



## **ONTARIO LABOUR RELATIONS BOARD**

OLRB Case No: **2060-14-R**

The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v **Giffels Constructors Inc.**, Responding Party

**BEFORE:** Kelly Waddingham, Vice-Chair

**APPEARANCES:** Meg Atkinson, J. James Nyman and Cameron Dickson appearing on behalf of the Applicant; Abdul-Basit Khan, Colin Soule and Elizabeth Glassbergen appearing on behalf of the Responding Party

**DECISION OF THE BOARD:** December 3, 2015

1. This decision is in relation to an application for certification brought pursuant to the construction industry provisions of the *Labour Relations Act*, 1995, S.O. 1995 ch.1, as amended (the "Act"), and in particular section 128.1 of the Act. The parties to the application are the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America ("Carpenters' Union" or the "Union"), and Giffels Constructors Inc. ("Giffels"). The application was filed on October 10, 2014.

2. The primary purpose of the hearing in this matter is to determine who was the true employer of two individuals employed on the worksite on the date of the application. The Union asserts that the individuals were employed by the responding party, Giffels. Giffels contends that they were employed by one of its subcontractors, Coverall Tents Inc. ("Coverall" or "Coverall Tents"). There is no dispute that the individuals at issue were at work, performing bargaining unit work, on the date of the application.

## **BACKGROUND**

3. Giffels is a construction management company that provides general contracting services for large construction projects. In June 2014, Giffels began work on a Flex Industrial Building (the "project") located at 20 Tyler Street in Cambridge, Ontario (the "worksite"). The owner of the project is Bentall Kennedy (Canada) LP ("Bentall Kennedy"), a large real estate investment, development and management company.

4. Bentall Kennedy is bound by the Carpenters' Provincial ICI Collective Agreement. When Bentall Kennedy engaged Giffels as its general contractor for the project, it advised Giffels that as a consequence of its obligations under the Collective Agreement, any carpentry work on the project would have to be performed by members of the Carpenters Union.

5. Coverall Tents is a weatherproofing company operated by Tonino (Tony) Sarracini. Coverall was engaged by Giffels to perform water removal work (de-watering). Mr. Sarracini began working at the worksite in the summer of 2014. At that time, he had no employees on site with him. Mr. Sarracini completed Giffels's safety orientation and provided all the required certification to Giffels on August 13, 2014. On the Worker Orientation Checklist, Mr. Sarracini indicated that his position was "Labourer."

6. The workers at issue are Richard Smith and Scott Worthman. Both Mr. Smith and Mr. Worthman are members of the Carpenters' Union. At the relevant time, Mr. Smith was a journeyman and Mr. Worthman was an apprentice. Both Mr. Smith and Mr. Worthman began working on the project on Monday, October 6, 2014. Mr. Smith worked on the project for two weeks, finishing on Friday, October 17th. Mr. Worthman worked on the project a further week (October 20th to 24th), and into the week beginning October 27, 2014.

7. Messrs. Smith and Worthman were engaged principally to perform hoarding work on the project. Hoarding involves covering unfinished door and window openings with clear plastic sheeting (tarpaulin) to protect the interior of the building from the elements. In the present case, the hoarding work was necessary to protect interior surfaces that were being prepared for the pouring of concrete. The Union regards hoarding work as carpenters' work.

8. Cameron Dickson is the Union representative/organizer tasked with overseeing collective agreement compliance and organizing efforts on the project. Massoud Bolourian is the Site Superintendent for Giffels on the project.

## **EVIDENCE**

9. Mr. Dickson, Mr. Smith and Mr. Worthman gave evidence on behalf of the Union. Mr. Bolourian and Mr. Sarracini gave evidence on behalf of Giffels. Joe Bendici, Director of Project Management for Giffels, also appeared on behalf of the company. The parties made arguments by way of written submissions in July 2015.

10. Evidence was adduced regarding an event that took place prior to the employment of Messrs. Smith and Worthman. In or about August/September 2014, Giffels engaged a subcontractor, Flynn Canada Ltd. ("Flynn") to perform roofing work. One of the jobs assigned to Flynn was to construct a parapet along the edge of the roof of the building. Flynn is a signatory to a collective agreement with the Sheet Metal Workers' Union, and was thus using sheet metal workers to construct the parapet. When Mr. Dickson became aware that sheet metal workers were performing the parapet work, he asserted to Mr. Bolourian that the work was, in fact, carpenters' work. Giffels called upon Flynn to cease its work on the parapet. The work was stopped for a few days. Bentall Kennedy was apparently apprised of the dispute, and requested that Giffels "sort it out immediately." Mr. Bolourian discussed the matter with Giffels's project manager, Kevin Miller, and it was decided that the parapet work should be reassigned to a subcontractor that employed carpenters. With Mr. Dickson's assistance, Mr. Bolourian engaged a company called STM Construction ("STM") to complete the parapet work. The "Flynn incident" sensitized Giffels (and, in particular, Mr. Bolourian) to the fact that Bentall Kennedy was obliged to use Carpenters' Union members to perform carpentry work, and it undertook thereafter to respect that obligation.

11. In September 2014, while attending at the worksite, Mr. Dickson indicated to Mr. Bolourian that hoarding work would need to be done to protect the grade inside the building from the elements. He advised Mr. Bolourian that hoarding work was carpenters' work, and suggested that the work could be done by STM. However, Mr. Bolourian indicated that he wanted Coverall to do the work rather than STM, despite the fact that Coverall exclusively engaged labourers.

12. Coverall was incorporated in 1985 and has been continuously in the weather protection business since then. Coverall has an HST number, carries commercial liability insurance, and is registered as an employer with the Workplace Safety and Insurance Board. Mr. Sarracini typically performs much of Coverall's work alone. To the extent that he employs other workers to perform Coverall's work, Mr. Sarracini engages labourers. On a given job, Mr. Sarracini determines how many workers are required, what skills they must have, and how their work will be billed out to the company's customers.

13. Instead of having Coverall contact Mr. Dickson to work out the arrangements for the hiring of carpenters, Mr. Bolourian proceeded to negotiate directly with Mr. Dickson the complement and qualifications of the workers. According to Mr. Dickson, Mr. Bolourian asked him if one Labourer and one Carpenter could do the hoarding job. Mr. Bolourian denied this claim, but conceded that he was concerned about the cost of the work. Ultimately, he accepted Mr. Dickson's suggestion that the work could be performed by one journeyman carpenter and one apprentice carpenter.

14. It is not clear precisely how or when the agreement between Mr. Bolourian and Mr. Dickson was relayed to Mr. Sarracini. However, it appears that at some point, Mr. Bolourian told Mr. Sarracini that he would have to hire carpenters to do the hoarding work in order for Coverall to get the job. Mr. Sarracini priced the hoarding job on a lump sum basis before it began by estimating the cost of materials and labour. Coverall's general labour/de-watering contract with Giffels was purportedly priced in the same manner. In the case of both jobs, Coverall bore the costs on its business account, and invoiced Giffels separately for the jobs after they were completed.

15. Once it had been determined (by Mr. Bolourian) that the hoarding work should begin on or around October 6, 2014, Mr. Dickson asked Mr. Bolourian to have Coverall contact him to make arrangements to dispatch the workers. With Monday, October 6th approaching, Mr. Dickson had not heard from Coverall. He called Mr. Bolourian to find out what was happening with respect to the impending hoarding work. Finally, in the afternoon of Friday, October 3, 2014, someone from Coverall (either Mr. Sarracini or his son) contacted Mr. Dickson by phone. The conversation established the start date and time for the carpenters being engaged for the hoarding job. Mr. Dickson had by that time identified the particular carpenters who would be referred to the worksite. Mr. Dickson testified that at that time he asked for a fax number or e-mail address so that he could

forward referral slips (containing necessary payroll information) to the company. Mr. Dickson was apparently advised that someone would "get back to him" with the information. However, it appears that Mr. Dickson never obtained this information. When he visited the worksite on October 7, 2014, Mr. Dickson spoke with Mr. Sarracini, but was able to obtain only the company's address and phone number(s). The referral slips ultimately had to be relayed to Coverall via Mr. Bolourian.

16. When Messrs. Smith and Worthman arrived at the worksite on October 6, 2014, they were directed to attend at the Giffels trailer for site and safety orientation. Mr. Sarracini was not present for this orientation (and possibly had yet to arrive at the worksite). Mr. Sarracini did not provide any further safety training. According to Mr. Smith, the general contractor and the subcontractor typically provide their own orientation. That was not the case on this job.

17. The carpenters were not able to set to work promptly following their orientation by Mr. Bolourian, as Mr. Sarracini did not have the necessary materials on hand. Mr. Sarracini left the worksite in his personal vehicle to obtain the materials. The carpenters had to wait until Mr. Sarracini returned before they could set to work. Mr. Bolourian did not assign duties to the men in Mr. Sarracini's absence.

18. Coverall provided the carpenters with the materials and the tools necessary to perform the hoarding work. The tools included a hammer drill, a circular saw, a stapler, cordless nail guns, and extension cords. Materials included plastic tarpaulin, wood strapping, and tarpcons. Hoarding involves spreading clear plastic tarpaulin over the empty window and door openings, wrapping the edges of the tarp around 1-inch x 3-inch wood strapping and fastening the strapping to the concrete using concrete fasteners known as tarpcons.

19. Messrs. Smith and Worthman indicated that they both had previous experience doing hoarding work. When Mr. Sarracini arrived with the materials on Monday, October 6th, he took them to the work area and "showed them roughly how to do it." To the extent that Mr. Worthman (as an apprentice) needed additional guidance performing the work, it was provided by Mr. Smith. However, the work was, by all accounts, "repetitive and straightforward", and once the men started on it, little or no direction or supervision was required.

20. Both Mr. Smith and Mr. Worthman testified that they perceived Mr. Sarracini as being subordinate to Mr. Bolourian. They stated that on several occasions, Mr. Bolourian, either directly or

through Mr. Sarracini, directed their work. The first and most significant instance was with respect to the hoarding work. On the first day of the job, Mr. Smith and Mr. Worthman were performing the hoarding work, fastening the strappings to the concrete with the tarpcons spaced two to two-and-a-half feet apart. According to Mr. Smith, this spacing ensured a tight seal to the concrete. However, according to Mr. Smith, Mr. Bolourian was of the opinion that the tarpcons could be affixed farther apart (i.e. at three-foot intervals), and expressed that view to Mr. Sarracini. Mr. Sarracini relayed this information to Messrs. Smith and Worthman. Despite Mr. Smith's concerns about the quality of the seal, Mr. Sarracini directed the carpenters to follow Mr. Bolourian's direction. In his evidence, Mr. Bolourian recalled objecting to the original spacing of the tarpcons, indicating that he thought it amounted to "overkilling the job."

21. Mr. Bolourian also exercised some control over the carpenters' de-watering work. While Mr. Sarracini generally provided direction as to where to concentrate their efforts and where to place the pumps, Mr. Bolourian also gave directions (directly or through Mr. Sarracini) regarding these matters.

22. Giffels provided the pumps and generators that were required for de-watering. At some point, Mr. Bolourian returned a generator that the carpenters' were using, notwithstanding the fact that Mr. Smith indicated to him that it was still required to finish the work. Mr. Sarracini was unable to affect Mr. Bolourian's decision. Ultimately, however, Mr. Bolourian was persuaded that the carpenters still needed the generator, and he directed Mr. Sarracini to go back to the rental company to pick it up.

23. Mr. Smith testified that Mr. Bolourian directed him with respect to the repair of a leak in the roof. He testified that Mr. Bolourian selected the sealing material (an expanding spray foam) on his advice. He stated that after Mr. Bolourian purchased the material, he and Mr. Sarracini proceeded to seal the leak under Mr. Bolourian's supervision.

24. The events of October 10, 2014 were unique in that Mr. Sarracini was not at the worksite that day. He was absent so that he could attend a funeral. At the end of the workday on Thursday, October 9th, Mr. Sarracini informed the carpenters that he would be absent, and told them that he would leave tools and hoarding materials in the locked "C-can" (a storage container) on site. He advised them that Mr. Bolourian would unlock the C-can in the

morning so that they could access the tools and materials. According to Mr. Smith, he also advised them that they should "do what Massoud (Mr. Bolourian) says."

25. When Messrs. Smith and Worthman arrived at the worksite on October 10, 2014 Mr. Bolourian opened the C-can for them. They immediately determined that there were not enough materials to enable them to do a full day of hoarding work. Mr. Smith raised this concern to Mr. Bolourian. Mr. Smith testified that Mr. Bolourian directed the carpenters as to the areas they should cover first. When Mr. Smith later asked Mr. Bolourian if he would be getting more materials for them, Mr. Bolourian told him that he would not be. According to Mr. Smith, Mr. Bolourian advised them that they should finish what they could with the materials they had, and then they could go home. Mr. Bolourian testified that the carpenters decided independently to leave when they ran out of materials. Mr. Worthman's evidence (which indicated that he had been experiencing stomach problems that week) suggests that he may have determined independently to leave early on the 10th. Mr. Smith testified that he preferred to work all his hours on Friday afternoon so that he could obtain his weekly pay, and would not have left if there had still been work to do.

26. As the hoarding work neared completion (at the end of the second week of the carpenters' employment) Mr. Sarracini decided that he would keep Mr. Worthman on to assist him with Coverall's remaining work on the project. He testified that the reason he kept Mr. Worthman on instead of Mr. Smith was that Mr. Worthman's hourly rate of pay was lower. Mr. Worthman testified that his week-plus of further employment was spent doing general clean-up and de-watering. There was no evidence suggesting Mr. Worthman did any further carpentry work.

## **LAW**

27. The question to be answered in this case is: Who was the true employer of Messrs. Smith and Worthman on October 10, 2014? The circumstances of their employment on the project (however brief) gave rise to a tripartite relationship involving the workers, Giffels Constructors, and Coverall Tents. Such circumstances are not uncommon in the construction industry, in which workers and subcontractors are routinely engaged on an "as needed" basis and supervisory authority on a job site is widely diffused.

28. In the course of determining questions of who is the true employer in circumstances of a tripartite relationship, labour relations boards and courts have attempted to delineate a test or a set of factors to facilitate such determinations. The objective of the test(s) is to ascertain who exercises "fundamental control" over working conditions and the central features of the employment relationship. This Board has generally relied upon one of two tests (or sets of factors) to make such determinations. The earliest of these was set out by the Board in *York Condominium No. 46*, [1977] OLRB Rep. October 645. In that decision, the Board identified the following factors:

- (1) who exercises direction and control over the employees when they are performing the work;
- (2) who bears the burden of remuneration;
- (3) who has the power to impose discipline;
- (4) who does the hiring;
- (5) who has the authority to discharge;
- (6) who do the employees perceive to be their employer; and
- (7) the intention to create an employment relationship.

29. The application of and, indeed, the utility of this test have since been the subject of much consideration and comment by the Board. In *Best Personnel Services*, [1997] OLRB Rep. September/October 849, the Board offered the following comments:

12. Although the Board is always prepared to consider any factor which is relevant, as a general matter, the factors which the Board has considered when faced with a "who is the employer" issue are the ones first compiled in the *York Condominium, supra* decision [...].

13. None of these factors is necessarily determinative, and the relative significance of any individual factor will depend on the circumstances of the particular case.



Having said that, it is apparent that the object of the exercise is to assess the various factors, both individually and in the context of all the factors, in order to ascertain who has fundamental control over the employment relationship, particularly where the factors point in different directions. In making the assessment and determination, the Board is more concerned with substance than with form; that is, the Board will not permit commercial form to obscure labour relations reality.

14. A natural consequence of this is that the first five factors listed in *York Condominium, supra*, which are indicators of control, have become more important than the last two, which are both more subjective and difficult to gauge. This is consistent with the Board's preference (and the underlying theme of the Act as demonstrated by provisions like subsection 1(4) and section 69) for substance over form, and with the principle that perception and impression cannot be determinative of a question of law (see, *International Union of Canada and Kent Line Ltd.*, (1972) 27 D.L.R. (3d) 105 (Federal Court of Appeal)).

15. When it comes to a question of fundamental control, there is little which is more important than the beginning of the relationship (hiring), regulating it (direction, control and supervision) and ending it (termination). Accordingly, *York Condominium, supra*, factors 1, 4 and 5 have gained primacy. Indeed, even though the Board (and arbitrators) have been careful to say that it will not be determinative, decisions like *Dare Personnel, supra*, *Sylvania Lighting, supra*, and *Royal Ontario Museum, supra*, demonstrate that direction and control is a very significant factor. At the same time, these decisions also demonstrate that the perception of the employees, and commercial contracts as indicators of intention often carry little weight.

16. As noted by the Board in *Sutton Place Hotel*, [1980] OLRB Rep. October 1538 at para. 43, "[t]he significance of each indicator can only be ascertained through an appreciation of how they all fit together in the facts of each case." The analysis, however, that is being undertaken is aimed at determining which entity exercises fundamental control over the working lives of the individuals in issue. The search is to find the entity

that in fact meaningfully impacts the working lives of the workers.

30. Despite the assurance that the Board will consider "any factor which is relevant" (the first sentence of the above passage), the narrowing of the *York Condominium* test in the course of twenty years of use is clearly identified by the Board in the remaining paragraphs. While in some cases the Board has continued to apply the *York Condominium* factors (see: *Brookfield Multiplex Construction Canada*, [2015] O.L.R.D. No. 1250), in others the Board has been critical of any continued reliance on the test. In *B.M. Metals Services Inc.*, [2012] OLRB Rep. September/October 782, the Board made the following comments about the test (at paragraphs 27 and 37):

27. [...] Frankly, a simple recitation of [the *York Condominium* factors] is not particularly helpful in analyzing the question that the Board must ultimately answer. Some factors are of almost no value. The existence of an intention to create the relationship of employer and employee is a rather odd test. The only reason cases like this come before the Board is that the "client" has done its best to structure the relationship so it is not. The perception of many construction employees is usually unhelpful. Rarely does a construction employee have any significant bargaining leverage [...].

...

37. In the view of this panel of the Board, the focus on the seven criteria enunciated in *York Condominium No. 46* risks placing excessive emphasis on irrelevant facts or placing emphasis on others.

31. In *B.M. Metals Services Inc.*, *supra*, and in subsequent decisions, the Board adopted the analytical approach described by the Supreme Court of Canada in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015. In *Pointe-Claire (City)*, *supra*, the Supreme Court was called upon to determine whether the Quebec Labour Court made a patently unreasonable decision in declaring the worker at issue an employee of the City. The Supreme Court was critical of the Labour Court's analysis in tripartite relationship cases, in particular its over-reliance on either of two tests to determine the true employer: the "legal subordination" test and the "integration" test (see paragraphs 35-47). The "legal subordination" test generally addressed the question of which party was in control of the day-to-day

assignment and direction of work performed by the individual at issue. The "integration" test (derived from independent contractor-vs-employee cases) considered the extent to which the work of the individual was integrated into the alleged employer's business. The Supreme Court stated that a "more comprehensive approach" was called for in such cases:

48. According to this more comprehensive approach, the legal subordination and integration into the business criteria should not be used as exclusive criteria for identifying the real employer. In my view, in a context of collective relations governed by the *Labour Code*, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work - and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.

32. While most references to *Pointe-Claire (City)*, *supra* pay particular attention to the above paragraph and, in particular, to the list of factors set out in the final sentence, the paragraph that follows is also noteworthy. In paragraph 49, the Court comments favourably on the Ontario and Canada Labour Relations Boards' reliance on a "fundamental control" test to identify the true employer in tripartite relationship cases. The Court described the test as follows:

49. [...]. The application of the fundamental control test leads to an analysis of which party has control over, *inter alia*, the selection, hiring, remuneration, discipline and working conditions of temporary employees and to a consideration of the factor of integration into the business. In the final analysis, the application of the fundamental control test involves an examination of factors that are similar to those suggested by the comprehensive approach set out in

*Vassart* and in the Court of Appeal's decision in the instant case.

33. The Union submits that the Board has by now effectively abandoned the *York Condominium* test in favour of the analysis articulated by the Supreme Court in *Pointe-Claire (City)*, *supra*. However, as noted above, application of the *York Condominium* test, in theory if not in practice, did/does not foreclose consideration of other relevant factors. Whichever analytical framework or test is chosen it should, as stated by the Supreme Court, "[allow] for a consideration of which party has the most control over all aspects of the work on the specific facts of each case." By strictly adhering to a particular set of specified factors – whether drawn from *York Condominium* or *Pointe-Claire (City)* – and applying them in a rigid manner, the Board runs the risk of creating situations in which "the test runs the facts." This scenario must be resolutely avoided.

34. In fact, the Board has moved towards a more comprehensive analysis, going beyond the strict application of a formalistic legal test to examine any and all relevant factors in each case. This does not mean that the analysis has (or will) become completely amorphous. Generally speaking, the same range of factors will be applicable in the majority of cases. However, which factors will be considered and the relative weight to be accorded them will inevitably be case-specific. Also guiding the Board's approach to these cases is the principle that the analysis must be purposive. As expressed by the Board in *Grant Development Corporation*, [1993] OLRB Rep. January/February 21 (at paragraph 26), the choice (of employer) should be that which "appears to be more consistent with the statutory and labour relations framework within which the Board operates."

## **ANALYSIS**

35. It is Giffels' position that the Board should consider the *York Condominium* factors as a starting point and supplement those with factors set out in *Pointe-Claire (City)*. The Union points out that since *B.M. Metals Services*, *supra* this Board has favoured the comprehensive approach and factors set out in *Pointe-Claire (City)*. It submits that the task of the Board is to identify the locus of fundamental control through the analysis of a variety of factors integral to an employment relationship. Regardless of the parties' differing positions on the form the analysis should take, their recitations of the factors relevant to this determination generally

overlap. Where the parties' differ is on the interpretation of, and/or the emphasis to be given to, the factors and the facts relating to them.

36. Based on the written submissions of the parties, the Board finds that the relevant factors in this case are: the selection process and hiring; training; assignment of duties and direction; supervision; control; authority to discharge; and, remuneration. The parties agreed that the factors discipline, evaluation and integration into the business are not relevant in this case. Consequently, these factors will not be considered here. On the basis of the relevant factors, and bearing in mind the principle of purposive analysis set out above, the Board finds that Giffels retained fundamental control, and therefore was the employer of Messrs. Smith and Worthman.

37. The Board finds that Giffels, through Mr. Bolourian, played a far more significant role in the selection process, that is the determination that the hoarding work would be performed by carpenters – one at the journeyman level, the other at the apprentice level, than did Coverall. Mr. Bolourian was instrumental in determining that the work would be done by carpenters, he negotiated the complement of workers, and their level of expertise (a journeyman and an apprentice) directly with the Union. Coverall was not involved in this negotiation. Mr. Sarracini acceded to Bolourian's instruction that carpenters would do the work, despite holding the view that hoarding was not carpenters' work. It was clear that he did not want to hire carpenters to do the hoarding, and did so only under the direction and at the insistence of Mr. Bolourian.

38. Giffels was not involved in the actual hiring of Messrs. Smith and Worthman. However, Coverall's involvement in their hiring was itself negligible. It was Mr. Dickson who ultimately selected Messrs. Smith and Worthman for the job. Coverall's involvement in the hiring process consisted of a single telephone conversation with Mr. Dickson on Friday October 3, 2014, the purpose of which was primarily to establish the start date and time for the carpenters.

39. The training provided to Messrs. Smith and Worthman by either company was negligible. Mr. Bolourian provided safety/site orientation and Mr. Sarracini provided an initial demonstration as how the hoarding work should be carried out. Mr. Smith provided additional instruction to Mr. Worthman as the carpenters carried out the work. This factor slightly favours a perception that Coverall is the employer. However, it cannot be accorded much weight given the paucity of actual training provided.

40. It is the Board's view that in the present case, the factors assignment of duties (*Point-Claire*) and direction (*York Condominium*) are essentially the same. The evidence indicates that both Mr. Bolourian and Mr. Sarracini assigned or directed the carpenters' work at various points during their two-week engagement. However, it was clear that Mr. Bolourian frequently determined the priority areas for the carpenters' hoarding and de-watering work. Furthermore, Mr. Bolourian provided the ultimate direction as to how the hoarding work was to be performed (i.e. the spacing of the tarpcons). Mr. Bolourian directed Messrs. Smith and Worthman with respect to the repair of a leak in the roof. It is notable that Mr. Bolourian selected the sealing material (a spray foam) on the advice of Mr. Smith. Consequently, the Board finds that Giffels (Mr. Bolourian) assigned or directed the work of Messrs. Smith and Worthman to a greater degree than did Coverall (Mr. Sarracini).

41. Giffels takes the position that Mr. Sarracini supervised the hoarding work. The Union takes the position that Mr. Bolourian supervised it. However, very little evidence was adduced in support of either position. In fact, the evidence indicates that supervision of the actual performance of the work was minimal. Consequently, the Board finds that this factor does not favour either party's position.

42. Control, in this case, principally concerns the provision of materials, tools and equipment. Coverall (Mr. Sarracini) controlled the provision of tools and materials. When Mr. Sarracini failed to have materials on site for the hoarding work to begin, and subsequently failed to have sufficient materials on site on the day he was absent, the carpenters were unable to perform the primary work for which they were hired. Mr. Smith (and possibly Mr. Worthman) lost a partial day of work as a result. Giffels, however, controlled the provision of equipment. When Mr. Bolourian decided to remove a generator from the worksite, the carpenters were unable to complete the job they were doing. Mr. Bolourian was called upon to have the generator returned to the worksite. The Board concurs with the Union that the fact that Mr. Bolourian was able to send Mr. Sarracini to retrieve the generator illustrates the degree of control he exercised over his subcontractor. However, in the Board's view, Coverall exercised slightly greater control over the ability of the carpenters to actually perform the work for which they were hired.

43. Giffels submits that Mr. Sarracini controlled how long Messrs. Smith and Worthman worked on the site, and that Mr. Sarracini's

decision to retain Mr. Worthman amounts to a lay-off of Mr. Smith. On this basis, it submits that Coverall had authority to discharge the carpenters. The Union submits that the termination of Mr. Smith's employment does not constitute an exercise of authority on the part of Mr. Sarracini. It asserts that Mr. Smith's employment ended simply because the work for which he was hired (hoarding) was completed. The Union points out that in the week-plus that Mr. Worthman's employment continued at the worksite, he was performing general labourers' work (clean-up and de-watering) and not carpenters' work (hoarding).

44. The Board agrees with the Union's position regarding the end of Mr. Smith's employment. There was no evidence to suggest that his employment ended as the result of an exercise of authority by either Coverall or Giffels. His employment ended simply because the work he was hired to do was at an end. Furthermore, the extension of Mr. Worthman's employment (for what appears to have been labourers' work) does not constitute an exercise of authority with respect to the end of Mr. Smith's employment. There was no evidence indicating that either business had or lacked the authority to discharge for other reasons. Accordingly, this factor is effectively neutral.

45. The carpenters' wages for the hoarding work were determined by the Carpenters' Collective Agreement. There were no wage negotiations between the carpenters (or the Union), on the one hand, and Coverall (or Giffels) on the other. Coverall was advised that it would have to engage a journeyman carpenter and an apprentice carpenter at hourly wage rates established by the Collective Agreement. It priced the hoarding job on this basis. Accordingly, it bore the chance of profit and risk of loss that may have flowed from that pricing. The Board therefore finds that Coverall bore the burden of remuneration. However, it is the Board's view that this factor cannot be accorded much weight. In the circumstances of this case, the fact that Coverall was the party that actually issued the paycheques does little to demonstrate its control over the employment of Messrs. Smith and Worthman. It is, as the Union submitted, essentially a "form" factor.

## **CONCLUSION**

46. The Board finds that the factors selection and hiring, and assignment and direction are the most indicative of fundamental control in the circumstances of this case. Both of these factors favour the view that Giffels was the employer of Messrs. Smith and

Worthman on October 10, 2014. While the factor of control might be highly indicative in other circumstances, in this case it only slightly favours Coverall as the employer and, therefore, does not weigh heavily in its favour. While the factors training and remuneration favour Coverall as the employer, it is the Board's view that in the circumstances, neither factor should be accorded much weight. Neither factor demonstrates a significant degree of fundamental control over the employment of Messrs. Smith and Worthman by Coverall. Thus, in the Board's view, the appropriate balancing of the relevant factors favours the conclusion that Giffels was the employer of Messrs. Smith and Worthman on the application date.

47. It is unclear what issues, if any, remain to be determined in this matter. The parties shall have five business days to advise the Board whether a certificate should now issue, or whether other issues remain outstanding.

"Kelly Waddingham"  
for the Board