EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Aries Property Maintenance (Canada) Ltd.

("Aries" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	99/126
DATE OF DECISION:	June 22nd , 1999

DECISION

OVERVIEW

This is an appeal brought by Aries Property Maintenance (Canada) Ltd. ("Aries" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 8th, 1999 under file number 031-027 (the "Determination").

The Director's delegate determined that Aries owed $26,353.77 in unpaid wages and interest payable to 10 named employees (the "employees"). The unpaid wages were determined to be payable pursuant to the provisions of the *Skills Development and Fair Wage Act* (*"SDFWA"*) and the *SDFWA Regulation.*

This appeal is being decided based on the written submissions of the parties including written submissions received on behalf of Walter Construction (Canada) Ltd. ("Walter") who was given "intervenor" status by way of an order issued by the Tribunal Registrar on March 23rd, 1999.

ISSUE TO BE DECIDED

Aries appeals the Determination on the ground that the *SDFWA* did not govern the work undertaken by the employees.

FACTS

The employees worked as cleaners/janitors at two construction sites referred to in the Determination as the "Annacis Island" and "Lulu Island" sites. It is conceded that these construction sites fell under the purview of the *SDFWA.* The employees were all employed by Aires, a subcontractor to Walter.

The work undertaken by the employees was set out in Walter's submission to the delegate which was reproduced, at page 3, of the Determination:

> "...when a property maintenance company contracts to perform work in relation to a construction project, their duties in relation to the building under construction (as opposed to other general janitorial duties that they may also perform) are performed after the construction is complete. The job of the property maintenance company is to clean the completed structure (*e.g.*, clean doors, windows, stairwells, railings, light fixtures, drains, panels, washrooms, vacuum flooring etc.) prior to the structure being turned over to the owner. Other than the volume of work involved, there is little if any difference between the nature of the work performed by the property maintenance company before the building is turned over to the owner and the routine cleaning or

> janitorial work that the owner would contract to have performed on an ongoing basis after taking possession of the building."

Both Aires and Walter assert that simply because the employees' work was undertaken at a project that fell under the ambit of the *SDFWA*, it does not follow that the employees were entitled to be paid the "fair wages" dictated by the *SDFWA* and accompanying *Regulation*. The delegate rejected that latter assertion and determined that the *SDFWA* and *Regulation* applied to the employees for the following reasons, commencing at page 4 of the Determination:

> "Site cleaners are generally called in near the end of a project to provide a cleaning of the site/building before the owners take possession. The cleaners job is to make the site/building suitable for the purposes for which the building was constructed...
>
> The definition of on site employee/construction worker cannot be limited only to those employees the product of whose work actually physically remains after substantial completion...cleaners who prepare the site for possession by the owners are also an integral part of the construction process. The building/site is cleaned before the building is turned over to the owner for occupancy.
>
> The Employer contention that a cleaner job is different than a construction labourers is not correct. Their function is no different than any other construction labourer involved in the physical act of constructing.
>
> ...Section 1 of the SDFWA defines 'employee' and it does not put any preconditions on the specific type of work or functions an employee has to be doing in order to receive fair wage [sic]. An expansive definition of the term 'employee' which encompasses the greatest number of workers on a fair wage project is consistent with the scheme and object of the SDFWA.
>
> Section 2 sets out the purposes of the [*SDFWA*] and states that one of the purposes is *to ensure employees receive fair wages for worked* [sic] *performed on publicly funded projects* [*italics* in original]. This means that all employees working on a project should be receiving fair wage [sic] regardless of what work functions they may be performing.
>
> The work function that is performed by employees on a fair wage project is not the determining factor as to whether or not an employee receives fair wage [sic]. What is relevant is that the employees are working on a project that is covered by the SDFWA. Section 5 of the SDFWA states that all employees of a contractor, subcontractor or any other person doing or contracting to do the whole or any part of the construction to which this Act applies must be paid fair wage in accordance with the regulations [sic]. The Cleaners are employees of a subcontractor on a fair wage site.
>
> Section 4 of the Fair Wage Act regulation [sic] sets out a schedule of wages that will be paid to each trade and category of worker on a fair wage project. One of the

> categories is that of a Labourer/Helper/on-site clerk or equivalent. A cleaner is in actuality a labourer, and thus fits into this category.
>
> ...Construction was ongoing and substantial completion of the project had not yet occurred during the time the cleaners were working on the two projects."

ANALYSIS

The requirement to pay "fair wages" in accordance with Schedule 3 of the *SDFWA Regulation* is set out in section 5 of the *SDFWA:*

> **Requirement to pay fair wages**
> 5. All employees of a contractor, subcontractor or any other person doing or contracting to do the whole or any part of the construction to which this Act applies must be paid fair wages in accordance with the regulations.

I am satisfied that the employees in question were employed by a "subcontractor" or "other person" (*i.e.,* Aires). The key question is whether or not Aires was "doing" or "contract[ed] to do" any part of the "construction" at either of the Annacis Island or Lulu Island sites. "Construction" is defined in section 1 of the *SDFWA* as follows:

> "construction" means the construction, renovation, repair or demolition of property and the alteration or improvement of land that is undertaken by a tendering agency using Provincial money.

Both Aires and Walter submit that the cleaning function undertaken by the 10 employees cannot be characterized as "construction" work. The Legislature defined four separate job functions that would trigger an employer's obligation to pay fair wages, namely, construction, renovation, repair or demolition. In my view, it is manifestly apparent that the cleaning function performed by the employees in this case could not be characterized as "renovation", "repair" or "demolition", all of which activities involve some physical alteration to, or destruction or improvement of, an existing physical structure. Thus, the cleaning function must be characterized as part of the "construction" process if the *SDFWA* is to apply.

To define, as the *SDFWA* does, "construction" as including "construction" is, of course, a pure tautology and not the least bit helpful. The *Oxford* dictionary is only marginally more helpful, defining "construction" as the process of "constructing or being constructed" although "construct" is defined by *Oxford* as to "make by fitting parts together; build, form" which implies the creation of a physical structure. *Black's Law Dictionary* defines construction, *inter alia,* as "the creation of something new, as distinguished from the repair or improvement of something already existing; the act of fitting an object for use or occupation." In my view, "cleaners who prepare the site for possession by the owners" (Determination, page 4) may well be, as was stated by the delegate, "an integral part of the construction process" if one defines construction as any and all activities that take place on-site and that precede the

ultimate completion of the project. However, and this is the fundamental point, cleaners do not create any new physical form and thus cannot be considered to be undertaking "construction" work.

I must reject the notion, espoused in the Determination (at page 5), that "the work function that is performed by employees on a fair wage project is not the determining factor as to whether or not an employee receives fair wage". In my view, section 5 of the *SDFWA* clearly establishes that it is *precisely* the work function, namely, "doing or contracting to do the whole or any part of the *construction*", that determines whether or not the *SDFWA* applies. As noted above, the delegate stated that one of the purposes of the *SDFWA* was "to ensure that employees receive fair wages for worked [sic] performed on publicly funded projects". But this latter statement omits an important qualifier set out in section 2 of the *SDFWA*, namely, the work must be undertaken in regard to a *construction* project.

Section 2 reads as follows:

> **Purposes of the Act**
>
> 2. The following are the purposes of this Act:
>
> (a) to ensure skill development training in the *construction industry;*
>
> (b) to ensure high quality work standards on publicly funded *construction projects* by requiring that employees hold the appropriate qualifications;
>
> (c) to ensure employees receive fair wages for work performed on publicly funded *construction projects.*
>
> [my *italics*]

The *SDFWA* is designed to ensure that construction workers on certain government projects hold appropriate qualifications--and that they are paid wages considered to be commensurate with those qualifications--and to ensure, through apprenticeship training programs, that there will continue to be an adequate supply of properly trained persons in the construction trades (thus the rationale for the words "skills development" in the title of the *SDFWA*).

However, one does not require any specialized training or certification in order to perform the essentially unskilled labour function of cleaning. In enacting the *SDFWA*, the Legislature was not responding to an actual or predicted shortage of trained cleaners, nor was there any legislative concern that cleaners obtain appropriate apprenticeship training. Tellingly, in my view, the long list of trades and occupations listed in Schedule 3 of the *Regulation* does not include "janitor" or "cleaner" or some other similar job title. The delegate held that the employees could be properly characterized as "labourers"--a job title that is included in the *Regulation* ("Labourer/Helper/on-site clerk or equivalent")--and, undoubtedly, one could reasonably assert that janitors are labourers. However, it is only those labourers who are involved in "construction" work, namely, the creation of some physical form, that fall under the ambit of the *SDFWA*.

It is important to note that the employees did not, during the course of construction at the two sites in question, assist any of the construction tradespeople with the latter's duties on site, nor did the employees tidy up the site during the course of the workday, or at the end of the workday. Those latter clean-up functions, which for safety and other logistical reasons can be properly characterized as integral to the construction process--were undertaken by the tradespeople themselves. If the employees had undertaken on-site clean-up during construction, they may well have been entitled to be paid at the higher wage rates provided for in the *Regulation* but that simply is not the case here.

The Director, in a written submission filed with the Tribunal on March 29th, 1999 asserted that:

> "...a construction site is not complete until such time as all necessary construction and inspection have cleared with the appropriate authorities and the building is deemed ready. At this time the owner of the project/building is in a position to take possession after substantial completion is determined. [Aries] performed janitorial work needed to prepare the building for substantial completion and possession. If the work Aries was contracted to do was not performed the project would be deemed incomplete."

While an individual owner might well consider the building contract to be incomplete until the building has been fully constructed, cleaned and readied for occupancy--indeed, that might be the contractor's contractual obligation--this is not the test defined in the *SDFWA* as to whether or not the legislation governs. Further, under the *Builders Lien Act,* a construction project is deemed to be "completed" not when the project is completely and finally finished but rather only when the underlying construction contract has been "substantially performed". Thus, I do not find that the moment of "substantial performance"--which triggers time limits governing lien claimants--is a helpful threshold in terms of the application of the *SDFWA.* Work done before or after substantial performance may well be governed by the *SDFWA;* the signal consideration is not *when* the work was performed but rather the *nature* of the work performed.

I am fortified in my view that the *SDFWA* does not apply to any and all employees, simply because their work was undertaken at a "fair wage" construction site, by the decision of my colleague, Adjudicator David Stevenson, in *Andrew Irvine* (B.C.E.S.T. Decision No. 312/97--original decision and *corrigendum*):

> "When the [*SDFWA*] is analyzed, what is apparent is that it is intended to regulate those persons who perform work directly involved in and related to the physical act of constructing, renovating, repairing or demolishing property and altering or improving land. The [*SDFWA*] is not intended to regulate the employment of persons not involved in the performance of work directly related to the physical aspect of 'constructing'...even when that work is performed on a construction site."

ORDER

Inasmuch as I find that the *SDFWA* did not govern the work performed by the employees, pursuant to section 115 of the *Act*, I order that the Determination be cancelled. It follows that the $0 penalty, also levied by way of the Determination, is similarly cancelled

Kenneth Wm. Thornicroft,
Adjudicator
Employment Standards Tribunal