Saskatchewan
Labour Relations Board

KDM CONSTRUCTORS LP, Applicant and CONSTRUCTION AND GENERAL WORKERS' UNION LOCAL 180, Respondent

LRB File Nos: 004-22 and 006-22; December 30, 2022
Vice-Chairperson, Barbara Mysko; Board Members: Maurice Werezak and Don Ewart

Counsel for the Applicant, KDM Constructors LP:	Steve Seiferling and Walker Paterson, Student-at-Law
Counsel for the Respondent, Construction and General Workers' Union Local 180:	Rick A. Engel, K.C. and Andrea Johnson

Non-Suit Application – Underlying Certification Application – *Res Judicata* – Construction Industry Work – Previous Decision Finding Onus Not Met – *Res Judicata* Applies to Certification Applications – Applies in Current Case – No Change in Circumstances – Non-Suit Application Granted – Certification Application Dismissed.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an application for non-suit brought by the Employer, KDM Constructors LP, in relation to a certification application before the Board.

[2] On March 19, 2020, the Construction & General Workers' Local Union No. 180 [Union] filed a certification application pursuant to Division 13 of Part VI of *The Saskatchewan Employment Act* [Act], seeking a province-wide bargaining unit consisting of all labourers employed by the Employer. A primary issue was whether the work was construction industry work or maintenance work. The certification application was dismissed on March 30, 2021 because the Union had failed to meet its onus to prove that the work came within the definition of construction industry contained in section 6-65 of the Act: *Construction & General Workers Local Union, No. 180 v KDM Constructors Inc*., 2021 CanLII 25131 (SK LRB) [*KDM No. 1*]. The Board later dismissed the Union's application for reconsideration: *Construction & General Workers Local Union 180 v KDM Constructors LP*, 2021 CanLII 78804 (SK LRB) [*KDM No. 2*].

[3] Later, two decisions were issued in relation to an application for certification brought by the Operating Engineers for employees working for KDM: *International Union of Operating*

Engineers, Hoisting & Portable & Stationary, Local 870 v KDM Constructors, 2021 CanLII 77359 (SK LRB) [*KDM No. 3*]; *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v KDM Constructors LP*, 2021 CanLII 101129 (SK LRB) [*KDM No. 4*].

[4] On January 17, 2022, the Union filed a certification application seeking a province-wide bargaining unit of all labourers, apprentice labourers, and labourer foremen employed by the Employer. In its Reply to that application, filed on January 20, 2022, the Employer denied that the unit is appropriate for collective bargaining, stated that the work being performed is maintenance work, raised a constitutional question, and asserted that the entire matter is *res judicata*.

[5] The Employer brought an application for summary dismissal to be determined without an oral hearing. In that application, the Employer argued that the application for certification should be dismissed due to *res judicata*; although an exception to *res judicata* might lie in a material change in circumstances, there was no such change in this case. The Union argued that *res judicata* does not apply to certification applications.

[6] The Board found that it was appropriate to hold an oral hearing with respect to the issue of whether the doctrine of *res judicata* can apply to certification applications. It also noted that "the exact nature of the change which will be sufficient to warrant taking the matter outside of *res judicata*, assuming *res judicata* applies, would have to be decided based on the evidence".[1] The Employer's application for summary dismissal was dismissed by the Board on June 17, 2022: *KDM Constructors LP v Construction and General Workers Union*, 2022 CanLII 52912 (SK LRB) [*KDM No. 5*].

[7] The hearing on the certification application proceeded before the Board on October 13 and 14, 2022. After the Union presented its case, the Employer brought an application for non-suit. Both parties indicated that they needed additional time to prepare their arguments, both written and oral and, therefore, the Board set a date for a hearing of that application, being November 10, 2022.

[8] At that hearing, the Union consented to the Board proceeding without requiring the Employer to make an election. At the end of the hearing, the Board reserved its decision on the non-suit application and set a new date to hear the remaining evidence if necessary.

---

[1] *KDM Constructors LP v Construction and General Workers Union*, 2022 CanLII 52912 (SK LRB) [*KDM No. 5*] at para 54.

Arguments:

Employer:

[9] For the Board to dismiss the application for non-suit, there must be an arguable case based on the evidence presented by the Union. The Union must show that there is evidence that the elements of its case, that is, that there has been a material change in circumstances, can be made out.

[10] There is no change in circumstances on which the Union can rely to avoid the application of the doctrine of *res judicata*. Based on the Union's own evidence, the work has not changed since the Board's first certification decision was made. Although the volume has changed, the nature and scope of the work has not. The site services agreement, in particular, is the same.

[11] The Union's attempt at re-litigation is the essence of what the doctrine of *res judicata* is supposed to prevent.

[12] The Board has also highlighted a question about whether the doctrine of *res judicata* operates in applications for certification. The Employer does not take a position on this question, specifically, but says that the question as to whether the work is construction or maintenance has been asked and answered. The work is maintenance and the Union has had the opportunity but failed to demonstrate that it is now construction.

[13] The Union had an obligation to put forward its best evidence at the first hearing. It bore the onus of demonstrating that the work was construction work. If a party fails to put forward a part of its case, it does not get a second chance. The doctrine of *res judicata* is designed to prevent a "re-do" of the same issue that has been decided.

[14] All three of the *res judicata* criteria have been satisfied in this case: There have been two final and binding decisions; the issue remains the same; and the parties are the same. This case does not come within the exceptions to the application of *res judicata*, such as minor stakes, an inadequate incentive to defend, a tainted process in the prior proceeding, or the discovery of new evidence following that proceeding.

[15] While a second certification application is possible if the prior application was dismissed due to a failed vote, the dismissal of the first certification application did not result from a failed vote. The Board made a final and binding decision on a legal issue.

[16] The Employer also describes the Union's application as an abuse of process.

Union:

[17] The Union argues that its application is not barred by the doctrine of *res judicata*. Different rules apply to an application for certification in comparison to an application to amend or rescind a certification order. According to section 6-9 of the Act, a union may apply for a certification order "at any time". The only exceptions to the ability to apply at any time are: if there is a certification order applicable to the entire or part of the bargaining unit; if there was an unsuccessful vote within the specified timeframe and the Board dismissed the subsequent application; if the application was filed under employer influence; or, if the Board barred or dismissed a subsequent application within twelve months after dismissing the first application. The statute "speaks about the right to apply at any time; not just the right to apply when a vote has been unsuccessful".

[18] Given the fundamental rights of employees to free collective bargaining, the statutory language "must be construed as carefully as it has been written". The certification process is designed to allow employees as much flexibility as is possible to be able to organize among themselves. The Board has a primary role in assisting in facilitating employees' rights to organize in and to form, join or assist unions, as set out in section 6-4.

[19] Once a certification order is issued, the objective shifts from facilitating the employees' rights to organize to supporting the stability of the bargaining unit. This latter objective justifies the use of a material change in circumstances threshold on applications to amend a certification order.

[20] In respect of existing certification orders, there is a presumption of continuity. The Board will only amend an order if the parties agree to the amendment or if the Board finds that the amendment is necessary. In an application to amend the scope of a unit, the Board does not apply the doctrine of *res judicata*, but instead requires a material change in circumstances to be demonstrated.

[21] Sections 6-114 and 6-115 signal to the courts that the Board's decisions call for deference. When there is another provision that limits or expands the Board's powers, the "binding and conclusive" nature of the Board's orders does not override these provisions.

[22] In past decisions, the Board refused to apply the doctrine of *res judicata* to certification orders because *The Trade Union Act* expressly allowed the orders to be amended or rescinded

on an annual basis. Due to the ongoing process of amendment or rescission, the Board concluded that certification orders were not final. The removal of the temporal (annual) restriction on applications for amendment and rescission only signaled greater support for the characterization of certification orders as not final.

[23] The Board has discretion to determine the appropriateness of a bargaining unit. In *Saskatchewan Association of Medical Laboratory Technologists v Regina General Hospital and Regina Hospital Employees' Union, Local 176 (C.U.P.E.) and Service Employees' International Union*, [1978] July Sask Labour Rep 49 [*Medical Laboratory Technologists*], the Board found that its determination of the appropriateness of the bargaining unit is "never final" and therefore the doctrine of *res judicata* "does not apply to the finding of appropriateness of unit".

[24] The determination of whether the work is construction industry activity versus maintenance work is central to the question about the appropriateness of the bargaining unit. The labourer trade division is only applicable if the Board determines that the work being performed comes within construction industry activity pursuant to section 6-65. In the earlier decision, the Board did not find that the unit applied for was inappropriate; instead, it found that there were insufficient facts about the context of the project and that the connection between the work in question and the construction industry activity on site had not been demonstrated. The Board has not made a conclusive decision about the appropriateness of the bargaining unit.

[25] In the alternative, if the Board finds that the doctrine of *res judicata* applies, there has been a material change and therefore the doctrine does not apply to the certification application. There has been a substantial change in the size and the composition of the bargaining unit. More critically, however, there has been a material change in the overall project. The project has moved from a preparatory stage to a construction stage. From March 2020 to Fall 2021 and the beginning of 2022, the nature and volume of the work has changed dramatically. These facts establish the material change in circumstances necessary to permit the application to proceed.

Applicable Statutory Provisions:

[26] The following statutory provisions 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.*

6-9*(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.*

(2) When applying pursuant to subsection (1), a union shall:

> *(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and*
>
> *(b) file with the board evidence of each employee's support that meets the prescribed requirements.*

6-11*(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, including a bargaining unit comprised of supervisory employees, as defined in clause 6-1(1)(o) of this Act as that clause read before the coming into force of The Saskatchewan Employment Amendment Act, 2021, the board shall determine:*

> *(a) if the unit of employees is appropriate for collective bargaining; or*
>
> *(b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.*

(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.

…

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

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

6-12*(1) Before issuing a certification order on an application made in accordance with section 6-9 or amending an existing certification order on an application made in accordance with section 6-10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.*

(2) Notwithstanding that a union has not established the level of support required by subsection 6-9(2) or 6-10(2), the board shall make an order directing a vote to be taken to determine whether a certification order should be issued or amended if:

> *(a) the board finds that the employer or a person acting on behalf of the employer has committed an unfair labour practice or has otherwise contravened this Part;*
>
> *(b) there is insufficient evidence before the board to establish that 45% or more of the employees in the proposed bargaining unit support the application; and*

(c) the board finds that sufficient evidence of support mentioned in clause (b) would have been obtained but for the unfair labour practice or contravention of this Part.

(3) Notwithstanding subsection (1), the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same union.

6-108*(1) The board may cause a certified copy of any board order or decision to be filed in the office of a local registrar of the Court of Queen's Bench.*

(2) On filing of the certified copy pursuant to subsection (1), the board order or decision is enforceable as a judgment of the Court of Queen's Bench.

(3) Notwithstanding that a board order or decision has been filed pursuant to this section, the board may rescind or vary the order or decision.

(4) On an application to the Court of Queen's Bench arising out of the failure of any person to comply with the terms of a board order or decision filed pursuant to subsection (1), the court may refer to the board any question as to the compliance or non-compliance of that person with the board order or decision.

(5) An application to enforce a board order or decision may be made to the Court of Queen's Bench by and in the name of the board, any union affected or any interested person.

(6) On an application to enforce a board order or decision, the Court of Queen's Bench:

(a) is bound by the findings of the board; and

(b) shall make any order that it considers necessary to cause every person with respect to whom the application is made to comply with the board order or decision.

(7) The board may, in its own name, appeal any judgment, decision or order of any court affecting any of its orders or decisions.

6-114 *In any matter or proceeding arising pursuant to this Part, a board order or decision is binding and conclusive of the matters stated in the board order or decision.*

6-115*(1) Every board order or decision made pursuant to this Part is final and there is no appeal from that board order or decision.*

(2) The board may determine any question of fact necessary to its jurisdiction.

(3) Notwithstanding subsections (1) and (2), the board may:

(a) reconsider any matter that it has dealt with; and

(b) rescind or amend any decision or order it has made.

(4) The board's decisions and findings on all questions of fact and law are not open to question or review in any court, and any proceeding before the board must not be restrained by injunction, prohibition, mandamus, quo warranto, certiorari or other process or proceeding in any court or be removable by application for judicial review or otherwise into any court on any grounds.

Analysis:

Preliminary:

[27] Prior to the hearing on the application for non-suit, the Board asked the parties to be prepared to address the applicable law as it is described in Part V (paras 69 to 73) of the decision in *Ceapro Inc. v Saskatchewan*, 2008 SKQB 76 (CanLII) [*Ceapro*]. In *Ceapro*, the Court relies on the general legal principles that apply to non-suit applications as per *Kvello v Miazga*, 2003 SKQB 451 (CanLII), [2004] 7 WWR 547 (Sask QB) [*Kvello*]. In particular, at paragraph 19 of *Kvello*, the Court explains that:

> *At the non-suit stage, it is not the function of the court to decide the substantive issues to be tried or to make substantive rulings respecting the application or non-application of common law principles or statutory provisions to the facts of the case as they may ultimately be found. These substantive determinations are properly left as matters to be decided and determined after all the evidence is in and complete legal briefs are filed. …*
>
> *The extensive appeal judgment indicated that it was not the facts but the application of legal principles to those facts which was primarily in dispute between the parties. The decision also indicates the wisdom of the trial court dismissing the non-suit application on the basis that it required the court to rule primarily on substantive legal issues. The determination of those substantive issues was deferred until the trial judgment and was made with the benefit of all the evidence and full legal submissions. Had the trial court done otherwise, the Court of Appeal would likely have had no other alternative but to order a new trial at the considerable expense of all the parties.*
>
> *Obviously, a ruling on legal issues pursuant to a non-suit application brought midway through the trial might well shorten the trial by narrowing the focus of the litigation. But where the parties desire a legal interpretation or a ruling on legal issues that is likely to determine the outcome of the litigation or that is likely to significantly affect the course of the trial, there are more efficient and timely ways of doing so, such as a Rule 188 application by the consent of the parties.*
>
> *Views expressed by some of the Justices of the Supreme Court of Canada in Nelles v. Ontario, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170 (S.C.C.) as to the advisability of the court determining unsettled legal issues on the basis of a preliminary motion, do not strictly apply to a non-suit motion. But the views indicate the potential problems that preliminary rulings can pose for the parties and the appeal courts.*

[28] Both the Union and the Employer acknowledged that this non-suit application requires the Board to rule on substantive legal issues. Having reviewed the reasoning in *Ceapro*, the parties have specifically asked the Board to proceed and determine those issues, those being, whether the doctrine of *res judicata* can and does apply in the circumstances of this case. In the interest of expediency, the Union wants an answer to these issues at the non-suit stage. The Board will proceed to consider the non-suit application on this basis.

Substantive:

[29] The Employer observes that there has been some confusion in the case law about whether the Board applies the same test as the Court of King's Bench does on a non-suit application. It also states that the confusion was resolved in *Amenity Health Care L.P. v Workers United Canada Council*, 2018 CanLII 38254 (SK LRB) [*Amenity Health Care*] where the Board made the following comments:

> *[16] The Union argues that the test for determination of whether or not a non-suit should be granted is as enunciated by Mr. Justice Zarzeczny in Travel West (1987) Inc. v. Langdon Towers Apartments Ltd.[11] as being "is there sufficient evidence, which left uncontradicted, would lead a reasonable trier of fact, properly instructed, to find for the plaintiff".*
>
> *[17] Amenity argues for the test established by the Board in the Communications, energy and Paperworkers Union, Local 922 v. Potash Corporation of Saskatchewan decision should be the test relied upon by the Board. Simply put, that test is whether or not a prima facie case had been made out by the Applicant. This was also the test utilized by the Board in two of the cases cited by the Union, Koop v. SGEU[12] and D.M. v CUPE[13].*
>
> *[18] It is clear from the decision in Communications, energy and Paperworkers Union, Local 922 v. Potash Corporation of Saskatchewan that the current test adopted by the Board is not the test utilized in the Court of Queen's Bench, but rather a test similar to the test applied by the Board to applications for summary dismissal. As noted in paragraph [58] thereof, the Board said:*
>
> > *[58] The Board dismissed the Union's application for a non-suit without the necessity of hearing from counsel for the City. The Board was satisfied based upon the test set out in Mitchell's Gourmet Foods, that the City had made out a prima facie case. As noted in that case, a "motion for non-suit cannot succeed if there is some evidence upon which the Board could return a finding" that the alleged unfair labour practice has occurred. In keeping with the admonition in Mitchell's Gourmet Foods, supra, the ruling by the Board was restricted to a declaration whether or not there is some evidence upon which the complaint(s) could be sustained, in order to permit no advantage to be gained by the applicant.[emphasis added]*

[30] In our view, the test as outlined in *Amenity Health Care* is essentially the same test as that which is applied by the Court of King's Bench. The central question for both the Court and the Board is whether the applicant for non-suit has demonstrated that there is no *prima facie* case. A *prima facie* case is an arguable case: *Vivendi Canada Inc. v Dell'Aniello*, 2014 SCC 1, [2014] 1 SCR 3 [*Vivendi*]. This articulation of the test is consistent with the Board's power to summarily dismiss a matter if, in its opinion, there is no arguable case, pursuant to clause 6-111(1)(p) of the Act. It is also consistent with the descriptions of the applicable test in *Potash Corp. of Saskatchewan v CEP, Local 922*, 2012 CarswellSask 755 [*Potash Corp.*] and *Brenda E.*

McDonald v Saskatchewan Union of Nurses and Saskatchewan Health Authority (Formerly Heartland Regional Health Authority), 2018 CanLII 68446 (SK LRB) [*McDonald*].

[31] In making reference to the Court's test, the Board in *Amenity Health Care* relied on *Travel West (1987) Inc. v Langdon Towers Apartments Ltd*., 2000 SKQB 294 (CanLII) [*Travel West*]. In *Travel West*, the Court followed the approach taken in *Reid v Kraus*, 2000 SKCA 32 (CanLII), explaining that the test on a non-suit is whether there is insufficient evidence which if left uncontradicted could lead a reasonable trier of fact to find for the applicant. It did not expressly adopt the language of "*prima facie*" or "arguable case".

[32] The Court, as demonstrated in *Ceapro*, has since adopted the language of *prima facie* case. The suggestion that there is a distinction in the tests applied by the Board and the Court seems to have come about because of the language used in *Travel West*. However, each of the tests is substantially the same, as disclosed by the following passage from *Ceapro*:

> *17 I use the term prima facie case to indicate that the applicants have a lesser onus than having to demonstrate the absence of "any" evidence on a material issue. The case law clearly establishes that the applicants need only demonstrate the absence of "sufficient" evidence, which if left uncontradicted, could satisfy a reasonable trier of fact that the case has been made out on a balance of probabilities. The ruling on a non-suit motion is a question of law. The determination of the credibility or believability of the evidence is a question of fact to be subsequently determined in the action if the non-suit application fails.*

[33] Thus, the Board will rely on the legal test that applies to non-suit applications as described by the Court in *Ceapro* and applied in *Potash Corp.* and *McDonald*. The Employer bears the onus to demonstrate that there is an absence of sufficient evidence which if left uncontradicted could satisfy a reasonable trier of fact that the case has been made out on a balance of probabilities. In other words, the Employer bears the onus to demonstrate that there is no *prima facie* or arguable case.

[34] It is important for the Board to consider the evidence in a fashion most favourable to the Union. If inferences of fact are required, the Board must ask whether the inferences that the Union seeks could reasonably be drawn from the direct evidence if that evidence is accepted as fact. The Board is to make determinations on questions of law, but questions about credibility are questions of fact that are not before the Board.

[35] Next, to decide if there is an arguable case, it is necessary to determine whether *res judicata* applies to the underlying certification application.

[36] In *KDM No. 5*, the Board explained the basic three-part test for *res judicata*: that the same question has been decided; the prior decision was final; and the parties were the same persons. Given that the last of these criteria is satisfied, only the first and second criteria remain. In the present application, the second criterion, finality, is of particular importance.

[37] In *KDM No. 1*, the Board had to determine whether the nature of the work performed by the labourers came within the definition of construction industry pursuant to section 6-65 of the Act. The Board found that there was a lack of clear, convincing, and cogent evidence with respect to the overall work on site. Although the Board was able to accept that there was construction work taking place on the site, it observed that the "specifics of the construction work, and the relationship between that construction work and the activities of the labourers, [were] unclear".[2] The Board observed that the connection between the work in issue and the overall project was not obvious and therefore the contextual assessment of the work had to be undertaken carefully.[3] The Board concluded that the Union had not met its evidentiary onus.[4]

[38] In *KDM No. 5*, the Board reviewed the purpose of the doctrine of *res judicata*:

> *[32] The Board has held that it has the authority to apply the doctrines of res judicata and abuse of process and that it may apply those doctrines to determine whether it has jurisdiction in relation to a matter: Metz v Saskatchewan Government and General Employees' Union, 2007 CanLII 68747 (SK LRB) [Metz].*
>
> *[33] The purpose of the doctrine of res judicata is to "balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case": Danyluk v Ainsworth Technologies Inc., 2001 SCC 44 (CanLII), [2001] 2 SCR 460 [Danyluk], at para 33. In Danyluk, Binnie J. described the doctrine, as follows:*
>
> > *18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry…. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.*
>
> *[34] The Employer relies on the following articulation of the doctrine in Henderson v Henderson, [1843] 8 Hare 100, 67 ER 313:*
>
> > *... I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was*

[2] *KDM No. 1* at para 112.
[3] *Ibid* at para 124.
[4] *Ibid* at para 126.

> *not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.*
>
> *[35] The Court of Appeal, in Canada (Attorney General) v Merchant Law Group LLP, 2017 SKCA 62 (CanLII) [Merchant Law], described the two branches of res judicata in the following terms:*
>
> > *[60] The doctrine of res judicata has been described as having two distinct aspects – cause of action estoppel and issue estoppel. Cause of action estoppel bars the rehearing of a cause (claim) that has been decided or could have been decided in a prior proceeding involving the same parties or their privies. Issue estoppel, on the other hand, applies where the cause of action may be different but an issue (the finding of a material fact or mixed fact and law) was decided or could have been decided in a prior proceeding between the same parties or their privies.*

[39] In *Metz*, the Board explained that the doctrine of *res judicata* prevents the Board from exceeding its jurisdiction by sitting in appeal of its own decisions:

> *[37] On the basis of the analysis in Canadian Linen, supra, it is clear that the Board has no jurisdiction to sit in appeal of its own decisions. An applicant is prevented from utilizing an application as an appeal mechanism through the Board's application of the doctrine of res judicata. It is through the Board's consideration of the principle of res judicata that the Board decides whether it has jurisdiction to embark on the determination of an application – if res judicata applies, the Board lacks jurisdiction to do so. Therefore, in this case, if the Applicant is asking us, in essence, to sit in appeal of any or all of the Board's decisions in LRB File No. 164-00, we have no jurisdiction to proceed with the hearing and determination of the applications before us. The doctrine of res judicata assists us to determine whether an application is in the nature of an appeal. This principle also underlies our consideration of whether the Board lacks jurisdiction because the applications are an abuse of process, a doctrine that is similar in its application to res judicata, which will be further discussed below.*

[40] The Board relied on the B.C. Board's analysis of the role of *res judicata* in labour relations matters, contained in *Lloyd Duhaime v B.C. Government and Service Employees' Union and the Government of the Province of British Columbia*, [2001] BCLRBD No 55, Case No 41435:

> *[137] The Board and its predecessors have applied the principles underlying the doctrine of res judicata in a number of cases. In Crestbrook Forest Industries Ltd., IRC No. C47/90 the Council adopted the reasoning of the Ontario Labour Relations Board in Oakwood Park Lodge, [1981] 1 Can LRBR 348 respecting the application of the principles of res judicata in labour relations matters:*
>
> > *Although the Act does not expressly authorize the application of the doctrine of res judicata, there are strong practical and policy grounds for doing so. Rights and duties have meaning only if they are certain and relatively stable. Parties expect that a decision of the Board will clarify their legal relationship and put an end to the controversy between them. ... Continuous litigation would undermine the harmonious relationship between the parties which the Act is*

> *designed to foster... It could also give rise to costly duplication, inefficient utilization of the Board's scarce resources, and a serious impediment to the effective administration of the Act. This potential consequence is especially serious in labour relations matters where "time is the essence" and finality is an important statutory objective. ...The doctrine of res judicata serves to minimize these possibilities, and is based upon the entirely reasonable expectation that if a judgement is rendered in an earlier case which is related logically to a subsequent proceeding, the former will be taken into account in resolving the latter. ... Cases involving similar factual and legal questions should be decided in the same way, and if there is a close relationship in terms of the parties and issues involved, the interrelationship of the two proceedings may legitimately preclude the relitigation of those issues already settled. ... (at pp. 350-351; emphasis added)*
>
> *[138] In TNL Construction Ltd., IRC No. C30/90 the Council expressly adopted the remarks of the Ontario Labour Relations Board in Wright Assemblies Ltd. 61 CLLC 956 at 957 and 958 as follows:*
>
> > *The fact that a party did not present all his evidence in the earlier proceeding, generally affords no answer to a plea of res judicata raised against him in a subsequent proceeding involving the same matters. As was argued by Counsel for the respondent, a party is not permitted to present part of his evidence and then finding that the Court is against him, launch new proceedings for the purpose of having the same issues or questions re-litigated once again on the basis of further evidence which he could have advanced before. (p. 5; emphasis added)*

[41] According to *Metz*, the Board has the authority to apply the doctrine of *res judicata*. The Board may apply the doctrine to determine whether it has jurisdiction in relation to a matter. If the criteria for *res judicata* are satisfied, then the Board may find that it does not have jurisdiction.[5]

[42] The statute provides support for the conclusion in *Metz*. Board orders and decisions made pursuant to Part VI are final. The Board has no jurisdiction to hear appeals of its decisions, however, it may reconsider any matter that it has dealt with and rescind or amend any decision or order it has made (s. 6-115). Pursuant to clause 6-111(1)(o) of the Act, the Board has authority to summarily refuse to hear a matter that is not within its jurisdiction.

[43] Recognizing that it does not have jurisdiction to hear an appeal of its own decisions, the Board has carefully circumscribed the grounds for granting a reconsideration application.[6] Among these grounds is the second, which permits the Board to reconsider a prior decision if a hearing had been held but certain crucial evidence had not been adduced for good and sufficient reasons. The Union who is the applicant in the underlying certification application filed a reconsideration application of the Board's first decision relying, in part, on the second ground. In *KDM No. 2*, the Board analyzed the Union's arguments at length and dismissed its application.

---

[5] *Metz* at paras 37, 38.
[6] *Remai Investment Corp. v Saskatchewan Joint Board, R.W.D.S.U.*, [1993] 3rd Quarter Sask Labour Rep 103.

[44] The Union suggests that, although the Board has accepted that it has jurisdiction to apply the doctrine of *res judicata*, it does not have that jurisdiction in relation to certification applications. In *SJBRWDSU, Local 568 v Canadian Linen and Uniform Service Co*., 2004 CanLII 65625 (SK LRB) [*Canadian Linen*], the Board stated that its longstanding position was that "the principle of *res judicata* does not apply to findings of the appropriateness of a unit". The Board relied for this statement on *Medical Laboratory Technologists*. In *Medical Laboratory Technologists*, the Board observed that "*res judicata* does not apply to the finding of appropriateness of unit"[7] and then proceeded to dismiss the application on the basis that there was no substantial change in circumstances.

[45] In *KDM No. 5*, the Board made note of the distinction between the Board's finding in *Medical Laboratory Technologists* and the findings of other labour boards in *Wal-Mart Canada Corp. v United Food and Commercial Workers International Union, Local 1518*, 2006 CanLII 6150, 2006 CarswellBC 3203 (BC LRB) [*Wal-Mart*][8] and *Practical Nurses Federation of Ontario v Strathroy Middlesex General Hospital*, 1993 CanLII 7795 (ON LRB) [*Practical Nurses*].

[46] In *Wal-Mart*, the B.C. Board rejected the argument that *res judicata* can never apply if the underlying issue is the appropriateness of a proposed bargaining unit, reasoning instead that whether *res judicata* is applicable depends on the circumstances in each case. The Board then ruled that a previous determination on appropriateness was binding upon the parties unless the circumstances had changed since the original application was filed. After finding that the labour relations question before the Board was the same as that which had been previously decided, the Board concluded that the preconditions for *res judicata* were present.

[47] In *Practical Nurses*, the majority of the Ontario Board took a similar approach:

> *13. We agree with counsel for the PNFO that the Board does not, in its search for finality, necessarily preclude a party from asking for a determination of employee status where it can estab-lish that the facts have materially changed. In Oakwood Park Lodge, the Board discussed several cases where the Board permitted fresh applications with respect to employee status to proceed, notwithstanding previous agreements between the parties or decisions by the Board. Likewise, it is possible that where a determination of the appropriateness of a bargaining unit is based on a set of facts which are fixed at a particular point in time, a materially changed set of facts might lead the Board to consider a fresh application for the same bargaining unit.*

---

[7] *Medical Laboratory Technologists* at 50.
[8] *Wal-Mart Canada Corp. v U.F.C.W., Local 1518*, 2006 CarswellBC 3208 – *res judicata* determination affirmed; reversed on other grounds.

[48] The majority decided that there was no reason to apply any more liberal grounds to the existing application than it would if it were being asked to reconsider its earlier decision:

> *15. The notion that the Board will not normally consider new evidence unless it was not previously available by the exercise of due diligence, is also reflected in the discussion of res judicata in Ellis-Don Limited. Although this is not a request for reconsideration, the timing of the application, and the limited grounds advanced by the PNFO for considering this as a fresh applica-tion, seem to raise the same kinds of issues which arise in a request for reconsideration. Certainly, we see no reason to apply any more liberal grounds to this applicant in determining whether it is precluded from making this application, than we would had it made a request for reconsideration.*

[49] The third member on the panel dissented on the basis that the new application was not an attempt to re-litigate an issue already decided but, instead, was an application based on a different factual context.

[50] The Union distinguishes from *Wal-Mart*, which it describes as a carve-out decision involving an existing certification order. The Union argues that the application in issue, and therefore the decision, were highly dependent on the wording of the statute. We do not find this argument persuasive. The B.C. Board in *Wal-Mart* was dealing with the union's alternative application for two stand-alone units, one of which was at a different location than previously had been assessed. The Board found that the appropriateness of these units had already been decided.

[51] The B.C. Board described the employer's primary argument and its response in general terms, at paragraph 53:

> *The Employer's primary argument is that the doctrine of res judicata does not apply to issues of bargaining unit appropriateness because appropriateness is a fluid concept which by its nature is capable of change. I agree that the appropriateness of a bargaining unit can change. This is recognized and accounted for with provisions of the Code such as Section 142. However, I do not agree that simply because the issue being dealt with by the Board is the appropriateness of a proposed bargaining unit, the doctrine of res judicata can never apply. It will depend on the circumstances in each case.*

[52] The B.C. Board decided to apply *res judicata* on the basis that the employer "seeks to litigate the same labour relations question" as had previously been dealt with.[9] There is no indication that the statutory provisions permitting a variance application were particularly decisive.

[53] The Union also distinguishes the present case from *Practical Nurses* on the basis that, in *Practical Nurses*, the second certification application was filed two weeks after the decision

[9] *Wal-Mart*, at para 77.

dismissing the first certification application. This is a fair distinction, but it does not account for the Ontario Board's finding that there are "strong practical and policy grounds" for applying the doctrine of *res judicata* generally.[10] The Board has also reviewed the statute under consideration in *Practical Nurses*, and further to that review, observes that the applicable certification provisions included the language "at any time", which is the language that is central to the Union's argument in the present case.

[54] In our view, the case law in Saskatchewan is not as contrary to *Wal-Mart* and *Practical Nurses* as it might first appear. On the whole, the cases permit subsequent applications relating to the appropriateness of a bargaining unit when there has been a material change in circumstances. To be sure, as will be explained, a more flexible approach has been adopted in relation to applications requesting a consolidation of bargaining units in Saskatchewan and, at least to some extent, in jurisdictions with different statutory provisions.

[55] However, the case law does raise the question as to whether and when a decision relating to the appropriateness of the bargaining unit is properly characterized as "final". In considering this question, the Board will proceed to apply the modern principle of statutory interpretation to the relevant provisions.

[56] The Board has on many occasions described the proper approach to the modern principle.[11] The first step is to form an initial impression as to the meaning of a legislative provision from the text.[12] The second step is to read the words of the Act in their entire context, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.

[57] To begin, section 6-115 states: "Every board order or decision made pursuant to this Part is final and there is no appeal from that board order or decision".

[58] The Union argues that there are only specific exceptions, set out in the Act, to a union's ability to make a certification application at any time. The exceptions are: an existing certification order (s. 6-9); a prior unsuccessful vote (s. 6-12); employer influence; and the circumstances outlined in clauses 6-111(1)(m) and (n). In our view, these sections have to be read together with section 6-115. The language of section 6-115 is broad. For the Board to find an exception to the finality of the Board's orders and decisions, the exception must be expressly stated.

---

[10] *Practical Nurses* at para 12.
[11] See, for example, *University of Saskatchewan v Administrative and Supervisory Personnel Association*, 2021 CanLII 12946 (SK LRB) [*ASPA*].
[12] *ASPA* at para 57, citing *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77 (CanLII).

[59] The Board's initial impression of the phrase "at any time", included in section 6-9, is that it is a temporal indication, and not an indication of unlimited frequency. That is not to suggest that section 6-9 expressly bars multiple certification applications; nor does it prevent the application of *res judicata*. It simply does not account for circumstances in which an application has been brought multiple times. The focus of the phrase is the timing of the application, not the frequency.

[60] A comparison of sections 6-9 and 6-10 reveals that the phrase "at any time" also differentiates between a certification application with no existing certification order (section 6-9) and a certification application by another union when a union is already certified as the bargaining agent for a unit (section 6-10). In the latter case, the application is subject to strict time limits. In the former, there are no time limits. Again, "at any time" provides a temporal indication. When section 6-9 and 6-10 are read together, it is clear that a union may apply at any time if no certification order has been issued but a union is subject to specific time limits if a certification order has been issued.

[61] Next, subsection 6-12(3) deals specifically with votes. It prevents multiple votes from occurring within a short period of time by giving the Board discretion to refuse to direct a vote in specific circumstances. It does not directly address what the Board is to do when a substantive determination has been made with respect to a particular issue. Nor does it deal directly with questions relating to the Board's jurisdiction.

[62] The Union argues that clauses 6-111(1)(m) and (n) provide another specific exception to the ability of a union to apply at any time for a certification order. In our view, clauses 6-111(1)(m) and (n) do not assist the Union. These provisions give the Board the specific authority to decide whether to deal with an application at all, at an early stage in the process. These are general provisions, not specific to certification applications. If they were intended to have any impact on the finality of the Board's decisions, then their impact would be significantly broader, and not limited to certification applications. The Union's interpretation would conflict with the function of section 6-115.

[63] Finally, pursuant to section 6-11, if a union applies for certification the Board shall determine if the unit is appropriate for collective bargaining. Again, this provision has to be read together with section 6-115, which means that if a prior decision is final then the Board does not have jurisdiction to hear an appeal of that decision.

[64] Next, the Union makes the argument that the fundamental right to organize necessitates that the certification process be flexible so as to not create unnecessary obstacles to the realization of those rights. Although there is a need for flexibility in the establishment of those relationships, there is a need for stability in established bargaining relationships. To accommodate this, a different approach should be taken to certification applications as compared with amendment applications. The Union finds support for this argument in the principle of continuity of certification orders.[13]

[65] The Board does have some concern, particularly in the context of a trade division application for certification under Division 13, that employees may be hindered in their attempts to organize. As a statutory tribunal, the Board has a responsibility to exercise a measure of flexibility in its application of legal principles where those principles do not sufficiently take into account the unique context of labour relations. However, the primary purpose of Part VI of the Act is to facilitate collective bargaining by establishing the appropriate relationships, preventing obstructions, and promoting good faith negotiations. Many of the statutory provisions that govern ongoing bargaining relationships are designed to prevent conduct that interferes with the employees' exercise of their rights. There is no suggestion that *res judicata* is inapplicable to those circumstances. Where possible, the Board should aim to apply the provisions of Part VI in a manner that is consistent and fair.

[66] Moreover, the relevant statutory provisions do not support the Union's suggested approach.

[67] Where there is an existing certification order, the Board has explicit authority to amend a certification order if the employer and the union agree to the amendment or if, in the opinion of the Board, the amendment is necessary (s. 6-104(2)(g)). The authority to amend means that orders that grant bargaining rights to a union for a particular bargaining unit are not final. In addition, if the applicant alleges a material change in circumstances, then it is open to the Board to find that the issue or question to be determined is not the same and therefore the second criterion for *res judicata* has not been satisfied.[14]

[68] The Board has taken a more flexible approach to applications for the consolidation of bargaining units. There, the Board has found that the material change of circumstances

---

[13] See, *RWDSU v Prince Albert Co-operative*, [1983] 1 WWR 549.
[14] *Canadian Linen* at paras 76-8.

requirement is unnecessary.[15] Although not articulated in the case law, the difference may be explained through the Board's power to amend a certification order, which requires only that the amendment be upon agreement or be necessary. It is up to the Board to determine what is "necessary". When an amendment by way of consolidation is sought, different considerations may arise.

[69] A more flexible approach was also taken in *Memorial University of Newfoundland v Memorial University of Newfoundland Faculty Association*, 2001 CanLII 37563 (NL SC) [*Memorial University*]. The Union relies in particular on the following passage from that decision:

> *[54] While the logic with respect to finality of decisions set out in the Rogers Broadcasting case above and in Memorial University of Newfoundland Faculty Association v. Memorial University of Newfoundland et al. case is persuasive, I am satisfied that because of the absence of some statutory or regulatory restriction limiting the right of the LRB to reconsider its decisions, the legislature intended those rights contained in s. 19(2) to be as described by the Court of Appeal of Newfoundland in N.A.P.E. v. College of Fisheries, i.e. a "plenary independent power". The logic of the New Brunswick Court of Appeal in the Red Cross case is, to me, more persuasive. I am persuaded, as in the words of the New Brunswick Court of Appeal, that "labour relations… differ from court proceedings in that they involve a dynamic and ongoing relationship between the same parties. In such situations, the application of a doctrine similar to res judicata would not always be appropriate." […]*

[70] The Court in *Memorial University* accepted that the Newfoundland Board had a "plenary independent power" that was not subject to restrictions and therefore it would not always be necessary for there to be a factual change to justify the amendment of a decision. It is significant that the provision in issue, in the *Labour Relations Act*, read as follows:

> ***19.*** *(1) A decision, order, direction, declaration or ruling of the board shall not be questioned or reviewed in a court, and an order shall not be made or process entered or proceedings taken in a court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the board or its proceedings.*
>
> *(2) The board may review, rescind, amend, alter or vary an order or decision made by it or by a panel and may rehear an application before making an order in respect of it.*

[71] Nor was there a specific reconsideration power. Five years later, in 2006, subsection (3) was added to place some restrictions on the power to review, rescind, amend, alter or vary:

> *(3) An application to the board for the review, rescission, amendment, alteration or variation of an order or decision of the board or a panel under subsection (2) shall be made within 6 months of the making of the original order or decision or the longer period the board considers appropriate in the circumstances.*

---

[15] *Ibid* at para 114.

[72] By contrast, the Saskatchewan Board has interpreted its powers of reconsideration to not include an appeal of its own decisions. It relies for this conclusion on subsection 6-115(1), which states that "[e]very board order or decision …is final and there is no appeal from that board order or decision". Newfoundland's *Labour Relations Act* contained a privative clause similar to subsection 6-115(4) of the Act but did not contain a provision equivalent to subsection 6-115(1).

[73] In conclusion, in the matter before us, there is no existing certification order. Instead, the Board has previously found that there was insufficient evidence to conclude that the unit was appropriate. The Board's decision with respect to whether the Union met its onus was final. However, if there has been a material change in circumstances, then the Board may find that the second criterion under the doctrine of *res judicata* has not been satisfied.

[74] Next, the Board will consider whether there is sufficient evidence which if left uncontradicted could demonstrate a material change in circumstances.

[75] To begin, the Employer argues that the Board in the prior decision found that the work was maintenance. The Employer's argument on this point is manifestly wrong. In the prior certification matter, the Board concluded that the Union had not met its onus, in particular, by not demonstrating the requisite connection between the construction activity taking place on site and the work being performed by the labourers. This is particularly important because the labourers are a support trade: the nature of the work performed by the labourers is highly dependent on the work of the other trades that they are supporting.

[76] The Union suggests that, although it is possible that inadequate evidence led to the Board's prior decision, that conclusion cannot be drawn from the decision itself.

[77] It is clear that, in the hearing on the first certification application, there was inadequate evidence with respect to the overall project and the connection between the overall project and the work being performed by the labourers. This means that the parties are left in, as the Union describes it, a "state of unknowing" as to whether the work being performed comes within the definition of construction industry. The Board is not being asked to change its view as to whether the work is construction or maintenance. It is being asked to determine that there is now sufficient evidence to find that the work comes within the construction industry.

[78] In *KDM No. 5*, the Board described the task before it:

> *[51] In the present case, the question out of which the alleged estoppel is said to arise is whether the bargaining unit is appropriate for collective bargaining, and specifically, whether the nature of the work being performed is construction industry work. In the first decision, the Board found that the Union had not met its onus to prove that the work being performed was construction industry work. The general nature of the evidence about the overall project prevented the Board from being able to adequately perform a contextual assessment and determine whether the requisite connection existed. This question, whether the work is construction industry work, is sufficiently "fundamental to the substantive decision" that the latter could not stand without the former.*
>
> *[52] Again, this conclusion is limited, however, due to the passage of time. The Union has stated that the approval of the Stage 1 work in August 2021 has resulted in a change in circumstances. The only way for the Board to determine the relevance of the intervening period is to hear the evidence. This case is unlike Metz, in which the Board was dealing with the same time period in the relevant applications. The Board cannot make this determination on the basis solely of Mr. Blackwell's affidavit. The fact that the Employer filed his affidavit only confirms that the nature of the work is a contested issue.*
>
> *[53] A similar observation was made in Federated Co-operatives Limited v Retail Wholesale and Department Store Union, Local 504, [1978] July Sask Labour Rep 45 [Federated Co-operatives] at 46:*
>
> > *Another requirement before res judicata can apply is that the previous decision constituted a determination of the same question as that sought to be determined in the present application. It is here that a problem may arise when it is alleged that there has been a change in circumstances between the date of the first decision and the date of the second application. When it is alleged that there has been a change in circumstances, the only manner in which the Board can properly determine the issue is by hearing the evidence. The exact nature of the change in circumstances which will be sufficient to warrant taking the matter outside of the principle of res judicata or to warrant an amendment is a factual matter to be decided upon the evidence in each individual case.*
>
> *[54] The Board agrees with this latter observation that the exact nature of the change which will be sufficient to warrant taking the matter outside of res judicata, assuming res judicata applies, would have to be decided based on the evidence. To find otherwise would be to draw an arbitrary and unworkable distinction without sufficient information prior to the hearing of the matter.*

[79] This is not a usual case (if such a case can even be called "usual") in which the prevailing circumstances at the time of the first hearing were readily apparent such that the Board could easily assess whether there has, in fact, been a material change in circumstances. This fact should not stand in the way of the Union being permitted to attempt to demonstrate that there has, in fact, been such a change. However, in assessing the alleged change, it is necessary for the Board to be alert to the potential of allowing the Union a re-do. The Board has to consider the importance of fairness for the Employer in preventing a re-litigation of the same issue and fairness for the Union in permitting it to make its case if there has been a material change in circumstances.

[80] To address these unusual circumstances, the Union has made a novel argument. The Union has suggested that the material change in this case is the change from a "state of

unknowing" to a "state of knowing", and has asserted that, it is possible, that at the prior hearing there was simply no evidence to present that would assist the Board in understanding the requisite connection between the labourers' work and the overall project. The "pre-construction" stage of the project resulted in a "state of unknowing", which is different from Stage 1 of the project, which permits a "state of knowing". In our view, if that were the case, then it would have been incumbent on the Union to present evidence about that very thing – the absence of available evidence in the prior case – in order to show that there was a material change in circumstances.

[81] Next, the Board will consider the concrete evidence which in the Union's submission constitutes the material change in circumstances. It will consider this evidence in a fashion most favourable to the Union. However, it is not sufficient for the Union to simply demonstrate that the current work comes within the construction industry definition. The change that may be found to be material must provide some foundation for why the construction industry definition was not satisfied in the first instance and why it may be satisfied now.

[82] The Union states that there has been a substantial change in the size of the bargaining unit and that there has been a dramatic increase in the amount of work performed by the labourers. Between March 2020 and January 2022, the labourers' work has tripled. In our view, these observations have no bearing on whether there has been a change that is material to the question before the Board. Even if it were sufficient for the Union to simply demonstrate that the current work comes within the construction industry definition, the size of the workforce and the extent of the work would have no bearing on this issue.

[83] The Union also suggests that the composition of the workforce has changed. Again, its observations in relation to unit composition have no bearing on the question before the Board.

[84] Next, the labourers are working under a Work Package that is substantially the same as the one which was in place during the timeframe subject to the prior proceeding. Shane Sali, who is the Union's Business Manager, admitted that between the prior application and the current application the scope of work did not change. Bonnie Halkett, who is a labourer, acknowledged that, generally speaking, the labourers are still performing the same duties.

[85] The Union also asserts that there has been a change in the overall project, pointing to a press release entered into evidence which announced a new stage of work to be performed on site. The press release is dated August 17, 2021, and it announced the approval of a major capital expenditure for the Jansen Stage 1 (Jansen S1) potash project, which is described as follows:

> *Jansen S1 includes the design, engineering and construction of an underground potash mine and surface infrastructure including a processing facility, a product storage building, and a continuous automated rail loading system. Jansen S1 product will be shipped to export markets through Westshore, in Delta, British Columbia and the project includes funding for the required port infrastructure.*

[86] Further down in the press release, it states:

> *…The investment to date includes construction of the shafts and associated infrastructure… as well as engineering and procurement activities, and preparation works related to Jansen S1 underground infrastructure. The construction of two shafts and associated infrastructure at the site is 93 per cent complete and expected to be completed in the 2022 calendar year…*

[87] Prior to the decision that led to this announcement, the possibility remained that, following the preliminary stage of the project, there would be no further construction on the site.

[88] Sali described the construction work that was being performed on site during his tour of November 2021. At that time, the work was being performed on the headframe and the venting of the shafts. He could not comment on their stage of construction. For comparison purposes, in the prior decision, the Board made the following observation:

> *[32] The mine remains under construction and is not yet operational. Work is being performed on the shafts. The final liner is being installed, and this is expected to take another 10 to 14 months. The processing plant will also need to be constructed. By the end of 2021, Blackwell expects that there will be more certainty about whether the project will continue. The work package is held directly with BHP until the end of 2021.*

[89] The Board also observed at paragraph 111 that "[t]he work is being performed on a large industrial site. The mine remains under construction; it is not yet operational."

[90] Sali also indicated that, when he took his tour in November 2021, he was told by BHP personnel that they were starting the civil work on the processing plant.

[91] Other than during that tour in November, Sali has not been present on site and did not have any personal knowledge of the work being performed on site.

[92] Halkett, who is a labourer and was very involved in providing cleaning services, made the following observations:

a. During the pandemic, labourers have been involved in substantial “cloroxing” of various surfaces throughout the site. This is considered safety work. As of May 2022, the regular cloroxing came to an end.

b. Since 2020, there has been a large increase in the number of trailers on site.

c. After November 2021 (for four or five months), there was a large increase in the number of gravel trucks coming on site. The gravel is used to build platforms for trailers, roads, and the foundations of any mills that were being constructed. The labourers escorted the trucks on site. They did not unload the trucks.

d. The Employer filled a labour shortage for another company by supplying workers to assist in dropping off the rig mats to support the work done for the foundation pilings.

[93] Having considered all of the evidence presented by the Union, the Board is persuaded that there is no arguable case. The evidence with respect to a material change in circumstances is insufficient. The primary change is the announcement of Stage 1 of the construction project. The extent to which that announcement has resulted in a change of work for the labourers is minimal.

[94] The regular cloroxing that Halkett described in detail is not qualitatively different from the usual work of cleaning that is required to ensure that the work site is safe.[16] The increase in the number of trailers, as with the increase in the amount of work, is of no consequence.

[95] The labourers’ work with the gravel is insufficient. Although the gravel is used, in part, to lay the foundations for the mine, it is also used for the foundations for trailers and for roads, which were all present (albeit in different numbers) on the date of the prior application. In the hearing with respect to that application, the Project Manager explained that the escorting of delivery vehicles was a part of the labourers’ responsibilities.[17]

[96] Lastly, the announcement or even commencement of Stage 1 of the project is not a material change in circumstances. In the prior matter, there was construction on site of the shafts and underground infrastructure; now there is construction of the shafts, the underground infrastructure, and the surface infrastructure. For similar reasons, the existence of a new Project Labour Agreement does not change the circumstances, other than by officially recognizing work

[16] *KDM No. 1* at paras 16, 42.
[17] *Ibid* at para 42.

that is occurring, including on both underground and surface infrastructure. The fact that an agreement recognizes that construction work is now occurring is not proof that similar work was not previously occurring.

[97] Lastly, the labourers have been involved in dropping off rig mats to fill a labour shortage for another company. The work with the rig mats is not a regular part of the labourers' duties and is not sufficient to demonstrate a material change in circumstances.

[98] The balance of the work is substantially the same as what was being performed at the time of the first hearing.

[99] As such, all three of the requirements for *res judicata* have been met. The question before the Board is the same as that which was present at the time of the first hearing.

[100] However, as the Board observed in *Metz*, the application of the doctrine of *res judicata* still requires some exercise of discretion:

> *[76] The application of the doctrine of res judicata still requires some exercise of discretion by the Board. As stated by the Supreme Court of Canada in the Danyluk decision, quoted in Hibernia, supra, there [may be] certain factors that limit the application of the doctrine of res judicata. One must weigh these factors or concerns of fairness against the principle of finality enshrined in the doctrine of res judicata. According to Danyluk, supra, a consideration of fairness includes an examination of the following factors: if the stakes in the original proceeding were too minor in nature "to generate a full and robust response" but the current stakes are considerable; if there was an inadequate incentive to defend at the original hearing; there has been the discovery of new evidence in appropriate circumstances; or that the original proceeding was tainted in some way.*

[101] Not one of these factors applies to the current case. Nor are we persuaded that there is another principle that justifies the exercise of the Board's discretion to not apply the doctrine of *res judicata*. If we were to find as much, we would be allowing the Union a second opportunity to litigate the same question.

[102] For all of the foregoing reasons, the Employer's application for non-suit is granted and the Union's application for certification is dismissed. The hearing for the resumption of the certification application will be cancelled.

[103] The Board thanks the parties for the excellent submissions made in relation to the matters before it, all of which have been reviewed and considered, including the Union's detailed and thoughtful review of the relevant statutory provisions.

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

DATED at Regina, Saskatchewan, this **30th** day of **December, 2022.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson