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

LRB File No. 052-22; June 17, 2022
Vice-Chairperson, Barbara Mysko; Board Members: Maurice Werezak and Don Ewart

Counsel for the Applicant, KDM Constructors LP: Steve Seiferling

Counsel for the Respondent, Construction and General Workers Union, Local 180: Crystal Norbeck, Q.C.

Application for summary dismissal – Certification Application – Employer Raised Question of *Res Judicata* – First Application Dismissed for Failure to Meet Onus – Preconditions for *Res Judicata* – Change in Circumstances Precludes Finding that All Criteria Satisfied – *Res Judicata* Application to be Determined Following Presentation of Evidence.

REASONS FOR DECISION

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application to summarily dismiss a certification application. This matter began on March 19, 2020 when 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, KDM Constructors LP.[1]

[2] At the time of the application, the labourers were performing work on the site of the BHP Jansen Potash Project in Saskatchewan. The Union sought a construction industry certification only. On March 30, 2021, the Board issued a decision finding that the Union had failed to meet its onus to prove that the work came within the definition of construction industry contained at section 6-65 of the Act. The Union applied to the Board seeking a reconsideration of that decision, which application was dismissed on August 26, 2021.

[3] 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

[1] LRB File No. 056-20.

Employer.[2] 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*.

[4] On April 6, 2022, the Employer filed this application for summary dismissal. The Employer says that the matters in dispute have already been decided by the Board, including by way of a reconsideration application, and are therefore subject to the doctrine of *res judicata*. In support of this application for summary dismissal, the Employer has filed an affidavit of Nick Blackwell, the Site Manager for KDM. Attached to the affidavit is a site services agreement. Mr. Blackwell asserts that there has been no material change to the services being performed by KDM on the project and that the nature and scope of the work performed by KDM employees has not materially changed since the first hearing was held.

[5] In its Reply to the application for summary dismissal, filed April 13, 2022, the Union argues that the doctrine of *res judicata* does not apply to a Board determination as to the appropriateness of a bargaining unit and asserts that, contrary to the Employer's statements, the matters in dispute have not previously been decided by the Board. The Union asserts, in particular, that on August 17, 2021, after the first certification decision was issued, BHP approved the funding and completion of Stage 1 of the Jansen potash mine. Work on that stage of the project has since commenced. This work is now being supported by the proposed bargaining unit's members.

[6] The Employer asks that this matter be determined without an oral hearing. Following the receipt of the pleadings in this matter, the Board set deadlines for the filing of written submissions. Both parties filed briefs, which the Board has reviewed and found helpful. Upon review of the materials, the Board has determined that it can make an initial decision whether to summarily dismiss the original application without the benefit of an oral hearing.

Arguments:

The Union:

[7] The Union argues that the doctrine of *res judicata* does not apply in the context of the Board's determination as to the appropriateness of a bargaining unit. The Union relies for this argument on *CLR v Plumbers and Pipefitters*, 2020 CanLII 44354 (SK LRB) [*CLR*], at paragraphs 66-69. Relatedly, the doctrine of *res judicata* does not apply to applications for the amendment of

[2] LRB File No. 004-22.

existing certifications; instead, the applicant in such a case is required to prove that a material change in circumstances has occurred. The Union relies for this argument on *SJBRWDSU, Local 568 v Canadian Linen and Uniform Service Co.*, 2004 CanLII 65625 (SK LRB) [*Canadian Linen*]. The Union states, further, that an applicant on a certification application is not required to prove a material change in circumstances has occurred following a previous, unsuccessful application.

[8] Furthermore, the Employer, through the application for summary dismissal, argues the facts of the original application, including the nature of the work, and therefore could not be found to have demonstrated that, if the allegations in the original application were to be proven, the Union's application has no reasonable chance of success. The nature of the work is an issue that should be fully canvassed by the Board, including through the presentation of evidence and with the benefit of cross-examination.

The Employer:

[9] The Employer asks that the Board dismiss the original application for lack of jurisdiction, pursuant to clause 6-111(1)(o).

[10] The Employer argues that the original application is identical to the first certification application, given that it seeks to certify the same bargaining unit, based on the same work being performed at the same site for the same project. The question relating to the nature of the work, which is central to the case, has already been asked and answered. It is an abuse of process for the Union to seek to relitigate this issue again.

[11] The original application appears to be an attempt re-do the original hearing. At the original hearing, as with all hearings, the Union had a duty to put forward its best case; having failed to do so, it is not entitled to try again. Decisions of the Board are binding, conclusive, and final.

[12] There are three requirements to establish *res judicata*. These are: the prior decision must have been final; the issue must be the same as the one previously decided; and the parties to both proceedings must be the same, or be the privies of those parties. All three of these requirements are met in the current case.

[13] The Employer says that while it acknowledges that an applicant may make a further application in the case of a previous failed vote on a certification application, that is not what happened in this case. Rather, the first hearing disposed of a principle of law in a final and binding

manner. Although an exception to *res judicata* might lie in a material change in circumstances, there is no such change in this case.

Statutory Provisions:

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

> ***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 forceof 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.

6-111*(1) With respect to any matter before it, the board has the power:*

…

(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;
(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;
(q) to decide any matter before it without holding an oral hearing;

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.

[15] The following provisions of the Regulations are applicable:

19*(1) In this section:*

"application to summarily dismiss" means an application pursuant to subsection (2);

"original application" means, with respect to an application to summarily dismiss, the application filed with the board that is the subject of the application to summarily dismiss;

"party" means an employer, union or other person directly affected by an original application.

(2) A party may apply to the board for an order to summarily dismiss an original application.

(3) An application to summarily dismiss must:

(a) be in Form 18 (Application for Summary Dismissal); and

> *(b) be filed and served in accordance with subsection (5).*
>
> *(4) In an application to summarily dismiss, a party shall specify whether the party requests the board to*
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> *(5) The application to summarily dismiss must be filed, and a copy of it must be served on the party that made the original application and on all other parties to the original application, before the date for the hearing of the original application is set.*

Analysis and Decision:

Preliminary Matter – Timing of Filing:

[16] Subsection 19(5) of the Regulations sets out the timeline for the filing of an application for summary dismissal, as follows:

> *(5) The application to summarily dismiss must be filed, and a copy of it must be served on the party that made the original application and on all other parties to the original application, before the date for the hearing of the original application is set.*

[17] Subsection 19(5) states that the application for summary dismissal must be filed, and a copy served, before the date for the hearing of the original application is set. The process that the Board has created is intended to ensure, not only sufficient preparation time for the parties, but also sufficient time for the Board to review and consider a matter before the existing date for the substantive hearing, and to prevent the adjournment of the original application.

[18] When attempting to file such an application late, applicants should make a request for a further or other time than the time fixed by the Regulations for the filing of the application, pursuant to subsection 30(2) of the Regulations. The Employer has not made such a request in this case.

[19] After the Board raised this issue with the parties, the Employer stated that the matter would have to be placed on Motions' Day to be addressed, given the timelines. The Board denied the request to put the matter on Motions' Day.

[20] The Employer has since provided its comments on the late filing issue, with the caveat that it is not able to make submissions on the substantive issues. The Employer argues, first, that the Board's interpretation of subsection 19(5) is incorrect; and second, that the Board's interpretation of the provision would discourage parties from setting substantive dates.

[21] The Employer submits that subsection 19(5) means that a summary dismissal application is to be filed before the hearing commences, and not before it is set down. To interpret the provision in the manner suggested by the Employer would mean that the phrase "is set" is

superfluous; the provision need only state "before the date for the hearing of the original application". To find that "is set" is superfluous would contradict well-established principles of statutory interpretation. As explained by Professor Sullivan, "[g]enerally speaking, the rules governing the meaning of statutory texts and the types of analysis relied on by interpreters to determine legislative intent apply equally to regulations";[3] and, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose".[4]

[22] The ordinary meaning of the provision is clear. The provision means that the application for summary dismissal is to be filed before the hearing date of the original application is set, that is, before it is scheduled.

[23] The Employer also argues that the Board should not enforce the deadline because of the policy consequences, being that parties will be discouraged from setting dates on substantive matters if they are required to file preliminary applications in advance of setting dates.

[24] Regulations are to be read within the context of the enabling legislation.[5] The deadline exists, in part, because of the very concerns that the Employer has raised about preparation and resources and, relatedly, to avoid adjournments of substantive matters. Labour relations matters, and in particular certification applications, are expected to proceed with dispatch in accordance with the rights of employees to organize and engage in collective bargaining through a union of their own choosing and for the purpose of reducing the likelihood of unnecessary, long-term conflict, thereby promoting more harmonious labour relations.

[25] The deadline should also have the effect of encouraging parties to review and assess the merits of an application at an earlier stage in the proceeding, which, in turn, should promote the efficient and appropriate use of the parties' and the Board's time and resources.

[26] Lastly, there is a mechanism for requesting a further or other time for filing, pursuant to subsection 30(2) of the Regulations.

[27] The Employer also states that the Board should proceed to vacate the dates at the end of June to permit the Board time to decide the matters and because the outcome of the preliminary matter will change the preparation and approach to the hearing. The Board has been flexible in accommodating the parties' timelines and schedules so as to permit this matter, and the

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[3] *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014), at 13.18.
[4] *Ibid* at 8.23.
[5] *Ibid* at 13.18.

substantive matter if necessary, to proceed while giving due consideration to the issues raised by the parties. The parties should be prepared to proceed.

[28] The Employer's requests to have this matter placed on Motions' Day and then, later, to adjourn the main hearing (to help the Board) would cause the very delay that subsection 19(5) is designed to avoid. The adjournment request is denied.

[29] The Board has authority to waive compliance pursuant to section 35 of the Regulations. In the past, the Board has characterized matters raising issues of *res judicata* as "jurisdictional". The Board may summarily "refuse" to hear a matter that is not within its jurisdiction. If the Board finds that it does not have jurisdiction, that brings the matter to an end. If it finds that it has jurisdiction, its answer to this application may provide the parties guidance with respect to the main hearing. Therefore, the Board finds that it is appropriate to waive compliance and to provide a substantive decision on this application.

[30] To be clear, this decision is not an invitation to parties to ignore the Regulations. By proceeding in this fashion, the Board means to provide instructions with respect to its expectations in relation to subsections 19(5) and 30(2) of the Regulations and to communicate to the parties to, in the future, take the steps necessary to file applications in a timely manner.

Substantive Matter:

[31] The Employer has brought this application pursuant to clause 6-111(1)(o) of the Act. Pursuant to this provision, the Board has the power to summarily refuse to hear a matter that is not within its jurisdiction.

[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 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.*

[36] A precondition for the operation of cause of action estoppel is that the basis of the cause of action was argued or could have been argued in the prior action with the exercise of reasonable diligence: *Grandview (Town) v Doering*, 1975 CanLII 16 (SCC), [1976] 2 SCR 621, [1975] SCJ No 93, at 638. It has also been suggested that the question as to whether the basis "could have been argued" is too broad of an articulation and that a better question is whether the basis "should have been argued": *Doig River First Nation and Canada (Minister of Indian Affairs and Northern Development), Re*, 2014 SCTC 2; 2014 CarswellNat 9760, at para 48.

[37] The other preconditions for the operation of cause of action estoppel are that there was a final decision and that the parties to that decision were the same persons, or privies to the parties,

as in the current proceeding.[6] A fourth precondition has also been identified, being that the cause of action and the prior action may not be separate and distinct: See, *Doering* at para 11; *Bjarnarson v Manitoba* (1987), 38 DLR (4th) 32 (Man QB) at para 6.

[38] The preconditions for a finding of issue estoppel were set out in *Angle v Minister of National Revenue*, 1974 CanLII 168 (SCC), [1975] 2 SCR 248 [*Angle*], at 254:

> *(1) that the same question has been decided;*
>
> *(2) that the judicial decision which is said to create the estoppel was final; and,*
>
> *(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.*

[39] There is no question as to whether the parties in the current proceeding are the same parties as those to whom the prior decision applied.

[40] Next, the Board will consider whether the decision was final. At this stage it may be appropriate to consider the Union's argument that the doctrine of *res judicata* cannot apply to certification applications.

[41] The Union suggests that it has brought the application within the "expiry of the statutory timeline applicable" pursuant to subsection 6-12(3) of the Act. That provision deals with whether the Board may refuse to direct the representation vote if the Board has, within 12 months preceding the date of the application, directed a vote of employees in the same or a substantially similar unit on the application of the same unit. The Board issued a Direction for Vote on January 31, 2022, and so there is no outstanding issue with respect to whether the Board may refuse to direct a vote.

[42] The Union also relies on *CLR*. *CLR* was dealing with an intervenor application; the Board found that the question was whether that application should be granted giving due consideration to the principles underlying a grant of intervention. The discussion of *res judicata* was accordingly brief.

[43] The Union also relies on *Canadian Linen*. In that decision, the Board stated, at paragraph 55:

> *[55] In applications for certification of an initial unit of employees, the Board may certify an appropriate unit rather than the most appropriate unit: See, for example, Construction and General Workers Union, Local 180 v. Saskatchewan Writers Guild, [1998] Sask. L.R.B.R.*

[6] See, for example, *The Catalyst Capital Group Inc. v VimpelCom Ltd*., 2019 ONCA 354 (CanLII).

> *107, LRB File No. 361-97. Similarly, applications for amendment of the bargaining unit structure must be determined subject to the condition that any resulting bargaining unit configuration will be appropriate for the purposes of collective bargaining. With respect to amendment, the issue of the appropriateness of the unit is again within the discretion of the Board. The longstanding position of the Board is that the principle of res judicata does not apply to findings of the appropriateness of a unit: 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, LRB File Nos. 617-77 & 618-77.*
>
> *[emphasis added]*

[44] In *Canadian Linen*, the Board relied on its prior decision in *Medical Laboratory Technologists*. There, the Board made the following statement, at 50:

> *The Board ruled that since it had frequently found that, under Section 5(a) of the Trade Union Act it had power to certify for a unit that was appropriate, not necessarily the unit that was the most appropriate, the matter of appropriateness of unit was a matter which is, at all times, in the discretion of the Board and orders determining the appropriateness of the unit are, in that sense, never final. Accordingly, the principle of res judicata does not apply to the finding of appropriateness of unit. The Board then proceeded to hear the evidence.*

[45] In *Medical Laboratory Technologists*, the Board had in a previous "almost identical application made by the same Applicant to represent virtually the same bargaining unit at the same hospital" found that the unit applied for was not appropriate. Although the Board observed that the doctrine of *res judicata* did not apply, it noted that the facts were unchanged, except for one issue which it addressed, at 50:

> *Upon consideration of all of the evidence adduced, the factual situation appears to be essentially unchanged from that which existed at the time of the previous application and which is described in the Reasons for Decision of this Board in the South Saskatchewan Hospital Center case. The only evidence of any substantial change in circumstances was that the Laboratory Technologists were dissatisfied with certain terms and conditions of employment negotiated on their behalf by the Intervener, the Regina Hospital Employees' Union. They complained that the unit represented by the Regina Hospital Employees' Union was too large and diverse and that the interests and concerns of the Laboratory Technologists were largely ignored or disregarded.*

[46] The Board proceeded to dismiss the application.

[47] The statement that the doctrine of *res judicata* "does not apply to the finding of appropriateness of unit" may be taken as being a broader articulation when compared to statements made in some case law from other jurisdictions: for example, *Wal-Mart Canada Corp. v United Food and Commercial Workers International Union, Local 1518*, 2006 CanLII 6150 (BC LRB); *Practical Nurses Federation of Ontario v Strathroy Middlesex General Hospital*, 1993

CanLII 7795 (ON LRB). If the finality question is material to the Board's disposition in this application, the Board wishes to consider and address this observation, acknowledging that it is not bound by decisions of other boards. The most appropriate way to proceed, then, is to have an oral hearing on the question of whether *res judicata* can apply to certification applications. The Board will proceed with its remaining analysis before deciding whether the finality issue is material and whether an oral hearing is necessary.

[48] The next precondition for cause of action estoppel is whether the basis of the cause of action was argued or could (or should) have been argued in the prior action with the exercise of reasonable diligence. If necessary, the Board will also consider whether the actions are separate and distinct.

[49] The basis of the original application is that the proposed bargaining unit is appropriate. To the extent that there has been a change in circumstances that has impacted the question of appropriateness, it is not possible to find that the basis of the cause of action was argued, could have been argued, or should have been argued in the previous matter.

[50] The remaining precondition for issue estoppel is whether the same question has been decided. In determining whether the same question has been decided, the Board finds guidance in the majority's description in *Angle*:

> *Is the question to be decided in these proceedings, namely the indebtedness of Mrs. Angle to Transworld Explorations Limited, the same as was contested in the earlier proceedings? If it is not, there is no estoppel. It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. That is plain from the words of De Grey C.J. in the Duchess of Kingston's case [(1776), 20 St Tr 355, 538n], quoted by Lord Selborne L.J. in R. v. Hutchings [(1881), 6 QBD 300], at p. 304, and by Lord Radcliffe in Society of Medical Officers of Health v. Hope, [[1960] AC 551]. The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings: per Lord Shaw in Hoystead v. Commissioner of Taxation, [1925 CanLII 607 (UK JCPC), [1926] AC 155]. The authors of Spencer Bower and Turner, Doctrine of Res Judicata, 2nd ed. pp. 181, 182, quoted by Megarry J. in Spens v. I.R.C., [[1970] 3 All ER 295], at p. 301, set forth in these words the nature of the enquiry which must be made:*
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> > *… whether the determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter cannot stand without the former. Nothing less than this will do.*

[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.

[55] Next, as the Court of Appeal pointed out in *Merchant Law*, at paragraph 78, a conclusion on the preconditions does not bring the inquiry to an end. The Board has discretion as to whether to apply the doctrine of *res judicata* in the circumstances of the present case after it has found that all of the preconditions have been met. It is an error not to exercise this discretion. The Court in *Danyluk* explained the necessity of exercising this discretionary step:

> *33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose 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. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in Angle, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: […]*
>
> *[citations omitted]*

[56] The Board recognized in *Metz* that there may be factors that limit the operation of the doctrine of *res judicata*. The exercise of discretion in the application of the doctrine seeks to achieve fairness within the context of the case. The discretion is limited and is based on whether the application of the doctrine would result in an injustice: *Merchant Law*, at paras 78-9. The Board in *Metz* described what it found to be the relevant factors:

> *[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 maybe 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.*

[57] The Board must weigh its interest in the finality of its decisions with questions of fairness. It should also be noted that the Court in *Merchant Law*, at paragraph 81, observed that the list of relevant factors is "open". Given the Board's conclusion about the preconditions, it is not necessary to consider whether any of these factors apply or whether there are additional factors that might persuade the Board to exercise its discretion not to apply the doctrine.

[58] The Employer also refers in its argument to clauses 6-111(1)(m) and (n) of the Act. Pursuant to these provisions, the Board may bar persons or refuse to entertain applications for a period not exceeding 12 months after the date that the application was dismissed:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> > *(m) to bar from making a similar application, for any period not exceeding 12 months after the date an unsuccessful application is dismissed:*
> >
> > > *(i) an unsuccessful applicant;*
> > > *(ii) any of the employees affected by an unsuccessful application;*
> > > *(iii) any person or union representing the employees affected by an unsuccessful application; or*

> *(iv) any person or organization representing the employer affected by an unsuccessful application;*
>
> *(n) to refuse to entertain a similar application, for any period not exceeding 12 months after the date an unsuccessful application is dismissed, that is submitted by anyone mentioned in subclauses (m)(i) to (iv);*

[59] If the Board had made a prohibition, pursuant to clause 6-111(1)(m), then it could find that it did not have jurisdiction over the original application. However, the Board has made no such prohibition on any party in this case. The original application comes within the timeframe set out in clause 6-111(1)(n), which means that the Board could exercise its discretion to refuse to entertain the application if it found that the application was similar. Given the phrase "refuse to entertain", this clause could be interpreted to apply to matters at an early stage of the proceedings. However, clause 6-111(1)(n) sets out a discretionary power, only. For the reasons given, the Board has decided to proceed to a hearing.

[60] Lastly, the Board has decided not to dismiss the original application on the basis of the doctrine of abuse of process. As explained in *Metz*, at paragraph 84, this doctrine is "similar to that of *res judicata* but it is unencumbered by the specific requirements of *res judicata*". In applying the doctrine of abuse of process, the Board may "exercise its discretion to prevent re-litigation for the purposes of preserving the integrity of the Board's processes and its adjudicative functions": *Metz*, at para 84. For the reasons already described, it is necessary for the Board to hear the evidence on this matter before making a final determination as to whether any aspect of this application is *res judicata*. It follows that the matter should not be dismissed at this stage as disclosing an abuse of process.

[61] Finally, the Board noted that if the finality question is material to the Board's disposition in this application, it wishes to consider and address any confusion that might arise from the case law. Given that the Board has found that all of the remaining preconditions are not met, the finality question is not material to the current disposition; however, the parties should be prepared to address this issue at the main hearing.

[62] For the foregoing Reasons, the application for summary dismissal of the certification application is dismissed.

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

DATED at Regina, Saskatchewan, this **17th** day of **June, 2022.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson