Saskatchewan
Labour Relations Board

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant and THE CORPS OF THE COMMISSIONAIRES, NORTH SASKATCHEWAN DIVISION, Respondent

LRB File No. 139-19, 253-19 & 264-19; February 26, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Shawna Colpitts and Lisa Poissant

Counsel for the Applicant, United Food and Commercial Workers Union Local 1400:	Heath Smith
Counsel for the Corps of the Commissionaires, North Saskatchewan Division:	Andrea Rohrke and Bonnie Cherewyk

Summary Dismissal – Timeliness – Alleged Delay filing Unfair Labour Practice Application – Sections 6-111(3) and (4) – 90-day Period – Discoverability – Application filed within 90-day period – Delay not Established.

Unfair Labour Practice Application – Payment of Union dues – Section 6-43 – Employee Request in Writing is Prerequisite – No Employee Request – No Collective Agreement in Evidence – Not Sufficient Evidence of Union Security Clause – Application pursuant to section 6-43 dismissed.

Unfair Labour Practice Application – Allegations of Breach contrary to sections 6-62(1)(b), (d), (r) – Interference with Union Predicated on Breach of section 6-43 – No Collective Agreement in Evidence – No Evidence of Open Period pursuant to section 6-26 – No argument on clause 6-62(1)(r) – Application pursuant to sections 6-62(1)(b), (d), (r) dismissed.

Application to Cancel or Amend Certification Order based on abandonment – Section 6-16 – Significant Period with no employees in Bargaining Unit – Period of no employees not Relevant to Calculation of Period of Inactivity – Prior Period not Relevant – Earliest Start to Period of Inactivity in July 2016 – Period of Inactivity shorter than three years – Application to Cancel dismissed.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to three applications between the United Food and Commercial Workers, Local 1400 [Union] and the Corps of the Commissionaires, North Saskatchewan Division [the Corps]. These

applications consist of an unfair labour practice application, an application to cancel a certification order, and an application to summarily dismiss.

[2] The Corps is a non-profit organization founded to provide employment opportunities to veterans of the military and police forces and with a modern mandate that includes both veteran and civilian employees. A large portion of the Corps' revenue goes back to the employees. Among all of the services it provides, the security industry is the most prevalent. The Union is certified, pursuant to the certification order dated March 26, 2002, as the exclusive bargaining agent on behalf of the employees of the Corps providing services with respect to the City of Saskatoon asset management division whose principal place of work is City Hall, Frances Morrison Library, J.S. Wood Branch Library and Avenue P Greenhouses, in Saskatoon.

[3] The certification order was issued pursuant to the decision in *United Food and Commercial Workers, Local 1400 v Corps of Commissionaires*, [2002] Sask LRBR 188 [*Corps No. 1*].[1] The Board found that there was deemed to have been the sale of a business pursuant to section 37.1 of *The Trade Union Act* from Inner-Tec Security Consultants Limited to the Corps, the Corps was bound by the applicable certification order dated April 24, 1991, and the Corps was bound by the collective agreement between Inner-Tec Security Consultants Limited and the Union, which agreement shall be in force for all employees in the bargaining unit [*Inner-Tec Agreement*]:

> *(a) that there is deemed to have been the sale of a business for the purposes of s.37.1 of The Trade Union Act from Inner-Tec Security Consultants Limited to the Respondent, The Corps of Commissionaires, North Saskatchewan Division, with respect to the provision of security services to the City of Saskatoon asset management division and, from and after August 21, 2000, the Respondent is bound by the certification order dated April 24, 1991 with respect to Inner-Tec Security Consultants Limited and by the collective agreement between Inner-Tec Security Consultants Limited and the Applicant, which collective agreement shall be the agreement in force for all employees in the bargaining unit described in paragraph (b):*
>
> *(b) that all employees of the Respondent providing services with respect to the City of Saskatoon asset management division whose principal place of work is City Hall, Frances Morrison Library, J.S. Wood Branch Library and or Avenue P Greenhouses, in Saskatoon, Saskatchewan, are an appropriate unit of employees for the purpose of bargaining collectively;*
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> *(c) that the Applicant, a trade union within the meaning of The Trade Union Act, represents a majority of employees in the appropriate unit of employees set out in paragraph (b);*
>
> *[…]*

[1]LRB File No. 276-00.

[4] Throughout these Reasons, the sites mentioned in clause (b) of the certification order will be referred to as the City Sites.

[5] The Board also ordered the Corps to bargain collectively with the Union and found that the Corps had committed an unfair labour practice by failing or refusing to bargain with the Union.

[6] On June 14, 2019, the Union filed the unfair labour practice application which is central to the current dispute. In that application, the Union alleges that the Corps has neither collected nor paid dues to the Union since the certification order was issued, and has thereby violated sections 6-62(1)(b), (d), and (r), and section 6-43 of *The Saskatchewan Employment Act* [Act].

[7] The Corps filed a reply to that application, stating that, from March 26, 2002 to May 7, 2019, the Union had made no attempts to enforce any bargaining rights nor to collect union dues from the Corps. Alternatively, the Union has abandoned its bargaining rights and the workers who would otherwise be subject to the certification order. In the reply, the Corps also suggested that, given the existing successorship rules in the Act, there is no successorship between the Corps and the previous provider of security services, nor any other provider of services since the Act came into force. The Corps did not pursue the successorship argument at the hearing.

[8] On November 15, 2019, the Corps filed the application to cancel the certification order, pursuant to section 6-16 of the Act, for the reasons as outlined in its reply to the unfair labour practice application, alleging that the period of inactivity has lasted for 17 years.

[9] Then, on November 27, 2019, the Corps filed an application to summarily dismiss the unfair labour practice application for reason of delay, pursuant to the 90-day timeline set out in subsection 6-111(3) of the Act.

[10] A Webex hearing in respect of the three applications was held on October 8, 9, and 23, 2020, pursuant to the Board's Covid-19 guidelines. The Board is grateful for the assistance of the parties who filed helpful, written submissions and authorities, all of which the panel has reviewed and considered.

Evidence:

[11] The Board heard evidence from the following witnesses: Danielle Cote [Cote], Human Resources Manager for the Corps; Les Speers [Speers], Director of Operations for the Corps;

Gene Sturby [Sturby], employee; and, Lucia Flack Figueiredo [Figueiredo], Secretary Treasurer of the Union.

[12] Cote has been employed by the Corps for about four years. She was not aware that the Corps was unionized until she received a letter from the Union dated May 7, 2019, requesting maintenance of dues. In early May, the CEO of the Corps, Lorne Gelowitz [Gelowitz], provided Cote with a copy of the letter with the direction to look into the situation. Cote reviewed the organization's records and could find nothing of assistance.

[13] Then, upon receipt of the Union's unfair labour practice application in June, Cote reached out to this Board and retrieved the related certification order. She then performed an extensive search of the company's records and could find no Union documentation. There was no collective agreement on file; no agreement with Inner-Tec; no certification order. She noted that documents that are no longer in use are deleted and destroyed after seven years. She also reached out to the City of Saskatoon and was advised that they had found nothing.

[14] Further to her search, she was not able to determine at what point, after the certification order, the Corps stopped performing services at the City Sites. It does not help that not one of the employees who were working on the City Sites in 2002 is still employed in that capacity. As well, there has been a complete turnover in the Board of Directors and the CEO.

[15] From 2002 (or whenever the Corps left the City Sites) until 2016, the Corps has employed no security guards at the City Sites. In 2016, the Corps was asked to temporarily provide security services to the City Sites to assist with the transition after another company was removed from the sites. The Corps began providing these services during the week of July 10, 2016. The contract was then awarded to another company that was ultimately unable to provide the necessary staff. Both the company that was removed and the second company are certified to this Union. Ultimately, the City awarded the contract to the Corps on October 3, 2016. Since July 2016, the Corps has been the only security company providing services at the City Sites.

[16] After the awarding of the contract in October 2016, there was an announcement on SaskTenders that the Corps was the successful bidder.

[17] Cote had the payroll department run a report from June 1, 2016 to December 31, 2016 to determine the staffing levels on City Sites during that period. Especially at City Hall and Francis Morrison, the staffing was consistent throughout that period. During the temporary service period

prior to October, the staffing was a little less consistent due to the Corps' obligations with respect to other sites.

[18] The City Sites contract is highly desirable. It is high profile and highly visible. Tenders are public documents. As far as bids are concerned, the industry is very competitive and companies are often pitted against one another. When a company is awarded a contract such as this, that information tends to get around. The typical length of a contract is three years.

[19] Cote did a search of the Union's website, including on web archives, for the periods in October 2016 (after the contract was awarded), May 2006, October 2003, and June 2002, and observed that on none of these dates did the Union's website list the Corps.

[20] Cote has never been contacted by the Corps; she had no communication with the Union prior to receiving the letter requesting union dues. She has not reached out to the Union. She has not been provided with a copy of the Inner-Tec Agreement or the amount of the dues. Cote testified that no employees have provided permission to have their dues deducted. She has not provided maintenance of membership on behalf of the organization.

[21] Sturby began working for the Corps in 1995. In 2002, he was working for the Corps but not at the City Sites. He does not recall hearing anything about a union back then. The guards were a close knit group and so he thinks that he should have heard something.

[22] Sturby began working at City Hall in the position of Rover around the time that Mayor Clark was inducted in 2016. The Rover is one of three Commissionaire positions located at City Hall. One of these is located on the second floor; one is located at the main desk in the lobby; and one is the Rover position, which is technically located at a desk in the basement. The desk has a good line of sight and is located close to a Credit Union.

[23] The Rover position is not a stationary position. As Sturby explained, "the Rover did a lot of roving". The Rover's tasks include assisting the other guards in responding to incidents, filling in for other guards in attending to their duties, conducting rounds, and performing continual security checks. As compared to the previous company (which did none), the Corps security guards have done extensive incident reports. It seems that there is always something to deal with – people use City Hall as a public park and the guards are expected to be a presence.

[24] As Sturby explained, "even though that position was the basement…I hardly used it for the reason being that I … was in interaction with the other two managers[.]" When he was at his

desk, he would exchange pleasantries with the bank staff. Even so, they were a pretty quiet bunch.

[25] Prior to this matter, Sturby had no knowledge of the certification order. He does not have a copy of a collective agreement. He does not have a Union card. He has had no contact with the Union. He testified that he did not give his permission to have dues deducted.

[26] Speers has been working with the Corps since 2002. He began as a security guard. At the time, he was not working on the City Sites and had no direct knowledge of the events with the Union.

[27] Speers was the contract manager for the Corps from 2009 until 2013. He applied for the City Sites contract in 2010, 2013, and 2016. The first two bids were unsuccessful. The third was also unsuccessful but, as mentioned, the Corps was ultimately awarded the contract in October. Speers agreed that, from sometime in 2002 until 2016, the Corps employees were not providing services at the City Sites. He also agreed that the industry, being a competitive one within a relatively small urban centre, is such that multiple companies may hold a contract for the same location consecutively over a period of a few years.

[28] In June 2019, Speers was made aware of the certification order. He has had no communication with the Union; no employees have mentioned the Union to him; he has not contacted the Union; he has not remitted dues.

[29] Figueiredo was hired by the Union in 2006 and assumed the role of Secretary Treasurer in 2016. The Union has close to 85 certifications and close to 60 employers, including a number of security companies. The employees of the security industry comprise a significant proportion of the Union’s membership.

[30] It is difficult for the Union to monitor the security industry. There are many sites and significant transition in contracts. Figueiredo explained that the collective agreements in the security industry generally require the employers to report sites on a monthly basis so that the Union can provide service to its members. Unless an employer submits these reports it can be difficult for the Union to remain current with respect to its membership. Figueiredo did not speak specifically to the Inner-Tec Agreement and whether it contained such an obligation.

[31] Not only is monitoring the industry difficult, but servicing the sites is also fraught with difficulties – according to Figueiredo, when a Union representative shows up there is no guarantee

that a security guard will be on site. As a solution to this problem, the Union has held industry-specific group meetings and has managed to nurture activism from within.

[32] Figueiredo began with the Union as a volunteer organizer. In 2002 and 2003, she had no direct involvement with the Corps. However, when she began, she knew the Corps would be difficult to organize. According to Figueiredo, this assumption was borne out. Rather than negotiate a renewal of the collective agreement "suddenly" the Corps was off site after the issuance of the certification order. She suggested that there was an unconfirmed assumption that the Corps did not want to negotiate with the Union in 2002 and that the Corps "abandoned" the sites to avoid the obligations of the collective agreement

[33] The Union represents two of the companies that previously held contracts for the City Sites, including the company that was operating on those sites just prior to July 2016. That company was consistently inconsistent in remitting dues, and so when, in the Spring of 2017, Figueiredo noticed that the Union was no longer receiving dues she did not consider this to be anything out of the ordinary. Figueiredo does not remember when she learned that this company was no longer providing services, but she believes that she was alerted to the fact in the middle of 2017.

[34] After that company left, the Union received no notification about any replacement company. According to Figueiredo, she assumed it was a non-unionized company. Generally, the Union would become aware of a new unionized company on site either because the company had reported in compliance with its obligation contained in the collective agreement or because the Union had begun receiving dues check offs. She did not, however, take any steps to determine who was awarded the contract.

[35] The Union relies on the collective agreement language to plan its site visits. Some agreements allow full access; some do not. Some require scheduled visits. The Credit Union, which is located in the basement of City Hall, is certified to this Union; its membership meetings are scheduled. Generally speaking, Union representatives have a two or three-week rotation on each site.

[36] It was not until May 2019 that Figueiredo says that she realized that the Corps were on site. In May 2019, a Union representative encountered a security guard downtown and, according to Figueiredo, asked the guard if the Corps was providing services at a City site. After she heard of this, Figueiredo proceeded to perform a Google search for the Corps and found Gelowitz and

his contact information online. She decided to send him a letter, dated May 7, 2019, requesting maintenance of membership. The letter states,

> *The Union is remitting the following maintenance of membership request as well as notifying the Employer that the Union is intending to bargain a renewal of the terms and conditions contained within the Collective Agreement that apply to all members of UFCW 1400 as established by the Order of the Labour Relations Board, dated the 26th day of March, 2002.*
>
> *In accordance with Section 6-42 of the Saskatchewan Employment Act, United Food and Commercial Workers Local 1400, which represents the employees in the appropriate unit of employees established by section (b) of the Order of the Labour Relations Board, dated the 7th day of November, 2002, being:*
>
> *…*
>
> *Hereby requests you, the Employer, to carry out the provisions of Section 6-42(1) of the said Saskatchewan Employment Act and to make the following terms effective from and after the date of service thereof:*
>
> 1. *Every employee who is now or later becomes a member of the union shall maintain membership in the union as a condition of the employee's employment.*
> 2. *Every new employee shall, within 30 days after the commencement of the employees' employment, apply for and maintain membership in the union, and maintain membership in the union as a condition of the employee's employment.*
> 3. *Notwithstanding paragraphs 1 and 2, any employee in the bargaining unit who is not required to maintain membership or apply for and maintain membership is* [sic] *the union shall, as a condition of the employee's employment, tender to the union the periodic dues uniformly required to be paid by the members of the union."*
>
> *And to carry out the said terms and provisions until such time as you the Employer, are no longer required by or pursuant to the said Saskatchewan Employment Act to bargain collectively with the said Union.*

[37] Figueiredo explained, in a manner that was both frank and helpful, why she sent this letter:

> *…We don't have a collective agreement with Commissionaires. I don't have the entitlement or the requirement that they report to me what sites they get or what new sites they have. I don't have any check-offs or any information on members. I don't have the ability to have a union rep interview them, go visit them. I don't have those, the union security clause negotiated. I don't have the language to allow for a shop steward on those sites with Commissionaires because we have no collective agreement negotiated. And so my desire was let's get together and start to bargain a collective agreement.*
> *…*

[38] Clearly, the Union does not have access to the members' contact information or their payroll records.

[39] Figueiredo says that the intent of the letter was to request a commencement of collective bargaining. Following the certification order, the parties did not successfully negotiate a collective agreement. It is only after the parties have concluded a collective agreement that the Union distributes the dues structure. Clearly, there are no dues check offs here. Her intention was not

to collect dues from members in the absence of a collective agreement or any benefit to the employees. Nor is there an assigned Union representative.

[40] Figueiredo was asked to account for the omission on the website. According to Figueiredo, Norm Neault has wanted her to update the website for two years, there is no one else to do it, and she does not know how to update this information. There are many errors and omissions on the website. She acknowledged, however, that sometime between June 9, 2002 and October 8, 2003 the website information about security guards was updated.

[41] Figueiredo acknowledged that the Union has not provided the Corps with a copy of the Inner-Tec Agreement. She was not able to find it. She has no knowledge of the Union attempting to enforce the order to collectively bargain.

Arguments of the Parties:

Unfair Labour Practice Application - Union:

[42] After the evidence portion of the hearing, the Union abandoned any claim to dues arising during the period prior to July 2016. The Union says that the Corps' failure to remit dues since July 2016 is an obvious violation of section 6-43 of the Act. It acknowledges that there was no employee request. Where the Union does not have access to employees, the absence of any employee request is to be expected. The Corps claims that the dues are to be found in the collective agreement, but this is not true. The dues are determined by a formula that is not subject to change through negotiation.

[43] Furthermore, the Corps' failure to remit dues is *de facto* interference with the administration of a trade union contrary to clause 6-62(1)(b) of the Act. A failure to provide union dues interferes with the Union's ability to represent members, conduct hearings, perform informational seminars, provide trainings, and perform its duties generally. The failure to provide the informational aspects of maintenance of membership hinder the Union in contacting its members, providing members with information, and canvassing issues, and thereby has a negative impact on the Union's ability to represent its members.

[44] The Corps has also breached clause 6-62(1)(d) of the Act. In the letter, dated May 7, 2019, the Union indicated its intention to bargain a renewal of the terms and conditions contained in the Inner-Tec Agreement, as per the 2002 Order. As of the date that the Union filed the unfair labour practice application, the Corps had not responded to that letter.

[45] The Union did not make any argument in relation to clause 6-62(1)(r) of the Act.

Unfair Labour Practice Application – The Corps:

[46] The Corps denies the allegations in the Union's unfair labour practice application.

[47] First, the Union has failed to identify how the Corps has discriminated or interfered with the administration of the Union pursuant to clause 6-62(1)(b) of the Act.

[48] Second, there is no evidence that the Corps failed to collectively bargain. Even if there were, clause 6-62(7)(b) of the Act is a complete defense to this allegation. The Corps did not know that its employees were represented. Furthermore, the Union did not make a request to collectively bargain; it only indicated its intent. It did not provide a copy of the existing collective agreement; it did not make proposals as to terms. There was no requirement for the Corps to respond to the Union's stated intent to bargain.

[49] Third, none of the employees have ever provided a request in writing for the Corps to deduct dues from their wages, pursuant to subsection 6-43(1). Moreover, there is no indication of the amount of dues owing to the Union, which amount should be set out in the Inner-Tec Agreement, not in the Union's own formula.

[50] The Union failed to outline what specific contraventions it alleges in relying on clause 6-62(1)(r) of the Act.

[51] The Corps also relies on the principle of abandonment as a defense to the Union's claim for dues. It says that the Union has failed to exercise the rights granted to it, and that there are no factors that would excuse its inactivity and lack of use with respect to these rights. The Union has abandoned its bargaining rights and, therefore, has abandoned any claim it might have with respect to dues.

Application to Cancel Certification Order – The Corps:

[52] The Corps' position is that the Union has no representative character with respect to the bargaining unit. In support of this position, the Corps relies on the principles outlined in *International Brotherhood of Electrical Workers, Local 529 v Saunders Electric Ltd*., 2009 CanLII 63147 (SK LRB) [*Saunders*]. In short, there is absolutely no evidence that the Union took any positive steps to enforce the certification order.

[53] Unlike in *Varsteel Ltd. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5917*, 2018 CanLII 127675 (SK LRB) [*Varsteel*], there is no agreement that the Corps is to advise the Union when there are employees within the bargaining unit. Even if the Inner-Tec Agreement contains such an obligation, the Corps had no knowledge of that agreement during the material times.

[54] The Corps also relies on the Alberta Board's reasoning in *IBEW Locals 424 and 254 v Siemens Building Technologies Inc.*, [2004] Alta LRBR 141, 2004 CarswellAlta 492 [*Siemens*], including at paragraphs 132 and 134:

> *132 … In our view, the scheme of the Code, and especially the fundamental requirement that bargaining agents be representative of the employees they hold bargaining rights for, demands that trade unions exercise ordinary prudence and industry in policing their bargaining rights, in detecting employer attempts to avoid those bargaining rights, and in enforcing any existing collective agreement. Serious and prolonged failure to do this will damage and ultimately destroy the representative relationship between union and employees and generate reasonable expectations by employer and employees alike that they operate in a non-union enterprise.*
>
> *…*
>
> *134 If this seems harsh upon a largely innocent bargaining agent, two things need to be said. First, we reiterate that in an adversarial labour relations system, trade unions have at least some obligation to anticipate and defend themselves against employer misrepresentation, concealment and uncommunicativeness. It is, regrettably, not enough to rely on one's rights as they exist on paper and refrain from actively defending them…*

[55] The Corps agrees that there have to be employees in the bargaining unit for the Board to find that there was abandonment. However, the case law does not require that the threshold time period be consecutive. Such a requirement would be unfair. In a case involving standard industry contracts of fewer than three years, there would then be no opportunity to bring an application to cancel a certification order.

[56] If the Board is not persuaded to cancel the certification order, the Corps asks the Board to order a vote to determine the employees' wishes. The Union came to its bargaining rights through a successorship application. None of the people who were employed at that time are employees to this day. Therefore, the Union's position in these proceedings is a product of its own wishes, and not the wishes of the employees. It is appropriate to order a vote of the current employees to determine whether they wish to be represented by this Union.

Application to Cancel Certification Order – Union:

[57] The Corps has greatly overstated the evidence in support of its abandonment argument. While there is no evidence that there was collective bargaining in the earlier period, there is no evidence that there was not. It is entirely possible that the parties met on many occasions but still failed to conclude a collective agreement. Relatedly, there is no evidence that the Union was otherwise inactive in 2002. The only evidence from 2002 is the Board's decision in *Corps No.1*, which demonstrates that the Union was active in challenging the inappropriate conduct of the Corps. The Board can infer nothing from the fact that the Union has never received dues.

[58] More to the point, the Union cannot be found to have abandoned a certification when there are no employees in a bargaining unit. Before abandonment can be found, the Corps must establish that it employed employees within the scope of the certification order during the time period in question. This principle is well established. By extension, if in assessing a claim of abandonment the Board were to take into account the time period during which there were no employees in the bargaining unit, that would be unreasonable. It is also unreasonable to expect union dues to be remitted when there are no employees in the bargaining unit - it was for this reason that the Union abandoned its claim for the relevant time period.

[59] Employee choice must be the governing principle in the assessment of an application to cancel a certification order. Generally, a certification order that has been issued on the basis of the employees' wishes should be cancelled only on the basis of the employees' wishes. The Board should be reluctant, but for exceptional circumstances, to cancel a certification order without testing the Union's support through a decertification application and a related vote.

[60] If the Board were to cancel the certification order in the current circumstances, it would provide an incentive to employers to rotate through contracts with the goal of defeating certifications. Part VI of the Act is not an employers' rights statute. It is a roadmap for working people to acquire and exercise their collective bargaining rights. It is irrelevant whether the prevalence of short term contracts prevents employers from applying to cancel certification orders. Part VI does not exist to facilitate the process of employers overcoming the employees' collective bargaining rights.

[61] For these reasons, the Board should not treat as consecutive the two distinct periods on either side of a lengthy period with no employees in the bargaining unit. The earliest starting point should be July 2016. From this date, the alleged inactivity falls short of the three-year threshold, and the Corps' application must fail.

Application for Summary Dismissal – The Corps:

[62] The Corps asserts that the operating provisions are subsections 6-111(3) and (4), and the test to be applied by the Board, pursuant to those provisions, is well established.

[63] The Act gives the Board discretion to refuse to hear an unfair labour practice application made more than 90 days after the applicant knew or ought to have known of the circumstances giving rise to the allegation. The evidence suggests that the Union ought to have known that the Corps had taken over security services at the City Sites far earlier than it claims to have done so, and relatedly, that the Union ought to have brought its application far earlier than it did.

[64] The Corps submits that, even if a breach did occur, it occurred on or shortly after the Corps took over security services in July 2016. The Union did not bring the unfair labour practice application until June 14, 2019. As the Union representing employees of the previous holder of the City Sites contract, the Union knew or ought to have known that the Corps had employees at the locations subject to the certification order.

[65] In a case involving delay, there is a presumption of prejudice against the responding party. In this case, there is also a clear, practical prejudice. Due to the passage of time, the Corps has lost its ability to make a full answer and defense to the Union's application. Further, the Corps may have negotiated differently with the City if it had known of the certification order. There are no extenuating circumstances to excuse the delay.

[66] If the Board finds that the alleged breach is a continuing one, then the union dues should, at most, be due and owing for the 90 days prior to the date on which the Union brought the application and not from the date of the resumption of services in July 2016. A finding that a breach is a continuing one does not excuse the Union from sitting on its hands.

Application for Summary Dismissal - Union:

[67] The Union relies on the arguable case test and states that it has satisfied that test.

[68] The Union also relies on the discoverability principle. There are strong policy reasons not to create an incentive for employers to operate covertly and attempt to avoid detection from unions with the aim of outrunning a limitation period. The Corps' argument leaves the fate of collective bargaining rights to chance, for example, through a chance encounter with the employees following a long absence. It is unreasonable to expect the Union to monitor sites for the purpose of discovering which employers have been awarded contracts at any given time.

[69] The relevant period is between July 2016 and June 4, 2019, the date when the Union filed its unfair labour practice application. The breach was discovered on May 7, 2019. The application was filed on June 4, 2019, which is well within the 90-day limit. In the alternative, the violation is a continuing one, as the Corps fails each month to remit the union dues.

[70] The Board has discretion to accept the application notwithstanding any issues with timeliness. Even if the Board finds that the Union filed the application late, the Board should allow it to proceed. Whether the Board accepts that the breach was discoverable in July 2016 or May 2019, the Corps has suffered no greater prejudice. Staff turnover does not equate to prejudice.

Applicable Statutory Provisions:

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

> ***6-4****(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> *(2) No employee shall unreasonably be denied membership in a union.*
>
> *. . .*
>
> ***6-16****(1) An application may be made to the board to cancel a certification order by an employee within the bargaining unit or the employer named in the certification order if the union has been inactive in promoting and enforcing its bargaining rights for a period of three years or more.*
>
> *(2) The board shall cancel the certification order if the board is satisfied that the union has been inactive in promoting and enforcing its bargaining rights in the period mentioned in subsection (1).*
>
> *. . .*
>
> ***6-42****(1) On the request of a union representing employees in a bargaining unit, the following clause must be included in any collective agreement entered into between that union and the employer concerned:*
>
> 1. *Every employee who is now or later becomes a member of the union shall maintain membership in the union as a condition of the employee's employment.*
> 2. *Every new employee shall, within 30 days after the commencement of the employee's employment, apply for and maintain membership in the union, and maintain membership in the union as a condition of the employee's employment.*
> 3. *Notwithstanding paragraphs 1 and 2, any employee in the bargaining unit who is not required to maintain membership or apply for and maintain membership in the union shall, as a condition of the employee's employment, tender to the union the periodic dues uniformly required to be paid by the members of the union.*
>
> *(2) Whether or not any collective agreement is in force, the clause mentioned in subsection (1) is effective and its terms must be carried out by that employer with respect to the employees on and after the date of the union's request until the employer is no longer required by this Part to engage in collective bargaining with that union.*

(3) In the clause mentioned in subsection (1), ***"the union"*** *means the union making the request.*

(4) Failure on the part of any employer to carry out the provisions of subsections (1) and (2) is an unfair labour practice.

(5) Subsection (6) applies if:

(a) membership in a union is a condition of employment; and

(b) either:

(i) membership in the union is not available to an employee on the same terms and conditions generally applicable to other members; or

(ii) an employee is denied membership in the union or the employee's membership is terminated for reasons other than the failure of the employee to tender the periodic dues, assessments and initiation fees uniformly required to be paid by all other members of the union as a condition of acquiring or maintaining membership.

(6) In the circumstances mentioned in subsection (5), if the employee tenders payment of the periodic dues, assessments and initiation fees uniformly required as a condition of acquiring and maintaining membership, the employee:

(a) is deemed to maintain membership in the union for the purposes of this section; and

(b) shall not lose membership in the union for the purposes of this section for failure to pay any dues, assessments and initiation fees that are not uniformly required of all members or that in their application discriminate against any member or members.

6-43*(1) On the request in writing of an employee and on the request of a union or union local representing the employees in the bargaining unit, the employer shall deduct and pay in periodic payments out of the wages due to the employee the union dues, assessments and initiation fees of the employee.*

(2) The employer shall pay the dues, assessments and initiation fees mentioned in subsection (1) to the union or union local representing the employee.

(3) The employer shall provide to the union or union local the names of the employees who have given their authority to have the dues, assessments and initiation fees mentioned in subsection (1) paid to the union or union local.

(4) Failure to make payments or provide information required by this section is an unfair labour practice.

. . .

6-62*(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*

. . .

(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;

. . .

(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;

. . .

> *(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.*

Analysis:

Issues:

[72] The Board will proceed to consider the issues raised by the parties, which are summarized as follows:

a. Was the Union's unfair labour practice application filed more than 90 days after the Union knew or ought to have known of the action or circumstance giving rise to the allegations? If so, should the Board dismiss the application for delay?

b. Did the Corps fail to pay dues contrary to section 6-43?

c. Did the Corps interfere with the administration of a labour organization and thereby contravene clause 6-62(1)(b)?

d. Did the Corps fail or refuse to engage in collective bargaining in a manner contrary to clause 6-62(1)(d)?

e. Has the Union abandoned the bargaining unit and should the certification therefore be cancelled?

f. In the alternative, should there be a vote of the employees in the bargaining unit?

Summary Dismissal Application:

> **Was the Union's unfair labour practice application filed more than 90 days after the Union knew or ought to have known of the action or circumstance giving rise to the allegations? If so, should the Board dismiss the application for delay?**

[73] On this issue, subsections 6-111(3) and (4) are the operating provisions:

> ***6-111*** *(3) Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.*
>
> *(4) The board shall hear any allegation of an unfair labour practice that is made after the deadline mentioned in subsection (3) if the respondent has consented in writing to waive or extend the deadline.*

[74] Subsection 6-111(3) provides the Board with discretion to refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or ought to have known of the action or circumstance giving rise to the allegation. As per *United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union Local 1-184 v Premier Horticulture Ltd*., 2019 CanLII 10580 (SK LRB) (para 24), the language of the provision suggests that the Board's analysis should start from the premise that the application should be heard. The Board must also consider relevant jurisprudential principles.

[75] In considering a similar issue, the Board in *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, 2016 CanLII 58881 (SK LRB) [*Sask Poly*], at paragraph 18, outlined the principles to be applied:

> - *Applications alleging an unfair labour practice must be filed within 90 days after the applicant knew or ought to have known about the misconduct giving rise to the allegation (ss.6-111(3)).*
> - *The 90 day limitation period reflects the fact that time is of the essence in addressing labour relations disputes and timely resolution of such disputes is essential to ensuring amicable labour relations in Saskatchewan (Dishaw, at para. 36; Peterson, at para. 29; SGEU, at paras. 13-14).*
> - *It is important to identify with precision when the 90 day limitation commences. Typically, the alleged misconduct will be founded upon a particular fact situation and the clock starts running from that date (SGEU, at para. 29).*
> - *A complaint may be based on a "continuing policy or practice rather than a discrete set of events". This fact makes it more difficult to ascertain the commencement of the 90 day limitation period and may make it easier to justify a delay (Toppin, at para. 29; SGEU, at para. 30).*
> - *The Board will adjudicate applications filed outside the 90 day limitation period provided the other party consents or otherwise waives the application of the limitation period (ss. 6-111(4)).*
> - *Where no such consent or waiver is given, the Board possesses discretion to adjudicate the application (ss. 6-111(3); SGEU, at para. 24).*
> - *When exercising this discretion, the Board should apply the non-exhaustive list of counter-vailing factors identified in Toppin (SGEU, at paras.26-27; Toppin, at para. 30)*
> - *Prejudice is presumed in all late filings; however, if actual prejudice could result from hearing the application it will be dismissed.*

[76] The reasoning in *Sask Poly* relies on the applicable principles outlined in previous, related case law. Of particular relevance is this Board's decision in *Saskatchewan Government and General Employees' Union v Saskatchewan (Government)*, 2009 CanLII 30466 (SK LRB) [*SGEU*] and the Alberta Board's decision in *Neville Toppin v United Association of Journeymen and*

Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 488, [2006] Alta LRBR 31, 123 CLRBR 253 [*Toppin*]. In *Toppin*, the Alberta Board reviewed the relevant Alberta case law and outlined the key concepts revealed in those cases:

> *29 The Board's jurisprudence on the 90-day time limit also features these propositions:*
>
> *• Where the delay is extreme, a complainant must show "compelling reasons" to justify proceeding to a hearing: Grabowski v. I.A.T.S.E., Local 210, supra*
>
> *• Actual prejudice to a respondent, for example through the death of a witness, is a strong factor against allowing a late complaint to proceed: Busslinger v. I.B.E.W., Local 424, [2002] Alta. L.R.B.R. LD-073 (Alta. L.R.B.)*
>
> *• A minor delay may be ignored by the Board where there is no indication of actual prejudice: I.A.F.F., Local 237 v. Lethbridge (City), [1999] Alta. L.R.B.R. LD-004 (Alta. L.R.B.) (Delay of 98 days); Anten v. A.T.U., Local 583, [2000] Alta. L.R.B.R. LD-072 (Alta. L.R.B.) (five months delay); Wakeford v. Edmonton Police Assn., [2000] Alta. L.R.B.R. 589 (Alta. L.R.B.) (five and one-half months delay)*
>
> *• The strength or weakness of the case that is apparent to the Board on a review of the file is a factor that may be considered in exercising the Board's discretion to waive the time limit: Morgan v. C.U.P.E., Local 37, supra*
>
> *• A party "sophisticated in labour relations matters", like a trade union, faces a burden of explanation to justify even a short delay: A.T.U., Local 987 v. Lethbridge Handi-Bus Assn., supra*
>
> *• Delay may be excused where the complaint concerns a continuing policy or practice rather than a discrete set of events: Chinook Regional Health Authority, Re, [2002] Alta. L.R.B.R. LD-056 (Alta. L.R.B.)*
>
> *• Though the Board may infer from delay that a respondent has been prejudiced, the inference may be negated by the fact that a timely grievance was filed about the same transaction: Chinook Regional Health Authority, Re, supra*
>
> *• The Board may not waive prejudicial delay just because the complainant may have received faulty legal advice: Busslinger v. I.B.E.W., Local 424, supra*

[77] After reviewing the case law, the Alberta Board explained which principles are to be applied in assessing an allegation that a party was late in filing an unfair labour practice application:

> *1. The 90-day time limit is a legislative recognition of the need for expedition in labour relations matters.*
>
> *2. "Labour relations prejudice" is presumed to exist for all complaints filed later than the 90-day limit.*
>
> *3. Late complaints should be dismissed unless countervailing considerations exist.*
>
> *4. The longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed. There is no separate category of "extreme" delay.*

> *5. Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:*
>
> > *(a) Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?*
> >
> > *(b) Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?*
> >
> > *(c) Has the delay caused actual litigation prejudice or labour relations prejudice to another party?*
> >
> > *(d) And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complaint?*

[78] In this case, the Board's first task is to determine when the 90-day limitation period began to run. To do this, it is necessary to determine when the Union knew or ought to have known of the action or circumstances giving rise to the allegations. For the current purposes, the main allegation is that the Corps failed to pay dues after assuming control of the City Sites in July 2016. Since that time, the Corps has been providing service without interruption whether through a temporary arrangement or as a result of the contract awarded in October 2016. The time begins to run when the Union knew or ought to have known that the Corps began to employ employees on the City Sites, and therefore, within the scope of the bargaining unit, and allegedly failed to comply with its obligations.

[79] The Corps argues that the Union ought to have known of this failure shortly after the Corps resumed work on the City Sites in 2016. In response, the Union argues that it was not aware of the circumstances giving rise to the allegation until its Union representative encountered the security guard downtown in May 2019.

[80] The evidence as to when the Union representative encountered this guard is imprecise – Figueiredo states that this happened in early May. She was not pressed for an exact date. The letter, May 7, 2019, provides the only date for assessing when this occurred.

[81] Can it be said that the Union ought to have been aware of the presence of employees on the City Sites earlier than May 7, 2019?

[82] The Corps says that the Union ought to have known, as of October, 2016, that the Corps was failing to remit dues. That was when the City awarded the contract and announced the award on SaskTenders. The Union ought to have been monitoring the industry more carefully; if it had done so it would have known that the Corps had been awarded the contract and that the

employees had returned to the sites. In making this argument, the Corps seems to overlook its obligation, pursuant to subsection 6-43(3), to provide names of employees who gave permission to have dues paid to the Union. This is not a statement on whether any employees provided said permission – such a conclusion belongs, if anywhere, in the main application. However, the statutory obligation to provide names assists a union in monitoring compliance with the obligation to pay dues, and reveals that it is not entirely within a union's control whether it becomes aware of a breach.

[83] Likewise, the Corps asks the Board to consider the fact that the Union is certified to the security company servicing the City Sites immediately prior to July 2016 and that, in 2017, Figueiredo learned that said company had lost the contract. Although none of the evidence pinpoints the date or even the month of the company's departure, Figueiredo's testimony about this issue suggests that the clock should have started to run at some point in 2017.

[84] This argument also implies that the Union ought to have been monitoring the industry more carefully and therefore ought to have known that there were employees in the bargaining unit. However, any number of companies could have replaced the previous security company at the City Sites. While it is true that many of the companies providing those services are unionized to this Union, there is a large number of security companies in Saskatoon, significant competition, and continual transition.

[85] Next, the Corps argues that, given the Union's practice of visiting the Credit Union to attend to union business every two to three weeks, the Union had repeated opportunities to observe the presence of the security guards at the security desk.

[86] The Board is unable to impute knowledge to the Union representative based on the Union representative's visits and the proximity of the bank to the basement security desk. Sturby's evidence was that the Rover "did a lot of roving". He was "hardly" at the basement security desk. He pointed to some benefits of having a desk - and he must have used it to prepare his many incident reports - but he also described an extensive array of additional activities that took him away from the desk in the ordinary course of his duties.

[87] There is no evidence of the time of day when the Union representative would have been in the basement; even if there was, there is no evidence that the Rover was required to be on guard at the desk at specific times. In addition, there is no evidence about the route that the Union

representative took to attend to the bank and no indication whether he or she would have had an opportunity to observe the Rover as he attended to duties away from his desk.

[88] Clearly, this case is distinct from the situation in *Varsteel*, in which the Board was unable to impute knowledge to the union on the basis that the union members in one location knew that there were employees in another location. Certainly, a Union representative can be expected to, having observed the presence of uniformed security guards on a unionized site, make the connection to its certification order and follow up with respect to the relevant obligations. However, the Board is not persuaded that, prior to May 7, 2019, the Union representative observed the security guards when attending to meet with the employees of the Credit Union.

[89] Lastly, the Board is unable to impute knowledge to the Union based on the Union representative's interactions with the previous company. There is no evidence that, at a time when the Corps' employees were working, the Union representative attended the City Sites for the purposes of visiting the employees of the previous company. The extent of the evidence is this. In 2017, Figueirdeo realized that the previous company was no longer paying dues; she asked the representative what was going on and was told that the previous company had lost the contract. The representative had had conversations with the employees about whether they received appropriate lay-off notices. When and how the representative became aware of the departure of the previous company is unclear.

[90] The evidence shows that the Corps stepped in to assist the City by providing temporary service during the week of July 10, 2016. However, the Union was not aware of the circumstances giving rise to the allegations until May 7, 2019. The Union filed its application on June 14, 2019, well within the 90-day period. The Corps' application to dismiss the Union's unfair labour practice application for delay is therefore dismissed.

[91] It is also worth noting that the allegation that the Corps failed to pay dues is in the nature of a continuing breach. However, given the foregoing observations, it is not necessary to consider whether the continuing nature of the breach makes it more difficult to determine when the clock begins to run, or excuses any delay: *Toppin* at para 29; *Chinook Regional Health Authority, Re*, [2002] Alta LRBR LD-056 (Alta LRB).

[92] Finally, the application for summary dismissal relates to the entirety of the Union's unfair labour practice application, which includes the Union's allegation of a failure to bargain in good

faith. This allegation puts in issue the Corps' conduct after receiving the letter, dated May 7, 2019, and therefore this aspect of the unfair labour practice application has been filed in time.

Unfair Labour Practice Application:

[93] Next, the Board will deal with the Union's unfair labour practice application which alleges violations of sections 6-62(1)(b), (d), and (r) and 6-43 of the Act.

Did the Corps fail to pay dues contrary to section 6-43?

[94] The first allegation is that the Corps failed to pay union dues. The Union bears the onus to prove, on a balance of probabilities, the elements of the alleged breach as contained in section 6-43:

> ***6-43****(1) On the request in writing of an employee and on the request of a union or union local representing the employees in the bargaining unit, the employer shall deduct and pay in periodic payments out of the wages due to the employee the union dues, assessments and initiation fees of the employee.*
>
> *(2) The employer shall pay the dues, assessments and initiation fees mentioned in subsection (1) to the union or union local representing the employee.*
>
> *(3) The employer shall provide to the union or union local the names of the employees who have given their authority to have the dues, assessments and initiation fees mentioned in subsection (1) paid to the union or union local.*
>
> *(4) Failure to make payments or provide information required by this section is an unfair labour practice.*

[95] The Corps argues that the Union has not met the prerequisites for a breach pursuant to section 6-43, having failed to produce any evidence of a request in writing of an employee. The Corps also argues that there is no evidence that the employees gave their authority to have the dues paid to the union, nor is there any evidence that the Corps is aware of the amount that is due and owing.

[96] It is clear that an employer's obligation to pay dues comes into effect on the request in writing of an employee and on the request of a union or union local representing the employees in the bargaining unit. The Union has presented no evidence of a request in writing of an employee. This is consistent with the state of the parties' relationship. The current company management was unaware of the existence of the certification order before receiving the letter, dated May 7, 2019. The employees were not even aware that they were unionized. For some reason, neither party has a copy of the Inner-Tec Agreement. Neither party appears to be familiar with the contents of that agreement. There has been no renewal of that agreement.

[97] Pursuant to subsection 6-43(3), the Corps has an obligation to provide names of the employees who have given their authority to have the dues paid to the Union. The Corps has not done this. Section 6-43 states that, on the request of a union representing employees in a bargaining unit, a union security clause must be included in any collective agreement entered into between that union and the employer. Subsection 6-42(6) states that an employee maintains membership in the union for the purpose of that section if the employee tenders payment of the periodic dues, assessments and initiation fees uniformly required as a condition of acquiring and maintaining membership. Similar provisions in the now repealed *Trade Union Act* required an employer to include a specific union security clause in a collective agreement upon the request of the union.

[98] However, the Board cannot conclude, based on the evidence that has been presented in this hearing, that there is an enforceable union security clause between these parties. Neither party presented evidence of the contents of the Inner-Tec Agreement. Despite the decision in *Corps No. 1*, Figueiredo suggested that the Union is not seeking to enforce the terms and conditions of that agreement. The Union's pivotal communication with the Corps specifically requests that the Corps make "effective" the terms of a union security clause pursuant to section 6-42 of the Act, but does not rely on an existing agreement for that purpose.

[99] It does not escape the Board's notice that, in *Corps No. 1* (para 10), the Board observed, without providing the specific language of the relevant provision, that the Inner-Tec Agreement required all newly-acquired personnel to join the union and accrue seniority from that date. The Union has not sought to rely on this finding of fact, as general as it is, as *prima facie* evidence of a union security clause that binds the Corps. Even if the Union were to rely on this finding, it would have to then be reconciled with the lack of evidence on the specific language of the provision and Figueiredo's testimony.

[100] Given the existing evidence and the positions of the parties, the Board is not prepared to draw conclusions based on the Board's observation in *Corps No.1*. The Corps remains obligated to provide names of those employees who have given their authority to have the dues paid to the Union, however, there is no evidence of any employees who have done so.

[101] For the foregoing reasons, the Union has not met its onus to prove on a balance of probabilities that the Corps breached its obligation to pay dues to the union. The allegation that the Corps breached any obligation contained in section 6-43 must fail. It is therefore not necessary

or even helpful for the Board to consider whether the Union's alleged abandonment releases the Corps of an obligation pursuant to section 6-43.

Did the Corps interfere with the administration of a labour organization and thereby contravene clause 6-62(1)(b)?

[102] Likewise, there is no evidence that the Corps interfered with the administration of a labour organization in the manner described by the Union. The Union relies on the Corps' failure to pay union dues as a *de facto* interference with the administration of a union contrary to clause 6-62(1)(b). As the Union has not met its onus to establish that the Corps breached an obligation pursuant to section 6-43, the allegation of interference must also fail.

Did the Corps fail or refuse to engage in collective bargaining in a manner contrary to clause 6-62(1)(d)?

[103] The next issue is whether the Corps failed or refused to engage in collective bargaining in a manner contrary to the Act. During the hearing of this matter, it became clear that this is the issue with which the Union is most concerned. According to clause 6-62(1)(d) of the Act, it is an unfair labour practice for an employer, or any person acting on behalf of the employer:

> *(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;*

[104] The duty to bargain in good faith is a fundamental obligation in the relationship between a union and a unionized employer. It is described at section 6-7 of the Act in this manner:

> ***6-7*** *Every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to this Part or by an order of the board.*

[105] The 2002 Order directed the Corps to bargain with the Union, as follows:

> *. . .*
>
> *(d) the Respondent, the employer, to bargain collectively with the trade union set forth in paragraph (c), with respect to the appropriate unit of employees set out in paragraph (b);*
>
> *(e) the collective agreement described in paragraph (a) shall be amended to reflect its application to the bargaining unit in paragraph (b);*

[106] The main issue is whether, by serving the Union with a letter indicating its intent to bargain, the Union triggered the Corps' duty to bargain in good faith a renewal of the collective agreement.

[107] The relevant portions of the letter state:

> *The Union is remitting the following maintenance of membership request as well as notifying the Employer that the Union is intending to bargain a renewal of the terms and conditions contained within the Collective Agreement that apply to all members of UFCW 1400 as established by the Order of the Labour Relations Board, dated the 26th day of March, 2002.*

[108] Instead of responding to the Union's letter indicating its intent to bargain, the Corps brought an application to cancel the certification order.

[109] This circumstance engages section 6-26 of the Act, which states:

> ***6-26****(1) Before the expiry of a collective agreement, either party to the collective agreement may give notice in writing to the other party within the period set out in subsection (2) to negotiate a renewal or revision of the collective agreement or a new collective agreement.*
>
> *(2) A written notice pursuant to subsection (1) must be given not less than 60 days nor more than 120 days before the expiry date of the collective agreement.*
>
> *(3) If a written notice is given pursuant to subsection (1), the parties shall immediately engage in collective bargaining with a view to concluding a renewal or revision of a collective agreement or a new collective agreement.*

[110] In *United Steelworkers v Jamel Metals*, 2015 CanLII 63019 (SK LRB), the Board considered a predecessor provision:

> *[88] In Communications Workers of Canada v. Northern Telecom Canada Limited, [1985] Oct. Sask. Labour Rep. 46, LRB File No. 062-85, the Board held that if a notice to negotiate a revision of the collective agreement is not provided within the open period prescribed by subsection 33(4), neither party is obligated to negotiate revisions, and the agreement is "automatically renewed for one year by operation of subsection 33(1)."*

[111] Section 6-7 requires every union and employer to, in good faith, engage in collective bargaining in the time and in the manner required pursuant to Part VI or by an order of the Board. The main issue is whether the Corps breached its duty to bargain upon receipt of the notice of an intent to bargain. The subsidiary issue is whether the Union gave written notice pursuant to subsection 6-26(1).

[112] No collective agreement has been filed with the Board. Therefore, there is no evidence of the applicable open period. Moreover, there is no evidence that the Union gave written notice pursuant to subsection 6-26(1). On the evidence and the circumstances put before the Board, the Union has not met its onus to prove that the Corps has breached its duty to bargain in good faith. For the foregoing reasons, the Union's application pursuant to clause 6-62(1)(d) is dismissed.

[113] A few additional comments are warranted. The Corps argues that it could not be found to have breached an obligation to bargain because it was not aware that the employees were represented by the Union. It relies for this argument on clause 6-62(7)(b) of the Act which states that no employer shall be found guilty of an unfair labour practice contrary to clause 6-62(1)(d) in the following circumstances:

> *(b) if the employer shows to the satisfaction of the board that the employer did not know and did not have any reasonable grounds for believing, at the time when the employer committed the acts complained of, that:*
>
> *(i) the union represented the employees; or*
>
> *(ii) the employees were actively endeavouring to have a union represent them.*

[114] The Board does not accept the Corps' argument that it did not know and did not have any reasonable grounds for believing, at the time of the alleged breach, that the Union represented the employees. The Corps received a letter from the Union in which it was clearly stated that the Union represented the employees of the bargaining unit. Clearly, the Corps had reasonable grounds for believing that the Union represented the employees.

Has the Union abandoned the bargaining unit and should the certification therefore be cancelled?

[115] In its application, the Corps asks the Board to cancel the certification order pursuant to section 6-16 of the Act, which states:

> ***6-16****(1) An application may be made to the board to cancel a certification order by an employee within the bargaining unit or the employer named in the certification order if the union has been inactive in promoting and enforcing its bargaining rights for a period of three years or more.*
>
> *(2) The board shall cancel the certification order if the board is satisfied that the union has been inactive in promoting and enforcing its bargaining rights in the period mentioned in subsection (1).*

[116] The onus is on the Corps to prove that the Union has been inactive in promoting and enforcing its bargaining rights for a period of three years or more: *Varsteel* at para 38. If it is established that the Union has been inactive in promoting and enforcing its bargaining rights for a period of three years or more, the Board shall cancel the certification order.

[117] Both parties rely on the principles outlined in *Saunders*:

> *[54] There are, however, some principles which can be distilled from Adams and cases which have dealt with the issue which can be provided for guidance of the labour relations community. These are:*

> *1. The onus of proof in abandonment cases is upon the party who asserts the rights have been abandoned;*
>
> *2. The focus of the inquiry by the Board should be upon the use or lack thereof of the collective bargaining rights granted to the Union under the Act. The activities of the employer, may, in some instances, give rise to an unfair labour practice, but the underlying basis of the principle of abandonment is that a union has failed to exercise the rights granted to it to bargain collectively; and*
>
> *3. If a failure to utilize collective bargaining rights has been established, then the inquiry must turn to a determination of whether there any* [sic] *other factor or factors which would excuse the inactivity or lack of use of the rights by the Union.*

[118] It should be noted that *Saunders* was decided in the absence of a specific statutory provision setting a timeframe for abandonment.

[119] It is clear however that the Board's focus is on the Union's use or lack thereof of its collective bargaining rights: *Saunders* at para 50. Each case is context dependent and must be determined on its facts: *Saunders* at para 53. The underlying issue is whether the Union has failed to exercise its collective bargaining rights during the time period set out in the Act.

[120] In the current case, the main issue is whether the alleged period of inactivity lasted three years or more. To determine whether the threshold timeline has been satisfied, it is necessary to consider three separate time periods. The first is the period from the certification order, dated March 26, 2002, until the departure of the Corps in 2003. The Corps relies on *Corps No. 1* to suggest that there were employees in the bargaining unit on October 23, 2003, and to suggest that this time period consists of at least 19 months. The witness testimony suggests only that the Corps left the City Sites sometime in 2003. As will be seen, for the purpose of the Board's analysis, it is not necessary to arrive at an exact date.

[121] The second time period extends from 2003 until the week of July 10, 2016, for a total in excess of 12 years. This is the period during which there were no employees in the bargaining unit. The third time period extends from the week of July 10, 2016 until May 7, 2019, for a total of two years and 10 months.

[122] An assessment of these time periods must take into account the long-held and well understood principle that abandonment cannot be found if there are no employees in the bargaining unit.

[123] In *United Brotherhood of Carpenters and Joiners of America, Local 1985 v Graham Construction and Engineering Ltd*., 2008 SKCA 67 (CanLII), the Court of Appeal considered an appeal of a judicial review decision arising from the Board's finding of abandonment, pursuant to the common law, in the construction industry. The majority of the Court observed that,

> *[71]…there never were any employees in the bargaining unit during the period of alleged abandonment and, therefore, there was no collective agreement to administer and no terms and conditions of employment to be changed by the employer either with or without participation by the Union…*
> *…*
> *[75] What both Wappel and Aim have in common is that there were employees in the bargaining unit and what the unions abandoned was their right to bargain collectively for those employees. Even at that, in Aim the Board ordered a representation vote notwithstanding 22 years of inactivity to determine whether the employees of the company still wanted to be represented by the union.*
>
> *[76] Nonetheless, the Graham 2003 Board held that Wappel stands for the proposition that "[t]he Board has held that abandonment occurs when a union is inactive in enforcing its bargaining rights."[79] On a reading of Wappel (and Aim), abandonment is not the same as inactivity alone. The emphasis in both Wappel and Aim is on the failure to bargain on behalf of employees in the bargaining unit.*

[124] The majority went on to review the case law, including the Board's decision in *International Brotherhood of Electrical Workers, Local 529 and Mudjatik Thyssen Mining Joint Venture (2000)*, 65 CLRBR (2d) 204 [*Mudjatik*]. The majority observed that the Board's past case law, including *Mudjatik*, had never found an abandonment in a case involving no employees in the bargaining unit (para 88). For this and other reasons, the majority concluded that the Board's decision was unreasonable:

> *[92] Mudjatik and Graham 2003 cannot stand together. The fundamental basis of Mudjatik is that since abandonment is a failure to represent employees, abandonment cannot be found if there are no employees, particularly in the construction industry for which the status of "no employees" occurs frequently.*

[125] In its review of the case law, the majority cited *Cineplex Galaxy Limited Partnership v International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Trades of the United States and Canada, Local 295*, 2006 CanLII 62952 (SK LRB) [*Cineplex*], which is not a construction industry case. The majority in *Graham* noted that *Cineplex*, like *Mudjatik*, was "fundamentally at odds" with the Board's decision finding abandonment.

[126] In *Cineplex*, the Board confirmed that, whether in the construction industry or otherwise, a "prerequisite to a finding of abandonment is a demonstrated period of time of inactivity or neglect by the union in its representation of the employees in the bargaining unit" (para 42). The Board confirmed that in all the cases it had referred to "there exists a requirement that there must be

employees in the bargaining unit employed during the period of the alleged abandonment, whether it is explicitly stated or is implied by the facts of the case" (para 43).

[127] A similar approach has been adopted in an analysis pursuant to section 6-16. In *Varsteel*, the presence of employees in the bargaining unit was a central issue in assessing whether abandonment had been established:

> *[44] The only evidence before the Board of the presence of employees at the Estevan location who fell within the bargaining unit came from Mr. Hasley. He indicated that there was such an employee in 2015. He did not provide further evidence regarding when this employee commenced work in this position, or whether there were previous employees in this position. Therefore, the evidence before the Board is that, at the date of the Employer's application, November 14, 2016, the alleged abandonment of this employee by the Union could only have been occurring for less than two years.*

[128] From sometime in 2003 until July 2016, there were no employees in the bargaining unit. Therefore, the Board cannot consider this time period when assessing whether the Union has been inactive in promoting and enforcing its bargaining rights.

[129] Since July 2016, the Corps has been the only company providing security services at the City Sites. The Union's first attempt at contact occurred on May 7, 2019. The period from July, 2016 until May 7, 2019 consists of two years and 10 months. A prerequisite to an application to cancel a certification order is that the period of inactivity be at least three years. If the period is any shorter than this, the application may not be made.

[130] Therefore, the Corps' application can be successful only if the Board reaches back in time and stitches together the two time periods that fall on either side of the period during which there were no employees. The first time period begins on the date of the certification order on March 26, 2002, and ends in 2003. The lengthiest possible delineation of this time period is shorter than two years. The second period begins the week of July 10, 2016 and ends on May 7, 2016. Together, these two time periods comprise approximately four and a half years.

[131] It would be unfair to stitch together the two time periods in this manner. As per *Varsteel*, section 6-16 provides the Board with an "extraordinary power" to cancel a certification order (para 39). The period during which there were no employees in the bargaining unit lasted for over 12 years. The certification order was dormant for over 12 years. The absence of employees in the bargaining unit was beyond the Union's control. Due to the manner in which contracts to security companies are awarded, this workplace is characterized by a relatively transient workforce. This

poses challenges for monitoring the workforce. It is reasonable to expect, after over 12 years of dormancy, some delay in the onset of the Union's representational activity.

[132] For these reasons, it is only fair that the Corps should be expected to wait the length of the three-year period prior to making an application to cancel a certification order. The three-year period had not elapsed prior to the letter, dated May 7, 2019. The application to cancel the certification order is therefore dismissed.

Should there be a vote, as requested by the Corps in the alternative?

[133] In the alternative, the Corps argues that the Board should order a representation vote pursuant to clause 6-111(1)(v) of the Act. For this purpose, the Corps relies on *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International, Local 2014 v United Cabs Limited*, 2017 CanLII 43858 (SK LRB) [*United Cabs*].

[134] Clause 6-111(1)(v) states that, with respect to any matter before it, the Board has the power:

> *(v) to order, at any time before the hearing or proceeding has been finally disposed of by the board, that:*
>
> > *(i) a vote or an additional vote be taken among employees affected by the hearing or proceeding if the board considers that the taking of that vote would assist the board to decide any question that has arisen or is likely to arise in the hearing or proceeding, whether or not that vote is provided for elsewhere; and*
> > *(ii) the ballots cast in any vote ordered by the board pursuant to subclause (i) be sealed in ballot boxes and not counted except as directed by the board;*
> > *…*

[135] In *United Cabs*, the Board noted:

> *[69] This general power is generally used sparingly by the Board since a concern regarding the choice of employees is rarely engaged. However, in this case, after a period of separation from the workplace of almost 6 years, and an obvious lack of interest from the drivers who refused to pay union dues as noted in the October 3, 2011 communication, there is a real issue as to whether the current employees (who, unless they were drivers since before October 3, 2011) support or continue to support CAW or the Steelworkers, notwithstanding the process undertaken by the Steelworkers to engage support.*
>
> *[70] Had we reached the conclusion that there was no abandonment of the bargaining rights, or if, in the event we are wrong in our conclusions above regarding abandonment, we would have ordered a vote pursuant to section 6-111(1)(v) and ordered a vote to be held among those drivers affected by the representational change.*

[136] The Corps says that the current circumstances are analogous to the *United Cabs* case. The certification order was issued without any assessment of the employees' support. None of

the current employees were employees in 2002 or 2003. Therefore, the certification order does not reflect the choice of the employees.

[137] As further evidence of the Union's inadequate representational character, the Corps also points to the findings of the Board in *Corps No. 1*. In particular, prior to Inner-Tec assuming the City Sites contract, the Corps had had a relationship with the City for over 20 years and had performed most of the work that was subject to the successorship application in *Corps No. 1.* Inner-Tec had been working under contract for only a few months when the Corps returned under contract, employing the same employees as it had before.

[138] The Board is not inclined to order a vote to assess the wishes of the employees. As the Board noted in *United Cabs*, the power to order a vote is used sparingly. Although the Corps may not favor the former statutory provisions that permitted the issuance of the successorship order in *Corps No. 1*, the certification order stands. The origin story of this legitimate, existing certification order does not justify ordering a vote.

[139] In *United Cabs*, the Board noted the unusual manner in which the issue had come before the Board, proceeded to apply the common law of abandonment, and then found that, even if it were wrong in doing so, it would exercise its authority to permit the matter to be raised as if an application had been made. It was within this context that the Board found that there had been a period of inactivity of almost six years, a significantly longer period than the statutory threshold period. There is no equivalent finding in this case. In *United Cabs*, the Board also found that the employees had refused to pay union dues. Again, there is no equivalent finding in this case.

[140] Instead, this is a case in which the Union's exercise of its bargaining rights and its relationship with the employees in the bargaining unit have not been adequately tested. This is in part due to a lengthy period of time in which there were no employees in the bargaining unit. In these circumstances, it would not be appropriate for the Board to order a vote of the employees in the bargaining unit.

Conclusion:

[141] In summary, the applications in LRB File Nos. 139-19, 253-19, and 264-19 are dismissed.

[142] Lastly, the certification order imposed a bargaining obligation on the Corps. The Corps is required to recognize the Union as the exclusive bargaining agent on behalf of the employees in the bargaining unit. Under the circumstances, it is unnecessary to grant the requested order to

collectively bargain. The Board expects that the parties will be able to arrive at a mutual agreement about the applicable collective bargaining timelines. Should they fail to do so, then either party may bring an application to the Board for an order requiring compliance with the certification order, or other appropriate remedy.

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

DATED at Regina, Saskatchewan, this **26th** day of **February, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson