

**2029-91-G Labourers'** International Union of North America, Local 1036 and Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Ellis-Don Limited**, Responding Party.

**BEFORE:** S. Liang, Vice-Chair, and Board Members F. B. Reaume and J. Redshaw.

**APPEARANCES:** S. B. D. Wahl and William Suppa for the applicant; and Walter Thornton and P. Richer for the responding party.

**DECISION OF S. LIANG, VICE-CHAIR, AND BOARD MEMBER J. REDSHAW;** July 29, 1993

1. This is a referral of grievance to arbitration pursuant to the provisions of section 126 of the *Labour Relations Act*, in which the applicant (referred to hereafter as "the Labourers" or "the union") alleges that Ellis-Don Limited ("Ellis Don" or "the company") has violated the provisions of the provincial collective agreement to which the parties are bound. The Labourers contend that Ellis Don has subcontracted work covered by this agreement to a company which is not in contractual relations with the union. The Labourers seek damages on its own behalf and on behalf of its members for the failure to subcontract the work in accordance with the collective agreement. Ellis Don takes the position that the work in question is not work in the construction industry and therefore, is not covered by the collective agreement. In the alternative, the company asserts that the union is not entitled to the relief requested as there were no appropriate union subcontractors available to perform the work.

2. The parties agreed and the Board ruled at the hearing that the Board would determine the issue of liability and, if the grievance is upheld, remain seized of the issue of remedy, including the issues raised by Ellis Don with respect to the availability of union subcontractors.

I

3. The Board heard the evidence of Roderick Goodall and Douglas Page, and received documentary material in the form of contract documents, time sheets and other material, which we have reviewed in detail. Ultimately, there is little in the evidence which is in dispute, and the case is centred on the opposing views which the parties take of the facts and the legal conclusions that should be drawn from them.

4. The grievance involves the construction of an Ontario government office building in Sault Ste Marie to house the Ontario Lottery Corporation as well as some offices of the Ministry of Natural Resources. The building is commonly referred to as the "Lotto Centre". Ellis Don entered into a general contract with the government to construct the building. Part of the work which Ellis Don contracted to perform was the cleanup of the premises at the completion of construction. This cleanup work was sub-contracted by Ellis Don to a company called Final Touch Maintenance Services ("Final Touch"), which was on the construction site from August, 1991 to April, 1992.

5. The General Conditions which form part of the contract documents state that "at the completion of the Work, [Ellis Don] shall remove all debris, tools, equipment and surplus materials from the Site and shall leave the work clean and suitable for occupancy unless more exactly specified." In the section of the contract documents describing Final Clean Up, the instructions

state:

1. CLEANING
  - 1.1 Close rooms and areas finished by painters and decorators to all but authorized persons.
  - 1.2 Keep access areas to work reasonably clean during work and on completion. On completion of work remove stains, dust, smudges caused by work within work areas of this Contract. Within this work area wash and polish interior glass and clean and apply coat of wax to finished resilient floors. Make good any damage caused outside work area including doing necessary cleaning required due to work.
  - 1.3 Replace broken, damaged or scratched glass and mirrors, which are part of work.
  - 1.4 Use appropriate apparatus and cleaning materials. Clean work in strict accordance with applicable Sections and/or manufacturer's directions.
  - 1.5 Upon completion of final cleaning, remove cleaning equipment, materials and debris from building site.

6. Not all of the work described above was performed by Final Touch; however, the work of Final Touch is included in the description above.

7. Although the parties spoke of Final Touch having been sub-contracted the work by Ellis Don, there does not appear to be a contract in writing between Ellis Don and Final Touch. Instead, the relationship between Final Touch and Ellis Don is described in a general written proposal by Final Touch setting out the work it can perform, estimates by Final Touch for the work on specific floors of the project and then subsequent purchase orders issued by Ellis Don. Some of the work was not specifically estimated prior to commencement, but simply performed and then invoiced by Final Touch.

8. In a letter dated March 5, 1991, Rod Goodall, the owner of Final Touch set out a description of the services which his company was prepared to offer to Ellis Don on the Lotto Centre project:

#### DESCRIPTION OF SERVICES

--For Supply of all labour, materials and [sic] tools for the following:

- A. WINDOWS:
  1. Stickers, tape, plaster removed
  2. Glass cleaned and polished, interior & exterior
  3. Window frames etc. vacuumed and washed.
- B. FLOORS:
  1. Sweep, dust mop
  2. Edges, baseboards vacuumed.
  3. Wash and rinse

4. When applicable - stripping/sealing & waxing C.

DARPETS: [sic] 1. Vacuumed

2. Minor sport [sic] removal

D.WASHROOMS: 1. All sinks, toilets, counters, mirrors, floors, walls cleaned, washed, sanitized and polished.

- E. GENERAL:
1. Baseboards vacuumed &/or washed.
  2. Walls spot cleaned as needed
  3. Door frames, handles, kick plates cleaned and polished
  4. Fire extinguishers, hose cabinets cleaned.
  5. Removal of dirt and construction debris from site to dumpster.
  6. Dusting &/or washing of all other items soiled by construction, i.e. Desks/shelves, counters, kitchen [sic] items etc.
  7. Report of any damages or deficiencies to site supervisor.
  8. Assist in the up-keep of main trade areas - Dust control, Safety & appearance.

9. Most of the work described in the above document was ultimately performed by Final Touch at the Lotto Centre. Some was performed by others. For instance, the cleaning of windows was done by another company, under sub-contract from the company that installed them. As well, Goodall testified that his employees did not remove dirt and construction debris to the dumpster. For the most part, construction debris had already been cleared away from the site by construction labourers employed by Ellis Don. Final Touch employees occasionally had to deal with small bits of mortar, drywall, and other rubbish created by the construction process. Where Final Touch employees were involved in cleaning up rubbish, they placed it in garbage bags which were removed to the dumpster by the construction labourers. Some of this rubbish was created by the cleaning process, for example, chrome protective wrapping and plastic carpet covering which was peeled away by Final Touch employees.

10. Goodall testified that as a rule, his employees are "the last trade on site". On this project, the building was turned over to its occupants gradually, with several floors at a time made ready for occupancy. The work done by Final Touch was completed before the turnover of the premises, except where deficiencies required it to do additional work after turnover. The overall time period over which the building was gradually occupied was more than two months in duration. Although it was intended that the work done by Final Touch be the final cleanup when all other work was completed, in fact, there were times when Final Touch employees had to re-clean certain areas because of further traffic in those areas. For instance, use of cleaned areas by architects, inspectors, telephone and computer installation people, government personnel and tradespersons working on deficiencies, resulted in further cleaning by Final Touch. Some of this further cleaning was performed when areas were already occupied, and some of it was done in as-yet unoccupied areas.

11. Ellis-Don supervisors notified Final Touch as to the scheduling of cleaning work in specific areas. Ellis Don had target dates for the turnover of floors, and Final Touch was expected to have its cleaning done before those dates. Once Final Touch finished its primary cleaning, it was inspected by Ellis Don's site supervisors. Proctor and Redfern, the consulting engineers, also

inspected the work on behalf of the owner, the government.

12. Goodall testified that labourers employed by Ellis Don performed some of the initial cleaning of the site, such as sweeping, vacuuming (using the shop-vac), and removal of equipment and debris after the other trades were finished. He stated that the labourers "take the clean-up to a degree" whereas his employees gave the site the "final touches". An example given of the division of cleanup work between the construction labourers and the employees of Final Touch was in relation to power boxes. Labourers raised portions of the concrete flooring and vacuumed and cleaned the wiring and other components underneath the floor. After the flooring and carpeting was re-assembled, Final Touch employees cleaned each UPS power box attached to the floors with specialty vacuums, brushes and anti-static treated cloths.

13. In performing the cleanup work, Final Touch used some general cleaning equipment, plus some more specialized machinery, such as a van-mounted carpet steam cleaner. Goodall testified that one characteristic which distinguished the type of work performed by his employees from the work performed by the construction labourers was the use of specialized cleaning solutions, which requires a certain level of knowledge in the field. He states that perhaps 30-35 different types of cleaning solutions were used on this site. It appears, however, that the employees of Final Touch did not receive special training with respect to these, except for on-the-job instruction from their forepersons.

14. Construction on the project started in 1989. Final Touch began its cleaning work in August of 1991. The certificate of substantial performance for the purposes of the Construction Lien Act was issued on February 19, 1992. The agreement between Ellis Don and the government states that the project is deemed substantially performed when it is "ready for use or is being used for the purpose intended" and capable of completion or correction at a specified maximum cost. The certificate of total performance was issued on December 22, 1992. Final Touch was on the project until near the end of April, 1992, although the hours worked in March and April were far fewer than in previous months. It appears that the months of greatest activity by Final Touch were November 1991 to January 1992. The hours worked by Final Touch employees over a period of about 8 months from August 1991 to April 1992 totalled more than two thousand hours.

15. Most of the work of Final Touch is in building maintenance, not related to construction activities. For its maintenance work, the company has a group of regular employees who work regular shifts. Some of these employees worked on the Lotto Centre project, and were supplemented by short-term employees hired for the duration of this project. Final Touch bid on the maintenance work for the Lotto Centre, but did not get the contract.

16. Most of the work done by Final Touch on this project was done at night, essentially because it was more convenient to co-ordinate the cleaning work around the other work. Some of the work, for instance, required sealing or waxing floors and thus was more conveniently done when no other people were using the premises.

17. Goodall from time to time went to the site to check on the work. On some occasions, he participated in tours of the project along with other sub-contractors, for purposes of inspection or co-ordination of the work of the sub-trades.

18. Douglas Page is a construction labourer who worked for Ellis Don on the Lotto Centre project from September 1989 to December 1991. He testified that it was his job to clean the construction site offices and lunchroom. He used brooms, dust pans, mops, cleaning solutions, rags, and vacuum cleaners. The premises which he cleaned were temporary premises, used during construction and in a relatively unfinished state.

## II

19. The provincial collective agreement requires employers bound to it to employ only members of the union to perform work covered by the agreement. Schedule "E" of that agreement, which sets out a list of work which is claimed by the union, includes the following paragraph:

Cleaning and clearing of all debris including wire brushing of windows, scraping of floors, removal of surplus material and cleaning of all debris in building and construction areas. The cleanup of all work areas.

20. It is the primary position of the Labourers that the work performed by Final Touch is construction industry work and is covered by the Labourers provincial collective agreement. In the alternative, the Labourers assert that even if the work is *not* construction industry work, it is covered by the collective agreement by virtue of Article 2.05, which states:

2.05 The Employer agrees to engage only subcontractors who are in contractual relations with the Union and/or its affiliated bargaining agents for all work covered by this Agreement, or work forming part of an ICI. General Contract except as provided in Schedule "D" hereof.

21. It is the position of the Labourers under this alternative argument that work outside of the construction industry, as long as it is part of an "I.C.I. General Contract", is subject to Article 2.05. With respect to the primary position, it was submitted that among the responsibilities of Ellis Don under its general contract to construct the Lotto Centre was the cleaning and maintenance of temporary facilities, and the final cleanup in anticipation of occupation. There is no material distinction between these two types of cleaning. Both are necessitated by and necessary to the completion of the construction work performed in connection with this project. Both are responsibilities that Ellis Don took on as part of this project.

22. Counsel urged the Board to look to the certificate of total completion, or at the least, the certificate of substantial performance, as a signpost as to when construction work ends on a project. On either measure, the work done by Final Touch is work on the construction side of the line.

23. The similarity of the work performed by Final Touch on a construction site and that performed as part of a maintenance contract should not be persuasive, since this can be true with respect to other types of contractors, who use the same tools for work on a maintenance project as on a construction project. There is nothing unique about the work functions performed by Final Touch employees. Some special skills or knowledge is required by the working forepersons on the job, but not by the casual labourers employed by Final Touch.

24. The Board was referred to the following cases: *Ming Sun Holdings Inc.*, [1987] OLRB Rep. Dec. 1585; *Nu-West Development Corporation Ltd.*, [1983] OLRB Rep. May 692; *PHI International Inc.*, [1980] OLRB Rep. Dec. 1789 and *Honeywell Limited*, [1993] OLRB Rep. Feb. 128.

25. Counsel for the company submits that the most relevant evidence from which the Board should draw its conclusions is the evidence of the nature of the work that was done by Final Touch. It is clear from this evidence that the work done by Final Touch on the Lotto Centre project is not substantially different from the work the company performs under its maintenance contracts. For instance, the hours worked by the Final Touch cleaners are similar to the type of

hours worked by cleaners under maintenance contract, and not similar to the hours worked by construction employees on this site.

26. The Board should not conclude that it is work in the construction industry simply because it is done pursuant to a contract with a general contractor, and near the time of completion of a construction project. The Board should not place any weight on the inclusion of the work done by Final Touch in the general contract. The persons drafting such a contract may have a certain understanding of what can be considered construction work, but their understanding is irrelevant to the Board's determinations, which are based on principles which have been developed through its caselaw.

27. Counsel stated that Ellis Don does not rely on the specialized knowledge of cleaning techniques and solvents referred to in Goodall's evidence, as distinguishing the work from construction work. Rather, the company relies on the overall nature of the work, which is in contrast to the nature of work undertaken by construction trades.

28. With respect to the alternative argument put forward by the Labourers, counsel disputes that the provincial collective agreement covers anything but work in the construction industry. The Preamble refers to employees of employers "engaged in construction". The recognition clause speaks of "construction labourers", and the "construction industry".

29. Further, Article 2.05 cannot be read literally to include anything but construction labourers work, because if it were, it would include *all* work covered by an ICI general contract, including, for instance, electrical work, plumbing work, etc. It must be read in context, and the context dictates that it covers work of construction labourers in the construction industry in Ontario.

### III

30. We are satisfied that the work which was performed by Final Touch is work in the construction industry. We accept, however, that the general intent of the agreement is to govern construction industry work. Essentially, we find ourselves unable, as urged by Ellis Don, to distinguish between the type of cleanup that construction labourers performed on this project, from the type of cleanup performed by the employees of Final Touch on the basis that the former is construction work whereas the latter is not.

31. All of the cleanup work, whether done by construction labourers or by employees of Final Touch, was on a construction project, while construction was still continuing. The work of both groups of employees came under the ultimate responsibility of Ellis Don, the general contractor. The work of both groups of employees overlapped in timing and complemented each other. As the cleanup work was the ultimate responsibility of Ellis Don, Ellis Don's supervisors were involved to some degree in overseeing the performance of the work. The degree of direct supervision was obviously much greater where the work was performed by Ellis Don employees. However, Ellis Don supervisors were responsible for giving instructions to Final Touch as to the timing of its work and for inspecting the work during its progress. It would be artificial to characterize some aspects of the cleanup work over which Ellis Don had responsibility as construction industry work, and other aspects of it as outside the construction industry.

32. The example of the cleaning of UPS power boxes illustrates the artificiality of making a distinction between the work performed by construction labourers and the work performed by Final Touch employees. Rather than suggesting a difference between cleaning which is part of construction work and cleaning which is not construction work, as submitted by counsel for Ellis

Don, the example shows how all the cleaning work done under the general contract was part of a continuum of work, for the same general purpose.

33. We do not find much significance in the fact that the nature of the work performed by

Final Touch employees on this project is similar to the type of work which they perform under maintenance cleaning contracts. There may well be many similarities between work performed in the construction industry, and maintenance work. In *The Master Insulators' Association of Ontario, Inc.*, [1980] OLRB Rep. Oct. 1477, the Board found on the evidence that the same tools, materials and skills were used by insulators whether the work was new construction or what was found by the Board to be maintenance work. Instead of focusing on the nature of the work itself, the Board applied a purposive approach in defining the distinction between maintenance and repair (which is construction work), stating:

.....Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work...

34. We prefer to apply a similar purposive approach to the case before us. There is no dispute that the overall project is a construction project, whose purpose was the erection of a building for the government of Ontario. Although the work of Final Touch was not directly related to the physical erection of the building, it was necessitated by it, just as, for instance, the erection and maintenance of site offices was necessitated by the project of erecting the building. Further, the final cleanup of the effects of construction is a necessary aspect of making the building ready for use as intended.

35. Maintenance cleaning can also be seen as essential in order for a building to be used for the purpose for which it is intended. However, as stated in *The Master Insulators' Association of Ontario, Inc.*, *supra*, maintenance work is work that assists in preserving the functioning of a system. Here, the building had not yet been used. The cleaning performed in this case was not for the purpose of preserving the functioning of the building, but was for the purpose of enabling the owner to begin using the building after its erection.

36. In coming to our conclusions above, we find it significant that the work performed by Final Touch was included in the general contract. We agree with the general proposition that the Board is not bound by an agreement by the parties to characterize work as "construction" for the purposes of the Act, where it is clearly not. However, the inclusion of the cleaning work in the general contract is an indication of the integration of this work into the general obligations undertaken by Ellis Don to construct the Lotto Centre. Ellis Don would not have undertaken an obligation to have maintenance cleaning performed after the building was constructed, because clearly, this has nothing to do with its obligation to construct the building. It did accept the obligation to have *this* cleaning work performed, because this cleaning work was related to the construction.

37. We do not view it as desirable to use the certificate of substantial performance or of total performance as a complete measure of whether work should be characterized as construction work. However, to the extent that these certificates represent indicators as to the progress of construction work, they are useful in order to place the disputed work in context. It is thus also relevant in the case before us that the work of Final Touch was for the most part completed prior to the issuance of the certificate of substantial Performance. It lends support to the characterization of this cleaning work as part of the overall construction work undertaken. From the evidence, it appears that work which was performed after February 19, 1992 was "deficiency" work. This was how Goodall described it, and from the evidence, it appears analogous to the type of deficiency work that other sub-contractors might engage in after the date of substantial performance.

38. Having found the work that was sub-contracted to Final Touch to be work in



the construction industry, we are also satisfied that it is covered by the terms of this agreement, in particular, Schedule "E". We thus find that the work performed by Final Touch is covered by the provincial collective agreement between the Labourers and Ellis Don and that Ellis Don is in violation of Article 2.05 by failing to subcontract the work to a company in contractual relations with the Labourers.

39. In light of our findings, we find it unnecessary to rule on the alternative arguments relied on by the Labourers with respect to the interpretation of Article 2.05 and its application to work outside of the construction industry.

40. We remit the matter back to the parties to attempt to resolve the issue of remedy and, if appropriate, quantum of damages and remain seized of these issues failing their agreement.

**DECISION OF BOARD MEMBER F. B. REAUME; July 29, 1993**

1. I dissent from the majority decision.
2. It is not uncommon in the industry for owner/clients to include the Final Clean-up in the General contract for their own reasons. No significance other than owner/client preference, can be attributed to this practice.
3. Construction clean-up or housekeeping is clearly distinguishable from the final clean-up required for human occupancy whether it is for workplace or for residence. Construction clean-up is concerned with basic removal of waste material, lunch room debris, and general debris, with emphasis on workplace health and safety.
4. The final clean-up, is concerned with the "spic and span" look required for human occupancy and requires more attention to detail. There is no particular emphasis on the safety of personnel in the area. There is a clearly distinguishable line between construction clean-up and final clean-up.
5. Normally the final clean-up would commence on or about the time of substantial completion and be completed by the final completion date. Once an area is given its final clean-up that area would normally be locked up until occupancy. In this case the owner required temporary use of some of these areas before final completion and requested further clean-ups after they were finished. While I do acknowledge that some of the work performed by Final Touch could be construed as construction clean-up, the final clean-up is not construction clean-up work.
6. There is no difference in the final clean-up of a newly completed building or the clean-up required to reactivate a vacant building for use. The work is clearly in contrast to the work of construction trades clean-up and is best classified as building maintenance which is performed in the absence of construction trade personnel.
7. This decision will encourage owners to do their own final clean-up or to utilize the services of a non-affiliated general contractor which could cause the loss of employment for union members. Furthermore this decision could have serious effects on the tendering process and the ability of the unionized contractor to compete with those contractors not so restricted.
8. With respect to the union's alternate argument, I concur with the argument that Article 2.05 cannot be read literally to include anything but construction labourers' work (see para 29).

9. For all of the above reasons, I would dismiss the grievance.