SASKATCHEWAN PROVINCIAL BUILDING AND CONSTRUCTION TRADES COUNCIL, Applicant v CHURCHILL RIVER EMPLOYEES' ASSOCIATION (CREA), Respondent and TRON CONSTRUCTION & MINING LIMITED PARTNERSHIP, Respondent

LRB File No. 218-19; February 3, 2020
Vice-Chairperson, Barbara Mysko; Board Members: Shawna Colpitts and Laura Sommervill

Counsel for the Applicant, Saskatchewan Provincial Building and Construction Trades Council:	Gary Caroline
Counsel for the Respondent, Churchill River Employees' Association:	Robert J. Frost-Hinz
Counsel for the Respondent, Tron Construction:	Richard F. Steele

Practice and Procedure – Certification Application – Notice of Application provided by Registrar – Challenge to Practice of Registrar – Discretion of Registrar – Subsection 20(3) of *The Saskatchewan Employment (Labour Relations Board) Regulations*.

Intervention Application – Construction industry – Wall-to-wall bargaining unit – Applicant seeks standing as Exceptional and/or Public Law intervenor – Board grants Public Law 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"] in an underlying certification application. The Board has decided to grant public law intervenor status to the Applicant for the purposes as set out.

[2] On September 18, 2019, Churchill River Employees' Association ["CREA" or the "Respondent"] filed an application for acquisition of bargaining rights pursuant to section 6-9 of *The Saskatchewan Employment Act* [the "Act"] in relation to certain employees of Tron Construction & Mining Limited Partnership ["Tron" or the "Respondent"]. Tron operates a construction services business through which it services clients on various worksites around Saskatchewan.

[3] The proposed bargaining unit is described as follows:

> *All employees of Tron Construction in Saskatchewan except supervisors, office staff, salaried employees and management personnel*

[4] On September 19, 2019, Tron provided a list of employees falling within the scope of the proposed bargaining unit. On September 20, 2019, the Board issued a Direction for Vote pursuant to section 6-12 of the Act. On October 15, 2019, the Notice of Vote was sent out.

[5] On September 30, 2019, Tron filed a reply to the certification application. Tron did not object to CREA's validity as a trade union under the Act, or take any position on the appropriateness of the proposed bargaining unit.

[6] On September 18, 2019, the Agent for the Board emailed various recipients advising of the certification application, indicating that "the Registrar has determined that you may have an interest in the application given the industry and scope".

[7] On October 2, 2019, the Saskatchewan Provincial Building and Construction Trades Council [the "Council" or the "Applicant"] filed an Application to Intervene in the certification application, seeking status as an exceptional intervenor and/or a public law intervenor. According to the Council, the certification application raises two issues about which the Council is interested, namely:

> *a. Whether CREA is a "union" within the meaning of the Act; and*
> *b. Whether different or special considerations apply to the certification of an [I]ndigenous-oriented labour organization under the Act.*

[8] In accordance with subsection 20(4) of *The Saskatchewan Employment (Labour Relations Board) Regulations* [the "Regulations"], the Council's Application was filed within 10 business days after the date a copy of the original application was provided by the Registrar.

[9] In line with past practice, the Board found it appropriate to decide the Council's Application on the basis of written submissions. Dates for a hearing of the certification application were set for April, 2020.

Argument on Behalf of the Parties:

Council

[10] The Council points out that its Application hinges on the issues raised by the underlying certification application. In the certification application, CREA is required to satisfy the Board that it is a union as defined by clause 6-1(1)(p) of the Act. The relevant analysis consists of two considerations, as outlined by the Board in *C.S.U. v C.U.P.E.*, 2011 CarswellSask 651, [2011] SLRBD No 22 ["*Canadian Staff Union*"], at paragraph 11:

> *In this exercise, the Board is simply concerned with whether or not the organization is dedicated to advancing the interests of its members by means of collective bargaining and that its internal structure possess certain hallmarks of organizational legitimacy associated with a trade union. See: Board of Education Administrative Personnel Union v. Board of Education and Regina Collegiate Institute, [1978] June Sask. Labour Rep. 44, LRB File No. 380-77. See also: Regina Musicians Association, Local 446 v. Saskatchewan Gaming Corporation, [1997] Sask. L.R.B.R 273, LRB File No. 012-97.*

[11] Although the decision in *Canadian Staff Union* was made in relation to, now repealed, *The Trade Union Act*, RSS 1978, c T-17 ["*The Trade Union Act*"], the Board has since applied the foregoing considerations pursuant to the current Act: *Faculty Association Staff Union v Saskatchewan Polytechnic Faculty Association*, 2017 CanLII 85454 (SK LRB), at paragraph 16.

[12] On the question of exceptional intervenor status, the Council and each of its affiliate unions has a demonstrable and genuine interest in the issues raised by CREA's certification application, as demonstrated by the Council's organizational structure:

> *The Council's 14 affiliated craft unions together represent approximately 10,000 workers in the Saskatchewan construction industry. The affiliate unions are also the employee bargaining agencies under the province's scheme of Trade Division bargaining.*

[13] The Council says that its status as the principal representative of craft unions in the construction and building trades differentiates it from others who may have an interest in the issues raised by the certification application. The Council argues that, because Tron is not contesting the certification application, the Board will be deprived of a range of perspectives in relation to the issues raised by that application.

[14] The Council asserts that it can provide the Board with information and submissions about:

a. *The range of considerations and challenges relating to the meaningful representation of employees in the construction industry.*

> *b. The structure and organization of longstanding unions operating in the Saskatchewan construction industry. […]*
>
> *c. The typical indicia of organizational legitimacy for unions operating in the Saskatchewan construction industry. […]*
>
> *d. The sufficiency of the materials filed by the CREA.*
>
> *e. The legal and policy considerations relating to any contemplated modification to the test for employer domination.*

[15] The Board, in *Saskatchewan Building Trades Council v Construction Workers Union, CLAC, Local 151*, Re, 2018 CarswellSask 143, 2018 CanLII 38251 (SK LRB) ["*Saskatchewan Building Trades*"] at paragraph 28, observed that the Council "represents all but one of the craft based unions that operate in the construction industry in Saskatchewan" and is therefore "well placed to answer any questions about how those unions operate". Furthermore, an assessment of whether a new labour organization meets the definition of union may involve comparing "how other well-established unions organize their operations": *North Battleford Community Safety Officers Police Assn. v North Battleford (City)*, 2017 CarswellSask 461, 2017 CanLII 68783 (SK LRB) ["*North Battleford*"], at paragraph 48.

[16] The Council states that it also satisfies each of the principles governing the granting of public law intervenor status, as set out by the Court of Appeal in *R v Latimer* (1995), 128 Sask R 195 (Sask CA) ["*Latimer*"]. The Council is able to provide a different and valuable perspective that may assist the Board in its consideration of the main issues. Both of the referenced issues are public law issues that may have far-reaching consequences for Saskatchewan labour law, particularly construction labour law. The certification application is the first of its kind to involve an "expressly [I]ndigenous-oriented labour organization sought to be certified as a bargaining agent, let alone for a unit of employees of a First Nation-owned employer such as Tron".

CREA

[17] CREA says that the Council is "seizing this opportunity to meddle and undermine CREA's attempt to represent construction workers in Saskatchewan". The Council and its affiliated locals are complete strangers to the certification application. They do not represent or seek to represent any employees in the proposed bargaining unit and have no history of representing employees of Tron in Saskatchewan.

[18] According to CREA, the Council proposes that it is interested in two issues raised by the certification application, namely whether CREA is a union, and whether CREA should "be afforded special consideration". The Council seeks to import irrelevant issues into the underlying application, in particular by suggesting that CREA is employer dominated and that it lacks the hallmarks of organizational legitimacy associated with a union.

[19] CREA argues that these issues are not in dispute between the parties, or alternatively, that the Board is well placed to be able to address these matters independent of the Council's intervention. According to CREA, the Council has "conjured up these issues" for purposes of its intervention application. Besides, the Council's assertion of employer dominance is grounded in speculation and conjecture, not evidence or fact.

[20] The Council has not demonstrated an exceptional circumstance. The Board does not require a Council witness to take the stand, or the Council to make argument, to address the underlying issues. The Council's asserted "valuable assistance" is nothing of the sort. Its perspective is not unique, and if accepted as such, this would imply that any union involved in the construction industry in Saskatchewan should be allowed to intervene in the underlying application.

[21] On the issue of public law intervention, the Council's intervention would unduly delay the proceedings, prejudice the employees, widen the *lis* between the parties, and transform the Board into a political arena. There are significant similarities between the arguments made and rejected in the current case and the arguments made and rejected by the majority in *Construction Workers Union (CLAC), Local 151 v Tercon Industrial Works Ltd.,* 2012 CarswellSask 329, 2012 CanLII 2145 (SK LRB) ["*Tercon*"]. The Board should heed the guidance provided in *Tercon* and seek to achieve consistency with the majority's holding in that case. The Board has an interest in promoting efficiency, reducing resource waste, and maintaining the "convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the '*lis*'".[1]

Tron

[22] Tron states that it takes no position in the certification application but does take issue with the claims that it acted improperly with respect to the formation of CREA and/or with respect to the certification application.

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[1] *Latimer* at paragraph 5, quoting Sopinka and Gelowitz, *The Conduct of an Appeal* (Toronto: Butterworths) at 187-8, as cited in *Saskatchewan (Environment) v Saskatchewan Government Employees Union*, 2016 SKQB 250 (CanLII) at paragraph 29.

[23] On the question of exceptional intervenor status, Tron states that the Council has no genuine interest in the proceedings other than to "fulfill a self-appointed role as arbiter of acceptable unionization in Saskatchewan". It is an uninvolved third party with no legal interest at stake, nor any outstanding application involving similar issues. The Council's involvement would not provide any value to the proceedings but would instead add to the complexity, length, and cost of the proceedings.

[24] As for the proposed public law intervention, the Council's involvement would delay and lengthen the proceedings and widen the *lis* by adding new issues. The Council's assistance is not required for the Board to determine whether CREA is a "good" trade union; besides, the Board is not concerned with the substantive quality of trade unionization. There is nothing in the Council's submissions that raises legitimate suspicions of employer domination.

Applicable Statutory Provisions:

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

> ***6-1****(1) In this Part:*
>
> *. . .*
>
> *(p) "union" means a labour organization or association of employees that:*
>
> *(i) has as one of its purposes collective bargaining; and*
>
> *(ii) is not dominated by an employer.*
>
> *. . .*
>
> ***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.*
>
> *. . .*
>
> ***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.*

[26] The following provisions of the 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.*

Analysis:

Preliminary Issue: Notice by the Board

[27] CREA raises a preliminary issue about the Registrar's authority to provide notice of the certification application to parties who do not have a direct interest. The Board has provided a full answer to this issue in two recent cases before the Board: *Saskatchewan Building Trades* and *IBEW, Local 2038, et al v International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers, Local 771*, 2019 CanLII 43219 (SK LRB) ["*IBEW v Ironworkers"*]. CREA takes issue with the conclusions drawn in those cases. In particular, the Board erred in finding

that section 20 of the Regulations operates such that the Registrar has discretion to provide a copy to persons who do not have a direct interest in the underlying application. This interpretation effectively "neuters" the operation of clause 19(a) and thereby creates an absurdity.

[28] Section 19 of the Regulations creates a requirement on the Registrar to make efforts he considers reasonable to determine the identity of any employer, other person, union and labour organization that has a direct interest in the application, and provide to them a copy of the application. The fact that the Registrar is required to provide a copy of the application in the circumstances as set out cannot be taken to preclude the Registrar's discretion to provide a copy in other circumstances. There can be no "neutering" of the requirement to provide notice through the Registrar's exercise of a broader discretion.

[29] The Board responded to a similar argument in *Saskatchewan Building Trades*, as follows:

> *[19] Section 19 of the Regulations imposes an obligation on the Board Registrar to identify and provide a copy of certain applications to persons, including the employer, who have a direct interest in the application. Subsection 20(2) provides that a person served with an application pursuant to section 19, who intends to intervene in the matter, shall file a document called a Reply. Subsection 20(3) provides that persons not served pursuant to section 19 (i.e., persons not identified by the Registrar as having a direct interest), who intend to intervene in the matter shall file an Application to Intervene. Subsection 20(4) provides a deadline for filing a Reply or an Application to Intervene of "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". 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.*[2]

[30] In *Saskatchewan Building Trades*, the Board found that subsections 20(3) and (4) of the Regulations contemplate that the Registrar has discretion to provide a copy of an application to persons who do not have a direct interest, and confirmed that providing such notice is not a new practice in Saskatchewan.

[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

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[2] Cited and relied upon in *International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers, Local 771*, 2019 CanLII 43219 (SK LRB) ["*IBEW v Ironworkers*"] at paragraph 16.

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 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.

[32] For the foregoing reasons, the Board has no reason to depart from *Saskatchewan Building Trades* or *IBEW v Ironworkers*. CREA's preliminary objection is therefore dismissed.

Substantive Analysis:

[33] The test that the Board applies in deciding whether to grant intervenor status is well established. An order granting intervenor status is a discretionary order based on the Board's assessment of the fairness to the parties and the potential for the proposed intervenors to assist the Board in coming to a decision.

[34] The Board endorses the following comments made in *Construction Workers Union, CLAC Local 151 v Ledcor Industrial Limited*, 2018 CanLII 53123 (SK LRB) ["*Ledcor*"]:

> *[20] By definition, an intervenor is a stranger to on-going litigation before an administrative tribunal or a court. As such, allowing such a party to participate in the litigation, especially private litigation, is an unusual, if not an extraordinary, occurrence. It is precisely for this reason that applications to intervene must be carefully scrutinized, and when deciding them this Board should exercise its discretion to grant intervenor standing sparingly, mindful of the particular factual matrix of the case under consideration.*

[35] The Board summarized its approach to the granting of intervenor status in proceedings before the Board in *Tercon*, at paragraph 31:

> *In J.V.D. Mills Services #1, supra, this Board clarified its general approach to the granting of intervenor status in proceedings before the Board. In doing so, the Board reiterated the long standing principle that the granting of standing as an intervenor in any proceedings before the Board is a matter of discretion and that, generally speaking, the Board exercises its discretion based on the circumstances of each case, considerations of fairness (to the party seeking standing) and/or the potential for the party seeking standing to assist the Board (by making a valuable contribution or by providing a different perspective) without doing injustice to the other parties. The Board went on to identify and adopt three (3) forms of intervention recognized by this Board. These three (3) forms of intervention are summarized as follows:*
>
> 1. *A Direct Interest Intervenor; where the applicant seeking standing 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 determinations of the Board.*

> 2. *An Exceptional Intervenor; where the applicant has a demonstrable and genuine interest in the answer to the legal question in dispute (i.e.: for example, if the party has a pending application before the Board on the same issue and thus has legal rights or obligations that may be affected by a binding precedent); and the applicant can establish the existence of "special circumstances" that differentiate it from others who may have a similar interest; and where that party can demonstrate that it can provide a valuable assistance to the Board in considering the issues before it.*
>
> 3. *A Public Law Intervenor; where 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 Board that its perspective is different or that its participation would assist the Board in considering a public law issue before it.*

[36] The Council does not apply for direct intervenor status. Instead, it applies for status as an exceptional intervenor and/or a public law intervenor in the underlying application. In deciding how to proceed, the Board heeds the observation made by the Board in *Tercon*, as follows:

> *37 …In recognizing this form of intervention, the Board was not expanding the grounds for intervention but rather was merely recognizing that there have been in the past (and can be in the future) exceptional circumstances that justify granting intervenor status to a party that does not qualify as either a direct interest intervenor or public law intervenor.*

[37] In light of these comments, the Board will proceed to consider the public law category first, and then will consider the exceptional intervenor category if necessary.

[38] In arguing for public law intervenor status, the Council states that the certification application raises issues of public law for which the Council is equipped to provide valuable assistance to the Board. In order to grant standing on this basis, the Board must find that there is a public law aspect to the dispute, such that the dispute has significance extending beyond the immediate parties. Once a public law issue is identified, the Board must determine whether the applicant's participation has the potential to assist the Board in considering that issue. An intervenor has the potential to assist the Board by making a valuable contribution or providing a different perspective.

[39] More specifically, in determining whether to grant public law intervenor status, this Board considers the factors outlined in *Latimer*, which have been summarized as follows:[3]

> *a. Whether the intervention will unduly delay the proceedings?*
> *b. Possible prejudice to the parties if intervention be granted?*
> *c. Whether the intervention will widen the lis between the parties?*
> *d. The extent to which the position of the intervenor is already represented and protected by one of the parties? And*

[3] As cited in *Tercon* at para 42.

e. Whether the intervention will transform the court into a political arena?

[40] In *Communication, Energy and Paperworkers Union of Canada v J.V.D. Mill Services*, [2010] 199 CLRBR (2nd) 228 ["*J.V.D. Mills Services*"], the Board reiterated the *Latimer* factors, and then reflected on the role of the Board in exercising its discretion when assessing an intervenor application:

> *[25] The Court in Latimer, supra, also noted that "[A]s a matter of discretion, the court is not bound by any of these factors in determining an application for intervention but must also balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the "lis".*
>
> *[26] The Board has also recognized that it must be cognizant of balancing the interests of the parties in having access to make representations to the Board and preserving the resources of the Board. As noted by the Board in Re: Merit Contractors Association[13] at [page 124/125]:*
>
> > *These statutes represent an embodiment of public policy, and a wide range of persons may have an "interest" in a broad sense, in bringing to our attention various issues which may arise in conjunction with the implementation of these policies. As both the courts and other tribunals like our own have concluded, however, some limits must be set in allowing the assertion of interests which are contingent in nature. In Canadian Council of Churches v. The Queen (1992), 1992 CanLII 116 (SCC), 88 D.L.R. (4th) 193, the Supreme Court of Canada expressed the concern in this way:*
> >
> > > *. . . I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the Courts and preserving judicial resources. It would be disastrous if the Courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.*

[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.

[42] Taking into account the foregoing principles, the Board will proceed to outline its reasoning in granting public law intervenor status in the underlying certification application. To be clear, the

Board's grant of intervenor status is confined to the first issue raised by the Council, that is, whether CREA is a union as defined by clause 6-1(1)(p) of the Act.

[43] The Board begins by considering whether the present case raises a public law issue, and finds that it does. In coming to this conclusion, the Board has reflected on whether the underlying dispute has significance extending beyond the immediate parties, by raising questions of concern to society at large, or in this context, questions of concern to the labour relations community.

[44] The Board finds that the certification application raises questions about whether CREA can satisfy the definition of a union pursuant to clause 6-1(1)(p) of the Act, and by extension, about the standard and criteria in so determining. The standard and criteria that the Board applies to the certification of new unions has important consequences for the manner in which workers' rights are extended, and therefore for the quality of workers' representation and consequent working conditions. CREA has little to no history before the Board. This is not a common scenario. The Board hears new union certifications only rarely, or at most infrequently. This being the case, there is no legitimate concern with opening the floodgates to similar intervenor applications.

[45] Furthermore, if and when it is certified, CREA will be one of only a few non-registered, non-craft-based unions representing employees in the construction industry in Saskatchewan. As such, it represents a departure from the traditional organization of construction labour relations in this province, albeit not without precedent. If and when it does begin to represent employees in Saskatchewan, its participation in Saskatchewan's labour relations environment will have some influence over the nature, quality, and standard of employee representation.

[46] The Board has carefully reviewed the decision in *Tercon*, upon which CREA and Tron rely in objecting to the instant Application. In *Tercon*, the Board was not satisfied that "the question of whether or not CLAC is company dominated gives rise to an issue of public law for which intervention by the proposed intervenors would be of assistance to the Board without doing injustice to the parties".[4] While there are certainly parallels between *Tercon* and the current case, the Board is not persuaded that *Tercon* is wholly determinative of the issues here.

[47] First, in *Tercon*, the Board had previously decided that CLAC had satisfied the criteria of a union. This determination is summarized at paragraph 45 of the Board's reasons:

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[4] At para 53.

> *[45] The proposed intervenors (excluding the Bricklayers Union) collectively argued that CLAC is company dominated and did so for essentially the same reasons that they asserted in their respective company dominated applications that were summarily dismissed by this Board in Tercon Industrial Works, supra. In our opinion, this Board's decision in Tercon Industrial Works, supra, was wholly determinative as to the issue of whether or not CLAC is dominated by any of the respondent employers. In this regard it is noted that the Board's decision was upheld on judicial review by the Saskatchewan Court of Queen's Bench. To grant standing for the purpose of allowing the same parties to argue the same issue again in these proceedings would be an abuse of process and would violate the principles of judicial economy and finality. See: Barbara Metz v. Saskatchewan Government and General Employees' Union, [2008] Sask. L.R.B.R. 654, 159 C.L.R.B.R. (2d) 231, 2008 CanLII 58436, LRB File Nos. 199-05 to 211-05. In our opinion, the issue of whether or not CLAC is dominated by any of the respondent employers is not a question of public law in these proceedings, having been previously determined by this Board.*

[48] While the issue of employer domination had already been determined, the proposed intervenors proceeded to offer a novel argument, suggesting that "CLAC [had] so supplicated itself to the wishes of employers generally as to become voluntarily company dominated".[5] This latter argument has not been raised in the present proceedings.

[49] The Respondents also rely on *Tercon* to argue that the proposed hallmarks of organizational legitimacy do not raise questions of public law. In *Tercon*, the Board held that the proposed organizational legitimacy questions did not "give rise to matters of public law",[6] but then focused its assessment on the *Latimer* factors. The Board will review and apply the *Latimer* factors to the current case, in due course. However, for the reasons outlined in the preceding sections, the Board has found that the existing questions around organizational legitimacy raise issues of concern to the labour relations community, at large.

[50] Furthermore, the Board in *Tercon* noted that the issues raised in relation to organizational legitimacy were not matters with which a certification application should be concerned. However, the Council does not request the kind of probing inquiry sought in *Tercon*, as demonstrated by the Board's description of the arguments in that case:

> *[66] Whether or not CLAC's genesis is from a religious base is not of a consideration for this Board on an application for certification; neither is the quality of past collective agreements that have been negotiated by CLAC; nor whether or not CLAC openly raids other trade unions to grow its membership. These are all issues for the employees within the bargaining unit to determine in deciding whether or not they wish to have CLAC represent them.*

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[5] At para 51.
[6] At para 61.

[51] In contrast to the foregoing, and setting aside the Indigenous-orientation issue, the Council proposes to focus on subject matter that is relevant to the existing issues. The Council sets out its concerns with CREA's organizational legitimacy in its Application, as follows:

> *Concerns that the CREA lacks hallmarks of organizational legitimacy*
>
> *15. The CREA constitution filed with the instant certification application contains a number of provisions which indicate or suggest that the CREA lacks certain hallmarks of organizational legitimacy associated with a trade union. In particular:*
>
> a. *Art. 4.02 and 4.03 contemplate biennial general meetings and permit a gap of up to 2.5 years between meetings. In the Council's view, such infrequency of meetings would be exceptional for any recognized union and may suggest that the CREA neither wishes nor intends for its membership to have meaningful input into the organization's affairs.*
>
> b. *Art. 5.02 contemplates, in effect, biennial Board meetings. Again, such infrequency of Board meetings would be exceptional for any recognized union and may suggest that the CREA neither wishes not* [sic] *intends for its Board to exercise meaningful oversight of the organization's affairs.*
>
> c. *Even if the CREA constitution was duly ratified – which, as described further on, is itself uncertain – the constitution is certainly incomplete, and glaringly so. In particular, Art. 4.50 contains a conspicuously blank line which creates patent uncertainty regarding who is eligible to vote in the election of Board members – clearly a fundamental provision.*
>
> *16. The materials filed also fail to address a number of key concerns regarding the organizational legitimacy of the CREA. These include the following:*
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> a. *While the constitution purports to have been adopted in May 2019, there is no indication as to who participated in its adoption; the circumstances surrounding the creation of the CREA in general, and the adoption of its constitution purports to have been adopted in May 2019, there is no indication as to who participated in its adoption; the circumstances surrounding the creation of the CREA in general, and the adoption of its constitution in particular, merit careful scrutiny.*
>
> b. *There is no indication as to whether a CREA Board and Executive have been duly elected, meaning there is some doubt as to whether anyone has been duly authorized to file, or direct the filing, of the instant certification application.*
>
> c. *Further, as noted above, the incomplete nature of the constitution raises doubts as to whether a Board could have been duly elected at all, it being uncertain as to who is in fact eligible to vote.*
>
> d. *There is no indication as to the identities of any ostensible Board members or Executive officers.*
>
> e. *While the purposive clause of the CREA constitution (Art. 2) makes perfunctory reference to collective bargaining, nothing in the CREA's constitution "define[s] its structures and processes for collective bargaining" (see C.S.U.,supra, at para 12). Indeed, aside from the bare mention in the purposive clause, the constitution does not contemplate the CREA engaging in collective bargaining at all.*

[52] The Council relies on *Canadian Staff Union* and *North Battleford* in support of its claim for intervenor status. In *Canadian Staff Union*, the Board made the following observations and then drew some reasonable conclusions:

> *[11] … In this regard, it should be noted that this is not an enquiry into the relative strength or tenacity of the applicant organization in terms of achieving particular collective bargaining goals or its adherence to particular ideological beliefs. In this exercise, the Board is simply concerned with whether or not the organization is dedicated to advancing the interests of its members by means of collective bargaining and that its internal structure posses* [sic] *certain hallmarks of organizational legitimacy associated with a trade union. See: Board of Education Administrative Personnel Union v. Board of Education and Regina Collegiate Institute, [1978] June Sask. Labour Rep. 44, LRB File No. 380-77. See also: Regina Musicians Association, Local 446 v. Saskatchewan Gaming Corporation, [1997] Sask. L.R.B.R 273, LRB File No. 012-97.*
>
> *[12] It was clear from the evidence presented in these proceedings that the Applicant had a long history of collective bargaining, albeit exclusively for employees employed by the Employer and primarily based upon the Employer's voluntary recognition of the Applicant as the bargaining agent for its employees. The Applicant's Constitution defined its structures and processes for collective bargaining. In our opinion, the Applicant's history of labour relations, including the numerous, nationally-recognized collective agreements it had negotiated, together with the Applicant's Constitution, unequivocally demonstrated that collective bargaining is among its purposes. Furthermore, the Applicant's internal structures appeared to be transparent, democratic and membership-driven. These structures operate at both a national and regional level. Saskatchewan is a Region within the Applicant's organization structure, ensuring that members within Saskatchewan can have a voice at both the local and national level through a variety of means, including the election of officers. In our opinion, the Applicant demonstrated the requisite hallmarks of organizational legitimacy anticipated by this Board. For the foregoing reasons, we were satisfied that the applicant organization was a labour organization within the meaning of The Trade Union Act.*

[53] In *North Battleford*, the Board considered a number of factors in deciding whether the applicant qualified as a union, including whether the executive was duly constituted in accordance with the constitution.[7] Although it found that the absence of direct evidence about the formal elections of officers was not "fatal" to the application, the Board nevertheless relied on other proof that the executive was duly constituted in deciding that the applicant so qualified.

[54] The Board considered the referenced subject matter in *Canadian Staff Union* and *North Battleford* as a part of its assessment of whether the applicants had met their onus to prove that the applicant had satisfied the definition of a union. The Board observes that there are parallels between the subject matter considered in those cases and the subject matter outlined in the Council's submissions.

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[7] At paras 49, 50.

[55] Next, having determined that the present dispute raises a public law issue, the Board must decide whether the Council's participation has the potential to assist the Board in considering that issue. An intervenor may assist the Board by making a valuable contribution or providing a different perspective. Through its submissions, the Council has demonstrated that it may make a valuable contribution and assist the Board in making a decision. The Council has alerted the Board to its concerns about employer dominance and institutional legitimacy. The Council is the long-standing representative of affiliate unions in the province. This does not mean that the Council is, or should be, the arbiter of appropriate unionization in the province. However, the Council does have a unique and broad perspective on the structure and functioning of construction industry unions in Saskatchewan. And while the Council may in fact be "competing" for workers' allegiance it is also the case that the Council is, at least in theory, arguing in support of safeguarding workers' rights.

[56] The Council has also demonstrated that it may provide a different perspective by raising relevant questions that may not be forthcoming from the parties. Given the positions of the parties, the hearing on this matter will not likely benefit from the usual indicia of the adversarial process; nor can the Board expect or count on a vigorous cross examination of CREA's witnesses or assume that role itself. The Board will benefit from the Council's contribution. Whether that contribution is ultimately persuasive or even influential is another matter entirely.

[57] Next, the Board will apply the *Latimer* factors to the current case.

[58] First, on the question of whether the intervention will unduly delay the proceedings, the parties disagree about the circumstances leading up to the scheduling of the certification application. The Board scheduled the hearing of the certification application and set the timelines for the submission of written arguments on the intervenor Application at the same time. The Council facilitated this process by proposing that, instead of filing a fresh brief of law, its Application could serve as its brief on the issues. This suggestion abridged the necessary time for the filing of reply briefs. When the certification application was being set down, there were multiple scheduling conflicts for one or both of Respondents' counsel, as is common in all cases before the Board. The scheduling of two days for the certification application, instead of the hypothetical one day, does not create any substantive delay. As such, any delay in scheduling cannot be attributed to the intervenor Application.

[59] The next consideration relates to any possible prejudice to the parties if the requested intervention is granted. Prejudice should be understood in terms of the overall fairness to the original parties. The Board notes that all interventions involve some minimal prejudice by contributing to the complexity, the cost to the client, and the resource allocation to the file. If the Board's only goal was to avoid greater complexity it would deny intervenor status in every case. As with all of the *Latimer* factors, the Board's assessment of prejudice must also be assessed in context and weighed against the remaining factors. The Board views the underlying issues as sufficiently important to justify a minimal increase in procedural complexity, and is confident that any substantive prejudice will be minimal. The Board will also assess whether it is appropriate to exercise some control over the potential for prejudice through its design of its order.

[60] The next question is whether the intervention will widen the *lis* between the parties. The Respondents have suggested that it will. CREA goes so far as to suggest that "the *lis* does not encompass company dominance". However, the questions raised by clause 6-1(1)(p) necessarily come before the Board in the normal course of the certification hearing. The question of whether CREA is a union is squarely in issue. CREA has the onus to prove that it has as one of its purposes collective bargaining and that it is not dominated by an employer. The Board cannot so determine in the absence of any evidence. The fact that Tron does not contest those issues does not mean that those issues are not, or should not be, before the Board.

[61] The next issue is whether the position of the proposed intervenor is already represented and protected by one of the parties. This question is easily answered - it is not.

[62] Lastly, the intervention will not transform the court into a political arena. In this respect, the Board in *SGEU v University of Saskatchewan*, 2019 CanLII 76931 (SK LRB), 2019 CarswellSask 377[8] made the following observation:

> *[48] The intervention should not transform the court into a political arena: In R v Latimer, the Court of Appeal stated, when considering this criterion: "This case has given rise to some public debate in respect of matters which are more moral or political than legal, and more properly dealt with by Parliament than by the courts. I am satisfied that the applicants intend to confine themselves to matters of law."[14] None of the applicants indicated an intention to make submissions that strayed beyond matters of law.*

In the current case, the Council has not indicated an intention to make submissions that stray beyond matters of law. Even if the Council were "treating this as an opportunity to advance its

[8] Rev'd 2019 SKQB 309 (CanLII) for unrelated reasons.

own interests", as suggested by CREA, the Council does not propose to introduce political questions or put before the Board a political issue; nor does it appear to be interested in making political arguments.

[63] Tron argues that there is "nothing in the Applicant's application materials which would give rise to any suspicions of company-domination of the CREA". In this vein, Tron suggests that a "very similar application was heard and determined by this Board in *Tercon Industrial Works* where similarly groundless allegations were leveled by the Applicant and its co-applicants against CLAC in those proceedings". In the case in question, the Board considered a summary dismissal application brought by CLAC alleging failure on the part of the unions to raise a *prima facie* case in alleging that CLAC was employer dominated.[9] The Board found that the underlying applications and other materials filed in response to a request for particulars did not give rise to an arguable case.

[64] Here, there is no summary dismissal application. The Board is concerned with whether the Council provides a different perspective or whether its participation would assist the Board in considering a public law issue before it. The potential that CREA's organizer may work as a labour consultant employed by Canadian Work Strategies raises questions that the Board wishes to have answered. If CREA is not employer dominated, then that should certainly lessen Tron's concern.

[65] On the other hand, it is a stretch to allege that there is any relevance to the allegations that Tron is a First Nations-owned company and that the First Nation is situated on the Churchill River.

[66] Relatedly, the Board will now summarize its findings in relation to the second issue, that is, whether "different or special considerations apply to the certification of an [I]ndigenous-oriented labour organization under the Act". As previously alluded to, there are parallels between this argument and the "religious base" argument raised in *Tercon*.[10]

[67] The Board finds that an assessment of the *Latimer* factors does not support the granting of intervenor status on the basis of the second issue. Principally, neither of the parties has raised

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[9] *Tercon Industrial Works Ltd., Westwood Electric Ltd., Canonbie Contracting Ltd., Wilbros Construction Services (Canada) L.P., Pyramid Corporation, et. al. v Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers, et. al*., [2011] 195 CLRBR (2nd) 1, 2011 CanLII 8881.
[10] At para 66.

this subject in the underlying proceedings. Nor is it an issue that needs to be addressed through the Board's assessment of whether CREA is a union or through its assessment of whether the proposed bargaining unit is appropriate. There is certainly no statutory or jurisprudential imperative to do so. Therefore, by raising the subject matter independent of the parties, and independent of any legal requirement, the Council has raised a new issue and has proposed to widen the *lis* in the certification hearing.

[68] Evidence and argument on this issue would also be very likely to transform the Board hearing into a political arena, and unnecessarily so. The Council theorizes about a dispute based entirely on speculation and, perhaps unintentionally, constructs a narrative grounded on unhelpful stereotypes. The supporting argument is therefore predictably ambiguous, raising concerns about the Respondents' ability to mount a defense. For these reasons, the Council's request for public law intervenor status on the basis of the second issue is denied. The Board is therefore restricting its grant of intervenor status to the issue of whether CREA satisfies the definition of a union pursuant to clause 6-1(1)(p) of the Act.

[69] Finally, in arriving at its conclusions on this Application, the Board considered carefully the potential for setting a precedent in which third parties are permitted, or implicitly invited, to participate in certification applications. It is the Board's role to assess whether an organization satisfies the criteria of a union under the Act. The Board certainly does not want to encourage organizations to interfere or meddle in the proceedings of other parties. However, each case must be decided on its facts. In the unique circumstances of the current case, the Board is persuaded that the Council is able to provide a different and valuable perspective that may assist the Board in its consideration of the main issues.

[70] In an effort to strike a fair balance between permitting the Council's assistance and controlling the complexity of the proceedings, the Board is granting public law intervenor status to the Council for the purpose of cross examining witnesses and making submissions only. Although the Council has proposed to lead evidence, for example, on the structure and organization of longstanding unions and the typical indicia of organizational legitimacy, the Board is confident that the Council will be able to employ its background and expertise in the manner as outlined, and thereby provide assistance to the Board in making a decision.

[71] Having determined that the Council qualifies for public law intervenor status, it is not necessary for the Board to consider whether the Council also qualifies as an exceptional

intervenor. Even if the Board were inclined to grant exceptional intervenor status, the Board would not expand the scope of the Council's participation rights in so doing. There is nothing in the application of the related qualifications (demonstrable and genuine interest; special circumstances; and valuable assistance) that would persuade the Board to do so.

[72] For the foregoing reasons, the Board makes the following Orders:

a. The Saskatchewan Building Trades Council is granted standing as a public law intervenor in LRB No. 209-19 to cross examine witnesses and make submissions with respect to whether Churchill River Employees' Association meets the definition of a union in the Act.

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

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

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson