UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1021, Applicant and CONSTRUCTION AND GENERAL WORKERS UNION, LOCAL 180, Applicant v INTERNATIONAL COOLING TOWER INC., Respondent and ICT INDUSTRIAL INC., Respondent

LRB File Nos.: 092-22 and 094-22; March 31, 2023
Vice-Chairperson, Barbara Mysko; Board Members: Allan Parenteau and Aina Kagis

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Common Employer Applications – Section 6-79 of *The Saskatchewan Employment Act* – Expanded Business Within Construction Industry – Preservation of Bargaining Rights – Four Prerequisites Satisfied – Valid and Sufficient Labour Relations Purpose – Applications Granted.

Common Employer Applications – Section 6-20 of *The Saskatchewan Employment Act* – Original Certification Orders Made Under General Provisions – Common Employer Declarations Restricted to Construction Industry Division.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to two common employer applications, designated by the Board as LRB File Nos. 092-22 and 094-22. Both applications were filed on June 13, 2022. The applicant in LRB File No. 092-22 is the United Brotherhood of Carpenters and Joiners of America, Local 1021 [Millwrights]. The applicant in LRB File No. 094-22 is Construction and General Workers Union, Local 180 [Labourers]. Both of these applications relate to ICT Industrial Inc. [Industrial] and International Cooling Tower Inc. [International].

[2] International is required to bargain collectively with the Millwrights pursuant to a certification order issued in LRB File No. 168-91 on August 30, 1991. The Order describes the bargaining unit:

> *(a) that all millwrights, millwright apprentices and millwright foremen employed by International Cooling Towers Inc., in the Province of Saskatchewan, are an appropriate unit of employees for the purpose of bargaining collectively;*

[3] International is also required to bargain collectively with the Labourers pursuant to a certification order issued in LRB File No. 104-91 on June 10, 1991. The Order sets out the bargaining unit as follows:

> *That all labourers, and labourer foremen employed by International Cooling Tower Inc., within the boundaries of the 49th and 51st parallels in the Province of Saskatchewan, are an appropriate unit of employees for the purpose of bargaining collectively;*

[4] *The Construction Industry Labour Relations Act*, SS 1979, c C-29.1 was repealed in December, 1983. The certification Orders were issued pursuant to clauses 5(a), (b), and (c) of *The Trade Union Act* (statute since repealed) prior to the coming into force of *The Construction Industry Labour Relations Act, 1992*.

[5] Both of the applications were brought pursuant to section 6-20 of the Act. This is despite each of the parties agreeing that the activities described in the applications, which are taking place at the site of the Great Plains Power Station project in Moose Jaw, Saskatchewan [Project], are activities within the construction industry as defined by section 6-65 of the Act. Section 6-79 provides the Board with authority to make a common employer declaration within the construction industry division, whereas section 6-20 applies outside of that division.

[6] After the Board raised this issue with the parties, the applicants made an application to amend their applications to add section 6-79 of the Act, which the Board granted.

[7] In the course of making that application, counsel for the applicants indicated that they still intended to rely on section 6-20, that is, they were requesting common employer declarations applicable both to activities within the construction industry division and to maintenance or other work. The intention of the applications is to seek to preserve all existing bargaining rights as against both employers. Both of the respondents objected to any order that would cover activities that fall outside of the construction industry division. The Board indicated that it would hear arguments from the parties on this issue at the close of the hearing.

[8] A hearing on the common employer applications was held on December 5, 6, 7, and 8, 2022. All of the parties were represented, called witnesses, filed briefs, and made oral argument. The Board has reviewed all of the submissions and the associated authorities, even if not referred to in these Reasons, and has found them helpful.

Evidence:

[9] The parties filed an agreed statement of facts, as well as additional documents, by consent.

[10] The Board heard testimony from five witnesses on behalf of the applicants: Shane Sali, Nathan Jaeb, Jack Schuba, Darren Schaffer, and Devon Schaffer. Sali has been the Business Manager for the Labourers for approximately two and a half years and, before this, was the dispatcher for the Labourers for approximately six years. Jaeb is the Business Representative and Financial Secretary for the Millwrights. Schuba has been working in the millwright trade for approximately 50 years and has been a member of Local 1021 for approximately 25 years. Darren Schaffer works in the millwright trade and has been a member of Local 1021 for 17 years. Devon Schaffer has worked as a millwright for approximately 20 years.

[11] Three witnesses were called on behalf of the respondents: Chris Patten, Brad Vickers, and Jennifer Dart. Patten is the Vice-President of Operations for Industrial. Vickers' title is Vice-President, Engineering. He has been employed with International since 1997. Dart is a Project Manager employed by International. She has had that role for approximately one year. Prior to that, she was doing a combination of estimating and proposal writing with the company.

[12] According to Patten's testimony, there is a single 100% owner of ICT Group Canada Inc. and all subsidiaries - Baron Douglas. All of the profits flow to this one individual. According to the Corporate Registry documents, ICT Group is the voting shareholder for International. Prior to August 31, 2022, International was the voting shareholder for Industrial. Industrial's single director was Douglas. Since then, ICT Group has been the voting shareholder for Industrial. Industrial, International, and ICT Group now have the same three directors (the owner, CEO, and Chief Financial Officer). Patten testified that this change was made for estate tax planning purposes. There is a single CEO of International and Industrial, Brent Middleton, who is also one of the three directors. He has responsibility for the hiring and firing of the Vice-President of Industrial.

[13] Neither Douglas nor Middleton testified.

[14] International was founded in 1958. Its primary business line is the design, supply, and erection of wet cooling towers. A wet cooling tower is used to cool the water generated by plants. It consists of a low-pressure system open to the atmosphere. Plants are equipped with a steam surface condenser. The water is cooled through evaporation.

[15] In the past, wood was the primary building material for wet cooling towers. Fiberglass is now more common. With its potential for corrosion, steel is not used (although a steel frame supports the motor and the gear box).

[16] Wet cooling towers are erected by a crew of carpenters. The mechanical equipment is serviced by millwrights. Boilermakers are not used.

[17] In the wet cooling tower business, International has a large market share. However, in the last five to ten years new construction of wet cooling towers has slowed and, currently, approximately 90% of the entity's work consists of "maintenance" work (as described by the respondents' witnesses).

[18] In comparison with a conventional wet cooling tower, an air-cooled condenser (ACC) contains vessels that are connected by piping, and results in higher pressure within the system. The steam output of the turbine is directly condensed in welded duct work through exchangers. Steel is required as a building material to support the weight of the equipment.

[19] The primary reason to use an air-cooled versus an evaporative or water-cooled system is environmental. A water-cooled system is more efficient and involves significantly less capital cost. With an unrestricted supply of water, a water-cooled system is the system of choice. But an unrestricted supply of water is not and will not be available in all circumstances.

[20] Approximately five years ago Patten was hired by Middleton (and paid by International) to create a new company that was to become a subsidiary of International. International's website, which was filed as an exhibit in these proceedings, states that Patten "joined ICT in October of 2017". The new entity, Industrial, was incorporated in Alberta in April 2018.

[21] Patten is a professional engineer with a business administration degree. He has significant experience in heavy construction with different companies.

[22] Patten testified that Industrial seeks to perform construction work in the industrial construction sector, not exclusive to cooling. He suggested that the preferred work would be performed by tradespeople working in the compulsory trades. He provided examples: piping, civil, concrete, welding, boilermaker, and plate-fitting. Patten also described the work that Industrial has performed. These descriptions focused on cooling-related work.

[23] Over a period of one to two years Industrial obtained the certifications necessary to do the work that it was interested in performing. It developed a quality program, submitted to an audit process, performed some work on a demonstration basis, and then received the required certifications.

[24] It also had to develop a quality manual in compliance with the relevant codes. It is significantly more extensive than International's manual and consists of two volumes. The first volume covers subject matter as required by the Technical Safety Authority of Saskatchewan (TSASK). It is a controlled copy issued specifically to the regulatory authority in the relevant jurisdiction. The second volume covers certifications that come outside what is required by the regulatory authority of the relevant jurisdiction.

[25] Industrial has an authorization from TSASK that allows it to perform work on pressure equipment as required pursuant to the relevant Codes; and an authorization to perform welding on structural steel in any Canadian province.

[26] International is not registered or licensed to do the same type of high-pressure piping work. Nor does it have anyone on staff who is qualified to do that work.

[27] There is no evidence that International has ever attempted to obtain the certifications required to do the high-pressure vessel work performed by Industrial. It has never hired employees for the purpose of acquiring those certifications for that entity.

[28] In cross, Patten was asked about the addition of cooling tower procedures and forms to the manual, volume 2 - a revision he approved on August 5, 2020. Patten admitted that the content used for cooling towers was the same as the content used in International's manual.

[29] In 2019, Industrial was awarded its first contract. The project, which was based in Virginia, involved retrofitting a dry system to an existing tower. Beginning in April 2021, Industrial worked on an extensive project in Ontario with a cooling tower on site. Industrial modified systems adjacent to the cooling tower (turbine circulating pumps, dry exchangers, steel piping, and some concrete and structural steel work).

[30] Industrial has been awarded one project in Saskatchewan [the Project]. The Project requires the erection of an induced draft air-cooled condenser. Industrial bid on the project in January 2021 (or earlier), and then submitted a revised proposal in January 2022. The contract

was awarded in February 2022. Patten testified that International was incapable of bidding on or executing the Project, both technically and legally.

[31] Patten was asked about the proposal submitted in relation to the Project. He testified that there was no assistance received by International in preparing the proposal. In the cover letter to the proposal, Patten relied on the following statement: “ICT has been in business since 1958 and has established itself as one of the longest standing construction companies in the industrial cooling industry”. To explain, he suggested that in most cases these companies require a parental guarantee based on the financial sufficiency of subordinate companies. However, a notice of financial sufficiency was not required for this Project.

[32] The proposal also claims that “ICTI has extensive experience in the erection of…conventional cooling towers”. Patten attributed that experience to the Project Manager, Wes McDougall. However, the past experience that is listed in the proposal includes a previous project of International’s, in which McDougall was involved. Patten suggested that the inclusion of this project was intended to demonstrate past experience in Saskatchewan.

[33] The footer on the cover letter included International’s address. Patten explained that the accounting team is located in that office and so paperwork related to invoices or purchase orders is to be sent to the accountants at that location. He testified that they have started to slowly change that so that most of the paperwork comes to the office of Industrial.

[34] In the proposal submitted for the Project, there is a description of “Our Business History”, as follows:

> *OUR BUSINESS HISTORY*
>
> *Our parent company, International Cooling Tower has been in business since 1958 and has grown into a North American market leader in the design, supply, installation, and maintenance of Wet Cooling Tower systems for our diverse client base across all industries.*
>
> *For over 60 years our strategy has been the same; work with the needs of our clients to add value by providing the most cost-effective procurement and construction solutions in the best possible timeframe.*
>
> *With the formation of ICT INDUSTRIAL in 2017, our focus has expanded to include complex multi-disciplinary scopes of work that allow us to better serve the turnkey needs of our client base. From Air Cooled Condenser work to cooling distribution pump, piping and heat exchanger work, ICT INDUSTRIAL can successfully manage any type of industrial construction project.*

[35] The next page describes Industrial as a full-service contractor. The description of Industrial's focus includes the execution of multi-disciplinary projects, installation of ACCs, erection of structural steel, installation of boilers, vessels, pumps, and exchangers, fabrication of piping systems, modularization of steel, piping and equipment packages, construction management, and international procurement, as well as civil and concrete work.

[36] The purpose of the Quality Management System Manual, Volume 2, revised April 10, 2018, is described as follows:

> *21.1 PURPOSE*
>
> *a. ICT Industrial is engaged in the design, supply, and installation of cooling technologies for commercial and industrial clients across North America. It is the objective of the company to become a market leader by providing excellent service through the delivery of quality work with a view of continued success by focusing on customer satisfaction and the continual improvement of our business processes.*

[37] The head office of Industrial is located at 7019 – 68th Avenue in Edmonton. The key personnel work at this office location. International's head office is located at 3310 – 93 St NW in Edmonton. The registered office mailing address for both corporations is the same. There is a common power of attorney for both corporations.

[38] Common executive personnel through the ICT Group are the CEO and the Chief Financial Officer (CFO). Vickers is listed on the website as "Vice President Engineering" and is described as leading "ICT's engineering and estimating operations" – the "ICT Group" is not referenced. Vickers' testified that he has no responsibility for engineering or estimating for Industrial.

[39] Patten is also listed on the website as Vice President of the Industrial Group, with the following description: "Chris is Vice President of Operations for ICT Industrial Inc. and an active member of ICT's executive team. He joined ICT in October of 2017 and has 15 years of industry experience." When asked whether it was inaccurate to describe himself as a member of the executive team he did not answer the question directly.

[40] Early on, Patten hired a team to perform estimates and business development. Later, he had to hire Project Managers, a Project Controls Lead, and a Project Quality Lead. In addition to Patten, the key personnel at Industrial are:

- Gavin Sugiyama – Chief Estimator

- Ernie Smith – Business Development Manager
- Shelby MacKenzie – Project Controls Lead
- Wes McDougall – Project Manager
- Fabio Faragalli – Project Manager
- Patrick Callanan – Project Quality Lead

[41] As mentioned, McDougall had previously worked on a Belle Plaine project (on conventional cooling towers) with International.

[42] Patten testified that he directs Smith as to which clients to target and determines whether they are comfortable with the risk profile of a project. Patten is responsible for selecting the project managers and the people who report to them. From the point that these individuals began their employment with Industrial, their sole responsibilities have rested with that entity.

[43] Industrial relies on clerical support from International in payroll, accounting, and human resources. It receives a bill for shared resources each month. For the Project, McDougall did the "vast majority" of hiring. International gets involved by placing job ads that Industrial requests and processing employees' documents through payroll after hiring. Discipline and termination take place at the site level and the termination paperwork is filed with the payroll department.

[44] All of the equipment leased or owned by Industrial is solely leased or owned.

[45] The entities have their own bank accounts and separate financial statements are produced.

[46] Patten suggested that Industrial has to have additional insurance, for example, for heavy lifts. However, both entities operate under the same insurance policies with the same policy numbers, effective on the same dates.

[47] According to a response to a production request, there are no agreements between the two entities for the supply of labour.

[48] In or around January 2022, there was an exchange between Dart and Jaeb that is a matter of some contention between the parties. The related testimony included hearsay evidence, in particular, on behalf of Patten. The Board has assigned the appropriate weight to the hearsay evidence.

[49] As background, International maintains wage rates for the work that it performs throughout Canada, presumably for bidding purposes. At some point, someone (it is unclear who) realized that the on-file wage rates for the Millwrights were out of date. Apparently, it is David Erickson, who was not at work at the time but who works for International, who is responsible for pulling the union rates needed for bid packages. In Erickson's absence, Laura Trapp, the HR manager, made the request to Dart. Dart understood that the request had come from Industrial.

[50] In accordance with this request, Dart called the Local office to obtain an update to the rates. She spoke with Jaeb, proceeded to introduce herself, and explained that she was calling from International Cooling Tower. Jaeb believed that she was calling on behalf of the certified entity. He testified that he does not provide wage information to "outside" companies for bidding purposes.

[51] Dart asked Jaeb for a copy of the collective agreement and for the applicable wage scale. In her testimony, Dart suggested that she had told Jaeb at least roughly where the Project was so that she would get the proper rates. From Jaeb's perspective, the conversation was specifically directed at bidding on the Project.

[52] After Dart received the rates, she forwarded them to the group that had made the request. In March 2022, Jaeb sent an email to Dart asking to be put in touch with the individual looking after the "Moose Jaw packages". Dart replied that she had passed his email on "to our contact at Industrial and they will contact you." He was not contacted by anyone at Industrial.

[53] Dart testified that she had understood that the union rates were public information. She did not know why Industrial was asking for the rates. She just knew that they were looking at bidding the job in Moose Jaw. She explained that, normally, she has no role in relation to Industrial. She testified that she has no interaction with employees of Industrial except for at social events. Dart testified that, on any Saskatchewan project with which she has been involved, International has used a specific union contract. She is not aware of building trade workers being used.

[54] According to Patten, the initial proposal for the Project was based on rates from CLAC. Patten believed that, on or around January 2022, Sugiyama had requested that Trapp obtain the current rates for CLAC. According to Patten, Sugiyama said that Dart had reached out to him and passed on the contact for Local 1021 as they were interested in supplying Millwrights for the Project.

[55] Ultimately, CLAC was unable to fulfill the labour supply requirements. The peak trade labour requirements for the Project, as noted in Industrial's response to a production request, include six labourers, two millwrights, 42 boilermakers and boilermaker welders, three pipefitters, six operators, and eight ironworkers.

[56] The boilermakers and the operating engineers are certified to Industrial. Industrial was unsuccessful in its attempts to recruit boilermakers to work on the Project and so it decided not to oppose the boilermakers' certification application. It did not oppose the application brought by the operating engineers either.

[57] At the time of the hearing in this matter, there was also a pending, contested certification application for the plumbers and pipefitters.[1]

[58] In the early summer of 2022, Sali learned that Industrial was doing work in Saskatchewan. He was informed by the operating engineers that the entity had been employing labourers.

[59] Sali contacted a labourer about organizing on site. Apparently, this individual had been told that he would not be paid his live-out allowance if they unionized. In cross, Sali agreed that the live-out allowance is not available under the "PLA". Patten testified that Industrial has paid a live-out allowance to labourers who lived away from the job site.

[60] Sali has been in contact with McDougall. They talked about hiring non-labourers and coming to an agreement. McDougall also suggested sub-contracting the labourer work to one of the signatory (certified) contractors. Neither of these options worked out.

[61] According to Jaeb, it is difficult for unions to gain access to the site without a contractor on site. There were no Millwright members performing the work even though there was millwright work being performed by other trades.

[62] There was some evidence describing both the work generally performed by millwrights and labourers and the work performed on the Project.

[63] Jaeb explained that millwrights perform work on any and all equipment that rotates. When he performs millwright work, he does not focus on the project as a whole, but on whether there

[1] Following a hearing on the bargaining unit inclusions, the Board ordered that the vote be tabulated: *ICT Industrial Inc. v United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada*, 2022 CanLII 122753 (SK LRB). A certification order was issued on January 12, 2023.

are fans, pumps, conveyer systems, or other mechanical components to the project. Whether a structure is built out of wood or steel makes no difference to him.

[64] Sali suggested that every job should include a labourer, regardless of the size of the job. Labourers move materials. If a labourer is not on site then it is very difficult for the trades to get their jobs done.

[65] Devon Schaffer is now working on the Project through a different employer. He was dispatched through the hall and is assisting the Ironworkers. He has observed the work being performed by Industrial, including what he described as standard millwright work, that is, erecting steel, assembling cooling fans, and working on gear boxes and fan blades.

[66] In 2007, Darren Schaffer worked for a different company (BFI) on a cooling tower shutdown project at Belle Plaine. He was changing out motors on fans and doing work that he described as preventative maintenance. More recently, Devon Schaffer and Darren Schaffer did extensive work for a different company on galvanized steel cooling towers at the Chinook Power Station. They were replacing fan blades, removing motors, and performing repairs.

[67] Finally, there was also some evidence about the use of labour by International.

[68] After a hiatus, International reached out and started working with the Millwrights again in and around 2018. In evidence is a list of work that International has performed in Saskatchewan from 2018 to 2022, and a list of the jobs during that timeframe including the associated tradespersons employed by the entity. Labourers were not employed on any of the jobs. Sali testified that the Local was not contacted about work during this time period, nor was it invited to a mark-up meeting; the last time a member of the Labourers was dispatched by International was in 2007. He only learned of this work when he reviewed the documents produced for this hearing. He indicated that he will be filing a grievance for a breach of the collective agreement, presumably due to the absence of an invite to a mark-up meeting.

[69] There are provincial construction agreements for both the Millwrights and the Labourers. The Labourers' Agreement expressly applies specifically in the industrial construction sector. Sali and Jaeb offered their interpretations of Articles 16 and 18 of those agreements, respectively, which relate to pre-job and mark-up conferences. The provisions are functionally similar except that the Labourers, and not the Millwrights, require that notification of a pre-job conference be given to the union, not just the Building Trades; and the Millwrights allow a mark-up conference to be conducted by facsimile for small projects.

[70] Both provisions use the terminology “interested unions” to describe those unions who are expected to attend the mark-up conference. With respect to the invitation to unions, Jaeb explained that his union is always “interested” until they know what is involved in the project. He testified that there was no record of a mark-up having been held with International in the last five years. In the absence of a mark-up conference, it is difficult to make a jurisdictional claim.

[71] In relation to the aforementioned list of jobs, Jaeb was aware only of a Belle Plaine project. There were three members of the Millwrights involved in that project. Consistent with the practice of International, there was no mark-up conference. He became aware of the work when International reached out and asked whether any millwrights were available. There has been no other contact on any of the other projects.

[72] Schuba was among the Millwrights dispatched to work at Belle Plaine. It was an approximately five-day job. There were carpenters and non-union employees on the project. The Millwrights worked on the drive system on the fans on the top deck of the cooling tower. He observed that non-union employees were doing their jobs after their shifts were done. Schuba complained to management, but they continued to proceed in this fashion. When he was asked to return to the job for the re-assembly phase he did not.

Arguments:

Unions:

Test for Common Employer Declaration:

[73] A common employer application is to be evaluated through a four-point test, as follows.

[74] The first criterion, whether there is more than one corporation and at least one of those entities is a certified employer, is conceded by the respondents.

[75] The second criterion is whether the entities are sufficiently related to a unionized employer through involvement in associated or related businesses, undertakings or other activities. The Board’s case law has found businesses to be related upon facts which demonstrate significantly less relatedness than is demonstrated in the current case. Two such cases are: *International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v Book Insulations Ltd*., 2019 CanLII 98480 (SK LRB) [*Book Insulations*] and *International Brotherhood of Electrical*

Workers, Local 2038 v Stuart Olson Industrial Contractors Inc., 2021 CanLII 46897 (SK LRB) [*Stuart Olson*].[2]

[76] Industrial was directly created by International. The corporate structure of the two entities has always been interrelated. At the time of the applications, International was the sole shareholder of Industrial. To this day, the two entities have a common corporate parent and common directors with profits flowing to the same shareholder. The resources of International have been fundamental to the establishment of Industrial. The use of a company's resources to finance another entity is relevant to assessing their relatedness: *Iron Workers District Council of Ontario and the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 v Gage Aluminum & Glass Ltd.*, 2022 CanLII 25852 (ON LRB) [*Gage Aluminum*]. As well, Industrial has relied on the resources, reputation, and past projects of International to allow it to bid on projects.

[77] In assessing whether there is common control or direction, the Board may consider a number of factors, including those set out in *Lithographers & Photoengravers International Union, Local 12-L v Walters Lithographic Co*., 1971 CarswellOnt 442, [1971] OLRB Rep 406 [*Walters Lithographic*]. The *Walters Lithographic* factors do not comprise a checklist nor a test.

[78] In the current case, there is substantial overlap in relation to each of these factors. The ownership structures are identical. There is common management with a common set of directors; an interrelationship of employees; interrelated control of labour relations; and representations to the public and potential customers as an interrelated enterprise. There are common insurance policies through a common provider and there was an untracked and uncompensated transfer of manual documentation and advice to assist Industrial bid on work normally performed by International. There is also a common repository of information, which is a significant, shared operation, and demonstrates dependence of Industrial on International. The recent re-organization of the companies only highlights the fact that they serve a common master.

[79] On a common employer application, labour boards are concerned with the diversion of work from a certified entity. If there is actual or potential risk of the erosion of bargaining rights, this justifies a common employer declaration. There is no question whether the work of Industrial operates within the scope of the trades of the applicant unions. There has been a decline in the construction business of International over time. That entity continues to attempt to find work in

[2] Upheld on judicial review in *International Brotherhood of Electrical Workers, Local 2038 v Stuart Olson Industrial Constructors Inc.*, 2023 SKKB 39 (CanLII), appeal pending.

the construction industry but its work in Saskatchewan since 2018 has been focused on existing towers rather than new construction. As a result, International has chosen to pursue work through another entity, which has had the effect of evading the bargaining rights that would attach to that same work had it been performed through International.

[80] Another valid labour relations purpose is to "ensure viable labour relations between the parties". Within this context, the particular issue raised by the current case is new. International is sharing labour relations information with Industrial which is giving Industrial a competitive advantage in bidding on work. The unions should not have to take proactive steps to confirm whether information is being requested either by its certified employer or Industrial. The applicants argue that the foreseeable impact, which may have crystallized in this case, of the shared repository of information is to allow Industrial to erode the bargaining rights of the building trade unions, which would prefer that the work be awarded to unionized employers who may be bidding in competition.

[81] In this respect, there is a unique but important labour relations purpose for a declaration, which is to ensure that the applicants can deal with the certified contractor without the risk that the information will be used to erode the unionized sector as a whole.

[82] The Board may also consider the feasibility of organizing as part of its assessment. There is no obligation for a union to pursue a certification application prior to a common employer application. The unions' difficulty organizing the site is significant given the employer's stated preference to operate with a workforce supplied by CLAC. Work was assigned to tradespersons who were not eligible to sign up as members. There are no concerns with respect to employee choice. Given the existing certifications for other trades, it would be impossible to organize the site on an all-employee basis.

[83] This case is the inverse of the rationale in *International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v Cornerstone Contractors Ltd.*, 2015 CanLII 43777 (SK LRB) [*Cornerstone*]. In *Cornerstone*, there was an outstanding CLAC certification application. The Board found it appropriate to step aside and leave the question to be determined until after the certification application was decided. That type of application is not possible here; therefore, there is no other way to certify than through the building trades structure.

Scope of Application and Orders:

[84] Under this heading, the primary question is whether the changes in the statutory definition of "construction industry" should be taken to eradicate or "severely limit" bargaining rights. Although the applications were brought pursuant to section 6-20, the applicants "clarified that they sought orders preserving all of their existing bargaining rights", including through an order pursuant to section 6-79.

[85] There are two orders before the Board. They include construction but also non-construction, or maintenance. The applicants seek to have the full extent of their rights to continue to apply.

[86] When a certification order is granted, there is a presumption of continuity of support for the union flowing from that order. The presumption of continuity finds support in subsection 6-1(2) of the Act, to the effect that an employer remains subject to an order even if the employer ceases to be an employer within the meaning of Part VI. The differences between sections 6-20 and 6-79 do not present any basis for drawing a distinction as to when to make an order or in defining the scope of said order. To the extent that there is a requirement to find "one person" under section 6-20, that requirement is satisfied with the control demonstrated by common principals.

[87] The definition of a unionized employer sets no threshold for being actively involved in the construction industry. The certification orders and voluntary recognition agreements remain effective.

[88] As for geographic scope, the applicants do not seek that the geographic limitation to the Order under LRB File No. 104-91 be changed. The evidence demonstrates that International operates both north and south of the 51st parallel, as outlined in the certification order.

Industrial:

Test for Common Employer Declaration:

[89] Industrial addresses each of the factors in turn.

[90] The first factor is whether the application involves more than one corporation, partnership, individual or association, of which one is a certified employer. This point is readily conceded.

[91] The second factor is whether the subject entities are sufficiently related through involvement in associated or related businesses, undertakings or other activities. The nature of

the work performed by each of the entities is fundamentally different. The non-certified company was established to specialize in industrial projects and air-cooled condensers. The nature of the work is code certified and technically complex. It requires the experience of a different workforce. The markets and the capital costs are different. The companies could not and do not bid for or perform the work of the other. Even if the projects are “conceptually similar” the activities are not associated or related.

[92] With respect to common control or direction, the test has a practical orientation. The focus should be on day-to-day management of the business, whereas high level strategic control and corporate organization are of secondary importance. In the current case, the companies operate independently in respect of “estimates, bids, marketing, banking, finance, payroll, insurance, business development, and communications”. Of note, the fundamental differences in the nature of the work performed by each entity would make it impossible to operate as one entity. The most significant trade employed for International’s work is carpentry. Industrial is not concerned with carpenters because the structures are made not from wood or fiberglass, but from steel.

[93] There is not a compelling labour relations purpose to grant a common employer declaration. The Board should not impose a union on the employees absent a compelling reason. The purpose of making a declaration is to address an actual or potential erosion of existing bargaining rights. There has been no erosion of rights in this case. Both companies bid on their own work with absolutely no overlap. In fact, it is outside of their ability to bid on the other’s work.

[94] International was founded in 1958. In the approximately 60 years that followed, International continued to perform work within its specific field. It was certified in Saskatchewan in 1991. Industrial was created to fulfill a particular role in a specialized area. If it had been established for the purpose of avoiding collective bargaining obligations, this would not have taken almost 30 years. Industrial is a legitimate business venture.

Scope of Application and Orders:

[95] The last issue is the appropriateness of granting a common employer declaration pursuant to section 6-20 of the Act. By maintaining their argument with respect to section 6-20, the applicants seek to benefit from a maintenance (or general) certification based on the performance of construction industry work. This is inappropriate.

International:

Test for Common Employer Declaration:

[96] The evidence does not establish that there has been a need for millwrights since 2018 except for in one job located in Belle Plaine (which millwright was supplied by the union); likewise, the evidence does not establish that there has been a need for labourers since 2018. It is not possible to conclude that there was any work within those two trades in the last four years.

[97] In assessing whether the companies are engaged in associated or related businesses, undertakings, or activities, the Board should look for a connection between the work done by the employers. Although this factor is interrelated with common control or direction, the two factors outline two different prerequisites that must be met. If one of these prerequisites is not met, then the test for a declaration has not been satisfied. When two companies are engaged in different aspects of the construction industry of a different character and a different market, they are not related.

[98] In the case before the Board, the work performed by the two companies is not of the same character; their mode of obtaining business is different; the purposes of establishing the businesses were not the same; the corporate expertise in the two companies is different; there was no evidence that Industrial is financially dependent on International; the property and assets used are different; the key personnel used to perform the work are different; the trades are different; and the modes or means of providing services are different.

[99] The applicants are relying heavily on factors that relate to common control and direction. However, if a finding of common control and direction was enough to permit a common employer declaration then there would be no need to assess whether the companies are engaged in associated or related businesses.

[100] With respect to common control or direction, it is the activities, undertakings, or businesses that are the focus, as opposed to the entities. In other words, common control or direction must be found in relation to the activities, undertakings, or businesses. Common control or direction means that the non-certified employer does not have a substantial degree of autonomous control over the employees. It has to do with a lack of operational freedom.

[101] When considering whether there is common control or direction, the focus should be on the day-to-day activities of the employers and the “work-generating activities”. Even if the employers assist one another in relation to central services and labour relations, such

circumstances do not amount to common control or direction. Common control or direction does exist where such control or direction is found in relation to the worksite and the work being performed. The focus is the degree of operational independence.

[102] In the current case, there is common ownership but this is not important. There is no common management, especially in day-to-day operations and business generation. The only way in which the companies are interrelated is through administrative services. Any representations made to the public should be considered within the context of the purpose of a declaration pursuant to section 6-79, which is to protect bargaining rights. Understood within this context, the question is whether the ICT Group makes representations that it can provide the same product and service through both entities. The answer to that question is “no”. Lastly, the companies do not have centralized control of labour relations.

[103] The last question is whether there is a valid and sufficient labour relations purpose for a declaration. This Board has explained that the purpose of a declaration is to address an actual or imminent erosion of bargaining rights, as opposed to one that is speculative. The labour relations purpose must be not only valid but also sufficient. This means that the benefits must outweigh the mischief likely to be caused by issuing a declaration. The Board must be careful not to unilaterally impose collective bargaining upon a group of employees who may not wish to be represented by a union.

Applicable Statutory Provisions:

[104] The following statutory provisions are applicable:

> ***6-1****(1) In this Part:*
> *…*
> *(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.*
>
> ***6-20****(1) On the application of any union or employer affected, the board may, by order, declare more than one corporation, partnership, individual or association to be one employer for the purposes of this Part if, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by one person through the different corporations, partnerships, individuals or associations.*
>
> *(2) Subsection (1) applies only to corporations, partnerships, individuals or associations that have common control or direction on or after October 28, 1994.*
>
> ***6-65*** *In this Division:*

(a) ***"construction industry"****:*

> *(i) means the industry in which the activities of constructing, erecting, reconstructing, altering, remodelling, repairing, revamping, renovating, decorating or demolishing of any building, structure, road, sewer, water main, pipeline, tunnel, shaft, bridge, wharf, pier, canal, dam or any other work or any part of a work are undertaken; and*
>
> *(ii) includes all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection with a work mentioned in subclause (i), but does not include maintenance work;*

…

(f) ***"trade division"*** *means a trade division established by the minister in accordance with section 6-66;*

…
(h) ***"unionized employer"****, subject to section 6-69, means an employer:*

> *(i) 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 6-66; or*
>
> *(ii) who has recognized a union as the agent to engage in collective bargaining on behalf of unionized employees working in a trade for which a trade division has been established pursuant to section 6-66.*

6-79*(1) On the application of an employer or a union affected, the board may declare more than one corporation, partnership, individual or association to be one unionized employer for the purposes of this Part if, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through those corporations, partnerships, individuals or associations.*

(2) In exercising its authority pursuant to subsection (1), the board may recognize the practice of non-unionized employers performing work through unionized subsidiaries.

(3) The effect of a declaration pursuant to subsection (1) is that the corporations, partnerships, individuals and associations, on and after the date of the declaration:

> *(a) constitute a unionized employer in the appropriate trade division;*
>
> *(b) are bound by a designation of a representative employers' organization; and*
>
> *(c) are bound by the collective agreement in effect in the trade division.*

(4) The board may make an order granting any additional relief that it considers appropriate if:

> *(a) the board makes a declaration pursuant to subsection (1); and*
>
> *(b) in the opinion of the board, the associated or related businesses, undertakings or activities are carried on by or through more than one corporation, partnership, individual or association for the purpose of avoiding:*
>
> > *(i) the effect of a determination of a representative employers' organization with respect to a trade division; or*

> *(ii) a collective agreement that is in effect or that may come into effect between the representative employers' organization and a union.*
>
> *(5) For the purposes of subsection (4), the burden of proof that the associated or related businesses, undertakings or activities are carried on by or through more than one corporation, partnership, individual or association for a purpose other than a purpose set out in subclause (4)(b)(i) or (ii) is on the corporation, partnership, individual or association.*
>
> *(6) An order pursuant to subsection (4) may be made effective from a day that is not earlier than the date of the application to the board pursuant to subsection (1).*

Analysis and Decision:

Section 6-79 of the Act

[105] The applicants have applied for orders pursuant to both sections 6-20 and 6-79 of the Act. The Board will first consider whether it should make an order pursuant to section 6-79.

[106] The applicants bear the onus to prove that it is more likely than not that the respondents' businesses, undertakings or other activities are associated or related and are carried on under common control or direction by or through the corporations.

[107] The Board's analysis of whether the prerequisites have been met is highly fact dependent and contextual. In undertaking this analysis, the Board may, and will sometimes have to, consider circumstantial evidence and draw inferences from that evidence.[3]

[108] To be clear, the burden shifts to the respondents for the purpose of subsection 6-79(4). Subsection 6-79(4) allows the Board, if it grants a declaration pursuant to subsection (1), to make an order granting additional relief if it determines that the associated or related businesses are carried on through more than one entity for the purpose of avoiding: the effect of a determination of a representative employers' organization with respect to a trade division; or a collective agreement that is in effect or that may come into effect between the representative employers' organization and a union. The respondents bear the burden of proof to demonstrate that the related businesses are carried on as outlined for a purpose other than as set out in subclause (4)(b)(i) or (ii).

[109] The applicants have not requested additional relief pursuant to subsection 6-79(4).

[110] Pursuant to section 6-79, the Board may declare employers to be one unionized employer if the purpose or *effect* of a corporate organization or reorganization is to avoid collective

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[3] *International Brotherhood of Electrical Workers, Local 424 v Chemco Electrical Contractors Ltd*., 2019 CanLII 55689 (AB LRB) at para 41, citing *Ironworkers, Loc. 720 v Empire Iron Works Ltd. et al*., [1986] Alta LRBR 167.

bargaining obligations.[4] A common employer application is not equivalent to an unfair labour practice application.

[111] In *Re ATU, Local 588 and Regina (City) et al*., [1999] Sask LRBR 238, 1998 CarswellSask 928 [*Wayne Bus*], the Board discussed the purpose of section 37.3 of the since-repealed *Trade Union Act*:

> *[124] One of the primary purposes of common employer legislation is to prevent the erosion or undermining of existing bargaining rights, as may occur, for example, when work is diverted from a unionized employer to an associated non-union entity. Historically, the most common example of this erosion has been the creation by unionized contractors of non-unionized "spin-offs" in the construction industry. In Saskatchewan The Construction Industry Labour Relations Act, 1992, c. C-29.11, contains specific provisions applicable to the construction industry; s. 37.3 of the Act applies to all other sectors.*

[112] The foregoing passage was cited with approval by the Board in *Stuart Olson*.[5] The applicants argue that the present case is consistent with the circumstances in which the Board would find it appropriate to make a common employer declaration.

[113] In *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union v Comfort Cabs Ltd*, 2015 CanLII 19986 (SK LRB) [*Comfort Cabs*], at paragraph 61, this Board considered the common employer case law, both within and outside of the construction industry, and identified four prerequisites for a common employer declaration.

[114] With some adjustments, these four prerequisites have been applied in recent construction industry cases brought pursuant to section 6-79 of the Act, such as *Book Insulations* and *Stuart Olson.* As in those decisions, it is necessary to review subsection 6-79(1) to ensure that the legal test is precisely framed:

> ***6-79****(1) On the application of an employer or a union affected, the board may declare more than one corporation, partnership, individual or association to be one unionized employer for the purposes of this Part if, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through those corporations, partnerships, individuals or associations.*
> …

[115] According to the language of subsection 6-79(1), the Board may make a declaration if:

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[4] *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v North American Construction Group*, 2013 CanLII 60719 (SK LRB) [*North American*], at para 60.
[5] *Stuart Olson,* at para 78.

1) There is more than one corporation, partnership, individual or association and at least one of those entities is a unionized employer;

2) The businesses, undertakings or other activities of the entities are associated or related;

3) The associated or related businesses, undertakings or other activities are carried on under common control or direction by or through the corporations, partnerships, individuals or associations.

[116] It is helpful to note that aspects of the language used in *Comfort Cabs* are derived from clause 18(1)(b) of *The Construction Industry Labour Relations Act, 1992,* SS 1992, c C-29.11 [*CILRA*]. This is made clear by the Board's reference to *United Brotherhood of Carpenters and Joiners of America, Local 1985 v Graham Construction and Engineering Ltd., et. al*., [1998] Sask LRBR 719[6] [*Graham Construction*] and upon review of the reasons in *Graham Construction*.

[117] When *Graham Construction* was decided, Clause 18(1)(b) of the *CILRA, 1992* permitted the Board to make a declaration if "a corporation, partnership, individual or association is sufficiently related to a unionized employer that, in the opinion of the board, they should be treated as one and the same." The current legislation does not include a similar provision. Nor does it contain a similar "sufficiently related" test. Moreover, it is the businesses, undertakings or other activities that are to be associated or related, pursuant to section 6-79.

[118] Therefore, the language that was used in *Comfort Cabs* should be adjusted to ensure consistency with the language of the provision, as outlined herein.

[119] The fourth prerequisite, not yet discussed, asks whether a valid and sufficient labour relations purpose will be served by a common employer declaration. In *Wayne Bus*, the Board explained what is involved in deciding the fourth prerequisite:[7]

> *However, once these requirements have been fulfilled the Board must determine whether to exercise its discretion to treat entities as one employer for purposes of the Act. This discretion will be exercised where there is a valid and sufficient labour relations value, interest or goal contemplated by the Act that will be served by making a single employer declaration. Absent such a purpose, the discretion to make the declaration will not be exercised.*

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[6] *Comfort Cabs,* at para 61.
[7] *Wayne Bus*, at para 149.

[120] It is well established that the common employer provisions are powerful remedial tools to allow the Board to pierce the corporate veil to prevent the erosion of bargaining rights. In *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v North American Construction Gro*up, 2013 CanLII 60719 (SK LRB) [*North American*], the Board considered a common employer application brought pursuant to section 18 of the *CILRA, 1992* (as since amended). The Board explained the purpose of the provision:

> *[60] In response to the complex and often murky realities of corporate organization, most Canadian jurisdiction have enacted legislation that authorizes labour boards to pierce the corporate veil and find that two (2) or more related businesses ought to be treated as one (1) common employer for the purposes of labour relations. Saskatchewan has such a provision for the construction industry in s. 18 of The Construction Industry Labour Relations Act, 1992. Many corporations operate in an associated or related fashion and these corporations may be operated under common direction and control for a variety of legitimate business reasons. However, if the purpose or effect of a corporate organization or reorganization is to avoid collective bargaining obligations (for example, by permitting the transfer of work that would normally be completed by a unionized company to a non-union […] related company operated under common direction and control – a practice commonly known as "double breasting"), then this Board has authority pursuant to s. 18 to pierce the corporate veil, so to speak, and declare both employers to be one (1) for the purposes of collective bargaining. The [effect] of a common employer designation is to cause the employees of both the union and non-union employers to fall within the scope of a trade union's bargaining unit. Obviously, it is a powerful tool granted by the legislature for the purpose of achieving a particular remedial effect. Its focus is to preserve as opposed to create bargaining rights.*

[121] The Board also explained the relevance and importance of considering whether there is a valid labour relations purpose:

> *[62] In considering a common employer application, it is very important to be mindful that a finding that two (2) or more employers are related and operating under common direction and control, is not determinative of the issue. Even if we are satisfied that the subject companies are related and operating under common direction and control, the question still remains as to whether or not that board should exercise its discretion to make a common employer declaration. Such declarations are not automatic. Rather, they are only granted if there is a valid labour relations reason for doing so and that the benefit of making such a designation outweighs the mischief it is likely to cause.*

[122] The Board has held that the primary reasons for granting a common employer declaration are to prevent an erosion of established bargaining rights, for example, by the redirection of work by a unionized employer to another enterprise; to remove obstacles to viable structures for collective bargaining, for example, the inclusion of the employees of two entities in a single unit; and to ensure that the union is able to deal directly with the entity that possesses real economic control: *Wayne Bus*, at paragraphs 126, 127.

[123] The purpose of a declaration is to address an actual or potential erosion of bargaining rights, as opposed to a speculative one.[8] Although the word "potential" is arguably more commonly used in the case law, some Saskatchewan and other cases have also used the language "imminent".[9]

[124] With these principles in mind, the Board will now turn to considering the evidence to determine whether the prerequisites have been met.

Prerequisite No. 1: The application involves more than one corporation, partnership, individual or association and at least one of those entities is a unionized employer.

[125] There is no question whether this prerequisite is satisfied. It is.

Prerequisite No. 2: The businesses, undertakings or other activities of the entities are associated or related.

[126] In arguing that this prerequisite is met, the applicants rely, firstly, on the corporate structure of the two respondents and, secondly, on the role of International in the formation of Industrial.

[127] The applicants rely on the following excerpt from *Book Insulations* to argue that the corporate structure is relevant:

> *[57] The second requirement is that the businesses, undertakings or other activities be associated or related. The businesses in question are those that are operated by Hallbook and Book. Both companies primarily serve contractors by performing insulation work, in both the industrial and commercial areas. They both perform work or have performed work in Saskatchewan. As is discussed more in the next section, the corporate structure discloses common and interconnected directors and shareholders. The entities are not organized out of a common interest or for a common purpose, and so are not "associated", but in a commercial sense, the businesses are related.*

[128] In coming to this conclusion, the Board in *Book Insulations* considered the purpose of the provision:

> *[48] The Respondents argue that the Board's analytical focus must be on the activities, as opposed to the structure, of the entities. In considering this argument, the Board has again been guided by the modern rule of statutory interpretation. Section 6-79 allows the Board to make a declaration if it finds that associated or related businesses, undertakings or other activities are carried on under common control or direction. The distinction between the categories of "corporation, partnership, individual or association" and "businesses, undertakings or other activities", combined with the phrase "carried on" suggests that the provision is more concerned with the active businesses, undertakings or other activities of*

[8] *International Brotherhood of Electrical Workers, Local 529 v Merick Contractors Inc*, 2015 CanLII 19981 (SK LRB), at para 127; *United Food and Commercial Workers Union, Local No. 832 v Sun GRO Horticulture Canada Ltd*, 2013 CanLII 93937 (MB LB).
[9] *Comfort Cabs*, at para 64.

> *the organization or individual, than with the structure of the organization itself. But that certainly does not mean that the Board should ignore evidence of organizational structure altogether.*
>
> *[49] An objective of the provision is to prevent the avoidance or anticipated erosion of bargaining rights through the transfer of work. The Act is benefit conferring legislation, providing through subsection 6-4(2), that "[n]o employee shall unreasonably be denied membership in a union". The Board observes that, in some cases, the corporate organization is indicative of an avoidance or an anticipated erosion of bargaining rights through the transfer of work. Therefore, in scrutinizing the business, the Board should look to the whole of the circumstances, including the structure and corporate organization of the entities in question. Generally, the focus should be on the day-to-day management of the business, but depending on the circumstances, the corporate organization may be more or less significant in deciding whether to make the declaration requested.*

[129] The applicants rely on *Gage Aluminum* to argue that the use of a company's resources to finance another entity is relevant to assessing relatedness. In making this argument, the applicants cite paragraph 102 of the decision, which outlines the factors that support the Ontario Board's finding of common control or direction. The Board's findings in support of the "associated or related" prerequisite are found at paragraph 101:

> *101. Earth Architectural Panels was incorporated in April 2016. Arcanex was incorporated in June 2017. EAP's business was panel design, fabrication and installation. Mr. Pasiecznik's involvement in Arcanex gave the newer company the ability to also do glass work. Nonetheless, it continued to do panel work, and its work remained within the construction industry category "building envelope construction". The Board notes that jobs that were originally undertaken by EAP were either completed by Arcanex or subsequently identified as Arcanex jobs. Accordingly, the Board has no difficulty finding that EAP and Arcanex carried on associated or related activities or businesses.*

[130] In contrast, both Industrial and International argue that the type of work being performed by each entity is fundamentally different from the other and therefore the businesses, undertakings or other activities are not associated or related. In support of this argument, Industrial relies on *International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 764 v Deer Lake Rebar Inc*., 2005 NLLRB 8 (CanLII) [*Deer Lake*] and on the Alberta Board's reasoning in *A.U.P.E. v Carewest*, 2004 CarswellAlta 1064 [Alta LRB] [*Carewest*].

[131] In *Deer Lake*, the Newfoundland Board considered and applied the direction given by the Ontario Board in *Brant Erecting & Hoisting*, [1980] OLRBR 945, as follows:

> *"...Businesses or Activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of the related principals..."*

[132] In *Carewest*, the Alberta Board confirmed the specific factors that it considers to assess a connection between the work of the relevant entities:

> *14 When determining whether entities carry on associated or related activities, the Board considers many factors while looking for a connection between the entities. The Board reaffirmed this test in TransAlta Employees' Assn. v. TransAlta Utilities Corp., [2001] Alta. L.R.B.R. 267 (Alta. L.R.B.) at paragraph 56 where the Board cited I.B.E.W., Local 424 v. Centennial Electric (1983) Ltd., [1994] Alta. L.R.B.R. 154 (Alta. L.R.B.):*
>
> > *When determining if there are associated or related activities, the Board looks for a connection between the work done by the respondents. It considers such factors as type of product, target market, mode of obtaining new business, purpose of establishing the business, type of work, corporate expertise, financial ability and capacity, capital assets, personnel team, and labour force. See: [IBEW Local 424 v. Empire Iron Works Ltd., [1986] Alta. L.R.B.R. 167; O.E.'s 955 v. Kiewit & Sons Co. Ltd., [1987] Alta. L.R.B.R. 79]. The major factor is the extent to which the two entities engage in the same work or enterprise.*

[133] In *Carewest*, the union had asked the Alberta Board to reconsider all of the bargaining certificates between it and Carewest, a wholly owned subsidiary corporation of the Calgary Heath Region, to reflect the Calgary Health Region as the employer. The Board found that, although both employers operated in the health care field, the Calgary Health Region was focused on the delivery of acute care and community care services while Carewest was involved in the provision of continuing care. Ultimately, it was determined that the entities were "not engaged in the same work or enterprise"[10] and therefore were not engaged in associated or related activities.

[134] In coming to this conclusion, the Board observed that the provision of long term or continuing care "has long been recognized within the health care sector as a separate sub-sector of the health care field".[11] Given the unique circumstances of the health care sector in Alberta, the Board had developed a policy with respect to standard health care bargaining units.[12] There were six different recognized "sectors" in the health care industry, one of which was continuing care.[13] The Board recommended an amendment to its policy to adopt four standard bargaining units, each of which approached the issue of appropriate bargaining units differently, but to allow for the possibility of an all-employee unit in a small private employer operating a single facility.[14]

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[10] *Carewest*, at para 17.
[11] *Ibid.*
[12] *Ibid.*
[13] Alberta Labour Relations Board, *Discussion Paper – Standard Health Care Bargaining Units*, January 24, 2002, Alta LRBR DP-005 at 33.
[14] *Discussion Paper* at 34.

[135] In *Carewest*, the Board confirmed that the continuing care employer (Carewest) did not fall into the category of private employer.[15] Therefore, the employees employed by Carewest came within one of the four standard health care bargaining units.

[136] International relies on many of the same factors as cited in the foregoing cases, and also refers to a list of considerations cited by the Canadian Industrial Relations Board in *T.W.U. v TELUS Corp*., 2004 CIRB 278, 2004 CCRI 278, 2004 CarswellNat 3315 [*Telus*]:

> *255 Factors looked at to determine the associated and related business and the common control and direction criteria often overlap. They include such factors as: the degree of interrelationship of the operations of the various enterprises; whether they provide similar services and products; whether they are part of a vertically integrated process whereby one part of the business carries out one function and another part of the business carries out another; and the extent of common ownership and management ...*
>
> *[citations omitted]*

[137] International also relies on the findings of the Ontario Board in *United Brotherhood of Carpenters and Joiners of America, Local 494 v Arbis Construction Ltd*., 1983 CanLII 777 (ON LRB) [*Arbis*] and *United Brotherhood of Carpenters and Joiners of America, Local 27 v Century Store Fixtures Ltd*., 1990 CanLII 5746 (ON LRB) [*Century Store*].

[138] In *Arbis*, the Ontario Board found that the entities were not associated or related. There, one of the two principals were in common. The first company had been engaged in "the development of properties and in the construction and remodelling of commercial and residential properties". The second company was engaged in masonry work, which was an area in which the first company had not been involved. The Board found that the two companies were "neither of the same character nor serve the same general market".[16] While the Board's analysis of the relatedness factor was limited, it is worth noting that the second business was created after financial difficulties caused the collapse of the first business and, then, as a result of the employment and business opportunities presented by two different companies altogether.

[139] Next, International highlights the following passage from *Century Store*:

> *28. The fact that carpenters employed by Century (as the Board had found in the certifica-tion application) did "general" carpentry work does not make Century a general contractor. The market for the manufacture and installation of store fixtures is not the same market as that of a general contractor. These businesses operate in different aspects of the construction industry. This section 1(4) application would extend bargaining rights*

[15] *Carewest*, at para 18.
[16] *Arbis*, at para 15.

> *rather than protect the existing bargaining rights held by the applicant with respect to Century. There is no evidence that Jasper is going into the business of manufacturing and installing store fixtures. However, even if Century were to act as a general contractor, Century is bound to the Carpenters' provincial agreement and the applicant holds bargaining rights for Century regardless of the type of carpentry work performed by Cen-tury.*

[140] The foregoing comments should be understood within the broader and unusual context of the *Century Store* case. There, the employees of the certified entity had been loaned out to the non-certified entity but paid by the certified entity under the provincial agreement. In these circumstances, the union asked the Board to exercise its discretion to make a declaration; the Board, reasonably, found there was no real or potential erosion of bargaining rights. It also observed that the businesses were separate entities that had developed separately despite the existence of close personal relationships.

[141] Relevant Saskatchewan case law has considered the following in determining whether the businesses, undertakings, or other activities are associated or related:

a. Functional integration (*Wayne Bus*, at paragraph 152; *North American* at paragraph 66, ftnt 3);
b. Commercial connection, including evidence of a significant degree of interdependence in the carrying on of an enterprise in which the parties to the relationship have a mutual or reciprocal interest. This could include common directors, officers or shareholders (structural) but does not need to (*Wayne Bus*, at paragraph 153);
c. Common interest or common purpose (*Wayne Bus*, at paragraph 152).

[142] All three of these elements are described in the following excerpt from *Wayne Bus*:[17]

> *The concept of "association" is predicated upon the organization or alliance of two or more individuals or entities out of a common interest or for a common purpose; their respective activities may be combined in a manner that results in an organization that is functionally independent of either 'associate' alone.*
>
> *The concept of "relation" connotes connection in a commercial sense. The connection need not be structural, as in the case of companies that have common directors, officers or shareholders, but may arise because of a significant degree of interdependence in the carrying on of an enterprise in which the parties to the relationship have a mutual or reciprocal interest.*

[17] *Wayne Bus*, at paras 152 & 153.

[143] Other Boards, such as Alberta, Newfoundland, and Ontario, have considered whether the activities, businesses, or undertakings:[18]

a. Are of the same or similar character;
b. Involve the same type of product;
c. Serve the same general market;
d. Employ the same mode of obtaining new business, mode and means of production, or utilize similar employee skills;
e. Are carried on for the benefit of related principals (commercial connection);
f. Are connected through the corporate expertise, financial ability and capacity, capital assets, personnel team, and labour force of the respective entities;
g. Are connected by similar purposes for the establishment of establishing the respective businesses.

[144] The last three factors include consideration of functional integration, commercial connection, and common purpose, as in Saskatchewan.

[145] A question arises, however, as to the applicability of the first four factors (same or similar character; same type of product; same market; same mode, means, skills). The Alberta Board has said that "[t]he major factor is the extent to which the two entities engage in the same work or enterprise".[19] The Board in *Wayne Bus*, by contrast, states that "[i]t is not necessary that the entities are engaged in the same or similar businesses or activities to make a finding that they are associated or related."[20] In coming to this conclusion, the Board in *Wayne Bus* cites another case from the Alberta Board, *HCEUA and Danfield Security Services Ltd., Re*, 1996 CarswellAlta 1733 [*Danfield*], which involved "contracting-in". There, the Board acknowledged that the entities were not engaged in "identical" businesses but found that the activities of a security contractor and a hospital were associated or related because they were "jointly engaged in providing the overall services of the Hospital".[21]

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[18] See*, Brant Erecting & Hoisting,* [1980] OLRBR 945, 1980 CarswellOnt 1000; *IABSOI, Local 764 v Deer Lake Rebar Inc*.,[2005] NLLRBD No 8, 2005 CarswellNfld 268; *I.B.E.W., Local 424 v Centennial Electric (1983) Ltd*., [1994] Alta LRBR 154, 1994 CarswellAlta 1258 (Alta LRB).
[19] *I.B.E.W., Local 424 v Centennial Electric (1983) Ltd*., [1994] Alta LRBR 154, 1994 CarswellAlta 1258 (Alta LRB) at para 10.
[20] *Wayne Bus*, at para 154.
[21] *HCEUA and Danfield Security Services Ltd., Re*, 1996 CarswellAlta 1733, at paras 62, 63.

[146] For the present purposes, the statutory provisions considered in the Alberta, Newfoundland, and Ontario cases are substantially similar to subsection 6-79(1) of the Act.[22] Alberta and Ontario, in particular, have a robust body of case law in the area of common employer applications. In the Board's view, the first four factors are relevant, even if not necessarily determinative, of whether the businesses, undertakings or other activities are associated or related. The weight of any factor will depend on the circumstances and should be animated by the underlying purpose of the provision.

[147] Furthermore, there is a degree of overlap between the associated or related prerequisite and the control or direction prerequisite.[23] With that overlap comes the potential for applying the same set of facts to satisfy the two prerequisites. However, each prerequisite must be satisfied for a declaration to be granted. Therefore, it is important for the Board to be alert to the objective of the respective prerequisite (that is, to determine relatedness versus control) and to consider the facts with that objective in mind.

[148] As well, it is necessary to assess the labour relations purpose to ensure that any declaration is based not only on the fulfillment of the first three prerequisites but also in the presence of a valid and sufficient labour relations purpose.

[149] For the following reasons, we have concluded that the business, undertakings or other activities of the two entities are associated and related. In coming to this determination, we have found sufficient evidence of functional integration, commercial connection (including benefit flowing to related principals), and common purpose, as well as overlap in the character of the activities, the product, the general market within the construction industry, and, to some extent, employee skills.

[150] It is well established that the activities of the two entities relate, in considerable measure, to different aspects of the cooling industry, that is, to the towers or systems that provide cooling functions to operating plants. To be sure, International is a well-established company in a specialization that it continues to pursue. But clearly, International had an interest in the type of work performed by Industrial. Had it been otherwise Industrial would not exist. The reason for the interest is obvious. In the last five to ten years new construction of wet cooling towers has declined. International, through the development of a new specialization, is able to tap into a

[22] Or, to be clear, "were" at the time of those decisions.
[23] See, for example, *T.W.U. v TELUS Corp*., 2004 CIRB 278, 2004 CCRI 278, 2004 CarswellNat 3315, at para 255.

potentially lucrative emerging market. The work of each entity is being performed for the benefit of one principal, the 100% owner of ICT Group.

[151] There is a specific rationale for choosing one cooling system over another, and therefore, some market differentiation within the cooling industry. However, customer differentiation is connected to this rationale. The demand for the construction of wet cooling towers has declined. The Board also notes the following statement in the manual, which communicates a sentiment that the entities share a common "client base":

> *With the formation of ICT INDUSTRIAL in 2017, our focus has expanded to include complex multi-disciplinary scopes of work that allow us to better serve the turnkey needs of our client base.*

[152] Prior to the hearing, the applicants asked International to produce documents setting out the purpose of Industrial's establishment. At the hearing, Vickers was asked what efforts he had made to find such documents. He testified that he did not know why such documents would exist. He then said that he had not been involved in the decision to create Industrial. Despite his lack of involvement, he did not ask anyone with the relevant knowledge to search for any documents so that he could appropriately respond to the product request.

[153] While not necessary to support the Board's conclusions, Vickers' testimony certainly did nothing to undermine them.

[154] To be fair, Industrial also seeks to perform construction work in the industrial construction sector not exclusive to cooling. Various references in Industrial's manual suggest that this is the aspiration. However, there was an overall lack of clarity as to the extent of non-cooling work actually performed by Industrial. The manual, revised April 10, 2018, describes Industrial's work: "ICT Industrial is engaged in the design, supply, and installation of cooling technologies for commercial and industrial clients across North America." If the manual was accurate at the time it was implemented, Industrial is or was involved in "cooling technologies". Consistent with this, Industrial has relied on its association with International to obtain work and to establish itself within the emerging market. It is likely that its other work has been slower to develop.

[155] On the other hand, International does not have the capacity to bid on or perform the primary work that is performed by Industrial, either technically or legally. The respective sub-specialties relate to specific types of cooling towers, which are made of different materials, are constructed by a different crew composition, contain different technology, and require different qualifications and licenses. There is no evidence that International has ever attempted to obtain

the certifications necessary to do the work performed by Industrial. International's Vice-President, Engineering lacks knowledge about the specifics of the work performed by Industrial.

[156] That said, neither the CEO nor the CFO of International, both of whom are common to the entities, testified at the hearing. Ultimately, it was International's decision to develop a new entity for the purpose of expanding its business in the face of a declining construction market.

[157] International argues that the applicants rely almost exclusively on "control or direction factors" to support their argument for relatedness. This argument stems from International's view of the appropriate focus in a relatedness assessment (which it says is aligned with that of the Alberta Board). However, the "carrying on of activities for the benefit of related principals" is squarely within the factors considered by the Alberta Board. It is also directly tied to the notion of commercial connection, as described in *Wayne Bus*. Commercial connection may be particularly significant where an entity has expanded its business independent of whether the entities are engaged in the same businesses or activities. Counsel for the applicants alluded to this overlap when describing the reasoning (albeit incorrectly) in *Gage Aluminum*.[24] Depending on the facts, the expansion of a business may disclose a mutual or reciprocal interest or common benefit and therefore relatedness; it may, additionally or alternatively, disclose control.

[158] Moreover, the respondents' attempts to differentiate the activities of two entities that already operate in a specialized sector of the construction industry were, at times, overwrought. No doubt, a high-pressure piping system job demands a different crew composition than a conventional cooling tower job and is subject to different and more extensive regulatory requirements and licenses. The Board certainly does not discount the significant work done to obtain the necessary certifications to perform the work undertaken by Industrial.

[159] However, Patten suggested that Industrial's goal is to work on projects that require the use of the compulsory trades. Yet, none of the trades listed in the peak labour requirements come within the compulsory trades set out at Table 4 of *The Apprenticeship and Trade Certification Regulations, 2020*, RRS c A-22.3 Reg 2. To be fair to Patten, the determination of compulsory apprenticeship trades is within the jurisdiction of the provinces. The trades that he describes as compulsory are the ironworkers, pipefitters, boilermakers, and welders, and these trades are working on the Project. However, there are also millwrights and labourers listed in the peak labour

[24] To be sure, counsel's reference to the Board's factual findings and conclusions with respect to the relevant factors in *Gage Aluminum* was incorrect.

requirements. The essence of the evidence given by the millwrights was that the millwright work is the same or similar without regard to the type of cooling tower involved.

[160] In his examination in chief, Patten stated that Industrial has no interest in bidding on "the kind of work that [International] is doing". However, cooling tower work is included in the quality management section of Industrial's manual. When asked about this in cross, Patten said it was included "in case it became a possibility in the future although it hasn't been something that we bid on". He pointed out that this reference was included only in volume 2 of the manual, which volume was relevant to "other" industry standards depending on the scope of work (not controlled by the regulatory authority).

[161] Patten also suggested that Industrial created the manual to cover "every possible thing that could be done" and that Industrial was not conceptualized as "taking away work from International". However, the manual's revision history includes Patten's approval of cooling tower forms in August 2020. The date of this revision is inconsistent with the suggestion that the manual was initially created to cover "every possible thing". The addition of cooling tower forms is the only revision listed since the manual was issued for implementation in October 2018. Industrial relied on International in preparing the manual forms related to wet cooling towers. The documentation related to cooling towers in the respective manuals is the "same content".

[162] In re-direct, Patten suggested that the revision was made because of a "possible" project that did not come to fruition, which was based in Texas and involved work on a direct air capture system. According to Patten, the project would have involved structural work that was "functionally similar" to the structural element of a cooling tower. He stated that the documentation covering cooling towers was included on the "off chance that we were invited to participate in that activity". However, there has been no removal of the cooling towers documentation from the manual and so it remains.

[163] As with all the evidence, the Board has reviewed this testimony carefully. In the Board's view, Patten's testimony in re-direct was a strained attempt to downplay the significance of Industrial's intention to do work "if invited" that required the existence of cooling tower procedures, and, along with the inconsistencies in his testimony, undermined his credibility.

[164] Although not necessary for the Board's conclusion on relatedness, we also observe that most if not all of the activities described on the "full-service contractor" page of the manual could be involved in the cooling-related work of the construction industry.

[165] Finally, Industrial's dependence on International for payroll or accounting as well as the existence of the same registered mailing address and power of attorney are minimally indicative of functional integration.

[166] Additional factors militate against functional integration, but are not outweighed by the evidence of functional integration:

a. All of the equipment leased or owned by Industrial is solely leased or owned.
b. The entities have their own bank accounts and separate financial statements are produced.
c. There is no evidence of interchange or sharing of tradespeople.

Prerequisite No. 3: The associated or related businesses, undertaking or other activities are carried on under common control or direction by or through the corporations, partnerships, individuals or associations.

[167] All of the parties submit that, in determining whether the third prerequisite has been satisfied, the factors outlined in *Walters Lithographic* are relevant. These are:

a. Common ownership or financial control;
b. Common management;
c. Interrelationship of operations;
d. Representation to the public as a single integrated enterprise;
e. Centralized control of labour relations.

[168] These factors do not represent a checklist; nor is a single criterion necessarily determinative. It is not necessary to demonstrate the existence of all of these factors. It is the totality of circumstances that should be assessed in a given case. The weight of each factor will vary depending on the facts and the purpose of the assessment. No single factor will necessarily translate into fundamental control.[25]

[169] "Control" focuses on matters of the general orientation of the entity; "direction" focuses on the day-to-day management.

[25] *Book Insulations*, at para 47.

[170] As noted in *Wayne Bus*, it is "the activities, undertakings or businesses, not the entities themselves, over which the exercise of common control or direction must be found to exist".[26] This direction is consistent with the language contained in subsection 6-79(1).

[171] In arguing that the third prerequisite has been met, the applicants rely on *Cornerstone* and *International Brotherhood of Electrical Workers, Local 424 v Chemco Electrical Contractors Ltd*., 2019 CanLII 55689 (AB LRB) [*Chemco*].

[172] According to the applicants, the Board in *Cornerstone* found that common control or direction existed "based on common high level strategic control of the respondent employers". To be clear, the Board's precise language in *Cornerstone* was as follows:[27]

> *We also agree, however, that the element of high level strategic control can, in appropriate factual situations, such as is the case here, be a factor in the determination of whether entities operate under common control or direction.*

[173] Thus, high level strategic control may be a factor in determining whether the businesses, undertakings or other activities are carried on under common control or direction. It is necessary for the Board to consider all of the facts.

[174] In *Chemco*, the Alberta Board found that a new entity operated "more like a department within the larger Chemco group than a separate legal entity".[28] The applicants argue that the relevant factors as found in *Chemco* are similar to those that are present in the present case. In *Chemco*, the holding company owned both entities, one of which had been in business for many years. The CEO of the older entity was instrumental in the creation of the new entity and was its sole owner. The COO of the older entity recruited the director for the new entity.

[175] In *Chemco*, the only work performed by the new entity was given to it by a company that was owned by the holding company for both entities. There was no competitive bid process. The entity was not "given [to the director] to operate as he pleased".[29] The Board even noted that the director demonstrated a surprising lack knowledge about aspects of the entity's business.[30]

[176] In this case, weighing in favor of common control or direction is the existence of a single owner, three common directors, and a common CEO and CFO. Patten was hired and paid by

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[26] *Wayne Bus*, at para 224.
[27] *Cornerstone,* at para 61.
[28] *Chemco*, at para 14.
[29] *Chemco,* at para 57.
[30] *Ibid,* at para 60.

International to create the new company. In this way, it can be inferred that the finances from International were used to fund the creation of the new entity. Industrial was a subsidiary of International until recently. Now both entities are held by the same company, ICT Group.

[177] Furthermore, executive leaders, including Patten, are described on the website as being members of an executive team. When asked whether this was inaccurate, Patten did not answer the question that was asked. Instead, he offered other information. First, he suggested that he "was not the person who created this website". He provided that he had developed Industrial's own website. When asked a second time, he indicated that he is responsible only for Industrial and does not "participate in any decision-making as it relates to any other operating entity of the ICT group". He was then asked whether he participates in meetings with the executive team that involve discussions short of decision-making. He responded that he reports to the CEO about bids, profits, loss, and "things of that nature". In short, Patten's answers were evasive and undermined his credibility.

[178] In any event, Patten reports directly to the CEO of both entities, meaning that the CEO makes the decisions about his performance, retention, and termination.

[179] In this case, the corporate structure is indicative of vertical integration and influence over management.

[180] It should also be mentioned that McDougall previously worked for International on a cooling towers project. Although Saskatchewan is a relatively small jurisdiction, it is unlikely that the hiring of McDougall (who worked on the only past project in Saskatchewan that is included on the list of "substantially similar work" in the Project proposal) is a mere coincidence and that, in hiring McDougall, Patten did not have some knowledge of his performance on the past project.

[181] On the other hand, Patten hired the key personnel who are in charge of the estimating, business development and project management. Those personnel work only for Industrial. Patten makes the decisions as to which customers to target for project proposals (although the manual refers to "our clients" and "our client base"). McDougall hires tradespeople on a project management level. Discipline and termination of tradespeople take place at the site level.

[182] As for the interrelationship of operations, Industrial relies on support from International in the areas of payroll, accounting and human resources. At the human resources level, the assistance from International consists of placing job ads and processing documents for payroll.

[183] There is also evidence that Industrial has relied on International to obtain wage rate information indirectly through a building trade union. Both Industrial and International attempted to distance themselves from the implications of this practice, suggesting that the information was publicly available. However, if International or Industrial were satisfied with whatever information was available publicly or with the process for obtaining such publicly available information, then it stands to reason that they would not have gone to the effort of obtaining the information through the building trades union. If asked directly, the Millwrights would not have provided the wage rate information to Industrial.

[184] The only reason that this information was sought, and the only reason that the details of the request came to the Millwrights' attention, is that the information maintained by International was not current around the time that Industrial was preparing the bid package. Therefore, it is likely that Industrial also relied on any current wage rate information maintained by International for the other trades in preparing its proposal for the Project.

[185] Furthermore, Industrial was initially intending to use CLAC-supplied labour to perform the work. Patten testified that the initial proposal was based on rates from CLAC. He also suggested that there were requests made for current CLAC rates. But if CLAC had provided fixed rates for use in the bid package then there would have been no reason to request the Millwrights' rates. It is obvious that the rates obtained through the building trades union would have assisted Industrial in bidding on the job, contemplating the use of CLAC labour, in competition with any unionized employer. The applicants argue that they should not have to proactively determine whether the rates are being requested by either the certified or non-certified entity. The Board agrees.

[186] It is also noted that the same insurance policies apply to the activities performed by each entity. This commonality suggests shared liability and, to some extent, shared interest in potential losses. In contrast, Patten testified that he is responsible for the profits and loss of the entity. Consistent with this, he testified that Industrial had its own insurance. He went into some detail describing insurance riders that he believed were specific to Industrial. When it was put to him that the insurance policies covering the two entities were the same, he indicated that he hadn't been entirely sure when he had given his previous answer and, upon reviewing the details, acknowledged that they were. To be fair, it appears that a crane company was, in fact, added as an additional insured on the commercial general liability and contractors equipment policies, both of which are in common with International. The additional riders are listed on the certificate of insurance held by the crane company.

[187] Next, there is evidence that Industrial relies on International's history and experience in its bid proposals. In its proposal for the Project, Industrial referred to its "extensive experience in the erection of…conventional cooling towers". The proposal also included specific information about a project performed by International. The project was included to demonstrate that Industrial had familiarity with working in Saskatchewan. In his testimony, Patten claimed that Industrial was not awarded the work because of its relationship with International. Whether or not the work was awarded because of the relationship (or the specific experience in Saskatchewan), Industrial sought to rely on that experience in obtaining the work.

[188] Although there is no direct evidence of centralized control of labour relations, there is evidence of a shared repository of wage rate information inclusive of information that is provided by the building trade unions and that is used by Industrial. This suggests a level of dependence by Industrial on the information that is acquired by International through its relationship with a union, as a unionized employer. Whether the work was awarded to Industrial due to competitive pricing is beside the point. We also note that the Project Manager who is charged with the task of hiring the tradespeople for the Project is the same person who worked for International on its wet cooling tower project in Saskatchewan.

[189] Finally, International asks the Board to treat the relationship between International and Industrial as similar to that of a contractor/sub-contractor relationship. The Alberta Board in *Danfield* stated that, despite the labour force restrictions that contractors impose on sub-contractors, labour boards do not have a tendency to "construe these kinds of contractual limitations as giving rise to 'common control or direction' as that term is used in common employer provisions".[31] Although the union movement has sought recognition of bargaining rights in contracting-out and contracting-in scenarios through successorship and common employer applications, these efforts have had limited success, especially in the successorship applications. In the common employer applications, labour boards recognize that the contractor and sub-contractor have different legal control, and as such, restrict their consideration to facts showing day-to-day operational control.[32] Consistent with this, the Alberta Board in *Danfield* described its "threshold" for contracting-in scenarios as "difficult",[33] the most difficult hurdle being the issue of common control or direction.

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[31] *Danfield*, at para 72.
[32] *Ibid*, at para 24.
[33] *Ibid*, at para 30.

[190] The Alberta Board also observed that arbitrators recognize that it is possible to bargain for specific protection against contracting-out and have declined to find that contracting-out, absent such a provision, violates implied restrictions.[34] The approach to such scenarios is influenced by this arbitral history:

> *It will be evident that we have settled on a difficult threshold in respect of common employer declarations in contracting-in situations. We think that this approach is mandated by the history of the contracting out issue generally, and the manner in which this and other boards have approached their common employer powers. We cannot but think that our current legislation was enacted against the backdrop of that very history. That conclusion warrants, in our view, an interpretation of section 45 that might seem unduly restrictive if the issue were being considered in the absence of such a history.*[35]

[191] In our view, depending on the circumstances, the corporate organization may be more or less significant in deciding whether to make the declaration requested. In principle, the Board is careful not to allow a corporation to hide behind its corporate structure to avoid its collective bargaining obligations. The existence of factors such as legal control, corporate structure, corporate history, executive management, transfer of assets, knowledge, and reputation, among others, may all play a more significant role in assessing the circumstances involving spin-off companies as compared to contracting-out or contracting-in scenarios.

[192] In conclusion, based on the foregoing evidence, the Board finds that the associated or related businesses, undertakings or other activities are carried on under common control or direction by or through the corporations.

Prerequisite No. 4: A valid and sufficient labour relations purpose will be served by a common employer declaration.

[193] Having found that the first three prerequisites are satisfied, the question remains as to whether the Board should exercise its discretion to make the common employer declarations. Such declarations are not automatic. There must be a valid and sufficient labour relations purpose for issuing a common employer declaration. Valid reasons include the prevention of an erosion of established bargaining rights through the redirection of work by a unionized employer to another enterprise and the preservation of the union's ability to deal directly with the entity that possesses real economic control. The labour relations purpose is sufficient if the benefit of making a designation outweighs the mischief it is likely to cause.

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[34] *Ibid,* at para 5.
[35] *Ibid*, at para 30.

[194] We have concluded that there is a valid and sufficient labour relations purpose for making the common employer declarations pursuant to section 6-79 of the Act. The erosion of bargaining rights is actual. Industrial is working on a Project in which millwrights and labourers are included in the peak trade labour requirements; the employees performing that work were not dispatched through the hiring hall of the respective trade unions.

[195] This case is not equivalent to one in which a union seeks to extend its bargaining rights to a non-unionized company that continues to operate in a manner consistent with its longstanding past operations:[36] *Carpenters and Joiners v Valente Home Development Corp. and Valente Development Corporation and Toroso Group Inc. and Oakdale Trails Inc*., 2021 CanLII 134549 (ON LRB) [*Valente*], at paragraph 65. International, a unionized employer, has experienced a decline in its construction industry work and has established a non-unionized entity to expand its business into related markets within the construction industry. While it employs a different crew composition, it continues to employ millwrights and labourers to perform the new work. The declarations will protect the existing bargaining rights from being eroded by the use of these two corporate vehicles for engaging in related activities that are carried on under their common control and direction.

[196] As the Ontario Board explained in *Valente*:

> *As noted, one of the purposes of subsection 1(4) is to ensure that the union's bargaining rights will not be restricted because an employer chooses to expand its business through another corporate vehicle (Canada Stampings & Dies Ltd., [1996] OLRB Rep. May/June 355 at para 56-57). It is also concerned with ensuring that the growth of the business accrues to the bargaining unit.*

[197] The declarations will ensure that the unions are able to deal directly with the entity that possesses the real economic control over the employees.

[198] The respondents argue that the applicants have failed to organize the relevant bargaining units and therefore the Board should discourage the use of the common employer provisions to circumvent "legitimate" organizing. They point to the evidence of the Labourers' attempt to organize and contrast that evidence with the experience of other unions, such as the Boilermakers, Pipefitters, and Operating Engineers, who have successfully organized.

[199] The Ontario Board in *I.B.E.W., Local 353 v Agincourt Electric*, 1991 CarswellOnt 1135 [*Agincourt*] addressed a similar argument. In response, the Ontario Board explained that it would

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[36] See, for example, *Stuart Olson*.

not attach much significance to the choice of a union to pursue a common employer application over a certification application. It relied on the following, helpful excerpt from *United Food and Commercial Workers International Union, Local Union 175 v Great Atlantic & Pacific Company of Canada Limited*, 1981 CanLII 994 (ON LRB) in coming to this determination:

> *15. We have considered the respondents' arguments with respect to "foisting" a union upon a group of employees who may not wish to be represented; however, we do not think that the wishes of the employees are the only, or even the predominant, factor to be considered in a section 1(4) application. If such were the case, the very erosion of bargaining rights which triggered the proceeding, (and which section 1(4) was designed to cure) could be raised as a bar. It is entirely typical that the employees of a related company will not be union members, for it is the creation of job opportunities ostensibly beyond the scope of the collective agreement, which constitutes the "erosion" of the union's bargaining rights. But for the creation of a separate vehicle, the work opportunities associated with the related business activity, and the conditions of employment of the employees engaged in that activity, would be regulated by the collective agreement. The very purpose of section 1(4) is to ensure that the union's bargaining rights and the scope of the collective agreement will not be restricted simply because an employer chooses to expand through a new corporate vehicle rather than its existing one. Nor do we think we can attach much significance to the fact that upon learning of the existence of a related employer, a union opts to utilize section 1(4) rather than apply for certification. The statute contemplates both types of application, and if the circumstances are such that section 1(4) can be applied, we do not consider it a proper exercise of our discretion to raise a bar simply because a union might have applied for certification. Indeed, if the two corporate entities otherwise satisfy the requirements of section 1(4), there are good labour relations reasons for making a section 1(4) order so that the collective bargaining structure will accord with the economic and industrial relations reality.*

[200] There is nothing in the language of section 6-79 that suggests that the wishes of new employees are supposed to be tested or given special significance before a declaration will be granted. To find otherwise would be inconsistent with the labour relations realities of the work opportunities created outside the scope of a collective agreement.

[201] Moreover, the Board does not, in this case, place much weight on organizing “successes” that result from labour supply shortages, such as occurred with the Boilermakers.

[202] The notion that the common employer provisions are not a substitute for unsuccessful organizing simply means that the prerequisites for a declaration must be met for a declaration to be granted. A lack of success in organizing is not a bar to a declaration. The present case is not comparable to *Cornerstone*. There, the Board found that the applicants had attempted to “collaterally attack an application filed by a rival union”.[37] In the present case, the attempts to use CLAC-supplied labour have failed due to labour shortages; given the subsequent certifications by

[37] *Cornerstone,* at para 74.

the other building trade unions, the only likely certification route for the remaining employees is through their respective building trade unions.

[203] Finally, if the effect of a corporate organization is to avoid collective bargaining obligations, then the Board has the authority to pierce the corporate veil and make the declaration. It is not necessary to find intentional avoidance.

[204] Contrary to Industrial's argument about delay, there is no such concern. The applicants brought these applications in June 2022. The work on the Project began after the proposal was accepted in February 2022. The start of the intended voluntary recognition agreement between CLAC and Industrial was May 1, 2022. It is acknowledged that Industrial did not perform any work in Saskatchewan other than on the Project.

[205] In summary, the benefits outweigh the mischief likely to be caused by issuing a declaration.

[206] For all of the foregoing reasons, the Board finds that all of the prerequisites have been satisfied for the issuance of common employer declarations pursuant to section 6-79 of the Act.

Section 6-20 and Scope

[207] The last issue is the scope of the application and the certification orders. The applicants argue that, because the certification order did not distinguish between construction and other types of work, the Board should grant a declaration that preserves all bargaining rights regardless of whether the activities come within the construction industry.

[208] The applicants rely on the presumption of continuity of bargaining rights, as confirmed in *Army and Navy Department Store Ltd. v RWDSU* (1962), 39 WWR 311 and *RWDSU v Prince Albert Co-operative*, [1983] 1 WWR 549. The applicants also rely on subsection 6-1(2) and clause 6-65(h) of the Act.

[209] The applicants suggest that there is only one potentially relevant discrepancy between section 6-79 and section 6-20, which is the final one highlighted by the Board in its comparison of the provisions in *Stuart Olson*, at footnote 1:

> *… Third, section 6-20 references common control or direction being carried on by "one person through the different corporations", etc., rather than "by or through those corporations", etc.*

[210] They offer that to the extent that the control or direction must be carried on by one "person" that requirement is met given the multiple common principals, including the common director and owner.

[211] Both Industrial and International argue that the applicants are inappropriately seeking to benefit from a maintenance (or general) certification based on the performance of construction industry work. They argue that there is no evidence of Industrial performing anything other than construction industry work. There is no foundation for a section 6-20 application.

[212] In our view, it is the work performed by Industrial within the construction industry division that forms the basis for the declarations being granted. Whereas the evidence of International's activities included non-construction work, the evidence of Industrial's activities did not. Furthermore, although the construction work of International has declined, the construction work of Industrial has taken off. The purpose of a declaration is to address an actual or potential erosion of bargaining rights, as opposed to a speculative one. The Board has determined based on this evidence that there was an actual erosion of the Unions' bargaining rights.

[213] In addition, all parties were in agreement that the activities being performed by Industrial in Saskatchewan came within the construction industry division. The evidence and argument about the potential for Industrial to perform non-construction work and the potential for an erosion of the unions' bargaining rights outside of the provincial registration system were limited.

[214] Under these circumstances it would not be appropriate to make common employer declarations pursuant to section 6-20 of the Act.

Conclusion:

[215] The Board has determined that associated and related businesses, undertakings or other activities are carried on under common control and direction by the corporations, International and Industrial. There is a valid and sufficient labour relations purpose for the declarations to be granted pursuant to section 6-79.

[216] Lastly, the scope as described in the application is broader than that which was included in the original certification order. The description of the bargaining unit in the original certification order includes only millwrights, millwright apprentices and millwright foremen. In the application, the Millwrights sought a certification order for millwrights, millwright apprentices, millwright machinists, millwright welders, millwright foremen and millwright general foremen. The Millwrights

did not address this discrepancy during the hearing. As such, the Board will issue an order that reflects the scope of the original certification order but will remain seized to address this scope issue upon receipt of an application by the Millwrights and after providing a reasonable opportunity to the respondents to reply to that application.

[217] An appropriate Order will accompany these Reasons.

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

DATED at Regina, Saskatchewan, this **31st** day of **March, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson