**UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL, Local 2014, Applicant v. UNITED CABS LIMITED, Respondent**

LRB File No. 110-17; July 6, 2017

Chairperson, Kenneth G. Love, Q.C.; Members: Duane Siemens and Gary Mearns

For the Applicant: Heather Jensen
For the Respondent: Larry Seiferling, Q.C.

**Interim Relief** – Union applied for interim relief pending hearing of final application with respect to this matter – Board considers usual factors related to an application for interim relief. In this case, the balance of convenience of maintaining collective bargaining relationships outweighed the potential harm to the Employer in continuing the certification rights pending a final determination – Interim Order issued.

**Abandonment** – Union applies for declaration that it is the successor to previously certified union certified to represent drivers of Employer – Employer counters that previous union abandoned its certification – Employer argues that abandoned certification rights could not be transferred to Union.

**Abandonment** – Union argues that statutory provisions of *The Saskatchewan Employment Act* requires that Employer file an application with the Board to declare bargaining rights abandoned – Board reviews statutory provisions and previous common law jurisprudence and finds that statutory rights complement the common law rights in providing Employer and Employee with a pro-active right (a sword) as distinct to a reactionary right (a shield) with respect to abandonment.

**Abandonment** – Board considers, in the alternative, if the statutory provisions ousted the common law jurisprudence – Finds that actions of Union precluded the ability of the Employer to make an application – Board concludes that equity would require that it allow the Employer under its authority granted pursuant to section 6-112(1) to permit the matter to be raised by the Employer as if an application had been made under section 6-16**.**

**Abandonment** – Board reviews facts and jurisprudence – Finds that previous union abandoned its certification rights – Finds purported transfer

to Union a nullity – Board finds certification rights abandoned and orders certification Order be rescinded.

**Practice and Procedure** – Employer argues that the Board should order a vote pursuant to section 6-111(1)(v) of *The Saskatchewan Employment Act* – Board determines that if its findings concerning abandonment were wrong that it would, in these circumstances, order a vote.

## REASONS FOR DECISION

**Background:**

**[1]** **Kenneth G. Love, Q.C., Chairperson:** These Reasons for Decision relate to (2) two matters heard by the Board. The first was an interim application[1] by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International, Local 2014 (the "Steelworkers") for an interim order continuing a certification Order of this Board originally granted to National Automotive, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) ("CAW")[2]. The second is in respect of an application by the Steelworkers to be confirmed by the Board as the successor[3] to CAW in respect of that certification Order. As the same panel sat with respect to both matters, it is convenient that both matters be dealt with in these Reasons for Decision.

**LRB File No. 115-17 – Application for Interim Relief**

**[2]** The Steelworkers brought this application for interim relief in respect of the certification Order which was granted in 2000 to the CAW relating to:

> *All taxi drivers employed by United Cabs Limited and United Cabs Limited operating as United Cabs and Blue Line Cabs, except dispatchers, office personnel, garage staff, gas bar staff, employees of Atomic Motors, supervisors and management above the rank of supervisor and limousine drivers and further excluding those persons who own or control two or more taxi cabs.*

**[3]** There were issues regarding this certification which will be described later, but on June 8, 2017, the Steelworkers purported to take an assignment of the bargaining rights granted in this certification application from CAW. The Steelworkers presented themselves to

[1] LRB File No. 115-17
[2] LRB File No. 236-00
[3] LRB File No. 110-15

United Cabs Limited ("United") as the successor Union to CAW, but United refused to recognize the Steelworkers as the bargaining representative for the drivers at United. The Steelworkers then applied to the Board for an interim Order to maintain what they argued was the *status quo,* that is, that drivers at United were entitled to representation for collective bargaining in accordance with Board's Order in LRB File No. 236-00.

**[4]** After a hearing on June 20, 2017, the Board issue an Order confirming that until the Board had the opportunity to consider the complete matter, including the claims made by United that the certification had been abandoned, the Union was entitled to represent the employees at United with Reasons to follow. These are those Reasons.

**The Interim Order**

**[5]** The Board's jurisprudence with respect to granting interim relief is well established. Firstly, the issuance of any order for interim relief is discretionary[4]. Secondly, the Board needs to satisfy itself that the main application brings forth an arguable case for the relief sought.[5] Thirdly, the Board considers the labour relations harm to each of the parties that would flow from the granting or not granting the requested Order[6]. Additionally, the Interim relief must be urgent[7]. Finally, the interim relief sought must not essentially grant the relief sought on the main application[8]. Any relief granted is intended to maintain the *status quo* until the hearing of the main application.[9]

**[6]** The Board's authority to issue interim orders derives from section 6-103(2)(d) of *The Saskatchewan Employment Act,* SS 2013, c S-15.1 (the "*SEA*"), which provision allows the Board to "make an interim order pending the making of a final order or decision". Such applications are made in accordance with the Board's Regulations[10] and Practice Note No. 1 issued by the Board.

**[7]** The parties took divergent views of what constituted the "*status quo*" with respect to the application. The Steelworkers took the view that the certification Order granted to CAW

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[4] See *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. o/a Regina Inn Hotel and Convention Centre*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99 at 194
[5] *Ibid*
[6] *Ibid*
[7] *See SJBRWDSU v. Saskatchewan Indian Gaming Authority Inc. (Painted Hand Casino)*
[8] *Tai Wan Pork Inc. (Re)* [2000] S.L.R.B.D. No. 21
[9] See *Grain Services Union Canada v. Saskatchewan Wheat Pool, Heartland Livestock Services* [2001] CanLII 32545,

had not been repealed by the Board and it had been assigned to the Steelworkers pursuant to section 6-21 of the *SEA*. As a result, the Steelworkers argued that they were entitled to represent the drivers at United. United argued that the *status quo* was that the certification Order granted to CAW had been abandoned by CAW. As a result of this abandonment, the certification Order was a nullity and could not be transferred to the Steelworkers as CAW did not maintain its bargaining rights as a result of the abandonment of those rights.

**[8]** The Board considered these divergent views and, after consideration, determined that the *status quo* espoused by the Steelworkers should be maintained in the interim. That period was to be fairly short, since the Board, at the hearing of the interim matter on June 20, 2017, set the matter for expedited hearing on June 27 and 28, 2017.

**Analysis and Decision regarding the Interim Application**

**[9]** That an arguable case existed was not seriously debated by the parties. It was clear that there was opposing views of the effect of the assignment of the certification rights as between CAW and Steelworkers. In addition, there was an arguable case as to whether or not the assigned rights had been abandoned by CAW and, if so, the effect of that abandonment on the purported assignment of those rights.

**[10]** The Board is then required, by its jurisprudence, to look at the balance of labour relations harm which would result as between the parties. Steelworkers argued that the Board should not presume that the bargaining rights had been abandoned without further inquiry. They argued that the certification Order had not been cancelled by the Board and was, therefore, still a binding Order that should be respected. United argued that on the face of it, there had been an abandonment of the Order which had been confirmed to the Board by CAW. As such, it argued, the order could not be assigned to the Steelworkers.

**[11]** On this interim application, the Board is of the opinion that the arguments provided to it by the Steelworkers are more persuasive. That is, the certification Order, on its face, remains in force and effect because it has not been cancelled or rescinded by the Board. Additionally, because the certification Order had not been cancelled or rescinded, that Order could (insofar as any existing rights existed) be transferred pursuant to section 6-21 of the *SEA*.

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[10] See Section 15 of *The Saskatchewan Employment Act (Labour Relations Board) Regulations* S-15.1 Reg 1

**[12]** The Board was of the opinion that it could not, without further evidence, take the position advocated for by United that the certification Order was abandoned and therefore, there were no rights that could be transferred. For the Board to have made that determination would require that it, on a summary application, make the determination requested by United in respect of the main application, which conclusion would, we submit, be contrary to the Board's jurisprudence in *Tai Lan Pork Inc*. (*supra*).

**[13]** On balance, the Board was of the opinion that the balance of labour relations harm in this interim case favoured the Steelworkers position as greater harm would be occasioned to the Steelworkers and the drivers it wished to represent than would be occasioned to United. The Board leans towards the preservation of bargaining rights, when there is, at least, an arguable case that those rights survived and were properly transferred to the Steelworkers.

**LRB File No. 110-17 - The Main Application**

**[14]** Some additional background is necessary to fully understand the content to the application and some of the arguments made. On May 23, 2017, a driver for United, Imran Aziz made application[11] to the Board under section 6-16 of the *SEA* requesting that the Board cancel the certification granted to CAW in respect of the drivers of United on the grounds that CAW had abandoned its representation rights. Unifor, who is the successor to CAW did not file a formal reply to the application, but, through its counsel, advised the Board, and the parties to the application, on May 25, 2017 by email as follows:

> *Jonathan Swarbrick and Fred Bayer:*
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> *I write in response to this matter on behalf of Unifor which is the successor of National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) ("CAW-Canada"). CAW-Canada is the certified bargaining agent for the bargaining unit described in a February 28, 2001 order ((LRB File No. 236-00) that is described more fully in the application.*
>
> *Unifor as the successor of CAW-Canada hereby advises the Board that CAW-Canada abandoned all rights as bargaining agent in respect of the bargaining unit at least 10 years ago. There have been no efforts by CAW-Canada or Unifor in the last ten years to negotiate a collective agreement or to otherwise represent the employees in the bargaining unit. If those facts do not themselves constitute an abandonment of bargaining rights, Unifor hereby abandons the bargaining rights.*

[11] LRB File No. 086-17.

> *In the case of this matter (LRB File No. 086-17 Application to Cancel Order; Imran Aziz v. CAW-Canada), Unifor as the successor of CAW-Canada therefore consents to the cancellation of the 2001 certification order.*
>
> ***Anthony F. Dale***
> *Director, Legal Department*
> *Directeur, Service juridique*
>
> UNIFOR

**[15]** Counsel for United advised the Board and Mr. Aziz's counsel by email on June 5, 2017 as follows:

> *I am not sure what my client can offer as this is an application by an employee claiming a union abandoned them. The issues are between the employee and the CAW. Our issue is whether the certification application is in time regardless of what happens with the abandonment application*

**[16]** The Application came before a panel of the Board at Motions Day on June 5, 2017 for scheduling. During the Board hearing on June 5, 2017, Mr. Dale again stated that Unifor (CAW) had abandoned its rights under the certification Order granted in respect of the drivers of United. Mr. Seiferling, on behalf of United again repeated that he would not be participating in the hearing when scheduled and may have someone present to keep a watching brief of the proceedings. The Board scheduled a hearing of the matter for June 9, 2017 in Saskatoon commencing at 9:30 AM.

**[17]** On May 24, 2017, the Steelworkers made application[12] to this Board to be certified to represent drivers at United for collective bargaining. Again, Mr. Dale, on behalf of Unifor (CAW) provided the email above in response to the application. In its reply, United argued that the application was not within the "open period" due to the existing certification in favour of CAW which had not been cancelled. In other respects, United took no position with respect to the application.

**[18]** This application was also dealt with by a panel at Motions Day on June 5, 2017. This matter was scheduled to be heard in Saskatoon on June 16, 2017 commencing at 9:30 AM. During the hearing on June 5, 2017, the existence of a Collective Bargaining Agreement between CAW and United was discussed. The Steelworkers and Unifor (CAW) claimed to have

[12] LRB File No. 087-17

no knowledge of a Collective Bargaining Agreement. That collective bargaining agreement was provided to the Board at the hearing of this matter. It spanned the period May 15, 2010 to May 15, 2012.

**[19]** Knowledge of the existence of the Collective Bargaining Agreement, and after obtaining a copy of the Agreement, spurred some activity on the part of the Steelworkers. They organized a meeting of the drivers which they sought to represent late on the evening of June 7, 2017. That meeting determined that they should attempt to obtain an assignment of the bargaining rights granted to CAW. It was also determined that a secret ballot vote would be held among the drivers at United to determine if they were in favour of accepting a transfer of obligations from CAW/Unifor to the Steelworkers. That vote was conducted from approximately 11:00 PM, June 7, 2017 until 8:00 AM on June 8, 2017. 75 drivers voted, with 74 in favour and 1 opposed.

**[20]** On June 8, at 9:00 AM, Unifor (CAW) assigned its bargaining rights to the Steelworkers. That agreement purported to transfer all of CAW's bargaining rights for United's drivers to the Steelworkers.

**[21]** Also on June 8, 2017, Mr. Aziz withdrew his application for abandonment and the Steelworkers abandoned their application for certification. The hearings scheduled for June 9, 2017 and June 16, 2017 were accordingly cancelled. That same day, (June 8, 2017) the Steelworkers filed this application to be declared the successor to CAW with respect to the drivers at United, in accordance with section 6-21 of the *SEA*.

**Additional Evidence from the Hearing**

**[22]** The Board heard evidence from two witnesses, Mike Pulak for the Steelworkers and Tony Rosina for United. Mr. Pulak described his involvement in the organizing drive related to the drivers of United and the events that transpired on the evening of June 7, 2017 and morning of June 8, 2017 when the drivers met to consider being represented by the Steelworkers. He also described his involvement with the agreement between Unifor (CAW) and the Steelworkers to take over the representational rights of Unifor (CAW) in respect to the drivers of United.

**[23]** Mr. Pulak also testified that following the successful vote and the completion of the agreement with Unifor (CAW) that he attended on the business office of United and

provided them with a collective agreement on which he had changed the title page to reflect the Steelworkers as the bargaining agent for the employees and on which he had modified the expiry date to be May 15, 2018. He also noted that he had changed the signature page of the agreement by again changing the name of the bargaining agent to the Steelworkers and by signing and dating the agreement as at June 8, 2017.

**[24]** Mr. Rosina testified concerning the early attempts to organize United and the events which followed the successful organizing drive by CAW. He described that negotiations were difficult and a First Collective Agreement was only reached after lengthy bargaining just prior to a Board hearing at which a first collective agreement was to be imposed by the Board. He also described negotiations related to a renewal of the first collective agreement which were also difficult, but which resulted in the collective agreement referenced above, which expired on May 15, 2012.

**[25]** Mr. Rosina produced a copy of a communication dated October 3, 2011 which he described as an attempt by CAW to assert itself in the workplace, as well as an attempt to convince union members to pay their dues. That document threatened that failure to pay dues would result in the termination of the driver's employment and that the union would begin enforcement action against non-paying members by selecting (10) ten members who did not remit dues to the union by random draw. CAW would then seek the termination of those (10) ten drivers.

**[26]** Mr. Rosina testified that this attempt was a failure and thereafter he never heard from CAW again. He noted that there were no shop stewards appointed by the Union, no requests for renewal of the Collective Agreement and no grievance or other enforcement of the Collective Agreement, notwithstanding that United had taken discipline actions against drivers and otherwise asserted management rights. He testified that United had never remitted any dues payments to CAW from the time the CAW was certified to represent the drivers.

**[27]** United also provided the Board with a book of documents that was admitted with the agreement of the Steelworkers. That book of documents included some of the documents referenced above, but also included some additional material. One was an exchange of email correspondence between counsel for the Steelworkers, counsel for United and the Board Registrar which followed from the email noted in paragraph [15] above. Those emails were as follows:

Email from Ms. Jensen to Mr. Seiferling and the Board Registrar on June 5, 2017 at 9:22 AM:

*Hello.*
*Thank you for your emails.*

*I understand the purpose of today's application to pertain to Mr. Aziz's application to cancel a certification order for abandonment.*

*The relevant information is as follows. The application was filed May 23 by a member of the bargaining unit at issue. Counsel for the union that is the successor to the certified union filed correspondence consenting to the application and providing information. Counsel to the employer wrote to disagree with information provided in the correspondence from the successor to the certified union, but did not provide any indication of activity between the employer and the union within the three years immediately before the application was filed. No formal reply was filed by the employer within the 10 day limit, which we understand to have expired on Friday, June 2.*

*The applicant, Mr. Aziz, has requested in the cover letter accompanying the original application that the application be processed expeditiously.*
*I understand the issues to be addressed to be: whether the abandonment application ought to be heard and determined based on the information filed by the parties; whether the statutory preconditions have been met and the order requested should be issued.*

*We have received an email from the Employer's counsel today suggesting the employer has nothing to offer in relation to the abandonment application. If the employer agrees (or takes no position) that the statutory pre-conditions to granting the order to cancel a certification order because of abandonment, perhaps this position could be clarified. It there is no dispute that the applicant's abandonment application should be granted following an in camera consideration by the Board, it may be that there is no need for oral submissions in relation to the abandonment application.*

*I would appreciate it if the Employer could confirm its position.*

**[28]** Mr. Seiferling responded to Ms. Jensen and the Board Registrar on June 5, 2017 at 9:44 AM as follows:

*The issue on the abandonment is for the applicant, certified union and the LRB to decide. Once the LRB decides and issues and order, the question we raised is whether the certification application filed before that order was made is in time. How the LRB decides to proceed on the Abandonment application is not our concern because we can not force a union to represent workers. My client was never told they abandoned the certification, but we can not refute their position that they did. My client therefore has not asked me to take a position on that application. I agree that there may not be a need for a hearing from my clients point of view on this application but the timeliness of the certification application is an issue my client wants to argue as quickly as possible. We thought that was*

> *going to be argued today. In any event we would want it argued before we go to the time and expense of a vote on that application.*

**[29]** Also introduced by agreement of the parties was a written argument submitted by Ms. Jensen, as counsel for Imran Iziz, with respect to his abandonment argument. In that written argument, she advocated for a granting of the abandonment Order without a formal hearing. This was primarily based upon her assertions that the certified union had consented to the abandonment and that the Employer was taking no position.

**[30]** Nevertheless, as noted above, on the eve of the Board hearing to consider the abandonment issue, Mr. Aziz withdrew his application. The certification application was also withdrawn, a purported successorship agreement reached by Unifor (CAW), the Steelworkers held a secret ballot vote to consider the assignment of bargaining rights to the Steelworkers, and this application was filed.

**Analysis and Decision:**

**[31]** The issues to be determined in this matter are: (a) do the provisions of section 6-16 of the *SEA* oust the common law remedy with respect to abandonment?; (b) if the common law remedy in respect to abandonment has not been ousted by section 6-16, do the facts in this situation lead to an abandonment?; and (c) what is the effect of a finding of abandonment?

**Does Section 6-16 oust the Common Law Remedy respecting Abandonment?**

**[32]** The history of the abandonment remedy was outlined by the Board in *International Brotherhood of Electrical Workers, Local 529 v. Saunders Electric Ltd.*[13] . Contrary to an earlier decision of the Board, on reconsideration, following the Court of Appeal's ruling in *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Graham Construction and Engineering Ltd*.[14], the Board found that the remedy of abandonment continued to be alive and well in the Province of Saskatchewan.

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[13] [2009] CanLII 63147 (SKLRB), LRB File No. 019-05

[14] 2008 SKCA 67 (CanLII), [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

**[33]** Abandonment of bargaining rights had been found to exist in Saskatchewan prior to the *Saunders* decision[15]. However, doubt was cast upon the viability of the remedy in the initial decision in *Saunders* based on what the Board, on reconsideration, found to be a misstatement of the Graham Construction decision.

**[34]** One of the principle aspects of the common law remedy with respect to abandonment was that the remedy could only be utilized as a shield and not as a sword, that is, an employer could defend an assertion of bargaining rights by a trade union on the basis of abandonment, but could not take any positive steps, such as making application to the Board to have an abandonment declared.

**[35]** That difficulty of that situation arose 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*[16]. In that case, the employer applied for an order of abandonment of the bargaining right held for certain of their employees. The Union was originally certified for employees at one location. When certain other theatre locations were opened, the union did not assert its rights to have its members undertake projectionist duties in those locations. Four (4) projectionists remained covered by the certification Order at the time of application. The employer and the union entered into an agreement that would permit the termination of the four (4) existing projectionists and pay severance to those employees.

**[36]** The employer then applied to the Board for a rescission of the bargaining order on the basis of abandonment of those collective bargaining rights. That application was described in paragraph [24] & [25] of the Board's decision as follows:

> *The issue before us is whether an employer may bring a rescission application before the Board in circumstances where a union has agreed not to continue to bargain collectively on behalf of its members or assert jurisdiction over the employer. The Employer suggests that, by virtue of the agreement entered into between it and the Union, the Union has abandoned its representative rights, thereby entitling the Employer to succeed with this rescission application.*
>
> *The Board has had occasion to consider the doctrine of abandonment and to apply it in limited circumstances, although the doctrine is not supported by any*

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[15] See *Mudjatik Thyssen Mining Joint Venture* [2003] Sask. L.R.B.R. 471, LRB File Nos. 014-98 & 227-00 and *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* 2006 CanLII 62952 (SKLRB), [2006] Sask. L.R.B.R. 135, LRB File No. 132-05

[16] Ibid

> *statutory authority. It is considered an equitable remedy and it is typically one that is claimed by an employer when faced with an application by a union which attempts to assert the union's rights vis a vis the employer's employees. It is necessary to consider a detailed history of the Board's application of the doctrine of abandonment in order to determine whether it is available in the circumstances before us.*

**[37]** In the circumstances described above, the Board refused the employer's request to rescind the certification Order. At paragraph [50], the Board says:

> *In our view, the fact that the Board has not previously considered an application for rescission made by an employer in industries other than construction, does not change our conclusion that this application must fail in the circumstances of this case. The Applicant has failed to satisfy the two criteria referred to above necessary to invoke the doctrine of abandonment - the two criteria which are common to both the construction and industrial settings – as follows:*
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> *(i) Firstly, the Applicant has been unable to establish that it had employees working during the period of alleged abandonment because the Applicant presented the Board with evidence only of a questionably valid agreement between the Union and the Employer where the Union states its intention not to represent the employees in the bargaining unit in the future. Even had the Board been inclined to consider rescission of the certification Order in the circumstances of this case, the Board, in almost all circumstances, directs a vote of the employees in the bargaining unit as a means of testing the employees' wishes on an application for rescission. Such a vote in the circumstances of this case could not be held because the evidence before the Board indicates that the Employer no longer employs any employees in the bargaining unit.*
>
> *(ii) Secondly, the Employer has attempted to utilize the doctrine of abandonment as a sword and not a shield, in other words, as a basis for founding an application for rescission rather than as a defence to the assertion of bargaining rights by the Union. Although the Employer, in filing documents evidencing the employees' consent to this application, maintained that these documents should not be considered as evidence of support typically filed with a rescission application, in the circumstances of an application for rescission by the employer, there must be a presumption of the applicability of s. 9 of the Act, that is, that the support was obtained through employer involvement or influence. Such a conclusion by the Board would result in dismissal of the application.* ***The foregoing excerpts from the VicWest Steel case, supra, clearly illustrate the Board's policy that applications for rescission by an employer are not permitted in construction or industrial settings because of the importance of employee choice.*** [Emphasis Added]

**[38]** In 2010, the Legislature amended what was then *The Construction Industry Labour Relations Act*[17] to provide for the right for employees, employers, and a trade union to seek a determination as to "whether a trade union in the construction industry has abandoned

[17] S.S. 2010 c.7 (Bill 80)

its bargaining rights in relation to a unionized employer"[18]. Bill 80 was introduced into the legislature and given 1st reading on March 10, 2009. It was given 3rd reading on May 19, 2010 and came into effect on proclamation. The Board's decision in *Saunders* was issued on November 6, 2009, which was during the time that Bill 80 was under consideration by the Legislature. However, Bill 80 was passed without amendment.

**[39]** This draws us to the conclusion that the abandonment process outlined in Bill 80 was addressed not to the issue in *Saunders*, but rather the issue in *Cineplex* which was that an employer was precluded from bringing an application to have a certification order declared to be abandoned, ie; the legislature provided for the abandonment provision to be used as a "sword", rather than a "shield". It was obviously not direct towards the situation dealt with by the Board in *Saunders* since that decision post-dated the introduction of the amendments.

**[40]** However, the abandonment provisions were also incorporated into the *SEA* when it was enacted in 2014. In the *SEA*, there was no distinction drawn between construction and non-construction activity. The provision is included within Division 1 of the legislation, not under Division 13 which deals with the Construction Industry. Additionally the references to the construction industry, within the provision, have been removed in section 6-16 of the *SEA*. Also, the ability for a trade union to apply for abandonment found under the previous provision was not repeated in section 6-16.

**[41]** While the amendment to *The Construction Industry Labour Relations Act*[19] clearly did not suggest that the statutory provision ousted the Board's prior common law remedy as enunciated in *Saunders*, the enactment of section 6-16 of the *SEA* needs to be examined.

**[42]** The Supreme Court of Canada dealt with the effect of a statutory codification on a common law right in *Rawluk v. Rawluk*[20]. That case dealt with the determination of the availability of a constructive trust in the face of legislative provisions which made provision for such a trust. In that decision, Mr. Justice Cory, on behalf of the majority, said:

> *It is trite but true to state that as a general rule a legislature is presumed not to depart from prevailing law "without expressing its intentions to do so with irresistible clearness" (Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co., 1956 CanLII 2 (SCC), [1956] S.C.R. 610, at p. 614). But even aside from this presumption, when the structure of the Family Law Act, 1986 is examined and the ramifications of a*

[18] S. 6.1
[19] S.S. 2010 c.7 (Bill 80)
[20] [1990] 1 SCR 70, 1990 CanLII 152 (SCC)

> *number of its provisions are studied, it becomes apparent that the Act recognizes and accommodates the remedial constructive trust.*

**[43]** The abandonment provision in section 6-16 does not, in our opinion, oust the Board's jurisdiction with respect to declaring bargaining rights to be abandoned as a defence to an action taken to enforce those rights. As noted by the Board in *Saunders*, other jurisdictions in Canada routinely declared bargaining rights to be abandoned in the Construction Industry, which was contrary to the position taken by this Board in *Cineplex*.

**[44]** As noted above, the statutory provision provides an employer with a sword, something which was lacking in *Cineplex*. It does not, however, provide a shield, something which the common law practice provides. The statutory provision is complementary to the common law rather than ousting it.

**[45]** Additionally, there is nothing in the statutory provision which provides "irresistible clearness" that there was any intention by the Legislature to oust the Board's common law jurisdiction. Rather the contrary, as noted above when the statutory provision is clearly a complementary provision to the Board's existing jurisdiction which allows an employee or an employer to have both a defensive shield and an offensive sword in relation to the abandonment of bargaining rights.

**[46]** The Board took a similar view with respect to the continuation of the common law duty of fair representation when the statutory provisions related to that duty were introduced into *The Trade Union Act*. In *Mary Banga v. Saskatchewan Government Employees' Union*[21] the Board said at p. 98:

> *The concept of the duty of fair representation was originally formulated in the context of admission to union membership. In the jurisprudence of the courts and labour relations boards which have considered this issue, however, it has been applied as well to both the negotiation and administration of collective agreements. Section 25.1 of The Trade Union Act, indeed, refers specifically to the context of arbitration proceedings. This Board has not interpreted the section in a way which limits the duty to that instance, but has taken the view that the duty at "common law" was more extensive, and that Section 25.1 does not have the effect of eliminating the duty of fair representation in the context of union membership, collective bargaining or the grievance procedure.*

[21] [1993] Sask. Labour Rep. 88, LRB File No. 173-93

**[47]** In our opinion, the statutory provision in 6-16 added to the Board's authority with respect to declarations of abandonment. We cannot see how the legislature would have intended to prohibit the employees and employers from the exercise of the common law rights regarding abandonment.

**[48]** Even if we are wrong with respect to our interpretation with respect to our authority to deal with abandonment under the statutory provision and under the common law, we would, in the circumstances of this case, exercise our authority granted pursuant to section 6-112(1) to permit the matter to be raised by the employer as if an application had been made under section 6-16.

**[49]** From the outline above it is clear that the Employer was provided no opportunity to make application to the Board under section 6-16. A hearing, at which the issue of abandonment (which had been raised in the reply filed by United) was to be considered by the Board was suddenly and without notice to United, cancelled as a result of the withdrawal and filing of this application by the Steelworkers. There was no possible way in which United could have filed an application, something which the Steelworkers argued disentitled them to any relief. By the Steelworkers actions, United was unable to file and application for abandonment.

**[50]** The issue had clearly been raised by United in its reply and the issue was a live one, and resulted in the hearing in this matter. While United did not request that the Board consider that an amendment should be made insure that the real question between the parties be considered, we presume that was because United was of the view expressed above that the common law right of abandonment continued to be in effect. Nevertheless, the Board has authority to "[A]t any time" …"to amend any defect or error in any proceedings, and all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings".

**[51]** For either of the reasons set out above, we are of the opinion that the issue of whether or not the CAW abandoned its bargaining rights is the issue which must be determined in this application.

**Did the CAW (Unifor) Abandon its Representational Rights?**

**[52]** We have no difficulty coming to the conclusion that CAW had abandoned its bargaining rights. The contradicted evidence from Mr. Rosina was that United had heard

nothing from CAW with respect to bargaining or enforcement of its rights since October 3, 2011 when CAW attempted to have the represented drivers pay union dues. The last negotiations with the Union for a collective agreement occurred in 2010 and since that time there has been no attempt to bargain a renewal or to enforce its rights under the collective agreement.

**[53]** Additionally, both CAW through its correspondence in response to the abandonment application filed by Mr. Aziz and the certification application filed by Steelworkers was that their bargaining rights had been abandoned. This amounts to an admission on the part of the CAW (through their successor, Unifor).

**[54]** Similarly, the employee, Mr. Aziz also took the position that the rights had been abandoned. The Steelworkers also appeared to take that position by virtue of their filing an application for certification co-incidentally with the application for abandonment by Mr. Aziz.

**[55]** The onus, of course, falls on United to establish that abandonment has occurred. From the facts outlined above, that onus is clearly met. Once met, the onus shifts to CAW to establish reasons why the Board should not make the requested Order.

**[56]** Regrettably, CAW (through its successor, Unifor) did not appear at the hearing and led no evidence. The only evidence available to the Board is the email reply noted in paragraph [14] above which supports United's view of the matter.

**[57]** Nor did Steelworkers provide any evidence to rebut the abandonment. The only evidence which they provided was evidence related to the organization of the drivers initially and the events leading to the purported transfer of obligations as between Unifor (CAW) and the Steelworkers.

**[58]** For these reasons we hereby declare that the bargaining rights granted to CAW in respect to drivers of United have been abandoned. An Order of the Board rescinding the certification Order granted on LRB 236-00 will accompany these reasons.

**What is the Effect of the Finding of Abandonment?**

**[59]** If CAW's bargaining rights were abandoned, can there be a valid transfer of those rights to the Steelworkers. In short, the answer is no.

**[60]** We have reached this conclusion for two reasons. Firstly either there were no rights which CAW (Unifor) possessed which it could assign, as argued by United, or secondly, those rights, even if they were in existence and could be assigned to the Steelworkers, those rights will be extinguished upon the rescission of the Certification Order on LRB 236-00.

**[61]** The only case which either counsel could provide to the Board on this issue was the Canada Industrial Relations Board decision in *Whitehorse Hotels Ltd. (Re:)*[22]. In that case, at page 3, the Canada Board says:

> *…In view of the circumstances of this case, however, the Board finds that it would be incompatible with the policies of the code to revive a certification order long dead by amending it and updating it and to place the onus on the employees in the bargaining unit to disavow the applicant.*

And later, on page 4, the Canada Board says:

> *… Furthermore, in view of the fact that there is no point in retaining a certification order which it now finds meaningless, the Board hereby pursuant to its powers under section 119 of the Code, rescinds the certification order ….*

**[62]** The abandonment of CAW's bargaining rights occurred well before the date of this application by the Steelworkers. In section 6-16, the operative time frame set out by the legislature is three years of inactivity. In the present case we have inactivity for a period from October 3, 2011 to June 8, 2017 a period of almost 6 years. The timeline becomes even longer if we examine it from the date of the last collective bargaining negotiations in 2010. As of the date of purported assignment of the bargaining rights, CAW (through its successor, Unifor) had already declared the rights abandoned. Those rights could not be revived through the purported assignment of them.

**[63]** Secondly, the Board has rescinded the certification Order issued on LRB file no. 236-00. Even if rights were transferred to the Steelworkers, those rights are rescinded when that Order is rescinded. So, in either event, the Steelworkers have nothing on which it can rely to require United to bargain collectively with it.

**Should the Board have ordered a vote?**

[22] [1977] Can LRBR 477, 77 CLLC 16,080

**[64]** United urged the Board to conduct a proper vote of the affected drivers to insure that the driver's rights to "organize in and to form, join, or assist unions and to engage in collective bargaining through a union of their own choosing[23]" are protected. The Steelworkers argued that no such vote should be considered because they had already canvassed the drivers and found that 98%+ wished to be represented by the Steelworkers.

**[65]** I is unnecessary for the Board to deal with this issue based upon the reasons set out above, nevertheless, for the guidance of the labour relations community, the Board wishes to make the following comments.

**[66]** The right to "organize in and to form, join, or assist unions and to engage in collective bargaining through a union of their own choosing" is protected both by the *SEA* and the *Canadian Charter of Rights and Freedoms*. It is a fundamental associational right which the *SEA* seeks to uphold and protect. It is a fundamental principle upon which the *SEA* is built.

**[67]** In 2008, the legislature saw fit to amend the then *Trade Union Act* to require the Board to permit employees to determine by board certified voting processes conducted in accordance with the *SEA* and the Board's *Regulations*. Those amendments sought to insure that the right to be represented by a union of the employees "choosing" was protected and enhanced. That right to conduct a vote was specifically provided for in some instances such as a certification, rescission, or raid situation.

**[68]** In addition, the Board has, and did have under *The Trade Union Act*, the authority to order "a vote or additional votes…if the Board considers that the taking of that vote would assist the board to decide any question that has arisen or is likely to arise in the hearing or proceeding, whether or not that vote is provided for elsewhere".

**[69]** This general power is generally used sparingly by the Board since a concern regarding the choice of employees is rarely engaged. However, in this case, after a period of separation from the workplace of almost 6 years, and an obvious lack of interest from the drivers who refused to pay union dues as noted in the October 3, 2011 communication, there is a real issue as to whether the current employees (who, unless they were drivers since before October 3, 2011) support or continue to support CAW or the Steelworkers, notwithstanding the process undertaken by the Steelworkers to engage support.

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[23] See section 6-4 of the *SEA*

**[70]** Had we reached the conclusion that there was no abandonment of the bargaining rights, or if, in the event we are wrong in our conclusions above regarding abandonment, we would have ordered a vote pursuant to section 6-111(1)(v) and ordered a vote to be held among those drivers affected by the representational change.

**[71]** For all of these reasons, the Steelworkers application is dismissed. Appropriate Orders will accompany these Reasons. This is a unanimous decision of the Board.

**DATED** at Regina, Saskatchewan, this **6th** day of **July, 2017.**

**LABOUR RELATIONS BOARD**

Kenneth G. Love, Q.C.
Chairperson