CITATION: International Union of Operating Engineers, Local 793 v. Labourers' International Union of North America, Ontario Provincial District Council, 2025 ONSC 902
DIVISIONAL COURT FILE NO.: 401/24
DATE: 20250214

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Lococo, Matheson and O'Brien JJ.

BETWEEN:	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 Applicant	*Robert Gibson*, for the Applicant
– **and** –	
LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL and CLEAN WATER WORKS INC. and ONTARIO LABOUR RELATIONS BOARD Respondents	*Ryan White*, for the Respondent Union *Neil Dzuba*, for the Respondent Clean Water Works Inc. *Aaron Hart*, for the Ontario Labour Relations Board
	HEARD at Toronto: January 16, 2025

REASONS FOR JUDGMENT

R. A. Lococo J.:

I. Introduction

[1] The applicant International Union of Operating Engineers, Local 793 ("Operators") brings an application for judicial review of five decisions (the "Decisions") of the respondent Ontario Labour Relations Board (the "Board") dated March 3, 2024 (reported at 2024 CanLII 24398), April 8, 2024 (2024 CanLII 35751), June 13, 2024 (2024 CanLII 61016), June 26, 2024 (2024 CanLII 68701) and July 16, 2024 (2024 CanLII 74827).

[2] The Decisions arose from the application of the respondent Labourers' International Union of North America, Ontario Provincial District Council ("Labourers") to the Board in September

2021 for certification to represent a bargaining unit of construction employees of the respondent Clean Water Works Inc. ("CWW") in Ottawa and elsewhere in eastern Ontario. In 2011, Operators obtained bargaining rights for those employees but did not subsequently enter into a collective agreement with CWW with respect to those employees.

[3] In its decision dated March 5, 2024 (the "Abandonment Decision"), the Board found that Operators by its inactivity had abandoned its bargaining rights. In the reconsideration decision dated June 13, 2024, the Board dismissed Operators' request for reconsideration of the Abandonment Decision. The Board granted Labourer's certification application in its decision dated July 16, 2024 (the "Certification Decision").[1]

[4] Operators submits that the Decisions unreasonably departed from previous Board decisions by, among other things, failing to apply the fundamental principle that a finding of abandonment depends upon a finding that the trade union intended to abandon its bargaining rights.

[5] As explained below, I would dismiss the judicial review application.

II. Background

[6] Operators and Labourers are both trade unions within the meaning of ss. 1(1) and 126 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the "*LRA*"). CWW is an Ottawa-based sewer rehabilitation company, which also operates elsewhere in Ontario. As explained below, starting in about 2007, both unions sought exclusive bargaining rights with respect to construction employees of CWW.

[7] The *LRA* sets out the process under which trade unions can be certified as the exclusive bargaining agent of groups of employees in Ontario. The Decisions under review relate to bargaining rights in the construction industry: see *LRA*, ss. 126-150. Bargaining rights within the construction industry are defined with reference to a specific "geographic area": see *LRA*, s. 128(1). The Decisions relate to bargaining rights in Board Areas 13 and 15 in eastern Ontario, including Ottawa.

[8] Bargaining rights in the construction industry may be obtained through "Card-based Applications" under s. 128.1 of the *LRA* or "Vote-based Applications" under s. 8 of the *LRA*. The matter under judicial review relates to a Card-based Application that Labourers made in September 2021 under s. 128.1. A certification application cannot be made under s. 128.1 if another union already holds the bargaining rights in question. If another union has previously obtained bargaining rights for the same employees, a trade union seeking bargaining rights must bring an application to displace the incumbent union, which must be brought under s. 8. Bargaining rights can also be obtained (or expanded) where an employer agrees to voluntarily recognize a trade union as the exclusive bargaining agent for a defined bargaining unit: see *LRA*, ss. 16, 18(3).

[1] As discussed below, the other two decisions under review provided case management directions to deal with procedural issues relating to the application.

[9] After a trade union has been certified or voluntarily recognized and has provided the employer notice of its desire to bargain for a collective agreement, the union and the employer have a statutory obligation to bargain in good faith and "make every reasonable effort to make a collective agreement": *LRA*, ss. 16-17. By request to the Minister of Labour, either party may seek the assistance of a conciliation officer to effect a collective agreement: *LRA*, s. 18(1).

[10] Unless expressly noted below, there is no significant dispute about the facts as found in the Abandonment Decision. In 2007, both Operators and Labourers filed applications with the Board for certification to represent CWW construction employees in Board Areas 13 and 15. In August 2010, the parties entered into a memorandum of agreement (the "2010 MOA"), providing that (i) the employees' ballots cast in support of Operators' certification application would be counted to see which union had majority support, and (ii) the parties would be bound by the results. Operators was successful and on June 10, 2011, was certified by the Board to represent two bargaining units, including one for CWW labourers and equipment operators in the "non-ICI" sectors[2] of the construction industry in Board Areas 13 and 15: Abandonment Decision, paras. 11-13. In accordance with the 2010 MOA, CWW then voluntarily recognized Operators as the bargaining agent for all its construction employees in the non-ICI sectors province-wide: see Abandonment Decision, para. 14; *LRA*, s. 16.

[11] As a result of Operators' June 2011 certification orders and its voluntary recognition agreement with CWW, the parties were bound by three collective agreements with respect to CWW employees, including the accredited sewer and watermain collective agreement relating to the Greater Toronto Area (GTA), referred to as the "GTSWCA collective agreement": Abandonment Decision, at para. 15. However, Operators and CWW did not reach a collective agreement with respect to CWW construction labourers and equipment operators in the non-ICI sectors in Board Areas 13 and 15.

[12] After obtaining bargaining rights for those workers in 2011, Operators had initial discussions with CWW relating to a collective agreement. In June 2012, Operators requested the appointment of a conciliation officer under s. 18(1) of the *LRA* to assist with the negotiations: Abandonment Decision, at para. 20. According to Operators, its negotiating strategy included attempting to first obtain a collective agreement with an Ottawa-based competitor of CWW (Veolia) that included a pre-existing Operators benefit plan for workers, with a view to obtaining a template for negotiations with CWW. Operators ultimately succeeded in negotiating a first collective agreement with Veolia, but the agreement did not include that benefit plan. Operators considered it important that a collective agreement with CWW include that benefit plan, but CWW would not agree to a collective agreement that included it: Abandonment Decision, at paras. 18-20.

[13] In May 2016, Labourers' International Union of North America, Local 183 ("LIUNA Local 183"), a constituent local union of Labourers, filed an application for certification to represent CWW's employees in the non-ICI sectors in Board Area 8, which includes the GTA. Operators

[2] The "non-ICI" sectors refer to those sectors of the construction industry other than the "industrial, commercial and institutional" (ICI) sector: see *LRA*, s. 126(1), definition of "sector".

intervened to oppose that application and filed several grievances under the GTSWCA collective agreement, alleging that LIUNA Local 183's application violated Operators' existing bargaining rights relating to CCW employees in the GTA: Abandonment Decision, at para. 23.

[14] On August 25, 2017, Operators and CWW entered into an agreement resolving those grievances (the "GTSWCA Grievance Settlement Agreement") and the Board subsequently dismissed LIUNA Local 183's certification application because of Operators' existing rights under the GTSWCA collective agreement: Abandonment Decision, at para. 24. The GTSWCA Grievance Settlement Agreement included a provision requiring the parties to "make best efforts to conclude the bargaining of a collective agreement applicable for all work the employer performs that does not fall within the scope of any accredited collective agreement … on or before July 1, 2017". In the Abandonment Decision, at para. 25, the Board noted that Mr. Kerr (Operators' Business Representative who provided evidence at the abandonment hearing) "had no explanation or recollection as to why the 2017 GTSWCA Grievances Settlement included a commitment to conclude such a collective agreement by July 1, 2017, but [the settlement agreement] was not signed until August 25, 2017."

[15] Operators' collective agreement with CWW's competitor Veolia was due to expire in April 2020, and Operators sought a renewal of that agreement. According to Operators, part of its negotiation strategy with CWW once again was to seek to include Operators' prior benefit plan in the renewed collective agreement with Veolia and try to use that agreement as a template for negotiations with CWW. Operators' renewed collective agreement with Veolia was ratified in August 2020, but the agreement did not include a benefit plan: Abandonment Decision, at paras. 33-34.

[16] On August 13, 2020, Operators filed an application with the Board for certification to represent CCW employees in the non-ICI sectors in Board Area 9, which includes Oshawa (the "Oshawa Certification Application"). The Board issued a default certificate in favour of Operators on August 25, 2020. Operators already had bargaining rights for such workers for the whole province pursuant to the 2010 MOA and the voluntary recognition agreement with CWW: Abandonment Decision, at paras. 36-37. In the Abandonment Decision, at para. 58, the Board referred to the Oshawa Certification Application as "telling objective evidence of the abandonment by [Operators] of its non-ICI sector bargaining rights" not already covered by collective agreements. In September 2020, Operators requested the appointment of a conciliation officer to assist in settling a collective agreement with CWW relating to Board Area 9. However, the parties were unable to reach a collective agreement, resulting in the issuance of a "no board report" in December 2020: see Abandonment Decision, at para. 37; *LRA*, ss. 20(1), 21(b).

[17] In the period from January to April 2021, there were meetings between representatives of Operators and CWW to discuss entering into collective agreements for CWW workers in the non-ICI sectors province wide: Abandonment Decision, at paras. 38-40. However, those negotiations were put "on the back burner" because of other priorities in the summer of 2021 and no further meetings occurred prior to Labourers' certification application in September 2021: Abandonment Decision, at para. 41.

III. Labourers' certification application

[18] On September 3, 2021, Labourers filed an application with the Board under s. 128.1 of the *LRA* for certification to represent a bargaining unit of CWW construction labourers and equipment operators in the non-ICI sectors in Board Areas 13 and 15. As of that time, more than 55 percent of the employees in the bargaining unit had signed union membership cards in favour of Labourers: see Certification Decision, at para. 6; *LRA*, s. 128.1(13).

[19] Operators intervened in the application, on the basis that it already had bargaining rights for the proposed bargaining unit under the Board's 2011 certification order. Labourers' position was that Operators had abandoned their bargaining rights in Board Areas 13 and 15, noting that no collective agreement had been entered into with CWW since that time.

[20] In the Board's interlocutory decision dated January 10, 2022 (reported at 2022 CanLII 2419) following a case conference, in order to determine if Labourers was barred from proceeding with its certification application, the Board decided that it would first determine the issue of Operators' alleged abandonment of bargaining rights and set out the procedure for the abandonment hearing: see Abandonment Decision, at paras. 4-5. The hearing procedure included the following:

a. Operators and CWW will first call their evidence on the issue of abandonment, and

b. Each witness that the parties call to testify will (i) prepare a "will say" statement that the witness will adopt as their examination in chief, and (ii) provide any documents on which the witness relies. Each witness will then be subject to cross-examination by the other parties and re-examination.

[21] At the abandonment hearing, the Board (Vice-Chair Michael McFadden) considered extensive evidence in the form of will say statements provided by Business Representatives of Operators (Mr. Kerr and Mr. McInnis) together with their cross-examinations and documentary evidence they provided.

[22] On March 5, 2024, the Board released the Abandonment Decision, finding that Operators had abandoned their bargaining rights for CWW construction employees in the non-ICI sectors of the construction industry in Board Areas 13 and 15: Abandonment Decision, at para. 68. Therefore, there were no subsisting bargaining rights that operated as a bar to Labourers' s. 128.1 certification application. Among other things, the Board determined that Operator's bargaining rights had been abandoned before the meetings between representatives of Operators and CWW in January 2021 and there was no reasonable basis for saying that Operators re-acquired the abandoned rights: Abandonment Decision, at para. 67.

[23] Operators sought reconsideration of the Abandonment Decision in its request for reconsideration dated April 4, 2024. The Board provided case management directions for the reconsideration request in its decision dated April 8, 2024. The Board dismissed the request in its reconsideration decision dated June 13, 2024.

[24] By decision June 6, 2024, the Board provided case management directions relating to the balance of Labourers' certification application.

[25] On July 16, 2024, the Board released the Certification Application, certifying Labourers as bargaining agent for CWW construction labourers and equipment operators in the non-ICI sectors in Board Areas 13 and 15.

[26] By Notice of Application to this court dated July 12, 2023, Operators seeks judicial review of the Decisions.

IV. Jurisdiction and standard of review

[27] There is no appeal from a Board decision under the *LRA*: see *LRA*, ss. 114(1), 116. The Divisional Court's jurisdiction is limited to a judicial review application: see *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, ss. 2, 6(1).

[28] Upon judicial review of an administrative decision, there is a presumption that the standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 2 S.C.R. 653, at paras. 23-25. The parties agree that the reasonableness standard of review applies in this case: see also *Turkiewicz (c.o.b. Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780, 476 D.L.R. (4th) 421, at para. 53, leave to appeal refused, [2023] S.C.C.A. No. 131; *Enercare Home & Commercial Services Limited Partnership v. UNIFOR, Local 975*, 2022 ONCA 779, 476 D.L.R. (4th) 342, at para. 42, leave to appeal refused, [2023] S.C.C.A. No. 133.

[29] Reasonableness review "finds its starting point in the principle of judicial restraint" but remains "a robust form of review" rather than "a 'rubber-stamping' process or a means of sheltering administrative decision makers from accountability": *Vavilov*, at para. 13. A reasonable decision is one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires a reviewing court to defer to such a decision: *Vavilov*, at para. 85. The relative expertise of administrative decision makers with respect to the questions before them is a relevant consideration in conducting reasonableness review: *Vavilov*, at paras. 31, 92-93.

[30] Administrative decisions must also be reviewed in light of the legal and factual contexts that inform the decisions. In *Vavilov*, the Supreme Court set out a non-exhaustive list of elements that are generally relevant in evaluating whether a decision maker exercised its powers reasonably: see *Vavilov*, at paras. 105-106, 292. Those elements include: the governing statutory scheme; other relevant statutory or common law; principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the parties' submissions; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies.

[31] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on that basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov*, at para. 100.

[32] The courts have consistently afforded labour relations boards "the highest levels of judicial deference on matters within their exclusive jurisdiction": *Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819*, 2008 ONCA 265, 90 O.R. (3d) 451, at para. 42. The Board has exclusive jurisdiction under s. 114(1) to exercise the powers conferred upon it by the *LRA*, including with respect to a certification application and related steps.

[33] After noting the Board's exclusive jurisdiction under s. 114(1) and the "strong privative clause" in s. 116, the Court of Appeal for Ontario has characterized the Board as "a highly specialized tribunal with considerable expertise, placing it in an elevated position to interpret its home statute": *Turkiewicz*, at para. 77; *Enercare*, at para. 64. Board decisions with respect to the construction industry have been described as "an even more specialized subset of [the Board's] expertise", which are entitled to "significant deference": *1778767 Ontario Inc. (c.o.b. Strasser & Lang) v. Carpenters' District Council of Ontario*, 2023 ONSC 2247, 2024 CLLC para. 220-003 (Div. Ct.), at paras. 43, 55; see also *International Brotherhood of Electrical Workers, Local 1739 v. International Brotherhood of Electrical Workers* (2007), 86 O.R. (3d) 508 (Div. Ct.), at paras. 18-19, 47.

V. Issues for determination

[34] Operators submits that the Decisions are unreasonable and should be set aside. It asks that the matter be remitted to the Board and decided by a different panel in accordance with the court's decision. CWW supports Operators' position.

[35] Among other things, Operators submits the Decisions are unreasonable because:

a. by determining that Operators abandoned its bargaining rights, the Board departed from previous Board decisions without justification, including by failing to apply the fundamental principle that a finding of abandonment depends upon a finding that the trade union intended to abandon its bargaining rights;

b. the Board unreasonably failed to consider and address Operators' continuing efforts to obtain a collective agreement with CWW for the entire period until the time of Labourers' certification application in September 2021, including the meetings between Operators and CWW in January to April 2021; and

c. the Board misconstrued the evidence and relied on irrelevant considerations in its adverse findings relating to the August 2017 GTSWCA Grievance Settlement Agreement and the August 2020 Oshawa Certification Application.

[36] As explained below, I have concluded that Operators has not established that the Decisions are unreasonable.

VI. Analysis and conclusions

A. The Board applied established principles to reasonably conclude that Operators abandoned its bargaining rights

[37] The principle that a trade union can abandon its bargaining rights has long been established in Board jurisprudence and confirmed by the courts: see *Bricklayers' & Masons' Union No. 1 v. G.S. Wark Limited*, 1996 CanLII 11190 (Ont. LRB), at para. 9; *Carpenters' District Council of Lake Ontario and Hugh Murray (1974) Ltd.; Re Labourers' International Union of North America, Local 527 and John Entwistle Construction Ltd.* (1980), 33 O.R. (2d) 670 (Div. Ct.), leave to appeal to Court of Appeal refused, February 2, 1981.

[38] In the Abandonment Decision, at para. 43, under the heading "Legal Framework", the Board set out what it called "essential guideposts for analysis where a party alleges a trade union has abandoned its bargaining rights in the construction industry", citing previous Board decisions:

> (i) it is the party alleging abandonment that bears the onus to prove it on a balance of probabilities (see [*Burling*] *Ranger Company Inc.* 2007 CanLII 2101 (ON LRB) at paragraph 17);
>
> (ii) whether abandonment has been demonstrated is a question of fact in each case, and the Board must make its determination not based on a "…scientifically measurable test…" but rather the reasonably objective conclusions that arise from an assessment of the evidence as a whole (see *Maurice's Masonry and Forming Ltd.*, 2016 CanLII 86063 (ON LRB) at paragraph 4);
>
> (iii) a trade union may be said to have abandoned its bargaining rights if the Board is satisfied that, over a sufficient period of time, the trade union holding such rights has done little to "actively promote" the bargaining rights (see *J.S. Mechanical* 1979 CanLII 832 (ON LRB) at paragraph 4);
>
> (iv) the Board in analyzing the facts should be careful to distinguish between the abandonment of bargaining rights and what may appear to be inadequate representation of employees (see *J. G. Jackson & Associates Mechanical Contractors Ltd.*, 2016 CanLII 62266 (ON LRB) at paragraph 50); and
>
> (v) when inquiring whether a trade union holding bargaining rights has failed to actively promote them, the Board will look to see if the evidence establishes a sufficient length of inactivity, whether the trade union has sought to obtain a collective agreement out of its bargaining rights, and if there are extenuating circumstances that may sufficiently explain a trade union not actively promoting its bargaining right (see, for example, *John Entwistle Construction Limited* [1979] OLRB Rep. March 211 at paragraphs 10 and 11).

[39] Operators does not allege any particular error in the above statement of principles but alleges a notable omission – the Board did not mention the question of whether Operators intended to abandon its bargaining rights, which Operators submits is the central question in any case where abandonment is alleged.

[40] Operators relies in particular on the Board's 1996 decision in *G.S. Wark*, at para. 12, which stated that "the onus is on the parties asserting abandonment to establish it, and that the

presumption is that trade unions do not voluntarily abandon bargaining rights" (emphasis added). At para. 19, the Board explained:

> "Intent" is a fundamental part of the principle of abandonment, and it is inherent in the principle that a finding of abandonment depends upon a finding that the trade union intended to abandon its bargaining rights. But the intent which is important is the union's objective intent as demonstrated by its conduct during the relevant time period, and not its subjective intent as expressed after the fact when the union is responding to an assertion that it has abandoned its bargaining rights. That is, the question is: when viewed objectively, does the trade union's conduct demonstrate an intention to abandon bargaining rights? [Emphasis added.]

[41] Operator submits that in determining that Operators abandoned its bargaining rights relating to the CWW employees, the Board departed from previous Board decisions without justification by failing to apply the presumption that trade unions do not voluntarily abandon bargaining rights. As a result, Operators says that the Board failed to apply the fundamental principle that a finding of abandonment depends upon a finding that the trade union intended to abandon its bargaining rights. Operators submits that the Board instead applied the wrong test by asking whether Operators had actively promoted its bargaining rights and emphasizing the poor quality of its representation of the bargaining unit.

[42] I do not agree that the Board fundamentally misconstrued previous Board jurisprudence by failing to apply the principle that a finding of abandonment depends upon a finding that the trade union intended to abandon its bargaining rights. Operators' reliance on the Board's statement in *G.S. Wark* to support that submission ignores other parts of that decision, which indicate that the union's intention is one factor to be considered when determining whether bargaining rights have been abandoned, but not the only factor. In *G.S. Wark*, at para. 11, the Board stated:

> Whether a trade union has abandoned bargaining rights is a question of fact which stands to be determined on the facts surrounding the issue in each particular case. Among the factors which the Board considers in determining an issue of abandonment are the length and degree of the trade union's inactivity, whether the trade union has attempted to negotiate or renew a collective agreement, whether terms and conditions of employment have been altered without the agreement or objection from the trade union, and the trade union's explanation for its conduct (or lack thereof). The quality of a trade union's representation will not, as such, be a relevant consideration, except to the extent that it may suggest abandonment.

[43] At para. 14, the Board went on to consider the issue of intention:

> [A]lthough a trade union's "intent" with respect to bargaining rights is a factor which the Board will consider, this intent must be discerned from the objective facts, and the reasonable inferences which can be drawn from those facts. The weight which is given to a trade union's subjective *ex post facto* expression of intent at a hearing when abandonment is raised will depend on the circumstances, but it will generally be given little weight unless there is something in the evidence before

> the Board which supports it, and *it will not necessarily be determinative in any event*. [Emphasis added.]

[44] Similarly, at para. 19, the Board also stated that "the intent which is important is the union's objective intent as demonstrated by its conduct during the relevant time period, and not its subjective intent as expressed after the fact when the union is responding to an assertion that it has abandoned its bargaining rights" (emphasis added).

[45] Contrary to Operators' position, I am not satisfied that the Board improperly shifted the onus to Operators by failing to apply the presumption that trade unions do not voluntarily abandon bargaining rights. At the time of the abandonment hearing, there was already uncontested evidence before the Board in Labourers' certification application that Operators had not concluded a first collective agreement despite obtaining bargaining rights almost ten years earlier. I agree with Labourers that this evidence would be sufficient to displace the presumption that Operators did not intend to abandon their bargaining rights. In its January 2020 interlocutory decision, the Board ordered Operators to call its evidence first on the abandonment issue, providing Operators with the opportunity to explain the lengthy period without a collective agreement. After considering the extensive evidence that Operators provided at the abandonment hearing, the Board found that Operators had abandoned its bargaining rights. That finding is entitled to significant deference.

[46] Operators also submits that the Board applied the wrong test by asking whether Operators had actively promoted its bargaining rights and emphasizing the poor quality of its representation of the bargaining unit.

[47] Once again, I disagree. As the Board recognized in the Abandonment Decision, the union's obligation to actively promote its bargaining rights is well established in Board jurisprudence. In applying that principle in the Abandonment Decision, the Board was well aware that care must be taken to distinguish between abandonment and inadequate representation of employees, as indicated further below.

[48] In setting out the legal framework for the Abandonment Decision, at para. 43(iii), the Board correctly noted the union's obligation to "actively promote" its bargaining rights, citing *J.S. Mechanical*, at para. 4. In *G.S. Wark*, at para. 10, the Board explained:

> A primary purpose of every Ontario *Labour Relations Act* has been … to facilitate collective bargaining and promote the expeditious resolution of workplace disputes. This purpose cannot be realized if a trade union is not active in the exercise of its bargaining rights…. [A] trade union which has obtained bargaining rights … is expected to actively exercise those rights. A trade union which fails to use bargaining rights may lose them. [Emphasis added.]

[49] In the Abandonment Decision, at para. 43(iv), the Board also referred to the need to distinguish between abandonment and inadequate representation of employees, citing *J. G. Jackson*, at para. 50. In *G.S. Wark*, at para. 11, the Board also referred to that consideration, stating that the "quality of a trade union's representation will not, as such, be a relevant consideration, except to the extent that it may suggest abandonment" (emphasis added).

[50] In the Abandonment Decision, the Board considered (and distinguished between) those principles in its findings to support the conclusion that Operators had abandon its bargaining rights. I see no error in the Board's analysis.

[51] In the Abandonment Decision, at para. 51, the Board found that it was satisfied that Operators abandoned its bargaining rights "because for too long a period it did not 'actively promote' the bargaining rights it had." The Board explained:

> In the Board's view, [Operators] did not actively promote the bargaining rights at issue between approximately 2012 and 2021. Although the Board can say on the evidence before it that [Operators] made material efforts to conclude a collective agreement in respect of the subject bargaining rights commencing in 2021, by then it had objectively abandoned them, and so the post-2021 activity cannot "cure" the prior abandonment.

[52] As discussed further below, the Board then considered the evidence before it relating to the period from 2012 and 2020 and decided that there was no objective evidence to support the conclusion that Operators took material steps to actively support its bargaining rights during that period: see Abandonment Decision, at paras. 53-58. At para. 59, the Board found that Operators' "bargaining rights were ultimately abandoned by 2020." Those findings were reasonable and entitled to deference.

[53] At para. 53, the Board found that for the period 2012 to 2016, there was "no objective evidence … that [Operators] took any material steps to actively promote its bargaining rights, apart from the request for conciliation made in 2012." In reaching that conclusion, the Board referred to "Mr. Kerr's non-specific recollections" about communications with CWW during that period about concluding a collective agreement, the notes for which had been lost. The Board found that this "totality of evidence does not meet the objective standards the Board looks to in determining if bargaining rights have or have not been abandoned."

[54] At para. 56, the Board also referred to discussions between Mr. Kerr and CWW representatives in 2017 to 2018, which indicated that Operators remained interested in including a benefit plan in any non-ICI sector collective agreement with CWW but noted that "the record of those discussions is vague and not a basis for the Board to agree with Mr. Kerr that [Operators] made 'some progress' towards settling a collective agreement." The Board also noted that on this issue, there was "no material difference between where the parties were in 2012 and where they were in 2018." The Board found that there was no evidence that in those discussions Operators did anything "other than repeat its position to CWW Inc. that it should consider inclusion of items previously and categorically rejected by CWW Inc."

[55] At para. 57, the Board also noted that after 2018, Operators returned to its earlier strategy of obtaining inclusion of Operators' prior benefit plant in the Veolia collective agreement and then use it as a "bargaining tool" with CWW. The Board concluded it was "not prepared to accept that again attempting to forward a five-year old proposal that had been previously rejected and in respect of which no activity occurred in the intervening period can reasonably be said, by then, to be actively promoting the bargaining rights that [Operators] held with CWW Inc."

[56] Operators submits that those and other passages in the Abandonment Decision indicate that the Board fundamentally departed from the classic test for abandonment, making it clear that the Board's singular focus was on the quality of the union's representation and what the union was able to achieve, rather than whether Operators intended to abandon its bargaining rights (which Operators agrees must be viewed objectively). According to Operators, the record before the Board reflected Operators' desire for a collective agreement that included a benefit agreement. Operators submits that the fact that it did not achieve its goal was not a relevant consideration when determining the abandonment issue.

[57] I do not agree. At para. 56 of the Abandonment Decision, the Board addressed the issue of quality of representation as follows:

> The Board is mindful of the admonition that a distinction should be drawn between the quality of representation of employees and an assertion of abandonment, and that these are two different categories. The Board is also of the view that maintaining this important distinction ought not be taken to mean that essentially any activity by a trade union must mean that there has not been abandonment. The Board is satisfied that the activity described by Mr. Kerr in 2017 and 2018 was not sufficient for the Board to conclude that [Operators] was "actively promoting" the bargaining rights it held.

[58] As previously noted, quality of representation in itself is not a relevant factor "except to the extent that it may suggest abandonment": *G.S. Wark*, at para. 11. I am satisfied that the Board was aware of the distinction between abandonment and inadequate representation of employees and did not err in its analysis of the issue when determining whether Operators abandoned its bargaining rights.

B. The Board did not err in failing to consider Operators' efforts to obtain a collective agreement with CWW in 2021 prior to Labourers' certification application

[59] Operator submits that in the Abandonment Decision, the Board unreasonably failed to consider and address Operators' continuing efforts to obtain a collective agreement with CWW for the entire period until the time of Labourers' certification application in September 2021, including the meetings between Operators and CWW in January to April 2021.

[60] As previously noted, from January to April 2021, there were meetings between representatives of Operators and CWW to discuss entering into collective agreements for CWW workers in the non-ICI sectors province wide: Abandonment Decision, at paras. 38-40. In these circumstances, the Board was satisfied that Operators "made direct efforts with CWW Inc. to conclude a collective agreement" within a few months prior to Labourers' September 2021 certification application: Abandonment Decision, at para. 60. However, at paras. 60-67, the Board found that Operators had already abandoned its bargaining rights by the time of those meetings and that those rights were no reacquired by reason of the meetings. As the Board stated, at para. 51, by 2021, Operators "had objectively abandoned [its bargaining rights], and so the post-2021 activity cannot 'cure' the prior abandonment" (emphasis added).

[61] Operators submits that the Board's refusal to consider Operators' negotiating activity in 2021 was unreasonable and out of step with Board jurisprudence that required that Board to consider the union's intention from all the objective evidence as of the time of the certification application that gave rise to the abandonment issue. Instead, Operators says that the Board erroneously refused to consider that evidence on the basis that the rights had been abandoned by sometime in 2020.

[62] I see no merit in that submission.

[63] When considering abandonment, the Board's focus was whether the union's conduct in the period of inactivity is inconsistent with what it likely would have done if it did not intend to abandon its rights: see *J. G. Jackson*, at paras. 86-87. Once bargaining rights have been abandoned, they cease to exist and cannot simply be reactivated by subsequent activities: see *United Brotherhood of Carpenters and Joiners of America, Local 38 v. Marineland of Canada Inc.*, 1990 CanLII 5633 (Ont. LRB), at paras. 7-8, 19. A union wishing to reestablish bargaining rights must either bring an application under the *LRA* or negotiate a written voluntary recognition agreement. Intention or conduct alone is not sufficient: see *Labourers International Union of North America v. Pachecos Contractors Ltd.*, 2008 CanLII 60071 (Ont. LRB), at paras. 13-15.

[64] Accordingly, I conclude that Operators has not established that the Board was unreasonable when, in deciding the issue of abandonment, it declined to consider Operators' discussions with CWW in 2021 prior to Labourers' certification application.

C. The Board did not err in its consideration of the GTSWCA Grievance Settlement Agreement or the Oshawa Certification Application

[65] Operators submits that the Board misconstrued the evidence and relied on irrelevant considerations in its adverse findings relating to the GTSWCA Grievance Settlement Agreement and the Oshawa Certification Application.

[66] In the Abandonment Decision, at paras. 53-58, the Board considered the evidence relating to Operators' activities during the period 2012 to 2020. Among other things, those activities related to Operators' involvement in events leading to the August 2017 GTSWCA Grievance Settlement Agreement (at paras. 54-55) and the August 2020 Oshawa Certification Application (at para. 58).

[67] Before the Board, Operators argued that the Board should consider the GTSWCA Grievance Settlement Agreement to be "reconfirmation of [Operators'] province-wide non-ICI sector bargaining rights", with the result that there could not have been an abandonment of rights between 2012 and the signing of that agreement in August 2017. The Board, at para. 55, rejected that submission, finding that the parties' intention in signing that agreement "was to specifically shore up and secure the rights of [Operators] under the GTSWCA collective agreement". The Board also noted that in the GTSWCA Grievance Settlement Agreement, there was a "puzzling and unsatisfactorily explained reference" to the parties' commitment to negotiate a non-ICI sector collective agreement by no later than a date that had already passed by the time the settlement agreement was signed. The Board described this reference as "a signal to the Board that the parties

were not devoting attention to the non-ICI sector bargaining rights apart from those in respect of the GTSWCA collective agreement": Abandonment Decision, at para. 55.

[68] In its factum and oral argument, Operators referred to the date discrepancy in the settlement agreement as a "clerical error" that did not justify an adverse finding against Operations relating to the issue of abandonment of bargaining rights.

[69] I see no merit in that submission.

[70] The Board, at para. 55, reasonably rejected Operators' submission that the settlement agreement (which related to workers in the GTA where there was a subsisting collective agreement) should be taken as reconfirmation of Operators' province-wide bargaining rights. That conclusion would be the same, with or without the unexplained date discrepancy. In any case, the evidence of Operators' witness Mr. Kerr was that he "had no explanation or recollection" relating to the discrepancy in the agreement: Abandonment Decision, at para. 25. As Operators conceded in oral argument, there was no evidence to support the labeling of the discrepancy as a clerical error.

[71] With respect to the August 2020 Oshawa Certification Application, as previously noted, the Board referred to Operators' certification application relating to Board Area 9 as "telling objective evidence of the abandonment by [Operators] of its non-ICI sector bargaining rights" not already covered by collective agreements: Abandonment Decision, at para. 58. Operators objects to this characterization on the basis that an application pertaining to bargaining rights in Board Area 9 is not relevant to the issue before the Board, which was limited to Board Areas 13 and 15.

[72] Once again, I see no basis for interfering with the Board's finding, which was open to the Board on the record before it.

[73] Operators has not shown that the Decisions are unreasonable.

VII. Disposition

[74] For the above reasons, I would dismiss the judicial review application.

[75] As the parties agreed, I would make the following costs order, payable within 30 days: (a) Operators shall pay $6,500 all inclusive to Labourers; (b) CWW shall pay $6,500 all inclusive to Labourers; and (c) no costs are payable to or against the Board.

_____

Lococo J.

I agree: _____

Matheson J.

I agree: _____
O'Brien J.

Date: February 14, 2025

CITATION: International Union of Operating Engineers, Local 793 v. Labourers' International Union of North America, Ontario Provincial District Council, 2024 ONSC 902
DIVISIONAL COURT FILE NO.: 401/24
DATE: 20250214

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Lococo, Matheson and O' Brien JJ.

BETWEEN:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793

Applicant

– **and** –

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL and CLEAN WATER WORKS INC. and ONTARIO LABOUR RELATIONS BOARD

Respondents

REASONS FOR JUDGMENT

R. A. LOCOCO J.

Date: February 14, 2025