CLR CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF SASKATCHEWAN INC., Applicant v UNITED ASSOCIATION OF JOURNEYMAN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Respondent and RELIANCE GREGG'S HOME SERVICES, A DIVISION OF RELIANCE COMFORT LIMITED PARTNERSHIP, Respondent

LRB File No. 035-20; July 3, 2020
Vice-Chairperson, Barbara Mysko; Board Members: Hugh Wagner and Joan White

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Intervention Application – Construction Industry – Underlying certification application – Bargaining unit outside Division 13 – Stability of Registration system – Applicant seeks standing as Direct Interest and/or Exceptional and/or Public Interest Intervenor – Board denies Intervenor status to applicant.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an application to intervene [Application] filed by the CLR Construction Labour Relations Association of Saskatchewan Inc. [the CLR] with the Board on February 25, 2020 in relation to an underlying certification application, filed with the Board on November 21, 2019 (LRB File No. 260-19). The Board has decided to dismiss the Application for the following reasons.

[2] The underlying certification application was brought by United Association of Journeyman & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 [Union] in relation to employees of Reliance Gregg's Home Services [Employer]. The Employer is a provider of residential plumbing and HVAC services in the Saskatoon area. The Union is the

bargaining agent for employees in the plumbing and pipefitting trade represented through the bargaining structure pursuant to Division 13 of the Act. The certification application is set for a hearing before the Board on August 12,13, and 14, 2020.

[3] This is not the first certification application filed by this Union in relation to this Employer. In November 2017, the Union filed three certification applications in relation to different bargaining units of the employees of the Employer, consisting of the following:[1]

> *(a) Employees engaged in construction work;*
>
> *(b) Journeypersons engaged in maintenance work; and*
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> *(c) Apprentices engaged in maintenance work.*

[4] On December 18, 2018, in *Plumbers and Pipefitters v Reliance Gregg's*, 2018 CanLII 127680 (SK LRB) [Certification Decision], the Board granted a certification for two units of employees, as follows:

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

[5] The majority of the Board found that Division 13 did not apply to the workplace. Member Holmes dissented from the majority decision, citing the reasoning in *Sheet Metal Workers International Union, Local 296 v Atlas Industries Ltd.*, [1998] SLRBD No 43 (SK LRB) [*Atlas*].

[6] The voting results disclosed by the Reports of the Agent of the Board, dated December 20, 2018, favored certifying the unit of journeymen and foremen, but did not favor certifying the unit of apprentices. The resulting certification order was issued for the bargaining unit of journeymen and foremen.

[7] On July 10 and 11, 2019, the Board heard an application for reconsideration in relation to the Certification Decision. In relation to that application, in *Reliance Gregg's v Plumbers & Pipefitters*, 2019 CanLII 120618 (SK LRB) [Reconsideration Decision], the Board found as follows:

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[1] LRB File Nos. 234-17, 235-17, and 236-17. As described at paragraph 33 in *Reliance Gregg's v Plumbers and Pipefitters*, 2019 CanLII 120618 (SK LRB) [Reconsideration Decision].

> *[38] The only reasonable interpretation of #4, above, is that, on a correct interpretation of the Act, the Board would have ordered that the appropriate bargaining unit of employees in this workplace was one bargaining unit combining the two bargaining units described in #1 and #2:*
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> > *All journeyman plumbers, steamfitters, pipe-fitters, welders, gas-fitters, refrigeration mechanics, instrumentation mechanics, sprinkler-fitters and all apprentices and foremen connected with these trades employed by Reliance Gregg's Home Services, a division of Reliance Comfort Limited Partnership in the City of Saskatoon, in the Province of Saskatchewan.*

[8] The Board observed that the voting results of a combined bargaining unit did not favor certification of that unit. Therefore, the Board rescinded the certification order for the existing bargaining unit. In the Reconsideration Decision, the Board dealt primarily with the interpretation or application of statutory provisions related to the supervisory employees.

[9] The Reconsideration Decision was issued on November 19, 2019. On November 21, 2019, the Union filed the current certification application seeking certification of the following unit of employees:

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

[10] This is the same unit outlined by the Board in the Reconsideration Decision.

[11] The CLR was not involved in any of the foregoing proceedings. This matter was previously set for a hearing in March 2020. Prior to the hearing, the CLR brought this Application, and the certification hearing was therefore adjourned to the new dates in August 2020. The CLR has also filed a reconsideration application in relation to the Certification Decision, and a judicial review application in the Court of Queen's Bench.

Applicable Statutory Provisions:

[12] The following provisions of the Act are applicable:

> ***6-11****(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:*
>
> > *(a) if the unit of employees is appropriate for collective bargaining;*
>
> *. . .*
>
> *(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.*

. . .

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

> *(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and*
>
> *(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:*
>
> > *(i) the geographical jurisdiction of the union making the application; and*
> >
> > *(ii) whether the certification order should be confined to a particular project.*
> >
> > *…*

6-112 *…(4) Without limiting the generality of subsections (2) and (3), in any proceedings before it, the board may, on any terms that it considers just, order that the proceedings be amended:*

> *(a) by adding as a party to the proceedings any person that is not, but in the opinion of the board ought to be, a party to the proceedings;*

[13] The following provisions of *The Saskatchewan Employment (Labour Relations Board) Regulations* [Regulations] are applicable:

19 *On the filing of an application mentioned in Part II, the registrar shall:*

> *(a) make efforts that the registrar considers reasonable to determine the identity of any employer, other person, union and labour organization that is referred to in the application or has a direct interest in the application; and*
>
> *(b) provide a copy of the application to the employers, other persons, unions and labour organizations identified pursuant to clause (a).*

20*(1) In this section:*

> *(a) "application to intervene" means an application in Form 17 (Application to Intervene);*
>
> *(b) "original application" means an application made to the board pursuant to the Act and these regulations that is the subject of an application to intervene.*

(2) An employer, other person, union or labour organization that is served with a copy of an application pursuant to section 19 and intends to intervene in the proceedings before the board shall file a reply in Form 18 (Reply).

(3) An employer, other person, union or labour organization that is not served with a copy of an application pursuant to section 19 and that intends to intervene in the proceedings before the board shall file an application to intervene.

(4) All replies and applications to intervene must be filed within 10 business days after the date a copy of the original application was given to the employer, person, union or labour organization by the registrar.

(5) The registrar shall provide a copy of every reply and every application to intervene to:

(a) the party that filed the original application;

(b) in the case of an application to intervene, any other party that filed a reply; and

(c) any other employer, person, union or labour organization that is directly affected by the application to intervene.

Argument of the Parties/Proposed Intervenor:

[14] The CLR, the Employer, and the Union provided extensive written argument with respect to the CLR's Application to intervene. The Board provides the following summary of those arguments.

The CLR:

[15] The CLR makes this Application on the basis of all three categories of intervenor status: direct interest, exceptional, and public interest intervenor status. The Board will address each of these arguments, in turn.

[16] The first category is direct interest. The CLR says that its rights as the Representative Employer Organization [REO] for the Plumber/Pipefitter Trade Division are directly engaged by the certification application. If the proposed unit is found to be appropriate, and a non-Division 13 unit is subsequently certified "inclusive of employees working as plumbers and pipefitters in the construction industry", then those employees will be able to negotiate terms and conditions that are separate, and possibly different, from those contained in the provincial collective agreement. The Certification Decision represented a significant policy change inconsistent with existing case law. If employees working in construction are able to negotiate different terms and conditions, this will impact the "integrity and viability of bargaining" within the trade division, and disrupt labour relations stability.

[17] The CLR says that the Board in the Certification Decision relied on erroneous findings of fact in relation to the operation of the construction industry without the benefit of evidence from the CLR. The CLR was not notified of the application, contrary to the usual practice of the Board, and therefore was not present at the hearing. The CLR, as an REO, has a statutory obligation to advocate on behalf of unionized employers operating within a trade division and a "direct interest"

in maintaining the confidence of those employers and preserving the integrity of the registration system for their benefit.

[18] As for exceptional intervenor status, the CLR checks off all the boxes. It has a demonstrable and genuine interest to the answer to the legal question in dispute; special circumstances that differentiate it from other parties with similar interests; and it can provide a unique and valuable perspective to assist in the Board's determination of the issues. It has significant experience with the construction industry registration system, an established interest in the preservation of the registration system, and "the ability to call relevant evidence" on the appropriateness of the proposed unit, including on "the potential ramifications to collective bargaining, the availability of labour, and the stability of labour relations in the construction industry if the unit is found to be appropriate." It is in a better position than the Union or the Employer to provide such submissions.

[19] Lastly, the CLR says that it satisfies the five questions arising on an application for public interest intervenor status. On the issue of delay, the CLR does not intend to call evidence beyond that needed to support its position, to duplicate evidence or argument, or to make submissions outside of its unique position as an REO and participation in the registration/accreditation system. Its intervention would not prejudice the parties, widen the *lis,* or transform the proceedings into a political arena. The CLR is in a unique position to speak to the construction industry generally, and the impact of the Board's decision, specifically.

The Union:

[20] The Union does not oppose a grant of intervenor status on the basis of public interest or exceptional intervenor status, but only on the following condition. The CLR's involvement must be limited to "making argument as to the appropriate policy to be applied by the Board respecting hybrid bargaining units". This is necessary to avoid "significantly lengthening or expanding the proceeding under circumstances where the composition of the workplace has already been the subject of a hearing and multiple decisions by the Board".

[21] The Union opposes the CLR's request for direct interest intervenor status.

The Employer:

[22] The Employer fully objects to the CLR's Application. The application of Division 13 was thoroughly argued and considered, including through the presentation of evidence, in the previous hearing. The Certification Decision arose from the facts before the Board, and neither the Union

nor the Employer sought reconsideration of the conclusion that the CLR now puts in issue. Only the CLR is seeking to appeal a decision to which it was not a party. The Division 13 issue is *res judicata* and there has been no material change in circumstances to justify reconsidering it.

[23] The Board should bear in mind that both parties expended considerable resources litigating the issue that the CLR now seeks to overturn. The Board utilized public resources. Reconsidering the appropriateness of the bargaining unit would require a further allocation and expenditure of resources to reargue and rehear an issue that has already been determined. The CLR's insistence on this approach is out of line with the Board's objective in promoting finality or expeditious adjudication of certification applications.

[24] Besides, the Certification Decision does not set the precedent suggested by the CLR. Gregg's operates an atypical business model, engaging employees in both construction and non-construction work, work that is sometimes performed by the same employee. The employees are permanent, are not routinely laid off and rehired, and the proposed bargaining unit applies only to the operations in Saskatoon. The decision did not, by extension, exclude residential sector work from the construction industry on a grand scale. Even if the Certification Decision does depart from *Atlas*, the CLR puts too much stock in the precedential value of that decision.

[25] The CLR exercises a limited role in relation to collective bargaining, and no role in relation to the certification process. It is the Board's statutory mandate to determine whether a proposed bargaining unit is appropriate, and whether a bargaining unit properly falls under Division 13. The CLR does not have a right to weigh in on the appropriateness of a bargaining unit or to insist that it be consulted in advance of a certification order.

[26] On the question of public interest intervenor status, the CLR's participation will necessarily widen the *lis* and in so doing, lead to even more delay and ongoing prejudice to the parties. The CLR has provided no information about how it will offer a different perspective than that of the parties or a valuable assistance to the Board. The CLR is not unique in supporting a Division 13 unit; the Union has already represented that position

[27] In the upcoming hearing, the parties need only call evidence related to the timing of the application and to voter eligibility. By allowing the CLR to participate, the Board will add another layer of complexity to what should be, finally, relatively straightforward proceedings. The greater complexity will prolong the hearing and increase the likelihood of further delay. In the meantime,

the Employer will continue to experience prejudice arising from the statutory freeze on terms and conditions of employment.

Analysis:

[28] To begin, this Application engages the Board's discretionary power pursuant to subsection 6-112(4) of the Act, which reads:

> *6-112 […] (4) Without limiting the generality of subsections (2) and (3), in any proceedings before it, the board may, on any terms that it considers just, order that the proceedings be amended:*
>
> > *(a) by adding as a party to the proceedings any person that is not, but in the opinion of the board ought to be, a party to the proceedings;*

[29] The Board exercises this discretion sparingly, taking into account considerations of fairness (to the party seeking standing) and the proposed intervenor's potential to assist the Board in making a decision, without doing an injustice to the other parties.

[30] The Board in *C.E.P. v J.V.D. Mill Services*, [2010] SLRBD No 27 [*J.V.D. Mill Services*] set out the three categories into which an intervenor may fall:

> *13 In the article by Sheila M. Tucker and Elin R.S. Sigurdson entitled Interventions in British Columbia: Direct Interest, Public Law & 'Exceptional Intervenors', (the "Article") as noted by the authors, the three forms of intervenor status can be described as follows:*
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> 1. *The applicant has a direct interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be directly affected by the answer ("direct interest intervenor");*
>
> 2. *The applicant has a demonstrable interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be affected by the answer, can establish the existence of "special circumstances", and may be of assistance to the court [Board] in considering the issues before it ("exceptional intervenor"); and*
>
> 3. *The applicant has no legal rights or obligations that may be affected by the answer to the legal question in dispute, but can satisfy the court [Board] that its perspective is different and its participation may assist the court [Board] in considering a public law issue before it ("public law intervenor").*
>
> *14 …We adopt the three categories of intervenor status as reflective of the categories of status that may be granted by the Board. Granting of status in any particular case, will, of course, be discretionary, and dependent upon the facts in each particular case.*

[31] In *Saskatchewan Provincial Building and Construction Trades Council v Churchill River Employees' Association (CREA)*, 2020 CanLII 10513 (SK LRB) [*CREA*], the Board described the balance that it seeks to achieve on intervenor applications:

> *[41] The Board must seek to achieve a balance between the preceding factors and the important goals of litigation convenience, efficiency, and judicious use of the Board resources. Underlying all of these considerations is a concern for fairness to the parties and for the promotion of a balanced, transparent, healthy and effective labour relations environment.*

[32] The Board will consider each of the three categories in turn.

Direct Interest Intervenor:

[33] The first category is direct interest intervenor status. As evidence of direct interest, the CLR says that it has negotiated, on behalf of unionized employer members, three collective agreements covering all unionized plumber and pipefitter trade division construction work in the province. According to the CLR, these collective agreements will be affected by the underlying application. If the proposed unit is found to be appropriate, that will allow for a non-Division 13 certification in relation to employees who are performing unionized construction work within the trade division. In other words, employees performing unionized construction work will be permitted to negotiate outside the registration system.

[34] In support of its argument for direct interest intervenor status, the CLR relies on the general principles outlined in *J.V.D. Mill Services* and the following comments from *Edmonton Exchanger & Refinery Services Ltd. (Re)*, [2019] SLRBD No 41 [*Edmonton Exchanger*]:

> *A claim of standing as a direct interest intervenor must flow from the potential that the subject proceedings could have a direct impact on the party seeking standing (for example, through the potential imposition of legal obligations upon them or an impact on certification rights they currently hold or are seeking to obtain).*[2]

[35] The CLR distinguishes from the Board's decision to deny intervenor status in *HSAS v Regina District Health Board*, [1995] SLRBD No 46 [*HSAS*]. There, SGEU applied for intervenor status in relation to the certification application brought by another union, the HSAS. In relation to the intervention application, the Board found that the "trade unions were asserting a position based, not on their existing bargaining rights for a group of employees, but on the idea of some pre-emptive entitlement to bargain on behalf of certain kinds of employees, whether they had been organized previously or not".[3]

[36] The CLR says that this case is characterized by a different set of expectations. The CLR expects that it will bargain with unionized employees as the exclusive agent for all unionized

[2] At para 16.
[3] At 6.

employers in all sectors of the relevant trade division. The CLR's interest in employees who perform construction work is not merely prospective; it is existing. If those employees are unionized, the expectation is that they will be governed by collective agreements negotiated by the CLR. This is the very purpose of the registration system.

[37] The CLR also relies on the general principles derived from *JVD Mill Services.* Similar to *HSAS*, the proposed intervenors in *JVD Mill Services* argued that they had a direct interest in the underlying application because the proposed bargaining unit included "employees whom they would normally represent". The Board applied the reasoning in *HSAS* and denied direct interest intervenor status.

[38] To establish a direct interest, a party has to show that it has legal rights or obligations that may be directly affected by the answer. Neither a keen interest nor a potential for a "bad precedent" rise to the level of a direct interest. As explained by the Board in *IBEW, Local 2038 v IABRSRI, Local 771*, 2019 CanLII 43219 (SK LRB) [*Ironclad*]:

> *[32] CLR states that the precedent in this case could "affect the CLR not only as the REO for the Ironworkers Trade Division, but also as the REO in 15 other trade divisions within which the CLR represents unionized employers". That may be true but the potential for a "bad precedent" is not a sufficient basis for a direct interest intervention. As the Board stated in Ledcor, at paragraph 25, the "fact that a proposed intervenor may have a similar case pending before the tribunal or court in question, does not mean it should be granted intervenor status in an unrelated matter". Similarly, the fact that a proposed intervenor may be impacted by the case before the Board does not mean that it should be granted direct interest intervenor status.*

[39] The Union says that the CLR's position is substantially similar to that which it held in *Ironclad*. There, the underlying certification application raised an issue of whether a union designated under a ministerial order could apply for a certification of an all-employee bargaining unit in the construction industry. The Board denied direct interest intervenor status to the CLR, stating that it "does not have legal rights or obligations that will be directly affected by the answer". According to the Board, the CLR did not have a direct stake in the *lis* between the parties.

[40] Pursuant to section 6-70 of the Act, the CLR is the exclusive agent to engage in collective bargaining on behalf of all unionized employers in the trade division. If the Board determines that a bargaining unit is subject to Division 13 then the CLR has a statutory mandate to represent the relevant employer in collective bargaining. On the other hand, if the Board determines that a bargaining unit is not subject to Division 13, then the CLR has no role in relation to that unit.

[41] The CLR's mandate comes into effect upon certification pursuant to Division 13. If the Board grants a certification order in relation to an employer within the trade division, then the CLR is expected to represent that employer in collective bargaining, just as it is expected to represent all unionized employers in the trade division. Either way, the CLR remains the exclusive agent to engage in collective bargaining on behalf of all unionized employers in a trade division.

[42] A primary objective of Part VI of the Act is to facilitate the right of employees to be represented by a bargaining agent and to facilitate the chosen union's acquisition of bargaining rights on behalf of those employees. Section 6-4 of the Act confirms this objective:

> ***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.*

[43] This objective is largely accomplished through the certification process set out in the Act. Pursuant to section 6-9, the Union applies for the acquisition of bargaining rights in relation to the proposed bargaining unit. Through a certification application, the Board determines the rights and obligations of the Union and the Employer, in relation to the employees in issue. Although various challenges may arise, the Board strives to hear and determine certification applications as expeditiously as possible. The expeditious resolution of certification applications is a central feature of the Board's operations.

[44] In contrast with these aims, the CLR's arguments with respect to direct interest, if accepted, could be interpreted as inviting the CLR, and potentially the Building Trades Council, to participate in every certification application involving, or with a potential to involve, the construction industry. Such an approach would be counterproductive to the expeditious resolution of certification applications.

[45] The CLR argues that, by granting intervenor status in this case, the Board can rectify past wrongs and "help alleviate the prejudice occasioned to the CLR by the Board's breach of procedure" in relation to the Certification Decision. It says that, in that proceeding, the CLR was "denied an opportunity to apply for intervenor status" due to the Registrar's failure to provide notice, in contrast with standard practice:

> *The Board's common practice in matters involving the construction industry is to notify a REO when the Board receives an application relating to a unit of significant interest to the REO's trade division or where the application could implicate the REO's bargaining rights. The Board's practice in this respect demonstrates recognition of the interest the REO has*

> *in bargaining rights relating to employees performing construction work within their trade division.*[4]

[46] The Board agrees to the extent that the Registrar often provides notice to several organizations, including the REO, when it receives unusual certification applications in the construction industry. The Board made a similar, but broader, observation in *RWDSU v Sobeys*, 2006 CanLII 62956 (SK LRB) [*Sobeys*], at paragraph 16:

> *…In those situations* [certification applications in the construction industry]*, notification is given to several organizations and unions in the construction industry, although they are not specifically invited to reply. Therefore, in the Board's view, the act of giving notice of proceedings to parties appearing to have a direct interest in the application is an administrative action carried out by the Board Registrar. …*

[47] The foregoing observation was recently cited in *Saskatchewan Building Trades Council v Construction Workers Union, CLAC Local 15*, 2018 CanLII 38251 (SK LRB):

> *While section 20 could have been drafted to provide guidance to the Registrar respecting when it would be appropriate to provide a copy of the application to persons who do not have a direct interest, it instead has left this issue to the discretion of the Registrar. However, subsections 20(3) and (4) clearly contemplate that this will occur. It should be noted that this is not a new practice. In Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. 617400 Saskatchewan Limited (Sobeys) 2006 CanLII 62956 (SK LRB), the Board noted, in paragraph 16, that, with respect to certification applications in the construction industry, the Registrar's standard practice was to give notice to several organizations and unions in the construction industry.*

[48] By contrast, in *Construction Workers Union, CLAC Local 151 v Saskatchewan Labour Relations Board*, 2020 SKQB 137 (CanLII) [*CLAC 151*], Justice Konkin found that the Board exceeded its jurisdiction by giving notice of a certification application to a person without a direct interest in the application. However, this panel remains of the view that the Registrar has discretion to provide notice to persons without a direct interest. Providing this notice is an administrative action carried out by the Registrar.

[49] The Board has found on many occasions that the Regulations provide the Registrar with discretion to give notice of an application to a person without a direct interest. Recently, in *CREA*, the Board explained its reasoning:

> *[31] To find that the Registrar has no discretion to provide notice to those without a direct interest in the underlying application is inconsistent with the procedure provided by subsection 20(3). It would mean that an employer, other person, union or labour organization that is not served with a copy of an application pursuant to section 19, but still falls into subsection (3) would have received a copy of an application (and then have*

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[4] *The CLR's Brief* at para 8.

> *applied to intervene) by any means other than through service on the part of the Registrar. This is entirely inconsistent with the function and discretion of the Registrar.*

[50] The Registrar does not determine whether a person has a direct interest in a proceeding. A panel of the Board does. It cannot be the case that the Registrar is restricted to providing notice to only those persons with a direct interest in the proceeding when the Registrar has no authority to so determine.

[51] Furthermore, the fact that the Registrar may provide notice to the CLR plays no role in the Board's decision whether to grant intervenor status. Nor is the Board required to consult the CLR when making certification decisions. The Board's broad discretion in determining the appropriateness of a bargaining unit, which the CLR emphasizes, suggests otherwise.

[52] More to the point, it is not the case that a certification decision would directly affect the CLR in the manner exemplified by the direct interest category. This is not a case like *Edmonton Exchanger* where the underlying application will require a direct interpretation of the application of an agreement to which the proposed intervenor is a party. The Board is not being asked to interpret the collective agreements negotiated by the CLR. The Board is being asked to determine whether the Union may acquire bargaining rights in relation the proposed bargaining unit. The certification order will not name the CLR; nor will it change the interpretation to be given to the terms and conditions of the existing collective agreements. It will not require the CLR to enter into negotiations anew.

[53] Lastly, the CLR suggests that it has a direct interest in part because the Board in the Certification Decision found as a fact that the "trade division is more focused on sectors other than the residential sector".[5] The CLR says that it should have the opportunity to correct the record. However, the Board arrived at this finding, which was one of many, based on the evidence before it. The Board is not required to hear from all possible witnesses on every finding of fact that it makes in every hearing.

[54] For the foregoing reasons, the CLR has not established that it has a direct interest in the underlying certification application.

[55] Next, the Board will consider whether to grant the CLR status to intervene as a public interest intervenor.

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[5] At para 44.

Public Interest Intervenor Status:

[56] The CLR relies on the following reasoning in *Ironclad* to support its argument in relation to public interest intervenor status:

> *[42] The Board may grant public law intervenor status when it is satisfied that the applicant's participation has the potential to assist the Board in considering a public law issue before it. An intervenor has the potential to assist the Board by making a valuable contribution or providing a different perspective.*
>
> *[43] Public law standing "is premised on a finding that there is a 'public' law aspect to the dispute, giving it significance beyond its immediate parties[.]"[5] The Board agrees with the applicants that there is a public law aspect to the present dispute. The applicants have raised concerns with the continuing stability of the registration system and the operation of the Plan for resolving jurisdictional disputes. It is clear that these are public law issues with significance beyond the immediate parties.*
>
> *[44] Furthermore, this the first case in which a craft union, subject to a Ministerial Order, has applied for an all-employee bargaining unit in the construction industry in Saskatchewan. This Board has exercised a certain flexibility in granting intervenor status in matters that have the potential to break new ground.*
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> *[45] In determining whether to grant intervenor status, this Board considers the factors outlined in R v Latimer (1995), 128 Sask R 195, 1995 CanLII 3921 (SK CA) ("Latimer"), which have been summarized as follows:*
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> 1. *Whether the intervention will unduly delay the proceedings;*
> 2. *Whether there is possible prejudice to the parties if the intervention is granted;*
> 3. *Whether the intervention will widen the lis between the parties;*
> 4. *The extent to which the position of the intervenor is already represented and protected by one of the parties; and*
> 5. *Whether the intervention will transform the court into a political arena.*

[57] The Board is not bound by any of the *Latimer* "factors" in determining an application for intervention. For this reason, these "factors" are more accurately described as principles, or even questions. In considering these questions, the Board must not lose sight of the foregoing considerations of fairness, the proposed intervenor's potential to assist the Board, and the potential for injustice to the parties.

[58] As in *Ironclad*, the Board agrees that there is a public law aspect to this dispute, giving it significance beyond the parties. The CLR has again raised concerns with the impact on the stability of the registration system in the event that the Board grants the requested certification order. The CLR says that the application risks setting a precedent for certification orders that allow parties to engage in collective bargaining outside the registration system, thereby potentially undercutting and undermining the existing collective bargaining agreements. Although the Board is not bound by its previous decisions, we accept that there is a public law aspect to the dispute.

[59] Next, the Board will consider each of the *Latimer* principles, or questions, in turn.

[60] The first question is whether the intervention will unduly delay the proceedings. In considering this question, the Board notes that the CLR's Application for intervention has already created delay. The certification hearing was originally scheduled for two days in March 2020, the CLR filed this Application shortly before that hearing, and the Board adjourned to August 2020 to allow for due consideration.

[61] The CLR suggests that in addition to making arguments at the hearing, it should have the right to lead evidence. The addition of third party evidence would increase the likelihood of not completing the hearing in the given time and of requiring an adjournment. However, the Board took into account the potential participation of a third party in scheduling the new dates. Furthermore, the CLR states that it would limit its submissions in the following manner:

> *On the issue of delay, the CLR would only intend to call evidence where needed in support of its position; would not intend to duplicate evidence or argument offered by the parties; and would only make submissions which reflect on its unique position as a REO and longterm participant in the construction industry registration/accreditation system.*

[62] The second question is whether the CLR's intervention would cause prejudice to the parties. This question is connected to, but not dependent on, the third question of whether the intervention would widen the *lis* between the parties. The CLR says that there could be no prejudice because it seeks only to lead evidence and argument on the appropriateness of the bargaining unit, a matter that is necessarily in issue.

[63] The Employer says that context is key, invoking *res judicata* to persuade the Board to deny intervenor status in all three categories. The CLR wishes to intervene so that it may lead evidence and argument on a question that has been asked and answered. In the first certification hearing, the Union argued in support of a proposed bargaining unit comprised of employees engaged in construction work. The Board considered that bargaining unit and found that it was not appropriate. By reopening this issue, the CLR's intervention would cause prejudice to the parties who have used significant resources litigating this issue.

[64] The Employer explains its objections in detail:

> *Unlike the Prior Certification Applications and Reliance's replies to those applications, the current certification application and Reliance's reply do not put in issue the proper definition of the bargaining unit. Instead the UA has adopted the bargaining unit description set out by the Board in its November 19, 2019 decision. As a result, absent intervention by CLR, the UA and Reliance will not be required to call evidence before the Board to support*

> *arguments regarding how to describe the bargaining unit. During the hearing of the Prior Certification Applications, such evidence consumed a substantial portion of the 7 days of evidentiary hearings. Instead, Reliance and the UA would only need to call evidence regarding whether the Board should exercise its discretion to refuse to hear the application due to recently dismissing a similar certification application, and evidence regarding the eligibility of three employees to have their votes counted in determining whether the majority of employees support the UA becoming their bargaining agent. As a result, Reliance and the UA set only two days to hear the matter.*

[65] The Employer argues that the Board should not grant standing to the CLR on any basis because the issue that the CLR wishes to address is *res judicata*. This Board has confirmed that, if *res judicata* applies to a case, the Board is without jurisdiction to "embark on the determination of an application": *Metz (Re)*, [2008] SLRBD No 25. The doctrine of *res judicata* assists the Board in determining whether a matter is improperly in the nature of an appeal.

[66] The CLR argues that the Board has jurisdiction to consider the appropriateness of the bargaining unit, and a broad discretion to do so, and so therefore the issue related to the application of Division 13, which relates to the appropriateness of the bargaining unit, cannot be *res judicata*. The Board agrees that the underlying application is a new application. The certification order, issued following the Certification Decision, has been rescinded. The Union has now brought a new application for certification. Almost two years has passed since the Certification Decision was issued.

[67] Indeed, the Board has a broad discretion to consider the appropriateness of a bargaining unit. In *SFL v Saskatchewan (Attorney General)*, 2010 SKQB 390, the Court described the relevant predecessor provision as giving the Board "an absolute discretion to determine appropriate bargaining units".[6] In *Amenity Health Care LP (Re)*, [2018] SLRBD No 3, the Board explained, in reference to the current legislation, that the "discretion of the Board is not constrained in any way even in cases where the parties are agreed as to the description and scope of the bargaining unit in question."[7]

[68] Here, the Board made a determination on the appropriateness of a bargaining unit on a prior occasion, the employees were ultimately found to have voted against certification, and the Board then rescinded the certification order due to a lack of employee support. The CLR says that, because the certification order was not properly issued, and does not stand, that the Certification Decision is not a final decision.

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[6] At para 59.
[7] At para 62.

[69] The Board is not persuaded that the issue raised by the CLR falls strictly within the parameters of *res judicata* or issue estoppel. The Board has yet to hear the new certification application. The appropriateness of the bargaining unit remains in issue. The Board is not interested in binding a future panel to a particular result.

[70] On the other hand, the question before the Board is not whether the CLR's intervention is precluded through the operation of the doctrines of issue estoppel, *res judicata,* or even collateral attack. The question is whether the CLR's Application should be granted giving due consideration to the principles underlying a grant of intervention. In considering this question, the Board must assess whether the CLR's intervention would cause prejudice to the parties.

[71] The overarching aims of finality and fairness, and concerns for preventing unnecessary inconsistency, multiplicity, and delay are instructive. The parties have expended considerable time and resources on the resolution of the within dispute, they have come to a mutual understanding of the issues in dispute, as between the parties, and are coming to the Board with the benefit of having reached that understanding. It would be naïve to ignore that context by permitting the intervention of the CLR at this stage. The reality is that this certification application comes to the Board in the latter stages of a series of related applications and decisions, and associated resources and delays. It would be unfair to permit a third party to participate in the proceedings at this stage.

[72] The fourth question is whether the position of the CLR is already represented. Currently it is not. However, to some extent, the position of the CLR has already been represented, in the previous, related proceeding.

[73] The fifth question is whether the CLR's intervention would transform the proceeding into a political arena. This is not a concern.

[74] In conclusion, the Board is not persuaded that it is appropriate to grant public interest intervenor status to the CLR in this particular case. Granting public interest intervenor status under these circumstances would do an injustice to the parties.

Exceptional Intervenor:

[75] The last category relates to exceptional intervenor status. The Board in *J.V.D. Mills Services* described this category in the following terms:

> *22 As expressed by the terminology for this type of intervenor status, "exceptional" requires that there be some additional factor or factors that the proposed intervenor can*

> *demonstrate in order for them to be according standing in the matter. The authors in their article conclude as follows at p. 199:*
>
> > *Approached this way, exceptional intervenor standing requires an applicant to establish a genuine interest in the matter (e.g., involvement in pending litigation involving the same issue) and circumstances that differentiate the applicant from all others with the same interest. It is in the latter sense that the "exceptional intervenor" must persuade the court that it is, in fact, exceptional. The circumstances that might be advanced to differentiate the applicant in this respect are limited.*
>
> *23 Similarly, as the terminology suggests, the granting of standing under this proviso should be used sparingly and only in clearly "exceptional" circumstances when a direct interest cannot be shown by the applicant for standing.*

[76] The minimum criteria for granting exceptional intervenor status may be distilled into three factors:

1. the applicant must have a demonstrable and genuine interest in the answer to the legal question in dispute;
2. the applicant can establish the existence of "special circumstances" that differentiate it from others who may have a similar interest; and
3. the applicant can demonstrate that it can provide a valuable assistance to the Board in considering the issues before it.

[77] Exceptional intervenor status is an intermediate form of standing that should be applied sparingly and, as the term implies, only in exceptional circumstances. To be granted exceptional intervenor status, a proposed intervenor need not demonstrate a direct interest. Conversely, exceptional interest intervenor status is not a lesser version of public interest intervenor status. Furthermore, the concern for preventing an injustice to the existing parties remains an overarching consideration. The Board's concern about the potential for injustice to the parties is not alleviated by the particular form of intervention sought in this case. The Board will nonetheless proceed to consider the three factors, as follows.

[78] A demonstrable and genuine interest is often established through the proposed intervenor's involvement in pending litigation involving the same issue.[8] The Board is not aware of a relevant and pending litigation involving the same issue. The legal question in dispute is whether the certification order should be granted. The CLR certainly has a general interest in the question of whether the proposed bargaining unit is appropriate. However, the CLR's statutory mandate begins after certification. The CLR is not a party to certification applications, and

[8] See, Sheila M. Tucker, Elin R.S. Sigurdson, (June 2010) 23 Can J Admin L & Prac 183.

therefore is not impacted through its role in the certification process. The CLR's claim to a demonstrable and genuine interest is borderline, at most.

[79] The following comments, made in *Ironclad*, are equally applicable to the current case:

> *[37] A key question is whether there are circumstances that differentiate the applicant from all others with a similar interest. The Board acknowledges CLR's significant and historical involvement with the system, but does not agree that this amounts to special circumstances justifying CLR's intervention on an exceptional basis. Significant involvement does not equate to exceptional circumstances.*
>
> *[38] This Board has stated that exceptional intervenor status may be granted where an applicant has a pending application before the Board on the same issue and thus has legal rights or obligations that may be affected. CLR does not have a pending application before the Board on the same issue. In fact, CLR's role in labour relations begins after certification and not before.*

[80] The CLR makes a similar argument here:

> *The CLR has had considerable experience and historical involvement with the Division 13 construction registration system. The CLR's participation as intervenor will provide a unique perspective for the Board to consider. The CLR has the ability to call relevant evidence speaking to the appropriateness of the Proposed Unit; including the potential ramifications to collective bargaining, the availability of labour, and the stability of labour relations in the construction industry if the unit is found to be appropriate.*

[81] The CLR has not established special circumstances that differentiate it from others who may have a similar interest. Considerable and broad experience does not equate to special circumstances. The fact that the CLR represents a broad coalition of persons who may be interested in the answer to the legal question does not elevate its status to that of special circumstances. It is not, in that way, differentiated from those who may have a similar interest.

[82] The Board is not persuaded that the CLR will provide a valuable assistance to the Board, sufficient to justify granting exceptional intervenor status. The CLR says that it could call evidence relating to the potential ramifications to collective bargaining, the availability of labour, and the stability in labour relations in the construction industry if the unit is found to be appropriate. Described in this general fashion, much of this evidence could have been called by the Union. To the extent that the CLR may have been able to provide a valuable assistance, however, this consideration is outweighed by the potential for injustice to the parties.

[83] Lastly, the Employer interprets one aspect of the CLR's argument as suggesting that the Employer and the Union may collude to opt out of Division 13. To the extent that such an argument

was intended, which is not entirely clear, the Board agrees with the following comments of the Employer:

> *CLR has also suggested at para 57 of its written submission that exceptional interest intervention might be appropriate because Reliance and the UA might collude to "opt out" of the construction industry collective bargaining provisions of the SEA. While there may be a case where such a concern arises, even a cursory examination of the procedural history of this matter shows that Reliance and the UA have been thoroughly litigating their disputes. To suggest that Reliance and the UA might be engaging in such collusion when they have proceeded through one lengthy contested certification application, have each brought applications against the other alleging unfair labour practices, have each brought reconsideration applications, and where the UA has now reapplied for certification is, with respect, absurd.*

[84] Exceptional intervenor status should be granted only sparingly. To do otherwise would risk expanding a category lacking a clear principled basis. For the foregoing reasons, the Board finds that it is not appropriate to grant standing to the CLR on an exceptional basis.

[85] The Board is grateful to the parties for their helpful evidence and written submissions, all of which have been reviewed in the course of the Board's deliberations.

[86] The CLR's application to intervene in LRB File No. 260-19 is dismissed.

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

DATED at Regina, Saskatchewan, this **3rd** day of **July, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson