

[1990] OLRB Rep. August 844

**2567-88-G** Labourers' International Union of North America, Local 1036, Applicant v. **Future Care Limited** and Kuco Construction Limited, Respondents

**BEFORE:** *Inge M. Stamp*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine*.

**APPEARANCES:** *L. A. Richmond* and *B. Suppa* for the applicant; *Mike Failes* and *P. Kuhn* for the respondents.

**DECISION OF THE BOARD;** August 22, 1990

1. This is a referral of a grievance pursuant to section 124 of the *Labour Relations Act* alleging non-compliance with the collective agreement binding on the parties.

2. In a separate section 1(4) application, the parties reached agreement and requested the Board to declare that Future Care Limited and Kuco Construction Limited constitute one employer for the purposes of the Act. Having regard to the agreement of the parties, the Board hereby declares that Future Care Limited and Kuco Construction Limited are one employer for the purposes of the Act.

3. At this stage, the parties requested a hearing before the Board to deal with the respondent's request made in response to the above grievance, for a determination under section 150 of the Act. Section 150 provides as follows:

150. The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).

4. Notice was given to a number of parties who were identified as having an interest in the determination of whether the work performed on the respondent's retirement home project at 760 Great Northern Road in Sault Ste. Marie, Ontario, is work in the ICI sector of the construction industry.

5. Hearings into the section 150 determination started on June 26, 1989 and were completed on October 19, 1989. Although notice had been given to thirteen contractors and the designated bargaining agencies, no one else appeared at the hearing, other than the parties to the section 124 application, to make any submissions with respect to the section 150 issue.

6. The evidence is not in dispute. The witnesses were straightforward and credible. The project which is the subject of the section 150 determination is described as the Great Northern Retirement Home ("Great Northern") in Sault Ste. Marie. The respondent has built two other homes since being certified in 1986 by the applicant, one in Sudbury and one in Timmins. The respondent takes the position that these homes fall within the residential sector of the construction industry.

7. The retirement home was built pursuant to the residential portion of the building code.

The retirement home is privately funded, with no government financing and no application for government financing. It is not subject to any legislation affecting nursing homes, homes for the aged or homes for special care. The retirement home is targeted to persons 55 years and older, but is not restricted to persons of that age. There is no ongoing medical care provided and no doctor or registered nurse on staff. There is no association with any other institution or hospital. A nursing home on the adjacent property is owned by Tendercare Nursing Homes Limited (Tendercare). Great Northern bought the land next to the nursing home from Tendercare who took back a substantial mortgage. The land is zoned for institutional use.

8. Both Tendercare and Great Northern have management contracts with Extendicare Health Services Inc. ("Extendicare"). There is no other tie-in or connection between Tendercare and the Retirement Home.

9. The Corporation of the City of Sault Ste. Marie, in granting a building permit, advised the respondent "Your working drawings for this development has [sic] been thoroughly reviewed by this office and have been examined under the requirements for Group "C", Residential Occupancy. Part 9 of the Ontario Building Code applies". The building permit issued by the City of Sault Ste. Marie describes the retirement home as an "Institutional Building" (Exhibit 4). Mr. Kuhn testified that when he queried the Building Department on that issue he was advised that "institutional" was shown on the permit because of the zoning.

10. The retirement home is a three-storey building. There are 120 suites, a number of stairwells and one elevator. There are two sizes of suites. A little over half the suites are private bed-sitting rooms and the rest are semi-private. There are two suites that can accommodate three persons. When they are not occupied by three persons, they become semi-private suites for two. There are six one-bedroom suites. There are fourteen units equipped with kitchens. If there is a demand for more units with kitchens, they can be added. Each unit has a four-piece bath.

11. Portions of the 'Occupancy Agreement' (Exhibit 7) state:

In consideration of payment, by the Resident to the Owner, of the Occupancy Fee set forth in Schedule "A". the Owner shall provide to or for the benefit of the Resident, accommodation referred to herein, three (3) meals per day, maid service, laundry facilities and the right to use all recreational facilities within Great Northern Retirement Home.

2. The Resident acknowledges that this Agreement is not assignable and further acknowledges that no person other than the Resident shall be permitted to use or occupy the Suite, other than as temporary guests of the Resident.

3. The Owner, from time to time, shall establish reasonable house rules and policies with respect to Great Northern Retirement Home, and the RESIDENT AGREES to abide by such rules and policies, including the restrictions imposed by the Owner on guests of the Resident permitted on the premises. The Resident acknowledges that the Owner may take all responsible measures to enforce compliance with such rules and policies. The current house rules are described in Schedule "B".

4. The RESIDENT FURTHER ACKNOWLEDGES that it is the owner's responsibility to furnish the suite but the Resident may be required by the Owner to occupy a suite other than the suite described in Schedule "A". PROVIDED that such suite has equivalent amenities to the suite described in

Schedule "A".

5. The Resident shall pay for any services other than those referred in paragraph four(4) above, when billed by the Owner. Any arrears of payments of the Occupancy Fee and any incidental charges for such additional services not paid within thirty(30) days after the Owner renders an account therefor, to the Resident, shall be subject to a delinquency charge of 1-1/2% per month until paid.

6. The Resident further acknowledges that since the Great Northern Retirement Home is not equipped to provide and is not providing nursing or medical care, that, in the event the Resident shall require special nursing or medical care as a result of physical or mental incapacity, the Owner shall be entitled to terminate this Agreement.

12. Residents can decorate suites, at their own expense, if they wish. If the retirement home provides the furniture, the rate is higher. Residents are encouraged to bring their own furniture.

13. All suites have their own thermostats and there is provision for an air-condition unit. All suites are equipped with 3 pull-cords, one in the bathroom and two in the bed-sitting area. The pull-cords notify the person at reception that there is a problem. It is intended for emergencies, i.e., a fall in the bath-tub or out of bed. Laundry services are available and there are coin-operated washers and driers on each floor for persons wishing to do their own laundry.

14. The basic per diem includes three meals per day and open snack-bar. There are common facilities, including main dining lounge, private dining lounge, two activity rooms, two exercise rooms, chapel, library, designated smoking rooms, three lounges, three private laundry rooms, a small shop for selling products such as toothpaste and other personal needs, and a beauty salon which is open to the public. There are parking facilities for the residents. Furnished guest suites are available for visitors for a fee. There are Registered Nursing Assistants (RNA's) but they are not allowed to work under their licence without a Registered Nurse (RN) being present. The RNA's are floaters and participate in all activities. If residents require medical or nursing care, they have to leave. If they are ill and requiring hospitalization, their suite is kept for them until they return. All residents must be able to look after themselves. There is no personal care assistance available, no dispensing of medication, no meal tray service to the rooms. There is no infirmary on the premises. There is a room on the first floor for the RNA's, with a counter, sink and coffee machine.

15. In December of 1988 Kuco Developments signed both a pre-operational agreement and a management agreement for a health care facility with Extencicare. Extencicare provides marketing services, managerial and bookkeeping services, is responsible for the budget, operation of the building and administration of the residents. Extencicare provides the administrator (Exhibits 8 & 9).

16. By building the structure under the Group "C", Part 9 of the building code which also applies to individual homes, as permitted by the city, all the wiring is done under the residential code allowing for standard house wiring, using conduit only from the main feeders. There is no requirement for a sprinkler system. A standard wood truss is used in the construction of this structure. The retirement home consists of cast concrete on the first floor and 2' x 6' wood frame for the rest. The second and third floors are clad in steel siding. By contrast, the nursing home nearby is constructed of non-combustible materials, solid masonry, open steel web joists, steel joists and

0-decking (steel).

17. The respondent testified that in the Fall of 1987 similar projects were built in Sudbury and Timmins in the residential sector and that the union was aware of these projects.

18. Part of Extencicare's standard management agreement includes the option to purchase and the first right of refusal. The respondent's evidence was that without the Extencicare management agreement it would not have been able to obtain the mortgage to build the facility since the respondent has no experience operating retirement homes.

19. The respondent explained the concept involved in building retirement homes in close proximity to nursing homes. It is a community for the elderly, those that need care and those that do not. The persons in good health start out in the retirement home and when they need assistance they go to the nursing home. In the case of couples, if one needs to go to the next stage, the other is still close by. The respondent's position is that they are "selling a lifestyle, not health care".

20. The floor plans in Exhibit 24 included nurses' rooms which were subsequently deleted by the respondent. Although an examination room is part of the floor plan, the respondent explained that the final plan did not include such a room. There were a number of other changes in the plan at the time of actual construction.

21. Some of the features in the promotional literature (Exhibit 6) include:

- Enjoy safe, carefree living.
- Gather in the recreation room for crafts and cards.
- Relax in the whirlpool.
- Hop into our private van for a day of shopping or other outings.
- Use the exercise room to stay fit and active.
- Join friends for a game of cards or a chat.
- Spend quiet moments in our chapel.
- No more cooking or cleaning.
- No more health worries because a nurse is on call at all times.

The brochure goes on to talk about all the comforts of home .with none of the work:

All meals at Great Northern are prepared by our professional chef and served at your table. Savour our gourmet cooking in the main dining room... or in our private dining room with your family or friends. Are you accustomed to midnight snacks? Help yourself to the dining room refrigerator anytime .24 hours a day.

Dedicated, trained staff clean your apartment everyday and launder your towels and linen They will also do your other laundry. The Activities Co-ordinator plans outings, games and other entertainment. There is a beauty salon right in the home.

22. Residents are able to lock their doors. There will be a staff person with a master key on a 24-hour basis. Currently the kitchen staff and dining room staff are estimated at 8 persons; housekeeping and laundry room staff at full occupancy is about 7. It is anticipated there will be 2 receptionists, 4 RNA's, as well as administrative staff, including an administrator and an assistant administrator. Staff will include a part-time maintenance person and an activity co-ordinator to arrange outings, set up trips and drive the courtesy van. Full-time staff will be between 20-25.

The maximum number of residents is 174. The home includes 2 in ground Jacuzzis which can be reserved ahead of time. There is a storeroom for the RNA on duty, where blood pressure equipment and emergency nursing supplies are kept.

23. With respect to the shared suites or semi-private rooms, Extencicare would try to find persons that are compatible. Residents can share with friends if they wish. If one person moves out, the other can pay the difference or another person will move in. However, the Home will have the final say

24. A receptionist is on duty from 8:00 am. - 8:00 p.m. Visitors can be buzzed in from the rooms/apartments. Pets are allowed in the retirement home, provided they do not cause problems.

25. The respondent testified that he understood all services were flexible and the rate would be adjusted accordingly. The marketing manager of Great Northern testified that the only optional service is the meal service. Linen and housekeeping are part of the daily rate and are not negotiable We accept the marketing manager's evidence as being more accurate in terms of what services are optional.

26. A referral service operated by the Victoria Order of Nurses and funded by the Ministry of Health lists the Great Northern The marketing manager was not aware that Great Northern was listed by the referral service, although there had been discussions about referring potential clients. The referral service lists Great Northern under Type 1, Residential.

27. The owner/operator of the retirement home reserves the right to remove anyone who becomes ill for an extended period of time and place them in a hospital or nursing home In the respondent's view, it is not a care facility but offers services and assistance in emergency situations only.

28. There was evidence as to why leases were not desirable for this type of facility. The *Landlord and Tenant Act* would not provide the flexibility needed for persons moving from a Type I facility to a Type II or III facility.

29. Type I, II, III facilities (Exhibit 28) are generally described as follows:

#### RESIDENTIAL - TYPE I CARE

The person requiring Type I care, should be independently mobile either alone or with the use of a cane, walker or wheelchair. The person may have a chronic or ongoing medical condition but it is stabilized either by medication or by other measures. The person requiring this care is probably able to perform most of the daily grooming tasks, such as washing, dressing, shaving, etc. but due to physical or mental frailty, may require someone to monitor or supervise or provide minimal assistance to ensure that these tasks are done. The individual should be independent for toileting needs, requiring only a gentle reminder or perhaps to have someone point out the location of the washroom as necessary. The type of care provided in this setting is primarily supervisory: treatments, if any, are standardized and include maintenance, medication and preventive care.

...

#### EXTENDED HEALTH - TYPE II CARE

The person requiring Type II Care, requires on-going Nursing Care over a 24

hour period. This individual may have a Chronic Medical condition, but is stabilized by either drugs or standardized therapeutic measures, and requires minimal intervention. The individual requires, either as a result of physical or mental impairment, a minimum of 1 1/2 hours of skilled nursing care daily. This care may include daily washing/bathing, some, or total assistance with dressing, regular toileting, or prompt attendance for incontinence, regular care for skin, teeth, hair and nails supervision, or in some instances feeding, of meals. The care needs may include limited physiotherapy of exercises. The focus of care in the Extended Health program is reactivation oriented maintenance on a 24 hour basis over a prolonged period of time.

...

#### CHRONIC CARE PROGRAM [Type 111]

Care in a hospital can be either an acute short-term illness or for a long-term chronic illness or disorder. When a person requires care as an inpatient for a chronic disorder for a long period of time, and this care includes the need for regular frequent care by skilled professionals, then this care is provided in hospital in a chronic care bed.

Under this program, after 60 days the patient contributes toward the cost of his/her room and board. The cost of health care is paid by the Ontario government. The patient's contribution (the co-payment) for room and board is adjusted on a quarterly basis. However, there are few exemptions to the requirement for co-payment.

30. The Board heard evidence with respect to a non-profit senior citizen home run by the Ontario Finnish Rest Home Association. The facility included self-contained senior citizen apartments and a residential care home. The facility is not subject to the *Nursing Homes Act* or the *Home for the Aged Act*. There is some assistance for residents such as getting in and out of the bathtub on a weekly basis. There is help from family members and volunteers. Some of the other services are similar to those of Great Northern, i.e. meals, linen service, housekeeping. Fees are paid on a monthly basis. There is an age requirement of 59-60 and income restrictions in order to be eligible.

31. Win. Suppa testified on behalf of the Labourers. He testified as to how he obtained Exhibits 23, 28, 29 and 31. Exhibit 28 was handed out by the placement service detailing the different types of care, Residential Type I Care, Extended Health or Type II Care and Chronic or Type III Care. The document is not dated nor does it indicate the author of these definitions. The work performed in connection with the Phase I of the Finnish Home was performed under an agreement (Exhibit 33) which is an all sector agreement. Phase II was built by Tuomi Bros. (Exhibit 37).

32. Exhibit 29 includes a question and answer leaflet explaining the services and accommodation at Great Northern. Some of these questions and answers are set out below:

*Q.* What is a retirement residence?

*A.* A retirement residence is for people who are able and desire to care for themselves, and who wish to be free from the traditional responsibilities of maintaining a private home. The residence provides a social, yet private lifestyle for active, independent seniors, some who may require minimal care and assistance. Great Northern Retirement Home has been designed to offer a

variety of features to meet your every need.

*Q.* What does the monthly rate include?

*A.* Your monthly rate includes weekly laundry service, including linen as well as daily housekeeping. Full-time nursing assistance is on duty for individual help as required. Our formal dining room provides you with three(3) meals a day and 24-hour access to a snack refrigerator in the dining room hall. Private telephone and cablevision can be installed and maintained at an additional cost.

*Q.* How private is my accommodation?

*A.* As private as your own home. No one will enter without your permission. Privacy is respected by the staff who are available to assist you at all times.

*Q.* May I prepare some of my own meals?

*A.* Our modified meal plan allows you to set your own schedule for meals, while enjoying your main meal in the dining room at either lunch or dinner. Your monthly rate will be reduced. The kitchenettes provided in the suites will provide a minimal service at meal time.

33. Mr. Suppa testified that the work characteristics involved in building Great Northern and a small shopping plaza are the same. The skills required are the same.

#### Argument

34. Respondent's counsel referred the Board to a number of cases. *Heavy Construction Association of Toronto*, [1973] OLRB Rep. May 245 looks at the end use and the work characteristics to define the sector. *Ecodyne Limited*, [1979] OLRB Rep. July 629 was cited by the respondent for the proposition that you cannot look at work characteristics in isolation. The intended use has to be considered as well.

35. The respondent referred to the Board's jurisprudence in *West York Construction*, [1983] OLRB Rep. Dec 2132; *Sword Contracting*, [1985] OLRB Rep. May 743; *Armbro Materials*, [1987] OLRB Rep. July 948 and *Dufferin Construction*, [1989] OLRB Rep. Jan. 25 with respect to the criteria used when making sector determinations. Counsel submits that there are two principles coming out of *Sword Contracting*, *supra* and *West York*, *supra*:

- 1) the Board should look at the use in the beginning of its analysis;
- 2) work practice can be used to differentiate projects which are similar in their end use but have some uncertainty as to which sector they fall into.

Counsel submits to a large extent, end use and work practice are going to be interrelated. (*West York*, *supra*).

36. Counsel for the respondent submits that the building in question, Great Northern, is clearly a place people live; it is their home. They will live there on the average 5-10 years. The case before us is different from that of *Sword Contracting*, *supra*. There is no medical care involved in Great Northern. There are three care levels - I, II and III or chronic care. Persons who live in this retirement home are not subject to any of those levels of care. The advantage here is a

carefree lifestyle. If more kitchen facilities are desired, they can be added. The contrast between the Finnish Rest Home, which falls within *Sword Contracting*, and that of Great Northern, is that unlike Great Northern, the Finnish Home is non-profit and received funding from Comsoc. The Finnish Rest Home is run by an organization which has a social benefit objective. This particular group is limited by age and income with a Board of Directors elected by that non-profit organization. That definition, counsel submits, flows from the *Sword Contracting* case. There should be no doubt that Great Northern does not fall within *Sword Contracting*. But if there is some doubt, in this case work characteristics differentiate it - such things as the importance of the design characteristics, the materials used, the trades involved and the kinds of problems one would find in the workplace. The design is essentially frame construction covered by Part C of the Residential Building Code, Part 9 of which is applicable to residential construction. Counsel referred the Board to the definitions of "institutional" and "residential" used in the Building Code and which read as follows:

**Institutional occupancy** means the occupancy or use of a **building or** part thereof by persons who are involuntarily detained, or detained for penal or correctional purposes, or whose liberty is restricted, or require special care or treatment because of age, mental or physical limitations.

**Residential occupancy means** the occupancy or use **of a building** or part thereof by persons for whom sleeping accommodation is provided but who are not harboured or detained **to** receive medical care **or** treatment **or** are not involuntarily detained.

37. Counsel submits that these definitions are important in dealing with construction regulations for the province of Ontario and determining the requirements for the building. Clearly this building falls within "residential" as defined under the Building Code. If the building was "institutional" it would have to be built from non-combustible material, i.e., concrete or brick, not wood-frame. If it was a hotel, it would have to be built of non-combustible material. Under the *Nursing Home Act*, the building has to be designed a certain way; materials to be used are specified. This is an important design characteristic which distinguishes it from Great Northern. Similarly, there are differences in design to accommodate the *Hotel Fire and Safety Act*. Counsel for the respondent contends these differences will affect the tradesmen used. Instead of carpenters, there will be other trades doing brickwork and poured concrete work (see paragraph 7 of *West York Construction, supra*). There are different trades involved, depending on the materials used. The work problems one will encounter depend on who will be doing the work. The building code regulations do not require non-combustible materials or other design criteria. In addition, counsel for the respondent referred the Board to *West York Construction Ltd.* (Board File No. 1938-86-JD) where another local of the applicant took the position that this type of construction is in the residential sector in Toronto.

38. In summary, the respondent submits that the building in question clearly does not fall within the institutional sector as defined in *Sword Contracting, supra*. It is of a different nature; there are different characteristics which are not found in *Sword Contracting* because of the nursing component. That is not the case here. It is important for the Board to be consistent across the province. The respondent has not had problems in other parts of the province, only in Sault Ste. Marie.

39. Counsel for the applicant submits that this case is unlike *Sword Contracting, supra*, and *West York Construction, supra*. In the instant case, only the Labourers have a collective agreement with the respondent. If this project is in the ICI sector, then the agreement applies. This is not a matter just between these two parties. If the project is in the ICI sector, then section

146 of the *Labour Relations Act* has been breached in that another arrangement has been made. The applicant submits that this project is in the ICI sector and relies on both the commercial and institutional portions. One can have a building that is commercial and institutional; for example, a privately-owned hospital run for profit.

40. Counsel argues Great Northern is a commercial institution designed to make a profit for its owners by housing a certain target group of the elderly in respect of which a market has been identified. It is a combination of commercial and institutional, with a large residential component. Whether the facility is built by a charitable organization or private enterprise cannot affect the end use or the work characteristics.

41. Tendercare, the nursing home, sold their adjacent lot to Great Northern and took back the mortgage. Extendicare operates both the nursing home (Tendercare) and the retirement home (Great Northern). Extendicare is a large corporation and has a sophisticated management contract. Counsel submits they are managing an institutional facility, not an apartment building. Tendercare and Great Northern both have an interest in the concept of having a community for the elderly with different levels of care. Counsel pointed out the reference to "commercial cooking equipment" in Exhibit 3 under Building Code Requirements Counsel submits that apartments or houses do not need equipment to feed 150 people three times per day. There is a residential aspect in that people live in the home. But this is no different, counsel submits, than people living in hotels, motels, student residences and even jails.

42. Applicant counsel refers to Exhibit 9, where Extendicare describes the Great Northern nursing home as a health care facility, not apartments or apartment suites. Extendicare are not property managers. They are health care facility administrators. Extendicare is marketing this facility as a retirement care facility, a health care facility. Counsel contends that these are not the type of agreements entered into for residential properties where you need someone to perform maintenance work and rent the apartments.

43. Counsel for the applicant submits this facility is for the elderly who are healthy and wealthy This is not a home for a person living on a Canadian pension. \$1 ,050.00/month for one person to share an apartment, with meals, is not inexpensive. Approximately half of the suites are shared accommodation, the other half are private. Only a small number of suites have cooking facilities. Approximately 150 of the 170 residents will be eating in the dining room A staff of approximately 27 will be looking after the Home, including kitchen staff, housekeeping staff, receptionists, RNA's, a driver, part-time maintenance person, a manager and an activity co-ordinator. Counsel submits you would not have housekeeping staff, RNA's and kitchen staff in a condominium or apartment building. That type of staff complement is found in an institutional/commercial building.

44. Counsel submits the facilities and services offered by Great Northern as outlined in Exhibit 6 are of a nature that make this an institutional/commercial building. Some of these services might be available in some luxury condominiums. What distinguishes this facility from a senior citizen's residence is the medical care in the form of RNA's, the food services and the cleaning services .all the comforts of home with none of the work Meals are prepared and served

45. Counsel for the applicant contends that residents give up certain residential rights of a private home, such as when and what to eat, who to share a room with, or to stay as long as you want. When the manager retains that kind of control it ceases to be an apartment building. It is the degree of control, counsel argues, in the areas of daily living that caused the Board in *Sword Contracting, supra*, to find that the Baker Centre was within the ICI sector.

46. Counsel contends the building code does not tell the Board what ICI construction is. All it says is how buildings of that size can be built, including small hotels or motels of the same size. There are no differences in the skills or work characteristics between the Great Northern or a shopping mall of the same size. There are no differences in the work characteristics. Concrete forming is the same for this building or a small shopping mall.

47. There is not a lot of past practice in this area. The Finnish Rest Home was built under the ICI agreement. Counsel argues that because the respondent got away with building other facilities non-ICI it does not mean that the Labourers have agreed that this facility is not in the ICI sector. There was no contact with Local 1036 of the Labourers as to how this home was going to be built. The applicant in this case is not interested in what happened in other areas. Counsel submits that this applicant raised the issue early. Any resulting damages are not because of the applicant's failure to advise the employer of its position.

48. Ultimately, counsel submits that it is the degree of autonomy versus the degree of control over the persons who are going to reside in these institutions or facilities that should determine how they are viewed. The applicant contends that the work involved in building the Great Northern is work within the ICI sector. If the work is found to be ICI work, counsel requests that the Board remain seized with respect to damages in the section 124 should the parties be unable to come to an agreement.

#### Decision

49. The Board has been asked to determine whether the Great Northern comes within the residential or the ICI sector of the construction industry. Section 117(e) reads:

117.-(e) "sector" means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector.

50. The construction of a single family home is clearly in the residential sector. The construction of a hospital is clearly in the ICI sector at the other end of the spectrum. The question then is at what point in the spectrum does a facility such as the Great Northern cross over from a residential building to a commercial/institutional building? There is not a lot of area practice in Sault Ste. Marie with respect to retirement homes. The building code requirement is not determinative of the sector for the purposes of the *Labour Relations Act*. Commercial type buildings can also be built under the residential code. Group C (Exhibit 19) of the Building Code includes hotels and motels. The fact that the Great Northern is in close proximity to a nursing home or that they retained the same administrator is not determinative in the circumstances of this case. There is no difference in the work characteristics in the work performed by members of the applicant on a retirement home such as Great Northern or a small commercial project.

51. The promotional literature for Great Northern describes features and services which show this is more than a home in the traditional sense. Some of the services included in the fee are the type of services one would find for example in a hotel as opposed to an apartment building or a condominium.

52. It is, in the final analysis in the circumstances of this case, a matter of the degree of direct control over one's "home". In the Great Northern, the residents have very little personal

control. The occupancy agreement shows the degree of control exercised by the administrator/owner. This arrangement is substantially different than that between a landlord and a tenant. Approximately half of the units are "shared" accommodation. When a "resident" requires on-going medical care he/she has to leave. The administrator has the final say in the choice of a room-mate. As in *Sword Contracting, supra*, there are shared areas not under the residents' direct control. In *Sword Contracting, supra*, the Board held as follows:

36... However, while the fact people reside in a facility is one factor that suggests that the construction of the facility comes within the residential sector, it is not by itself necessarily determinative. People reside in a number of facilities that do not come within the generally understood meaning of the term residence. For example, servicemen may reside in army barracks and convicted criminals reside in correctional facilities, and yet it is questionable whether the construction of either of these types of facilities involves work coming within the residential sector of the construction industry.

37. In assessing what type of construction does come within the residential sector, the logical place to start is with the construction of a single family home to be owned by the family that will be residing in it. Such construction clearly comes within the residential sector. When one moves away from this clear-cut example, however, the matter becomes more complex. For example, it might be argued that the construction of a rental apartment building should be viewed as commercial construction because the owner intends to operate the facility to make a profit. On the other hand, however, once an apartment unit is rented out it becomes someone's home in the generally accepted use of that term. The residents carry out their activities of daily living in a physical area they have a tenancy interest in, and immediate control over. There has grown up a clear and generally accepted practice in the Toronto area of treating the construction of apartment buildings as coming within the residential and not the ICI sector of the construction industry. Based on this practice, the Board has in the Toronto area recognized such construction as coming within the residential sector. Indeed in the *West York* case, on the basis of a generally accepted local practice, the Board concluded that a building built by an institution but comprised primarily of self-contained apartment units also came within the residential sector. The Baker Centre is, however, even further removed from the example of the single family home. Although accommodation will be provided at the Centre, it will not be in self-contained units. Rather, individuals will be required to conduct a major part of their activities of daily living, including eating and bathing, in shared areas not under their direct control. No matter how concerned staff might be about giving residents as much autonomy as possible, it seems reasonable to assume that residents will have to conform to certain rules and norms relating to matters such as meal times. In the nursing home portion of the Centre, residents will be receiving daily nursing care under the direction of a professional nursing staff. Staff working in both the retirement and nursing home portions of the Centre will not be under the immediate direction of the residents, as would be the case of domestics employed in a home, but rather under the direction of a company hired for the express purpose of managing the Centre.

38. In the health care field the word institution has developed a negative connotation, primarily because it connotes a medical model of care where an individual loses more autonomy over his daily living activities than is necessary. However, outside the health care field, the word institution has a much more neutral connotation. The term is generally used to refer to an

organization established to provide a service viewed as being of benefit to either the public at large, or to some specific group. For example, schools, universities and churches are generally viewed as institutions. In this sense of the word, we also view the Baker Centre as an institution. It is a non-profit organization formed in part for the socially beneficial purpose of providing facilities for the elderly who are unable or unwilling to live independently. Through an outside management firm and a fairly large staff of employees, the Centre will be providing nursing care and other forms of assistance to its elderly residents. The Centre will also house day care facilities for children and elderly persons. The Baker Centre is held out to the public as being associated through the Northwestern Health Centre with the Northwestern General Hospital. The bylaws of the Baker Centre require that a majority of the directors of the Centre, including the chairman, either be connected with the Northwestern General Hospital or be approved by the board of directors of the Hospital. Given all of these factors, we are satisfied that the construction of the Baker Centre does come within the industrial, commercial and institutional sector of the construction industry as that term is used in the *Labour Relations Act*.

53. With respect to the position taken by another local of the applicant in another proceeding that this work is residential and the possibility for inconsistent results across the province, the Board in paragraph 25 and 26 of *West York, supra*, made the following comments:

25. Lacking a definition of either the residential or the ICI sector in the Act, the Board is required to determine the dividing line between them with limited statutory guidance. In determining the matter, we incline to the view that as far as reasonably possible our conclusion should be one which takes into account existing industrial relations realities. We would refer in this regard to our earlier expressed view that by incorporating the notion of sectors into the Act, the Legislature did not thereby intend to change the existing understandings between trade unions and employers as to the scope of the different sectors. We recognize that local practices and understandings might vary in different parts of the Province and that our approach has at least the potential for different results in different areas. We also recognize that this might create a number of uncertainties. Nevertheless, we view such a situation as something that both trade unions and employers can accommodate themselves to. Indeed, if the result of this approach is that the line separating the residential and ICI sectors is somewhat different in various parts of the Province it would be precisely because trade unions and employers in different parts of the province have already adopted different approaches to the issue.

26. This is not to say that local area practices or local agreements will always be determinative. Most projects clearly fall within one sector or another, and a local practice or agreement cannot alter that fact. Accordingly, an agreement to regard a clearly ICI project such as a shopping plaza or a school as residential would not find much favour with the Board. Rather, it is only with respect to those relatively small number of projects which fall into the "grey area" between the sectors that a widely accepted local practice or agreement might assist in deciding how the project should be characterized. We would caution, however, it is possible that for one reason or another other relevant factors might be persuasive enough to cause the Board to conclude that a local practice or agreement should not be followed. Each situation will have to be determined on the facts involved.

54. Having regard to the entirety of the evidence and the cases cited, we find that the construction of the Great Northern Retirement Home in Sault Ste. Marie falls within the ICI sector of the construction industry.

55. The Board will remain seized with respect to the section 124 grievance should the parties be unable to agree on the amount of damages.