The Labour Relations Board
Saskatchewan

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529, Applicant v. SAUNDERS ELECTRIC LTD., Respondent

LRB File No. 019-05; November 6, 2009
Chairperson, Kenneth G. Love, Q.C.; Members: Maurice Werezak and Joan White

For the Applicant: Larry F. Seiferling, Q.C
For the Respondent: Drew S. Plaxton

Abandonment. Board reviews Court of Appeal decision in Graham Construction as well as other jurisdictions treatment of Abandonment. Board concludes that Saskatchewan jurisprudence is not in accord with Canadian jurisprudence concerning the principle.

Abandonment. If abandonment found, Board considers if there is any factor or factors which excuse the Union's inactivity.

Reconsideration. Board reconsiders decision of previous panel. Finds decision not in accord with Court of Appeal decision in Graham Construction and focuses on factors not relevant in determining whether abandonment has occurred.

Practice and Procedure. Board establishes principles of abandonment in Saskatchewan. Onus of proof in cases of abandonment is on the party asserting abandonment. Focus of investigation of abandonment is on the activities of the Union in promoting the rights granted to it by Certification Order not on the activities of the Employer. If abandonment found, inquiry shifts to factors which might excuse abandonment.

***The Trade Union Act*, ss. 5(i) & 42**

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Chairperson**: International Brotherhood of Electrical Workers, Local 529 (the "Union") was designated as the certified bargaining agent for an appropriate unit of "journeymen, helpers and apprentices" in the electrical trade that are employees of Saunders Electric Ltd. (the "Employer") based in Prince Albert. The Employer was incorporated in 1959. The original certification Order was issued to the Union's Local 1717 on January 30, 1962, (LRB File No. 145-61). The Order was

amended on April 6, 1972 (LRB File No. 198-71) to reflect the merger of Local 1717 with Local 529. That certification Order has not been rescinded.

[2] On January 20, 2005 the Union filed an application with the Board alleging that the Employer committed unfair labour practices in violation of Sections 11(1)(a), (c) and 36 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act* "), in refusing to bargain collectively with the Union and in refusing to comply with the union security provisions of the *Act* to require that new employees join the Union within (30) thirty days as a condition of maintaining employment.

[3] At the commencement of the hearing, counsel for the parties agreed to the amendment of the Union's application to include reference to an alleged violation of s. 32 of the *Act*, in failing to deduct and remit union dues to the Union, assessments and initiation fees on behalf of the employees.

[4] The Board issued its Reasons for Decision with respect to the Union's application on September 23, 2008. In its Reasons, the Board found the Employer to be guilty of the unfair labour practice alleged in the Union's application. The Board also found the Employer to be in violation of ss. 32 and 36 of the *Act*. The Board's Order provided as follows:

> 1. *DETERMINES that the Respondent committed an unfair labour practice within the meaning of s. 11(1)(c) of The Trade Union Act by failing or refusing to bargain in good faith;*
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> 2. *ORDERS THAT the Employer is guilty of unfair labour practices within the meaning of each of sections 11(1)(c), 32 and 36 of the Act;*
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> 3. *ORDERS THAT the Employer shall forthwith cease and desist from any further violations of The Trade Union Act, and shall fulfill the duties imposed by the certification Order and the Act, including, but not limited to, the duty to bargain collectively, and recognition of union security and dues check-off pursuant to sections 32 and 36 of the Act;*
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> 4. *ORDERS THAT the Employer shall forthwith advise the Union of the identity of and contact information for all existing employees within the description of the appropriate bargaining unit; and, THAT within five (5) days of the date of this Order, the Employer shall advise all such employees that they must join the Union within a period of 30 (thirty) days as a condition of maintaining employment and must provide the Employer with written authority to deduct and remit union dues on their behalf;*

> 5. *ORDERS THAT within sixty (60) days of the date of this Order the Employer shall pay to the Union a sum equal to the dues, assessments and initiation fees that it ought to have deducted from its employees in the appropriate bargaining unit and remitted to the Union from and after 2 March 1984; in the event that the parties are unable to agree upon the amount due within a period of fifteen (15) days from the date of this Order, either party may request the Senior Labour Relations Officer/Investigating Officer of the Board to ascertain the amount due, and the Senior Labour Relations Officer/Investigating Officer of the Board is empowered to make any and all inquiries, enter into any premises, and inspect and make copies of any and all documents and records as may required to make the determination;*
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> 6. *ORDERS THAT the Employer shall forthwith post a copy of this Order, the Reasons for Decision, the certification Order, and sections 32 and 36 of the Trade Union Act, in a conspicuous location in the workplace where it is likely to be seen by a majority of the employees in the bargaining unit for a period of sixty (60) days, and shall send a copy of this Order, the Reasons for Decision, the certification Order, and sections 32 and 36 of the Trade Union Act to each of the employees by ordinary mail to their last known address.*

[5] On October 15, 2008, the Employer filed an application for reconsideration of the Board's September 23, 2008 Reasons. On October 27, 2008, the Employer applied under s. 5.3 of the *Act* for an interim order of the Board staying the effect of the Order made by the Board on September 23, 2008. A hearing with respect to the application for interim relief was heard by the Board on October 31, 2008. At the conclusion of that hearing, the Board issued an Order staying the effect of its September 23, 2008 Order until 5:00 pm on November 24, 2008, or until further Order of the Board. A hearing of the application for reconsideration was set for November 24, 2008 at the Board's hearing room in Saskatoon. The hearing did not proceed as scheduled, but the interim Order was further continued until further Order of the Board.

[6] The Employer's application for reconsideration asked the Board to reconsider its September 23, 2008 Order on a number of grounds. Those grounds were as follows:

> (a) *The decision turns on conclusions of law and general policy which were not properly interpreted by the original panel. In particular, the panel failed to recognize that the enforcement of rights negotiated under accreditation legislation is done on an individual contractor basis by the Respondent Union and that the Respondent Union failed to enforce any rights for the workers of Saunders Electric for a significant period of time as follows:*

(i) from 1984 to 1998, when Saunders Electric was openly operating, the Respondent Union presented no evidence as to why it did not enforce its members' rights.

(ii) from 1998 to 2004, after the Respondent Union was aware not only that Saunders electric had employees working for them but that the employer's position was that the Respondent Union had abandoned the workers, they took no action to enforce the rights under the Provincial Collective Agreements negotiated by their REO;

(iii) by applying for certification in 2004 which action was inconsistent with the assertion of rights to represent the workers prior to the date of the application for certification.

(b) The decision is precedential and amounts to a significant policy adjudication which the Board may wish to change. In particular, the policy whether a Respondent Union that fails to enforce any rights for a period of time for employees of a contractor can:

i) reclaim the right when they have slept on them with regard to the individual employees working for the contractor;

ii) claim dues for periods that they have not represented the workers to enforce the terms of the Collective Bargaining Agreement against the contractor; and

iii) require an employer to pay dues that would have been paid by the employee for union representation that on the facts the employees did not get.

(c) The Order has operated in an unanticipated way and will have an unanticipated effect:

i) by requiring payment of monies from an employer of monies that would normally be paid by an employee to a union for representation;
ii) requiring an employer to pay monies back to 1984, a period substantially longer than limitation periods in legislation.

(d) The decision constitutes a significant error of law in interpretation of the concept of abandonment in the construction industry.

(e) The decision constitutes a significant and unwarranted departure from previous jurisprudence of the Labour Relations Board in Saskatchewan and elsewhere, in particular, Ontario and Alberta.

(f) The decision is made without evidence on matters found in the original decision. In particular, on the state of the industry and the reasons why the Respondent Union took no action before 1998.

[7] By its decision dated April 27, 2009, the Board agreed that it would reconsider the Board's original decision in two (2) respects. The Board determined to review whether the doctrine of abandonment continued to be effective in Saskatchewan and to provide policy guidance to the labour relations community with respect to that

issue. Secondly, the Board determined to review item No. 5 of the Board's Order regarding the payment of dues retroactive to March 2, 1984. These are the Reasons with respect to the reconsideration of those items.

Facts:

[8] This panel of the Board had the benefit of reviewing transcripts of the original hearing which was held on July 18 – 20, 2005. The original panel did not have the benefit of the transcript when preparing their decision more than three (3) years after the hearing. As a result, some of the conclusions drawn by the original panel do not appear to be in accordance with the evidence as presented at the hearing, or, some of the evidence and one particular undertaking appear to have been overlooked. That is undoubtedly due to the reliance on notes made at the hearing, along with the passage of time since the hearing and the resultant ability to recall the testimony in any detail after the passage of so much time. For that reason, the Board will point out certain discrepancies between the facts found in the original decision and the testimony as outlined in the transcript.

[9] One of the more fundamental matters which the original panel overlooked, and which the Board had undertaken to reconsider, was the issue of payment of arrears of union dues as ordered by the Board. At the hearing in 2005, the Union counsel, Mr. Plaxton acknowledged to the Board that it would not be seeking an order for the enforcement of payment of union dues prior to the date "of the most recent union security request".[1] This matter was brought to the Board's attention at the reconsideration hearing by counsel for the Employer. Counsel for the Union, Mr. Plaxton acknowledged this earlier undertaking to the Board.

[10] At paragraph [22] of the Board's decision, in setting out the evidence heard by the original panel, the Board says, "[W]ith the exception of the Company's two principals, Don Saunders and Delores Saunders, all of its employees performing electrical work are in the bargaining unit covered by the certification Order". This statement, presented as a fact, is far from proven, but was taken from the evidence of Mr. Greer of the union who was merely offering an opinion.[2] This question, that is, if the employees

[1] See transcript of evidence prepared by Valerie J. McPherson, C.S.R. page 10, line 1.
[2] See transcript of evidence prepared by Valerie J. McPherson, C.S.R. page 46, lines 4-14.

were covered by the certification order, was fundamentally what the Board was seeking to determine. That is, had the Union abandoned these workers such that the certification order was no longer effective with respect to them.

[11] In paragraph [25] the panel made the finding that at the time of an application for rescission by employees of the Employer, there was only one employee, the son of the then owner, Don Saunders. This finding is not supported by the transcript. In his evidence, Don Saunders, in response to a question by Mr. Plaxton in cross-examination, says[3] "there was still two or three guys working in the back of the shop". Those employees would be in addition to himself.

[12] In paragraphs 24 through 34, the original panel references correspondence from the union to the Company and one letter from counsel for the Employer to the Union, but failed to reference minutes of the executive committee of the Union which presumably was the reason for the correspondence which began in 1998. At the executive meeting of February 12, 1998, it was reported under "Old Business", that "Saunders Electric has up to 6 men employed. Rob informed him that he is enforcing an old certification from the 60's".

[13] Again, the Minutes of an executive committee meeting on March 10, 1998 in respect of another company read:

> *A letter was received from the Lawyer detailing expenses incurred to date regarding Pyramid fight. There is another hearing coming up. Recommended to re-evaluate depending on outcome of hearing.*

[14] The evidence also disclosed[4] that apart from the discussion of Saunders by the Executive Board on February 10, 1998, even following the letter received by the Union from counsel for the Employer on March 25, 1998, there was no further discussion of Saunders Electric.

[15] The original panel also did not note that notwithstanding the March 20, 1998 correspondence to the Employer threatening that "an Unfair Labour Practice for

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[3] See transcript of evidence prepared by Valerie J. McPherson, C.S.R. page 268, lines 3-6.
[4] See transcript of evidence prepared by Valerie J. McPherson, C.S.R. page 226, lines 7-13.

recovery of the full wages and benefits of the Provincial Agreement" would be filed, that no steps were taken to file such an application.

[16] Nothing further occurs until correspondence from the Union to the Employer on March 5, 2001 giving "Notice To Commence Collective Bargaining." That was followed up by various other pieces of correspondence as noted in paragraphs [32] – [36] of the original decision.

[17] Apart from the comment in paragraph [42], there is no mention in the decision of the admission by Mr. Greer, one of the Union's witnesses, in response to a question by counsel for the Employer, that he had never, after he had learned that Saunders Electric was non-compliant, except for sending these pieces of correspondence attempted to force the Employer to conform to the certification Order.[5]

[18] Nor was there any mention that in cross examination, Mr. Greer acknowledged that he could provide no explanation for why the Union did not take steps to enforce its certification Order either in 1998 or in the period 2001-2005.[6]

[19] At paragraph [40] of the original decision, the Board notes that Mr. Greer testified that the Union has never intended to give up its right to represent the Employer's employees. While Mr. Greer did, indeed testify to that effect, that again is the fundamental question that the Board was required to address. Whether there had been an abandonment of those rights, either intentionally or unintentionally, it was up to the Board to make that determination, not the witness.

[20] At paragraph 41, the Board makes note of an application made by the Union to certify the Employer. The Board notes that the application was dismissed "without reasons." The Union applied to the Board to reconsider that application, which application was denied with written reasons dated April 27, 2009. In that decision, the Board says:

> *That hearing, conducted by then Vice-Chairperson Matkowski, occurred on December 10, 2004 in the Board's Saskatoon hearing room. From*

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[5] See transcript of evidence prepared by Valerie J. McPherson, C.S.R. page 119 - 120, lines 26 & 1-10.
[6] See transcript of evidence prepared by Valerie J. McPherson, C.S.R. page 117 - 119, lines 26, 1-26 & 1-25.

> *reading that transcript, it is clear that the Board dismissed the application for certification for the reason that the Union was already certified to represent the employees of Saunders Electric.* ***The Union refused to withdraw the application so the Board had no option but to dismiss the application.*** *[Emphasis added]*

[21] Again, in paragraph [49], the Board references testimony by Mr. McLeod for the Union which suggests that the Union "never decided to 'abandon' the Employer." As noted above, this was the fundamental determination to be made by the Board, not something Mr. McLeod could determine. Also, of note is the reference to abandonment of the "Employer", not the employees. That was not what Mr. McLeod said in his evidence.[7] He responded to a question from Union counsel concerning whether or not the Union "ever intended to give up on their bargaining rights with Saunders".

[22] Mr. McLeod's evidence was that they did not pursue Saunders Electric because "it was a relatively small operation"[8]. They were trying to decide "where to spend their money most effectively"[9]. He says:[10]

> *…, if we could have got them to comply, so you know, spending a lot of money to get Don to comply with an agreement doesn't affect the construction industry as much as these other cases where — I guess is probably the major reason, you know, there is always the fact, you know, too that we spend a lot of money on it and then he goes back to a two man shop (inaudible) getting us there anyways.*

[23] In paragraph [50] and in other places in the decision, reference is made to the fact that Don Saunders, the son of the founder of the Employer was an employee at one time, but "not a member of the Union". His membership or non-membership is of limited relevance since if, at the relevant time, he met the definition of "employee" within s. 2(f) of the *Act*, then under s. 36 of the *Act* he could presumably have been compelled to become a member of the Union.

Relevant statutory provisions:

[24] Relevant provisions of the *Act* are as follows:

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[7] See transcript of evidence prepared by Valerie J. McPherson, C.S.R. page 181, lines 15-19.
[8] See transcript of evidence prepared by Valerie J. McPherson, C.S.R. page 180, line 25.
[9] See transcript of evidence prepared by Valerie J. McPherson, C.S.R. page 180, lines 17-21.
[10] See transcript of evidence prepared by Valerie J. McPherson, C.S.R. page 181, lines 4-11.

5 The board may make orders:

(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

…

42. The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.

Analysis & Decision:

The Doctrine of Abandonment in Saskatchewan

[25] Our analysis of whether or not the doctrine of abandonment continues to be alive and well in Saskatchewan, whether it is on life support, or is dead as proposed by the original panel must begin with an examination of the recent Saskatchewan Court of Appeal ruling in *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Graham Construction and Engineering Ltd*[11]:

[26] That case involved the appeal of a decision of this Board[12] That decision was originally upheld by the Court of Queen's Bench[13] , but the appeal was allowed, by the Court of Appeal (Jackson J.A, and Lane J.A, with dissent by Cameron J.A.) and the Board was ordered to reconsider the matter.[14]

[27] In its original decision, the Board concluded at paragraphs [77] and [78] of its decision that:

[77] It is now clear that the Board does not have the jurisdiction to declare that a trade union has abandoned its collective bargaining rights in the context of a statutory regime of sectoral bargaining in the construction industry. The arguments asserted by counsel for the

[11] [2008] S.J. No. 319, 2008 SK CA 67, 71 Admin. L.R. (4th) 259, [2008] 8 W.W.R. 421, 311 Sask. R. 1
[12] [2003] Sask. L.R.B.R. 471, LRB File Nos. 014-98 & 227-00
[13] 2006 SKQB 182, 278 Sask. R. 283
[14] Supra footnote 11, at paragraph 111.

> *Employer in this case, are essentially the same as those mounted in Graham LRB, supra, and are as incorrect and unreasonable.*
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> *[78] Accordingly, on the basis of the decision in Graham CA, supra, we find that the plea of abandonment by the Employer in this case as a defense to unfair labour practices related to refusal to recognize the Union as the certified bargaining agent of its employees in the appropriate unit, is not available.*

[28] These statements are directly contrary to all of the Board's former jurisprudence and its decisions related to abandonment. With respect to the original panel and for the reasons which follow, we cannot agree with the original panel's interpretation of the Court of Appeal decision in *Graham*, *supra*. Contrary to the conclusion adopted by the original panel, we believe that the proper interpretation of the Court's decision in *Graham*, *supra,* was that there is a doctrine of abandonment embodied in Canadian and Saskatchewan law. At paragraphs [90] and [91], the Court says:

> *[90] In my view, Domtar does not prevent the conclusion that I have reached. In Saskatchewan, there is no legislative provision upon which the Board can rely for its authority to find abandonment. The legal content of the principle of abandonment must be derived from the jurisprudence. Over a period of some 20 years, it is this Board that has determined the content of the principle.*
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> *[91] While this is the first time the Court has been asked to rule on the question of whether the Board has the authority to find abandonment, it is a power that has already been exercised by the Board and, I have found, that the assumption of such a power is not unreasonable. It is not, however, an unlimited power. Domtar does not mean that the law pertaining to abandonment need not be determined. Legislative silence does not mean that there are no legal contours to the power to declare that bargaining rights have been abandoned. Prior decisions of this and other Labour Boards are our only recourse to determine the content of the power. Thus, I have concluded that the jurisprudence of this Board and from elsewhere is a factor to be considered in reviewing the within decision.*

[29] By these paragraphs, the Court made it clear that doctrine of abandonment has been and continues to be available to the Board and that the "assumption of this power is not unreasonable". However, the Court in the following paragraphs made it clear that the Board's jurisprudence was inconsistent and that the jurisprudence from other

jurisdictions (dealing with the issue of abandonment) ought to be considered in the formulation of the doctrine of abandonment in Saskatchewan.

[30] This view of the jurisdiction of the Board with respect to the principle of abandonment was also supported by Mr. Justice Cameron in his dissenting opinion. At paragraph [159] he says:

> *For the reasons expressed by the Chief Justice in arriving at his conclusion, augmented by the further provisions of the Act to which I have referred, I agree with him that the Board is empowered to act on the principle of abandonment when applying subsection 37(1) of The Trade Union Act.*

[31] The Justices in the majority and Mr. Justice Cameron in dissent referred to with approval, the statement of the law of abandonment postulated by George W. Adams, *Canadian Labour Law*[15]. That text provides ample support for the principle of abandonment in jurisdictions such as Saskatchewan and Ontario where no direct statutory authority exists, as well as in other jurisdictions where some principle of abandonment is recognized in the relevant Trade Union legislation.

[32] The majority of the Court of Appeal in Graham concluded that the decision by the Board in *Graham*, *supra,* was unreasonable[16]. The Court held that the facts relied upon by the Board and its statements regarding the principle of abandonment were not in accord with the statements of the law as contained within Adams[17]. At para [107], the Court says:

> *Viewed in the light of the Board's other decisions with respect to abandonment, Graham 2003 does not apply the law set out in Adams, Canadian Labour Law. The Board, in my respectful opinion, moved from the question of union inactivity to asking whether there were any extenuating circumstances justifying the inactivity.*

[33] At paragraphs [108] and [109] the Court's conclusion regarding the decision is clear. Rather than rejecting the principle of abandonment, the Court found that the conclusion by the Board, in accordance with the tests in *Dunsmuir v. New*

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[15] 2nd ed. (Aurora: Canada Law Book Inc., 2003)
[16] At para. [108]
[17] *Supra* at para. [34]

Brunswick[18], was not reasonable and could, therefore, not be supported. In paragraph 109, the Court concludes, "The principle of abandonment does not apply to these facts. It is premised on a different notion".

[34] In its decision, the majority of the Court reviewed *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*[19] which decision deals with divergent interpretations of the same legislation. It quotes from the decision at p. 800 - 801 as follows:

> *This process has led to the development of the patently unreasonable error test. If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would, in my opinion, constitute a serious undermining of those principles. This appears to me to be especially true as the administrative tribunals, like the legislature, have the power to resolve such conflicts themselves. The solution required by conflicting decisions among administrative tribunals thus remains a policy choice which, in the final analysis, should not be made by the courts. [Emphasis added.]*

[35] From the analysis by the Court of the Board's jurisprudence concerning abandonment which follows this quote, it is clear that the state of the Board's jurisprudence and the rules which it applies are in conflict and should be resolved by the Board as suggested by the Supreme Court of Canada in *Domtar, supra*.

The Principle of Abandonment in other Jurisdictions

[36] The Ontario jurisprudence regarding abandonment was reviewed by that Board in *J.S. Mechanical*[20]. At p. 88, the Board says:

> *Over the last 20 years, the principle of abandonment has been deeply entrenched in the Board's jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no*

[18] 2008 S.C.C. 9
[19] 1993 CanLII 106 (S.C.C.), [1993] 2 S.C.R. 756
[20] [1979] 2 Can L.R.B.R. 87, (Ont)

> *longer rely on them to support the appointment of a Conciliation Officer under…the Act. As well, if a union has abandoned its bargaining rights, it may be precluded from relying on them either to bar another agreement that renews itself automatically, or to require an employer to bargain by giving notice to bargain under such agreement. A union's abandonment might also obviate the necessity for the Board to determine the merits of a termination application.*[21]

[37] The most recent and detailed review of the issue of abandonment was undertaken by the Alberta Board in response to a situation where the Alberta Board had issued conflicting decisions concerning the principle of abandonment. In *I.B.E.W, Local 424 v. Siemans Building Technologies Inc.*[22] the Alberta Board decision canvassed the state of the jurisprudence throughout Canada regarding the principle of abandonment. That analysis dealt with abandonment both in the context of the construction industry and outside that industry.

[38] Beginning at paragraph 123 of the *Siemans* decision, the Alberta Board reviews first, the approach to abandonment in the construction industry in Ontario. In paragraphs 124 – 126, they discuss the restrictive nature of Ontario Board's view of abandonment. At paragraph 126, they say:

> *It may well be that Ontario's restrictive approach to abandonment post-1977 in the ICI sector of the construction industry is justified by Ontario's particular statutory scheme. Perhaps there is merit in the approach that abandonment cannot be applied to defeat a recognition of the union that is entirely deemed by statute. Equally, there may be merit in the approach that a local union's failure to enforce the provincial collective agreement does not constitute an abandonment of bargaining rights held in law by a totally different party, the employee bargaining agency.*

[39] However, the Alberta Board determines that the approach taken by Ontario's Board should be restricted to Ontario based upon its particular legislative scheme and held that this approach is not appropriate in Alberta. In the final result, the Alberta Board declines to follow the approach taken in Ontario.

[40] The Alberta Board then turns to the Saskatchewan jurisprudence in paragraphs 127 -130. The Alberta Board discusses the Saskatchewan Board's decisions

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[21] Cases referenced in support of these statements omitted.
[22] [2004] Alta. L.R.B.R. 141, 105 C.L.R.B.R. (2nd) 1

in both *Mudjatik Thyssen Mining Joint Venture*[23] and the Saskatchewan Board's original decision in *Graham, supra*[24].

[41] The Alberta Board was critical of the position taken by the Saskatchewan Board in *Mudjatik, supra,*, while agreeing on the "threshold finding" in that case, "that abandonment is applicable in the construction industry"[25]. They criticized *Mudjatik, supra,* on the following grounds:

> 1. *They found little significance in the fact that the employer in that case had failed to utilize the hiring hall provisions of the collective agreement.*[26]
> 2. *They were not convinced of the utility of having "hard and fast" rules by which abandonment is judged*[27]*.*
> 3. *They found limited significance in the fact that in the Construction Sector, there is limited, if any, face to face bargaining by individual affected employers. While they agreed that this was a factor to be considered, they took the view that contract negotiations was only one of the ways in which local unions and individual employers might be expected to interact. They pointed out that unions must deal with local employers for a number of other activities, such as (a) gaining access to individual employees, (b) to administer the collective agreement, (c) to process grievances, and (d) receive dues payments from an employer.*[28]

[42] In the view of the Ontario Board, "the peculiarities of the registered part of the construction industry merit at most a modified approach to abandonment of bargaining rights".[29] However, that having been said, the Alberta Board went on to say:[30]

> *[132] Construction industry trade unions, however, are not entitled to be completely passive. Like all trade unions, they are in the business of representing employees against the interests of employers. They are in an adversarial relationship with employers. Employers sometimes find it in their interests to violate, ignore or conveniently forget about their bargaining obligations. While that may be reprehensible, it should surprise no one that it happens, least of all trade unions. It is not enough to justify Union inactivity to say that the Employer too has obligations under the Code. In our view, the scheme of the Code, and especially the fundamental requirement that bargaining agents be representative of the employees they hold bargaining rights for, demands that trade unions exercise ordinary prudence and industry in policing their bargaining*

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[23] [2000], 65 C.L.R.B.R. (2d) 204, LRB File No. 140-99
[24] Supra footnote 12
[25] Supra footnote 22, at paragraph 128
[26] Supra footnote 22, at paragraph 129
[27] Supra footnote 22, at paragraph 128
[28] Supra footnote 22, at paragraph 130
[29] Supra footnote 22, at paragraph 131
[30] Supra footnote 22, at paragraphs 132 - 134

rights, in detecting employer attempts to avoid those bargaining rights, and in enforcing any existing collective agreement. Serious and prolonged failure to do this will damage and ultimately destroy the representative relationship between union and employees and generate reasonable expectations by employer and employees alike that they operate in a non-union enterprise.

[133] This is not to say that employer misrepresentation and concealment is no defence to a charge that a trade union has abandoned its bargaining rights. Expectations of a bargaining agent must be lower when an employer hides or misrepresents its activities. Just as the inherent difficulties of policing bargaining rights and enforcing collective agreements in the construction industry will generally have the effect of lengthening the period before the Board will conclude that bargaining rights have been abandoned, so too will evidence that the Employer has lied or remained deliberately unresponsive about whether it is a party to a bargaining relationship or is engaged in activity that is covered by a collective agreement. Employer misrepresentation or concealment may go far toward excusing the Union's inactivity and negating any reasonable expectation the Employer has that it is legitimately operating on a non-union basis. In our view, however, it cannot be a complete defence. If, as we have said, the primary interest supporting the concept of abandonment is the interest of employees in having a bargaining agent that is broadly representative of their will, there must come a point in a course of Union inactivity when the employees' interest becomes paramount over the equities between Union and Employer. Thus, extreme lengths of inactivity by the bargaining agent will result in a finding of abandonment, even where the inactivity has been procured by the Employer's misrepresentation or concealment.

[134] If this seems harsh upon a largely innocent bargaining agent, two things need to be said. First, we reiterate that in an adversarial labour relations system, trade unions have at least some obligation to anticipate and defend themselves against employer misrepresentation, concealment and uncommunicativeness. It is, regrettably, not enough to rely on one's rights as they exist on paper and refrain from actively defending them. Second, employer misrepresentation and concealment is not without some risk. Again, it will generally lengthen the time before an abandonment is found. Liability for unpaid dues, benefit contributions, and wage differentials may accrue in the meantime. And to the extent that the misrepresentation and concealment is a purposeful scheme to defeat the Union's bargaining rights, it can found unfair labour practice complaints in respect of which significant compensation might be ordered.

Saskatchewan Jurisprudence

[43] The *Mudjatik* decision, *supra,* referenced above was, until the *Graham,* decision, *supra*, by the Board, the leading case regarding abandonment in the construction sector. That case, while recognizing that abandonment was applicable within

the construction industry in Saskatchewan, restricted its use by the establishment of 4 considerations for the Board. These are:

> 1. *For a claim of abandonment to succeed the employer must establish that it employed tradespeople within the scope of the union's certification order during the period of the alleged abandonment.*[31]
>
> 2. *Where an employer is relying on abandonment, it must explain how it came to employ persons without regard to the hiring provisions contained in the collective agreement.*[32]
>
> 3. *Where construction industry bargaining is centralized in an employer bargaining agent, the individual employer's lack of awareness of or lack of involvement in the bargaining work of the employer organization is not indicative of union abandonment;*[33] *and*
>
> 4. *A finding of abandonment made outside the normal vehicle of a rescission (revocation) application and vote should be reserved for only the most extreme cases.*[34]

[44] The next Saskatchewan case that reviewed the doctrine of abandonment in Saskatchewan was not from the construction sector, but nevertheless, it supported the use of the principle in Saskatchewan. In *Cineplex Galaxy Limited Partnership v. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Trades of the United States and Canada, Local 295* (the "Cineplex" decision)[35] .

[45] That decision canvassed all of the Board's previous decisions concerning the issue of abandonment. In its decision, the Board determined two (2) principles concerning abandonment in Saskatchewan. Those were:

1. That abandonment was recognized in Saskatchewan, notwithstanding a lack of specific legislative authority for the concept; and
2. Abandonment was available to be used only as a "shield", and not as a "sword".

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[31] Supra footnote 23 at paragraph 38 et seq.
[32] Supra footnote 23 at paragraph 42.
[33] Supra footnote 23 at paragraph 44.
[34] Supra footnote 23 at paragraph 45.

[46] In *Graham, supra,*[36], the Court of Appeal concludes that "the Board's implicit decision that it has the authority to find the Unions had abandoned their right to bargain collectively under s. 37 is reasonable." The Court went on to say in that same paragraph "[I]t is a completely foreseeable exercise of a power that may be appropriate to a particular case."

[47] Given the support by the Court of Appeal for the use of the principle of abandonment, as well as the previous jurisprudence as outlined in the *Cineplex* and *Mudjatik* decisions[37], *supra,* the inescapable conclusion is that the doctrine of abandonment remains available to be utilized by the Board both inside the Construction Sector and outside the Construction Sector.

<u>Reconsideration of the Board's Decision</u>

[48] In *Graham, supra,* the Court[38] says:

> *[71] The Board never fully addresses whether the Unions can be said to have abandoned collective bargaining in light of the other three points in the Adams Text, Canadian Labour Law : (i) whether the union has made attempts to renegotiate or renew a collective agreement; (ii) whether the union has sought to administer the collective agreement; and (iii) whether the terms and conditions of employment have been changed by the employer without objection from the union.*

[49] That criticism could also be made in the case under reconsideration. In addition to the erroneous conclusion based upon the analysis of the Court of Appeal decision in *Graham, supra,*, contained in paragraph [77] of the decision, the Board went on in paragraphs [79] et seq. to list twelve (12) reasons for its findings that the "Union did not abandon it [sic] collective bargaining rights, and the Employer is guilty of unfair labour practices…" Each of those findings requires review.

[50] The focus of the inquiry as to whether or not the rights granted to a union by a certification Order have been abandoned is not on the activities of the Employer. The rights granted by the certification Order are for the benefit of employees of the Employer. It is for these employees, on whose application and for whose benefit those

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[35] [2006] Sask. L.R.B.R. 135, LRB File No. 132-05
[36] S*upra,* at paragraph [53]
[37] Also, see the other Saskatchewan cases referenced by the Court in *Graham*, *supra*, in support.

rights have been granted by the Board. The Board must determine if these rights have been abandoned by the Union certified to represent those employees. Activities by an employer which interfere with those rights may amount to an unfair labour practice, but the activities of an employer cannot determine how a union utilizes and enforces the rights which it has been given to represent the employees of an employer.

[51] The Board must not focus its inquiry on the activities of the employer in determining an issue regarding a claim that a Union's rights have been abandoned. In that regard, the criticism of the Board's decision in *Mudjatik, supra,* by the Alberta Board is fully justified.

[52] Similarly, the concerns of the Court of Appeal in *Graham, supra,*[39] that the Board failed to deal with the three points raised by Adams as *indicia* of abandonment of bargaining rights by a union is also of concern in this case since those indicia were also not considered by the Board in the decision under review.

[53] The Board concurs with the Alberta Board in *Siemens, supra,* and the Ontario Board's approach to abandonment that each case must be determined on its particular facts. There is "limited utility" in having "hard and fast" rules[40] by which abandonment can be determined.

[54] There are, however, some principles which can be distilled from Adams and cases which have dealt with the issue which can be provided for guidance of the labour relations community. These are:

1. The onus of proof in abandonment cases is upon the party who asserts the rights have been abandoned;

2. The focus of the inquiry by the Board should be upon the use or lack thereof of the collective bargaining rights granted to the Union under the *Act.* The activities of the employer, may, in some instances, give rise to an unfair labour practice, but the underlying

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[38] Supra, footnote 11 at paragraph [71]
[39] Supra at paragraph 49
[40] Supra footnote 27.

basis of the principle of abandonment is that a union has failed to exercise the rights granted to it to bargain collectively; and

3. If a failure to utilize collective bargaining rights has been established, then the inquiry must turn to a determination of whether there any other factor or factors which would excuse the inactivity or lack of use of the rights by the Union.

Did the Union Abandon its Bargaining Rights?

[55] Sectoral bargaining was originally established in Saskatchewan effective May 4, 1979 by the enactment of *The Construction Labour Relations Act*[41] (the "1979 *CILRA*"). That statute was repealed on December 12, 1983[42]. It was re-enacted effective September 22, 1992 as *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11 ("*CILRA, 1992*").

[56] Based upon the facts found in the original decision, it appears that there was no issue during the period of in which the 1979 *CILRA* was in force. Following the repeal of the 1979 *CILRA* in 1983, the Union began its communication with the company. For ease of reference, we are reproducing the findings of fact as outlined in the original Reasons for Decision, supplemented by our notes set out above based upon a review of the transcript of the hearing.

[57] By letter dated March 2, 1984, the Union served a union security demand upon the Employer pursuant to s. 36 of the *Act*, and requested the Employer to commence collective bargaining for a revision of the collective agreement.

[58] On August 2, 1984, Don Saunders made an application for rescission (LRB File No. 307-84). The application was dismissed by the Board on August 30, 1984. At the time, Mr. Saunders and his father were the only ones working for the company, he was the only employee and was not a member of the Union.

[41] S.S. 1979 c. 29.1
[42] S.S. 1983-84 c. 2

[59] By letter dated February 9, 1998, the Union provided the Employer with copies of the applicable collective agreements and demanded compliance.

[60] Saunders Electric was discussed at the Executive Meeting of the Union on February 12, 1998 with the note that "[R]ob informed him that he is enforcing an old certification order from the 60's."

[61] By letter dated March 5, 1998, the Union demanded that the Employer commence collective bargaining, and advised that because the representative employers' organization (REO), Construction Labour Relations Association of Saskatchewan Inc., would be negotiating with the Union on behalf of all unionized contractors, the Employer should contact the REO to provide its input. The letter was copied to the REO.

[62] In discussion of an action involving Pyramid Electric, the Minutes of the Executive Meeting of March 10, 1998 note the Union was concerned about the costs associated with the prosecution of an action against this company.

[63] By letter dated March 20, 1998, the Union demanded that the Employer bargain collectively, and demanded remittance of union dues, failing which the Union would file an unfair labour practice application. However, no such application was ever filed by the Union. In his evidence, Mr. Greer, for the Union, could provide no explanation for why the Union did not take steps to enforce its bargaining rights, as threatened in the correspondence.

[64] By letter dated March 25, 1998, solicitors on behalf of the Employer advised the Union that it had "abandoned its bargaining rights and ability to enforce any collective agreements" by reason of non-contact with the Employer.

[65] By letter dated October 5, 1998, the Union provided copies of the applicable collective agreements to the Employer.

[66] By letter dated March 5, 2001, the Union provided notice to the Employer to commence collective bargaining. The letter was copied to the REO.

[67] By letter dated March 7, 2002, the Union provided the Employer with copies of the Provincial Electrical Agreement.

[68] By letter dated December 10, 2003, the Union advised the Employer of an increase in union dues and requested that the Employer deduct and remit the new amounts.

[69] By letter dated March 10, 2004, the Union served notice on the Employer to commence collective bargaining. The letter was faxed to all unionized contractors represented by the REO, including the Employer. It was copied to the REO.

[70] On August 12, 2004, the Union filed an application with the Board for certification of a "Newbery[43] unit" of electrical trade employees of the Employer (LRB File No. 214-04). The application was dismissed without Reasons on December 15, 2004 by a panel of the Board chaired by then Vice-Chairperson, Matkowski.

[71] By letter dated December 23, 2004, the Union served a union security demand on the Employer and demanded compliance with the collective agreement.

[72] On January 20, 2005, the Union filed the present application.

[73] The evidence reveals that the Union was seeking to enforce its rights in 1984. However, those efforts resulted in an application for decertification by the son of the then owner of the Employer, Don Saunders, which application was dismissed by the Board.

[74] From August 30, 1984 (the date on which Mr. Saunders rescission application was dismissed by the Board) until March 20, 1998 the Union took no further steps to enforce its bargaining rights. Various letters were exchanged, culminating in correspondence from then counsel for the employer on October 5, 1998 that took the

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[43] *The standard bargaining unit for the electrical trade division in the construction industry was established by the Board in Construction and General Workers' Local Union No. 890 v. International Erectors & Riggers, a Division of Newbery Energy Ltd., [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79.*

position that the Union had "abandoned its bargaining rights and ability to enforce any collective agreements" by reason of non-contact with the Employer.

[75] No further steps are taken by the Union until March 5, 2001. There is a further time gap until the letters of March 5, and March 7, 2002 and December 10, 2003. This correspondence does not expressly seek to enforce the Union's bargaining rights, but rather is administrative in nature, that is, providing copies of the Provincial Electrical Agreement to the employer on March 7, 2002 and advising of an increase in union dues on December 10, 2003.

[76] Then, on August 12, 2004, the Union made an application for fresh certification of the employees of the Employer, LRB File No. 214-04. That application ultimately fails due to the existence of the previous Order of the Board in LRB File No. 145-61 dated January 30, 1962, as amended April 6, 1972 in LRB File No. 198-71. On January 20, 2005, the Union filed the present application.

[77] When the 1979 *CILRA* was repealed in 1983, the Union took steps to re-establish a relationship with the employer, but ultimately, for reasons which they were unable to provide, chose not to pursue the rights granted to them in 1962 to represent employees of Saunders Electric. During that period, Saunders Electric had operated quite openly and had employees who should have been represented by the Union.

[78] The Union took up the matter again in 1998, but desisted when challenged by counsel for the employer that they had abandoned their bargaining rights. Nothing further was done by the Union for a further period of six (6) years (apart from the administrative correspondence in 2002 and 2003) until the Union again organized the employees of the employer and applied for certification, albeit unsuccessfully, as confirmed on December 15, 2004 (LRB File No. 214-04). Again, during this period, Saunders Electric operated openly in Prince Albert and had employees who should have been represented by the Union.

[79] Based upon these facts, it is clear that the Union abandoned its collective bargaining rights during these periods. If the position taken by the Employer through its

counsel in 1998 was not correct at that time, it certainly was correct following the second period of inactivity by the Union during the period 1998 – 2004.

[80] The second part of the inquiry is whether or not there is any factor or factors which would excuse the Union's failure to exercise its collective bargaining rights. One factor which merits consideration is the sectoral bargaining scheme enacted by the 1979 *CILRA* and its re-enactment in 1992.

[81] In this case, however, the periods of inactivity by the Union overlap periods where sectoral bargaining was in place and the period where it was not. Sectoral bargaining was in place from 1979 – 1983 and from 1992 onward. The periods of inactivity were from 1984 to 1992, when no sectoral bargaining was in place, and between 1992 and 2004, when sectoral bargaining was re-established, by which time, abandonment had already occurred.

[82] The existence of sectoral bargaining, by itself, would not be a sufficient reason to excuse abandonment by a Union of its bargaining rights. There would need to be further evidence related to the activities of the Union during that period, i.e.: had it made application to the Board for Unfair Labour Practices committed by the Employer, had it processed grievances for employees of the Union, had it received dues and remittances on behalf of the employees, had it held meetings with the employees to obtain their input into collective bargaining etc. In this case, there is no such evidence of representation by the Union.

[83] Even the Ontario Board now recognizes that abandonment may occur where a provincial-wide bargaining scheme is in effect. In *Enka Contacting Ltd. and Carpenters District Council*[44] the Ontario Board determined that unions should not be precluded from being able to withdraw from bargaining where they determined it was in the best interests of its members to do so.

[84] As a result of its bargaining rights having been abandoned in this case, the Union is estopped from reliance upon those rights to require the Employer to bargain collectively with it.

[85] Therefore, following reconsideration of the Board's earlier decision dated September 23, 2008, the Board finds that the original application is not well founded as the rights sought to be relied upon by the union have been abandoned. The application for reconsideration is allowed and the original application is accordingly dismissed. The Board's Order staying the original decision is no longer necessary, given the result of the reconsideration.

[86] Given the finding of abandonment of the Union's bargaining rights, we must then turn to the appropriate remedy. We are of the opinion that the existing certification Order cannot remain outstanding. If it remains outstanding, it has the potential to impact on the employee's rights to seek renewed representation as occurred when the Union sought to certify the employees in 2004. The force of the original Order, by virtue of the abandonment of the rights granted pursuant to it is spent. It cannot be revived by the Union, the employees or the Employer. The Order can be of no further benefit to the Union or to the effected employees. The certification Order is therefore rescinded.

[87] Board Member, Maurice Werezak dissents from these Reasons. His written dissent will follow at a later date.

DATED at Regina, Saskatchewan, this **6th** day of **November, 2009.**

LABOUR RELATIONS BOARD

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Kenneth G. Love, Q.C.,
Chairperson

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[44] [2004] 106 C.L.R.B.R. (2nd) 43, See also, Adams, supra at paragraph 9.385