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Dear Mr. Hamilton and Mr. Smith:

Re: LRB File No. 031-21 (253-19); Reconsideration Application
The Corps of Commissionaires, North Saskatchewan Division v United Food and Commercial Workers, Local 1400

Background:

[1] These are the Board's Reasons for Decision in relation to the second stage of a reconsideration application brought by the Corps of Commissionaires, North Saskatchewan Division. This matter came before Aina Kagis, Mike Wainwright, and the Vice-chairperson, as the panel. The original decision is *United Food and Commercial Workers Union, Local 1400 v Corps of the Commissionaires*, 2021 CanLII 15152 (SK LRB) [*Original Decision*]. Relevant background to the dispute was outlined in the Original Decision:

> *[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;*
>
> *(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);*
>
> *[…]*
>
> *[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.*

[2] In the Original Decision, the Board considered three applications: an unfair labour practice application, an application to cancel a certification order, and an application to summarily dismiss.

[3] The unfair labour practice application was the first application to be filed. In this application, the Union alleged that the Corps had failed to pay union dues, as required by section 6-43 of *The Saskatchewan Employment Act* [Act]. In the reply to the application, the Corps made the following statements:

> *…*
> *(b) Subsequent to [the March 2002 order], the Applicant made no attempts to enforce any bargaining rights nor to collect union dues from the Employer.*
>
> *(c) The Employer was never served with copies of the applicable collective agreements.*
>
> *(d) From March 26, 2002 through May 7, 2019 the Applicant took no steps to enforce its bargaining rights.*
>
> *(e) The Employer's contract was not renewed after August 31, 2003 and the work was performed by other Employers who may or may not have been unionized and/or represented by the Applicant.*
>
> *(f) On or about July 15, 2016, the Employer was awarded a contract by the City of Saskatoon to provide security services at the following locations:*
> *…*

(g) Immediately prior to July 15, 2016, these security services were being provided by another employer who, to the best knowledge of the Employer, was not under any certification order, but certainly was not bound by any certification order with the Applicant.

(h) The Employer was never contacted by the Applicant until May 7, 2019. To date, the Applicant has never provided the Employer with any copies of a Collective Agreement[.]

(i) The Employer was not providing any services at any of the locations in the Order for a period of thirteen years. In the interim, the services were provided by other employers.

[4] The Corps continued:

(j) As security services are now subject to ordinary successorship rules pursuant to Part VI of The Saskatchewan Employment Act, SS 2013, c. S-15.1, a successorship will only occur where there is a sale, lease, transfer or other direct disposition of a business to a new employer. There is no successorship between the Employer and the previous provider of these security services, Neptune Security nor any other provider since The Saskatchewan Employment Act, SS 2013, c. S-15.1 came into force.

(k) Further, and in the alternative, the Applicant has abandoned its bargaining rights by reason of non-contact with the employer for a period of seventeen years.

(l) Further, the Applicant has abandoned the workers such that the certification order is no longer effective with respect to them.

[5] Paragraph (j) outlines what the Board will call the "no successorship" argument.

[6] After the unfair labour practice application was filed, the Corps brought the application to cancel a certification order, LRB File No. 253-19, pursuant to section 6-16 of the Act. That provision 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).

[7] In the application to cancel a certification order, the Corps stated:

As outlined in 4(k) of the Reply to Unfair Labour Practice dated July 2, 2019, it is the Applicant's position that, pursuant to section 6-16 of The Saskatchewan Employment Act, the Union UFCW, Local 1400, has abandoned its bargaining rights due to inactivity for a period of seventeen years. In addition, as outlined in 4(j) of the Reply to Unfair Labour

> *Practice dated July 2, 2019, it is the Applicant's position that they are not a successor employer and therefore the certification order granted is of no application.*

[8] The "no successorship" argument, described in the reply to the unfair labour practice application and in the application to cancel the certification order, was not pursued by the Corps at the hearing. The Board made a related observation, specific to the unfair labour practice application, in the Original Decision:

> *[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.***
>
> *[**Emphasis added**]*

[9] As will be described in more detail in these Reasons, the "no successorship" argument was revived in the course of the reconsideration proceeding, after the evidence was presented and during the closing arguments.

[10] At the original hearing, the Corps also argued that it had no knowledge of the 2002 Board order and that the Corps was not in possession of any records confirming that there was such an order. While the Corps admitted that abandonment cannot be found when there are no employees in the bargaining unit, it argued that the three-year timeframe may be comprised of periods that are not consecutive.

[11] Also at the original hearing, the Corps argued, in the alternative, that should the Board decline to cancel the certification order on the basis that the Union abandoned the bargaining unit, the Board should exercise its discretion pursuant to clause 6-111(1)(v) and order a vote to determine whether the Union has the support of the employees. It stated that the certification order was not the choice of the employees; rather, it had been forced upon them.

[12] In the Original Decision, all three of the applications were dismissed. No other order was made in relation to these applications. After dismissing all three applications, the Board made the following, obiter statement:

> *[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.*

[13] As will be made clear, the Original Decision, including this paragraph, should be understood within the context of the arguments made by the parties.

[14] After the Board's decision, the Corps retained new counsel, who acted for the Corps in relation to the reconsideration application. In *Corps of Commissionaires, North Saskatchewan Division v United Food and Commercial Workers*, 2021 CanLII 71335 (SK LRB) [*First Stage Reconsideration*], the Corps sought to reconsider the Board's finding that the Union had not abandoned the bargaining unit and, alternatively, the Board's conclusion that holding a representation vote of employees who are employed by the Union was not appropriate. It did not seek reconsideration in relation to either of the other two orders.

[15] In its application for reconsideration, the Corps relied on three of the criteria derived from *Remai Investment Corp. v Saskatchewan Joint Board, RWDSU*, [1993] Sask Lab Rep 103 (SK LRB) [*Remai*], known as the *Remai* criteria. The Board accepted that two of the three criteria met the test to proceed to the second stage of the reconsideration application.

[16] First, the Corps relied on the second of the *Remai* criteria, which allows for reconsideration in cases in which a hearing was held but where certain crucial evidence was not adduced for good and sufficient reasons. Here, the Corps claimed that the Board had made factual findings that were based on incomplete facts and that new and additional facts had become known to the Corps after the decision was issued.

[17] Included in the new evidence was the Union's collective agreement with another security company, SSG, bearing an expiry date of October 31, 2013. The Corps' argument with respect to this ground, put simply, was that the collective agreement demonstrated that there were employees in the bargaining unit during the material times.

[18] The Board found, that for the purposes of the first stage of the reconsideration application, the Corps had satisfied the Board that the evidence was crucial and that it had not been adduced at the original hearing for good and sufficient reason, at least on the part of the Corps.

[19] Second, the Corps relied on the fourth *Remai* criterion, which allows for reconsideration in certain circumstances if the original decision turned on a conclusion of law or general policy under the Act which law or policy was not properly interpreted by the original panel. The Corps phrased its reliance on this criterion in the following way:

> *The conclusion regarding abandonment appears to be incorrect in both law and fact. The conclusion is inconsistent with the approach in past decisions of the Board in how the statutory provisions on abandonment were only applied to the time periods when the Applicant had employees working in the bargaining unit without regard to the employees of other companies who were working in the bargaining unit.*

[20] In considering the fourth criterion, the Board was guided by the following description:

> *[21] The fourth ground is relevant where there is an inconsistency between the decisions rendered by different panels on an important issue of law or policy, or in some cases, where it is alleged the Board misapplied or misconstrued its enabling statute.*

[21] The Board then described the Corps' arguments in relation to this ground:

> *[22] The Corps states that the Board used the incorrect date when it assessed the duration of the time period applicable to the application to cancel the certification order. Based on the law of successorship, the expiry date of the collective agreement is the appropriate starting date for purposes of making that assessment. The finding that the Corps was a successor employer in Corps No. 1, [2002] Sask LRBR 188 meant that the Corps had acquired the essential elements of the business. The Board did not consider, and should have considered, the impact of intervening employers and the Union's obligation to represent employees through the successive employers who held the security contract. This occurred because the Union withheld information with respect to the related bargaining relationships.*

[22] The Board found, without indicating whether it accepted these arguments, as follows:

> *[23] The Board finds that it is appropriate to re-examine the underlying decision to ensure that it is consistent with past decisions, and that the enabling statute has been properly applied. The Board is not, however, persuaded that this decision is precedential, given the unusual circumstances of the hearing of this matter, including the nature of the evidence and argument.*

Evidence:

[23] Next, the Board will summarize the evidence presented at the reconsideration hearing.

[24] Danielle Cote, the Director of HR for the Corps, and Lucia Flack Figueiredo, the President of the Union, testified.

[25] The collective agreement between the Union and Inner-Tec Security, signed January 13, 1998, bears an expiry date of November 5, 2000. Ms. Cote first saw this agreement in March or April of 2021 when she received it from the Corps' lawyer.

[26] The succession of contractors who provided security services through the City Sites contract is as follows:

- Inner-Tec Security [Inner-Tec] (1991-2000);

- Corps of Commissionaires (2000-2005);
- United Protection Services [UPS] (2005-2013);
- SSG Security [SSG] (2013-2016);
- Neptune Security was awarded the contract in Spring 2016 but was unable to staff the sites, and therefore did not provide services;
- Corps of Commissionaires (2016 to present).

