ONTARIO LABOUR RELATIONS BOARD

2353-08-M The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, Mechanical Contractors Association Ontario, and Procon Niagara, a division of 1149855 Ontario Inc., Applicants v. **V.K. Mason Construction Co.**, International Brotherhood of Electrical Workers Construction Council of Ontario, Lincoln, Welland, Haldimand Building and Construction Trades Council, Brick and Allied Craft Union of Canada, Local 4/Marble Tile and Terrazzo Workers, International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 303, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, International Union of Operating Engineers, Local 793, Labourers' International Union of North America, Local 837, Ontario Building and Construction Trades Council, International Brotherhood of Painters and Allied Trades, Local 1795 (Glaziers), International Union of Elevator Constructors, Local 90, Operative Plasterers' and Cement Masons International Association of the United States and Canada, Local 598, Sheet Metal Workers International Association, Local 537, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787, Refrigeration Workers, United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local 666, United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local 853 (Sprinkler), and United Brotherhood of Carpenters and Joiners of America, Local 1007 (Millwrights), Responding Parties v. Crane Rental Association of Ontario, Intervenor v. Electrical Power Systems Construction Association, Intervenor v. Labourers' International Union of North America, Ontario Provincial District Council, Intervenor.

0609-09-U The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, and Procon Niagara, a division of 1149855 Ontario Inc., Applicants v. **V.K. Mason Construction Co.**, International Brotherhood of Electrical Workers, Local 303, and Vipond Inc., Responding Parties v. Lincoln, Welland, Haldimand Building and Construction Trades Council, Intervenor.

1441-08-U Mechanical Contractors Association Ontario, Applicant v. **United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 666,** Responding Party.

BEFORE: David A. McKee, Vice-Chair.

APPEARANCES: Scott G. Thompson and Eryl M. Roberts for The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and Procon Niagara, a division of 1149855 Ontario Inc.; Michael Horvat for Mechanical Contractors Association Ontario; Hendrik Nieuwland and Jean-Phillipe David for V.K. Mason Construction Co.; April Brousseau for the International Brotherhood of Electrical Workers Construction Council of Ontario; Denis Ellickson for the Lincoln, Welland, Haldimand Building and Construction Trades Council; Jesse Nyman, Ian McIsaac for the Millwright Regional Council of Ontario; Jesse Nyman and

Mike Yorke and the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America,; M. Patrick Moran, Ron Martin and Ivars Starasts for the Electrical Power Systems Construction Association; L.A. Richmond and H. Bartlett for Labourers' International Union of North America, Ontario Provincial District Council.

DECISION OF THE BOARD: December 9, 2009

Introduction

1. This is an application under section 166 of the *Labour Relations Act, 1995*, S.O. 1995, c.1 as amended ("the Act") in which the applicants seek a determination as to which sector of the construction industry the Thorold Cogeneration Project ("the Project" or the "Thorold Project") falls. The Project is situated on land owned by Abitibi Consolidated and is connected physically and operationally to its paper mill. The builder and owner of the Project is Northland Power. The Project is the construction of a Co-generation facility (or "Co-gen") that will generate steam to be used in the operation of the paper mill and in the production of electrical power.

2. The Project is described in a 2007 press release as follows:

> ...
>
> The plant is being built at the Abitibi-Consolidated Company of Canada Thorold Recycled Paper Mill. When completed, the Thorold Cogeneration Plant will supply enough electricity to power the equivalent of 100,000 homes in Ontario under a 20-year electricity supply contract with the Ontario Power Authority. In addition, the 265 megawatt gas-fired cogeneration facility, which will consist of a 170 megawatt General Electric gas turbine and associated 95 megawatt steam turbine, will supply electricity and up to 350,000 lbs per hour of steam to the Abitibi-Consolidated mill, for use in its newsprint manufacturing process. The high efficiency of the new plant, which will replace Abitibi-Consolidated's steam boilers, will enhance the mill's competitiveness in the market, and help reduce airborne emissions.

More technically, the main components of the Project are as follows. Natural gas is piped to the site for combustion. It is burned in a combustion turbine generator. The combustion turbine generator exhausts its heat into three heat recovery steam generators to produce steam for the steam turbine generator, which produces electricity, and for export of steam to the Abitibi Paper Mill, for paper making. There are two auxiliary boilers as well. The Project will always produce steam for the Abitibi Mill. When it is profitable to do so, it will also produce electricity for sale to the Ontario Power Authority for its resale in the wholesale electrical market, to be sold and distributed through the province-wide transmission and distribution network of Hydro One (the "Grid"). One added feature of the system is a back-pressure steam turbine generator that uses steam returning from the Mill to produce a small amount of electricity (9 megawatts).

3. The system is completely integrated. The contract with the Ontario Power Authority, provides in part as follows:

> The combined cycled equipment and systems ... shall be seamlessly integrated with the auxiliary boiler systems so that each provides back-up to the other for start-up (e.g. pegging steam, gland steam supply, ejectors, etc.) operation and shutdown services.

> The auxiliary boilers shall be the main source of steam supply to the Mill. The auxiliary boilers shall produce processed steam to: (i) supplement the HRSG-STG CRHS for Mill steam supply while in Co-gen mode ... and (ii) provide the full Mill steam requirements during periods when the combined-cycle ... [i.e. the electrical generation portion of the Project] is not dispatched and is thus not operating.

The final agreement on the Project was announced on September 24, 2007 and construction commenced shortly after that.

4. The general contractor was V.K. Mason Construction Company ("V.K. Mason"). It entered into a collective agreement with the Lincoln, Welland, Haldimand Building and Construction Trades Council ("the Lincoln Trades Council"). That Council is comprised of the Local Unions of the Building Trades Unions with geographic jurisdiction in the area. It did not include any of the respective employee bargaining agencies to which those Local Unions are affiliated. The collective agreement is not the same as the Provincial Collective Agreement binding on any one of these Local Unions.

5. The parties to this proceeding (after some shuffling and changes of position) are as follows. The Mechanical Contractors Association of Ontario ("MCAO"), the Electrical Trade Bargaining agency of the Electrical Contractors Association of Ontario ("EGBC") and Procon Niagara, a division of 1149855 Ontario Inc. ("Procon") are the applicants. They bring this application as EBAs, or as an affected employer, alleging that the collective agreement between V.K. Mason and the Lincoln Trades Council is a violation of section 162 of the Act, among others. In that assertion, at least with respect to sector, they are joined by the International Brotherhood of Electrical Workers, Construction Council of Ontario ("IBEW"), the Millwrights Regional Council of Ontario ("Millwrights") and the Carpenters District Council of Ontario, United Brotherhood of Carpenters and Joiners of America ("the Carpenters"), who take the position that the Project is in the ICI sector. The Lincoln Trades Council, although originally an applicant, took no position and played no role in argument. On the opposite side of the issue are V.K. Mason, the Ontario Provincial Council of the Labourers International Union of North America ("the Labourers") and the Electrical Power Systems Construction Association ("EPSCA"), all of whom take the position that the Project is in the electrical power systems sector.

6. The parties were able to agree on all arguably relevant facts and documents. Hence the matter proceeded essentially by way of argument with reference to documentary evidence that had been filed.

History

7. The argument in this case focused a great deal on what was, or was alleged to be, the historical development of work and bargaining with respect to construction work associated with the production (and to a lesser extent distribution) of electrical power. Some analysis of that history is required at this point.

8. The concept of sector was introduced into the Act in 1971. The history of the concept of sector, and the way in which that concept was adapted and modified over the next thirty years is set out in *The City of Sault Ste Marie* [2003] OLRB Rep. Sept/Oct 870 at paragraphs 20 to 39 in a passage that it too lengthy to repeat here.

9. The issue of sector as it related to the electrical power systems sector did not arise before the Board from 1971 to 2005. The only time it was examined was not by the Board but by Professor S. R. Ellis who was appointed by the Minister of Labour in 1977 as an Industrial Inquiry Commission. That report is examined below, but suffice it to say that there were no changes to the Act arising out of Professor Ellis' report and no issue as to whether a project fell in the electrical power systems sector or another sector was ever considered by the Board or anyone else.

The Ellis Report

10. The Ellis Report was delivered to the Minister of Labour in January 1978. At that time, the Act had been amended to provide, effective May 1, 1978, for province-wide bargaining in the ICI sector. A proposal had been made to the Minister of Labour to combine the ICI and the electrical power systems sectors. The Minister's response was to request Professor Ellis to inquire into the proposal and report on it, which Professor Ellis did.

11. Much has been said and much has been written about the Ellis Report, in my view, rather more than is necessary. Although often referred to as a sort of irrefutable source of fact, it was simply a report to the Minister. It is neither a statute nor a regulation. It is not a decision of the Ontario Labour Relations Board, the body given the statutory task of determining sector.

12. Professor Ellis's ultimate recommendation was that the two sectors ought to remain separate. The Act was not amended. In the course of examining that issue, Professor Ellis, as was appropriate, examined the entire history and structure of bargaining in both sectors. Ultimately, he made a number of recommendations two of which are of significance to the parties in this case. The first was that the ICI sector and the electrical power systems sector not be combined. The second was that the definition of the electrical power systems sector be made more precise. The Legislature did not amend the Act.

13. The admissibility of such reports for the purpose of interpreting legislation is undoubted, but must be put in perspective. In *Sullivan & Driedger on the Construction of Statutes* (4th edition, Butterworths, Toronto: 2002) the authors discussed the use of extrinsic aids such as the Ellis Report at pages 481 to 502. While much of the historical case law would restrict the use of such reports, the authors detail a growing trend to use reports to interpret legislation for the purposes of examining both the "mischief to be cured" and the legislative purpose of statutory enactments that follow on the presentation of a commission or report. The weight to be assigned to that report, of course, is to be determined on a case by case basis. (See also Cote, *The Interpretation of Legislation in Canada* (3rd edition, Carswell, Toronto: 2000) at page 414 to 419.)

14. In an often-cited introductory paragraph, Professor Ellis attempted to be precise about the subject matter of his Report. At page C.1-3 he said:

> 4. The construction industry, or at least those construction industry participants who are most concerned about the issues of interest to this Inquiry, in fact understands the Electrical Power Systems Sector to be primarily an euphemism for Ontario Hydro's capital construction program – both the construction of long distance high voltage transmission lines and transformation stations, and the construction of major power generation projects such as the Pickering Nuclear Power Generating Project and the Bruce Nuclear Power Development Project. But any reasonable interpretation of the words themselves will also encompass the construction of municipal, low voltage, distribution lines and related

> facilities (not constructed by Ontario Hydro except occasionally under special contract from the municipality) and the construction of privately-owned, generation and transmission facilities. Nevertheless, the labour relations issues which the separate existence of the EPS Sector vis-à-vis the ICI Sector has raised, do not relate to these municipal or private segments of the EPS Sector. Accordingly, I have considered these latter segments of the sector only from the point of view of how they might be affected by my recommendations for solving the Ontario Hydro-ICI problem.

This paragraph is, in my view, perfectly straightforward. Professor Ellis makes three points: (i) the construction industry participants most concerned understand that the electrical power systems sector is a euphemism for Ontario Hydro's capital construction projects; (ii) the dictionary definition of the words could include municipal systems and private power generation and transmission systems; (iii) his Report will deal with the reality of the electrical power systems sector, that is, Ontario Hydro, and with what he calls the "other segments" of the sector, only peripherally.

15. Counsel for the Labourers and EPSCA referred to many passages in the Report. Professor Ellis used the phrase "electrical power systems sector" as if it included both private electrical generation and Ontario Hydro. Counsel for the Labourers asserted that the Board in *Barclay Construction Group Inc.* [2008] OLRB Rep. Mar/April 136 ("*Barclay*") had improperly "severed" private power generation from the sector. This is simply a misreading of the Report. Professor Ellis does, in places such as the above paragraph and his conclusions refer to the sector as if it included everything that could fit within a dictionary definition, including private power generation. He refers to private power and municipal systems as segments of the electrical power systems sector.

16. It must be remembered that he was writing a report, not attempting to interpret the Act (as the Board must do). Had he seen that as his task, he might well have gone beyond the simple dictionary definition of the words on the page. Even a casual reading of the Board's decision in the *Heavy Construction Association*, [1973] OLRB Rep. May 245 case would make the reader realize that the task was not as simple as that. More importantly, for most of the Report, he does as he suggests in the introductory paragraph and ignores anything other than Ontario Hydro when he is dealing with the issue of what to do with bargaining in the ICI and electrical power systems sector.

17. The bulk of the Report uses the term "electrical power systems sector" in that sense. For example, at page C.1-10:

> 15. After all is said and done, perhaps the most significant point of distinction is the fact that in the EPS Sector there is only one owner-client, who is single-handedly responsible for a construction program which over the next ten years will be worth in the order of ten billion dollars – a dollar volume that is likely to approximate almost half the dollar volume for the entire ICI Sector during the same period. The ICI Sector is, of course, characterized by a multiplicity of owner-clients.
>
> 16. Furthermore, on most EPS Sector projects, that single owner-client, Ontario Hydro, is also a major contractor – very often the biggest employer of tradesmen on a particular project. In fact, in terms of volume of construction work done with its own forces and the numbers of tradesmen employed year after year, Ontario Hydro is perhaps the most significant single construction contractor in

> the Province. The ICI Sector has no comparable experience with organizations playing the dual role of owner and contractor.

In his proposals, however, Professor Ellis reverts to treating the sector as if it were defined only by the dictionary definition and distinguishes between the "Hydro part of the electrical power systems sector" and other portions (page C5-5) and indeed, advocated "removing from the sector the construction of privately owned generation transformation and distribution facilities" (page C5-6).

18. His definition of sector in that portion of the Report is no more profound than reading the widest-possible dictionary definition of the words used. He ultimately uses phrases such as "removal from the sector" of private power generators in the course of what is, in fact, a recommendation that the sector be redefined to accord with its reality.

19. Much was made in argument of the fact that the Legislature did not act on that particular recommendation. It is true it did not merge the ICI and electrical power systems sector sectors, nor did it seek to define the electrical power systems sector (or any sector) leaving the task of elaboration to the Board under section 166.

20. The fact that the Legislature did not amend the Act was something that could be seen as acting in accordance with Professor Ellis's recommendation that the two sectors not be combined, although it may have acted for other reasons unknown to us. The failure to act on the other recommendations contained in the rest of the Report is not as likely to be meaningful. There are many other recommendations Professor Ellis made, as well as a more precise definition of the sector that the Legislature similarly ignored. It made no changes requiring coordination between ICI and EPSCA bargaining (referring to bargaining by EPSCA by name, which included only Ontario Hydro and its contractors). It did not redefine the sector. It did not create mandatory bargaining structures with a "public power construction council". It did not require multi-sector bargaining councils. It did not require coordinated expiry dates of collective agreements in the EPS and ICI sectors. It did not put any limitations on the types of collective agreements that could be entered into in the electrical power systems sector. It did not provide for ratification structures for unions involved in bargaining in the electrical power systems sector. It did not adopt his "inter-sector disputes" resolution mechanism, but left the Board to deal with such conflicts as jurisdictional disputes.

21. As noted, courts have begun to look to such commissions and reports with respect to both the purpose of the legislation and its interpretation. As always, the question of weight to be assigned is determined on a case by case basis. It is difficult to assign much weight to the Ellis Report when the issue of the definition of the electrical power systems sector (or any other sector) was not an issue into which he had been asked to inquire. Further, I am unaware of any authority that stands for the proposition that any conclusion should be drawn in circumstances where a legislature does not respond to gratuitously offered advice.

22. The Ellis Report is a useful document, but one whose significance ought not to be overstated. Most of the Report is a discussion of bargaining within an electrical power systems sector that consists only of Ontario Hydro and within the ICI sector. In doing so, it gives a useful description of how bargaining was anticipated to take place in the ICI sector and how it took place in EPSCA negotiations. His comment that the dictionary definition of the words used in the term "electrical power systems sector" could have a wider meaning than that which "everyone in the industry" gave it, is not a finding or a determination of any sort about the extent of the electrical power systems sector. Indeed, the differing uses of the term in different sections of the

Report indicate where his, and presumably the Legislature's, real concern was. Finally, I draw no conclusion of any sort from the fact that the Legislature did not further define the electrical power systems sector (or any other sector) any more precisely than it had already done. That is a fact without meaning.

Legislative History

23. Before 1998, electrical power generation was largely in the hands of Ontario Hydro and the distribution of electricity to persons and businesses was a complete monopoly, again in the hands of Ontario Hydro. There was some quantity of electrical power produced by private industry. Counsel for the Labourers asserted that all such privately-produced power was used by the producer for its own use without interacting with the provincial transmission grid. There is no evidence of this one way or the other, but it is fair to say that private power producers produced only a small amount of the power used in the Province. Of course to the extent that they did produce power for their own consumption, they reduced demand on the Grid.

24. In 1998, the Province shifted its policy with respect to electrical power. The precise and lengthy details of the legislative changes are set out in two decisions of the Board in *Independent Electricity Market Operator:* [2008] OLRB Rep Mar/Apr 210 and the more recent decision of November 23 2009, in the same application (Board File No. 3322-03-R) reported at 2009 Can LII 66091 (OnLRB). What follows is a sketch of the relevant highlights of those changes.

25. The Province concluded generally that the production of electrical power should be undertaken by private industry and the role of Ontario Hydro should be reduced in its proportion of the market, but not eliminated. Electrical distribution would remain in the hands of Ontario Hydro, or that portion of it known from that point onwards as Hydro One. The *Electricity Act, 1998*, S.O. 1998, c.15 was passed to amend and replace the existing *Electricity Act*. Ontario Hydro was split into four primary businesses that contained certain parts of the old Ontario Hydro business: Ontario Power Generation Inc. ("OPG") for power generation; Hydro One for the purposes of transmission, the Independent Electricity System Operator ("IESO") to oversee and control the operation of the grid and the Ontario Electricity Financial Corporation to deal with the "stranded debt". (I use the current names for these entities.) The business model, again according to counsel, was that a combination of OPG, Hydro One and the IESO would negotiate agreements with private sector partners to operate (in the case of Bruce Power) or to build electrical generating facilities. This initiative produced only one such project, Brighton Beach Power, of which more is said below.

26. This way of proceeding was found not to be satisfactory. The financial basis of the Brighton Beach Project required a guarantee of revenue stream by the Province and cooperation in the capital outlay. More significantly, the regime produced only one new source of electrical power, albeit a large one.

27. In 2004, the *Electricity Act* was amended again to create a different regime. The Ontario Power Authority ("OPA") was created. Its objects were set out at length in section 25.2(1) of the *Electricity Act*. For our purposes, the significant areas are the forecasting of demand, creating of plans for electrical generation projects, and engaging in activities to support those plans. The OPA was required by section 25.31 to develop a "procurement process" to give effect to these goals. The market was "open" to the extent that there would be no "direction" to produce power, or plans to initiate a project, by OPG, IESO or the Province, nor subsidy of any projects undertaken by private industry. Anyone could prepare a proposal for an electrical

generation project (and preferably one using a less polluting fuel source or a renewable energy fuel source). The electricity thus produced would be sold on an open market where prices would fluctuate almost hourly. The OPA would determine how much power was needed and would prioritize the projects submitted to it. Once it had done that, it would enter into contracts with the most desirable proposed ventures that would produce the amount of electricity that the OPA sought. A contract was required to commence building any project.

28. The "Procurement Process" used by the OPA was first to issue a Request For Proposal for procurement of power. The OPA determined that the Province needed an additional 3000 megawatts of electrical power. In 2006 it issued a Request For Proposal for "1000 megawatts of combined heat and power generation in Ontario" as part of that overall goal of 3000 megawatts. This portion sought proposals for Co-gens. The Thorold Project was one of them.

29. Once a project is approved by the OPA, it must obtain an electricity generating licence from the Ontario Energy Board, as well as authorization, in this case, to build a pipeline to the plant. The electricity must conform to the standards of the Grid, set by the IESO, in accordance with the regulations, rules and licence requirements set by the Ontario Energy Board. Once it has done so, the project has a right under section 26 of the Act to obtain access to the Grid. The electrical power is sold pursuant to the IESO market rules. Counsel for the Labourers asserted that all power must be sold to the OPA for its prevailing price at that time, which price can change by the hour. In *Barclay*, the Board was advised that that power facility (which was not a Co-gen, but an electrical power generator) could, or believed it could, enter into arrangements with single customers for a fixed price and deliver it by the Grid to that customer. Whether or not this is available to a Co-generation project such as the Thorold Project does not matter. Northland Power intends to sell all the power it produces to the wholesale electricity market through the Grid.

History of the issue before the Board

30. Disputes about the boundary between the electrical power systems sector and the ICI sector are relatively recent in origin. There are three decisions the parties referred to: *Ontario Hydro*, [2005] OLRB Rep. May/June 437 ("Ontario Hydro"); *Leo Alaire & Sons Limited*, [2006] OLRB Rep. Sept./Oct. 722 ("*Alaire*") and *Barclay Construction Group Inc.*, [2008] OLRB REP. Mar./Apr. 136 ("*Barclay*"). Many of the parties criticized or attacked either the *Alaire* decision or the *Barclay* decision (and parts of the *Ontario Hydro* decision) for various reasons. The Millwrights and Carpenters argued that *Alaire* was simply wrong and ought to be disregarded. The Labourers argued that *Ontario Hydro* and *Barclay* were in some form of irreconcilable conflict with *Alaire*, which led to "confusion" in the industry.

31. As discussed below, I find all of these arguments to be misconceived. First, while there are differences on some issues of analysis between *Alaire* and *Barclay*, neither in fact contradicts the other. The Labourers argue that they represent simply the two opinions of two different Vice-Chairs. The Labourers are correct in that assertion as far as it goes, but, although there are some differences in analytic approaches, *Alaire* and *Barclay* are not in conflict. Neither contradicts the other, and no confusion should result from any fair reading of the two decisions.

32. The *Ontario Hydro* decision was not a sector dispute at all. It was an application under subsections 1(4) and section 69. The Labourers and Operating Engineers asserted that Ontario Power Generation ("OPG") and Hydro One Inc. ("Hydro One") and various subsidiary corporations were the successors to the old Ontario Hydro. The issue was not really whether or not they were the successors (that much was conceded), but whether the bargaining rights of the

Operating Engineers and Labourers to which OPG and Hydro One were the successors, included bargaining rights in the ICI sector. That decision required an examination of the nature of the bargaining rights of those two unions as they had developed in the electrical power systems sector. It was therefore necessary generally to indicate sectoral boundaries because of the nature of the question before the Board, but nothing more than that.

33. *Alaire* was a sector dispute about wind-powered electrical turbines, sometimes colloquially referred to as a wind farm. *Alaire* did not decide that all electrical power generating projects were in the electrical power systems sector. It decided nothing more than what it had to decide. At paragraph 30 it said:

> We are not dealing with co-generation projects where different considerations may well apply. Nor are we dealing with the construction of large, industrial steam plants where the steam is used to drive electric generators and where the nature of the mechanical, electrical, and structural work associated with those kinds of facilities is analogous to large industrial plants where steam is used in the manufacturing process. A co-generation facility being constructed together with or as part of an industrial installation and a large industrial steam generation plant are, in our view, significantly different from the projects in question before us. The projects before us involve the construction of facilities that are "stand alone" electric generators powered by the wind and transmission lines. (We do not purport to decide in this case whether a privately owned thermal electric generating plant is in the electrical power systems sector. We only note that the construction of that kind of a facility is significantly different from the wind farm projects before the Board in these two cases.) There is no "mixed use" issue before us with these projects.

In *Barclay*, the Board dealt with a sector dispute about a "thermal electric generation plant", specifically a gas-fired, steam-driven electrical generator. While disagreeing with some of the analytic elements of the *Alaire* decision, at no time does it contradict or purport to negate the conclusion in *Alaire*. Specifically, it did not decide that all privately-owned electrical generation facilities in the Province of Ontario were in the ICI sector. It found that the Goreway Project was.

34. Both *Alaire* and *Barclay* took the appropriate analytic framework as that set out in the *City of Sault Ste. Marie*, cited above. However, that decision received little application in *Alaire*, as the particular technology and construction techniques were new to the Province. The Board in *Alaire* concluded that all three characteristics pointed to the electrical power systems sector, including, in the end, bargaining patters (albeit from elsewhere).

35. In *Alaire* he Board was strongly influenced by the following considerations:

(a) this was the first case dealing with the sector into which a privately-owned wind-powered electric power generation project fell;

(b) the Board saw in a Request For Proposal from the Government of Ontario what amounted to the Ontario Government mandating an electrical generating project and regulating it accordingly;

(c) the work history was defined by certain speciality contractors about whom the Board said:

> 27. ... The speciality subcontractors that erected the turbines had experience doing this kind of construction work in other jurisdictions and sought agreements with the trades that had the work experience and skills those speciality contractors considered best suited for wind turbine erection work. In effect, those contractors arrived in a jurisdiction where this work was being done for the first time and sought to replicate the collective bargaining patterns they had developed elsewhere. ...

The Board concluded in that case at paragraph 33:

> 33. We have found, for reasons expressed earlier, that the electrical power systems sector extends beyond the construction work done for what was at one time Ontario Hydro on property that was at one time the property of Ontario Hydro. We are also of the view that although the work characteristics for some elements of the projects might well be distinctive, there really are not any significant work characteristics associated with construction in the electrical power systems sector, other than government mandating the project where such constitution [sic] takes place as a part of its electric power policy, that are unique to construction in that sector. Bargaining patterns in the segment of the electrical power systems sector to which the EPSCA collective agreement applies are well established. In those areas of that sector falling outside the EPSCA collective agreement, there are not yet long standing bargaining patterns, but, as the employers and trade unions continue working in that part of the electrical power systems sector on new electrical generation and transmission projects, we anticipate, based on the collective bargaining relationships that have been created as a result of these two projects, new bargaining patterns will develop and emerge.

36. In *Barclay*, the Board did indeed take a different view of two matters the Board considered in *Alaire*: the meaning or weight to be accorded the Ellis Report and the regulatory framework surrounding the work. However, these issues were not the deciding factors in either case. The Board concluded that the three factors that constitute the Board's analysis of sector pointed, cumulatively, to the ICI sector. In extremely summary form, *Barclay* concludes:

(a) End Use

The end use was similar to the electrical power systems sector, but subject to a number of significant qualifications;

(b) Work Characteristics

The Board concluded that the regulatory regime does not put it uniquely into one sector or the other and that the work characteristics of the bulk of the plant were commonly found in the electrical power systems sector, but also found in the ICI sector. The plant connection to the Grid facility was typical only of electrical power systems work characteristics;

(c) Bargaining Patterns

The Board concluded at paragraph 83 that:

> The conclusion one draws from this is that when the parties have engaged in the construction facility, not on Ontario Hydro or Ontario Power Generation property that produced electric power, the predominant collective agreement used is the ICI collective agreement or one that is more similar to the ICI collective agreement than it is to an EPSCA collective agreement.

37. The Board considered *Alaire* and stated at paragraphs 84 and 85 that the Board had considered a different pattern of bargaining history relevant to that project, patterns that had developed outside of Ontario and were related closely to the specific technology associated with the building of the wind farms. By way of contrast, there was ample evidence of bargaining patterns already developed within Ontario on which the Board could rely.

38. The Board concluded therefore that the project was in the ICI sector, but expressed no opinion on the "physical connection to the Grid" about which the Board had little evidence.

Task of the Board

39. In different ways, both the Labourers on the one hand and the Millwrights and Carpenters on the other urged the Board to do what it has no business doing. The Millwrights and Carpenters asked me to reject *Alaire* and "return" wind farms to the ICI sector where they "belong". The Labourers on the other hand asked me to reconsider *Barclay* and "restore" the electrical power systems sector to a unity and wholeness they claim was "fractured" by the *Barclay* decision. This is both a misconception of the two decisions referred to above and of the Board's task.

40. The Labourers asserted that the Board in *Barclay* was carving out a portion of the electrical power systems sector. As counsel put it in written submissions:

> "11. In this case the Board has an opportunity to reconsider its findings in *Barclay* which lack rigorous analysis and has the effect of simply carving out a large part of the electrical power systems sector for reasons which are not transparent and are unstated. ...
>
> 17. The position of the Labourers is that such a change of direction is appropriate for the Legislature where the norms of democratic change including full discussion of the effects of such a change can be engaged. It is not the job of a single Vice Chair to unilaterally alter the composition and definition of sector. Such action only feeds a concern that important decisions, decisions the Legislature has conspicuously avoided making for decades, are made without consultation and to satisfy a select group of stakeholders in the industry."

Aside from the entirely unwarranted innuendo suggested in the submission, the only basis for the assertion that the electrical power systems sector includes everything connected to electrical generation and distribution is said to be the Ellis Report. Again, the Report was not a piece of legislation, or a declaration or finding with any binding force. It was an opinion, and a well-informed opinion, of one who had been asked by the Minister of Labour to investigate and to report on the extension or application of the province wide bargaining scheme to the electrical power systems sector. Aside from the internally inconsistent use of vocabulary in Professor Ellis' report, which defined the meaning of the electrical power systems sector by reference to a dictionary definition, there is no authority for this assertion.

41. The Legislature had not chosen to define sectors beyond the naming of them in the Act. Indeed the only amendment the Legislature ever made to the Act was to remove the "tunnels" from the definition of sector. It has never defined any sector. Both before and after Professor Ellis' report, the determination of sector in the construction industry was a matter to be decided by the Board under what is now section 164.

42. I need to say nothing more about the two decisions I have discussed above. The Board's role is not to create or legislate the boundaries of sectors of the construction industry. The Act lists them. It is up to the Board, when a question as to sector arises on a particular project, to apply the Act. That involves an application of the Board's expertise and experience to the evidence at hand. In the end, however, the Board makes a decision about what is before it. It does not make legislative decisions.

Analytic Framework

43. The proper analytic framework for determining sector is that set out in the *City of Sault Ste. Marie*:

> 39. 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 [be present] 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.

44. In this case, the analysis is somewhat complicated by the paucity of previous Board jurisprudence and the sustained and at times bitter attacks on the two decisions of the Board that have dealt with this sector: *Alaire* and *Barclay*. For example, if one accepts the *Barclay* decision, then the production of electricity is an end use which is found in every generation project in the electrical power systems sector, but also on occasion found in industrial projects in the ICI sector. The reverse is not true of *Alaire*, of course, since it found that the two projects it dealt with were in the electrical power systems sector. It did not suggest any universal definition of the boundary of the electrical power systems sector. The same difficulty with relying on *Barclay* arises in dealing with work characteristics. If one accepts that the project is one in the ICI sector then all of the work characteristics found at the Barclay project appear on occasion in the ICI sector.

45. For the purposes of clarity in this decision, in comparing the Thorold Project in terms of end use or work characteristics to other sectors, I shall initially refrain from referring to either case or to the characteristics of steam plants that generate electricity or wind farms or Co-gens. For convenience, I shall refer to those projects that fall indisputably in the electrical power systems or the ICI sectors and shall refer to the former as "OPG projects" and the latter as "non-electrical industries". This is a matter of convenience only and is not intended to imply that *only* OPG projects are in the electrical power systems sector or that there are any "electrical industries" in the ICI sector.

46. As will be seen, this analysis does not point to a definitive answer in either direction. It is therefore necessary to look at bargaining patterns, and specifically bargaining patterns of OPG, electrical generating projects not controlled entirely by OPG, non-utility generators or "NUG's" and Co-Generation projects such as the Thorold Project.

End Use

47. The Thorold Project does two things: it produces steam that is used in paper making and steam that is used to produce electricity. As well, a small portion of the steam produced is used for both processes (in the back pressure steam turbine generator). Those arguing that this Project falls in the electrical power systems sector focus on the electrical generation; those who argue for the ICI sector focus on the steam used by the Abitibi Paper Mill.

48. The production of steam itself is not a distinctive end use. The steam is used in two processes and in any event, is found equally commonly in the electrical power systems and the ICI sectors.

49. Production of steam for industrial use is purely an ICI end use, as the term suggests. Steam may be used for heating purposes in buildings in OPG facilities.

50. The production of electricity is certainly an OPG end use. OPG produces large amounts of electricity by various means. The generation of electricity is not typical of "non-electrical industries".

51. There were many attempts by all counsel to identify one or the other factor as the dominant or primary function. None of these attempts is ultimately convincing.

52. Counsel argued about which purpose was the reason for embarking on the project. The existing steam plant at Abitibi will be demolished and the Co-gen will become the only source of steam for the Abitibi mill. From that, I was asked to deduce that the steam plant was near the end of its life. On the other hand, the continued viability of certain parts of Abitibi Consolidated are fraught with the uncertainties of the paper industry in the twenty-first century; electrical power will always be in demand. In the end, there is no evidence as to which purpose was the initial one (if it ever was only one of them) and is unlikely to be helpful in any event. When Abitibi and Northland Power decided to go ahead with the project, they had both purposes in mind.

53. Counsel for V. K. Mason suggested that the steam for industrial use was secondary because paragraph 3.2.2.9 of the OPA's Request for Proposal required only that the purchase of steam for industrial use be guaranteed only for five years. That of course is only the OPA's Request; it tells me nothing about the arrangements on this Project. The demolition of the steam plant in the Abitibi mill is more indicative of the relationship between the Project and Abitibi's paper mill.

54. Counsel for the Labourers argued that there is more "power" in the form of electricity than in the form of steam produced. When asked to compare 265 MW to 350,000 lbs of steam per hour, counsel was unable to provide an answer, nor were any of the other counsel. As it happened, the representative from V.K. Mason was an engineer who worked out the formula. (For those who are interested, the steam is equivalent to 9,875 x 350,000 / 34.5 = 100.18 MW of electricity.) It was however clear that this was the first time anyone had made that calculation. There is nothing to suggest that it was material to Abitibi or Northland Power. It also does not address the fact that the steam will run constantly and electricity will be produced only when it is profitable to do so. On the other hand, the steam may not always be at 350,000 lbs of steam per hour, there is no evidence either way. Similarly, it is impossible to predict fluctuations in the electrical power market. That distinction does not provide any assistance in the analysis of sector.

55. The Labourers and EPSCA attempted to draw a distinction between the bargaining patterns between those Co-gen projects that delivered no power to the Grid, a minority of their power to the Grid, and a majority of power to the Grid. In *West York Construction* [1983] OLRB Rep. December 2132 the Board was faced with the task of deciding the sector of a building that was partly used for residential purposes and partly for commercial purposes. The Labourers and EPSCA argue the same should be done in this case using the power production as the defining criteria.

56. There are two difficulties with this approach. One can posit such a distinction; there are examples of all three types of Co-gens. The question is whether the distinction is a meaningful one. First, the measurement of steam and electricity is a valid expression of two kinds of force that is a coherent statement in terms of physics, but appears to have no significance or meaning in the construction of this or other Co-generation projects. Second, the Board in *West York* was faced with the impossibility of dividing up responsibility for work on a single concrete structure, the structural frame of the building, and where the comparison was of identical portions of the same structure. In addition the decision was predicated on an existing local bargaining pattern (something the Board has been loathe to rely on since).

57. As will be seen below when dealing with bargaining patterns, there is, in fact, no discernible pattern of bargaining of collective agreements used in the construction of Co-gens. For those involved in the development and construction of these projects, the percentage of electrical power generated is simply not a factor.

58. Counsel for EPSCA argued that all power produced by the Thorold plant must be sold to the OPA. That is certainly the plan of Northland Power, but as the findings in *Barclay* indicated, that is not always the case. Industries that produce goods for retail markets obviously sell to a wide range of customers, and those that sell to other industries will sell to a more restricted number. Some, notably in the chemical and automotive industries, may have a single customer. The number and identity of potential customers does not demonstrate a sectoral distinction.

59. Because I have excluded consideration of the *Barclay* case, what we have are two end uses, one of which points to the "non-electrical industries" in the ICI sector and one to the OPG projects in the electrical power systems sector. There is nothing that enables me to find that one or the other is predominant. Both are the end uses of this Project.

Work Characteristics

60. Work characteristics is a concept found in the definition of sector in section 126 and is said to be determinative of the sector of the construction industry in which a project is found. In the earliest decision of the Board on sector, *The Heavy Construction Association of Ontario*, [1973] OLRB Rep. May 245, the Board attempted to define what was meant by the term at paragraph 14:

> The work characteristics which distinguish one sector from the other may be shown in terms of the type of problems to be dealt with at the job sites, the material used, the relative importance of various specifications, the variety of skills and trades, and certain characteristic relations with employees. This list of characteristics is not to be thought of as exhaustive, but as particular characteristics which differ between the various sectors enumerated in the Act.

The Board has not significantly added to this list of examples of characteristics that are relevant to a sector determination, although some of them have been examined in detail in many of the cases. The one common theme among them is that they all relate to issues that arise from the actual work of construction, not from other factors that may apply to any one project. Since the purpose is to define sectors of work in the construction industry, that is hardly surprising.

61. The Board went on in that decision to comment that "work characteristics" was a difficult determination to make in the abstract. For example at paragraph 16 the Board commented that certain characteristics of the heavy engineering sector were also to be found in the construction of a large steel refinery, steel mill, power station or sewage settling pond. Similarly, Professor Ellis said at page C.1-3:

> ... the difficulty is that there are no discernible "work characteristics" capable of determining the scope of the electrical power systems sector in a manner that would reflect the construction industry's actual understanding of the sector.

The Board made the same comment in *Alaire* at paragraph 30, quoted above, although in *Barclay* certain portions of the project were found to have work characteristics associated with the electrical power systems sector.

62. In this case, both EPSCA and the Labourers argued that the Board and more specifically Professor Ellis were wrong and that there was a single distinguishing work characteristic: the presence of electrical generating equipment and the equipment necessary to connect the generator to the Grid. They argued that such equipment is nowhere found in any industrial use (again excluding *Barclay*) and there is no OPG project that does not feature one or the other. Within that restricted universe, that is true. The question is whether that fact is instructive in dealing with the Thorold Project, or indeed any NUG or Co-gen.

63. Various industries are characterized by the machinery and the equipment they utilize to create their product. The Abitibi Mill, to which the Thorold Project supplies steam, produces paper using paper-making machinery that is unique to that industry. Printing presses are found only in the printing industries. Blast furnaces are found in steel and other smelting operations. The question again is whether the product (electricity) and the equipment used to produce it defines the sector.

64. In dealing with any project that deals with the production and distribution of electrical power, the question immediately arises as to whether or not it is part of the electrical power systems sector. That is a sector whose existence is connected to the production and distribution of electricity. However, the sector is not the "electrical power sector". It is the electrical power systems sector. The sector must have something to do with a particular system as well as simply electrical power. Thus, all electrical power systems sector projects will have something to do with electrical power. The question is whether the reverse is true, a question that cannot be answered simply by looking at the name of the sector.

65. In *Ontario Hydro*, a panel of the Board (consisting of myself and both of the Board Members who sat on *Alaire*) said at paragraph 58:

> 58. The Operating Engineers' definition is at variance with the statutory term. The sector is not the electrical power sector; it is the electrical power *systems* sector. Some meaning must be given to the word "systems". The term suggests something

> more than simply the generation and the transmission of electrical power. To give the word "systems" some meaning, one must put the generation and transmission of electrical power in some sort of integrated context that can be identified as one or more systems. For most of the time from 1952 to the present, that context has been exclusively the work of Ontario Hydro. However, the statute provides no clue as to where the "system" leaves off and any other operation of Ontario Hydro begins. Indeed, it is possible to define it very narrowly or very widely without doing violence to the words in the statute. However one defines the term, one must give some meaning to the word "system" that is different from the phrase "electrical power".

66. EPSCA argued that the electrical power systems sector should be seen as what counsel described as a single system for the production and delivery of electricity. The system, in EPSCA's view, consists of all of the components that are involved in the process from production up to the point where it is delivered to the consumer. That is so, in their view, because electricity is an essential service without which the Province cannot function and hence production and delivery must be seen as a single system.

67. That, of course, is one way of looking at the electrical power systems sector as an essential service, which it clearly is. The question is whether it has any meaning for the purposes of the *Labour Relations Act*. The *Labour Relations Act* does not govern or regulate the production and distribution of electricity in Ontario or of any other essential service. The only issue relevant to the Board with respect to the production and distribution of electrical energy is in the context of a sector dispute. The differentiation of the construction industry into sectors is for the purposes of determining issues related to labour relations. The Board is not responsible, nor does it oversee the supply and delivery of this, or any other, essential service. It does adjudicate labour relations issues that arise in the course of building those things that accomplish that function.

68. Simply because one can conceptualize a system or a network that accomplishes a particular essential service delivery does not result in a conclusion that all of the components of a system or network must fall within one sector. The production and delivery of potable water and the disposal of waste sewage is arguably more basic than the supply of electricity. It certainly precedes it in historical terms. Sewers and watermains are in one sector, water purification and sewage treatment plants are in the ICI sector (*Mathews Contracting Inc.*, [1993] OLRB Rep. Dec 1332, *City of Sault Ste. Marie*, cited above). Something more than that is necessary to define a sector.

Regulation

69. Both EPSCA and the Labourers point to the detailed regulation of the Project as typical of work in the electrical power systems sector and unusual in other sectors. Some of the regulation is indeed complex. That is to be expected when the electrical portion of the Project connects to the province-wide Grid that can be disrupted dramatically by a significant failure of one generator. There are, it seems to me, three issues addressed by the regulation of this and similar projects. The first is the fact of regulation, second the control of entry of parties into a particular market as suppliers and finally the detail and complexity of the regulation.

Fact of Regulation

70. The fact of regulation does not distinguish this project from others in the construction industry. Certainly there are forms of regulation that are common to all sectors: Building Code, zoning, Occupational Health and Safety compliance, and various engineering codes. However,

there are also forms of regulation that are specific to certain types of construction. Pipelines (including the pipeline leading to the Thorold Project) require the approval of the Ontario Energy Board. Water and Sewage treatment plants require specific kinds of regulation on both a municipal and provincial level. Regulation that is specific to certain types of work is a commonplace feature of any sector of the construction industry.

Market Entry

71. The fact that the various boards and authorities that govern the sale of electric power regulate market entry is not a unique feature of these types of projects. The province also controls when, where and whether universities and hospitals will be built or expanded. Nothing can be built without passing successfully through that approval process. Further the process of regulating the construction and operation of hospitals through Local Heath Integration Networks or Universities through various Ministries is not a casual or perfunctory process.

72. The OPA, through its pricing, and the IESO through direct regulation, certainly control entry to the market. Between them, they decide how much power may be sold into the system and what they will pay for it. EPSCA and the Labourers criticized the *Barclay* decision for treating this market regulation, which is extraordinarily complex in terms of electrical power, as the equivalent of an agricultural marketing board. The difference, they say, lies in the detail of the level of regulation of the market that is unique to the production and distribution of electrical power. I do not accept that argument. On a conceptual level, these are all simply markets to which access is controlled by a public body. Conceptually, there is no difference.

73. There is one other area of endeavour that provides a useful illustration of the impact, or rather lack of impact, that a strict control of market entry, combined with a detailed regulation about the operation of a project, has on the determination of the sector of the construction industry in which the project is constructed. The provision of publicly assisted housing is provided primarily by the Province of Ontario through municipal governments that build and operate social housing projects. A small portion of such projects are created, sponsored and operated by private groups (though for philanthropic rather than profit making purposes). The province still funds the housing subsidies and regulates in extreme detail the operation of the projects. It certainly controls the approval process for any privately built social housing project under the *Social Housing Reform Act, 2000.* The fact that the Province controls the ability to create a project in this "market" (and the detailed level of regulation that is entailed) is not reflected in sectoral divisions. The collective agreement between the Metropolitan Toronto Apartment Builders Association and the Labourers covers both public and private housing as do the various collective agreements covering different phases of low-rise residential construction.

Level of Complexity

74. There is a complex array of regulations and regulatory bodies that govern this Project. I conclude that this level of complexity is neither unique to the electrical power systems sector nor is it relevant to what the Board examines when examining "work characteristics" for the purpose of deciding the question of sector.

75. Some of the approvals necessary are not peculiar to the electrical power systems sector. The approvals needed for the Project from the Ontario Energy Board are not of significance. The application to the Ontario Energy Board was necessary to build the pipeline that supplies gas to the Project. That is true whether the gas is used to produce steam for the paper mill or the electrical generator or both.

76. There are a number of codes that regulate the distribution of power and how that is to be accomplished. Of course, the Thorold Project does not distribute electricity; it produces it for the IESO and Hydro One to distribute through the Grid. Applicable codes in that respect are the *Transmission Code* and perhaps a Local Distribution System Code as well. Those are codes that deal with the Grid operated by Hydro One, and Local Distribution Systems operated by a variety of sources, including Hydro One. The obligation of the Thorold Project is to deliver power in a manner that conforms to the requirements of its customer, the Provincial Grid. Consequently, that is no different from the water purity standards required by a municipality, or the quality control standards of any industry, although the *Transmission Code,* the CHP contract and other regulatory bodies may provide greater detail than many such regulatory regimes.

77. The other area subject to enormous detail is the financial arrangement for the sale of electricity and the calculation of payment owed for it. The many formulae set out in a contract between the OPA and the contracting party on this project (the Board was provided only with the standard form of contract) are initially impenetrable for an outsider in their complexity. It would, of course, be possible for the OPA simply to provide a single rate in exchange for an undertaking to produce as much power as the plant could. That would be absurdly expensive and impossible to control. Certainly, after the experience with Brighton Beach, price guarantees and set rates were not going to be part of any arrangement made by the OPA. The system of calculating payment for the supply of electricity delivered over the course of an hour, the appendices for capacity payments, payments for dispatch orders, contingent support payments, revenue-sharing payments, credit payments, "force majeure" capacity reduction allowances and other such items is staggering in its detail. It also has nothing to do with the construction of the project. It has to do with the market rules for the commercial operation of the project once it is built.

78. The level of complexity of the regulation of the electrical power market, as compared to any other regulated market, is not an assessment I can make on the evidence before me. I have no comparable evidence about what is required for the approval of a gas pipeline by the Ontario Energy Board, the development of land by various land use and environmental tribunals or the building of a toll highway. I was simply asked to conclude that the lengthy and almost impenetrable documents before me are more complex than anything else. To return to the *Social Housing Reform Act*, that statute also provides a dense layer of regulation about the operation of a social housing project. *The Social Housing Reform Act* itself is a very lengthy and detailed statute and is further elaborated by nine regulations several of which rival in length and complexity (but not higher mathematics) the level of detail filed in this case relating to the Thorold Project. In addition, since the overseers of such projects are municipal rather than provincial, these regulations call for a host of equally detailed municipal policies, codes and requirements. There may be no set of regulations as detailed as those applicable to the Thorold Project, but if not, the regulatory regime applicable to public housing comes a close second. As noted, the greater degree of public regulation does not distinguish public housing from private housing in collective agreements covering the residential sector.

79. The conclusion I draw from this is that the detailed regulation does not provide a demarcation line between sectors in the one other instance where it appears to be as detailed as the regulation surrounding the Thorold project. In this case I see no reason to regard the differences in the level of regulation (about which I have no actual comparative evidence) as a significant distinction between any two sectors and specifically between the electrical power systems sector and ICI sectors.

80. Even assuming that the level and complexity of the regulation is unmatched elsewhere, the regulations and contracts themselves do not impact in any significant way on the construction of the Thorold Project. The *Transmission Code* does not apply to the construction of a power generating plant. To the extent that the *Transmission Code* does determine the nature of the electrical current the Thorold Project seeks to export to the Grid, that simply represents quality control by a customer that is not unique to any sector of the construction (or any other) industry.

81. The provisions of the standard contract dealing with construction are brief in the extreme. They are:

> **2.1 Design and Construction of the Facility**
>
> (a) The Supplier agrees to design and build the Facility using Good Engineering and Operating Practices and meeting all relevant requirements of the IESO Market Rules, Transmission System Code, Distribution System Code, the Connection Agreement, in each case, as applicable, and all other Laws and Regulations. The Supplier shall ensure that the Facility is designed, engineered and constructed to operate in accordance with the requirements of this Agreement.
>
> ...
>
> **2.2. Additional Development and Construction Covenants**
>
> ...
>
> (c) The Supplier agrees to provide, at its expense, all power system components on the Supplier's side of the Connection Point, including all transformation, switching, metering and auxiliary equipment, such as synchronizing and protection and control equipment, pursuant to requirements deemed necessary by the IESO, the Transmitter, the LDC (and as specified in the System Impact Assessment, the Customer Impact Assessment and the Connection Impact Assessment, as applicable) and the End-User, as applicable, to protect the safety and security of the IESO-Controlled Grid, the Local Distribution System, each of their customers and the End-User Load, as the case may be. The equipment to be so provided by the Supplier shall include such electrical equipment as the IESO, the Transmitter, the LDC and the End-User, as applicable, deem necessary, from time to time, for the safe and secure operation of the IESO-Controlled Grid, the Local Distribution System and the End-User Load, as required by the IESO Market Rules, the Transmission System Code, the Distribution System Code and the End-User, as applicable.

The obligation to describe the final Project itself is merely that set out in Article 2.1(b):

> (b) The Supplier agrees to provide a single line electrical drawing which identifies the as-built Connection Point(s), clearly showing area transmission and distribution facilities, including the transmission station(s) that is electrically closest to the Facility.

In addition, the Project must provide a brief outline of the major components of the Project as set out in Appendix A to the Contract. Compared to the drawings and specifications that accompany the types of contracts typical in many projects in various sectors, the OPA's standard contract is almost indifferent to construction issues, except at the Connection Point to the Grid. There is,

unquestionably, at that point, detailed regulation of the manner of constructing the Connection Point. Most of the contract has nothing to do with construction of the Project at all.

82. Electrical power is now produced by OPG and by private developments for sale to the OPA or some other customer. Before 1998 the vast majority of electrical power was produced, and all of it distributed by Ontario Hydro, and there was no commercial transaction among the various divisions of Ontario Hydro. Presumably Ontario Hydro collected the charges for the supply of electricity from the local distributors (or individual customers in some areas) to whom it sold the power. I do not know what the precise arrangements are now. Presumably OPG is paid by someone other than the direct customers of the electricity. I do not know if that is the OPA or Hydro One or the local distribution networks. Hence, the existence of a commercial basis for the project's relationship to the Grid does not make it a commercial enterprise that inevitably falls outside the electrical power systems sector. It does mean that the financial basis of the project is different for the Thorold Project from what it was for OPG projects before 1998 and perhaps up to the present time.

83. In the end, all that can be said is this. The electricity market is one that is regulated by government, and is regulated more than many and perhaps all other markets. It controls entry to the market for power producers and maintains a monopoly for distribution. There are highly detailed and technical requirements for connecting to the Grid and the nature and characteristics of the power to be supplied. The financial arrangements between the producer and the customer are very complex. However, all of this regulation contains virtually nothing about the construction of a facility such as the Thorold Project, other than a reference to "Good Engineering and Operating Practices". For all its regulation, this particular market has no requirements that dictate or regulate any work characteristic of the construction of the Thorold Project, until it reaches the supplier side of the Connection Point.

84. At the Connection Point, the regulation of the supply of electricity does impact on the methods of construction and the work characteristics associated with it. In *Barclay,* I found that these characteristics were most closely associated with the electrical power systems sector or, in the context of this decision, the OPG projects, and only one set of standards used in the rest of the plant were characteristic of electrical power systems sector work. As a result I expressed no opinion as to the work dealing with the "connection to the grid". In part, that decision was based on the fact that this was a portion of the project that required the active participation of Hydro One. I am unable to discern whether Hydro One would be involved in the construction of the Connection Point, although it would clearly be concerned about its fitness for connection. The parties did not focus on that part of the project as a separate item. In the context of the entire Project, it is a small portion of the work.

85. I conclude therefore that there are no work characteristics which distinguish this Project overall from those in the ICI sector or the electrical power systems sector, unless one concludes that any project involved in the production of electrical power is *per se* an electrical power systems sector project, a contention which is not borne out by any analysis.

Bargaining Patterns

86. The relevant bargaining patterns analysis must focus on projects which in whole or in part produce electrical energy. Within that sphere, there are potentially three relevant types of collective agreements:

(1) The provincial collective agreement of each trade, which is the only collective agreement that the trade may lawfully conclude in the ICI sector;

(2) The EPSCA collective agreements, which have been applied to all construction work on OPG projects and its successor Bruce Power;

(3) Any other collective agreement that may be created for use on this type of project.

87. Before the argument commenced, the parties had agreed on a unified list of previous projects that involved the generation of electric power, and the collective agreements used by all trades on that project. The collective agreements were classified as "EPSCA", "Provincial Agreement/ICI" and "Provincial Agreement/Sector Undetermined". Only the Labourers objected to the accuracy of the summary, and those issues of accuracy were clarified by the time argument commenced. The Labourers also complained generally of the "misleading" nature of the third category. Their objection is this. The Labourers argue that the use of a provincial collective agreement does not indicate an acceptance by the parties of the sector in which the Project fell, but rather an agreement simply to use that collective agreement to govern terms and conditions of employment on the Project. In many cases, I am sure this is true; probably that is the reason for distinguishing between the second two categories, "Provincial Agreement/ICI sector" and "Provincial Agreement/Sector Undetermined". Indeed, many of the provincial collective agreements state on their face that they cover more than the ICI sector, which is effective if an individual employer has given the employer bargaining agency or a component of it the authority to bargain for it in those sectors. For those trade unions whose Provincial Collective Agreement is limited to the ICI sector, of course, it was an explicit choice of an ICI collective agreement.

88. I am unclear from argument whether the Labourers dispute the characterization of some projects as "Provincial Agreement/ICI Sector" on that same basis. Certainly no other party did. In the end I conclude it makes no difference whether this category is what it says, that is the use of the Provincial Collective Agreement by all trades explicitly recognizing it as an ICI project, or whether it represents the use of the Provincial Collective Agreement by all trades on the site, and that all of them except the Labourers believed it was used because the work was in the ICI sector of the construction industry.

89. In the end, what parties' believed at the time about which sector they were working in is all rather beside the point. An examination of bargaining patterns is not an examination of what sector the participants thought they were working in (if they thought about it at all), but which collective agreements, for whatever reason, they did use. The "pattern" is one of activity, rather than of thought or belief. The question is whether the bargaining for collective agreements covering employees performing this type of construction work are EPSCA collective agreements, Provincial Collective Agreements or some new and different type of collective agreement.

90. I further reject the assertion of EPSCA and the Labourers that a provincial collective agreement as modified by an agreement on a particular job, or under the formal mechanism of the Project Agreement provisions of section 163.1, ceases to be a provincial collective agreement. Provided that a variance of a Provincial Collective Agreement is made available to all bidders and participants on a project, and is approved by the employer and employee bargaining agencies, any variation is a valid amendment to the Provincial Collective Agreement. All the industry participants are familiar with jobs that have been subsidized through "stabilization funds" or "enabled" in some fashion, generally by the variation of wage rates or mobility provisions or

some other provision of the collective agreement. This happens particularly in difficult economic times and is a common feature of provincial bargaining. With respect to the Project Agreement, that is simply a statutory process whereby a provincial collective agreement can be modified for the purposes of concluding a particular project. I note once again the employee bargaining agencies must be given notice. Such projects are often, but not necessarily, in the ICI sector. The Project agreement modifications do not make the Provincial Collective Agreement any the less lawful, or any the less a modified Provincial Collective Agreement. In any event, there are few projects (and none of them Co-gens) where the parties' agreement indicated that the Provincial Collective Agreement was used where sector was undecided or where the sector was explicitly agreed to be non-ICI.

91. Although it was not stated explicitly, the "EPSCA" category includes, I assume, both collective agreements to which EPSCA is a party, and any other agreement that does not include EPSCA, but which is different either from the EPSCA Agreement or the Provincial Collective Agreement (e.g. the Brighton Beach project).

92. For the purposes of analyzing the material, I shall refer to the privately-owned and operated electrical generating projects which are powered by steam or by wind as non-utility generators or "NUG's". The facilities that produce both steam for industrial uses and for the generation of electricity (regardless of whether that electricity goes to the industrial sponsor of the project or to the Grid) are Co-generation projects or "Co-gens".

93. Counsel for the Labourers objected to the term "Co-gen", which he argued was an imprecise term capable of more than one meaning. In support of that argument, he pointed to the definition of a "By-Product Fuel-Fired Industrial Co-generation Facility" contained in the glossary of terms in Appendix "B" to the request for proposal issued by the OPA. I find nothing difficult about the definition given in that Appendix, and indeed it simply contrasts with the "Natural Gas-Fired Industrial Co-generation Facility" found a few pages on. In other words, the glossary distinguishes between two types of Co-generation facilities. The term "Co-generation facility" is a term that is so commonly known it does not require further definition in this definition-laden glossary. No other party to the hearing had any trouble with the meaning of the term, and indeed even the Labourers did not suggest that any of the projects on the list classified as "Co-gens" ought to be treated in some different fashion from the others. The term is a common one in the industry referring to projects which produce both steam for industrial use and for the generation of electricity or to use the words of the Request For Proposal itself, a "combined heat and power facility".

94. The parties' chart identifies 56 Co-gen projects. They were all built using the Provincial Collective Agreements. They are all classified in the chart as "Provincial Collective/ICI Sector". There are no exceptions. It applies where most of the steam is used for an industrial use and to projects where the majority of the steam is used for electrical production. It applies when the electrical portion is used exclusively by the industrial process (only 6 of them), primarily by the industrial process, and where a majority of the electrical power is delivered to the Grid. Some projects produce only a small amount of electricity, some produce a large amount of electricity (e.g. No. 2 Algoma, 70 MW, No. 24 Iroquois Falls, 120 MW, No. 41 Kirkland Lake, 102 MW, No. 64 St. Catherine's General Hospital, 250 MW, and No. 74 Trans Alta, 565 MW). There is simply no variation in the bargaining pattern at all. All Co-gens built before the Thorold Project were built under a provincial collective agreement defined by all or almost all involved as an ICI agreement.

95. I note as well that there was no distinction between the main portions of the projects listed and any work that was done at the point where the connection was made to the grid. On the other hand, the summaries did not really contemplate such a detail, if it did make a difference. All projects were treated as a single unit.

96. This pattern is reinforced when looking at NUG's. All of the NUG's produce more electrical power than most of the Co-generation facilities. There are 12 projects (13 if one includes Bruce Power) that produce electricity from heat and steam energy. Of the 13 projects listed, the agreements applied are as follows: Bruce Power is bound to the EPSCA Agreement as a successor to Ontario Hydro. Of the remaining 12, 8 were built using provincial collective agreements, 6 of them as "Provincial Agreement/ICI Sector". This includes the Goreway Project, which was the subject of the *Barclay* decision, and Halton Hills, where one trade union considered bringing a sector challenge and then abandoned that thought. Two others are classified as "Provincial Agreements/Sector Undetermined".

97. That leaves 4 projects built under an EPSCA agreement or, at least, an agreement that does not resemble the provincial agreement. One of these was the Brighton Beach project, about which the Board said at paragraph 5 of its decision, that some trades negotiated collective agreements similar to ICI province-wide agreements and some were more similar to EPSCA collective agreements. However, it appeared that Brighton Beach and the various local unions at least tacitly agreed that this project did not fall within the ICI sector. Although the Portlands Project was described as "Provincial Agreement/Sector Undetermined", counsel agreed that this was built under a modified EPSCA style agreement. The other two are the Five Nations Project and the Mississauga Energy Projects, about which the parties provided me no information. The only distinguishing feature between Brighton Beach and Portlands and the 8 other NUG's built under a Provincial Collective Agreement is that OPG was involved as a participant in Brighton Beach and Portlands.

98. The *Alaire* decision dealt with two projects (Lake Erie Shores and Prince Township) that were wind farms that generated electrical power to supply the Grid. The Board found they were in the electrical power systems sector. The parties identified 13 other wind farm projects built after the wind farms discussed in *Alaire*. Ten were classified as "Provincial Collective Agreement/Sector Undetermined", two were identified as "Provincial Agreement (Non-ICI), and one was identified as "Project Agreement/ICI Sector". Whatever conclusions one might wish to draw about the sector of such projects, the prediction of the Labourers that new bargaining patterns were likely to develop and emerge in the area of wind farms has not in fact, been realized.

99. The other source to look for bargaining patterns in formal and legal terms is the recent accreditation applications filed with respect to the electrical power systems sector. EPSCA has applied for and been accredited in four applications in respect of employers for whom bargaining rights were held by the Labourers (Board File 0516-07-R), Boilermakers (Board File 1284-09-R), Ironworkers (Board File 1285-09-R) and the United Association (Board File 0515-07-R) in the electrical power systems sector. In each case, the collective agreement to which the majority of employers was said to be bound is the EPSCA Agreement and the bargaining unit of employers defined in each accreditation reflected the scope provisions of that agreement, namely:

> All employers employing ... [trade name] engaged in all construction work [as defined] in the electrical power systems sector performed on Ontario Power Generation, Bruce Power, and Hydro One property.

100. The Mechanical Contractors Association of Ontario, one of the applicants here, was accredited to represent a bargaining unit of employers for whose employees the UA had bargaining rights in the electrical power systems sector (Board File 3744-08-R) described as follows:

> All employers of [plumbers, etc.] in the electrical power systems sector in the Province of Ontario, save and except employers that are named in the accreditation certificate dated November 13, 2007 (Board File 0515-07-R). [i.e. the EPSCA accreditation]

101. The collective agreement to which the MCAO stated the employers identified in Schedule "E" to that application were bound is the Provincial Collective Agreement with the UA. On its face, it covers the electrical power systems sector, as well as the ICI sector. As the panel hearing that application, I had some concerns about it. The projects identified as being the projects on which employees and employers worked during the relevant time for the accreditation order included Goreway, which had already been found to be in the ICI sector, and Halton Hills, about which there might have been a dispute brewing, although in the end no party challenged the sector in which the project was built. All of the projects identified appeared to be NUG's. Once the employees employed on Goreway and Halton Hills were removed, there were, in fact, very few employees to count in that application. The other projects identified were listed by the parties, but no information was supplied to the Board about what those projects were. The Board does not conduct an inquisitorial process. In the face of an agreement of the parties when there is no evidence to the contrary, the Board accepts those facts. In this case, there was no reason not to grant the accreditation order, and it was granted.

102. Counsel for the Labourers described this process as the MCAO "doing it right". Given the number of employees identified for the purposes of the "double majority test" in that application who were working at Goreway or Halton Hills, it strikes me as more of a "just in case" sort of application.

103. In any event, those applications seem to reflect the same pattern as the non-utility generators examined in this application. When OPG, Bruce Power or Hydro One are involved, the EPSCA Collective Agreement is applied. When none of them is involved, the Provincial Collective Agreement is used, whether or not there is agreement on the sector of the project. In any event, with respect to Co-generation projects like the Thorold Project, the pattern of using exclusively ICI sector provincial collective agreements is undisturbed.

104. In summary then, bargaining patterns point decisively to the use of the Provincial Collective Agreement, and explicitly to the ICI sector, with respect to Co-generation facilities and largely to the use of provincial collective agreements (even when sector is not defined) in the steam and wind-driven generating facilities.

105. What is significant is not what parties thought of what they were doing, assuming they turned their mind to the question of sector at all. What is significant is that for these types of projects, there was no new or different bargaining structure created. It was not necessary to respond to "new" or "special" labour relations issues when performing this work. There were no new employer associations created to address bargaining specifically with respect to this kind of work. The Provincial Collective Agreement structure was quite sufficient to handle the bargaining. Those facts lead one to conclude that there were no "work characteristics" that required a different bargaining or collective agreement approach to the performance of work on these projects.

106. The significance of bargaining patterns is described in *West York Construction*, cited above, at paragraphs 3 and 25:

> 3. The idea that the construction industry is divided into different divisions or sectors originally developed independently of any provisions in the *Labour Relations Act*. Instead, the different sectors evolved as a result of employer associations and trade unions entering into separate collective agreements covering particular types of construction work. The lines separating the different types of work or sectors evolved primarily on the basis of common understandings, and to the extent they were written down, it tended to be only in collective agreements negotiated between the various unions and employer associations. In 1971 the Act was amended to reinforce the bargaining position of employer associations by permitting the Board to "accredit" them as the statutory bargaining agent for employers, whether members of the employer association or not. In that many employer associations tended to be active only in a particular geographic area, and in one or, at most, a relatively small number of sectors, the accreditation provisions of the Act specified that the Board could accredit an employers' association by reference to a geographic area and by reference to one or more sectors. (The current provision in this regard is set out in section 126 of the Act). So as to explain what it meant by the term sector, coincidental with the enactment of the accreditation provisions in the Act, the Legislature enacted what is now section 117(e). In setting out the various sectors, the legislation referred to the residential and ICI sectors as being separate sectors, a move which recognized, and likely hastened, an already existing trend towards treating "building construction" differently on the basis of whether it is residential or ICI. In 1978 the Legislature amended the Act so as to consolidate bargaining structures in the ICI sector on a province-wide basis, and to stipulate that, with certain exceptions, the only agreements which could apply to ICI work were the provincial agreements referred to in section 136(1)(e). This amendment gave increased importance to the concept of sectors, and to the issue of determining exactly what work came within the ICI sector. *We do not believe, however, that by giving statutory recognition to the concept of different sectors and by enacting special provisions with respect to the ICI sector, the Legislature thereby intended to change the existing understandings between trade unions and employers concerning the scope of the different sectors.*
>
> 25. Lacking a definition of either the residential or the ICI sector in the Act, the Board is required to determine the dividing line between them with limited statutory guidance. In determining the matter, we incline to the view that as far as reasonably possible our conclusion should be one which takes into account existing industrial relations realities. We would refer in this regard to our earlier expressed view that by incorporating the notion of sectors into the Act, the Legislature did not thereby intend to change the existing understandings between trade unions and employers as to the scope of the different sectors. ...

In this case, the existing understandings between trade unions and employers are crystal clear when looking at Co-gens and reasonably clear with respect to NUG's.

Conclusion

107. Although bargaining patterns relate to the statutory purpose of defining sectors of the construction industry, they do not determine the outcome of any sector dispute. The *West York* decision itself referred to local bargaining patterns which has not been part of the Board's analysis since that decision. Indeed, the statutory definition requires the Board to look at work characteristics and, implicitly, end use. Sometimes these will be decisive. More often, as the

Board stated in *The City of Sault Ste Marie* decision, cited above, it will be a matter of considering all of the factors and arriving at a result based on the weighing of all three of them.

108. In this case, neither the end use nor the work characteristics provide a clear indication of sector. However, the pattern of bargaining and use of the provincial collective agreement is very clear. It is certainly confirmatory of *Barclay*. Accepting then that *Barclay* was correctly decided, that would indicate that both the end use of electricity production and the work characteristics associated with electrical equipment and machinery, and the regulation of the sale of electrical power, are found occasionally in the ICI sector, as well as invariably in the electrical power systems sector. With respect to Co-gens, the pattern speaks loudly and clearly.

109. I conclude then that the end use and work characteristic issues point almost as strongly to the ICI sector as they do to the electrical power systems sector, and the bargaining patterns point strongly to the ICI sector. Accordingly, I declare that the Thorold Project is work falling within the industrial, commercial and institutional sector of the construction industry.

"David A. McKee"
for the Board