CITATION: Labourers International Union of North America, Local 183 v. Carpenter's District Council (Ontario), et al 2017 ONSC 6780
DIVISIONAL COURT FILE NO.: 133-16
DATE: 20171122

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

J.M. Fragomeni, M.G. Quigley and W. Matheson JJ.

B E T W E E N:	
LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183	Paul J.J. Cavaluzzo and Tyler Boggs, for the Applicant
Applicant	
- and -	
THE CARPENTER'S DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND ALLIANCE SITE CONSTRUCTION LTD.	Douglas J. Wray, for the Respondent The Carpenters' District Counsel of Ontario and United Brotherhood of Carpenters and Joiners of America Leonard Marvy and Aaron Hart, for the Ontario Labour Relations Board
Respondents	
	HEARD at Toronto: October 26, 2017

Michael G. Quigley J.

REASONS FOR DECISION

[1] This application for judicial review was dismissed on October 26, 2017, with reasons to follow. These are those reasons.

Overview

[2] The Applicant (sometimes "LIUNA" or the "Labourers")) sought judicial review of a decision of the Ontario Labour Relations Board (the "Board") dated February 10, 2016.

[3] The Board's decision ("Decision") dealt with an application by LIUNA pursuant to Section 99 of the *Labour Relations Act* (the "*Act*").[1] That is a provision that addresses disputes between trade unions about which union's workers are entitled to be designated to perform particular types of work. It is the so-called "work jurisdictional dispute" provision of the statute. It comes into play where a trade union complains that an employer is improperly assigning work to members of another trade union.

[4] This dispute relates to the assignment of a particular part of the work involved in the construction of the Bridgepoint Hospital ("Bridgepoint") in Toronto, Ontario. The work in dispute was exterior concrete formwork, which included the "fabrication, installation and stripping of forms" for the concrete sidewalks, stairs, retaining walls, planters, ramps and benches at Bridgepoint (the "disputed work"). The project is acknowledged to form part of the Industrial, Commercial and Institutional ("ICI") sector of the construction industry.

[5] The contractor, Alliance Site Construction ("Alliance"), assigned the work in dispute to members of the Respondent union (the "Carpenters") rather than to the Labourers, albeit through a composite assignment that included workers of both unions assigned to get the total job done. The Labourers filed a grievance over Alliance's work allocation determination. That grievance was held in abeyance pending a determination of the work jurisdiction dispute.

[6] The Board heard the matter by way of a full-day consultation on January 19, 2016. The parties filed extensive briefs in support of their respective positions before that consultation. Mr. Shouldice, the Vice-Chair of the Board, presided over that consultation. The Board's Decision upheld the assignment and dismissed the Labourers' claim.

[7] The Board's Decision turns on its interpretation of LIUNA's Provincial ICI Collective Agreement[2] (the "ICI Agreement"). LIUNA claims that the Board's found that "the ICI Agreement does not cover the disputed work." I address that claim later in these reasons, but in my view it does not correctly state the Board's finding on that point. Nevertheless, there is no dispute either that Alliance and the Labourers, LIUNA Local 183 ("Local 183"), are bound to the ICI Agreement or that Alliance had a collective agreement with Local 27 of the Carpenter's, who were also providing work at Bridgepoint at the time the work was assigned.

[8] In its application for judicial review, LIUNA submitted that the Board committed a number of reviewable errors:

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[1] S.O. 1995, c.1, Sched. A, as amended.

2 The full name of LIUNA's Provincial ICI Collective Agreement is: An agreement between the Construction Labour Relations Association of Ontario; Ontario Masonry Contractors Association; Industrial Contractors Association of Canada; Waterproofing Contractors Association of Ontario; Cement Finishing Labour Relations Association and Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council, on behalf of its affiliated Local Unions 183, 247, 493, 506, 527, 607, 625, 837, 1036, 1059, 1081 and 1089;

(i) That it was unreasonable for the Board to conclude that the disputed work was not covered by or claimed by the ICI Agreement, through working conditions that the Labourers claim were incorporated by reference into the ICI Agreement, or through the non-exhaustive claimed job tasks in Schedule E to the Labourers' ICI Agreement;

(ii) That the Board failed to take account of relevant considerations in determining whether the disputed work was covered by the Labourers' ICI Agreement, including by provisions allegedly incorporated by reference, and the sometime performance of work covered by those provisions by members of Local 183;

(iii) That it was unreasonable for the Board to conclude that the work performed by a worker was not a "working condition" in the context of this Agreement; and finally

(iv) That the Board unreasonably ignored or distinguished existing Board jurisprudence on the application of the "collective agreement factor" with respect to the disputed work.

Background Facts

[9] The disputed work involved exterior hard landscaping work, so-called "hardscaping." It included the fabrication, installation and stripping of forms with respect to the construction of concrete sidewalks, stairs, retaining walls, planters, ramps and benches at the Bridgepoint project, and also included the placement and finishing of concrete. Alliance assigned the disputed work to a composite crew that generally consisted of six members of LIUNA and two members of the Carpenters.

[10] The undisputed evidence before the Board was that the two carpenters generally took the lead in fabricating, installing and stripping of the forms. They were assisted in that work by construction labourers from LIUNA. Similarly, construction labourers generally took the lead with respect to installing rebar and the pouring, placing and finishing of concrete. On occasion, the carpenters assisted the construction labourers performing the latter work.

[11] None of the assigned workers complained at the time about the manner in which Alliance had assigned the work to a composite team. Nevertheless, LIUNA later challenged the work assignment by filing a grievance. The parties agreed to adjourn the litigation of the grievance pending the filing and determination of this jurisdictional dispute. In the grievance, and later in the jurisdictional dispute, LIUNA asserted that Alliance should have assigned all of the work in dispute to its members exclusively and that no work should have been assigned to any Carpenter members.

[12] Both the Carpenters and Alliance took the position that the assignment of the disputed work to a composite crew of Labourers and Carpenters was appropriate and that LIUNA's claim ought to be dismissed.

[13] The Board's jurisprudence sets out a number of factors to consider in jurisdictional disputes such as this. These factors include: (i) collective agreements; (ii) employer practice; (iii) area practice; (iv) economy and efficiency; (v) agreements between the competing trades; and (vi) safety, skills and training. There was no suggestion before us that the parties disagreed with the Board's finding that only the first four factors were engaged in this particular dispute.

[14] In the Decision, the Board found that

(i) the area practice factor "strongly" favoured the assignment of the work to members of LIUNA;

(ii) the assignment of the work to the Carpenters was consistent with economy and efficiency and weighed in their favour;

(iii) employer practice favoured assignment of the work to members of LIUNA, although the Board acknowledged it was giving "very little weight" to that factor; and

(iv) the collective agreement factor, that is, the interpretation of the provisions of the collective agreements as they related to this project and the disputed work, outweighed the factors that favoured the Labourers' claim.

[15] Noting that prior Board decisions had confirmed that a collective agreement claim to the work is of great significance to the analysis, "a powerfully important consideration" when making a decision about the assignment of work,[3] the Board concluded that the factors that did favour the Labourers were outweighed by the absence of a more important collective agreement based claim to all of the work in dispute.

[16] The Board found the remaining factors were either neutral or had no "meaningful effect" on how the work ought to have been assigned.

Allegation of Mootness

[17] As a preliminary matter, the Carpenters claim the issues under scrutiny are moot and that the Court ought to decline to deal with this application.

[18] In support of this claim, the Carpenters assert that the Labourers' challenge to the Board's Decision is based solely on its rejection of the Board's interpretation of the LIUNA collective agreement that expired on April 30, 2016. That was the collective agreement that governed at the time the work was assigned. Within a few weeks of the issuance of the Board's Decision that is under review here, LIUNA amended its collective agreement with Alliance, effective May 1, 2016, to make an express claim to the disputed work.

[19] In light of that amendment, the Carpenter's contend that the Labourers' challenge to the Board's Decision is now moot because it is based on the interpretation of its old, expired

[3] UCC No. 2 at para. 62.

collective agreement. Moreover, they claim this is not an exceptional case where the Court ought to exercise its discretion and deal with a moot application. They rely upon the analysis and reasons of the Court of Appeal in *Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819*,[4] and the cases cited there.

[20] *Borowski v. Canada (Attorney General)*[5], is the seminal case on the doctrine of mootness. Sopinka J. explains the doctrine in the following terms:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case, which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy, which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.[6]

[21] More recently, the Court of Appeal has revisited the doctrine of mootness in *Tamil Co-operative Homes Inc. v. Arulappah*.[7] In *Tamil Co-operative*, Doherty J.A. describes the approach the court is to take when deciding the question of mootness:

> Courts exist to resolve real disputes between parties and not to provide opinions in response to hypothetical or academic problems. Courts will, however, on occasion address the merits of an appeal even where the dispute giving rise to the appeal has dissolved. Where a question of mootness is raised, the court must first decide whether the appeal is moot. If the appeal is moot, the court must then decide whether it should nonetheless hear the merits of the appeal. The discretion to hear a moot appeal is intended to address those exceptional cases where the circumstances are such that the general rule against hearing appeals where there is no live controversy between the parties should not be followed . . .
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> As a general rule, the court will not decide moot cases.[8]

[22] Based on these authorities, the Carpenters argue not only that the application is moot owing to the amendment to the Applicant's collective agreement, but also that LIUNA cannot

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[4] [2008] 90 O.R. (3d) 451 at paragraphs 24-26 (C.A.).
[5] [1989] 1 S.C.R. 342, [1989] S.C.J. No. 14.
[6] *Ibid.*, at p. 353.
[7] (2000), 49 O.R. (3d) 566, [2000] O.J. No. 3372 (C.A.).
[8] *Ibid.*, at para. 13.

satisfy its onus to demonstrate why the Court should depart from its usual practice of refusing to hear moot applications.[9]

[23] However, several aspects of the dispute continue to be live issues. These include (i) the Labourers' issue regarding the form of Schedule E, (ii) the Board's determination that "work tasks" are not terms and individual working conditions permitting incorporation by reference from the Roads and Landscaping collective agreements, and (iii) the grievance commenced by LIUNA, which remains outstanding with the possibility of a damages award against Alliance.[10]

[24] On the last point, based on the authorities provided to us on the hearing[11], it may well be that the potential for a damages award arising out of that grievance is slim, but that is not a determination for us to make. I am not satisfied the issues are entirely moot and would not dispose of the application without considering its substantive merits.

Issues and Analysis

[25] The main issue on this application is whether the Board unreasonably interpreted the LIUNA ICI Agreement by concluding that agreement does not establish a claim to the disputed work.

(i) Standard of Review:

[26] Both parties concede that the standard of review is 'reasonableness.'

[27] The Board's order was made under s. 99(5) of the *Act*, which simply states that:

> The Board may make any interim or final order it considers appropriate after consulting with the parties.[12]

[28] This language makes plain that the Board is given broad discretion in determining an application like this. Of importance to judicial review, the *Act* has two strong privative clauses in ss. 114(1) and 116 of the *Act*. They are intended to limit and protect the scrutiny to which the Board's decisions may be subjected on an application for judicial review.

[29] Since the controlling 2008 decision of the Supreme Court of Canada in *Dunsmuir*[13] established two possible standards of review, namely correctness or reasonableness, Canadian courts have consistently held that where a party brings judicial review proceedings to challenge Board decisions on their merits, the applicable standard of review is reasonableness.[14]

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[9] *Maystar General Contractors Inc.*, above, at paragraphs 32-41.
[10] *CUPE v. Calgary (City)*, 2009 ABCA 377 at paras. 9-10.
[11] *Sayers & Associates Limited*, [1994] O.L.R.D. No. 3212; *Robertson Yates Corporation Limited*, [1995] OLRB Rep. February 158.
[12] S.O. 1995, c.1, Sched. A, as amended.
[13] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (S.C.C.)
[14] *Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819*, (2008) 90 O.R. (3d) 451, at paragraphs 42-43 (C.A.); *EllisDon Corporation v. Ontario Sheet Metal Workers' and Roofers' Conference and International Brotherhood of Electrical Workers, Local 586*, (2015) 123 O.R. (3d) 253, at

[30] At paragraphs 47 and 49 of *Dunsmuir*, the court explained the nature of the reasonableness standard of review and the deference to the decision-maker that it requires. It is a deferential standard, but informed by the reality that certain questions that come before administrative tribunals do not lend themselves to merely one specific particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Thus, tribunals have a margin of latitude within a range of acceptable and rational outcomes. As such, a court conducting a reasonableness review must inquire into the attributes of a decision that make it reasonable, as it pertains to both process and outcomes. Deference in the context of the reasonableness standard requires respect for the legislature's choices and that we recognize and accept that day-to-day decision makers who implement complex administrative schemes develop expertise or field sensitivity to the imperatives and nuances of that legislative framework. [15] It requires "respectful attention to the reasons offered or which could be offered in support of a decision", and even a presumption of correctness, even if the reasons given do not seem wholly adequate to support the decision. This follows because "*the court must first seek to supplement them before it seeks to subvert them.*"[16]

[31] In summary, the *Dunsmuir* reasonableness standard involves consideration of the existence of justification, transparency and intelligibility within the decision-making process, and a consideration whether the decision falls within a range of possible acceptable outcomes that are defensible in respect of facts and law.

[32] In this application for judicial review, the Applicant's entire challenge to the Board's Decision is based on the alleged unreasonableness of the Board's determinations, and in particular on its interpretation and application of LIUNA's collective agreement. However, the Carpenters respond that the Board's decision is reasonable and that the Labourers' application should be dismissed. They argue that the Board carefully dealt with and rejected all of the Applicant's arguments in its Decision and provided detailed reasons for doing so.

[33] In considering this question, I again note, as did the Vice-Chair in his reasons, that in reaching its Decision, the Board properly referred to the various factors it usually considers and applies in jurisdictional disputes as set out above, but in this case, it is also plain that the Board concluded that there were two factors of great significance, namely the collective agreement and area practice factors.

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paragraph 40 (C.A.), leave to appeal to S.C.C. refused; *Cotton Inc. v. Labourers' International Union of North America, Local 837*, [2016] O.J. No. 2758, at paragraph 16 (Div. Ct.); *Labourers' International Union of North America, Local 1059 v. McKay Cocker Construction Ltd.*, [2016] O.J. No. 6454, at paragraph 13 (Div. Ct.)

[15] See *EllisDon Corporation v. Ontario Sheet Metal Workers' and Roofers' Conference and International Brotherhood of Electrical Workers, Local 586*, (2015) 123 O.R. (3d) 253; *Cotton Inc. v. Labourers' International Union of North America, Local 183*, [2016] O.J. No. 2758, at paragraph 17 (Div. Ct.); *Labourers' International Union of North America, Local 1059 v. McKay-Cocker Construction Ltd.*, [2016] O.J. No. 6454, at paragraph 14 (Div. Ct.);

[16] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62 (S.C.C.); and David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304.

(ii) Interpretation of the Collective Agreement and Area Practice

[34] LIUNA argued before us that the Board's Decision that the disputed work was not within the scope of the ICI Agreement was unreasonable, given its finding that members of Local 183 had previously performed such work in other locations and that when doing so, were covered by the provisions of the ICI Agreement.

[35] In committing these alleged errors, LIUNA contends that the Board failed to follow its own jurisprudence in which the Board had held, in several earlier cases, that work "identical" to the disputed work was covered by terms and conditions incorporated into LIUNA's ICI Agreement by reference, and which they claim was therefore properly subject to a claim by the Labourers under that Agreement.

[36] The Labourers presented five arguments in support of their position that the Board's interpretation of the Agreement was unreasonable, interpreting it as covering some *but not all* of the disputed work, yet did not acknowledge that the Carpenters' claim flows directly from the language the Labourers' chose to use in their own collective agreement, at least as it read at the time this dispute arose.

[37] Obviously, concrete forming work is essential to the construction of concrete structures. As such, and as the new collective agreement does, all the Labourers' collective agreement needed to state to provide the jurisdiction that LIUNA claims was that it covered "all tasks involved in connection with concrete formwork" or that it covered "job site fabrication and installation of forms to receive concrete". However, the language of the Agreement does not encompass the disputed formwork even though it could have easily been worded to do so.

[38] In my view, the Carpenters are correct in their contention that the Labourers cannot point to any words in their collective agreement, before its amendment, that encompass this part of the work in dispute. The Carpenters say that to adopt any of the Applicant's five arguments to interpret the collective agreement *as including* the disputed work would effectively amount to an improper amendment of the terms of the written Agreement as it appears on the face of this record. In the Carpenters' submission, that *would* amount to an unreasonable interpretation, but in contrast, the Board's interpretation is entirely reasonable based on the language of the collective agreement it was considering. I agree. The interpretations contended for by the Labourers require the reaching of inferences from other unconnected language, and conclusions by analogy from other types of work, but which is not the work described in the Agreement or the work that is in dispute here.

[39] First, the Labourers assert that the disputed work is covered and claimed by the Agreement. Pursuant to Article 1.01, the Agreement applies to "all construction labourers." Article 2.03 states that the work covered by the Agreement is within the exclusive jurisdiction of the Labourers and, pursuant to Article 2.04, must be assigned to the Labourers' members.

[40] The Labourers claim that work is "covered" by the Agreement if the Agreement "sets out the wage rates and other terms and conditions to which an employee carrying out those tasks is entitled," which are to be found in the Applicant's Local Union Schedule. Thus, they contend that Article 2 and Schedule E of the "collective agreement", which sets out certain tasks and

working conditions, are incorporated into that schedule by reference. However, they do not make this argument by actually looking at *this* collective agreement, but rather it is made by reference to *other* LIUNA collective agreements, specifically, the Roads and the Landscaping Collective Agreements.

[41] LIUNA claims that the Landscaping Agreement applies to hard exterior landscaping. Therefore they say it encompasses the disputed work, and that the terms and conditions of the Landscaping Agreement would and must therefore be incorporated into the Agreement at issue here. The same claim is made relative to the Roads Agreement, but the point is that *neither* of those agreements are the Agreement in issue in this case. Indeed, the Applicant concedes that the disputed work is not *explicitly* covered or claimed in the provisions of that Agreement. The claim to its inclusion is merely inferential and by extension from other unrelated agreements.

[42] The Board found that Schedule E of the LIUNA ICI Agreement was the sole source of the Labourers' jurisdictional claim. The Labourers argued that this was an unreasonable interpretation of that Agreement. However, in its Decision the Board specifically noted that the language of Schedule "E" to the collective agreement states that the work listed is "Work Claimed but not Limited To:" The Board specifically addressed how this provision should be read in paragraph 54 of the Decision:

> 54. The absence of a specific obligation to use members of Local 183 to perform the work in dispute significantly decreases the strength of the claim made by Local 183 to that work. The fact that the claim for work contained in Schedule E to the Labourers' ICI Agreement is said to be "not limited to" the work tasks outlined in that Schedule does not augment the otherwise limited jurisdictional claim. What other work tasks are claimed? It is unclear; any task could be claimed. Accordingly, the "not limited to" language contained in Schedule E is of little assistance for the purpose of establishing work jurisdiction. If there is a desire to claim further work tasks on behalf of construction labourers performing ICI sector work for the purpose of securing work assignments, those tasks must be specifically listed in Schedule E to have any meaningful effect.[17]

[43] I agree with the Board. It makes no sense as a matter of proper interpretation, and would be unreasonable to conclude that when Schedule "E" makes specific reference to concrete form removal *only*, it ought nevertheless to be interpreted as covering all work in connection with concrete formwork, including job site fabrication and installation of forms to receive concrete. I find the Board's conclusion on this point to be the only reasonable conclusion given the language that was before it. It is the only reasonable conclusion because there is no language in any other part of the Labourers' collective agreement that purports to expand the work claims set out in Schedule "E".

[44] The next line of argument advanced against the Board's Decision claimed that the Vice-Chair was in error in not relying on evidence of practice to interpret the scope of the Labourers' collective agreement. This was said to amount to a failure to take relevant considerations into

[17] Decision, at para. 54.

account. Again, this argument was specifically considered by the Board and rejected. At paragraphs 51-53 of its Decision, the Board stated:

> 51. The area practice evidence establishes that construction labourers regularly fabricate and install concrete forms on hardscaping projects in the ICI sector of the construction industry in Board Area No. 8. In fact, there can be no doubt that members of Local 183 perform the work in dispute on ICI sector construction sites, and that when they do so they are covered by the provisions of the Labourers' ICI Agreement (as modified by the provisions of the Roads Agreement and/or Landscape Agreement, as the case may be).
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> 52. However, for the purpose of assessing the collective agreement factor in this proceeding, the question before the Board is not whether Local 183 members have fabricated and installed concrete forms on hardscaping projects in the ICI sector of the construction industry in Board Area No. 8. Instead, the question before the Board is whether the Labourers' ICI Agreement mandates an employer bound to its terms to assign the work in dispute to members of Local 183, in accordance with Article 2.01 and 2.03 of that collective agreement. The Carpenters ICI Agreement requires Alliance to assign the fabrication and installation of concrete forms on hardscaping projects in Board Area No. 8 to members of Local 27. Does the Labourers' ICI Agreement require Alliance to assign that very same work in Board Area No. 8 to members of Local 183, such that Alliance is forced into choosing between two inconsistent contractual obligations?
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> 53. In my view, it does not. Irrespective of whether members of Local 183 have previously performed the work of fabricating and installing concrete forms on ICI sector hardscaping projects in Board Area No. 8, there is nothing in (or incorporated by reference into) the Labourers' ICI Agreement to establish that Local 183 has the *contractual* right to insist that Alliance use members of Local 183 to complete the fabrication and installation of concrete forms on its ICI sector hardscaping projects.[18] (my emphasis)

[45] *McKay-Cocker Construction Limited*[19] clearly establishes that it is only where there is an ambiguity in written contractual language (including the scope of collective agreements) that extrinsic evidence, including practice evidence in this case, can be relied upon as an aid to interpretation. However, no argument was advanced before the Board, or before us, that the Labourers collective agreement was ambiguous, nor have the Labourers identified any ambiguous language. Further, the mere fact that a collective agreement may have been considered applicable to particular work in particular circumstances in particular regions, does not have the effect of expanding the scope of the collective agreement itself.[20]

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[18]Decision, paras. 51-53.

[19] 2015 CanLII 32607 at paragraph 32; application for judicial review dismissed [2016] O.J. No. 6454 (Div. Ct.), at paragraphs 20-22.

[20] *Ecodyne Limited*, [1979] OLRB Rep. July 629.

[46] Given that absence of circumstances that needed to be present before extrinsic past practice evidence, or evidence of practices in neighbouring territories with their own distinct collective agreements, could be looked to in interpreting this collective agreement, as it was written, the Carpenters correctly observe such an approach would have amounted to error. Far from being unreasonable, I find the Board's analysis on this issue is correct.

[47] The Labourers' penultimate argument was that the Board unreasonably interpreted "working conditions." The argument was that applying a broad and purposive reading of the term "the rates and other individual employee working conditions for construction labourers" should result in a finding that the specific work performed by a worker falls within the scope of the "individual employee working conditions."[21] The Labourers characterize the Board's interpretation as "absurd": any reasonable employee or employer would view the work performed to be part of the working conditions of the worker, and the "past application of the ICI Agreement is a testament to that interpretation."

[48] On this issue, as on the final issue, it is important to bear in mind that this is a work jurisdictional dispute. Article 2 of the Labourers' collective agreement deals expressly with "Work Jurisdiction." It refers only to Schedule "E" and *not* to any of the Local Union Schedules. Schedule "E" refers to work jurisdiction and does *not* refer to any Local Union Schedules. Article 7 is entitled "Hours of Work, Overtime and Wages Rates" and refers to the Local Union Schedules.

[49] The Local 183 Schedule makes reference to other collective agreements for "rates and other individual employee working conditions for construction labourers," but in my reading of the language, it refers to the items specified in Article 7, that is, hours of work, overtime and wage rates. However, Local 183's Schedule does not refer to work jurisdiction at all and does not purport to expand the work jurisdiction provisions of Article 2 and Schedule "E".

[50] Faced with these provisions, the Vice-Chair stated as follows:

> 50. For the reasons outlined above, I am of the view that the limited incorporation by reference into the Labourers' ICI Agreement of the rates of pay and other individual employee working conditions for construction labourers contained in the Roads Agreement and the Landscape Agreement does not have the effect of broadening the limited jurisdictional claim with respect to the performance of formwork contained in Schedule E of the Labourers' ICI Agreement. Any provision in the Roads Agreement or the Landscape Agreement that could extend the limited jurisdictional claim for formwork is not a rate of pay or an individual employee working condition for construction labourers that is incorporated by reference into the Labourers' ICI Agreement. For the reasons expressed earlier, nor are the actual work tasks performed by construction labourers on roads projects or landscape projects incorporated into the Labourers' ICI Agreement as jurisdictional claims.[22]

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[21] *Liquor Control Board of Ontario et al. and Ontario Liquor Board Employees' Union et al.*, 29 O.R. (2d) 705.
[22] Decision, at para. 50.

[51] This is yet another instance of the Board's careful interpretation of the Labourers' collective agreement. I regard the Board's decision on this point as transparent, correctly reasoned and reasonable.

[52] Finally, the Labourers claim that the Board unreasonably ignored or distinguished its own prior jurisprudence. They argued before us that the Board must be found to have acted unreasonably if it fails to consistently and logically apply its past awards, even while recognizing that the Board must be afforded some deference in the development of its own jurisprudence: *Sloane v. Canada (Attorney General)*[23], *Joey's Delivery Service v. New Brunswick (Workplace Health and Safety and Compensation Commission)*[24], and *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Graham Construction and Engineering Ltd.*[25]

[53] In support of its position, the Labourers rely on the decision in *Well-Bur Construction Ltd*[26], as well as three other cases where the Board has upheld the assignment of the disputed work in this case to members of Local 183 in roads or landscaping circumstances, under the incorporated terms of the Roads Agreement and/or the Landscaping Agreement.[27] In *Well-Bur*, the Board concluded that

> [i]t cannot be disputed that what can be described as 'the carpentry portion of concrete forming work' in the ICI sector of the construction industry has been performed, historically, by both labourers and carpenters... In the result, then, there *is* a collective agreement relationship between Well-Bur and Locals 506 and 837 that covers the work in dispute [emphasis in original].

[54] Having previously upheld the assignment of the disputed work to members of Local 183 under the incorporated terms of the Roads Agreement and/or Landscaping Agreement in three earlier decisions[28], LIUNA argues that the Board is bound to follow that jurisprudence and relies on isolated findings rather than the full context of the decisions.

[55] In *PCL Constructors Canada Inc.* the Board held that the LIUNA ICI Agreement applied to the disputed work. When the Carpenters sought reconsideration of this decision the Board upheld its earlier conclusion that the [LIUNA ICI Agreement] applied to construction labourers who were engaged in the carpentry portion of concrete forming construction in relation to exterior landscaping work or "hardscaping".

[56] In *UCC Group* (2014), the Board concluded that "there is a long-established track record *of both construction labourers and carpenters performing concrete formwork*", and that "*both*

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[23] 2012 FC 567, at para. 27.
[24] 2001 NBCA 17 (leave to appeal dismissed) [2001] SCCA No. 425 (S.C.C.), at paras. 37–38.
[25] 2008 SKCA 67, at paras. 105-106.
[26] [1998] OLRB Rep. January/February 124, BOA, Tab 10
[27] *PCL Constructors Canada Inc.*, 2014 CanLII 10697 (OLRB), at paras. 52-54; *PCL Constructors Canada Inc*, 2014 CanLII 22000 (OLRB) ("PCL Reconsideration") at paras. 11, 13; and *UCC Group*, 2014 CanLII 54367 (OLRB), ("*UCC No.1*") at paras. 41–43, 45.
[28] *Ibid.*

the Labourers and Carpenters have *valid* ICI Collective Agreement provisions that cover [exterior concrete formwork].[29] (my emphasis)

[57] In light of those earlier decisions, LIUNA argued before us that the Board unreasonably distinguished its own prior jurisprudence on the basis that past decisions focused upon [an] illegality argument made by [the Carpenters]. The "illegality" argument was an assertion that the LIUNA ICI Agreement covered work that could only be performed by the trade of "carpenter" and, as a result, could not be claimed by any other trade, including a construction labourer. LIUNA claims the Board has repeatedly rejected this argument.[30] But that is a different question than that which was before the Board or before us.

[58] LIUNA argued before us that those prior decisions were not limited to the "illegality" argument and that the issue of whether the ICI Agreement covered the work in dispute was not only argued in those decisions, but that the Board found in those decisions that the ICI Agreement did cover the work in dispute.

[59] According to LIUNA, in *PCL (2014)* the Carpenters "failed to address whether the [LIUNA ICI Agreement] encompassed the work in dispute" in their request to reconsider that decision. In the *PCL Reconsideration,* the Board rejected the Carpenters' argument:

> The Board did not, as Local 27 contends, fail to address whether the Labourers' Agreement encompassed the work in dispute. The Board in its January 23rd decision discussed the scope of the Labourers' Agreement in some detail and in that discussion dealt with the Local 183 appendix to the Labourers' Agreement and its effect on the scope of that agreement.[31]

[60] Similarly, in *UCC No.1*, the Carpenters again took the position that the LIUNA ICI Agreement did not cover the work in dispute and the Board again held that *there was a long-established track record of both construction labourers and carpenters performing concrete formwork.* It found that the scope of the LIUNA ICI Agreement covered construction labourers and, accordingly that Local 183 possessed valid ICI Collective Agreement provisions, which covered the work in dispute.[32] In the face of these prior decisions, the Labourers complained before us that the Decision cited only one prior decision in which the Board did *not* find that the work in dispute should have been assigned to members of LIUNA. That is the decision in *UCC #2.*

[61] Thus, LIUNA claims that the Board concluded that if the work *would* have arisen within Local 183's geographical jurisdiction, the Board *would* have had "little hesitation" in upholding an assignment to LIUNA.[33] That submission is speculative in the context of this application. But regardless, it is an argument premised on an incorrect assumption relative to geographic territory.

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[29] *UCC #1, above, at* para. 41-43.
[30] *PCL 2014 above,* at paras. 44-50; *UCC No. 1, above,* at paras. 43-44.
[31] *PCL Reconsideration, above,* at para. 8; Local 27, Reconsideration Application, para. 10.
[32] *UCC #1*, above, at paras. 41-43
[33] *Universal Workers Union, Labourers' International Union of North America, Local 183 v Carpenters' District Council of Ontario*, 2015 CanLII 31912 (ON LRB) (hereafter *UCC #2),* BOA, Tab 14, at paras. 60 and 81.

[62] First, I would observe that there is no legislative or judicial mandate that there may never be any deviance in Board decisions from decisions it has previously rendered. The standard of review is reasonableness, not rigid consistency with prior jurisprudence.[34]

[63] However, returning to the Labourers' argument, while they rely on those earlier Board decisions, they do not refer to any portion of the reasons in any of those cases as purporting to interpret a provision in the Labourers' collective agreement as claiming the work in dispute. Those cases simply accepted a state of affairs that existed in those cases at the time those decisions were reached.

[64] In my view, it was open to the Board to distinguish those prior cases. The Board in fact referred to and adopted the reasoning and interpretation of the very same Labourers' collective agreement from one of its more recent decisions in reaching its conclusion in this case. That more recent case is the *UCC No. 2* case.[35] That was a decision that involved the same collective agreement. A different conclusion was reached, but LIUNA did not request that the Board reconsider its decision. Neither did LIUNA seek judicial review of that decision.

[65] However, if the premise advanced before us about failing to follow prior jurisprudence is correct, then the Board in this case would have been acting unreasonably in failing to follow the *UCC No. 2* decision.

[66] The law moves forward. Decisions that may have been appropriate in an earlier time, or in different circumstances, or in different geographical territories, based on differing collective agreements, may or may not be correct or the required answers as time and the constellation of facts and circumstances progress and change. As the Carpenters correctly observe, the issue is not whether there are inconsistent decisions of the tribunal. The question is whether the decision reached by the Board in the particular case passes the muster of the *Dunsmuir* reasonableness test: that it is justified, transparent and intelligible within the decision-making process, and falls within a range of acceptable outcomes that are defensible in respect of facts and law.

[67] Consistent with these principles, the New Brunswick Court of Appeal has held that the Labour Board acted reasonably in following its most recent decision, but ignoring earlier ones.[36] I find that the Board was reasonable in reaching the Decision.

Conclusion and disposition

[68] In the result, the Board concluded that

> "[H]ere, the absence of a collective agreement claim to the entire work in dispute tips the scales in favour of an assignment of the work in dispute to a composite crew consisting of members of both Local 183 and Local 27."

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[34] Domtar Inc. v. Québec (Commission d'appel en matière de lesions professionnelles,[1993] 2 S.C.R. 756 (S.C.C.)Wilson v. Atomic Energy of Canada Ltd., [2016] 1 S.C.R. 770 (S.C.C.)Hydro Ottawa Ltd. v. IBEW Local 636, [2007] 85 O.R. (3d) 727 (Ontario C.A.)

[35] 2015 CanLII 31912

[36] *CUPE, Local 2745 v. New Brunswick (Board of Management)*, [2004] MBCA 24 (N.B.C.A.).

[69] Using its considerable expertise and based on its sophisticated and nuanced analysis of the matter, the Board found the work assignment was a sensible decision and not contrary to the Agreement, correctly in my view. The Board's decision was reasonable and well within the Board's purview and discretion to reach. The LIUNA application is dismissed.

Michael G. Quigley J.

I agree

J.M. Fragomeni J.

I agree

W. Matheson J.

Released: November 22, 2017

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ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

J.M. Fragomeni, M.G. Quigley and W. Matheson JJ.

B E T W E E N:

LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183

Applicant

- and –

THE CARPENTER'S DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND ALLIANCE SITE CONSTRUCTION LTD.

Respondents

REASONS FOR DECISION

Released: November 22, 2017