[27] Therefore, except for the brief and failed attempt of Neptune Security, the company that was operating under the City Sites contract just prior to the Corps, from 2013 to 2016, was SSG.

[28] On August 5, 2003, the Corps wrote to the Union alleging that the Union had taken no action to bargain collectively in "some months" and suggesting that the Union had abandoned its rights to represent the employees. Then, on October 12, 2005, the Union wrote to the Corps, indicating that the parties were in the early stages of a round of collective bargaining.

[29] On April 11, 2013, the Union filed an unfair labour practice application against SSG, outlining the following:

> *(c) By order of this Honourable Board dated the 21st day of October, 2005, LRB File No. 160-05, the Union was designated the duly authorized agent to bargain collectively on behalf of all employees of United Protection Services Inc. (UPS), at the Saskatoon City Hall, located at 222 Third Avenue North, Saskatoon, SK. The Union and United Protection Services, Inc. (UPS) bargained a collective agreement. The last collective bargaining agreement between United Protection Services Inc. (UPS) and the Union is dated March 1, 2011 and expired on February 28, 2014.*
>
> *(d) Since certification, there was a disposition of the business, or part thereof, of United Protection Services Inc. (UPS), via sale as deemed pursuant to Section 37.1(2) of The Trade Union Act, to SSG Safe Security Services Canada Inc. As a result of this disposition, United Protection Services Inc. (UPS) ceased providing security services to the Saskatoon City Hall and the same or substantially similar services were provided by SSG Safe Security Services Canada Inc. … thereafter.*
>
> *(e) United Protection Services, Inc (UPS) has up until approximately the 30th day of March, 2013 carried on the business of security and related activities at a location known as the Saskatoon City Hall located at 222 Third Ave North, Saskatoon, and Saskatoon public libraries throughout the city of Saskatoon. This business was undertaken by UPS by virtue of successorship.*
>
> *(f) The union is the certified collective bargaining agent for all employees employed by UPS in Saskatoon and surrounding area in Saskatchewan as set out in the LRB order 160-05, dated October 21, 2005.*
>
> *(g) Since the disposition described in paragraph (d) above, on or around March 30, 2013, the Union notified SSG Safe Security Services Canada Inc. of certain obligations imposed on SSG Safe Security Services Canada Inc. as a result of the disposition. SSG Safe Security Services Canada Inc. has disregarded the Union's correspondence, SSG Safe Security Services Canada Inc. has not abided by the collective agreement.*

> …
>
> *(j) As set forth in its application re successorship, the union says the SSG Safe Security Services Canada Inc. are successors to United Protection Services, Inc. (UPS) and are bound by the certification order and collective bargaining agreement in place. SSG Safe Security Services Canada Inc. has refused and continues to wholly refuse to honour the terms of the collective bargaining agreement in place and the certification order. SSG Safe Security Services Canada Inc. has refused to continue the employment of a number of employees at the worksite.*
>
> …

[30] On September 11, 2013, the Board issued two orders, one consent order finding that SSG had committed an unfair labour practice and the other an order that SSG bargain collectively with the Union with respect to the unit of employees as described in that order.

[31] The collective agreement between the Union and SSG is dated February 8, 2013 and bears an expiry date of October 31, 2013, which latter date was likely an error, given that the wage schedule in the agreement includes wages for 2014. The more probable, intended expiry date of the agreement was October 31, 2014. Ms. Cote first saw this agreement in March or April of 2021.

[32] On March 9, 2021, the Union wrote to the Corps, attaching a copy of the last collective agreement with SSG, stating:

> *I have attached a copy of the last collective agreement with [SSG] Safe Security Group, the previous Unionized employer certified at the locations you are now providing services to, was operating under the previous collective agreement which had been in place at the time of the Order of the Labour Relations Board dated November 7th, 2002. The collective agreement in place in 2002 has been subsequently renewed by the Unionized Companies who have provided services under this certification since 2002. As you know, SSG lost the sites and did not conclude the renewal of the collective agreement. Notwithstanding, the Collective Agreement continues to apply, and transfers to the Commissionaires, North Saskatchewan Division, hence the obligation to provide maintenance of membership as I had requested. I call your attention to **Article 3** and **Article 4** which outline the employers [sic] obligations regarding notice to the Union of it's [sic] members, which includes contact information, information on their hire dates, wage rates etc. When we receive this information, we will be able to contact our members and elect a bargaining committee. In the spirit of negotiations, with the intention of renewing a collective agreement on behalf of the members, we can proceed with negotiations on the date and time specified above.*

[33] In her evidence, Ms. Figueiredo attempted to explain her inconsistent positions with respect to the SSG agreement, as reflected in the letter to the Corps, dated March 9, 2021, which states that the collective agreement "continues to apply", and the later correspondence in which she backed away from that position.

[34] As well, Ms. Figueiredo admitted that, while she hopes that the national office is complying with provincial filing requirements, she took no steps to reach out to the Ministry to obtain a copy of the Inner-Tec collective agreement.

[35] Ms. Figueiredo stated that she had filed grievances against SSG respecting remittances, but she could not recall specific dates, other than to observe that the last grievance was sometime in 2017. The Union was constantly chasing SSG.

Statutory Provisions:

[36] Sections 31, 37, 37.1, and 38 of *The Trade Union Act* (repealed) state:

> ***31*** *Each of the parties to a collective bargaining agreement or any document altering, modifying or amending a collective bargaining agreement or any provision thereof or contained therein shall forthwith upon execution of the agreement or document file one copy thereof with the minister and the copies so filed shall be made available by the minister for inspection by any person.*
>
> ***37****(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.*
>
> *(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:*
>
> *(a) determining whether the disposition or proposed disposition relates to a business or part of it;*
> *(b) determining whether, on the completion of the disposition of a business or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:*
> *(i) an employee unit;*
> *(ii) a craft unit;*
> *(iii) a plant unit;*
> *(iv) a subdivision of an employee unit, craft unit or plant unit; or*
> *(v) some other unit;*
> *(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);*
> *(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);*

(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;
(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).

37.1*(1) In this section, "services" means cafeteria or food services, janitorial or cleaning services or security services that are provided to:*
(a) the owner or manager of a building owned by the Government of Saskatchewan or a municipal government; or
(b) a hospital, university or other public institution.
(2) For the purposes of section 37, a sale of a business is deemed to have occurred if:
(a) employees perform services at a building or site and the building or site is their principal place of work;
(b) the employer of employees mentioned in clause (a) ceases, in whole or in part, to provide the services at the building or site; and
(c) substantially similar services are subsequently provided at the building or site under the direction of another employer.
(3) For the purposes of section 37, the employer mentioned in clause (2)(c) is deemed to be the person acquiring the business or part of the business.

38 *Where an employer has by an order of the board been required to bargain collectively, he shall, while the order remains in force continue to be subject to the order and to any collective bargaining agreement entered into pursuant thereto notwithstanding that after the making of the order and while a collective bargaining agreement remains in force he at any time or from time to time ceases to be an employer within the meaning of this Act and the collective bargaining agreement shall while it remains in force continue to apply at all times during which he is an employer within the meaning of this Act.*

[37] Applicable provisions of *The Saskatchewan Employment Act* state:

6-1 *(1) In this Part:*
(a) "bargaining unit" means:
(i) a unit that is determined by the board as a unit appropriate for collective bargaining; or
(ii) if authorized pursuant to this Part, a unit comprised of employees of two or more employers that is determined by the board as a unit appropriate for collective bargaining;
(b) "certification order" means a board order issued pursuant to section 6-13 or clause 6-18(4)(e) that certifies a union as the bargaining agent for a bargaining unit;
…
(2) Unless otherwise ordered by the board, an employer remains subject to a certification order, a collective agreement and the other provisions of this Part notwithstanding that the employer, at any time or from time to time, ceases to be an employer within the meaning of this Part.

6-13*(1) If, after a vote is taken in accordance with section 6-12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:*

(a) certifying the union as the bargaining agent for that unit; and

(b) if the application is made pursuant to subclause 6-10(1)(b)(ii), moving a portion of one bargaining unit into another bargaining unit.

(2) If a union is certified as the bargaining agent for a bargaining unit:

(a) the union has exclusive authority to engage in collective bargaining for the employees in the bargaining unit and to bind it by a collective agreement until the order certifying the union is cancelled; and

(b) if a collective agreement binding on the employees in the bargaining unit is in force at the date of certification, the agreement remains in force and shall be administered by the union that has been certified as the bargaining agent for the bargaining unit.

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).

6-18*(1) In this Division, "disposal" means a sale, lease, transfer or other disposition.*

(2) Unless the board orders otherwise, if a business or part of a business is disposed of:

(a) the person acquiring the business or part of the business is bound by all board orders and all proceedings had and taken before the board before the acquisition; and

(b) the board orders and proceedings mentioned in clause (a) continue as if the business or part of the business had not been disposed of.

…

6-104*(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*

(h) notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of a certification order or collective bargaining order is pending in any court, rescinding or amending the certification order or collective bargaining order;

6-108 *(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.*

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.

***6-127** (3) Every order, declaration, approval and decision of the board made pursuant to the former Acts continues in force as if made by the board pursuant to this Part and may be enforced and otherwise dealt with as if made pursuant to this Part.*

Analysis:

[38] It is worthwhile to begin by reiterating the existence of sections 6-1 and 6-13 of the Act, which state:

***6-1** (1) In this Part:*

(b) "certification order" means a board order issued pursuant to section 6-13 or clause 6-18(4)(e) that certifies a union as the bargaining agent for a bargaining unit;

…

(2) Unless otherwise ordered by the board, an employer remains subject to a certification order, a collective agreement and the other provisions of this Part notwithstanding that the employer, at any time or from time to time, ceases to be an employer within the meaning of this Part.

…

***6-13**(1) If, after a vote is taken in accordance with section 6-12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:*

(a) certifying the union as the bargaining agent for that unit; and

(b) if the application is made pursuant to subclause 6-10(1)(b)(ii), moving a portion of one bargaining unit into another bargaining unit.

(2) If a union is certified as the bargaining agent for a bargaining unit:

(a) the union has exclusive authority to engage in collective bargaining for the employees in the bargaining unit and to bind it by a collective agreement until the order certifying the union is cancelled; and

> *(b) if a collective agreement binding on the employees in the bargaining unit is in force at the date of certification, the agreement remains in force and shall be administered by the union that has been certified as the bargaining agent for the bargaining unit.*

[39] According to subsection 6-18(5), section 6-13 applies, with any necessary modification, to a certification order issued pursuant to the current successorship powers. Certification orders are defined at section 6-1 of the Act.

[40] Relatedly, section 38 of *The Trade Union Act* and subsection 6-1(2) of the current Act set out the continuation of obligations of an employer who ceases to be an employer in respect of a certification order and a collective agreement.

[41] Subsection 6-127(3) sets out the transitional rules that apply to orders that were made pursuant to *The Trade Union Act*:

> ***6-127*** *(3) Every order, declaration, approval and decision of the board made pursuant to the former Acts continues in force as if made by the board pursuant to this Part and may be enforced and otherwise dealt with as if made pursuant to this Part.*

[42] Subsection 6-1(2) permits an "otherwise order" when an employer is subject to a certification order. The Board has powers to cancel a certification order pursuant to sections 6-14, 6-15, 6-16, and 6-17 of the Act. It also has powers to rescind a certification order pursuant to sections 6-104(2)(h), 6-108(3), and 6-109 of the Act. Although the Board's current approach is to rescind certification orders for a previous employer once a certification order has issued for a successor employer pursuant to section 6-18 of the Act, the certification order issued pursuant to the decision in *United Food and Commercial Workers, Local 1400 v Corps of Commissionaires*, [2002] Sask LRBR 188, LRB File No. 276-00 has never been cancelled or rescinded. The record of certification orders related to the City Sites would suggest that the Board did not, at the material times, have a uniform practice of cancelling or rescinding certification orders upon making a finding of successorship, at least in respect of the deemed successorship regime.

[43] As will become clear, the precise applicability of the foregoing provisions to this matter has not been determined. Furthermore, the Corps is now arguing that the negotiation of a collective agreement by a successor employer impacts the permanence of the bargaining rights that arise from a previous employer's certification order, that the certification order in this case has been "spent", and that there is no successorship. However, the form and manner by which these arguments have been presented preclude the Board from grappling with them. We will explain.

[44] Here, the application to cancel the certification order was brought pursuant to section 6-16 of the Act. In considering whether to cancel a certification order pursuant to section 6-16, the question is whether the certification order has been abandoned. Section 6-16 outlines what is meant by abandonment:

> ***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).*

[45] In *International Brotherhood of Electrical Workers, Local 529 v Saunders Electric Ltd*., 2009 CanLII 63147 (SK LRB) [*Saunders*], the Board considered the following principles, which remain relevant on an application pursuant to section 6-16:

> *[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 [are] any other factor or factors which would excuse the inactivity or lack of use of the rights by the Union.*

[46] In the Original Decision, the Board considered whether a failure to utilize collective bargaining rights over the required time period had been established and found that the statutory minimum three-year period had not been met. It is for this reason that the abandonment application was dismissed.

[47] The Board has before it a reconsideration application in relation to that Original Decision.

[48] On this application, the Corps' initial argument was that the Union had failed to provide the Board with the relevant collective agreements, which would have shown that there were employees in the bargaining unit during the material times, and that the Union's activities, or lack thereof during those times, were relevant for determining whether the Union had been inactive in promoting and enforcing its bargaining rights for a period of three years or more. It argued, further, that once the allegation of abandonment was raised, the Union should have demonstrated that, in situations where and at times when there were intervening employers, it was representing employees. The Corps suggested that there were employees in the bargaining unit prior to the 2016 contract and alleged that the Union's bargaining rights continued through each successorship relationship, with each successive tender and contract.

[49] The Corps also suggested that the Board's conclusion that there was no renewal of the Inner-Tec collective agreement was wrong in fact and in law. The Board is now able to conclude that the agreement has been renewed. The deemed successorship provision, section 37.1 of *The Trade Union Act*, required that a successor employer was bound by a certification order or collective agreement applying to the employees affected by the disposal to the same extent as if the order had originally applied to the successor employer or as if the agreement had been signed by the employer. UPS entered into collective agreements with the Union, the last one being effective from March 1, 2011 to February 28, 2014.

[50] The task for the Corps in relation to this application is to persuade the Board to reconsider its decision on abandonment. However, the Corps has shifted its argument from one that focused on the question of abandonment to one, which in the Corps' own admission, requires no consideration of abandonment. The re-purposed argument focuses not on whether the Union has abandoned its bargaining rights, but rather, on whether there were any bargaining rights to abandon. While the Board understands why this occurred, it poses some difficulty for the Board in assessing the Corps' abandonment arguments, as outlined in its application, given that those arguments were treated in a somewhat cursory manner at the reconsideration hearing. It also poses some difficulty in assessing the Corps' "no successorship" argument, given that it is not relevant to the question of whether any bargaining rights have been abandoned, that is, whether the Union was inactive in promoting and enforcing its bargaining rights for a period of three years or more.

[51] To provide further clarity, the Corps' argument at the reconsideration hearing may be summarized as follows.

[52] The Corps argues that the certification order to which it is a party was issued pursuant to section 37.1 of *The Trade Union Act*. Since that certification order was issued, there has been a series of intervening employers providing security services, also at those sites, pursuant to contracts with the City. Those employers have each been deemed successors and have been bound by the existing orders of the Board and the existing collective agreement, also pursuant to section 37.1 of *The Trade Union Act*.

[53] The Corps says that subsequent collective agreements have also been negotiated and concluded. Each of those collective agreements either does or can be assumed to define the scope of the bargaining unit. The scope of the bargaining unit references the relevant employer as a party, meaning that the scope of the relevant bargaining unit includes only the employees that work for that employer. The Corps concludes that the negotiation and conclusion of a collective agreement following the issuance of a certification order means that the scope of the certification order is "spent": *SMI v United Steelworkers, Local 8933*, 2021 SKCA 137 (CanLII).

[54] The Corps distinguishes this argument from the Canada Board's approach, as demonstrated in *United Brotherhood of Carpenters and Joiners of America, Local 1325 v PCL Constructors Northern Inc., et al*, [2004] CIRB No 294. There, the Board considered a successor employer's argument that the union had abandoned the bargaining rights that had once attached

to the seller's business. The Corps says that the reason that the Canada Board did not accept this argument was that the principle of abandonment was not available to it. The Board concluded, at paragraph 54:[1]

> *The Board concludes that accepting the successor employer's abandonment argument in the present matter would be a clear reversal of the Board's current and longstanding policy and a shift away from the Board's policy regarding its exclusive authority over the determination of appropriate bargaining units. Cancelling the union's certification at the request of an employer would also be contrary to the principle of permanence of bargaining rights embodied in the Code…*

[55] The Corps observes that it began providing security services to the City pursuant to the current contract only in October 2016. *The Trade Union Act* was repealed by Chapter S-15.1 of the Statutes of Saskatchewan, 2013, effective April 29, 2014. Therefore, whether the Corps is a successor of SGG is to be determined in reference to the provisions contained in the current Act.

[56] The Corps continues by observing that when *The Trade Union Act* was repealed it was replaced by the Act, and section 37.1 was not reproduced in the Act in any form. There is no deemed successorship provision in the Act. The existing successorship provision is section 6-18. A requirement of section 6-18 is a disposal of a business or a part of a business. It could not be said that the Corps is a successor to SSG due to a disposal of a business or a part of a business pursuant to section 6-18.

[57] Therefore, the Corps says, there cannot be any successorship from SSG to the Corps. The certification order that was issued in relation to the Corps is not valid or enforceable.

[58] Lastly, the Corps' argument is most succinctly illustrated by its requested remedies, summarized in its brief, as follows:

> *a) The 2002 certification order regarding The Corps has no application to the current employees working at the Sites who were/are employed by The Corps on or after 2016;*
>
> *b) There is no successorship flowing from Inner-Tec or SSG Security to The Corps as of 2016 when The Corps began providing security services at the Sites;*
>
> *c) The Order(s) accompanying the Decision of the Board on February 26, 2021 are rescinded retroactive to the date of issue;*
>
> *d) As a result of the above conclusions, there is no need to address the issue of abandonment by the Union given that there was no certification order to abandon in 2016.*

[1] 2004 CarswellNat 4237, at para 53.

[59] In reference to clause (c), listed in the remedies, it is not entirely clear which order or orders the Corps wishes to have rescinded. The only order that arose from the abandonment application was an order dismissing that application for failure to prove abandonment. If the Corps is asking the Board to "rescind", for reasons other than abandonment, its decision, which was made in relation to the abandonment application, the Board cannot do so. If the Corps is seeking to rescind the certification order for reasons other than abandonment, it is doing so in the wrong application.

[60] Briefly, in response to the "no successorship" argument the Union relies on the presumption against retrospective operation of statutes and the presumption against interference with vested rights: *Gustavson Drilling (1964) Ltd. v Minister of National Revenue*, 1975 CanLII 4 (SCC), [1977] 1 SCR 271; *R v KRJ*, 2016 SCC 31.

[61] The Union also relies on *United Food and Commercial Workers, Local 1400 v Kowalchuk*, 2014 CanLII 63999 (SK LRB), in which it was stated:

> *[23] The decision of this Board (that the 2008 change to The Trade Union Act did not apply to UFCW's certification application) was upheld by the Saskatchewan Court of Appeal in Wal-Mart Canada Corp v. United Food and Commercial Workers, Local 1400, (2010) 185 C.L.R.B.R. (2d) 79, 326 D.L.R. (4th) 367, 362 Sask. R. 90, 2010 SKCA 123 (CanLII). The Court of Appeal articulated two (2) reasons for doing so. Firstly, Richards, J.A. (as he was then) concluded that the 2008 change to The Trade Union Act, when examined as a whole and in the context of that Act, could not reasonably be characterized as a legislative change that was purely procedural in nature. On this basis, the Court, relying on its prior decision in Scott, supra, and concluded that this Board was correct in not apply the new legislation to the union's certification application because substantive rights were involved and those rights had been sufficiently exercised or solidified prior to the change in legislation. Secondly, Justice Richards went on to note that, when the 2008 change was introduced to The Trade Union Act, the union's certification application had not only been filed with the Board but a hearing had already been concluded by the Board. The Court went on to conclude that, even if it had found the change in voting procedures was purely procedural in nature, it would still have been an error of law to attempt to apply those changes to an application that had been both filed and heard by the Board prior to the change in legislation.*

[62] For the following reasons, the Board has decided to dismiss the Corps' request for remedies arising from the "no successorship" argument.

[63] First, this argument is not properly raised in the context of an abandonment application. In short, the Corps is seeking, in the context of an abandonment application, to have the certification order declared invalid for reasons unrelated to abandonment. Although the Corps' argument raises a question about whether it is available to the Board to assume that the certification order is enforceable or that the bargaining rights are continued, it is for the applicant to bring the application before the Board, and to frame the issues. An abandonment application does not seek a determination about whether a certification order is enforceable or whether the obligations are continued for any reason other than that the bargaining rights have or have not been abandoned.

[64] Furthermore, there was no mention of this argument in the Corps' application for reconsideration, and the Corps provided very little notice of its change in course. In most cases, substantive, late-stage changes have a negative impact on the quality of all parties' arguments before the Board; this is normal. They can also impact the Board's ability to consider the issues properly and to provide quality service to the parties, which is what the Board tries to do. Here, it is not entirely clear which order the Corps is seeking to have rescinded, or at least, in what way. And, if the Corps is suggesting that the certification order can be found invalid without also being rescinded, it still has not addressed the relevance (or irrelevance) of the provisions outlined in paragraphs 38 to 42 of these Reasons.

[65] Relatedly, if it is the Board's obiter comments with which the Corps is concerned, it will not assist the parties for the Board to provide additional obiter comments in response, especially without the benefit of full argument in the context of an appropriate application.

[66] Second, the Corps has not sought to have this application amended pursuant to section 6-112. During closing submissions, the Vice-chairperson asked the Corps if it was arguing a different application, and it responded that it was not.

[67] The Corps did make a minor attempt in oral argument to argue abandonment. It will be recalled that the onus is on the Corps to prove abandonment and that the focus of an abandonment application is on the use or lack thereof of collective bargaining rights granted to the Union. The underlying basis of such an application is that the Union has failed to exercise rights granted to it to bargain collectively.

[68] On this issue, the Union recognizes that the issue of abandonment is complicated by the history of successor employers that provided security services at the City Sites. To establish the three-year time period, the Corps relies on the evidence arising from the timeframe prior to the Corps' latest takeover of the security services at the sites in 2016, or more specifically, the last few months during which SSG was providing security services for the City Sites. The Union maintains that there were no employees in the bargaining unit when the Corps was not providing security services to the City Sites, and that the binding collective agreement was the Inner-Tec agreement.

[69] The Board's analysis of this issue should be understood within the foregoing context, and for this reason, there may be limitations to its application to future cases. On the one hand, the Corps' reliance on the Union's activity during the preceding timeframe is consistent with the Board's understanding of the permanence of bargaining rights, as that principle operates through the application of successorship provisions, and with the focus of an abandonment application on the Union's promotion and enforcement of its bargaining rights. On the other hand, there is the issue of a third-party employer who is not a party to the proceedings. The benefits of the adversarial process are diminished due to the lack of participation by that employer. It is more difficult to draw conclusions based on the Union's activities or lack thereof in another workplace.

[70] In its application, the Corps suggested that the evidentiary onus is on the Union. Certainly, much of the evidence of the Union's activity in relation to the enforcement or promotion of its bargaining rights prior to July 2016 would not normally be in the Corps' possession. Still, the Corps has the burden to prove that abandonment has occurred. To attempt to satisfy this burden but underscore the issue with possession and control of evidence, the Corps made production requests of the Union. The production requests focused on remittances made or not made by SSG to the Union. The Union refused to comply with the requests.

[71] To explain the failure to produce, Ms. Figueiredo relied on employee privacy and lack of relevance. The Board finds Ms. Figueiredo's suggested concerns with employee privacy half-hearted, at best, given her admission that she did not even review the remittances to make such an assessment. Instead, it appears that the Union was convinced that these materials were irrelevant to the issues in these proceedings, despite the arguments that had been made by the Corps in the reconsideration application. This is a rather feeble justification.

[72] The Board is inclined to draw an adverse inference. However, the resulting conclusion is that the intervening employer failed to provide remittances; this alone does not prove that the Union failed to exercise any bargaining rights. This conclusion is primarily an indictment of the non-compliant employer; it is not necessarily an indictment of the Union. What legal inferences are available to the Board are dependent on the Union's actions. And, the Union has suggested that it spent a lot of time chasing after SSG, which is consistent with what was clearly a historical pattern. This context should be considered in assessing the Union's activities while SSG was the employer.

[73] In making these observations, the Board has considered the reference to remittances in *Saunders*, at paragraph 82. There, remittances were only one of a number of factors listed as potentially relevant.

[74] Other, related evidence before the Board includes the testimony of Ms. Figueiredo that the Union filed grievances against SSG, that the Union had bargaining unit meetings to update the membership about grievances and the CEO's whereabouts, and some more general statements asserting that the Union continued to provide services to its members regardless of whether the dues were remitted. Ms. Figueiredo could not recall the dates when grievances were filed but knew that the last one was in 2017. She was not asked at the hearing about whether the Union had served notice to bargain on SSG after the expiry of the agreement.

[75] The Board acknowledges certain frailties in Ms. Figueiredo's evidence, in particular, that she suggested that the Union was staying on top of its many grievances but at the same time was not aware that SSG had left the site until 2017. These two assertions are not easily reconciled. There had to be some communications between the Union and the members to permit the Union to process the members' grievances. However, even if this lack of knowledge were taken to suggest that the Union was inactive at the end of the SSG contract, it does not clarify for how many days, weeks, or months it was inactive.

[76] Another issue with the Corps' case is the evidence surrounding its late stage, and seemingly peripheral, request to counsel for the Union for correspondence between the Union and SGG between January and July 2016 in relation to labour relations matters, located in a letter which was otherwise focused on records of remittances. The Corps did not ask Ms. Figueiredo about this request. Therefore, the Board is unable to draw a conclusion that is based on it.

[77] Overall, there is not sufficient, clear, or cogent evidence to conclude, on a balance of probabilities, that the Union was inactive during the latter months of SSG's contract, so as to support a finding that the three-year period has been met. Even if it were less active than usual, the history with SSG and Ms. Figueiredo's unwavering assertions about SSG's evasions and the Union's efforts point to extenuating circumstances.

[78] The Corps has not met its onus to reconsider and overturn the Board's decision dismissing the application for abandonment brought pursuant to section 6-16 of the Act.

[79] The Corps has not pursued its alternative argument that the Board should reconsider its decision not to order a representation vote. The Board has been given no reason to consider a vote.

[80] The Corps' application is dismissed.

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

Yours truly,

Barbara Mysko, Vice-Chairperson
Labour Relations Board