ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **1019-14-R**

The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v **Synercapital Asset Management Inc.** and Synercapital Real Estate Investment Services Inc., Responding Parties

OLRB Case No: **3172-14-R**

The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v **Synercapital Asset Management Inc.** and Synercapital Real Estate Investment Services Inc., Centre Town Apartments Holdings Inc., Arif Enterprises Inc., Responding Parties

BEFORE: Caroline Rowan, Vice-Chair

APPEARANCES: Michael Church, Meg Atkinson, Rod Thompson, Paul Daly and Kevin Harrigan for the applicant; Jacques Emond and Ashraf Arif for the responding parties

DECISION OF THE BOARD: May 22, 2015

1. Board File No. 1019-14-R is an application for certification under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995 c.1, as amended ("the Act"), filed on July 10, 2014 by The Carpenters' District Council of Ontario ("the Union") with respect to Synercapital Asset Management and Synercapital Real Estate Investment Services Inc. Board File No. 3172-14-R is a related application under section 69 and 1(4) of the Act.

2. In its response in Board File No. 3172-14-R, the responding parties (referred to collectively as "Synercapital" or "the responding party") confirmed that they are related and under common control and

direction within the meaning of section 1(4) of the Act. Synercapital however submits that the Board should not exercise its discretion to make a single employer declaration as there is no labour relations purpose for doing so. In this respect, it denies that it is a construction employer within the meaning of the Act since it claims to do no work for compensation for unrelated parties. In the circumstances, it argues that both the certification and the related employer application should be dismissed.

3. The sole outstanding issue in these applications concerns whether or not the responding party is a "non-construction employer" within the meaning of the Act. This issue arises since the Act permits access to certification under section 128.1 of the Act only if a "construction trade union" files an application for certification relating to a "construction industry employer" - which by definition excludes a "non-construction employer" (*Labourers' International Union of North America v. 2095527 Ontario Limited (Embassy Suites)*, [2009] O.L.R.D. No. 3207, 2009 CanLII 48742 (ON L.R.B.). The definitions of "non-construction employer" and "employer" under section 126 of the Act have therefore been interpreted as precluding a trade union from seeking certification for a "non-construction employer" under the construction certification provisions set out in section 128.1 of the Act.

Facts

4. The relevant facts are not in substantial dispute and may be summarized as follows.

5. Ashraf Arif is a Director and Officer of all of the entities which are collectively referred to herein as "Synercapital" or "the responding party".

6. Mr. Arif gave testimony about the nature of the business he operates through the various corporate entities collectively referred to herein as the responding party. His core business involves acquiring properties, improving or renovating them and renting them out and eventually selling them. He is also required to perform maintenance and repair work on the properties he owns and leases. He owns primarily properties containing residential units but also owns some containing commercial units and some with mixed commercial and residential units. Some of the properties he owns jointly with other investors.

7. The present certification application was brought by the Union in connection with work performed by the responding party at Centre Town Apartments, 227 Lake Street, in Pembroke (the "Lake Street Project"). There is no dispute that the responding party engaged two employees at the Lake Street Project to perform carpentry work at that site on the date of the certification application.

8. Mr. Arif, through his company, Arif Enterprises Inc., purchased the property located at the Lake Street Project, which had been a medical building. He did the necessary construction and renovation through Synercaptal Asset Management Inc. in order to convert it to 49 residential housing units used primarily as a student residence for the Pembroke Campus of Algonquin College. The responding party bought the vacant building at 227 Lake Street and then applied for a change in zoning from commercial to a commercial/residential use. The responding party acted as its own general contractor and selected all of the contractors engaged to perform the retrofit work in question. The total cost of the renovation was approximately one million dollars. The rooms were then rented out for approximately $700 per month plus an additional amount for parking. The building contains certain common areas and laundry facilities available to residents for a fee. The cost of the construction was not charged back to anyone except to the extent that Mr. Arif sought to recoup his costs through the rental income.

9. From time to time, the respondent enters into lease agreements under which the respondent as landlord also agrees to do certain leasehold improvements. For example, the respondent entered into three commercial lease agreements on or about the time the certification application was filed in 2014 with The Urban Gourmet Co, with Rapid Rent-to-Own Ltd and with Michelle's School of Performing Arts. In each case, the responding party as landlord agreed to engage in certain renovation and repair work at the property and such work is set out at Schedule "B" to each agreement. The renovation and repair work in question includes bathroom renovations, new flooring, new ceilings, providing baseboard and trim, and installing radiators. According to Mr. Arif's evidence, the cost of the leasehold improvements done are not charged back to the tenant, but rather are incorporated into the rate charged to the tenant.

10. The compensation set out in the lease agreements is the provision of rent for the premises. For example in the lease agreement with Rapid Rent-to-Own Ltd., there is a provision setting

out a certain minimum rent per square foot of Rentable Area. There is also a provision for the payment of additional "Additional Rent", which provision reads as follows:

> 3.3 Additional Rent From and after the Commencement Date, the Tenant shall pay to the Landlord in lawful money of Canada, and subject to section 6.6, without deduction, abatement or set off, Additional Rent for the Premises equal to:
>
> The Real Property Taxes;
> The Proportionate Share of Operating Costs;
> The Proportionate Share of Other Taxes; and
> Sales Taxes
>
> The Landlord shall be entitled at any time or times in any year, upon at least thirty (30) days' notice to the Tenant to require the Tenant to pay to the Landlord monthly, on the date for payment of monthly Minimum Rent instalments, as additional rent, an amount equal to one-twelfth (1/12) of the amount estimated by the Landlord to be the amount of the Additional Rent for such year. The Landlord shall be entitled subsequently during such year, upon at least thirty (30) days' notice to the Tenant, to revise its estimate of the amount of the Additional Rent and the said monthly instalment shall be revised accordingly. …

The term "Operating Costs" is, in turn, defined in the lease agreement as follows:

> 1.2. **Meaning of Certain terms.** In this lease and in the schedules to this lease:
>
> (l) **"Operating Costs"** means the total amounts incurred, paid, attributable, payable by or on behalf of the Landlord for the maintenance, operation, repair, replacement, management and administration of the Building and the Lands, calculated as if the Building were at all times fully occupied and operational, provided that if the Building is less than one hundred percent (100%) completed or occupied for any time. Operating Costs shall be adjusted to mean the amount obtained by adding to the actual Operating Costs during such time additional costs and amounts as would have been incurred or otherwise included in Operating Costs if the Building had been one hundred

> percent (100%) completed, leased and occupied as determined by the Landlord. Operating Costs include, without limitation and without duplication, without profit to the Landlord, the aggregate of:
>
> …
> (v) the cost of signs and equipment, including, without limitation, the cost of all repairs, maintenance and rental charges of any equipment and signs, and the cost of supplies, used in the maintenance and operation of the Building and Lands; provided that signage and equipment is for the whole or partial benefit of the Tenant, or required to maintain the whole of the Premises in good working order, and the Tenant has had the opportunity to approve the erection of any signage before its placement on the Premises.
> …
>
> (vii) the cost of *all repairs* (including repairs which are structural in nature or which are considered capital items in accordance with generally accepted accounting principles) to and maintenance (including without limitation, landscaping maintenance) and operation of the building and Lands and the systems, facilities and equipment (including, without limitation, elevators, escalators and other transportation equipment, if any) servicing the Building and all repairs undertaken by the Landlord for the general safety and benefit of the tenants of the Building or to reduce Operating Costs, and the cost of repairing and maintaining energy conservation equipment and systems and safety or life support systems in the Building or on the Lands; [emphasis added]
>
> …

11. The responding party has also undertaken to perform certain construction work in connection with the sale of some of its properties. For example, in an agreement of purchase and sale, Ashraf Arif, as the seller of a property at 445 Cambridge Street South in Ottawa for $590,000 agreed to install a fence at the back of the property which work was included in the overall purchase price of the property. Mr. Arif acknowledged that the cost of the renovation work he does is factored into the sale or rental price, as the case may be.

Decision

12. As previously noted, the sole outstanding issue in this case concerns whether the responding party meets the definition of a "non-construction employer" within the meaning of the Act. The following provisions of the Act are relevant to that issue:

> 1. (1) In this Act,
>
> ...
>
> "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipelines, tunnels, bridges, canals or other works at the site;
>
> ...
>
> 126. (1) In this section and in sections 126.1 to 168,
>
> ...
>
> "employer" means a person other than a non-construction employer who operates a business in the construction industry, and for purposes of an application for accreditation means an employer other than a non-construction employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;
>
> "non-construction" employer means an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person;
>
> ...

13. The definition of non-construction employer" in the Act was amended by *The Labour Relations Amendment Act, 2000* («Bill 139") in 2000 to reflect its current wording. An employer can meet the terms of this definition if it either does no work in the construction industry or if it does work in the construction industry but does not expect to

receive compensation from a third party for that work (*Don Park Inc.,* [2001] O.L.R.D. No. 4895 at para 16).

14. In the present case, there is no dispute that the responding party engages contractors from time to time to perform construction work. For example, the responding party acted as its own general contractor in respect of the extensive renovation which took place at the Lake Street Project in order to convert that property from a commercial office building to a residential property, which was then used primarily as a residence for University students.

15. The central issue is whether the responding party has engaged in work in the construction industry for which it expects compensation from an unrelated person. In *Shell Canada Products, a General Partnership of Shell Canada Limited and Shell Canada O.P. Inc. (formerly Shell Canada Limited)*, [2002] OLRB rep. July/August 729, the Board discussed what is required to meet the definition of non-construction employer, as follows:

> 43. ... The definition of «non-construction employer" requires that an applicant demonstrate that it does «no work in the construction industry *for which* the employer expects compensation from an unrelated person". The italicized words must mean, in a grammatical sense, that it is the construction work *for which* the third party is paying. That is, the Third Party directly or indirectly causes the applicant to engage in construction activities, and has undertaken to pay the applicant for doing so.

16. An employer who performs no work in the construction industry for the benefit of an entity other than itself meets the definition of a non-construction employer. In order for the employer to fall outside of that definition, it must undertake some construction activities "at the behest of, and for the benefit of, an unrelated person and expect to be compensated for such activity." (*Windsor-Essex Catholic District School Board*, [2002] OLRB Rep. September/October 971 at paragraph 13).

17. The effect of the current non-construction employer provisions and the Legislature's purpose in enacting them were considered by the Board in *Hudson's Bay Co.,* [2002] OLRB Rep. May/June 398. In that case, the Board made the following observations concerning the distinction which the Legislature sought to make under the amended "non-construction employer" provisions between those who will

continue to be covered by the specialized construction provisions and those who will not:

> 48. But there is no doubt that the Legislature intended to draw some distinction between employers who will continue to be covered by the construction industry provisions and those who will not. The first definition of "non-construction employer" required the Board to analyze the relationship between the employer's businesses outside the construction industry, and the business in the construction industry operated by the employer, to determine if the construction business engaged in was "... incidental to the person's primary business".
>
> 49 The amended definition focuses the Board's attention elsewhere. First, as both parties agree, an employer can operate a business in the construction industry to an unlimited degree if it is doing work for itself, or for its own benefit, whether by directly hiring employees or engaging contractors, and meet the definition of "non-construction employer". But in contrast, as counsel for the employer accepted, if the employer is doing any construction work for an unrelated person from whom it expects compensation, that employer remains an "employer" whose labour relations will continue to be governed by the construction industry provisions of the Labour Relations Act.

The legislation therefore distinguishes between employers who operate a business in the construction industry (whether by hiring employees or by engaging contractors) exclusively for their own benefit and those who operate such a business in the construction industry *to any degree* for an unrelated person from whom such an employer expects compensation.

18. In that case, the Board considered the situation of an employer such as Hudson's Bay which, in addition to its primary business, acts as a landlord and provides space to tenants or licensees. The Board noted that, in some of those instances, the employer will be providing construction work for its own benefit in order to preserve its assets and, in other cases, will provide construction work for the benefit of its tenants or licensees. The Board distinguished those construction activities of a landlord from those

which will be found to have been performed for the benefit of an unrelated person, being the tenant or licensee, as follows at para 51:

> "We are satisfied that when HBC engages contractors who perform work in the space that licensees occupy, HBC is performing construction work not for its own benefit, but for the benefit of unrelated persons. **We accept that where HBC supplies nothing more than demising walls, and electrical and plumbing outlets to licensees, HBC is performing that work for its own benefit; it is the minimum it must do to attract a licensee. But when HBC provides finishing work in premises occupied by licensees, which can include fixturing, partitioning and decorating, HBC is performing construction work for the licensee.** Similarly, we conclude that when HBC arranges the supply and installation of fixtures on behalf of, for example, a cosmetic manufacturer, HBC is performing construction work for an unrelated person."

In that case, the Board found that HBC did not meet the definition of a non-construction employer because it, in some cases, charged back to the licensee the fixturing work it had done on the premises it leased to them.

19. Similarly, in *Shell Canada Products,* [2002] OLRB Rep. July/August 729, the Board found that Shell did not meet the definition of non-construction employer since it was not possible to say that it did *no construction work* for which it expected compensation from a third party. In doing so, the Board noted the absolute nature of the current statutory definition and articulated the applicable test for meeting it as follows, at para 50:

> 50. The statute provides a definition that speaks in absolute terms. An applicant seeking to demonstrate that it is a non-construction employer must demonstrate that it does "no work" of the type defined. It does not require that the applicant make profit for the construction work. It does not require that all of the costs of the construction be received from a third party. It says nothing about ultimate title to the final work. It simply requires that an applicant do no construction work for which it receives remuneration from a third party. The statute does not direct the Board to examine what proportion of the applicant's total business such work is. An applicant must demonstrate that it does no such work. In this case,

> Shell does such work and therefore does not meet the definition of a non-construction employer.

In that case, the Board found that Shell had engaged in construction work to accommodate a Trading Partner and charged the Trading Partner an amount identified as a "capital cost" fee, which represents one year's worth of the cost of construction. In the circumstances, the Board found that Shell has engaged in construction work to accommodate the business of a Trading Partner and expects to be compensated by the Trading Partner for having done so. The Board reasoned, at para 46, that "[t]he fact that the capital cost fee is separate from the rental or "throughput" fee makes what Shell is doing clear, but, in [the panel's] view, the result would be the same if the parties had negotiated a single annual fee for the Trading Partner".

20. The fact that compensation charged for the construction work performed for an unrelated party need not be clearly identified as a reimbursement for construction services was also underscored in *Greater Essex County District School Board,* [2009] OLRB Rep. January/February 65 (upheld at the Divisional Court in *Greater Essex County District School Board,* [2012] OLRB Rep. January/February 280 and at the Court of Appeal in *Greater Essex County District School Board,* 2012 ONCA 791). In that case, the Board determined that the School Board did construction work as part of a third party's activities insofar as the School Board's activities at the Essex County Civic and Education Centre (the "Centre") were concerned. The Centre was jointly operated by the School Board and three other entities which shared the cost of "maintenance operations".

21. The compensation which the Board found was paid in exchange for construction services involved an "administrative fee" charged to the three other entities for the services performed by one of the School Board's employees, Mr. Faulkner, who supervises outside contractors in their construction work performed at the Centre. His work was found to amount to "construction management" work, a type of work often performed by general contractors. The fact that Mr. Faulkner's work was compensated for in part by the three other entities through the School Board's charge of an administrative fee was sufficient to amount to compensation by an unrelated party for construction work within the meaning of the definition. The School Board was accordingly found not to meet the definition of non-construction employer. It is therefore sufficient that compensation of some form change hands in relation to construction work performed

whether or not explicitly identified as reimbursement for the construction work itself.

22. In *Waterloo (Regional Municipality),* [2014] OLRB Rep. March/April 400, the Board recently had occasion to consider the issue in a context similar to the present case involving a landlord/tenant relationship. In that case, the Regional Municipality of Waterloo acted as a landlord of certain property it had no need for. In finding that the municipality did not meet the definition of "non-construction employer", the Board noted that it is irrelevant how much construction work for the unrelated person(s) the employer performs explaining, as follows at para 42:

> 42. Rather, an "absolute" definition – limited, narrow and specific – of non-construction employer has been inserted in the Act. Employers who do no construction activity whatsoever or do it only for themselves, or if they do it for third parties, do it for no compensation whatsoever, can qualify to be non-construction employers. Employers who choose, for whatever reason (business or policy – good or bad) to vary from this, risk not qualifying as a non-construction industry employer and becoming ensnared in the Act's construction industry regime and provincial bargaining.

Given the absolute nature of the definition, the Regional Municipality of Waterloo was unable to meet it, since it had, at a minimum, performed a small toilet repair for the convenience of one of its tenants and for which it expected some compensation for the work done, albeit only at cost. The Board also had regard to some electrical work the Municipality arranged to have done by a contractor in the tenant's space and for which the tenant benefited and was invoiced. The Board also suggested that the Municipality had arguably received compensation for construction work on an even wider basis from all tenants since it charged them a 10% administration fee for "operating costs and expenses" when the base that the 10% is calculated on includes items broader than just common repairs.

23. Similarly, in the present case, the responding party performs construction work for its tenants from time to time and, in the case of the lease with Rapid Rent-to-Own Ltd. explicitly charges an additional fee, referred to as "Additional Rent" which includes reimbursement of such things as its operating costs for construction work. Under the lease agreement, operating costs are calculated as including all repair

to the Building, including the cost of all repairs of any equipment and signs provided the signage is for the whole or partial benefit of the Tenant. The Additional Rent is further calculated on the basis that it includes the cost of such signs and equipment, and the cost of all repairs of any equipment and signs. There can therefore be no doubt that at least some of repair (or construction) work performed is for the benefit of an unrelated party and that the responding party charges back those costs to the tenant, an unrelated party, in the form of additional rent.

24. In addition, the responding party has entered into purchase and sale agreements under which it agrees to perform certain construction work at the property being sold, such as the construction of a fence, prior to the sale of the property and as part of the negotiated purchase price. This is not, as the respondent suggested, a situation in which a landlord simply improves the value of the asset over time and then sells the building at an improved value for a profit. Instead, the responding party has agreed to undertake certain construction work for the benefit of the purchaser, not for its own benefit, for a negotiated price.

25. The responding party has further entered into lease agreements under which it has undertaken to do substantial improvements to the rented unit such as bathroom renovations for the benefit of the tenant and its overall investment in exchange for the monetary compensation provided for under the agreement. Like the panel in *Shell Canada Products*, cited above, I am not persuaded that it matters that the amount attributable to the construction (of the fence in the case of the purchase and sale agreement) is not separated out from the overall contract price. What the responding party did in that case was to engage in construction work to accommodate the purchaser, an unrelated party, and expects to be compensated by the purchaser for having done so. It is not, in my view, reasonable to conclude that a substantial renovation such as one done to the bathroom of a rented unit as part of an undertaking in a lease agreement is done purely for the benefit of the landlord, rather than for the benefit of the tenant.

26. Given the absolute nature of the definition and the evidence before me, I find that the responding party does not meet the definition of "non-construction employer" within the meaning of the Act. In the circumstances, the applicant is entitled to seek certification

under the construction industry provisions set out in section 128.1 of the Act.

Disposition

27. In view of the Board's determination herein and the respondent's concession that the entities collectively referred to as "Synercapital" or "the responding party" are related and under common control and direction within the meaning of subsection 1(4) of the Act, I find it appropriate to make the requested declaration under subsection 1(4) of the Act. I therefore declare that Synercapital Asset Management Inc., Synercapital Real Estate Investment Services Inc., Centre Town Apartment Holdings Inc., and Arif Enterprises Inc. are a single employer within the meaning of subsection 1(4) of the Act.

28. In its decision of July 18, 2014 in Board File No. 1019-14-R, the Board determined the appropriate bargaining unit pursuant to section 158(1) of the Act.

29. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant) and the information provided under subsection 128.1(3) of the Act), the Board is satisfied that more than 55% of the employees in the bargaining unit were members of constituent locals of the applicant at the time the application was filed. Therefore, pursuant to section 12(3) of the Act, those individuals are deemed to be members of the applicant on the date the application was filed. The applicant filed membership evidence on behalf of two persons, both of whom are agreed to be employees in the bargaining unit.

30. The applicant has asked that it be certified pursuant to section 128.1(13)(a) relying solely on the number of persons in the bargaining unit who are its members. The applicant is entitled to do so under section 128.1. There is nothing raised in this file by any party that would cause the Board to consider directing a representation vote.

31. The Board has received no objection from any employee within the time set in the Notice to Employees provided to the responding party for posting.

32. The Board is satisfied that it should certify the applicant.

33. Section 128.1(24) of the Act, which states as follows, provides for the issuance of more than one certificate if the applicant has the requisite support:

> If an election under this section is made in relation to an application for certification that relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126,
>
> ...
>
> (b) if the Board certifies the trade unions on whose behalf the application for certification was brought as the bargaining agent of the employees in the bargaining unit under clause (13)(a), it shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas;
>
> ...

Therefore, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the United Brotherhood of Carpenters and Joiners of America and the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America in respect of all carpenters and carpenters' apprentices in the employ of Synercapital Asset Management Inc. and Synercapital Real Estate Investment Services Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

34. Further, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices in the employ of Synercapital Asset Management Inc. and Synercapital Real Estate Investment Services Inc. in all sectors of the construction industry in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

35. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 45 business days.

"Caroline Rowan"
for the Board