INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING & PORTABLE & STATIONARY, LOCAL 870, Applicant v KDM CONSTRUCTORS LP, Respondent and ATTORNEY GENERAL OF SASKATCHEWAN, Respondent and SASKATCHEWAN BUILDING TRADES COUNCIL, BOILERMAKER CONTRACTORS ASSOCIATION and CLR CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF SASKATCHEWAN INC., Intervenors

LRB File No. 028-20; October 18, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Maurice Werezak and Mike Wainwright

Counsel for the Applicant, International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870:	Crystal L. Norbeck
Counsel for the Respondent, KDM Constructors LP:	Steve Seiferling, Preyanka Prasad (Student-at-law)
Counsel for the Respondent, Attorney General of Saskatchewan:	Katherine Roy, Cheyenne Esmond (Student-at-law)
Counsel for the Intervenor, Saskatchewan Building Trades Council:	Greg Fingas
Counsel for the Intervenors, Boilermaker Contractors Association And CLR Construction Labour Relations Association of Saskatchewan Inc.:	Hugh J.D. McPhail, Q.C.

***The Constitutional Questions Act* – Constitutional Validity of Part VI, Division 13 of *The Saskatchewan Employment Act* – S. 2(d) of *Canadian Charter of Rights and Freedoms* – Freedom of Association.**

Certification pursuant to Construction Industry Division – Representative Employers' Organization – Exclusive Bargaining Agent for Unionized Employers – Binding Collective Agreement.

Employer Asserts Protection of s. 2(d) of *Charter* – Purpose of s. 2(d) in Labour Relations – Empowering Employees – Employer Not a Rights-Holder – *Big M Drug Mart/CEMA* not Applicable – Constitutional Question Dismissed.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On February 18, 2020, the International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 [Union] filed a certification

application related to a bargaining unit of operating engineers working for KDM Constructors LP [Employer]. The Union requested a certification order pursuant to the construction industry provisions contained within Part VI, Division 13 of *The Saskatchewan Employment Act* [Act]. The certification application was placed in abeyance, on the parties' request, pending the conclusion of a related matter, *Construction & General Workers Local Union, No. 180 v KDM Constructors Inc.*, 2021 CanLII 25131 (SK LRB).

[2] The decision in this latter case was issued on March 30, 2021. The application on behalf of the operating engineers was then set for a hearing to be held in June, 2021. That hearing proceeded, and in the course of the hearing, the Union confirmed that it was specifically not seeking a certification order under the general certification provisions contained in Part VI. Therefore, a main issue to be determined was whether the work being performed by the proposed bargaining unit members fell within the construction industry, as defined in section 6-65 of the Act. If it did, and if the proposed unit was appropriate for collective bargaining, then the construction industry provisions would apply.

[3] Part way through the Union's case and while the hearing was adjourned to be continued at a later date, the Employer filed and served a notice of constitutional question pursuant to *The Constitutional Questions Act, 2012,* SS 2012, c C-29.01 [*The Constitutional Questions Act*]. By way of this notice, the Employer alleges that Part VI, Division 13 of the Act offends the protection for freedom of association contained in s. 2(d) of the *Charter*. The Employer seeks a declaration of invalidity in respect of the relevant provisions as a result of the alleged contravention.

[4] The Employer says that, should it be found to be a unionized employer, it will be compelled to rely on the representative employers' organization as its exclusive bargaining agent, and will be automatically bound by the existing collective bargaining agreement, which was negotiated without its involvement or input, and without regard for the existing terms and conditions of employment in the relevant workplace.

[5] These concerns are summarized at page 1 of the notice of constitutional question:

> *TAKE NOTICE that an application will be made to the Saskatchewan Labour Relations Board, in LRB File No. 028-20 that Division 13 of Part VI of the Saskatchewan Employment Act (The "Act") be struck down pursuant to s.24(1) of the Canadian Charter of Rights and Freedoms, to the extent that those sections automatically impose a [sic] both a bargaining agent, and collective agreement, on an employer, without providing the employer with an opportunity choose [sic] its bargaining agent, or to bargain for itself, as well as prohibiting the employer from bargain [sic] collectively with respect to terms and conditions of work. Division 13 of Part VI of the Act, including without limitation Sections 6-69 and 6-70 of the*

> *Act, serve to impose both a bargaining agent and a collective agreement on an employer, such as KDM Constructors LP ("KDM") without allowing the employer to choose its own bargaining agent, and engage in collective bargaining, and such an imposition of a bargaining agent and a collective agreement is a violation of the constitutional right to bargain collectively.*
> *…*

[6] The Employer states that its entire right to collective bargaining has been eliminated by the Act, through the imposition of the provincial agreement. The Board should strike down the provisions contained within Division 13 to the extent that they automatically impose both a bargaining agent and a collective agreement on an employer and do not provide the employer with the ability or right to collectively bargain terms and conditions of work.

[7] The hearing of the certification application continued in July. The Union raised concerns with the delay occasioned by the notice of constitutional question. However, both the Union and the Employer, as well as the Attorney General, asked the Board to provide a copy of the notice to a number of potentially interested entities, consisting of the representative employers' organizations [REOs] in Saskatchewan and the Saskatchewan Building Trades Council [Building Trades].

[8] On July 16, the Board scheduled separate, tentative dates for the hearing of the constitutional question, pending the Board's determination on the certification application. In the course of scheduling these dates, the Board communicated to the parties that the REOs and the Building Trades would be notified of the hearing dates, that the hearing was to be held in September and not earlier due to the request to provide notice to these entities, and that the Board expected to proceed on the dates that were scheduled. The Union communicated that its preference for either a virtual hearing or an in-person hearing depended only on whether greater delay would be caused by either format. The matter was scheduled to be heard in-person in Regina.

[9] On August 23, 2021, the Board issued its decision in *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v KDM Constructors*, 2021 CanLII 77359 (SK LRB), finding that the work being performed fell within the construction industry and the proposed unit was appropriate for collective bargaining.

[10] In the meantime, the Board had provided notice to the requested entities. It then received intervenor applications from the Building Trades, the Boilermaker Contractors' Association [Boilermaker Contractors], and CLR Construction Labour Relations Association of Saskatchewan

Inc. [CLR]. On August 26, 2021, the Board issued orders granting intervenor status to each of the three applicants (Building Trades, Boilermaker Contractors, and CLR), as follows:

> *…to provide evidence, including through cross-examination of witnesses, and argument with respect to the constitutional question, but not so as to duplicate the evidence provided by other parties, or to delay the hearing of the matter.*

[11] Following the issuance of these orders, the Employer requested an adjournment on the basis that two days was insufficient time for a hearing now that three intervenors were involved, and for the purpose of scheduling the matter in a block of five days. The request for an adjournment was denied. In denying the adjournment, the Board reminded the parties that the intervenor orders were clear and stated that the matter would proceed on the days that were scheduled. The Employer made a subsequent request to place the matter on motions day to set dates in addition to those which were scheduled. That request was denied.

[12] On September 15, 2021, the Attorney General communicated to the Board that they intended to raise a preliminary question with respect to the application of s. 2(d) to corporations, and indicated that they would be filing as part of the Attorney General's case a book of Hansard transcripts and related, publically available documents. The Employer then made an additional request for an adjournment, stating in part, that the Attorney General was proposing to enter evidence by way of Hansard transcripts and related historical documents without calling a witness, which was inappropriate, and that it needed more time to review these materials in order to prepare its case. In response to the Employer's position, the Attorney General opted to remove a couple of reports from the anticipated materials.

[13] The Board convened a conference call prior to the hearing of the constitutional matter to discuss the request to argue a preliminary question and the request for an adjournment, among other matters. The Board sought submissions as to why it should waive the requirements set out in the Regulations with respect to an application for summary dismissal. The Attorney General indicated that they did not plan to argue the preliminary question at the outset of the hearing. The Union, who adopted the preliminary question, argued to the contrary that the preliminary question raised a straightforward legal issue, which for reasons of expediency should be heard at the outset of the hearing, but was not equivalent to an application for summary dismissal in the usual sense. The Employer argued that it had the right to call evidence with respect to the constitutional issue.

[14] The Board decided to hear and decide the preliminary matter at the outset of the hearing, on the dates that were set aside. It concluded that the question raised a legal issue, but if it became

apparent that evidence was necessary to decide the question, then it would move on to the substantive application. Based on the Employer's submissions, the Board was not persuaded that there was any prejudice to the Employer in proceeding in this manner. The Employer could not be found to have been taken by surprise by the argument, and it did not provide any concrete indication that it was prejudiced by the failure to comply with the timelines set out in the Regulations. The Board had communicated to all parties that it expected that they would endeavour to conclude the matter, inclusive of legal arguments, within the time that had been set aside.

[15] All parties understood that if the Board found that the Employer was not entitled to make a claim pursuant to s. 2(d), then that would be the end of the matter.

[16] With the consent of all of the parties, the Board changed the format of the hearing to virtual. At the hearing, the Board received written argument on the preliminary question from the Employer, the Union, and the Attorney General, and oral argument from all of the parties. After reviewing and hearing the arguments of the parties, the Board decided to adjourn the remainder of the hearing pending the issuance of this decision.

Arguments:

[17] The Board will pause here to summarize the parties' arguments. The central tenet of the Employer's argument is that Part VI, Division 13 infringes its right to collective bargaining, pursuant to s. 2(d) of the *Charter*. The Employer relies on what it describes as a modern, expansive view of freedom of association, beginning with the decision in *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 SCR 391 [*B.C. Health Services*].

[18] The Employer says that the freedom of association includes, first, the freedom to choose a bargaining agent and, second, the right to collective bargaining. The *Charter* can apply to corporations and, in fact, the Supreme Court has found that s. 2(d), specifically, extends its protection beyond the individual person. Each of the Employer, the REO, and the Union should be afforded equal protection to the procedural right to collective bargaining. There is no distinction between these entities that would justify any other approach.

[19] The Employer urges the Board to undertake a purposive interpretation of s. 2(d), including by adopting the direction in *B.C. Health Services* to interpret the provision "in a way that maintains its underlying values and its internal coherence" (para 80). The Board should perform this purposive analysis rather than inquiring into the nature of the parties. Alternatively, if the Board

finds that it is necessary to consider the nature of the parties, then it should allow the Employer to lead evidence on the collective goals of the three First Nations that comprise the majority ownership of the Employer entity.

[20] The arguments of the Union, Attorney General, and intervenors, while varied, arrive at the same destination. Each concludes that the Employer is not a rights-holder pursuant to s. 2(d). In support of this conclusion, the Attorney General focuses on the fact that the Employer is a corporation. The Union also argues that the Employer's corporate status prohibits it from benefiting from the *Charter* guarantee, but explains that its status as a corporate *employer* is key. It is the power imbalance between employees and employers that the *Charter* guarantee is intended to rectify. The Employer's claim to the protection afforded by s. 2(d) does not align with this purpose.

[21] The intervenors focus not on the Employer's corporate status, but rather, on its status as an employer claiming to benefit from the *Charter* guarantee, which is intended, first and foremost, to protect employees. For an employer entity, it is not the specific type of corporation that is of primary importance. An employer entity that takes different forms, such as that of sole proprietorship, should not be found to have greater or lesser protection pursuant to s. 2(d).

[22] The Union and the intervenors acknowledge that a union can be a corporation, but argue that the essence of a union's corporate identity is distinguishable from that of an employer.

Preliminary Matters:

[23] Having summarized the parties' arguments, there are a few preliminary matters which bear mentioning. The first is the matter of the Board's jurisdiction. In short, where a tribunal has the jurisdiction to decide questions of law arising from a statutory provision it is presumed to have the jurisdiction to consider the constitutional validity of that provision, as long as the latter jurisdiction has not been found to have been excluded from the scope of its authority: *Nova Scotia (Workers Compensation Board) v Martin*, [2003] 2 SCR 504 [*Martin*] at para 36. Such jurisdiction has not been excluded from the scope of this Board's authority, and therefore the Board may proceed.

[24] The second is the matter of the Employer's requested remedy. The Employer seeks a declaration of invalidity. While the Board has jurisdiction to consider the constitutional validity of a statutory provision, like all administrative tribunals, the Board does not have jurisdiction to grant a general declaration of invalidity. A finding that a provision is constitutionally invalid pertains only to the matter before it, and is not binding on other decision-makers: *Martin*, at para 31.

[25] Lastly, the Employer has relied on the wrong remedial provision to accomplish the stated objective. The remedial provision cited by the Employer, s.24(1), provides for individual remedies. The appropriate provision is s. 52(1), which states that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. As no party has suggested that this error prohibits the Board from considering the preliminary question, the Board will proceed to do so.

Analysis and Decision:

[26] Next, it is necessary to frame the question before the Board. The essence of the inquiry is whether a corporate entity, such as the Employer, is a rights-holder pursuant to s. 2(d), and if it is not, then whether it has any other claim to the protection of s. 2(d) of the *Charter*. If the Employer is a rights-holder, then it has standing as of right to bring the constitutional question before the Board, and the matter will proceed. If the Employer is not a rights-holder, then it may be necessary to consider whether it has standing on some other basis. If the Employer has no standing to raise the constitutional question, then there is no arguable case, and the Board may dismiss the constitutional question, pursuant to s. 6-111(1)(p) of the Act.

[27] In their submissions, the Union and the Attorney General rely on the Supreme Court of Canada's decision in *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 (CanLII) [*Quebec*], holding that s. 12 of the *Charter*, which provides that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment", does not apply to corporations.

[28] *Quebec* conveys a fundamental point, applicable to the circumstances currently before the Board. That is, in order to claim the protection offered by a provision of the *Charter*, a claimant has to establish that it has an interest that falls within the scope of the guarantee provided by that provision. To determine the scope of that guarantee, it is necessary to interpret the provision using the purposive approach:

> *[7] To claim protection under the Charter, a corporation —— indeed, any claimant —— must establish that "it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision": R. v. CIP Inc., 1992 CanLII 95 (SCC), [1992] 1 S.C.R. 843, at p. 852. In order to make that determination, the court must seek to discern the scope and purpose of the right by way of a purposive interpretation, that is, "by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter": Big M Drug Mart, at p. 344; see also Poulin, at para. 32. The approach is "generous, purposive and contextual" and should be done in a "large and liberal manner": R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 15; Caron v. Alberta, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 35.*

[29] In considering whether the Employer has an interest falling within the scope of the guarantee, the Board must seek to discern the scope and purpose of the right by reference to the character and the larger objects of the *Charter*, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.

[30] Although the approach is intended to be a generous one, it is confined by the purpose of the provision, and should not result in a distortion of that purpose. The majority in *Quebec* explains why this is so:

> *[9] This is so because constitutional interpretation, being the interpretation of the text of the Constitution, must first and foremost have reference to, and be constrained by, that text. Indeed, while constitutional norms are deliberately expressed in general terms, the words used remain "the most primal constraint on judicial review" and form "the outer bounds of a purposive inquiry": B. J. Oliphant, "Taking purposes seriously: The purposive scope and textual bounds of interpretation under the Canadian Charter of Rights and Freedoms" (2015), 65 U.T.L.J. 239, at p. 243. The Constitution is not "an empty vessel to be filled with whatever meaning we might wish from time to time": Reference re Public Service Employee Relations Act (Alta.), 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313 ("Re PSERA"), at p. 394; Caron, at para. 36. Significantly, in Caron, the Court reiterated this latter passage and reasserted "the primacy of the written text of the Constitution": para. 36; see also para. 37.*
>
> *[10] Moreover, while Charter rights are to be given a purposive interpretation, such interpretation must not overshoot (or, for that matter, undershoot) the actual purpose of the right: Poulin, at paras. 53 and 55; R. v. Stillman, 2019 SCC 40, at paras. 21 and 126; R. v. Blais, 2003 SCC 44, [2003] 2 S.C.R. 236, at paras. 17-18 and 40; Big M Drug Mart, at p. 344. Giving primacy to the text — that is, respecting its established significance as the first factor to consider within the purposive approach — prevents such overshooting.*

[31] By giving primacy to the text, the Board is less likely to overshoot the actual purpose of the guarantee. For this reason, the text is to be treated as the first indicator of purpose. The text at issue in this case, including the surrounding clauses, reads as follows:

> *2 Everyone has the following fundamental freedoms:*
> *(a) freedom of conscience and religion;*
> *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*
> *(c) freedom of peaceful assembly; and*
> *(d) freedom of association.*

[32] As far as s. 2(d) is concerned, the French version of the provision is equivalent to the English.

[33] The use of the word "everyone" is not conclusive as to whether a guarantee extends or does not extend to corporations but, instead, should be considered in context. The authors of *The Law of the Canadian Constitution*[1], Guy Régimbald and Dwight Newman, explain (at 562):

> *18.6 Whether moral persons or corporations hold Charter rights is not as specifically defined in the text as it could have been. The drafting history shows that the term "every individual" in section 15 was adopted, and indeed substituted for "everyone", so as to ensure that section 15 would be held only by natural persons and thus to preclude equality rights claims by corporations. However, there are other rights where the term "everyone" is used that may not apply to corporations anyway….*

[34] The authors provide examples of rights which do not to belong to corporations, including the rights pursuant to ss. 7 (life, liberty, security), 9 (arbitrary detention), 10 (right to counsel), and 11(c) (compelled as witness) of the *Charter*. By contrast, the guarantee of freedom of religion, which is found at s. 2(a), is more nuanced:

> *…Section 2(a) rights to freedom of religion present a more complex instance. Early on, there was a holding that seemed to say that corporations would not hold section 2(a) rights to freedom of religion. However, section 2(a) rights can clearly be held by a religious group. One of the cases to affirm this latter principle most clearly, Loyola High School, also saw the Supreme Court of Canada engage at length with the possibility of corporations established for specifically religious purposes holding religious freedom rights.*[2]

[35] They conclude that, in a given case, it is necessary to analyze "carefully in all of the relevant circumstances" whether "everyone" includes a corporation, for the following reasons:

> *…although there are reasons for caution in not allowing corporations to claim rights that are clearly not appropriate for them to claim, there are also reasons to ensure that the courts are sufficiently open to corporations claiming rights. Corporations and other moral persons do, after all, further the interests of natural persons and where individuals can best pursue certain interests in life within such structures, they may well have rights claims that are similarly best protected by those vehicles…*[3]

[36] This conclusion is consistent with the purposive approach to interpreting the *Charter*, as described by the majority in *Quebec*.

[37] As explained by the majority in *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 SCR 3 [*Mounted Police*], the purpose of s. 2(d) is well-established:

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[1] Guy Régimbald and Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed, (Toronto: LexisNexis Canada, 2017).
[2] *Ibid.*, at 562.
[3] *Ibid.*, at 563.

> *[58] This then is a fundamental purpose of s. 2(d) — to protect the individual from "state-enforced isolation in the pursuit of his or her ends": Alberta Reference, at p. 365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.*

[38] Put succinctly, the purpose of s. 2(d) is to empower vulnerable individuals and groups by guaranteeing their freedom to associate with others.

[39] In this case, the Employer claims to benefit from the guarantee within the context of labour relations, and specifically collective bargaining. Freedom of association has a particular application to labour relations matters, arising from the underlying purpose of s. 2(d) and the inherent power imbalance between employees and employers. The recognition of this power imbalance is the driving force behind the principled application of the guarantee in cases that come to courts and tribunals for decision.

[40] The majority in *Mounted Police* relies on this fundamental understanding of labour relations to ground and develop its reasoning. According to the majority, the guarantee of freedom of association empowers individuals by enabling them to amplify their voices through the strength of the collective. Individuals are able to achieve through the collective what they might otherwise not be capable of achieving as individuals: *Mounted Police*, at paras 55-57, 62. The guarantee protects "the right of employees to meaningfully associate in the pursuit of collective workplace goals" and "functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power": *Mounted Police*, at paras 67, 70.

[41] In *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (CanLII), [2015] 1 SCR 245 [*Saskatchewan Federation of Labour*], the majority confirmed the purpose of s. 2(d) in the context of collective bargaining:

> *[28] The recognition of the broader purpose underlying s. 2(d) led the Court to conclude in Health Services that "s. 2(d) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining" (para. 87). In reaching this conclusion, McLachlin C.J. and LeBel J. held that none of the majority's reasons in the Alberta Reference which had excluded collective bargaining from the scope of s. 2(d) "survive[d] scrutiny, and the rationale for excluding inherently collective activities from s. 2(d)'s protection has been overtaken by Dunmore" (Health Services, at para. 36).*

> *[29] This Court reaffirmed in Fraser that a meaningful process under s. 2(d) must include, at a minimum, employees' rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith.*
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> *[30] The evolution in the Court's approach to s. 2(d) was most recently summarized by McLachlin C.J. and LeBel J. in Mounted Police, where they said:*
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> > *The jurisprudence on freedom of association under s. 2(d) of the Charter . . . falls into two broad periods. The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purposive approach to the guarantee.*
> > *. . .*
> > *. . . after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by "the historical origins of the concepts enshrined" in s. 2(d) . . . . [paras. 30 and 46]*
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> *[31] They confirmed that freedom of association under s. 2(d) seeks to preserve "employee autonomy against the superior power of management" in order to allow for a meaningful process of collective bargaining (para. 82).*

[42] What this case law makes clear is that the purpose of s. 2(d) is to promote employee empowerment relative to the superior power of an employer. *Saskatchewan Federation of Labour* relies on this recognition of purpose in finding that there is a constitutionally-protected right to strike:

> *[55] Striking — the "powerhouse" of collective bargaining — also promotes equality in the bargaining process: England, at p. 188. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. In the Alberta Reference, Dickson C.J. observed that…*

[43] Thus, it makes sense that the guarantee, interpreted and applied purposively, stops short of protecting all associational activity, as per *Mounted Police*:

> *[59] The flip side of the purposive approach to freedom of association under s. 2(d) is that the guarantee will not necessarily protect all associational activity. Section 2(d) of the Charter is aimed at reducing social imbalances, not enhancing them. For this reason, some collective activity lies outside the Charter's protection. For example, associational activity that constitutes violence is not protected by s. 2(d): Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 107.*

[44] By failing to appreciate the power imbalance that underlies the provision's purpose, one risks falling into error:

> *[80] … The guarantee entrenched in s. 2(d) of the Charter cannot be indifferent to power imbalances in the labour relations context. To sanction such indifference would be to*

> *ignore "the historical origins of the concepts enshrined" in s. 2(d): Big M Drug Mart, at p. 344*

[45] The majority in *Saskatchewan Federation of Labour* describes the consequences of such an error:

> *[56] In their dissent, my colleagues suggest that s. 2(d) should not protect strike activity as part of a right to a meaningful process of collective bargaining because "true workplace justice looks at the interests of all implicated parties" (para. 125), including employers. In essentially attributing equivalence between the power of employees and employers, this reasoning, with respect, turns labour relations on its head, and ignores the fundamental power imbalance which the entire history of modern labour legislation has been scrupulously devoted to rectifying. It drives us inevitably to Anatole France's aphoristic fallacy: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."*

[46] Clearly, it is an error to ignore the fundamental power imbalance that has been repeatedly and consistently relied upon in interpreting and applying the guarantee, and to therefore attribute equivalence between the power of employees and employers.

[47] Both the Union and the Attorney General rely on *Communications, Energy and Paperworkers Union of Canada, Local 2121 v Hibernia Management and Development Company Limited*, 2014 NLLRB 10, 2014 NLLRB 10 (CanLII) [*Hibernia*] to suggest that the s. 2(d) guarantee extends only to individuals and not to corporations. The circumstances described in *Hibernia* are similar to those in the current case. In *Hibernia*, the legislation imposed a representative employers' organization on the employers of employees working on an offshore petroleum production platform. The Newfoundland and Labrador Labour Relations Board found that the applicant did not have a constitutionally-protected freedom of association because it was a corporation. In arriving at this conclusion, the Board applied the following reasoning:

> *273. Prior to analysing whether there is a Charter-protected right of freedom not to associate, which the Board would have to read into the Charter, the Board must first determine whether Spectrol has a constitutionally-protected right of freedom of association. The Charter states that "everyone" has the right to a list of freedoms. Included in that list is the freedom of association. Also included are the rights to expression, religion, thought, belief and peaceful assembly. Generally, the courts have interpreted these fundamental rights as rights of the individual. There was no jurisprudence presented to support the argument that a corporation has a right to freedom of association or an implied right to not associate. Justice LeBel stated at para 175 of Advance Cutting & Coring [2001] 3 S.C.R. 209, 2001 SCC 70:*
>
> > *This Court has adopted the view that, although the right of association represents a social phenomenon involving the linking together of a number of persons, it belongs first to the individual. It fosters one's self-fulfillment by allowing one to develop one's qualities as a social being. The act of engaging in legal activities, in conjunction with others, receives constitutional protection. The focus of the analysis remains on the individual not on the group. (emphasis added)*

[48] The Employer argues that *Hibernia* is flawed in that it relies on the reasoning of LeBel J. in *Advance Cutting & Coring*, [2001] 3 SCR 209, 2001 SCC 70 [*Advance Cutting*], which has since been eclipsed by other case law.

[49] Indeed, it is overly simplistic to describe s. 2(d) as simply guaranteeing individual rights. This characterization has long been overtaken by judgments such as *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 SCR 1016 [*Dunmore*] and *B.C. Health Services*. The majority in *Mounted Police* provided a succinct explanation of the evolution in this understanding, citing the reasons of L'Heureux-Dubé J. in *Advance Cutting*:[4]

> *[62] Section 2(d), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually. It follows that the associational rights protected by s. 2(d) are not merely a bundle of individual rights, but collective rights that inhere in associations. L'Heureux-Dubé J. put it well in Advance Cutting:*
>
> > *In society, there is an element of synergy when individuals interact. The mere addition of individual goals will not suffice. Society is more than the sum of its parts. Put another way, a row of taxis do not a bus make. An arithmetic approach to Charter rights fails to encompass the aspirations imbedded in it. [para. 66]*

[50] The associational rights protected by s. 2(d) are collective rights that may be vested in associations. However, the recognition of a collective aspect to s. 2(d) should not open the door to an erosion of the *Charter* guarantee. In fact, the Supreme Court in *Mounted Police* envisioned just the opposite:

> *[65] It has also been suggested that recognition of a collective aspect to s. 2(d) rights will somehow undermine individual rights and the individual aspect of s. 2(d). We see no basis for this contention. Recognizing group or collective rights complements rather than undercuts individual rights, as the examples just cited demonstrate. It is not a question of either individual rights or collective rights. Both are essential for full Charter protection.*

[51] It must be remembered that the generous approach to the guarantee is "centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by 'the historical origins of the concepts enshrined'" in s. 2(d): *Mounted Police*, at para 46.

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[4] Justice L'Heureux-Dubé concurred with the result reached by the majority but wrote separately, in part, about the fundamental purpose of freedom of association.

[52] Where individuals can pursue their interests within a corporate structure, such a vehicle might be the best way of protecting those interests.[5] However, any protection over associational activities or collective rights must be extended in a manner that is consistent with the purpose of the *Charter* guarantee. The collective aspect of s. 2(d) should complement rather than undercut individual rights.

[53] In summary, the *Charter* guarantee that the Employer invokes has developed in response to the historical inequality between employees and employers. It functions so as to empower employees and to reset the balance of power. It is "aimed at reducing social imbalances, not enhancing them": *Mounted Police*, at para 59. To disregard that context is to fall into error and to overlook the fundamental purpose of the guarantee.

[54] The Employer grounds its argument in the belief that the freedom of association applies equally to "both sides". In its view, to extend the guarantee to only one party or another is to create an inequity. However, by suggesting as much, the Employer attributes equivalence between the power of employees and employers. This approach "turns labour relations on its head, and ignores the fundamental power imbalance which the entire history of modern labour legislation has been scrupulously devoted to rectifying": *Saskatchewan Federation of Labour*, at para 56. It distorts the purpose of the guarantee.

[55] The Employer also suggests that the reciprocal nature of the statutory obligation to bargain in good faith shows that procedural bargaining rights cannot be extended only to one side of the table. In making this argument, the Employer mistakenly equates the reciprocal nature of the statutory obligation to engage in good faith collective bargaining to a reciprocal *Charter* right to collective bargaining. In short, the existence of a statutory right does not ground a constitutional guarantee.

[56] The Employer has suggested that it should be entitled to present evidence about the collective goals of the three First Nations who comprise the majority ownership of the Employer entity. The Board sees no reason to receive evidence on this point. Having applied a purposive interpretation to the *Charter* provision, and having concluded that the underlying purpose of the guarantee being invoked is to promote employee empowerment through the collective bargaining process, it is clear that it does not extend to the Employer. The Employer is not a vehicle through which individual employee interests are to be protected in collective bargaining. Although some

[5] Régimbald and Newman, s*upra*, at 563.

entities which present in corporate form may hold *Charter*-protected collective bargaining rights (as corporations), this entity does not.

[57] The next question is whether there is any other basis upon which the Employer can claim direct interest standing. To this end, the Employer relies on *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 1985 CanLII 69 (SCC) [*Big M Drug Mart*]. *Big M Drug Mart* stands for the proposition that a party who is charged with an offense has standing to rely on a *Charter* right to challenge the constitutionality of legislation which is said to have been offended. In *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 [*CEMA*], the rule was extended to apply to civil proceedings in cases in which a corporation is involuntarily brought before the courts. Therefore, the rule applies both where a corporation has been charged with a criminal offence and in the context of a corporation defending against a civil suit enforcing a regulatory scheme.[6]

[58] The Employer suggests that it has been compelled to come before the Board as a result of the certification application. However, the Employer is not a defendant in a civil proceeding instigated by the state or a state agency pursuant to a regulatory scheme.

[59] Even if the Employer could be found to fall within the *CEMA* exception, the Employer's reliance on the exception rests on a faulty premise. The Employer alleges a violation of its own rights, stating that it has been directly affected by the alleged *Charter* violation. It does not allege a violation of the rights of any other person who actually is a rights-holder.

[60] If a party wishes to rely on the *CEMA* exception then it has to assert that the legislation breaches *Charter* rights that belong to a person who is a rights-holder. The Employer does not. Therefore, it cannot benefit from the application of the *CEMA* exception.

[61] Relatedly, the *CEMA* exception does not apply to a law that is aimed only at corporations. The logic underlying this exclusion is the same – the applicant must assert that the legislation breaches *Charter* rights that belong to a person who is a rights-holder. Régimbald and Newman explain:

> *It would not apply, however, to a law that was aimed only at corporations, as there would then be no Charter breach against others on which the corporation would be arguing the unconstitutionality of the law…*[7]

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[6] *Ibid.*, at 579.
[7] *Ibid.*, at 580.

[62] The imposition of the exclusive bargaining agent is aimed only at employers, and not at unions or employees. The bargaining agent is imposed only if a union is successful in bringing an application for certification, and if a majority of eligible employees votes in favour of the union acting as the exclusive bargaining agent. In this respect, the impugned law is aimed only at employers, and therefore there can be no *Charter* breach against others on which the Employer can rely to argue its unconstitutionality.

[63] The Employer has not applied for standing to invoke a *Charter* right on any other basis, such as public interest standing.

[64] The Board has concluded that the Employer is not a rights-holder pursuant to s. 2(d) of the *Charter*, and does not have standing. It is plain and obvious that the constitutional question will not succeed. For all of these reasons, the constitutional question is dismissed, pursuant to s. 6-111(1)(p) of the Act.

[65] The following Orders will issue:

1. The Constitutional Question filed by KDM Constructors LP is dismissed;

2. The ballots held in the possession of the Board Registrar pursuant to the Direction for Vote issued on February 25, 2020, in the within proceedings are to be tabulated in accordance with *The Saskatchewan Employment (Labour Relations Board) Regulations*.

3. The result of the vote is to be placed in Form 24, and that form is to be advanced to a panel of the Board for its review and consideration.

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

DATED at Regina, Saskatchewan, this **18th** day of **October, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson