# ONTARIO LABOUR RELATIONS BOARD

**0765-12-JD** Labourers' International Union of North America, Local 527, Applicant v. **EllisDon Corporation,** OSC Constructors, and International Union of Painters and Allied Trades, Local Union 1891, Responding Parties.

**1455-12-JD** Labourers' International Union of North America, Local 527, Applicant v. **EllisDon Corporation,** Delsan-Aim Demolition Services, and International Union of Painters and Allied Trades, Local Union 1891, Responding Parties.

**1460-12-JD** Labourers' International Union of North America, Local 527, Applicant v. **EllisDon Corporation,** Delsan-Aim Demolition Services, and International Union of Painters and Allied Trades, Local Union 1891, Responding Parties.

**BEFORE:** Lee Shouldice, Vice-Chair.

**APPEARANCES:** James Robbins and Luigi Carrozzi for Labourers' International Union of North America, Local 527; Chris Fiore and Tom Howell for EllisDon Corporation and OSC Constructors; Melissa Kronick, Meg Atkinson and Edgar Pacheco for International Union of Painters and Allied Trades, Local Union 1891; no one appeared for Delsan-Aim Demolition Services.

**DECISION OF THE BOARD:** December 10, 2013

## I. Introduction

1. These proceedings are three work jurisdiction disputes in the construction industry filed with the Board pursuant to section 99 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act"). One day of consultation was held by the Board on September 10, 2013 to hear the submissions of the parties regarding the merits of these applications.

2. I had carefully reviewed the briefs filed by the parties prior to the commencement of the consultation. A number of the factors typically considered by the Board to resolve jurisdictional disputes were dealt with sufficiently in the briefs filed by the parties. Accordingly, at the outset of the consultation the parties were advised that they did not need to address the onus of proof, the factor of safety, skills and training, and the question of the identity of the employer. Counsel were requested to focus their submissions upon the factors of collective agreements, area practice, employer practice, and economy and efficiency.

3. The parties were advised that the Board would devote no more than one day of consultation to these proceedings. Accordingly, the parties were advised at the outset of

the consultation that their submissions would be limited to a total of one hour and 45 minutes each. As the International Union of Painters and Allied Trades, Local Union 1891 ("Local 1891") is attempting to overturn these assignments of work, its counsel was invited to proceed first. After the other parties had completed their submissions, counsel for Local 1891 was provided with the time remaining from her one hour and 45 minutes to reply to the argument made by opposing counsel.



## II. The Work in Dispute

4. These applications arise from the subcontracting of certain asbestos abatement work by EllisDon Corporation ("EllisDon") at three construction projects in the city of Ottawa, Ontario. The three projects were located in the following buildings, and the work in dispute was subcontracted by EllisDon to the entity identified:

i) the West Block on Parliament Hill (hereinafter "Parliament Windows"). EllisDon subcontracted the performance of the work in dispute to OSC Constructors ULC (hereinafter "OSC");

ii) the Bank of Montreal on Wellington Street (hereinafter the "BMO Project"). EllisDon subcontracted the performance of the work in dispute to Delsan-Aim Environmental Demolition Services (hereinafter "Delsan"); and

iii) the West Block on Parliament Hill (hereinafter "Parliament Ceilings"). EllisDon subcontracted the performance of the work in dispute to Delsan.

These three projects, and the assignment of the work in dispute on the projects, are described in greater detail below.

5. Local 1891 challenged each work assignment by filing a grievance against EllisDon. Labourers' International Union of North America, Local 527 ("Local 527") intervened in those grievance proceedings and undertook to file these work assignment complaints. The parties agreed to have the grievance referrals adjourned *sine die* pending the determination of these three complaints.

6. As the work in dispute is common to all three projects referred to above, the parties agreed that these complaints would be dealt with together. The work in dispute claimed by Local 1891 was defined by a differently-constituted panel of the Board in its decision dated March 20, 2013 as follows (with a minor typographical error corrected):

> The abatement, removal and disposal of materials containing asbestos or other hazardous substances at EllisDon projects at the Bank of Montreal on 144 Wellington Street and at the West Block building on Parliament Hill in Ottawa. The abatement, removal and disposal work claimed by Local 1891 also includes

> the construction of the containment and disposal areas but does not include the general demolition work carried out by the applicant's members.

The parties agree that the work in dispute was performed in the industrial, commercial and institutional sector of the construction industry.



## III. Factors Considered by the Board

7. The Board has previously identified a number of factors that it normally considers in order to resolve work assignment disputes. The factors typically considered by the Board include the following:

(a) collective agreements;
(b) agreements between the competing unions;
(c) employer practice;
(d) area practice;
(e) safety, skills and training; and
(f) economy and efficiency.

The above-noted factors are not exhaustive; nor are they necessarily given equal weight. In addition, in any given proceeding other factors or considerations may be taken into account by the Board in reaching its decision.

## IV. Onus

8. The onus of establishing that the work assignment was incorrectly made lies upon the party or parties that makes that assertion. The standard of proof that must be established is that described by the Board in *KEW Steel Fabricators Limited*, 2006 CanLII 2118. The party or parties challenging the work assignment must demonstrate, on a balance of probabilities, that the work in dispute should have been assigned to its members, having regard to all of the relevant factors.

## V. The Projects

### *(a) Board File No. 0765-12-JD - Parliament Windows*

9. The work in dispute in this proceeding is the removal of caulking containing asbestos around the windows in the West Block building on Parliament Hill, including the construction of the containment and disposal areas.

10. The context within which the work in dispute at the Parliament Windows project was assigned to members of Local 527 is of significance. Local 1891 states that EllisDon originally awarded the performance of the work in dispute at the Parliament Windows project to Inbex Environmental Services Inc. ("Inbex"), a subcontractor that is bound only to Local 1891. Local 1891 states that the Parliament Windows work consisted of lead windowsill abatement and window putty abatement, and was part of a

larger package of work awarded to Inbex. EllisDon states that the issue of whether the window abatement work was included within the scope of the contract it had with Inbex was the subject of debate between it and Inbex.

11. EllisDon and Inbex appear to have entered into the above-noted contract during May, 2011. It appears that on or about September 27, 2011, EllisDon subcontracted the performance of the work in dispute at the Parliament Windows work to OSC, which is contractually bound only to Local 527. The Parliament Windows work was thereafter completed by a crew of construction labourers. There is no dispute that the Parliament Windows work involved the removal of Type 2 asbestos.

12. EllisDon and OSC note that the scope of work undertaken by OSC at the Parliament Buildings relating to this project included more than the asbestos removal work referred to above. OSC was responsible for dismantling and/or demolishing the very windows from which the contaminated putty was being removed. It was also responsible for a number of other tasks, including removal of the mechanical and electrical systems, demolition of structural steel, concrete slabs and foundations, and the disassembly, removal and disposal of wall assemblies. I will consider the significance of the performance of these work tasks later in this decision.

*(b) Board File No. 1460-12-JD – Parliament Ceilings*

13. The work in dispute in this proceeding is the abatement and removal of asbestos contaminated ceilings, light fixtures (with related PCB ballasts), ACM pipe insulation and amosite fire spray, including the construction of the containment and disposal areas for a portion of the work at the West Block building on Parliament Hill.

14. The Parliament Ceilings work was originally subcontracted by EllisDon to Inbex. The Parliament Ceilings work was subsequently removed from the Inbex contract by EllisDon and awarded to Delsan. Delsan is a contractor that is bound only to Local 527. Delsan performed the work in dispute with members of Local 527 until in or about June, 2012. At that time, EllisDon subcontracted the Parliament Ceilings work to Inbex, which performed the work in dispute using a crew of members of Local 1891. The Parliament Ceilings work was completed in August, 2012.

15. There is no dispute that the Parliament Ceilings work involved the removal of Type 3 asbestos, which is the most dangerous form of asbestos work.

*(c) Board File No. 1455-12-JD – BMO Project*

16. The final instance of the performance of the work in dispute occurred at the former Bank of Montreal building located at 144 Wellington Street. The work involved the abatement and removal of asbestos contaminated material, including Type 3 asbestos. The work at the BMO Project was subcontracted by EllisDon to Delsan in two separate subcontracts. Each contract included both an asbestos removal and demolition component. Delsan assigned the performance of the work to members of Local 527.

17. The first subcontract was executed in full by the parties on August 7, 2012. The scope of work that was included within the first subcontract was described as follows:

> "Subcontract Work": Supply all labour, material and equipment necessary to the abatement and removal of hazardous materials and selective demolition and removal of all non-heritage items noted to be removed, demolished, dismantled or salvaged in the contract documents as per scope of work attached.

18. There appears to be no dispute that the second subcontract was executed in full by the parties on August 28, 2012. The scope of work that was included within the second subcontract was described as follows:

> "Subcontract Work": Supply all labour, material and equipment necessary to complete all Temporary Exiting Abatement work at the Booth Building, 165 Sparks Street as per the scope of work below.

Included within a schedule which elaborated upon the scope of work was the demolition of a plaster ceiling, once decontamination had commenced.

## VI. Asbestos Removal, Abatement and Disposal

19. As noted above, the work in dispute involved the removal, abatement and disposal of asbestos, including the construction of the containment and disposal areas. There is no disagreement that the work in dispute required the removal of both Type 2 and Type 3 asbestos. The proper procedure for the removal of Type 2 and Type 3 asbestos is different, highlighting the highly dangerous nature of Type 3 asbestos.

20. Asbestos removal at construction projects located in Ontario is governed by Ontario Regulation 278/05 (Designated Substance – Asbestos on Construction Projects and in Buildings and Repair Operations) made under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended. Elaborate procedures are established by the regulation to ensure that asbestos fibres are not released into the atmosphere.

21. The parties agree that on the two jobs that included Type 3 asbestos abatement, removal and disposal (the Parliament Ceilings project and the BMO Project), the following procedures were performed:

> (a) a work area was set up. This involved setting up three chambers – the clean area or change room; the shower room; the dirty room – separate from the work area or containment area.
>
> (b) the walls around the work area were made of 2 x 4 pieces of wood from floor to ceiling that were covered by polyethylene sheets. The work area was perfectly sealed.
>
> (c) the work area was accessed through a doorway that was made by using two pieces of overlapping polyethylene sheets. Within the work area,

there was a negative air pressure so that the asbestos was safely contained within the work area. This was created through the use of a negative air machine in the containment area.

(d) a chamber beside the containment area was built, called the "dirty room" or the "equipment room". When workers left the work area, they were required to leave all equipment in this room, including hard hats, boots and tools. They also were required to remove their tyvek suits and dispose of them in that room.

(e) a room was built beside the dirty room called the shower chamber. In this chamber, the workers were required to take a full shower to decontaminate from the asbestos removal.

(f) a further chamber, the outermost one, was called the clean room/change room, where workers left their regular clothing at the beginning of the shift and changed back at the end of the shift, or when breaks were taken.

22. On the job that involved only the abatement, removal and disposal of Type 2 asbestos (the Parliament Windows project), the following procedure was performed:

(a) a chamber system was established, but not quite as elaborate a system as required for Type 3 removal. It required two chambers – a containment area and a dirty room.

(b) the containment area was described as above, and the dirty room contained a sink for washing up, rather than a separate shower chamber.

Workers are still required to wear disposable tyvek suits and respirators to complete Type 2 asbestos abatement work. Removing window putty or caulking containing asbestos and hazardous materials requires the use of basic hand tools such as hook knives, hammers, chisels and scrapers.

23. On all three projects the asbestos waste was disposed of by using a special double bagging system, which passed through the various chambers. Plastic bags containing asbestos waste were damp-wiped or HEPA vacuumed in a cleaning area. The bags were then put into another plastic bag, and passed to a storage area where they were placed into an airlock room.

## VII. The Merits

### *(a) Collective Agreements*

24. It is important at the outset to identify the various collective agreement relationships in effect in these proceedings. Of equal importance for the purpose of these proceedings is to identify the effective dates of those collective agreement obligations.

25. Ellis Don is bound to both the Provincial Collective Agreement between the Ontario Painting Contractors Association, Acoustical Association of Ontario, and Interior Systems Contractors Association of Ontario, and the International Union of Painters and Allied Traces and the Ontario Council of the International Union of Painters and Allied Trades, effective May 1, 2010 to April 30, 2013 (the "Painters ICI Agreement") and the Provincial Collective Agreement between the Construction Labour Relations Association of Ontario; Ontario Masonry Contractors Association; Industrial Contractors Association of Canada; Waterproofing Contractors Association of Ontario; Cement Finishing Labour Relations Association and Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council, on behalf of its affiliated Local Unions 183, 247, 493, 506, 527, 607, 625, 837, 1036, 1059, 1081 and 1089 (the "Labourers ICI Agreement").

26. Ellis Don became bound to the Painters ICI Agreement by way of a decision of the Board dated November 14, 2011. That decision granted to the International Union of Painters and Allied Trades and the Ontario Council of the International Union of Painters and Allied Trades ("the Painters") ICI sector bargaining rights for journeymen painters and painters' apprentices employed by EllisDon.

27. EllisDon has applied to the Ontario Superior Court for judicial review of the above-noted decision. It does not appear that the application for judicial review has been set down for hearing. In the absence of a successful judicial review of the decision of the Board dated November 14, 2011, or a court-ordered stay of that Board decision, the ICI sector bargaining rights granted to the Painters on November 14, 2011 are both valid and subsisting.

28. The Painters ICI Agreement contains a clear claim for the work in dispute. Articles 3.01 and 3.02 of Appendix "B" of the Painters ICI Agreement makes the following claim to trade jurisdiction on behalf of Local 1891:

> 3.01 The Association recognizes the trade jurisdiction of the Union and agrees to assign the work of such jurisdiction to the employees covered by this Agreement.
>
> 3.02 The trade jurisdiction of the Union shall consist of but not be limited to the following:
>
> … All work involved in fireproofing, drywall taping, plastering, acoustical spraying, asbestos removal, mould removal, fire stopping, or related work including spray or troweling of cementitious, fibre, urethane, cellulose materials for said purposes and the application of materials such as but not limited to, A/D fire barrier, fire stopping, fire-rated wall and floor assemblies, cable tray penetration, voids between multi cable/pipe installations, perimeter of slabs and top of masonry wall, etc., and the application of polyurethane sprayed form and polypropylene plastic sheet membrane (i.e. air-gap/drainage membrane) and lead removal, chemical remediation and biological hazardous clean-up.

29. The Labourers ICI Agreement does not contain a strong claim for the work in dispute. Schedule "E" of the Labourers ICI Agreement claims trade jurisdiction over:

> Demolition work, debris handlers, dumpmen …
>
> All Labourers' work involved in restoration, renovation, rigging and the clean up of hazardous material or hazardous waste.

The latter claim is unhelpful because it is circular. It assumes that the very issue in dispute has already been answered.

30. In fact, Local 527 did not place much reliance upon the above-noted provision of the Labourers ICI Agreement as establishing its contractual claim for performance of the work in dispute. There is another ICI sector collective agreement that has relevance to this proceeding, namely the demolition agreement between the Ontario Association of Demolition Contractors Inc. and the Labourers' International Union of North America, and the Labourers' International Union of North America, Ontario Provincial District Council, on behalf of its affiliated Local Unions, 183, 247, 493, 506, 527, 607, 625, 837, 1036, 1059, 1081 and 1089 ("the Demolition Agreement").

31. The Demolition Agreement contains extensive provisions relating to asbestos removal and the conditions applicable to the performance of that work. Article 2.02 of the Demolition Agreement contains a description of the types of work that fall within the jurisdiction of that collective agreement. Included within that jurisdiction is the:

> … wrecking, demolition, dismantling and salvage of any buildings, bridges, houses, fences, hoarding, platforms, loading docks and/or miscellaneous structures of all types, including asbestos and lead abatement the erection and removal of scaffolding, canopies, fences, hoarding, outriggers, platforms, chutes, barricades, asbestos decontamination enclosures, barriers and partitions, including all asbestos abatement work tools and associated equipment, in whole or in part, removal and handling of contaminated waste and hazardous waste …

There is also contained within the Demolition Agreement an Asbestos Abatement Remediation/Contaminated Soils and Interior Demolition Appendix that addresses asbestos removal and abatement in considerable detail. There can be no dispute that the Demolition Agreement contains a very strong claim for the performance of the work in dispute.

32. EllisDon is not bound to the Demolition Agreement. However, the Labourers ICI Agreement permits EllisDon to apply the provisions of the Demolition Agreement to the work in dispute. In this regard, there is a Letter of Understanding contained in the Labourers ICI Agreement that permits an employer bound to that agreement to subcontract work that falls within the ICI sector of the construction industry to contractors that are bound to one or more of three identified collective agreements. One of those three identified collective agreements is the Demolition Agreement.

33. EllisDon took advantage of the Letter of Understanding in order to engage a subcontractor to perform the work in dispute. It subcontracted the Parliament Windows work to OSC, and the work on the Parliament Ceilings project and the BMO Project to Delsan. Both OSC and Delsan are bound to the Demolition Agreement. Neither OSC nor Delsan is bound to any collective agreement obligation to the Painters. Not surprisingly, OSC and Delsan assigned the performance of the work in dispute to members of Local 527.

34. Briefly put, Local 1891 asserts that the Demolition Agreement is irrelevant. It argues that the Painters ICI Agreement requires all of the work in dispute to be assigned to its members. It argues that the Labourers ICI Agreement does not contain a strong claim to the work in dispute, and that EllisDon was not required by the Labourers ICI Agreement to apply the Demolition Agreement to perform the work in dispute. Accordingly, it argues that the Board ought to conclude that the collective agreement factor in these three proceedings falls very strongly in its favour.

35. Local 527 disagrees. It states that EllisDon, as a contractor bound to the Labourers ICI Agreement, was required to subcontract asbestos abatement work to a subcontractor bound to either the Labourers ICI Agreement or the Demolition Agreement. Local 527 states that the work in dispute is claimed by it in the Labourers ICI Agreement as "demolition work". Counsel for Local 527 acknowledged that this claim for the work in dispute is stated in very broad terms. However, citing *PCL Constructors Canada Ltd*., 2010 CanLII 58369, at paragraph 76, counsel asserts that the fact a specific reference to the work in dispute is not made in the Labourers ICI Agreement ought not to weaken the claim to the work made by Local 527. In addition, Local 527 asserts that, together, the Labourers ICI Agreement and the Demolition Agreement address asbestos removal in a comprehensive manner, and that the Painters ICI Agreement does not. Local 527 asks that the Board conclude that the collective bargaining factor strongly supports its claim to the work in dispute.

36. EllisDon and OSC make a somewhat more complicated argument, which counsel for Local 527 concurred with during his oral submissions. They assert that the collective agreement obligations and jurisdictional claims over asbestos removal must be considered against the backdrop of the relevant Ministerial designations and certain previous Board decisions regarding asbestos removal work.

37. EllisDon and OSC note that the current Employee Bargaining Agency designation for demolition work designates the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council as the employee bargaining agency to represent in bargaining:

> *construction labourers* engaged in the wrecking, demolition, dismantling or salvage of buildings and structures in the industrial, commercial and institutional sector of the construction industry (emphasis added)

represented by the Labourers' International Union of North America and other affiliated bargaining agents in the ICI sector of the construction industry. By way of contrast, the

current Employer Bargaining Agency designation for demolition work designates the Ontario Association of Demolition Contractors Inc. as the employer bargaining agency to represent in bargaining:

> *all employers engaged* in the wrecking, demolition, dismantling or salvage of buildings and structures and *whose employees* (emphasis added)

are represented by the Labourers' International Union of North America and other affiliated bargaining agents in the ICI sector of the construction industry.

38. EllisDon and OSC argue that the Labourers have traditionally asserted the position that asbestos removal is covered by its Provincial ICI Agreement (see *Metropolitan Toronto Demolition Contractors' Association*, [1993] OLRB Rep. July 612, at paragraph 10). At the same time, it is observed that the Board, in *Delsan Demolition Limited*, [1993] OLRB Rep. October 963 noted (at paragraph 18) that demolition is an acknowledged, distinctive subset of ICI sector construction. EllisDon and OSC argue that the Labourers ICI Agreement and the Demolition Agreement cover different aspects of demolition work – the former governing what they refer to as "garden variety" demolition work, and the latter governing what is referred to as "specialty" asbestos removal work.

39. With the above distinction in mind, EllisDon and OSC argue that the work assignments made in these proceedings followed an approach that flowed from the Ministerial designations and above-referenced Board decisions. They assert that where a contractor bound to the Labourers ICI Agreement self-performs "garden variety", "regular" or "general" demolition labour work, any other "specialty" demolition work may be covered by that same collective agreement. However, where a contractor bound to the Labourers ICI Agreement subcontracts "garden variety" demolition work, or where demolition work of that nature is "intertwined" with other, specialty asbestos removal work that is subcontracted to a contractor bound to the Demolition Agreement, the incidental or necessary "specialty" asbestos removal work may be included within the scope of work and performed under the Demolition Agreement. EllisDon and OSC further observe that, although asbestos removal is expressly covered by the Painters ICI Agreement, there is no reference at all to other forms of demolition work under that collective agreement.

40. I have considered all of the arguments made by the parties, both in their briefs and at the consultation.

41. Turning first to the Parliament Windows project, in which EllisDon subcontracted the work in dispute to OSC, the collective agreement factor very strongly supports the assignment of the work in dispute to members of Local 527. At the time that EllisDon subcontracted the work in dispute to OSC, and OSC assigned the work to its construction labourers, Local 1891 did not have ICI sector bargaining rights with either EllisDon or OSC; that is, both EllisDon and OSC were bound only to Local 527. EllisDon had the right under the Labourers ICI Agreement to subcontract the work to a contractor bound to the Demolition Agreement. It chose to do so. That contractor, OSC,

is bound only to Local 527. Its assignment of the work in dispute to members of Local 527 was entirely appropriate in the circumstances.

42. This same result does not hold with respect to the Parliament Ceilings project and the BMO Project. On those two projects, EllisDon subcontracted with Delsan to perform the work in dispute during August, 2012. Counsel for EllisDon asserted during oral argument that the Board ought to give some significance to the fact that the bargaining rights held by Local 1891 were in their infancy at the time the subcontracts were let by EllisDon. I do not agree. The subcontracts with Delsan were entered into by EllisDon many months after Local 1891 had secured its ICI sector bargaining rights with EllisDon. EllisDon is a large corporate entity that employs sophisticated managers and very capable legal counsel. At the time that the two subcontracts with Delsan were entered into there were competing jurisdictional claims made by the trades that had to be considered and weighed by EllisDon.

43. EllisDon is bound to both the Labourers ICI Agreement and the Painters ICI Agreement. It subcontracted the work in dispute to Delsan, a single trade contractor bound only to Local 527. EllisDon knew at the time that it subcontracted the work in dispute to Delsan that it may have to defend a grievance from Local 1891 claiming jurisdiction over the work in dispute, and I can infer from its contracting with Delsan that it was content to do so. Accordingly, the evidence before the Board reflects what EllisDon perceived to be the proper assignment of the work in dispute.

44. The difficulty with the position asserted by EllisDon and Local 527 with respect to this factor is that it does not properly consider the relative strengths of the jurisdictional claims made by Local 1891 and Local 527 in the relevant collective agreements. As noted above, the claim to the work in dispute made by Local 1891 in the Painters ICI Agreement is very strong. Not only does the language contained in the Painters ICI Agreement encompass the work in dispute, but the Painters ICI Agreement expressly requires EllisDon to perform the work in dispute by reference to its terms.

45. Local 527 cannot rely upon equally strong collective agreement language in the Labourers ICI Agreement. As noted above, the claim to the work in dispute made by Local 527 on the basis of the language contained in the Labourers ICI Agreement is very weak. I agree with the observation made by the Board in *PCL Constructors Canada Ltd*., cited above, that was relied upon by counsel for Local 527. However, this case is different. In *PCL Constructors Canada Ltd*., cited above, the applicants claimed work jurisdiction over the installation of concrete forms, and the work in dispute was a type of concrete form. Here, the work in dispute is the abatement, removal and disposal of materials containing asbestos or other hazardous substances. General demolition is expressly excluded from the work in dispute. Having regard to the words that immediately follow the words "demolition work" in the Labourers ICI Agreement, and the type of work claimed by the Labourers in the Demolition Agreement, it is evident that the demolition work claimed in the Labourers ICI Agreement is general demolition, not referable to asbestos abatement and remediation.

46. Local 527 does assert a very strong claim to the work in dispute in the Demolition Agreement. However, EllisDon is not bound to the Demolition Agreement. It had the *option* under the Labourers ICI Agreement to have the work in dispute performed under the Labourers ICI Agreement, or to subcontract that work to a contractor bound to the Demolition Agreement. However, it was not required to subcontract the work in dispute to a contractor bound by the Demolition Agreement.

47. In these circumstances, it is of little assistance for either EllisDon or Local 527 to focus upon the provisions of the Demolition Agreement that clearly encompass the work in dispute. EllisDon is not bound to that collective agreement, and it is not required under the Labourers ICI Agreement to utilize the Demolition Agreement to perform the work in dispute. The language contained in the Demolition Agreement is therefore of no significance for the purpose of assessing the significance of collective agreement obligations in these proceedings. Although Delsan is not bound to the Painters ICI Agreement, and its assignment of the work to members of Local 527 was hardly unusual or unexpected, the collective agreement factor remains strongly in favour of Local 1891 in the circumstances.

48. Accordingly, with respect to the Parliament Windows project, the collective agreement factor strongly favours assignment of the work in dispute to members of Local 527. With respect to the Parliament Ceilings project and the BMO Project, the collective agreement factors strongly favours assignment of the work in dispute to members of Local 1891.

*(b) Area Practice*

49. When assessing area practice evidence, the Board's normal practice is to consider work performed in the same sector of the construction industry located within the Board Area in which the work in dispute was performed (see, for example, *Buttcon Ltd.*, 2006 CanLII 18101, at paragraph 40). In these proceedings, the work in dispute was performed in Board Area No. 15.

50. Much of the area practice evidence relied upon by the parties to these proceedings was the practice of single trade contractors. The Board's decisions in *Sayers & Associates*, 2005 CanLII 3062, *Chem-Thane Engineering Inc.*, 2005 CanLII 3105 and *PCL Constructors Canada Inc.*, [2004] 104 CLRBR (2d) 132 establish the proposition that the Board does not accord much weight to the area practice of single trade contractors because the competing trade union had no effective opportunity to contest the assignment.

51. Other decisions by panels of the Board potentially provide for a little more latitude for using evidence of single trade contractors. In *Eastern Construction Company Limited,* 2003 CanLII 18761, the Board made the following observations at paragraph 27:

> 27. Generally speaking, evidence with respect to "single trade contractors" will often be of less value than that of contractors bound to both trades' collective agreements in a particular area. If there is a significant number of contractors

> active in a given area who are bound to both trades' collective agreements, the evidence of the kind of *choice* made by those contractors is likely to be more significant than the practice of single trade contractors who have no choice open to them and *must*, pursuant to their collective agreement, assign the work to a single trade. This general rule is, of course, always open to variation depending on the circumstances of an individual case. If, for example, a contractor bound to two agreements were to take a contract in an area where one trade always performed the work in dispute, even if single trade contractors in the area did the work, the area practice, albeit of single trade contractors, would be significant for the Board and, presumably, the contractor. (emphasis in original)

52. It is intuitive that for the purposes of a work assignment dispute the area practice of dual trade contractors is preferable to the area practice of single trade contractors. When considering work assignment disputes the Board looks for evidence that work similar in nature to the work in dispute has been assigned by area employers more often to one trade over the other. In circumstances where the assigning employer is bound to both trades, the evidence of which trade has had the work assigned to its members reflects a choice made by the contractor in question. In addition, the existence of dual collective agreement obligations allows the trade not assigned the work to challenge the choice made by the contractor. If that trade chooses not to do so, a conclusion may be drawn as to the appropriateness of the assignment made by the contractor.

53. This, however, does not mean that the evidence of single trade contractors is always irrelevant. In *Ellis-Don Ltd*., [1999] OLRB Rep. January/February 28, request for reconsideration denied [1999] OLRB Rep. March/April 193) the initial decision of the Board declined to consider the area practice evidence of single trade contractors. Upon reconsideration, the Board observed (at paragraph 6) that the weight to be given to such evidence "is determined on a case by case basis". Where there was area practice evidence of contractors in contractual relations with both unions, the Board was of the view that that evidence was much more relevant for the purposes of determining a work assignment dispute. For the reasons set out above, it is.

54. Turning to the evidence before the Board in these proceedings it appears that there is only one contractor in Board Area No. 15 that is bound to the ICI sector collective agreements of both the Painters and the Labourers, namely Amor Construction Inc. ("Amor"). Amor is bound to the Painters ICI Agreement and the Demolition Agreement, rather than the Labourers ICI Agreement. Notwithstanding the stronger claim for the work in dispute contained in the Demolition Agreement, Local 1891 states that Amor has always performed the work in dispute with a crew of Painters rather than members of the Labourers. The principal of Amor, in correspondence filed with the Board by Local 1891, agrees. He states that Amor uses members of Local 527 "to complete general demolition work" and that the elements of a given project that involve asbestos and hazardous material removal are "routinely and always" assigned to members of Local 1891. Local 1891 states that Local 527 has not grieved any of those work assignments, and the principal of Amor concurs.

55. It is important to consider the evidence offered by Local 1891 with respect to Amor in the context of a number of considerations, including the relevant bargaining relationships. Appended to the above-referenced correspondence from the principal of Amor is a chart that lists the various "asbestos jobs" performed by Amor from January, 2009 to May, 2013. There is no dispute that the Labourers did not secure ICI sector bargaining rights with respect to Amor until June 22, 2010, and there appears to be no dispute that the bargaining rights held by Local 1891 with respect to Amor predated those secured by Local 527. Accordingly, all of the practice evidence of Amor that predates June 22, 2010 is single trade contractor evidence that ought not to be afforded much, if any, meaningful weight. The evidence also establishes that Local 1891 first challenged the decision made by EllisDon to subcontract the work in dispute to OSC on or around April 17, 2012. Accordingly, I will not afford any weight to work assignments made by Amor on or after April 17, 2012.

56. Local 527 was unimpressed by the area practice evidence of Amor that was offered by Local 1891. Turning initially to the question of form, counsel for Local 527 asserted that the first name of the principal of Amor is incorrectly spelled as "Rock" and not "Roch" in the first paragraph of the letter filed by Amor. Counsel for Local 527 surmises that counsel for Local 1891 drafted the letter filed on behalf of Amor. He does not fault opposing counsel for having done so, but asserts that the typographical error ought to lead to the conclusion that the principal of Amor did not even read the letter, and that the assertions of fact made in the letter are unreliable. In support of that conclusion, counsel notes that the letter was actually signed by the CEO of Amor on behalf of the principal, and not by the principal personally.

57. It may well be that the letter provided to Local 1891 by Amor was drafted by counsel for Local 1891. That would not be unusual. Nor is it problematic. Counsel often draft declarations and other evidentiary documents filed with the Board in jurisdictional disputes. In fact, many of the documents filed by all of the parties to these proceedings reflect the hallmarks of documents that have been drafted by legal counsel.

58. The assertion made by Local 527 is that the typographical error ought to lead to the conclusion that the substance of the letter is unreliable. I do not agree. The letter is not a personal letter. It is on the business letterhead of Amor, and the letter is signed on behalf of its principal by its Chief Executive Officer, whose name is specifically identified on the face of the letter as signing on behalf of the principal. In these circumstances, I am not prepared to conclude that the assertions of fact made in the letter are not reliable.

59. Finally, I observe here that the materials filed with the Board suggest that it is in fact Local 527 that may be in error, at least to some extent. Consistent with the observation made by counsel for Local 527, the declaration filed by the Business Manager of Local 527 identifies the first name of the principal of Amor as "Roch" rather than "Rock". However, the principal of Amor signed and then printed his name on the second page of the pick-up agreement between Amor and Local 527 that was filed by Local 527 in these proceedings to establish its bargaining rights with Amor. The principal identifies himself when doing so as "Rock".

60. Turning to the merits of the practice evidence relating to Amor, Local 527 asserted that much of the work performed by Amor involved projects of small value. Local 527 also asserts that some of the projects were not similar in nature to the work in dispute, and that some of the projects were not ICI sector projects.

61. These observations are, to some extent, true. However, they can only take the argument made by Local 527 so far. The non-ICI sector projects can be dealt with quickly. The four projects that Local 527 asserts were not ICI sector projects were performed by Amor outside of the period that spans from June, 2010 to April, 2012. Accordingly, I have not considered them as area practice for that reason.

62. The assertion made by Local 527 that some of the projects were not similar in nature to the work in dispute is not so easily dealt with. Local 527 asserts that 10 projects listed by Amor are dissimilar to the proceedings at hand. Two of those projects were performed outside of the relevant 22 month period. Of the remaining eight projects, four appear from their descriptions to be dissimilar ("drilling holes in ceiling"; "installation of a fire access door"; "asbestos analysis" and "insulation removal"). I have not considered these six projects as establishing area practice evidence for the purpose of these proceedings.

63. It is not at all clear that the other four projects are dissimilar. Three of those four jobs are described as "lead removal" and one is described as "lead abatement". Local 527 argues that that is not the work in dispute. However, it will be recalled that the work in dispute in these proceedings is described, in part, as:

> The abatement, removal and disposal of materials containing asbestos or other hazardous substances …

There can be no dispute that lead is a "hazardous substance". Most importantly, the contractual documents filed with the Board suggest that lead abatement was included as part of the work in dispute. The Parliament Windows work was described by Local 1891 as consisting of lead windowsill abatement and window putty abatement. None of the parties challenged that description. The removal and disposal of lead containing paint on exterior window sills is included within the description of the work that Inbex (or some entity other than OSC) initially contracted with EllisDon to perform, and that OSC ultimately performed. Furthermore, the BMO Project contractual documents identify "the abatement and removal of hazardous materials" as falling within the scope of the work to be performed, and required that work to be completed in accordance with certain specifications, including specifications for "Lead Abatement".

64. In the circumstances, I am satisfied that the four Amor projects identified as "lead removal" and "lead abatement" are sufficiently comparable to the work in dispute that they can be properly considered as evidence of the area practice of Amor for the purposes of these proceedings.

65. Finally, I note here that the list of asbestos projects performed by Amor contains a number of projects performed in the Province of Quebec. For obvious reasons

those projects will be given no weight at all. Once the out-of-jurisdiction, temporally irrelevant, and dissimilar asbestos projects are removed from consideration, it appears that Amor performed 54 asbestos removal, lead removal and lead abatement projects between July, 2010 and April, 2012 in Board Area No. 15 in which members of Local 1891 performed the work in dispute.

66. Although some of the work performed by Amor during the relevant time period involved jobs of small value (of the above-referenced 54 projects, there are 12 that are valued at less than $1,000), most of the work performed by Amor involved larger projects. There are 21 projects in which the asbestos remediation work is valued at more than $10,000, with an approximate average value of $134,500. Amongst those 21 projects are nine projects in which the asbestos remediation work is valued at more than $100,000, with an average value of slightly more than $275,000. These larger projects involved asbestos removal work at government buildings, schools and a hospital. Accordingly, the work performed by Amor during the relevant time period was not *de minimus* or limited to projects of little significance.

67. Local 527 asserts that it was not aware, and could not have been aware, of the vast majority of the asbestos abatement jobs performed by Amor. It states that three circumstances combined to make this the case, namely (a) the small size of most of the jobs; (b) the nature of asbestos removal and abatement work, which occurs indoors; and (c) the absence of Local 527 members performing other work, namely demolition work, on many of the job sites where asbestos abatement was performed. The assertion, of course, is that Local 527 would have grieved all 54 assignments of the work in dispute made by Amor to members of Local 1891, if only it had known of those assignments.

68. I do not accept this assertion. The smaller jobs performed by Amor may well have not come to the attention of Local 527. Again, however, that only provides a limited amount of assistance to Local 527. In this regard, it is significant that Local 527 states only that it could not have been aware of "the vast majority" of the jobs performed by Amor. This is a very vague statement, and suggests, at the very least, that Local 527 was aware of some of the projects performed by Amor (presumably the larger, more visible ones) and chose not grieve the assignment of the work to members of Local 1891 by Amor on those jobs. There were a significant number of jobs performed by Amor at prominent locations in Board Area No. 15 over the relevant 22 month period that were of sufficient importance and value to have made them well-known amongst the Ottawa area construction community. I do not accept that all of those projects were a mystery to Local 527. Information about those jobs and the work performed at them would have been available from a number of different sources that Local 527 could have accessed, if it did not do so.

69. There is an additional assertion made by Local 527. It states that Amor does not, in fact, have a consistent practice of assigning the work in dispute to members of Local 1891. It states that from time-to-time its members have performed asbestos abatement and/or removal for Amor, and that Local 1891 did not grieve those assignments of work. The materials filed on behalf of Local 527 identify three jobs performed by Amor at which the work in dispute was performed by its members: (a) 180

Wellington Street between 2010 and 2013; (b) Children's Hospital of Eastern Ontario during 2010; and (c) the Heron Road Bridge during 2010 and 2011. For the purposes of these proceedings, no party disputed that the latter project was an ICI sector project.

70. Local 527 filed with the Board two declarations attesting to the information set out above. One of the declarants states that he performed asbestos removal work at each of the above-noted projects for Amor between 2010 and 2012. The second declarant states that he performed this same work for Amor at the 180 Wellington Street site between 2010 and 2013.

71. I have some concerns regarding the quality of these two declarations. They are each "fill in the blank" declarations and provide very little detail regarding the work performed by the declarant. When each declarant actually performed the work in dispute for Amor is not clear. If, for example, the second declarant performed the work in dispute for Amor at the 180 Wellington Street site during 2013, the evidence would be given no weight for the purposes of these proceedings. In addition, a declaration filed in support of a party engaged in a Board proceeding traditionally contains wording that attests to the accuracy of its contents. Notably, neither declaration executed by either individual contained such a statement.

72. That being said, I accept that during the relevant time period Amor assigned asbestos abatement work to at least one of the two individuals who provided a declaration on behalf of Local 527. Local 1891 had access to the principal of Amor. However, it did not secure a reply declaration from that individual in response to the assertions of fact made by the two members of Local 527. In the circumstances, I am prepared to accept that Amor has, from time-to-time, assigned the work in dispute to at least one member of Local 527. There is no evidence to suggest that Local 1891 ever grieved such an assignment.

73. There is evidence before the Board that establishes that on a number of occasions contractors bound only to Local 527 have subcontracted the work of asbestos removal and abatement to entities bound to Local 1891. By way of example, Donalco Inc. ("Donalco"), a subcontractor that performs the work in dispute and is bound to Local 1891, was engaged by PCL Constructors Canada ("PCL") in October, 2011 to perform certain asbestos removal and abatement work at the same location as two of the projects in dispute, the West Block on Parliament Hill. There appears to be no dispute that PCL is bound to the Labourers, but not the Painters. However, it subcontracted the work in dispute to Donalco, a company bound only to the Painters. There is no suggestion in the materials filed with the Board that the Labourers grieved this decision. In some ways, this is the strongest area practice evidence, because PCL effectively assigned the work in dispute to members of Local 1891 in the face of its contractual obligations to Local 527, without any corresponding contractual obligation to do so, and without challenge.

74. EllisDon and OSC acknowledge in their brief that evidence of area practice is more readily available from Local 1891 and Local 527. Both urge the Board to give more weight to work assignments that were contextually similar to those in dispute in this proceeding; that is, work assignments within scopes of work which included both

asbestos removal and other demolition work. However, it must be kept in mind that general demolition work is expressly excluded from the work in dispute in these proceedings. EllisDon and OSC also argued that practice evidence in which members of Local 1891 performed the work in dispute because it was tied into the performance of other work traditionally performed by Painters (such as fireproofing) ought to be given less weight. However, Local 1891 asserted (without any serious dispute) that the asbestos removal work and fireproofing work are not "tied together", and are performed separately and apart.

75. I make one final observation under this heading. Local 1891 included within its reply brief a significant amount of analysis and argument regarding its own area practice evidence that reinforced certain submissions previously made in its initial brief. Neither Local 527, EllisDon nor OSC had an opportunity to file materials with the Board regarding that analysis. When the consultation was convened, counsel for Local 527 made a valiant effort to respond to the analysis during the limited time that he had available to make his submissions. However, he would have had to have utilized all of his allotted time to have fully and completely responded to the analysis.

76. In the circumstances, I have determined not to put any weight on the analysis offered by Local 1891, because it would be unfair to do so. Each party is expected to put their entire case forward in the initial brief it files with the Board. A party that files its brief first is provided with an opportunity to file a reply brief in order to respond to assertions of fact or law contained in the briefs filed by the other parties. A reply brief should not be used by a party as an opportunity to marshal the facts it previously pleaded and craft them into a better written argument than it submitted at first instance. If a reply brief were to be permitted to be utilized in that fashion, the advantage of the consultation process would be lost. The purpose of the consultation in a jurisdictional dispute proceeding ought to remain what is always has been, namely an opportunity for the parties to address, at a high level, the key points each party has previously made in their comprehensive, written briefs.

77. Having regard to all of the materials filed with the Board regarding area practice, I conclude that the factor falls in favour of Local 1891. Assuming, without deciding, that the area practice of single trade contractors ought to be given weight, that evidence is neutral, because each of Local 1891 and 527 has significant single trade evidence in support of assigning the work in dispute to its members. Amor, the only dual trade contractor in Board Area No. 15, has performed a significant amount of the work in dispute. Although it has assigned the work in dispute to at least one member of Local 527 with respect to two or three projects during the relevant 22 month period, the evidence establishes that the overwhelming practice of Amor is to assign the work in dispute to members of Local 1891. There is, as well, evidence that contractors bound to the Labourers have subcontracted the work in dispute to entities bound only to Local 1891.

78. Accordingly, this factor falls in favour of Local 1891.

*(c) Employer Practice*

79. When assessing employer practice, the Board's normal practice is to examine work performed by the employer throughout the Province of Ontario in the sector of the construction industry in which the work in dispute falls (see *Buttcon Ltd.*, cited above, at paragraph 22).

80. In recent years the Board has consistently adopted a broader review of the contractual relationships in play when assessing practice evidence. Recent decisions of the Board have identified the significance of considering the circumstances surrounding the initial subcontracting of the work in dispute in the course of determining whether the work assignment was correctly made. The Board put it this way in *Alliance Verdi Civil Inc.*, 2011 CanLII 447, at paragraph 18:

> In *PCL Constructors Canada Ltd*. it was noted that the factors that are typically considered by the Board in a work assignment proceeding are not mandated by the Act but have, instead, been developed by the Board over time. Accordingly, irrespective of the identity of the "employer" for the purposes of section 99 of the Act, the Board can consider as a factor in the determination of a work assignment dispute the practice of a general contractor that subcontracts the work in dispute to a subcontractor, notwithstanding that the general contractor is not the employer of the individuals who ultimately perform the work. In the vast majority of recent work assignment decisions the Board has found it important to consider as a factor the broader contractual relationships in effect when determining whether a work assignment was properly made. Accordingly, in a work assignment proceeding in which the work in dispute has been subcontracted by a general contractor to a subcontractor that has assigned the work in a particular manner, and where the collective agreement obligations of the general contractor and subcontractor are different, the work assignment practices of both the general contractor and the subcontractor will be factors considered by the Board in determining the dispute in question.

For the purposes of these proceedings, it is appropriate to consider the practices of EllisDon, OSC and Delsan throughout the Province of Ontario.

81. The evidence of employer practice establishes that when Delsan and OSC perform the work in dispute in the Province of Ontario they regularly and routinely assign the work in dispute to members of the Labourers. Delsan first performed asbestos removal and abatement work with its own employees in 2010. The evidence before the Board establishes that during 2010 and 2011 Delsan performed the work in dispute in both Kingston (at one project) and in Toronto (sixteen different projects). It assigned the work in dispute to be performed to members of the relevant local union affiliate of the Labourers.

82. The OSC evidence of employer practice is more extensive. The only qualification to the OSC practice evidence is one project at which OSC subcontracted the work in dispute to Amor, which performed that work with members of Local 1891. Local 527 characterized that instance as a "one-time, one-site" concession that it

provided to OSC. Ultimately, whether that is or is not the case does not matter, because Amor is a dual trade contractor, bound to Local 1891 and to Local 527. Accordingly, the entity that actually made the assignment of the work in dispute was Amor, not OSC. The evidence filed with the Board establishes that OSC overwhelmingly assigns the work in dispute to members of the Labourers.

83. The employer evidence of EllisDon is not as consistent. Local 1891 identified 10 projects prior to May, 2012 at which the work in dispute was subcontracted by EllisDon to entities bound to the Painters. Five of those jobs were subcontracted to Donalco, four were subcontracted to Terrasan Environmental Inc. ("Terrasan"), and one job was subcontracted to Inflector Environmental Services ("Inflector"). Although the assertions of fact with respect to some of the EllisDon projects subcontracted to Donalco were established through correspondence from Donalco itself, rather than by way of declaration, EllisDon did not dispute the accuracy of the assertions made in that correspondence and responded to the evidence offered by Local 1891, both in its brief and at the consultation.

84. In this regard, EllisDon acknowledges that two of the five jobs subcontracted to Donalco (two projects performed at the Montfort Hospital) related to asbestos removal work, but states that the work was incidental to other fireproofing work and therefore should be given less weight. Local 1891 takes issue with that assertion. As noted above, Local 1891 states that fireproofing work is performed *after* asbestos remediation work, at a later stage in restoration projects, and does not occur in the containment area set up for asbestos removal. However, even if that is not the case, Local 1891 points out that the work in dispute was nonetheless performed by members of the Painters on those two projects.

85. EllisDon responded to the other projects relied upon by Local 1891. On the remaining three Donalco projects and the Inflector project, the declarant on behalf of EllisDon could only say that EllisDon "typically only subcontracts with Donalco and Inflector for applying fire-proofing". There is, therefore, no meaningful evidence from EllisDon challenging the assertion made by Local 1891 that its members performed the work in dispute, and no specific evidence as to the context within which those members performed the work. In the absence of more definitive statement by EllisDon regarding those four projects, I accept the assertion made by Local 1891 that its members performed the work in dispute at those projects. As noted above, the assertion made by Local 1891 that fireproofing work is performed after asbestos remediation was not meaningfully challenged by EllisDon at the consultation. With that in mind, I accept the assertion made, and conclude that the distinction urged by EllisDon has no merit in the circumstances.

86. Finally, EllisDon states that Terrasan is a dual trade contractor, and that it was ultimately Terrasan that made the decision to subcontract work to members of the Painters on the four projects referred to by Local 1891. In those circumstances, EllisDon states that the practice evidence with respect to Terrasan can have no weight in these proceedings. I agree. Three of the Terrasan projects were performed in Toronto, and the fourth was performed in Hamilton. The assignments of work on those four projects were

made by Terrasan, and are simply nothing more than area practice of the assignment of work in two Board Areas that are not relevant for the purpose of these proceedings.

87. The evidence filed by EllisDon regarding its subcontracting of the work in dispute was not entirely helpful. One project included in its employer practice evidence was performed in British Columbia. Many of the projects identified were performed on or after May, 2012, and therefore are of no assistance for the purposes of these proceedings. Of the projects that are of assistance, many were performed prior to November 14, 2011, the date that Local 1891 secured bargaining rights. Although those subcontracts are not as significant as those made by EllisDon when both the Painters and the Labourers had ICI sector bargaining rights with EllisDon, the subcontracts prior to November, 2011 are nonetheless part of the employer practice of EllisDon and should be taken into account by the Board. Not surprisingly, on those projects EllisDon subcontracted the work in dispute to entities that had bargaining obligations to the Labourers. Also not surprisingly, the Painters did not grieve any of those assignments of work.

88. Local 527 also filed evidence that speaks to the practice of EllisDon. Local 527 makes reference to three jobs in Board Area No. 8 that were subcontracted by EllisDon to OSC, two at Trillium Health locations in Mississauga, and a third at a restaurant in Toronto. There is also an asbestos abatement project in Hamilton to which reference is made, as well as three projects subcontracted to companies in Ottawa. The two projects in Mississauga were undertaken during 2007, prior to Local 1891 securing ICI sector bargaining rights, as was the project in Hamilton. The Toronto project and two of the Ottawa projects occurred during unidentified periods in 2012, which may or may not be after the relevant date. One project in Ottawa – at Algonquin College in 2011 – was also identified that appears to have some relevance. However, there is very little detail provided with respect to that assignment of work.

89. Local 1891, in reply to the evidence offered by EllisDon and Local 527, asserted that, to the extent that the projects subcontracted by EllisDon in Board Area No. 8 were to be given any weight, that evidence ought to be entirely discounted. A Business Representative of Local 1891, Mr. Greg Smith, signed a declaration filed by Local 1891 that indicates that in Board Area No. 8 an agreement between the Painters and the Labourers exists to the effect that, where asbestos removal and abatement is contracted out, those two unions will not challenge the assignment. Local 527 did not dispute the arrangement described by Mr. Smith during the course of argument. With that agreement in mind, I am not prepared to give the evidence of employer practice relating to Board Area No. 8 any weight for the purposes of these proceedings.

90. The evidence adduced by the parties regarding the subcontracting of the work in dispute by EllisDon establishes that EllisDon has subcontracted the work in dispute to entities that are bound to only one of the Labourers and the Painters. However, its overall practice favours assignment of the work in dispute to members of Local 527. Before the time period when Local 1891 secured ICI sector bargaining rights with EllisDon that it could rely upon to make a claim for the work in dispute, the work in dispute was

performed by subcontractors that were bound to the Labourers and who performed the work using members of the Labourers.

91. To summarize, EllisDon has a mixed practice, but has generally subcontracted the work in dispute to entities bound to the Labourers. OSC and Delsan have regularly and consistently performed the work in dispute by assigning it to members of the Labourers. Taken as a whole, this factor favours assignment of the work in dispute to members of Local 527. However, the weight of this factor is qualified to some extent by the fact that the employer practice evidence in large measure simply reflects the absence of a contractual obligation on the part of EllisDon until November, 2011.

92. Finally, I note that Local 1891 included within its reply brief a considerable amount of evidence, analysis and argument regarding employer practice evidence that ought to have been included in its initial brief. Once again, neither Local 527, EllisDon nor OSC had an opportunity to file materials with the Board regarding that evidence. For the same reasons set out above with respect to area practice, I have determined to give this evidence no weight.

*(d) Safety, Skills and Training*

93. Each of Local 1891 and Local 527 asserted that its members were more skilled, better trained, and could perform the work in dispute more safely than the members of the other trade. In fact, the evidence establishes that members of both trades are fully and properly trained to perform the tasks required. There is simply no credible evidence filed with the Board to suggest otherwise.

94. This factor is neutral.

*(e) Economy and Efficiency*

95. Local 1891 asserted that this factor favours assignment of the work in dispute to its members. Local 527, EllisDon and OSC disagree. They assert that this factor favours that the work in dispute be assigned to members of Local 527.

96. Mr. Edgar Pacheco, a Business Representative of the Painters, states in a declaration filed with the Board that there is a general understanding in Board Area No. 15 that, where a unionized workforce is used in a demolition project, contractors bound to the Painters union complete asbestos and hazardous materials removal (referred to colloquially as "dirty demolition") using members of the Painters. Subsequently, contractors bound to the Labourers complete the rest of the demolition work (referred to colloquially as "clean demolition"). Local 1891 states that the division of demolition work in this fashion makes it efficient for the work in dispute to be assigned to its members.

97. No details underlying the basis for this "general understanding" were provided by Mr. Pacheco in his declaration. In a second declaration, included in the reply brief filed by Local 1891, Mr. Pacheco states that clean demolition and dirty demolition are

two completely separate types of work, and are routinely performed by different contractors and different crews in Board Area No. 15. He states that dirty demolition occurs in a containment area and must be performed in accordance with the provisions of Ontario Regulation 278/05. Mr. Pacheco asserts that clean demolition does not occur at the same time, but occurs later, after the asbestos and hazardous material has been removed, and the containment area has come down.

98. Local 527 takes issue with the proposition asserted by Mr. Pacheco. It notes that Mr. Pacheco provided no details regarding the above-noted "general understanding", and states that no weight ought to be given to the assertion that any such understanding exists. Local 527 also argues that none of the three responding party employers to these proceedings acted in accordance with any such practice. It points out that, given the dearth of dual trade contractors in Board Area No. 15, it is difficult to understand how such an understanding would exist. It also notes that Amor, the only dual trade contractor operating in Board Area No. 15, makes no reference to the distinction between dirty demolition and clean demolition in the materials that it provided to the Board through Local 1891.

99. Local 527 states that the position taken by Local 1891 is contrary to the promotion of efficiency and economy, because it would require general contractors to split the assignment of demolition work between entities bound to Local 527 and entities bound to Local 1891, and would limit the pool of contractors capable of performing asbestos removal in Board Area No. 15. Multiple subcontractors would have to be engaged to perform demolition work, depending upon the absence or presence of asbestos. Local 527 states that its position permits a general contractor to use a single demolition subcontractor, regardless of the presence of asbestos.

100. The position taken by EllisDon and OSC is largely the same as that adopted by Local 527. They have difficulty understanding why it is more economical and efficient to require a general contractor to retain two contractors to perform demolition work, rather than just one, and assert that it would be clearly uneconomical and inefficient to do so. EllisDon and OSC argue quite forcefully that, in the context of restoration work or renovation of older buildings, asbestos removal and demolition go "hand in hand", and that asbestos removal work and demolition work are often performed one after the other on the same day. EllisDon and OSC state that it does not make sense to separate the asbestos removal and demolition work, and assert that contractors ought to be permitted to avail themselves of the economies of scale and efficiencies that exist in the circumstances.

101. By way of example, EllisDon and OSC point to the Parliament Windows project. They state that OSC was initially contracted to perform demolition work which included the dismantling and demolishing of the windows in question. There was contaminated putty around the windows that first required removal so that the window jamb could be accessed. EllisDon and OSC state that the asbestos removal portion and the demolition portion of the work were both parts of the same work task. The significant overlap between the abatement and demolition aspects of the work, they argue, made it sensible to include the removal of the contaminated putty around the

windows in the scope of work provided to the OSC, to be performed by members of Local 527.

102. During the course of argument counsel for EllisDon and OSC relied upon a passage from *PCL Constructors Canada Inc*., 2013 CanLII 57379, where it is noted, at paragraph 63, that the Board should be mindful of the overall work context and the practical reasons underlying why particular assignments of work were made. EllisDon and OSC argue that it does not always make sense to lump together the asbestos removal work and the demolition work, and in those cases an assignment of the work in dispute to members of Local 1891 may be warranted. Here, counsel argued, it made sense to have the asbestos removal work and the demolition work performed under one contract, by one trade. As Local 1891 does not perform general demolition work, counsel argues that the appropriate assignment of the work in dispute was to members of Local 527. With respect to the factor of economy and efficiency, counsel for EllisDon and OSC made reference during argument to *Bothwell Accurate Co*., 2006 CanLII 922, at paragraph 20, and *Kvaerner Constructors Ltd*., [2004] OLRB Rep. May/June 716, at paragraph 29.

103. The position asserted by Local 527, EllisDon and OSC makes considerable sense, on one level, and the Board's decisions cited above have acknowledged the validity of that argument in certain circumstances. Assuming that an entity is capable of performing all of the tasks bundled into a given work package, it is often more efficient and economical for a general contractor to enter into one contract with that entity to perform the tasks in question, rather than to enter into two or more separate contracts in order to ensure performance of the work.

104. That said, the assessment of this factor requires more than simply recognizing the greater efficiency and economy of a subcontracting arrangement that minimizes the number of subcontractors required to perform a given set of tasks. In these proceedings Local 527, EllisDon and OSC dispute the distinction between "dirty demolition" work and "clean demolition" work asserted by Local 1891. However, the contractual documents filed by EllisDon and OSC with the Board appear to confirm the existence of that practice. As will be discussed below, the contractual documents also appear to confirm other assertions made by Local 1891 regarding the performance of the work in dispute.

105. I note here that in each of these proceedings EllisDon did not file with the Board the entire text of the relevant contracts; instead, only selected portions of those contracts were filed. Neither the Board nor any party to these proceedings objected to that practice. However, I observe that what follows below is based upon the materials that were filed with the Board by EllisDon. I have assumed that counsel for EllisDon and OSC reviewed the relevant documents and filed with the Board only those portions that had relevance for the purposes of these proceedings.

106. I turn first to the Parliament Windows project. The first page of the subcontract between EllisDon and OSC defines the "subcontract work" as follows:

> Supply all labour, material and equipment necessary to complete clean demolition as per Schedule A all of which work is more fully described in the schedules attached this *Subcontract* and in accordance with the plans and specifications referred to therein, together with all work directly or indirectly related thereto and described in the *Subcontract Documents*, which work includes competent supervision and the supply of all labour, materials, supplies, products, tools, machinery, equipment and all other services and items necessary to carry out and conduct the same. (emphasis in original)

What is notable about this defined term is that the work to be performed by OSC is specifically defined as "clean demolition".

107. This distinction is carried though to the Schedule "A" – Scope of Work document that is appended to the subcontract. Under the heading "Items Included" is the word "Demolition". What follows is one enumerated paragraph with 27 separate subparagraphs. The scope of work is defined in the latter subparagraphs and includes the following tasks:

> 2. Unless otherwise indicated within the scope of work, the subcontractor shall be responsible for the disassembly, removal, disposal and/or salvage of all elements noted on the drawings and specifications. *If the material to be removed is contaminated with a designated substance, it shall be decontaminated by others* followed by disassembly, removal, disposal and/or salvage by the subcontractor.
>
> 5. All *clean demolition* shall only proceed once the environmental consultant has signed off that all hazardous materials have been removed and proceeding with the work shall not contaminate the building or workers.
>
> 6. *In areas where plaster contains hazardous material, the plaster shall be removed by others*. Once the wall assembly has been decontaminated, the remaining assembly shall be disassembled, removed and disposed by the subcontractor.
>
> 7. The subcontractor shall be responsible for the removal and disposal of the steel beams in the Fox & Barrett system, once they have been decontaminated.
>
> 9. The subcontractor shall be responsible for all mechanical and electrical removal. This work shall be completed once an area is deemed to be no longer contaminated. (emphasis added)

Again, it is notable that the work to be performed by OSC at the Parliament Windows project is defined by the parties (in line item 5, above) as "clean demolition".

108. It is also of considerable significance that EllisDon did not initially contract with OSC to perform what the parties to these proceedings have referred to as "dirty demolition". The contractual documents expressly state that any material contaminated by a designated substance will be decontaminated *by others*. Local 1891 states that

"others" was initially Inbex, and that the decontamination work was the work in dispute. Local 1891 states that that work was subcontracted to Inbex until EllisDon removed that work from Inbex in September, 2011, and awarded it to OSC. EllisDon disagrees. It asserts that the work in dispute was initially assigned to OSC. However, the contractual obligations imposed upon OSC set out above reflect that EllisDon and OSC agreed – at least initially - that a third party would perform the decontamination work that is the work in dispute.

109. With that in mind, it is of some significance that the economy and efficiency argument championed by EllisDon and OSC during the course of argument did not appear to have been of much significance for EllisDon at the time that the subcontract for the Parliament Windows work was executed by it and OSC. When EllisDon had total control over the packaging of the demolition work to be performed with respect to the Parliament Windows project, it was content to split the demolition into two portions – contracting with Inbex (or some other entity) to perform the "dirty demolition" work on that project, and contracting with OSC to perform the "clean demolition" work on that same project.

110. The above-noted contractual provisions also undermine another basis for the economy and efficiency argument made by EllisDon, OSC and Local 527. As noted above, those parties argue that asbestos removal and demolition work go "hand in hand", and that often asbestos removal work and demolition work will be performed one after the other on the same day. The suggestion made by EllisDon, OSC and Local 527 is that the removal of asbestos, lead and other contaminants, and the subsequent demolition of the underlying material to be removed, is a seamless process, and thus assignment of the work in dispute to members of Local 527, as part of this larger demolition process, made sense.

111. The Parliament Windows subcontract between EllisDon and OSC suggests that the process is not as seamless as asserted. Section 5 of the scope of work set out above specifically states that the clean demolition work that OSC has been retained to perform will only proceed once an environmental consultant has signed off that all hazardous materials have been removed from the building, and that proceeding with the work will not contaminate the building or workers.

112. In fact, a similar (though not identical) approach is identified in the contractual documents filed by EllisDon and OSC with respect to the BMO Project that was performed by Delsan. In that subcontract, the Schedule "A" – Scope of Work document clearly requires Delsan to perform "dirty demolition". The scope of work is defined as follows:

> - Mobilize manpower, equipment and tools required for the above noted project.
> - Set up a type 3 enclosure c/w negative air pressure, shower, decontamination chambers, garbage chute, etc. to prepare for asbestos plaster removal.

> - Once set up has been completed, the consultant will be called in to review and approve the enclosure.
> - Once approved, decontamination will begin and plaster ceiling will be demolished.
> - Plaster debris will be collected and double bagged in yellow asbestos bags for disposal from site.
> - Clean and was down the area and prepare for a visual inspection from the project environmental consultant.
> - Once clearance from visual has been provided, crew to spray "lockdown" glue within the enclosure.
> - *Consultant to be brought in once lockdown settles and dries for air testing to be carried out.*
> - Once air test passes, *crew will return* to tear down enclosure and demobilize from the Booth Building. (emphasis added)

Of significance, once the contaminated product is removed from the fabric of the building and bagged, an environmental consultant must be called in to visually inspect. Later, after further work is performed to ensure a safe working area, the environmental consultant is called back to the site to perform air testing. Subsections 18(4) to (9) of Ontario Regulation 278/05 require such testing to be performed in most cases when the removal of Type 3 asbestos occurs indoors. Upon confirmation that the air test is satisfactory, the crew that performed the work then returns to the site to tear down the enclosure. If there is "clean demolition" work to be performed after the removal of the contaminated materials, that demolition occurs only *after* air testing; that is, after a specific temporal break in all demolition work.

113. Counsel for Local 527, during argument, pointed to section 1.12 of Schedule "A" – Scope of Work in the contract between EllisDon and Delsan relating to the BMO Project as supportive of the position taken by EllisDon, OSC and Local 527. Section 1.12 states that the removal of the caulking from the existing historical metal windows is to be coordinated with the Construction Manager and the trades removing, salvaging and replacing the metal windows and stone jambs. Counsel submitted that this provision reflected the integration between the asbestos abatement work and the demolition that occurs after asbestos abatement is completed.

114. I do not view section 1.12 of the Schedule "A" – Scope of Work as establishing the high degree of integration suggested by counsel. All that section 1.12 does is highlight the usual expectation of the general contractor that a subcontractor performing work on a construction site will coordinate its work to align with the work performed by other subcontractors. In fact, section 1.12 in some ways undermines the argument made by Local 527, EllisDon and OSC. That provision appears to anticipate that the contractor tasked with the removal of the caulking from the windows will be a different contractor than the contractor engaged to remove the windows.

115. In my view, the evidence before the Board supports the assertion made by Local 1891 that the work in dispute is not, as is claimed by EllisDon, OSC and Local 527, part of a seamless process of abatement work and clean demolition, such that the crew of construction labourers employed by OSC or Delsan to perform the asbestos

abatement work will simply continue right into the clean demolition phase of the work after dealing with the abatement work, without interruption. There are breaks throughout the decontamination process, and a natural break in the process once the asbestos abatement work is completed. That work is reviewed by an environmental consultant and, where Type 3 asbestos is involved, air testing is performed. After that air testing confirms that clean demolition can occur safely, that demolition begins.

116. Having regard to all of the above, I consider the economy and efficiency factor to be neutral. Whether the dirty demolition work and subsequent clean demolition work is performed by one subcontractor, or the dirty demolition work is performed by one contractor, and a second contractor is brought in subsequently to perform the clean demolition work, does not establish any meaningful economy or efficiency for the performance of the work in dispute on these three projects.

## VIII. Conclusion

117. Local 1891 asserts that its members should have been assigned the work in dispute that was performed with respect to the Parliament Windows project, the Parliament Ceilings project, and the BMO Project. As noted earlier in this decision, Local 1891 must demonstrate, on the balance of probabilities, that the work in dispute should have been assigned to its members, having regard to all of the relevant factors.

118. With respect to the Parliament Windows project, I conclude that Local 1891 has not met its onus. There are only two factors that are not neutral in that proceeding, namely the area practice and collective agreement factors. Although the area practice evidence falls in favour of assignment of the work in dispute to members of Local 1891, Local 1891 did not have any contractual claim to the work in dispute when the work was subcontracted by EllisDon to OSC, and when OSC assigned the work in dispute to members of Local 527.

119. A trade union without a relevant collective agreement will have a difficult time succeeding with a jurisdictional complaint against a trade union that has a collective agreement with the employer (see, for example, *Groff & Associates*, [1994] OLRB Rep. July 846; *Bondfield Construction Company (1983) Limited*, [2002] OLRB Rep. March/April 114; *Brunswick Drywall Limited*, [1982] OLRB Rep. August 1143; *Pigott Construction Limited*, [1992] OLRB Rep. June 748, and *Elecon Electrical Contractors Inc.*, [1995] OLRB Rep. May 645). Even with strong evidence of area practice, it is only in the most exceptional of cases that the Board will conclude that work in dispute ought to have been assigned to members of a trade in the absence of a contractual claim to that work.

120. Board File No. 0765-12-JD is not such a case. In the circumstances, Local 1891 has not established a valid claim to the work in dispute. Accordingly, with respect to Board File No. 0765-12-JD, the Board declares that Local 1891 has not established, on the balance of probabilities, that the abatement, removal and disposal of materials containing asbestos or other hazardous substances at the Parliament Windows project ought to have been assigned to its members rather than to members of Local 527.

121. The situation is different with respect to the assignments of work in Board File Nos. 1455-12-JD and 1460-12-JD. In those two proceedings, the collective agreement factor strongly favours assignment of the work in dispute to members of Local 1891. The area practice evidence also favours such an assignment, and all other factors are neutral. The work in dispute ought to have been assigned to members of Local 1891.

122. Accordingly, with respect to Board File Nos. 1455-12-JD and 1460-12-JD, the Board declares that Local 1891 has established, on the balance of probabilities, that the abatement, removal and disposal of materials containing asbestos or other hazardous substances at the Parliament Ceilings project and the BMO Project ought to have been assigned to its members rather than to members of Local 527.

"Lee Shouldice"
for the Board