Saskatchewan
Labour Relations Board

CONSTRUCTION AND GENERAL WORKERS UNION, LOCAL 180, Applicant v KDM CONSTRUCTORS LP, Respondent, THE ATTORNEY GENERAL OF SASKATCHEWAN, Respondent, CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF SASKATCHEWAN, Intervenor and SASKATCHEWAN BUILDING TRADES COUNCIL, Intervenor.

LRB File No. 056-22; October 31, 2022

Vice-Chairperson, Barbara Mysko; Board Members: Maurice Werezak and Don Ewart

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

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

Summary Dismissal Application – Consideration of Abuse of Process Principles – Determination of Employer's Standing – Constitutional Question Dismissed.

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 Notice of Constitutional Question filed pursuant to *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01. The issues raised in the Constitutional Question pertain to the constitutionality of Division 13 of Part VI of *The Saskatchewan Employment Act* [Act], the Construction Industry Division. On June 21, 2022, the

Board issued an Order granting the application for summary dismissal. These are the Reasons for that Order.

[2] The purpose of the Construction Industry Division is to permit collective bargaining to occur in the construction industry on the basis of trade on a province-wide basis and/or on a project basis. The term “construction industry” is defined at section 6-65 of the Act.

[3] Section 6-66 permits the Minister to establish trade divisions comprising all unionized employers in one or more sectors of the construction industry. A unionized employer includes, pursuant to clause 6-65(h), an employer with respect to whom a certification order has been issued for a bargaining unit comprised of unionized employees working in a trade for which a trade division has been established. Pursuant to section 6-69, an employers’ organization may apply to the Board for an order making it the representative employers’ organization [REO] for all unionized employers in a trade division.

[4] By Minister’s Order, dated December 2, 1992, the labourer trade division was found to be an appropriate trade division for the purposes of *The Construction Industry Labour Relations Act, 1992,* SS 1992, c C-29.11. That trade division is continued pursuant to subsection 6-66(8) of the Act. The Construction Labour Relations Association of Saskatchewan Inc. [CLR] is the REO for the labourer trade division, pursuant to Board Order dated April 29, 2014, and clause 6-127(9)(b) of the Act.

[5] Pursuant to section 6-70 of the Act, the REO is the exclusive bargaining agent on behalf of all unionized employers in the trade division; a union representing the unionized employees in the trade division shall engage in collective bargaining with the REO; and, a collective agreement between the REO and a union is binding on the unionized employers in the trade division. These conditions apply to an employer who subsequently becomes a unionized employer in a trade division.

[6] Section 6-70 states in full:

> ***6-70****(1) When an employers’ organization is determined to be the representative employers’ organization for a trade division:*
>
> > *(a) the representative employers’ organization is the exclusive agent to engage in collective bargaining on behalf of all unionized employers in the trade division;*
> >
> > *(b) a union representing the unionized employees in the trade division shall engage in collective bargaining with the representative employers’ organization with respect to the unionized employees in the trade division;*

> *(c) a collective agreement between the representative employers' organization and a union or council of unions is binding on the unionized employers in the trade division;*
>
> *(d) no other employers' organization has the right to interfere with the negotiation of a collective agreement or veto any proposed collective agreement negotiated by the representative employers' organization; and*
>
> *(e) a collective agreement respecting the trade division that is made after the determination of the representative employers' organization with any person or organization other than the representative employers' organization is void.*
>
> *(2) If an employers' organization is determined to be the representative employers' organization for more than one trade division, only the unionized employers in a trade division are entitled to make decisions with respect to negotiating and concluding a collective agreement on behalf of the unionized employers in that trade division.*
>
> *(3) Subsection (1) applies to the following:*
>
> *(a) an employer who subsequently becomes a unionized employer in a trade division;*
>
> *(b) a unionized employer who subsequently becomes engaged in the construction industry in a trade division.*
>
> *(4) A unionized employer mentioned in subsection (3) is bound by any collective agreement in force for a trade division at the time the employer:*
>
> *(a) becomes a unionized employer in a trade division; or*
>
> *(b) becomes engaged in the construction industry in a trade division.*
>
> *(5) Notwithstanding subsection (1), a unionized employer is responsible for settling disputes mentioned in section 6-45.*

[7] Next, there is an extensive procedural background to this matter. A brief outline of this background is necessary.

[8] As the Board explained in its decision in *KDM Constructors LP v Construction and General Workers Union*, 2022 CanLII 52912 (SK LRB), a related matter began on March 19, 2020 when the Construction and General Workers Union, Local No. 180 [Union] filed with the Board a certification application pursuant to the Construction Industry Division of Part VI of the Act, seeking a province-wide bargaining unit consisting of all labourers employed by the Employer, KDM Constructors LP.[1] The work in question was taking place on the BHP Jansen Potash Project. In that application, the Union sought a construction industry certification only.

[1] LRB File No. 056-20.

[9] 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: *Construction & General Workers Local Union, No. 180 v KDM Constructors Inc*., 2021 CanLII 25131 (SK LRB) [*KDM No. 1*].

[10] In the meantime, the Operating Engineers had also brought an application for certification of a bargaining unit of workers performing work on the same work site for the same employer. This application was filed on February 18, 2020. The Employer's Reply to that application is here summarized:

> *… In reply, the Employer states that the unit applied for is not appropriate for collective bargaining. The Employer states that the work being performed is maintenance work and is therefore excluded from the construction industry, and that the Employer's operations were established for the purpose of driving employment for Indigenous workers in Saskatchewan, and are not compatible with a construction industry certification. Furthermore, the proposed unit is under-inclusive. The Union has applied for a so-called craft unit of four employees in a workplace of 27 employees. The work being performed by the employees cannot be divided on trade lines.*[2]

[11] The matter was placed in abeyance pending the outcome of *KDM No. 1*. After the decision was issued in *KDM No. 1*, the Board set dates for the Operating Engineers' application. The matter was heard on June 14, and on July 15 and 16, 2021. On June 16, 2021, the Employer filed a Notice of Constitutional Question. In the Notice, the Employer alleged that Division 13 of Part VI of the Act offends the protection for freedom of association contained in section 2(d) of the *Charter*. The Employer alleged that, should it be found to be a unionized employer, it would be compelled to rely on the representative employers' organization as its exclusive bargaining agent, and would be automatically bound by the existing collective bargaining agreement. The Employer sought a declaration of invalidity in respect of the relevant provisions.

[12] The Employer's concerns were summarized on page 1 of the Notice:

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

[2] *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v KDM Constructors*, 2021 CanLII 77359 (SK LRB) [*KDM No. 2*], at para 2.

> *bargaining agent, and engage in collective bargaining, and such an imposition of a bargaining agent and a collective agreement is a violation of the constitutional right to bargain collectively.*
> *…*

[13] On August 23, 2021, the Board issued its decision in *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v KDM Constructors*, 2021 CanLII 77359 (SK LRB) [*KDM No. 2*], finding that the work being performed fell within the construction industry and the proposed unit was appropriate for collective bargaining. Shortly after, a preliminary issue was raised with respect to the Employer's standing to bring a Notice of Constitutional Question.

[14] After addressing a multiplicity of procedural and other issues, the Board proceeded to hear the application for summary dismissal of the constitutional question. On October 18, 2021, in *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v KDM Constructors LP*, 2021 CanLII 101129 (SK LRB) [*KDM No. 3*], the Board found that it was plain and obvious that the Employer's constitutional question would fail and granted summary dismissal. This is where the present application comes in.

[15] 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 KDM Constructors.[3] In its Reply to that application, filed on January 20, 2022, the Employer denied that the unit is appropriate for collective bargaining (that is, the Employer's operations were established for the purpose of driving employment for Indigenous workers in Saskatchewan and the bargaining unit is underinclusive because the work cannot be defined along trade lines), stated that the work being performed is maintenance work, raised a constitutional question, and asserted that the entire matter is *res judicata*. The Employer also filed a Notice of Constitutional Question alleging that Division 13 offends the protection for freedom of association contained in section 2(d) of the *Charter*.

[16] The Employer's concerns were summarized at page 1 of the Notice:

> *TAKE NOTICE that an application will be made to the Saskatchewan Labour Relations Board, in LRB File No. 004-22 that Division 13 of Part VI of the Saskatchewan Employment Act (The "Act") be struck down pursuant to the Canadian Charter of Rights and Freedoms, to the extent that those sections automatically impose a [sic] both a bargaining agent, and collective agreement, on an employer, without providing the employer with an opportunity choose [sic] its bargaining agent, or to bargain for itself, as well as prohibiting the employer from bargain [sic] collectively with respect to terms and conditions of work. Division 13 of Part VI of the Act, including without limitation Sections 6-69 and 6-70 of the Act, serve to*

[3] LRB File No. 004-22.

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

[17] This paragraph is identical to the opening paragraph of the previous Notice of Constitutional Question, except for the transposing of the file number and the removal of the reference to section 24(1) of the *Charter*. The latter change was likely in response to the Board's observation in *KDM No. 3* that the Employer had relied on the wrong remedial provision to accomplish its stated objective.[4]

[18] The Employer seeks to have the Construction Division struck down to the extent that the Division automatically imposes both a bargaining agent and a collective agreement on an employer without the ability or right to collective bargaining with respect to terms and conditions of work.

[19] As in *KDM No. 3*, the Board was asked to provide notice of the Constitutional Question to the REOs and the Saskatchewan Building Trades Council [Building Trades]. The Board provided notice and, further to their applications, granted intervenor status to CLR and to the Building Trades, pursuant to an order issued on May 3, 2022.

[20] The Employer filed an application for summary dismissal of the certification application based on *res judicata* (LRB File No. 052-22). That application for summary dismissal was dismissed by this Board on June 17, 2022: *KDM Constructors LP v Construction and General Workers Union*, 2022 CanLII 52912 (SK LRB) [*KDM No. 4*].

Arguments:

Union:

[21] The Union argues that the facts asserted in the Notice do not raise a *prima facie* argument as to a breach of the *Charter*. The same question as raised by the current Notice was already decided by the Board in *KDM No. 3*. The Union relies on the Board's reasoning in that decision to assert that the Employer does not have standing to avail itself of the protection of section 2(d) of the *Charter*. As an entity without standing, its assertion of a *Charter* protection is bound to fail.

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[4] At para 25.

[22] The Union alleges that it is an abuse of process for the Employer to seek to have the Board again consider a matter despite substantively identical facts and pleadings. The doctrine of abuse of process operates to preclude relitigation in circumstances in which the strict requirements of issue estoppel are not met. Of the principles underlying the operation of abuse of process, the Union relies, in particular, on the integrity of the legal system and the prevention of inconsistent results. Given that the Notice raises no new or altered facts, the only plausible purpose is to attack the Board's previous ruling on the same issue. The Board does not have jurisdiction to sit in appeal of its own decisions.

Attorney General:

[23] The Attorney General submits that section 2(d) does not protect corporations. The fundamental purpose of the provision is "to recognize the profoundly social nature of human endeavors and to protect the individual from state-enforced isolation in the pursuit of his or her ends".[5] The Employer cannot rely on the exceptions in *R v Big M Drug Mart Ltd.,* [1985] 1 SCR 295, 1985 CanLII 69 (SCC) [*Big M Drug Mart*] or *Canadian Egg Marketing Agency v Richardson,* 1997 CanLII 17020 (SCC), [1998] 3 SCR 157 [*CEMA*]*,* which permit a corporation to rely on the *Charter* when it is involuntarily brought before the courts. These exceptions do not apply to laws that are directed only at corporations, such as the laws that have been put in issue in this case. Sections 6-69 and 6-70 of the Act apply only to corporations, and as such, the *Big M Drug Mart* and *CEMA* exceptions cannot be found to assist the Employer in the current case.

[24] The Board should follow its prior decision and dismiss this Constitutional Question.

Intervenor – Building Trades:

[25] Employers do not hold a constitutionally protected freedom of association or right to collective bargaining analogous to those held by employees pursuant to section 2(d) of the *Charter*. The relationship between a unionized employer and an REO is not comparable to the relationship between a servant and master which is the relationship that underpins the right to collective bargaining held by workers. Even if an employer could assert such a freedom, it would not be violated by Division 13. None of the rights that KDM asserts are available to employees, and Division 13 provides for ample representation and choice on the part of unionized employers.

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[5] Dickson C.J., dissenting in *Reference Re Public Service Employee Relations Act (Alta.),* 1987 CanLII 88 (SCC), [1987] 1 SCR 313, at para 86.

[26] To the extent that the Employer reframes its argument in the present proceeding, it suggests that it should be treated as facing a power imbalance as against its own prospective bargaining agent. The totality of the Supreme Court of Canada's jurisprudence respecting the *Charter* protection for collective bargaining confirms that the protection arises from the need for a "counterweight" for employees against the "superior power of management'. None of the historical context "bears an even passing resemblance to the relationship between a unionized employer and an REO". An REO is not a master; it is an agent, and its express function as an agent, is to represent the interests of unionized employers.

[27] Alternatively, even if the Board could conclude that an employer had a constitutionally protected right to collective bargaining, the Board should follow the extensive Supreme Court precedent outlining the limitations on the scope of the right to collective bargaining. These include the following principles:

- there is no *Charter* mandate against designated agent models in collective bargaining;
- an individual worker does not hold a freedom from collective bargaining within a statutory system of representation comparable to that asserted by the Employer;
- a statutory compulsion to hold membership in one set of bargaining agents does not offend the *Charter*;
- employees are not entitled, pursuant to a *Charter*-protected freedom from association, to not have their personal information provided to a bargaining agent;
- employees can be subject to a bargaining agent without their approval, including designated agents;
- the *Charter* does not entitle employees to disregard the terms and conditions of collective agreements with which they disagree, including when they have not had an opportunity to participate in the initial negotiation of the agreement;
- the terms and conditions of a collective agreement do not benefit from constitutional protection.

Intervenor – CLR:

[28] The Employer is attempting to re-argue the decision in *KDM No. 3*. The arguments that it now makes were made in the previous matter, were understood by the Board, and were properly addressed. The Employer also makes many assertions of fact that are simply false. CLR lists these assertions and provides its counterpoints, including where possible by citing the statutory

provision that contradicts the Employer's statements of fact. Furthermore, the Employer's arguments overlook the fact that there is nothing in the legislation preventing "enabling, carve-outs, project agreements, sector specific agreements, or other customizations".

[29] The Employer's application is an attack on the registration system and on the very existence of CLR. The registration system has been a common bargaining system in Canada in most jurisdictions for almost 50 years. It was implemented at the request of employers to provide a counter to union strength in bargaining in the construction industry: *United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 v Reliance Gregg's Home Services*, 2018 CanLII 127680 (SK LRB). It mirrors the system that is in place for employees when they are represented by a trade union.

[30] CLR also points out that it is unclear who comprises the "stakeholders" in a limited partnership other than the partners in that partnership. This does not matter, however, because the main application is brought on behalf of no other entity than the limited partnership, which is the party that is affected by the requested certification. A limited partnership is a separate entity in law, which explains why the Board issues certifications in relation to them. The limited partnership is the party to these proceedings; not its "stakeholders". This case does not come down to whether the Employer is a business corporation under the Business Corporations Act or limited partnership.

Employer:

[31] The Employer is concerned that, if certified, it will be subject to the automatic imposition of a collective bargaining agent and agreement, contrary to section 2(d) of the *Charter*. The rights, pursuant to section 2(d), that are applicable to this case are the freedom to choose a bargaining agent and the freedom to a procedural right to collective bargaining. The Employer would like to choose its own bargaining agent, and more importantly, negotiate the terms and conditions of employment "collectively", and in good faith, with the Union.

[32] The other parties suggest that section 2(d) does not apply to corporations. This is incorrect. It is also incorrect to claim that section 2(d) applies only to individuals. Besides, KDM is not a corporation. It is a limited partnership. The stakeholders of the limited partnership, which in this case are three First Nations, have rights to collective bargaining. The stakeholders are individuals, who as part of a group, decided to invest in the limited partnership. The statute interferes with, or removes, their collective bargaining rights.

[33] The purpose of the *Charter* is not to rectify an imbalance of power between employees and employers; that is the function of unions. Nor is the purpose of the *Charter* to transfer an existing imbalance of power to other parties; it is to rectify an imbalance of power overall. The imbalance of power between employees and employers that was rectified with the inception of unions has now shifted to employers and REOs. The case is about the resulting imbalance of power between employers and REOs.

[34] The issue before the Board is two-fold: the Employer must demonstrate that it is engaged in activities that fall within the protections of section 2(d); and, must demonstrate that the impugned legislation has, either in purpose or effect, interfered with these activities. The nature of the entity claiming the *Charter* right has no bearing on this issue.

[35] The stakeholders are individuals who need to be protected against a more powerful entity, the REO. The stakeholders came together in the pursuit of a common goal and as a collective, should be afforded the same freedom to associate as the Union. In particular, they should be afforded the same independence and choice to determine and pursue their collective interests in pursuit of workplace justice. Each of the three organizations (union, employer, REO) have status as persons and are distinct and separate from their owners or members. They should each enjoy equal recognition of a procedural right to collective bargaining.

[36] Allowing an REO to automatically become the bargaining agent for these stakeholders only enhances social imbalances. The stakeholders are powerless to the REO. Handcuffing an employer to an REO effectively removes an employer's rights to collective bargaining.

[37] Employers have a right to lock out employees, which is reciprocal to the right to strike recognized in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (CanLII), [2015] 1 SCR 245 [*SFL*]. As recognized in *SFL*, such a right is infringed if the statute is devoid of any review mechanisms or alternate means of addressing workplace issues, which is precisely the case here.

[38] The Employer was not involved in the negotiation of the collective agreement. By contrast, when employees certify, the terms and conditions of work are frozen by operation of the statute until a collective agreement is negotiated.

[39] Furthermore, employers tied to an REO are responsible for its funding. Not only is the employer paying higher wage rates resulting from union dues, but it is also paying fees to CLR for purposes of bargaining. Employers who are dissatisfied with the REO have no options.

[40] There is no public interest in having an REO appointed as the agent of employers in the construction industry. The REO has no, or no proper, incentive to bargain in the employers' interests.

[41] The Employer should be entitled to call evidence on issues such as the nature of KDM (majority owned by three First Nations); the objects and goals of KDM (to drive employment directly from the First Nations without going through a hiring hall); and the challenges and changes caused by the automatic imposition of a collective agreement and a bargaining agent. Without evidence, the Board cannot assess the impact of the imposition of the collective agreement.

[42] The Employer also argues that the freedom not to associate with CLR is a freedom that has been recognized by the Supreme Court of Canada in *R. v Advance Cutting & Coring Ltd*., 2001 SCC 70 (CanLII), [2001] 3 SCR 209 and *Lavigne v Ontario Public Service Employees Union*, 1991 CanLII 68 (SCC), [1991] 2 SCR 211. The Employer seeks protection for a freedom not to associate so that it may bargain its own terms and conditions.

Analysis and Decision:

Preliminary Issue – Timing:

[43] As in *KDM No. 4*, this application for summary dismissal was filed after the deadline set out at subsection 19(5) of the Regulations, which states:

> *(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.*

[44] The Union relies on section 35 of the Regulations and section 6-112 of the Act to request that the Board waive compliance with the deadline. In support of this request, the Union argues that the late filing has caused no prejudice to the opposing party, the opposing party finds itself in the same position on its own application, and the date for the summary dismissal hearing was already set.

[45] In issuing the Order on June 21, 2022, the Board decided to waive compliance with the deadline for filing, pursuant to section 35 of the Regulations. In addition to the absence of any

prejudice to the opposing party, the Board considered the nature of the application, which raises preliminary issues that are properly considered prior to the hearing of the substantive matter, and if, granted will promote a more efficient approach to the hearing.

[46] However, in the Board's decision in *KDM No. 4*, the Board reviewed the interpretation to be given to subsection 19(5), the purpose of the deadline set out at subsection 19(5), and the proper approach when attempting to file an application after the expiry of this deadline. The Board relies on these comments in the present case and will not repeat them here.

[47] In *Canadian Union of Public Employees, Local 650 v Cristina Sipos-Bozzai*, 2022 CanLII 53790 (SK LRB) [*Sipos-Bozzai*], which was also issued on June 21, 2022, it was explained that the proper procedure is to "request an extension of time pursuant to subsection 30(2) of the Regulations, and provide rationale for the delay, at the same time that [the applicant] filed its Application for Summary Dismissal."[6]

[48] The Board also outlined its expectations for future applications:

> *This is the procedure that the Board will expect to be followed in future late applications for summary dismissal. Best practice, of course, would be for such applications to be filed on time.*[7]

[49] The procedure outlined in *Sipos-Bozzai* is the procedure that the Board expects to be followed in late applications for summary dismissal.

Substantive Issues:

Abuse of Process:

[50] In *Bear v Merck Frosst Canada & Co*., 2011 SKCA 152 (CanLII) [*Merck Frosst*], the Saskatchewan Court of Appeal described the doctrine of abuse of process:

> *[36] The doctrine of abuse of process reflects the inherent power of a judge to prevent an abuse of his or her court's authority. It is a flexible concept not restricted by the requirements of issue estoppel, such as those relating to privity. The doctrine can be engaged by a variety of circumstances including what might be called those concerning the "re-litigation" of issues or claims.*
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> *[37] Goudge J.A., in Canam Enterprises Inc. v. Coles (2000), 2000 CanLII 8514 (ON CA), 194 D.L.R. (4th) 648 (Ont. C.A.), dissenting but approved at 2002 SCC 63 (CanLII), [2002] 3 S.C.R. 307, explained the applicable concepts as follows at paras. 55-6:*

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[6] *Canadian Union of Public Employees, Local 650 v Cristina Sipos-Bozzai*, 2022 CanLII 53790 (SK LRB) at para 13.
[7] *Ibid.*

> *[55] The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See House of Spring Gardens Ltd. v. Waite, [1990] 3 W.L.R. 347 (C.A.) at 358.*
>
> *[56] One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. …*
>
> *[38] The need to maintain the integrity of the adjudicative process sits at the heart of the concept of abuse of process. The Supreme Court of Canada explained this point as follows in Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77:*
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> > *51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.*
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> *See also: Cameco Corp. v. Insurance Co. of State of Pennsylvania, 2010 SKCA 95, [2010] 10 W.W.R. 385 per Cameron J.A. at paras. 47-50.*

[51] In *Merck Frosst*, the Court of Appeal observed, at paragraph 41, that,

> *There is often no individual marker indicating whether a proceeding is an abuse of process. Rather, it is typically necessary to consider all of the relevant context and background in assessing whether an abuse of process has been established.*

[52] To determine whether this Notice is an abuse of process by relitigation, the Board should compare the Notice that was filed in this matter to the Notice that was filed in the previous case. The Notices are almost identical. As the Employer did in *KDM No. 3*, the Employer again asks the Board to find that the Construction Division is invalid to the extent that it imposes a bargaining agent and a collective agreement on the Employer. There is nothing substantive to distinguish the Notices in the two cases.

[53] The Board's decision in *KDM No. 3* was issued less than a year ago (in relation to the Order issued in this matter). The Board's decision was primarily a legal one, in that it focused on the Employer's standing to bring the Notice. The Employer does not now raise a change in the law, or any change in its own nature or structure that would be relevant to the Board's earlier determination.

[54] Although the unions are not the same in both matters, the Employer is the same. With respect to the constitutional question, which is a legal one, nothing turns on the identity of the union. The primary issue is that the certification sought comes within the Construction Industry Division. Furthermore, the work is being performed at the same general location or work site; the Employer's objections to the proposed bargaining unit in the present case are very similar to the objections it expressed in relation to the proposed bargaining unit in *KDM No. 3*.

[55] Finally, the Employer states that it had to file this Notice to preserve its rights pending judicial review of the decision in *KDM No. 3*. While this argument is less relevant in the context of a constitutional question that challenges the validity of an entire statutory regime, it is not entirely lacking in reason. On the other hand, the Employer has not sought overly expeditious approaches to proceeding with this matter, which would be the usual approach of a party asserting a need to preserve rights during a pending, related proceeding.

[56] The Board is also alert to the reality that, unrelated to the merits of any particular case, litigants occasionally misuse legal processes for the purpose of creating delay in the potential realization of workers' rights. The Board must take care to discourage litigants from taking such actions, wherever possible and just.

[57] However, abuse of process is a serious allegation. While there are factors weighing in support of such a finding, the Board has decided that, given the pending, related proceedings, the Notice is not manifestly unfair to a party to the litigation before it nor does it bring the administration of justice into disrepute. The Board will dismiss this allegation.

Constitutional Question:

[58] In *KDM No. 3*, the Board found, relying on *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 (CanLII) [*Quebec*], that to claim the protection offered by a provision of the *Charter*, a claimant has to establish that it has an interest that falls within the scope of the guarantee provided by that provision. To determine the scope of that guarantee, it is necessary to interpret the provision using the purposive approach. After reviewing the established case law interpreting section 2(d), the Board concluded that the Employer did not have an interest that fell within the scope of the guarantee provided by the provision. To the extent that the Employer's position in the current case is substantially the same as that which it posited in *KDM No. 3*, the Board finds that it is appropriate to dismiss this matter for substantially the same reasons as provided in that decision.

[59] In addition, CLR refers in its argument to *PCL Industrial Constructors Inc. v CLR Construction Labour Relations Association of Saskatchewan Inc*., 1999 CanLII 12551 (SK QB) [*PCL v CLR*], a case that was not raised in *KDM No. 3*. The Court in that case found as an alternative and additional finding in the "unique circumstances of the cases before [it]" that CLR's denial of membership to the plaintiff corporations had infringed their rights, pursuant to section 2(d). The Court did not outline the test that it was applying in coming to that determination.[8]

[60] However, the Court expressly rejected the characterization of the issue as being the right to collective bargaining, and instead defined it as the "right to join an organization". By contrast, in the present case, the Employer is expressly asserting a right to collective bargaining pursuant to section 2(d) of the *Charter*.

[61] Furthermore, the origin, scope, and nature of the *Charter* right to collective bargaining has been both established and greatly refined since 1999.

[62] For all of these reasons, *PCL v CLR* provides only limited guidance to the Board in deciding the question before it.

[63] Next, the Board has considered those aspects of the Employer's argument that represent a reframing of the argument it presented in *KDM No. 3*. First, the Employer emphasizes an asserted imbalance of power between the Employer and the REO that is woven into the statutory registration system, including in comparison to the statutory provisions governing the relationship of unions with their members. Next, the Employer compares the registration system in Saskatchewan with statutory regimes in other provinces to assert that the system in this province is comparably more restrictive for employers. Lastly, the Employer makes what it refers to as a public interest argument, in which it suggests that an REO is not structurally capable of negotiating effectively on behalf of employers.

[64] In summary, none of these arguments suggest that the Employer has an interest that falls within the scope of the guarantee provided by section 2(d).

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[8] In finding that the plaintiff corporations had standing, the Court relied, in part, on the *CEMA* exception, while, at the same time accepting that the freedom of association guaranteed by the *Charter* applied to the plaintiff corporations. This appears to be in contrast with the guidance provided at page 580 in Guy Régimbald and Dwight Newman, *The Law of the Canadian Constitution, 2nd ed*., (Toronto: LexisNexis Canada, 2017). See, in comparison, *Black v Law Society of Alberta*, 1989 CanLII 132 (SCC), [1989] 1 SCR 591; *Costco Wholesale Canada Ltd v Board of Examiners in Optometry*, 1998 CanLII 2479 (BC SC).

[65] First, the Employer argues that the Board should consider the purpose of section 2(d) of the *Charter*, being to redress the power imbalance between itself and the REO, from whom it should be permitted to dissociate. Relatedly, it asserts, somewhat loosely, a freedom not to associate with an REO that it views as exceedingly powerful and largely illegitimate. It does not, however, identify a liberty interest, in the form of imposed political or ideological conformity, that it wishes to have protected.[9]

[66] In our view, in circumstances such as this, in which the purpose, object, and necessity of the construction division regime are well-established,[10] it is up to a litigant alleging a *Charter* breach to identify the relevant liberty interest. While it is certain that freedom of association includes a "negative aspect", section 2(d) does not confer a right to "isolation".[11] Nor is it "intended to protect against association with others that is a necessary and inevitable part of membership in a modern democratic community".[12] In respect of such an association, there can be no infringement of section 2(d) in the absence of a threat to a specific liberty interest.

[67] It is revealing that, instead of doing this, the Employer asserts a right to collective bargaining, pursuant to the *Charter*, and seeks the benefits which it suggests should flow from that right. This includes, in the Employer's assertion, mechanisms for the establishment of the relationship between the Employer and bargaining agent that are equivalent or the same as those that exist between employees and unions. As such, the Employer's suggestion that it should benefit from the freedom not to associate serves to distract from the true object of the Employer's interest, which is *Charter* equivalence between unions and employers in the context of collective bargaining.

[68] Relatedly, the Employer also suggests that the imposition of the REO upsets the power balance between unions and employers by effectively removing the right to lockout. In arguing for the Board's recognition of a *Charter*-protected right to lockout, the Employer relies on passages from *SFL* which, in context, pertain to the *Charter* right to strike, and attributes false equivalence between the power of employees and employers. In *KDM No. 3*, the Board outlined in detail the flaw in such reasoning. It is not necessary to revisit or restate that analysis here.

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[9] *Advance Cutting*, at paragraphs 19, 195, 196, 220; *Lavigne*, at 328-29.
[10] See, for example, *CLR Construction Labour Relations Association of Saskatchewan Inc. v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 119*, 2016 CanLII 30542 (SK LRB).
[11] *Lavigne*, at 320-21.
[12] *Bernard v Canada (Attorney General)*, 2014 SCC 13, [2014] 1 SCR 227 at para 38.

[69] The Employer also characterizes the company's "stakeholders" as individuals who have *Charter* rights that need to be protected from the more powerful REO. Clearly, this argument does not respond to the issue before the Board, which is whether the Employer, being the respondent, has *Charter* rights that are engaged by the application. Furthermore, the Employer fails to plead which of the stakeholders' *Charter* rights are independent of the interests of KDM and distinct from the asserted right to collective bargaining.

[70] Next, the Employer compares the registration system in Saskatchewan with statutory regimes in other provinces to assert that the system in this province is comparably more restrictive for employers. It is, perhaps, an understatement to observe that the Employer and CLR differ in their understanding of the registration system and its effect on employers. Again, however, this argument would be relevant only if the Board were to find that the Employer had a *Charter* right to assert.

[71] Even if it were relevant, the Board agrees with the CLR that the Employer has made inaccurate statements about the operation of the legislation. The legislation is markedly less restrictive than described. For example, the determination that an employers' organization is the REO for all unionized employers in a trade division is made following a vote demonstrating the support of 45% of unionized employers in the trade division, pursuant to section 6-69 of the Act. Unionized employers may also vote for a new REO. In comparison, section 6-42 provides that, upon the request of a union representing employees in a bargaining unit, a union security clause must be included in a collective agreement. The union security clause makes membership in a union a condition of employment.

[72] There are other notable aspects of the system that stand to be mentioned. Pursuant to section 6-71, the constitution and bylaws of an REO are in force only after they are approved or amended by the Board. And, pursuant to subsection 6-72(3), an REO "shall not act in a manner that is arbitrary, discriminatory or in bad faith in representing any of the unionized employers on whose behalf it acts."

[73] Next, the Employer suggests that an REO is not structurally capable of negotiating effectively on behalf of employers. This public interest argument does not add anything to assist in determining the legal question that is before the Board.

[74] None of the Employer's arguments has persuaded the Board that the Employer properly has standing in the Notice of Constitutional Question that it has filed.

[75] For the foregoing Reasons, the Board has granted the application for summary dismissal of the Employer's Notice of Constitutional Question.

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

DATED at Regina, Saskatchewan, this **31st** day of **October, 2022.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson