CONSTRUCTION WORKERS UNION, CLAC LOCAL 151, Applicant v. LEDCOR INDUSTRIAL LIMITED, Respondent and SASKATCHEWAN BUILDING TRADES COUNCIL (Intervenor) and PROGRESSIVE CONTRACTORS ASSOCIATION OF CANADA (Intervenor)

LRB File No. 004-18; March 7, 2019
Chairperson, Susan C. Amrud, Q.C.; Members: Ken Ahl, John McCormick

For Construction Workers Union, CLAC Local 151:	Richard Steele and Susan Fader
For Ledcor Industrial Limited:	Susan Barber, Q.C. and Michael Phillips
For Saskatchewan Building Trades Council:	Greg Fingas
For Progressive Contractors Association of Canada:	Thomas Ross

Certification – Union applies for certification of all-employee, province-wide unit of employees in construction industry – Board dismisses application – Evidence indicated top down organizing – Current and future employees' right to union of their own choosing was not respected.

Build-up principle – On date of application, expected increase of employees was imminent, certain and significant – Complement of employees on date of application was insufficiently representative.

Build-up principle rarely applied in construction industry – Board held build-up principle should be applied sparingly and only in compelling circumstances – Facts in this case indicate that this is one of those rare cases where it should be applied.

Background:

[1] On January 3, 2018 Construction Workers Union, CLAC Local 151 ["CLAC"] filed an Application for Bargaining Rights for all employees of Ledcor Industrial Limited in Saskatchewan ["Ledcor"]. The application stated that there were approximately six employees in the proposed bargaining unit. Ledcor did not file a Reply. On January 10, 2018, a Direction for Vote was issued. The ballot box is currently sealed. Three intervention applications were filed, by Saskatchewan Building Trades Council ["SBTC"], Progressive Contractors Association of Canada ["PCAC"] and Brand Energy Solutions (Canada) Ltd.

[2] On March 26, 2018, the Board issued an Order determining that if the Board decided that the build-up principle should be considered as one of the factors in its determination of the Certification Application, the SBTC was granted leave to intervene in order to provide the Board with:

(a) Evidence as to the circumstances of the Chinook Power Station being constructed by SaskPower in Swift Current, Saskatchewan and the STG/ACC Mechanical & Water Treatment work for Phase 2 of that project relevant to the application of the build-up principle, as well as the distinction between craft and non-craft bargaining units in the construction industry;
(b) Argument as to the proper application of the build-up principle based upon the evidence before the Board; and
(c) Any further evidence or argument that the Board shall direct.

[3] On May 29, 2018, the Board issued an Order dismissing Brand Energy Solutions (Canada) Ltd.'s application and determining that if the Board decided the build-up principle should be considered as one of the factors in its determination of the Certification Application:

(a) The PCAC was permitted to file a written submission not exceeding 25 pages respecting the application of the build-up principle in the construction industry; and
(b) The right of counsel for PCAC to present oral argument to the panel of the Board hearing the Certification Application was reserved to that panel.

[4] At the beginning of the hearing of this matter on August 20, 2018, Ledcor asked that, rather than address the build-up principle, an immediate vote be held among the then current employees. CLAC supported this proposal. The Board denied this request.

Evidence submitted at hearing:

[5] Phil Polsom gave evidence on behalf of CLAC. He stated that CLAC has 39 construction certification orders in Saskatchewan; all of them are all-employee and province-wide bargaining units. He stated that when Ledcor asked CLAC to send them these initial six employees CLAC did not have exact information but expected there would be more employees hired.

[6] Mr. Polsom testified that the first six employees started work on January 1 or 2, 2018. One of these six then contacted CLAC's office to see how they could get CLAC to represent them on this project. The Certification Application was filed on January 3, 2018. The CLAC collective agreement was ratified on site by the six employees on January 3, 2018. He said that the collective agreement was ratified in the form of CLAC's standard agreement. The six employees had no input into the content of the collective agreement. Mr. Polsom indicated that they could have voted against it and CLAC would have had to go back to the bargaining table with Ledcor; however, he later admitted that, in his eight years of employment with CLAC, that has never happened. His evidence about when this agreement was negotiated was initially vague, but

in the end he admitted that it was negotiated before there were any employees working for Ledcor in Saskatchewan.

[7] Mr. Polsom testified that the vast majority of the employees on the Ledcor worksite are CLAC members. This is not surprising since the Collective Agreement between Ledcor and CLAC indicates that "The Employer will give preference to qualified union members" (Article 6.01 of Exhibit U-1). Other significant provisions of the Collective Agreement include:

- Employer voluntarily recognizes the Union as the sole bargaining agent of all employees in the bargaining unit.
- If the union is not able to refer qualified union members, the employer will be able to hire from outside the union membership.
- Neither the employer nor the union will compel employees to join the union, but the employer will deduct union dues from every employee's paycheque.
- Even though wage schedules are set out in a schedule to the agreement, the employer and union will jointly determine the wage schedule applicable to a project prior to its commencement.
- The agreement is effective January 3, 2018.

[8] Jeff Watt, President of Ledcor Contractors provided evidence at the hearing on behalf of Ledcor. The work undertaken by Ledcor was construction of a steam turbine generator and air cooled condenser at the Chinook Power Station being built near Swift Current, Saskatchewan. Ledcor filed a tender for the work in June 2017, based on CLAC wage rates. He indicated that was their normal practice. At one point he indicated that they started talking to CLAC about the project in late August 2017, but later admitted that it was actually June 2017. The project was awarded to Ledcor in October 2017. The project was initially scheduled to run from January 2018 to August 2018. Because of design delays, the projected completion day was extended to November 7, 2018. He indicated this meant that the timeframe for finishing the project was compressed so that even though Ledcor initially expected to hire 115 people at peak it actually hired 207 at peak. Exhibit E-1, Chinook Manpower Forecast, shows the actual number of employees from January to August 2018, and the forecast number of employees to the end of the project, with a peak of 207 on July 22, 2018. For much of this time, the majority of employees were pipefitters.

[9] He indicated that Ledcor had a history of hiring all but one of the original six employees for its projects, dating back to about 2007. The sixth worker was a brother of one of the other five. These six initial employees included three millwrights, two laborers and one equipment operator[1].

[1] This oral evidence appears to be inconsistent with Exhibit E-1, Chinook Manpower Forecast, which indicated that on January 7, 2018 the majority of employees were laborers.

[10] Mr. Watt stated that there was no negotiation of the collective agreement: his words were "the employees had no choice". This Collective Agreement is not site specific – it is meant to be the umbrella document for all Ledcor projects in Saskatchewan. The Collective Agreement was identical to the CLAC-Ledcor collective agreement in Alberta (with any changes required by Saskatchewan legislation, none of which were identified). In his view, the employees signed on knowing what the wage rates were; that's how the construction industry works. While the collective agreement was symbolically ratified by the employees, a number of important issues were covered in the site specific pre-job agreement that Ledcor negotiated with CLAC in June 2017. It set out the actual wage rates to be paid (3.5% less than required by the Collective Agreement) and other site specific conditions that would affect their earnings.

[11] His evidence was that Ledcor only had one project in Saskatchewan as of the date of the hearing.

[12] After hearing this evidence, the Board decided that it would consider the build-up principle as one of the factors in determining whether CLAC was proposing an appropriate bargaining unit.

[13] Dion Malakoff of the SBTC provided evidence respecting how the job board process works for the craft-based unions in its membership. The SBTC also filed a sample collective agreement, the Articles of Agreement that apply to Boilermakers[2]. It included the following significant provisions:

- Employer recognizes union as sole bargaining agency for employees performing specified work within the union's jurisdiction.
- Employer has the right to name hire 50% of the crew.
- Employer agrees to employ union members in the performance of all work within the scope of the agreement and to continue in its employ only employees who are members in good standing with the union.
- All employees shall be hired through the union offices.
- If the union cannot furnish the required number of workers, the employer has the right to procure workers from other available sources. They shall be required by the employer to apply to join the union.

These provisions were consistent with the Provincial Iron Workers' Agreement filed by CLAC[3].

Relevant statutory provisions:

> ***Interpretation of Part***
> *6-1(1) In this Part:*
>
> *(a) "bargaining unit" means:*

[2] Exhibit I-1.
[3] Exhibit U-2.

(i) a unit that is determined by the board as a unit appropriate for collective bargaining;

. . .

(p) "union" means a labour organization or association of employees that:

(i) has as one of its purposes collective bargaining; and

(ii) is not dominated by an employer;

Right to form and join a union and to be a member of a union
6-4(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.

Acquisition of bargaining rights
6-9(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.

(2) When applying pursuant to subsection (1), a union shall:

(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and

(b) file with the board evidence of each employee's support that meets the prescribed requirements.

Determination of bargaining unit
6-11(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:

(a) if the unit of employees is appropriate for collective bargaining; or

(b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.

. . .

(7) In making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:

(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and

(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:

(i) the geographical jurisdiction of the union making the application; and

(ii) whether the certification order should be confined to a particular project.

Representation vote
6-12(1) Before issuing a certification order on an application made in accordance with section 6-9 or amending an existing certification order on an application made in accordance with section 6-10, the board shall direct a vote of all employees eligible to

vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.

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

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

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

Purpose of Division
6-64(1) The purpose of this Division [Division 13: Construction Industry] is to permit collective bargaining to occur in the construction industry on the basis of either or both of the following:

(a) by trade on a province-wide basis;

(b) on a project basis.

(2) Nothing in this Division:

(a) precludes a union from seeking an order to be certified as a bargaining agent for a unit of employees consisting of:

(i) employees of an employer in more than one trade or craft; or

(ii) all employees of the employer; or

(b) limits the right to obtain an order to be certified as a bargaining agent to those unions that are referred to in a determination made by the minister pursuant to section 6-66.

(3) This Division does not apply to an employer and a union with respect to a certification order mentioned in subsection (2).

(4) If a unionized employer becomes subject to a certification order mentioned in subsection (2) with respect to its employees, the employer is no longer governed by this Division for the purposes of that bargaining unit.

(5) If there is a conflict between a provision of this Division and any other Division or any other Part of this Act as the conflict relates to collective bargaining in the construction industry, the provision of this Division prevails.

Argument on behalf of CLAC:

[14] CLAC's argument can be boiled down to the following:

- Its application in this matter satisfies all of the statutory preconditions;
- It is a union;
- The unit applied for (all-employee and province-wide) is an appropriate bargaining unit;

- A representation vote has been conducted and the majority of employees have expressed their desire to have CLAC be their bargaining agent[4];
- The build-up principle rarely applies in the construction industry;
- The build-up principle does not apply to this situation.

[15] CLAC urged the Board not to consider the build-up principle. The construction industry, CLAC argues, is a different world, with a work force that is unpredictable, fluctuating and not permanent. There is going to be a build-up; workers come and go on projects. How do they exercise their *Charter* right to freedom of association if the build-up principle applies? When a union is putting together a certification application in a construction setting, they cannot be expected to know what is the peak moment of employees at which to apply. The employer does not even know when that will be. That is why the build-up principle cannot apply.

[16] CLAC relied extensively on decisions of the Alberta Labour Relations Board ["ALRB"] to support its argument that the build-up principle should not be applied in the construction industry in Saskatchewan, starting with *IUOE, Local 955 v Devon Sand & Gravel Ltd.*, 1979 CarswellNat 1287, [1979] 3 Can. LRBR 326 ["*Devon Sand*"], which made the following comments:

> *7. . . . There is a clear distinction in the Board's mind between a rapidly expanding work force where the build-up principle may apply and a fluctuating work force where the principle would not apply.*
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> *8. The build-up principle is normally accepted by this Board in a situation where the work force is expanding relatively quickly - normally in a new business or expanding business situation. In such cases where it is applied, it is accepted as protecting the right of the majority, of a presumably continuing work force, in the future to a say in the determination of their representation system or body. Even in such instances, if build-up is slower than might be expected, or if the Board finds a satisfactory representative work force in place, the Board may not accept the build-up argument with respect to the processing of an application. Each case must be considered on its own merits.*
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> *9. Where there is a fluctuating work force – that is a work force which may increase and/or decrease for a variety of reasons at varying time intervals – the Board does not as a rule accept the build-up argument. In the construction industry where the nature of the work is such that a great deal of the industry has a widely fluctuating work force, these fluctuations are frequently the result of contracts gained or lost. Forecasting gained or lost contracts or contract start or stop times cannot be normally expected of employees or a union seeking to represent such employees.*

[4] This is a troubling argument, considering that the secret ballots are still sealed.

[17] *UMW, Local 1656 and Rocky Mountain Ski Inc. (Re)*, 1994 CarswellAlta 1243 is a case where the ALRB applied the build-up principle. In that case the certification application was filed when only the 16 employees who worked at the ski resort year round were present. The work force during ski season was around 200. The ALRB held that the decision of the Supreme Court of Canada in *Noranda Mines Ltd. v The Queen et al*[5] ["*Noranda Mines*"] placed their jurisdiction to apply the build-up principle beyond dispute. After referring in passing to their policy of not applying the build-up principle in the construction industry, because of the fluctuating nature of the work force, they stated:

> *Returning to the application presently before us, we are satisfied that the build-up principle should be applied in the case at hand. In a period of slightly over a month from the time of the application, the applied-for unit will change dramatically both in terms of size and character. It will increase more than tenfold, and will encompass numerous classifications not represented as of the time of application. (para 19)*

[18] In 2003, in *CJA Local 1325 v JV Driver Installations Ltd.*, 2003 CarswellAlta 1152, the ALRB stated:

> *. . . The Board has not applied the principle of "build up" in the construction industry, given the nature of the work and the fact that virtually every construction project involves a regular cycle of few workers building up to many workers and then a return to gradually less workers. Very often we see two employees in the initial unit support the application for certification for a union that will eventually represent hundreds of workers on the site. That is part of the unique considerations applicable to the construction industry. (para 48)*

[19] That approach was confirmed in the non-construction case of *CUPE, Local 46 v Medicine Hat (City)*, 2008 CarswellAlta 794 (ALRB):

> *… this Board may, outside the construction industry, refuse a certification application made at a time when a "substantial and representative group of employees" is not present, but a build-up to more representative levels is imminent. (para 28)*

[20] The ALRB made the following comments respecting the build-up principle in *UNITE HERE, Local 47 v SNC-Lavalin O&M Logistics Inc.*, 2012 CarswellAlta 883 ["*UNITE HERE*"] at paragraph 21:

> *… The "build up principle" is an exception to the statutory entitlement to collective representation and it should be applied sparingly and only in compelling circumstances. In I.A.M. & A.W., Local 99 v O.E.M. Remanufacturing Co., [2011] Alta L.R.B.R. 1 (Alta LRB), the Board discussed the circumstances that would warrant the application of the principle as follows:*
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> > *116 …The Board can dismiss or defer a certification application because of an imminent large build-up in the workforce, again using its power to consider "other relevant matters": Rocky Mountain Ski Ltd. and U.M.W.A., Local 1656, [1994] Alta. LRBR 475. The Board denies or defers efforts to acquire collective representation only reluctantly, however, and only where the build-*

[5] [1969] SCR 898, (1969) 7 DLR (3d) 1.

> *up is so dramatic in terms of overall numbers or the classifications in the workforce that it would call into question the essential representative character of a trade union that gains support among the current workforce. Had a build-up issue based on the projected Finning transfer been raised with the Board at the time of the CLAC certification application, we think that the overwhelming likelihood is that the Board would have dismissed the objection, on grounds that a representative workforce was already in place at OEM and the Board's powers to sort out a competition between bargaining agents in a successorship are adequate to deal with the transaction if and when it happens.* (emphasis in original)

They dismissed the employer's objections to the union's certification application, stating that in all the cases relied on by the employer there were fewer than 20 employees and a number of primary classifications that were not occupied at the time of application; in *UNITE HERE*, there were approximately 100 employees occupying all of the anticipated classifications, and the build-up was expected to take another year.

[21] CLAC also referred the Board to two decisions of the Ontario Labour Relations Board. *LIUNA, Ontario Provincial District Council v Govan Brown & Associates Ltd.*, 2018 CarswellOnt 5177 (OLRB) ["*Govan Brown*"] took the following approach, based on their legislation:

> *11 The Board must obviously determine the percentage of employees in the bargaining unit who are members of the trade union as of the date the application is filed. However, the Act does not further elaborate on how the Board is to make that determination or define who exactly is an employee in the bargaining unit – other than section 128(2) which provides:*
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> > *(2) In determining whether a trade union to which subsection (1) applies has met the requirements of subsection 8 (2),* ***the Board need not have regard to any increase in the number of employees in the bargaining unit after the application was made.***
>
> *which clearly indicates that, in the construction industry, the Board need not consider any employees hired after the date of the application. That is the reason the "build up principle" (i.e., that a representation vote to determine a certification application be deferred when there will be a stipulated greater number of employees working by a stipulated future date) has never really been applied by the Board in the construction industry. Rather, the Board has developed the criteria to perform this task of ascertaining the necessary level of union support jurisprudentially – by the evolution and development through case law of the "bright line" or the date of application test in the construction industry – who is actually at work in the bargaining unit on the date of application. This has been the test the Board has utilized for more than half a century.* (emphasis in original)

This approach must, however, be interpreted as explaining the background to their policy of allowing to vote only those individuals who are both employed and at work on the date the certification application is filed.

[22] *Looby Construction Ltd. v LIUNA, Ontario Provincial District Council*, 2017 CarswellOnt 592 (OLRB) noted at paragraph 42 that, although subsection 128(2) of their Act provided the board with discretion to consider it, the board has never applied the build-up principle to the construction industry since that subsection was enacted.

[23] CLAC also referred to two 1978 decisions of the Canada Labour Relations Board that considered the build-up principle.

[24] In *IUOE, Local 870 v Uranerz Exploration & Mining Ltd.*, 1978 CarswellNat 661 (Can LRB) ["*Uranerz Exploration*"] the Board noted that the criteria applied by the Ontario Labour Relations Board were: "(1) a lack of a substantial and representative segment of the workforce to be employed – usually less than fifty percent . . . ; (2) a real likelihood of a build-up within a reasonable time; and (3) the build-up must not depend on factors beyond the employer's control"[6]. They decided not to apply the build-up principle:

> *"We have serious concerns about the importation of the build-up principle into the operation of the [Canada Labour] Code . . . . it certainly has little force in this case where the build-up is not planned until 1984[7].*

[25] The Canada Labour Relations Board confirmed this approach in *BACM Construction Co. (Re)*, 1978 CarswellNat 1173, where they stated "the Board perceives no useful role for the application of the build-up principle in the construction industry context"[8].

[26] *Sky-Hi Scaffolding Ltd. v British Columbia Regional Council of Carpenters*, 2010 CarswellBC 482 (BC LRB) ["BC LRB"] ["*Sky-Hi Scaffolding*"] considered the application of the build-up principle in British Columbia:

> *9 If, when a union applies to be certified to represent a unit of employees, a buildup of the workforce is anticipated, the Board may find the unit applied for to be inappropriate: P. Sun's Enterprises (Vancouver) Ltd. v CAW-Canada, Local 4234 [2000 CarswellBC 2924 (BC LRB)], BCLRB No. B432/2000 ("P. Sun's"). The policy that guides the Board in making such determinations was succinctly described in Standard Pole Ltd. v CSWU, Local 1611, BCLRB No. B94/2008, 155 C.L.R.B.R. (2d) 102 (BC LRB) ("Standard Pole"):*
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> > *The [build-up] doctrine is designed to avoid the disenfranchisement of employees. It is based on the premise that it is undemocratic to permit the smaller group of current employees to determine the representational rights of the future larger group: "To certify a unit prematurely may exclude employees who are hired later from having a say on the representational choice" ([P. Sun's] para. 108).*

[6] At para 20.
[7] At para 21.
[8] At page 6.

> *The flip side of these important principles is that the application of the doctrine may lead to a delay of collective bargaining rights to an existing workforce or deny the existing employees the "opportunity to obtain collective representation and deprive them of the benefits of collective bargaining" ([P. Sun's] para. 108).*
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> *Because of this, the Board attempts to balance the rights of present and future employees to decide upon collective representation. To do this, the Board looks at a number of factors to determine whether to delay the exercise of collective bargaining rights by the present employees in order that the rights of future employees be preserved. These are (para. 110):*
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> 1) *the nature of the employer's organization;*
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> 2) *the nature and degree of build-up (i.e., the expansion of the workforce must be "overwhelming" or "significant"): Noranda Mines Ltd. and I.U.O.E., Local 115, (1982) 2 Can. LRBR 475, (1982) B.C.L.R.B.D. No. 26 (BCLRB No. 26/82) ["Noranda Mines"];*
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> 3) *its imminence and certainty (i.e., there must be a "firm plan" for expansion of future operations. This plan must not be speculative in nature, nor should they be dependent on market forces outside the control of the employer: Dynamar Energy Ltd. and Tunnel & Rock Workers' Union, Local 168, (1984) B.C.L.R.B.D. No. 2 (BCLRB No. 429/83) (reconsideration dismissed (1984) B.C.L.R.B.D. No. 130 (BCLRB No. 128/84))); and*
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> 4) *the representativeness of the existing employee complement. [P. Sun's, para. 110]*
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> *These factors guide the Board in balancing the competing interests, but they are to be applied in a flexible manner. Decisions are made on a case-by-case basis: Wastech Services Ltd. and I.U.O.E., Local 115, (1988) B.C.L.R.B.D. No. 308 (IRC No. 308/88) (reconsideration of IRC Letter Decision dated October 24, 1988); and Weyerhaeuser Canada Ltd. and P.P.W.C., Local 5, (1989) B.C.L.R.B.D. No. 149 (IRC No. C150/89) ["Weyerhaeuser"], at p. 4 (reconsideration of IRC No. C112/89).*
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> *The Board examines staffing estimates and projections for their consistency with the probabilities surrounding existing conditions to see if the estimates are accurate or inflated: Great Canadian Casino Co. and CAW-Canada, Local 3000, (1997) B.C.L.R.B.D. No. 181 (BCLRB No. B181/97). (paras. 41-45)*[9]

[27] When considering the nature of the employer's organization in *Sky-Hi Scaffolding*, the BC LRB considered whether the work force was low due to its normal fluctuation.

[28] In looking at the nature and degree of build-up, they noted that *Noranda* had adopted a 50% rule of thumb, in other words, was the work force before the build-up more than one-half of what it will be after the build-up occurs. They also noted that in *Kingfisher Sales Inc.*, BCLRB No. 73/86, they did not apply the build-up principle in part because the build-up would not be permanent.

[9] At para 9.

[29] With respect to imminence and certainty of the build-up the BC LRB looked at two factors: will the build-up occur within a relatively short period of time and is the build-up firmly scheduled to take place.

[30] In considering the representativeness of the existing employee complement, the BC LRB noted that they will consider whether the current employee complement is representative quantitatively and qualitatively of the ultimate work force:

> *. . . Normally the Board will not entertain an application for certification where the employees present number less than half of the full anticipated complement and most of the classifications are not represented. However, that 50% "rule of thumb" is not applied as a rigid formula, but from the perspective that this "rule of thumb" is a guidepost, not an invariable rule. It is one yardstick to measure the representative character of the existing work force, but it is not solely an arithmetic exercise. It is a factor that weighs in the balance, but the force of which depends on the relative weight of other factors.*
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> *The combined effect of other factors, such as the relative impermanence and the speculative nature of the increase, may prevail over the 50% rule of thumb: Sears, supra, at para. 35. In some cases, the numbers present figure more prominently when the build-up is both certain and very near in the future: eg. Sears, supra, where the build-up was more imminent and had actually already occurred by the time of the hearing. Where the build-up is more distant, that prospect raises concerns about whether that remote event should deny employees the opportunity to select a bargaining representative when the classifications are representative and the numbers of employee border on 50% of the ultimate complement. (paras. 133-4, 136-7)*[10]

[31] The BC LRB's decision not to apply the build-up principle in *Sky-Hi Scaffolding* was based, to a significant degree, on the fact that the application was, in part, a raid, and that the projected build-up was not going to occur before the end of the raiding period.

[32] CLAC referred to the comment in *Sky-Hi Scaffolding* that if planned additional work is based on market forces outside of the employer's control or is speculative in nature, it does not satisfy the test for imminence and certainty[11]. CLAC suggested those comments were applicable here.

[33] CLAC also referred the Board to Saskatchewan jurisprudence on this issue. In *KACR v IUOE, Local 870*, 1983 CarswellSask 1011 (SK LRB) ["*KACR*"], the build-up principle was not applied. At that time there was a statutory prohibition[12], which has since been repealed, against the employer raising the principle. An

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[10] At para 20, quoting from *P. Sun's Enterprises (Vancouver) Ltd. v CAW-Canada, Local 4234,* 2000 CarswellBC 2924 (BC LRB), BCLRB No. B432/2000.

[11] At para 9.

[12] *The Trade Union Act*, "5 The Board may make orders: (a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit, but no unit shall be found not to be an appropriate unit by reason only that the employer of employees in the unit claims that his complement of employees in the unit is at less than full strength;".

employees' association with a competing application for certification was allowed to appear at the hearing as an interested party. The Board held:

> *32 The Board has grave doubts that the Employees Association ought to be permitted to advance that argument at least until its status as a trade union has been determined. However, it is not necessary to decide the point at this time.*
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> *33 It is only rarely that the buildup principle has been applied in the construction industry by any jurisdiction in Canada even without the kind of statutory prohibition contained in Section 5(a) of the Trade Union Act. The reason for that is clearly because of the fluctuating nature of the work force as opposed to a rapidly expanding but relatively permanent work force in an industrial setting.*

[34] CLAC also cited *CEP v JVD Mill Services*, 2011 CanLII 2589 (SK LRB) ["*JVD Mill Services*"] as support for its argument that the Saskatchewan Board has rejected the application of the build-up principle in the construction industry and has rejected the comments of the BC LRB on that issue in *Cicuto & Sons Contractors Ltd.*, [1988] BCLRBD No. 271 ["*Cicuto*"].

[35] *Construction Workers Union, Local 151 v Saskatchewan (Labour Relations Board) and Technical Workforce Inc.*, 2017 SKQB 197, 2017 CarswellSask 351 was a decision of the Court of Queen's Bench on a judicial review application challenging the Board's decision in *Construction Workers Union (CLAC), Local 151 v Technical Workforce Inc.*, 2016 CarswellSask 467 ["*Technical Workforce*"]. The Board dismissed the certification application as premature, on the basis of the build-up principle. The Court overturned the Board's decision, holding that it was based on findings made respecting differences between craft and non-craft unions, without any evidence.

[36] CLAC also cited *UFCW, Local 1400 v K-Bro Linen Systems Inc.,* 2015 CanLII 43773 (SK LRB) ["*K-Bro Linen*"] as establishing that the build-up principle should be applied sparingly and only in compelling circumstances, and that the Board must balance the rights of future employees to choose their bargaining agent with the benefits of a work place with industrial stability.

[37] CLAC also placed significant emphasis on clause 6-11(7)(a) of the Act. It expressed concern that application of the build-up principle to the construction industry would create a material competitive advantage for the craft unions.

Argument on behalf of Ledcor:

[38] Ledcor's arguments were consistent with CLAC's arguments. Its position was that the application of the build-up principle has not been embraced in Saskatchewan. It referred to *KACR* as finding that its application is not appropriate in a workplace with a fluctuating work force. It relied on *JVD Mill Services* as finding the build-up principle of very limited relevance in the construction industry because the work force

is inherently fluctuating, transient, of short duration and project specific. It noted that *K-Bro Linen* also mentioned that it is seldom applied in the construction industry.

[39] It reminded the Board that, because of clause 6-11(7)(a) of the Act, any finding it makes must be based on evidence; relying on a presumption that a craft unit is more suitable would be contrary to the Act. It would be inconsistent with clause 6-11(7)(a) if employees were free to choose a bargaining agent on a craft basis in circumstances where they were not free to choose an all-employee unit.

[40] Ledcor argued that applying the build-up principle to the construction industry would stymie union representation. It opposes the application of the build-up principle to this bargaining unit and to the construction industry generally. The root of the build-up principle, as described in *Uranerz Exploration*, was to protect rights of future employees that were not adequately protected in the legislation at that time. In its view, adequate protections exist.

[41] Ledcor referred to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Brown Industries (1976) Ltd.*, [1995] SLRBD No 19, which suggested caution should be exercised in opening the door to the use of the build-up principle, as it could allow an employer to use it to defeat a certification application on the grounds that a considerable influx of employees is anticipated at some time in the future.[13]

[42] It referred to the following statement about the build-up principle in Canadian Labour Law by George W. Adams[14] ["Adams"]:

> *it should be applied sparingly and only in compelling circumstances. A board denies or defers collective representation reluctantly and only where the buildup is "so dramatic in terms of numbers or classifications" that the "essential representative character" of the trade union is brought into question. (para 7.1870)*

[43] Ledcor reviewed the decision in *Noranda Mines* and noted that the Supreme Court emphasized the significance of the nature of the employer's business to the decision whether to apply the build-up principle.

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[13] At page 80. Note, however, that immediately following this sentence the Board clarified that the build-up principle had no application in that case, and the real issue was the appropriate geographic scope of the bargaining unit.

[14] George W. Adams, Canadian Labour Law, 2nd ed. Thomson Reuters Canada Limited (loose-leaf updated December 2018, release 70).

[44] Ledcor submitted that there is no aspect of this project or its work force that distinguishes this case from the policy considerations that predominate in the construction industry.

Argument on behalf of Saskatchewan Building Trades Council:

[45] The SBTC is of the view that the build-up principle should be applied generally to certification applications for all-employee units in the construction industry and, in particular, in this case.

[46] The SBTC argues that *KACR* was not a blanket prohibition of the build-up principle, particularly since it was decided at a time when *The Trade Union Act* expressly prohibited the consideration of the build-up principle when raised by an employer. It argued that *KACR* should be distinguished by the Board from the current case on that basis.

[47] *Devon Sand*, they say, is also distinguishable because it was decided based on a factual assessment. In that case the ALRB held that the number of employees at the time of the application was sufficiently representative.

[48] *JVD Mill Services*, it says, set a precedent by deciding all-employee units were available in the construction industry. The Board also said, however, that it would be guided by British Columbia case law, for example, the principles established in *Cicuto*. *Cicuto* held that the build-up principle applied to all-employee units in construction:

> *. . . We agree that the build-up principle ought not to be applied in the construction setting relative to craft unit structures. However, in the context of the industrial model "all employee" bargaining unit, the reasons for declining the application of the principle appear to evaporate. In particular, the application of the build-up principle would not make the task of organizing all employee units more difficult, as it does for craft unions, and it does not necessarily contribute to conflict between unions which make competing claims to jurisdiction over work tasks. Indeed, there is at least one compelling reason why the build-up principle should be applied in the case of all employee units: to ensure that the composition of the workforce at the time of the application is reasonably representative of the workforce that will be employed at later dates. This has not been an important consideration in assessing applications for the certification of craft units. Craft unions have employed processes which ensure that the democratic rights of workers are preserved and protected. We refer to the craft unions' use of hiring halls and ratification votes. (para 135)*

[49] The BC LRB, it says, has subsequently affirmed the application of the build-up principle on this basis, recognizing that a craft union is inherently representative of all additional employees. It referred to three subsequent cases that affirmed *Cicuto*, including *Saipem Canada Inc. and Construction and Allied Workers' Union (CLAC, Local 68), Re,* 2015 CanLII 50401 (BC LRB), which granted two unions standing

in an application for certification to raise an objection to the appropriateness of the proposed bargaining unit, on the basis of the build-up principle:

> *In all the circumstances, I am satisfied the Applicants have made out a prima facie case of a potential problem with CLAC's application for certification that will not otherwise come to the attention of the Board, and they should therefore be granted standing to raise a build-up principle objection to the appropriateness of the proposed unit. To the extent CLAC submits the Board should abandon the build-up principle because it is not consistent with Code principles, I am satisfied this issue has been decided by the Board in Noranda. The build-up principle is consistent with Code principles. However, it is a principle of limited application and does not, as CLAC points out, prevent the gradual growth of a small bargaining unit into a much larger one over time. Nor does it apply in circumstances where a significant build-up of the workforce is neither certain nor imminent. These may present formidable issues for the Applicants; however, I am persuaded they should be given an opportunity to make their case.*[15] *(para 27)*

[50] The SBTC also referred the Board to the following comments in *U.A., Local 488 v Firestone Energy Corp.*, 2009 CarswellAlta 760 (ALRB) as support for its argument that the build-up principle can be used to protect against employer abuses:

> *220 The second feature to note is the ease with which trade unions can acquire bargaining rights in the construction industry when the employer does not oppose it. The prevalence of voluntary recognition in that industry is only part of the picture. A union can also acquire certification through support in an unrepresentatively small start-up portion of the workforce because the "build-up principle" in other industries does not apply in construction: see Rocky Mountain Ski Inc., [1994] Alta. L.R.B.R. 475; Devon Sand & Gravel, (Alta. L.R.B. No. 79-054, Aug 29, 1979, Bloomer, Vice-Chair). The non-application of the build-up principle in construction proceeds mostly from the fear that construction workforces change so greatly and so quickly that the build-up principle would stymie union representation in that industry. When many years ago the Board decided that the build-up principle should not apply in construction, there was little reason to fear that this could in fact inhibit employees' freedom to choose their bargaining agent. The building trades unions were really the "only game in town" at that time. Contractors generally either looked unfavourably upon union representation, or viewed a building trades certification as the price to be paid for access to work tendered by owners on a union shop basis. Employees decided to work union or non-union and took their jobs accordingly. Building trades unions generally observed their respective craft lines and did not compete with one another to represent employees.*
>
> *221 With entry into the construction industry of alternative multi-trade unions like CLAC, however, union representation there became a competitive activity. Certification by one union became a tool or a potential tool to block certification by others. Employers, either by collusion or by studied indifference to organizing by alternative unions, could pursue*

[15] In *Saipem Canada Inc. and Construction and Allied Workers' Union (CLAC, Local 68)*, 2015 CanLII 67586 (BC LRB) the BC LRB, on reconsideration, cancelled the standing granted in the previous decision, instead ordering an investigation by a board officer. However, it reaffirmed the applicability of the build-up principle: "To start with, we do not accept either CLAC's or the Labourers' submissions in respect to the Board's law and policy on the build-up principle. We do not agree with CLAC's submission that the build-up principle should be abandoned. Nor, however, do we agree with the Labourers' submission that the certain and imminent requirement in the build-up test should be abandoned. In respect to CLAC's submission, the build-up principle protects against a small group of initial employees determining the unionization of the imminently much larger group of workers. In respect to the Labourers' submission, having some clarity and firmness in the test, in the form of the certain and imminent requirement, protects the legislatively intended expeditious nature of the Code's certification processes." (para 12)

> *whatever competitive advantage they considered to exist from such a bargaining relationship. The certification application for a two- or three-person bargaining unit, met with silence or even apparent enthusiasm by the employer, has become absolutely commonplace in the construction industry. And while the unrepresentative constituency in many construction representation votes has long been a cause for concern for the Board, the evolution of the two- or three-employee certification application into a tool capable of inoculating employers against organizing by unions they do not wish to deal with has greatly elevated the level of that concern.*
>
> *…*
>
> *227 …. But almost uniquely to the construction industry, the restraining force of employee consent is more apparent than real. The lack of any "build-up" principle in construction; the wild fluctuations in workforces; the short duration of the average employment relationship; the consequent short time horizons of employees asked to make representational choices; the unusual ability of employers in the construction industry to influence the voting constituency through their management rights to schedule and reassign employee functions; and the ability of the incumbent union to, in co-operation with the employer, adopt vote procedures that maximize the chance of a "yes" vote, all combine to make employee consent a much less reliable defence against abuse than it is in other industries.*

[51] These comments were made in the context of a case in which the employer and incumbent union purported to eliminate the open period in a collective agreement. The decision that they could not was upheld on reconsideration[16].

[52] *Metrico Enterprise Co. and IUOE, Local 901, Re,* 1977 CarswellMan 339 (MLB) was cited as an example of the Manitoba Labour Board applying the build-up principle. After stating that "we normally have no regard to the "build-up" principle[17], they ordered a new vote, stating:

> *65 The Board is of the opinion that because of the seasonal influx of employees between the date of the application and the date of the hearing the numbers have increased to such an extent that it would not be in the spirit of the legislation if we permitted a slight majority of forty employees to dictate the wishes of some One Hundred and Thirty-six employees. One could hardly describe that as the unions being the freely designated representative of the employees in the unit as contemplated by the preamble to the Act.*

[53] The SBTC distinguished *Govan Brown* on the basis that Ontario has a statutory prohibition against consideration of the build-up principle. They have significantly different legislation, as reflected in paragraph 11 of that decision[18].

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[16] *Firestone Energy Corporation v Construction Workers Union, Local No. 63*, 2011 CanLII 62466 (ALRB).
[17] At para 52.
[18] Also relied on by CLAC. See para 21, above.

[54] Turning to this case, they argue that the build-up was foreseeable and imminent. The Application for Certification was based on six employees; the expected maximum work force was 115, while the actual maximum work force turned out to be 207. According to *K-Bro Linen*, what is relevant is what is known or anticipated at the date of the application - in this case, that the six employees on site would grow to 115. What was also known at the date of the application was that the contract had been awarded to Ledcor.

[55] The SBTC argue that clause 6-11(7)(a) of the Act does not apply here. The Board does not need to make a decision based on a presumption, but can make findings based on the evidence before it respecting the appropriateness of the proposed bargaining unit and the need to safeguard the employees' freedom of association.

[56] The SBTC also referenced the classifications of the workers. At the time of the application, the employees on site were the people setting up the site, not those who would do the actual work. Accordingly, it was highly non-representative of the pending work force. This assertion is borne out by Exhibit E-1, Chinook Manpower Forecast.

[57] In *K-Bro Linen*, they argue, the Board has decided as a matter of policy to apply the build-up principle in all-employee bargaining units where the complement of employees at the time of a certification application is not representative of the ultimate work force. There is no reason for the Board to have a different practice in construction, if the application is for an all-employee certification. They argue that it would not apply to an application for a craft bargaining unit.

[58] The SBTC urged the Board to rely on its decision in *Technical Workforce*, even though it was overturned by the Court of Queen's Bench, since it was overturned based on a lack of evidence and not because the principles applied were wrong.

Argument on behalf of Progressive Contractors Association of Canada:

[59] PCAC's position is that it is settled law across the country that the build-up principle does not apply to the construction industry. It states that the build-up principle is only designed to address substantial and imminent change to a work force, such that the group at the time of the certification application is unrepresentative of what it soon will be.

[60] It referred the Board to *Technical Workforce*, *KACR*, *K-Bro Linen* and *JVD Mill Services* for support of its position that there is a practice of excluding the construction industry from the build-up principle. It urged the Board not to depart from its recent decisions in *JVD Mill Services* and *Construction Workers*

Union, CLAC, Local 151 v Tercon Industrial Works Ltd., 2012 CarswellSask 969 (SK LRB) ["*Tercon*"][19]. Like CLAC it urged the Board to interpret *JVD Mill Services* as a rejection of the principles established in *Cicuto*. In its view, application of the build-up principle in the construction industry would create uncertainty, instability, increased litigation and delay to certification applications. It also objected to the application of the build-up principle because it favors the voice of future employees over the voice of current employees.

[61] It suggested that CLAC did not know how, when or whether the number of employees would grow when they filed the certification application and that delays in engineering and delivery of materials led to an increase in the required work force. The facts of this case do not warrant any different outcome than in the Court of Queen's Bench decision that overturned the Board decision in *Technical Workforce*.

[62] PCAC cautioned the Board that, in its view, if the build-up principle is found to apply only to all-employee units in the construction industry, that would be a contravention of clause 6-11(7)(a) of the Act. Applying the build-up principle to all-employee bargaining units, but not to craft units, would make it harder to form all-employee units compared to craft units and thereby prefer craft units.

[63] As did CLAC, PCAC relied on a number of Ontario and Alberta cases. It argued that these cases establish the principle that there is a distinction between a rapidly expanding work force and a fluctuating work force. It referred to *Devon Sand* for support of its argument that with rare exceptions, build-up is not an issue in the construction industry in Alberta. Its view is that this case is nothing like the situation described in *Firestone Energy*, which should therefore be ignored.

[64] The Ontario Board, it says, has stated that exempting the construction industry from the build-up principle is necessary to ensure labour relations are functional within that industry. PCAC referred the Board to the following comments in *IBEW, Local 586 v Megatech Electrical Ltd.*, 1999 CarswellOnt 2883 (OLRB):

> *… in a fluctuating work setting, there must be clear and simple rules, or the process will inevitably sink under layers of litigation. Process will defeat purpose, and the right to organize will become illusory. The context demands a "bright line test"…. (para 25).*[20]

[65] PCAC also referred to a New Brunswick decision that indicates that the Labour Board there follows the Ontario practice of assessing bargaining unit numbers based on the employees at work on the day of the certification application. It also referred to *Uranerz Exploration* as reflecting the position of the Canada Labour Board that they will not apply the build-up principle to the construction industry.

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[19] *Tercon* is another case that did not consider the build-up principle, but found that an all-employee, province-wide unit was an appropriate unit for the purposes of bargaining collectively in the construction industry in Saskatchewan.

[20] This comment, however, had nothing to do with the build-up principle. This comment was offered as an explanation of the practice followed in Ontario (that is not followed in Saskatchewan) that, in the construction industry, employees are only entitled to vote on a certification application if they are both employed and at work on the date of the certification application.

[66] PCAC urged the Board not to rely on *Cicuto*, stating that the application of the build-up principle has already been decided here, in 2010, in *JVD Mill Services*. Saskatchewan legislation is different than that in British Columbia. Clause 6-11(7)(a) of the Act has no equivalent in British Columbia. All-employee bargaining units were not common in 1988, leading to the BC LRB adopting the build-up principle, as a precaution. Even in *Cicuto*, they noted, the BC LRB stated, at paragraph 137, that it may be necessary to modify the build-up principle to fit the construction setting.

[67] PCAC quoted the bolded comments in the passage set out below from *Weyerhaeuser Canada Ltd. (Secondary Fiber Division) (Re)*, [1989] BCLRBD No. 149 ["*Weyerhaeuser*"] (a 1989 decision of the BC LRB that involved employees of a paper recycling plant) as support for its position:

> *11 The jurisdiction of the Council to dismiss an application for certification on the basis of being premature is settled law. The application of the practice is, by necessity, not as clear-cut. It is essential that the Council maintain the flexibility to meet the various situations which may arise in such cases as Cheni Gold Mines Inc. and IUOE et al, C284/88. When considering the application of this principle, the Council will be cognizant of the competing interests at stake; the rights of the existing employees to decide the question of union representation and the rights and potential interests of the future employees to have a say in the choice and exercise of representational rights (see Kingfisher Sales Inc. and British Columbia Provincial Council, United Fishermen and Allied Workers Union, BCLRB 73/86). Panels must consider very carefully a build-up case advanced by an employer to dismiss an application for certification. It would be stretching one's imagination to say that an employer who opposed an application for certification on the basis of the build-up principle is doing so to protect the rights or interests of future employees. The employer would, no doubt, rather operate absent the constraints of union representation.*
>
> *12 Although decisions will be made on a case-by-case basis, parties involved in such applications should be aware of the parameters within which the Council may find that an application for certification is premature. That awareness is particularly important to the employees who have signed cards with a Union. Once an application for certification is made to the Council they are protected by the freeze provisions in Section 51 of the Act. If the application is dismissed on the ground that it is premature, Section 51 has no further application. Furthermore, predictability will assist trade unions in making a more informed decision as to whether to mount an organizing drive early in a company's life or to wait until it is certain that sufficient employees have been hired.*
>
> *13 When an employer raises the build-up principle as a defense to an application for certification, the Council will consider the factors set out in Kingfisher Sales, (supra):*
>
> *1. The nature of the employer's operation.*
> *2. The nature and degree of the build-up.*
> *3. The imminence and certainty of the build-up.*
> *4. Whether the existing employees are representative of the eventual complement.*
>
> *14* ***With regard to the "nature of the employer's business"; a successful application on the basis of it being premature will be rare in those cases where the work force is low due to the normal fluctuation of an employer's work force****. (See Filkon Food Services Limited, [1981] OLRB Rep. dec. 1771). When an employer argues that its work force is not representative of its true complement due to a fluctuation, seasonal or otherwise, the employer will be expected to prove which laid off persons should be considered as employees for the purposes of the application for certification. If successful, the application may be denied on the basis of lack of support rather than being premature.*

> ***Further, the Council will not apply the build-up principle in the construction industry because of the rapidly changing composition of the work force as opposed to the expanding but relatively permanent work force in an industrial setting****. There is, however, one important exception to that policy. That exception is set out in the decision of the Council Cicuto and Sons Contractor et al, C271/88. In that case, the Council held that the build-up principle would be considered in the construction industry where the application sought is an all employee bargaining unit. One of the reasons stated by that panel was to ensure that the composition of the work force at the time of the application is reasonably representative of the work force that will be employed at a later date.*
>
> *15 With respect to the second factor identified in Kingfisher, (supra), the nature and degree of the build-up, it is clear that the expansion of the work force must be significant. Significant not only on a quantative basis with respect to its impact on the majority of employees, but the build-up must also be permanent in nature: see Atco Industries Ltd., BCLRB No. 306/84.*
>
> *16 The third factor emphasized in Kingfisher, (supra), is the imminence and certainty of the build-up. This contemplates a "firm plan" regarding the expansion of future operations. The plan must not be speculative in nature nor dependent on market forces or other factors outside the control of the employer.*
>
> *17 The fourth and final factor, whether the existing employees are representative of the eventual component, lies at the very heart of the build-up principle. As stated in Noranda, (supra), the general rule of thumb is that if the present complement of employees is at least 50% of the expected work force and it represents all or most of the classifications or departments which will be present once the expansion is complete, certification will be granted barring some other valid ground for refusal. While the 50% rule is not absolute, it is the most critical factor. A party seeking to have the Council dismiss an application for certification as premature when the trade union has at least 50% of the proposed complement where all or most of the classifications or departments are represented within the existing group, will have to make a particularly compelling case on the first three factors listed above.*

[68] Finally, PCAC noted in its Brief of Law that CLAC has the required support to be granted certification. As noted above, this is speculation, unless Ledcor or CLAC have required the six employees to breach the confidentiality of their vote provided by the Act[21].

Analysis and Decision

[69] The Board has reviewed and considered all of the Briefs of Law and numerous authorities referred to us and we thank counsel for providing them. While not all of the authorities are referred to, all were reviewed and considered.

[70] The application before the Board is an application for certification. Subsection 6-9(1) of the Act provides that a union may apply to the Board, at any time, to be certified as bargaining agent for a unit of

[21] Jeff Watt, President of Ledcor Contractors, and witness for Ledcor in this matter, is the Chairperson of PCAC.

employees appropriate for collective bargaining. Subsection 6-11(1) provides that, on receipt of that application, the Board shall determine whether the unit applied for is appropriate for collective bargaining. The Board has complete discretion to determine what factors to take into account in making this decision. Subsections 6-12(1) and 6-13(1) require that a vote be taken of all employees eligible to vote and that a majority of the votes cast favour certification before a certification order can be issued.

[71] Section 6-9 of the Act states that an application for certification is to be made by a union. The definition of union in clause 6-1(1)(p) of the Act has two requirements: the labour organization or association of employees must have as one of its purposes collective bargaining; it must not be dominated by an employer. The issue of whether CLAC was dominated by Ledcor in this case was not argued by the SBTC. Therefore, the Board cannot make any finding about CLAC in this regard. The troubling fact situation in this case might have provided them with that opportunity.

[72] The first issue, then, is whether the proposed unit is appropriate for collective bargaining in this case. The Board agrees with CLAC that all-employee, province-wide units have previously been found by this Board to be appropriate bargaining units on certification applications in the construction industry in Saskatchewan. That does not close the door to the Board finding that it is not appropriate here. Each case must be decided on its own facts.

[73] The second issue is whether a majority of eligible employees voted in favour of certification. If the number of employees in the bargaining unit are the six initial employees, the answer to this question can be discovered by unsealing the ballot box and counting the ballots. But even if, as CLAC and PCAC suggest, the sealed ballots, if unsealed and counted, would reflect that CLAC represents the majority of the original six employees, that does not answer the question before the Board, that is, whether it represents the majority of employees in the bargaining unit. If the application of the build-up principle leads to the conclusion that it is premature for the Board to determine support for CLAC as the bargaining agent on the basis of the ballots cast by those six employees, then the votes of those original six are not determinative.

[74] To assist the Board in its determination of these issues, many of the parties referred the Board to the pre-eminent textbook, Canadian Labour Law by George W. Adams. It cautions against the use of the build-up principle, especially in the construction industry:

> *The buildup principle is an exception to the statutory entitlement to collective representation and it should be applied sparingly and only in compelling circumstances. A board denies or defers collective representation reluctantly and only where the buildup is "so dramatic in terms of numbers or classifications" that the "essential representative character" of the trade union is brought into question[22].*
>
> *Across Canada the build-up principle has seldom been applied in the construction industry. This principle is an exception to the statutory entitlement to collective representation and,*

[22] At paragraph 7.1610.

> *thus, has been applied sparingly and only in compelling circumstances. Because a board denies or defers collective representation reluctantly, the Alberta board has held that it only be applied where the build-up is "so dramatic in terms of numbers or classifications" that the "essential representative character" of the trade union is brought into question[23].*
>
> *The "build-up" principle is rarely applicable in the construction industry. The reason for this is that a great deal of the industry has a widely fluctuating work force. These fluctuations are frequently the result of contracts gained or lost and it cannot reasonably be expected of employees or a union seeking to represent such employees to forecast gained or lost contracts or contract expiration or commencement times[24].*

[75] The case law provided by the parties indicates that the Ontario and Canada Labour Boards do not apply the build-up principle in the construction industry. One example of the Manitoba Board applying it was cited; one example of the New Brunswick Board not applying it was cited.

[76] The general practice in Alberta is to not apply the build-up principle in the construction industry. However, both the SBTC and CLAC referred the Board to the ALRB decision in *Firestone Energy*, which mused about the advisability of this practice[25].

[77] CLAC discounted the comments in *Firestone Energy*, saying they have since been rejected in *United Brotherhood of Carpenters and Joiners of America, Local Union No. 1325 v Keenan, Hopkins, Suder & Stowell Contractors Inc.*, 2010 CanLII 37280 (ALRB), ["*Keenan Hopkins*"] at para 20. With respect, the Board does not interpret *Keenan Hopkins* as rejecting the comments in *Firestone Energy*. The decision in *Keenan Hopkins* was a very short (21 paragraphs) letter decision that the ALRB decided was not the appropriate case in which to carry out the re-examination that *Firestone Energy* suggested is necessary:

> *[20] With respect to the suggestion by Canada Co. the Board should rely upon this case as the reason to re-examine its practice about not applying the build-up principle to the construction industry, we have not been convinced to accede to that suggestion. The Firestone Energy decision, while containing some critical comments about some practices in the construction industry, is not a sufficient justification to induce us to carry out that re-examination.*

[78] The BC LRB applies the build-up principle to applications for all-employee bargaining units in the construction industry. Their rationale is described in detail in *Sky-Hi Scaffolding* (which case is discussed at paras 26-32, above).

[79] While the approach taken in other jurisdictions is of assistance, the Saskatchewan jurisprudence is the most instructive.

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[23] At paragraph 7.1870.
[24] At paragraph 15.490.
[25] See para 50, above.

[80] *Noranda* is the foundational decision. The Board dismissed the application for certification because the number of employees employed on the date the application was filed did not constitute a substantial and representative segment of the work force to be employed by Noranda in the future. The Court of Appeal overturned the Board's decision on the basis that the Board made no finding that the unit was not appropriate, and made no finding that the union did not represent a majority of employees in the unit. The Supreme Court of Canada restored the Board's decision, stating that the Board has jurisdiction to apply the build-up principle in appropriate cases. In determining whether a proposed bargaining unit is appropriate, the Board is not subject to any directions in the Act and can therefore consider any factors that may be relevant:

> *14 …. In my opinion, the board has jurisdiction under the Act to determine whether or not it considers a proposed unit of employees to be appropriate for collective bargaining. In determining that issue the board is not subject to any directions contained in the Act and it can, therefore, consider any factors which may be relevant. The application to the board asked it, inter alia, to determine that the unit described in the application was an appropriate one. The application was dismissed, thereby demonstrating that the board was not prepared to make that determination in the union's favour. The board ruled on a matter over which it had exclusive jurisdiction.*
>
> *15 The reasons which were given by the board for this exercise of its jurisdiction were that the number of employees employed by Noranda at the time the application was made did not constitute a substantial and representative segment of the working force to be employed by Noranda in the future. In my opinion, the board had full discretion under the Act to take that factor into consideration when considering the application. The expected increase in Noranda's work force, in the year 1969, from 25 to approximately 326 was a factor of great weight in deciding whether the proposed unit was appropriate and, as provided in s. 5(b), in "determining what trade union, if any, represented a majority of employees in an appropriate unit of employees".*
>
> *16 That the board should consider this factor in cases of this kind, in the interests of employees, seems to me to be logical. A union selected by a handful of employees at the commencement of operations might not be the choice of a majority of the expected large work force. The selection of a union at that early stage could be more readily subject to the influence of an employer. A large work force, when a plant went into operation, might comprise employees in various crafts for whom a plant unit, comprising all employees, other than management, might not be appropriate. In my view, the board not only can, but should, consider these factors in reaching its decision when asked to make a determination under sec. 5(a) and (b).*
>
> *17 To summarize the position, in my opinion, with respect, the court of appeal erred when it held that the board had dismissed the application on a ground which was wholly irrelevant and had declined to exercise its jurisdiction. What the board did do was to take into consideration, when determining whether the proposed unit of employees was appropriate for collective bargaining, and whether the union represented a majority of employees in that unit, the nature of Noranda's business, the fact that it was at its inception, and the fact that it was expected to increase its labour force enormously within a year. This it was entitled to do, and its decision, based on those and other factors, is not subject to review by the court.*

[81] *KACR* was decided in 1983, when *The Trade Union Act* included a prohibition against the consideration of the build-up principle, when the employer raised the issue. Relying on *Devon Sand*, it made the following comment:

> *33 It is only rarely that the buildup principle has been applied in the construction industry by any jurisdiction in Canada even without the kind of statutory prohibition contained in Section 5(a) of the Trade Union Act. The reason for that is clearly because of the fluctuating nature of the work force as opposed to a rapidly expanding but relatively permanent work force in an industrial setting.*

In that case the build-up principle was raised by an employees' association. The Board had grave doubts that it should be allowed to raise that argument before its status as a trade union under *The Trade Union Act* (*i.e.* a labour organization that is not company dominated) had been established.

[82] The build-up principle was not an issue in *JVD Mill Services*. That case was focused on the interpretation of new legislation in Saskatchewan[26] and whether an all-employee, province-wide bargaining unit was appropriate in the construction industry. However, the Board reviewed eight factors that the British Columbia Industrial Relations Council[27] had identified in *Cicuto*, that were to be considered in determining the appropriateness of proposed bargaining units in the construction industry. The Board commented on the applicability of those factors in Saskatchewan:

> *[128] At p. 25, the Council identified 8 factors to be considered in determining the appropriateness of proposed bargaining units in construction. Those factors which they identified as appropriate for British Columbia are set out in bold below:*
>
> > ***1. The use of standardized craft bargaining unit descriptions continues to be appropriate***
>
> *[129] As noted above, this factor is also applicable in Saskatchewan under the amended provisions of the CILRA.*
>
> > ***2. The freedom of choice of workers is not in itself determinative when assessing the appropriateness of a bargaining unit, whether the proposed unit is craft or all employee in character***
>
> *[130] This factor is also applicable in Saskatchewan. The Board has always considered many other factors with respect to appropriateness of a unit, including those outlined in its decisions. However, Cicuto was decided prior to the Supreme Court of Canada decision in Health Services and Support – Facilities Subsector Bargaining Assoc. v. British Columbia which may mitigate towards this factor having greater weight. However, as noted above, the amendments to the CILRA tend, in our opinion, towards greater availability of choice of bargaining agent by employees and reduce the price paid by employees for sectoral bargaining under the CILRA.*

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[26] *The Construction Industry Labour Relations Amendment Act, 2010,* SS 2010, c. 7 (often referred to as Bill 80).
[27] As the BC LRB was then named.

3. The considerations behind the preference for large integrated bargaining units are present in the construction setting, but they must be tempered with other considerations which are unique in the construction sector

[131] The Council noted that while size is important, even in the construction industry, "it is only one of many considerations and it is not an immutable law". This is equally true in Saskatchewan where large units are preferred, but that preference must be tempered by other equally important considerations in the context of choosing an appropriate unit.

[132] The fourth factor, being the impact of non-affiliation clauses is not of particular moment to the Board. Similarly it was only a factor which the B.C. Council wished to monitor to determine their effects on industrial stability in the Province.

4. Craft unions are not precluded from participation in the representation of construction workers by means of all employee bargaining units

[133] This fifth factor is also available to craft unions in Saskatchewan under the amended the CILRA, even if those unions are designated by the Minister under section 9 of the CILRA from seeking an order of the Board under section 4 with respect to a unit comprised of "more than one trade or craft" or for an "all employee" unit. However, without making a determination on this point because it is not before us, nor was the question argued, it would appear that any applications by a designated union for the employee group for which it is designated could not be made under s. 4, but must be made in accordance with the other provisions of the CILRA.

5. The Council will consider the application of the build-up principle when assessing the appropriateness of all employee units in construction

[134] The Saskatchewan Board has only rarely considered the build up principle. In K.A.C.R., the Board made the following comments regarding this principle, referencing in support of the statement International Union of Operating Engineers Local 955 and Devon Sand and Gravel Ltd.:

> *It is only rarely that the buildup principle has been applied in the construction industry by any jurisdiction in Canada …. The reason for that is clearly because the fluctuating nature of the work force as opposed to a rapidly expanding but relatively permanent work force in an industrial setting.*

6. When considering applications for certification from generic unions, the focus for the Council is on the appropriateness of a proposed bargaining unit; not on the appropriateness of the applicant union

[135] In its rational for this consideration, the Council took the view that "there are no compelling reasons arising out of labour relations considerations, for limiting workers in construction to choose only craft unions to represent them". With the focus on "employee choice" of their bargaining agent, notwithstanding item 2 above, where a unit is otherwise appropriate, employee choice would normally be respected by the Board notwithstanding that the employees have chosen to be represented by a non-traditional craft union, or another craft union. This is particularly true now that the Act has been amended to require secret ballot votes on applications for certification, which allows employees to support or withhold their support for an applicant union based upon their personal beliefs when casting their ballot.

7. In relation to voluntary recognition, arrangements involving employees in the construction setting, union, generic or craft, should not assume that Council will continue to sanction top-down organizing as has been done in the past

> *[136] This caution is appropriate in the Saskatchewan context as well. Under the previous scheme under the CILRA, it was often more convenient for trades to operate under the banner of a voluntary recognition and work under the provincially negotiated contract than to go to the trouble and expense of organizing the work site and applying for certification. Similarly, contractors with an existing relationship with a non-craft union in another province may, as in this case, enter into a voluntary recognition agreement and, as here, negotiate a collective agreement on behalf of the employees. As noted by the B.C. Council, the Board "must be satisfied that proper and adequate processes are employed to ensure that the democratic rights of workers affected by voluntary recognition arrangements are preserved and protected. Nothing less will be acceptable".*
>
> *[137] In this case, we have evidence from Mr. Josh Coles that after the Union was voluntarily recognized by the Employer, they began to negotiate a collective agreement. The initial agreement which they proposed to the membership was not accepted and they returned to negotiations and were able to achieve the agreement which was finally ratified by the employees. Additionally, as noted above, the Board has supervised a vote, of all employees eligible to vote, as determined by the Board, by secret ballot. Employees have the choice of supporting the proposed union as their bargaining agent or withholding their support.*
>
> *[138] After analyzing the factors noted above, the Council in Cicuto concluded that an "all employee" bargaining unit is appropriate in the Construction industry.*
>
> *[139] Following the rational of the B.C. Council in Cicuto, and upon review of the amendments to the CILRA, we conclude that an "all employee" unit is an appropriate unit within the construction industry in Saskatchewan. (emphasis added)*

At paragraph 140 the Board noted that subsection 4(3) of the CILRA[28] does not prescribe that a craft unit could not be the most appropriate unit in the construction industry. The Board must take a "clean slate" approach to its determination of the appropriate unit.

[83] The factor identified as #7, above, is particularly applicable in this case. As Mr. Watt frankly admitted "the employees had no choice". Despite the valiant efforts of his counsel and CLAC's counsel to have him resile from this admission, the Board is satisfied that this statement represented the true circumstances in this case. The Board is not satisfied that that proper and adequate processes were employed to ensure that the democratic rights of the workers affected by the voluntary recognition arrangement were preserved and protected.

[84] Freedom of choice of the workers in choosing their bargaining agent is an important factor for the Board in considering this application. The freedom of choice does not just apply to the initial six employees but also to the employees who were hired shortly afterward to do the construction work. This is particularly important since the unit applied for is not just for this project, but on a province-wide basis, so that it would apply to any future projects Ledcor may undertake in Saskatchewan. This consideration makes it even

[28] Now clause 6-11(7)(a) of the Act.

more important that the Board be satisfied that CLAC represented a majority of the employees in the proposed bargaining unit when it applied for certification.

[85] Section 6-4 of the Act also enshrines a right for employees to engage in collective bargaining. Given the facts of this case, where the employees signed the CLAC-Ledcor standard agreement the day after they commenced work, there was no evidence provided to the Board that these employees had any opportunity to engage in collective bargaining.

[86] *K-Bro Linen* is a non-construction case that considered the build-up principle. The Board reviewed the history of its use in Saskatchewan, referring to *Noranda* as providing the Board authority to apply the build-up principle. It acknowledged that it should be applied sparingly and only in compelling cases:

> *[33] We concur with the Alberta board that the "build up principle" should be applied sparingly and only in compelling circumstances. In the SNC Lavalin case, there were also additional considerations that were applied by the Board.*
>
> *[34] As noted by both the Employer and the Union, the Board must balance the rights of future employees to choose their bargaining agent with the benefits of a stable workplace environment with industrial stability.*
>
> *[35] Notwithstanding its long standing roots and the temporary statutory interdiction imposed by the Legislature, the Board has not often employed the "build up principle" to declare applications for certification to be premature. As noted by the Board in United Steelworkers of America, CLC v. Noranda Mines Ltd., "each application will depend on its particular facts. That requirement can also be found in the Alberta board decision in SNC Lavalin.*
>
> *[36] Both the Employer and the Union point to the statutory provisions for, either changing a bargaining agent (raiding), or decertification of the bargaining unit after (2) two years of representation. They argue these provisions in the SEA are a sufficient balance to the certification of a bargaining agent when the workforce is not at its full (or near full) complement.*

[87] As was the case in *K-Bro Linen*, in balancing the rights of future employees to choose their bargaining agent, the Board is not satisfied that the raiding or decertification provisions of the Act can be relied on to provide the entire answer in this case.

[88] In *Technical Workforce*, seven employees were in place when the certification application was filed on March 4, 2016. The employer said this number would increase to 140 in the summer of 2016. The certification application was dismissed as premature.

[89] On judicial review, the Court of Queen's Bench overturned that decision. After the application date the employer obtained an additional scope of work for other construction, then a third scope of work. The

Court found that there was no evidence that significant or overwhelming expansion was planned for at the date of the application. The growth came after the application was made and after the direction for vote; the Board's conclusion to the contrary was not supported by the evidence. The Board's decision was overturned because it applied the test of the build-up principle at the date of the hearing as opposed to the date of the application:

> *[83] A review of the evidence does not indicate that it was obvious that the scope of work to be performed as of the date of application was expected to grow or anticipated to grow as of the date of application. There was no evidence that there was significant or overwhelming expansion planned for at the date of the application for certification. It was clear that the growth came after the application and the after direction for a vote. The Board's conclusion is not supported by the evidence.*

[90] The Court concluded that the Board had applied the test of the build-up principle at the date of the hearing, rather than the date of the certification application. The evidence before the Board indicated that, at the date of the application, seven employees had been hired; after the date of the application one more employee was hired. Those were the only employees required for the one contract the employer had been awarded, and no other contracts had been secured at that date. In this case, the situation is much different. Ledcor was awarded the contract to build the steam turbine generator and air cooled condenser at the Chinook Power Station in October 2017, more than two months before the certification application was filed.

[91] The build-up principle requires the consideration of the following factors:

- There is an imminent and certain likelihood that there will be an overwhelming and significant increase in the work force; such that
- The complement of employees on the date of the application compared to the ultimate built-up work force is insufficiently representative in terms of numbers or job classifications.

[92] The Board starts from the premise that it should apply the build-up principle sparingly and only in compelling circumstances. As Adams states, it should be applied only: "where the build-up is 'so dramatic in terms of numbers or the classifications' that the 'essential representative character' of the trade union is brought into question"[29]. That is exactly the situation here.

[93] The Board has concluded that this is one of those rare cases where the build-up principle should be applied in the construction industry.

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[29] At paras 7.1610 and 7.1870.

[94] The build-up principle requires that the increase must be imminent. Mr. Watt's evidence was that the contract was scheduled to commence January 2018 and be completed by August 2018. In other words, the build-up was imminent when the application was filed. At the date of the certification application, there was a firm plan for expansion of the work force. That is the critical date for assessing these factors. The evidence, especially Exhibit E-1, confirmed that despite Mr. Watt's suggestion that the build-up was not imminent, and was delayed by engineering and material delivery delays, just three months after the application was filed, the work force had already increased almost ten-fold.

[95] The expected increase must be certain. This is not a case like *Technical Workforce*, where the employer was hoping to be awarded work on a project. When the certification application was filed, Ledcor had already been awarded the contract. The build-up was certain.

[96] The expansion of the work force must be overwhelming and significant. It was overwhelming and significant here. The expected increase was 19 times; the actual increase was 34 times. *Noranda* established a 50% rule of thumb: the six employees at the date of the certification application represented 5% of the expected work force. *Weyerhauser*[30] states that while the 50% rule is not absolute, it is the most critical factor. It defies belief that CLAC thought that the original six employees would be the work force that would build the steam turbine generator and air cooled condenser at the Chinook Power Station in less than a year.

[97] In determining whether to apply the build-up principle, the Board must balance the rights of current employees to engage in collective bargaining with a union of their choice, with the same right for future employees. This right applies equally to both groups. Application of the build-up principle in this case will respect the democratic rights of and avoid the disenfranchisement of future employees. The original six employees on the date of the application were insufficiently representative of the work force to be employed on this project. The number of employees employed by Ledcor at the time the application was made did not constitute a substantial and representative segment of the work force to be employed by Ledcor on this project.

[98] Another factor regularly taken into account is the nature of the employer's business, in this case, construction. Normally the regularly changing composition of the work force would militate against the application of the build-up principle. However, as outlined above, the Board has come to the conclusion that this is one of those rare case where the facts of the case, considered in their entirety, lead the Board to the determination that the only outcome that respects the principles laid out in Part VI of the Act is dismissal of the application.

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[30] At para 17.

[99] Mr. Watt made it clear in his evidence that Ledcor chose CLAC to be its employees' union. Section 6-4 of the Act sets out the principle that employees have the right "to engage in collective bargaining through a union of their own choosing". This right does not belong to the employer or the union, but the employees. The Board is not satisfied that the evidence indicates that this right was respected.

[100] This is a case like that referred to in the factor from *Cicuto* identified as #7 in *JVD Mill Services*, where the British Columbia Industrial Relations Council stated that it would not sanction top down organizing. As the Board stated in *JVD Mill Services*, at para 136, "This caution is appropriate in the Saskatchewan context as well".

[101] The comments of the ALRB in *Firestone Energy* also resonate here.

[102] Special mention must be made of clause 6-11(7)(a) of the Act:

> *6-11(7) In making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:*
>
> > *(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining;*

CLAC invited the Board to find that the word "presumption" in clause (a) means "finding". CLAC's argument was that a finding against them on this matter would necessarily mean that the Board has made a presumption that a craft unit would be more suitable. The Board respectfully disagrees. The fact that this application was made by a non-craft union played no role in the Board coming to its conclusions. This decision is made based on the evidence provided in this matter by CLAC and Ledcor.

[103] This application is not a competition between a craft unit and a non-craft unit. It is a determination of whether the proposed bargaining unit is appropriate for collective bargaining and whether CLAC represented a majority of employees in that unit. For all of the reasons outlined above, the Board makes a finding that the answer to those questions is no.

[104] CLAC's application for certification is dismissed.

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

DATED at Regina, Saskatchewan, this **7th** day of **March, 2019.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson