ATCO FRONTEC LTD., Applicant v THE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Respondent and ATCO STRUCTURES & LOGISTICS LTD., Respondent

LRB File Nos. 105-23 and 138-23; February 26, 2024
Chairperson, Michael J. Morris, K.C.; Board Members: Phil Polsom and Laura Sommervill

Counsel for the Applicant, ATCO Frontec Ltd.:	Steve Seiferling
Counsel for the Respondent, the United Food and Commercial Workers Union, Local 1400:	Heath Smith
Counsel for the Respondent, ATCO Structures & Logistics Ltd.:	Dan Bokenfohr

Summary dismissal – Common employer application – Section 6-20 of *The Saskatchewan Employment Act* – Not plain and obvious that common employer application will fail based on facts alleged – Application permitted to proceed.

REASONS FOR DECISION

Background:

[1] Michael J. Morris, K.C., Chairperson: These are the Board's reasons with respect to a summary dismissal application[1] brought by ATCO Frontec Ltd. [Frontec]. Frontec seeks dismissal of an application[2] brought by the United Food and Commercial Workers Union, Local 1400 [Union] that requests a common employer declaration with respect to Frontec and ATCO Structures & Logistics Ltd. [ASL], pursuant to s. 6-20 of *The Saskatchewan Employment Act* [Act].[3]

[2] The Union is certified to represent employees of ASL[4] within a specified geographic area. The relevant certification order was issued by the Board on November 12, 2015.[5] Prior to its issuance employees were working at a large housing complex known as the Discovery Lodge that housed a workforce for a potash mine under construction near Jansen, Saskatchewan.[6] ASL

[1] LRB File No. 138-23.
[2] LRB File No. 105-23.
[3] *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act].
[4] With some specified exceptions.
[5] LRB File No. 239-14.
[6] *United Food and Commercial Workers, Local 1400 v ATCO Structures and Logistics Ltd.*, 2015 CanLII 80541 (SK LRB) [*ASL 2015*], at paras 2 and 12-14.

ceased operating at the sites covered by the certification order [Sites] in or about 2015, and the parties did not conclude a collective agreement.[7]

[3] According to the Union, in or about March of 2023 it became aware through media reports that Frontec was conducting business at the Sites.[8] The reports referenced Frontec and George Gordon Developments Ltd. [GGDL] being involved in a "joint-venture partnership" known as Wicehtowak Frontec Services [WFS], and WFS having been awarded "a multi-year, base contract of approximately $86M to provide camp support services at… BHP Jansen Discovery Lodge in Saskatchewan beginning April 2023."[9]

[4] On or about March 28, 2023, the Union corresponded with ASL, requesting re-commencement of collective bargaining and that ASL "provide maintenance of membership for all related employees."[10] In response, on or about April 18, 2023, ASL indicated that it had no employees operating at the Sites and denied the Union's requests.[11]

[5] In or about June of 2023, the Union became aware that Frontec was posting available positions at the Sites. Amongst others, these include positions such as "General Kitchen Helper", "Front Desk Clerk" and "Camp Attendant".[12]

[6] The Union has been unable to verify that an entity exists and is operating in Saskatchewan with either the trade name or legal name of the joint venture, WFS.[13]

[7] The Union's application states the following under the heading "Grounds for making the application":

> *16. At some time currently unknown to the Union, [ASL] appears to have assigned some portion of its business, especially camp management services, to its sister corporation, [Frontec], both of which operate under the aegis of the ATCO "family" of companies.*
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> *17. The Union submits that [ASL] and [Frontec], along with any additional corporate entity or entities that may be operating at the [Sites] in a manner consistent with the Order, are associated or related businesses, undertakings or other activities and are carried on under common control or direction by one person through the different corporations, partnerships, individuals or associations.*

[7] Union's application in LRB File No. 105-23, para 6.
[8] Union's application in LRB File No. 105-23, para 11.
[9] Union's application in LRB File No. 105-23, para 11.
[10] Union's application in LRB File No. 105-23, para 12.
[11] Union's application in LRB File No. 105-23, para 13.
[12] Union's application in LRB File No. 105-23, para 14.
[13] Union's application in LRB File No. 105-23, para 15.

> *18. By failing to recognize their obligations attendant to the Order, [ASL] and [Frontec] have effectively denied employees access to their Constitutionally-protected rights to join the Union and to negotiate collectively with their employers. Furthermore, [ASL] and [Frontec] have effectively interfered with the Union's administration, inhibiting its ability to, inter alia, engage the process of collective bargaining, solicit collective bargaining proposals from members, investigate and pursue issues in the workplace, and integrate members into the programs and processes of the Union.*[14]

[8] In addition, the Union has ticked the "yes" box in response to the following question on the prescribed form,[15] but has provided no particulars with respect to same: "Has an interchange of employees of one business with those of another business represented by a union taken place?"

[9] ASL and Frontec have both filed replies opposing the Union's application. Their replies state, amongst other things, that their business activities are not carried out under common control or direction, and that making a common employer declaration with respect to them would expand the Union's bargaining rights to a group of employees who have not chosen to be represented by the Union. Frontec denies any interchange of employees with ASL. It states that it was operating in Saskatchewan prior to entering into the joint venture, WFS, with GGDL, and that work at the Sites was awarded to WFS, not Frontec.

[10] Frontec's summary dismissal application, as pled, centers on the effect the joint venture having been awarded the work at the Sites has on the Union's application, from Frontec's perspective. The following portions of its application are illustrative:

> *3. The facts relied on in support of summary dismissal are as follows:*
>
> *. . .*
>
> *d) WFS was recently awarded work on the Site. Frontec, by itself, has not been awarded any work on the site. The work being performed on the site was awarded to, and is being performed by, WFS.*
>
> *…*
>
> *f) Frontec states that Frontec operates separate and apart from ASL. Furthermore, and more importantly for the purposes of this summary dismissal application, Frontec states that it was not awarded the work on the Site – WFS was.*
>
> *g) WFS was awarded the work on the Site, and is performing the work on the Site. Frontec, as a legal entity, is not performing any work on the site.*
> *…*

[14] Union's application in LRB File No. 105-23, paras 16-18.
[15] Form 5 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021*.

> *4. A summary of the law that is relevant to the board's determination is as follows:*
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> *f) Frontec maintains that it is not presently performing work, as Frontec, on the Site. The work on the Site was awarded to WFS, and not to Frontec, and WFS is performing the work.*
>
> *g) As a result of the fact that WFS, and not Frontec, is performing the work, the Union's application for a common employer declaration must be summarily dismissed, on the basis that Frontec is not presently performing any work, on its own, at the Site.*
>
> *h) Given that Frontec is not performing work at the Site, this Board cannot make an assessment of a common employer application, since there must be two corporations which are sufficiently related, operating within the jurisdiction of this Board, under common control and direction.*[16]

[11] That said, Frontec's written submissions attack the Union's application more broadly, as will be discussed later in these reasons.

[12] Frontec also filed an affidavit [Hussain affidavit],[17] though it is referenced only in passing in its written submissions.[18] Frontec's written submissions target whether the Union has pled an arguable case:

> *2. The present summary dismissal application deals with one issue: whether the Union's application pleadings disclose facts that, if taken as true, support a declaration that [Frontec] is a common employer with [ASL].*
> *…*
>
> *46. The Union has not pled any material facts which could support an arguable case with respect to the four indicia required of a common employer declaration.*
>
> *47. Based on the lack of pleadings, the Union has not disclosed an arguable case, and therefore their Application must be dismissed.*
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> *V. Conclusion*
>
> *48. The Union has not pleaded material facts to substantiate their claims and cannot rely on unsupported conclusory assertions in their pleadings to found an arguable case. The Union has not pleaded an arguable case.*[19]

[13] The Union objects to consideration of the Hussain affidavit on the basis that only the Union's pleadings are relevant to whether its application discloses an arguable case.[20] At the same time, however, the Union has filed its own affidavit [MacFarlane affidavit].[21]

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[16] Frontec's application in LRB File No. 138-23, paras 3(d), (f) and (g), and paras 4(f), (g) and (h).
[17] Affidavit of Brian Hussain, sworn or affirmed January 10, 2024 [Hussain affidavit].
[18] Frontec's written submissions dated January 10, 2024, para 43: "[Frontec's] documentary and affidavit evidence further cements a finding that the Union has no arguable case."
[19] Frontec's written submissions dated January 10, 2024, paras 2 and 46-48.
[20] Union's written submissions, para 21.
[21] Affidavit of Marilynne MacFarlane, sworn or affirmed January 17, 2024 [MacFarlane affidavit].

Argument on behalf of Frontec:

[14] Frontec identifies *Comfort Cabs*[22] as the leading authority with respect to common employer applications. The Board will only grant a common employer declaration if the following criteria are satisfied:

> *1. The application must involve more than one corporation, partnership, individual or association and at least one of those entities must be a certified employer. …*
>
> *2. The subject entities must be "sufficiently related" to a unionized employer through their involvement in associated or related businesses, undertakings or other activities. …*
>
> *3. The subject entities must be operated under "common control and direction". …*
>
> *4. The designation must serve a valid and sufficient labour relations purpose, interest or goal. ... In other words, there must be a compelling labour relations reason for making the declaration and the benefits of doing so must outweigh the mischief such declaration is likely to cause. …*[23]

[15] Frontec's position is that the Union has not pled facts to satisfy the second, third and fourth criteria;[24] as such, it pleads no arguable case and its application should be summarily dismissed.[25]

[16] Regarding the second criterion, Frontec characterizes the Union's pleading that it and ASL "operate under the aegis of the "ATCO "family" of companies"[26] as a nebulous claim.[27] It similarly characterizes the allegation that ASL assigned some portion of its business, especially camp management services, to Frontec,[28] as vague; this is a bare assertion without supporting facts.[29] Frontec notes that no particulars are pled regarding any interchange of employees between ASL and Frontec. Further, it submits that the allegation that it was posting available positions at the Sites does not support a conclusion that those positions were assigned to Frontec from ASL.[30]

[17] Regarding the third criterion, Frontec notes that *Comfort Cabs* emphasizes consideration of the *Walters Lithographic* indices.[31] Frontec asserts:

> *A finding of "common control and direction" requires at least the allegation of facts that:*

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[22] *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*].
[23] *Comfort Cabs*, at para 61. Citations omitted.
[24] Frontec's written submissions dated January 10, 2024, paras 30-32.
[25] Frontec's written submissions dated January 10, 2024, para 48.
[26] Union's application in LRB File No. 105-23, para 16.
[27] Frontec's written submissions dated January 10, 2024, para 33.
[28] Union's application in LRB File No. 105-23, para 16.
[29] Frontec's written submissions dated January 10, 2024, para 36.
[30] Frontec's written submissions dated January 10, 2024, para 37.
[31] *Comfort Cabs*, at paras 61 and 69.

> 1. *The management of both Frontec and ASL are not independent of one another;*
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> 2. *The hiring and firing, or human resources management, of both Frontec and ASL are not independent of one another;*
>
> 3. *The day-to-day operations of both Frontec and ASL are not independent of one another; and*
>
> 4. *The bidding activities of both Frontec and ASL are not independent of one another.*[32]

[18] Frontec submits that that the Union has not pled facts to support any of the above. Rather, the Union relies only upon the nebulous and vague assertions previously mentioned.

[19] The Union has not satisfactorily pled with respect to the fourth criterion - that a valid labour relations purpose would be served through a common employer declaration - because it has not pled facts establishing the preceding criteria.[33] A common employer declaration would expand the Union's bargaining rights, not preserve them.[34]

[20] Finally, Frontec has requested costs. In its view, the Union shouldn't have filed the common employer application because, based on the MacFarlane affidavit, it knew all along that the work at the Sites had been awarded to WFS.[35]

Argument on behalf of ASL:

[21] ASL supports Frontec's summary dismissal application. It submits that the Union has not pled sufficient particulars to establish that Frontec and ASL operate under common control and direction.[36]

Argument on behalf of the Union:

[22] The Union notes that the Board's assessment of whether it has pled an arguable case must focus on its pleadings.[37] In light of this, it submits that the Hussain affidavit, which was filed by Frontec, should not be considered by the Board:

> *21. The Union submits that the Affidavit of Brian Hussain is not available for the Board's consideration, at the summary dismissal stage, as only the Union's pleadings, and precipitating documents are strictly relevant. As previously mentioned, the Board, in KBR Wabi, clearly explains that "the Board may consider only the application, any particulars*

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[32] Frontec's written submissions dated January 10, 2024, para 39.
[33] Frontec's written submissions dated January 10, 2024, para 44.
[34] Frontec's written submissions dated January 10, 2024, para 20.
[35] Frontec's written submissions dated January 18, 2024.
[36] ASL's written submissions, para 7.
[37] Union's written submissions, para 17.

furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim." [38]

[23] The Union submits the following with respect to the common employer "test":

20. As the Board has articulated, in determining whether a common employer order is appropriate in any given circumstances, the Board does not apply a rigid test, but instead, considers a list of potential factors:

> *[103] In the North American Construction case, the Board adopted the criteria set out by the Ontario Labour Relations Board in Walters Lithographing Company Co. Ltd. Those criteria are:*
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> 1. *Whether or not there is common ownership and/or financial control;*
> 2. *Whether or not there is common management;*
> 3. *Whether or not there is an interrelationship of operations, including the transfer of employees;*
> 4. *Whether or not there is centralized control of labour relations; and*
> 5. *Whether or not the employers represent themselves to the public as a single integrated enterprise.*[39]

[24] The Union refers to the abovementioned factors as the "North American Construction Factors".

[25] Its written submissions highlight facts alleged in its application and information from the MacFarlane affidavit that it contends are relevant to consideration of these factors.

[26] The Union references the following facts from its application:

25. The Union submits that, in accordance with the relevant factors for assessing the appropriateness of summary dismissal, the Union has clearly presented an arguable case. In establishing an arguable case, the Union has submitted the following:

a) The Union has been unable to confirm the existence of any legal entity named "Wicehtowak Frontec Services," which Frontec claims as the employer operating at the material sites (see the Union's Common Employer Application at para 15);
…

l) At some point currently unknown to the Union, the Employer appears to have assigned some portion of its business, especially camp management services, to its sister corporation, Frontec, both of which operate under the aegis of the ATCO "family" of companies (see para 16 of the Common Employer Application). The Union submits

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[38] Union's written submissions, para 21.
[39] Union's written submissions at para 20, quoting the Board's decision in *International Brotherhood of Electrical Workers, Local 529 v Merick Contractors Inc*, 2015 CanLII 19981 (SK LRB), at para 103.

> *that the interrelationship of these three ATCO companies is relevant to all of the "North American Construction Factors."*[40]

[27] The Union also refers to Frontec advertising available positions at the Sites,[41] which is mentioned in its application.[42]

[28] Apart from the facts alleged in its application, the Union highlights evidence contained in the MacFarlane affidavit.[43] This evidence includes, amongst other things, copies of corporate registry searches and printouts from ATCO Ltd.'s website. The Union submits that this evidence establishes that Frontec and ASL are wholly owned subsidiaries of ATCO Ltd., that directors of Frontec occupy senior leadership roles with ATCO Ltd., and that ATCO Ltd., ASL and Frontec share at least one key director.

[29] It is unclear upon what basis the Union considers it open to the Board to consider the documents exhibited to the MacFarlane affidavit. The Board gleans the Union may be contending that these documents are able to be considered as "precipitating documents", based on the following (emphasis added):

> *21. The Union submits that the Affidavit of Brian Hussain is not available for the Board's consideration, at the summary dismissal stage, as only the Union's pleadings, and precipitating documents are strictly relevant. As previously mentioned, the Board, in KBR Wabi, clearly explains that "the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim."* [44]

[30] Ultimately, the Union's position is that it has an arguable case for the purposes of its application; it should not be summarily dismissed.

Relevant Statutory Provisions:

[31] The following provisions of the Act are relevant:

> ***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.*

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[40] Union's written submissions, paras 25(a) and (l).
[41] Union's written submissions, para 25(j).
[42] Union's application in LRB File No. 105-23, para 14.
[43] Ms. MacFarlane attests to this information having been provided to her by the Union's counsel.
[44] Union's written submissions, para 21.

> *(2) Subsection (1) applies only to corporations, partnerships, individuals or associations that have common control or direction on or after October 28, 1994.*
> *…*
>
> ***6-111****(1) With respect to any matter before it, the board has the power:*
> *…*
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*

Analysis and Decision:

[32] Frontec has applied to dismiss the Union's application pursuant to clause 6-111(1)(p) on the basis that it discloses no arguable case. The test for summary dismissal on this basis is summarized in *KBR Wabi*:

> *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant is able to prove everything alleged in his/her claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
>
> *2. In making its determination, the Board may consider only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his/her claim.*[45]

[33] The above test is generally analogous to that which has been employed by the Court of King's Bench when determining whether to strike a claim as disclosing no reasonable cause of action. Indeed, in *KBR Wabi* the Board referred to that test,[46] as articulated by the Court of Appeal in *Sagon*,[47] before articulating the Board's test (emphasis added):

> ***[69]*** *The Courts have the inherent jurisdiction to dismiss actions. That inherent jurisdiction is set out in Rule 173 of The Queen's Bench Rules of Court. The jurisdiction of the Courts is far greater than the jurisdiction provided to the Board in the Act. The Saskatchewan Court of Appeal, in a judgment[45] authored by a former Chairperson of this Board, Mr. Justice Sherstobitoff, … says:*
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> > *In determining whether a claim should be struck as disclosing no reasonable cause of action, the test is whether, assuming the plaintiff proves everything alleged in his claim, there is nevertheless no reasonable chance of success, or to put it another way, no arguable case. The Court should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the court is satisfied that the case is beyond doubt: Marshal v. Saskatchewan, Government of, Petz and Adams (1993), 1982 CanLII 2387 (SK CA), 20 Sask. R. 309 (C.A.); The Attorney General of Canada v. Inuit Tapirsat, 1980 CanLII 21 (SCC), [1980] 2 S.C.R.*

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[45] *International Brotherhood of Electrical Workers, Local 529 v KBR Wabi Ltd.,* 2013 CanLII 73114 (SK LRB) [*KBR Wabi*], at para 79. See also *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB), at para 8.
[46] The Board notes that while Rule 173(a) has been superseded by Rule 7-9(2)(a) of *The King's Bench Rules*, the same test applies to the current rule: *Ryan v Klause*, 2020 SKQB 131, at paras 17-18.
[47] *Sagon v Royal Bank of Canada*, 1992 CanLII 8287 (SKCA) [*Sagon*], at para 16.

> *735. The Court may consider only the statement of claim, any particulars furnished pursuant to demand, and any document referred to in the claim upon which the plaintiff must rely to establish his case: Balacko v. Eaton's of Canada Limited (1967), 1967 CanLII 369 (SK KB), 60 W.W.R. 22 (Sask. Q.B.); Lackmanec v. Hoffman (1992), 1982 CanLII 2585 (SK CA), 15 Sask. R. 1 (C.A.)*

> ***[70]*** *As noted above, the powers given to the Board under section 18 are discretionary powers, as are the powers of Courts to dismiss either through their inherent jurisdiction or pursuant to Rule 173. The jurisdiction exercised by the Courts is to be exercised only in plain or obvious cases and where the court is satisfied the case is beyond doubt. That same principle should guide the Board.*[48]

[34] As noted in *KBR Wabi*, the Board will summarily dismiss an application on the basis that it discloses no arguable case in limited circumstances. The Board must be satisfied that it is plain and obvious that an application will fail even if the applicant can prove everything they allege.

[35] The focus is on the applicant's pleadings. The Board's ability to consider "any document referred to in the application upon which the applicant relies to establish his/her claim" is not an invitation to an applicant to file affidavit evidence, generally. Rather, this circumstance contemplates where an application references a document and relies upon same to ground it, such that the document may be viewed as being incorporated by reference into the application. An obvious requirement for the Board to consider a document in this manner, per *KBR Wabi*, is that the document be referenced in the application.

[36] On the basis of the foregoing, the Hussain affidavit cannot be considered by the Board in assessing whether the Union has pled an arguable case.

[37] Similarly, however, the Union has not provided the Board any basis to conclude that the MacFarlane affidavit can be considered. More particularly, the Union has not suggested that the affidavit contains particulars in response to a demand. Nor can the Union's contention that "precipitating documents" are relevant to whether it has pled an arguable case overcome the requirement that such documents be mentioned in its application, should it be relying upon them as "any document referred to in the application upon which the applicant relies to establish [its] claim". Upon closely reviewing the Union's application, the only document that might fall into this category from the MacFarlane affidavit is the press release dated March 9, 2023.[49] In any event, the Union appears to have quoted the excerpt it is relying upon from this document in its application:

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[48] *KBR Wabi*, at paras 69-70.
[49] Exhibit "A" to the MacFarlane affidavit.

> *11. Media reports indicate that:*
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> > *BHP has awarded Wicehtowak Frontec Services (WFS) a joint-venture partnership between ATCO Frontec Ltd. and George Gordon Developments Ltd. (GGDL), a multi-year base contract of approixmately CAD $86M to provide camp support services at its BHP Jansen Discovery Lodge in Saskatchewan beginning April 2023.*[50]

[38] Accordingly, for the purposes of considering whether the Union's application discloses an arguable case, the Board will not consider the MacFarlane affidavit. Before moving on, however, the Board wishes to make some brief comments with respect to the affidavit. In it, Ms. MacFarlane states that she instructed counsel to investigate matters, and she then proceeds to recite what she was advised by counsel,[51] indicating that she believes it to be true. In effect, this means that counsel was the source of the evidence that was tendered for the Board's consideration. Unless it is obvious that such evidence is purely formal and uncontroverted,[52] counsel should not be placed in this position.[53]

[39] In assessing whether the Union's application pleads an arguable case, the Board must consider what must be established for a common employer declaration to be granted. This was addressed in *Comfort Cabs*, as follows (emphasis added):

> *[61] A review of this Board's jurisprudence reveals that there are four (4) prerequisites of a common employer declaration:*
>
> > *1. The application must involve more than one corporation, partnership, individual or association and at least one of those entities must be a certified employer. See: Wayne Bus, supra; and International Brotherhood of Electrical Workers, Local 529 v. Western Electrical Management Ltd. & Merick Contractors Inc., 2013 CanLII 55453 (SK LRB), LRB File Nos. 096-13, 087-13, 109-13, 152-13, 180-13 & 181-13 ("IBEW v. Merick Contractors #1").*
> >
> > *2. The subject entities must be "sufficiently related" to a unionized employer through their involvement in associated or related businesses, undertakings or other activities. See: Wayne Bus, supra; and United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Graham Construction and Engineering Ltd., et.al., [1998] Sask. LR.B.R. 719, LRB File No. 014-98.*
> >
> > *3. The subject entities must be operated under "common control and direction". See: Wayne Bus, supra; and Graham Construction and Engineering Ltd., supra.*

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[50] Union's application in LRB File No. 105-23, para 11. The excerpt is the first paragraph in Exhibit "A" to the MacFarlane affidavit.

[51] Ms. MacFarlane states that counsel advised her regarding the matters "between, or about, April and June of 2023". The Board notes that Ms. MacFarlane swore or affirmed the Union's application in LRB File No. 105-23 on July 14, 2023.

[52] This may be the case with the evidence contained in the MacFarlane affidavit; the Board has not made any determination in this regard.

[53] See, for example, Court of Appeal for Saskatchewan Civil Practice Directive No. 1, and *Adams v Canadian Tobacco Manufacturers' Council*, 2010 SKQB 308.

> *See also the indices of common control and direction adopted by the Ontario Labour Relations Board in Walters Lithography Company Limited [1971] O.L.R.B. Rep. July 406.*
>
> *4. The designation must serve a valid and sufficient labour relations purpose, interest or goal. See: Wayne Bus, supra. In other words, there must be a compelling labour relations reason for making the declaration and the benefits of doing so must outweigh the mischief such declaration is likely to cause. See: Edgewood Forest Products Inc., supra; North American Construction Group Inc., supra; and International Brotherhood of Electrical Workers, Local 529 v. Merick Contractors Inc., Western Electrical Management Ltd. & Western Electrical Constructors Ltd., LRB File No. 331-15 (Decision dated February 5, 2015 – unreported) ("IBEW v. Merick Contractors #2").*
> *…*
>
> *[63] In Saskatchewan, the primary reason for granting a common employer declaration is the avoidance or anticipated erosion of bargaining rights through transfer of work that would normally be performed by unionized employees to a related, non-union entity. See: Wayne Bus, supra. Other purposes have also been acknowledged by other Labour Boards, including the desire to remove obstacles to meaningful collective bargaining and to ensure that the "true employer" is at the bargaining table (i.e.: to ensure that the bargaining agent is negotiating with the entity possessing real economic control over terms and conditions of employment for employees rather than an employer in name only). See: Penmarkay Foods Limited v. Retail Wholesale & Department Store Union, Local 414, 1984 CanLII 1128 (ON LRB), [1984] OLRB Rep. Sept. 1214.*[54]

[40] More recently, in *International Cooling Tower*,[55] the Board noted that the language used in *Comfort Cabs* should be adjusted where it conflicts with the language of the provision under consideration (emphasis added):

> *[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.*
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> *[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.*[56]

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[54] *Comfort Cabs*, at paras 61, 63.
[55] *United Brotherhood of Carpenters and Joiners of America, Local 1021, v International Cooling Tower Inc.*, 2023 CanLII 24873 (SK LRB) [*International Cooling Tower*].
[56] *International Cooling Tower*, at paras 116-118.

[41] Here, with respect to the second prerequisite from *Comfort Cabs*, s. 6-20 does not use the words "sufficiently related entities"; it speaks of *associated or related businesses, undertakings or other activities* being carried on. Further, with respect to the third prerequisite, s. 6-20 requires that these businesses, undertakings or other activities be carried on under common control *or* direction, rather than common control *and* direction.[57] The common control or direction must be by *one person*, through different corporations, partnerships, individuals or associations. "Person" is defined in *The Legislation Act*, and includes a corporation.[58]

[42] Before considering whether the Union's application pleads sufficiently for the purposes of the four prerequisites, it is helpful for the Board to examine some of its other jurisprudence concerning common employer applications. More particularly, it is helpful for the Board to consider its reasoning in other cases where employers were applying to summarily dismiss a common employer application based on the application disclosing no arguable case.

[43] In *KBR Wabi*, the Board was considering whether to summarily dismiss applications brought by multiple unions alleging that multiple employers were successors or common employers. Some of the unions' applications pled more particulars than others. The most thorough provided detailed narratives regarding the employers' corporate histories.[59] The Board characterized the least detailed, that of the International Brotherhood of Electrical Workers, Local 529 [Local 529], as a mere recitation of statutory provisions in the (since repealed) *Trade Union Act*.[60] To put this in context, Local 529's application stated (emphasis added):

> *(a) This applicant is the bargaining agent on behalf of the Electrical Trade Division as set forth The Construction Industry Labour Relations Act, and designations pursuant to same in relation to that area of the Province, North of the 51st parallel and therefore has a direct interest in the application within. If a certification were allowed as sought, it would interfere with the union's representational rights in the Province of Saskatchewan.*
>
> *(b) Further by virtue of an order of this Honourable Board dated the 24th day of October, 1984, on LRB File No. 344-84, this applicant is the certified bargaining agent for all journeymen electricians, electrician apprentices, electrician workers, and electrician foremen employed by Brown & Root Ltd., within the Province of Saskatchewan, North of the 51st parallel.*
>
> *(c) This applicant is aware of a number of other trade unions with existing certification orders binding Brown & Root Ltd in relation to their respective crafts.*

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[57] In *International Cooling Tower* the Board suggested that "control" and "direction" are not necessarily synonymous, at paragraph 169: *"Control" focuses on matters of the general orientation of the entity; "direction" focuses on the day-to-day management.*

[58] *The Legislation Act*, SS 2019, c L-10.2, s 2-29: "In an enactment: … "person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person[.]"

[59] *KBR Wabi*, at para 10.

[60] *KBR Wabi*, at para 115.

> *(d) This applicant and Local 2038 of IBEW have negotiated a number of provincial collective bargaining agreements with the Construction Labour Relations Association of Saskatchewan Inc., which negotiates on behalf of unionized employers in the electrical trade division in the province, the last of which bears effective dates from the 26th of December 2010 to the 30th of April, 2014.*
>
> *(e) In this application, CLAC claims KBR Wabi Ltd. is the employer in question in the province. This matter appears to be under dispute. This applicant seeks a declaration determining who the present actual employer is.*
>
> *(f) This applicant says KBR Wabi Ltd. and / or the actual employer is a related business or common employer with Brown & Root Ltd. and this applicant seeks a declaration that they be treated as one unionized employer for the purposes of The Trade Union Act and the CILRA pursuant to s. 37.3 of The Trade Union Act and s. 18 of the CILRA.*
>
> *(g) Further, or in the alternative, this applicant says a business or part thereof is being or has been sold, leased, transferred or otherwise disposed of from Brown & Root Ltd. KBR Wabi Ltd. and / or the actual employer, and it (or they) is a successor employer to Brown & Root Ltd. and is bound by the above noted certification order and asks for an order to said effect pursuant to s. 37 of The Trade Union Act, and further, asks for an order that KBR Wabi Ltd. and / or the actual employer is bound by all collective agreements, orders of the Board and all proceedings had and taken before the Board in relation to the said bargaining unit.*[61]

[44] In considering the sufficiency of Local 529's pleading, the Board noted that unions often operate at an information disadvantage when filing successorship or common employer applications (emphasis added):

> *[115] Local 529 does not provide the specifics mentioned above with respect to the corporate trail linking KBR Wabi to Brown & Root Ltd. At paragraph (g) of that application, the application merely alleges that a business or part thereof has been "sold, leased, transferred or otherwise disposed of" from Brown & Root Ltd. KBR Wabi Ltd. and/or the actual employer. On its own, this allegation, which is a mere recitation of the provisions of s. 37, would not be sufficient to satisfy the essential elements of s. 37 of the Act.*
> *[116] However, as noted by the Ontario Labour Relations Board in Sault Ste. Marie (City) v. LIUNA, Local 1036:*[70]
>
> > *The Board accepts and agrees with the principle put forward by the applicant and supported by the Board's case law that applicant trade unions in related/successor employer proceedings often have limited information, such that the standard for determining the sufficiency of the pleadings must be a relatively low one: Toronto Dominion Bank [1999] O.L.R.D. No. 1348; Richmond Tile Limited (2008) CanLII 12442 (March 12, 2008); Johnson Controls LP 2011 CanLII 24625 (April 28, 2011); Silmar Management Inc. 2012 CanLII 17090 (March 30, 2012)*
>
> *[117] Arguably, this principle has application to all of the applications here and justifies, at least insofar as related/successor applications, a lower standard should be applied. The argument which underlies this principle is that Unions are often at a disadvantage since they are not privy (unless they have negotiated something into their collective agreements) to the various corporate gyrations that business entities regularly engage in for tax or other purposes.*

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[61] *KBR Wabi*, at para 97.

> *[118] We can accept this principle in this case since our authority under section 18(p) is discretionary. Since 4 of the applications by other unions have met the test, and it is likely that the remaining 3 will "tag on" to this evidence, we would not exercise our discretion to dismiss this application.*[62]

[45] In the result, Local 529 was permitted to continue with its application in spite of its sparse pleadings.[63]

[46] Notably, in allowing all of the unions' common employer applications to proceed, the Board stated that they could not be expected "to know with particularity all of the interrelationships between the various entities and their function within the corporate empire".[64]

[47] A subsequent case, *EllisDon*,[65] also involved applications to summarily dismiss several unions' successorship and common employer applications. The unions' pleadings could be reasonably characterized as "thin". The Board described them as "confusing and not entirely consistent."[66] The pleadings with respect to two of the respondents[67] were somewhat more detailed than those with respect to the other three respondents.[68] The allegations with respect to the latter three were as follows:

> *[13] The allegations of the applicant trade unions with respect to EllisDon Civil Ltd. are:*
>
> > *(a) That EllisDon Civil Ltd. is a corporation owned and/or controlled by EllisDon Inc. and/or EllisDon Corporation;*
> >
> > *(b) That EllisDon Civil Ltd. was formed for the purpose of avoiding collective bargaining obligations; and*
> >
> > *(c) That EllisDon Civil Ltd. has refused to recognize the applicant trade unions or comply with their respective collective agreements.*
>
> *[14] The allegations of the applicant trade unions with respect to EllisDon Construction Ltd. are that:*
>
> > *(a) EllisDon Construction Ltd. is a corporation owned and/or controlled by EllisDon Inc. and/or EllisDon Corporation;*
> >
> > *(b) That EllisDon Construction Ltd. was formed for the purpose of avoiding collective bargaining obligations; and*

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[62] *KBR Wabi*, at paras 115-118. For clarity, s. 18(p) of *The Trade Union Act*, referenced in this passage, was the predecessor provision to s. 6-111(1)(p) of the Act.
[63] *KBR Wabi*, at paras 4-8.
[64] *KBR Wabi*, at para 126.
[65] *Prairie Arctic Regional Council of Carpenters, Drywallers, Millwrights v EllisDon Corporation (EllisDon Energy Services Inc.)*, 2014 CanLII 42398 (SK LRB) [*EllisDon*].
[66] *EllisDon*, at para 10.
[67] EllisDon Inc. and PME Inc. The allegations with respect to these corporations are listed at paragraphs 11 and 12 of *EllisDon*.
[68] EllisDon Civil Ltd., EllisDon Construction Ltd. and EllisDon Construction Services Inc.

> *(c) That EllisDon Construction Ltd. has refused to recognize the applicant trade unions or comply with their respective collective agreements.*
>
> *[15] The allegations of the applicant trade unions with respect to EllisDon Construction Services Inc. are that:*
>
> *(a) EllisDon Construction Services Inc. is a corporation owned and/or controlled by EllisDon Inc. and/or EllisDon Corporation;*
>
> *(b) That EllisDon Construction Services Inc. was formed for the purpose of avoiding collective bargaining obligations; and*
>
> *(c) That EllisDon Construction Inc. (sic) has refused to recognize the applicant trade unions or comply with their respective collective agreements.*[69]

[48] The Board summarized all of the unions' allegations as follows:

> *[16] In their applications, the applicant trade unions essentially allege that all of the named corporate Respondents are part of a one (1) large corporate enterprise involving numerous inter-related divisions, all having common direction and/or control. It is further alleged that this corporate structure has been created for the purpose or is being used to avoid collective bargaining obligations arising out of valid certification Orders held by the Carpenters, the Ironworkers and the Labourers.*[70]

[49] Ultimately, the Board was not prepared to summarily dismiss any of the successorship or common employer applications. It was not satisfied that any of them had no chance of success, in spite of the challenges they might face (emphasis added):

> *[32] Having reviewed the applications and other material filed by the applicant trade unions, we are not able to conclusively exclude any of the disputed Respondents at this stage of the proceedings. The fact that it may well be difficult to establish that the disputed Respondents are successors to the collective bargaining obligations arising out of their certification Orders or that they have any relationship to any of the work being performed in Saskatchewan does not mean that such relationships do not exist. In our opinion, in light of what appears to be the complex corporate structure within which all of the named Respondents operate, we are not satisfied that the allegations of the applicant trade unions can be summarily dismissed against any of the disputed Respondents. Simply put, we are not satisfied that it is plain and obvious that the allegations involving the disputed Respondents have no chance of success.*[71]

[50] As evidenced by *KBR Wabi* and *EllisDon*, the Board accepts that unions often operate at an information disadvantage when drafting a successorship or common employer application. As a practical matter, this may limit the particulars that can be alleged in their pleadings. That said, unions must at a minimum plead facts which, if accepted, could result in relief being granted

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[69] *EllisDon*, at paras 13-15.
[70] *EllisDon*, at para 16.
[71] *EllisDon,* at para 32.

pursuant to the provision(s) they rely upon. Failing to do so will render an application susceptible to being summarily dismissed.

[51] The Board will now proceed to examine the Union's pleading in the context of the four prerequisites for a common employer declaration.

[52] There is no dispute that the Union has satisfied the first prerequisite.[72] ASL is a certified employer with respect to the area in which the Discovery Lodge is located.

[53] The second prerequisite requires that the businesses, undertakings or other activities of ASL and Frontec be associated or related. In *International Cooling Tower*, the Board commented as follows with respect to this prerequisite:

> *[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.*[73]

[54] Here, the Union has pled that there has been an interchange of employees between ASL and Frontec (though without any particulars of same), that Frontec and ASL both operate as part of the ATCO "family" of companies, and that ASL assigned part of its business, specifically camp

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[72] Frontec's written submissions dated January 10, 2024, para 31.
[73] *International Cooling Tower*, at paras 141-142.

management services, to Frontec. It has also pled that Frontec has posted the types of positions at the Discovery Lodge that employees of ASL would have previously occupied, at least until 2015.[74]

[55] Frontec's primary complaint with the Union's pleading is that it is vague and not particularized. In this regard, the Board notes that at this point it must accept the Union's allegations as true. Further, it accepts that a union's ability to plead particulars in a common employer application is generally more limited than in other types of applications.[75] In the Board's view, the Union has sufficiently pled with respect to the second prerequisite. It is arguable that the facts that it relies upon support an inference that the businesses, undertakings or other activities of ASL and Frontec are associated or related. In other words, it is not plain and obvious that the Union's application must fail because the facts upon which it relies cannot satisfy the second prerequisite.

[56] The third prerequisite requires that Frontec's and ASL's associated or related businesses, undertakings or other activities be "carried on under common control or direction by one person" through Frontec and ASL. As mentioned earlier, a "person" for the purposes of s. 6-20 includes a corporation.

[57] The Board has held, in examining the third prerequisite, that the indices of common control or direction identified by the Ontario Labour Relations Board in *Walters Lithographic* are relevant. However, they do not represent a checklist, nor is any single one of them necessarily determinative. Though the Board's comments in *International Cooling Tower* were made in the context of s. 6-79[76] as opposed to s. 6-20, they are also relevant with respect to s. 6-20:

> *[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.*

[74] *ASL 2015*, at para 14: "To operate the camp and provide guest services, [ASL] employs cooks and kitchen staff, housekeepers, janitors and a range of maintenance and security staff. All of these employees are employed through [ASL's] Lodge Services division."
[75] *KBR Wabi*, at paras 116-117.
[76] Section 6-79 is a provision which is specific to Division 13 (Construction Industry) certifications.

> *[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.*
>
> *[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).*[77]

[58] In the Board's view, the Union's pleadings could be better particularized, including by indicating which person or entity in the "ATCO family" it says controls or directs ASL's and Frontec's alleged associated or related businesses, undertakings or activities (whether camp management services, or other businesses, undertakings or activities). Generally, pleading in the alternative is permissible, if required or appropriate based on a lack of information in a party's possession.

[59] Presently, though the Union's pleadings are vague, the allegations identified at paragraph 54 of these reasons suggest that one or more of the *Walters Lithographic* indices may apply[78] with respect to ASL and Frontec; for example, interrelationship of operations and/or representation to the public as a single integrated enterprise. Further, the Union's pleadings suggest that WFS is not the employer of some or all of the employees at the Sites, with the Union having been unable to confirm the existence of a legal entity operating as WFS,[79] and Frontec having posted available positions at the Sites.[80] Relatedly, the fact that WFS may have been awarded the work at the Sites is not conclusive as to who is employing employees at the Sites,[81] or who a "true employer" of employees at the Sites might be.[82]

[60] Bearing in mind that the Union's pleadings must be taken as true at this point, it is not plain and obvious that the Union will not be able to establish the third prerequisite. The fact that it may be difficult to do so is not determinative at this stage of the proceedings.[83]

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[77] *International Cooling Tower*, at paras 167-170.
[78] I.e., arguably apply.
[79] Union's application in LRB File No. 105-23, para 15.
[80] Union's application in LRB File No. 105-23, para 14.
[81] See the Board's comments at paragraph 31 of *EllisDon.*
[82] Act, s 6-1(1)(i)(iii). See, for example, *International Association of Bridge, Structural, Ornamental And Reinforcing Ironworkers, Local Union No. 771 v Matrix Labour Leasing Ltd*, 2018 CanLII 127662 (SK LRB).
[83] *EllisDon,* at para 32.

[61] The fourth prerequisite for a common employer declaration is that it must serve a valid and sufficient labour relations purpose, interest or goal. As identified in *Comfort Cabs*, in Saskatchewan the primary reason declarations have been made is to prevent the erosion of bargaining rights through the transfer of work that would normally be performed by unionized employees to a related, non-union entity.[84] The Union's application identifies that this is the mischief that the requested declaration seeks to abate.[85] As such, if the first three prerequisites are able to be established by the Union, it is not plain and obvious that it will not be able to establish the fourth prerequisite.

[62] In the result, the Board is not persuaded that it is plain and obvious that the Union's application discloses no arguable case. Accordingly, it will not be summarily dismissed. That said, nothing in these reasons should be interpreted as discouraging Frontec or ASL from requesting particulars from the Union. The Union may be able to provide particulars that can clarify its allegations and the issues that are in dispute in its application.

[63] An appropriate order will accompany these reasons.

[64] This is a unanimous decision on behalf of the Board.

DATED at Regina, Saskatchewan, this **26th** day of **February, 2024.**

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson

[84] *Comfort Cabs*, para 63. This practice is often referred to as "double-breasting".
[85] Union's application in LRB File No. 105-23, paras 18-19.