.*

[4] This employee also holds certification in the plumbing and electrical trades.

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

(3) Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.

(4) Subsection (3) does not apply if:

(a) the employer and union make an irrevocable election to allow the supervisory employees to be in the bargaining unit; or

(b) the bargaining unit determined by the board is a bargaining unit comprised of supervisory employees.

(5) An employee who is or may become a supervisory employee:

(a) continues to be a member of a bargaining unit until excluded by the board or an agreement between the employer and the union; and

(b) is entitled to all the rights and shall fulfil all of the responsibilities of a member of the bargaining unit.

(6) Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.

(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.

DIVISION 13
Construction Industry

Subdivision 1
Preliminary Matters for Division

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.

(2) Nothing in this Division:

(a) precludes a union from seeking an order to be certified as a bargaining agent for a unit of employees consisting of:

(i) employees of an employer in more than one trade or craft; or

(ii) all employees of the employer; or

(b) limits the right to obtain an order to be certified as a bargaining agent to those unions that are referred to in a determination made by the minister pursuant to section 6-66.(3). This Division does not apply to an employer and a union with respect to a certification order mentioned in subsection (2).

(4) If a unionized employer becomes subject to a certification order mentioned in subsection (2) with respect to its employees, the employer is no longer governed by this Division for the purposes of that bargaining unit.

(5) If there is a conflict between a provision of this Division and any other Division or any other Part of this Act as the conflict relates to collective bargaining in the construction industry, the provision of this Division prevails.

Interpretation of Division

6-65 *In this Division:*

(a) ***"construction industry"****:*

(i) means the industry in which the activities of constructing, erecting, reconstructing, altering, remodelling, repairing, revamping, renovating, decorating or demolishing of any building, structure, road, sewer, water main, pipeline, tunnel, shaft, bridge, wharf, pier, canal, dam or any other work or any part of a work are undertaken; and

(ii) includes all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection with a work mentioned in subclause (i), but does not include maintenance work;

(b) ***"employers' organization"*** *means an organization of unionized employers that has, as one of its objectives, the objective of engaging in collective bargaining on behalf of unionized employers;*

(c) ***"project agreement"*** *means an agreement mentioned in section 6-67;*

(d) ***"representative employers' organization"*** *means an employers' organization that:*

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

(ii) if applicable, may be a bargaining agent to engage in collective bargaining on behalf of unionized employers that are parties to a project agreement;

(e) ***"sector of the construction industry"*** *means any of the following sectors of the construction industry:*

(i) the commercial, institutional and industrial sector;

(ii) the residential sector;

(iii) the sewer, tunnel and water main sector;

(iv) the pipeline sector;

(v) the road building sector;

(vi) the powerline transmission sector;

(vii) any prescribed sector;

(f) ***"trade division"*** *means a trade division established by the minister in accordance with section 6-66;*

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

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

(i) with respect to whom a certification order has been issued for a bargaining unit comprised of unionized employees working in a trade for which a trade division has been established pursuant to section 6-66; or

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

Subdivision 2
Trade Divisions and Project Agreements

Trade divisions

6-66*(1) The minister may, by order, establish one or more trade divisions comprising all unionized employers in one or more sectors of the construction industry, with each trade division being restricted to unionized employers that are:*

(a) in a trade; or

(b) in an identifiable category or group of unionized employers in a trade.

(2) Before establishing a trade division pursuant to subsection (1), the minister shall:

(a) conduct, or cause to be conducted, any inquiry or consultation that the minister considers necessary;

(b) consider any request of unionized employers and a union to establish a trade division based on an agreement between the employers and the union; and

(c) if a request mentioned in clause (b) is received, make a decision whether to establish the requested trade division within 90 days after receiving the request.

(3) The minister may amend or cancel an order establishing a trade division:

(a) with the consent of:

(i) the representative employers' organization that represents all unionized employers in the trade division; and

(ii) the union or council of unions that is the bargaining agent of all unionized employees in the trade division; or

(b) without the consents mentioned in clause (a) in accordance with subsection (4).

(4) Before the minister amends or cancels an order establishing a trade division without the consent of the representative employers' organization and the union or council of unions, the minister shall:

> *(a) inform the representative employers' organization and the union or council of unions of the minister's intention to amend or cancel the order establishing the trade division;*
>
> *(b) provide the representative employers' organization and the union or council of unions with an opportunity to make representations to the minister; and*
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> *(c) as soon as possible after amending or cancelling the order, provide the representative employers' organization and the union or council of unions with a copy of the order and with a written decision setting out reasons for the order.*

Union's arguments:

[16] UA 179 argued that the Board should certify it to be the bargaining representative for employees of Gregg's under Division 13 of the *SEA*. It argued that since some of the work being done by Gregg's was construction work, that the Board's jurisprudence supported the establishment of a "Newbery" type unit of employees. The Union relied upon this Board's decision in *Atlas Industries Ltd. (Re:)*[5] and subsequent cases from the Board and the Court of Appeal for Saskatchewan.

[17] UA. 179 also argued that the provisions of the *SEA* were substantially similar to the definitions considered by the Board in *Atlas* and that the Board should continue to apply those definitions as was done in *Atlas* and the Board's subsequent decision in *I.B.E.W., Local 2038 v. Tesco Electric Ltd*[6]*.*

[18] The Union argued that the Board should not create separate bargaining units such as is done by the Labour Relations Board of Alberta which results in unnecessary and prolix representational issues. The Union argued that this approach was also supported by the evidence of Mr. Shamji on behalf of Gregg's wherein he described the bargaining situation that the business was required to deal with in Ontario.

[19] UA. 179 argued that journeymen employed by Gregg's were not supervisors as they did not exercise any supervisory functions, those functions having been reserved to management of Gregg's. Furthermore, it noted, that the *Labour Relations (Supervisory Employees) Regulations*[7] were amended in 2016 to specifically exclude "foremen, general

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[5] [1998] S.L.R.B.D. No. 5 and 1999 CanLII 12301 (SKCA)
[6] 2002 CanLII 52910 (SKLRB)
[7] RRS c. S-15.1 Reg 4

foremen and journeypersons in the construction industry" from the definition of "supervisory employees".

