

## ONTARIO LABOUR RELATIONS BOARD

**2203-02-M Toronto Construction Association General Contractors' Section,** Applicant v. Universal Workers Union, LIUNA, Local 183; Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America; Labourers' International Union of North America, Local 506; Toronto-Central Ontario Building & Construction Trades Council; Responding Parties v. Formwork Council of Ontario; Ontario Formwork Association; Metropolitan Toronto Apartment Builders Association; International Union of Operating Engineers, Local 793; Intervenors.

**3014-02-G Canform Structures Limited,** Applicant v. Universal Workers Union, LIUNA, Local 183, Responding Party v. Toronto-Central Ontario Building & Construction Trades Council, Intervenor.

**BEFORE:** Harry Freedman, Vice-Chair.

**APPEARANCES:** Walter Thornton and Brian Foote for the applicants; L. A. Richmond, M. Lewis, C. Debicki and R. Lotitto for Universal Workers Union, LIUNA, Local 183 and the Formwork Council of Ontario; D. Wray and J. Slaughter for Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America; Daniel Randazzo, Carmen Principato and Joe Inacio for Labourers' International Union of North America, Local 506; Laurence Arnold and Jay Peterson for Toronto-Central Ontario Building and Construction Trades Council; Carl Peterson and Richard Lyall for Ontario Formwork Association and Metropolitan Toronto Apartment Builders Association; Sean McFarling, Peter Dimitruk and Ken Lew for International Union of Operating Engineers, Local 793

**DECISION OF THE BOARD;** December 20, 2004

1. This is a sector dispute filed under section 166 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as am. (the "Act") (Board File No. 2203-02-M) arising out of the construction of the Woodsworth College Residence of the University of Toronto (the "Project") and a referral of a grievance to the Board for determination under section 133 of the Act (Board File No. 3014-02-G) filed by Canform Structures Limited ("Canform"). The grievance itself had been filed earlier against Canform by the Universal Workers Union, LIUNA, Local 183 ("Local 183"). At the commencement of the hearing of these two matters, the parties agreed that the grievance referral in Board File No. 3014-02-G be adjourned *sine die* pending a determination of the sector dispute.

2. The Project involves the construction of a 17 storey reinforced concrete structure with a four level podium and one level below grade. The building provides housing for students enrolled at the University of Toronto in Woodsworth College. The building contains one bedroom suites for use by the resident Dons, and a number of four, five and six bedroom suites that the student residents occupy. In addition to the 338 bedrooms (8 one bedroom suites, 24 four

bedroom suites, 6 five bedroom suites and 34 six bedroom suites), the basement area of the building has four lecture halls, five meeting or break out rooms, washrooms and a storage area that can be converted into a fifth lecture hall. There is some retail space, a student lounge and common areas, a laundry area, office space and a security desk and one classroom on the main floor of the building.

3. The Toronto Construction Association General Contractors' Section (the "applicant"); the Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America ("Local 27"); the Labourers' International Union of North America, Local 506 ("Local 506") and the Toronto-Central Ontario Building and Construction Trades Council ("Trades Council") all assert that the Project comes within the industrial, commercial and institutional sector of the construction industry. Local 183; the Formwork Council of Ontario ("Formwork Council"); the Ontario Formwork Association ("OFA"); the Metropolitan Toronto Apartment Builders Association ("MTABA"); and the International Union of Operating Engineers, Local 793 ("Local 793") claim that the Project is residential and therefore falls into the residential sector of the construction industry.

4. The sector dispute came to a head when Canform, the concrete forming subcontractor on the Project, did not assign members of Local 183 to do the concrete forming work under the collective agreement between the Formwork Council and the OFA ("Formwork Agreement") by which Canform is bound. Local 183 filed a grievance against Canform alleging it had failed to apply the terms and provisions of the Formwork Agreement to the concrete forming construction work being done on the Project that Canform referred to the Board for determination. Canform and the general contractor on the Project (Aecon Building) understood that the Project came within the industrial, commercial and institutional ("ICI") sector and therefore the single trade ICI collective agreements by which Canform was also bound were applicable to the Project rather than the Formwork Agreement.

5. The applicant seeks to have the Board, when determining sector disputes, establish a clear, bright line test that can be applied by the affected parties to avoid the uncertainty that arises when these matters get litigated. It submitted that the Board had been developing an approach to sector determinations that focussed on the end use of the construction in issue. Parties appearing in those cases did not call evidence relating to work characteristics but rather based their positions on end use. That changed, the applicant submitted, with the Board's decision in *Corporation of the City of Sault Ste. Marie*, [2002] OLRB Rep. Sept./Oct. 870. The applicant argued that moving away from the easily understood and clear end use test and requiring parties to lead evidence about work characteristics would result in more litigation. The applicant suggested that the Board would best serve the interests of the parties by returning to the end use analysis that had been used in decisions like *Dufferin Construction Company*, [2001] OLRB Rep. March/April 323; *Duntri Construction Ltd.*, [1996] OLRB Rep. 399; *H. Kerr Construction Ltd.*, [1999] OLRB Rep. March/April 196; and *Modern Mechanical Contracting Ltd.*, [1999] OLRB Rep. July/Aug. 655.

6. Local 183, the Formwork Council, Local 793, the OFA and the MTABA urge the Board to examine the labour relations consensus that has been built up over many years with respect to this kind of work.

7. The Board in *Corporation of the City of Sault Ste. Marie*, *supra*, reviewed many of the Board's previous sector decisions and provided an analysis that need not be repeated. Suffice it to say that the Board, in a number of decisions, had adopted an "end use" analysis to the exclusion of any other consideration. In *Corporation of the City of Sault Ste. Marie*, the Board

pointed out that determining the sector into which a specific construction project came required consideration of more than simply the end use of the construction. The Board wrote at page 882:

In the end, what this means is that there is no single test which can be applied to determine sector, nor is there a descending order of factors which directs the Board to look at the “end-use” first and only later at work characteristics or bargaining patterns as a means of resolving doubtful cases. It is necessary to examine all the relevant factors. In most cases all of them will be present to some extent (or one will and the others will be neutral). It is where they do not point in the same direction that the Board must determine which sector the work falls in, having regard to both of the statutory definition of sector and the statutory purpose of sectoral divisions.

While it would always be preferable to have an easily understood, clear boundary between sectors of the construction industry, section 126(1) of the Act defines the term “sector” to mean “a division of the construction industry as determined by work characteristics”. As the Board explained in the *Corporation of the City of Sault Ste. Marie* decision, the end use of the construction, while a relevant consideration, cannot be the only consideration in making a sector determination, as the Act requires the Board to have regard to the “work characteristics” of the project. Thus, it is clear that work characteristics, together with bargaining patterns and the end use of the construction must be examined to make a sector determination.

8. The work characteristics associated with the construction of the Project were not, for the most part, distinctively “residential” or “institutional”. Those work characteristics, or the manner in which work on the Project is carried out, in order to have relevance to the sector determination, must relate to all of the trades performing work on the Project. The parties were unable to point to any particular or peculiar work characteristics that would point to either the residential or the ICI sector. In other words, it appeared to me that the work characteristics of the Project did not provide a significant distinction between residential and institutional or commercial construction.

9. The one area in which the parties contending that the Project came within the residential sector submitted there were distinctive work characteristics was in respect of concrete forming work. They claimed that concrete forming construction is carried on differently in the residential sector when compared to how forming work is typically performed in the ICI sector. They submitted the Board should consider how the trades themselves treated student housing, both in relation to concrete forming and other construction work associated with the Project. They referred to the patterns of collective bargaining established through the OFA collective agreement with the Formwork Council, the MTABA collective agreement with Local 183, and earlier collective agreements with the Building Trades Council.

10. Bargaining patterns are clearly an important element of work characteristics. Indeed, given that the concept of sector in the Act relates to labour relations, the manner in which trade unions and employers have characterized the nature of the work they undertake must have considerable bearing on the determination. Those collective bargaining relationships demonstrate that certain parties have, through their collective agreements, determined the sector into which particular projects come.

11. The OFA collective agreement, in its appendix relating to Labourers’ Local 506, excludes work coming within the scope of the MTABA collective agreement. The MTABA collective agreement, by virtue of section 1.01, applies to the construction of “apartment buildings”. Section 1.02 (i) of that collective agreement deems “all Public Housing, Co-

Operatives, Senior Citizens' and Student Housing" to be an apartment building for purposes of that collective agreement. That same approach to student housing had been in place in the early 1980's in the collective agreement between the Building Trades Council and the MTABA, as pointed out in *West York Construction Ltd.*, [1983] OLRB Rep. Dec. 2132. Thus, there is some basis for arguing that the trades have, in Board Area 8 in any event, defined the residential sector of the construction industry as including student housing.

12. Reference was also made to the "Peace Treaty" agreement between Local 27 and Local 183 relating to concrete forming construction under which those two parties, among others, agreed that concrete forming work on certain types of projects would be performed by members of Local 183. Those projects included student residences. It was therefore suggested that Local 27 had accepted concrete forming work on student residences would be carried out by members of Local 183, consistent with MTABA collective agreement, and evidenced an understanding that such projects come within the residential sector.

13. Nevertheless, as the Board had noted in *Armbro Materials and Construction Limited*, [1987] OLRB Rep. July 948, a local area practice among some trades with respect to the sector in which certain work falls is not material to a sector determination. The Board commented at page 952:

11. The concepts of area practice and geographic practice, which have been referred to before, find no basis in section 117(e) [now 126]. Similarly, there is no indication in either section 117(e) or section 150 [now 166] that the Legislature intended to introduce the variable of "area practice" or "geographic area" into sectoral determinations. If such had been the case, the Legislature, in our opinion, would surely have included the words "area practice and geographic area" after the word characteristics in section 117(e). As referred to earlier, the Legislature has recognized differences based on geography in the certification and accreditation provisions in the construction industry by specific statutory language.

12. In *Steen Contractors Limited*, the Board appeared to indicate that different trades could give rise to different sectoral determinations. There is nothing in sections 117(e) and 150 which indicates that the Legislature intended to fractionate sectoral determinations in this way. In determining appropriate geographic areas under the certification provisions of the Act, the Board contemplated (see, for example, *M. Sule Construction Ltd.*, [1962] OLRB Rep. Nov. 251 and *Welcon Construction Limited*, [1962] OLRB Rep. Dec. 379) and rejected arguments that different trades whose local trade unions had different geographic jurisdictions ought to have different geographic areas for each trade. There exists one set and not several sets of geographic areas in Ontario. The one set of geographic areas applies equally to all trades. In our opinion, by analogy, labour relations would best be served by not making distinctions among the trades in sectoral determinations.

This view was reinforced by the Board in *Corporation of the City of Sault Ste. Marie*, *supra* at pages 892:

The Board must inevitably give very little, if any, weight to local bargaining patterns. ...if the Board is to deal meaningfully with bargaining patterns in defining the boundaries of the ICI sector (if not all sectors) it is necessary to have evidence of bargaining patterns across the province....

In determining sector issues, the Board's decision will have a wider impact than many of its other decisions. The Act defines sector without geographic limitation, and

indeed defines it in a province wide sense in the ICI sector. The power of the Board to determine sector was introduced into the Act as part of the amendments to the Act which created province-wide bargaining in the ICI sector. Just as the definition of sector (or at least the ICI sector) should not vary across the province, it should not vary depending on who the parties are.

14. The collective bargaining relationships relied on by the parties claiming that the Project was in the residential sector related principally to Board Area 8. While the OFA collective agreement is province wide in scope, it does not, as Local 506 pointed out, distinguish between sectors, as it is a multi-sector collective agreement applicable to the ICI sector as well as other sectors of the construction industry. More importantly, there was nothing to suggest that any of the other trades involved in the Project had treated student residences as coming within the residential sector, at least since the early 1980's. On the other hand, Local 27 demonstrated that the carpentry portion of the construction of student residences throughout the province, except for London and Toronto, had been carried out under the Carpenters' ICI provincial agreement. Furthermore, it is open to the Board to infer that the other trades involved in such construction outside of Board Area 8 would have treated those projects as coming within the ICI sector since residential construction outside of Board Area 8 is often carried out by contractors and subcontractors who are not bound by any collective agreement. I also note that the Trades Council asserted that many of its affiliates treated the construction of student residences in Board Area 8 as being in the ICI sector. In other words, to the extent that the construction of student residences outside of Board Area 8 was undertaken by contractors and subcontractors bound by collective agreements, the work on those projects was treated as coming within the scope of the applicable ICI collective agreements. Thus, it seems to me that collective bargaining relationships, but for those relationships relating to formwork construction in the Toronto and London areas of the province, tend to indicate that the construction work on the Project comes within the ICI sector of the construction industry.

15. The specific work characteristics of the Project did not distinguish between residential and institutional or commercial construction. The relevant collective bargaining patterns, in Board Area 8, for concrete forming work suggested the construction work in issue was in the residential sector while the balance of the trades involved in the Project and comparable projects in most other parts of the province pointed to such work coming within the ICI sector.

16. Although the applicant suggested that focusing on the end use of the construction in issue would provide greater certainty, the parties disagreed over whether the end use of the Project was residential or institutional.

17. The Project is a student residence built for students enrolled in Woodsworth College at the University of Toronto. Whether it has an "institutional" or "residential" end use depends, in my view, on characterizing its principal or fundamental purpose within the context of the University.

18. There can be no doubt that the Project provides housing for its occupants. If the Project were developed by the University of Toronto to be simply a building containing apartment units that were rented or sold with the only relationship between the occupants and the University being one of landlord and tenant or vendor and purchaser, then the Project would, in my view, come within the residential sector. In other words, merely because the University, as an educational institution, is the owner of the Project or is responsible for its development is not determinative of its end use. It is therefore imperative to examine the role, if any, the Project will have within the University.

19. The Project is intended to provide students enrolled in Woodsworth College who wish to live in residence as an element of their university experience with suitable accommodation. Unlike the building constructed for the Hospital for Sick Children dealt with in *West York Construction Ltd., supra*, occupancy of all of the residential units in the Project is limited to students enrolled in Woodsworth College and the residence Dons. The Board in the *West York Construction Ltd.*, noted at page 2134:

...the apartments are to be leased through A.E. LePage acting as property manager and rental agent. Preference for the apartments is to be given to medical doctors serving their periods of residency at the Hospital, but any apartments not taken up by these doctors are to be leased to the general public. ...any doctors who do occupy the apartments will be charged the same rent as the general public.

The Board determined that the project in issue in *West York Construction Ltd.* came within the residential sector of the construction industry. The Board, however, did note at page 2140:

We surmise (although there was no direct evidence on point) that at one time the traditional form of university residences in the Toronto area were considered as institutional buildings and hence constructed as ICI projects. ...

20. It is apparent that the Project does far more than merely provide housing for its occupants. The University of Toronto described the Project's functions in the Woodsworth College Student Residence Users' Committee Report:

The College believes that it can best fulfill its academic plan, serve its changing student body, and strengthen its sense of community by completing the "College Precinct" with an appropriate residence structure.

The new residence will house a minimum of 348 full-time students and 9 dons in suite style accommodations. The residence will house a mix of first-year and upper-year students. First-year students will be primarily housed in the 30 six-bedroom suites to encourage the interaction usually found in a dormitory style residence. Upper-year students would normally be housed in the 42 four-person suites....

Students will be grouped into houses of no more than 45 persons in order to create smaller units to which students can relate. Common rooms, small study rooms, and laundry rooms will be distributed throughout the residence. Four short-stay rooms, which can be rented or which may be used to temporarily house students in difficulty, are included in the space program, as are offices for administrative staff.

That report goes on in some further detail to describe the design of the building and the suites. The Project not only provides housing for students, but also is intended to be an integral part of the students' university experience. The general principles applied by the committee emphasized the importance of interaction among the students within the residence and between the residence and non-residence students to provide them with a richer educational experience. Common rooms, study rooms, space to accommodate student groups together with having six, five and four bedroom suites so that students will interact with one another are all elements of the Project suggesting that its function is more than housing. The report states, after describing the "house system" within the college residence:

Within the suites, each student should be accommodated in a single room. First-year students would primarily be housed in six-person suites *to encourage the interaction*

*usually found in a dormitory style residence.* Upper-year students would normally be housed in four-person suites.... Whenever the building design allows, both suite types should exist on each floor of the residence.

The suites should be designed to promote interaction between the students living in them. Each suite should contain kitchen facilities...and sitting and eating areas for four to six people. The eating area and sitting area should be distinct and integrated....

The Committee was aware that the style of accommodation could cause the suites to become “introspective” and that students might simply close the door and not mix with their peers in the house. Thus, the committee recommends the careful placement of large common rooms throughout the residence, as well as of other central facilities, such as laundry areas, to foster interaction by acting as “social conductors”. Common rooms should hold between 20-30 students and should be used on a functional basis (e.g., one for television, one for music, etc. to promote interaction rather than assigned to a particular house. [emphasis added]

21. In addition to the actual living units, the Project also includes lecture halls, meeting rooms, some office space and a classroom. The physical design of the Project suggests that its principal purpose is more closely related to the function of the University as an educational institution rather than simply to provide housing for students enrolled at the University. In addition to the physical characteristics of the Project, there are other elements to consider. Each of the floors will have a Don (who occupies the one bedroom suites on the floor) who, according to the University’s Student Housing website, “is responsible for assisting and advising residence students, and developing a residence community.” All of the students in the Woodsworth residence are also subject to a comprehensive code of conduct governing their behaviour.

22. The University of Toronto, in its Statement of Institutional Purpose, outlines briefly the purpose and objectives of the University and describes its approach to undergraduate education in the following way:

Undergraduates are taught in the Faculty of Arts and Science and in a number of professional faculties. Students in Arts and Science are registered in a college. They can take classes in their college and use college libraries; some students live in their college; for many their college is the locus of social and sporting activities. For many years, there were four colleges on the St. George campus; University College and those of the federated universities, Victoria, St. Michael’s and Trinity. In the 1960’s, the University affirmed its commitment to the college system on the St. George campus by founding Innis, New and Woodsworth colleges to accommodate the increased number of students....

*College life is experienced most fully when students live in residence. The University would like to make it possible for more undergraduates, in Arts and Science, and from the professional faculties, to live in residence.* [emphasis added]

I am persuaded that the Project is an integral element of the University’s institutional academic program. That is, the Project is not just an apartment building constructed to provide housing for students attending the University of Toronto. The function of the Project is inextricably related to the academic objectives of the University. Thus, I am of the view that end use of the Project is principally institutional.

23. In the result, having regard to the work characteristics associated with the Project, the relevant collective bargaining relationships and the end use of the Project, the Board declares, pursuant to section 166 of the Act, that the construction work carried on at the Project comes within the industrial, commercial and institutional sector of the construction industry.

24. In view of the Board's determination of the sector dispute, it does not appear that it is necessary for the grievance referral in Board File No. 3014-02-G to proceed. Therefore, unless a party requests that the grievance referral Board File No. 3014-02-G be listed for hearing within 30 days of the date of this decision, that matter will be deemed dismissed without further notice to the parties.

---

“Harry Freedman”  
for the Board