INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2038, Applicant v WAIWARD STEEL LP, Respondent

LRB File No. 170-17; June 17, 2019

Vice-Chairperson, Barbara Mysko; Board members: John McCormick and Ken Ahl

Counsel for the Applicant Union:	Greg Fingas
Counsel for the Respondent Employer:	Meghan McCreary, Q.C.

Voluntary Recognition – Unfair Labour Practice – Open shop – Union claims voluntary recognition on basis of pre-job and mark-up conference – Contractor awards contract to non-affiliated sub-contractor – Union claims that contractor is bound to Provincial Agreement based on pre-job and mark-up conference – Union commenced an application alleging contractor repudiated collective bargaining agreement by failing to employ affiliated members, which amounted to an unfair labour practice.

Statutory interpretation – Board reviews relevant principles of statutory interpretation – Board concludes that pre-job and mark-up conference documents do not constitute a "collective agreement" as defined in subsection 6-1(1)(d) of The Saskatchewan Employment Act.

Voluntary Recognition – Board reviews its jurisprudence on voluntary recognition – Board concludes that there was no voluntary recognition – Board concludes that Union failed to satisfy its burden of proof and dismisses application.

Arbitration – Unfair Labour Practice – Refusal to submit to arbitration – Union failed to satisfy its burden of proof that the refusal to arbitrate amounted to an unfair labour practice.

Deferral – Board reviews principles and test for deferral to arbitration – Board has jurisdiction to determine whether collective agreement exists – Having found no binding collective agreement, remaining issues must fall.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: International Brotherhood of Electrical Workers, Local 2038 ["IBEW" or the "Union"] represents a trade division of unionized electrical workers in

the construction industry pursuant to Part VI, Division 13 of *The Saskatchewan Employment Act* [the "*Act*"] and is an affiliate of the Saskatchewan Provincial Building and Construction Trades Council ["Council"]. The Union has brought an application alleging that Waiward Steel LP ["Waiward" or the "Contractor"] has been or is engaging in an unfair labour practice (or contravention of the *Act*) within the meaning of sections 6-41(2), 6-41(3), 6-46(5) and 6-62(1)(r) of the *Act* [the "Application"].

[2] The background begins with the K+S Crystallizer Rebuild at Bethune [the "Project"]. IBEW alleges that Waiward assigned its electrical and instrumentation work on the Project to Westwood Electric ["Westwood"], a sub-contractor whose electrical workers are not represented by IBEW, but by CLAC. IBEW says that Waiward failed to do everything it is required to do, and refrained from doing anything it is required to refrain from doing, under the "Pre-Job Conference Agreement", contrary to subsections 6-41(2) and 6-41(3) of the *Act;* and has failed and refused to respond to its arbitration notice contrary to subsection 6-46(5) of the *Act*.

[3] The hearing of this Application took place on January 19, 2018 before then Vice-Chairperson Graeme Mitchell, Q.C. and panelists Ken Ahl and John McCormick. Vice-Chairperson Mitchell was appointed as a Judge of the Court of Queen's Bench on September 21, 2018. The parties agreed that this matter could be concluded by either the Chairperson or the incoming Vice-Chairperson listening to the recording of the hearing and then issuing this decision in conjunction with the other members of the panel.

[4] Evidence was heard from two witnesses, Maurice Kovatch ["Kovatch"] and Harry Tostowaryk ["Tostowaryk"], and documentary evidence was tendered. The parties made oral submissions and filed written briefs and books of authorities, all of which the Board has reviewed and found helpful. While not all of the authorities are referenced in these Reasons, they have all been reviewed and considered.

Argument on Behalf of the Parties:

IBEW

[5] IBEW states that its Application pertains to the effect of a collective agreement voluntarily entered into by Waiward and to Waiward's refusal to engage in the legislated arbitration process.

[6] According to IBEW, in May 2017, Waiward engaged in a pre-job and mark-up conference, which is a customary process for assigning work in the construction industry. In the mark-up conference, Waiward agreed that all work awarded to it on the Project would be performed by members of affiliates of the Council. IBEW is an affiliate of the Council, but Waiward failed and refused to employ its members on the Project.

[7] Both the Provincial Electrical Agreement [the "Provincial Agreement"] and the Collective Bargaining Agreement for Industrial Construction in the Province of Saskatchewan [the "Provincial Plumber/Pipefitter Industrial Agreement"] provide for a mark-up conference for small projects to be held by facsimile. Neither of those agreements allow for an email mark-up. Notwithstanding the clear wording of these provisions, Waiward proceeded to hold a conference by email. The Union received no notice of the intention to hold an electronic conference nor notice of the conference itself.

[8] Through the electronic conference, Waiward assigned electrical work to Westwood rather than to an "affiliated" sub-contractor. When the Union found out, it invoked the arbitration process by serving a policy grievance. But instead of responding to the grievance, Waiward took the position that no agreement existed.

[9] IBEW argues that the best and proper interpretation is that there was intent to enter into a binding legal agreement that obliged Waiward to sub-contract the electrical work to a sub-contractor certified to an affiliated union. At least three facts support this interpretation. First, an agreement was expressly recognized. Second, IBEW has a right to demand an in-person mark-up, which did not occur. Third, work was assigned to affiliates under the terms of their collective bargaining agreements and the work was performed without regard to separate agreements or assigned manpower numbers.

[10] Furthermore, the Provincial Agreement expressly prohibits subletting or pre-fabricating of work as follows:

> *3.06 a) Local Unions 529 & 2038 are part of the International Brotherhood of Electrical Workers, and violation or annulment of working rules or agreement of any other Local Union of the IBEW, or the subletting and/or prefabricating of any work normally performed by the Employees covered in this Agreement, to any person, firm or corporation not fair to the IBEW, or the employment of other than IBEW members on any electrical work in the jurisdiction of this or any other such Local Union by the Employer, will be a violation of this Agreement.*

[11] According to IBEW, should the Provincial Agreement apply the implications are obvious. Waiward failed to follow the procedure for the mark-up conference, went outside the agreement, and sub-contracted illegally.

[12] IBEW relies on *SPI Marketing Group (Re)*, [1996] SLRBD No 9 ["*SPI Marketing*"], to argue that, regardless of the determination on the first issue, the failure to comply with the arbitration process is itself an unfair labour practice. The issue of arbitrability is not for the parties to decide. Apart from any other issue, Waiward committed an unfair labour practice by refusing to submit to arbitration.

Waiward

[13] Waiward relies on the fact that the Project took place at an open site in which union and non-union labour was permitted. Waiward did not voluntarily recognize IBEW and without voluntary recognition, Waiward is not bound by the Provincial Agreement. Waiward voluntarily recognized five craft unions for the employees that it directly hired. Where it sub-contracted work, there was no restriction on hiring union labour alone.

[14] As a result, Waiward is not bound to proceed to arbitration. There is no agreement between the parties with respect to any dispute that might arise, and Waiward took no actions in bad faith. On the other hand, if there is a legal relationship, then Waiward concedes that its refusal to proceed to arbitration would be properly characterized as an unfair labour practice.

[15] Waiward raises a jurisdictional issue with respect to the remaining issues before the Board. Waiward is not a unionized employer with respect to the employees in the electrical trade division. As such, neither section 6-70 of the *Act*, nor the Provincial Agreement, apply to Waiward. If the Board accepts Waiward's submission on this point, the remaining allegations must be dismissed. Alternatively, if the Board disagrees with Waiward's submissions and finds that Waiward has voluntarily recognized the Union and is bound by the Provincial Agreement, then the disputes about the potential breach are within the jurisdiction of an arbitrator and not the Board.

Evidence:

Maurice Kovatch ["Kovatch"]

[16] Kovatch is the business manager for IBEW. He is the sole signatory to the Provincial Agreement on behalf of IBEW.

[17] Kovatch was involved in bargaining Article 11 of the Provincial Agreement, entitled "PRE-JOB AND MARK-UP CONFERENCES (For Industrial Only), JURISDICTION AND ASSIGNMENT OF WORK". Article 11 sets out the process for the employer when "marking up" a job, that is, when describing what work will occur in that job and who will perform that work. Kovatch summarized the process. According to Kovatch, the contractors contact the Council and set up a conference. At the conference, in which the building trades are in attendance, the unions are given an opportunity "to mark up the document that describes what work will take place and who will receive what scope of work". The unions are given an opportunity to accept or to ask questions about the decisions made by the employer, and then to file documentary evidence supporting any claims.

[18] Mark-up conferences are to be held in person except for in exceptional circumstances. Article 11 allows for a mark-up conference by facsimile for small projects with the consent of the Council. It does not allow for electronic mark-up. Kovatch explained that in the last round of bargaining a contractor asked that electronic mark-up be made an option, but agreement on this issue was not reached. Electronic mark-ups are considered less transparent than in-person conferences, making it more likely that a job will not be awarded properly.

[19] According to Article 11, notification of the conference and hard copy documents are to be given to the Council a minimum of 15 calendar days before the work commences.

[20] Article 11 reads in its entirety:

> ***ARTICLE 11:00 PRE-JOB AND MARK-UP CONFERENCES (For Industrial Only), JURISDICTION AND ASSIGNMENT OF WORK***
>
> *The Employer will hold a pre-job conference and equipment mark-up attended by all interested Unions and will provide an overall description of the project, projected manpower requirements by craft, general information pertaining to hiring and recruiting procedures, transportation, on site work rules, safety and security regulations, safety meetings and any other pertinent information. The Employer will inform the Union as to the projected scope of the contract, information pertaining to the Employer's intended supervisory staff and other relevant information including intended work assignments. Notification of the pre-job*

conference and hard copy documents to be presented shall be given to the Saskatchewan Provincial Building & Construction Trades Council and the office of the President of the Building Trades Department AFL-CIO with a minimum of fifteen (15) calendar days prior to the date set for the conference. The pre-job and equipment mark-up in all cases shall be held at least ten (10) calendar days before the work commences. The time limits set forth herein may be varied to suit unusual circumstances after consultation between the Employer and the Building Trades Council.

[…]

Before the close of the meeting, the Employer will read over the items in dispute. The Employer will then request that documentary evidence supporting the disputing Unions' claims be forwarded to him within a period of seven (7) calendar days. The Employer will make and circulate to the disputing trades final assignments, based on the evidence provided within a further three (3) calendar days or as may otherwise be agreed at the mark-up. All such assignments shall be made in accordance with the procedural rules of the National Joint Board.

The Employer(s) recognizes the jurisdictional claims of Union(s) as set forth in the Charter Grants issued by the AFL-CIO subject to Trade Agreements and final decisions of the AFL-CIO as well as the decisions rendered by the Canadian Jurisdictional Disputes Plan, or its successor.

It is incumbent on all Employers to assign work in accordance with the Employers' responsibility set forth in the procedural rules and regulations of the Canadian Jurisdictional Disputes Plan.

In the event a jurisdictional dispute arises, the representative(s) of the Union(s) shall first seek resolution of the dispute at the project level. In the event no resolution is found at the project level, the respective International Union(s) shall follow the procedures of the Canadian Jurisdictional Disputes Plan, or its successor.

A mark-up conference for small projects may be conducted by facsimile when mutually agreed with the Saskatchewan Provincial Building and Construction Trades Council.

[21] The Board makes the following observations about Article 11:

a. It is the Council that holds the ability to consent to facsimile conferences, on behalf of the trades;
b. The mark-up conference is to be attended by all interested unions;
c. The mark-up conference is to be held at least 10 calendar days before the work commences;
d. Before the close of the meeting, the employer will read over the items in dispute;
e. The employer will request that support of the disputing unions' claims be provided within seven calendar days;
f. Final assignments are to be made in accordance with the procedural rules of the National Joint Board;

g. Employers are required to assign work in accordance with the Canadian Jurisdictional Disputes Plan;

[22] Identical wording is found at Article 7 of the Pipefitters' provincial agreement, which was entered into evidence. Despite the in-person procedural requirements outlined in Article 11, Waiward conducted the mark-up by email without IBEW's knowledge.

[23] An email from Tostowaryk to the Council, dated May 9, 2017, was entered into evidence:

> *Good morning Bonnie*
>
> *We were hoping that you guys could distribute the mark-up to the trades and see if there were any issues, we would rather not do a mark-up as our scope of work is not that large however we understand that the Agreement gives the Unions the right to demand it. Your thoughts*

[24] The Council forwarded Tostowaryk's email to affiliated unions on the same date and explained:

> *Good Morning. We have been corresponding with Waiward Steel re: having a pre-job mark-up at our office. As you can see from the below email, they would prefer not to have a pre-job mark-up in our office, rather we send it out to everyone (attached). What are everyone's thoughts on not having a face to face meeting but rather just doing the mark-up electronically?*
> *Please let us know.*

[25] Kovatch did not receive the emails. He first became aware that the mark-up had occurred on May 26, 2017. By this time, Westwood, who is a CLAC contractor, had been awarded the electrical work.

[26] The documentation presented by email had consisted of two parts. First, there was a one-page template filled out by Waiward, consisting of the following statements:

> *The Company agrees all work assignments will be made according to the procedures of the Building Trades Department ALF-CIO. Yes*
>
> *The Company agrees that all work will be done by workers who are members of Local Unions affiliated with the Saskatchewan Provincial and Construction Trades Council. AFL-CIO. Yes for work awarded to us.*

[27] Second, there was a series of pages listing the intended assignments for the various trades and sub-contractors.

[28] Throughout these Reasons, these two parts will be referred to as the Pre-Job and Mark-Up documents, respectively.

[29] Kovatch decided to notify Waiward that the mark-up conference had been conducted in a manner contrary to the Provincial Agreement and that IBEW should have been awarded the electrical work. On May 26, 2017, IBEW sent a letter to Harry Tostowaryk stating that:

> *[…] IBEW 2038, in whose jurisdiction this work is to occur, was not notified of the mark-up nor is there a provision in their agreement for electronic mark-ups. As a result, IBEW 2038 was informed of the final assignments after the fact.*
>
> *The final assignment of Electrical and Instrumentation was given to Westwood Electric, a CLAC represented company.*
>
> *IBEW 2038 is officially claiming all of the electrical and instrumentation work as per the course of a pre-job mark-up. As per attached sheets*
>
> *As well, the pre-job conference states, "The Company agrees that all work will be done by workers who are member [sic] of Local Unions affiliated with the Saskatchewan Provincial and Construction Trades Council. AFL-CIO."*

[30] Kovatch had been confident that IBEW members would be employed through a signatory contractor, Chemco Electric ["Chemco"], who had been doing work for K+S for approximately eight months. In February, a representative of Chemco contacted Kovatch to advise that they had been asked to submit a bid. Chemco was seeking changes to the collective agreement to assist them in being awarded the contract. Several days later, Chemco sent IBEW a document entitled Q17-001 – Addendum #01, and further to the enabling clause, Chemco reduced the union wages by three dollars per hour. Kovatch was confident that there would be 12,000 hours of work.

[31] It was later explained that Westwood was awarded the work because it was the only contractor who had taken the time to properly complete the information requested in the tender. On May 29, 2017, Kovatch sent a letter to Tostowaryk stating:

> *I have considered your answer to my questions about the tendering procedures at the K+S Legacy Mine Crystallizer job and I realize that this project will begin in short order. You indicated that Chemco was considerably higher than Westwood and I would like an opportunity to review the bid number between Westwood and Chemco since we targeted the job and our price per man hour was quite low. I would need some documentation to validate your information that the Union contractor was way too expensive to see if I can facilitate a better price from any of our Building Trades contractors.*
>
> *I took the liberty of contacting DMS Industries and Aecon West, both of whom are on site and Building Trade members. They weren't contacted about bidding and would like the opportunity to put a bid in.*

[…]

[32] In an email to Kovatch, dated May 30, 2017, responding to his concerns, Tostowaryk wrote:

> *I called you earlier this week as a courtesy as you had some umbrage over the fact when you found out that one of your signatory Contractors was not successful obtaining this work.*
>
> *You are correct and one of the factors was how high their bid was however the main factor was during the bid process how much effort was put forth by the Electrical Contractors who bid on this work. The Owner has a list of Contractors who are allowed to bid on this site and the four who choose to submit were Chemco, Westwood, Flyer and Concept. Of these four only Westwood took the time to properly fill in all the requested information in their bid.*
>
> *We have no control who the owner chooses to put on their list of qualified Contractors that is up to them, as far as going over the bids that were submitted to us there is a principal against disclosing these numbers which I'm sure you can understand.*
>
> *We do not wish for a conflicted job site and do not believe who this work is awarded to should make a difference however the process took place months ago and as I mentioned earlier it came down to the effort which was put in by the Contractors who submitted bids only one (Westwood) took the time and effort to put in a bid properly. You mentioned that the targeting was quite low on this project that is between you and your contractor and if either party thought it wasn't enough it should have been discussed before the price was sent in to the General.*
>
> *I hope this answers your concerns if you wish to discuss further however the Contract has been awarded.*

[33] On June 21, 2017, IBEW prepared and then sent a grievance form that read as follows:

> *NATURE OF GRIEVANCE*
>
> *Voluntary Recognition Agreement dated May 2017*
>
> *Terms of Agreement Violated:*
>
> - *Agreement to hold a pre-job mark-up*
> - *Agreement that all work will be done by workers who are members of Local Unions affiliated with the Saskatchewan Provincial and Construction Trades Council*
> - *And all other article that may apply.*
>
> ***DETAILS***
>
> *The Employer has refused to comply with the Agreement respecting the performance of electrical work at its Bethune work site (the "Site").*

> *In May 2017, the Employer entered into a voluntary recognition agreement (the "Agreement") respecting all work at the Site. The Agreement is a collective agreement within the meaning of the Saskatchewan Employment Act.*
>
> *Contrary to the Agreement, the Employer failed to hold a pre-job mark-up, and instead held only an electronic mark-up with no notice to IBEW 2038.*
>
> *The Employer then assigned electrical and instrumentation work at the Site to Westwood Electric. Westwood's electrical workers are not members of IBEW 2038 or any other local affiliated with the Saskatchewan Provincial and Construction Trades Council, but are instead represented by CLAC.*
>
> *IBEW 2038 intends to submit the within dispute to arbitration pursuant to section 6-46 of the Saskatchewan Employment Act. […]*
>
> *RELIEF REQUESTED*
>
> *The Union requests that:*
>
> - *The Employer be declared to have breached the Agreement, and be ordered to cease doing so in the continued performance of work at the Site; and*
> - *The Employer be ordered to compensate IBEW 2038 and its members for all losses arising out of its breaches of the Agreement, including paying salary and dues to the extent they would have been paid had the Employer complied with the Agreement.*

[34] Donny McCue ["McCue"], Vice President Construction for Waiward, replied by email on June 27, 2017. He asked for a copy of the voluntary recognition agreement referred to in the grievance, and then stated:

> *Yes sub contract electrical work was awarded to an approved vendor to KSPC and who have done work at the Bethune site previous to this contract. It appears your issue is with KSPC.*
>
> *Pre Job mark up was held and copies are with the BT Sask and with CLRA Sask.*

[35] On June 28, 2017, Kovatch wrote back to McCue, stating:

> *I have attached a copy of the Voluntary Recognition Agreement signed by Waiward Steel and the Saskatchewan Provincial Building and Construction Trades Council. The International Brotherhood of Electrical Workers Local 2038 is affiliated with the Building Trades Council as specifically identified in the agreement, and on whose behalf the agreement was signed by the Building Trades.*

[36] The email reply from McCue, dated June 28, 2017, stated:

> *Thank you sir, you referred in the previous email to a Voluntary recognition? Its [sic] not attached!*

[37] Counsel for IBEW replied on June 29, 2017, stating:

> *We understand from your exchange of correspondence with Maurice Kovatch that you are refusing to recognize the attached (negotiated by the Building Trades on behalf of its affiliates including IBEW 2038) as a collective bargaining agreement binding upon Waiward Steel, and are using that position as a basis to avoid providing any response whatsoever to IBEW 2038's referral to arbitration.*
>
> *IBEW 2038 considers Waiward's position in this respect to be patently wrong. The agreement is a written between Waiward and the Building Trades' affiliates which sets out the terms and conditions of employment for unionized employees at the Bethune site.*
>
> *In any event, any dispute as to the effect of a collective agreement – including whether a matter is arbitrable – falls within the jurisdiction of an arbitrator pursuant to the Saskatchewan Employment Act: s. 6-54(1). Waiward is under an express obligation to respond to IBEW 2038's grievance with its position on the arbitrators proposed: SEA, s. 6-46(5).*

[38] Waiward prepared a letter in response, dated June 29, 2017, stating:

> *We reiterate that there is no voluntary recognition of the IBEW by Waiward Steel LP ("Waiward").*
>
> *This is a matter within the jurisdiction of the Labour Relations Board and we invite you to bring your application in that forum.*

[39] On cross, Kovatch acknowledged that contractors are subject to certain licensing requirements in Saskatchewan, when employing electrical workers.

[40] He also acknowledged that an electronic mark-up could have taken place with his consent, but that did not happen. He did not receive the email in which the Council advised the unions of this option. He blamed internal technical issues. He understood that his office had been having difficulties with email at around that time.

[41] When Kovatch advised Terry Parker ["Parker"], Executive Director of the Council, that he had not been notified about the electronic mark-up, Parker indicated that no one had opposed it and so the Council had consented. The Council should have pursued a response from IBEW before giving its consent.

[42] According to Kovatch, the Pre-Job constitutes a voluntary recognition agreement. In cross, he acknowledged that it contains no number for electricians, contrary to his earlier testimony in which he had indicated that it lists electricians. He also acknowledged that no one from the Council had signed it.

[43] By February 2017, Kovatch knew that Chemco was not the only contractor in the running for the work. It was an open site. Therefore, he knew that there was a chance that a non-IBEW sub-contractor could be awarded the electrical work. When asked at which point Waiward had become bound to use an IBEW sub-contractor, he stated that this had occurred when the Pre-Job had been created. According to Kovatch, the Council entered into the "agreement" without IBEW's knowledge. When asked how the Council attained its authority, Kovatch explained that the affiliates are bound to bargain together, and for that reason, the Council signs on their behalf. Finally, he agreed that the Council is not a signatory to the Provincial Agreement.

[44] Kovatch knew that other non-IBEW sub-contractors were bidding on the work. He explained: "It was an open site as you pointed out earlier." He was aware that a non-IBEW contractor could have been awarded the work, and in order to be competitive, he signed the enabling document.

Harry Tostowaryk ["Tostowaryk"]

[45] Tostowaryk works for Waiward as a labour relations specialist, fulfiling the requirements for Waiward's dispatch requests. When it comes to executing voluntary recognition agreements, McCue is in charge.

[46] Waiward is a structural steel fabricator that has historically focused on commercial projects. More recently, Waiward has begun working on "shut downs". Waiward does not hold an electrical contractor's license for Saskatchewan.

[47] Waiward secured the demolition work at K+S. That work occurred in the Fall of 2016. Shortly after, Waiward was awarded the work of the new construction services on site. Tostowaryk received direction that K+S was an open site and that Waiward was to source its workers accordingly. Waiward has never, to his recollection, directly engaged electrical workers. Electrical is a specialty trade and so this work is done through specialty contractors. Waiward is not one of them.

[48] According to Tostowaryk, the belief at Waiward was that a voluntary recognition agreement was necessary to employ the members of the various affiliates. Consistent with this belief, Waiward voluntarily recognized the Labourers, the Millwrights, and the Plumbers and Pipefitters.

[49] For the Labourers, the parties entered into a "try me" agreement, determined that the work was satisfactory, and then decided to proceed with a written voluntary recognition agreement. Tostowaryk was unable to find a fully signed copy that could be entered into evidence.[1] As for the Plumbers and Pipefitters, Waiward toured the facilities, talked about the work coming up, and then proceeded with voluntary recognition. Waiward undertook a similar process for the Millwrights.

[50] Waiward has a long standing relationship with both Ironworkers, Local 771 and with the International Union of Operating Engineers, as their trades represent the "bread and butter" of Waiward's work. Tostowaryk was not aware of any written voluntary recognition agreements with either of these unions. Instead, due to these longstanding relationships, there was a general understanding that both unions would be used for the work at K+S. Waiward has no voluntary recognition agreement with IBEW, whether in Saskatchewan, Alberta, or any other location. Nor does Waiward have a long-term relationship with IBEW.

[51] A primary purpose for the mark-up conference is to avoid jurisdictional disputes by addressing the allocation of work in advance. Tostowaryk had requested, in advance, that the conference be conducted electronically. According to Tostowaryk, for such a small job, it would have been excessive for everyone to travel to Regina. After checking with the Council, he believed he had obtained permission to conduct the conference by email.

[52] Tostowaryk agreed with Kovatch's explanation as to how the mark-up conference is conducted, generally. In performing this particular conference, Tostowaryk relied on and completed the Council's template, provided by Parker ["Pre-Job"]. Parker had explained that the template needed to be used for this job. Tostowaryk completed the remaining information, in spreadsheet form, in Excel ["Mark-Up"].

[53] To complete the documentation, Tostowaryk obtained information from key people to assess the breakdown of work, and then made preliminary assignments based on historic jurisdictional guidelines. The tradespersons for each trade were represented by a numerical range, to allow for the day-to-day variability in work. This was to provide the unions with the opportunity to line up their work. There was no number assigned to electricians because Waiward had no intention to hire electricians directly.

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[1] The copy entered into evidence was signed only by the Union and dated, September 6 2016.

[54] In answering “yes” and “yes for work awarded to us”, Tostowaryk meant that the work performed through Waiward with the trades to whom manpower numbers were attributed, would be done through the affiliates. It was not his intention that all sub-contractors had to be affiliated with the Council. After all, K+S was an open site.

[55] The Pre-Job was completed on May 9, 2017. No one signed on behalf of the Council. By this point, Westwood had been verbally awarded the work. The Pre-Job reads:

> *The Company agrees all work assignments will be made according to the procedures of the Building Trades Department ALF-CIO. Yes*
>
> *The Company agrees that all work will be done by workers who are members of Local Unions affiliated with the Saskatchewan Provincial and Construction Trades Council. AFL-CIO. Yes for work awarded to us.*

[56] The Mark-Up was completed at the same time.

[57] Tostowaryk admitted that he made some mistakes. For example, historically, work on “Pumps (Skids)” is awarded in a certain way depending on whether the pumps come as one piece or in components. He mistakenly assigned this work to IBEW. Due to his many years working within the union system, Tostowaryk had acquired certain habits of mind. In the closed shop, this was always IBEW’s work. That was his mistake. In the end, the pumps came as a complete unit and so this issue was a moot point, as there was no electrical work required.

[58] The final assignments were awarded around May 26, 2017, and were sent to Parker only. Tostowaryk chose not to send the assignments to the unions in case he missed one or two. Between May 9 and May 26, 2017 several trades called for clarification, and he attempted to respond to their concerns.

[59] Tostowaryk described certain follow-up communications with various trades. First, the Pipefitters asked for clarification and some items were added. The Cement Masons asked about grouting, work that the Millwrights were completing due to the size of the job. The Cement Masons followed up by providing Tostowaryk with a list of contractors. Tostowaryk heard from the Boilermakers. He told them that, due to the size of the job, “their work” was being performed by another affiliate. In the end, neither the Cement Masons nor the Boilermakers were assigned manpower numbers.

[60] Tostowaryk did not hear from IBEW during this time, but had several conversations with Kovatch after the final assignments were distributed. Kovatch expressed his concern that Chemco had not been awarded the work. Tostowaryk explained that the Chemco bid was significantly higher and that the execution plan was not very detailed. Westwood was selected earlier in the Spring, around March or April 2017.

[61] Tostowaryk acknowledged that the Provincial Agreement would determine wages for the trades, for those who were hired. He also acknowledged that, the representatives of the unions with "signatory agreements", had the right to "ask more questions" with respect to the mark-up. Although there is written documentation of the relationship, at least with Operating Engineers, he was unable to find an agreement with either the Labourers or Operating Engineers.

[62] Tostowaryk acknowledged that, although plumbers are also a specialty trade, Waiward has recently begun performing "plumbing work" directly.

Relevant Statutory Provisions:

[63] The following provisions of the *Act* are applicable:

> ***Interpretation of Part***
> ***6-1****(1) In this Part:*
> *…*
> *(d)* ***"collective agreement"*** *means a written agreement between an employer and a union that:*
> *(i) sets out the terms and conditions of employment; or*
> *(ii) contains provisions respecting rates of pay, hours of work or other working conditions of employees;*
>
> *(e)* ***"collective bargaining"*** *means:*
> *(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;*
> *(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;*
> *(iii) executing a collective agreement by or on behalf of the parties; and*
> *(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union;*
>
> ***Parties bound by collective agreement***
> ***6-41****(1) A collective agreement is binding on:*
> *(a) a union that:*
> *(i) has entered into it; or*
> *(ii) becomes subject to it in accordance with this Part;*
> *(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and*
> *(c) an employer who has entered into it.*

(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:

(a) do everything the person is required to do; and

(b) refrain from doing anything the person is required to refrain from doing.

(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.

(4) If an agreement is reached as the result of collective bargaining, both parties shall execute it.

(5) Nothing in this section requires or authorizes a person to do anything that conflicts with a requirement of this Part.

(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails.

Arbitration to settle disputes

6-45*(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.*

(2) Subsection (1) does not prevent the director of employment standards as defined in Part II or the director of occupational health and safety as defined in Part III from exercising that director's powers pursuant to this Act.

(3) Without restricting the generality of subsection (2), the director of employment standards may issue wage assessments, issue hearing notices, take action to collect outstanding wages or take any other action authorized pursuant to Part II that the director of employment standards considers appropriate to enforce the claim of an employee who is bound by a collective agreement.

Arbitration procedure – single arbitrator

6-46*(1) Arbitration must be conducted in accordance with:*

(a) subject to subsection (2), the procedures set out in the collective agreement;

(b) if the collective agreement does not provide procedures, the procedures set out in this section; or

(c) if the parties agree, section 6-47.

(2) Notwithstanding the terms of the collective agreement, the parties may agree to use the procedures set out in this section for settling disputes mentioned in section 6-45.

(3) After exhausting any grievance procedure established by the collective agreement, a party may notify the other party in writing that it intends to submit the dispute to arbitration.

(4) The notice mentioned in subsection (3) must contain the name of the person, or a list of names of persons, that the party that gives the notice is willing to accept as a single arbitrator.

(5) Within seven days after receiving a notice mentioned in subsection (3), the party that receives the notice shall:

(a) notify the party that gives the notice that it accepts the name of an arbitrator set out in the notice, and the dispute shall proceed to arbitration; or

(b) if it does not accept the name of an arbitrator set out in the notice, notify the party and send that party a list of names of persons that it is willing to accept as the arbitrator.

(6) If the parties cannot agree on an arbitrator within a further period of seven days, either party may ask the minister to appoint an arbitrator.

(7) No person is eligible to be appointed as an arbitrator or shall act as an arbitrator if the person:

(a) has a pecuniary interest in a matter before the arbitrator; or

(b) is acting or has, within a period of one year before the date on which notice

of intention to submit the matter to arbitration is given, acted as lawyer or agent of any of the parties to the arbitration.

(8) The arbitrator shall:

(a) hear:

(i) evidence adduced relating to the dispute; and

(ii) argument by the parties or their lawyer or agent; and

(b) make a decision on the matter or matters in dispute.

Unfair labour practices – employers

6‑62*(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*

…

(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.

Interpretation of Division

6‑65 *In this Division:*

. . .

(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;*

…

(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;

…

(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.

Effect of determination

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

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

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

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

> *(d) no other employers' organization has the right to interfere with the negotiation of a collective agreement or veto any proposed collective agreement negotiated by the representative employers' organization; and*
>
> *(e) a collective agreement respecting the trade division that is made after the determination of the representative employers' organization with any person or organization other than the representative employers' organization is void.*
>
> *(2) If an employers' organization is determined to be the representative employers' organization for more than one trade division, only the unionized employers in a trade division are entitled to make decisions with respect to negotiating and concluding a collective agreement on behalf of the unionized employers in that trade division.*
>
> *(3) Subsection (1) applies to the following:*
>
> *(a) an employer who subsequently becomes a unionized employer in a trade division;*
>
> *(b) a unionized employer who subsequently becomes engaged in the construction industry in a trade division.*
>
> *(4) A unionized employer mentioned in subsection (3) is bound by any collective agreement in force for a trade division at the time the employer:*
>
> *(a) becomes a unionized employer in a trade division; or*
>
> *(b) becomes engaged in the construction industry in a trade division.*
>
> *(5) Notwithstanding subsection (1), a unionized employer is responsible for settling disputes mentioned in section 6-45.*

Jurisdiction:

[64] For the purpose of assessing jurisdiction, it is appropriate to separate the substantive issues into two categories. The first category pertains to whether there is a binding collective agreement between Waiward and IBEW, and whether Waiward committed an unfair labour practice by refusing to submit to the legislated arbitration process in relation to that agreement. With respect to this category, the parties do not dispute jurisdiction.

[65] Waiward believes that it is not a party to a collective agreement and, on this basis, has refused to submit to arbitration. IBEW alleges that there is a binding agreement between the two parties and that, due to Waiward's refusal to arbitrate, it is compelled to seek vindication of its rights before the Board. As it stands, there is no alternative mechanism for the resolution of this particular dispute. These circumstances, combined with the Board's authority to consider the definition of collective agreement pursuant to clause 6-1(1)(d) of the *Act*, provide the jurisdiction necessary to consider the first category of issues, as outlined.

[66] The second category pertains to the alleged breach of the collective agreement. Waiward says that the Board must defer to the arbitration process in relation to this matter, and relies on *Administrative and Supervisory Personnel Assn v University of Saskatchewan*, [2005] Sask LRBR 541 ("*APSA*") in support of this argument, as follows:

[26] The Board has followed a longstanding policy of deferring to the grievance and arbitration process contained in a collective agreement where the issues raised involve the interpretation or application of the terms of the collective agreement and where complete relief can be obtained through the arbitration process. The Union urges the Board not to defer and asks the Board to exercise its jurisdiction to determine what documents form part of the collective agreement and to hold the Employer responsible for failing to bargain in good faith.

[27] Several of the case authorities on the issue of deferral refer to the following three-part test enunciated by the Saskatchewan Court of Appeal in Westfair Foods Ltd., supra:

> *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*
> *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance arbitration procedure; and*
> *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

[…]

[34] It seems to the Board that it would be inappropriate to defer to the grievance arbitration process if the essence of the dispute was the employer's improper conduct in relation to that grievance procedure. Here, however, we are not dealing with allegations of interference in the grievance procedure itself, particularly because no grievance has been filed by the Union. Questioning the arbitrability of a grievance on the basis that the alleged violation is not in relation to a term of the collective agreement does not amount to interference by the Employer in the grievance procedure.

[…]

[39] In the case before us it appears that the Employer intends to proceed to implement the changes it made to the PD. Whether the Employer is obliged to negotiate those changes to the PD depends on a determination of whether the collective agreement has been violated, which in this case initially depends on a finding by an arbitrator that the PD forms part of the MOA or the collective agreement. In our view, it is only in the event that it is determined that the collective agreement has been violated that the obligation to bargain changes to the PD arises. Until such time, there is no duty on the Employer to bargain with the Union and no apparent breach of the Act. The Board finds that the fact situations in the two Saskatchewan Power Corporation decisions, supra, (LRB File Nos. 312-97 & 162-99) as well as in the University of Saskatchewan and University of Regina decision, supra, (LRB File Nos. 246 & 247-03) are very similar to the case before us and we have decided to defer this matter to the parties' grievance arbitration process.

[67] IBEW argues that the Board has jurisdiction to decide whether there has been a breach of a collective agreement and to award the appropriate remedy, pursuant to subsections 6-41(2) and (3) and clause 6-62(1)(r). Waiward's actions have compelled IBEW to come before the Board. While the Board allows for and defers to consensual arbitration where possible, doing so would not be appropriate in this case. Waiward has defied the arbitration process. The Board should recognize this and take jurisdiction of all matters before it.

[68] By reason of its disposition in this case, it is not necessary for the Board to determine whether it has jurisdiction over the question of a substantive breach. Nor is it practical. The test for deferral, in cases of concurrent jurisdiction, makes this clear.

[69] In many cases, the Board has concurrent jurisdiction in cases involving the interpretation of a collective agreement, but will generally defer to an arbitrator in circumstances where an unfair labour practice application engages issues involving the interpretation of a collective bargaining agreement.[2]

[70] However, the Board must determine whether so deferring is appropriate in the circumstances. In making this determination, the Board considers the three-stage test as set out in *Communications, Energy & Paperworkers Union of Canada, Local 911 v ISM Information Systems Management Canada Corporation (ISM Canada)*, 2013 CanLII 1940 (SK LRB) ["*ISM Information Systems*"]:

> *[22] Our Court of Appeal in United Food & Commercial Workers, Local Union 1400 and The Labour Relations Board et al., established the following criteria for the Board to exercise its authority to defer to arbitration:*
>
> > *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*
> >
> > *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance arbitration procedure; and*
> >
> > *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

[71] The first question is whether the dispute before the Board is essentially the same as the dispute before the arbitrator. This question is not controversial. When Waiward refused to submit to the legislated arbitration process, IBEW applied to the Board to resolve that same dispute.

[72] The essence of the dispute, as described in IBEW's grievance form, is that Waiward entered into a collective agreement or a voluntary recognition agreement respecting all work at

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[2] See, *Communications, Energy & Paperworkers Union of Canada, Local 911 v ISM Information Systems Management Canada Corporation (ISM Canada)*, 2013 CanLII 1940 (SK LRB) at para 16 citing *United Food and Commercial Workers, Local 1400 v Westfair Foods Ltd*. [2002] CanLII 154 (SKQB), 213 DLR (4th) 715; [2002] 8 WWR 654; 44 Admin LR (3d) 100; 218 Sask R 196.

the site, and contrary to the agreement, the Employer failed to hold a mark-up. The Employer then assigned work to Westwood, whose workers are not members of IBEW.

[73] The second question is whether the resulting collective agreement empowers the resolution of the dispute by means of the arbitration procedure. IBEW, through its own correspondence, seems to have accepted this fact. The letter to Waiward, dated June 29, 2017, reads:

> *In any event, any dispute as to the effect of a collective agreement – including whether a matter is arbitrable – falls within the jurisdiction of an arbitrator pursuant to the Saskatchewan Employment Act: s. 6-45(1). Waiward is under an express obligation to respond to IBEW 2038's grievance with its position on the arbitrators proposed: SEA, s. 6-46(5).*

[74] In order to make this determination, however, the Board has to find that there is an agreement between the parties. Without an agreement, the Board is unable to conclude that "the collective agreement empowers the resolution of the dispute by means of the grievance arbitration procedure". It is likewise unnecessary to answer the third question.

[75] Despite this, the Board must, and properly does take, jurisdiction over the question of whether there is a collective agreement. The necessary corollary is that, should the Board find that there is no collective agreement between the parties, deferral to arbitration is no longer an option and the remaining allegations must fall.

Onus of Proof:

[76] IBEW bears the onus in this case.[3] First, IBEW must demonstrate that Waiward committed an unfair labour practice pursuant to clause 6-62(1)(r) of the *Act* by refusing to engage in the legislated arbitration process related to the effect of a collective agreement, contrary to subsection 6-46(5) of the *Act*. Second, IBEW must demonstrate that Waiward committed an unfair labour practice pursuant to clause 6-62(1)(r) of the *Act* by failing to do everything that it was required to do and failing to refrain from doing anything that it is required to refrain from doing, under a collective agreement, contrary to subsections 6-41(2) and (3) of the *Act*.

[77] IBEW relies on the effect of a collective agreement, which it says was binding on Waiward. IBEW states that, on the basis of this agreement, Waiward agreed that all work awarded to it

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[3] *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc.*, 2017 CanLII 44004 (SK LRB) at paras 85-86 ["*CUPE*"].

would be performed by members of affiliates of the Council. IBEW is an affiliate of the Council and contrary to this agreement, Waiward failed and refused to employ members of IBEW on the project. Waiward was required to take steps to enable the arbitration of the parties' dispute, but it refused to do so.

[78] According to Waiward, IBEW has the onus to prove that Waiward and IBEW reached a voluntary recognition agreement. Waiward argues further that if the evidence of such an agreement is ambiguous and not sufficiently clear, convincing and cogent to convince the Board that Waiward voluntarily recognized IBEW, then IBEW's application must be dismissed.

[79] The Board agrees that the case law is clear that, in demonstrating that the respondent committed an unfair labour practice, the applicant is required to present evidence that is "sufficiently clear, convincing and cogent".[4] If this standard is not met, then the application should be dismissed.

Analysis:

[80] IBEW alleges that Waiward has breached subsections 6-41(2) and (3) of the *Act*, which read:

> ***6-41****(1) A collective agreement is binding on:*
> *(a) a union that:*
> *(i) has entered into it; or*
> *(ii) becomes subject to it in accordance with this Part;*
> *(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and*
> *(c) an employer who has entered into it.*
> *(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:*
> *(a) do everything the person is required to do; and*
> *(b) refrain from doing anything the person is required to refrain from doing.*
> *(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.*

[81] As explained by IBEW, its application involves the effect of a collective agreement voluntarily entered into by Waiward. In its brief, IBEW explains:

> *Waiward entered into a Pre-Job Conference Agreement (the "Agreement") in which it agreed that all work awarded to it on the K + S Crystallizer Rebuild at Bethune (the*

[4] *CUPE*, at para 86 citing *Calokay Holdings Ltd. and UFCW, Local 1400, Re*, 2016 CanLII 74282, (2016), 281 CLRBR (2d) 149 (SK LRB) at para 106, citing *C. (R.) v McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (SCC) at para 46.

"Project") would be performed by members of affiliates of the Saskatchewan Building and Construction Trades Council ("Council").[5]

The Applicant IBEW is an affiliate of the Council. However, contrary to its agreement, Waiward failed and refused to employ IBEW 2038 members on the Project.

[82] IBEW relies on the definition of "collective agreement" as set out at clause 6-1(1)(d) of the *Act*:

> *(d) "collective agreement" means a written agreement between an employer and a union that:*
>
> > *(i) sets out the terms and conditions of employment; or*
> > *(ii) contains provisions respecting rates of pay, hours of work or other working conditions of employees;*

Principles of Statutory Interpretation

[83] In *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc*., 2017 CanLII 44004 (SK LRB) ["*CUPE*"], the Board considered the principles of statutory interpretation, relying on a passage from the Court of Appeal in *Ballantyne v Saskatchewan Government Insurance*, 2015 SKCA 38 (CanLII), 457 Sask R 254 ["*Ballantyne*"],[6] at paragraphs 19-20:

> *[19] The leading case with respect to statutory interpretation is the Supreme Court of Canada's decision in Re Rizzo & Rizzo Shoes Ltd., 1998 CanLII 837 (SCC), [1998] 1 SCR 27 [Rizzo Shoes]. A number of principles set out in that case are applicable to the case at hand, namely:*
>
> > *1. The words of an Act are to be read in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its objects, and the intention of the legislature (See: Rizzo Shoes at para. 87). (See also: Saskatchewan Government Insurance v Speir, 2009 SKCA 73 (CanLII) at para 20, 331 Sask R 250; and Acton v Rural Municipality of Britannia, No. 502, 2012 SKCA 127 (CanLII) at paras 16-17, [2013] 4 WWR 213 [Acton]).*
> >
> > *2. The legislature does not intend to produce absurd consequences. An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent or if it is incompatible with other provisions or with the object of the legislative enactment (See: Rizzo Shoes at para. 27).*
> >
> > *3. Any statute characterized as conferring benefits must be interpreted in a broad and generous manner (See: Rizzo Shoes at para. 21). This principle is enshrined in s.10 of The Interpretation Act, 1995, SS 1995, c I-11.2 (See: Acton at paras. 16-18).*

[5] *IBEW Brief* at para 2.
[6] *CUPE* at para 46.

> *4. Any doubt arising from difficulties of language should be resolved in favour of the claimant (See: Rizzo Shoes at para. 36).*

> *[20] In Sullivan on the Construction of Statutes, 6th ed (Markham: LexisNexis, 2014) at 28-29, Ruth Sullivan sets out three propositions that apply when interpreting the plain meaning of a statutory provision:*
>
> > *1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.*
> >
> > *2. Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.*
> >
> > *3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.*

[84] In summary, the ordinary meaning of the words are to be read in the context of the *Act* and the relevant Part. To the extent that the current legislative regime is benefit conferring, it should be given a broad and purposive interpretation.

[85] The Board will proceed to consider both: (1) whether the Pre-Job and/or Mark-Up constitute a collective agreement as defined in the *Act* (with or without the Provincial Agreement); and (2) whether the Pre-Job and/or Mark-Up, and surrounding context, demonstrate voluntary recognition of IBEW and thereby incorporate the Provincial Agreement by reference. To start, it is worth considering the general principles of voluntary recognition as set out in the relevant cases.

Voluntary Recognition – Principles

[86] IBEW relies on *CUPE* to the effect that the obligation to provide a "valid response to a notice to arbitrate pursuant to section 6-46(5) is not limited to certified bargaining units, but applies in all of the types of cases encompassed by section 6-45(1)".[7]

[87] In *CUPE*, the Board considered an application pursuant to subsection 6-62(1) of the *Act*, alleging that the students' union ["URSU"] had committed various unfair labour practices, including by failing to recognize CUPE as the exclusive bargaining agent for the employees. As the Board

[7] *IBEW Brief* at para 37.

observed, URSU had voluntarily recognized CUPE as the bargaining agent for its employees for more than four decades. At paragraph 57 of *CUPE*, the Board stated,

> *…It would seem to follow that an uncertified union can invoke the remaining unfair labour practice provisions set out in section 6-62(1). This interpretation flows from the fact that the Legislature expressly identified unfair labour practices that did not apply to uncertified unions.*

[88] However, as this Board observed in *CUPE*, the legal status of voluntary recognition in Saskatchewan remains "shrouded in uncertainty".[8] There is no explicit legislative framework and there is a paucity of related case law. Nonetheless, the case law that does exist, provides some general guidance. For one, it is clear that a collective bargaining agreement, and relationship, can exist independent of a Board order.[9] This approach to recognizing union bargaining rights is particularly common in the construction industry.

[89] But while a voluntarily recognized union may benefit from bargaining rights with respect to a group of employees, this does not mean that the union should or will benefit from all of the protections provided under the *Act*.[10] As explained by the Board in *CUPE*, "the apparent inability of an uncertified union to demonstrate it has majoritarian support is the principal concern about such arrangements consistently identified in the case law".[11] Another concern is the potential for "sweetheart deals".[12] To determine whether a voluntarily recognized union can invoke a particular protection depends on the nature of the right and "whether a purposive interpretation of [the *Act*] will accommodate" it.[13]

[90] Despite these concerns, the Board notes that in the construction industry employees often times have a closer relationship with the union than they do with the employer. Employees may be members of the union before voluntary recognition ever occurs and before the job in question is fully defined. The Board bears this observation in mind when considering the effect of the evidence in this case.

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[8] *CUPE* at para 35 citing *Saskatchewan Construction Labour Relations Council Inc v Construction Labour Relations Association of Saskatchewan Inc. and Saskatchewan Provincial Building and Construction Trades Council*, LRB File No 023-94 [1994] 2nd Quarter Sask Labour Rep 190 at 200 ["*Saskatchewan Construction Labour Council*"].
[9] *CUPE* at para 36, citing *Saskatchewan Government Employees' Union v Saskatchewan Institute of Applied Science and Technology*, LRB File No 131-88, [1989] Summer Sask Labour Reports 51 at 65-66.
[10] George Adams, *Canadian Labour Law*, loose-leaf (Rel 65, Dec 2017) 2nd ed (Toronto: Thomson Reuters, 1993) at 7.12 (7.1525) ["*Adams*"].
[11] *CUPE* at para 40.
[12] *Adams* at 7.12 (7.1527).
[13] *CUPE* at para 41, 42.

Is the Pre-Job and/or Mark-Up a Collective Agreement with, or without, the Provincial Agreement?

[91] The starting point for this analysis is the definition of collective agreement at clause 6-1(1)(d) of the *Act*. Furthermore, a collective agreement is binding on a union that has entered into it, or becomes subject to it in accordance with Part VI; and is binding on an employer who has entered into it, pursuant to subsection 6-41(1) of the *Act.*

[92] IBEW draws a comparison with previous decisions in *CLR Construction Labour Relations Association of Saskatchewan v International Association of Heat and Frost Insulators and Asbestos Workers, Local 119*, 2016 CanLII 30542 ["*CLR Construction Labour Relations*"] and *Terra Engineering Ltd. v Teamsters Union, Local 213*, 1995 CarswellBC 4108, 43 CLAS 2, 54 LAC (4th) 119 (Blasina) ["*Terra Engineering*"].

[93] First, IBEW says that in *CLR Construction Labour Relations Association* the Board found that a collective agreement may consist of a short form agreement that incorporates by reference the terms and conditions found elsewhere.[14] Second, IBEW says that in *Terra Engineering* the Arbitrator found that a collective agreement may be reached through an agent where the parties' intention to be bound can be established by the surrounding context.[15]

[94] In *CLR Construction Labour Relations*, the Board considered whether a Letter of Understanding for a Labour Supply Agreement rendered a contractor, Kaefer, a "unionized employer" for the purposes of clause 6-65(h)(ii) of the *Act*. Clause 6-65(h)(ii) reads:

> *(h) "unionized employer", subject to section 6-69, means an employer:*
>
> *…*
>
> *(ii) who has recognized a union as the agent to engage in collective bargaining on behalf of unionized employees working in a trade for which a trade division has been established pursuant to section 6-66.*

[95] The applicant argued that the registration system had been introduced into the construction industry to level the playing field for contractors in their negotiations with the building trades.[16] Kaefer was a unionized employer and the union had committed an unfair labour practice by negotiating directly with Kaefer for terms and conditions that were different than those

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[14] *CLR Construction Labour Relations Association of Saskatchewan v International Association of Heat and Frost Insulators and Asbestos Workers, Local 119*, 2016 CanLII 30542, 2016 CarswellSask 333, 275 CLRBR (2d) 221 ["*CLR Construction Labour Relations"*] at paras 31-32.

[15] *Terra Engineering Ltd. v Teamsters Union, Local 213*, 1995 CarswellBC 4108, 43 CLAS 2, 54 LAC (4th) 119 (Blasina).

[16] *CLR Construction Labour Relations* at para 8.

contained within the provincial agreement. In considering this question, the Board noted that the purpose of clause 6-65(h)(ii) was to guard against "leap frogging" or "whipsawing" in collective bargaining and to ensure that the bargaining relationship in question remains "balanced".[17]

[96] To determine whether Kaefer recognized the union as the agent to bargain collectively on behalf of unionized employees, the Board took into account four components of collective bargaining, namely: (1) negotiations in good faith; (2) putting the terms of the agreement in writing; (3) executing the agreement; and (4) negotiating from time to time the settlement of disputes. The Board concluded:

> *[31] The LOA meets all of these criteria. Mr. Rudder testified as to the negotiations between the parties that lead to the agreement. Those negotiations were intended to and did result in the provision of qualified tradesmen to Kaefer, through the Union Hall hiring process for Kaefer to complete its contract at the K & S Potash project. The result of those negotiations was a "collective agreement" as that term is defined in section 6-1(1)(d) of the SEA.*
>
> *[32] The LOA is clearly a collective agreement insofar as it sets out the "terms and conditions of employment" and "contains provisions respecting rates of pay, hours of work or other working conditions of employees".*
>
> *[33] The LOA also is a written agreement as required by section 6-1(1)(e)(ii) and is executed by the parties as required by section 6-1(1)(e)(iii). Additionally, while there was no evidence that there had been any ongoing disputes, the Provincial Agreement which was adopted by reference contained provision for ongoing dispute resolution.*
>
> *[34] We therefore conclude that the LOA was a collective agreement and that by its negotiation and execution Kaefer recognized that the Union was the bargaining agent of the employees dispatched to work on that project by the Union. This is clear from the terms of the LOA, especially in respect of the departure from the Provincial Agreement insofar as wage rates were concerned, but also in respect to the provision of the LOA where the Union agreed that its members would not strike and Kaefer agreed that those employees would not be locked out.*

[97] The Board found that the Letter of Understanding was a collective agreement.

[98] In *Terra Engineering*, the issue was whether the employer was bound by a collective agreement with the union and if so, whether a second company was bound to guarantee certain payments for the employer. An agent concluded a Letter of Understanding, which was intended to apply to the first company and bind it to the collective agreement as between the union and the second company. The Arbitrator found that the agent's actions resulted in binding obligations for the second company.

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[17] *Ibid* at para 2.

[99] In the current case, the question before the Board is whether there is a written agreement between an employer and a union that sets out the terms and conditions of employment, or contains provisions respecting rates of pay, hours of work or other working conditions of employees. The Pre-Job was prepared on the Council's template. It includes information about the job site, the hours of work, and contact information. The Mark-Up lists the work description breakdown and intended assignments.

[100] Given the facts before it, the Board must consider whether a "written agreement" may include an agreement that has not been signed by both parties. In considering this issue, the Board must apply a generous and purposive approach to interpreting the definition of "collective agreement".[18] The Board notes subsection 6-41(4) of the *Act* which reads: "If an agreement is reached as the result of collective bargaining both parties shall execute it". This subsection, combined with the overarching duty to bargain in good faith, suggests that, in appropriate circumstances where the evidence demonstrates an agreement, a collective agreement *may* be established in the absence of signatures from all agreeing parties.

[101] In this case, the only person who signed the Pre-Job is Tostowaryk, on behalf of Waiward. Neither a Council representative nor an IBEW representative signed the document. While this may not be fatal, the Board is compelled to examine the surrounding circumstances to determine whether there was an intention to agree.

[102] On its face, the phrase "yes for work awarded to us" demonstrates an intention to hire affiliated members *for the work awarded to Waiward*. But what is meant by "work awarded to"? For clarification, the Board reviews the assigned manpower numbers. The number of Labourers, Millwrights, Operating Engineers, Pipefitters and Structural workers, is listed. The number of Electrical workers is not.

[103] Without more, the Board is compelled to look to the extrinsic evidence to inform the intent of the parties. The list of intended assignments, which was prepared at the same time as the template, allocates no work to IBEW, other than for pumps (skids) - work that did not materialize. Tostowaryk's explanation of his mistake, on this assignment, was credible. Furthermore, the intended assignments were prepared and distributed at the same time as the Pre-Job, by the same person, and likely would have been reviewed by the unions around the same date.

