ONTARIO LABOUR RELATIONS BOARD

0309-03-U Sarnia Construction Association on its own behalf and on behalf of the Members Listed in Appendix "A" to the application, Applicant v. Operating Engineers Employer Bargaining Agency, Construction Labour Relations Association of Ontario and Industrial Contractors Association of Canada**,** Responding Parties v. Ontario Erectors Association, Incorporated, Intervenor v. Crane Rental Association of Ontario, Intervenor v. Associated Earth Movers of Ontario, Intervenor.

BEFORE: David A. McKee, Vice-Chair.

APPEARANCES: Richard J. Charney, Andy Pilat and Michael Horvat for the applicant; Stephen McArthur and Joe Keyes for the Operating Engineers Employer Bargaining Agency and the Construction Labour Relations Association of Ontario; Carl Peterson and Tony Fanelli for the Industrial Contractors Association of Canada; Robin B. Cumine and William Jemison for the Ontario Erectors Association, Incorporated; David Bannon and Vello Medri for Crane Rental Association of Ontario; Charles Humphrey for the Associated Earth Movers of Ontario.

DECISION OF THE BOARD; April 7, 2004

Introduction

1. This application is a complaint about the manner in which the Operating Engineers Employer Bargaining Agency decides whether to ratify or reject a provincial collective agreement negotiated every three years. The Operating Engineers Employer Bargaining Agency ("the EBA" or "Employer Bargaining Agency") is the employer bargaining agency designated by the Minister of Labour in 1978 to bargain with the International Union of Operating Engineers and its Local 793. Its functions are limited to the bargaining of the provincial collective agreement. It is the manner in which the EBA to make decisions in bargaining that is at issue in this case.

2. The Employer Bargaining Agency is an association created in 1978 for the purpose of provincial bargaining. It had no previous existence. The 1978 designation refers to the employer bargaining agency as "consisting" of a number of other associations. The names of some of these associations have changed over the years and I propose to list them using their current names, although where the previous name is relevant I will refer to it in the decision. These associations are:

a. The Canadian Association of Foundation Specialists ("Foundation Specialists")
b. The Crane Rental Association of Ontario ("CRA")
c. The Industrial Contractors Association of Canada ("ICA")
d. The Construction Labour Relations Association of Ontario ("CLRAO")
e. The Ontario Erectors Association ("OEA")
f. The Eastern Ontario Crane Rental Group ("Ottawa Crane")
g. The Associated Earth Movers of Ontario ("Earth Movers")
h. The Heavy Equipment Services Section of The Windsor Construction Association ("Windsor – Heavy")

3. The complaint is brought by the Sarnia Construction Association (the "SCA") on its own behalf and on behalf of 47 of its 50 contractor member employers who are bound to the Operating Engineers Provincial Collective Agreement (there are 20 supplier members of the SCA who are not relevant to this decision). The SCA is not one of the organizations named in the Minister's designation, nor is it a member under the constitution of the Employer Bargaining Agency. It is, rather, a geographically defined association that is a member of CLRAO. In turn, the CLRAO is made up of 14 geographically based employer associations. Two other members of the EBA, CRA and the Earth Movers filed interventions in this application. They too are of the view that the voting structure within the EBA ought to be different from what it is. In this they are opposed by CLRAO, ICA, and the OEA. The Foundation Specialists, Windsor – Heavy, and Ottawa Crane took no part although they were given notice of the proceedings.

4. Although the SCA is not an employer for the purposes of section 167(2), it can act as agent for its 47 member contractors. Thus, I will refer to the SCA, and indeed to most of the employer associations, as a convenient abbreviation for the contractors who make up their membership.

5. The focus in this case is not general matters of governance and decision-making during the periods between bargaining, nor even during the course of bargaining. It is about the number of votes each party is entitled to cast when the EBA must make a decision about the provincial collective agreement. The only evidence I heard was evidence about the final votes to accept or reject a complete package that would renew and settle the terms of the provincial collective agreement for the next three years. These votes appear to be taken at the end (or what might be the end) of bargaining rather than at different points during bargaining, although in theory the same structure and process could be used to make any decision in bargaining.

6. There are two issues in this case. In the first, the SCA alleges that there was an agreement made in 1995 to give it 2 of the 5 votes held by the ICA (out of a total of 32 votes). They say this is a settlement made in respect of an outstanding application before the Board and as such the SCA seeks enforcement under section 96(7). The EBA and the ICA have raised a number of defences, including that this was not a settlement of an outstanding application, that is was at best a revocable agreement, and so on. As a preliminary matter they ask that this complaint be dismissed for delay. I heard all the evidence and argument on this issue and reserved until this decision on the issue of delay.

7. The second issue is a complaint by the SCA that the EBA has violated section 167(2) by retaining the voting structure that has prevailed since 1995. The CRA and the Earth Movers join them in this complaint. In their submission, this structure constitutes arbitrary decision making on the part of the EBA, contrary to section 167(2). They argue, in different ways, that the distribution of votes used to make decisions is so divorced from the weight of the interests that different groups of employers bring to the bargaining table, that the structure itself is arbitrary. The EBA, CLRAO, ICA and OEA all contend that the voting structure is not arbitrary, and that in any event, the Board has no jurisdiction to inquire into what is essentially the internal affairs of the EBA.

The Provincial Collective Agreement and the Voting Structure

8. The Provincial Collective Agreement, like many, is composed of a Master Portion, which applies across the province and a number of schedules that add to or perhaps modify these provisions. There are 15 schedules attached to the agreement as follows:

Schedule A – Crane and Equipment Rental
Schedule B – Erection and Mechanical Sections
Schedule C – Foundations and Piling
Schedule D – Excavators
Schedule E to N - 9 Geographic Areas
Schedule O – Survey

9. The first four schedules are obviously applicable primarily to members of the CRA, the OEA, Foundation Specialists and Earth Movers respectively. The local Employer Associations who make up CLRAO bargain the nine geographic Schedules. Sometimes more than one local construction association bargains a single geographic schedule. The Survey Appendix is not significant for the purposes of this decision.

10. Although wages are found in the schedules, money (in the sense of a general dollar or percentage increase) is negotiated as a "main table" issue, although there may be room for some adjustments, particularly with respect to classifications, in each schedule. The "schedule negotiations" may take place at the same time as the Master Portion negotiations. Monetary items are negotiated at the main table. As in most collective agreement negotiations, money is usually the last item to be settled.

11. Although the evidence was not clear on this point, it appears to me that when all negotiations have run their course, a final memorandum is drawn up. This does not mean that each of the schedule negotiations or even the monetary negotiations have necessarily reached a satisfactory conclusion. The parties in the last three rounds of negotiations appear to have produced the document that will "settle" the collective agreement in the sense that the union will accept the entire package. The members of the EBA then vote on whether to accept or reject this memorandum. In 1995 and 2001 they voted to accept it. In 1998 they voted to reject it and a strike commenced. A second vote, on a different Memorandum of Settlement, which did settle the strike and the collective agreement, was held three weeks later.

12. There is one other feature of this ratification procedure. Any organization that holds votes is entitled to give a proxy for its votes to any other party. Indeed, on some occasions (although not recently) the ICA has given its votes by proxy to the SCA, which has cast them. If one party perceives that its interests in bargaining are the same as those of another party, and for whatever reason chooses not to attend bargaining, it may simply give its votes by proxy to that other party.

13. The current voting structure is as follows:

Foundation Specialists – 5
ICA - 5
CLRAO – 5
OEA – 5
Earth Movers – 5
CRA – 5
Ottawa Crane – 1
Windsor - Heavy – 1

This has been in effect since 1995, the last time the voting structure was changed.

14. CLRAO has 5 votes. CLRAO is made up of 14 regional Employer Construction Associations including the SCA. These regional Associations are at the table, in part to bargain their own appendices, and in part to determine CLRAO's positions. CLRAO decides how to cast its 5 votes by conducting a vote among the member associations. Each member of CLRAO has one vote. I heard no evidence about divisions within CLRAO. Historically, it has cast its 5 votes as a block; I do not know if the votes can be split if there is a division within CLRAO.

15. The EBA does very little other than conduct bargaining. I heard no evidence of any centrally directed co-ordination or employer initiatives conducted by the EBA. Each association, primarily by CLRAO, does some of that type of work. The chief officer of CLRAO has historically been the secretary (and again chief officer) of the EBA.

16. The constitution of the EBA is brief in the extreme. It provides nothing more than a framework for the conduct of bargaining. It contains no provisions for the resolution of disputes that may develop within the EBA nor does it contain any provision with respect to any amendment process of the EBA Constitution.

The History of Changes to the Voting Structure and Provincial Bargaining

Pre-1995

17. The voting structure has changed a number of times. In 1978 each of the members of the EBA held one vote except for the CRA, Ottawa Crane and Windsor - Heavy who among them held one vote. In 1988 each vote was converted into five votes. Of the last group, the Crane Rental Association received three votes and Ottawa Crane and Windsor – Heavy received one vote each. All the other members had five votes instead of one.

1995

18. This structure did not satisfy the CRA or the Earth Movers for long. In 1993, and formally in 1994, both the CRA and Earth Movers indicated their dissatisfaction with the voting structure of the EBA. They raised it at Employer Bargaining Agency meetings and attempted to negotiate a solution. Ultimately, they filed a complaint under what is now section 167(2) (Board File #4546-94-U). Their position, in 1994, was set out in a letter from counsel as follows:

> …
>
> A review of the number of votes that members of the Bargaining Agency have under the Constitution as compared to the number of manhours of employment they represent discloses a number of discrepancies. Our client, the Crane Rental Association of Ontario, based upon the figures you have provided, accounted for 26% of the manhours worked by all Bargaining Agency association members in the interval from November 1992 to October 1993. They only had 10% of the votes under the Constitution. Likewise, our client, the Associated Earth Movers of Ontario, employed persons performing 20.8% of the hours worked and have 16.7% of the votes under the Constitution.
>
> It is our client's position that these discrepancies in the voting arrangements under the Constitution must be rectified. It is our client's position that the voting arrangements should be such that the percentage of votes held by a member of the Employer Bargaining Agency reflect the manhours of employment attributed to that Agency member.

…

19. The SCA intervened in this application. Its position was stated briefly:

> a. The SCA supports the position of the responding party [i.e. it opposed the application].
> b. If the Board undertakes to amend the voting structure, the SCA requests independent status within the agency with votes reflecting the basis found to be appropriate by the Board.

The year 1995 was also a bargaining year. The collective agreement was in fact settled July 22, 1995 and ratified by the Employer Bargaining Agency in early August. The settlement was not contentious for the Sarnia Construction Association; they were in favour of it. However, the matter before the Board proceeded. A request to dismiss the application for failing to disclose a *prima facie* case was dismissed on June 29, 1995, and a request to reconsider this decision dismissed July 17, 1995. Hearings were presumably to commence in the fall of that year.

20. On September 22, 1995 the Employer Bargaining Agency held a meeting searching for a resolution of the conflict. A proposal was made subject to ratification by all of the constituent members of the Employer Bargaining Agency. The settlement altered the voting structure by increasing the number of votes of the CRA to 5 and thus increasing the total number of votes to 32. In addition, the constitution was changed in two respects. First, a decision had to be approved on a first vote unanimously and on a subsequent vote by a two-thirds majority. In addition, article 7.03 was added to the constitution which provides as follows:

> 7.03 Each association shall have the right to veto any change (other than total wage package change) to its schedule or any other provision elsewhere in the agreement specifically identified with that association if such change is less favourable to an employer. If a wage issue involves a multiple total wage package at least two-thirds of the constituents in each total wage package group must be in favour.

21. The Sarnia Construction Association's response to the proposal was:

> While the SCA is prepared to live with the current Constitution [of] the association [it] is strongly opposed to any change which will not give Sarnia a stronger voice reflecting the man hours worked under the Sarnia schedule and has requested support from Bureau [now CLRAO] members.

In fact, the Sarnia Construction Association had raised this issue in 1992, but apparently did not pursue it at that time.

The SCA - ICA Agreement

22. Members of the Employer Bargaining Agency had until October 23, 1995 to ratify the proposed agreement. They all indicated they were prepared to do so. The SCA was not in agreement. It was prepared to step up its opposition to any change that did not accommodate what it felt was the SCA's entitlement to vote. It advised Jim Thomson (Secretary of the Employer Bargaining Agency) that if the settlement were approved, the SCA would oppose the withdrawal of the application by the CRA and Earth Movers, or would file a complaint of its own. Mr. Thomson undertook to deal with this conflict also. He secured the agreement of the

ICA to a proposal that he put to the SCA. The text of the agreement between the SCA and ICA was as follows:

LETTER OF UNDERSTANDING

1. The undersigned Employer Organizations are part of the Operating Engineers Employer Bargaining Agency.

2. It is agreed between the undersigned organizations that in reference to the negotiation and ratification of the Operating Engineers Provincial Agreement that the Sarnia Construction Association will have control over two of the five general votes currently assigned to the Industrial Contractors Association of Canada.

Signed at this day of October, 1995

Sarnia Construction Association	Industrial Contractors Association of Canada
……	…….

23. The SCA and the ICA agreed to this proposal and executed the agreement. The document was not fully executed until October 26, 1995. Mr. Thompson advised the SCA on October 20 that the deal was there if they were satisfied with it. Mr. Pilat executed it and returned it to Mr. Thompson on October 24, 1995.

24. The changes to the EBA constitution were therefore approved and the complaint before the Board was withdrawn by decision dated November 6, 1995.

1998

25. The issue arose again in 1998. There were three issues left at the end of negotiations: Seniority provisions in Schedule A (Crane Rental Schedule), money (the Union was demanding a $4.00 an hour increase), and a make-up time provision for the Earth Movers and Foundation Specialists Schedules. The Employer Bargaining Agency was prepared to push these issues to impasse and a strike ensued. It lasted three weeks. At the end of that time, the Employer Bargaining Agency concluded that it was not prepared to continue to endure a strike, which showed no signs of collapsing, for the sake of any of these issues. The CRA was not happy with this decision. They found the seniority provisions in this schedule a major restriction on their operations and were prepared to continue the strike. However, they could see the writing on the wall and realised that they had no support among other members of the Employer Bargaining Agency. In the end they voted in favour of the settlement.

26. The Sarnia Construction Association was also unhappy about the conduct of bargaining. Mr. Thomson had retired and his position, both at CLRAO and on the Employer Bargaining Agency had been filled by Mr. Joe Keyes (who holds it to this day). Mr. Andy Pilat, (the Business Manager of the SCA), and Ray Curran, its President, approached Mr. Keyes at the beginning of bargaining in 1998 and stated that as a result of the 1995 settlement SCA had a right to two votes. Mr. Pilat testified that Mr. Keyes said, “he’d look into it. The next day he came back and said he had looked into it and we didn’t”. Mr. Pilat did not press the matter. The SCA

felt that the bargaining situation was sufficiently difficult (it did lead to a strike after all) that it did not wish to rock the boat. In the end the SCA did not cast any votes.

27. Following the 1998 bargaining, the SCA did nothing further about the two votes. Mr. Pilat's reasons given in testimony were that the SCA was sponsoring the first project agreements in Ontario and was fully occupied with that task. They were complete by mid-1999. The SCA did nothing between 1999 and 2001, when the next round of bargaining took place. Again, Messrs. Curran and Pilat approached Joe Keyes who again advised them that the SCA did not have two votes. The reason given, as far as Mr. Pilat remembers, was that "probably he [Mr. Keyes] didn't read the constitution the way we read it – most likely he'd say something like that". Again, bargaining proceeded with no further discussion of the issue.

28. What is remarkable is that in 1998 Mr. Pilat did not produce a copy of the agreement or even refer to it in his conversation with Mr. Keyes. The agreement of course did not change the constitution, which Mr. Pilat thought Mr. Keyes probably referred to. It was a deal outside the terms of the constitution, and of course Mr. Keyes would not find it if he looked within the constitution. When asked about this, Mr. Pilat's response was that the deal had been brokered by the EBA and that Mr. Keyes should have been aware of it.

29. Mr. Pilat did approach Mr. Fanelli, the representative of ICA, in 1998 about the proxy votes. But he did so only at the end of bargaining when he asked if ICA would give the SCA its proxy for its 5 votes. Mr. Fanelli refused to do so. Mr. Pilat did not mention the 1995 deal. When asked why not on cross-examination, he responded that it was up to the EBA, which had brokered the deal, to enforce it, not the SCA. In any event, the agreement was not discussed.

2001

30. The 2001 round of bargaining was not particularly eventful for the SCA and they voted in favour of the settlement. This was not true for the CRA. Its issues in 2001 were:

a. what it claimed was a typographical error in the listing of classifications within the wage schedules of Schedule A which had happened in 1998 but was not discovered by the CRA until 2001;
b. its desire to reduce or eliminate seniority from its schedule; and
c. the union's request for an hourly wage increase and a 27% increase in travel pay.

31. The issue of the typographical error in the classification schedules was a matter of extreme irritation to the CRA, even though it had not been noticed for three years. The CRA felt it had been cheated or hoodwinked by the Union in the proofreading process. It acknowledged that its previous Business Manager had made a mistake in not spotting the error. As a way of dealing with this problem it requested that the Employer Bargaining Agency provide it with an electronic copy of the collective agreement. The Employer Bargaining Agency declined to do so on the grounds that it did not have one and did not propose to create one.

32. The Crane Rental Association discovered that no one else on the Employer Bargaining Agency was prepared to endure a strike over its three issues. The other members took the position that the typographical error was something the CRA had to deal with in its own bargaining over Schedule A. They determined it would not become a strike issue at the main table. Similarly, all other members took the position that they had withstood, unsuccessfully, three weeks' strike in 1998 where the seniority provisions of Schedule A were a main issue, and

had no appetite to do so again. When the union offered to withdraw its other language proposals if the Employer Bargaining Agency would withdraw its language proposals and agree to the union's wage and travel proposals, all the other members of the Employer Bargaining Agency were prepared to agree.

33. The CRA was quite prepared to take a strike over what it saw as a huge increase in the wage burden associated with travel costs. (The CRA believes, with some justification, that travel costs impact on it far more than on other members of the Employer Bargaining Agency). However, all of the other members of the Employer Bargaining Agency were prepared to vote in favour of the collective agreement. Since the effect of a "no" vote by the CRA would simply require a second meeting where only a two-thirds majority was necessary, it voted in favour of the agreement. It refused to execute the memorandum of agreement or the collective agreement since it still contained, in its view, an error in the classification provisions of Schedule A.

Events Leading up to this Application

34. On January 7, 2003, the CRA wrote to the Minster of Labour asking the Minister to intervene in the operations of the Operating Engineers Employer Bargaining Agency to deal with two issues: membership in the Employer Bargaining Agency and the voting structure of the Employer Bargaining Agency. On January 22, 2003, the SCA wrote to the Minister supporting this request. In his letter Mr. Pilat noted, among other things, the agreement from 1995. He said:

> …
>
> Issues in respect to the voting structure have been discussed for several years and, as a result, the Sarnia Construction Association and the Industrial Contractor Association did reach agreement in 1995 whereby the ICA agreed to permanently assign two of its votes to our Association. These votes recognized Sarnia's unique position and were considered separate from those kept by the ICA.
>
> Despite this agreement, the Secretary of the EBA will not recognize the separate status of these votes. In our view this is arbitrary and improper given that there was agreement of the parties.
>
> …

35. On March 20, 2003 the SCA wrote to Mr. Keyes as secretary of the Employer Bargaining Agency and attached a copy of the 1995 agreement. Mr. Pilat's letter concludes:

> …
>
> You will note that the ICA has assigned two of their votes to the Sarnia Construction Association. The document is clear and unambiguous that the votes are separate and independent. It is also clear that the EBA constitution does not prohibit such assignment.
>
> We expect that this agreement will be honoured by the Employer Bargaining Agency. We request your immediate confirmation that the Letter of Understanding will be complied with as it is our intention to proceed with the appropriate action to enforce the Letter of Understanding if required.

This was forwarded to the ICA, which responded on March 24, 2003 as follows:

…

> During the 1995-1998 round of bargaining an agreement was reached between the Sarnia Construction Association and the Industrial Contractors Association of Canada. The Letter of Understanding dated October 24, 1995 was the result of the ICAC's good will and sincere efforts to attain agreement among management constituents within the EBA during negotiations with the Operating Engineers Union. The terms set out in the Letter of Understanding were to be exclusively applied to that round of bargaining and not to any future bargaining.
>
> …

36. Counsel for the SCA wrote to the President of the ICA pointing out that this answer was manifestly incorrect, as provincial bargaining had concluded well before October 24, 1995. Nonetheless, this remained as the ICA's position up to the first day of hearing in this matter.

37. The Minister appointed a conciliator to meet with the parties to assist them in finding a solution to their differences. I have no evidence about any such meetings (nor should I have any), other than the self-evident fact that no settlement was reached. The Minister has announced no other action with respect to the SCA's request. This application was filed on April 28, 2003 and final argument was completed on February 25, 2004.

The First Issue: The Complaint under Section 96(7) - Delay

38. The responding parties, and particularly the ICA, argued that the application under section 96(7) should be dismissed for delay. They argued that this 1995 agreement, which the SCA found was not being honoured in 1998, should not come back to haunt the parties in 2003 (when this application was filed). The ICA in particular argued that it was not necessary to show any prejudice or detrimental reliance. The fact that the matter could, and in the ICA's view, should, have been litigated in 1998 means that the SCA has simply waived or abandoned any rights it may have under the agreement.

39. I do not accept that bald proposition. An analysis of the impact of delay on litigation invariably involves an analysis of prejudice. The classic statement in the context of a section 74 complaint (the duty of fair representation by a union) is found in a case relied on by all parties, *The Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420 at paragraph 21, where the Board stated:

> 21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay – holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship – quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

40. The issue is not necessarily one restricted to the parties to the litigation. In *Toronto Housing Labour Bureau*, [1987] OLRB Rep. Sept. 1178, the Board considered the delay of the applicant Carpenters Union seeking to attack the bargaining relationship between a number of builders and Labourers Local 183. The Carpenters had filed their complaint in a timely fashion. It was adjourned on agreement after a number of days of evidence in the case. Although the Carpenters Union asked to have the matter relisted within an appropriate period of time, it did not press the matter and the Board attributed some of the delay in getting the matter relisted to the Carpenters. There was no doubt, by the time the Carpenters Union seriously sought to have the matter re-listed for hearing, that success in that complaint would call into question the manner in which the Labourers Union had in fact organized in the residential sector for several years following the adjournment in mid-stream of the first application. In refusing to allow the Carpenters to commence litigation of an identical case, the Board said at paragraphs 19 and 20:

> 19. …Here, there is no question but that the substance of this complaint long predates the particular agreements and incidents complained of. Indeed, the collective bargaining relationships between Bramalea, Presidential and Local 183 serve merely as a convenient foil for the prosecution of a complaint which Local 27 and its predecessor in title, Local 1190, have had against Local 183 and any and all of the many contractors, developers and builders within the residential housing sector with which it has a bargaining relationship since the commencement of this representational dispute in 1981. This is as much as admitted by the complainant in this very application when it advises that the issues here raised are identical to those raised in its earlier filed complaint – Board File 0554-83-U. Surely, it was with the filing of that complaint in June 1983 that the issue here sought to be litigated crystallized and the incidents here related and complained of could be, at most, subsequently materialized particulars in that original complaint.
>
> 20. On such a reading of the matter it becomes a foregone conclusion that the delay here occasioned must be fatal to the filing of this complaint. Each of the factors enumerated above in the *Mississauga* case can only be marshalled against the interest of the complainant. The length of the delay is excessive and arises years after it had become aware of the alleged statutory violations; the nature of the remedy claimed would strike at the heart of a pattern of hundreds of bargaining relationships which have developed, flourished and expanded within the residential framing sector of the construction industry since the alleged contravention first arose; there is in addition the existence of factors which would hamper and impede a fair hearing of the issues in the setting of freshly filed section 89 proceedings, including fading recollection, unavailability of witnesses, deterioration of evidence and the disposal of records. From all the foregoing, the Board concludes that, setting aside for a moment the convoluted history of the struggle between these two protagonists, the delay in the prosecution of a section 89 complaint by Local 27 attacking the integrity of the bargaining relationships entered into by Local 183 on the strength of no subcontracting clauses of which Local 27 or its predecessor Local 1190 were aware from their first inception and with respect to which exception has been taken in principle from almost that same moment, would alone suffice for the Board to conclude that it ought to exercise its section 89(4) discretion to refuse to entertain the complaint here filed.

(Ultimately, the original complaint was dismissed on the same basis.) If delay is postulated as a reason not to inquire into the application, it is necessary to demonstrate some form of prejudice.

41. That is not to say that the Board is unconcerned about delay apparent on the face of an application. The mere passage of time will usually cause some prejudice, particularly in an on-going, dynamic relationship. Generally speaking, the Board will assume that there has been some

form of prejudice after roughly one year of delay. The comments quoted above from the *City of Mississauga* case are often referred to for the proposition that there is a "rule of thumb" that complaints must be filed within a year. It is perhaps more accurate to say that after the passage of a year in most active collective bargaining situations, the Board will assume that a sufficient level of prejudice has occurred that the application should be dismissed unless a good reason is given for not doing so.

42. In *Mota v. Hamilton-Wentworth Police Services Board* (2003) 63 O.R. (3d) 747, the Ontario Court of Appeal discussed the issue of limitation periods under the Rules of Practice, adopting the basic analytic framework set out in an earlier case:

> In *Deaville v. Boegeman,* [(1984) 48 O.R. (2d) 725], at 730, MacKinnon A.C.J.O. explained the presumption of prejudice and the onus on the party seeking to rebut it.
>
> > Some courts have suggested that in applications of the nature of the one in the instant case, limitation periods can be ignored. Limitation periods, however, were not enacted to be ignored. It has also been suggested that the mere bringing of such an application as in the instant case immediately shifts the burden of establishing prejudice to the defendant. I do not agree. In my view, the expiry of the limitation period creates a presumption, however slight in some cases, of prejudice to the defendant. It may be that the mere recitation of the facts and history of the case makes it clear there is no prejudice to the defendant and it can be inferred that he knew, within the limitation period, of the case and the nature of the claims now being made against him. Alternatively the defendant may file material which establishes prejudice. If matters are left in balance, the usual rules apply and the applicant upon whom the burden lies has not discharged that burden. The facts of the case and the claims and the history of the dealings with the defendant are within the knowledge of the plaintiff and there is no unfairness in placing upon the plaintiff the burden of establishing those facts.
>
> In this case, the mere passage of time has created a presumption that OFGC [the defendant] would be prejudiced by the amendment. Although that prejudice cannot be measured, it must be taken to exist unless the appellants can show otherwise. Conversely, on the unusual record in this case, OFGC was not required to put forward evidence of actual prejudice. It was entitled to rely on the presumption of prejudice because the appellants led no evidence to suggest otherwise. The appellants, therefore, cannot meet the requirements of subrule 5.04(2). They have not shown that adding OFGC after the expiry of the limitation period would not result in prejudice that could not be compensated for by costs.

While there is no statutory limitation period involved in this case, this sort of analysis is a useful guide for the Board. Given the nature of labour relations realities, if a party allows more than one year from the time the events complained of came to his or her attention, there will be a presumption of prejudice and a burden of explanation will shift to the applicant to demonstrate that there is no prejudice.

43. In this case, the nature of the relationships within the EBA is different from most collective bargaining relationships. The EBA does very little between bargaining sessions. Even if it did do more, the Letter of Understanding relates only to an act that occurs once or twice every three years: the ratification of the collective agreement. Other than the two occasions in 1998 and 2001, the Letter of Understanding played no role in the life of the EBA. The SCA points out that it seeks no relief, even declaratory relief, with respect to the refusals to give it two

votes during those rounds of bargaining. It simply says now, in 2004, it wishes to enforce the agreement that the ICA clearly refuses to honour. There is no delay with respect to the 2003-2004 refusal.

44. The factors relied on by the ICA as evidence of prejudice are not persuasive. It did not actually demonstrate those difficulties by calling a witness. Originally, ICA pleaded that the Letter of Understanding applied to the 1995 negotiations only. That is clearly not the case, since it was concluded some two months after the collective agreement was ratified in 1995. While this may suggest some fading of memory, it is impossible to speculate about any forgotten facts that could possibly be relevant. Mr. Fanelli, who executed the agreement on behalf of ICA, was present during the hearings. Whether he has any memory of the Letter of Understanding or not, and whether or not he had any notes or related files, is of little consequence. There were no face-to-face discussions between Mr. Fanelli and Mr. Pilat, so there is no question of extrinsic evidence arising from the negotiation of the agreement. While the language used in the Letter of Understanding may be terse, that is all the parties agreed to. I am not prepared to hypothesize that Mr. Pilat's evidence might be contradicted by Mr. Thomson, who might have made some representation which he conveyed to both parties and which constituted some evidence of a shared intention which was expressed ambiguously in the Letter, without some such evidence from Mr. Fanelli. Mr. Thomson has relocated to British Columbia. I had no evidence he was unavailable by telephone or was being uncooperative.

45. The delay in raising the issue of the application of, or indeed the existence of, the Letter of Understanding is however, relevant to determining whether there has been a breach of the Letter. I will assume for the purpose of this analysis that the Letter of Understanding was a settlement of a proceeding under the Act. If it was, then section 96(7) applies and there is no need for consideration beyond the compromising of the litigation.

46. The words used in the second sentence of the Letter of Understanding are of significance. The word "control" is used in reference to what the SCA will have as opposed to the "assignment" of votes to the ICA. Assignment implies some sort of proprietary ownership interest. The ICA "owns" those votes. The Letter of Understanding states that the SCA will have "control" of two of the votes that the ICA owns. The distinction in the words implies a lesser form of proprietary interest. The ICA retains its primary ownership interest and permits the SCA to have control of two of those votes.

47. The verb in the sentence is a flat statement of fact: "the SCA will have control". This does not suggest an active assignment, transfer, sale, giving, conveyance, delivery, transmission, award, providing, supplying, donating, conferring on, bestowing, vending, presenting to or disposing of the votes to the SCA. The phrase "will have control" is one more suggestive of something the SCA can direct rather than something it owns or possesses as of right.

48. This interpretation is consistent with the Constitution and structure of the EBA. The SCA is not a component of the EBA. It is not named in the designation order. It is not at all clear that an EBA can permanently assign or convey to another party some part of its decision making power given to it by the Minister. (The issue of *delegatus non potest delegare* was not argued.) However, there is no such obstacle to a temporary assignment of the right to cast votes to a group such as the SCA. The ICA could accomplish the same thing by simply deciding to respect the wishes of the SCA with respect to two of the votes it casts. Since the ICA would retain ultimate control, no issue of improper delegation could arise. Regardless of any legal doctrine restricting permanent delegation, a revocable assignment of two votes to the SCA would be consistent with the structure of the designation made by the Minister, which the EBA is not free to alter.

49. The Letter of Understanding does not address the issue of whether the "control of two votes" is revocable or irrevocable. Given the language used, and the limited role the SCA can play in the EBA, I conclude that the decision that the SCA would have control of two votes was revocable. The ICA retained the authority to resume control of the two votes.

50. While the ICA owes the SCA no duty of fair representation under section 167(2), and the EBA is not a party to the Letter of Understanding, any agreement must be interpreted and applied on the basis that the parties entered into it, and would exercise rights under it, in good faith. However, given that the Letter of Understanding is revocable, the obligation to prove bad faith is on the part of the SCA. I heard no evidence from the ICA. The SCA is entitled to ask the Board to draw an inference from all the facts that on a balance of probabilities, the ICA's decision was tainted by bad faith. Indeed in the absence of facts that could provide a possible explanation, a simple revocation of the Letter of Understanding without comment might well suggest bad faith. However, the full context of this case suggests otherwise.

51. The delay on the part of the SCA is relevant here. On two occasions it raised the issue of the control of the votes with the EBA (though not the existence of the Letter of Understanding) but did not pursue the matter at all. It never spoke to the ICA about the Letter of Understanding at all. It now seeks to prevent the ICA from revoking it so that it will have two votes in its hands in bargaining. Unlike the CRA, the SCA does not suggest it has any specific issues that it wishes to use its two votes to promote. Indeed, it would not have cast them any differently in 1998 or 2001. It simply wishes to hold a position commensurate with its view of the significance of the SCA in the world of construction (though not within the structure of the EBA designation).

52. The result of the SCA's inaction in 1998 and 2001 is that bargaining proceeded on the basis of the strict wording of the Constitution for two rounds of bargaining after that. The ICA did not have the opportunity to see what effect the control of two votes by the Sarnia Construction Association would have on bargaining, both at the negotiation stage and at the crucial time of ratification by the Employer Bargaining Agency. Discontent on the part of the CRA and the Earthmovers continued to grow. In 2003 the situation had developed to the point that, based on the last two rounds of bargaining, two parties who are members of the Employer Bargaining Agency claim that the Employer Bargaining Agency is "dysfunctional" and that the voting structure needs to be changed.

53. The SCA is in a position, then, where it seeks to alter the voting structure to something that might have been viable in 1998, although no one except the ICA and the SCA knew of it. Other parties and the ICA did not have the experience or the opportunity to see how that reallocation of votes operated and to assess what impact that had on their own view of how bargaining operated. To drop that solution into the 2004 or 2007 bargaining would simply exacerbate the conflicts that already exist within the Employer Bargaining Agency without offering any relevant or helpful change.

54. To give effect to the Letter of Understanding now would add to, rather than reduce, the level of conflict within the Employer Bargaining Agency. It may satisfy the SCA, but it does little to address the issue of the Earth Movers and the CRA. While the CRA supported the SCA and the Earth Movers took no position, it is unlikely that the allocation of 2 votes to the SCA will reduce their demands. Indeed, it seems it would likely increase the disparity in their eyes. Whether or not the voting structure as it stands is appropriate, or indeed it is a violation of section 167(2), this change will worsen rather than improve the functioning of the Employer Bargaining Agency as it has developed in 2004.

55. Given these concerns, I cannot conclude that the revocation of the Letter of Understanding by the ICA, regardless of how clearly this was done, is on the balance of probabilities tainted by bad faith.

56. I do not mean to suggest that this finding should be interpreted as any conclusion about the motives or thought process of the ICA. On my interpretation of the Letter of Understanding, it was revocable at the insistence of the ICA. Since there are no provisions in the Letter of Understanding dealing with when or under what terms the it may be revoked, the only basis of complaint for the SCA was that the ICA was exercising its power in bad faith. I am unable to conclude on the basis of all of the facts that the SCA has proved bad faith on the part of the ICA. I make no finding other than those.

The Duty of Fair Representation Complaint

The Position of the SCA

57. The SCA argued in the alternative that, on the basis of the number of hours worked by persons employed under the Provincial Collective Agreement, it was entitled to even more than two votes. The failure of the EBA to recognize that principle of "proportionality" (discussed in greater detail below) constitutes in its view a violation of section 167(2). The remedy it seeks is an order from the Board directing the EBA to give it something like 4.3 votes. Since the CRA and the Earth Movers adopted the issue raised by the SCA, and the remedy it seeks, I will deal with them in detail. The fact that they intervened in this application rather than filing their own and seeking to consolidate the two is a matter of form rather than substance. I find that the CRA and the Earth Movers are entitled to pursue the remedies they seek in this application.

58. The SCA is not entitled to that remedy. The SCA is simply not a component of the EBA. If its members have been treated in a manner contrary to section 167(2), the only possible remedy with respect to voting structure would be an increase in the number of votes given to CLRAO. That organization is of course a responding party and opposes any change to the voting structure of the EBA. And of course, CLRAO owes the members of the SCA no statutory duty at all. In any event, if I find that there has been a violation of section 167(2), the specific remedy the SCA seeks, a number of votes in its own name, is not available. If the Board were to grant such a remedy, it would amount to an amendment of the EBA designation. The Minister has the power to do that; the Board does not.

59. That conclusion has no effect on the analysis the SCA asks the Board to make under section 167(2) on behalf of its members. The SCA is entitled to pursue the complaint as an agent for its members. It is entitled to seek appropriate relief if a violation is proved. The CRA and the Earth Movers are entitled to pursue a remedy that includes a redistribution of votes. The SCA is not entitled to pursue a remedy that give it votes in its own name. Having said that, the SCA took the lead in this application, and indeed defined the terms of the debate for the other parties, as it is entitled to do. I deal below with its request that its own particular status be given special recognition. I shall deal with all the issues raised in the positions of all parties.

The Board's Jurisdiction under Section 167(2)

60. The parties articulated two different theories of how the Board ought to deal with its mandate under section 167. The responding parties and the OEA argue for a very narrow role for the Board. They argue that the Board has no statutory power to regulate the internal affairs of an

employer bargaining agency, much as it has no power to regulate the internal affairs of a trade union (see *Michael Connolly* [1987] OLRB Rep. Feb. 193). They argue that section 167 should be read in a manner analogous to that of section 74. That is, it is an unfair labour practice section that has application only to specific actions and events, which actions and events may be remedied, if necessary, with respect to the specific act complained of. They argue that the Board may not order the voting structure of an employer bargaining agency to be changed in any permanent fashion. The SCA and CRA argue that the Board should take an expansive view of its jurisdiction and that section 167(2) deals precisely with the subject matter of this application.

Previous case law

61. There are very few reported decisions of the Board under this section. The two most notable ones appear to support the responding parties' view. In *Dominion Maintenance*, [1979] OLRB Rep. Oct. 940, the Board dealt with a complaint by a number of Sarnia area contractors about what had occurred in bargaining with the Painters Union. The allegation was that the employer bargaining agency had made a commitment about certain bargaining objectives relating to Sarnia and had, in fact, assured them that this objective had been achieved. It turned out that the Memorandum of Settlement did not, in fact, achieve the desired result; there was a wage increase in Sarnia in the second year of the collective agreement. The Board found that, in fact, the employer bargaining agency had carried forward the Sarnia area proposal, but had in the end compromised it in the interests of concluding a collective agreement. The Board found as a fact that there had been no misrepresentation to the Sarnia contractors. The Board concluded at paragraphs 25 and 32 as follows:

> 25. The respondent contractor associations in this case have been designated under the Act to represent the complainant contractors in bargaining. As the designated bargaining agency all the rights, duties and obligations of the complainant contractors under the Act are vested in the employer bargaining agency for the purpose of conducting bargaining and concluding a collective agreement. We start with the proposition, therefore, that the complainant contractors are legislated [sic] members of the collective agreement and as such are subject to the decisions made by the employer bargaining agency in the negotiation of the provincial agreement so long as those decisions do not evidence arbitrary, discriminatory or bad faith conduct within the meaning of section 136(2) of the Act. The complainant contractors do not have an absolute right under the statute to have their local bargaining objectives pursued and cannot succeed, therefore, simply on the basis that these objectives were abandoned.
>
> 32. The evidence does not support the finding that the complainant contractors were sold out or victimized by the ill-will of the employer bargaining agency. The bargaining sub-committee conducted themselves in an open and responsive manner vis-à-vis the directors of the Association including the Sarnia representatives. There is no evidence to support the finding that the bargaining sub-committee failed to put its mind to the Sarnia position to the extent that the Sarnia position was advanced. The Sarnia representatives, perhaps because they did not appreciate the nature of the provincial bargaining structure, did not respond to the dynamics of the bargaining process as they should have if they expected their position to be given special consideration. In the result the Board finds that the complainants were not subject to arbitrary, discriminatory or bad faith representation by the respondent associations and named individuals and hereby dismisses the complaint against the respondent associations and named individuals.

In coming to this conclusion, the Board analogized its role under section 167(2) to that of its role under section 74, citing a number of leading cases under section 74 or its predecessors. *On the*

facts of that case, the Board found that the employer bargaining agency had fulfilled its duty by fairly considering the Sarnia contractors' demands, by taking this bargaining objective into account in pursuing its bargaining strategy, and in communicating what it was doing and why. This analysis is similar to the Board's analysis of a section 74 complaint; once the responding party had taken the applicant's views into account, considered all the relevant factors and did not consider irrelevant factors, and made a decision on the basis of what it knew and believed, it had met the requirements of the statute. The Board did not see its role as one that required it to determine the "correct" result of bargaining.

62. Although the Board found a violation of section 167 in *Mechanical Contractors Association of Ontario,* [1982] OLRB Rep. Mar. 417, it did so on similar grounds. It explicitly analogized the section to the standard under section 74. The complaint in this case was that the employer bargaining agency had excluded the Mechanical Contractors Association of Sarnia ("MCAS") from bargaining because it had (for other reasons) refused to pay its dues and assessments to the MCAO. It had neither voice nor vote at the bargaining table. The Board found that there was a violation of the Act and said at paragraph 12:

> 12. Having regard to the able submissions of counsel and the evidence before the Board, we find that the respondent has acted in an arbitrary manner by the MTBC failing to properly consult with the former zone affiliate with respect to the preparation, conduct, and progress of negotiations. It is our further view that only the granting of observer status in the affairs of the MTBC for the current round of negotiations will clearly avoid an ongoing violation of section 151(2) [now 167(2)]. In coming to this conclusion we rely heavily on the fact that the complainant is not an individual employer but rather an organization that formerly had the status of a zone affiliate; the complainant in previous negotiations has played a fundamental and pivotal role in the negotiation of the Sarnia appendix; and the fact that the Sarnia area has a number of labour relations problems that tend to be unique to that area. However, we do not accept that the failure to accord the complainant a vote in the affairs of the MTBC relating to the negotiation of the Provincial Agreement constitutes a failure of section 151(2). The scheme of the Act, and particularly section 72(5) [now 79(8)], reveals that where such a right is intended it is provided for specifically. In all other situations the non-member of a bargaining unit is entitled only to the protection of "fair representation" as provided for in section 68 and 151. While these latter sections may require the bargaining agent to accord the non-member a number of procedural privileges in order that the non-member's interests be fully appreciated and understood, we do not understand these sections to require the respondent to extend to the complainant the right to vote in MTBC affairs. …

63. The results, and indeed the analysis, in both of these cases were entirely appropriate to the facts of each one and to the nature of the complaint made to the Board. However, it goes too far to suggest that the cases stand for the proposition that the duty of fair representation of an employer bargaining agency under section 167(2) is precisely co-extensive with that of a trade union under section 74.

The Statutory Context

64. Sections 74 and 167 are in fact two very different sections. They provide as follows:

> **74.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of

> the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.
>
> **167.** (1) A designated or certified employee bargaining agency shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of the affiliated bargaining agents in the provincial unit of affiliated bargaining agents for which it bargains, whether members of the designated or certified employee bargaining agency or not and in the representation of employees, whether members of an affiliated bargaining agent or not.
>
> (2) A designated or accredited employer bargaining agency shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers in the provincial unit of employers for which it bargains, whether members of the designated or accredited employer bargaining agency or not.

65. Section 74 is in fact a codification of what courts in the United States (*Vaca v. Sipes* 64 LRRM 2369 (SCUS)) and Canada (*Fisher v. Pemberton* (1969) 8 D.L.R. (3d) 521(B.C.S.C.); *Canadian Merchant Service Guild v. Gagnon* [1984] 1 SCR 509) have found to be a common law duty of fair representation. The duty arises from the exclusive nature of the Union's right to represent employees in their relations with an employer. The Act deprives the employee of the right (such as it is) to bargain terms and conditions of employment and gives that right and duty exclusively to the Union. That exclusivity carries with it a duty of fair representation.

66. However, section 74, like the common law duty, does not extend beyond the confines of that exclusive representational relationship. It covers many things – the negotiation of a collective agreement, the day-to-day administration of a collective agreement, including the processing of grievances. The Act has in section 75 extended the duty to the operation of hiring halls. The section does not extend into other activities of the union such as voluntary assistance given to members in their dealings with public agencies (e.g., WSIB, EI, Immigration,), matters of internal organization that are not related to the relationship with the employer (elections for office, the conduct of union meetings, and so on). None of these fall within a union's exclusive representational authority.

67. Both the statutory power and the real life activity of employer bargaining agencies and employee bargaining agencies are entirely different. The grant of exclusive authority is very different. It is defined by sections 156 and 157(a), which provide:

> **156.** Where an employee bargaining agency has been designated under section 153 or certified under section 154 to represent a provincial unit of affiliated bargaining agents, all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, *but only for the purpose of conducting bargaining and, subject to the ratification procedures of the employee bargaining agency, concluding a provincial agreement.*
>
> **157.** Where an employer bargaining agency has been designated under section 153 … to represent a provincial unit of employers,
>
> (a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, *but only for*

> *the purpose of conducting bargaining and concluding a provincial agreement*; (emphasis added)

That is, the exclusive authority relates only to the negotiation of the collective agreement. Once that is completed the employee bargaining agency and the employer bargaining agency have no statutory obligations to the employers or the affiliated bargaining agents they represent.

68. As a practical matter, employee bargaining agencies may in fact play a significant role in collective agreement administration. Typically the employee bargaining agency is either the single local union active in the province (and the International parent union) or was a pre-existing provincial body within a multi-local union structure. If the employee bargaining agency was the one local union, it continued to behave as a trade union between rounds of bargaining. If it was a provincial body that had institutional links with the affiliated bargaining agents, it has become common to find that the designated employee bargaining agencies have taken on an increasingly active role with respect to the administration of the Provincial Collective Agreement. However, the source of that authority came from the institutional links within the union itself, not the statute.

69. The same factual situation has not been true for most employer bargaining agencies. There are a few Employer Bargaining Agencies that are composed of a single trade association that existed on a voluntary basis before 1978 (e.g. the Ontario Sheet Metal and Air Handling Group). Most employer bargaining agencies, like this EBA, did not exist before 1978. This EBA, like many, was created for the sole purpose of being designated and negotiating a collective agreement. Before that time, most employers did, in fact, bargain through associations. However, the associations were, unless they were accredited, purely voluntary; they owed no duty to individual employers (see *Trudel & Sons Roofing Ltd.*, [2002] OLRB Rep. Mar./Apr. 261). Without accreditation, they lacked any exclusive bargaining authority. When the employer bargaining agencies were created, they were made up of both accredited and unaccredited associations.

70. Accordingly, an employer bargaining agency such as this EBA lacks any organizational structure that links it to the employers it represents. Although some employer bargaining agencies have undertaken an on-going role between each round of negotiations (and generally their union counterparts have urged them to be even more active) they are able to do so only on the basis of voluntary co-operation by the employers involved, or more typically the association of which the employer is a member.

71. Whatever the practice of an employer bargaining agency is, the statutory duty of fair representation is limited to what the employer bargaining agency does in bargaining the provincial collective agreement. That is the extent of the employer bargaining agency's exclusive authority and hence the extent of its duty of fair representation.

72. The "internal affairs" of the EBA that the SCA and the CRA complain about in this case relate exclusively to bargaining. That is, the number of votes cast by each member of the association is purely a function of bargaining. The number of votes to be cast by each such component association of the Employer Bargaining Agency is not cast in stone, nor is it defined in the Minister's designation. It has been changed over the years in a good faith attempt to readjust the different interests of groups within the Employer Bargaining Agency. If, to use a far-fetched hypothetical, the Employee Bargaining Agency were to decide, by a two-thirds majority, to give the power to ratify the collective agreement henceforth to a single individual nominated by the Windsor-Heavy Association to do with as he or she pleased, that would clearly be an

arbitrary decision related to the process of negotiating and concluding a provincial collective agreement.

73. That is not to say that section 167 gives the Board the power to dictate to employer bargaining agencies the details of the voting structure within the employer bargaining agency. It does, however, give the Board the power to examine the manner in which the employer bargaining agency, in fact, functions in making decisions in bargaining, and to decide whether a change that is made to the voting structure, or a refusal to make a change, is consistent with the employer bargaining agency's duty of fair representation. To that extent, then, the Board does have jurisdiction under section 167(2) to deal with the question raised in this case.

Members of the Employer Bargaining Agency

74. Before discussing the issue of how the SCA and CRA propose that the structure of the Employer Bargaining Agency be changed it is useful to review the issues for each of the constituent members of the Employer Bargaining Agency, and how the issues proposed as relevant to a consideration of bargaining impact on them. Each of the various members has a different level of involvement with the union and different kinds of interests to be protected in bargaining. In addition, certain groups within the Employer Bargaining Agency find themselves in commercial conflict with one another in the contractual relations they have between and among themselves.

Construction Labour Relations Association of Ontario

75. CLRAO is composed of fourteen regional employer construction associations. That is, in each area of the province, employers have created an association to deal with their common interests. There are some general characteristics of these associations that are not necessarily true in each location. In many locations they tend to be civil contractors as opposed to mechanical contractors. At one time, general contractors played a much larger role in at least some of the local construction associations than they currently do. CLRAO's original name was the Labour Relations Bureau of Ontario General Contractors Association. That reflected the predominant importance of general contractors in such associations. General contractors are still very much a part of the life of the construction industry in Ontario, particularly as projects get larger and more complex. However, general contractors have largely ceased to have much of a role as direct employers of labour. Rather, their expertise is in assembling a group of sub-contractors, managing the construction work as it proceeds, and managing risk.

76. It is probably also fair to say that one is more likely to find general contractors in the Toronto and Hamilton associations than in the associations elsewhere in the province. The list of 47 contractors on whose behalf the Sarnia Construction Association brings this application are not, to the extent I have any familiarity with them, general contractors. Indeed, many of them are mechanical contractors, reflecting the nature of the work in Sarnia.

77. The 14 geographic associations making up CLRAO, then, are composed of both general contractors and civil or mechanical contractors who are in fact the sub-contractors to these general contractors. The sub-contractors employ the majority of employees performing construction work on construction sites where there is a general contractor. However, a general contractor may employ one or more crane operators, particularly to operate a tower crane, as part of their work in scheduling the work of other trades.

Industrial Contractors Association

78. This association is made up of a group of what are, essentially, industrial general contractors. That is, their customers are industrial refining, processing and manufacturing plants in Ontario. They employ members of the mechanical trades to perform their work, but also act as general contractors, employing other contractors to perform portions of their work. It was asserted by the Crane Rental Association that in fact members of the ICA frequently contract out crane work to members of the Crane Rental Association. The ICA made no attempt to refute that.

Ontario Erectors Association

79. The contractors in this group are primarily specialty contractors who employ their own workforce to perform work under an agreement with either an owner or a general contractor. The OEA is also the employer bargaining agency for the Ironworkers' structural collective agreement. To the extent that they employ Operating Engineers at all, they tend to be operators of tower cranes.

Crane Rental Association

80. The Crane Rental Association is an Association of contractors who own or lease equipment used by Operating Engineers including cranes, boom trucks, tower cranes, Broderson mobile cranes and some very heavy (up to five hundred ton lifting capacity) hydraulic cranes. These contractors employ members of the Operating Engineers exclusively to perform their contracts. Typically, these contractors are bound only to the collective agreement with the Operating Engineers and not to any other trade. The nature of the machinery they own or lease involves very large capital expenditures on machinery that must be kept productively occupied for as long in each working day as possible.

81. Many of the contracts entered into by members of the CRA are for the supply of cranes and operators on an hourly basis. The employer will arrange for the equipment and the operator to be delivered to or arrive at a construction site (for which travel may or may not be negotiated in the contract price with the customer) and to perform work for a fixed rate per hour. Obviously this involves moving both personnel and equipment around the Province to follow the work.

82. Travel pay for employees is an issue for members of the CRA. They believe that it falls disproportionately on their shoulders. For example, the CRA pointed to the fact that in every geographic schedule, travel is negotiated in terms of distance. There is, for example, one or more "free zones" in each geographic area within which travel is not compensated. That is not the case for Schedule A, the Crane Rental Schedule. Travel of some sort must be paid if the job is five minutes from the yard of any particular contractor. Members of the CRA also believe that their travel pay in Schedule A provides a greater benefit to employees than those in other schedules, including travel, room and board, fuel for the employees' vehicle and other variables.

83. In addition, Schedule A is the only schedule with a seniority provision in it. Thus, lay-off and recall of employees to widely scattered job sites may involve a certain amount of dislocation of existing work forces with a concomitant increase in travel pay costs.

84. The members of the Crane Rental Association have as customers either owners or general contractors. These general contractors may be members of the local construction associations, or members of the ICA or OEA. Any increased cost in the wage package becomes a

potential source of conflict between members of the CRA and their general contractor customers. It would be a perfect world if all costs incurred in the course of business could be passed on to the ultimate owner of the construction work, and that owners could and would pay for them. However, general contractors, just like crane operators, are competing with non-union contractors and will therefore attempt to contain or allocate to others as much as possible any increased costs. Costs incurred by members of the CRA in paying their members will always be borne by the CRA employers. It is a matter of negotiation as to how much of these costs they can pass on to the general contractor, and ultimately to the owner. While any general contractor will negotiate hard with any of its sub-contractors (crane operators or otherwise) there is obviously a limit to how far any unalterable cost can be pushed. It is also important to remember that general contractors bound to the Operating Engineers provincial collective agreement have a limited choice of sub-contractors; they must contract with another signatory employer.

Earth Movers

85. I heard very little about the Associated Earth Movers' members. Presumably they are sub-contractors rather than general contractors, although I heard no evidence on this point. It may be that they also contract directly with the owners of sites on which construction is performed. As well as working in the ICI sector, members of the Associated Earth Movers Association perform work in the roads and residential sectors of the construction industry under the same collective agreement.

Ottawa Crane Rental Association, Windsor Heavy and Foundation Specialists

86. I heard nothing about the activities of contractors in these associations nor did they attend at the hearing. It was asserted by Mr. Pilat that the work of Windsor-Heavy members is almost exclusively in the heavy engineering sector or the construction industry and rarely in the ICI sector at all.

Theoretical Approaches to Voting Structure

87. The Sarnia Construction Association suggested that the original voting structure took into account four factors namely:

a. proportionality;
b. specialized trade interests;
c. specialized geographic interests; and
d. ensuring that no single interest possesses complete control of the EBA.

88. The SCA does not dispute that the latter three factors are entitled to some weight. However, the SCA asserts that proportionality should be by far the dominant factor in determining how votes are allocated.

89. CLRAO, ICA and the OEA all take the position that all four of these factors are appropriate factors for an employer bargaining agency to consider in the allocation of votes and that in fact each one has been given its due regard in the allocation of votes in the Employer Bargaining Agency.

90. The Crane Rental Association agrees with the Sarnia Construction Association that proportionality should be the determinant factor. However, it disagrees that the fourth criterion (ensuring that no single interest possesses complete control of the EBA) should be a relevant

principle at all. Indeed, it asserts that it is entitled to a minimum of 34% of the votes based on at least a rough proportionality.

91. The Associated Earth Movers take the position that proportionality should be the predominant factor. It acknowledged that employers or a group of employers might have a "stake" in the industry that is not precisely reflected in the number of hours worked by employees covered by the collective agreement. However, it asserted that it was inappropriate to allow one group of employers to have a disproportionate influence over bargaining.

92. Each of these factors requires some comment.

Proportionality

93. The SCA used this term in a specific manner. The SCA asserts that the primary rule ought to be that votes are allocated in accordance with the number of hours of work performed by employees of an employer or of a group of employers, employed pursuant to the Operating Engineers Provincial Collective Agreement as compared to the total number of hours worked by all employees covered by the collective agreement. The parties expended great efforts and much time attempting to determine the numerator and denominator of that fraction. In the end, I have only an approximate idea. The task is a very difficult one for a number of reasons.

94. This collective agreement is not restricted to the ICI sector. The recognition clause states that:

> The employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer for whom the Union has bargaining rights in the Province of Ontario engaged in work covered by the schedules and classifications set out in this agreement, at any additional classifications as may be agreed to by the parties.

In fact the collective agreement covers work performed in virtually every sector of the construction industry (except the electrical power systems and pipeline sector) and is regularly used by many employers in those other sectors.

95. The SCA had hoped to be able to isolate the hours worked in the ICI sector (since section 167(2) refers to the act of an Employer Bargaining Agency, which is designated for ICI sector bargaining). They reasoned (as indeed I initially assumed) that someone had to make that distinction for the purposes of making payments to the Ontario Construction Secretariat. While individual employers do make that distinction, it was not an easy process of separating out which hours applied to which sectors.

96. Further, once the total number of hours is determined, it is then necessary to allocate those hours among various employer groups based on the identity of the employer. In some cases this is easy. Employers who work under the Crane Rental Appendix are obliged to make an employer contribution to the Crane Rental Association. Accordingly, those hours are easy to identify from the remittances submitted to the EBA.

97. However, not every employer association collects association fees through a mechanism in the collective agreement. The ICA is a relatively smaller group of contractors, all of whom are of fairly substantial size in economic terms. They simply collect whatever money is necessary to run the association from among the members of the association on a voluntary basis.

98. When a member of the ICA such as Comstock performs work in Sarnia it pays employees pursuant to Schedule F, the schedule applicable to the Sarnia area. Thus, a crane operator who works 40 hours for Comstock (a member of ICA) will generate remittances under the collective agreement that appear to be identical to those of an employer who is a member of the Sarnia Construction Association. Accordingly it is impossible to identify any hours that may have been worked by members of the Industrial Contractors Association.

99. The Crane Rental Association asserts that, in fact, members of the ICA employ virtually no employees covered by the Operating Engineers Collective Agreement. They assert that these contractors do not make the capital investment in the kinds of equipment owned and leased by members of the CRA and sub-contract all such work to members of the CRA. The ICA disputes this, but chose not to call evidence of its own. If the association is small enough that the fees necessary to run the association can be collected on a voluntary basis, this information could presumably have been assembled by the ICA, a responding party to this application, with very little difficulty. If there was a difficulty, I did not hear about it.

100. Windsor-Heavy and Foundation Specialists did not participate in this proceeding. There appear to be no hours attributed to employers in those two groups in the ICI sector, although again this may be the result of the data that was used to compile the figures. Mr. Pilat suggested that the members of the Windsor-Heavy Association in fact perform virtually all of their work in the heavy engineering sector of the construction industry.

101. No hours were identified by the SCA as having been contributed by members of the Earth Movers Association in respect of their employees. However, the SCA and CRA accept that members of the Earth Movers' Association have employees who perform work in the ICI sector and that those hours are simply impossible to identify from the documents that were produced to them by the responding parties (who did not include the Earth Movers).

102. Finally, there is something of a fallacy in regarding all hours worked in Sarnia pursuant to Schedule F of the collective agreement as hours applicable to the 47 employers on whose behalf the SCA brings this application. If a contractor who is a member of the General Contractors Section of the Toronto Construction Association performs work in Sarnia, that company's employees are paid pursuant to Schedule F. That is the hours appear to be "Sarnia" hours and were attributed by the SCA to it.

103. The issue of proportionality has been a topic of discussion within the Employer Bargaining Agency for some time. In 1994 the CRA wrote to Mr. Thomson seeking a greater say in ratification of the agreement. It based its argument on the assertion that its members accounted for 26% of the person hours worked by all employers and that they should receive an equivalent proportion of the votes. The Employer Bargaining Agency responded in a memo seeking information from the other members of the EBA. This memo stated:

> …
>
> The Bureau takes the position that total related construction trade direct-hire manhours and the implications of the subcontract clause in the collective agreement are important issues which must be considered in any review of the voting structure by the agency. By way of an example, the removal of a single tower crane operator can close down a major project.

> For example, companies which work under the OE Foundation and Piling Schedule "C" would directly employ members of the Labourers International Union.
>
> **Please send me the appropriate related union manhours for the period November 1992 to October 1993 by June 1, 1994.**
>
> **…**

104. As a result of this survey, which was of course based on data voluntarily produced by members of the Employer Bargaining Agency, the EBA produced two charts. The first broke down the number of hours worked by membership in one or another employer association:

MONTHS WORKED – NOVEMBER 92 – OCTOBER 93

		MANHOURS	%	VOTES	
A1	CRANE RENTAL	422,170	26.0	3	10%
A3	OTTAWA CRANE RENTAL	59,070	3.6	1	3.3
B1	ONTARIO ERECTORS ASSN.	160,170	10.0	5	16.7
	FOUNDATION	86,130	5.3	5	16.7
D1	EXCAVATORS	337,000	20.8	5	16.7
E3	WINDSOR HEAVY	30,200	1.9	1	3.3
E1-N1	(9 AREAS) LABOUR RELATIONS BUREAU & INDUSTRIAL CONTRACTORS	525,910	32.4	10	33.3
TOTALS		**1,620.650**	**100.0**	**30**	**100.0**

105. It also produced a chart showing hours worked by members of other trades:

MONTHS WORKED – NOVEMBER 92 – OCTOBER 93

		Manhours	Other Manhours	Total Manhours
A1	CRANE RENTAL	422,170		
A3	OTTAWA CRANE RENTAL	59,070		
B1	ONTARIO ERECTORS ASSN.	160,170	2,714.700*	2,874,930
	FOUNDATION	86,130		
D1	EXCAVATORS	337,000		
E3	WINDSOR HEAVY	30,200		
E1-N1 (9 AREAS) LABOUR RELATIONS BUREAU & INDUSTRIAL CONTRACTORS		525,910	7,931,390	8,457,300

TOTALS: [not given]

*** Ironworkers only doesn't include other trades such as Boilermakers, Millwrights, members of UA and others.**

106. Those were the only figures that were available for discussions in 1994 and 1995. Clearly, in 1995, the Employer Bargaining Agency recognized the validity of the argument being put forward by the CRA and increased its number of votes under the constitution.

107. For the purposes of this proceeding the SCA attempted to produce a similar analysis of person hours worked by employers and attribute those person hours to one association or the other. I have noted the limitations of this analysis above. In addition to those factors, it is evident from the summaries compiled by the SCA that the data from which it worked was necessarily incomplete. Hours are recorded from the Ontario Erectors Association only for 1997, 1999 and 2002. Since there were between 115,000 and 194,000 hours recorded in those years, it seems unlikely that there were no hours worked in the ICI sector by employees of members of the Ontario Erectors Association in the other years.

108. However, even given all of those defects, the SCA produced the following chart converting the total numbers of hours to a percentage of the whole for the years 1995 to 2002 as follows:

CLRAO Member	EBA MEMBER	Current allocation of votes (of 32)	Current percentage of vote allocation (1 vote = 3.125%)	Average percentage of Operating Engineers' hours worked in the ICI sector based on Ontario Construction Secretariat hours for 1995 to 2002 inclusive pursuant to documents provided by the EBA
Ottawa				4.675
Hamilton				8.7
London				1.925
Sarnia				13.8125
Sault Ste. Marie				0.9875
Sudbury				0.7375
Toronto				7.275
Thunder Bay				0.8625
Windsor				1.2625
	CLRAO	5	15.625	40.1875 (total of above)
	Crane Rental	5	15.625	54.2
	Erectors	5	15.625	3.8625
	Eastern (Ottawa) Crane Rental	1	3.125	1.7625
	Industrial Contractors Association	5	15.625	0
	Windsor Heavy	1	3.125	0
	Foundation Specialists	5	15.625	0
	Earth Movers	5	15.625	0*

* Based on documents provided by Global Benefit and explanation of counsel, Sarnia Construction Association and Crane Rental Association concede that members of the Associated Earth Movers of Ontario have direct hire ICI hours which are currently unquantified.

109. As stated above, these figures are only roughly accurate. There are likely some hours worked by employees covered by the collective agreement for members of the ICA and the Foundation Specialists. Given that neither of them chose to lead any evidence about how many hours, I draw the inference that those hours are relatively small. To the extent that those hours are reported through one of the geographic schedules however, those hours will inflate, to some extent, the percentages of the CLRAO members.

110. In addition both CRA and SCA concede that members of the Earth Movers have employed persons covered by the collective agreement who worked in the ICI sector. There was no agreement on the quantity. The Earth Movers submitted in pleadings a chart indicating the number of hours they claimed had been worked by employees of their members that would indicate, over a 7-year period a number of hours equal to about 75% of the hours worked attributed to the CLRAO members. These figures were not, however, proven in any way. The document itself does not indicate whether this represents the total hours worked in all sectors or whether this is ICI hours only.

111. I draw the following conclusions from the data and these limitations. The percentages attributed to the regions in which members of the CLRAO work is probably over-stated to some degree. That is, hours worked by members of the ICA, Windsor Heavy, and Foundation Specialists may have been omitted from the summary or, more likely, have been reported through one of the other categories. I am not, however, in a position to assess how much these figures have been over-stated. Given that the ICA was a responding party and chose not to demonstrate the number of hours its members had employed persons for, I conclude that the exaggerating effect is very small.

112. Within the regions represented by the CLRAO, I also conclude that all of the percentages are over-stated to some degree. The SCA and CRA acknowledge that employees of the Earth Movers Association in the ICI sector worked some hours. They do not agree on how many hours those are. If we were able to determine those hours, it would clearly affect the denominator of the fraction used to calculate these percentages and accordingly each of the percentages in the chart above would decrease. The amount is unknown. Presumably, the upper limit would be the hours pleaded by the Earth Movers (since they have no reason to minimize the number of hours they have worked). The lower limit would be zero.

113. Based on all these calculations I conclude the following:

(i) None of the figures is entirely accurate.

(ii) The total number of hours worked by persons employed under the collective agreement which are reported through the geographic schedules, and therefore attributed to members of CLRAO is somewhere between 31% and 40% of the total. Those numbers may be slightly lower because of employment patterns of the ICA, Windsor Heavy and Foundation Specialists, but any such lowering would be minimal.

(iii) The number of hours reported under the Sarnia appendix, therefore, would be between 10.6% and 13.8% of the total. Again, these numbers might be somewhat reduced if one could ascertain the hours worked by employees employed by members of the three associations referred to above.

(iv) The percentage of hours worked by employees employed by members of the Crane Rental Association is between 42% and 54.2% of the total. The percentage would never be lower than 42% as hours are worked under Schedule A only.

114. Those then are my conclusions about the facts underlying the “proportionality” issue, as far as I can determine them. That is not, however, the only factor that must be examined, and therefore the significance of these figures is an entirely different question.

Specialized Trade Interests

115. This is a term that has meaning in the eye of the beholder. Certainly the Crane Rental Association claimed a specialized trade interest based on the nature of its work. It points to the following factors:

(b) its members employ only members of the Operating Engineers. This is the only trade they deal with and it is their sole, and therefore fundamentally important bargaining relationship.

(c) There are certain provisions of the collective agreement (which they wish were not there), which are unique to the Crane Rental business, namely seniority and the particular structure of travel pay.

(d) It asserts that members of the CRA have a greater capital investment than the general contractors for whom they work in the equipment that they own.

(e) CRA asserts that the trend in the industry has been for general contractors to subcontract work more and more to members of the CRA, to avoid that capital investment, and the difficulty of keeping a large capital investment productively employed.

116. However, other groups assert the same thing. Counsel for the Industrial Contractors Association pointed out that its members too face economic pressure in the performance of their contracts, the cost of operating engineers' work being one of them. In addition, they claim they are uniquely vulnerable in that a single employee operating a tower crane who goes on strike can bring to a halt a construction project worth millions of dollars employing hundreds of people and engaging the services of many subcontractors. Other crews of employees may be kept idle and, in times of relatively scarce labour, those crews may disperse to other jobsites.

117. Counsel for the Ontario Erectors Association asserts that his client too is subject to the vulnerability of the single tower crane employee. Given the nature of their work, they are more likely to have a tower crane employee on site. While the cost of the tower crane may be a relatively small part of the wage component of the overall cost of a contract for a member of the OEA, trends develop during provincial bargaining. It has an interest in "holding the line" with the Operating Engineers to ensure that it is not faced with higher wage demands from the unions (Ironworkers, Labourers, etc.) with whom it bargains and who represent the great majority of employees employed by those members. I heard no evidence from the Earth Movers or the Foundation Specialists, but presumably some of the pressures faced by members of the Crane Rental Association, particularly with respect to capital investment and machinery, apply to them as well.

Specialized Geographic Interests

118. This issue can be approached from two points of view. From a more general point of view, Provincial bargaining presents something of a straightjacket to some areas of the Province. The North, in particular, frequently feels left out of the decisions being made by central bargaining committees, when the majority of work, business and employment hours are to be found in Southern Ontario. Certain parts of Eastern Ontario frequently feel the same way. Collective bargaining will have no meaning at all if one region of the Province feels that it is simply being handed the result determined by other people, and that result is something over which they have no influence whatsoever.

119. On a more narrow ground, Sarnia Construction Association asserts that it is unique in the Province. The economy in Sarnia is, to a very great extent, dependent on work in the oil refineries in the area. Those refineries originally funded the SCA to ensure smooth and

cooperative labour relations among construction trades. Membership in the Sarnia Construction Association requires adherence to virtually every provincial collective agreement in the ICI sector.

120. The SCA has undertaken a number of initiatives, either alone or as a "pioneer" in the Province. It sponsored the first project agreements (although, contrary to Mr. Pilat's belief, a number of other projects have since followed in Northern Ontario). It is the only designated DREO in the Province.

121. On the basis of these particular unique characteristics, the SCA asserts that it too has a specialized interest that should be reflected in bargaining.

No Single Interest Controlling Bargaining

122. On this issue, the SCA and the CRA part company. The SCA acknowledges that there are different and at times conflicting interests among the various members of the employer bargaining agency. If one member were able to dictate bargaining, that member could use bargaining to its economic advantage, vis a vis other members of the employer bargaining agency. Alternatively, complete control by one member could, if improperly used, mean that the other members of the EBA lacked any meaningful input into bargaining and were forced to participate in strikes or lock-outs that had nothing to do with their economic interests.

123. The Crane Rental Association, on the other hand, asserts that it should control at least 34% of the votes of the employer bargaining agency. Since a two-thirds majority is required for approval of any collective agreement, this would give the CRA an effective veto over the agreement. CRA states this is necessary because it has been unable to bargain effectively over the issues that are of most importance to it, namely seniority and travel. The CRA points out that the Union is well aware of the voting structure of the employer bargaining agency and knows perfectly well that if it refuses to move in response to demands from the CRA, the CRA will ultimately be voted down. The lack of control means, for the CRA, that it cannot negotiate its own schedule because it is effectively deprived of the ultimate resort to economic sanctions.

Standard of Review

124. I analyzed above how the Board has jurisdiction to entertain a complaint about the bargaining structure of an Employer Bargaining Agency. It is still necessary to determine what sort of action will constitute a breach of the duty of fair representation. The Board is certainly not a court of appeal with respect to every internal dispute within an employer or an employee bargaining agency. I have already referred to the two cases the Board has decided about employer bargaining agency activity in bargaining. There are also a number of cases involving the standard set for trade unions under section 74, when the union is involved in bargaining on behalf of its employee members. In these decisions, the Board has been relatively consistent in the standard applied to both bargaining and the union's activity with respect to rights issues under the collective agreement. However, these decisions also serve to highlight the difference between a union and an employer bargaining agency.

125. In *John Daniell*, [1987] OLRB Rep. July 990, the Board heard a complaint that a union had, in fact, executed a collective agreement even though a majority of members of the union were opposed to it. In discussing that complaint, the Board relied on both (a) the union's right to prefer one set of values over another (a pension plan which would benefit older workers over younger workers), even though this value did not command majority support within the

bargaining unit, and (b) the union's right to take its own institutional interests into account. At paragraph 16, the Board said:

> 16. The respondent trade union is the legal bargaining agent of the employees. Its status, however, is quite different from that of an agent in a commercial context. In particular, it is not required to implement the views of a majority of employees as though they were its principals. Rather, it negotiates and enters into collective agreements as an independent contracting party. See: *Syndicat Catholique v. Cie Paquet Ltee* (1959) 18 D.L.R. (2d) 346 (S.C.C.). The union is entitled to take into account its own institutional concerns as well as what it believes to be in the best interests of employees in the bargaining unit. See: *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421, and *The T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309. In my view, the prohibition against arbitrary conduct in section 68 requires that a union take into account the views of employees. Once it has done so, however, the union is entitled, in light of other relevant considerations, to adopt a course of action other than that favoured by most employees. Although in the instant case certain employees, including possibly the complainant, could obtain a higher personal return on money now being contributed to the pension fund on their behalf, other employees closer to retirement stand to benefit from the plan. In addition, it is reasonable to assume that many younger employees would not, in fact, invest the money for their retirement years if they had immediate access to it. Given these considerations, it was reasonable for the respondent to conclude that the long-run interests of bargaining unit employees as a whole would benefit from the introduction of a pension plan, and that one should be implemented even over the objection of the employees themselves. The decision was not prompted by bad faith or a discriminatory intent or made in an arbitrary fashion. Accordingly, no breach of section 68 has been made out.

126. Similarly, in *The Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781, the Board dealt with the reverse situation. In that case, a minority of members of the bargaining unit complained that the wage increase negotiated was aimed at narrowing the spread of wages between the lowest and the highest-paid employees. The issue here was whether the majority had treated a minority (the higher-paid employees) in a manner contrary to section 74. The Board found there had been no violation. It followed the comments of the Board in *Dufferin Aggregates Ltd.*, [1982] OLRB Rep. Jan. 35:

> The fact that a union may be required in bargaining to make a hard decision that has a serious economic impact on individuals, up to and including the loss of their jobs, cannot of itself make that decision unlawful. That kind of decision is, moreover, not unusual. In making collective agreements it is practically impossible for the unions to avoid making decisions that benefit one class of employees at the expense of another. For example when a union opts for more wages rather than better pension provisions it benefits its younger members rather than the older ones. Trade-offs of that kind are the everyday stuff of collective bargaining.
>
> …
>
> > Section 60 of the *Labour Relations Act* seeks to ensure that individual's rights are not abused by the majority of the bargaining unit; it is an attempt to achieve a balance between the individual interests and the majority interest by recognizing that the exclusive bargaining agent has a duty to consider all the separate interests in the performance of its obligations. …

It added this comment about the facts of that case:

> 70. The Board is satisfied that the foregoing principles correctly point the way to the resolution of the first issue. As members of a large bargaining unit – a unit whose very effectiveness in gaining improvements for its members may well depend on its size – the complainants must accept that their economic interests may to a degree conflict with those of other employees whose views may reflect the will of the majority. As long as the wishes of the majority are effected by means that are honest, open and devoid of ill-will or hostility aimed at the minority, there is no violation of the duty of fair representation.

127. The right to make a choice of one set of values over another will inevitably mean that one group will benefit and the other will be similarly deprived. That result will be unavoidable. The duty that goes with that power requires the union to do three things:

1. Ensure there is no hostility, ill-will, bad faith, or unjustifiable discrimination;

2. hear and fairly consider the competing interests; and

3. be open and honest about what decisions were made and why.

128. In *George Magold, Tom Houston & others*, [1975] OLRB Rep. Oct. 758, the Board relied again on the union's right to make choices in its institutional interests when it decided not to hold a ratification vote for a collective agreement. It said at paragraph 19:

> 19. As for the respondent's policy in regard to ratification procedures, generally we do not believe that the wisdom of the policy is a matter to be reviewed under section 60. As exclusive bargaining agent a trade union is given the right and obligation to bargain with an employer in regard to the terms and conditions of employment to be applied to the employees in the affected bargaining unit. While the employees are expressly bound to a collective agreement by legislation (see section 43) the employer and the trade union are the parties to the agreement (see sections 37(2), 41 and 42). Having regard to these provisions of the legislation it seems clear that formal ratification is not required by law to make a collective agreement binding. While the union is legally required to follow the procedures prescribed in its constitution, the choice of procedures is for the union. …

129. The Board was also influenced by the fact that the statute did not require ratification of a collective agreement, as it does now outside the construction industry. Since there was no such statutory requirement, the Board declined to impose that duty under section 74. It said at paragraph 21:

> 21. But as we have said, section 60 is not designed to impose internal procedures upon trade unions because the Board believes them to be most congruent with effective collective bargaining. Such an approach would be an unwarranted intrusion into the internal affairs of trade unions – and an intrusion that could only be supported by a strained interpretation of section 60.

130. It is evident that some part of the reasoning in these cases is inapplicable to the facts of this case. It is difficult to imagine what institutional interest an employer bargaining agency could have, apart from the interests of the employers it represents in bargaining. Those members may have interests beyond the immediate bargaining, such as the pattern of wage increases in the

industry affecting other collective agreements to which they are bound, but the employer bargaining agency does not. It is closer to the classic common-law agent who represents its principals' interests and has none of its own. It is, however, accurate to say that this bargaining agent is faced with the task of negotiating a single collective agreement on behalf of a disparate group of employers whose interests are not only different, but often in conflict. In this respect the EBA resembles a trade union negotiating on behalf of employees with differing or conflicting interests.

131. There is also a major difference in the identity of an employer bargaining agency and a trade union. The union has an existence separate and apart from the existence of members in a bargaining unit. The officers of a union may not be employees in the bargaining unit themselves, but often employees of the union. It is possible to identify the union (with its own institutional interests) separate from the interests of the members of the bargaining unit. The employer bargaining agency does not exist apart from its employer members. Most, but not all, of those involved in bargaining are, in fact, officers, agents or employees of some of the employers represented. They represent the disparate interests of the employers and employer associations from which they come. This is why the employer bargaining agency has no institutional interest separate from those it represents. When this Employer Bargaining Agency makes a decision, it is done by a vote of those representatives attending bargaining. The Employer Bargaining Agency as such has no independent existence. It is not a separate entity that makes a decision separate and apart from the members of the unit it represents.

132. The issue of the vote, then, is not simply a matter of the internal constitution of the Employer Bargaining Agency. It is the way the EBA makes a decision. The relative weight of the interests that an employer bargaining agency will "consider" when it decides whether or not to ratify a collective agreement is determined long before bargaining ever begins. It is determined by the relative weight of the voting strengths given to the disparate and competing groups of employers. The voting structure determines the weight the EBA gives to certain interests when it makes a decision. The question is whether this "weighting" of factors is arbitrary.

133. In 1998, it was obvious that other employer associations were prepared to subordinate, to some extent, their interests and endure a strike in part to support the attempt by the CRA to reduce the restrictions in the seniority and travel provisions in the Crane Rental Appendix. In making a decision of that kind, the other groups may have been engaged in an act of relative altruism (relative because wages were also on the table, and increased costs to Crane Rental companies would translate into increased costs to general contractors). There was no legal reason or obligation for them to do so. It may have been altruism, it may have been recognition of long-term interests, a sense of solidarity with other employers, or some other reason I do not know of. However, whatever the reason or analysis was, it was that of the individual components of the Employer Bargaining Agency. They were entitled to determine what they believed to be in their best interests and to act accordingly when they cast their votes.

134. The question, then, is whether the voting structure, which defines the relative weight to be given to the disparate and conflicting interests within this Employer Bargaining Agency, is or has become arbitrary, discriminatory, or operates in bad faith. The very difficult task of the SCA and the CRA is to demonstrate that the relative voting strengths of the associations are, or have become over time, so divorced from any lawful, legitimate or rational basis on which bargaining is performed that it can be described to be arbitrary.

The Merits – Minor Issues

135. There are a number of more defined issues which the SCA and CRA identified as examples of how the lack of a more responsive Employer Bargaining Agency has harmed the interests of the SCA and the CRA, none of which I accept as evidence of a violation of section 167(2).

Electronic copies of the Collective Agreement

136. As noted, the CRA complains that in the 1998 round of bargaining, a costly error was made in proofreading the Crane Rental Appendix. It asked the Employer Bargaining Association to produce an electronic version of the collective agreement, so that it could track changes more carefully. It acknowledges that the former business manager of the Crane Rental Association did the proofreading. The EBA refused to produce an electronic version of the collective agreement. That choice is not one that, in this context, constitutes a violation of section 167(2) or an example of the EBA refusing to respond to the needs of a group of employers. Proofreading is a skill associated with any collective agreement renewal. It may well be easier to pass a cable through the eye of a needle than to catch every typographical error in a document as large as this collective agreement. However, surely the CRA can take responsibility for proofreading its own schedule. Someone must create the first electronic copy of the document; if it helps the CRA to have such document, it can undertake the work to create it.

CRA – The Cost of Capital Investments

137. Both the CRA and SCA argue that there are unique issues that confront both organizations that should be recognized in a greater control of the EBA. I am not persuaded by either argument.

138. The CRA argued that the continuing trend of general contractors to shed employees and equipment, and to subcontract work to Crane Rental employers has resulted in a much greater capital investment in machinery and plant on the part of CRA members. Since typically the purchase of equipment is financed by borrowing rather than by outright purchase, there is a daily interest charge attributed to each piece of equipment. This means, in the view of the CRA, that the impact of a strike is felt much more keenly by it and that consequently it should have more control over whether or not a strike happens.

139. I do not accept that economic analysis. No employer at any level in the construction industry can operate a risk-free business. General contractors must themselves be concerned about interest charges on cash flow if draws are not forthcoming. They must worry about penalty clauses or claims for late completion. They must be concerned about satisfying owners who want their project built and about other subcontractors who want to have their contracts honoured and their workplaces available on schedule. It may be that the capital cost of equipment is a greater economic concern for members of the CRA than for general contractors, but both face some prospect of potential economic harm, or worse yet, disaster, from a protracted strike. And if a worst-case scenario does occur, I do not accept that hitting bottom is any more or less painful because of the distance one falls to get there.

The SCA – A Special Case?

140. The SCA led considerable evidence about the history and function of the SCA and the history of labour relations in the Sarnia area. It argued that the position of the Sarnia Construction Association was unique in Ontario, and that distinctness should result in a formal recognition of the SCA's right to control a portion of the voting structure of the EBA.

141. I do not propose to outline this evidence. It is true that there are many factors common to the construction industry in Ontario that play out in unique ways in Sarnia. Certainly it is true that this Board has heard more evidence about labour relations in Sarnia than any other part of the Province, except perhaps Toronto. It is not, however, something that has any legal consequence in this case. The SCA is not a member of the EBA. The EBA does not owe the SCA any duty of fair representation (see *Grand Valley Construction Association*, [1988] OLRB Rep. June 593). The SCA, and more importantly, the 47 contractors it represents, are members of CLRAO. The Minister designated the groups who make up the EBA. The Minister may change the makeup or the identity of the employer associations who constitute the EBA, as the Minister did in 1978 with respect to the Elevator Constructors Employer Bargaining Agency. The Board's role in changing the constituent elements of the EBA is limited to a displacement application under section 155. It is not up to the Board to add or subtract parties from the Minister's designation. We simply have no jurisdiction to do so.

142. Nor does the Board have any jurisdiction to restructure CLRAO. It is not an employer bargaining agency, nor is it an accredited employer bargaining agency. It owes no duty of fair representation to its members (see *Trudel & Sons Roofing Limited*, *supra*). It may be that CLRAO is under-represented on the EBA in respect of the number and size of the employers it represents, including in respect of those employers who carry on business in Sarnia. Even if this were so, this is not a matter that can enure to the benefit of the Sarnia Construction Association or to Sarnia contractors as a defined group. The SCA is simply not a party the Board can grant any remedy to in this proceeding.

143. Much of the complaint of the SCA (and the CRA for that matter) stem from the facts of life associated with Provincial bargaining. The Sarnia contractors are part of CLRAO. There may well be divergent interests within the CLRAO. I note (for what it is worth) that five of the local construction associations making up CLRAO still refer to themselves as "General Contractor" sections or associations: Toronto, Hamilton, Grand Valley, Durham and Thunder Bay. It may be that the bargaining interests of the contractors represented by different components of CLRAO are in conflict. (Indeed, counsel for SCA suggested that very proposition when he pointed out that the representative of the General Contractors' Section of the Toronto Construction Association took a contrary position to that of the SCA at an EBA meeting.) If so, what is really at play here are the restrictions created by Provincial bargaining.

144. The decision to create Provincial bargaining structures is not a policy decision the Board can comment on or change. It was made by the Legislature when the Act was amended. The CRA might feel it would be better off if it could have a final showdown with a strike or lockout scenario over seniority and travel provisions. The reality is that it must bargain with other employer groups. Counsel for the OEA suggested that, in fact, the members of the CRA were better off, since they were bargaining with members of the OEA and other groups within the EBA who would give the CRA greater leverage. It is difficult to imagine how either thesis can be empirically tested since each round of bargaining is different. In any event, the Minister's designation makes this bargaining with other employers and employer groups obligatory. There is nothing the Board can do to alter that fact. The tensions created by provincial bargaining are simply a consequence of the requirement that these groups bargain together. The Act was amended in 1978 and 1980 because the Legislature, and indeed the industry as a whole (or at least

the employer side) concluded that the benefit of being able to present a united front to trade unions in negotiations outweighed the inevitable tensions that would be created by a Province-wide structure. That was a conclusion about the net gain to be achieved by the current status, and one that enjoyed very wide support. It was not a guarantee that there would be no complaints from any employer or group of employers about issues that arise from time to time that are dealt with by that province-wide structure.

The Merits - Voting Structure

145. This leaves, then, the primary issue of whether the weight assigned to the relative interests of the members of the EBA, which will be used in every decision the EBA makes, is or has become arbitrary or discriminatory in relation to the interests it serves in bargaining. I accept that the SCA, CRA and the Earth Movers can act as spokespersons for the employers they represent and to attempt to prove that their members have been treated in a manner that is arbitrary contrary to section 167(2). It is worth starting this analysis by re-stating the question before the Board. The Board has no general mandate to determine what the decision-making structure within an employer bargaining agency should be. There is, in fact, no "right" answer to the question. Given the disparate and unquantifiable interests of the employers at stake, there will inevitably be a range of structures within which any one arrangement will be no more or less preferable to another. The Board's jurisdiction under section 167(2) is engaged only if the particular structure chosen is, or has become, so far outside the range of reasonable responses to these disparate interests that it can be called arbitrary or discriminatory.

146. As set out above, the SCA suggested four criteria that, in its view, underlay the original structure of the EBA and should be the guiding principles for determining whether a particular structure is rational and reasonable: (a) proportionality, (b) specialized trade interests, (c) specialized geographic interests, and (d) ensuring that no one group possesses complete control of the EBA. None of the other parties suggested that these four criteria should not apply (except for the CRA, which would like to exert a kind of control), and no party suggested any other criteria should be considered. The SCA argues that if it can be demonstrated that an employer bargaining agency does not appropriately reflect these four considerations, it is arbitrary.

147. Counsel for the Associated Earth Movers put it in a somewhat more analytic way. The Act protects the interests of individual employers, not the interests of various employer associations. Each employer should have an ability to influence collective bargaining outcomes that is roughly proportionate to its "labour relations stake" in the industry. When one employer or a group of employers enjoys a disproportionate influence on collective bargaining outcomes, in relation to its rational "labour relations stake" in the industry, that lack of proportionality is arbitrary and a violation of section 167(2). I accept this as a useful articulation of the test to be applied in this case, and that the "labour relations stake" is defined by a combination of the four criteria suggested by the Sarnia Construction Association.

148. SCA, CRA and the Earth Movers all argued that greater weight should be given in the current EBA structure to proportionality, in the sense of the number of person-hours worked by employees of a contractor or group of contractors, compared to the total number of hours worked across the Province. While they agreed that this was not the only criterion, they argued that it should be the primary one.

149. These parties pointed to the "double majority" provisions of the accreditation provisions of the Act and section 155, the process by which one group may displace another as an

employer bargaining agency. Section 155 provides that a group may be certified as the employer bargaining agency if it can demonstrate the support of a "majority of employers falling within the provincial unit" and that the employers employ "a majority of employees for whom the affiliated bargaining agents hold bargaining rights". The second half of this formula is an exact replication of the "proportionality" analysis the SCA and CRA would have the Board adopt.

150. The first half of this double majority is not, however, based on that kind of proportionality. Unlike the accreditation process, all employers bound to the collective agreement, even if they have not employed members of the union for many years, are members of the group for whom majority support must be demonstrated to bring a successful displacement application. That is, the Act recognizes the fact that employers, such as general contractors bound by a subcontracting clause who do not actually employ members of a union, have a "labour relations stake" in the outcome of collective bargaining. Therefore, for the first half of the test under section 155, they have an equal weight with every other employer, including members of the CRA who employ dozens of union members on a continuous basis. Indeed, this is consistent with section 167(2) which creates a duty between an employer bargaining agency and all employers bound to the collective agreement, regardless of whether or how many employees they employ. To the extent that it provides guidance, it places as much emphasis on "proportionality" as it does on simply being bound to the collective agreement, but not more.

151. Section 155 is not, of course, determinative or legally relevant in this analysis, and indeed no one suggested the double majority test should be used to determine the appropriateness of the employer bargaining agency structure in any event.

152. I accept the proposition that no group of employers should be able to control the outcome of bargaining. The CRA seeks a kind of control by asking for 34% of the votes. Under the current Constitution, a two-thirds majority is necessary to ratify a collective agreement. If the CRA held 34% of the votes, it would be able to force a strike over its bargaining issues to the exclusion of all other issues. That is inconsistent with an employer bargaining agency composed of a number of different groups. The number of those different groups is sufficiently large that no one should predominate. If the CRA bargained on its own, it would be able to pursue its objectives single-mindedly. It does not. Since it must bargain as one of a group, it should not be able to hold other members of the group hostage to its own bargaining agenda.

153. Success in controlling outcomes will inevitably require the building of alliances over bargaining issues. It will require a compromise within the employer bargaining agency before and as it bargains with the union. That is the inevitable result of all of these groups bargaining jointly with the union. As counsel for the OEA pointed out, in the history of this EBA, alliances over bargaining issues have shifted and changed, and will likely do so in the future. This is the only way to ensure that all of the members of a disparate group have an influence on bargaining agendas and outcomes.

154. The SCA attacked certain other groups, primarily the Windsor-Heavy group and, in a more muted manner, the Earth Movers, as groups whose members work primarily in non-ICI sectors. The hours analyzed in this case referred exclusively to ICI hours. No argument was pursued to suggest that any other hours should be considered and accordingly, I will not consider it at any point in this case. It is evident that an employer bargaining agency that creates voting structures based exclusively on ICI hours will not, thereby, be in violation of section 167(2). However, I am not sure that the reverse is true. That is, if an employer bargaining agency bargains a collective agreement which covers all sectors to the benefit of many or most of the employers bound to the provincial collective agreement, it may not automatically be a violation

of section 167(2) to take non-ICI work hours into account. This was not argued in this case and I make no comment. In any event, Windsor-Heavy is a member of the designated EBA and must be accorded some say in bargaining.

155. The structure of the EBA also provides some representation on the basis of geographic interests. CLRAO is composed of local construction associations who not only participate in CLRAO but, jointly or singly, negotiate their own geographic appendices. This structure also takes into account specialized trade group interests, in the identity of virtually every group other than CLRAO.

156. The final voting structure is not the only matter to consider. Article 7.02 of the EBA Constitution gives each group that negotiates an appendix, including CRA and SCA, the right to veto any change to a schedule, or master portion provisions that affect that group specifically (other than the total wage package) "if such change is less favourable to an employer". This may be of less importance in practical terms, since after 26 years of provincial bargaining, there are only a few non-monetary issues of significance. Further, it does not permit an association to veto a status quo offer to settle (i.e. keeping seniority and travel for the CRA). A two-thirds majority is required to ratify a collective agreement, ensuring that approval must be obtained from a broad range of associations. There is a further provision in Article 7.03 that provides that: "If a wage issue involves a multiple total wage package, at least two-thirds of the constituents in each total wage package group must be in favour". The meaning of this phrase was not explained, but it does provide some further minority protections.

157. Accordingly, this EBA structure does respond to the issues raised by the SCA and does, in fact, provide some significant protections for minorities within a large and disparate group of employers. The only question, then, is whether, in that context, the distribution of votes among the various associations is so far out of proportion to the "labour relations stake" which is held by each of the employers making up the different associations, that it can be said to be arbitrary.

Decision

158. The complaint of the SCA, CRA and the Earth Movers comes down to this. They assert that the voting structure of the EBA is arbitrary or discriminatory in that it gives less emphasis to "proportionality" and more emphasis to the other ways in which employers or groups of employers establish a "labour relations stake" in the outcome of bargaining. It is not the criteria chosen, but the weight to be given to each one. The test is not whether the structure is wrong, or whether the Board would have created a different structure. A structure will be arbitrary or discriminatory to a particular group only where the voting structure is so disproportionate to the labour relations stake of a certain group that it bears no reasonable relationship to the interest that group has in bargaining.

159. If the CRA were still sharing one vote of seven with Ottawa Crane and Windsor-Heavy, the structure would be arbitrary. That structure may have reflected the relative weight of the parties' labour relations stake in 1978, but would clearly have been inadequate once its proportion of the direct employee hours grew to its current proportions. A refusal to take that change into account would have been arbitrary and discriminatory to the CRA. However the EBA did accord the CRA 3 votes and then 5 votes on ratification. The CRA has as much say as any of the other major players.

160. Is the EBA arbitrary in not giving the CRA or the Earth Movers more votes relative to the other groups? If one looked only at the issue of proportionality one would have to say "yes". To do that, however, would be to ignore the structural realities of this EBA. There are six major and two minor components of the EBA. They have not only disparate but competing and opposed interests. They must bargain together with an employee bargaining agency that is in fact composed of a single local union. Were it otherwise, the union (which is likely to have fewer internal divisions than the EBA) would be able to engage in the leapfrogging or whipsaw bargaining that provincial bargaining was intended to eliminate. The advantage of an employer "united front" is the greater bargaining strength all employers gain from it. The collection of disparate and competing interests means that there will inevitably be tensions on the employer side that will never be resolved, ambitions of one group that are thwarted, and dissatisfaction with the outcome.

161. In that context it would be inappropriate to place a primary emphasis on proportionality. The reality of bargaining for this EBA is that, in order to achieve some of their objectives, one group must form alliances with other groups, or persuade others that an issue that affects the group (e.g. travel pay under the Crane Rental Appendix) is in fact a cost issue for the general contractors represented by CLRAO and ICA (who must, and do, subcontract the work to CRA members). If one group were able to control or dominate the bargaining agenda, the likelihood of and need for, such alliances would disappear. That structure would be one that would generate more rather than less conflict.

162. The only consideration that suggests that proportionality ought to be given greater weight than other factors is the reality of section 155 itself. Depending on how many members of CLRAO (and there are many members) are actually bound to the Operating Engineers Provincial Collective Agreement, it is theoretically possible that an unlikely alliance of CLRAO and CRA could displace the current EBA as employer bargaining agency. That is, perhaps, a possibility more appropriately left to the parties. If such a displacement application were to succeed, the constitution of the EBA might well be expected to reflect that fact, with due regard to the duty of fair representation to other employers who are not members of those two associations.

163. However, the current structure is the one created by the Minister. Within that structure the proportion of direct employees to the total number is no more or less important than the kinds of interests represented by the EAO, ICA or Foundation Specialists. That structure is one that reflects the interests of all the named organizations that make up the EBA.

164. That structure is not arbitrary, nor is it discriminatory to any one group of employers. It is of no consequence that the Board might or might not have structured the EBA slightly differently had it been given that task. The allocation of power within the EBA is not so unrelated to the needs, interests and rational objectives of the organizations, in the context of a structure that requires them to bargain together despite disparate and conflicting interests, that it can be said to be arbitrary or discriminatory. The current voting structure is not a violation of section 167(2).

165. This application is therefore dismissed.

"David A. McKee"
for the Board