



ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0079-21-R**

NLG 2011 Inc. -and- Nautical Lands General Contractors Inc. -and- NLG LP One, Applicants v **Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America**, Responding Party

BEFORE: Lindsay Lawrence, Alternate Chair

APPEARANCES: Patrick Groom, Victor Kim and Kevin Pidgeon for NLG 2011 Inc., Nautical Lands General Contractors Inc., and NLG LP One; Kathryn Carpentier and Jim Congdon for Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America

DECISION OF THE BOARD: February 13, 2023

1. This is an application concerning a sector dispute in the construction industry filed under the *Labour Relations Act, 1995, S.O. 1995, c.1*, as amended, (the "Act"). This application (the "sector dispute") was filed on April 9, 2021.

2. The application was filed by NLG 2011 Inc., Nautical Lands General Contractors Inc., and NLG LP One. Board File No. 3184-19-R is an application filed with the Board pursuant to subsection 1(4) and/or section 69 of the Act involving, among others, the applicants in the sector dispute. Having regard to the agreement of the parties, the application in Board File No. 3184-19-R was adjourned *sine die*, pending a final decision of the Board in the sector dispute. Without making any finding or determination on the subsection 1(4) and/or section 69 issues, and purely for practical purposes and ease of reading, the Board refers herein to the applicants herein collectively as "NLG".

3. The Responding Party is the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (the "Union").

4. The work in dispute is "Phase 2" of Harbour Hill, a construction project which took place at 104 Suncoast Drive East, Goderich, Ontario. The Harbour Hill project consisted of two phases:

- Phase 1 is a retirement home registered with the Retirement Homes Regulatory Authority. The construction of Phase 1 began in 2012 and ended in 2014. It consists of 64 suites.
- Phase 2 is a four-storey building containing 75 suites. The construction of Phase 2 began in or around September 2019 and was completed in or around November 2020.

5. The parties agree that the Phase 1 construction falls within the industrial, commercial and institutional sector ("ICI" sector) of the construction industry. The question before the Board is what sector the Phase 2 construction falls within. NLG submits that the work in dispute falls within the residential sector; the Union submits that the work in dispute falls within the ICI sector.

6. For the reasons set out below, the Board has concluded that, for purposes of this sector dispute, the Harbour Hill Retirement Community project should be viewed as a whole rather than in two parts, and is a retirement facility which falls within the ICI sector of the construction industry.

Evidence

7. The parties agreed to file "will say" statements on behalf of each of their witnesses, with documents appended to each statement. They also agreed to a timeline for the exchange of these statements. Witnesses supplemented their statements as necessary in examination in chief, and were then cross-examined. This was a fairly lengthy hearing, but the time necessary to complete the evidence was greatly reduced by the cooperation of the parties and the process to which they agreed. Hearings were held on March 29, September 9, 15, 19 and December 12, 2022.

8. NLG called four witnesses:

- Mark Bennett was initially employed by the Harbour Hill Retirement Community as the Activity Director, and is now the "Readiness Facilitator", whose duties included acting as "a leasing counsellor for the prospective residents for Harbour Hill."
- Kevin Pidgeon is the President and Chief Operating Officer of the numbered company associated with Nautical Lands General Contractors Inc. and NLG 2011 Inc.
- Charles Beaulne is employed as the Owners' Representative of Nautical Lands General Contractors Inc., and managed the relationship with vendors including contractors for the construction project at issue.
- Peter Gregor is employed as the Vice President of Development of Nautical Lands Contractors Inc., and managed the land acquisition, planning, building design and building permit approval process for the company's properties, including the Harbour Hill Retirement Community.

9. The Union called two witnesses: Jim Congdon, a journeyman carpenter and a Business Representative for Carpenters Local 93, and Josh Neitzel, a journeyman carpenter and a Business Representative for Carpenters Local 2222.

10. The parties filed five volumes of documents, which included: construction management contracts; budget summaries; occupancy and rental agreements; architectural drawings and floor plans; photographs; advertising; project status reports; zoning by-laws, applications and planning rationale reports; correspondence with the Town of Goderich and public meeting documents; and an inspection report from the Retirement Homes Regulatory Authority.

11. Much of the oral evidence simply confirmed what is set out in the documentary record. To the extent that there are disputed facts, they arise from the parties challenging each other on smaller details. None of these challenges undermined the overall credibility of any of the

witnesses. Generally speaking, the differences result from the fact that that NLG and its witnesses described Phase 2 as any other apartment building, separate and apart from Phase 1, and focused on facts which supported that position. In contrast, the Union and its witnesses described Phase 2 as part of a retirement community, an integrated whole with Phase 1, and focused on facts in support of that view.

Legal Framework and Jurisprudence

12. Subsection 126(1) of the Act sets out the following definition of "sector":

"sector" means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector.

13. Over the years, the Board has developed an approach to determining the sector of the construction industry within which work has been performed. This approach was set out in the leading case, *Corp. of the City of Sault Ste. Marie v. Labourers' International Union of North America, Local 1036*, 2002 CanLII 8772 (ON LRB), and has regard to three main factors: end use, bargaining patterns and work characteristics.

14. "End use" refers to the use that is ultimately made of the construction, and to the sectors enumerated in the statutory definition. The "bargaining patterns" factor refers to the existing province-wide labour relations framework, which may include examination of local area practices and agreements. "Work characteristics" is a term used in the statutory definition of "sector" and was explained in *Metal Tech Systems Inc.*, 2012 CanLII 16068 (ON LRB), as follows:

Work characteristics involve a wide variety of elements, including but not limited to the manner in which construction work is performed, the nature of the equipment and materials used, the tasks that must be carried out and the order in which they are carried out, the relative importance of engineering or architectural specifications, the nature of the problems that may arise during construction and the manner in which those problems are resolved, the nature and variety of the skills and trades performing the work, ...

15. The Board's overall approach, as described in *Sault Ste. Marie, supra*, has been to look at each of these factors as applied to the particular facts of the individual case:

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

16. To be clear, sector disputes involving homes for senior citizens, such as retirement residences and nursing homes, are not new to the Board. These cases have recognized that modern senior living arrangements can fall on a continuum ranging from the traditional single family home, clearly in the residential sector, and the hospital-style institutional model, clearly in the ICI sector: *Sword Contracting Limited*, 1985 CanLII 974 (ON LRB); *Future Care Limited*, 1990 CanLII 5845 (ON LRB); *Four Seasons Drywall*, 1990 CanLII 5828 (ON LRB); *Modern Mechanical Contracting Ltd.*, [1999] O.L.R.B. Rep. 655; *Metal Tech Systems Inc.*, *supra*; and *Dominion Forming Inc.*, 2018 CanLII 107749 (ON LRB).

17. *Daniels Corporation*, 2015 CanLII 26175 (ON LA), is a 2018 labour arbitration award in which an arbitrator considered the construction of a retirement residence comprised of independent living, assisted living and secured memory units. In that case, the arbitrator aptly described some of the difficulties in assessing this particular type of sector dispute:

37. As their population increases, there is an increasing emphasis on encouraging senior citizens to have and exercise as much autonomy in their daily lives as possible, and to constructing retirement residences with that expanding market in mind. This, together with the explosion of luxury condominium residences in the Greater Toronto Area, has further blurred the dividing line between the ICI

sector and the residential sector. The level of luxury is no longer indicative of anything.

38. The speculated or actual perceptions of residents are irrelevant. It may well be that the subjective view of the residents of [the project] will be that they are living independently in a non-institutional residential community, but people typically view their living circumstances without regard to the distinctions made by the LRA. It is also not uncommon for people to misconstrue or live in denial of their living circumstances.

39. Developer advertising also typically offers limited assistance. Advertising may be suggestive, but it must be viewed with scepticism because of the "spin" designed to promote features that are thought to be likely to be attractive to the target market. That said, the issue stands to be determined on the basis of the application of the construction provisions of the LRA to the evidence provided, and much of the evidence presented in the expedited process agreed to in this case is in the nature of project promotion.

18. The most recent of these sector disputes involving senior living was adjudicated by the Board in *Dominion Forming, supra*, a 2018 case involving the construction of a retirement residence, comprised of independent living, assisted living and secured memory units. In that case, the Board concluded that the construction fell within the ICI sector of the construction industry, but noted that the project "had both ICI and residential elements". In *Dominion Forming*, the Board conducted a thorough review of the jurisprudence in this area. From paragraphs 40 to 50 of that decision, the Board reviewed the jurisprudence from the 1985 *Sword Contracting Ltd.* decision through to *Daniels Corporation* in 2015. The Board does not herein review each of these decisions, all of which were submitted by these parties, but relies upon the summaries and analysis set out in *Dominion Forming*.

19. In addition to the difficulties described above in assessing sector disputes involving senior living arrangements, there is a question in this case about how broadly to view the work in dispute, i.e., whether to consider only phase 2 of the construction, or the combination of phases 1 and 2, and if so, to what extent.

20. In considering the scope of the project for purposes of a sector dispute, and by necessity mixed-use buildings, the Board has regard to *Steen Contractors*, [1989] OLRB Rep. November 1173 and in particular paragraph 23:

Where the construction work for a particular project is closely integrated, as would be the case in the construction of a building, then all of the work of that project would fall within the same sector. Where however the work to be done is distinct, the responsibility for it is clearly severable and where such work appears to patently fall within one of the enumerated sectors of the construction industry, there is not any compelling reason to distort the concept of sector in order to find that all of the work on a project falls within the same sector.

A helpful summary was set out in *UCC Group Ltd.*, 2013 CanLII 24964 at paragraph 50:

In *Steen Contractors Limited*, the Board set out a test for determining when all of the work on a single construction project should be treated as falling into a single sector and when work on a single construction project might be found to fall within more than one sector. The test set out in *Steen Contractors Limited* provides that, where the work on the construction project is closely integrated, all of the work falls in the same sector. Where the work under examination is: (1) distinct; (2) the responsibility for it is clearly severable; and (3) the work patently falls into one of the enumerated sectors of the construction industry, it may fall in a different sector.

21. The Board has stressed that *Steen Contractors, supra*, is an “exception” to the general principle set out in *Sault Ste. Marie, supra*, that the Board makes a sector determination based upon consideration of the entire construction project. The Board has rarely applied this exception: *Aecon Construction Group Inc. (o/a Aecon Buildings)*, 2019 CanLII 116861 (ON LRB).

Analysis and Decision

Integration of the Project

22. For purposes of this sector dispute and applying the test set out in *Sault Ste Marie, supra*, the Board concludes that it is appropriate to consider Phase 2 of the construction in conjunction with Phase 1 for the reasons set out below. The completed project is one "retirement community", the Harbour Hill Retirement Community, and the Board sees no reason to depart from its usual approach, making the sector dispute determination having regard to the entire project.

23. As noted in *Dominion Forming, supra*, and in *Daniels Corporation, supra*, it would be easy to get lost in the details when looking at construction intended for senior citizen living – put simply, the big picture is most significant. As set out in the evidence section above, there were several witnesses and many documents were filed, including for example, detailed architectural drawings and many photos. It is hardly surprising that the parties focussed on the details favouring their respective positions, including focussing on either Phase 2 in isolation (in support of NLG's position), or Phase 1 and 2 together (in support of the Union's position). Ultimately, however, the Board must have regard to the big picture.

24. The factors which lead the Board to the conclusion that the construction in question must be viewed in the context of the Harbour Hill Retirement Community relate both to the physical integration of the construction, and to the functional integration of its uses. It can be difficult to separate the construction of the building from the ultimate uses of the building (such as, for example, the construction of the dining area and kitchenettes), and there is therefore overlap to some extent with the discussion of "end use" below, and in particular factors set out at paragraph 36 below. With respect to the construction, however, the factors pointing to integration at least include:

- The Harbour Hill Retirement Community has one street address: 104 Suncoast Drive East, Goderich, Ontario.
- Phases 1 and 2 are physically integrated. The construction drawings show that part of Phase 1 was a two-floor structure. Phase 2 involved an addition of a third and fourth floor on top of that structure, which required some demolition work and then new construction onto Phase 1. That part of the Harbour Hill Retirement Community is now four floors, and consists mainly of "the Link", i.e., common areas of the community. Phase 2 also included the construction of a new, albeit small, dry storage area for the

industrial kitchen built in Phase 1. The Harbour Hill Retirement Community shares one fire alarm panel, with both phases sharing the same panel for purposes of the fire department, as a result of which the panel was upgraded as part of the Phase 2 construction.

- The dining area is on the Phase 1 side but is used by all residents. Meals for all residents are prepared by the same staff in an industrial kitchen on the Phase 1 side of the building. While NLG asserts that Phase 2 residents are not required to sign up for the meal services (which is not apparent from the Occupancy Agreement), the fact is that no Phase 2 resident has opted out of meal services. There are kitchenettes in the Phase 2 suites, but they are not conducive to cooking meals. They do not have full-size refrigerators or freezers, and they do not contain an oven or stove. There was evidence about the electrical outlets and the potential to use crockpots or toaster ovens in Phase 2 but not Phase 1 – suffice it to say that this is not determinative, since all residents are in fact on the meal plan.
- The suites in Phase 1 and Phase 2 are the same with limited exceptions, most notably: the Phase 1 suites have an emergency call system (discussed further below) and there are refrigerators in the Phase 2 suites, while not full size, are bigger than the bar size refrigerators in the Phase 1 suites.
- Phases 1 and 2 are functionally integrated. Aside from the common meal room, mailboxes for Phase 2 residents are in the Phase 1 side of the building. Mark Bennett confirmed that the spaces in the “Link”, the common area, the pub, the games room and the multi-purpose activity room, are accessible to all residents. There is a guest suite in Phase 2, where families or friends of either Phase 1 or Phase 2 residents can stay.

25. The Union relied upon a number of cases for the proposition that the phases of Harbour Hill Retirement Community should be viewed as a single whole. NLG argued strenuously that the cases relied upon by the Union were distinguishable, and I accept this to be true. Notably, other than *Daniels Corporation, supra*, none of the cases involved circumstances where work was performed in “phases”, with one phase

completed several years before construction in the next phase began. *Daniels Corporation*, however, was such a case - there was some 14 years between the construction of the two phases and the decision nonetheless considered the project as whole. Moreover, this case is unlike *Steen Contractors, supra*, where there was a sewers and watermains subcontractor which had obtained work from a general contractor on an ICI project. The significant debate between these parties makes clear that this is not a situation where the work patently falls into only one of the enumerated sectors of the construction industry. The work here is not distinct, but rather is closely integrated, even though the construction occurred at separate points in time. This case simply does not properly fall into the exceptional circumstances in which the Board would depart from considering the project as a whole.

Work Characteristics

26. In the instant case, it is difficult to make any useful distinction based on work characteristics. In general, the work characteristics associated with a long-term care facility are not dissimilar from the work characteristics of a high-rise residential projects. This has been observed by the Board previously, such as for example in *Metal Tech Systems Inc., supra*, (at paragraph 22), where the Board accepted that "many of the work characteristics associated with the Project would be found in a high rise condominium project which would be in the residential sector, but would also be found in a hotel project or long term care facility project, both of which would come within the industrial, commercial and institutional sector."

27. On the specific facts of this case, there is no difference in the material or equipment used as between Phase 1, which is clearly a retirement home within the meaning of the *Retirement Homes Act*, and about which there is no dispute that it falls within the ICI sector, and Phase 2, the work in dispute here. Both phases were constructed the same way, using the same type of equipment and material, with the same concrete formwork and wood framing. Indeed, the building was intended to be an integrated whole, at least in terms of the look and feel of the interior and exterior of the two phases.

28. From NLG's perspective, the work characteristics related to Phase 2 would be found in either the residential or ICI sector, such that nothing can be concluded based on this factor. From the Union's perspective, because Phase 1 was clearly construction in the ICI sector, and because the work characteristics of the Phase 2 construction are the

same as Phase 1, the Board should conclude that the Phase 2 construction also falls within the ICI sector.

29. The Board agrees with NLG that there is nothing inherently ICI or residential about the work characteristics in relation to this project. However, as set out above, the phases of this project should properly be viewed as an integrated community. The fact is that the work characteristics for Phase 2 are the same as the work in Phase 1, which is indisputably in the ICI sector. Accordingly, this factor militates at least to some extent in favour of a finding that the work in dispute is in the ICI sector. It is difficult to see why work initially performed within the scope of the ICI sector, and continued in a second phase with the same work characteristics, where it forms part of the same overall community, should change to a different sector.

Bargaining Patterns

30. In the instant case, very limited evidence was presented about bargaining patterns and even more limited argument was made on this factor. Jim Congdon's evidence was that it is common for retirement homes to be designed as retirement communities, with both independent and assisted living components, and that there are many projects that are the same and/or similar to the project here that have been performed in the ICI sector. He pointed to two examples: the Wellington West Retirement Community, and the Carp Commons Retirement Community, both projects completed near Ottawa.

31. NLG submits that limited evidence was presented, that the projects relied upon by the Union are not in the relevant Board Area, and that these projects are distinguishable because they involved poured cement construction. In its closing argument, the Union acknowledged that bargaining patterns in the area would not be determinative of this case, and pointed out that there was nothing unique about combining independent and assisted living, with a view to a transition.

32. The Board agrees that bargaining patterns are a neutral factor in this case, and that no determination can be made on this basis.

End Use

33. Given that bargaining patterns are neutral, and work characteristics are not determinative, the most important factor to be

assessed in this case (similar to other sector disputes involving senior living arrangements discussed in the jurisprudence section above), is the end use of the construction.

34. Taking a step back and looking at the big picture (as urged in *Dominion Forming, supra*, and *Daniels Corporation, supra*), this is an institutional facility. The conclusion that the Harbour Hill Retirement Community is a single institution within the industrial, commercial and institutional sector of the construction industry stems from the physical and functional integration of the phases, including the factors set out at paragraph 24 above, with Phase 1 being indisputably construction in the ICI. This conclusion is also consistent with the broader meaning of "institution". As the Board noted in *Dominion Forming* (at paragraph 56), "the neutral connotation of the term institution generally refers to an organization established to provide a service viewed as being of benefit to either the public at large or to some specific group." In that case, the Board went on to find that the institution at issue was "a for-profit entity established to provide a facility for the elderly, who are unable or unwilling to live independently." That case does not set out any facts about the age of the residents, other than the use of the descriptors "elderly". Here, particulars from the responding parties confirmed that no Phase 2 residents were under the age of 55. While the demographic targeted by the Harbour Hill Retirement Community, adults over 55 years of age, may meet a ten-year old's definition of "elderly", it is certainly not an appropriate characterization in the view of this panel of the Board. I would also note that the individuals featured in the advertising for Phase 2 appear to be much older than 55. In any event, the point remains that the corporate entity here has established a facility intended for people of a certain age demographic, with a view to providing this demographic with various options for levels of assistance and the feeling and conveniences of a retirement community throughout.

35. The development was submitted as one retirement community for the initial approval and permits. The "Planning Rationale Report" submitted to the Town of Goderich advises that the "development will consist of a two-phase retirement residence providing housing and support services for seniors" and that "Phase 1 will consist of 64 units with 75 units being developed in Phase 2". Moreover, this document concludes with this description of the intended benefits:

"The retirement residence represents new supportive housing that will help keep seniors living in the Town of Goderich and assist in reducing the decline in the population. When communities do not have such housing alternatives for residents, seniors need to move away from their hometown to find the housing and services they need."

NLG's witnesses, and in particular Peter Gregor, NLG's Vice President of Development, testified that the original plan was that there would be no difference between the services and housing in Phase 1 and Phase 2. In the years in between the original planning and the start of the Phase 2 construction, the plan changed. The market for assisted living suites was not as strong, and as result, a change was made such that the Phase 2 suites became geared to "more of an independent living seniors' apartment." While I accept this evidence as credible and that the business plan changed, it does not change the conclusion above that regard must be had to the project as a whole and that the work in dispute, viewed in that light, created a retirement community as a whole, with a significant and anchoring institutional component, such as to fall within the ICI sector of the construction industry.

36. In addition to factors set out in paragraph 24 above, such as the common dining area and other shared spaces, the following factors support the conclusion that the project is to be viewed as a whole and constitutes single retirement community, within the ICI sector, having regard to the end use:

- The project was advertised as one retirement community, i.e., "the best of both worlds" – "offering retirement living with care options in Phase 1, and independent living without care in Phase 2: The Apartments at Harbour Hill." Phase 2 is for those "who don't need care, but do want the benefits of living maintenance-free with meals and weekly housekeeping." The advertising includes a description of one integrated community: "The [Phase 2] suites are an extension of Phase 1 and the entire community is completely accessible." (The notes here about advertising are subject to the comments in paragraph 38 below.)

- Residents for both Phase 1 and Phase 2 meet with the same management team prior to being approved for residency. Mark Bennett was formerly the Activity Director and is now the Readiness Facilitator, essentially a sales position. He testified that, in the latter capacity, he speaks to all potential residents and their families and helps them determine whether Phase 1 or Phase 2 is the right fit.
- Individuals living in Phase 2 can move to Phase 1 as their needs increase, and they have access to Phase 1 suites as available. Bennett confirmed in his testimony that the "concept" was that residents could start in Phase 2 and move to Phase 1 as their needs changed.
- There are features of the Phase 2 Occupancy Agreement which are not typical of a residential tenancy agreement, notably the agreement includes a meal plan (with no opt-out provision), allows Harbour Hill to request that a tenant move out of the community "if the Resident becomes incapable of providing or fails to provide for his or her health care or personal care", and prohibits the resident from having any occupants other than those listed in the agreement.
- Harbour Hill staff provide housekeeping services for both Phase 1 and Phase 2 residents. Although Phase 2 residents could opt out of weekly housekeeping services, only one resident has opted to do so.
- According to the marketing, Harbour Hill offers "social activities and community-led TED type talks, live music, book club, card clubs and interest groups." Bennett testified that activities were curtailed during the COVID-19 pandemic, however activities were resuming. He confirmed that some of the activities were for all residents, and some were just for Phase 2 residents, who could do "a bit more."

37. This is, of course, a blurred line. Likely, this decision would have been easier had there not been a change from the initial plans and/or had the phases been constructed more closely in time. Moreover, and as noted in the jurisprudence, the market in this area is increasingly blurred, with, for example, residential condominium projects offering more services and amenities, assisted living facilities striving for the

comfort and feel of home, and options for retirement living taking on attributes from both.

38. I have considered factors, such as the following, which point to Phase 2 of the Harbour Hill Retirement Community being in the residential sector, but ultimately these factors were not sufficient to sway my determination in this sector dispute:

- Unlike in Phase 1, the suites in Phase 2 do not have emergency or nursing call buttons. Moreover, Phase 1 residents, but not Phase 2 residents, wear a neck chain or bracelet with an emergency response system. I accept that emergency response has figured significantly in the Board's jurisprudence and is a distinguishing feature.
- The residents of Phase 2 are not entitled to access medical care services. This is specifically set out in the occupancy agreement. Similarly, Phase 1 residents must have a "care plan", and Phase 2 residents do not.
- The Phase 2 residents live more independently than the Phase 1 residents. For example, Phase 2 residents can come and go as they please, and have guests stay over in their suites. They also have more privacy in their suites, and the door closers in the Phase 2 suites, unlike the Phase 1 suites, are residential.
- There are hand railings and some other mobility assistance features in Phase 1, but not in Phase 2.

The features of Phase 1, including call bells, care plans, and other care assistance, are ultimately features which point to an institutional facility within the ICI sector of the construction industry. These features, however, are Phase 1 features of a retirement community as a whole, Phases 1 and 2, which together serve the institutional needs of a retirement community more generally, aged 55 and over, in the Goderich area.

Additional Notes

39. In considering the sector dispute in question, there is some evidence which featured prominently in the hearing and about which some final comment is required.

40. First, there was considerable evidence about advertising for the Harbour Hill Retirement Community. One of the advertisements was relied upon by both parties, and that is the marketing material for Phase 2 which is described above. There was significant dispute about the two other advertisements, on the Comfort Life website and on the ConstructionConnect website:

- The Comfort Life material refers to the “Harbour Hill Retirement Community”, describes a 139-unit facility with both assisted living and independent living options, and indicates that medical services are available throughout. Kevin Pidgeon testified that this was a highly misleading ad, in which “Comfort Life unilaterally grossed up the number of available units” and blurred the distinction between Phase 1 and Phase 2. According to Pidgeon, for this reason, NLG no longer advertises with this company.
- The Construction Connect refers to the “Harbour Hill Retirement Residence - Phase 2” and describes: a “four-storey above grade, 75-unit elderly care/ assisted living facility. Construction of a four-storey retirement residence with 75 units.” The Construction Connect website indicates the “Category” of the project is “Nursing Home”. NLG argued that the Union had not properly established a foundation for relying on this website material, and that the document is at best impermissible hearsay.

Ultimately, this case does not turn on the disputed advertisements and I did not need to, and therefore had no regard to, them. I agree with the warning in *Daniels Corporation, supra*, that developer advertising should be viewed with caution because “of the ‘spin’ designed to promote features that are thought likely to be attractive to the target market” (paragraph 39). The Board made comments to a similar effect in *Hermanns Contracting Limited*, 2018 CanLII 95128 (ON LRB). However, in this case, the “spin” in the advertising, which is not in dispute between the parties, is sufficient to conclude that Harbour Hill Retirement Community was marketed as a single community with two phases and options for care. This is a “spin” consistent with the Union’s understanding in this case and which, while it may have furthered NLG’s interest in attracting the target market, does not further its interest in this case such that it is comparable to an admission against interest.

41. Second, the Board heard evidence about various instances which were held out as examples of the extent to which medical care is not available or provided by Harbour Hill staff to residents of Phase 2. Mark Bennett described a situation where a resident of Phase 2 had a medical emergency in their suite, possibly a heart attack, and a more recent circumstance in which a resident of Phase 2 tripped outside while walking into the building. In both cases, 911 was called by non-staff and medical assistance was not provided by Harbour Hill staff. In addition to being marked by some tug of self-interest, this evidence was of little assistance to the Board. The evidence is clear that Phase 2 suites do not have emergency call buttons, and that medical services are provided to the residents of Phase 1 and not to the residents of Phase 2. It is also clearly the case that the medical professionals work in the facility have professional obligations, whether or not providing such care is strictly speaking a "job requirement". Bennett acknowledged in cross examination that if a resident from either Phase 1 or Phase 2 had a heart attack, or other medical emergency, in a common area of the facility, any staff in the area would be expected to provide assistance and to call an ambulance. As a result, the Board drew no conclusions from this evidence, other than what was already clearly in documents and/or the undisputed obligation of a medical professional.

42. Third, both parties made arguments related to Ontario's *Building Code*. Charles Beaulne testified about some details involving the *Building Code* but I have attached limited weight to those details. First, unlike in *Dominion Forming*, no expert evidence was tendered in this case and Beaulne candidly acknowledged that he had limited direct knowledge of the *Building Code* and that he relied on the architects and the drawings. Moreover, there was some evidence that the *Building Code* changed after the construction of Phase 1 and before the construction of Phase 2. The end result may be that there are certain features of Phase 1 which are the same or different from Phase 2, but that might have been or would have been built differently had the phases been built at the same time. For example, the sprinkler system is the same throughout both phases, but had Phase 1 been built in 2019 that system would have required an enhanced alarm system for Phase 1 and not Phase 2. Given the lack of expert evidence, the ambiguity in the evidence provided, and the degree to which these details are minute, the Board has not found the *Building Code* evidence of assistance.

43. Fourth, the Union asked questions in cross-examining witnesses about the possibility that various suites constructed in Phase 2 could be converted into assisted living suites. NLG vigorously objected in its closing argument that any conclusion could or should be reached to this end. Even assuming such a conversion may be possible (which it appears to be), it has not occurred to date and may never occur, and was therefore not a factor necessary or relied upon in reaching this decision.

44. Finally, the Union relied upon an email exchange between Mark Bennett and union representative Josh Neitzel's spouse. The email inquires about whether a resident in the Phase 2 suite would get priority to move to the Phase 1 suites should his health decline. By way of reply email, Bennett confirmed that this resident "would have priority to any available suite in Phase 1." NLG characterized this evidence as self-serving and obtained under false pretenses, but did not dispute the contents of Bennett's reply and indeed pointed to the email as evidence that a resident could not get personal/ medical care in Phase 2. In addition to this proposition, there was also no dispute or suggestion that a Phase 2 resident would get priority for an available Phase 1 suite, and I have had regard to the email exchange only for those two propositions.

Disposition and Next Steps

45. For the reasons set out above, based on the totality of the evidence, I find that Phase 2 of the Harbour Hill Retirement Community project falls within the ICI sector of the construction industry. While NLG has attempted to create a hard line between the two phases of construction, this is simply not borne out by an assessment of the big picture, including the associated work characteristics and the ultimate end use of this retirement community.

46. In accordance with the Board's February 22, 2021, decision in Board File No. 3184-19-R, the proceeding in that matter was adjourned pending a final decision of the Board in this sector dispute. Should no party seek to reschedule the proceeding in Board File No. 3184-19-R for hearing within 30 days of the date of this decision, that application will be deemed dismissed without any further notice to the parties.

"Lindsay Lawrence"
for the Board