[20] With respect to the eligibility of Brandon Heintz, the Union argued that he should be permitted to vote and his vote counted. The Union argued that he had the intention of becoming an indentured apprentice, but was thwarted in achieving this status due to management interference. In support the Union cited *Tesco*[8] and *I.B.E.W., Local 2038 v. Clean Harbours Industrial Services Canada*[9]

Employer's arguments:

[21] Gregg's argued that it was difficult to distinguish between construction work on the one hand and maintenance work on the other hand. It argued that a Division 13 certification for construction work could not, by definition, include maintenance work. Most, if not all, of Gregg's employees routinely performed both construction and maintenance work.

[22] Gregg's argued that an order under Division 13 should not be made by the Board when construction work is mixed with non-construction and maintenance type work. Gregg's further argued that any order made under Division 13 should be confined to only construction work.

[23] Gregg's argued that in *Atlas* the Board did not have to distinguish between what was "construction" work and what was "maintenance" work. That distinction was necessitated by the amendments to *The Construction Industry Labour Relations Act, 1992* [10] in 2010 and the replacement of that *Act* with Division 13 of the *SEA*.

[24] Gregg's argued that the Board should adopt the approach favoured by the Ontario Labour Relations Board which is to certify with respect to either construction or non-construction work. Furthermore, it argued for an expanded definition of maintenance work and that work being distinguished from service work.

[25] In support of its position with respect to classification of the work performed by employees, Gregg's cited this Board's decision in *Seventy-seven Signs Ltd. v. IBEW, Local*

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[8] Supra note 6
[9] 2014 CanLII 76047 (SKLRB)
[10] S.S. 1992 c. C29.11 as amended by S.S. 2010 c.7

2038[11]. Gregg's noted that it had the necessary technology to track when an employee was working on construction, maintenance or service.

[26] Gregg's argued that the creation of distinct bargaining units for construction work, maintenance work and service work would not lead to fragmentation of the bargaining unit. It offered an amendment to the bargaining unit description which would clarify that bargaining structure.

[27] In respect of the eligibility of Mr. Heintz to vote, Gregg's argued that while he was employed on the date of the application, he was not employed within one of the classes of employee covered by the applications. Gregg's further argued that even if there was an expectation that Mr. Heintz would eventually be offered an apprenticeship, no such offer had been made as of the date of the application or vote and therefore he did not fit within any of the classes of employees which were the subject of the applications.

Analysis:

[28] Before embarking on our analysis of the evidence and argument in these applications, some further background explanation should be provided to properly understand the nature of the applications filed and the necessity for such applications by the Union.

[29] Both parties acknowledge that Gregg's is engaged in "construction" work through either or both of its new home construction activity or by virtue of the installation of new air conditioning units, furnaces or plumbing fixtures in existing homes. It is also acknowledged that Gregg's is involved in non-construction, maintenance work.

[30] Division 13 of the *SEA* derived from *The Construction Industry Labour Relations Act, 1992* [12]. This legislation was a renewal of previous legislation which had been repealed in 1982. It re-instated sector bargaining on a provincial wide basis. Between 1992 and 2010, construction work included maintenance work. In 2010, *The Construction Industry Labour Relations Act, 1992* [13] was amended to exclude maintenance work from the definition of construction contained within the legislation. As a result of that amendment, maintenance work no longer falls within the purview of Division 13.

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[11] 2017 CanLII 30197 (SK LRB)
[12] S.S. 1992 c. C29.11 as amended by S.S. 2010 c.7
[13] S.S. 1992 c. C29.11 as amended by S.S. 2010 c.7

[31] An additional complication is the provisions of section 6-11(3) of the *SEA* which precludes the Board from including "supervisory" employees within the bargaining unit with those employees who are their supervisors. While the parties have agreed that there is no supervisory function performed by journeymen or foremen with respect to apprentices within the same unit as those journeymen or foremen, we are nevertheless precluded by section 6-11(3) from making an order that includes such employees.

[32] This supervisory employee issue is resolvable in two ways. With respect to an Order under Division 13, the regulations as noted above, permit the Board to include apprentices within a construction unit under Division 13. With respect to any other unit of employees found to be appropriate, the parties may resolve any issue regarding inclusion of supervisory employees by entering into an irrevocable election in accordance with section 6-11(4)(a) of the *SEA*.

[33] Because of the various possible combinations, the Union was required, out an abundance of caution, to file its applications in the manner it did to cover off any possible combination. In its argument, the Union also suggested that another alternative could be considered, being a non-Division 13 unit of plumbers etc, employed by Gregg's in its business in Saskatoon. That proposal was objected to by Gregg's on the basis that it represented a considerable departure from the units previously applied for by the Union.

The Nature of the Construction Industry

[34] In its decision in *Construction Labour Relations Association of Saskatchewan Inc. v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 119*[14], the Board described the nature of construction industry bargaining. At paragraph [19] *et seq.* the Board says:

> *[19] Mr. Andrew C.L. Sims Q.C*[15]*. provided an Affidavit to the Board which was entered into evidence. While he was not qualified as an expert witness, his Affidavit evidence was not challenged by the Union. In his Affidavit, Mr. Sims describes the nature of registration/accreditation system adopted almost uniformly in Canada for collective bargaining in the construction industry. He notes that the system of collective*

[14] 2016 CanLII 30542 (SK LRB)
[15] Mr. Sims served as Chairperson of the Alberta Labour Relations Board for nine (9) years and as a Vice-Chairperson of that Board for an additional 21 years.

bargaining in the construction industry arose out of the "Goldenberg-Crispo" report[16]. He notes that this "report led to the adoption of the registration/accreditation provisions [by legislation] in other jurisdictions, including Saskatchewan."

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

1. *The core essence of a registration/accreditation scheme is that for unionized contractors operating in the same market are bound to adopt a common bargaining position and advance that position through an agent obligated to bargain on their behalf;*

2. *The system results in wages that apply equally to all unionized contractors;*

3. *The system is mandatory;*

4. *Registration/accreditation eliminates or reduces the competition that resulted where trade unions dealt with each employer individually and used one employer to "leap frog" over another;*

5. *Registration/accreditation was designed to reduce a unionized employer's vulnerability to union bargaining power; the 'quid pro quo" is that unionized employers are not free to individually negotiate wage rates with a trade union directly, and therefore, improved its competitive position in relation to its competitors who have a relationship with the same union.*

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

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

11. *To permit trade unions subject to a registration/accreditation system to negotiate directly with employers and maintain different terms and conditions than those bargained by the REO would run contrary to the very purpose of a mandatory registration/accreditation system, and would allow employers to obtain an unfair competitive advantage over their fellow contractors.*

[22] The rationale postulated by Mr. Sims must be considered in the context of the construction industry. Work in the construction industry has several unique

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[16] *Construction Labour Relations, Canadian Construction Association*, H. Carl Goldenberg and John H.G. Crispo, editors, 1968

> *characteristics.*[17] *One of those features is the transitory nature of the work locations, being project which has a beginning and an end. Another is the specialization within the construction industry resulting in an array of craft trade unions and related specialty contractors. One of the institutional manifestations of these two characteristics is the role of the hiring hall in construction industry labour relations. Because the work sites and the work at those sites are not permanent, employers typically hire employees only when necessary and those employees are employed only for the duration of the work available. Once work at one site is concluded, the employee is released and may well be re-employed by a competitor of his former employer for another project.*
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> *[23] As noted by Mr. Sims, the nature of work in the construction industry and the nature of the collective bargaining system resulted in a unique scheme for collective bargaining in the construction industry throughout Canada. This unique scheme in the Saskatchewan context is embodied in Division 13 of Part VI of the SEA.*

[35] As noted by Mr. Sims, employment in the construction industry is generally speaking transitory in nature. It permits employers to have access to a pool of qualified employees who can be called upon as necessary to perform work on behalf of a unionized contractor. Such contractors do not normally maintain any permanent employees, but rather they requisition employees on an "as needed" basis from the union hiring hall. Following completion of the required work, employees are laid off and return to the hiring hall for redeployment to another unionized employer.

The Decision in Atlas

[36] The Union relies heavily upon the Board's decision in *Atlas* to support its case. It argued that *Atlas* stands for the proposition that if any portion of an employer's work falls into the "construction" classification, then it is appropriate to certify that employer under the construction industry collective bargaining scheme.

[37] We believe that *Atlas* must be confined to its unique facts and time period during which it was decided. Since the decision in *Atlas*, there have been significant changes to the legislation governing construction labour relations and the direction provided to this Board in respect to its choice of an appropriate unit of employees for collective bargaining.

[38] When *Atlas* was decided, "maintenance" was included within the definition of "construction". The majority of the work performed by employees of Atlas was "maintenance"

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

work. Under the current statutory scheme, the bargaining unit found to be appropriate in *Atlas* could not be found so by this Board.

[39] That is not to say, of course, that an appropriate unit of employees could not be found and certified by this Board. However, such unit could not be certified pursuant to Division 13 as a construction bargaining unit.

[40] Arguably, as well, the facts in this case are different from *Atlas* insomuch as the work here falls within the definition of "construction". However, for the reasons which follow, we do not agree that bargaining units as applied for by I.A. 179 are appropriate units for collective bargaining.

[41] Firstly, the proposed units do not fit neatly within the scheme of collective bargaining set out in Division 13 and as described by Mr. Sims above. In this case we have permanent employees, not transitory project based employees who are employed full-time by Gregg's. When slowdowns occur in one of the divisions, manpower is diverted to another division to help out and layoffs are minimized as Gregg's tries to maintain its workforce as much as possible.

[42] Secondly, employees are often dispatched to work within other divisions. Witnesses noted in their testimony that they were dispatched from "day to day" to job sites as needed. These employees either worked alone or as a team with other employees dispatched to the same job.

[43] Thirdly, Residential construction work is somewhat different from industrial or commercial work, none of which Gregg's does. The process for obtaining sub-contracts for the plumbing installations was described in testimony. That process involves a bidding process, not on a project basis usually, but on a supplier basis. That is, Gregg's would bid to perform all of the work for a home builder such as Dream Homes rather than bidding for each individual home based upon its unique specifications. There is also an element of personal relationship brought to bear as we heard that Gregg's lost its contract with Dream Homes because the former owner refused to lower its price in the face of decreased demand and an economic downturn which resulted in pricing pressures in the industry.

[44] No distinction is drawn between the residential sector and the commercial/industrial sector for the purposes of Division 13. There is only one "representative

employers' organization" for the Plumbing/Pipefitter trade division. However, in his testimony, Mr. Shamji noted that he attempted to contact that REO for assistance, they were not interested in talking to him. This demonstrates that the trade division is more focused on sectors other than the residential sector.

[45] Fourthly, we are instructed in section 6-11(7)(a) of the *SEA* that, in determining an appropriate unit under Division 13, the Board is not to assume "that a craft unit is the more suitable unit appropriate for collective bargaining". This provision was not in the legislation considered at the time the *Atlas* decision was under consideration by the Board.

[46] Fifthly, the scope of work for employees of Gregg's is not province-wide. Typically, under Division 13 certification orders, the union is certified to represent employees province-wide, not at specific locations within the province. While there could be a project certification for a particular project within the province, that is not the case here. Simply put, the proposed bargaining units do not fit the scheme described by Mr. Sims above.

[47] Finally, if the interpretation proposed by the Union with respect to *Atlas*, that is, if any portion of work by an employer is "construction" work, it can be certified under Division 13 is correct, it begs the question as to whether the converse should also be true. It would follow logically from that conclusion that if any portion of the employer's work is not in "construction", then the Board can also define a unit outside the construction industry which is appropriate for collective bargaining.

Defining the Appropriate Unit for Collective Bargaining

[48] The Applications, as filed, suggest that there should be 3 bargaining units comprised, loosely speaking, of:

(a) Employees engaged in construction work;
(b) Employees engaged in maintenance work, exclusive of supervised apprentices; and
(c) Apprentices engaged in maintenance work.

[49] Such units, of course, are not ideal, and given the numbers of employees involved in each certification, would be considered to be under inclusive units. A far more preferable unit

would be all employees of Gregg's in the City of Saskatoon, Saskatchewan. However, that is not the unit of employees which I.A. 179 has applied to represent.

[50] The Board is not charged with a determination of the most appropriate unit for collective bargaining. It must only seek to insure that the unit of employees represented by a union is an appropriate unit. In so doing, however, it must also insure that the unit approved is not under inclusive and is a viable bargaining unit.

[51] The Board has long relied upon its jurisprudence as outlined in its decision in *Graphic Communications International Union, Local 75M v. Sterling Newspapers Group, a Division of Hollinger Inc.*[18]. The Board set out the factors which it relied upon in reaching its decision at pp. 776-781.

> *First, in assessing the viability of the proposed bargaining unit, we note that the employees are a discrete group who possess special skills and who are distinguishable from other employees in the newspaper. There is little interchange between the press room employees and other departments of the newspaper. Historically, press room employees have enjoyed a craft status. The unit is viable in terms of its ability to engage in effective collective bargaining with the Employer because the members of the bargaining unit control over the printing process.*
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> *Second, although the Board generally prefers all employee bargaining units over small craft or departmental units, the Board will maintain a flexible approach to the establishment of bargaining units in industries which have proven difficult to organize. In this instance, an all employee bargaining unit was applied for by TNG in 1996 and was unsuccessful. The Employer has operated without any union representation since 1982. The longest period of union representation at the Employer was the Regina Typographical Union, Local 657 who held a certification from August 8, 1950 to March 7, 1975.*
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> *The Board is faced in this instance with choosing between the rights of employees to organize and the need for stable collective bargaining structures that will endure the test of time. It is clear from the decisions in other jurisdictions that the "most" appropriate bargaining units in this industry consist either of wall-to-wall units or two bargaining units, one consisting of the front end employees, including office, administration and editorial, and one consisting of the production workers, including pressmen. Such a configuration would likely result in stable and effective labour relations, in the sense that the Union would have a significant constituency within the workplace to bargain effectively with the Employer. The ultimate viability of smaller, less inclusive, bargaining units is, in our experience, and certainly in the past experience with this Employer, more tenuous over the long run. The proposed unit can be described in this sense as an under-inclusive unit.*
>
> *The Board faced a similar dilemma in Hotel Employees & Restaurant Employees Union Local 767 v. Regina Exhibition Association Ltd., [1986] Oct. Sask. Labour Rep. 43, LRB File No. 015-86, where the applicant, which had previously unsuccessfully applied to represent all employees in the food services department of the employer, applied a*

[18] [1998] Sask L.R.B.R.770, LRB File No. 174-98

second time to represent only the concessions department of the food services department. On the second application, the Board held as follows, at 45:

> *The fundamental purpose of The Trade Union Act is to recognize and protect the right of employees to bargain collectively through a trade union of their choice, and* ***an unbending policy in favour of larger units may not always be appropriate in industries where trade union representation is struggling to establish itself. It would make little sense for the Board to require optimum long term bargaining structures if the immediate effect is to completely prevent the organization of employees.*** *In effect, the Board is compelled to choose between two competing policy objectives; the policy of facilitating collective bargaining, and the policy of nurturing industrial stability by avoiding a multiplicity of bargaining units.* ***Where the Board is of the view that an all employee unit is beyond the organizational reach of the employees it is willing to relax its preference for all employee units and to approve a smaller unit.***
>
> ***This does not mean, however, that the Board will certify proposed bargaining units based merely on the extent of organizing. Every unit must be viable for collective bargaining purposes and be one around which a rational and defensible boundary can be drawn.***

In the Regina Exhibition Association Ltd. case, supra, the Board found that the smaller bargaining unit comprised of concession workers was an appropriate bargaining unit.

Bargaining units that may be considered to be under-inclusive in their scope have been found by the Board to constitute appropriate units in a variety of sectors including the service sector (see Regina Exhibition Association Ltd., supra and Retail, Wholesale and Department Store Union v. Nelson Laundries Limited, [1993] 1st Quarter Sask. Labour Rep. 242, LRB File No. 254-92); casinos (see Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd., [1992] 4th Quarter Sask. Labour Rep. 75, LRB File No. 182-92; restaurants (see Hotel Employees and Restaurant Employees International Union, Local 767 v. Gene's Ltd., [1984] July Sask. Labour Rep. 37); financial sector (see Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canadian Pioneer Management Group, [1978] May Sask. Labour Rep. 37, LRB File No. 661-77); and non-profit sector (see Construction and General Workers Union, Local 180 v. Saskatchewan Writers Guild, [1998] Sask. L.R.B.R. 107, LRB File No. 361-97.

In some situations, however, the Board has refused to certify bargaining units that are composed of fewer employees than the total employee compliment in the business. In Hotel Employees and Restaurant Employees International Union, Local 767 v. Courtyard Inns Ltd., [1988] Winter Sask. Labour Rep. 51, LRB File No. 116-88, the Board found that a unit of maintenance employees in a hotel was not an appropriate unit for the following reasons, at 51:

> *. . . the historical pattern of organization of large hotels in Saskatchewan like the Regina Inn indicates that bargaining units significantly larger than the one applied for by the applicant in this case have been considered appropriate. There is no indication that a larger unit would unreasonably inhibit union organization, and there is no suggestion that maintenance employees possess a particular community of interest that would make it inappropriate to include them in a larger unit. The proposed bargaining unit comprises a numerically insignificant number of employees and the Board has serious doubts about its viability for collective bargaining purposes. The maintenance employees in question are not so highly skilled that they would be difficult to replace or that a*

> *withdrawal of their services would put much economic pressure on the employer. Finally, if the unit applied for in this case were appropriate, then other units of comparable size would also be appropriate which would lead to piecemeal certifications, a multiplicity of bargaining units and industrial instability.*

In Canadian Union of Public Employees, Local 1902-08 v. Young Women's Christian Association et al., [1992] 4th Quarter Sask. Labour Rep. 71, LRB File No. 123-92, the Board refused to carve out a unit of daycare workers from an "all employee" bargaining unit. The Board commented as follows, at 73:

> *In determining whether a proposed unit of employees is an appropriate one for the purpose of bargaining collectively, this Board makes a decision which is of unique importance in terms of the implementation of the public policy objectives guiding the institution of collective bargaining. These policy objectives were outlined in a decision of the Ontario Labour Relations Board in International Federation of Professional and Technical Engineers v. Canadian General Electric Co. Ltd., [1979] OLRB Rep. Mar. 169, at 171:*
>
> > *In assessing the suitability of a proposed unit, the **Board is generally guided by two counter-balancing concerns. Firstly,** having regard to the proposed unit itself, **the Board looks to whether the employees involved share a sufficient community of interest to constitute a cohesive group which will be able to bargain effectively together. Secondly**, looking to the employer's operation as a whole, **the Board assesses whether a proposed unit is sufficiently broad to avoid excessive fragmentation of the collective bargaining framework. A proliferation of bargaining units is not normally conducive to collective bargaining stability.** Not only may it place significant strains on an employer who would be required to bargain with each group, but it may also hamper the employees' ability to bargain effectively with the employer. Under the umbrella of these two guiding principles, the Board seeks to give effect to an equally important concern: the freedom of association guaranteed to employees in section 3 of the [Ontario] Act.*
>
> > *There is a **range of factors**, some of which were put forward for consideration at this hearing, which may affect the balance of these policy goals in any particular case; some of these were listed in the decision of the Board in Health Sciences Association v. South Saskatchewan Hospital Centre [1987] Apr. Sask. Labour Rep. 48, LRB File Nos. 421-85 & 422-85]. Counsel for the applicant Union suggested that the **wishes of the employees to be represented by a particular bargaining agent must be given a high priority** in this regard, and pointed as well to the **community of interest of this cohesive group of employees**.*
>
> > *These factors are clearly important, and the Board must take seriously any indication of strong attachments of employees, to each other and to a particular bargaining agent. These factors are not determinative, however. Counsel for the applicant Union reminded us that the Board should be prepared to certify a unit which does not satisfy all requirements which the ideal bargaining unit might meet; as a general proposition, this is quite accurate. A situation in which the Board is asked to choose between two differently-constituted bargaining units is distinguishable, however, from a situation in which some less than ideal bargaining unit is contrasted with no collective bargaining at all.*

> *Where the choice is available, the Board will attempt to decide which is the more appropriate, if not most appropriate, bargaining unit. A case cited by counsel for the applicant Union, the South Saskatchewan Hospital Centre decision, supra, suggested that where such a choice is presented, the Board will choose the unit "most appropriate for the promotion of long-term industrial stability."*

Another example of the Board refusing to certify an under-inclusive bargaining unit is found in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Centre of the Arts, [1995] 4th Quarter Sask. Labour Rep. 52, LRB File No. 175-95. In that case, the union applied to represent employees in four of seven departments of the employer's operations. The Board distinguished the factual situation in the Centre of the Arts case, supra, from the one dealt with previously in The Regina Exhibition Association Ltd. case, supra, as follows, at 59-60:

> *In our view, the situation of this Employer differs significantly from that of the Regina Exhibition Association Limited. Though there are large numbers of casual employees involved in both cases, the bargaining units proposed in the Regina Exhibition cases were based on small and distinct groupings of employees. Here, though the seven departments have been designated to serve particular administrative and accounting purposes, it is difficult to draw a line between them in terms of the workforce. There is little to differentiate the employees in different departments in terms of their skills or experience, and there is considerable and growing cross-over of employees from one department to another.* ***Though it was possible to draw a rational boundary around the wheelers and dealers at the casino or the employees in the concessions in the Exhibition cases, it is more difficult to draw a line through the pool of employees in this case in any way which can be defended****.*

...

> ***In this case, we have concluded that any line drawn on the basis proposed by the Union would be essentially arbitrary.*** *Though the departmental divisions have been made for certain purposes, the employees in the seven departments really constitute a pool of casual labour which is used without strict regard to these divisions. The inclusion of some of the departments and the exclusions of others could only, in our opinion, have a negative effect on the employees in terms of their ability to obtain more hours by working across departments, and create anomalies in terms and conditions as the cumulative impact of distinctions between those represented by the Union and those without representation began to make itself felt.*

In Saskatchewan Government Employees' Union v. Gabriel Dumont Institute of Native Studies and Applied Research Inc., [1989] Winter Sask. Labour Rep. 68, LRB File No. 118-89, the Board declined to find a bargaining unit comprising employees of one division of the Institute as an appropriate bargaining unit. The Board intimated that there was insufficient evidence related to any difficulties in organizing on a broader basis within the Institute, at 71:

> ***There was no evidence that a larger unit is beyond the organizational reach of the union, nor is there any other discernable labour relations reason that would compensate for the difficulties, actual and potential, for employees and employer alike, that the proposed unit would create.***

From this review of cases, it would appear to the Board that ***under-inclusive bargaining units will not be considered to be appropriate in the following circumstances: (1) there is no discrete skill or other boundary surrounding the unit that easily separates it from other employees; (2) there is intermingling between the proposed unit and other employees; (3) there is a lack of bargaining strength in the proposed unit; (4) there is a realistic ability on the part of the Union to organize a more inclusive unit; or (5) there exists a more inclusive choice of bargaining units.***

Overall, the Board is satisfied in this application that the press room employees are a sufficiently skilled and discrete craft group to justify their separate certification. There is no evidence that the press room employees are regularly interchanged with employees in other departments. They obviously have a sufficient ability to bring the work of the newspaper to a halt and possess sufficient bargaining power to render them a viable collective bargaining unit. In addition, there is recent history establishing the difficulty of organizing on a more inclusive basis and a past history of lack of success in organizing in this sector in Saskatchewan. Finally, there is no existing bargaining unit that would be more suitable for the employees in question. For these reasons, and the reasons stated above, although the unit proposed is not the most appropriate bargaining unit, the Board is convinced that the proposed unit is, nevertheless, appropriate for collective bargaining.

This finding does signal that the Board is placing more emphasis in this instance on the rights of the employees in the press room to be represented by a union of their own choosing than we are with the long-term stability of the bargaining relationship. There is no doubt that the history of organizing in this industry throughout Canada has produced a fragmented maze of craft and industrial units resulting in jurisdictional disputes and prolonged labour disputes. The Employer's concern for the long term consequences of fragmented bargaining is justified in the overall context of what has occurred in the industry in other provinces.

In Saskatchewan, however, the industry has not been plagued by any problems related to multiple bargaining units because it has remained, by and large, unorganized. At this stage, we believe we are justified in permitting GCIU to certify on an under-inclusive basis in order to ensure that the right of employees to organize is given the primacy it is entitled to under s. 3 of the Act. At some point in the future, it may be necessary for the Board to rationalize bargaining units in this sector; however, as stated in The Regina Exhibition Ltd. case, supra at 45, "it would make little sense for the Board to require optimum long term bargaining structures if the immediate effect is to completely prevent the organization of employees."

*[**emphasis added**]*

[52] 5 factors can be distilled from this decision. An under-inclusive bargaining unit will not be appropriate where:

(1) there is no discrete skill or other boundary surrounding the unit that easily separates it from other employees;

(2) there is intermingling between the proposed unit and other employees;

(3) there is a lack of bargaining strength in the proposed unit;

(4) there is a realistic ability on the part of the Union to organize a more inclusive unit; or

(5) there exists a more inclusive choice of bargaining units.

[53] In this case, there is clearly no discrete skill or other boundary surrounding the proposed units so as to make them unique and easily separated from other employees. All of the proposed units include journeymen plumbers and apprentices not any other trades[19]. Secondly, as noted above, there is regular intermingling between the proposed units and employees are often engaged in construction, maintenance or service depending on the job requirements. The skills employed by the employees are employable by them within any of the areas in which Gregg's works.

[54] While it has not been shown that there would be any lack of bargaining strength within the proposed units, it is not, in our opinion, ideal. With three separate bargaining units, there is potential for whipsawing or other similar behaviour by either of the parties seeking to divide the units.

[55] In this case, the Union has more than a realistic ability to organize a more inclusive unit and has done so. It organized each of the 3 units, and all of those employees sought to be represented by U.A. 179 for collective bargaining.

[56] This larger, more inclusive unit is, we believe, the more appropriate unit for collective bargaining to occur. While not the subject of any of the 3 applications, the Union did request that its applications be amended, if necessary to permit its application to succeed in respect of this larger unit. That request, as noted above, was opposed by Gregg's on the basis that it was a departure from the position advanced by the Union in its applications.

[57] Section 6-112 of the *SEA* grants the Board broad authority to allow parties to amend their applications at "any stage of the proceedings". This Board exercises this authority liberally to insure that the objects of the legislation are achieved and parties are not prejudiced by procedural issues that may arise. This is particularly true with respect to certification applications where details of the application are often unknown until the hearing of the matter.

[19] Exclusive of the one employee who has numerous trade certifications

[58] While we are of the view that the Board's authority to frame an appropriate unit of employees does not necessitate an amendment of the Union's applications, we would, nevertheless, if required, grant the Union's request for an amendment to insure that the real questions in dispute between the parties are resolved.

Eligibility of Mr. Heintz

[59] We do not agree with the Union; that Mr. Heintz should be eligible to vote. In order to be eligible to vote, Mr. Heintz must have been employed within one of the classifications (ie journeyman plumber/pipefitter or apprentice) on the date the application was filed by the Union.

[60] The Board has evidence that Mr. Heintz asked to be indentured as an apprentice and that he had hours which he had worked which could be credited towards his apprenticeship. His request to be indentured was dismissed by Gregg's due to the uncertainty regarding the union organizing drive and the current economic conditions.

[61] The Union argues that we should permit Mr. Heintz to vote because he "intended" to become indentured and had performed work as a plumbing/pipefitting apprentice. In support of its position, the Union cited the Board's decision in *Tesco*[20] and *I.B.E.W., Local 2038 v. Clean Harbours Industrial Services Canada*[21].

[62] In *Clean Harbors*, the Board was dealing with apprentice workers who, while registered in Alberta as apprentices, had not, as yet, registered in Saskatchewan. Furthermore, the bargaining unit applied for in that case included "electrical workers", whereas no such employee classification was applied for in this case.

[63] Mr. Heintz was neither an apprentice in another jurisdiction nor was he within any of the classifications of employee that the Union sought to represent.

[64] The vote was conducted by the Board based upon the employee classifications sought by the Union. We cannot, at this time, amend the scope of that classification as to do so would possibly raise issues concerning whether or not other employees (such as another person

[20] Supra note 6
[21] 2014 CanLII 76047 (SKLRB)

who asked to become indentured about the same time as Mr. Heintz, or persons employed within Gregg's warehouse) might fall within that broader classification.

[65] Accordingly, we find that Mr. Heintz's vote should not be considered in respect of the representational question.

Decision and Order:

[66] It is the Board's decision that the following units of employees are appropriate for collective bargaining:

1. All journeyman plumbers, steamfitters, pipe-welders, gas-fitters, refrigeration mechanics, instrumentation mechanics, sprinkler fitters and foremen connected with these trades employed by Reliance Gregg's Home Services, a division of Reliance Comfort Limited Partnership in the City of Saskatoon, in the Province of Saskatchewan.

2. All apprentice plumbers, apprentice steamfitters, apprentice pipe-welders, apprentice gas-fitters, apprentice refrigeration mechanics, apprentice instrumentation mechanics, and apprentice sprinkler fitters.

3. That the Board Agent shall forthwith count all ballots cast, excluding the ballot cast by Brandon Heintz, and shall report the results of that vote to a panel of the Board for the issuance of an appropriate Order.

4. That U.A. 179 and Gregg's may file an irrevocable election with the Board pursuant to section 6-11(4)(a) within 30 days of this decision. In the event such an election is filed, the certification Orders shall be issued for one bargaining unit combining the two bargaining units set out above.

DISSENT OF JIM HOLMES

ATLAS INDUSTRIES LTD LRB 11-97

[67] I have read the decision of the majority and I agree with the description of the evidence in this case. With respect I cannot agree with the conclusion of the majority (para 37-

39) regarding the interpretation of Atlas Industries Ltd, LRB File No. 011-97, a decision upheld by the Court of Appeal and that has been the guiding case of the Board's jurisprudence since 1998.

[68] CILRA mentioned below is The Construction Industry Labour Relations Act, 1992.

[69] I believe Atlas stands unequivocally for the position that if some of the employees work in construction as defined by the Act, all employees in the trade employed by the employer are covered by the statutory regime applicable to construction.

[70] Counsel for Atlas argued that the Board should distinguish between sheet metal employers who operate fabrication shops primarily in conjunction with on-site construction projects and sheet metal employers whose primary focus is custom fabrication, with a small emphasis on on-site installation and maintenance. **There may be some merit to this sliding scale approach to the definition of construction which would place a unionized employer under the CILRA umbrella only where the primary focus of its work is construction activity. On the other hand, however, it is a distinction that may lessen the stabilizing features of the CILRA scheme.** It could result in non-CILRA employers undercutting the bids of CILRA employers based on lower wage costs which may result from the non-CILRA employers' ability to enter into a contract on their own with the Union. It may also result in job tensions where non-CILRA employees work side-by-side with higher paid CILRA employees, all performing similar work. In addition, the Board would need to devise some criteria for determining when an employer is sufficiently engaged in construction activities so as to place it under the umbrella of the CILRA. This may result in an employer moving in and out of the CILRA umbrella depending on its particular mix of work at anyone time.

[71] **The CILRA describes "construction industry" in terms of activities, not in terms of the primary or principal work performed by a business or enterprise. It is concerned with any employer who performs construction work and does not exclude employers from the operation of the CILRA based on the fact that a preponderance of their work falls outside the definition of the "construction industry".** In our view, the overriding purpose of the CILRA which is to bring stability to the unionized construction sector would be jeopardized if employers who are engaged in construction work, such as installation and maintenance work, are excused from the provisions of the CILRA based on an assessment of the primary focus of their work. (emphasis added)

[72] We are reliant on the Board and Court Decisions for the facts of Atlas. The clearest description is found in the Queen's Bench decision:

[73] It is not clear from the facts found by the LRB whether Atlas has 10 or 11 employees. It is clear however that all but two work exclusively in non-construction activities at the Atlas shop. One of the two is involved for 60 to 70 percent of his time in construction activities at Intercon Packers changing the conveyor lines to stainless steel and maintaining the conveyor lines. The other spends 5 percent of his time in construction activities at a chemical plant doing welding maintenance.

[74] The definition of construction in CILRA was amended in 2010 and the revised definition specifically excluded maintenance, both by striking it from the definition of construction in Section 2(i), and specifically identifying it as excluded Section 2 (ii). This exclusion was carried into the SEA Division 13 Section 6-65 (a) (ii).

[75] This amendment may well have caused a different outcome on a certification brought now on the fact situation of Atlas, but this hearing is not deciding the certification of that bargaining unit. The amendment of the definition does not change the principle that where some of the employees in the trade work in construction as defined by the Act in force, all employees in the trade employed by the employer are covered by the statutory regime applicable to construction.

[76] In Atlas, 2 of 10 or 11 employees were sufficient to bring all under the construction provisions. In the case before us it is uncontested by Counsel that the eight (8) employees in the New Home Construction division and the five (5) employees in the Install and Small Projects division fit the definition of construction. The six (6) within the Service Division were primarily, but not exclusively, engaged in maintenance.

[77] I would respectfully submit that Atlas was specifically decided to prevent the fragmentation of bargaining units.

[78] The majority decision in this case also avoids fragmentation, but it does so by excluding this bargaining unit from the provisions of Division 13. With respect, I suggest the Board's power to determine appropriate bargaining units cannot be used to nullify specific rights provided in the Act. Section 6-65 (e)(ii) explicitly names "the residential sector" as a sector of the

construction industry. **The Commercial Provincial Utility Core Agreement** (Exhibit U-2**)** contains the **Provincial Residential Agreement**. Both were entered into by the Union and the Construction Labour Relations Association Saskatchewan Inc., (CLR) the Representative Employers Association accredited under Section 6 of the Act.

[79] The majority decision states, the Employer in this case reported it was rebuffed by the CLR (para 45). With respect, the CLR does not get to pick and choose its members. A certified employer in the trade division must be represented by the Representative Employer Organization (Sections 6-65 (c & d) 6-70 (1 & 3) and 6-72 (3)

[80] In its decision, the majority quotes (para 35-36) from a paper by Albert Sims QC, who has extensive experience in construction labour relations. The excerpts speak extensively to the benefits to employers of systems like those contained in SEA Division 13. But the Union also gains benefits including having one collective agreement that will apply to all newly certified bargaining units. That same collective agreement will bind recalcitrant employers without the necessity of work stoppages to bring them up to the normal standard. The difficulty of trade unions in bargaining first agreements has been recognized as a real impediment to worker's rights and a generally applicable, but cumbersome and time consuming remedy, is available in SEA Section 6-25 **Assistance re first collective agreement**. The provisions of Division 13 relieve the Union of the necessity of using Section 6-25.

[81] The difficulty of bargaining for and maintaining small bargaining units of 1, 2, or 19 employees is widely remarked upon by all familiar with labour relations. SEA Division 13 addresses this challenge for this Union and means workers in small workplaces can effectively exercise their Charter Rights.

[82] Sims puts a good deal of emphasis on the role of the union hiring hall but the hiring hall is not mentioned at all in the Act. It is not a statutory requirement, but a negotiated solution to the problem of precarious employment. It is not restricted to the construction or maintenance industry. It is used for example by longshore unions, although some of those union members have steady employment outside of the hiring hall. **(**Ménard v. The Queen, 2004 TCC 516 (CanLII).

[83] The majority puts a good deal of weight on the precariousness of much large scale construction work and contrast it with the greater stability of the residential sector. I may

perhaps take “judicial” note that my son has been continuously employed, never laid off, for over 8 years as an industrial construction electrician with only two firms, one union, one non-union. Both firms mirror Gregg’s business model of a steady complement of employees working on aggressively sought short-term contracts. Precarious work mitigated by the protection of the hiring hall may be the dominant form of employment in construction, but it is not the only one.

[84] The evidence is that Gregg’s had been stable because it had long-term contracts with large builders but that they had lost some of those contracts and coupled with the recent slowdown, their work had become more precarious. The evidence is also clear that Reliance Gregg intends to continue its new home construction business.

[85] Surely the degree of precariousness cannot be a deciding factor, otherwise bargaining units would move in and out of the provisions of Division 13 based on the economic cycle.

[86] As long as there are no lay-offs, construction workers do not need to use the hiring hall. For the workers affected by this certification order, the hiring hall only becomes relevant if Reliance Gregg reduces the size of its workforce. If Reliance Gregg subsequently expands its workforce, the employer can name hire but it must obtain its workers from the hiring hall (Article 4.02 (b) of the collective agreement (Exhibit U-2).

WHAT IS MAINTENANCE?

[87] The Board heard considerable evidence about the work procedures in an attempt to define what is maintenance. The Act provides no definition of maintenance and the definition of construction specifically includes “reconstructing, altering, remodeling, revamping, renovating, decorating…”

[88] A common interpretation would suggest all of these activities are more maintenance than construction.

[89] With respect, the meaning of maintenance is found in the context of Division 13 dealing with the construction industry and specifically the construction industry organized on a craft union basis. In other words, the meaning is not found in a detailed examination of specific tasks or work routines but in the macro-economic organization of a craft based industry.

[90] To understand why maintenance is excluded, we must first note that craft based construction collective bargaining is based on one collective agreement binding all employers in a trade division. If there is a strike or lockout, the Act requires all employees and employers in the trade division to be participants. There are no selective strikes or lockouts. (Subdivision 7 **Additional Obligations re Strikes and Lockouts** 6-77 and 6-78)

[91] A useful discussion of maintenance is found in **Alberta Construction Labour Legislation Review,** prepared for the Government of Alberta Andrew C.L. Sims, Q.C. submitted November 6, 2013 and particularly Chapter 12 The Maintenance Industry.

[92] The second [Contracted on-going maintenance services] and third [Shutdown or turn-around maintenance] type of maintenance services are provided in large part by several very large maintenance contractors. Many are signatory to agreements with the General Presidents' Maintenance Committee and draw their labour as and when needed from the building trades hiring halls. There are alternative unions and non-union contractors operating in this area, but less so than in construction.

[93] On-going maintenance requires a relatively steady supply of skilled labour. In contrast, shutdowns and turn-around maintenance, and maintenance work in response to emergencies requires a very large workforce marshaled quickly to work for as short a time as possible, normally only a few weeks. Some work on a plant, whether repair work or upgrading, can only be accomplished while the plant is out of production. Wherever possible such shutdowns have to be carefully planned for maximum efficiency and minimum delay.

[94] As with construction, major maintenance projects are linear, with different trades being brought on-site in the appropriate order. Shutdowns also have to be coordinated between projects; they cannot all draw on the same workforce at the same time.

[95] In almost all provinces, the labour statutes exclude maintenance from construction, recognizing that, while using the same trades and largely the same unions, a different labour relations dynamic needs to exist. The focus of construction bargaining has been provincial. The focus of maintenance bargaining has been national, mostly through the General Presidents' Maintenance Committee for Canada.

[96] The GPMC delivers two maintenance agreements, the GPMA for on-going construction maintenance and the NMA for short duration, intermittent maintenance. These are

multi-craft collective agreements with all the trades working together under the same terms and conditions although with craft-based rates. **To succeed, these agreements have had to achieve two things; no strikes or lockouts that might delay production and a steady supply of skilled labour on an as-needed basis. The no-strike or lockout objective has been achieved for about 60 years by providing, in each agreement, that the rates for each trade will be picked up from the local registration or accreditation agreements in force.** The labour supply has been obtained by the union drawing first on the resources of the local union where the project exists, and then, as necessary, from other locals first in Canada and then in the U.S. The ability of employees to move between jurisdictions on travel cards, and to maintain their health, welfare, and pension benefits when doing so, is important to the ability to provide sufficient labour when needed. (Emphasis added)

[97] With respect, I suggest that the reason for the exclusion of "maintenance" is to ensure the ongoing or turn around maintenance of the major industries of the Province (mines, steel mills, energy infrastructure etc.) are not disrupted by work stoppages arising from the construction industry. Without the "maintenance" exclusion, all unionized craft based work would be governed by the all-inclusive work stoppages required by Subdivision 7 **Additional obligations re Strikes and Lockouts**.

[98] With respect, if Reliance Gregg is unable to fulfill it maintenance contracts with its residential customers due to a construction work stoppage it will have no devastating effect on the economy of Saskatchewan. However, I may take "judicial note" that in every work stoppage I took part in over 30 years, the Union agreed to emergency measures during a work stoppage to protect safety and property. During the first one, I was told this was standard union practice. There is no case law I know of, but hopefully such an agreement would not be found to be a violation of Subdivision 7 **Additional Obligations re Strikes and Lockouts** 6-77 and 6-78)

[99] In summary, Atlas established that where some tradespeople in a workplace fall under the provisions of the Construction Labour Relations, all tradespeople in that workplace fall under the provisions. This has been the law for 20 years.

[100] The amendments consolidating legislation and in particular those excluding "maintenance" from "construction" do not change the principle of Atlas.

[101] The "maintenance" exclusion deals with the continued maintenance of Saskatchewan industrial infrastructure, uninterrupted by construction work stoppages.

[102] I would therefore certify the “Newbery” unit requested by the Union under Division 13 of the SEA.

DATED at Regina, Saskatchewan, this 18th day of December, 2018.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Vice-Chairperson