Court of Appeal for Saskatchewan

Docket: CACV4073

Citation: *KDM Constructors LP v The International Union of Operating Engineers Local 870,* 2024 SKCA 43

Date: 2024-04-23

Between:

KDM Constructors LP

Appellant
(Applicant)

And

The International Union of Operating Engineers Local 870, Attorney General of Saskatchewan and Saskatchewan Labour Relations Board

Respondents
(Respondents)

And

Saskatchewan Building Trades Council, Boilermaker Contractors' Association and CLR Construction Labour Relations Association of Saskatchewan Inc.

Intervenors
(Intervenors)

Before: Schwann, McCreary and Drennan JJ.A.

Disposition: Appeal dismissed

Written reasons by:	The Honourable Madam Justice McCreary
In concurrence:	The Honourable Madam Justice Schwann The Honourable Madam Justice Drennan
On appeal from:	QBG-SA-01071-2021, Saskatoon
Appeal heard:	May 29, 2023
Counsel:	Steven Seiferling for KDM Constructors LP Richard Engel, K.C. for the International Union of Operating Engineers Local 870 Katherine Roy for the Saskatchewan Ministry of Justice and Attorney General – Constitutional Law Branch Gregory Fingas and Turner Purcell for Saskatchewan Building Trades Council Hugh McPhail, K.C. for CLR Construction Labour Relations Association

McCreary J.A.

I. INTRODUCTION

[1] On February 18, 2020, the International Union of Operating Engineers, Local 870 [Union] filed a certification application with the Saskatchewan Labour Relations Board [Board] to represent a craft bargaining unit of operating engineers under Part VI, Division 13 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [*SEA*]. KDM Constructors LP [KDM] was named as the employer.

[2] In its reply to the Union's certification application, KDM took the position that Part VI, Division 13 of the *SEA*, which covers labour relations in the construction industry, did not apply to the certification application because, *inter alia*, the work performed by the operating engineers fell within the exception of maintenance work. Later, KDM also argued that Part VI, Division 13 of the *SEA* was unconstitutional because it violated KDM's right to freedom of association pursuant to s. 2(d) of the *Charter*.

[3] In response to these issues, the Board held that:

(a) the work of KDM's operating engineers was properly included in the construction industry under Part VI, Division 13 of the *SEA*: see *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v KDM Constructors*, 2021 CanLII 77359 (Sask LRB) [*KDM #2*]; and

(b) KDM, as a corporate employer, did not have a protected right to freedom of association under s. 2(d) of the *Charter*, and therefore was not entitled to opt out of the collective bargaining process contained in Part VI, Division 13 of the *SEA*: see *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v KDM Constructors*, 2021 CanLII 101129 (Sask LRB) [*KDM #3*].

[4] KDM brought a judicial review application in the Court of Queen's Bench challenging both these decisions. That application was dismissed by the Chambers judge in *KDM Constructors LP v International Union of Operating Engineers, Local 870* (1 September 2022) Saskatoon, QBG-SA-01071-2021 [*Chambers Decision*].

[5] KDM now appeals to this Court from the *Chambers Decision*. It says that the Chambers judge erred in finding that the Board's decision in *KDM#2* – that the work performed by KDM's operating engineers was construction work – was reasonable. It also argues that the Chambers judge erred in concluding that the Board correctly determined that KDM did not have a right to free association pursuant to s. 2(d) of the *Charter*.

[6] For the reasons that follow, I would dismiss KDM's appeal.

II. STANDARD OF REVIEW

[7] In an appeal from a judicial review decision, this Court's role is to determine whether the Chambers judge (i) selected the appropriate standard of review, and (ii) correctly applied it: *Dr. Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paras 43–44, [2003] 1 SCR 226. Once the proper standard of review is identified, this Court must step into the shoes of the Chambers judge and review the decision of the Board in accordance with that standard: see *Sran v University of Saskatchewan*, 2024 SKCA 32; *Andritz Hydro Canada Ltd. v The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*, 2023 SKCA 69; *Teamsters Canada Rail Conference v Canadian National Railway Company*, 2021 SKCA 62 at para 41, 327 LAC (4th) 322; *Amalgamated Transit Union, Local 615 v Saskatoon (City)*, 2021 SKCA 93 at paras 94–95, 86 CLRBR (3d) 1; *AlumaSafway Inc. v The International Association of Heat & Frost Insulators and Asbestos Workers, Local 119*, 2022 SKCA 99 at para 33, [2023] 6 WWR 74; *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, 2022 SKCA 30 at para 21; and *Liao v Saskatchewan (Economy)*, 2022 SKCA 137 at para 13, 6 Admin LR (7th) 163.

[8] Two separate standards of review are at play in this appeal.

[9] The Board's decision that the work of the proposed bargaining unit was construction industry activity (*KDM #2*) is subject to the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*]. In *KDM #2*, the Board exercised its statutory role to interpret a core feature of the *SEA*, namely, bargaining unit configuration, and to apply the evidence before it to that interpretation. This type of decision is subject to deference such that the reviewing court is not to determine its own view of the evidence

or decide matters *de novo* but is to consider whether the decision under review was reasonable: *Vavilov* at para 83. A reviewing court must pay "respectful attention" to the Board's reasons and limit its determination to assessing whether the Board's decision is supported by the elements of justification, transparency and intelligibility (*Vavilov* at para 99).

[10] In contrast, in *KDM #3*, the Board made a determination respecting the constitutionality of a statute – specifically, Part VI, Division 13 of the *SEA* – pursuant to s. 2(d) of the *Charter*. Its decision on this issue is subject to a correctness review: *Vavilov* at para 55.

[11] KDM also takes issue with the Board's refusal to allow it to call evidence prior to the Board reaching its substantive decision in *KDM #3*, arguing that this was procedurally unfair. This Court has said that questions of procedural fairness are to be reviewed on a correctness standard: *Akpan v The University of Saskatchewan Council*, 2021 SKCA 129, 10 Admin LR (7th) 61; *Sran* at para 57; *Toutsaint v Investigation Committee of The Saskatchewan Registered Nurses' Association*, 2023 SKCA 11, 477 DLR (4th) 213; *Saskatoon Co-operative Association Limited v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2016 SKCA 94, 484 Sask R 157; and *Eagle's Nest Youth Ranch Inc. v Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at para 20, 395 DLR (4th) 24. The Court's role is to determine whether the process used "accords with the underlying values reflected by the duty of fairness" :*Feng v Saskatchewan (Economy)*, 2020 SKCA 6 at para 45, 70 Admin LR (6th) 237 [*Feng*], quoting *Mercredi v Saskatoon Provincial Correctional Centre*, 2019 SKCA 86 at para 29, [2020] 4 WWR 212.

III. STATUTORY AND FACTUAL OVERVIEW

[12] Part VI, Division 13 of the *SEA* governs certifications and collective bargaining in the construction industry.

[13] Under Division 13, the unionized construction industry is divided into trade divisions by ministerial order: s. 6-66(1). The trade division structure may only be amended by the Minister of Labour with the consent of the authorized representative employers' organization [REO] and the union(s) involved, or upon notice to the REO and union(s) involved: s. 6-66(3)–(4).

[14] When a group of employees is certified as a collective bargaining unit in the construction industry, Division 13 of the *SEA* requires the certified employer to join an REO and to bargain collectively through it: s. 6-68. Once an order establishing a trade division has been made and a construction employer has been certified, collective bargaining in the trade division is authorized exclusively between the REO and the certified union(s): s. 6-70(1)(a). However, the *SEA* does prescribe a procedure allowing for the substitution of another REO after an application and vote by members: s. 6-69.

[15] An REO is subject to the express requirement not to act in a manner that is arbitrary, discriminatory or in bad faith toward "the unionized employers on whose behalf it acts" (s. 6-72). In addition, Division 13 recognizes the practices of entering into project agreements and holding pre-job conferences, which allows an REO to consider the circumstances of particular projects: ss. 6-67 and 6-73, respectively.

[16] In this case, the Union is the designated bargaining agent for operating engineers under Part VI, Division 13 of the *SEA*. The Union applied to be certified as the bargaining agent for the operating engineers employed by KDM, a construction and maintenance company and trade contractor, based on the operating engineers' work at the BHP Jansen potash mine site [Jansen site].

[17] At the time the Union filed its application for certification, the Jansen site was under construction and was not operational. The work being done consisted of installing "Galloway" work platforms into service and production shafts. These platforms were intended to enable the installation of concrete and steel liners, which were necessary for the mine to begin production. Other work at the site, such as the construction of a water treatment plant and a highway bypass, had also been done to advance the mine's construction.

[18] The employees in the proposed bargaining unit were employed by KDM as "drivers/operators". Their duties consisted of work within the operating engineer trade, including operating vehicles, removing sewage, and transporting water to enable the trades installing the platforms to perform their work. The operators supplied water to wash trailers, as well as bottled drinking water, for all employees on the Jansen site. The water truck operators were also tasked with supplying water to mix the concrete that was being poured or used in mine shaft construction.

[19] Shortly after the Union's certification application was filed, the Board conducted a vote of the proposed bargaining unit members, and the ballots were sealed pending the Board's determination of the issues raised in this case. The vote was subsequently tabulated, and the Union was certified as the bargaining agent for the KDM unit of operating engineers on July 5, 2022.

IV. ISSUES

[20] The issues for determination on this appeal are as follows:

(a) Was the Board's reasoning and conclusion that the work at issue was "construction industry activity" reasonable?

(b) Did the Board correctly determine that s. 2(d) of the *Charter* did not give KDM, as a corporate employer, a right to opt out of the collective bargaining process contained in Part VI, Division 13 of the *SEA*?

V. ANALYSIS

A. The Board's decision in *KDM #2* is reasonable

[21] In *KDM #2*, the Board found that the work being performed at the Jansen site by the operating engineers in the proposed bargaining unit was "construction industry activity" as defined by s. 6-65(a) of the *SEA*. KDM contends that this decision is unreasonable.

[22] As this Court stated in *P&H Milling Group, a Division of Parrish & Heimbecker, Limited Saskatoon v United Food and Commercial Workers, Local 1400*, 2023 SKCA 14, 478 DLR (4th) 604:

> [8] … [A] reasonableness review is concerned with a decision-maker's reasoning process and the outcomes of the decision. It determines whether the decision in question is based on an internally coherent and rational chain of analysis that is defensible in relation to the relevant facts and the law. Conceptually, there are two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the decision-maker's reasoning process. The second is when the decision is untenable in some respect, given the relevant factual and legal constraints that bear on it. …

See, generally, *Vavilov*.

[23] As I will explain, it is my view that both the justifications the Board offered for its determination on this issue, and the determination itself, are reasonable.

[24] KDM's appeal is grounded in the fundamental assertion that Part VI, Division 13 of the *SEA* does not apply to the operating engineers because they engage in "maintenance work" at the construction site. In advancing this argument, KDM first says that the Board acted unreasonably by giving too liberal a meaning to the definition of "construction industry" in s. 6-65(a), the result of which was to inappropriately limit the scope of what constitutes "maintenance work".

[25] In determining whether the Union's certification application fell under Part VI, Division 13 of the *SEA*, the Board was required to interpret and apply a key provision of Division 13: s. 6-65(a). Section 6-65(a) distinguishes between work performed within the "construction industry", which is captured by Division 13, and "maintenance work", which is deemed to be an exception that does not fall under the construction industry umbrella and, thus, outside the certification provisions of Division 13.

[26] Section 6-65(a) defines "construction industry" as encompassing the following:

> **Interpretation of Division**
> **6-65** In this Division:
>
> (a) **"construction industry"**:
>
> (i) means the industry in which the activities of constructing, erecting, reconstructing, altering, remodelling, repairing, revamping, renovating, decorating or demolishing of any building, structure, road, sewer, water main, pipeline, tunnel, shaft, bridge, wharf, pier, canal, dam or any other work or any part of a work are undertaken; and
>
> (ii) includes all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection with a work mentioned in subclause (i), but does not include maintenance work;

[27] In its decision, the Board thoroughly canvassed the meaning of, and the dichotomy between, "construction industry work" and "maintenance work" as those concepts have been explored in its own jurisprudence. For example, the Board relied on its previous decision, *Construction & General Workers Local Union, No. 180 v KDM Constructors Inc*., 2021 CanLII 25131 (Sask LRB) [*KDM #1*], involving KDM and another union, which represented labourers. In that case, the Board considered a certification application filed by the labourers' union respecting labourers employed by KDM at the Jansen mine site. While the Board dismissed that application

because of a lack of evidence respecting whether the work at issue was construction work, it interpreted the scope of "construction industry" activity as defined under s. 6-65(a). The Board stated:

> [72] Next, section 6-65 states that construction industry means the industry in which the activities *of* constructing, erecting, reconstructing, etc. of any work or any part of a work are undertaken. In the absence of a definition, the specified terms outlined in subclause (i) are to be given their ordinary meaning. According to subclause 6-65(a)(ii), construction industry includes *all* activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection with a work, but does not include maintenance work. The word "all" in reference to "activities" and in reference to machinery, etc. calls for a broad interpretation of "activities" and of each of machinery, plant, fixtures, facilities, equipment, systems and processes.
>
> [73] The activities in the construction industry include "all activities" as described in subclause (ii). The activities are included if they have the necessary relationship with machinery, etc., and if machinery, etc. have the necessary relationship with the work or part of a work as expressed by the phrases "contained in" and "used in connection with". The phrase "contained in" suggests that the necessary relationship is based on whether machinery, etc. exists within the limits of the work or part of a work. The phrase "used in connection with" suggests that the necessary relationship is based on the use of the machinery, etc. in relation to the work or part of a work.
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> (Emphasis in original)

[28] In both *KDM #1* and *KDM #2*, the Board reasoned that once a union has established a "necessary relationship" (*KDM #1* at para 73) or a "requisite connection" (*KDM # 2* at para 87) between (1) the work of the bargaining unit, (2) the components of the construction work as per s. 6-65(a)(ii) of the *SEA* ("machinery, plant, fixtures, facilities, equipment, systems and processes"), *and* (3) the activities of the construction industry as per s. 6-65(a)(i) ("constructing, erecting, reconstructing, altering, remodelling, repairing, revamping, renovating, decorating or demolishing of any building, structure, road, sewer, water main, pipeline, tunnel, shaft, bridge, wharf, pier, canal, dam or any other work or any part of a work"), then an application for certification is shown to belong within the construction industry bargaining structure of Division 13, unless the work in question is maintenance work.

[29] "Maintenance work" is not defined in the *SEA*. As such, the Board was required to consider what type of work constitutes "maintenance" within the meaning of s. 6-65. In *KDM #2*, it did so by reviewing other case law and provided the following definition of what comprises maintenance:

> [69] According to the case law, to maintain is to keep something in repair, as in the upkeep of machinery and equipment to enable it to operate efficiently and in the manner in which it was designed to perform. To maintain includes taking action to prevent decline,

> to prevent a lapse, or to prevent a cessation from what is an existing condition. Synonyms for maintain include to keep, to keep up, to preserve, and to sustain.

[30] The Board then set out how it would apply its conception of "maintenance" to the evidence before it to determine what type of work was being performed by the operating engineers. It concluded that it had to consider the work at issue in the context within which it was being performed, including the larger purpose of the work and scope of the project at issue:

> [70] Context is often determinative of the distinction between construction industry activities and maintenance work. Whether an activity or work is included in the construction industry is not just a function of the physical activity of the employee. Seemingly similar activities or work, performed using similar skills, may be characterized differently depending on the context in which they are performed. Likewise, an activity or work that does not appear to be construction industry work if performed as part of an isolated project may be included within the construction industry due to the overall context within which it is performed. Therefore, the Board must consider the activity or work in the context within which it is performed. The context includes not only the work in question, but also the overall purpose of the work and the scope of the overall project.

[31] This methodology for categorizing the work, including a consideration of the larger purpose of the work and the scope of the project, was consistent with that employed by the Board in *United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 v Andritz Hydro Canada Inc.*, 2021 CanLII 4217 (Sask LRB) [*Andritz LRB*] (appeal to SKCA allowed, 2023 SKCA 69, but not in relation to the analytical model the Board had identified). In *Andritz LRB*, the same arguments advanced by KDM in the present matter were argued by the employer in that case, namely, that the employer contended that the work of the bargaining unit should be evaluated in isolation rather than in the context of the whole of the project. The Board in that case rejected the employer's argument and concluded that any assessment of the work being performed must be considered within the context of the project as a whole (see para 109). The Board stated:

> [115] … [T]he Board must consider not only the work in question, but the overall purpose of the work and the scope of the overall project. The work of the pipe trades is a part of a larger whole. Construction work involves the addition to an existing facility, or is undertaken for the purpose of or results in an increase of the design or production capacity of an existing facility. …

[32] The Board in *Andritz LRB* also accepted that, if it could be shown that the work of the bargaining unit was connected to an increase in production capacity, then the certification applied for would properly fall within "construction industry activity": see para 114. Further, it expressly rejected the argument that its assessment of the work at issue should turn on the terms of an

agreement between the employer and an owner. Instead, the Board ruled that its determination must be based upon the evidence of the actual project presented at the hearing: see para 102.

[33] This was also the Board's conclusion in *International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v AlumaSafway*, 2021 CanLII 72031 (Sask LRB) [*AlumaSafway LRB*], when it considered whether insulation work related to the expansion of processing facilities at another potash mine should be classified as construction or maintenance work. The Board described the distinction between construction industry work and maintenance work as follows:

> [97] … [C]onstruction industry work, generally, may involve the addition to an existing facility, or work the purpose or results of which are to increase the design or production capacity of an existing facility. Maintenance is work on an existing facility to keep it in a state of repair. The word "keep" is important. It is not the creation of a new or expanded facility. To determine the nature of the work, it is appropriate to consider the context within which the work is being performed, which includes the overall purpose of the work and the scope of the project.

[34] In *AlumaSafway LRB*, the Board once again rejected the employer's argument that the starting point for its analysis should be the terms of an owner/contractor agreement and not the evidence of the work performed on the actual project: see paras 73 and 75. It concluded that work which enhanced the functioning of the facility was properly classified as construction work rather than maintenance work: see paras 104–105 and 109.

[35] Applying this same interpretive approach in *KDM #2*, the Board concluded that the work performed by the operating engineers fell within the construction industry because it was service work that was necessary to both the mixing of cement as a construction material and the supply of services to construction workers. In so determining, the Board considered the nature of the work within the context of the purpose and scope of the overall project, and not in relation to the use of the word "maintenance" in the work package provided by KDM. The Board based its conclusion in *KDM #2* on its specific findings of fact from the evidence before it:

> [101] The ongoing nature of the overall construction project will necessarily affect whether the facility is found to be "existing" for the purposes of the construction/maintenance distinction. The potash mine is under construction. The construction work has not been completed. The production phase has not begun. The mine is not an existing facility or plant for the current purposes. Similarly, the wash cars, lunch trailers, guard shacks, and hoist house are supporting the construction activities. The purpose of these facilities must be considered in context.

> [102] The delivery of water to the batch plant is clearly not maintenance work. The water is used to mix cement to create concrete which is used to line the shafts. The delivery of water provides for the transformative process that occurs when water is mixed with cement. This work is not intended to preserve any aspect of an existing facility. It is intended to further the construction of the facility. It is essential to the lining of the shaft.
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> [103] The delivery of water to workers, whether those workers are directly involved in construction or not, is not maintenance work. It does not maintain (re: preserve or sustain) an existing facility. It is a service that is provided to the workers on site.
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> [104] Nor is the removal of septic waste equivalent to maintenance work. the trailers are facilities that support the ongoing construction work on site, and are not existing facilities, for current purposes. The removal of septic waste is necessary for the continuation of the construction work that is being performed.

[36] In my view, the Board's interpretive approach, which demonstrates its adoption and application of the consistent principles of its own jurisprudence, is internally coherent, rational and logical. Thus, the Board's analysis shows the hallmarks of reasonableness: justification, transparency, and intelligibility: *Vavilov* at para 99; see also *Enercare Home & Commercial Services Limited Partnership v UNIFOR Local 975*, 2022 ONCA 779 at para 56, 476 DLR (4th) 342.

[37] In its second argument, KDM asserts that the Board's interpretive approach to determining the distinction between "construction industry activity" and "maintenance work" should have taken into account certain case law and regulatory guidelines from other jurisdictions that have adopted a different conception of what constitutes maintenance work. It says that failing to do so was unreasonable. Respectfully, I cannot agree. In my view, the authorities cited by KDM from other jurisdictions are clearly distinguishable and, thus, the Board's decision not to follow them was entirely reasonable. Let me explain.

[38] KDM referred the Board to two labour board cases from outside Saskatchewan: one from Alberta, and the other from Nova Scotia. In the first case, *Construction Workers Union, CLAC Local 63 v Nason Contracting Group*, 2017 CanLII 64948 (Alta LRB), the union successfully applied for an all-employee unit of "non-construction work". The Alberta Labour Relations Board defined the work at issue as "general repair work and maintenance outside of the scope of a major plant shutdown" (at para 20, quoting the Alberta Board's *Policy and Procedural Manual*). However, and critically, under Alberta's legislative framework there are three types of work: "non-construction work", "maintenance work" and "construction work". All employee units are

allowed in the first grouping, but only craft units are allowed in the "maintenance work" and "construction work" categories (see para 18). For this reason alone, this case is distinguishable from the dichotomy that exists between "construction industry activity" and "maintenance work" under the *SEA*. It was therefore reasonable of the Board to reject this authority.

[39] In the second case, *United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, UA Local 56 v Ainsworth Inc.*, 2011 CanLII 152214, the Nova Scotia Labour Relations Board applied its own policy document, *"Work" and the "Employer" in the Construction Industry*, to distinguish between maintenance and construction work. In that case, the union sought a review of an order dismissing a certification application because the union did not have sufficient support. In the review, the union argued that gas fitters should not be included in the construction unit of pipefitters because the gas fitters were doing maintenance work. The fact that there is no equivalent policy document in Saskatchewan is sufficient to distinguish this case, particularly because the wording in s. 6-65(a) of the *SEA* is different from the wording of the Nova Scotia policy and its enabling legislation. Thus, again, it was reasonable for the Board not to accept this authority.

[40] I note as well that KDM's argument respecting these two authorities had been advanced unsuccessfully before the Board in other cases: see *Andritz LRB* at paras 100–101 and 112–114; and *AlumaSafway LRB* at paras 108–111. In each instance, the Board rejected these same authorities and referred to the principles set out in its own precedents as defining the dichotomy between construction industry and maintenance work under the *SEA*: *KDM #2* at paras 66–67. While precedent decisions from other provincial labour tribunals made under different statutes may be persuasive, they are not binding. The Board fully explained its reasoning in applying its own line of analysis. As such, it demonstrated a rational decision-making process that is tenable given the relevant factual and legal constraints that bore on it.

[41] In conclusion on this issue, it is my view that the Board's justifications offered in *KDM #2* and the determination itself, are reasonable. The Board's reasoning process was logical and rational. It applied well-recognized statutory interpretation principles to the definition of "construction industry activity" in s. 6-65(a) and set out a reasonable and practical definition of "maintenance work". It then applied the evidence before it to the definitions it had articulated. In

this manner, the Board coherently and logically concluded that determining whether the work at issue is construction work or maintenance work is a fact-specific inquiry, and that the work performed by the employees of the proposed bargaining unit served to enhance or construct a facility and, as a result, that the work was reasonably classified as construction, rather than maintenance work. The Board's reasoning process is unassailable from the perspective of a reasonableness review and its decision is tenable given the relevant factual and legal constraints. It falls squarely within the Board's own case law, applying the evidence on the record before it. As the Chambers judge similarly determined, there is no basis upon which a reviewing court could interfere.

B. The Chambers judge and the Board correctly determined that s. 2(d) of the *Charter* did not give KDM a right to opt out of the collective bargaining process contained in Division 13

[42] KDM claims that ss. 6-69 and 6-70 of Part VI, Division 13 of the *SEA* violate its right to freedom of association under s. 2(d) of the *Charter*, and that the Board and the Chambers judge erred in law by finding otherwise. KDM also contends that the Board erred in refusing to allow KDM to call evidence on the *Charter* issue, and that the Chambers judge erred in finding that the Board's process in this regard was not unfair.

[43] As I will explain, I am not persuaded that either the Chambers judge or the Board erred in the ways alleged. Moreover, there is absolutely no merit to the underlying proposition that, in the circumstances of this case, KDM as a corporate employer has freedom of association under s. 2(d) of the *Charter*.

1. The Board's process to hear and determine the *Charter* issue was fair

[44] I will deal first with KDM's contention that the Chambers judge erred when he held that the Board's decision not to allow KDM to present evidence prior to the Board's determination of the initial *Charter* issue [*KDM #3*] was procedurally fair.

[45] The Chambers judge's determination regarding this issue, found in the *Chambers Decision* at paragraphs 55–70, is correct and I adopt his reasons in their entirety.

[46] In summary, the Board correctly concluded that it did not require evidence from KDM to determine whether KDM, as a corporate employer, enjoyed the freedom afforded under s. 2(d) of the *Charter*. This is because the evidence KDM proposed to call was not required to determine the preliminary issue, which was the matter of standing. That was a pure question of law. As an aside, I note that the Board's ruling left open the possibility that it would hear evidence "if it became apparent that evidence was necessary" (at para 14).

[47] Before the Board could consider KDM's evidence, which KDM said would demonstrate that the provisions of Division 13 breached its right to meaningful collective bargaining, the Board needed to answer the threshold question of whether KDM had a right to free association pursuant to s. 2(d). That is a question of law alone – not a question which requires the application of law to the facts. As such, the Board determined that no evidence was relevant. I see no error in that conclusion. Further, depending on the Board's determination respecting the threshold s. 2(d) issue, the Board could have disposed of the entire constitutional challenge at that point. In the context of labour relations, the maxim "labour relations delayed is labour relations denied" certainly applied – it was in the interests of justice to resolve the issues as expeditiously as was fairly possible: see *Siksika Health Services v Health Sciences Association of Alberta*, 2019 ABCA 169 at para 16, [2019] Alta LRBR 256. For all these reasons, it was not unfair for the Board to have refused to allow KDM to call evidence at that point in the proceedings, as the Chambers judge correctly concluded.

[48] There is one final point. In my view, KDM's argument on appeal either asks the wrong question or is circular in its reasoning. It posits the proposition that an inability to call evidence before the Board was *ipso facto* a breach of procedural fairness. However, the question before the Board was not whether procedural fairness was owed to the employer or what the content of those rights should be, but whether, as a matter of law, KDM was a rights-holder pursuant to s. 2(d) or could claim protection as a corporate employer under that provision of the *Charter*. As the Board appropriately put it, "[i]f the Employer has no standing to raise the constitutional question, then there is no arguable case, and the Board may dismiss the constitutional question" (at para 26). Considering the limited issue before the Board and KDM's inability to explain why evidence was required to determine that question of law, its argument cannot succeed.

2. KDM is not entitled to the protections of s. 2(d) of the *Charter*

[49] KDM argues that pursuant to s. 2(d) of the *Charter*, it has a right to freedom of association, and a corresponding right not to associate, which is violated by Division 13, ss. 6-69 and 6-70 of the *SEA*. These provisions require KDM, as a certified employer, to join an REO and to bargain collectively through it. In particular, KDM complains that the representative bargaining structure required under Division 13 does not allow it to bargain for itself or to appoint an alternative bargaining agent. KDM contends that it is entitled, pursuant to its s. 2(d) *Charter* right, to avoid the application of the trade division collective agreement negotiated between the REO, CLR Construction Labour Relations Association, and the Union. KDM says that the Board and the Chambers judge erred in law by finding otherwise.

[50] In my view, both the Chambers judge and the Board correctly determined that, as a corporate employer, KDM does not have a right to freedom of association pursuant to s. 2(d) of the *Charter* and, thus, the impugned provisions of Division 13 of the *SEA* are valid and binding on it. KDM's argument fails because it does not have an interest falling within the scope of the s. 2(d) guarantee, nor one which accords with the purpose of that provision.

a. The purpose of s. 2(d) of the *Charter*

[51] Section 2(d) of the *Charter* provides that "everyone" is entitled to the fundamental right of freedom of association.

[52] To claim *Charter* protection, a claimant must establish that they have an interest that falls within the scope of the guarantee contained in the provision sought to be invoked. The purpose of s. 2(d) is critical to determining the scope of the asserted guarantee. The Chambers judge and the Board both recognized this, correctly relying on the Supreme Court of Canada's approach in *Quebec (Attorney General) v 9147-0732 Québec Inc.*, 2020 SCC 32 at para 7, [2020] 3 SCR 426 [*Québec Inc*.], where it was held that a court's analysis respecting the scope of the guarantee requires an interpretation of the provision at issue by taking a purposive approach. The historical origins of the enshrined guarantee are a key consideration in that analysis.

[53] Freedom of association has a particular application to labour relations matters. As recognized in labour jurisprudence, the freedom arises from what has been acknowledged as an

inherent power imbalance between employees and employers: *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 28–31, [2015] 1 SCR 245 [*SFL*].

[54] As the Board explained in *KDM #3*, the purpose of freedom of association in a labour law context is to alleviate the perceived power imbalance between employees and management. The object is "to promote employee empowerment relative to the superior power of an employer" (at para 42), in order to "empower vulnerable individuals and groups by guaranteeing their freedom to associate with others" (at para 38).

[55] In determining the purpose of s. 2(d) in the context of the case before it, both the Board and the Chambers judge considered the evolution of the Supreme Court's approach to s. 2(d) as summarized in *SFL*. There, the Court held that s. 2(d) of the *Charter* "seeks to preserve 'employee autonomy against the superior power of management'" (at para 31; see also paras 28–31). The Court recognized that the right to strike is protected under the *Charter* and is inextricably tied to the right to a meaningful process of collective bargaining, which is enshrined within the scope of s. 2(d). The Court stated as follows:

> [28] The recognition of the broader purpose underlying s. 2(*d*) led the Court to conclude in [*Health Services and Support — Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391] that "s. 2(*d*) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining" (para. 87). In reaching this conclusion, McLachlin C.J. and LeBel J. held that none of the majority's reasons in the [*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313] which had excluded collective bargaining from the scope of s. 2(*d*) "survive[d] scrutiny, and the rationale for excluding inherently collective activities from s. 2(*d*)'s protection has been overtaken by [*Dunmore v Ontario (Attorney General)*, 2001 SCC94, [2001] 3 SCR 1016]" (*Health Services*, at para. 36).
>
> [29] This Court reaffirmed in *Fraser* that a meaningful process under s. 2(*d*) must include, at a minimum, employees' rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith.
>
> [30] The evolution in the Court's approach to s. 2(*d*) was most recently summarized by McLachlin C.J. and LeBel J. in [*Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 241], where they said:
>
> > The jurisprudence on freedom of association under s. 2(*d*) of the *Charter* . . . falls into two broad periods. The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purposive approach to the guarantee.
> >
> > . . .

> . . . after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by "the historical origins of the concepts enshrined" in s. 2(*d*) . . . . [paras. 30 and 46]
>
> [31] They confirmed that freedom of association under s. 2(*d*) seeks to preserve "employee autonomy against the superior power of management" in order to allow for a meaningful process of collective bargaining (para. 82).

[56] Thus, as the Board correctly concluded, because the purpose of s. 2(d) in the context of labour relations is to "promote employee empowerment relative to the superior power of an employer" (*KDM #3* at para 42), any extension of that protection over associational rights, such as that claimed by KDM, must be consistent with that purpose.

[57] KDM argues that "its stakeholders are individuals that need to be protected against more powerful entities, in this case the employer representative organization" and that this brings KDM within the scope of s. 2(d)'s protection because its need for security vis-à-vis the REOs is consistent with s. 2(d)'s purpose and analogous to the preservation of employee autonomy against the superior power of management.

[58] In my view, KDM's position that it is entitled to s. 2(d) protection is fatally flawed because it ignores the jurisprudence which has consistently held that, in a labour law context, that guarantee exists to empower *employees* through collective association to address the power imbalance between employers and employees. See, for example, a review of the Supreme Court of Canada's jurisprudence respecting s.2(d) recently provided in *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 [*Société des casinos*] at paras 21-37 and 57. As I will explain, the right claimed by KDM is not consistent with that purpose.

[59] KDM asserts that the Supreme Court's decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health Services*], so significantly expanded the scope of freedom of association that both employees and employers are provided with a right to collective bargaining, as well as the *right to choose* their own bargaining agent. Respectfully, I do not agree that *BC Health Services*, or the cases that

followed it, created an entitlement, without limit, for employers, or even employees, to choose their own bargaining agent, or to be free "not to associate".

[60] KDM contends that, pursuant to s. 2(d), it must be entitled to bargain its own collective agreement and should not be forced to join an REO and to bargain collectively through it, or to have imposed on it the trade division collective agreement already negotiated between the REO and the Union. At its essence, KDM's complaint is about the inability to dictate which bargaining agent engages in bargaining on its behalf. KDM argues that inherent in its right to freedom of association under s. 2(d), is its right "not to associate".

[61] KDM's advancement of its alleged right "not to associate" with REOs is antithetical to the objective of protecting association rights pursuant to s. 2(d)'s purpose of addressing the inherent power imbalance in an employment relationship. In addition, even if Division 13 of the *SEA* provided for a true system of designation (in other words, a system which designates a particular REO as the sole and exclusive bargaining agent for an employer), the Supreme Court of Canada has refused the notion that there is some *Charter* mandate to reject such systems as they apply to workers.

[62] As the Supreme Court has recently noted in *Société des casinos* at para 30, quoting from *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3 [*Mounted Police*]:

> … The majority [in *Mounted Police*] reiterated that s. 2(d) does not guarantee access to a specific statutory regime (at para. 67) and affirmed that "the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining" (para. 72). …

[63] In *Mounted Police*, McLachlin C.J.C. and LeBel J. described that various available models exist to satisfy the right to collective bargaining:

> [97] The search is not for an "ideal" model of collective bargaining, but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue. Choice and independence do not *require* adversarial labour relations; nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways. This said, genuine collective bargaining cannot be based on the suppression of employees' interests, where these diverge from those of their employer, in the name of a "non-adversarial" process. Whatever the model, the *Charter* does not permit choice and independence to be eroded such that there

> is substantial interference with a meaningful process of collective bargaining. Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2(*d*) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance.
>
> (Emphasis in original)

[64] Indeed, the Supreme Court in *Mounted Police* rejected the notion of protection for all associational activity including the idea that an individual worker holds a freedom *from* collective bargaining within a statutory system of representation comparable to that asserted by KDM. The Court stated:

> [59] The flip side of the purposive approach to freedom of association under s. 2*(d)* is that the guarantee will not necessarily protect all associational activity. Section 2*(d)* of the *Charter* is aimed at reducing social imbalances, not enhancing them. For this reason, some collective activity lies outside the *Charter's* protection. …

[65] This principle led the Board to observe that, in interpreting the protection, it is an error to ignore the power imbalance that has been employed as well as to "attribute equivalence between the power of employees and employers" (at para 46).

[66] Other cases illustrate this point. For example, while four separate decisions were issued in *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, respecting mandatory contributions to a bargaining agent, all agreed that there was no breach of s. 2(d) where such employees were required to make contributions which served to support collective bargaining: see 259 per Wilson J. concurring (concurred in by Cory J. at 342); per La Forest J. concurring at 325–326; and per McLachlin J. concurring at 347. Nor did the majority of the Court find a breach of the *Charter* in the statutory compulsion to hold membership in one of a set of bargaining agents in order to work within the construction industry: *R v Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 SCR 209. In particular, LeBel J. wrote as follows in his concurring decision as to the absence of any s. 2(d) violation based on the safeguards to allow for intermittent or withdrawal of support of a particular union:

> [252] … [T]he compulsion to join a union in this case is carefully embedded in a democratic process which safeguards each member's right to support or withdraw support from a particular union at regular intervals. Therefore I find no breach of the freedom to associate as protected under s. 2(*d*) of the *Charter*. …

[67] Finally, the Supreme Court has also rejected the assertion that employees have a freedom from association entitling them not to have their personal information provided to a bargaining

agent: *Bernard v Canada (Attorney General*), 2014 SCC 13 at paras 36–40, [2014] 1 SCR 227, and cases cited therein.

[68] Thus, based on the foregoing, the absolute freedom from representation or "association" asserted by KDM is contrary to well-established s. 2(d) jurisprudence. As noted in *Mounted Police*, the protections entrenched in s. 2(d) are premised on "encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values as informed by 'the historical origins of the concepts enshrined' in s. 2(d)" (at para 46, citing *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 344 [*Big M Drug Mart*]).

[69] It follows that the Board and the Chambers judge correctly concluded that the proposed right KDM claims in this matter is simply not consistent with the purpose of s. 2(d) of the *Charter*, as that purpose has been defined by Canadian jurisprudence.

b. Section 2(d) of the *Charter* does not apply to corporations, employers or non-individuals

[70] KDM's contention that it has a protected right under s. 2(d) also fails because the s. 2(d) protection applies to corporations in a very limited or attenuated way. The Board and the Chambers judge correctly determined that as a corporate employer, KDM does not have an interest falling within the scope of the s. 2(d) guarantee in the circumstances of this case.

[71] This conclusion is amply supported by jurisprudence from the Supreme Court.

[72] Most recently, in *Québec Inc.*, a corporation was found guilty of carrying out construction work as a contractor without holding a current licence for that purpose, an offence pursuant to s. 46 of Quebec's *Building Act*, CQLR c B-1.1. In the majority judgment of the Court, Brown and Rowe JJ. Jointly set out the test for a corporation to claim protection under the *Charter*:

> [7] To claim protection under the *Charter*, a corporation — indeed, any claimant — must establish that "it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision": *R. v. CIP Inc.*, [1992] 1 S.C.R. 843, at p. 852. In order to make that determination, the court must seek to discern the scope and purpose of the right by way of a purposive interpretation, that is, "by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*": [*R v Big M Drug Mart*, [1985] 1 SCR 295], at p. 344; see also [*R v Poulin*, 2019 SCC 47, [2019] 3 SCR 566], at para. 32. The approach

> is "generous, purposive and contextual" and should be done in a "large and liberal manner": *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 15; *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 35.

[73] In applying this test, the Court held that s. 12 of the *Charter*, which was invoked in that case, does not protect corporations and is confined to human pain and suffering:

> [14] Returning to the case at bar, the text of s. 12, particularly the inclusion of "cruel", strongly suggests that the provision is limited to human beings. Justice Chamberland quite rightly emphasized that the ordinary meaning of the word "cruel" does not permit its application to inanimate objects or legal entities such as corporations. As he explained, [TRANSLATION] "[o]ne would not say, it seems to me, that a group of workers who demolish a building using explosives (rather than going about it more gradually, brick by brick, plank by plank) are being cruel to the building. Nor would one say that a group of consumers who boycott a business's products, creating a real risk that it will be driven into bankruptcy, are being cruel to the company that owns the business": para. 56, fn. 32. We therefore agree with Justice Chamberland (at paras. 51-56), as with our colleague (Abella J.'s reasons, at para. 86), that the words "cruel and unusual treatment or punishment" refer to *human* pain and suffering, both physical and mental.
>
> (Emphasis in original)

[74] Thus, following the reasoning of the Supreme Court in *Québec Inc*., the Board (and the Chambers judge) correctly determined that, as with s. 12, the application of s. 2(d) must be confined to human beings – not a corporate entity such an employer.

[75] In *Mounted Police*, the Supreme Court discussed the meaning and purpose of s. 2(d) as recognizing "the profoundly social nature of human endeavours" (at para 54, quoting *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 365). The Court relied on its earlier decision in the *Reference* to detail the circumstances in which s. 2(d) is most essential (*Reference* at 365–366, quoted by *Mounted Police* at para 35):

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. …

[76] Like the right to be free from cruel and unusual treatment or punishment under s. 12, freedom of association under s. 2(d) is "inextricably anchored in human dignity" (*Québec Inc.* at para 17). In *SFL*, the Supreme Court recognized the crucial role of association in protecting the essential needs of working people (see para 55).

[77] A corporate entity's right to rely on a *Charter* protection is limited. In *Big M Drug Mart*, the Supreme Court ruled that while a corporation cannot hold a religious belief or any other belief, it may defend a criminal charge by arguing that the law under the charge that is brought is unconstitutional because it infringes upon an individual's *Charter* right (see 313–314). Further, in *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 [*Canadian Egg*], the Supreme Court expanded its determination in *Big M Drug Mart* to apply to civil proceedings.

[78] As a matter of law, it is understood that a corporation has procedural standing to contest the constitutionality of a law that is the basis of a criminal prosecution or where coercive proceedings have been brought against the corporation. This principle is succinctly explained in Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2d ed (Toronto: LexisNexis, 2017) at 580, as follows:

> **§19.8** This rule [the *Big M Drug Mart* rule], however, is subject to limits. It does not apply where there are no proceedings pending to enforce the law that the party would challenge. It can apply in the context of a corporation facing a criminal charge or in the context of a corporation defending against a civil suit enforcing a regulatory scheme. It would not apply, however, to a law that was aimed only at corporations, as there would then be no *Charter* breach against others on which the corporation would be arguing the unconstitutionality of the law. …
>
> (Footnotes omitted)

[79] The Board and the Chambers judge, correctly in my view, found that KDM could not rely on either *Big M Drug Mart* or *Canadian Egg* as support for its claim for *Charter* protection as a corporate entity. KDM does not claim the benefit of a finding of invalidity because of a violation of the rights of another person who is a s. 2(d) rights holder; rather, it contends that it holds a s. 2(d) right, itself. The Board rightly rejected that argument given KDM's status as a corporation. Finally, KDM was "not being 'dragged into court' on a charge, nor … being sued or otherwise involuntarily subject to civil process" (*Chambers Decision* at para 78), but, as the Chambers judge noted, it attempted to use the s. 2(d) protection as a sword rather than a shield. All these factors point to the conclusion that KDM does not meet the limited exception which allows corporations or non-individuals to claim *Charter* protection.

[80] Thus, it is clear that KDM is not able to claim an interference with any rights under s. 2(d) of the *Charter* in the context of this case. It does not have an interest falling within the scope of

the guarantee and does not fit within the exceptions mentioned in *Big M Drug Mart* or *Canadian Egg*.

c. Conclusion on KDM's alleged right under s. 2(d)

[81] In summary the Board and the Chambers judge were correct in determining that KDM is seeking a *Charter* protection that is not available to it at law.

[82] As a corporate employer, KDM does not have an interest falling within the scope of the s. 2(d) guarantee, nor one which accords with the purpose of that provision. To put it succinctly, the purpose of s. 2(d) is to protect "the right of employees to associate" (*SFL* at para 28). There is no "employer equivalent".

VI. CONCLUSION

[83] In the result, I would dismiss the appeal, with costs to the Union, in the usual manner.

"McCreary J.A."
McCreary J.A.

I concur. "Schwann J.A."
Schwann J.A.

I concur. "Drennan J.A."
Drennan J.A.