UNITED ASSOCIATION OF JOURNEYMAN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Applicant v YORKTON PLUMBING AND HEATING LTD./YPH MECHANICAL, Respondent

LRB File Nos: 221-18, 222-18, 223-18, 224-18 and 253-18; April 23, 2019
Vice-Chairperson, Barbara Mysko; Board Members Allan Parenteau and Jim Holmes

Counsel for the Applicant Union: Greg Fingas
Counsel for the Respondent Employer: Justin Yawney/Chris Wyatt

Application for bargaining rights – Union applies to represent bargaining units under Division 13 of *The Saskatchewan Employment Act* – Board finds that proposed units are not appropriate for collective bargaining.

Voters list – Names contested by Employer – Voters list properly determined based on the eligible employees working for the Employer on the date of the Application and until the date of the vote.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 (the "Union") has brought five applications for bargaining rights in relation to bargaining units of plumbers and related trades employed by Yorkton Plumbing & Heating Ltd./YPH Mechanical (the "Employer" or "YPH") at five different work sites across the Province ("Applications"). The Union is the designated bargaining agent for the plumbing and pipefitting trade division in the construction industry in Saskatchewan. YPH is a contractor based in Yorkton with construction work throughout Saskatchewan and in Manitoba.

[2] The work sites subject to the Certification Applications are described in the Applications as follows: Unit 1 – 1602 McDonald Street, Regina; Buffalo Pound Water Treatment Plant; Assiniboia Water Treatment Plant Upgrade; Clearwater River Dene Nation Water Treatment Plant Upgrade; and Conexus building communities project. The McDonald Street, Buffalo Pound, and

Assiniboia Applications were filed on November 1, 2018, the Clearwater Application on November 2, 2018, and the Conexus Application on December 13, 2018.

[3] The Board determined the eligible number of voters for each of the sites as follows: McDonald Street – 1 voter; Buffalo Pound – 5 voters; Assiniboia – 4 voters; Clearwater – 1 voter; Conexus – 4 voters. On December 14, 2018, Directions for Vote were issued for the first four Applications. The Direction for Vote in relation to the Conexus Application was issued on December 19, 2018. The Notice of Vote in relation to the first four Applications was mailed on December 17, 2018, and the Notice of Vote in relation to the Conexus Application was mailed on December 20, 2018. The votes were held and the ballot boxes remain sealed.

[4] The Employer asks the Board to dismiss the Applications for two reasons. First, the bargaining units are inappropriate and inconsistent with Part VI, Division 13 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1, SS 2013, cS-15.1 (the "*Act*"). Second, the Employer suggests that it provided inaccurate information about eligible employees to the Board, and asks the Board to rectify its "error".

[5] Other than the McDonald Street Application, each of the Applications includes the following employees in the proposed bargaining units: All Journeyman and ticketed plumbers, steamfitters, pipefitters, welders, gasfitters, refrigeration mechanics, instrumentation mechanics, sprinkler fitters, and all apprentices and foremen connected with these trades. Whether by design or by inadvertent error, the McDonald Street Application does not include apprentices and foremen in the proposed bargaining unit description.

[6] The Union provided a written Brief and case authorities which we have reviewed and found helpful.

Evidence:

[7] The Board heard evidence from four witnesses, three from the Union and one from the Employer.

Cody Summers

[8] Cody Summers ("Summers") swore the Certification Applications in these matters. He is a Business Development Representative for the Union, hired for the purpose of eliminating

existing barriers to organizing within the Province. Summers' evidence as to past and present organizing attempts was, in the main, unclear and non-specific. According to Summers, the previous organizing efforts lasted at least 12 months and were unsuccessful. This time, the Union began its organizing efforts at the Costco site where the Employer was performing work.

[9] Summers seemed to be operating, at least in part, based on certain assumptions about the Union's ability to organize the employees of this particular Employer. Summers explained that although the Union had knowledge of the other job sites, there "seemed to be tight sects" of unrepresented workers. He concluded that it was "virtually impossible" to gain ground. The job sites were spread all over the province, and therefore it was "impossible" to organize effectively and efficiently across all job sites without the potential for unfair labour practices or the "potential to scare unrepresented workers".

[10] When asked about site owner policies and restrictions on access to sites, Summers' evidence was limited, indicating only that Costco had raised a "concern" with the Union at one point during the organizing drive. Generally speaking, he had previously experienced "divide and conquer" tactics from employers, but he was careful not to infer anything about the conduct of this particular Employer. He stated that in the past there had been "things going on with older workers" that had presented challenges to organizing. He clarified that many of his observations were not directed at this Employer.

[11] Summers believed that the Employer was working on about 6-7 sites during this round of organizing, and that this number probably fluctuated as small jobs came in. Summers also concluded, based on his observations, that the employees of the company had no choice in where they worked.

[12] For the most part, Summers provided an unclear or limited basis for his conclusions.

Scott Aitken

[13] Scott Aitken ("Aitken") is a red seal plumber who was employed as a pipefitter and plumber foreman by YPH from August 25 to November 29, 2018. He explained that, at the beginning of every week, the Employer would send out "Batting Orders" to schedule the work at the specific

job sites. The Batting Orders were unique in Aitken's experience and served the purpose of directing the workers to their worksites.

[14] After he was hired, Aitken worked at the Buffalo Pound site for a short time, and then set up a welding shop at McDonald Street to fabricate materials for the Assiniboia site, together with a welder, Felix Spector ("Spector"). The McDonald Street location was not set up for welding. A Project Manager, Clint Fillmore, was working out of the office at that location.

[15] Aitken explained that he was also overseeing the Buffalo Pound job for the purpose of installing an underground gas line, making proper provisions and field measurements, and directing the workers on site. He attended at Assiniboia a few times to take measurements and for a couple of meetings. Otherwise, he worked exclusively at the McDonald Street location, and according to Aitken, had no choice as to where he was assigned to work.

[16] Aitken was working at the McDonald Street location on November 1, 2018. He stated that he resigned as a result of a third late payroll.

[17] On cross, Aitken acknowledged that the Batting Orders specified no assignment at the McDonald Street location. He insisted, somewhat unconvincingly, that Yawney and Fillmore had directed him to work at that location.

Jared Wilk

[18] Jared Wilk ("Wilk") worked with YPH from the end June 2018 until mid-January 2019. He had no concerns with his assignments. He was laid off due to declining demand. Wilk was a 4th year plumber, or plumber apprentice, during all material times.

[19] After he started, he "bounced between the Costco and McDonald's sites" for a few weeks. He worked at Costco on his first day, McDonald's in the first week or two, back to Costco, Indian Head Research facility for an afternoon or so, and then Buffalo Pound for the remaining material time. He started working at the Buffalo Pound location in mid-October, or "whenever the Costco job was close to complete". Wilk was working at Buffalo Pound in the first week of November.

[20] According to Wilk, the Buffalo Pound site consists of a large brick building with two floors. Wilk was performing plumbing and/or heating work in connection with the job. He said that, given

the layout, he would have noticed and been able to account for anyone working on site. No one would have been missed.

[21] Aitken was the foreman at Buffalo Pound on the first day, but he did not spend a lot of time on site. Wilk worked with Kris Rhinas ("Rhinas") every day until the beginning of January at which time Rhinas was laid-off. By the time Wilk was laid-off, Steve Kowalski and Adam Graham had started. Dallas Follick arrived sometime around December and eventually became the new foreman. Josh Gyurek ("Gyurek") was at the Buffalo Pound site once for about an hour in the latter half of October to unload a trailer for delivery.

[22] On cross, Wilk stated that he was one of the few Regina people working for YPH in his early days and that the Yorkton guys eventually got "weeded out" and replaced with Regina employees.

Justin Yawney

[23] Justin Yawney ("Yawney") is the President and owner of YPH. According to Yawney, YPH has been successful in retaining long term employees because it is able to transfer employees freely from site to site based on available work, as required to meet demand. Yawney said that he has transferred employees from site to site instead of releasing them from service. According to Yawney, it would be unfair to allow "11" employees to impact the working conditions of approximately 63 employees through the imposition of the union hall system on a small number of worksites across the Province.[1]

[24] Employees are assigned to projects based on their experience with the company, skill level, and with a view to ensuring that projects can be completed. YPH generally works on about 10-12 projects per year, but worked on approximately 19 projects in 2018. Employees do have a say in where they are assigned, particularly if they are long-term employees.

[25] Yawney said that when he prepared the Replies he misunderstood the process. According to Yawney, the fact that he is "allowed to include all employees for 90 days prior to the application" is a game changer. At YPH, the number of employees on a project varies day to day depending

[1] 6-8 of the total number of employees (63) are generally assigned, at any given time, to projects in Manitoba.

on operational needs company wide. There were numerous employees, not included on the voters' list, who worked with YPH during the 90 days prior to the date of the Application.

[26] The transient nature of the work is evident. Aitken was hired for both the project at Buffalo Pound and Assiniboia. Gyurek was assigned as a foreman on at least two separate worksites, but was at the Costco site dealing with deficiencies on November 1. Cory Perry worked on the Assiniboia, Buffalo Pound, and Clearwater projects. Adam Graham worked on Conexus, Clearwater, Buffalo Pound, and possibly Assiniboia, and was at the Costco site doing deficiencies on November 1.

[27] The remaining work at Buffalo Pound consists of deficiencies, expected to be complete by April 12. The remaining work at Assiniboia also consists of deficiencies, expected to be complete by April 8 or 9. With respect to the Conexus site, there are 220 hours to complete YPH's work on the project.

[28] Yawney suggested that unionizing the Clearwater and Conexus sites would be inappropriate because they were bid at non-union rates.

[29] YPH opened the McDonald Street location in the first week of May, 2018. McDonald Street does not show up on the Batting Orders for a reason - the fabrication work at that site was not carried out on the Employer's authorization. According to Yawney, three weeks after Aitken set up shop, he realized what was going on, proceeded to set eyes on the work, and shut it down. The McDonald Street shop has since been closed completely.

[30] Yawney says that Aitken and Spector resigned on December 4 and should not be allowed to vote. Finally, as work has begun to slow down, the Employer has been issuing lay-off notices, with more lay-offs pending.

Relevant Legislative Provisions

[31] The following statutory provisions of *The Saskatchewan Employment Act* are applicable:

> ***6-1(1) In this Part:***
> ***(a) "bargaining unit"*** *means:*
> *(i) a unit that is determined by the board as a unit appropriate for collective bargaining; or*

(ii) if authorized pursuant to this Part, a unit comprised of employees of two or more employers that is determined by the board as a unit appropriate for collective bargaining;

. . .

***(c) "certification order"** means a board order issued pursuant to section 6-13 or clause 6-18(4)(e) that certifies a union as the bargaining agent for a bargaining unit[.]*

Right to form and join a union and to be a member of a union

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

(2) No employee shall unreasonably be denied membership in a union.

Acquisition of bargaining rights

6‑9(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.

(2) When applying pursuant to subsection (1), a union shall:

(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and

(b) file with the board evidence of each employee's support that meets the prescribed requirements.

Determination of bargaining unit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Representation vote

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

(2) Notwithstanding that a union has not established the level of support required by subsection 6‑9(2) or 6‑10(2), the board shall make an order directing a vote to be taken to determine whether a certification order should be issued or amended if:

(a) the board finds that the employer or a person acting on behalf of the employer has committed an unfair labour practice or has otherwise contravened this Part;

(b) there is insufficient evidence before the board to establish that 45% or more of the employees in the proposed bargaining unit support the application; and

(c) the board finds that sufficient evidence of support mentioned in clause (b) would have been obtained but for the unfair labour practice or contravention of this Part.

(3) Notwithstanding subsection (1), the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same union.

Certification order

6‑13(1) If, after a vote is taken in accordance with section 6‑12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:

(a) certifying the union as the bargaining agent for that unit; and

(b) if the application is made pursuant to subclause 6‑10(1)(b)(ii), moving a portion of one bargaining unit into another bargaining unit.

(2) If a union is certified as the bargaining agent for a bargaining unit:

(a) the union has exclusive authority to engage in collective bargaining for the employees in the bargaining unit and to bind it by a collective agreement until the order certifying the union is cancelled; and

(b) if a collective agreement binding on the employees in the bargaining unit is in force at the date of certification, the agreement remains in force and shall be administered by the union that has been certified as the bargaining agent for the bargaining unit.

Votes by secret ballot

6‑22(1) All votes required pursuant to this Part or directed to be taken by the board must be by secret ballot.

(2) A vote by secret ballot is not required among employees in a bargaining unit consisting of two employees or fewer.

(3) An employee who has voted at a vote taken pursuant to this Part is not competent or compellable to give evidence before the board or in any court proceedings as to how the vote was cast.

(4) The results of the vote mentioned in subsection (1), including the number of ballots cast and the votes for, against or spoiled, must be made available to the employees who were entitled to vote.

DIVISION 13

Construction Industry
Subdivision 1

Preliminary Matters for Division
Purpose of Division
6‑64(1) The purpose of this Division is to permit collective bargaining to occur in the construction industry on the basis of either or both of the following:

(a) by trade on a province‑wide basis;

(b) on a project basis.

(2) Nothing in this Division:

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

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

(ii) all employees of the employer; or

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

. . .

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

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

Interpretation of Division
6‑65 In this Division:

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

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

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

. . .

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

(i) the commercial, institutional and industrial sector;

(ii) the residential sector;

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

(iv) the pipeline sector;

(v) the road building sector;

(vi) the powerline transmission sector;

(vii) any prescribed sector;

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

Argument of the Parties:

[32] The Union acknowledges that construction industry bargaining units are generally based on province-wide certifications or on the union's geographic jurisdiction. Despite this, the Union suggests that the Board can grant certification orders specific to sites on the usual principles governing under-inclusive bargaining units. The Union relies on the following cases: *United Food and Commercial Workers Union, Local 1400 v Plainsview Credit Union*, 2011 CanLII 40107 (SK LRB) ("Plainsview"); *G.C.I.U., Local 75M v Sterling Newspapers Group*, 1998 CarswellSask 926 (SK LRB) ("Sterling Newspapers"); *Construction and General Workers' Union, Local No 180 v Atco Structures & Logistics Ltd*., LRB File No. 015-14; *J.V.D. Mill Services v C.E.P*., 2011 CarswellSask 935, [2011] SLRBD No 1, 192 CLRBR (2d) 1; *L.I.U.N.A., Local 183 v Primeline Plumbing Ltd.*, 2001 CarswellOnt 5544 (ON LRB) ("*Primeline Plumbing*"); *955140 Ontario Inc. v L.I.U.N.A*., Ontario Provincial District Council, 2015 Carswell Ont 3487 ("*955140 Ontario")*.

[33] The Union argues that the employees' right to choose to be represented is a fundamental right that should supersede other considerations. It says that the Board has in the past certified smaller units, including in the construction industry. It relies on *Construction and General Workers' Union, Local No 180 v Atco Structures & Logistics Ltd*., LRB File No. 015-14, in which the Board granted a site specific certification order in the construction industry, with the Employer's support, resulting in no hearing or related Reasons for Decision. The Union acknowledges that there is no Saskatchewan case law analyzing the question in detail.

[34] The Union argues that the availability of "limited" bargaining units in the construction industry is supported as a matter of principle, taking into account the unique considerations of the industry. Many of the concerns that arise outside of the construction industry are not applicable here. For one, there are generally no competing bargaining agents. This should lessen concerns about the multiplicity of unions. Nor are there any issues related to the relative strength of a smaller unit as bargaining takes place across the trade union. Likewise, a construction industry Employer works across jurisdictions, and so its ability to manage its labour relations is less of an issue than in other industries.

[35] The Union points to its difficulty in attempting to organize a larger unit for an employer with "far-flung" work sites and to the Employer's ability to transfer employees to disrupt organizing patterns as additional factors relevant to the Board's analysis.

[36] The Employer's main objection to the proposed certification orders pertains to "fairness". It says that 11 employees should not determine the fate of 63. The proposed bargaining units are under-inclusive. Furthermore, it "moves employees around province-wide", and has been successful in retaining employees for this reason.

[37] In its Replies, the Employer objects to the votes, asserting that the Union has failed to demonstrate 45% support for the units applied for. But, in each of its Replies (except McDonald), it states that the number of eligible voters is the same as that included in the Directions for Vote.

[38] On the issue of voter eligibility, the Employer argued at the hearing that it erroneously provided the Board with a list of employees working at the respective sites at the time of the Applications. After the fact, the Employer came to believe that it should have had an opportunity to list the employees working during the entire 90-day period preceding those Applications.

[39] Lastly, the Employer makes a discrete objection in relation to the McDonald Street location. Here, the Employer states that it does not do any construction work within the meaning of the *Act*, that the work was not performed on its authorization, that there are no employees in the proposed bargaining unit, and that a certification order for these employees would therefore be improper.

Analysis

Jurisdiction:

[40] At the hearing, the Board raised a jurisdictional question with the parties in relation to the Clearwater Dene First Nation site. The issue is whether the labour relations at that site fall within federal jurisdiction given that the work site is located on reserve.

[41] There is a presumption of provincial jurisdiction over labour relations. That presumption is only rebutted on an exceptional basis. As the majority of the Supreme Court of Canada explained in *NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union*, [2010] 2 SCR 696, 2010 SCC 45 (CanLII):

> *[11] Jurisdiction over labour relations is not delegated to either the provincial or federal governments under s. 91 or s. 92 of the Constitution Act, 1867. But since Toronto Electric Commissioners v. Snider, 1925 CanLII 331 (UK JCPC), [1925] A.C. 396 (P.C.), Canadian courts have recognized that labour relations are presumptively a provincial matter, and that*

> *the federal government has jurisdiction over labour relations only by way of exception. This exception has always been narrowly interpreted […]*
>
> *[12] The approach to determining whether an entity's labour relations are federally or provincially regulated is a distinct one and, notably, entails a completely different analysis from that used to determine whether a particular statute is intra or ultra vires the constitutional authority of the enabling government. Because the regulation of labour relations falls presumptively within the jurisdiction of the provinces, the narrow question when dealing with cases raising the jurisdiction of labour relations is whether a particular entity is a "federal work, undertaking or business" for purposes of triggering the jurisdiction of the Canada Labour Code.*
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> *[citations removed]*

[42] The majority in *NIL/TU,O* confirmed that the functional test, developed in *Four B Manufacturing Ltd. v United Garment Workers of America*, 1979 CanLII 11 (SCC), [1980] 1 SCR 1031 applies in relation to section 91(24) of the *Constitution Act, 1867*.[2] That is, the Board should examine the nature, operations and habitual activities of the entity to determine whether it is a federal undertaking. If so, its labour relations will be federally regulated. When this inquiry is inconclusive, and only then, should the Board consider whether provincial regulation of the entity's labour relations would impair the core of the federal head of power at issue.

[43] There is no evidence to suggest that the nature, operations and habitual activities of the entity are a federal undertaking. The Clearwater worksite is one site among many at which the provincially incorporated Employer performs its work. Therefore, there is no reason for this Board to decline jurisdiction in relation to the Employer's work at the Clearwater site.

Voter Eligibility:

[44] At the hearing, the Employer raised objections to the employee list. The Employer suggested that it erroneously provided a list of employees working at the respective sites at the time of the Applications, and not during the entire 90-day period preceding those Applications. The Employer's argument is based on a misapprehension of the law pertaining to voter eligibility. The Employer relies on the following provision:

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[2] "91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, […] 24. Indians, and Lands reserved for the Indians."

> ***Acquisition of bargaining rights***
> *6-9(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.*
> *(2) When applying pursuant to subsection (1), a union shall:*
> *(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and*
> *(b) file with the board evidence of each employee's support that meets the prescribed requirements.*

[45] Section 6-9 requires that when applying for bargaining rights pursuant to section 6-9(1), a union shall establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent. In *International Association of Heat and Frost Insulators and Allied Workers, Local 119 v Northern Industrial Contracting Inc*., 2014 CanLII64991 (SK LRB), the Board observed:

> *[20] As was noted by this Board in Calvin Ennis v Con-Force Ltd. United Brotherhood of Carpenters and Joiners of America, Local 1985, et. al., [1992] 2nd Quarter Sask Labour Report 117, LRB File Nos. 185-92 & 188-92, the general standard for determining voter eligibility when a representational vote is ordered is that, subject to exceptional circumstances, a person must be an employee working within the scope of the subject bargaining unit on the date of the application and must remain an employee until the date of the vote.*

[46] The question is whether the employees were working within the scope of the proposed bargaining unit at the date of the application and until the date of the vote. The reference to 90 days relates to support card evidence. 90 days is not a window for gathering names to increase the size of the voter pool. The fact that additional employees may have previously worked on the site is irrelevant. The question is whether the employees were on the site on the date of the Application and until the vote.

Onus of Proof:

[47] The Union bears the onus to establish on a balance of probabilities that the proposed units are appropriate for collective bargaining. The Union must present evidence that is sufficiently clear, convincing and cogent.

Appropriateness of Bargaining Units:

[48] The Board is guided in its determination by section 6-4 of the *Act* which reads:

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

[49] Union representation is the employees' choice, a principle which is reinforced by section 2(d) of the *Charter.* Employees' choice to form and join new associations represents an exercise of the freedom of association pursuant to section 2(d).

[50] The Union in this case has made five Certification Applications in relation to work sites within the construction industry as defined by clause 6-65(a) of the *Act*. The Board's task is to determine if the proposed units are appropriate for collective bargaining. The Board's determination of appropriateness is a matter of discretion to be determined on the facts of the case, with reference to the following provision:

> *6-11(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:*
>
> > *(a) if the unit of employees is appropriate for collective bargaining; or*
> > *(b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.*
>
> *(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.*
> *…*
> *(7) In making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:*
>
> > *(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and*
> > *(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:*
> >
> > > *(i) the geographical jurisdiction of the union making the application; and*
> > > *(ii) whether the certification order should be confined to a particular project.*

[51] The Board must not presume that a craft unit is the more suitable unit appropriate for collective bargaining. Rather, its task is to determine the appropriate units by reference to those factors relevant to the Applications, including the geographical jurisdiction of the Union and whether the orders should be confined to particular projects.

[52] The main issue is whether the proposed bargaining units are under-inclusive and if so, inappropriate for collective bargaining. While the Board must not insist that the proposed unit be the "most appropriate", it must determine whether the proposed unit is appropriate.

[53] The Board is conscious of the fact that, in the construction industry, the standard practice has been to organize and certify province-wide bargaining units. As explained by the Board in *J.V.D. Mill Services*,

> *175 Province-wide bargaining has been the norm in the construction industry for many years now. Employees are accustomed to being able to move freely throughout the province without regard to changes that may occur in the nature of their bargaining relationship by virtue of a change in the location of their employment in the Province. …*

[54] In the absence of a comparable precedent, the Board is compelled to apply general principles developed in analogous case law in Saskatchewan. In determining whether to certify an under-inclusive unit, the Board on many occasions has recited and applied the reasoning outlined in *Graphic Communications International Union, Local 75M v Sterling Newspapers Group, A Division of Hollinger Inc*. [1998] Sask LRBR 770, LRB File No. 174-98 ("*Sterling Newspapers*").[3] In *Sterling Newspapers*, the Board listed the following factors to determine whether a proposed unit, being under-inclusive, will not be an appropriate unit:

1. There is no discrete skills or other boundary surrounding the unit that easily separates it from other employees;
2. There is an intermingling between the proposed unit and other employees;
3. There is a lack of bargaining strength in the proposed unit;
4. There is a realistic ability on the part of the Union to organize a more inclusive unit; or
5. There exists a more inclusive choice of bargaining units.[4]

[55] These factors have been adopted and applied by this Board in certification applications in the construction industry: *J.V.D. Mill Services*. In applying these factors, the Board has an overriding concern with ensuring that the employees share a sufficient community of interest to enable effective bargaining and that the units are adequately structured so as to avoid excessive fragmentation. Each of these issues could impact the viability of the proposed units. The Board will consider the *Sterling Newspapers* factors in turn.

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[3] See, for example, *J.V.D. Mill Services v CEP*, 2011 CarswellSask 935, [2011] SLRBD No 1, 192 CLRBR (2d) 1 ("*J.V.D. Mill Services*"); *Ranch Ehrlo*, [2008] SLRBR No 36, 161 CLRBR (2d) ("*Ranch Ehrlo*").
[4] *J.V.D. Mill Services* at para 143.

[56] The first factor is whether there are discrete skills or other boundaries surrounding the proposed units that easily separate the employees in those units from other employees. In the current case, all of the proposed units include plumbers and related tradespersons. Clearly, there are discrete skills that separate the plumbers and related tradespersons, in those units, from other employees. Conversely, there are no discrete skills separating the plumbers and related tradespersons, working in those units, from other plumbers and related tradespersons employed by YPH. There are, however, geographical boundaries surrounding the proposed units that correspond to the particular work sites described in the Applications.

[57] The second factor is whether there is intermingling between the proposed unit and other employees. There is no question as to whether there is intermingling. Transfers and temporary assignments to different work sites represent the Employer's standard practice. Employees commonly work on one site for a number of weeks or months, only to be transferred to another site as the work requires. With each transfer comes the potential for a different configuration of staff employed at the new site.

[58] The third factor is whether there is a lack of bargaining strength in the proposed units. While the size of a bargaining unit is not a determinative factor, the small size of the proposed units is not ideal. However, as the Union has rightly pointed out, union members in the construction industry benefit from one provincial agreement that applies to all newly certified bargaining units. The application of the provincial agreement tempers the existing concern around the bargaining strength of the proposed units.

[59] The next factor is whether there is a realistic ability on the part of the Union to organize a more inclusive unit. If there is, this weighs against the Union. On this question, the Union pointed to the disparate work sites across the Province, suggesting that there are barriers to organizing these units without threat of reprisal or interference on behalf of the Employer. The Board will generally take note of any efforts to organize, but the Union's evidence on this point was general, speculative at times, and rather unpersuasive. The Board concludes, on the evidence, that there is a realistic ability to organize a more inclusive unit.

[60] Furthermore, the Union has organized and applied for five separate bargaining units. While the presence of five separate Applications cannot be dispositive, it does demonstrate that the Union has made strides in obtaining support from the membership for each of these units. And while the Union has not requested a five-site certification order, these Applications do tend

to suggest that, apart from any issue of intermingling, the Union is able to organize a more inclusive bargaining unit. Furthermore, the Board has some difficulty with the suggestion that there were only 6-7 sites at the time of the Applications.

[61] The last factor is whether there is a more inclusive choice of bargaining units. Certainly, a province-wide bargaining unit would be more inclusive than the five disparate bargaining units proposed here. Based on the evidence, and the Board's conclusion on the fourth factor, the question of whether there is a more inclusive choice of bargaining units remains to be seen.

[62] The Board is also guided in its assessment by the principles recited and confirmed in *United Food and Commercial Workers Union, Local 1400 v Plainsview Credit Union*, 2011 CanLII 40107 (SK LRB) ("*Plainsview*"). The Board, at paragraph 38, relied on its reasons in *Canadian Union of Public Employees v The Board of Education of the Northern Lakes School Division No. 64*, [1996] Sask LRBR 115 at 116-117:

> *…*
> *The Board has always been reluctant to deny groups of employees access to collective bargaining on the grounds that there are bargaining units which might be created, other than the one which is proposed, which would be more ideal from the point of view of collective bargaining policy. The Board has generally been more interested in assessing whether the bargaining unit which is proposed stands a good chance of forming a sound basis for a collective bargaining relationship than in speculating about what might be an ideal configuration.*

[63] The Board's assessment of appropriateness seeks to balance the right of employees to organize and join unions of their choosing with the concern for stable bargaining structures. This Board has recognized that the "ultimate viability of smaller, less inclusive, bargaining units is, in our experience…more tenuous over the long run."[5] While smaller bargaining units are not necessarily inappropriate, they must be assessed on a case-by-case basis. In conducting that assessment, the unique characteristics of the relevant industry may be taken into account. Certain features of the construction industry, for instance, mean that smaller units are often viable.

[64] The Board in *J.V.D. Mill Services* also considered the factors outlined in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v O.K. Economy Stores (a division of Westfair Foods Ltd.)* [1990] Fall Sask Labour Rep 64 ("*O.K. Economy*"), at paragraph 149:

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[5] *Sterling Newspapers* at 776 as cited in *Plainsview* at para 42.

> *This does not mean that large is synonymous with appropriate. Whenever the appropriateness of a unit is in issue, whether large or small, the Board must examine a number of factors assigning weight to each as circumstances require. There is no single test that can be applied. Those factors include among others: whether the proposed unit of employees will be able to carry on a viable collective bargaining relationship with the employer; the community of interest shared by the employees in the proposed unit; organizational difficulties in particular industries; the promotion of industrial stability; the wishes or agreement of the parties; the organizational structure of the employer and the effect that the proposed unit will have upon the employer's operations; and the historical patterns of organization in the industry.*
>
> *The Board recognizes that there may be a number of different units of employees which are appropriate for collective bargaining in any particular industry. As a result, on initial certification applications a bargaining unit containing only one store may be found appropriate. That finding does not rule out the existence of other appropriate units and, accordingly, on a consolidation application, a larger unit may be found appropriate. There is no inconsistency between the initial determination of a single store unit with a municipal geographic boundary and a subsequent determination that a larger unit is appropriate.*[6]

[65] Distilling the foregoing excerpt, the *OK Economy* "factors" may be itemized as follows: viable collective bargaining, community of interest, organizational difficulties in particular industries, promotion of industrial stability, the preferences of the parties, the employer's organizational structure, the effect of the proposed unit on the employer's operations, and historical patterns of organization within the industry.

[66] A primary issue is viability. The Union says that the construction industry is unique. If certified, the employees will be represented by a "designated trade union" that can enjoy the benefits of a provincial agreement. From this perspective, viability is not a significant issue. Moreover, the fact that many of the employees no longer work at the specific site is not particularly dispositive.

[67] However, related to viability is whether there is a community of interest within the proposed bargaining units. Certainly, the relevant employees perform similar duties and have similar responsibilities to one another. But the worksites are not truly discrete. The Board is not persuaded that the units, as single sites, have a sufficient community of interest to ensure viability for collective bargaining purposes.

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[6] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v O.K. Economy Stores (a division of Westfair Foods Ltd.)* [1990] Fall Sask Labour Rep 64 ("*O.K. Economy*") [1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89 at 66, as cited *in J.V.D. Mill Services* at para 149.

[68] As discussed in the preceding paragraphs, the Board can take into account the organizational difficulties in particular industries. And while the Board recognizes the challenges in organizing a province-wide union in disparate work sites, especially in construction, the evidence on this point fell short.

[69] Finally, the concern with fragmentation in the construction industry is addressed, in part, through the operation of the provincial agreement. If, for example, non-union employees are transferred to the certified site, they will be covered by the provincial agreement and the relevant union security provisions. But this alone does not defeat the Board's concern with the potential for fragmentation in the current case.

[70] The remaining factors are less determinative in this case. First, there is no agreement between the parties. Second, the organizational structure is relevant to the extent that it informs the question on intermingling and viability, and that matter has been addressed in full in the preceding paragraphs. Third, the Employer is concerned about the impact of the proposed bargaining units on its overall operations, but this cannot be critical. To illustrate, despite the Employer's urging, this Board pays no heed to its bidding process, being at non-union rates or otherwise. And while the Employer will lose flexibility in its ability to transfer workers, a shift in the distribution of power is a primary purpose of the statutory protections for organizing and collective bargaining.

[71] Lastly, the Board turns to the fact patterns of the recommended precedents. Although the Union has relied on *Sterling Newspapers* and *Plainsview* as examples of under-inclusive units, those cases are distinguishable. For one, the application in *Sterling Newspapers* was for a small bargaining unit with little intermingling and no concern about viability. The Board found that there was "little interchange" between the press room employees and other newspaper departments.[7] Second, in *Plainsview*, there was solid evidence as to the Union's previous organizing attempts, very little intermingling among the employees, and a discrete boundary and community of interest among the employees at the branch level. Staff generally did not travel between branches and only occasionally filled in at other branches.[8]

[72] In the absence of any Saskatchewan precedents, the Union has asked the Board to follow *Local 183 v Primeline Plumbing Ltd.*, 2001 CarswellOnt 5544 (ON LRB) ("*Primeline Plumbing*")

[7] *Sterling Newspapers* at para 24.
[8] *Plainsview* at para 20.

and *955140 Ontario Inc. v L.I.U.N.A*., Ontario Provincial District Council, 2015 Carswell Ont 3487 ("*955140 Ontario")*. This Board must be cautious in relying on case law from other jurisdictions.

[73] In *Primeline*, the Ontario Labour Relations Board considered the Employer's argument that the bargaining unit should include areas that were not included in the certification application. The Employer argued that "creating a pocket of unrepresented employees would fragment collective bargaining and create obstacles to the flexibility necessary to move employees among its job sites".[9] The Board found that the unit applied for was appropriate.

[74] The Board in *955140 Ontario* considered a similar issue. There, the Board found that the Union was not required to attempt to organize all of an employer's employees in disparate locations. As the Board explained, "the applicant proposed a bargaining unit of construction labourers encompassing a number of geographic townships in a white area of the province".[10] The Board found that there was "no obligation on a union to attempt to organize employees who are working in disparate locations in the white area of the Province".

[75] In cases such as these, the Ontario Labour Relations Board makes decisions in the context of geographic areas, referenced at subsections 128(1) and 158(2) of the *Labour Relations Act, 1995*:

> ***Bargaining units in the construction industry***
>
> *128 (1) Where a trade union applies for certification as bargaining agent of the employees of an employer, the Board shall determine the unit of employees that is appropriate for collective bargaining* ***by reference to a geographic area*** *and it shall not confine the unit to a particular project.*
>
> ***Bargaining agents in the industrial, commercial and institutional sector***
>
> *158 (1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126 shall be brought by either,*
>
> *(a) an employee bargaining agency; or*
>
> *(b) one or more affiliated bargaining agents of the employee bargaining agency,*
>
> *on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless*

[9] *Primeline* at para 6.
[10] *955140 Ontario* at para 6.

> *bargaining rights for such geographic area have already been acquired under subsection (2) or by voluntary recognition.*
>
> *(2) Despite subsection 128 (1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.*
>
> [emphasis added]

[76] In Ontario, an applicant union is expressly permitted to apply for bargaining units in reference to a specified geographic area. In fact, an applicant is "free to determine what geographic area or areas it may seek to represent".[11] As such, the unique characteristics of the provincial regime are good reason not to rely on the Ontario precedents for certifying the bargaining units in this case.

[77] Furthermore, due to the governing legislation, there was no need for the Ontario Board to undertake an assessment of whether the proposed units were under-inclusive. The Board in the present case has applied said assessment and has made a determination on that basis.

[78] Lastly, the Board in *J.V.D. Mills Services* observed that province-wide bargaining units are the norm in the construction industry.[12] And while "limiting the scope of the certification to the current job site could be considered appropriate", doing so, in that case, did not achieve the goals of the *Act.* The Board explained:

> *174 These considerations must also guide the Board in its determination of the geographic scope of this bargaining unit. Clearly, limiting the scope of the certification to the current job site could be considered appropriate. However, with respect, we do not believe that limiting the scope of the order in so narrow a fashion best achieves the goals of the Act.*
>
> *175 Province-wide bargaining has been the norm in the construction industry for many years now. Employees are accustomed to being able to move freely throughout the province without regard to changes that may occur in the nature of their bargaining relationship by virtue of a change in the location of their employment in the Province. It also allows employers to know with some certainty the terms on which they may tender for work throughout the Province and understand the variable costs for manpower resultant therefrom.*

[79] The Board in *J.V.D. Mills Services* found that there was no compelling argument to confine the certification as requested. The question in the current case is whether the Union has satisfied

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[11] *Primeline* at para 8.
[12] *J.V.D. Mills Services* at para 158.

its burden to prove that the proposed bargaining units are appropriate, confined as they are to a limited number of work sites.

[80] For the proposed bargaining units, there are lingering concerns pertaining to under-inclusivity and viability. While the Board has been liberal in its application of the foregoing factors, it has not been persuaded that the proposed units are appropriate. In arriving at this determination the Board takes into consideration the requirement for clear, convincing, and cogent evidence, as necessary, to demonstrate that the proposed units are appropriate.

[81] The Board is deeply conscious of the starting point for any application for bargaining rights, being the employees' right to organize set out at section 6-4 of the *Act*. Nevertheless, the Board has established tests to assess the appropriateness of a bargaining unit. The five-point test, as established in *Sterling Newspapers* and applied in *J.V.D. Mills Services*, represents, what is at times, a certain hurdle to unions organizing under-inclusive units in the construction industry. There are some legitimate reasons for this. The construction industry is inherently unstable, the work is transient, and province-wide certifications serve the dual purposes of enhancing viability and limiting fragmentation.

[82] Nonetheless, construction industry stakeholders have, over time, instigated and developed important mechanisms to address the inherent instability in the industry. These mechanisms should be taken into account in determining the appropriateness of a given bargaining unit. The operation of the provincial agreement, for example, means that the bargaining strength of a small bargaining unit may be less of a concern in the construction industry than in another.

[83] The Board also notes that while Province-wide certifications are the norm, they are not universal. The most common exception is a certification based on a union's geographical jurisdiction. As counsel for the Union rightly points out, LRB File No. 015-14 is another exception.

[84] Although the Board has not been persuaded that the within bargaining units are appropriate, this does not preclude a different determination in a future case. As was suggested in *J.V.D. Mills Services*, "limiting the scope of the certification to the current job site could be considered appropriate". Given the foregoing analysis, it is fitting to examine the five factors through the lens of the construction industry. But in a given case, the evidence in relation to those factors must be clear, convincing, and cogent.

[85] The Board also wishes to comment on the proposed bargaining unit for the McDonald Street site. The Board accepts that the pertinent work was not being performed on the authorization of the Employer. When Yawney discovered what was happening, he promptly shut it down. It would have been unfair and inappropriate to grant a certification in relation to that location. And so, if the Board had granted any certification orders, it would not have granted a certification order for the McDonald Street site.

[86] The Board therefore dismisses the Union's Applications for bargaining rights, described as LRB File Nos. 221-18, 222-18, 223-18, 224-18, and 253-18, pursuant to section 6-11 and subsection 6‑103(1) of the *Act*.

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

DATED at Regina, Saskatchewan, this **23rd** day of **April, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson