



INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING & PORTABLE & STATIONARY, LOCAL 870, Applicant v KDM CONSTRUCTORS, Respondent

LRB File No. 028-20; August 23, 2021

Vice-Chairperson, Barbara Mysko; Board Members: Maurice Werezak and Mike Wainwright

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**Certification Application – Division 13 Construction Industry – Section 6-65
– Construction Site – Construction of Potash Mine – Work Performed by
Water and Vacuum Truck Operators.**

**Appropriateness of Bargaining Unit – Under-inclusivity – Discrete Boundary
– Company Objectives to Promote Employment not in Conflict – Proposed
Unit is Appropriate.**

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to a certification application brought by International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 [Union] in relation to a bargaining unit of employees working for KDM Constructors [Employer]. The Union applies for a certification under the construction industry provisions contained within Part VI, Division 13 of *The Saskatchewan Employment Act* [Act]. The description of the proposed bargaining unit is:

All Operating Engineers, Operating Engineer Apprentices, Mechanics and Mechanic Apprentices Employed by KDM Constructors in the Province of Saskatchewan.

[2] The Union's application was filed on February 18, 2020. In reply, the Employer states that the unit applied for is not appropriate for collective bargaining. The Employer states that the work being performed is maintenance work and is therefore excluded from the construction industry, and that the Employer's operations were established for the purpose of driving employment for Indigenous workers in Saskatchewan, and are not compatible with a construction industry certification. Furthermore, the proposed unit is under-inclusive. The Union has applied for a so-

called craft unit of four employees in a workplace of 27 employees. The work being performed by the employees cannot be divided on trade lines.

[3] This matter was placed in abeyance pending the outcome of *Construction & General Workers Local Union, No. 180 v KDM Constructors Inc.*, 2021 CanLII 25131 (SK LRB) [*KDM No. 1*]. The decision in *KDM No. 1* was issued on March 30, 2021. This matter was then heard on June 14, and on July 15 and 16, 2021. On June 16, 2021, the Employer filed a Notice pursuant to *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01. Pursuant to the Notice, the Employer states that the imposition of a collective bargaining agreement, pursuant to the operation of Part VI, Division 13, is a breach of the Employer's right to collective bargaining under section 2(d) of the Charter. The Board proceeded to bifurcate the hearing so as to, first, decide whether the unit is appropriate for collective bargaining and, second, if necessary, hear and decide the constitutional question.

[4] The current question before the Board is whether the unit is appropriate for collective bargaining.

Evidence:

[5] The following is a summary of the evidence in this matter.

[6] The Union called four witnesses to testify at the hearing of this matter: Cory Cowley [Cowley], Clayton Buffalo [Buffalo], Patrice Laliberte [Laliberte], and Lyle Daniels [Daniels]. The Employer called the following two witnesses: Chief Reginald Bellerose [Bellerose] and Nicholas Blackwell [Blackwell].

[7] KDM, which stands for Kawacatoose First Nation, Day Star First Nation, and Muskowekwan First Nation, is a majority First Nations-owned company. Prior to its incorporation, KDM was involved in the construction of the water treatment plant on the BHP site. BHP approached the Chiefs of the three First Nations bands, and KDM was formed as a result of an initiative of the three First Nations, SECON, and BHP. SouthEast Construction (SEC), which is a unionized company, operates under the SECON banner, and on the current project it is operating as a subcontractor under KDM.

[8] BHP has opportunities agreements with six First Nations, including Kawacatoose, Day Star, and Muskowekwan. A central goal for KDM is to improve employment prospects for people on the three First Nations reserves. KDM has undertaken a number of initiatives to achieve this

goal, including by developing a social value plan, working with a skills database, and involving labour force development officers in recruitment and other initiatives. All four of the individuals included within the proposed bargaining unit are First Nations. Two are from the KDM First Nations and two are not.

[9] The work is being performed at the BHP Jansen site which is located approximately 140 kilometers northeast of Saskatoon. A potash mine is being constructed on site. The production stage has not begun, that is, there has been no potash extraction. Construction remains in relatively early stages. The construction of the shafts is not yet complete. Excavation of the shafts has been completed, but they now have to be lined with concrete and steel. To create the concrete lining, cement is still being mixed and poured.

[10] KDM and BHP have entered into a Formal Instrument of Agreement [Work Package] to describe the site services for which KDM is responsible. This includes services for which KDM does the direct hiring and services for which it acts as general contractor to subcontractors. Among KDM's many responsibilities are site waste collection and disposal and water supply. Excluded from the scope of the package are the operations of the Discovery Lodge, as well as a number of other items.

[11] There are two distinct parts to the work on site. The first is "maintenance" of the infrastructure on site, apart from the electrical. The second is the site services component, which involves "maintaining" the site. The Work Package uses derivatives of the term "maintain" repeatedly.

[12] A project labour conditions agreement [PLA] has been entered into between BHP, the representative employers' organizations [REOs], and the Saskatchewan Provincial Building & Construction Trades Council, Affiliated and other signatory building trades unions. It was executed in February 2021. The PLA contains negotiated terms and conditions of employment which are available as an option for contractors involved in construction work on the site. This agreement allows for more consistency on the job site among the various trades. The Union is one of the signatories to the PLA. SEC has not approached the Union about entering into the PLA.

[13] The preamble of the PLA states:

Preamble

Whereas, the Owner is undertaking a major capital project involving the construction of potash mining operations in the Jansen region of Saskatchewan, including sub-surface

mining development, surface processing facilities and the requisite infrastructure to support the Project; ...

[14] Article 15 provides for preferential treatment for local residents, female workers, and Indigenous workers. The targets are subject to the hiring preferences as per the commitments made through the opportunities agreements with communities of interest. The parties agree to optimize employment and training opportunities for qualified local residents, female workers, and members of Indigenous communities. The Union is committed to the targets for employment for these groups but views the targets as minimums rather than maximums. Article 1.1 of the PLA lists certain socio-economic goals for the project, which include “[f]ulfilling any obligations or intents of the Opportunities Agreements negotiated by the Owner”.

[15] Among those who were called to testify were two employees in the proposed bargaining unit, Buffalo and Laliberte. They work as the water truck and the vacuum truck operators, respectively, as Drivers/Operators. Laliberte’s start date was April 2, 2019; Buffalo’s start date was September 24, 2019. They work 10 hour days on a shift rotation of seven days on, seven days off.

[16] Buffalo and Laliberte report to the Operator Foreman, Clinton Downing [Downing]. Downing is a member of the Union, was dispatched by the Union, and is working for SEC under the provincial agreement. Also working under the provincial agreement, and reporting to Downing, are SEC’s operating engineers. Certain terms and conditions have been enabled under the provincial agreement for the purposes of the work performed at this site.

[17] At the beginning of the day, Buffalo and Laliberte attend a toolbox meeting. Present at the meeting are SEC’s equipment operators, the safety personnel, the supervisor, and sometimes the manager or superintendent (who works for KDM). SEC’s equipment operators are operating the excavator, dozer, grader, zoom boom, and skid steers.

[18] Downing runs the toolbox meeting. Following the meeting, the KDM operators retrieve their trucks which are located at the laydown area, proceed to service the trucks, perform the walk-arounds, and complete the paperwork. All of SEC’s equipment operators’ vehicles are also located at the laydown area.

[19] Buffalo operates the water truck. There is no running water on site. He fills the tank with water from the treatment plant on the camp side of the site. In the course of a day, he delivers potable water (for washing, urinals, toilets) and bottled water to offices, lunch trailers, and wash

cars for workers while they are at work. The offices and wash cars are scattered all over the site. The offices belong to various contractors on site. Buffalo also delivers water that is used for washing machinery.

[20] The water is mainly for the workers who are in the process of constructing the mine. According to Buffalo, it is common knowledge that the mine is under construction. This is all anyone talks about. Some of the workers have worked directly in excavation, for example, and at the moment, are lining the shaft.

[21] Buffalo testified that he is not instructed to do anything other than operate the truck. Granted, he was once asked to shovel snow but he refused and it wasn't mentioned again. Also, when he started this job he washed the BHP trucks as well, which involved driving to town. He does not do that anymore. He had an anti-freeze spill that he had to clean up. There was no one else available at the time. Site cleaning work is not a part of his regular duties.

[22] Buffalo says that there are always 10 hours of operators' work. Sure, there is down time, but that is to be expected. In the winter, his shift increased to 12 hour days to accommodate his delivery of water to the batch plant for Jetcrete, where the cement is mixed. During the winter, the raw water supply for the batch plant is too cold to achieve the necessary compression strength of the concrete. The water truck would deliver warmer water to the batch plant. Sometimes these deliveries would take place all day, and sometimes not at all. It all depended on the mixing schedule.

[23] To keep up with the batch plant duties, KDM hired two additional operators, one of whom was First Nations. Those workers have since been laid off.

[24] Buffalo's contract includes the following terms:

Responsibilities: The roles and responsibilities of the Driver/Operators are provided in Appendix A and are subject to revision. This position is dependent upon KDM Constructors site requirements and availability of work at the BHP Jansen Site.

Hours of Work: You will work 7 days on and 7 days off shift rotation while on the project site until the project completes or as mutually agreed upon. KDM Constructors reserves the right to change your shift and usual starting and ending time at the managers discretion and as business needs require.

As discussed, your services will also be required at sites other than BHP Jansen. Your hours may fluctuate based on the requirements of the other sites. Hours are discretionary as per

KDM management. Any overtime needs to be approved by your supervisor.

[25] Laliberte usually operates the vacuum truck. Most of the work performed with the vacuum truck involves removing and transporting septic waste. The waste is removed from around 20 locations throughout the day. These septic trailers are used by a variety of contractors, including, Jetcrete (doing the concrete work for the shafts), Allan (widening the road coming into the site and building a pond), TRL (working on the shafts), Graham (moving the transformers), and Shermco (electricians). Every contractor has one or more wash cars. TRL, in particular, has five wash cars.

[26] As well, when the hoist house floods, Laliberte helps to remove the water with the vacuum truck and then transports it to the SWEF pond. The hoist house contains the cables and the galloway for the shaft. It floods every time it rains.

[27] The raw water pump house leaks regularly. He removes water from the house every second day. As well, sometimes he removes water from a ditch after a rain, and when operating the water truck, he waters the site roads to control the dust.

[28] With respect to the batch plant deliveries, Laliberte explained that the truck hooks up to a hose that is connected to the tank. From what he understands, the mixed cement then goes into a vessel which is then lowered down to where it is needed for the shafts. This work is pretty visible. The operators are not involved in the mixing of the cement.

[29] When Laliberte is not operating the trucks he is maintaining them. They also have to take their vehicles to Humboldt to get washed. He doesn't remember the last time, but he has washed and fueled some BHP trucks. He has never shoveled snow, other than to clear the path to complete his other work, for instance, to get the truck in and out of the parking area. He has been asked to shovel snow on one occasion. He refused. He does not perform site cleaning work, or landscaping.

[30] When he was hired, he made a point of explaining that he was not going to be performing unrelated duties. Been there, done that. From the date of hire, he has understood the contractual language "other duties as required" to mean related duties (ie, maintenance on the trucks), not unrelated duties.

[31] Laliberte works a 10 hour shift. He has down time. If he were required to do everything continuously he would be finished at 3:30 p.m. He manages his time. He takes his breaks and spends time maintaining or cleaning the truck in his down time. There is always a list containing some task that remains to be done on the truck. Laliberte performs water truck duties when Buffalo is away.

[32] Since being hired, he has worked continuously at the BHP site. He was also required to work 12 hour days during the “winter” period, which he described as lasting from December 2020 until about a week prior to his testimony, which occurred on June 14, 2021. During this period, he spent the first few hours of his shift supplying water to the batch plant. He would start this work at 4 a.m. After the toolbox meeting, Buffalo would take over the water truck duties and Laliberte would return to his vacuum truck duties for the rest of his shift.

[33] Laliberte’s contract includes the following terms:

- **Start Date & Term** – *Your full time employment with KDM Constructors will be for a term position ... as of April 2, 2019. This position is dependent upon KDM Constructors site requirements and availability of work at the BHP Jansen Site.*
- **Position** – *You will be employed by KDM Constructors as a **Driver/Operator** at the BHP Jansen Project in Jansen Saskatchewan. Your duties in this position are outlined below:*
 - *Sewage removal from trailers and facilities*
 - *Dumping of sewage into manhole(s)*
 - *Safely operating truck(s) around BHP Jansen site, and as required, off-site*
 - *Assisting with site vacuum truck/hauling, as requested or directed*
 - *Other duties as required*

[34] The contract stipulates that the shift rotation is to last “while on the project site until the project completes or as mutually agreed upon.”

[35] Cowley testified about the Union’s membership requirements and dispatch system. The Union allows for membership within a 30-day trial period following the completion of an application. During the 30-day period, an employer can decide whether the employee is a good fit. If a contractor wants to engage a specific individual, training is possible on-site.

[36] The CBA contains provisions relating to the dispatch process. Article 4:03 states that the Union, upon notification by the employer, is required to dispatch suitable and qualified employees within 72 hours or supply names of additional employees within 48 hours. If the Union fails to do so within the time set out, the employer may then hire from any available source. The employer has the right to determine the competency of the employees supplied by the Union. Name hiring

is available for every second employee who is not hired as a foreman. All foremen may be name hired.

[37] According to Cowley, the four employees who are currently within the bargaining unit will automatically become members if the certification is granted. They will not have to submit a resume or pay the initiation fee.

[38] Approximately 30% of the Union's members are First Nations individuals.

[39] Daniels works as an inclusion manager for the Saskatchewan Provincial Building & Construction Trades Council and for the Construction Opportunities Development Council (CODC). In these roles, he works to improve employment opportunities for First Nations youth. In his view, the option to apprentice in a trade is a key part of ensuring that an employment opportunity is meaningful. By contrast, historically, Indigenous people have been used as labour, without being provided with a pathway to a career. Daniels provides relevant training to union leaders and, now, to contractors. He is impressed by this Union, as it was the first trade organization in Canada to take the training.

[40] In his work, Daniels focuses on recruitment and training, and so although he was asked about the dispatch system, he was not equipped to provide helpful answers. He was also asked to comment on KDM's use of labour force development officers. He agreed that people who live on reserve experience many barriers to entry into the construction industry, and that the officers could be beneficial for workforce opportunities.

[41] Chief Bellerose is the Chief of the Muskowekwan First Nation. He believes that unionization will prevent or hinder the company's efforts at meeting its goals to create job opportunities for and improve the lives of First Nations people. He spoke about the TRC Calls to Action, in particular Call to Action No. 92, which calls upon the corporate sector "to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources." He believes that KDM has embraced this Call to Action, which explains why KDM is not a true joint venture, but rather, a First Nations-owned company. The point is that First Nations need to take ownership and leadership to improve their opportunities.

[42] Chief Bellerose admitted that he lacks knowledge about unionized workplaces and that he has not spoken with anyone from the Union. When asked what he understood to be the impediments to hiring through the hiring hall, he stated that he would “rather not find out. That would be my preference.”

[43] Chief Bellerose was asked about the Employer’s reply to the certification application, which he had completed and declared pursuant to the *Canada Evidence Act*. In the reply, he stated that KDM was “set up, and has always operated as a maintenance contractor, with a focus on driving employment for Indigenous workers in Saskatchewan.” He also stated that the four workers in question “are required to do more than simply operate trucks and equipment. They are also required to participate in site cleaning and snow clearing work.” When asked to account for the contrary evidence provided by the employees, Chief Bellerose admitted that he is not on site enough to speak to these detailed operations matters. He is not “hands-on”.

[44] He has been on site only three or four times. In cross, he was asked to describe the work in question, and he attempted to reply, but not in a way that was responsive to the questions. He was unable to speak in an informed way about the work. After acknowledging the limitations of his knowledge, he stated that he does believe that only the four people subject to the certification application operate the trucks. He believes this because he is aware that the requirement for a driver’s license presents a barrier to entering the trade for those people who live on reserve.

[45] Blackwell is the site manager and the project manager for KDM. He also acts as the project manager for SEC. He moved from SEC to KDM in January 2020.

[46] According to Blackwell, the water truck and vacuum truck duties do not consume an entire day’s shift. Therefore, it is necessary to provide the operators with other duties. In support of this statement, he pointed to the fact that Laliberte has had to perform the duties of both positions. This suggests that a full day working on one of the vehicles is equivalent to only 6 hours.

[47] When asked what activities the operators perform to fill the extra time, he indicated that they maintain their own vehicles, clean their vehicles, or fuel or wash the BHP vehicles. Contrary to the employees’ testimony, he suggested that the fueling of BHP vehicles was ongoing. He also suggested that they pick up parts in Saskatoon if necessary. He could not recall a specific occasion when this latter task was performed.

[48] Blackwell also stated that it is necessary, from time to time, to have the other trades, such as the labourers, fill in to perform the operators' duties. He suggested that this had happened just "recently", at the last hearing date. In cross, he admitted that it is a very exceptional situation which occurs only if the company is "up against a wall".

[49] Blackwell has concerns about unionization due, in part, to the perceived lack of control over hiring. In cross, he observed that if the hall cannot fulfill the request for workers "it comes back to me. I still need a recruitment strategy." According to Blackwell, the percentage of employees at KDM who identify as First Nations is now approximately 35%.

Arguments:

Union:

[50] The Union takes the position that KDM's work generally, and the work giving rise to the application, is construction industry work within the meaning of section 6-65 of the Act. In support of this position, the Union relies on the reasoning as set out by the Board in *United Association of Plumbers and Pipefitters v Andritz Hydro Canada Inc.*, 2021 CanLII 4217 (SK LRB) [*UA v Andritz*]. In particular, the determination must be made with reference to the whole of the project, not merely the component or trade at issue.

[51] Unlike most of the related cases, the current case does not involve a currently operating facility. At all relevant times, the site has been under construction, and the work has been performed to support the ongoing construction work. Although the Board in *KDM No. 1* dismissed the certification application made pursuant to Part VI, Division 13, its decision was based on a lack of clear, convincing and cogent evidence with respect to the overall work on site, and its connection to the work performed by the proposed bargaining unit members. In the current case, the Board has ample evidence of the construction industry work on site, and the operating engineers' roles in relation to that work.

[52] While the Board has substantial discretion to determine which type of bargaining unit is appropriate, the proposed bargaining unit in this application is a well-established standardized unit. Unless the Employer establishes special circumstances, the Board treats these standard units as appropriate for collective bargaining. The Board is rightly wary of an employer's attempt to arrange the workplace in a manner designed to avoid collective bargaining obligations.

[53] The implication of the Employer's argument is that it is entitled to structure its company so as to prevent employees from exercising their *Charter*-protected freedom of association. This argument should be viewed with extreme skepticism. Besides, there is no factual basis for the assertion that there is a conflict between the company's goals and the certification application.

Employer:

[54] This matter has already been decided. In *KDM No. 1*, the Board found that the union had failed to meet its onus to prove that the work fell within the construction industry. That case involved the same Employer, the same project site, and the same agreement. It is unnecessary for the Board to consider the matter further.

[55] In the alternative, the evidence presented in this case should persuade the Board that the work is maintenance. It does not fit within any of the terms contained in subclause 6-65(a)(i) of the Act. The work maintains an operating facility, and assists in preserving the function of a system. Nothing is being added to the site, and there is no impact on output.

[56] In characterizing the work as maintenance, the Employer relies on the guidelines contained in *Construction Workers Union, CLAC Local 63 v Nason Contracting Group Ltd.*, 2017 CanLII 64948 (AB LRB) [*Nason*] and *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, UA Local 56 v Ainsworth Inc.*, 2011 CanLII 152214 (NS LRB) [*Ainsworth*].

[57] Applying either the Alberta guidelines or the Nova Scotia guidelines, the answer to the central question is clear. Following the Alberta approach, the work should be characterized as ongoing maintenance work. Following the Nova Scotia approach, the work should be defined by the agreement that is being used for the project. In this case, the agreement divides the work into site services (maintenance services) and camp and site maintenance and operations.

[58] Furthermore, the proposed unit is not appropriate for collective bargaining. The first reason is that it is under-inclusive. Certification would fragment the workplace and undermine the company's objectives. In support of this argument, the Employer relies on *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and*

Canada, Local 179 v Reliance Gregg's Home Services, 2018 CanLII 127680 (SK LRB) [*Reliance Gregg's*].¹

[59] The second reason is that the structure of the construction industry regime is inimical to the achievement of the company's worthy objectives. KDM has structured its workplace in a specific way in order to perform a social good, and the automatic imposition of the provincial agreement would interfere with this structure. It would remove KDM's power to collectively bargain the terms and conditions of work for its own employees. It would also prevent KDM from continuing to train First Nations employees and to provide them with meaningful employment opportunities.

[60] Relatedly, hiring workers through the Union hall dispatch system would render useless the infrastructure that has been established to further meaningful job prospects for First Nations people. By becoming subject to the dispatch system, KDM would be stripped of its ability to hire directly from the three First Nations. The imposition of the hiring hall system would defeat the goals and purpose of KDM.

Applicable Statutory Provisions:

[61] The applicable statutory provisions are as follows:

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.

...
6-11(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.

...

¹ Reconsideration granted on other grounds: *Reliance Gregg's Home Services, A Division of Reliance Comfort Limited Partnership v United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada*, 2019 CanLII 120618 (SK LRB).

6-64(1) *The purpose of this Division is to permit collective bargaining to occur in the construction industry on the basis of either or both of the following:*

- (a) by trade on a province-wide basis;*
- (b) on a project basis.*

(2) Nothing in this Division:

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

- (i) employees of an employer in more than one trade or craft; or*
- (ii) all employees of the employer; or*

(b) limits the right to obtain an order to be certified as a bargaining agent to those unions that are referred to in a determination made by the minister pursuant to section 6-66.

(3) This Division does not apply to an employer and a union with respect to a certification order mentioned in subsection (2).

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

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

6-65 *In this Division:*

(a) "construction industry":

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

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

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

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

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

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

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

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

(i) the commercial, institutional and industrial sector;

(ii) the residential sector;

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

(iv) the pipeline sector;

(v) the road building sector;

(vi) the powerline transmission sector;

(vii) any prescribed sector;

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

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

- (h) “unionized employer”, subject to section 6-69, means an employer:
- (i) with respect to whom a certification order has been issued for a bargaining unit comprised of unionized employees working in a trade for which a trade division has been established pursuant to section 6-66; or
 - (ii) who has recognized a union as the agent to engage in collective bargaining on behalf of unionized employees working in a trade for which a trade division has been established pursuant to section 6-66.

Analysis:

[62] The Union bears the onus to demonstrate that the proposed bargaining unit is appropriate. The evidence in support of the application should be sufficiently clear, convincing, and cogent.

[63] On a certification application, the question is not whether the unit is the most appropriate bargaining unit, but whether it is appropriate for collective bargaining: *G.C.I.U., Local 75M v Sterling Newspapers*, [1998] SLRBD No 65 (SK LRB) [*Sterling Newspapers*]; *Northern Lakes School Division No. 64 and CUPE, Re*, 1996 CarswellSask 862 (SK LRB) [*Northern Lakes*].

[64] The Union has expressed a strong preference against certifying a bargaining unit outside of the construction industry regime. For this reason, the Board will consider only whether the unit applied for, pursuant to the construction industry regime, is appropriate.

[65] In this case, the primary question is whether the work falls under the definition of construction industry contained in Part VI, Division 13. The definition of construction industry is set out at section 6-65. Maintenance work is excluded from the definition.

[66] The Board has interpreted the definition of construction industry in two recent cases, both of which the parties have cited: *UA v Andritz, KDM No. 1*. In each of these cases, the Board was charged with considering the distinction between construction industry activities and maintenance work for the purpose of determining whether the proposed bargaining unit should be certified pursuant to Division 13. In the latter case, *KDM No. 1*, the Board found that the Union had not met its evidentiary onus, and therefore the application was dismissed.

[67] In these cases, the Board made the following observations with respect to the statutory definition of construction industry:

- The terms used in subclause 6-65(a)(i) are to be given their ordinary meaning;
- The scope of the activities that fall within the construction industry definition is broad;
- To determine whether the activity falls within subclause 6-65(a)(ii), the Board will consider the relationship between the activities and the machinery, plant,

fixtures, facilities, equipment, systems and processes contained in or used in connection with a work;

- Maintenance work is carved out of a broad definition of construction industry and is to be given its ordinary meaning;
- An activity is a thing that a worker does, whereas work in the sense of maintenance work is a task or tasks that are to be undertaken.

[68] The meaning of maintenance work has been considered in less recent cases, mostly outside of Saskatchewan. The cases are many, and those that have been considered by this Board include: *Saskatchewan Construction Labour Relations Council, Inc. v Wright and Sanders*, 1982 CanLII 2686 (SK QB), [1982] 6 WWR 704 [*Wright and Sanders*]; *J. Mason & Sons*, [1999] Alta LRBR 577 [J. Mason]; *IBEW Local 424 v Transwest Dynaquip Ltd.*, [1994] Alta LRBR 99; *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 v Francis H.V.A.C. Services Ltd.*, 2000 CanLII 13330 (ON LRB) [*Francis H.V.A.C.*]; *Nason*; and *Ainsworth*. The Board has also considered the principles contained in the guidelines developed by the Nova Scotia and Alberta Boards.

[69] According to the case law, to maintain is to keep something in repair, as in the upkeep of machinery and equipment to enable it to operate efficiently and in the manner in which it was designed to perform. To maintain includes taking action to prevent decline, to prevent a lapse, or to prevent a cessation from what is an existing condition. Synonyms for maintain include to keep, to keep up, to preserve, and to sustain.

[70] Context is often determinative of the distinction between construction industry activities and maintenance work. Whether an activity or work is included in the construction industry is not just a function of the physical activity of the employee. Seemingly similar activities or work, performed using similar skills, may be characterized differently depending on the context in which they are performed. Likewise, an activity or work that does not appear to be construction industry work if performed as part of an isolated project may be included within the construction industry due to the overall context within which it is performed. Therefore, the Board must consider the activity or work in the context within which it is performed. The context includes not only the work in question, but also the overall purpose of the work and the scope of the overall project.

[71] Finally, it is necessary for the Board to consider and apply the principles arising in the case law in a manner that is appropriate and consistent with its unique statutory regime.

[72] *KDM No. 1* and the current case implicate the same Employer and the same Work Package. According to the Employer, this means that the Board's decision about the nature of the work should be the same.

[73] In *KDM No. 1*, the Board's decision rested on the Union's failure to meet its evidentiary onus, as explained at paragraph 124:

[124] In our view, the general nature of the evidence about the overall project prevents the Board from being able to adequately perform a contextual assessment. Given the nature of the work being performed by the labourers, this is of particular concern. This is not a case in which the connection is obvious; therefore, the contextual assessment must be undertaken carefully.

[74] The Board's conclusion in *KDM No. 1* was based on a lack of clear, convincing, and cogent evidence with respect to the overall work on site, and the connection between the overall work and the work performed by the proposed bargaining unit members. The Board has to decide the current question based on the evidence before it. The evidence is not limited to the Work Package. Furthermore, the Board in *KDM No. 1* had this to say about the Work Package:

[110] This work is being performed in the context of a larger site services package which involves such responsibilities as road maintenance, ground maintenance, waste management, pond maintenance, busing, stockpile management, maintenance of site aggregates, and various other services that maintain the site, including the camp. Although the work package repeatedly makes mention of "maintenance" work, the language of the agreement, while perhaps helpful, is not determinative of whether the work falls under the maintenance work exclusion.

[75] Next, the Board will turn to its analysis of the work in question.

[76] The work of the operators is performed on the BHP construction site. There is no evidence that they have performed work in relation to any other site or project. When the operators leave the site to perform duties, they are performing duties in relation to the BHP project.

[77] The overall project is the construction of a potash mine. The construction is ongoing. The preamble of the PLA indicates that BHP is undertaking a major capital project involving the construction of potash mining operations, including "sub-surface mining development, surface processing facilities and the requisite infrastructure to support the Project". Currently, the shafts are being lined with concrete and steel. Cement is being mixed and poured to make the concrete for the liners.

[78] The employees in the proposed bargaining unit operate the water truck and the vacuum truck. Their job titles are “Drivers/Operators”. The water truck duties consist of delivering potable water and bottled water to offices, lunch trailers, and wash cars for workers while they are at work. The offices and wash cars are scattered all over the site. The workers who are not in the offices are directly involved in constructing the mine. Water is also delivered to be used for washing machinery on site, and is used to keep the dust down on the roads.

[79] In the winter, the water truck duties have included supplying water to the batch plant for the mixing of the cement which is used to make the concrete to line the shafts. The “winter” season in the context of this work is dependent on the temperature of the raw water supply, and it has lasted from December 2020 until June 2021.

[80] The vacuum truck duties are mainly related to septic waste removal. The septic trailers are used by a variety of contractors who are, for example, working on the shafts and widening the road. The vacuum truck operator also helps to remove the water from the hoist house when it floods. The hoist house contains the cables and galloway for the shafts.

[81] The operators report to and take direction from a foreman who was dispatched by the Union and is working pursuant to the Provincial Agreement. They attend a toolbox meeting every morning with other employees working under the Provincial Agreement. They retrieve their trucks at the same laydown area where the excavator, dozer, grader, zoom boom, and skid steers are located.

[82] Next, the Board will consider whether the work performed by the proposed bargaining unit members falls within the construction industry.

[83] The work performed by the water truck and vacuum operators, on its own, does not come within the ordinary meaning of any of the terms contained in subclause 6-65(a)(i). However, this is not the end of the inquiry. Subclause 6-65(a)(ii) includes within the construction industry all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection with a work mentioned in subclause (i). Therefore, it is necessary to consider whether the work consists of the activities as described within this provision.

[84] In interpreting this provision, the Board is called upon to determine the meaning of the phrase “in connection with a work”. It is well established that the words of an Act are to be read

in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its objects, and the intention of the legislature. Even if the ordinary meaning is plain, the Board should take into account the full range of contextual considerations relevant to the provision: *Ballantyne v Saskatchewan Government Insurance*, 2015 SKCA 38 (CanLII) [*Ballantyne*].

[85] It is commonly understood that a statute characterized as conferring benefits is to be interpreted in a broad and generous manner. In addition to this, pursuant to section 2-10 of *The Legislation Act*, every Act is to be construed as being remedial and to be given the fair, large and liberal interpretation that best ensures the attainment of its objects:

2-10(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.

(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

[86] To understand what this means in practice, it is helpful to consider the difference between strict and liberal construction, as explained by Professor Ruth Sullivan:²

15.18 The difference between strict and liberal construction is largely one of attitude and elasticity. Legislation that is strictly construed is applied with reluctance, as sparingly as possible. General terms are read down; conditions of application are fully and carefully enforced. Any doubts or ambiguities are resolved in favour of non-application. Liberal construction, by contrast, favours and facilitates the application of legislation to advance the remedial goal. The language of the statute is applied as fully as the conventions of meaning permit. Technicalities and formalities are avoided. If reasonable doubts or ambiguities arise, they are resolved in favour of those seeking the benefit of the statute.

[87] The Board must bear this approach in mind when considering the meaning of the phrase “in connection with a work”. The question, here, is whether “in connection with a work” should be interpreted to include the activities at issue in this case. On a plain reading of the provision, there is no temporal, physical or other limitation on the requisite connection, nor any stipulation that the connection be direct. It is therefore up to the Board to determine what it means to be “in connection with a work”.

[88] In *KDM No. 1*, the Board considered the purpose of the collective bargaining regime for the construction industry. The Board stated that it must work to strike a balance between facilitating employees’ rights and promoting harmony and stability in collective bargaining

² Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis), 2014 at 487.

relationships. It observed that the interdependence among the various trades supports an analysis of the work that takes into account the overall project. This analytical approach is consistent with the case law. Whether an activity or work is included in the construction industry is not just a function of the physical activity of the employee, but includes the context within which it is performed.

[89] The Board must also consider the meaning of “work”, as used in the phrase “in connection with a work”. This was addressed in *KDM No. 1*:

[80] It is clear from the context that work in subclause (i) has a different meaning from work in subclause (ii). Work in subclause (i) does not refer to tasks to be undertaken. This interpretation would render subclause (i) meaningless. Instead, work in subclause (i) refers to the architectural or engineering constructions that are set out therein. However, it also implies that the other type of “work” is inherent to the existence of the constructed thing; the thing is not naturally occurring – it is constructed.

[90] The type of “work” in issue here is not naturally occurring – it is constructed. The action of working is inherent to the existence of the constructed thing.

[91] The project that is currently underway at the BHP site is the construction of the potash mine. Granted, the fact that the work is occurring on a construction site is not a full answer to the question about the proper characterization of the work. Currently, this work involves the lining of the shafts. Previously, it involved the excavation of the shafts. “Shaft” is explicitly included as a “work” in subclause (i). The employees described the construction activities that are occurring on site, the contractors who are involved in those activities, and the work of the tradespeople who benefit from the operators’ activities. The evidence of these construction activities, while not first-hand, is based on the employees’ daily attendance at the site and observations, and is sufficiently reliable. It would have been excessive to require the Union to call the various contractors to give evidence with respect to each of their specific responsibilities.

[92] The delivery of the water to the batch plant clearly constitutes an activity undertaken with respect to a fixture (lining) contained in a work (shaft). The delivery activities are sufficiently proximal to the fixture and to the work. The transport and delivery take place on site. The activity is repeated and ongoing during the timeframe in which it is carried out. The water is a necessary ingredient for the mixing of the cement. The temperature of the water is a necessary aspect of the compression strength of the concrete used directly for the lining.

[93] The next question is whether the delivery of potable water and bottled water to the workers is a construction industry activity. As the Employer has argued, this raises a question about whether this activity is undertaken with respect to any machinery, plant, fixture, facility, equipment, system or process contained in or used in connection with a work, as outlined in subclause (ii). This set of facts engages the term “facility”. The facilities in question are the wash cars, lunch trailers, guard shacks, and offices, in particular. According to the Work Package, delivery does not extend to the Discovery Lodge camp.

[94] Are these facilities, and any related locations, being used in connection with a work, in the manner intended by section 6-65? In our view, the facilities are being used in connection with the construction of the mine, and specifically the shafts. These facilities are being used primarily by the workers who are directly involved in the construction of the mine, as well as the office workers who are working on the mine site. The facilities are located on the mine site.

[95] It is difficult to envision a scenario in which construction activities of this scale could proceed without such facilities being in operation, and without the ongoing delivery of water to those facilities, and to the workers, generally. The delivery of water supports the trades, in particular, and other workers in performing their work. The water transport and delivery occurs on site and occurs regularly. It supports the continuation of the project. The connection is sufficiently proximal.

[96] The next, related question is whether the removal of septic waste from the various locations on site is a construction activity. The reasoning is similar. In addition, the facilities subject to this activity have been clearly identified. They belong to the contractors on site. Again, it is difficult to envision a scenario in which the construction activities could proceed without such facilities, and without the ongoing removal of septic waste from those facilities. The removal and transport occurs on site and occurs regularly. It supports the continuation of the project. The connection is sufficiently proximal.

[97] Next, the removal of water from the hoist house constitutes an activity with respect to a facility used in connection with a work. The hoist house is such a facility. The hoist house contains the cables and the galloway for the shaft.

[98] The remaining operator work consists of the removal of water from the raw water pump house and the watering of the roads. Minimal detail was provided with respect to this work.

However, the Board is satisfied that this work does not depart meaningfully from the patterns and relationships which have already been established.

[99] It should also be remembered that the operators are working on a construction site, attending a daily toolbox meeting alongside other unionized trades, taking direction from a foreman working under the provincial agreement, and attending to the trailers of the various contractors throughout the day.

[100] Relatedly, the Board has concluded that the activities do not constitute maintenance work. Maintenance work involves keeping something in repair, as in the upkeep of machinery and equipment to enable it to operate efficiently and in the manner in which it was designed to perform. Common synonyms for maintenance work include to keep up, to preserve, and to sustain. Maintenance work is generally performed on an existing facility.

[101] The ongoing nature of the overall construction project will necessarily affect whether the facility is found to be “existing” for the purposes of the construction/maintenance distinction. The potash mine is under construction. The construction work has not been completed. The production phase has not begun. The mine is not an existing facility or plant for the current purposes. Similarly, the wash cars, lunch trailers, guard shacks, and hoist house are supporting the construction activities. The purpose of these facilities must be considered in context.

[102] The delivery of water to the batch plant is clearly not maintenance work. The water is used to mix cement to create concrete which is used to line the shafts. The delivery of water provides for the transformative process that occurs when water is mixed with cement. This work is not intended to preserve any aspect of an existing facility. It is intended to further the construction of the facility. It is essential to the lining of the shaft.

[103] The delivery of water to workers, whether those workers are directly involved in construction or not, is not maintenance work. It does not maintain (re: preserve or sustain) an existing facility. It is a service that is provided to the workers on site.

[104] Nor is the removal of septic waste equivalent to maintenance work. The trailers are facilities that support the ongoing construction work on site, and are not existing facilities, for current purposes. The removal of septic waste is necessary for the continuation of the construction work that is being performed.

[105] Finally, as mentioned in *KDM No. 1*, the use of the word “maintenance” or “maintain” in the Work Package is not determinative of the issue. More important is the work that is being performed, taking into account its purpose and the scope of the overall project.

[106] Nor is it indicative of maintenance work that KDM’s site services may or will continue after the construction phase of the project is complete. That day has not yet arrived, and appears to be rather far off.

[107] The Employer has argued that if the work is not found to be maintenance work, then it should be found to be non-construction, non-maintenance work. In the foregoing reasoning, the Board has considered whether there is the requisite connection to establish that the work consists of construction industry activities. If there was not, then the work would be non-construction work. The Board is persuaded that the connection exists. Therefore, there is no need to consider this argument any further.

[108] Next, the Board will consider the Employer’s additional arguments with respect to the appropriateness of the bargaining unit.

[109] The Employer’s first argument is that the unit is under-inclusive. The Union points out that the proposed bargaining unit is the standard Newbery unit for operating engineers, relying on the following cases: *International Erectors & Riggers (a Division of Newbery Energy)*, [1979] Sept Sask Labour Rep 37, LRB File No. 114-79; *International Union of Operating Engineers Hoisting & Portable & Stationary, Local 870 v Coopers Crane Rental Limited*, 2006 CanLII 62941 (SK LRB); *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v Energy Crane Service*, 2018 CanLII 91958 (SK LRB). It says that, in the absence of special circumstances, the Board treats craft units as appropriate for collective bargaining.

[110] For this latter argument, the Union relies on *K.A.C.R. v I.U.O.E., Local 870*, [1983] Sask Lab Rep 37, 1983 CarswellSask 1011 [*KACR*] at paragraph 18:

18 The Newbery Energy decision was based on the assumption that union certifications in the construction industry proceed along craft lines and the purpose of the decision was to permit the Board to certify according to standard unit descriptions, leaving it to the unions to resolve their own jurisdictional disputes. This Board has for many years accepted as appropriate and as a matter of policy has certified craft units in the construction industry. That is not to say however, that the Board cannot do otherwise. It can and will, deviate from the standard craft unit description if, in special circumstances established by appropriate evidence, it should appropriately do so.

[111] *KACR* was decided prior to the introduction of subsection 6-11(7) of the Act, which directs the Board not to presume that a craft unit is the more suitable unit:

(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.

[112] Clearly, this directive is not intended to bar certification of an otherwise appropriate unit. Furthermore, where there is no issue about a possible more suitable unit the Board may consider the craft unit status of the bargaining unit in assessing its appropriateness. However, the Union has specified that it is applying only for a construction industry unit pursuant to Division 13, which by necessity is a craft unit. Here, the Employer has suggested by implication that the more appropriate unit is an all-employee unit.

[113] The Union's argument is not directly responsive to the Employer's assertions. The Employer asserts that there is not a discrete skill or other boundary surrounding the unit that easily separates it from other employees and that there is intermingling between the proposed unit and other employees. The Employer says that there is a realistic ability on the part of the Union to organize a more inclusive unit or there exists a more inclusive choice of bargaining unit. It relies for this argument on *Reliance Gregg's*, stating that there is overlap in the work performed by the four proposed members of the bargaining unit and the rest of the workplace. The line drawn by the Union is arbitrary.

[114] In *Reliance Gregg's*, the employees were permanent rather than transitory employees. When a slowdown occurred in a division within the workplace, the employees were diverted to another division, which had the effect of minimizing the layoffs that would otherwise have occurred. Employees would also be dispatched to work within other divisions:

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

[115] The Board found that there was no discrete skill or other boundary surrounding the proposed units and that there was regular intermingling between the proposed units. The skills

employed by the employees could be performed by any of the employees within the relevant areas of work.

[116] Here, the Board will consider whether there is a discrete skill or other boundary surrounding the unit that easily separates it from other employees. It will begin this analysis by reviewing the employment contracts. Buffalo's contract states that the "position is dependent upon KDM Constructors site requirements and availability of work at the BHP Jansen Site". Laliberte's contract provides for a "term position" which is "dependent upon KDM Constructors site requirements and availability of work at the BHP Jansen Site". These are not permanent positions. While there was a suggestion that the work might continue after the construction phase of the project, this evidence was speculative, and does not transform what are obviously finite positions into permanent positions. The positions remain subject to the availability of work at the site.

[117] Buffalo's contract states that his services will be required at sites other than BHP Jansen. Laliberte's contract focuses on the duties related to the operation of the vacuum truck, and provides for other duties as required. While the language used in the contracts may be helpful, it is often the work that is being performed which is dispositive. It is therefore necessary for the Board to examine the work that the operators are performing. There is no evidence of work in relation to other sites. The evidence of other duties, beyond those that are an extension of the operator duties, is limited.

[118] Blackwell insisted that the operators do not have sufficient work to fill an entire shift, and that the Employer tries to find tasks to ensure that the days are full. He was asked to provide examples in support of this statement, but his answers fell short. The examples he provided consisted of the fueling and washing of BHP vehicles, as well as the travel to Saskatoon for the purpose of picking up parts when necessary. When asked for more information about a specific time when the operators had to perform this latter task, Blackwell's responses were nonresponsive.

[119] At various points, Blackwell seemed to rely on the fact that the employees are performing duties related to the maintenance of their vehicles to prove that the operators are performing duties that fall outside the scope of the proposed bargaining unit. Given some inconsistencies in his responses, it is unclear to what extent Blackwell believed that this evidence was supportive of the Employer's position. It is not. Operating Engineers are defined in the provincial agreement as all persons engaged in the operation, services, and maintenance of trucks. The provincial agreement includes a provision outlining the scope of the trade, as follows:

1:03 a) ... Operating Engineers shall be defined as all persons engaged in the operation, service, maintenance, assembling and dismantling of all hoisting, portable and excavating machines, boilers and engines, including trucks.

[120] The employees testified that they do not perform site cleaning work, landscaping, or snow shoveling other than in exceptional circumstances or for the purposes of clearing a path for the trucks. Both employees have refused to shovel snow when asked. On this latter point, the evidence is consistent. When Laliberte was hired he had a conversation for the specific purpose of ensuring that he would not be required to perform other duties.

[121] Besides the Employer's general assertions that the employees are performing work outside the scope of the proposed bargaining unit, there were only limited inconsistencies in the testimony between the employees and Blackwell. These inconsistencies relate to whether the employees continue to wash the BHP trucks and whether there is sufficient operators' work to fill a 10-hour day.

[122] Blackwell suggested that Laliberte was capable of doing both jobs in one 12 hour shift and, so therefore, there are only 6 hours of work per operator. Laliberte's testimony confirms that he does not work at a constant, steady pace throughout the day. However, a certain amount of downtime is to be expected. There is a list of maintenance items to be performed on the truck. Besides, if the operators' duties fill a maximum of 6 hours throughout the shift, then one would expect more detailed, specific evidence about the work they are performing to fill the additional four hours.

[123] To the extent that there are inconsistencies in the testimony about the work that the operators are performing, the Board prefers the evidence of the operators. Blackwell's evidence was more aspirational and general than it was actual and specific, and it therefore lacked the markers of reliability that would be necessary to overcome the employees' consistent descriptions of their own work. The testimony of the employees benefited from their familiarity with their daily routines. Their statements that they refused to shovel snow were specific and were supported by Blackwell's testimony. The employees take direction each day from an individual who did not testify at the hearing.

[124] Given the significant investment that the Employer has made in this line of reasoning, the deficiencies in Blackwell's evidence are particularly revealing. Relatedly, the Board can place no weight on the relevant evidence contained in the Employer's reply. Chief Bellerose admitted that

he lacked knowledge about the very facts that he declared as being true within that document. This is very troubling.

[125] The Employer has attempted to rely on certain exceptions to the norm as proof of a broader pattern in which the operators are performing non-operator work. This evidence does not persuade the Board that the unit is inappropriate.

[126] Next, the Board will consider whether there is intermingling between the employees in the proposed unit and the employees outside of the unit. There is no specific evidence of intermingling with the non-unionized employees outside of the unit. The evidence is that the operators attend a toolbox meeting at the beginning of every shift attended by unionized SEC equipment operators. The labourers and janitorial staff employed by KDM attend the next meeting. After the toolbox meeting, the operators retrieve their trucks, which are parked with the other equipment at the laydown area. Throughout the day the operators perform their duties which include deliveries and removals from various locations on site. As a whole, this evidence does not support the Employer's argument that the bargaining unit is inappropriate.

[127] In addition, a certain amount of intermingling between craft units for the purpose of completing a construction project, as is demonstrated through the attendance at the toolbox meeting, is typical.

[128] Relatedly, other than what was described as an exceptional circumstance, there is no evidence that any employees other than those hired specifically to perform the water truck and vacuum truck duties actually perform those duties. As well, the operators' licenses present an obvious barrier to those employees who do not hold a license. The licenses are akin to a discrete "skill" or other boundary, such as a necessary qualification, that surrounds the proposed unit. The skills, or duties, employed by these employees could not easily be performed by the other employees. This alone separates the proposed bargaining unit from the other employees.

[129] Finally, this is not a case involving small bargaining units at various locations. It is a standard trade union bargaining unit. The Employer's reliance on non-construction industry cases, such as, *Hotel Employees and Restaurant Employees Union, Local 41 v Cavalier Enterprises Ltd. (Sheraton Cavalier)*, 2002 CanLII 52909 (SK LRB) and *SJBRWDSU v Saskatchewan Centre of the Arts*, [1995] 4th Quarter Sask Labour Rep 52, LRB File No. 175-95 [*Centre of the Arts*] does not provide support for its argument. Furthermore, unlike *Centre of the Arts*, there is nothing arbitrary about the line drawn by the Union in this case.

[130] The next argument is that there is conflict between KDM's objectives and the structure of the construction industry regime. To the contrary, the evidence suggests that the Union is supportive of the company's goals, and that it is willing to negotiate terms with respect to preferential hiring and will accommodate preferential hiring through its dispatch system. The Union and the Building Trades are well-educated on the concerns raised by Chief Bellerose.

[131] The PLA refers to preferential hiring of Indigenous people which is a broader commitment than if it pertained to First Nations people. However, it stipulates among its goals the fulfillment of the obligations or intents of the opportunities agreements. Besides, the PLA is an option for contractors and does not detract from the bargaining authority of a trade union. There is no evidence that KDM has made any attempt to explore the possibilities of a construction industry certification with the Union. The reservations expressed by Chief Bellerose and Blackwell were not informed by any discussions with the Union, and appeared to have been based on certain preconceived notions.

[132] The dispatch system provides a greater amount of flexibility than was, perhaps, understood by the Employer's representatives. Stipulating qualifications and name hiring are two options available to an employer. As a result of the introduction of the dispatch system, there would be no change in the current composition of the bargaining unit. The current employees would automatically become members of the Union.

[133] For all of the foregoing reasons, the Board has decided that the work being performed by the operators falls within the definition of construction industry, and that the unit of employees is appropriate for collective bargaining.

[134] Due to the Notice of Constitutional Question, the Board will not order a tabulation of the vote at this time. The constitutional question will proceed to a hearing on the dates that were previously scheduled.

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

DATED at Regina, Saskatchewan, this 23rd day of **August, 2021**.

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson