Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **1346-13-R**

Carpenters' District Council of Ontario, Local 2486, Applicant v **RioCan Real Estate Investment Trust**, Laing Property Corporation, Campeau Corporation Limited, Timmins Square Shopping Centre Inc. and 1451945 Ontario Limited, Responding Parties

BEFORE: Matthew R. Wilson, Vice-Chair

APPEARANCES: D. Wray and Thomas Cardinal appearing for the applicant; Landon Young, Michael Connolly and Jonathon Gitlin appearing for the responding party

DECISION OF THE BOARD: January 7, 2015

1. This is an application by the Carpenters' District Council of Ontario, Local 2486 ("the Carpenters") filed under sections 69 and 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended (the "Act") seeking declaratory relief alleging a sale of a business has taken place or the responding parties are a single employer for purposes of the Act.

2. The Carpenters assert that it had bargaining rights with Campeau Developments Limited ("Campeau") at the Timmins Square Mall ("the Mall") and, through various transactions, it maintained those bargaining rights until present. It seeks a declaration pursuant to s. 69 of the Act that it holds bargaining rights with RioCan Management Inc., Timmins Square Shopping Centre Inc. and 1451945 Ontario Limited. The Carpenters did not pursue any relief under s. 1(4) of the Act.

3. The responding parties acknowledge that the Carpenters held bargaining rights with Campeau. They also concede that a sale of the mall in 2001 from Cambridge Shopping Centres Limited ("Cambridge")

to 1451945 Ontario Limited constituted a sale of business within the meaning of the Act. However, the responding parties take the position that the applicant abandoned its bargaining rights. They point to two periods where they say the bargaining rights were abandoned. First, they assert that the Carpenters' bargaining rights were abandoned prior to the legislative amendments in 1980. Second, if the Carpenters' bargaining rights survived, it is asserted that they were abandoned in 2005-2006 when a significant amount of construction work was performed on the mall and the Carpenters did not take any action to protect their bargaining rights.

4. The only issue is whether the Carpenters abandoned their bargaining rights prior to 1980, or, in the alternative, in 2005-2006.

BACKGROUND

5. There was no dispute about the corporate history of the Timmins Square Mall. In 1977, Campeau purchased 50% ownership in the mall with the other 50% owned by Uraeus Investments Limited ("Ureaus"). In 1982, Ureaus sold its ownership to Campeau who then sold the mall to Laing Property Corporation Limited in 1990. In 2000, the mall was sold to Cambridge Shopping Centres Limited ("Cambridge"). In 2001, the mall was sold to 1451945 Ontario Limited which is a company held by RioCan Real Estate Investment Trust ("RioCan") through a limited partnership. It then sold a 70% interest in the mall in 2003 to 3679462 Canada Inc., which was a subsidiary of CIBC Bank. In 2005, 3679462 Canada Inc. sold its interest to Montez (Timmins) Inc. who then sold its interest to Timmins Square Shopping Centre Inc.

6. The corporate structure of the two owners of Timmins Square mall at the time the application was filed - 1451945 Ontario Limited (30%) and Timmins Square Shopping Centre Inc. (70%) - requires a brief explanation. The corporate entities are at arms' length. Timmins Square Shopping Centre Inc. is a privately owned company and is best described as a passive owner. RioCan operates the mall through RioCan Management Inc. and invoices Timmins Square Shopping Centre Inc. for its services. Throughout this decision, I will refer to these entities as the responding parties.

7. In 2005, there was a substantial amount of construction work performed on the mall at an approximate cost of $5 million. The work, which took about one year to complete, was visible to the public as it

involved construction on the exterior and interior of the mall. Much of the evidence called by the parties dealt with the details of this work.

THE EVIDENCE

8. I heard testimony from Mr. Michael Connelly, Senior Vice President of Construction for RioCan and Mr. Tom Cardinal, President of the Carpenters District Council and Manager of Northern Area.

Pre-1980

9. It was not disputed that the Carpenters obtained bargaining rights with Campeau at some point prior to 1980. I reviewed voluntary recognition agreements between Campeau and the Carpenters Local 397 in Oshawa dated April 7, 1970 and for Carpenters Local 249 in Kingston dated June 15, 1971. I reviewed a certificate issued by the Board certifying the Carpenters as the bargaining agent for all carpenters and carpenters' apprentices in the employ of Campeau in Toronto dated June 27, 1972. I also reviewed an accreditation order for the General Contractors' Section of the Toronto Construction Association and the Carpenters District Council of Toronto and Vicinity on Behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America and Heavy Construction Association of Toronto dated April 18, 1973.

10. When the Timmins Square Mall opened in 1976 or 1977, Campeau (the owner of the mall at the time) was not bound by the Carpenters' collective agreement in that Board Area. The Act was amended effective May 1, 1980, to extend existing bargaining rights on a province-wide basis. The implications of these amendments have been described by the Board in numerous decisions and I do not need to describe them any further (see for example *Inducon Construction (Northern) Inc.*, [1982] OLRB Rep. Mar. 390*; Marineland*, *infra*). Suffice it to say that if the Carpenters did not abandon their bargaining rights prior to 1980, the impact of the legislative amendments was to expand the Carpenters' bargaining rights with Campeau on a province-wide basis.

11. There was no evidence of any remittances made by Campeau to the Carpenters at any time. There was no evidence that the collective agreements in Kingston or Oshawa were renewed or of any other union activity. It is equally important to point out that there was

also no evidence of any construction work by Campeau that would be otherwise be performed by members of the Carpenters.

12. There was no evidence of any activity until the 2005-2006 construction work.

The 2005-2006 Construction Work

13. Mr. Connelly testified that prior to the 2005-2006 major construction work at the mall, RioCan had done some minor carpentry work that involved repairs and some work performed for tenants. He referred to it as landlord's work and said such work may be visible to the public. However, I did not hear any evidence about the specific details of such work or when or where the work was visible to the public.

14. Mr. Connelly testified that the only major construction work on the mall since the purchase in 2001 was done in 2005-2006. This work was reviewed in detail. It was undisputed that this work would have been visible to the public.

15. There were three main contractors responsible for the work on the mall, who, in turn, subcontracted out much of the work. I received copies of purchase orders for various subcontractors as well as the Job Cost Report prepared by Tribury Construction. Some of the work was performed by non-union contractors. It is not necessary for me to determine whether the non-union work was carpentry work (that might otherwise be covered by the Carpenters' collective agreement), since the majority of the carpentry work was performed by sub-contractors bound to the Carpenters' collective agreement who used the Carpenters' members.

16. To replace the roof over the Sears location, RioCan contracted with Blanchfield. In turn, Blanchfield subcontracted the parapet work to Prosperi who is bound by the Carpenters' collective agreement and used its members to perform the work.

17. RioCan also contracted with Tribury Construction for the work in the old Sears store. Tribury subcontracted the work to Lazer Precision and Leo Alarie and Sons Ltd. who were both bound by the Carpenters collective agreement and used its members for the work.

18. Interpaving was a third company contracted around the same time for construction work. This company was bound to the Carpenters' collective agreement and used its members for the work.

19. There was also a significant amount of carpentry work performed by Interior Technologies. This company is bound by the Carpenters' collective agreement and used members of the Carpenters to perform the work.

The 2005-2006 Correspondence

20. The Carpenters raised concerns about whether the work being done at the mall was covered by its collective agreement as early as April 2005.

21. In a letter dated April 28, 2005, the Carpenters wrote to Manorcore Group Inc., the company retained by Sears for the construction at the mall. The Carpenters asserted that the work being performed on the site was covered by its collective agreement. Mr. Connelly testified that a grievance was never filed since Manorcore was not unionized. But since Sears was bound to the Carpenters' agreement, Mr. Connelly testified that it was not unusual for the Carpenters to send such a letter to the non-union subcontractor.

22. On October 20, 2005, counsel for the Carpenters wrote to RioCan Real Estate Investment Trust claiming that the Carpenters held bargaining rights for all carpenters and carpenters apprentices of the owner of Timmins Square and asserted that RioCan was bound by the Carpenters Provincial Collective Agreement. It was alleged that certain exterior work was being performed at the mall in violation of the collective agreement. Through the letter, the Carpenters filed a grievance alleging a breach of the collective agreement. After receiving the letter, Mr. Connolly contacted the mall manager and was led to believe that the Carpenters were questioning the work performed by two companies – Manorcore Construction and also Blanchfield Construction – on the roof of the building. Specifically, there was work being performed on the parapet on the roof of the Sears store.

23. In response to the Carpenters' grievance, counsel for RioCan wrote to the Carpenters on December 8, 2005 denying that it was bound to a collective agreement for work performed at the mall. RioCan explained that Manorcore Construction had been retained by

Sears to perform construction work. RioCan retained Blanchfield Construction to perform the work on the roof of the Sears store. Counsel suggested that perhaps the grievance was more appropriate for Sears. Counsel also sought particulars of the grievance and proposed that the grievance be held in abeyance pending the disposition of the sale of business application in Board File No. 3081-99-R ("the RioCan-Burnac case").

24. At this time, RioCan and the Carpenters were involved in other litigation before the Board. Specifically, the Carpenters had filed an application pursuant to section 69 of the Act claiming that there was a sale of part of a business from Burnac Corporation and/or Burnac Leaseholds Limited to RioCan Real Estate Investment Trust. Through this application, the Carpenters were seeking a declaration that RioCan was bound to its Provincial Agreement. I will return to the implications of this litigation.

25. In response to RioCan's letter, counsel for the Carpenters sent a letter dated December 22, 2005 advising that the Carpenters were claiming bargaining rights for all work being performed by Tribury Construction, which related to work being performed to the construction and addition to the mall where the old Sears store was located. He advised that the Carpenters were relying on their historical bargaining rights commencing with Campeau Corporation as well as the sale of business that was the subject of Board File No. 3081-99-R. The Carpenters rejected the suggestion that the grievance be held in abeyance.

26. In a letter dated January 27, 2006 counsel for RioCan suggested that the Timmins Square Mall issue be heard with the "Cambrian Mall/Burnac transaction" because "…the nature of the claims or allegations…" were similar. By this, I take it to mean the litigation in Board File No. 3081-99-R. This suggestion was again rejected by the Carpenters in a letter from its counsel dated January 30, 2006.

27. In a follow up letter from counsel for RioCan that dealt with a number of issues related to the ongoing Board litigation, counsel stated that if the Carpenters intended to pursue its bargaining rights claim for Timmins Square mall, it ought to file "…another (similar) section 69 Application with the Board, in relation to the various transactions mentioned above, which, according to your letter, begin with Campeau."

28. Mr. Connelly testified that RioCan did not receive anything further from the Carpenters.

29. This was not the end of the matter as the Carpenters filed a grievance dated February 15, 2006. The grievance was addressed to "Timmins Square Shopping Centre" to the attention of Ms. Brenda Johnson who was the manager of the mall. The cover letter states:

> It has come to Local 2486 attention that the mall has contracted or subcontracted work to a company not bound by the Union's Provincial Collective Agreement. Therefore the union has no alternative but to file this grievance with the Ontario Labour Relations Board under section 133 of the "The ACT".

30. Although Mr. Connelly testified that he had not seen the grievance when it was sent to the mall, Ms. Johnson was the general manager for the property and the onsite person for RioCan. Ms. Johnson works for RioCan Management Inc., which is the property management company controlled by RioCan to operate the mall.

31. The grievance was not pursued by the Carpenters. Mr. Cardinal testified that when the Carpenters wrote to RioCan in 2005, Local 446 still existed and was pursuing its claim for province-wide bargaining rights before the Board. The letter to RioCan was written on behalf of Local 2486, that later merged with Local 446 in 2009. There was very little evidence on this merger and neither party referred to it in their closing submissions. However, Mr. Cardinal testified that the responsibility for Local 2486's claim for the bargaining rights was handled by Mr. Bud Calligan who was also responsible for handling Local 446's claim before the Board. According to Mr. Cardinal, since he was aware that most of the carpentry work at the mall was being performed by members of the Carpenters and the Carpenters were pursuing province-wide bargaining rights at the Board, there was no need to pursue the grievance filed on February 15, 2006. According to Mr. Cardinal, the final decision rested with Mr. Calligan who was responsible for overseeing the Carpenters pursuit of province-wide bargaining rights at the Board in the RioCan-Burnac case.

Events after 2013

32. There was no further correspondence from the Carpenters between 2006 and 2013 other than the events that were unfolding in

the RioCan-Burnac case. It is worth repeating that the Carpenters were pursuing a remedy of province-wide bargaining rights that would have covered, if successful, the mall. This remedy was denied by the Board in 2010. The Carpenters filed an application for reconsideration.

33. The next time that the issue of bargaining rights was raised was in a letter from the Carpenters on June 21, 2013 where the Carpenters filed a grievance asserting that Laing Property Corporation and RioCan Real Estate Investment Trust violated the collective agreement by failing "…to pay proper wages and related benefits and/or has failed to hire and/or subcontract in accordance with the collective agreement". This grievance and a subsequent application pursuant to s. 69 and/or 1(4) of the Act led to this proceeding. According to Mr. Connelly, the construction work performed in 2013 was the only time that substantial construction work had been performed since the 2005-2006 project.

34. Mr. Cardinal testified that following the remedial decision in the RioCan-Burnac case, the Carpenters did not pursue the bargaining rights for the Timmins Square mall since there was no construction work going on at the time. It was not until June 2013 when the Carpenters learned of construction work at the mall that it immediately filed a grievance to stake out its claim. It was never the Carpenters' intention to give up its bargaining rights, according to Mr. Cardinal.

The RioCan-Burnac case

35. In the RioCan-Burnac case, the Carpenters asserted that the sale of eleven commercial shopping centre properties, of which six were in Ontario, from Burnac Corporation and/or Burnac Leaseholds Limited ("Burnac") to RioCan Real Estate Investment Trust was a sale of business under the Act. The Carpenters claimed their bargaining rights with respect to the construction work transferred from Burnac to RioCan as a result of the sale.

36. The application was filed on January 17, 2000 and was protracted by the death of the vice chair hearing the case. The case was reheard by Vice-Chair Silverman who granted the Carpenters' application in a decision dated April 14, 2008. Vice-Chair Silverman remitted the issue of the appropriate remedy to the parties.

37. The parties were unable to agree on the remedy and appeared before Vice-Chair Silverman who issued a decision on April 28, 2010.

In that decision, Vice-Chair Silverman denied the Carpenters' request for a declaration that RioCan was bound by the Provincial Agreement generally and, instead, declared that RioCan was bound by the Provincial Agreement for the six properties in Ontario that were the subject of the application. The Timmins Square Mall was not one of the six properties captured in the remedy.

POSITIONS OF THE PARTIES

38. The Carpenters rely on the bargaining rights that were established in the early 1970's and then expanded province-wide by the amendments to the Act in 1980. It argues that there was very little construction work on the Timmins Square Mall between 1980 and 2005 that would warrant any activity.

39. In 2005, the Carpenters set out its claim for the bargaining rights first to Manorcore (a non-union company subcontracted by Sears) and then to Rio Can Real Estate Investment Trust. However, it explains that it decided not to pursue grievances because (a) the work was being performed by its members through the sub-contractors; and (b) the Carpenters were pursuing province-wide bargaining rights in the RioCan-Burnac case. The Carpenters argue that this is not evidence of abandonment. The Carpenters state that it is not seeking damages retroactively or province-wide bargaining rights for Rio-Can. Rather, it is seeking a declaration that 1451945 Ontario Limited, Timmins Square Shopping Centre Inc. and RioCan Management Inc. are bound to the Carpenters' agreement for the Timmins Square Mall location.

40. The Carpenters rely *Ellis-Don Ltd.*, [2012] OLRB Rep. January/February 131; *Ottawa Business Interiors Ltd.*, [2011] OLRB Rep. May/June 369; *Burling Ranger Co.*, [2007] OLRB Rep. January/ February 8; *Enka Contracting Ltd.*, [2004] OLRB Rep. September/October 926; *J & D Display & Interiors Ltd.*, [1998] OLRB Rep. March/April 217; *G.S. Wark*, [1996] OLRB Rep. September/ October 811; *PCL Constructors Eastern Inc.*, [1995] OLRB Rep. October 1277; *Toronto Dominion Bank*, [1995] OLRB Rep. May 686; *Associated Contracting Inc.*, [1994] OLRB Rep. August 951; *Elirpa Construction and Materials Limited*, [1994] OLRB Rep. April 372; *Hudson's Bay*, [1993] OLRB Rep. June 563; *Bancliffe Contracting & Construction*, [1992] OLRB Rep. September 990; *Ellis-Don Limited*, [1992] OLRB Rep. January 67; *Marineland of Canada Inc.*, [1990] OLRB Rep. December 1298.

41. The responding parties agree that the sale of the Timmins Square Mall in 2001 constitutes a sale of business within the meaning of the Act. It argues that the Carpenters abandoned their bargaining rights and therefore nothing results from the sale.

42. The responding parties submit that the Carpenters abandoned their bargaining rights prior to the 1980 amendments to the Act. They point to the absence of any union activity, including no remittance of dues or pension contributions, as support for its position. It also points out that there was no evidence that the collective agreements in Kingston or Oshawa were renewed. The absence of any union activity prior to 1980, and for the decades that followed, support its contention that the Carpenters' bargaining rights were abandoned prior to the amendments to the Act in 1980.

43. In the alternative, if the Carpenters' bargaining rights survived the period of inactivity and were expanded province-wide by the 1980 amendments to the Act, they were abandoned in 2005-2006 when there was substantial construction activity at the Timmins Square Mall. It pointed to the non-union work – that of Tribury Construction, Blanchfield Construction and others – that was performed in the public area, with the knowledge of the Carpenters, and never objected to. The responding parties assert that the Carpenters were aware that the work was being performed as non-union and it was incumbent on the Carpenters to take action to protect their bargaining rights. The failure to do so constitutes an abandonment of their bargaining rights.

44. The responding parties argue that it is not credible for the Carpenters to rely on the RioCan-Burnac case as any indication that they were attempting to protect their bargaining rights since the Carpenters expressly rejected holding its grievance in abeyance pending the case. The Carpenters stated in its 2006 correspondence to RioCan that it intended to pursue the grievance for the Timmins Square Mall work. It did not and this is sufficient to conclude that it abandoned its bargaining rights.

45. The responding parties rely on *J.S. Mechanical v. U.A., Local 800* [1979] O.L.R.B. Rep. 110; *G.S. Wark Limited*, [1996] OLRB Rep. September/October 811; *Ameri-Cana Motel Ltd.*, [1989] OLRB Rep. 1009; *Burling Ranger Company Inc., a Subsidiary of Burling Ranger Company Limited*, 2007 CanLII 2101 (ON LRB); *Marineland of Canada Inc.*, [1990] OLRB Rep. December 1298.

Analysis

46. It was not contested that the sale of the mall in 2001 from Cambridge Shopping Centres Limited ("Cambridge") to 1451945 Ontario Limited constituted a sale of business within the meaning of the Act. There was no evidence that this sale was any different from previous transactions going back to 1977 when Campeau first purchased the mall. Thus, the Board declares that a sale of business occurred within the meaning of the Act. Additionally, the sale of 70% of the mall first to 3679462 Canada Inc. and then to Montez (Timmins) Inc. and then to Timmins Square Shopping Centre Inc. also constitutes a sale within the meaning of the Act.

47. The only issue for the Board to determine is whether the Carpenters abandoned the bargaining rights that were first obtained prior to 1980 when Campeau owned the mall. The Board explained the principle of abandonment and the underlying factors in *John Entwistle Construction Limited*, [1979] OLRB Rep. March 211:

> 10. The principle of abandonment of bargaining rights has been established for many years in the Board's jurisprudence. This principle finds expression in the expectation that a trade union, once it acquires bargaining rights by certification or voluntary recognition, actively will promote those rights. Conversely, failure to use the rights may result in the trade union's loss of them. See the Board's decision in *J. S. Mechanical*, Board File No. 1677-78-R (as yet unreported) at paragraph 4 for a comprehensive outline of Board cases dealing with this principle.
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> 11. The issue of whether a trade union has abandoned its bargaining rights must be determined on the particular facts of each case. The Board has looked to a variety of factors in the bargaining relationship as indicators of whether bargaining rights have been abandoned. Some of these are canvassed in paragraph *5* of *J. S. Mechanical*, *supra* and include: the length of the union's inactivity: whether it has made attempts to negotiate a collective agreement or sought to administer an existing collective agreement: whether terms and conditions of employment have been changed by the employer without objection from the bargaining agent; and whether there are any

> extenuating circumstances which might explain an apparent failure to assert bargaining rights.

48. The onus is not on the union to demonstrate that it has not abandoned its bargaining rights. Rather, the Board has consistently held that the employer must prove that the union has abandoned a collective agreement or its bargaining rights (See *G.S. Wark*, *supra*; *Ellis-Don Limited supra*).

49. The Board has long recognized a presumption that trade unions do not voluntarily abandon bargaining rights. As noted by Adams J. (former Chair of the Board) in *Ellis-Don v. Ontario (Labour Relations Board)*, [1995] O.J. No. 3924 (Ont. Div. Ct.), aff'd (1998) 38 O.R. (2d) 737), aff'd [2001] 1 S.C.R. 221, the unlikely possibility of a trade union giving up its bargaining rights "…is reflected in the Board's jurisprudence and 'policy' which requires unequivocal evidence that a trade union has 'slept on its rights'...". It is for the employer to call unequivocal evidence to rebut the presumption.

50. The nature and quality of the evidence required to meet the onus was described in *Toronto Dominion Bank,* [1995] OLRB Rep. May 686 at paragraph 65:

> 65. In cases of abandonment the Board must start with the proposition that the union holds bargaining rights. … The focus then turns to whether there is compelling evidence that the union abandoned the rights it attained. That evidence could take any number of forms. The clearest form of evidence for example would be a written communication from the trade union to the employer that it no longer wished to represent the employees for whom it holds bargaining rights. In other instances, the evidence might be such that, notwithstanding that fact that there is not an express representation to that effect, the *conduct* or *affirmative actions* taken by the trade union are such that a reasonable inference can be drawn that the union abandoned its bargaining rights. Typically this is shown through evidence that the employer consistently performed work on a non-union basis, *and* the trade union knew or reasonably ought to have known of that fact. In either circumstance however the onus is on the employer which asserts abandonment to present clear and unambiguous evidence from which the Board can conclude or draw a reasonable inference that the

> trade union abandoned bargaining rights. The onus is not on the trade union to assert that it has affirmatively exercised its bargaining rights or has not abandoned them. Rather, unequivocal evidence which either points to actual abandonment or from which a reasonable inference can be drawn is required.

51. I am also mindful of the Board's jurisprudence on the principle of abandonment as it applies in the ICI sector. This was articulated in *G.S. Wark Limited*, *supra*:

> 11. 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. For example, complete inactivity and a refusal to respond to employee complaints indicates a poor quality of representation which may, in the context of the circumstances as a whole, and in the absence of a satisfactory explanation from the trade union, indicate abandonment.
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> 12. It is true, as Local 1 asserts, 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 (*Ellis-Don Limited,* [1992] OLRB Rep. Feb. 147: application for judicial review dismissed [1995] OLRB Rep. Dec. 1506, Ontario Court of Justice (General Division), Divisional Court).
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> 13. Notwithstanding the language used in some Board decisions, we respectfully suggest that it is inaccurate to say that "clear and cogent" evidence is required to establish abandonment, at least in the sense suggested by Local 1. First of all, the Board's factual determinations are always made on the balance of

probabilities, while "clear and cogent", as argued by Local 1, suggests some higher test. Second, a common feature of abandonment cases is a less than satisfactory evidentiary foundation. It is not unusual, as in the case herein, for abandonment cases to deal with long periods of time for which there is little documentary evidence and where witnesses are either unavailable or have a very poor recollection of events. Many abandonment cases have to be determined on the basis of inferences drawn from bits of documentary or other evidence which is available. Accordingly, what constitutes evidence of abandonment, and what evidence is sufficient to rebut the presumption against abandonment, will depend on the circumstances. Further, since the operative presumption is clearly rebuttable, the onus can shift to the trade union to explain its conduct (as it does when it comes to a consideration of automatic collective agreement renewal clauses, for example - see below).

14. Similarly, although 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.

15. Further, cases which involve the province-wide bargaining scheme in the ICI sector in the construction industry present particular difficulties. Many such cases, including this one, involve periods of time which both precede and follow the introduction of province-wide bargaining in 1978. At the very least, the Board will consider post-provincial bargaining conduct insofar as it may give an indication of whether the bargaining rights in issue were or were not abandoned prior to the introduction of provincial bargaining (*Marineland of Canada Inc.,* [1990] OLRB Rep. Dec. 1298). This does not mean that post-provincial bargaining conduct cannot be the basis for a finding of abandonment and it

seems that a further clarification may be necessary in that respect.

16. It has been suggested that the Board's decisions in *Culliton Brothers Limited,* [1982] OLRB Rep. March 357 and *Lorne's Electric,* [1987] OLRB Rep. Nov. 1405 stand for the proposition that provincial bargaining rights in the ICI sector cannot be abandoned. We respectfully disagree. *In neither of those decisions did the Board say that the principle of abandonment does not apply to the province-wide bargaining scheme and provincial collective agreements in the ICI sector of the construction industry (Nor is it impossible for there to be abandonment of ICI bargaining rights. Consider the admittedly extreme example of an employee bargaining agency having the actual authority to do so, writing to an employer expressly stating that it and all of its affiliated bargaining agents are abandoning their ICI bargaining rights with respect to that employer.) Those decisions do no more than suggest that it is more difficult to establish abandonment in such circumstances because of the way bargaining rights are distributed under the Act, and the way that provincial agreements operate in the ICI sector. Further, to the extent that either of these decisions, or others, suggest that the conduct of an employee bargaining agency or an affiliated bargaining agent cannot weigh against other affiliated bargaining agents (or the employee bargaining agency; which in any case is always also an affiliated bargaining agent) for the purpose of determining whether bargaining rights have been abandoned we also respectfully disagree. It will not necessarily be the case that the conduct of one trade union entity will weigh against another related trade union entity in that respect, but it is not obvious why that could never be the case. Indeed, the conduct of other affiliated bargaining agents, or the employee bargaining agency which have had an opportunity to exercise bargaining rights may be symptomatic of abandonment, or not, as the case may be.*

. . .

19. The Board rejects Local 1's submission that the agreement of the parties that Local 1 never intended to abandon the bargaining rights in issue is determinative of the abandonment issue. "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?

52. The Board has held that a union is not required to actively pursue its bargaining rights during periods when the employer is not operating in the geographic scope of the collective agreement (See *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523 cited in *Steds Limited*, *supra*). While a union must actively promote its bargaining rights, lengthy periods of inactivity by a company make the case for abandonment more difficult to establish when a union is similarly inactive during the same period.

53. I will now consider the application of these principles to the facts of the case.

Pre-1980

54. The evidence establishes that the Carpenters had been certified as the bargaining agent for Campeau prior to 1978. When province-wide bargaining rights in the ICI sector came into effect in 1978, Campeau became bound to the Carpenters provincial agreement, but only in the three geographic areas where they had bargaining rights.

55. Following amendments to the Act in 1980, Campeau became bound to the Carpenters province-wide. It is worth repeating that Campeau was the owner of the Timmins Square mall from 1977 to 1990. The mall was sold several times over the next two decades, but there was no evidence that there was construction work performed at the mall. In particular, there is no evidence that Campeau performed work or subcontracted work to a non-union subcontractor in the geographic areas where the Carpenters held bargaining rights that would warrant any activity from the Carpenters. Thus, it is not surprising that there is no evidence of remittances, deductions or other

records prior to 1980. The absence of collective agreement renewals also does not establish abandonment since there was no activity at the time.

56. In the end, the Board is left with the inescapable conclusion that Campeau did not perform or subcontract out any work covered by the Carpenters' collective agreement in any of the three geographic areas where the union had bargaining rights and failed to enforce them.

57. I accept RioCan's argument, as supported by the Board's decision in *G.S. Wark*, *supra, and Marineland, supra*, that it is appropriate for the Board to examine the union's conduct after the legislative amendments in 1980 to determine whether there is a basis to conclude that the union has abandoned its bargaining rights.

58. From 1980 (when Campeau became bound to the Provincial Agreement) to 1990 (when it sold the Timmins Square Mall), there is no evidence it engaged in any construction activity, or failed to comply with the collective agreement, that warranted any activity by the Carpenters.

59. On October 17, 1991, when the Carpenters discovered that the mall had been sold, it wrote Laing Property Corporation, the new owners of the mall, and staked out its claim:

> My client has recently discovered that Laing Property Corporation has purchased Timmins Square from Campeau Corporation. My client and Campeau Corporation are bound by a collective agreement between the Carpenters' Employer Bargaining Agency (E.B.A.) and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America (O.P.C.) covering Industrial, Commercial and Institutional construction work in the Province of Ontario. It is my client's position that by virtue of Section 63 of the Ontario Labour Relations Act Laing Property Corporation is now covered as well by the aforementioned collective agreement.

60. Although a grievance was not filed, and the Board has no evidence of what transpired following the correspondence, this type of communication supports the Carpenters contention that they had no intention of abandoning their bargaining rights.

61. Moreover, in the absence of any construction work that would be covered by the Carpenters' collective agreement, it is hard to see what the Carpenters could have done differently with regards to the Timmins Square Mall. Until 2005 there had been very little construction activity that would warrant involvement of the Carpenters.

The Construction Work of 2005-2006

62. RioCan argues that the period of 2005-2006 is the second period where the evidence supports that the Carpenters abandoned their bargaining rights. It asserts that the Carpenters were aware of the significant amount of construction work being performed at the Timmins Square Mall and decided not to pursue its bargaining rights.

63. The evidence establishes that the construction work performed between 2005 and 2006 at Timmins Square Mall was subcontracted to both union and non-union subcontractors. The Carpenters initially raised its objection in its letter to RioCan Real Estate Investment Trust on October 20, 2005 (also identified as a grievance), which was followed by an exchange of correspondence between the Carpenters and RioCan, including the filing of a grievance on February 15, 2006.

64. What to make of the correspondence between the parties in 2005 and 2006? It was clearly embedded in the ongoing litigation between the parties in the RioCan-Burnac case. That case was a sale of business application involving other properties of RioCan, but where the Carpenters were seeking province-wide bargaining rights. The Carpenters clearly raised its objection to the work being performed outside of the terms of the collective agreement. RioCan disputed the Carpenters assertions. There was no agreement on how to proceed.

65. I accept the Carpenters' evidence that there was a decision made at the provincial level of the Carpenters that bargaining rights were being pursued in the RioCan-Burnac case and that it would not pursue the grievances identified in the 2005-2006 correspondence. In the Board's view, this is evidence that it abandoned the grievances, but not its bargaining rights.

66. With regards to the actual work being performed, I accept Mr. Cardinal's evidence that he visited the site at least once and was generally informed about what work was being performed. We know that RioCan contracted with Blanchfield to replace the roof on the

Sears location and also contracted with Pro-Spec roofing for consultation on the project. Blanchfield subcontracted the parapet work to Prosperi who was bound by the Carpenters' collective agreement and used its members for the work. RioCan also contracted with Tribury Construction, who subcontracted the work to Lazer Precision and Leo Alarie and Sons Ltd. who are also both bound to the Carpenters collective agreement and used its members for the work. RioCan also contracted with Interpaving and this company was bound by the Carpenters' collective agreement and used its members for the work.

67. We also know that Sears contracted with Manorcore for the construction. Mr. Connelly testified that RioCan was not involved in this work.

68. The Carpenters did not pursue their grievance nor did they file an application claiming that a sale of business had occurred. If that were the end of the matter, it would appear on its face that the Carpenters abandoned their claim that they had bargaining rights at the Timmins Square Mall. However, that was not the end of the matter since two events were simultaneously unfolding. First, the Carpenters were pursuing province-wide bargaining rights before the Board in the RioCan-Burnac case. Had they been successful, Timmins Square Mall would not be an issue. Unfortunately, that proceeding took almost a decade to complete with the Carpenters' remedial relief being limited to six locations. It can hardly be said that the Carpenters abandoned their bargaining rights at the Timmins Square Mall when, at the same time, it was pursuing province-wide bargaining rights with the same company in a proceeding before the Board.

69. Second, as the Carpenters discovered in their investigation following the exchange of correspondence, much of the work being performed in 2005-2006 was being performed by their members through the work of the subcontractors. The Carpenters discovered, and it appears that the Provincial Council of the Carpenters decided, that there was no sense in pursuing the grievance against RioCan since the work was being performed by its members.

70. Although RioCan established that the Carpenters were aware that some of the construction work was performed using non-union trades, this does not, on its own, establish abandonment in light of the fact that the Carpenters were pursuing province-wide bargaining rights and were also aware that much of the work was being performed by

its members. It certainly would affect any entitlement to damages since the Carpenters did not actively pursue the grievance. But that is a separate issue from abandonment of bargaining rights. The Board must weigh the entire context of the construction activity in 2005-2006 when considering the argument that the Carpenters intended to abandon their bargaining rights. This point was made by the Board in *Marineland, supra:*

> As the question of whether abandonment has occurred is a question of fact, we must take into account all of the circumstances. See *Lorne's Electric*, (supra) for a discussion of the principles of abandonment. In this respect, we do not consider only the events between September, 1977 and March, 1978, in deciding whether abandonment had occurred by the latter date. Events occurring after March 3, 1978 can be relevant in assessing the meaning or effect of the union's inactivity before that date.

71. The entire context includes the litigation being pursued by the Carpenters before the Board in the RioCan-Burnac case. The scope of the remedy sought included the Timmins Square Mall. It is not abandonment when the Carpenters decided not to pursue the grievances filed in 2005-2006 after learning that much of the work was being done with its members and the ongoing litigation in the RioCan-Burnac case.

72. For these reasons, I am not convinced that the Carpenters intended to abandon their bargaining rights at the Timmins Square Mall.

73. The Carpenters seek a declaration that it holds bargaining rights with RioCan Management Inc., Timmins Square Shopping Centre Inc. and 1451945 Ontario Limited. As RioCan Management Inc. does not own the mall and was not involved in the sale, there is no legal basis for declaring it bound to the Carpenters ICI Provincial Collective Agreement. The owners of the mall are Timmins Square Shopping Centre Inc. (70%) and 1451945 Ontario Limited (30%). The Carpenters bargaining rights flowed to these two companies when the various transactions occurred.

74. Pursuant to s. 69 of the Act, the Board finds that a sale of business within the meaning of the Act has occurred and therefore declares that the Timmins Square Shopping Centre Inc. and 1451945

Ontario Limited are bound to the Carpenters ICI Provincial Collective Agreement.

"Matthew R. Wilson"
for the Board