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[18] See, *CUPE* at para 56.

[104] Additional extrinsic evidence includes the following. First, Westwood was included in the list of sub-contractors at the end of the Mark-Up, under “Electrical & Instrumentation” and was explicitly assigned to the cable tray work in the intended assignments. This, combined with the absence of an electrical manpower number, is consistent with Tostowaryk’s explanation. In his testimony, Tostowaryk clarified that the statement “yes, for work awarded to us” is qualified by the existence or non-existence of manpower numbers. Second, Kovatch acknowledged that he had been aware of the possibility that the sub-contract could be awarded to a non-affiliated company. Third, there was no explicit prohibition on sub-contracting in the Pre-Job.

[105] Furthermore, it was open to the trades to contest the assignments through further discussions with Waiward. It was fully understood that the Pre-Job did not reflect the final assignments. It was clear to all the parties that the purpose of providing the Council with an opportunity to review the Pre-Job was to allow the trades an opportunity to contest those assignments, and potentially allow for a modification to the intended assignments prior to finalization.

[106] There is no evidence that the Council objected to the statement “yes for work awarded to us”, or to the inclusion of non-affiliated sub-contractors on the Mark-Up. Perhaps this was not the Council’s role. But IBEW cannot rely on the Council as agent in this Application, anticipate a benefit based on that characterization, and then not accept the consequences.

[107] It is unclear how the Council could have bound Waiward to the use of affiliate members for sub-contracting work, through the operation of the Pre-Job, when the Pre-Job was prepared after the tendering process had been completed. The bids were submitted almost two months prior to the completion of the Pre-Job. During this time, Kovatch admitted that he was aware that other non-IBEW sub-contractors were bidding on the work. In order to be competitive, presumably with other sub-contractors, Kovatch signed the enabling document. Westwood was verbally awarded the contract to Westwood prior to the completion of the Pre-Job. Kovatch testified that Waiward became bound to award the work to an IBEW sub-contractor as of the completion of the Pre-Job, after the bids had already been submitted.

[108] It cannot be the case that the document prepared by Waiward vitiated a tendering process that was already completed, and did so post-facto. This is especially so, given that the Mark-Up represented “intended”, not final, assignments.

[109] IBEW argues that the Pre-Job meets the criteria of a collective agreement. It sets out the terms and conditions for Waiward's employment of members of the Council's affiliates. Waiward argues that the Pre-Job was based on a template provided by the Council. It was not signed by a representative of the Council or of IBEW. It was not intended to be a comprehensive and binding agreement of the work to be performed, but instead was a planning document.

[110] The Board notes that, on its face, the Pre-Job fails to satisfy the definition of a collective agreement as per the *Act*. The document, while written, is not signed by the Council or by IBEW. And while it sets out certain terms of employment for a number of trades, it does not set out the terms of employment for IBEW. Rather than a collective agreement, the more accurate characterization of the Pre-Job is as a planning document.

[111] In its argument, IBEW pointed out that Waiward responded with an unqualified "Yes" to the statement: "The Company agrees all work assignments will be made according to the procedures of the Building Trades Department AFL-CIO." This amounts to an assertion that Waiward would follow the procedures of the Building Trades Department in assigning work along jurisdictional lines.

[112] The Board agrees that Waiward's qualification seems to allow for a two-tiered system in which Waiward directly hires affiliated workers, but retains choice in sub-contracting to companies in relation to employees who it does not hire directly. In theory, this could allow Waiward to sub-contract out of the protections offered by the Building Trades. This scenario may prejudice, in particular, specialty trades for whom the employer-contractor must have a specific license.

[113] Nevertheless, the facts of this case consist of an open shop site, a legitimate business reason for sub-contracting the electrical work, and no evidence of any objection to the tendering process – until after the work was awarded. Nor was there explicit wording in the Pre-Job document prohibiting sub-contracting to non-affiliated trades. Any prohibition in the Provincial Agreement is only binding if the Provincial Agreement applies. Waiward's intention to sub-contract was clear from the outset.

[114] Given the Board's preceding conclusions, it does not need to consider Waiward's arguments on exercising the equitable remedy of rectification.

The Significance of the Electronic Mark-Up

[115] IBEW argues that the existence or non-existence of a collective agreement depends on the intention of the parties as reflected in the wording of the written documents purported to be relied upon. Even if the Board were to find that the Pre-Job bound the parties in the manner suggested, this begs the question: *who were the parties?* IBEW was not involved in reviewing or approving the Pre-Job. Quite the contrary. IBEW relied on the Council to facilitate the mark-up conference. The Council did not check with IBEW to ensure that it received the email or to ensure that IBEW had a chance to respond.

[116] IBEW argues that Waiward cannot hide behind the failure of IBEW's email system. It draws an analogy to permitted modes of service for court documents, stating that when a party relies on a non-permitted mode of service, that party assumes the risk when service is not effected and consequences ensue. The party who relies on the unpermitted mode cannot impose responsibility on the party prejudiced by documents sent by an unpermitted mode of service.

[117] This argument does not account for the role of the Council acting as agent for IBEW in organizing the pre-job conference. The Council was in charge of facilitating the conference. IBEW relied on the Council to organize it, as did Waiward - and reasonably so. Waiward cannot be held responsible for the Council's representations on behalf of its membership.

[118] The Council emailed the affiliates informing them that Waiward preferred to hold an electronic mark-up. When the Council advised that no one had opposed an electronic mark-up, and then proceeded to accept the manner in which the mark-up proceeded, it was reasonable for Waiward to rely on the Council's assertion to that effect. It is clear, based on the email from Tostowaryk dated May 9, 2017, that he was aware that the trades could demand an in-person mark-up conference if they so choose. He had turned his mind to that possibility and, through his actions, had attempted to obtain consent.

[119] Kovatch acknowledged in cross examination that, while he did not give consent to an electronic mark-up, such conference could have occurred with his consent.[19] Whether the Council properly consented to the electronic mark-up, in the absence of consent from IBEW, is another matter. However, the Council is not before us.

[19] Whether he would have given consent, is perhaps another matter.

Otherwise, was there voluntary recognition of IBEW?

[120] The Board has, to this point, set out no specific requirements for voluntary recognition. It has instead opted to consider each case on its merits. In assessing each case, the Board must remember that according legal status to voluntary recognition has significant consequences for the parties. The Board agrees with Waiward when it suggests that the assessment of voluntary recognition must be based on an objective evaluation of the intentions of the parties as of, or within reasonable proximity to the date at which the applicant asserts that voluntary recognition occurred.

[121] While the Board must be cautious in relying on case law from other jurisdictions, it is worth considering, generally, the approach of other Boards in according legal status to voluntary recognition. The specific requirements for voluntary recognition in Ontario, have been described as follows:

> *7.1525 The advantages of voluntary recognition are that: it avoids the expense and delay of certification proceedings; it gives the parties a free hand in defining the bargaining unit; and it represents a non-adversarial manner by which to commence a collective bargaining relationship. A voluntary recognition agreement need not take any particular form as long as, in substance, it is intended to be such an agreement. The Ontario board has said no special language need be used, provided the requirements of s. 7(3) of the Labour Relations Act, 1995 are met. Those requirements are: the document must be in writing; it must express an agreement; it must be signed by the parties; and the employer must recognize the union as the exclusive bargaining agent for the employees in the defined unit.*[20]

[122] The Ontario Board applied these criteria in *North York Park Home Hotel LP v UNITED-HERE, Local 75*, 2015 CarswellOnt 19950.[21] Certainly, the Ontario requirements have not been satisfied in the current case. However, this is not the end of the matter.

[123] The Saskatchewan Board has observed, tentatively, that in some cases it may be possible that "evidence of one or more ratified collective agreements may be sufficient" to find that voluntary recognition has occurred.[22] As explained in the previous sections, the facts in the present case do not equate to current, or even, previous ratified collective agreements between the parties.

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[20] *Adams* at 7.1525.
[21] *North York Park Home Hotel LP v UNITED-HERE, Local 75*, 2015 CarswellOnt 19950, [2015] OLRD No 4092, 272 CLRBR (2d) 254 at paras 34, 41.
[22] *CUPE* at para 40, citing *Saskatchewan Construction Labour Council* at 200.

[124] It is worth reviewing the facts underlying the Board's finding of voluntary recognition in *CUPE*. As the Board observed:

> *[30] This case is unique. For more than four (4) decades, URSU had voluntarily recognized CUPE as the bargaining agent for its employees. Over the years, numerous collective agreements were negotiated between the parties, and ratified by CUPE members. The most recent collective agreement that expired on December 31, 2015, is a sophisticated document, virtually indistinguishable from collective agreements negotiated between parties in which the union in question has been certified by this Board as the exclusive bargaining agent of the employees. It contains the typical clauses covering terms and conditions of employment such as payment of wages; hours of work and scheduling; overtime; vacation leave; holidays; sick leave, and leaves of absence. It sets out a process pertaining to the discipline and discharge of employees; the filing of grievances, and arbitrations. And, unlike many collective agreements involving uncertified unions, the CUPE-URSU collective agreement also contains provisions relating to union security; collection, and remittance, of union dues, and a respectful workplace policy.*
>
> *[31] It cannot be gainsaid that a long-standing and mature labour-management relationship has existed in this workplace for years. Yet, only recently after discovering that CUPE had never obtained a formal Order from this Board certifying it as the exclusive collective bargaining agent for URSU's employees did URSU withdraw its voluntary recognition. This unfair labour practice application is intended to deal, at least in part, with the fall-out from the employer's unilateral decision to end that recognition.*
>
> *[citations omitted]*

[125] The extensive evidence of a collective bargaining relationship, as demonstrated in *CUPE*, is not replicated in or even comparable to the present case. Nor is there sufficient evidence of a mutual intention to voluntarily recognize IBEW for the Project work. Waiward had little to no involvement with IBEW until after the assignments were made. The Pre-Job was a template relied upon for planning purposes. Waiward was transparent and explicit in its intention to award the electrical work to Westwood, as of the date of the Pre-Job document upon which IBEW relies.

[126] According to Kovatch, the purpose of the mark-up was to give effect to the provisions of the Provincial Agreement and the terms and conditions of employment as set out therein. In at least two cases, Waiward admitted to having voluntarily recognized the unions on the basis of the mark-up only. IBEW is no different. All work was to be assigned to member affiliates of the Council, and IBEW is an affiliate of the Council. The reality is, in these two cases, the Ironworkers and Operating Engineers, Waiward had long-standing relationships with both unions. Furthermore, their members were hired directly.

[127] According to IBEW, Waiward has recognized through the Pre-Job that it is bound by standard industry practices. Waiward has not limited its relationship to only a subset of those

unions, for example, those with voluntary recognition agreements. Nor is it entirely clear that Waiward had voluntary recognition agreements with each union it employed.

[128] However, the construction industry has historically operated in a manner that is more fluid and dynamic than the strict application of the preceding Ontario requirements may allow. On this point, the Board, in *Saskatchewan Construction Labour Relations Council v Construction Labour Relations Association*, 1997 CarswellSask 835, [1997] SLRBD No 12, 98 CLLC 220-016, observed that:

> *38 … In our view, imposing for these purposes a requirement that voluntary recognition be recorded in written form would be inconsistent with the traditions of the construction industry, and would have the potential to exclude some legitimate collective bargaining relationships.*
>
> *39 … In our view, the legitimacy of any putative voluntary recognition would depend on the circumstances, and we must consider these relationships on a case-by-case basis. In the event the existence of a relationship based on voluntary recognition is a matter in dispute with respect to any of the employers in question in connection with these applications, it may be necessary for the Board to deal with the actual circumstances of these cases.*

[129] It is therefore necessary, in determining whether there is voluntary recognition, for the Board to consider each case on its merits.

[130] Waiward argues that voluntary recognition of one or more trade unions does not equate to voluntary recognition of the unions for all trade divisions in which the employer engages in work. Waiward says that to decide otherwise would conflict with the legislated system of collective bargaining based on craft bargaining units in trade divisions. Waiward states that the "operation of the construction industry provisions depends on bargaining units that are defined by trade".[23]

[131] To illustrate this separation along craft lines, Waiward points to clause 6-65(h)(ii), which defines "unionized employer" as an employer "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". According to Waiward, "an employer can become a unionized employer with respect to employees working in one trade division, while remaining a non-unionized employer with respect to employees in another trade division where no union has been certified or recognized as the bargaining agent for employees of the employer".[24]

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[23] *Waiward Brief* at para 19.
[24] *Ibid* at para 21.

[132] Having considered this argument, the Board finds the matter even more straightforward than set out therein. Simply put, the Board has arrived at its conclusions based on the evidence before it. IBEW has failed to satisfy the Board, on a balance of probabilities, that there is any voluntary recognition or binding collective agreement between the parties.

[133] Finally, it is not necessary for the Board to conclude definitively whether a Pre-Job could ever equate to a collective agreement or form the basis for a voluntary recognition relationship. It is worth noting, however, that IBEW filed no case law in which a Pre-Job was interpreted and applied in this manner.[25]

Refusal to Arbitrate as an Unfair Labour Practice

[134] IBEW alleges that Waiward has committed an unfair labour practice by refusing to submit to the legislated arbitration process. In support of its argument, IBEW relies on the Board's decision in *SPI Marketing*, in which the Board interpreted and applied subsection 25(1) of *The Trade Union Act*, which reads:

> *25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.*

[135] Subsection 25(1) uses similar language to subsection 6-45(1). The distinctions are restricted to the substitution of the words "differences" and "violation" in *The Trade Union Act* for the words "disputes" and "contravention" in *The Saskatchewan Employment Act*. Subsection 6-45(1) specifies that it is subject to subsections (2) and (3), neither of which applies to this case.

[136] In *SPI Marketing*, as to the application of subsection 25(1), the Board concluded:

> *18 In our opinion, it is not open to the Employer to make a unilateral decision that the collective agreement does not apply, or that this is not the type of dispute which should go to arbitration. The interests of the Employer in this connection are sufficiently protected in the arbitration process. The Employer is entitled to raise matters of arbitrability or the applicability of certain provisions of the collective agreement before an arbitration board, and the board has full jurisdiction to determine those issues.*

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[25] Section 6-73 of the *Act* imply states,

> Nothing in this Division interferes with or prevents the continuation of the practice of holding pre-job conferences in relation to particular projects.

> *19 We have concluded that, by refusing to contemplate proceeding to arbitration on these issues, the Employer has committed a breach of the duty to bargain which is set out in Section 11(1)(c) of The Trade Union Act. If there is not further possibility of resolution of the matter through grievance procedure, we will direct the Employer to acceded to the Union request to appoint an arbitration board.*

[137] In *SPI Marketing*, SGEU had been certified by the Board as the bargaining representative for a unit of employees of SPI. SGEU alleged that SPI had committed unfair labour practices. SPI took the position that the conduct of the employer could not be characterized as a breach of the collective agreement, SGEU's insistence on arbitration was unreasonable and SPI's refusal to accede to arbitration was justified. It was in this context that the Board determined that a question as to whether a matter is arbitrable must be settled by arbitration itself. The arbitrator did not have to determine whether a binding collective agreement existed between the parties.

[138] It is therefore not up to Waiward to make a unilateral decision that a collective agreement does not apply to the dispute, or that the dispute between the parties is not the type of dispute that should go to arbitration.

[139] In *Saskatoon Board of Police Commissioners v Saskatoon City Police Association*, 2001 SKCA 82, the Court of Appeal also considered "whether a party to a collective agreement may unilaterally decide whether or not a matter is arbitrable".[26] In that case, the Board of Police Commissioners refused to nominate a nominee to the Board of Arbitration, taking the position that a grievance filed under the terms of the collective agreement was a matter of discipline that could only be dealt with according to the provisions of *The Police Act, 1990*.

[140] The Court of Appeal interpreted and applied subsection 25(1) of *The Trade Union Act*, observing that it requires that "all differences between the parties to a collective agreement, *including whether a matter is arbitrable* are to be settled by arbitration".[27] But while the Court made clear that the question of whether a matter is arbitrable is to be settled by arbitration, it did so in the context of "parties to a collective agreement".

[141] Once the collective agreement is established, then the issue of arbitrability may be left to the arbitrator to decide. The Board has concluded that there is no binding collective agreement in this case.

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[26] *Saskatoon Board of Police Commissioners v Saskatoon City Police Association*, 2001 SKCA 82 at para 4.
[27] *Ibid* at para 9.

[142] Finally, IBEW argues that an employer's refusal to submit to the legislated arbitration process is not limited to certified bargaining units.[28] IBEW says that the Board's authority to find an unfair labour practice, in relation to the employer's refusal, is found in clause 6-62(1)(r) of the *Act*, which reads:

> *6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> > *(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.*

[143] Clause 6-62(1)(r) requires that an obligation exists and that the respondent has contravened that obligation. IBEW has grounded the alleged obligation in this case in its assertion of a binding collective agreement. Given the Board's finding that there is no binding collective agreement, it is unnecessary to determine whether there was a breach. In the absence of a collective agreement, the rest of the allegations fall.

[144] The Board wishes to make a few final, strictly obiter, remarks. It seems clear that there was a breakdown in communication in this case, particularly around the pre-job and mark-up conference process. The Board notes that it did not have the benefit of the Council's point of view, nor was the Council a party to this proceeding. The concern around the conference resulted from and then aggravated a communication breakdown, placing strain on the parties' relationship. Clearer communication around expectations may have avoided the pitfalls that ensued. Therefore, recognizing that the Council is not before us, both parties may do well to establish best practices, over which they have control, so as to avoid similar situations from reoccurring.

[145] In conclusion, IBEW has failed to satisfy the Board, on a balance of probabilities, that Waiward committed an unfair labour practice by refusing to arbitrate, breaching an agreement, or violating the *Act*, in the manner described in IBEW's application. On the basis of the foregoing, IBEW's unfair labour practice application, both in relation to the alleged refusal to arbitrate and the alleged breach of an agreement and/or the *Act*, is dismissed.

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[28] *IBEW Brief* at para 37; *CUPE* at paras 56-9.

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

DATED at Regina, Saskatchewan, this **17th** day of **June, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson