ONTARIO LABOUR RELATIONS BOARD

1405-03-R United Brotherhood of Carpenters and Joiners of America, Local 2486, Applicant v. **SNC-Lavalin Inc.,** SNC, The Group, SNC Services Ltd., SNC/FW Ltd., and SNC-Lavalin Engineers & Constructors Inc., Responding Parties.

BEFORE: Susan Serena, Vice Chair.

APPEARANCES: M. Church, C. Calligan and M. Yorke for the applicant, M. Horvat and P. Drake for the responding parties.

DECISION OF THE BOARD: November 9, 2010

1. In accordance with the request of the applicant on April 22, 2005 the style of cause in this matter is amended by adding the following responding parties: SNC/FW Ltd., and SNC-Lavalin Engineers & Constructors Inc.

2. This is an application filed under subsection 1(4) and section 69 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act") by United Brotherhood of Carpenters and Joiners of America, Local 2486 ("the union") for a declaration the responding parties SNC Services Ltd., ("Services") SNC/FW Ltd., ("SNC/FW") SNC, The Group, SNC-Lavalin Engineers & Constructors Inc., ("Engineers & Constructors") and SNC-Lavalin Inc., ("SNC-Lavalin Inc") are a common employer under the Act and/or there has been a sale or transfer of business from Services and/or SNC/FW and/or SNC, The Group to SNC-Lavalin Inc and/or Engineers & Constructors under section 69 of the Act.

3. This application was commenced after a dispute arose regarding certain carpentry work that SNC-Lavalin Inc was subcontracting to a non-union company at its project at the Abitibi Mill in Iroquois Falls. The union seeks to trace the bargaining rights it asserts it acquired as a result of the membership in the Sarnia Construction Association ("the SCA") of Services, SNC/FW and SNC, The Group to the other responding parties under subsection 1(4) and section 69 of the Act.

4. The principal positions of the responding parties is that the applicant's bargaining rights were either abandoned or became dormant because both Services and SNC/FW ceased to exist many years ago and neither entity has been active in the construction industry in Ontario for at least 25 years. The responding parties further assert the Board should decline to exercise its discretion under subsection 1(4) of the Act for the following reasons: the applicant failed to file this application in a timely manner, it abandoned its bargaining rights and granting this application would result in an expansion of the applicant's bargaining rights.

5. In compliance with the obligation placed on the responding parties by subsections 1(5) and 69(13) of the Act numerous corporate documents were admitted into evidence and the Board heard the *viva voce* testimony of Anthony Rustin, (who was employed by SNC Inc from 1973 until 1999) and Andrew Stoesser (who joined SNC-Lavalin Inc when it acquired Kilborn Holdings Inc in 1996) and Andrew Pilat, the General Manager of the Sarnia Construction

Association since 1982. Bud Calligan, the Secretary Treasurer of Carpenters' District Council, testified about the steps the union took to enforce its bargaining rights with the responding parties.

6. The majority of the evidence, in particular the evidence that relates to the operation and organization of the various responding parties over the past 40 years, is not in dispute. The pertinent evidence is summarized below.

SNC Services Ltd. ("Services")

7. To address the legislative restrictions in various provinces on the scope of work that can be performed by professional engineers, SNC Inc established Services to allow SNC Inc (in guise of "Services") to expand the scope of its operations to include project management in addition to the engineering consulting services that SNC Inc was providing to its clients. Services was at all material times a wholly owned subsidiary of SNC Inc before it ceased operations in 1978 and was formally dissolved in 1885.

8. The only apparent project that Services performed in Ontario was a project management job in Sarnia for Sun Oil that commenced in 1976. In May 1976 Services applied to join the SCA as a full member and it remained a full member of the SCA until 1978. Rustin testified that Services did not actually perform any construction work or directly employ any of the construction trades working on this project. Rather, Rustin testified that at all times Services acted as the agent for Sun Oil on any labour relations matters that arose in relation to this project. However, the documents admitted into evidence indicate that employees of SNC and/or Services dealt directly with the construction unions on various labour relations matters (e.g. grievances and jurisdictional disputes) that arose during the course of this project and Rustin conceded that Services might have hired certain trades directly, but that if it did so, it was as the agent for Sun Oil.

9. These documents also disclose that Services routinely used the following Montreal address for sending and receiving correspondence: 1 Complex Desjardins, P.O. Box 10, Desjardins Postal Station, Montreal, H5B 1C8 ("the Montreal address").

SNC/FW Ltd. ("SNC/FW")

10. SNC/FW was a partnership between Services and Foster Wheeler (an entity that had a world-wide presence in the petrochemical industry). This partnership was established in November 1976 with the limited mandate to obtain work in the petrochemical industry in Canada, in particular work related to the Alberta Tar Sands. In Ontario, this partnership's purpose was limited to project and construction management for the Sarnia petrochemical sector. The only significant work SNC/FW performed in Ontario was an engineering, design, procurement and construction management project for Suncor ("Suncor Hydrocracker Complex project") that ran from 1980 to 1984. Rustin testified that SNC employees were responsible for all of the administrative and day to day matters at SNC/FW so SNC "pretty much ran the show" at SNC/FW.

11. SNC/FW initially applied for membership in the SCA as an associate member but it ultimately joined the SCA as a full member in June, 1981. It remained a full member until 1983 when it appears its membership was transferred into the name of The SNC Group. Rustin, who ran this entity from 1976 to 1982, testified SNC/FW joined the SCA so it would be familiar with the requirements of the various collective agreements but that he did not consider the partnership

bound to those agreements because SNC/FW was only a project manager and it did not actually perform any construction work or directly hire the construction trades.

12. Rustin further testified that for the Suncor Hydrocracker Complex project, SNC/FW always acted as the agent for Suncor in all matters, including labour relations matters, and that all of the construction work on this project was subcontracted to unionized contractors that were expected to comply with the applicable collective agreements. As with the project previously performed by Services, some of the documents admitted into evidence indicate employees of SNC and/or SNC/FW dealt directly with various labour relations matters that arose on this project. These documents further disclose that grievances related to this project were filed against SNC/FW and SNC/FW issued records of employment to two carpenters (who SNC/FW terminated) indicating it was the employer of these workers. The documents further indicate that SNC/FW utilized both the Montreal office address of SNC and an address in Sarnia during the course of this project.

13. The operations of SNC/FW were wound down in the middle of the 1980's after the Tar Sands projects were cancelled. The partnership was formally dissolved in 1989 after SNC Inc had purchased all of the partnership shares owned by Foster-Wheeler and SNC Services.

SNC Hydrocarbon Projects Ltd., ("Hydrocarbon")

14. SNC Hydrocarbon Projects Ltd. was established in 1990 to complete the outstanding work of SNC/FW and demonstrate that SNC was still active in the hydrocarbon industry notwithstanding the dissolution of SNC/FW. Shortly after it was established, Hydrocarbon evolved into an operating division of SNC Inc and then through a corporate amalgamation it became part of SNC-Lavalin Inc in 1993. Rustin testified that other than completing the outstanding work left by SNC/FW Hydrocarbon has not performed any significant projects in Ontario since 1990. He further testified that if SNC-Lavalin Inc were to obtain hydrocarbon work in Ontario it would now most likely be performed by Engineers & Constructors.

SNC-Lavalin Inc.

15. In August 1991 SNC Inc acquired the assets and ongoing engineering projects of Lavalin Inc, a large engineering company that was in serious financial difficulty. The bulk of Lavalin's work related to municipal infrastructure projects and this company did not perform work in the ICI sector in Ontario nor was it bound to the Carpenters ICI collective agreement. In 1993 numerous corporate entities were amalgamated and continued under the name of SNC-Lavalin Inc which is wholly owned by SNC-Lavalin Group Inc. SNC-Lavalin Inc carries on operations from the Montreal address.

SNC-Lavalin Engineers & Constructors Inc. ("Engineers & Constructors")

16. From 1985 until 1995 SNC had no active operations or projects in Ontario. In 1996 SNC-Lavalin Inc purchased all the shares and operations of Kilborn Holdings Inc, ("Kilborn") to acquire this engineering company's expertise and presence in the petrochemical and mining sectors, in particular the employees and operations located in Sarnia. This Sarnia based engineering, procurement, construction and management business then operated under various names (Kilborn SNC-Lavalin, SNC-Lavalin Kilborn, and SNC-Lavalin) until it commenced operating under the name of SNC-Lavalin Engineers & Constructors Inc, in 1999.

17. Engineers & Constructors is a subsidiary of SNC-Lavalin Group Inc (the holding company that owns all of shares of the various SNC-Lavalin operating entities). Rustin also acknowledged during his testimony that Engineers & Constructors operates under the common direction and control of SNC-Lavalin Inc Meanwhile, Stoesser a long time project manager at Kilborn (both before and after it was acquired by SNC-Lavalin Group Inc) testified that after SNC-Lavalin acquired Kilborrn there were no significant changes in its operations or personnel in Sarnia or Toronto other than one employee who was transferred from the Montreal office of SNC-Lavalin Inc to the Kilborn's Toronto office.

18. The records of the SCA confirm that Kilborn was an associate member of the SCA until 1999 when its membership was transferred into the name of Engineers & Constructors. These records also indicate that Engineers & Constructors continued to occupy the same premises in Sarnia used by Kilbourn.

19. Stoesser also testified Engineers & Constructors does not perform field work and that it has always subcontracted construction work to unionized contractors because the chemical companies in Sarnia for whom it performs work are unionized.

SNC, The Group and SNC-Lavalin Group Inc.

20. SNC-Lavalin Group Inc (the successor to SNC, The Group) is the entity that holds the ownership interest in the various operating companies that comprise the SNC-Lavalin group of companies. It does not carry on any active business operations. The records of the SCA (including its annual directory) indicate that the membership in the SCA held by SNC/FW was transferred into the name of The SNC Group in 1983 and that The SNC Group remained a member of the SCA until at least 1985 even though there are no documents which indicate this change in the membership was either formally requested by The SNC Group or approved by the SCA. Nor did The SNC Group file an application for membership in the SCA and thereby acknowledge that as a full member of the Association it agreed to be bound to the labour agreements to which the SCA was a party. Other than the renewal forms in the name of The SNC Group the only other correspondence regarding this membership is a letter on SNC Inc letterhead enclosing "our membership fee for 1985". Documents tendered into evidence at the hearing indicate that both SNC Inc and The SNC Group utilized the Montreal office address.

21. Pilat testified that by 1983 the Suncor project SNC/FW was performing was winding down so the application to renew its membership was made in the name of The SNC Group. Pilat further testified that even after this name change he continued to deal with the same individuals on matters pertaining to the Suncor project and SCA business so he concluded both entities were really one and the same.

Membership in the Sarnia Construction Association

22. Andrew Pilat testified the SCA has two membership categories: full members who are unionized contractors that perform field work or directly hire construction trades to perform work and associate members which are suppliers of equipment or provide services to the petrochemical industry in the Sarnia area.

23. The documents pertaining to the SCA indicate that when the SCA receives a new application for membership the request is reviewed and, after the Directors of the SCA determine whether the applicant will be accepted for membership in the category applied for, a letter is sent to the applicant indicating whether or not the application has been accepted. The application for

membership clearly indicates that under the by-laws of the SCA all full members of the SCA agree to be bound to all the collective agreements to which the SCA is a signatory, including the Carpenters' ICI collective agreement. The annual renewal forms do not directly refer to the requirement on a full member to be bound to the collective agreements.

24. Pilat testified that various grievances and jurisdictional disputes were filed against both Services and SNC/FW when these entities were performing projects in Sarnia. He further testified that SNC/FW made remittances to and sought referrals from various construction unions. It was his opinion that Services and SNC/FW would not have been involved in grievances, jurisdictional disputes or sought referrals and made remittances to the unions if they did not directly hire any construction trades to work on their Sarnia projects.

Enforcement of the Carpenter's ICI collective agreement

25. Both Stoesser and Rustin testified that they were not aware of any instances after 1990 where an entity or division that was part of SNC Inc or SNC-Lavalin Inc allegedly performed work contrary to the Carpenters ICI collective agreement. Calligan, the Secretary Treasure of the Carpenters District Council also testified that he was unaware of any instance after 1989 where a SNC-Lavalin Inc entity contravened the Carpenters ICI collective agreement until 2003 when the dispute arose over SNC-Lavalin subcontracting carpentry work to a non-union company at the Abitibi Mill Project in Iroquois Falls.

Submissions of the Parties

26. The union approaches this case from the perspective that SNC-Lavalin Inc is the successor to SNC, The Group and the parent company of Engineers & Constructors. The union submits this is a pure case of three entities (SNC Services, SNC-FW and SNC The Group) that were bound to the collective agreement as a result of membership in the SCA being replaced by two non-union entities (Engineers & Constructors and SNC-Lavalin Inc). The union further submits that SNC Inc also became bound to the collective agreement through its ownership and control of Services and SNC/FW and that those bargaining rights have now been passed on to Engineers & Constructors and SNC-Lavalin Inc because these entities are all under the common ownership and direction of SNC-Lavalin Group and SNC-Lavalin Inc

27. The union further contends that there has been a transfer of work from SNC/FW and Services to both Engineers & Constructors and SNC-Lavalin Inc within the meaning of section 69 of the Act because these latter two entities now perform the construction work in the ICI sector in Ontario that was previously performed by SNC/FW and Services. The union also contends that if the Board were to find otherwise it would result in an erosion of the union's bargaining rights, the precise mischief the Act seeks to avoid.

28. On the issue of delay, the union submits that in the absence of any violations of the collective agreement after SNC/FW ceased operations in 1989 there was no reason for the union to assert its bargaining rights (by either filing a grievance or this application) until the issue arose at Iroquois Falls in 2003 when the union acted with appropriate dispatch. For the same reason the union submits that the evidence does not support the conclusion that it abandoned its bargaining rights. Finally, the union highlights that it is only seeking a prospective declaration and not damages in this application.

29. The principal theory of the responding parties' is that after the two companies that had been members of the SCA (i.e. Services and SNC/FW) disappeared a lengthy hiatus ensued before SNC acquired two non-union businesses (i.e. Lavalin and Kilborn) to create SNC-Lavalin Inc and Engineers & Constructors. The responding parties assert the Board ought not to exercise its discretion under section 1(4) of the Act as this would result in an expansion of the union's bargaining rights and there is no evidence that union work has been diverted to Engineers & Constructors. (See: *B&M Millwork Ltd.*, [1991] OLRB Rep. April 438).

30. The responding parties also contend there is no basis for the Board to conclude that there has been a sale or transfer of business from Services and/or SNC/FW to either Engineers & Constructors or SNC-Lavalin Inc. Essentially, the responding parties contend that after Services and SNC/FW ceased to operate in Ontario these companies no longer had any presence in the marketplace and they did not transfer any assets (or business) to any of the other responding parties. The responding parties submit the Board should follow the decision in *Serco Canada Ltd., and/or Dock Products Canada Inc, SPX Canada Inc, and/or Edwards Door Systems Limited*, [2006] OLRB Rep. March/April 290 where the Board refused to find a sale in similar circumstances because there was no transfer of a business or economic vehicle even though the work previously performed by Serco was subsequently performed by EDSL.

31. The responding parties concede that the purchase of Kilborn Holdings by SNC Lavalin Inc is an acquisition that involves the sale of a business. However, the responding parties maintain this acquisition involves the operations and assets of a non-union business that operates independently from the other SNC entities so this transfer should not result in a declaration under section 69 of the Act.

32. Insofar as SNC-Lavalin Inc, and Engineers & Constructors constitute a common employer because they operate under common control the responding parties contend this is not an appropriate situation for the Board to exercise its discretion under subsection 1(4) of the Act because such a declaration would result in an expansion of the applicant's bargaining rights to the non-union business previously operated by Kilborn and there has been a twenty year delay in bringing this application. The responding parties rely on the Board's decisions in *Andreynolds Company Limited*, [1990] OLRB Rep. November 1107, *Ferretti Forming Inc*, [1996] OLRB Rep. February 66, *Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844 and *Aecon Buildings*, [2006] OLRB Rep. March/April 125 that deal with the refusal of the Board to exercise its discretion under section 1(4) of the Act when the union's bargaining rights have not been eroded and work has not been diverted to a non-union operation and *Mandic Bros. Drywall and Construction Ltd.* [1982] OLRB Rep. May 693 and *Steds Limited*, [1992] OLRB Rep. January 67 where the Board considered the impact of the union's delay in asserting its rights under section 1(4) and section 69 of the Act.

33. The responding parties further submit the Board's decisions in *C.H. Heist* [1992] OLRB Rep. June 677 and *Aluma Systems* [1994] OLRB Rep. November 1469 that deal with the transfer of bargaining rights obtained from membership in the SCA are distinguishable because in this case neither Services or SNC/FW still exist.

34. Finally, the responding parties submit that SNC, The Group was never a full member of the SCA (because the name change was due to a clerical error) so the applicant's bargaining rights cannot be transferred from this entity under either section 1(4) or section 69 of the Act.

Delay and Abandonment

35. The responding parties assert that this application should be dismissed and the Board should not exercise its discretion under section 1(4) of the Act because of the applicant's delay in filing this application (between 1976 and 1984 when Service and SNC/FW ceased operations until this application was filed in 2003) during which time the "target" entities were openly operating in Ontario. The responding parties further assert that the union abandoned its bargaining rights during this period.

36. Abandonment of bargaining rights is often difficult to prove and requires unequivocal evidence that the trade union has walked away from its bargaining rights. In determining this issue the Board considers the length of time during which the trade union was inactive in relation to its bargaining rights, the attempts to renew or negotiate the collective agreement, steps taken to enforce the applicable collective agreement and any other relevant factor. Furthermore, in *Lorne's Electric*, [1987] OLRB Rep. Nov. 1405 the Board dealt with the unique difficulty that exists in trying to prove that an affiliated bargaining agent, like the applicant in this case, has abandoned ICI bargaining rights under the provincial bargaining scheme, which are the bargaining rights at issue in this application.

37. The evidence in this case is that there were no breaches of the collective agreement upon which the applicant failed to act between 1989 and 2003. Further, when the dispute over the Iroquois Falls work arose in 2003 the union took the appropriate steps to enforce its bargaining rights by first filing a grievance and then bringing this application when, in response to the grievance, SNC-Lavalin Inc denied it was bound to the applicant's ICI agreement. Accordingly, this is not a situation where the evidence establishes that the union failed to enforce its bargaining rights for an unexplained period of time sufficient to constitute abandonment.

38. In *KNK Limited*, [1991] OLRB Rep. Feb. 209, the Board dealt with the issue of delay in a situation where a unionized company ceased operations and shortly thereafter a second company was incorporated to perform the same work previously performed by the first company. The Board in that case concluded that delay alone would not lead the Board to dismiss the application and where the preconditions exist for a declaration under subsection 1(4) of the Act the Board could deal with the delay by limiting the remedy. At paragraph 57 the Board provided the following analysis:

> 57. In our view, where a trade union has established the legal requirements for a section 1(4) declaration, as well as the "mischief" which such declaration was designed to prevent, a declaration should ordinarily be made unless there is either particular prejudice or compelling policy reasons for not doing so. Those policy reasons should be rooted in labour relations rather than commercial law considerations, and the alleged prejudice should involve something more than having to apply a collective agreement which the related employer has disregarded in the past. If that were the test, the purpose of section 1(4) would be undermined, and the related employer could plead, in reply, the very "mischief" upon which the union relies and for which section 1(4) is a remedy. The argument becomes entirely circular. A union's undue delay in the face of knowledge of the corporate relationship (i.e. what section 1(5) suggests a union will NOT know) may be a factor to be considered in exercising the Board's discretion, but the focus should be on the actual prejudice suffered by the employer and the extent to which the union's inaction actually contributed to that prejudice [emphasis added in upper case text]. Where the union's inaction is so longstanding as to be tantamount to an abandonment of its bargaining rights, the Board may well dismiss the application. However, where the

> balance of labour relations interests can be achieved by limiting the retrospective effect of a declaration or granting such other relief "as it may deem appropriate", the Board should consider that option, rather than dismissing the application together.

39. Even though the delay in this case is significantly longer than was present in *KNK* the principals enunciated in that decision nonetheless apply. In this case the applicant is not seeking damages or a retrospective declaration so the issue of actual prejudice from any delay in bringing this application does not arise.

40. Furthermore, this is not a situation where the applicant failed to enforce its bargaining rights. After the disappearance of Services and SNC/FW a hiatus ensued during which no construction projects were apparently performed in Ontario by any SNC entity. Accordingly, there were no violations of the applicant's ICI collective agreement or disputes over these bargaining rights until 2003. There was no reason for the applicant to take steps to assert its bargaining rights or file this application until 2003 after SNC-Lavalin Inc denied it was bound to the Carpenters' ICI collective agreement.

41. The Board is therefore satisfied that this is not an appropriate case to find that the applicant has either abandoned its bargaining rights or unduly delayed in filing this application.

SNC, The Group

42. The responding parties submit the change from SNC/FW to The SNC Group on the membership records of the SCA was due to a clerical error and therefore The SNC Group (or SNC, The Group) is not bound to the applicant's collective agreement.

43. Although various documents purport to indicate that in 1983 an entity referred to as The SNC Group took over the membership held by SNC/FW in the SCA the evidence at the hearing is insufficient to establish how this change occurred. Unlike when both Services and SNC/FW joined the SCA there is no application for membership in the name of The SNC Group or letter from the SCA accepting the application for membership from The SNC Group. Nor were there any documents produced at the hearing to indicate The SNC Group agreed to be bound to the applicable collective agreements.

44. Rather, the only evidence on this issue is the 1983 and 1984 membership renewal forms in the name of The SNC Group and a November 1984 letter from SNC Inc enclosing the membership fees for 1985. Pilat's evidence that he did not think anything had really changed because he continued to deal with the same representatives that he been dealing with when SNC/FW was a member of the SCA also supports the logical conclusion that this change in name on the records of the SCA was clerical in nature and in response to the pending completion of the Suncor project and the withdrawal of SNC/FW from the Sarnia petrochemical market.

45. Therefore, in the absence of more compelling evidence on this issue, the Board is not prepared to conclude that SNC, The Group (or The SNC Group) formally joined the SCA as a full member and thereby became bound to the applicant's Provincial ICI collective agreement.

The Law

46. Subsection 1(4) and Section 69 of the Act read as follows:

> 1 (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through

> more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.
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> **69.** (1) In this section,
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> "business" includes a part or parts thereof;
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> "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.
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> (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

47. Both subsection 1(4) and section 69 are remedial provisions. As such, they have been liberally interpreted by the Board. Both provisions are concerned with protecting a union's bargaining rights and not the expansion of those rights or the impact that a declaration under either section of the Act would have on the operations of the corporate entities involved.

48. Before the Board will issue a declaration under subsection 1(4) of the Act, the Board must be satisfied that the following three pre-conditions are met and, if so, whether the Board should exercise its discretion and issue the declaration sought by the applicant union: (i) the existence of two entities that; (ii) operate associated or related businesses or activities and; (iii) do so under common control and direction.

49. No single factor is likely to determine whether two or more entities constitute a common employer under the Act. Rather, this determination is made on the basis of various factors and the particular facts at issue in the application. The indicia or criteria which the Board typically considers relevant in making a determination under subsection 1(4) of the Act include:

a) common ownership or financial control;
b) common management;
c) representation to the public as a single integrated enterprise; and
d) centralized control of labour relations.

50. There is no dispute that both Services and SNC/FW became full members of the SCA and through that membership agreed to be bound to the collective agreements to which the SCA is a signatory, including the Carpenters' Provincial ICI collective agreement. Furthermore, the evidence is that both of these entities performed work in Ontario in accordance with the applicants' ICI collective agreement and they participated in grievances and jurisdictional disputes that involved alleged violations of a collective agreement to which the SCA is a signatory.

51. The responding parties seek to distinguish the Board's decisions in *C.H. Heist, supra* and *Aluma System, supra* where the Board traced bargaining rights acquired from membership in the SCA because, unlike in those cases, Services and SNC/FW ceased to exist before the union asserted its bargaining rights against the other responding parties. However, the fact that the applicant acquired its bargaining rights through membership in the SCA does not mean those rights evaporate when the company discontinues its operations or ceases to exist. If that were the case, the precise mischief that subsection 1(4) and section 69 of the Act seek to address could arise with impunity. When applying subsection 1(4) and section 69 of the Act no distinction is made between bargaining rights acquired as a result of membership in the SCA and bargaining rights obtained through an application for certification.

52. Having regard to both the *viva voce* testimony and the numerous exhibits tendered into evidence at the hearing the Board is satisfied that all the responding parties are related and constitute a single employer within the meaning of subsection 1(4) of the Act.

53. There is no dispute on the evidence that all of the responding parties are (or were) wholly owned by SNC-Lavalin Holdings Inc (or its predecessor SNC Inc) and operate under the control of SNC-Lavalin Inc (or its predecessor SNC Inc). Further, all of the existing responding parties are component parts of the SNC-Lavalin "family of companies". Both Services and SNC-FW were part of SNC Inc an entity that becomes part of SNC-Lavalin Inc. At all relevant times SNC Inc and SNC-Lavalin Inc have publicly operated as if they are one large business organization that includes many component parts and related operations. For example, with respect to the operations in the hydrocarbon/petrochemical project sector the evidence is that since the 1970's the SNC Inc and SNC-Lavalin Inc have acquired and created new companies while it dissolved and amalgamated others depending upon the dictates of the business or corporate circumstances. It is clear from the evidence that the responding parties are all inextricably linked, have interrelated operations and operate under the common ownership and control of SNC-Lavalin Inc and SNC-Lavalin Holdings Inc (or the predecessor companies SNC Inc and SNC, The Group).

54. As discussed above, the purpose of subsection 1(4) is to prevent the union's bargaining rights from being eroded, even inadvertently, from the creation or acquisition of another business entity to perform work without regard to the collective agreement obligations that bind the original company. In *RLP Machine and Steel Fabrication Inc*, [2004] OLRB Rep. July/August 784 the Board succinctly addressed the presumption that arises in such a situation:

> 91. It is at this point that the order in which the businesses came into existence, or under common control and direction, becomes important. If a business bound to a collective agreement creates a new company not bound to the agreement, the Board will require very little proof of a potential erosion of bargaining rights. Indeed, the performance of any work, no matter how slight by the second company, that is covered by the collective agreement binding on the first company, will be proof of an erosion of bargaining rights: see Acme Plumbing & Heating [1992] OLRB Rep. Jan. 1; Steebil Limited [1989] OLRB Rep. April 304.

55. That is precisely what has occurred in this instance. Services and SNC/FW were bound to the applicant's Provincial ICI collective agreement. These entities both performed work in the petrochemical field that fell within the scope of that collective agreement. Eventually Services and SNC/FW ceased operations and disappeared into the SNC corporate structure. The ongoing work of SNC/FW was then transferred to Hydrocarbon (an entity that did not apparently

join the SCA) and Hydrocarbon was eventually amalgamated into SNC-Lavalin Inc. Then, in 2003, a dispute arose over a project in the ICI sector that SNC-Lavalin Inc was performing at Abitibi Falls. Finally, the evidence at the hearing is that Engineers & Constructors is the entity that would now perform any projects in the hydrocarbon or petrochemical field in Ontario, which is the work previously performed by Services and SNC/FW and falls within the scope of the applicant's Provincial ICI collective agreement. SNC-Lavalin Inc and Engineers & Constructors have filled the vacuum created when Services and SNC/FW, two unionized companies, ceased operations in Ontario.

56. The fact that Services and SNC/FW only completed a few projects in Ontario and these projects were limited to a small portion of the ICI sector does not alter the above conclusion. The Board has previously rejected attempts to divide the ICI sector when considering applications of this nature (See: *Warren Steeplejacks Limited*, [1989] OLRB Rep. March 309 and *Frank Plastina Investments Ltd*., [1986] OLRB Rep. June 720). Further, the amount of work performed by each business entity does not change the fact that the unionized operations have been discontinued and replaced by entities not bound to the applicant's Provincial ICI collective agreement. In short, the union's bargaining rights have been eroded through the above change in corporate structure. This is the precise mischief that subsection 1(4) is designed to prevent and the dispute between the parties at Abitibi Mill is a clear example of the potential erosion of the applicant's bargaining rights.

57. Finally, the responding parties assert that Engineers & Constructors operates independently from SNC-Lavalin Inc and it retained the employees and premises used by Kilborn so a declaration under section 1(4) of the Act would result in an expansion of the applicant's bargaining rights. However, Rustin testified that Engineers & Constructors operates under the control of SNC-Lavalin Inc. Furthermore, since this business was acquired it has used some derivation of the name SNC-Lavalin. Finally, the evidence is that Engineers & Constructors would be the entity that performs the work previously performed by Services and SNC/FW. In these circumstances a declaration against Engineers & Constructors is appropriate and that declaration does not constitute an expansion of the applicant's bargaining rights.

58. Accordingly, the mischief and the three preconditions for a declaration under subsection 1(4) of the Act have been established. The only issue remaining is whether the Board should exercise its discretion and grant the requested declaration. The issue of discretion and the appropriate remedy is discussed in *KNK Limited, supra*, as follows:

> 57. In our view, where a trade union has established the legal requirements for a section 1(4) declaration, as well as the "mischief' which such declaration was designed to prevent, a declaration should ordinarily be made unless there is either particular prejudice or compelling policy reasons for not doing so. Those policy reasons should be rooted in labour relations rather than commercial law considerations, and the alleged prejudice should involve something more than having to apply a collective agreement which the related employer has disregarded in the past. If that were the test, the purpose of section 1(4) would be undermined, and the related employer could plead, in reply, the very "mischief' upon which the union relies and for which section 1(4) is a remedy. The argument becomes entirely circular. A union's undue delay in the face of knowledge of the corporate relationship (i.e. what section 1(5) suggests a union will *not* know) may be a factor to be considered in exercising the Board's discretion, but the focus should be on the actual prejudice suffered by the employer and the extent to which the union's

> inaction actually contributed to that prejudice. Where the union's inaction is so longstanding as to be tantamount to an abandonment of its bargaining rights, the Board may well dismiss the application. However, where the balance of labour relations interests can be achieved by limiting the retrospective effect of a declaration or granting such other relief "as it may deem appropriate", the Board should consider that option, rather than dismissing the application altogether.

59. Applying the criteria set out above to the facts in this matter, the Board is satisfied that this is an appropriate case to exercise its discretion to issue a declaration under subsection 1(4) of the Act. As previously discussed the Board has rejected the assertion by the responding parties that the applicant inappropriately delayed in filing this application or asserting its bargaining rights. Furthermore, the union does not seek damages or a retrospective declaration.

60. The Board therefore declares that:

a) SNC Services Ltd., SNC/FW Ltd., SNC, The Group, SNC-Lavalin Inc.**,** and SNC-Lavalin Engineers & Constructors Inc., constitute a single employer within the meaning of subsection 1(4) of the *Labour Relations Act*;

b) SNC Services Ltd., SNC/FW Ltd., SNC, The Group, SNC-Lavalin Inc., and SNC-Lavalin Engineers & Constructors Inc., are bound to the Provincial Collective Agreement between The Carpenters' Employer Bargaining Agency (E.B.A.) and The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (C.D.C) effective May 1, 2010 to April 30, 2013.

61. In view of the above declarations it is not necessary to deal with the applicant's request for relief under section 69 of the Act.

"Susan Serena"
for the Board