The Labour Relations Board
Saskatchewan

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, CONSTRUCTION & GENERAL WORKERS, LOCAL 890, CONSTRUCTION & GENERAL WORKERS, LOCAL 180, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL NO. 771, INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING, PORTABLE AND STATIONARY, LOCAL 870 and OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL 222, Applicants and GRAHAM CONSTRUCTION AND ENGINEERING LTD., GRAHAM CONSTRUCTION AND ENGINEERING (1985) LTD., B F I CONSTRUCTORS LTD., BANFF LABOUR SERVICES LTD., JASPER LABOUR SERVICES LTD., BANFF FINANCIAL CO. INC., PETER BALLANTYNE CONSTRUCTION LTD., POINTS NORTH CONSTRUCTION LTD., GRAHAM INDUSTRIAL CONTRACTORS LTD. and GRAHAM INDUSTRIAL SERVICES LTD., Respondents

LRB File Nos. 014-98 & 227-00; November 4, 2003
Vice-Chairperson, Wally Matkowski; Members: Leo Lancaster and Duane Siemens

For the Applicants:	Drew Plaxton
For Banff Labour Services Ltd., Jasper Labour Services Ltd. and Banff Financial Co. Inc.:	Larry LeBlanc, Q.C.
For Graham Construction and Engineering Ltd., Graham Construction and Engineering (1985) Ltd. and BFI Constructors Ltd.:	Larry Seiferling, Q.C.

Successorship – Transfer of business – Section 37 of *The Trade Union Act* – Alleged successor leased predecessor's office and construction equipment, took over all existing work, purchased predecessor's shares, maintained key personnel and did not compete with predecessor – Board concludes that successor did acquire a business or part thereof pursuant to s. 37 of *The Trade Union Act*.

Collective agreement – Abandonment – Period of inactivity by unions significant – Board finds no justification for lengthy period of inactivity, distinguishes previous decision of Board relating to abandonment and finds that applicants abandoned their collective bargaining rights against successor employer.

***The Trade Union Act*, s. 37.**
***The Construction Industry Labour Relations Act*, s. 18.**

REASONS FOR DECISION

Background:

[1] This application, initially brought forward by the United Brotherhood of Carpenters and Joiners of America, Local 1985 (“Carpenters Union”) on February 2, 1998 and designated as LRB File No. 014-98, sought, among other things, a declaration that Graham Construction and Engineering (1985) Ltd. (“Graham 1985”) was a successor to Graham Construction and Engineering Ltd. (“Graham Engineering”).

[2] In July 2000, amendments to *The Construction Industry Labour Relations Act 1992,* S.S. 1992, c. C-29.11 (as amended, S.S. 2000, c. C-69) (*“CILRA, 1992”)* resulted in the Carpenters Union and the other Applicants (collectively the “Unions") filing a second application, LRB File No. 227-00, which also sought, among other things, a declaration that Graham 1985 was a successor to Graham Engineering.

[3] In a decision dated December 13, 2001, the Board amalgamated the two applications into one hearing as there were numerous overlapping issues.

[4] Both applications are extensive, with the application in LRB File No. 227-00 being 15 pages long. It lists the certification Orders held by the Unions relating to P.W. Graham and Sons Limited, Graham Construction Ltd., Jasper Labour Services Ltd. and BFI Constructors Ltd. Reference is made to the Board’s decision in *United Brotherhood of Carpenters and Joiners of America, Local 1867 v. Graham Construction Ltd.*, [1986] June Sask. Labour Rep. 35, LRB File No. 330-84 (the “*Graham ‘86* decision” or the “*Graham ‘86* case”) which found that Graham Engineering was a successor to Graham Construction Ltd.

[5] The Board heard the *Graham ‘86* case on March 6 and 7, 1985 and rendered its decision on April 9, 1986.

[6] The *Graham ‘86* decision reviews in detail the history of the Graham family’s involvement in the construction industry in Saskatchewan. At 35, the Board describes Graham Engineering as “a wholly owned subsidiary of Gracom Construction Companies Ltd., which in turn is 100% owned by Ronald L. Graham.” The *Graham ’86* decision recognized that the Carpenter’s Union was the certified bargaining agent for “all carpenters, carpenter foremen and

carpenter apprentices employed by Graham Construction Ltd." in various areas in Saskatchewan.

[7] The *Graham '86* decision also reviews the creation of Banff Labour Services Ltd. ("Banff") and Jasper Labour Services Ltd. ("Jasper"). Both of these entities supplied labour to construction companies, with Banff supplying non-union labour and Jasper supplying union labour. In the *Graham '86* decision, the Board described these entities as "labour brokers" and found that they had provided labour services to Graham Engineering.

[8] The *Graham '86* decision confirms that, at that time, there were no provisions in *The Trade Union Act*, R.S.S. 1978, c. T-17 ("*The Trade Union Act*") which permitted the Board to treat "associated companies" as a single employer. The Board found that Graham Engineering was a successor to Graham Construction Ltd., and that Banff, as a non-union labour broker, was not a successor to Graham Construction Ltd.

[9] In 1985 (prior to the release of the *Graham '86* decision), Graham Engineering ceased carrying on business in the construction industry. Graham 1985 commenced operating in Saskatchewan as an open shop contractor in the construction industry.

[10] Jasper and a new entity, BFI Constructors Ltd., supplied union labour to Graham 1985 while Banff supplied non-union labour to Graham 1985.

[11] The Applicants seek successorship relief and claim that the Respondents are "associated and related undertakings operating under common control and/or direction and/or ought to be treated as one and the same," and "are in reality one enterprise."

[12] The Applicants seek relief pursuant to ss. 2, 3, 11, 12, 36, 37 and 42 of *The Trade Union Act* and s. 18.1 of the *CILRA, 1992.*

[13] In an attempt to simplify the hearing, the Board, in *United Brotherhood of Carpenter and Joiners of America, Local 1985, et al. v. Graham Construction and Engineering Ltd. et al.*, [2001] Sask. L.R.B.R. 907, LRB File No. 227-00, asked the parties to first deal with both the successorship and abandonment issues, *vis à vis* Graham 1985 and Graham

Engineering. Banff asked that it be allowed to participate in the abandonment portion of the case, which was agreed to by the Applicants.

[14] The parties agreed that the evidence from the first portion of the hearing would be applied to any subsequent portions of the hearing necessary as a result of the Board's determination of the successorship and abandonment issues.

[15] From 1979 to December 1983, *The Construction Industry Labour Relations Act*, S.S. 1979, c. C-29.1[1] (the "*CILRA, 1979*") was in force. Section 17 of the *CILRA, 1979* provided:

> *17(1) No unionized employer shall, for the purpose of avoiding:*
>
> *(a) the effect on him of any designation of the minister or order of the board determining an employers' organization to be the representative employers' organization with respect to a trade division; or*
> *(b) any collective bargaining agreement that is in effect or that may come into effect between the representative employers' organization and a trade union;*
>
> *perform or seek to perform any work that is the type of work normally performed by him, by or through another corporation or entity that is owned or controlled wholly or substantially by him and that is not subject to the designation of the minister or the order of the board.*
>
> *(2) Where an employers' organization or trade union alleges that a unionized employer has contravened subsection (1), it may apply to the board for an order determining the other corporation or entity mentioned in subsection (1) to be:*
>
> *(a) a unionized employer in that trade division;*
> *(b) bound by the designation of the minister or the order of the board;*
>
> *so far as the performance of that work is concerned.*
>
> *(3) On an application under subsection (2), where it is shown that the work that is being or will be performed by the other corporation or entity is the type of work normally performed by the unionized employer, the burden of proof;*

[1] Repealed by S.S. 1983-84, c. 2.

> *(a) that the other corporation or entity is not owned or controlled wholly or substantially by the unionized employer;*
> *(b) that the unionized employer is not seeking by the acts complained of to avoid the effects of the designation of the minister or order of the board or a collective bargaining agreement;*
>
> *is upon the unionized employer.*

[16] The practical effect of s. 17 was that a construction company could not "spin off" and start a new company to, in effect, avoid an existing certification order.

[17] As dictated by the *CILRA, 1979*, negotiated province wide collective agreements were in place in the construction industry from 1982 until 1984. These agreements bound Graham Construction Ltd. as a unionized contractor and were entered into by Saskatchewan Construction Labour Relations Council ("SCLRC"). The SCLRC was the designated representative employer's organization under the *CILRA, 1979*.

[18] All of the Unions, with the exception of the Iron Workers Union had some form of a "no subcontracting out" clause in their applicable collective agreements. The accepted purpose of this clause was that if a unionized general contractor subcontracted work to another contractor, that contractor had to honour the applicable collective agreement. All of the collective agreements had some form of "hiring hall " provision in them.

[19] The *CILRA, 1979* was repealed in December, 1983. One of the effects of the repeal was that the SCLRC no longer was the bargaining agent for unionized contractors. In addition, there was some confusion over whether the collective agreements were still in effect in the construction industry once the negotiated collective agreements expired in 1984. The Board consistently held that the collective agreement continued to be in effect (see for example the *Graham '86* decision), while Grotsky J. in *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Little Borland* (1986), 48 Sask. R. 291 (Sask. Q.B.) upheld an arbitration decision which determined that the Carpenters Union's collective agreement was not in effect.

[20] The Saskatchewan Court of Appeal, in the decision *United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 264 (UA) v. Metal Fabricating and Construction Ltd.* (1990), 84 Sask. R. 195,

overturned a previous Queen's Bench decision and confirmed that the Board was correct and that the collective agreements continued in effect in the construction industry.

[21] In September 1992, the *CILRA, 1992* was proclaimed, re-introducing province wide bargaining in the construction industry and introducing common employer legislation. Section 18 of the *CILRA, 1992* provided as follows:

> *18(1) On the application of an employer or a trade union affected, the board may declare more than one corporation, partnership, individual or association to be one unionized employer for the purposes of this Act and The Trade Union Act where:*
>
> > *(a) in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through those corporations, partnerships, individuals or associations; or*
> >
> > *(b) a corporation, partnership, individual or association is sufficiently related to a unionized employer that, in the opinion of the board, they should be treated as one and the same.*
>
> *(2) Subsection (1) applies only to corporations, partnerships, individuals and associations that commence carrying on business, undertakings or other activities in the construction industry after the coming into force of this Act.*
>
> *(3) In exercising its discretion pursuant to subsection (1), the board may recognize the practice of non-unionized employers performing work through unionized subsidiaries.*
>
> *(4) The effect of a declaration pursuant to subsection (1) is that the corporations, partnerships, individuals and associations*
>
> > *(a) constitute a unionized employer in a specified trade division; and*
> > *(b) are bound by a designation of a representative employers' organization by the minister pursuant to section 10 or a determination of a representative emploeyrs' organization pursuant to section 11.*
>
> *(5) The board may make an order granting an additional relief that it considers appropriate where:*
>
> > *(a) the board makes a declaration pursuant to subsection (1); and*
> > *(b) in the opinion of the board, the associated or related businesses, undertakings or activities are carried on by or through*

> *more than one corporation, partnership, individual or association for the purpose of avoiding:*
>
> *(i) the effect of a designation of the minister or an order of the board determining an employers' organization to be the representative employers' organization with respect to a trade division; or*
>
> *(ii) a collective bargaining agreement that is in effect or that may come into effect between the representative employers' organization and a trade union.*
>
> *(6) Where the board is considering whether to grant additional relief pursuant to subsection (5), the burden of proof that the associated or related businesses, undertakings or activities are carried on by or through more than one corporation, partnership, individual or association for a purpose other than a purpose set out in subclause (5)(b)(i) or (ii) is on the corporation, partnership, individual or association.*
>
> *(7) An order pursuant to subsection (5) may be made effective from a day that is not earlier than the date of the application to the board pursuant to subsection (1).*

[22] The practical effect of s. 18 of the *CILRA, 1992* appeared to be that existing spin off or related companies would not be caught by the statute but that new spin off or related companies were caught by the statute.

[23] This interpretation was supported by the Board's decision in *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. P.S.P. Erectors Inc.*, [1995] 3rd Quarter Sask. Labour Rep. 64, LRB File No. 083-95. In *P.S.P. Erectors*, the Board held at 68:

> *Regardless of what jurisdiction the Board had to treat separate legal entities as one employer prior to the coming into force of section 37.3 of The Trade Union Act and 18 of The Construction Industry Labour Relations Act, 1992, the Board's jurisdiction is now set forth in these sections. The two respondent corporations may well be sufficiently closely related to warrant an order under either section, but the temporal limitations in these sections exempt these respondents from the application of these sections. The Union did not dispute the Employer's claim that these two corporations became related prior to section 37.3 of The Trade Union Act coming into effect on October 28, 1994. Nor did the Union dispute the fact that these two corporations were in existence prior to section 18 of The Construction Industry Labour Relations Act, 1992 coming into effect.*

[24] Amendments were passed in July 2000 in regard to the *CILRA, 1992*. Section 18(2) was repealed, leading the Unions to file LRB File No. 227-00.

Successorship Facts:

[25] Mike Wytrykush testified about what transpired between Graham Engineering and Graham 1985 in 1985. Mr. Wytrykush was formerly Graham Engineering's Vice-President of Finance and had personal knowledge of the transactions that occurred during that time. Mr. Wytrykush was involved with Graham Engineering in 1984 when the Board found Graham Engineering to be a successor to Graham Construction Ltd.

[26] Mr. Wytrykush was originally hired in Moose Jaw by Graham Construction Ltd. in 1969 and moved to Calgary in 1981. Ron Graham started Graham Engineering in 1983, while Peter Graham, Ron's father, started easing out of the construction business in approximately 1979.

[27] In 1985, Graham Engineering was a general contractor in the construction industry, and was experiencing significant financial problems, as were a number of the corporations owned and controlled by the Graham family. Owners on a number of projects were not paying Graham Engineering and the real estate market was weak, contributing to financial problems in the Graham family holdings. Graham Engineering's bank, the Canadian Imperial Bank of Commerce ("CIBC"), appointed a Receiver in 1985 to best realize on the security it held against the assets of Graham Engineering.

[28] Mr. Wytrykush, together with others from Graham Engineering, motivated in large part by impending unemployment, negotiated with CIBC during the period of approximately April to September, 1985 to purchase/lease some of the existing Graham assets through a new corporation ("New Co."). In addition, the agreement between CIBC and New Co. would allow New Co. to take over all the remaining work for which Graham Engineering was responsible and permit New Co. to complete any extra work including warranty work on the Graham Engineering projects.

[29] Originally, New Co. was a numbered shelf company, which subsequently changed its name to Graham 1985, once New Co. finalized an arrangement with CIBC in regard to the assets of Graham Engineering. Graham Engineering also changed names and became 301876 Alberta Ltd.

[30] Mr. Wytrykush testified that New Co.'s plan was to start a new company, an open shop contractor. To do this, New Co. needed to raise approximately one million dollars. New Co. also needed the backing of a surety company as well as a chartered bank line of credit to allow it to bid on projects.

[31] Negotiations between New Co. and CIBC lasted approximately four months, with the result being that New Co. became Graham 1985 and entered into a number of agreements with Graham Construction Ltd., Graham Engineering and Gracom Construction Companies Ltd. ("Gracom"), a company controlled by Peter Graham. The agreements were ultimately approved by CIBC. In the end result, Graham 1985 subcontracted with Graham Engineering to complete all existing Graham Engineering construction projects. Graham 1985 was responsible for all warranty work and extras on the projects. Mr. Wytrykush estimated that Graham Engineering had outstanding projects totaling approximately $9 million, which, following their completion by Graham 1985, would result in gross profits to Graham 1985 of $700,000. Graham 1985 paid no fee to CIBC to take over the Graham Engineering projects.

[32] During the transition period from Graham Engineering to Graham 1985, Graham 1985 used Graham Engineering's bank accounts and line of credit. Graham Engineering was no longer bidding on contracts, while Graham 1985 started bidding on contracts once it set up credit facilities with a new bank and a new surety company. Graham 1985 leased office equipment from Graham Construction and construction equipment from Graham Engineering (with an option to purchase). Graham 1985 maintained the existing Graham Engineering logo on all equipment. Graham 1985 maintained the existing Graham Engineering offices in Saskatoon, Regina, Estevan and Calgary. Graham 1985 maintained the same phone numbers, fax numbers and even used old Graham Engineering stationary.

[33] Graham 1985 entered into similar transactions as Graham Engineering had with labour brokers.

[34] Ron Graham, the former President of Graham Engineering, was the new Chairman of the board of Graham 1985. He held 40% of the shares in Graham 1985, but could only exercise 20% of the shares in a voting capacity. Tom Baxter, Vice-President responsible for construction operations in Saskatchewan for Graham Engineering, held 10% of the shares in Graham 1985 and was a director of Graham 1985. Garry Boan was responsible for the Alberta

marketplace for Graham Engineering. He became a director and shareholder of Graham 1985. Finally, Mr. Wytrykush was a director and Vice-President of Graham 1985, as well as a shareholder. These four individuals controlled the new corporation and gave personal guarantees to the new bank and surety company for Graham 1985. The financial statements of Graham 1985 for the years 1985, 1986, 1987 and 1988 all appear to have been signed by Ron Graham and Mike Wytrykush as directors "on behalf of the board."

[35] Of approximately 40 - 45 employees from Graham Engineering, 30 - 35 became employees of Graham 1985. The Graham Engineering offices never closed in Calgary, Saskatoon, Regina and Estevan, but became offices of Graham 1985. Graham 1985 took over existing office leases in these four cities. Graham Engineering did shut down its offices in a number of other cities in both Canada and the United States.

[36] Graham 1985 did not compete with Graham Engineering at any time.

[37] In 1987, Graham 1985 purchased all remaining assets of Graham Engineering including a tax loss of approximately 2.4 million dollars, by paying the CIBC $10,000 for the shares of 301876 Alberta Ltd. Presumably these shares had been pledged to CIBC earlier. It was not a condition subsequent in the agreements between Graham 1985 and CIBC that the shares of 301876 Alberta Ltd. be sold or transferred to Graham 1985.

[38] There were a number of documents reflecting agreements entered into by Gracom, 301876 Alberta Ltd. and Graham 1985, some of which were also executed by CIBC, relating to the share purchase. Mr. Wytrykush appears to have executed the agreements on behalf of all parties except CIBC.

[39] Mr. Wytrykush testified that Graham 1985 did not contact the Unions because it was Graham 1985's belief that it was operating as an open shop general contractor and was not bound by any certification orders.

[40] In 1992, a holding company called Graham Group Ltd. was created, with Graham 1985 becoming a wholly owned subsidiary of this new corporation. In approximately 1997, Graham 1985 changed its name and became Graham Construction & Engineering Inc.

Issue:

Is Graham 1985 a successor to Graham Engineering?

Relevant statutory provision:

[41] Section 37 of *The Trade Union Act* provides as follows:

> *37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.*
>
> *(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:*
>
> > *(a) determining whether the disposition or proposed disposition relates to a business or part of it;*
> >
> > *(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:*
> >
> > > *(i) an employee unit;*
> > > *(ii) a craft unit;*
> > > *(iii) a plant unit;*
> > > *(iv) a subdivision of an employee unit, craft unit or plant unit; or*
> > > *(v) some other unit;*
> >
> > *(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);*
> >
> > *(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);*

> *(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;*
>
> *(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).*

Applicants' arguments:

[42] The Applicants argue that there is overwhelming evidence that Graham 1985 obtained a business or part thereof from either or both Graham Engineering or the CIBC and that it is a successor to Graham Engineering pursuant to s. 37 of *The Trade Union Act*.

Respondent's arguments:

[43] Graham 1985 argues that it is not a successor company in that it started a new company and did not purchase an ongoing entity or business.

Purpose of s. 37:

[44] Board decisions have consistently found that the purpose of s. 37 of *The Trade Union Act* is to ensure that employee rights, gained and exercised under s. 3 to be represented by a bargaining agent, are not defeated upon the disposition by an employer of its business.

[45] The Board in the decision *Saskatchewan Government Employees Union v. Government of Saskatchewan*, [1999] Sask L.R.B.R. 307, LRB File No. 109-98, concluded at 347:

> ***[115]*** *The overall purpose of the successorship or transfer of obligations provisions, which are contained in s. 37 of the Act, was set out by the Board in Saskatchewan Government Employees' Union v. Saskatchewan Institute of Applied Science and Technology, [1989] Summer Sask. Labour Rep. 51, LRB File No. 131-88, at 64:*
>
> > *The two most fundamental rights protected by The Trade Union Act are firstly, the right of employees to bargain collectively through a trade union of their own choosing; and secondly, the right of the trade union representing a majority of the employees in an appropriate unit to act as*

> *exclusive bargaining representative of all employees in that unit. Section 3 of The Trade Union Act provides:*
>
> > *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> *Section 37 of The Trade Union Act ensures that the disposition of a business does not destroy these two fundamental rights. It protects the first right by binding the transferee of a business to the product of collective bargaining, namely, a collective bargaining agreement embodying rates of pay, hours of work and other conditions of employment. It protects the second right by binding the transferee of a business to Board orders under The Trade Union Act.*

[46] The Board, in the decision *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sask Gaming Corporation*, [2001] Sask. L.R.B.R. 751, LRB File Nos. 163-01 & 164-01, found that the legal effect of a disposition under s.37 is as follows:

> *[14] Section 37 of the Act is somewhat unique in that it effects an automatic amendment of a certification order and a collective bargaining agreement on the occurrence of a sale, lease, transfer or other disposition of a business or part thereof. The new employer stands in the shoes of the original employer and the terms of the certification order and collective agreement are deemed to apply to the new employer "to the same extent as if the order had originally applied to him or the agreement signed by him" (s. 37(1)). No order of the Board is required to effect this change in either the certification order or the collective agreement.*

[47] As such, pursuant to s. 37, no Board order was required to effect a change in either the certification Orders or the collective agreements of Graham Engineering. (See also: *UFCW, Local 1400 v. Corps of Commissionaires* [2002] Sask. L.R.B.R. 188, LRB File No. 276-00 at 197).

Successorship Test:

[48] The Board accepts the test in regard to a successorship and applies the reasoning set out in the decision *United Brotherhood of Carpenters and Joiners of America, Locals 1805 and 1990 v. Cana Construction Ltd., et al.*, [1985] Feb. Sask. Labour Rep. 29, LRB File Nos. 199-84, 201-84, 202-84 & 204-84 at 37:

> *In order to determine whether there has been a sale, lease, transfer or other disposition of a business or part thereof, the Board will not be concerned with the technical legal form of the transaction but instead will look to see whether there is a discernable continuity in the business or part of the business formerly carried on by the predecessor employer and now being carried on by the successor employer. The Trade Union Act does not contain a statutory definition of "business" and the Board recognizes that it is not a precise legal concept but rather an economic activity which can be conducted through a variety of legal vehicles or arrangements. It has given the term "business" a meaning consistent with the comments of the Ontario Labour Relations Board in Canadian Union of Public Employees v. Metropolitan Parking Inc., [1980] 1 Can. L.R.B.R. 197, at 208:*
>
> > *A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a dynamic activity, a "going concern", something which is "carried on". A business is an organization about which one has sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets. This notion is implicit in the remarks of Widjery J. in Kenmir v. Frizzel et al., [1968] 1 All E.R. 414 . . .*
> >
> > *Widjery J. took the same approach as that adopted by this Board, concentrating on substance rather than form, and stressing the importance of considering the transaction in its totality. The vital consideration for both Widjery J. and the Board is whether the transferee has acquired from the transferer a functional economic vehicle.*
> >
> > *In determining whether a "business" has been transferred, the Board has frequently found it useful to consider whether the various elements of the predecessor's business can be traced into the hands of the alleged successor business; that is, whether there has been an*

> *apparent continuation of the business - albeit with a change in the nominal owner.*

Analysis:

[49] Applying the test set out in *Cana Construction*, *supra*, this Board finds that there is a discernable continuity in the business or part of the business formerly carried on by Graham Engineering and now being carried on by Graham 1985. The transactions in their totality, between Graham 1985 and CIBC, Graham Engineering, Graham Construction Ltd. and 301876 Alberta Ltd. can lead to no other logical conclusion.

[50] Looking at the various transactions as a whole, including the fact that Graham 1985 leased its office equipment from Graham Construction Ltd., its construction equipment from Graham Engineering, took over all existing work of Graham Engineering, and the fact that Graham 1985 bought all the shares of Graham Engineering through 301876 Alberta Ltd., the Board has no hesitation whatsoever in finding that Graham 1985 is a successor to Graham Engineering.

[51] Graham 1985 maintained the majority of Graham Engineering personnel, used the same offices, the same phone numbers, the same stationary, the same office equipment, the same construction equipment, the same logos, the same Graham name, the same arrangement with labour brokers and even assumed all existing Graham Engineering construction work. Graham 1985 did not compete with Graham Engineering. Rather, Graham 1985 was the subcontractor who completed all the remaining Graham Engineering projects. The Board would have found that Graham 1985 was a successor to Graham Engineering, irrespective of the 1987 transaction that allowed Graham 1985 to purchase the outstanding shares of Graham Engineering through 301876 Alberta Ltd. The subsequent agreement which allowed Graham 1985 to purchase the shares of 301876 Alberta Ltd. in order to utilize the eventual $2.4 million tax loss only strengthens the finding that Graham 1985 is a successor to Graham Engineering.

[52] Another significant factor leading to the Board's conclusion was that the vast number of key personnel from Graham Engineering went over to Graham 1985. Ron Graham, the driving force behind Graham Engineering, continued to have a significant presence in Graham 1985, having invested a significant amount of capital, $400,000-450,000, to allow him

to own 40% of the shares. Ron Graham also held the position of director and chairman of the board.

[53] Graham 1985's main argument that it is not a successor to Graham Engineering centers around the fact that Graham 1985 was a new company that had to obtain new capital and have new investors provide personal guarantees. Furthermore, Graham 1985 had to approach a new bonding company and a new bank and establish a new relationship with these entities.

[54] In most instances, new corporations or individuals who purchase a business or part of a business must approach a bank to obtain financing for the purchase of assets. Often the new corporation or individual must obtain a line of credit to assist it in running the business. In addition, individuals or the individuals controlling the new corporation must provide security to a bank in many forms, such as mortgages on their homes in support of a personal guarantee. The act of having to obtain new financing or having to provide security to a bank does not change the dynamics of the transactions as described earlier in these Reasons for Decision. The transactions resulted in Graham 1985 obtaining a majority of the useful assets of Graham Engineering and leaving behind the liabilities of Graham Engineering, until the liabilities could be purchased at a later date so that Graham 1985 could utilize a tax loss.

[55] As such, the Board rejects Graham 1985's argument that, because Graham 1985 had new investors who provided new security to a new bank and a new surety company, Graham 1985 was not a successor to Graham Engineering. As stated earlier, looking at the transactions as a whole, the Board concludes that Graham 1985 is a successor to Graham Engineering in that it did acquire a business or part thereof pursuant to s. 37 of *The Trade Union Act*.

Abandonment introduction:

[56] Prior to the commencement of the hearing, the Board had dealt with the parties on a number of issues, including particulars, production of documents and exclusion of witnesses. It became obvious to the Board that there had been a significant period of inactivity on the part of the Unions in regard to the enforcement of their collective bargaining rights. With respect to the concept of the abandonment of bargaining unit rights, the Board was interested in the various reasons given by the Unions as to why they had not proceeded to enforce whatever rights they could as against Graham 1985. Why had the Carpenters Union waited approximately thirteen years and the other Unions fifteen years to bring a successorship application? Why had the Unions, save and except for the Iron Workers, not contacted Graham 1985 advising it that the Unions considered Graham 1985 to be a unionized general contractor? Why had the Unions not attempted to bargain with Graham 1985? Was this lengthy delay an indication of abandonment?

[57] A snapshot of the majority of the reasons given by the Unions for their inactivity can be gained from the particulars provided by the Carpenters Union dated July 2, 1999 in LRB File No. 014-98. Portions of the particulars provide:

> *Not very long after the Board's decision in 1985 (should read 1986), the Union began to notice a change in name by the Employer. Further action at that time did not appear to be realistic due to the chaos in the construction trade, the decimation of the Local's membership, the then state of legislation and the prospect that the employer would merely continue to create new spin-off companies and/or new successors to avoid the effects of certification.*

[58] The Board was struggling to understand why the Unions had taken no action as against Graham 1985 for a significant period of time and therefore agreed to hear the abandonment evidence and the successorship evidence separately. The Board was hopeful that a bifurcated hearing would proceed in a more focused manner and provide the Board with a more clear understanding of exactly what rights the Unions had allegedly abandoned or were sleeping on and whether or not that should affect the Board's decision in this matter.

Applicants' Argument:

[59] The Applicants argued that the onus of proof rested on the Respondents to prove that the Applicants had abandoned their bargaining unit rights and their certification Orders.

The Applicants argued that the Board, in *International Brotherhood of Electrical Workers, Local 529 v. Mudjatik Thyssen Mining Joint Venture*, [2000] Sask. L.R.B.R. 332, LRB File No. 140-99, set out four principles which were to be considered in the construction industry when analyzing whether or not to grant the equitable relief of abandonment. The Applicants argued that, according to these principles, the Respondents were not entitled to assert the claim of abandonment.

Respondents' Argument:

[60] The Respondent Graham 1985 argued that *Mudjatik*, *supra,* was not factually on point and that it was entitled, based on the facts, to the equitable relief of abandonment. In the alternative, Graham 1985 argued that *Mudjatik* was either wrongly decided, or that the principles required to prove abandonment had been met.

[61] The Respondent Banff argued that the Applicants had abandoned any bargaining rights they held and that therefore "any alleged bargaining rights on which the Applicants might have attempted to base a claim of common 'unionized employer' were abandoned long before the present applications were brought."

Abandonment Facts:

[62] There was no real disagreement on the facts relating to the abandonment issue. Bob Todd, the business manager and agent of the Carpenters Union, testified on behalf of the Carpenters Union and his testimony need not be reviewed in detail as it matched up with the Carpenters Union's particulars cited earlier. Mr. Todd confirmed that the Carpenters Union did not directly contact Graham 1985 to negotiate or at all until December 1997. The Carpenters Union was aware that Graham 1985 was doing extensive work in Saskatchewan as an open shop general contractor, subbing work out to labour brokers. The Carpenters Union was aware that Graham 1985 was not using carpenters from the Carpenters Union hiring hall and Mr. Todd was aware that the Carpenters Union could have utilized the subcontracting clause (article 5.05 of the collective agreement) as instructed by the Board in the *Graham '86* decision.

[63] Mr. Todd was aware, given the repeal of the *CILRA, 1979* in 1983, that the Carpenters Union was required to directly bargain with Graham 1985 and he conceded that the Carpenters Union did not directly bargain with Graham 1985. Mr. Todd agreed that he was

aware that Graham 1985 was not part of the SCLRC. Mr. Todd also agreed that he testified before the Board in 1994 regarding a dispute between two entities seeking to represent the unionized contractors in Saskatchewan and that he did not mention that Graham 1985 was unionized, or that it was the Carpenters Union's position that Graham 1985 was unionized.

[64] Mr. Todd testified that, at the same time the Carpenters Union was not contacting Graham 1985, not filing grievances against Graham 1985, not bargaining with Graham 1985, or bringing successorship applications against Graham 1985, the Carpenters Union was applying for certifications as against other entities, including Points North Construction Ltd. in 1995.

[65] The Carpenters Union also provided "enabling agreements" to other unionized contractors, but never contacted Graham 1985 in regard to these enabling agreements. Mr. Todd referred to Graham 1985 at times as a non-union company and at other times as a non-union spin off contractor.

[66] Ed Cowley, former business manager of the International Union of Operating Engineers, Local 870 also testified before the Board. He testified that, from 1984 to 2000, his Union took no legal actions as against Graham 1985. He acknowledged being aware of Graham 1985's existence and testified that he was aware of the significant amount of work that Graham 1985 was doing. He knew he could enforce his Union's subcontracting clause as against Graham 1985. He stated that his Union had obtained legal opinions in approximately 1992 in regard to taking action as against Graham 1985, but he could not produce these opinions. These legal opinions went both ways, with one opinion saying that his Union had a good case and one saying it did not have a good case.

[67] Boris Slipchuk, business manager for Construction & General Workers Union, Local 890, testified before the Board. Mr. Slipchuk became business manager in 1989 and from his review of the Union's business records he could not find any information to indicate that his Union had enforced any rights as against Graham 1985. From 1989 onward, his Union did not take any legal action as against Graham 1985 until 2000. His Union did not attempt to enforce its subcontracting clause (article 19) as against Graham 1985 and Mr. Slipchuk was aware of the effects of that clause, namely, that if Graham 1985, as a general contractor, subcontracted any labouring work, that work had to be done using union people.

[68] Mr. Slipchuk was aware of the existence of Graham 1985 and that Graham 1985 was doing non-union work in Saskatchewan and conceded that his Union never gave Graham 1985 any notices to bargain. He conceded that his Union never filed any grievances against Graham 1985, never took any applications to the Board until this application was filed in 2000, and never contacted Graham 1985 to inform it that it was a unionized contractor.

[69] Mr. Slipchuk acknowledged that his Union was bargaining with other individual contractors, such as Dominion Construction and Wright Construction. His Union was also filing grievances against such entities as Wright Construction, which occurred in 1997.

[70] Mr. Slipchuk gave the following evidence that his Union considered Graham 1985 to be non-union:

> *Q. 259* *And the union never informed any of these named respondents other than the ones you certified, Jasper and BFI, that they were a unionized contractor in the Province of Saskatchewan in the Labourers (inaudible)(jurisdiction)?*
>
> *A.* *We talked to people working for some of those companies, like Graham 1985, and told them that Graham was a union company. These people still…we talked to some of our members and they would have like (d) to file a certification, if we had support.*
>
> *Q. 260* *So when you talked to them and you couldn't... there was no... you couldn't get support.*
>
> *A.* *Not totally.*

[71] Kelly Reardon also testified for the Construction and General Workers Union. He is now an international representative of the Union but prior to that, he had been a business manager for the Union for the north part of Saskatchewan from 1984 to 1989, when he was replaced by Mr. Slipchuk. Mr. Reardon had no knowledge of his Union taking any action to enforce any rights against Graham 1985 and he could not remember any attempt to meet with Graham 1985 and negotiate. He could remember negotiating with Dominion Construction in 1986 but, not surprisingly, his memory of events which occurred between fifteen and twenty years ago was very limited. While the Union's minutes certainly helped him refresh his memory to some extent, Mr. Reardon was forced to answer, in regard to numerous questions, that he had no recollection.

[72] Mr. Reardon was aware of the existence of Graham 1985, that Graham 1985 was operating as an open shop contractor and he, like Mr. Slipchuk, was aware of the legal effect of his Union's subcontracting clause. He was not aware of any grievance filed against Graham 1985 by his Union. Mr. Reardon reviewed union minutes which indicated action and discussion in regard to two other significant general contractors in Saskatchewan at that time, Dominion and PCL. In regard to PCL, the minutes reveal the question "when will action be taken as against PCL?" and in regard to Dominion, "why was Dominion Construction not paying its employees the proper wages?" A portion of the minutes also revealed that in approximately 1988, there was some discussion about the difficulty of organizing PCL, Cana and Graham.

[73] Kerry Westcott, business agent for the Operative Plasterers & Cement Masons International Association, Local 222 from 1982 to 1998 also testified before the Board. His Union did not file any grievances against Graham 1985 and took no action against Graham 1985 to enforce its collective bargaining rights or to bargain with Graham 1985. Mr. Westcott testified that his Union's subcontracting clause was weaker, in that it stated that "preference" must be given to union subcontractors.

[74] Mr. Westcott was aware that he could file a successorship application before the Board in the event his Union believed that Graham 1985 was a unionized contractor and that he could file an unfair labour practice against Graham 1985 in relation to failing to bargain.

[75] Mr. Westcott described his Union's actions as passive and testified that he had hoped a larger Union would take action as against Graham 1985 so as to bring Graham 1985 back to the table.

[76] Mr. Westcott was clear that a "spin-off" describes a situation where a company changes its name to avoid a collective bargaining agreement, while a successor dealt more with the change of ownership situation. In regard to Graham 1985, it was Mr. Westcott's belief that Graham 1985 was formed to avoid its collective bargaining obligations, though he did not remember doing any research in regard to the origin or creation of Graham 1985.

[77] Mr. Westcott was familiar with the fact that Graham 1985 was doing a large amount of work in Saskatchewan and was aware that Graham 1985 had advised him that it was

a new corporation, operating non-union, with no employees, and that it was different from Graham Engineering.

[78] Mr. Westcott was familiar with the abandonment concept as his Union had a case that dealt with abandonment. He was aware there existed some risk to his Union as a result of doing nothing against Graham 1985. He stated that his Union was of the belief that there was nothing useful that it could have done following the enactment of the *CILRA, 1992*, and that his Union chose to lobby government to have a change implemented. During the period of time from 1992 onward, Mr. Westcott was able to negotiate a stronger subcontracting clause in the collective agreement which he now says should bind Graham 1985. Mr. Westcott conceded that Graham 1985 was not at the table negotiating a collective agreement and was not a member of CLR, the new organization representing unionized contractors.

[79] Richard Wassill, replaced Mr. Westcott as business manager of Operative Plasterers & Cement Masons International Association, Local 222 in 1998. He confirmed that his Union took no action as against Graham 1985 until 2000.

[80] Bert Royer, business manager of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771 testified before the Board. Mr. Royer was an iron worker in Saskatchewan from 1977-1983. He then left Saskatchewan due to the downturn in the economy, returning in 1987. He became involved with the Union's executive in 1991 and became business manager in 1995.

[81] From 1987-1994 Greg Zaba was the business manager for the Iron Workers Union. Prior to that, A. J. Zaba appears, from the records, to have been the business manager for the Iron Workers Union. Mr. A.J. Zaba sent a notice to commence bargaining to Graham Construction Ltd. dated March 13, 1987. Mr. A. J. Zaba subsequently sent correspondence to Graham Construction Ltd. dated October 29, 1987 which enclosed two copies of the Provincial Iron Workers' Standard Agreement which had recently been negotiated between the Ironworkers Union and the SCLRC. There was no evidence presented that Graham 1985 received these documents or responded to these documents.

[82] Mr. Greg Zaba sent Graham Construction Ltd. a Notice to Commence Bargaining dated June 15, 1990. There was no evidence that Graham 1985 received this correspondence or responded to this correspondence.

[83] The Iron Workers Union did enter into a new Provincial Iron Worker's Agreement dated August 15, 1990 with the SCLRC. The SCLRC listed who it acted as agent for, and thus who was bound by the terms of the collective agreement, in the actual collective agreement. Graham Construction Ltd., Graham Engineering and Graham 1985 were not listed as being represented by the SCLRC.

[84] Mr. Greg Zaba sent Graham 1985 a Notice to Commence Bargaining dated March 5, 1993. Graham 1985 responded to the Iron Workers Union by letter dated March 11, 1993. In this letter, Graham 1985 stated that it did not have an agreement with the Iron Workers Union so it would be impossible to negotiate a revision. Graham 1985 stated that it did not have any field workers, that it was not certified by the Iron Workers Union and that it would not be attending any bargaining sessions.

[85] Mr. Royer sent Graham Construction the signatory pages for the recently re-negotiated Iron Workers Provincial Agreement by letter dated November 6, 1996. There was no evidence to indicate that Graham 1985 received this correspondence.

[86] By correspondence dated March 1, 1998, the Iron Workers Union sent Graham 1985 a Notice to Commence Bargaining. Graham 1985 responded to the Iron Workers Union by correspondence dated March 12, 1998 advising the Iron Workers Union that Graham 1985 was not a signatory to the Provincial Iron Workers Agreement.

[87] The Iron Workers Union's documents revealed that, in 1990 and 1991, it was contacting BFI Constructors Ltd. and asking BFI Constructors Ltd. to execute the provincial bargaining agreement. BFI Constructors Ltd. did execute the provincial agreement.

[88] Mr. Royer stated that Mr. Greg Zaba worked for the Iron Workers Union, still lived in Regina and would have a better knowledge of Iron Workers Union matters in the 1980's and early 1990's than Mr. Royer would have.

[89] Mr. Royer testified that the Iron Workers Union did not have any collective agreements signed by Graham 1985, but that it did have collective agreements signed by BFI Constructors Ltd. The Iron Workers Union took no legal action against Graham 1985 from 1985 until 2000.

[90] Mr. Royer testified that the Iron Workers Union did not pursue Graham 1985 because the Iron Workers Union was getting its fair share of work through BFI Constructors Ltd., so he felt there was no work to pick up. Therefore the Iron Workers Union did not pursue Graham 1985 and have it sign any collective agreements, or bring any applications against Graham 1985 with the Board.

[91] Mr. Royer testified that the Iron Workers Union brought the application before the Board because the Union did not have a subcontracting clause in its collective agreement and he wanted one. In addition, an incident had occurred at a job site where Alberta workers had been used.

[92] Mr. Wytrykush testified on behalf of Graham 1985 and, as set out in the successorship facts, he confirmed that Graham 1985 commenced business in 1985 as an open shop contractor. From 1985-1992 no unions contacted Graham 1985 to inform it that the unions believed Graham 1985 was unionized, or to bargain, or to file any grievances, or to provide Graham 1985 with an enabling agreement.

[93] From 1992 onward, other than the Iron Workers Union, no unions contacted Graham 1985 in regard to Graham 1985 being a unionized general contractor until the end of 1997, when the Carpenters Union contacted Graham 1985. During that period of time, Graham 1985 did not belong to CLR, the representative organization for unionized contractors in provincial bargaining with the various trades. Graham 1985 was never asked to join any employer organization, or put on notice that any unions or entities considered Graham 1985 to be a unionized contractor, save and except for the Iron Workers Union, until these two applications were brought before the Board.

[94] Based on the evidence, there is a very strong case, from a common sense perspective, to be made that the Unions abandoned their bargaining rights. The Applicants did not file any grievances or proceed with any type of arbitration process to enforce collective

agreement provisions against Graham 1985. The Carpenters Union did not contact Graham 1985 until December 1997 and did not bring any applications to the Board against Graham 1985 until 1998. The remaining Unions also did not contact Graham 1985 (save and except for the Iron Workers Union which attempted to contact Graham 1985 on two occasions) prior to 2000.

[95] While Graham 1985 did not contact the Applicants at any time and ask that workers be sent from the Applicants' hiring halls (an event which would never occur given the open shop/labour broker structure of Graham 1985), Graham 1985 operated openly in Saskatchewan as an open shop contractor. The Applicants were all aware of this fact, though they received no details from Graham Engineering or Graham 1985 in relation to the demise of Graham Engineering or the creation of Graham 1985. Graham 1985 was not contacted by any of the Applicants to bargain directly following the repeal of the *CILRA, 1979*, or at all. Upon the proclamation of the *CILRA, 1992*, unionized contractors were again represented by a representative employer's organization in their negotiations within a number of trade divisions. Graham 1985 did not participate in this collective bargaining process and was not asked to participate or advised by the Unions that the Unions considered Graham 1985 to be unionized.

What is Abandonment?

[96] The Board has held that abandonment occurs when a union is inactive in enforcing its bargaining rights (See *International Union of Operating Engineers, Hoisting and Portable Stationary, Local 870 v. Wappel Concrete and Construction Ltd.,* [1984] Apr. Sask. Labour Rep. 33, LRB File No. 302-83). In arriving at a determination that a union has abandoned its bargaining rights, labour relations boards have considered numerous factors, notably:

1) the length of time of the union's inactivity;
2) Whether the union has made attempts to renegotiate or renew a collective agreement;
3) Whether the union has sought to administer the collective agreement;
4) Whether terms and conditions of employment have been changed by the employer without objection from the union;
5) Whether there are any extenuating circumstances to explain an apparent failure to assert bargaining rights. These circumstances involved the

> knowledge of the union of the employers actions (see G.W. Adams, *Canadian Labour Law*, 2nd ed. (Aurora: Canada Law Book Inc., 2003).

[97] In our case, the Unions' period of inactivity is significant (either thirteen or fifteen years). The Unions made no attempts to renegotiate the terms of the collective agreements from 1985-1992 with Graham 1985. Upon the reintroduction of province wide bargaining in 1992, the Unions took no steps to indicate that Graham 1985 was a unionized contractor who should therefore participate in province wide bargaining, save and except for the Iron Workers Union. The Unions took no steps to administer the collective agreements. While the Unions acknowledged being fully aware of Graham 1985's actions in the construction industry from the outset, counsel for the Unions argued that there were a number of extenuating circumstances which explained the Unions' inactivity. In addition, counsel for the Unions argued that the Board's decision in *Mudjatik*, *supra*, applied.

Introduction:

[98] Prior to discussing the various reasons given by the Unions for their inactivity, it is important to review some of the types of evidence that the Board received and why. As a starting point, the Board was faced with the difficult task of hearing and considering evidence relating to incidents which occurred approximately fifteen to twenty years ago. As stated earlier, the pleadings, including the particulars, confirmed that this would be occurring. The Unions were in possession of membership and executive minutes which covered the period of time in question. The Board determined that these minutes were relevant and ordered that they be produced.

[99] The production of the minutes was extremely helpful and beneficial for the Board and for the witnesses. For example, Mr. Reardon testified before the Board. Prior to testifying he reviewed whatever Union minutes were available. Mr. Reardon accepted that the minutes would more accurately reflect what transpired fifteen to twenty years ago with his Union than his memory would. While Mr. Reardon still answered a number of questions with "I don't remember," when questioned by counsel in regard to specific minutes, his memory was often refreshed. For example, Mr. Reardon provided, as set out in the transcript, the following answer to Q. 189 &190:

> A. *Well I remember this meeting because I'm reading it in the book here. If you had asked me do you remember any meetings with Bird and Osmac, I would have answered, "I can't remember." But I'm reading it in the minutes here, so... I accept it as accurate.*

[100] The Board also heard evidence relating to enabling agreements. It was the evidence of most, if not all, of the witnesses that "enabling" occurs when a unionized contractor approaches a union and asks for a reduced wage rate for a project. The reason why the unionized contractor would ask for the enabling agreement was that the unionized contractor would be unsuccessful in obtaining the bid in regard to the project if it was required to bid "union rates." In other words, if the union wage rates were $18 an hour, the union could agree that it would supply the unionized contractor with labour at $13 an hour for the particular project in question. The union would then advise all other unionized contractors that the union would supply labour, for the particular project in question at $13 an hour. This would ensure that no unionized contractor was favoured, and that all unionized contractors were able to bid on the particular project utilizing the same rates.

[101] The questions from counsel for Graham 1985, in regard to "enabling" attempted to demonstrate that the Carpenters Union never contacted Graham 1985, who the Carpenters Union stated in its pleadings was a unionized contractor by way of successorship, to advise Graham 1985 that it could have enabling rates. Counsel argued that this was another example which demonstrated that the Carpenters Union did not consider Graham 1985 to be a union contractor.

[102] While it is true that Graham 1985 would have known of instances where it was the initial unionized contractor asking for the enabled rates, (which the evidence demonstrated never occurred, for Graham 1985 held the unchallenged belief that it was not unionized) Graham 1985 would not be aware of other instances where the Carpenters Union gave enabling rates when asked to by other unionized contractors. Thus, the Board allowed this line of questioning as relevant.

Various Reasons Given For Union Inactivity:

1. No Financial Resources

[103] The Unions initially argued that financial resources were one reason why they did not take action against Graham 1985. When the Board sought to hold them accountable for the

reason given and ordered production of Union financial records, counsel for the Unions indicated that "the applicants do not rely upon financial circumstances in response to the employers' allegation of abandonment." Nonetheless, Mr. Cowley, on behalf of the International Union of Operating Engineers, testified that financial resources were one of the reasons why the Unions did not proceed as against Graham 1985. Given counsel's representation, financial circumstances cannot be used by the Unions to justify their inactivity against Graham 1985.

2. Uncertainty As To What To Do

[104] At the same time the Board was advising the Carpenters Union that the 1982/84 collective bargaining agreement was in force, one arbitrator had provided a ruling that the Carpenters Union's collective bargaining agreement was not in force. In other words, the Unions could not enforce their collective bargaining rights and enforce the subcontracting clause as instructed to by the Board. This decision was upheld upon judicial review. The Carpenters Union decided not to pursue the matter to the Court of Appeal to clear up the confusion.

[105] Another union, which is not an applicant in these proceedings, chose to challenge the uncertainty in the industry and pushed the matter to the Court of Appeal, which, in 1990, found that the collective bargaining agreements continued to exist as the Board had found on more than one occasion. As such, any confusion which existed, was now gone. Yet the Carpenters Union waited approximately seven and one half more years and the remaining Unions ten more years, prior to bringing any applications before the Board dealing with Graham 1985. This weakens the Unions' claim that they did not know what to do because of one arbitration decision.

[106] Irrespective of what one arbitration decision held, the Unions each had the ability to contact Graham 1985 directly and attempt to bargain with it given the repeal of the *CILRA, 1979* in 1983 which meant that provincial bargaining was no longer applicable. The Unions were aware of this. The facts indicated that Graham 1985 was not contacted to bargain collectively by the Unions. The Carpenters Union did contact the SCLRC in 1990 seeking to bargain collectively and asking which employers the SCLRC represented. However, the SCLRC did not advise the Carpenters Union that the SCLRC represented Graham 1985.

3. The Board's *Graham '86* Decision

[107] Linked with the "uncertainty as to what to do" argument was the argument that this Board should ignore the *Graham '86* decision. Counsel for the Unions referred to comments made by the Board in this decision in regard to the status of the collective agreements as *obiter dictum*. Counsel for the Unions gave no acceptable reasons or arguments why the Board should ignore its 1986 decision which instructed the Carpenters Union on how to enforce its rights.

[108] The *Graham '86* decision legitimized the labour broker concept and found that Graham Engineering was not utilizing labour brokers simply to avoid unions but, rather, to stay in business by obtaining business however it could. The Board found that the non-union labour broker supplying labour to Graham Engineering was not a successor. Finally, the Board advised the Carpenters Union to enforce its subcontracting clause in its collective agreement as these were the only rights it possessed. In other words, the collective bargaining agreement that existed, as between the Carpenters Union and Graham Engineering, could be utilized and enforced. The ensuing obligation to bargain would also exist.

[109] In the *Graham '86* decision, the Board stated at 47 that "the Union alleges that by contracting out its carpentry work to Banff, G.C.E.L. was motivated by an anti-union animus and interfered with the rights of union members in violation of s. 11(1)(a) of the *Act*." The Board held that neither G.C.E.L. nor Banff violated s. 11(1)(a) of *The Trade Union Act*, but did find that G.C.E.L. violated s. 11(1)(c) of *The Trade Union Act.*

[110] The Board accepts the *Graham '86* decision. The Carpenters Union was instructed by the Board to enforce its collective bargaining rights and the Carpenters Union was aware that Graham 1985 was contracting out its carpentry work to a non-union subcontractor. Likewise, the evidence confirmed that the Applicants were aware of the *Graham '86* decision and were aware that Graham 1985 was subcontracting out its labour. The Unions chose not to enforce these rights for a number of reasons which the Board will continue to review.

4. Arbitration Argument

[111] Also tied in to the "uncertainty argument" and the "ignore the *Graham '86* decision argument" is the argument that the Board should not concern itself with the wording of

the *Graham '86* decision which instructed the Carpenters Union to enforce its collective bargaining rights and to proceed to arbitration, if necessary. Counsel for the Unions argued that the strength of the subcontracting clause, the extent of its application and the ensuing remedies available to the Unions from an arbitrator were all issues which fell beyond the Board's expertise and rested within an arbitrator's realm. With respect, this argument misses the point. The Board in the *Graham '86* decision was advising the Carpenters Union of what rights it held, which were solely those arising from the provisions of the collective agreement. If the collective agreement existed, the Unions could directly bargain with Graham 1985, they could still enforce certain rights. By doing nothing for either thirteen or fifteen years in regard to the various collective agreements with Graham 1985, the Unions took no steps to enforce their collective bargaining rights and thus it can be argued that they lost those rights through abandonment.

5. Assumption of Improper Actions and Motives of Graham 1985

[112] The Unions argued that they did nothing to enforce their collective bargaining rights as against Graham 1985 because Graham 1985 would have simply "reincarnated itself as it pleased." This statement is not based on any evidence filed before the Board. There was no bad faith on the part of the principals of Graham 1985 when they formed the new corporation and commenced business in 1985. The Board had not released its *Graham '86* decision until 1986, so the argument that Graham was simply reincarnating itself to avoid the Board's decision does not make any sense. In addition, the evidence was compelling and uncontroverted that Graham 1985 was created following the financial demise of Graham Engineering. It is accepted that Graham Engineering did not intend to go broke and lose $2.4 million dollars to somehow avoid any unions that could have held a certification order against it, given that the *Graham '86* decision had not yet been released which found Graham Engineering to be a successor.

[113] It was conceded by a number of witnesses for the Unions that, from 1985 to 1997, Graham 1985 would not have known that the Unions considered it to be a unionized contractor, save and except for the Iron Workers Union. Therefore it is difficult to understand an argument that Graham 1985 was somehow acting in bad faith. The Iron Workers Union did contact Graham 1985 in 1993. Graham 1985 immediately responded to the Iron Workers Union and did not receive a legal challenge from the Iron Workers Union until 2000.

[114] It is difficult to understand an argument that the Unions did nothing to enforce or maintain their collective bargaining rights because they thought that if they did enforce these

rights, Graham 1985 would have then taken some type of action in response. The Board is unable to place any weight on assertions that are nothing more than speculation. In addition, the evidence indicated that it was a lengthy and difficult process for Graham 1985 to, in effect, take over from Graham Engineering. Secured assets, security agreements, surety companies and owners of projects had to be dealt with. It would not be as simple as counsel for the Unions would suggest for a corporation to create a new company to avoid the effects of a certification order.

6. No Employees of Graham 1985

[115] While Graham 1985 did not hire any union or non-union employees, it was conceded by Mr. Todd that directly hiring carpenters by Graham 1985, or for that matter any unionized contractor was not a requirement with the Carpenters Union.

[116] The no-employees issue is therefore a red herring. The Board, in the *Graham '86* decision legitimized the labour broker/no employee situation. The parties themselves recognized the possibility that an employer would not have employees at times and would sub-contract work.

7. Members Did Not Want To Enforce Their Rights

[117] At times the Unions attempted, through hearsay evidence, to allege that union members did not want to enforce their rights, or even acknowledge their union cards. No direct evidence was led by the Unions to support these comments.

8. Waiting For the *CILRA, 1992* To Change

[118] Mr. Cowley testified that one of the reasons that he did not take any action against Graham 1985 was that he was waiting for the *CILRA, 1992* to change. The proposition that one takes no steps to enforce one's rights while waiting and hoping for legislation to change is again difficult to accept. Counsel for Banff Labour Services Ltd. called it a "ridiculous proposition that a union may be excused from taking action for a period of upwards of fifteen years, banking on a change of law that might improve the union's legal position." The Board agrees with these comments.

[119] The Board asked counsel for the Unions the following question: If the 2000 amendment occurred in 2010, and some of counsel's clients had still not taken any action against Graham 1985, could it be said that counsel's clients had abandoned their bargaining rights? Counsel for the Unions, to be consistent, had to answer that his clients had not abandoned their bargaining rights. The Board does not agree with this answer as it does not make any sense, in a labour relations situation, for one party to sleep on rights which it is asserting against another party, though it has not advised the other party or put the other party on notice that it believes it has these rights.

[120] Also linked with this argument is the allegation that the Unions continually lobbied government, seeking legislative change. While this was certainly true in a general way, this does not excuse the Unions from enforcing or asserting their bargaining rights.

9. What Was the Purpose of the 2000 Amendment?

[121] Counsel for the Unions provided that it was the intention of the legislature to deal with the concept of abandonment through the 2000 amendment to the *CILRA, 1992*. With respect, this Board does not agree, as the amendment does not reference the concept of abandonment. Therefore, there is no statutory reason why the Board should ignore the facts, which are that the Unions abandoned their certification orders and their collective bargaining agreements.

10. Graham 1985 Was To Blame For Not Participating In Collective Bargaining

[122] Counsel for the Unions argued that Graham 1985 was to blame for not approaching the Unions and bargaining with the Unions. With respect, this argument does not make any sense given the fact that the Unions, save and except for the Iron Workers Union, did not approach Graham 1985, did not collectively bargain, did not bring a successorship application and did not challenge the belief of Graham 1985 that it was a non-union, open shop contractor.

11. *Mudjatik*

[123] As mentioned earlier, counsel for the Unions argued that, even if the facts dictated that his clients had been inactive for a significant period of time, the assertion of abandonment was not available to Graham 1985 given the Board's decision in *Mudjatik*, *supra*.

[124] The Board recently discussed the concept of a construction industry union abandoning its certification Order and its bargaining unit rights in the *Mudjatik* decision, *supra*. In *Mudjatik*, at 340 through 344, the Board set out the following factors to consider in a case of alleged abandonment (the *Mudjatik* test):

> *1) The employer must establish it employed trades people within the scope of the union's certification order during the period of alleged abandonment;*
>
> *2) Secondly, if the employer did employ trades people within the jurisdiction of the union certification order without reference to the hiring hall provisions of the collective agreement, it must explain how it came to do so - an example of this would be if the union refused to provide members in response to the employer's call;*
>
> *3) It is difficult to allege abandonment where bargaining is taking place or the union is attempting to engage in bargaining with a representative of the representative employer's organization in the provincial bargaining setting. The employer's lack of involvement with the employer's organization is not indicative of abandonment.*
>
> 4) *The Board should be reluctant except in the most extreme circumstances to find that a trade union has abandoned its certification rights without a rescission application.*

[125] In *Mudjatik, supra*, the Board considered previous Board decisions which analyzed and applied the concept of abandonment. At 6, the Board stated:

> *In Wappel Concrete and Construction Ltd., (supra), the Board permitted an employer to rely on the doctrine of "abandonment" to effectively render a certification order void. The Board justified the application of the doctrine of "abandonment" in the following terms at 36: Underlying the doctrine of abandonment is the concern that a trade union, because of its inactivity, no longer represents employees in the bargaining unit.*

and at 37:

> *If a union seeks and acquires the right to act as exclusive bargaining agent for employees and then for an unreasonably long time ignores its responsibilities to bargain in good faith for them it should lose its right to do so. Accordingly, any union that fails to actively carry out its duty to bargain collectively for the employees it represents, without a satisfactory explanation for its failure, will be found as a fact by this Board to have abandoned its bargaining rights. Although the Board will always be reluctant to infer that bargaining rights vested in a union have been abandoned, this case is one that is very clear.*

[126] In our case, the facts are significantly different from those in both *Wappel, supra* and *Mudjatik, supra.* One of the fundamental differences in our case is that, upon its creation in 1985, Graham 1985 had no employees. It subcontracted its work to either union or non-union entities. Therefore, the first element of the *Mudjatik* test*,* "that the employer must establish that it employed trades people within the scope of the union's certification order during the period of alleged abandonment" can never apply. If this part of the test is adjusted to reflect the factual reality which existed in this case, Graham 1985 did subcontract work within the scope of the Unions' certification Orders. The Board in the *Graham '86* decision confirmed and instructed the Carpenters Union to enforce its collective bargaining rights to attempt to gain this work. This could have been done by enforcing the terms of the collective agreement.

[127] The second part of the *Mudjatik* test is also difficult to apply, given that Graham 1985 did not have any direct hire employees. As stated earlier, the Board in the *Graham '86* decision found that this was a legitimate way for an employer to operate. Therefore, if Graham 1985 did not have any employees, and subcontracted out its labour, it would never call the Unions' hiring halls and ask the Unions to send it workers. This part of the test is inapplicable to our factual situation.

[128] The third part of the *Mudjatik* test recognizes the difficulty an employer will have when alleging abandonment where province wide bargaining is taking place. This portion of the test is again difficult for the Board to apply given the facts of the case. In our case, province wide bargaining did not exist from 1983 to 1992. As such, during this time period, unions were required to directly bargain with employers. Graham 1985 was created in 1985. None of the Unions attempted to directly bargain with Graham 1985 in the period of time 1985-1992. None of the Unions brought forward a successorship application or filed an unfair labour practice application in regard to bargaining. None of the Unions contacted Graham 1985 and none of the Unions alleged that Graham 1985 was bound by the terms of any collective agreement. Once province wide bargaining was reintroduced in 1992, none of the Unions alleged that Graham 1985 was now represented by the representative employers organization, save and except for the Iron Workers Union. Graham 1985 informed the Iron Workers Union that it was not certified and the Iron Workers Union did not challenge this representation until seven years later. As such, numerous changes were made to the various provincial collective agreements

without any input from Graham 1985. Given our facts, the third part of the *Mudjatik* test is inapplicable.

[129] The fourth part of the Mudjatik test recognizes the principle that the Board should be reluctant, except in the most extreme circumstances, to find that a trade union has abandoned its certification rights. However, the Board goes further to state "without a rescission application." Once again, in our fact pattern, this part of the test cannot be applicable because there can never be a rescission application given that Graham 1985 does not employ any employees, a concept endorsed by the Board in the *Graham '86* decision.

[130] While not specifically set out as part of the *Mudjatik* test, the Board also considered whether or not Graham 1985 came to the Board with clean hands, or whether or not Graham 1985 was attempting to avoid any certification orders which could be claimed as against it. As stated earlier, there was no evidence that Graham 1985 acted improperly or somehow attempted to avoid any certification orders. Graham 1985's position was that it was a new corporation, operating as an open shop contractor. All the Unions were aware of the existence of Graham 1985, and that it was doing significant levels of work as an open shop contractor. None of the Unions (save and except for the Iron Workers Union), contacted Graham 1985 and attempted to enforce their collective bargaining rights, bring a successorship application, or to bargain collectively with them. The evidence was overwhelming that Graham 1985 was created following the financial demise of Graham Engineering. The Board's *Graham '86* decision legitimized the labour broker scenario. Graham 1985 was doing nothing improper when it set up its business as an open shop contractor. Graham 1985 had the realistic belief that it was non-union, and no union challenged this belief in a legal setting until approximately thirteen years later.

Inequitable Consequences:

[131] Counsel for Graham 1985 argued that to ignore the Unions' delay in enforcing any rights as against Graham 1985 would result in a collective agreement being imposed on Graham 1985 without any input from Graham 1985. Counsel for the Unions argued that the Unions are "attempting to assert certification and collective bargaining rights that have been brought about in their present form by the year 2000 amendments to the *CILRA, 1992*." While the parties agreed that a newly certified general contractor in the construction industry would be bound by the various existing provincial collective agreements for the applicable trades, the

Unions' argument is based on the premise that Graham 1985 has been certified since 1985, by way of successorship. In other words, Graham 1985 is not a newly certified company, yet it would be treated as if it were in regard to the application of the various provincial collective agreements.

[132] Under normal circumstances, given that successorship operates automatically, Graham 1985 would have been bound by the 1982-1984 provincial bargaining agreements. However, these agreements have been changed a number of times since, without any input from Graham 1985. Thus, the Board can understand that it would be inequitable for Graham 1985 to be bound by the present provincial collective agreements. This is because Graham 1985 was not present and had no input into the various provincial collective agreements which were negotiated and revised a number of times since the 1982-84 provincial bargaining agreements were applicable.

Banff's Case:

[133] Banff's case is unique from Graham 1985's in that no union holds a certification order against Banff. As such, counsel for Banff does not point to any certification orders that were abandoned. Rather, counsel for Banff and Graham 1985 both argue that, because the Unions did not follow up on the suggestion contained in the *Graham '86* decision that the Unions pursue their contractual rights as against Graham Engineering and Banff (as the non-union labour broker for both Graham Engineering and Graham 1985), the Unions have abandoned any rights which they have to now utilize common employer legislation which became available upon the repeal of s. 18(2) of the *CILRA, 1992*.

[134] It is premature for the Board to make this determination at this time. The Unions may still have certain arguments and evidence to advance relating to such concepts as "reverse spin-offs."

Other Matters:

1. Costs in Cross Examining Mr. Bellows on his Reply

[135] Late in the Unions' case, Mr. Plaxton requested that he be allowed to cross-examine Mr. Bellows on his reply which was filed on behalf of Banff. The Board allowed this request, with some restrictions imposed in regard to the scope of the cross-examination. Mr. LeBlanc then asked for costs in producing Mr. Bellows from Calgary so that he could be cross-

examined on his reply. This request is denied. When a reply is filed, it is treated as evidence by the Board. As such, the Unions were entitled to cross-examine Mr. Bellows on his reply, his sworn evidence, and the Applicants are not required to pay Mr. Bellows to be present.

2. Exclusion of Mr. Wytrukush

[136] Prior to questioning Mr. Bellows on his reply, counsel for the Unions asked that Mr. Wytrukush be excluded, given that he too, would be a witness. Counsel for Graham 1985 objected, in that Mr. Bellows was not his client, would not be called by Graham 1985 as a witness and would be cross-examined by Graham 1985, if necessary.

[137] The request to exclude Mr. Bellows had very few similarities to the situation where the Board excluded the Unions' witnesses. For example, on the earlier exclusion issue, counsel for the Unions indicated that Mr. Todd's testimony would bind all of the Unions. In this case, counsel for Graham 1985 specifically took the position that Mr. Bellows' testimony would not bind Graham 1985 and that he would seek to cross examine Mr. Bellows, if necessary. The Board did not exclude Mr. Wytrukush.

Conclusion:

[138] The Board finds that Graham 1985 is a successor to Graham Engineering. The Board accepts the abandonment argument advanced by Graham 1985 in that the evidence revealed that the Unions have abandoned their collective bargaining rights as against Graham 1985. There were no certification orders as against Banff, and as such, the principle of abandonment cannot apply to Banff. Likewise, the delay principle is inapplicable to Banff.

[139] The Board will instruct the Registrar to contact the parties to schedule further dates to deal with any and all other remaining issues, including any issues arising from this preliminary decision.

DATED at Saskatoon, Saskatchewan this **4th** day of **November, 2003.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson