The Labour Relations Board
Saskatchewan

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES & CANADA, LOCAL 179, Applicant v. MONAD INDUSTRIAL CONSTRUCTORS INC., Employer and CONSTRUCTION WORKERS UNION (CLAC), LOCAL NO. 151, Respondent Union

LRB File No. 132-12, 160-12 & 161-12; February 15, 2013
Chairperson, Kenneth G. Love, Q.C.; Members: Ken Ahl and Bert Ottenson

For the Applicant Union:	Heather L. Robertson & Crystal l. Norbeck
For the Respondent Union:	Richard F. Steele & David A. deGroot
For the Employer:	Larry Seiferling, Q.C.

Section 37 – Successorship – Corporation formerly certified in Saskatchewan discontinues work in Saskatchewan. While no longer working in Saskatchewan, Corporation engages in sale of assets in Alberta to another Corporation who carries on Industrial Construction work formerly carried on by Saskatchewan certified Corporation.

Successorship – Following the purchase of assets from Corporation certified in Saskatchewan, purchaser corporation resumes operations in Saskatchewan. Applicant Union seeks to certify employees. Employer and Respondent Union, in response to certification application allege that Employer is successor to previously certified employer.

Successorship – Board reviews decisions related to successorship – Determines that successorship has occurred and Employer is successor to previously certified Employer.

Abandonment – Applicant alleges that Respondent Union has abandoned its certificate in Saskatchewan. Board reviews fact situation and determines that abandonment has not occurred.

Section 5(g) – Board determines that Applicant put to unnecessary expense resultant from failure of Respondent Union and Employer to file collective agreements as required by section 31 of the Act. Also notes that neither Respondent Union nor Employer took steps to amend its certificate in Saskatchewan, notwithstanding it had done so in both Alberta and Manitoba to recognize the successorship of the Employer following the acquisition of assets of the Employer formerly certified in Saskatchewan. Board orders Applicant to be made whole.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love Q.C., Chairperson:** The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 179, (the "Applicant Union") filed an application[1] on July 20, 2012 to be certified as the bargaining agent for:

> *all journeyperson & apprentice plumbers, steamfitters, pipefitters, gas-fitters, refrigeration mechanics, instrumentation mechanics, sprinkler-fitters, welders, foremen and general foremen employed by Monad Industrial Constructors Inc. operating under the likes and styles of PCL Monad; Monad Construction; Monad Industrial; Monad; Monad Constructors; Monad Contractors Ltd.*

[2] The Construction Workers Union, Local 151 (the "Respondent Union") filed a Reply on July 30, 2012 in which they claimed to hold a prior certificate from the Board dated October 3, 1984 in respect of "all employees of Monad Contractors Ltd. (hereinafter "MCL"), employed within the Province of Saskatchewan, except the general manager, office manager, office and sales staff and foremen."

[3] In its Reply, the Employer claimed that the application by the Applicant Union constituted a "raid" and had not been filed either within the open period in relation to the Board's Order of October 3, 1984, or the anniversary date of the effective date of the collective agreement that had been entered into between the Respondent Union and the Respondent Employer. The Employer also argued that the application was a "carve out", that is, the application was for a single craft unit to be created from an existing all employee unit.

[4] On August 3, 2012, the Applicant Union filed an amended application for Certification. In that application, the Applicant Union struck all references to entities other than Monad Industrial Constructors Inc. (hereinafter "MICI"). It also noted that:

[1] LRB File No. 132-12

> *To the best of my [Bill Steeves on behalf of the Applicant Union] knowledge, CLAC has never been certified to represent employees of the within employer. Instead, CLAC previously held collective bargaining rights only respecting a defunct corporation with a similar name to the present employer. CLAC subsequently abandoned those rights within the meaning of s. 6.1 of the Construction Industry Labour Relations Act, 1992.*

[5] In its Amended Reply, the Respondent Union denied any abandonment "of its bargaining rights or that it held its bargaining rights with another employer that is now defunct". The Respondent Union also claimed that MICI. (the "Respondent Employer") was the successor to MCL. In that respect, it said:

> *Monad [previously defined in the reply as being Monad Industrial Contractors Inc.] is the successor to Monad Contractors Ltd. Neither Monad nor Monad Contractors Ltd. conducted business in Saskatchewan for a period of time, but upon Monad's resuming business in Saskatchewan, Local 151 exerted its rights as bargaining agent. At that time, Monad admitted that it was the successor to Monad Contractors Ltd. Attached as Exhibit "C" is a true copy of a letter from Monad acknowledging that it is the successor to Monad Contractors Ltd. Thereafter, Local 151 and Monad negotiated the collective agreement attached to this Amended Reply as Exhibit B. The issues of successorship and abandonment are matters to which the applicant is a stranger. The Applicant has no standing to challenge whether Local 151 abandoned its bargaining rights or whether Monad is the successor to Monad Contractors Ltd.*

[6] The Respondent Employer also filed an amended reply expressly denying the statement set out in paragraph 4 above "insofar as it relates to the successorship issue".

[7] In accordance with its usual policy, the Executive Officer of the Board directed that a pre-hearing vote of the affected employees be conducted by secret ballot. That vote was conducted by the Board's Agent on August 14th and 15th by both a poll vote and mail-in ballot process. In accordance with the direction of the Executive Officer of the Board, upon completion of the voting process, the ballot box was sealed and retained in the possession of the Board's Agent pending further direction of the Board.

[8] On September 7, 2012, the Applicant Union filed an Objection to the Conduct of the Vote[2] by the Board Agent alleging that certain employees were allowed to vote that should not have voted, and that other employees were not allowed to vote who should have voted.

[9] Also on October 7, 2012, the Applicant Union filed an Unfair Labour Practice Application[3] with respect to actions taken by the Employer in respect of a group of approximately 21 Irish foreign workers who had been recruited by the Employer from Ireland.

[10] The Board held a hearing with respect to these matters on December 19, 2012. The evidence and arguments heard by the Board related to two preliminary matters, being (i) whether a successorship had occurred pursuant to Section 37(1) of the *Act*? and (ii) whether, if there had been a successorship, did the Respondent Union abandon its representational rights?

[11] For the reasons which follow, we have answered the questions posed as follows:

1. Did a successorship occur between MCL and MICI? Yes
2. Did the Respondent Union abandon its representational rights? No

Facts:

[12] MCL was incorporated in the Province of Alberta on September 10, 1979, under the name Scott-Lane Contracting Ltd. It changed its name to Monad Contractors Ltd. on February 2, 1984. Following its change of name, it operated in Saskatchewan, Alberta, British Columbia, Manitoba and Ontario.

[13] In Saskatchewan, the employees of MCL were organized by the Respondent Union who was granted representational rights by this Board on October 2, 1984. The employee group certified as an appropriate unit by the Board was an "all employee" unit.

[14] MCL continued to operate in Saskatchewan until the enactment of *The Construction Industry Labour Relations Act, 1992*[4] *("CILRA")*. *CILRA* required that unionized contractors negotiate through a Representative Employers Organization ("REO") with certain trade unions designated by the Minister pursuant to *s.* 9 of that *Act*. The Respondent Union was not among those trade unions designated by the Minister so as to allow them to represent employees in Saskatchewan.

---

[2] LRB File No. 160-12
[3] LRB File No. 161-12

[15] Evidence from the witness for the Employer was that MCL was not active as a contractor in the Province of Saskatchewan after 1992, but it continued to operate in other provinces.

[16] Mr. Eslin Eling testified for the Employer. He had been employed as the Manager of Human Resources for the PCL Group of Companies for 26 years and had previously been employed by the Province of Alberta including some time as Registrar of the Alberta Labour Relations Board. He testified that MCL was a part of the PCL Group of Companies and that he was an advisor to MCL as a part of his employment as Manager of Human Resources for PCL.

[17] Mr. Eling testified that during the period 2000 – 2003, MCL was an industrial contractor. During that period no work was done in Saskatchewan, however, the Company continued to pursue work in the province, albeit unsuccessfully.

[18] MICI was incorporated in Alberta on December 12, 2003 as a wholly owned subsidiary of PCL Construction Group Inc. Mr. Graham Wozniak was elected as a director and was appointed as President of MICI on incorporation. Mr. Bryan Alexander was elected as a director and appointed as Secretary.

[19] MCI had been acquired by the PCL Group of Companies at some time prior to 2003. The precise date of the acquisition was not provided to the Board.

[20] In 2003, Mr. Eling testified that MCI maintained offices in both Kelowna and Edmonton. He testified that the Kelowna office dealt with commercial work primarily in British Columbia whereas the Edmonton office dealt with Industrial work throughout western Canada.

[21] Mr. Eling testified that Mr. G. R. Wozniak was the President of MCL, who operated out of the Edmonton offices of the Company. During that period, MCL was already a part of the PCL Group of Companies. In its business promotion literature, MCL listed the following persons as its key employees:

- Graham Wozniak – President
- Donald Hutchison – Manager of Operations

---

[4] S.S. 1992 c. C-29.11

- Peter Monahan – Chief Estimator
- Tom Wilkinson – Superintendent
- Rod Bortnick – Project Manager
- Gordon Milne - Superintendent

[22] Effective December 17, 2003, MCL entered into a Bill of Sale and Assignment Agreement with MICI. This agreement transferred ownership of certain listed assets, located in the Province of Alberta, from MCL to MICI. Clause 2 of that agreement provided:

> *2. Effective as at January 1, 2004, the Vendor [MCL] hereby absolutely and unconditionally sells, bargains, assigns and transfers to the Purchaser [MICI] (a) all of the Vendor's rights and responsibilities under any bargaining authority held by the Vendor is Alberta and (b) all employees of the Vendor in Alberta, other than salaried employees. The Purchaser hereby agrees to accept such responsibilities.*

[23] Mr. Eling testified that the reason for the agreement in December of 2003 was to separate the commercial business operated by MCL in Kelowna from the industrial business operated by MCL from Edmonton. He testified that as a result of the asset sale, MICI became the operator of the Industrial business formerly operated by MCL and MCL continued to operate as a commercial contractor from Kelowna.

[24] Mr. Eling testified that all of the key personnel remained with MICI who continued to operate the former industrial business of MCL. He also testified that MICI took responsibility for completion of an ongoing industrial project, being the Borden Chemicals Inc. Formaldehyde Plant 3 Project. By letter dated February 9, 2004, MICI advised its suppliers that:

> *Current invoices to Monad Contractors Inc. that relate to the Borden Chemicals Project will be paid directly by Monad Industrial Constructors Inc. We would like to continue to do business with you and request to open an account under Monad Industrial Constructors Inc. Attached is our standard credit application for your information. Please adjust your address book and accounts receivable records accordingly.*

[25] Mr. Eling testified that subsequent to January 1, 2004, MICI represented itself to prospective customers and suppliers as the successor to MCL. He testified that MICI continued to operate out of the same office from which MCL previously operated using the same telephone number. He also noted that the logo utilized by MICI stayed the same as that formerly utilized by MCL.

[26] Mr. Eling also testified that following that agreement, the Alberta Labour Relations Board, by *Order*dated April 1, 2004, recognized MICI as the successor to MCL within the Province of Alberta.

[27] On December 24, 2003, MCL and PCL Monad Constructors Inc. were amalgamated under the name Monad Contractors Ltd. On May 4, 2004, this amalgamated company changed its name to PCL Constructors Westcoast Inc. Also on December 24, 2003, Mr. Graham Wozniak was named as a director of the amalgamated company.

[28] Insofar as PCL Constructors Westcoast Inc. is concerned, the story ends here. It was struck off the Saskatchewan corporate registry for inactivity on December 14, 2012.

[29] However, MICI continued to operate as an industrial contractor. MICI was registered to conduct business in Saskatchewan on June 3, 2008. We were provided no evidence with respect to its operations in Saskatchewan following its extra-provincial registration, but at sometime between that date and the filing of the certification application by the Applicant Union on July 20, 2012, MICI was contracted for work at a Potash Mine located near Vanscoy, Saskatchewan.

[30] Also during this period, the Respondent Union, applied to the Manitoba Labour Board seeking to have the certificate issued by the Manitoba Labour Board on June 16, 1987, amended to change the name of the Employer from MCL to MICI. That application was unopposed and was granted by the Manitoba Labour Board on April 12, 2010.

[31] The Respondent Union provided evidence from Mr. Brad Bent, who was the Respondent Union's Director of Training and who was formerly the regional director for the Respondent Union in Saskatchewan. Through Mr. Bent, the Respondent Union provided the following collective agreements negotiated between MCL or MICI and the Respondent Union. Details of those collective agreements are as follows:

Collective Agreement Dates	Employer named In Agreement	Union Named In Agreement	Sector Covered By Agreement
October 16, 1984 to January 31, 1986	MCL	CLAC Local 151	Not Stated
February 1, 1990 to January 31, 1992	MCL	CLAC Local 151	Not Stated
February 1, 1992 to January 31, 1994	MCL	CLAC Local 151	Not Stated
October 1, 1992 to May 31, 1994	MCL	CLAC Local 151	Pipeline Sector Saskatchewan
February 1, 1994 to January 31, 1996	MCL	CLAC Local 151	Construction Sector Saskatchewan
June 1, 1994 to May 31, 1996	MCL	CLAC Local 151	Pipeline Sector Saskatchewan
February 1, 1996 to January 31, 1998	MCL	CLAC Local 151	Construction Sector Saskatchewan
June 1, 1996 to May 31, 1998	MCL	CLAC Local 151	Pipeline Sector Saskatchewan
February 1, 2008 to January 31, 2010	MICI	CLAC Local 151	Construction Sector Saskatchewan
February 1, 2011 to January 31, 2014	MICI	CLAC Local 151	Construction Sector Saskatchewan

[32] None of these collective agreements, except the last one spanning the period Feb. 1, 2011 to Jan. 31, 2014 were filed with the Minister as required by 31 of the *Act*. The one agreement that was filed, was only filed after the filing of the certification application by the Applicant Union.

[33] Mr. Bent also supplied the Board with a copy of a letter dated November 19, 2010 from MICI which advised that MICI was "in the process of obtaining work in the Province of Saskatchewan". That letter acknowledged that "Monad Industrial Constructors Inc. is a successor to a certified business certified to Local 151. We are, therefore, prepared to confirm the transfer of Local 151's bargaining rights from Monad Contractors Ltd. to Monad Industrial Constructors Inc."

[34] The above referenced letter from MICI was in response to a letter dated November 16, 2010 in which Mr. Bent raised the issue with MICI. In that letter, he says:

> *As you are aware, the Construction Workers Union (CLAC), Local 151 has been operating within the Province of Saskatchewan for many years, and has been the bargaining agent for employees of Monad Contractors Ltd. Local 151 recently established an office in Saskatoon to serve its members who are and will be working within the Province. With the passage of Bill 80, an amendment to the Construction Industry Labour Relations Act 1992, Local 151 is once again active within the construction industry in Saskatchewan.*
>
> *We understand that Monad now operates its construction business in Saskatchewan through Monad Industrial Constructors Inc. Therefore, we assert that Local 151's bargaining rights, operation of law, have transferred to Monad Industrial Constructors Inc. We request reply correspondence fro Monad Industrial Constructors Inc. confirming its acknowledgement and recognition of the transfer of Local 151's bargaining rights from Monad Contractors Ltd. to Monad Industrial Constructors Inc.*

[35] Mr. Bent also supplied the Board with a supplementary agreement dated August 11, 2008 wherein MCL and the Respondent Union which provided as follows:

> *Effective June 3, 2008 the official name of the employer Monad Contractors Ltd. will be changed to* ***"Monad Industrial Constructors Inc."***
>
> *All other terms and conditions of the Collective Agreement not amended by this Supplementary Agreement shall remain in full force and effect.*

Relevant statutory provision:

[36] Relevant statutory provisions from *The Trade Union Act* are 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.*
>
> *37(2) On the application of any trade union, employer or employee directly affected by a disposition described in this s., 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).

. . .

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.

[37] Relevant statutory provisions from *The Construction Industry Labour Relations Act* are as follows:

6(1) In addition to the powers conferred on it by this Act, the board has all the powers conferred on it by The Trade Union Act, and the orders of the board pursuant to this Act are enforceable in the same manner as orders of the board pursuant to The Trade Union Act.

6(2) In addition to any other order that it may make pursuant to this Act, the board may make orders:

(a) determining whether an organization is an employers' organization;

(b) determining whether an employer is a unionized employer;

(c) determining whether an employee is a unionized employee;

(d) determining whether an unfair labour practice has occurred;

(e) determining whether this Act is being or has been contravened;

(f) requiring compliance with this Act, the regulations or any decision of the board with respect to a matter before the board.

6(3) The board may determine any question of fact that is necessary to its jurisdiction.

Respondent Employer's arguments:

Successorship

[38] The Employer filed a written Brief which we have reviewed and found helpful. The Respondent Employer argued that Monad Industrial Constructors Inc. was the successor to Monad Contractors Ltd. It argued that a successorship occurred by "operation of law" under the *"Act*", and is, therefore, automatic without the necessity of any Board Order or application. In support of that position, the Employer cited *United Brotherhood of Carpenters and Joiners of America, Local 185 et al v. Graham Construction & Engineering Ltd*[5] , *United Brotherhood of Carpenters and Joiners of America, Locals 1805 and 1990 v. Cana Construction et al*[6], and *S.G.E.U. v. Yorkton Mental Health Drop-In Centre Inc.*[7]

[39] The Employer argued that the facts in this case regarding the sale of assets as between MCL and MICI was stronger than the facts dealt with in *United Brotherhood of Carpenters and Joiners of America, Local 185 et al v. Graham Construction & Engineering Ltd*[8] decision of the Board. They argued that the evidence showed a disposition of a business as a going concern between MCL and MICI.

[40] The Employer argued that the intent of Section 37 is that so long as the certification Order remains in effect that when the certified employer, or a successor to that employer returns to the jurisdiction after an absence, that the certification remains in affect and is applicable to the returning employer or successor.

Abandonment

[5] [2003] S.LR.B.R. 471, LRB File No. 014-98
[6] [1985] Feb. Sask. Labour Rep. 29, LRB File Nos. 199-84 – 204-84
[7] [2011] C.L.R.B.R. (2d) 65, Carswell Sask 429, LRB File No. 027-09
[8] [2003] S.LR.B.R. 471, LRB File No. 014-98

[41] The Employer argued that the Applicant Union should not be permitted to raise any abandonment issue based upon the Board's decision in *CAA v. Saskatchewan Emergency Road Services*[9]. Additionally, they argued that an abandonment issue was precluded by Section 4(4) of *The Construction Industry Labour Relations Act, 1992*[10].

[42] Alternatively, the Employer argued that the facts of this case would not support an abandonment argument. They argued that the Applicant Union had failed to satisfy the onus of proof of abandonment[11]. The Employer argued that it would be necessary for the Applicant Union to provide evidence that during the period in question, that the employer was active in Saskatchewan and that during that period did not assert its rights to represent the employees of the employer. This, it argued, the Applicant Union had failed to do. The Employer cited the requirements to proof abandonment as set out by George W. Adams in his text *Canadian Labour Law* 2nd Ed. The Employer also cited numerous other cases in support of its position.[12]

[9] [2000] S.L.R.B.R. 46
[10] S.S 1992 c C-29.11
[11] Citing *G.S. Wark Ltd.* [1996] O.L.R.B. Rep. September/October 811
[12] Including *Barkman Builders Ltd.* [1984] O.L.R.B. Rep. April 565; *United Brotherhood of Carpenters and Joiners of America, Local 185 et al v. Graham Construction & Engineering Ltd***.** [2003] S.LR.B.R. 471, LRB File No. 014-98; *IBEW, Local 529 v. Saunders Electric Ltd.* [2009] CanLII 63147 (SK LRB); LRB File No. 019-05; *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. Wappel Concrete and Construction Ltd.* LRB File No. 302-83.

Impact of *The Construction Industry Labour Relations Act and the 2010 amendments on the 1984 Certification Order*

[43] At the conclusion of the evidentiary portion of the hearing and prior to commencement of argument by the parties, the Board requested the parties to consider what, if any impact, if any, the passage of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11 ("*CILRA, 1992*")[13], or the amendments to that *Act* in 2010, had on the certification Order of the Board from 1984.

[44] The Employer argued that neither *CILRA* nor the 2010 amendments to that *Act* impacted on the 1984 certification Order granted to the Respondent Union. The Employer argued that unless explicitly stated, no law is retroactive and cannot affect existing rights. As a result, the Employer argued the 1984 certification Order remained in effect, notwithstanding that neither MCL nor MICI were active in Saskatchewan, and became effective insofar as MICI is concerned when it returned to Saskatchewan as successor to MCL following the 2010 amendments to *CILRA*.

Respondent Union's arguments:

Successorship

[45] The Respondent Union filed a book of authorities related to its oral argument which we have reviewed. It echoed the arguments of the Respondent Employer with respect to successorship being automatic in Saskatchewan without any necessity for Board involvement.

[46] The Respondent Union argued that the Applicant Union put too fine a line on its interpretation of successorship. They argued it was unusual for a union to argue that successorship should have a narrow definition. The Respondent Union argued that successorship was more a question of the substance of any transaction than the form of that transaction, that is, that corporate documents and searches don't satisfy the usual tests of successorship. The Board was required to look at what actually occurred rather than the form of the transaction.

[13] Proclaimed September 1992.

[47] The Respondent Union argued that the Applicant Union was misreading the legislation in arguing that the disposition of the business or part thereof had to occur in Saskatchewan or reference assets in Saskatchewan. It argued that there would be opportunity for mischief on the part of employers who could attempt to relieve themselves of collective bargaining obligations by structuring a transaction outside the jurisdiction.

[48] In support of its position, the Respondent Union cited *United Brotherhood of Carpenters and Joiners of America, Locals 1805 and 1990 v. Cana Construction et al.*[14]; *S.G.E.U. v. Yorkton Mental Health Drop-In Centre Inc.*[15]; *W.W. Lester (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740.*[16]

[49] The Respondent Union also argued that the application for certification constituted a raid by the Applicant Union and as such, argued that it was outside the "open period" provided for in Section 5(k) of the *Act*.

[50] The Applicant Union filed a written Brief which we have reviewed and found helpful. The Applicant Union argued that the overarching purpose of the successorship provisions in the *Act* was set out by the Board in *Saskatchewan Government Employees Union v. Government of Saskatchewan.*[17]

[51] The Respondent Union also argued that there must be a functional and identifiable business vehicle conveyed from the transferor to the transferee. They argued that the Board need not be concerned about the technical legal form of the transfer, but should look to see whether there has been a discernable continuity in the business or part of the business formerly carried on. In support, it cited *Thyssen Mining Joint Venture (Re:) at para 48*[18] and *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*[19]; *Pac Fab Industries Corp (Re:)*[20] and *Construction Workers Union (CLAC), Local 151 v. Tercon Industrial Works Ltd. and Westwood Electric Ltd.*[21]

---

[14] [1985] Feb. Sask. Labour Rep. 29, LRB File Nos. 199-84 – 204-84
[15] [2011] C.L.R.B.R. (2d) 65, CarswellSask 429, LRB File No. 027-09
[16] [1990] S.C.J. 127
[17] [1999] S.LR.B. No. 30,
[18] [2000] S.L.R.B.D. No. 31
[19] [1990] 3 S.C.R. 644

[52] The Respondent Union also argued that the evidence provided was credible and uncontradicted with respect to the transfer of assets between MCL and MICI. They further argued that this transfer effected a transfer of the "beating heart" of the organization.

Abandonment

[53] The Respondent Union also argued that the Applicant Union had no standing to challenge the Applicant Union's certification on the basis of abandonment. In support it also cited the *CAA v. Saskatchewan Emergency Road Services*[22] case referenced by the Employer.

[54] The Respondent Union argued that the application by the Applicant Union amounted to a raid (displacement) application and was outside the time limits prescribed by *s.* 5(k) of the *Act*. Furthermore, it argued that the Applicant Union was attempting to "carve out" a smaller craft based unit from an "all employee" unit. It also argued that the onus of proof of abandonment fell to the Applicant Union.

[55] In support of its abandonment arguments, the Respondent Union cited *United Brotherhood of Carpenters and Joiners of America, Local 185 et al v. Graham Construction & Engineering Ltd.*[23]; *IBEW, Local 529 v. Saunders Electric Ltd.*[24]*; Cineplex Galaxy Ltd. Partnership (Re:).*[25]

Impact of *The Construction Industry Labour Relations Act and the 2010 amendments on the 1984 Certification Order*

[56] The Respondent Union agreed with the position taken by the Employer. They also argued that nothing in *CILRA* or the amendments impacted upon the 1984 certification Order. They also argued that there was no interference with vested rights by the legislation.

---

[20] [1996] Alta. L.R.B.R. 65
[21] LRB File Nos. 097-10 and 098 -10.
[22] [2000] S.L.R.B.R. 46
[23] [2003] S.LR.B.R. 471, LRB File No. 014-98
[24] [2009] CanLII 63147 (SK LRB); LRB File No. 019-05
[25] [2006] S.LR.B.D. No. 13, 127 C.L.R.B.R. (2nd) 1, CanLII 62952, LRB File No. 135-05

[57] The Respondent Union argued that there had never been any rescission or cancellation of the certification Order. It argued that even if *CILRA* put any cloud on the effect of the 1984 Order, the 2010 amendments to the *Act* lifted that cloud.

[58] The Respondent Union argued that to find that either *CILRA* or the 2010 amendments impacted the certification Order would amount to a collateral attack upon the rights of employees who had evidenced a desire to be represented by the Respondent Union. They argued that a large, liberal and remedial interpretation of the legislation would not reasonably arrive at any conclusion other than the certification remained in effect.

Applicant Union's arguments:

Successorship

[59] The Applicant Union filed a written Brief and case authorities which we have reviewed and found helpful. The Applicant Union argued that the overarching purpose of the successorship provisions in the *Act* was set out by the Board in *Saskatchewan Government Employees Union v. Government of Saskatchewan*[26]. They argued that in the absence of a functional and identifiable business vehicle having been conveyed from on party to another, *s.* 37 is not engaged. In support, the Applicant Union cited *Thyssen Mining Joint Venture (Re:)*[27]. The Applicant Union also cited *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*[28] in support.

[60] The Applicant Union argued that a transfer of assets or corporate entities outside Saskatchewan may serve as relevant evidence in determining whether a successorship has taken place, but only to the extent that the transferee is the heir to actual obligations borne within Saskatchewan by an active business [emphasis added]. In support the Applicant Union cited *Pyramid Electric Corp. (Re:)*[29]

[61] The Applicant Union further argued that the Board, rather than the parties should determine whether a successorship occurred for three reasons. Firstly, that determination of whether a successorship has occurred is consistent with the purpose for which the Board was

[26] [1999] S.LR.B. No. 30,
[27] [2000] S.L.R.B.D. No. 31
[28] [1990] 3 S.C.R. 644

established, that is, to adjudicate disputes regarding bargaining rights between unions. Secondly, it is the Board's jurisdiction to determine which units of employees are appropriate for collective bargaining purposes. Finally, if no successorship order exists, there is no public record for third parties to be aware of whether or not representational rights exist as between a trade union and an employer.

[62] The Applicant Union also argued against a determination which would allow employers and unions to jointly agree that a successorship has occurred without any sanction from the Board. It argued that in such circumstances, it would be difficult, if not impossible, for the Board to be effective in its role in regulating and reducing industrial conflict and to be aware of when such successorships had been brought into existence. Furthermore, they argued that it is the Board's role to make orders under Sections 5(a) and (c) of the *Act* to create collective bargaining obligations. They argued that the Respondents were effectively telling the Board to "mind its own business" and not to become embroiled in successorships, notwithstanding the Board's explicit powers to determine successorships and the bargaining relationship that flows therefrom.

[63] The Applicant Union also argued that if the Board is not involved in successorship determinations, the rights of employees to choose a trade union to represent them would be undermined. Similarly, in circumstances where a successorship is determined by the agreement of the parties, there is the potential for employer interference in the selection of the bargaining agent or for company domination to occur.

[64] The Applicant Union argued that the evidence did not support a finding of successorship. It noted that all of the assets sold as between MCL and MICI were situate within Alberta and only Alberta collective bargaining rights were referenced in the agreement. They also argued that there was no functional business in Saskatchewan as MCL had been inactive in the Province for some time. The Applicant Union noted that the Asset Sale Agreement served as an example of how a transaction could be structured to have different consequences and impacts in different jurisdictions. It argued that the evidence derived from the various corporate searches placed in evidence showed a different intention from that argued by the Employer and the Respondent Union.

---

[29] [1997] S.L.R.B.D. No. 53

[65] The Applicant Union argued that there was an unacceptable hiatus between the time of the transaction and the alleged successorship. In support they cited *Drywall Acoustic Lathing and Insulation (United Brotherhood of Carpenters and Joiners of America, Local 675) v. G.A. Hawkins Construction Co. Ltd.*[30]

[66] The Applicant Union argued that if there was no successorship, in fact, then the collective agreement and recognition by the Employer was nothing more than a voluntary recognition which could be challenged by another union outside the "open period". Furthermore, they argued that the corporate registry searches reveal that in Saskatchewan MCL amalgamated into PCL Constructors Westcoast Inc. MICI did not register in Saskatchewan until June, 2008.

Abandonment

[67] The Applicant Union argued that the Respondent Union had abandoned its bargaining rights. In support it cited the Board's decision in *IBEW, Local 529 v. Saunders Electric Ltd.*[31] The Applicant Union also argued that Section 6.1 of *CILRA* explicitly authorizes the Board to find abandonment, which provision establishes a presumption that abandonment has occurred if a trade union has not taken steps to enforce its rights for a period of three (3) years.

[68] It argued that the Union was inactive for two extended periods between 1986 and 1990 and between 1998 and 2008. They argued that there had been no evidence put forward by the Respondent Union of any activity during those periods.

Impact of *The Construction Industry Labour Relations Act and the 2010 amendments on the 1984 Certification Order*

[69] It argued that when the transfer of assets between MCL and MICI occurred, there could not have been any effective transfer of bargaining rights in Saskatchewan because at that time *CILRA* was in effect. *CILRA* it argued precluded any collective bargaining except by designated trade unions with Representative Employer Organizations in the Construction

[30] [2010] CanLII 29681 (ON LRB) at para 34
[31] [2009] CanLII 63147 (SK LRB); LRB File No. 019-05

Industry. In support of its position, it cited *Canadian Iron, Steel and Industrial Workers Union, Local No. 3 v. Emerald Oilfield Construction Ltd.*[32]; *Central Mills Construction Ltd. (Re:)* [33]; and *J.V.D. Mill Services Inc. (Re:)*[34].

Analysis & Decision:

[70] The Respondents in this matter urge the Board to resolve this issue on the basis that a successorship exists between Monad Industrial Constructors Inc. and the formerly certified, Monad Contractors Ltd and that the bargaining rights granted to them were not abandoned by them.

Successorship Issue

[71] After consideration of the evidence provided to us and the arguments of counsel, we are satisfied that the asset sale between MCL and MICI which was made effective December 17, 2003 constituted a transfer of a business or part of a business within the meaning of s. 37 of the *Act.*

[72] Vice-Chairperson Schiefner, in a recent decision,[35] outlined the purpose and intent of successorship legislation. At paragraphs [40] and [41] he says:

> *[40] Successorship in labour relations is a legislative creation that provides for the transfer of collective bargaining obligations from the owner of a certified business to another party upon the disposition of that business or a part therein. Without legislative intervention, changes in the ownership of a business would generally have the effect of undermining and/or dislocating the collective bargaining rights of the employees of that business. However, thanks to specific provisions in labour legislation, collective bargaining rights now tend to survive and flow through changes in the ownership of a business (provided there is some sense of continuity of that "business"). Through legislative intervention, it is the "business", not a particular employer to which the collective bargaining rights are seen to have attached and, if that business ends up in the hands of a new owner, previous collective bargaining obligations tend to flow with the transaction through to that new owner.*
>
> *[41] Like so many other areas of labour legislation, the statutory provisions dealing with successorship are policy laden and represent an attempt to balance*

[32] [1994] S.L.R.B.D. No. 19
[33] [2001] S.L.R.B.D. No. 7
[34] [2011] S.L.R.D.D. No. 1, CanLII 2589 (SK LRB), LRB File No. 087-10
[35] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Charnjit Singh and 1492559 Alberta Inc.* LRB File No. 196-10 (Decision dated January 31, 2013)

> *competing interests; in this particular case, the right of owners to freely dispose of their property and the expectation of employees that their collective bargaining rights will have some reasonable permanency irrespective of changes in ownership of their workplace. The legislative rationale for s. 37 of Saskatchewan's Trade Union Act was succinctly stated by the Board in Hotel and Restaurant Employees, Local 767 v. 603195 Saskatchewan Ltd., (1995) 25 C.L.R.B.R. (2d) 137, [1994] 3rd Quarter, Sask. Labour Rep. 136, LRB File Nos. 125-94, 130-94 & 131-94, at 139:*
>
> > *Section 37 of The Trade Union Act provides for a transfer of collective bargaining obligations when a business or part of a business changes hands. It represents an effort on the part of the legislature to safeguard the protection which employees have achieved through the exercise of their rights under the Act, when the enterprise in which they are employed is passed on as a result of negotiations or transactions in which they have no opportunity to participate. The protection provided by Section 37, however, does not apply to all cases where an employer disposes of his business, and the determination as to whether the means by which a business has changed hands brings the new entity under the obligations which flow from Section 37 is often a matter of some complexity.*

[73] Vice-Chairperson Schiefner goes on to say at paragraph [41] that "[I]n determining whether or not a new owner is a successor within the meaning of s. 37 of the *Act*, it is not necessary that we find there has been a transfer of a business in the strict legal sense". He quotes from *United Brotherhood of Carpenters and Joiners of America, Locals 1805 and 1990 v. Cana Construction et al*[36] in support of his comments that the legislature intended the Board to look at the practical effect of a transaction, rather than its technical or legal form. That quote from Cana Construction is as follows:

> *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.*

[74] As Vice-Chairperson Schiefner goes on to say, there is no checklist or exact criteria for determining whether or not a successorship has occurred. Rather, he says at paragraph [43]:

> *labour relations boards across Canada, including this Board have resigned themselves to the fact that such determinations must be made in the context of*

[36] [1985] Feb. Sask. Labour Rep. 29, LRB File Nos. 199-84 – 204-84

> *the facts of each particular case but always with a view to determining whether there has been a transfer of a business (or part thereof) rather than merely the disposition of a collection of surplus assets; with the former giving rise to successorship but not the latter.*

[75] Vice-Chair Schiefner went on to consider the Ontario Labour Relations Board decision in *Canadian Union of Public Employees v. Metropolitan Parking Ltd*.[37] and this Board's decision in *Versa Services Ltd. v. C.U.P.E*[38]. He concluded at paragraph [46] as follows:

> *In the end, the vital consideration for the Board is whether or not the effect of the transaction was to put the transferee into possession of something that could be considered a "going concern"; something distinguishable from an idle collection of surplus assets from which the new owner has organized a new business. To make a finding of successorship, the Board must be satisfied that the new owner acquired the essential elements of a business or part thereof; something of a sufficiently dynamic and coherent quality to be considered a going concern; and that the said business interest can be traced back to the business activities of the previous certified owner. In making this determination, this Board has cautioned that the test is not whether the business activities of the new owner resemble the previous certified business; but whether or not the business carried on after the transaction was acquired from the certified employer. See: JKT Holdings Ltd. v. Hotel Employees and Restaurant Employees, Local 767, [1990] 5 C.L.R.B.R. (2d) 316, LRB File No. 149-89. Tracing the business interest back to the previous owner is essential to a finding of successorship as this Board has rejected the proposition that, once a trade union becomes certified at a particular location for a particular type of work, anyone who subsequently opens a similar business at those premises is automatically a successor within the meaning of s. 37 of the Act. See: United Steelworkers of America v. A-1 Steel & Iron Foundry Ltd., et. al., [1985] Oct Sask. Labour Rep. 42, LRB File No. 001-85.*

[76] What the Board attempts to determine in these cases is whether or not, as described by former Chairperson Bilson "the beating heart"[39] of the enterprise has been transferred.

[77] In the present case, we are constrained by the evidence which we have. That evidence shows that on December 17, 2003, shortly after the incorporation of MICI, MCL transferred all, or substantially all of its industrial assets to MICI. Those assets were located in Alberta. No assets from British Columbia, where MCL was engaged in a commercial construction business were included in the sale. Unfortunately, we were not advised if there were any such assets in British Columbia, but have concluded, based upon Mr. Eling's evidence that the commercial construction business was operated from offices in Kelowna and that it

---

[37] [1980] 1 Can. L.R.B.R. 197, 1979 CanLII 815 (ON. LRB)
[38] [1993] 1st Quarter Sask. Labour Rep. 174, LRB File No. 170-92

continued with that business, that there were assets in British Columbia which remained with MCL.

[78] However, following the assets which were transferred to MICI by MCL, those assets were used by MICI to continue the industrial construction business formerly carried on by MCL. This is shown by the retention of key personnel, the retention of the offices of MCL by MICI, the use of the same telephone and fax numbers, and the use of the same or similar logo. Furthermore, MICI took over the completion of the Borden Chemicals Inc. Formaldahyde Plant from MCL, something which was not dealt with in the Asset Purchase Agreement.

[79] MICI continued to hold itself out as continuing the business formerly conducted by MCL in its promotional literature submitted when bidding on jobs. This was apparently done without any comment or concern about this holding out from MCL.

[80] MICI also received recognition from the Alberta Labour Relations Board as the successor to MCL. It later also received similar recognition from the Manitoba Labour Board.

[81] However, determinations made by the Alberta Labour Relations Board and the Manitoba Labour Board are not binding upon this Board. Neither are the factors these Board's considered, or the legal framework under which they operate open to this Board to review. Those decisions relate solely to the jurisdictions in which they were made.

[82] The Applicant Union argues that the Asset Purchase Agreement transferred no assets located in Saskatchewan as between MCL and MICI. They also say that while bargaining rights in Alberta were specifically referenced in the Agreement, Saskatchewan Bargaining rights were not. Furthermore, they say that the provisions of *CILRA* precluded MICI and the Respondent Union from engaging in collective bargaining directly, nor did *CILRA* allow the Respondent Union to represent employees of a construction company in Saskatchewan. In short, they argue that the Asset Purchase Agreement is silent concerning Saskatchewan assets and bargaining rights because there was no "Saskatchewan Business" being conducted or which could be conducted in Saskatchewan in 2003.

---

[39] See *Hotel Employees and Restaurant Employees, Local 767 v. 603195 Saskatchewan Ltd. (Victoria Inn),* [1994] 136 Sask. Labour Rep., 3rd Quarter, LRB File Nos. 125-94, 130-94 & 131-94.

[83] The Respondent Union counters that throughout the period in question, that it continued to represent its members (although whether it had any in Saskatchewan at the time was not disclosed) and it continued to negotiate collective agreements with both MCL and later with MICI on behalf of its Saskatchewan workers.

[84] The Employer says that during that period, it was actively seeking work in Saskatchewan. Mr. Eling's testimony made reference to a pipeline project having been undertaken in Saskatchewan between 2004 and the present, the details of which were not provided. Mr. Eling's testimony was that it utilized the Respondent Union's members on that project which would, on the face of it, seem to have been contrary to *CILRA*.

[85] For the purposes of *s.* 37, was there a business or part thereof, which was transferred between MCL and MICI? The Applicant Union concedes that "the transfer of assets outside of Saskatchewan may serve as relevant evidence in determining whether a successorship has taken place, **but only to the extent that the transferee is the heir to actual obligations borne <u>within Saskatchewan</u> by an active business".**[40] [Emphasis Added]

[86] In that regard, the Applicant Union cited *Pyramid Electric Corp (Re:)*[41]*.* That case dealt with a potential successorship between a company previously certified in Saskatchewan, Sparrow Electric Ltd. and the alleged successor to this company, Pyramid Electric Corp. At issue was the Board's jurisdiction to inquire into events and a transaction which occurred in Alberta as a part of its successorship jurisdiction. In that case, Chairperson Bilson says at paragraphs 21 and 23:

> *…it is our view that we are entitled to consider the transactions which have taken place elsewhere. This is not a matter of giving an extra-territorial effect to the Act, but of determining whether a particular company should be identified as the heir of an employer subject to a Saskatchewan certification Order in respect of work being done, and an employment relationship being carried on in Saskatchewan. The only way of doing this, especially in the particular circumstances of the construction industry, may be to look at dealings which the two companies have had with each other in Alberta.*
>
> *A finding that we can legitimately explore the nature of transactions which have taken place in Alberta in the context of a successorship application does not signify that we are trying to extend the operation of our legislation to Alberta.* ***The implications of such a finding is that events which take place in Alberta***

[40] See paragraph 21 of the Applicant's Brief of Law
[41] [1997] S.L.R.B.D. No. 53, LRB File No. 376-96

> ***might help us to decide whether a disposition took place which would entitle employees working in Saskatchewan to insist upon their bargaining rights, and these events are therefore relevant to our proceedings.***

[87] Here, as was the case in Pyramid, we are not concerned about the Board's jurisdiction to look to events that took place in Alberta. Those have been readily revealed by the Employer and the Respondent Union. The question which the Board must determine is whether or not those events and transactions are sufficient for a finding of successorship pursuant to *s.* 37.

[88] The Applicant Union also cited the Supreme Court of Canada decision in *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*[42]*.* That case dealt with the authority of the Labour Relations Board of Newfoundland to declare that a successorship had occurred in the case where a company had set up a "double breast" company. In that case, the majority of the Supreme Court determined that in the absence of evidence establishing a disposition under *s.* 89 of the governing legislation rendered the Board's decision patently unreasonable and therefore subject to judicial review. The majority went on to determine that the Board's action in construing the successorship provisions of its legislation as if they were common employer provisions was contrary to precedent.

[89] The Lester case was essentially about whether or not the Newfoundland Board could rely upon the successorship provisions of its act to deal with double breasted companies. The Supreme Court said it could not. It is, therefore, of little assistance to us in this case, where MCL and MICI are not engaged in an exercise to thwart collective bargaining rights in Saskatchewan, but rather, they assert that bargaining rights did, in fact, transfer to the Respondent Union in Saskatchewan.

[90] Clearly, as noted in Pyramid, the Board can and should review transactions that occur outside the Province to determine if those transactions impact upon employee's rights in Saskatchewan.

[91] The December 17, 2003 transaction was silent with respect to both Saskatchewan based assets and bargaining rights. The Applicant Union argues that because of

---

[42] [1990] 3 S.C.R. 644

the silence of the agreement with respect to Saskatchewan assets we should find that there was no transfer of any business sufficient to give rise to a successorship in Saskatchewan. However, to do so, we would have to be convinced that any business that was formerly conducted in Saskatchewan by MCL remained with MCL following the asset sale. By extension, that would also require us to presume that that business would then have flowed through to PCL Constructors Westcoast Inc., which company is no longer active in Saskatchewan.

[92] Such findings would, in our opinion, be contrary to the evidence provided. Mr. Eling's testimony was clear and uncontradicted. MICI obtained MCL's industrial contracting business based upon the Asset Purchase Agreement and MCL (later PCL Constructors Westcoast Inc.) retained the commercial contracting business which at that time was restricted to British Columbia. Since MCL had operated in Saskatchewan as an industrial contractor when it was certified and not as a commercial contractor, we can conclude that whatever residual business remained or was retained in Saskatchewan, that that business was conveyed to MICI.

[93] Additionally, MICI continued to attempt to obtain work in Saskatchewan, holding itself out as the successor to MCL. There was evidence of a pipeline project in Saskatchewan where members of the Respondent Union provided services. All of these factors lead to our finding that the December 17, 2003 agreement provided for the disposal and acquisition of a business or part of a business so as to satisfy the requirements of *s.* 37 of the *Act.*

[94] This finding is also consistent with the purpose and intent of the *Act*. To hold otherwise would, in our opinion, allow for potential mischief on the part of employers who, in order to strip away bargaining obligations, could structure a transaction so that a newly incorporated company would be able to acquire the ongoing assets of a unionized contractor, hold itself out as the successor to that corporation, both for business purposes to acquire new work, but also for the purposes of other provinces successorship legislation, but would not be a successor for the purposes of *s.* 37 in Saskatchewan. This would clearly be inconsistent with the purpose and intent of *s.* 37 which is to preserve bargaining rights.

[95] We therefore find that MICI is the successor to MCL pursuant to *s.* 37 of the *Act*.

Abandonment Issue

[96] Since we have determined that MICI is the successor to MCL, we must deal with the second question posed, which is to determine if the Respondent Union abandoned its bargaining rights.

[97] All parties referenced the Board's recent decision in *IBEW, Local 529 v. Saunders Electric Ltd.*[43] as establishing the Board's authority to declare that bargaining rights had been abandoned. Additionally, the Applicant Union referenced the 2010 amendment to *CILRA* which authorized the Board to make a finding of abandonment in the construction sector.

[98] Section 6 of *CILRA* cannot be applicable in this case. When MCL was certified in 1984, *CILRA* was not in effect. While similar legislation had been in effect prior to 1984, that legislation had been repealed and it was not reinstated until 1992. In 2010 when *s.* 6 was added to *CILRA*, other amendments where made to the *Act* to allow for unions, other than those unions permitted to represent employees under *CILRA*, to apply for certification of "(i) employees of an employer in more than one trade or craft; or (ii) all employees of an employer".[44] Where an order is made under *s.* 4(2), then *CILRA* does not apply[45].

[99] However, notwithstanding whether or not the provisions of *s.* 6 of *CILRA* apply, the principles regarding abandonment as set out in Saunders would continue to apply to this situation. In Saunders, the board reviewed its previous jurisprudence and jurisprudence from other Canadian Boards dealing with abandonment.

[100] The Saunders decision confirmed the principles established by it 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*[46], which were:

> *1. That abandonment was recognized in Saskatchewan, notwithstanding a lack of specific legislative authority for the concept; and*

[43] [2009] CanLII 63147 (SK LRB); LRB File No. 019-05
[44] See s. 4(2)(i) & (ii) of *CILRA*
[45] See s. 4(4) of *CILRA*
[46] [2006] Sask. L.R.B.R. 135, LRB File No. 132-05

> *2. Abandonment was available to be used only as a "shield", and not as a "sword".*

[101] The Saunders decision also provided additional principles, distilled from George W. Adams, *Canadian Labour Law*[47]. These were:

> *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 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 are any other factor or factors which would excuse the inactivity or lack of use of the rights by the Union.*

[102] From a review of these principles, it is clear that the Applicant Union cannot succeed with its collateral attack upon the Respondent Union's successorship rights. In *Mudjatik Thyssen Mining Joint Venture*[48], the Board determined that "a finding of abandonment made outside of the normal vehicle of a rescission (revocation) application and vote should be reserved only for the most extreme cases"[49]. This is not a case where the bargaining rights are sought to be extinguished by rescission. Rather, it is a competition for bargaining rights through a raid by the Applicant Union since a successorship has been found to exist.

[103] Additionally, as argued by the Respondents, the onus of proof that bargaining rights have been abandoned falls upon the Applicant Union. They have failed to satisfy this onus of proof that abandonment has occurred.

---

[47] 2nd ed. (Aurora: Canada Law Book Inc., 2003)
[48] [2000], 65 C.L.R.B.R. (2d) 204, LRB File No. 140-99
[49] At paragraph 45

[104] Also, because the successorship has been determined to have occurred, the application by the Applicant is apparently outside of the time limits prescribed by *s.* 5(k) of the *Act*.

[105] Nor do the facts in this case provide sufficient justification for a finding of abandonment if we ignore the other defects mentioned above. Principle to this is that we have no proof that any employees were employed during the alleged periods during which the abandonment is alleged to have occurred.

[106] We can recall that the Applicant Union argued that the Respondent Union was inactive for two extended periods between 1986 and 1990 and between 1998 and 2008. They argued that there had been no evidence put forward by the Respondent Union of any activity during those periods.

[107] Contrary to this assertion, it is the Applicant Union's onus to show that there were employees employed in Saskatchewan during those periods. We have no evidence with respect to the period 1986 to 1990. We do have evidence with respect to the pipeline project at some time between 2004 and 2008. However, that evidence also was that while employed in Saskatchewan the Respondent Union asserted its bargaining rights with respect to employees of MICI, which rights were respected by MICI. This evidence would counter any allegation of abandonment during that period.

[108] We note as well that the Respondent Union filed with us, as noted above, copies of collective agreements which covered some of the periods of alleged inactivity. We have not relied upon these collective agreements for proof that bargaining rights were being utilized. They were never filed with the Minister as required by *s.* 31 of the *Act.* Absent compliance with that provision, there is no public record of such agreements having been entered into. While there are no administrative penalties for failure to file collective agreements, penal sanctions might be imposed pursuant to s. 15 of the *Act*.

[109] For the reasons outlined above, we find that the bargaining rights granted to the Respondent Union have not been abandoned by it.

Other Matters

[110] As a result of our determination of the questions posed by the parties, there is no need for us to consider the question posed to the parties regarding the possible impact of *CILRA* on the 1984 certification Order. We thank all counsel for their consideration of that question.

Order

[111] No other orders have been requested by the parties apart from the following declarations:

> *1. That Monad Industrial Contractors Inc. is the successor employer to Monad Contractors Ltd.*
>
> *2. That there has been no abandonment of the bargaining rights granted to Monad Contractors Ltd. by this Board on October 3, 1984 on LRB File No. 333-84.*

[112] In the circumstances of this case, however, we feel that an order under s. 5(g) is also appropriate. The Applicant Union has been put to considerable expense as a result of the failure of the Employer and/or the Respondent Union to:

1. Take any steps to amend the Certification Order of October 3, 1984 upon either the return of MICI to Saskatchewan or upon the exchange of letters between MICI and the Respondent Union dated November 16, 2010 and November 19, 2010 wherein the successorship was acknowledged between them.
2. Take any steps to amend the Certification Order of October 3, 1984 at the time that steps were taken in both Alberta and Manitoba to amend bargaining certificates in those jurisdictions.
3. Take any steps to register, as required by s. 30 of the *Act* any of its collective agreements which it now relies upon for determination of the open period pursuant to s. 5(k) of the *Act.*
4. Take any steps under s. 37 to ask the Board to declare MICI to be the successor to MCL.

Had the Employer or the Respondent Union taken appropriate steps to either amend the certification Order, have a successorship declared, or filed its collective agreements with the Minister, these proceedings may not have been necessary.

[113] It is reasonable for us to conclude that had the Employer or the Respondent Union taken any of these steps, the Applicant Union would have been able to determine, from the public record, that the employees of MICI were represented and presumably, would not have sought to represent them through an application for certification. The lack of any public record is the fault of the Employer or Respondent Union, not the Applicant Union.

[114] Section 5(g) allows the Board to "fix and determine the monetary loss suffered by …a trade union as a result of a violation of this *Act*…and requiring those persons to …pay the monetary loss or any portion of the monetary loss that the Board considers to be appropriate".

[115] In the circumstances of this application, we believe that the Employer and the Respondent Union should make the Applicant Union whole with respect to its costs and expenses incurred as a result of the Applicant Union having been induced to make this application based upon an inaccurate public record, and, in particular, its failure to comply with *s.* 31 of the *Act*.

[116] Mr. Fred Bayer, Board Registrar, is hereby appointed as the Agent of the Board to determine with the parties the amount of monetary loss suffered by the Applicant Union. In the event the parties are unable to reach an agreement as to the amount of the monetary loss, this Panel of the Board shall remain seized of the matter for the purposes of determination of the monetary loss suffered.

DATED at Regina, Saskatchewan, this 15th day of **February, 2013.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson