

ONTARIO LABOUR RELATIONS BOARD

4126-05-M Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, Applicants v. **Leo Alarie and Sons Limited**; Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 446, Responding Parties v. International Union of Operating Engineers, Local 793; Canadian Union of Skilled Workers; Universal Workers' Union, Local 183, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736; International Brotherhood of Electrical Workers Construction Council of Ontario; Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America; Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America and its Local 1592; Electrical Power Systems Construction Association; Intervenors.

4162-05-M International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736, Applicant v. **Black & McDonald Limited**; H. B. White Canada Corp.; Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America and its Local 1592; Labourers' International Union of North America, Ontario Provincial District Council; Responding Parties v. International Union of Operating Engineers, Local 793; Canadian Union of Skilled Workers; Universal Workers' Union, Local 183, Labourers' International Union of North America, Local 1059; International Brotherhood of Electrical Workers Construction Council of Ontario; Carpenters' District Council of Ontario; Electrical Power Systems Construction Association; Intervenors.

BEFORE: Harry Freedman, Vice-Chair, and Board Members John Tomlinson and Alan Haward.

APPEARANCES: Rob Gibson and Harold Bartlett for Labourers' International Union of North America, Ontario Provincial District Council; Gary Caroline, Ben Barnes, Doug Smees and Darryl Hill for International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736; D.J. Shields for Leo Alarie and Sons Limited; D. Wray and Gilbert Scott for Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 446; D. Wray and Ron Harkness for Carpenters District Council of Ontario; M. McFadden and P. Calabrese for Black & McDonald Limited; Jay Rider for H. B. White Canada Corp.; D. Wray, Ian McIsaac and Ron Coltard (July 7) for Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America and its Local 1592; Bruce Price (July 6) and Rob Gibson (July 7) for International Union of Operating Engineers, Local 793; D. Wray and Jack Dowding for International Brotherhood of Electrical Workers Construction Council of Ontario; L. A. Richmond (July 6), Mark Wright (July 7) and J. Mulhall for Canadian Union of Skilled Workers; L. A. Richmond (July 6) and Mark Wright (July 7) for Universal Workers Union, Local 183, Carolyn Hart for Labourers' International Union of North America; Labourers International Union of North America, Local 1059; M. Patrick Moran and Max Jackson for Electrical Power Systems Construction Association.

DECISION OF THE BOARD; October 31, 2006

1. These two applications seek the Board's determination under section 166 of the *Labour Relations Act, 1995* (the "Act") of a sector dispute arising in respect of two construction projects: one in Prince Township near Sault Ste. Marie (Board File No. 4126-05-M) and the other on the Lake Erie shore near Port Burwell (Board File No. 4162-05-M).

2. This sector dispute encompasses the entirety of each of the two projects. The issue in both applications is whether the projects come within the industrial, commercial and institutional sector of the construction industry, as proposed by the Carpenters District Council of Ontario; the Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 446, (the "Carpenters"); the Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America and its Local 1592 (the "Millwrights") and the International Brotherhood of Electrical Workers Construction Council of Ontario (the "IBEW") or the electrical power systems sector as submitted by the other parties.

3. While these two construction projects are completely separate, having been undertaken by contractors unrelated to one another in different parts of the province, they were scheduled for hearing together as they both raise the same sector issue. The two construction projects each involve the assembly, erection and installation of 66 wind turbine electric generators, each with a capacity of 1.5 MW, collector lines, transmission lines, transformers, a substation and a switching station. The Prince Township project includes the construction of 14 km of 115 KV transmission lines, and the modification of existing roads together with the construction of some new roads to accommodate the delivery of heavy equipment and the turbines. The Lake Erie shore project, in addition to the 66 wind turbines, collector lines, transmission lines, transformers, substation and switching station, also involves the construction of an operations building near the substation and the construction of 30 km of 115 KV transmission lines.

4. In 2004, the government of the Province of Ontario embarked on program to establish new electricity generation capacity from renewable energy sources. That program envisioned, among other things, the construction of wind powered electrical generators by the private sector. The Ministry of Energy, in a request for proposals for renewable energy supply issued on June 24, 2004 made it clear that Ontario Power Generation Inc. was not to participate in that program, whether on its own or jointly with another party. At page 3 of that request for proposals, the Ministry of Energy wrote:

This Renewables RFP [the June 24, 2004 request for proposals] is expected to be just the first of many opportunities for the private sector to contribute to building new generating capacity in Ontario. Additional requests for proposals for renewable and other new electricity generation will likely follow in the near future, including a request for proposals for up to 2,500 MW of new clean electrical generating capacity and/or demand-side projects, which has also been announced and is expected to follow shortly.

Two of the projects selected to proceed under the June 24, 2004 Renewables RFP were the Prince Park Wind Development Project in Prince Township near Sault Ste. Marie undertaken by Superior Wind Prince Power Inc. ("Superior"), a subsidiary of Brascan Corporation and the Lake

Erie Shores Windfarm Project near Port Burwell undertaken by AIM PowerGen Corporation (“AIM”).

5. Before considering the nature and characteristics of the two projects, we think it useful to review the definition of sector in the Act and the Board’s understanding of that definition. The term “sector” is defined by section 126(1) of the Act as follows:

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

A sector is a “division of the construction industry as determined by work characteristics”. Construction industry is a term defined by section 1(1) of the Act:

“construction industry” means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site;

The Act, it appears, envisions that the businesses engaged in “constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works” are divided into distinct segments or sectors based on “work characteristics”. Just as the traditional construction industry trade unions segregate themselves to a large degree based on the work their members perform, the businesses in the construction industry also segregate themselves along the lines of the work they perform. And just as some construction trade unions may represent employees engaged in work that is well outside their “normal” or usual craft or trade, businesses in the construction industry may also perform work in many different sectors, despite normally being associated with work done in only one or two of the enumerated sectors.

6. The Legislature, by introducing the concept of sector into the Act at the same time as the provisions relating to employer accreditation, was recognizing developments taking place in the construction industry. The Board in *West York Construction Ltd.*, [1983] OLRB Rep. Dec. 2132 discussed those developments to provide some context for the meaning of sector at page 2133:

The idea that the construction industry is divided into different divisions or sectors originally developed independently of any provisions of the *Labour Relations Act*. Instead, the different sectors evolved as a result of employer associations and trade unions entering into separate collective agreements covering particular types of construction work. The lines separating the different types of work or sectors evolved primarily on the basis of common understandings, and to the extent they were written down, it tended to be only in collective agreements negotiated between the various unions and employer associations. In 1971, the Act was amended to reinforce the bargaining positions of employer associations by permitting the Board to “accredit” them as the statutory bargaining agent for employers, whether members of the employer association or not. In that many employer associations tended to be active only in a particular geographic area, and in one or, at most, a relatively small number of sectors, the accreditation

provisions of the Act specified that the Board could accredit an employers' association by reference to a geographic area and by reference to one or more sectors.... So as to explain what it meant by the term sector, coincidental with the enactment of the accreditation provisions in the Act, the Legislature enacted what is now section 117(e) [now 126(1)]. In setting out the various sectors, the legislation referred to the residential and ICI sectors as being separate sectors, a move which recognized, and likely hastened, an already existing trend towards treating "building construction" differently on the basis of whether it is residential or ICI.

It would seem the evolution of the concept of sector within the construction industry arose from groups of employers engaged in similar work with employees represented by the same trade union attempting to bargain a common collective agreement. See also *Ontario Hydro*, [2005] OLRB Rep. May/June 437 in which the Board observed at 449:

The statutory concept of sector entered the Act on November 13, 1970. The statute did not invent the idea of sector; the amendment was simply a reflection of the bargaining reality among various groups of employers and trade unions. Accreditation was originally envisioned as a process designed to provide some degree of compulsory discipline to a group of employers that bargained with the same trade union similar to the discipline exercised by a trade union with the exclusive authority to bargain for a group of existing or future employees.

It appears therefore the Act recognized that employers and trade unions had developed patterns of collective bargaining based on the nature of the construction work being performed. Thus, the underlying basis for the differentiation between sectors of the construction industry is the nature of the construction work undertaken by employers in the construction industry. Some types of construction work may occur in all or many sectors of the construction industry while there are some forms of specialized construction work undertaken by specialty contractors that may arise in only one or two sectors.

7. The Board, in the seminal decision dealing with the interpretation of the term "sector"—*Heavy Construction Association of Toronto*, [1973] OLRB Rep. May 245—observed that the definition of that term had three distinct components: a) a sector is a division of the construction industry; b) the divisions of the construction industry are determined by work characteristics; and c) the legislature's identification of seven specific sectors.

8. The Board in the *Heavy Construction Association of Toronto* decision, after reviewing those three components, used the following analysis at pages 249-50 as an approach to determining the sector applicable to a particular kind of construction:

14. An examination of the enumerated sectors in clause (e) of section 106 leads to the conclusion that for all but one of the sectors listed the names given to these divisions of the construction industry relate to the use which is ultimately made of the construction. At first this may appear to be somewhat of a puzzle in that the connection between the use of the construction and the work characteristics may not be obvious. *Upon examination, however, it becomes clear that the use that is ultimately made of the construction will to a large extent determine the task or the work to be performed at the construction site. The task in turn will have certain characteristics which make that project distinguishable from other types of construction. Thus, each of the sectors enumerated, by focusing on the different end*

uses of the construction, distinguishes one type of construction from other types of construction on the basis of peculiar tasks which are common to that type of project. The work characteristics which distinguish one sector from the other sectors of the construction industry may be shown in terms of the type of problems to be dealt with at the job site, the types of solutions resorted to at certain job sites, the material used, the relative importance of various specifications, the variety of skills and trades, and certain characteristic relations with employees. This list of characteristics is not to be thought of as exhaustive, but as examples of particular characteristics which differ between the various sectors enumerated in the Act.”

15. However, if we try to define the heavy engineering sector in terms of the emphasis of engineering problems and the use of large scale equipment, we are confronted with the problem that these two characteristics are not sufficient to distinguish projects which clearly fall into the other enumerated sectors. Thus, for instance, the construction of a large refinery, steel mill, power station or sewage settling basin may have these same characteristics. We are thus faced with the potential conflict that any project in any of the other sectors can arguably be placed in the heavy engineering sector if the problem is an engineering problem and the equipment used is large scale or heavy equipment. Clearly, section 106(e) [now section 125(1)] should not be interpreted in a way to allow such an ambiguity or uncertainty as to the meaning of the term “sector”. The problem, however, is not difficult to overcome. As pointed out earlier, the other sectors are defined in terms of the use ultimately made of the construction. This has the clear advantage of determining the sector at the earliest stages of the project. Thus any uncertainty as to whether the project falls in one sector or another can be removed even before the work has commenced at the job site. The removal of such uncertainty is, of course, a desirable goal in labour relations and indeed the Legislature in its wisdom has seen fit to remove the uncertainty from the definition by labelling the other sectors with names designating the end use of the project.

9. The Board in *City of Sault Ste. Marie*, [2002] OLRB Rep. Oct./Nov. 870 pointed out that as the Board’s case law relating to sector disputes developed, the end use of the construction became the predominant, if not the exclusive, criterion for making a sector determination. The Board noted that approach was inconsistent with the definition of “sector” in the Act. At page 878, after describing what had been called the “exclusive end use analysis”, the Board wrote:

However, to the extent that such analysis excludes any significant consideration of work characteristics or bargaining patterns, in my view this approach is flawed. It ignores half of the consideration set out in the definition of the term “sector”, and fails to place it in any sort of purposive context. The type of primary focus on an end use analysis in cases ... can lead to a situation in which the Board ignores work characteristics altogether. To do so is, in my view, inconsistent with the very issues the statutory definition directs the Board to examine.

One simple example may illustrate the problem. Parking facilities are usually treated as being in the same sector as the facility that they serve. Thus the parking garage at terminal 3 at the airport was in the ICI sector, and underground parking facilities below an apartment building are considered in the residential sector. What about a free-standing parking facility? It might be a multi-story concrete structure constructed with a basement level, formed in place concrete, and flat roofing. It might be an asphalt, paved parking lot. *The end use of both projects is the same: it is a commercial enterprise. The work characteristics are obviously totally dissimilar. I suspect the pattern of which contractors bound by which types of collective*

agreements might be equally divergent. To focus exclusively on end use would be to ignore those very important differences. [emphasis added]

We note the Board in that decision suggested that the “pattern of which contractors bound by which types of collective agreements” performing the work on the project that is the subject of the dispute could be viewed as a “work characteristic”. In that case, because the collective bargaining patterns and other work characteristics were not fully developed in the evidence the Board heard, the Board resolved the sector determination on the basis of its characterization of the end use of the project.

10. In *Magine Inc.*, unreported, Board File No. 2004-02-M, decision dated March 4, 2004, Q.L. cite [2004] OLRD No. 3885 a sector dispute was raised as a result of a grievance filed under a collective agreement which applied only in the industrial, commercial and institutional sector of the construction industry. The work performed by the employer in that case was described by the Board as the “excavation and hauling of earth for a surface parking lot over which is built a long-term care, residential facility.” The employer and other intervenors claimed the work came within the roads sector while the grieving union claimed the work came within the ICI sector. The Board examined the work characteristics and found that most of those characteristics associated with the roads sector would be present in the excavation of a free-standing parking lot. It also noted that the excavation required for the project is no different from the excavation required for the construction of the building adjacent to the parking lot. The Board concluded that the work characteristics pointed to both the ICI sector and the roads sector. The determining factor for the Board was the end use of the construction. The Board, at paragraph 27 of the decision, wrote:

This case is about a parking lot which is completely integrated into and inseparable from the construction of a building within the ICI sector. There is little to assist us in the information before us with respect to bargaining patterns. Our understanding of the work characteristics point equally to either ICI or roads. Our analysis, however, of end use, points compellingly in favour of a finding that the work falls within the ICI and not the road building sector.

Thus, the end use of the construction remains a relevant, if not significant, consideration when the Board must resolve a sector dispute. (See also *Toronto Construction Association General Contractors’ Section*, [2004] OLRB Rep. Nov./Dec. 1216 in which the Board reviewed both work characteristics and bargaining patterns but determined the sector dispute involving the construction of a student residence at the University of Toronto based on an analysis of the project’s end use.)

11. While it is clear that the projects in dispute involve the construction of electrical generating systems together with associated transmission lines, transformer and switching stations and therefore one might simply conclude that such construction must therefore come within the electrical power systems sector, in the same way that the construction of single family homes in a residential subdivision is in the residential sector, the construction of an oil refinery, office building or a high school is in the industrial, commercial and institutional sector, or the construction of a city street for a municipality is in the roads sector. Nevertheless, unlike the roads, residential and industrial, commercial and institutional sectors, there was some suggestion that the electrical power systems sector had a special meaning when it was added to the Act.

12. The Report of the Inquiry into the Electrical Power Systems Sector of the Construction Industry (the “Ellis Report), January 31, 1978 commented on the meaning and scope of the electrical power systems sector at page C. 1-4:

4. The construction industry, or at least those construction industry participants who are most concerned about the issues of interest to this Inquiry, in fact understands the Electrical Power Systems Sector to be *primarily* an euphemism for Ontario Hydro’s capital construction program – both the construction of long distance high voltage transmission lines and transformation stations, and the construction of major power generation projects such as the Pickering Nuclear Generating Project and the Bruce Nuclear Generating Project. But any reasonable interpretation of the words themselves will also encompass the construction of municipal, low voltage, distribution lines and related facilities (not constructed by Ontario Hydro except occasionally under special contract from the municipality) and the construction of privately-owned, generation and transmission facilities. Nevertheless, the labour relations issues which the separate existence of the EPS Sector vis-à-vis the ICI sector has raised, *do not relate to these municipal or private segments of the EPS Sector*. Accordingly, I have considered these latter segments of the sector only from the point of view of how they might be affected by my recommendations for solving the Ontario Hydro-ICI problem.
5. In this report, therefore, when I refer to the EPS Sector, unless I indicate to the contrary I am to be taken as referring only to the *Ontario Hydro-construction-program aspect of the Sector*, by which I mean Ontario Hydro’s major power generation projects...and the construction of Ontario Hydro long-distance, high-voltage transmission lines and transformation stations...including, in each case, construction work done for Ontario Hydro by contractors as well as that done by Hydro itself. [emphasis added]

We would note that Professor Ellis does not state that the electrical power systems sector is synonymous with the capital construction program of Ontario Hydro. Rather, he pointed out that the words used in the Act to name that sector were broad enough to encompass municipal transmission lines and related facilities as well as “privately-owned generation and transmission facilities”. He makes clear that his report does not deal with those “municipal or private segments of the EPS Sector” suggesting, it seems to us, that he accepted that construction work of that sort came within the electrical power systems sector, based on the language of the Act, but for reasons he discussed would not be a significant element of his report.

13. The Board dealt with the scope of the electrical power systems sector and the Ellis Report at some length in *Ontario Hydro, supra*. The Board noted in that case that the collective agreements between the Electrical Power Systems Construction Association (“EPSCA”) and various trade unions, and the Operating Engineers, in particular, were specifically restricted to the electrical power systems sector. The Board wrote in its conclusion at page 463:

The agreement covers all work on Ontario Hydro property for the bulk power system, which work includes such structures as administration buildings, sewer and water mains, pipelines, dams, earthworks, landscaping and roads. In the context of work on Ontario Hydro property, these structures are in the electrical power systems sector. We specifically do not

make any finding about the responding parties' submission that this collective agreement represents only part of the electrical power systems sector. That may or may not be true and is properly left to a case where there is a specific fact situation involving work off Ontario Hydro property.

Earlier in the decision, the Board made the following comments when it examined the collective bargaining history in the electrical power systems sector at pages 459-60:

Since 1978, the Board has acquired a considerable degree of expertise in defining sector. Professor Ellis concluded that the words "electrical power systems sector" were wide enough to cover not only the bulk power construction program of Ontario Hydro, but also the municipal transmission systems and private generating plants.

The Board then adopted a purposive analysis to the definition of electrical power systems sector by reviewing the bargaining history in that sector. It noted that there had been "no systematic or organized bargaining" for either the municipal systems or the privately owned generating systems. The Board did state at page 470:

When the Legislature defined the electrical power systems sector, Professor Ellis concluded that it did not have in mind municipal systems or privately owned generation and transmission systems.... The construction of privately-owned generation and transmission facilities (known now as Non-Utility Generators ("NUG") and Co-Generation ("Co-Gen") projects) to which both counsel referred, has been conducted largely since 1978, and has been, as far as this panel of the Board is aware (and counsel did not disagree), performed under ICI collective agreements. The Board and the parties are aware of this fact from other contexts than this case. *The Board has never been called upon to determine which sector a NUG or a Co-Gen fell into. On the other hand, there has never been a dispute that required the Board to do so.* [emphasis added]

It appears therefore that these two applications are the first ones in which the Board is deciding whether the construction of privately owned generation and transmission facilities comes within the industrial, commercial and institutional sector or the electrical power systems sector.

14. The Board concluded its analysis with the following passage at page 470:

Thus, when Professor Ellis said that the construction industry understands the electrical power systems sector to be primarily a euphemism for Ontario Hydro's capital construction project, he was identifying a particular pattern created by the bargaining history of, not only the Operating Engineers, but virtually all of the building trades unions. That was, in our view, a pattern of bargaining that the Legislature intended to identify as unique and separate from the ICI sector and other sectors.

The Board found Professor Ellis had concluded that the legislature did not have either privately owned generating and transmission systems or municipal systems in mind when it formulated the electrical power systems sector and indicated that the legislature, when it introduced the electrical power systems sector into the Act, was concerned with the pattern of bargaining affecting Ontario Hydro's capital construction program. We accept that the electrical power systems sector was "primarily" a term to describe the Ontario Hydro capital construction program and we also accept

the Board's conclusion that the legislature did have in mind the pattern of bargaining associated with that capital construction program, but we respectfully disagree with the observation that Professor Ellis had concluded that privately owned generating and transmission systems or municipal systems were outside the scope of the electrical power systems sector.

15. As we read the Ellis report, we understand that Professor Ellis recognized that the language used in the Act for the electrical power systems sector went beyond the capital construction projects of Ontario Hydro. He pointed out that "any reasonable interpretation of the words themselves will also encompass the construction of municipal, low voltage, distribution lines and related facilities (not constructed by Ontario Hydro except occasionally under special contract from the municipality) and the construction of privately-owned, generation and transmission facilities." He accepted that the construction industry understood the electrical power systems sector to "be *primarily* an euphemism for Ontario Hydro's capital construction program", suggesting that the construction industry itself understood that the electrical power systems sector might well include other sorts of construction activity. It is clear to us that in paragraphs 4 and 5 of his report (referred to above), Professor Ellis was focussing his report on the Ontario Hydro capital construction program part of the electrical power systems sector and, by implication, was not addressing the remaining portion of that sector.

16. More importantly, the Ellis report recommended a legislative amendment "removing from the sector the construction of privately-owned generation, transformation, transmission and distribution facilities and, as well, all municipal construction of transformation and distribution facilities." The report goes on to observe that although bargaining relationships in that part of the sector were not the focus of the inquiry, "there are established and unique bargaining relationships and special collective agreements in that part of the industry and there may well be justification for simply recognizing it as an additional, separate sector – perhaps the "Utilities and Private Power Sector". Although some changes were made to the Act in 1978 and 1979, the recommendations of the Ellis report were not adopted by the government. Thus, the language of the Act with respect to the label applied to the electrical power systems sector continues unchanged and can, according to the Ellis Report "encompass...the construction of privately-owned generation and transmission facilities".

17. The Board in *Ontario Hydro, supra* made a point several times throughout that decision to say that it was not determining the extent to which the electrical power systems sector might apply, if at all, to work that took place off Ontario Hydro property or was carried out by the private sector. The Board (differently constituted) in a subsequent decision indicated the electrical power systems sector extends beyond construction work done on what was at one time Ontario Hydro property. In *Ontario Power Generation Inc.*, [2005] OLRB Rep. July/August 675 the Board wrote at page 685:

The applicants' bargaining rights are based on the scope of the bargaining units described in the EPSCA collective agreement. That collective agreement applied to major construction work carried out on the property of Ontario Hydro. That bargaining unit may have been viewed by the applicants, at one time, as if it was congruent with the electrical power systems sector. Nevertheless, that was never, in fact, the legal situation. One of the reasons for these applications being filed by the applicants is that their bargaining rights do not cover that entire sector. Thus, to say that their bargaining rights are being eroded because work is being done in the electrical power systems sector but not under the EPSCA collective agreement would suggest that their bargaining rights had covered that entire

sector at one time. But that was not the case. It seems to us that a union's bargaining rights are not being "eroded" simply because an employer is choosing to have work not covered by its collective agreement done by persons who are not subject to that collective agreement and are not represented by the union that is a party to that collective agreement.

The Board's decision in *Ontario Power Generation Inc.*, *supra* did not refer to the analysis of the meaning of the electrical power systems sector found in the *Ontario Hydro* decision.

18. The Board in *Ontario Hydro*, *supra*, had observed that the parties to the EPSCA collective agreements had amended the scope clause of their collective agreements by adopting the recommendation of the Ellis Report when it wrote at page 463:

We also note that the first EPSCA collective agreement negotiated after the Ellis Report was released follows, in a recognition clause, almost exactly, the language that Professor Ellis proposed to use to "narrow" the definition of the electrical power systems sector by excluding municipal and private owners, and to align the definition more precisely with what "everyone understood" to be the electrical power systems sector, that is, Ontario Hydro's capital construction program. The Ellis Report was a public document widely circulated to those likely to be concerned with collective bargaining in the electrical power systems sector. The adoption of this language which, since it is in the collective agreement, was a mutual adoption, when combined with the addition of a recital reflecting an intention to address issues in the electrical power systems sector, suggests strongly that the mutual intention of the parties was to define a collective agreement in a manner confined to the electrical power systems sector, and *not* to enter into a multi-sector collective agreement. The intention of the parties, even if it was mutual, does not alter the Act. It is, however, evidence that is available to the Board to give a purposive, practical meaning to the phrase "electrical power systems sector" by looking at the bargaining patterns that sectoral divisions are intended to regulate.

That is, the Board in *Ontario Hydro*, *supra*, concluded that the parties to the EPSCA collective agreements amended the scope of those collective agreements so that they were applicable only to construction carried out in the electrical power systems sector by or on behalf of Ontario Hydro on its property. Indeed, the Board in that decision suggested that the scope of the EPSCA collective agreement was congruent with the electrical power systems sector when it wrote it was "looking at the bargaining patterns that sectoral divisions are intended to regulate" in order "to give a purposive, practical meaning to the phrase 'electrical power systems sector'".

19. Despite the Board's suggestion about the breadth of the electrical power systems sector in *Ontario Hydro*, *supra*, we do note the Board made it clear in that case it was not deciding whether construction work related to the generation and transmission of electrical power carried out by the private sector or off the property of what was once Ontario Hydro might come within the electrical power systems sector. In *Ontario Power Generation Inc.*, *supra* the Board described the applicants' arguments relating to the changes affecting labour relations in the electrical power systems sector that resulted from the amendments to the *Electricity Act, 1998*, S.O. 1998, c. 15 as am. at pages 679-80:

6. ...While the bargaining units contained in the EPSCA collective agreement are somewhat complex, in summary, the EPSCA collective

agreement covers employees in certain specified job classifications engaged in major construction work performed for or by Ontario Hydro (and is now performed for or by the successors to Ontario Hydro) on what was at one time the property of Ontario Hydro. The applicants submit that the bargaining unit contained in the EPSCA collective agreement is no longer appropriate with the passage of the *Electricity Act, 1998*, S.O. 1998, c. 15 as am. (the “EA”) and the changes that have taken place since Ontario Hydro was broken up and replaced by Ontario Power Generation Inc. (“OPG”) and Hydro One Networks Inc. (“Hydro One”)

7. The applicants claim that up to the passage of the EA, the electrical power systems sector and the construction activities of Ontario Hydro overlapped with one another. It was understood, according to the applicants, that the electrical power systems sector only encompassed the construction undertaken by or on behalf of Ontario Hydro. They say that changed with the EA, and that the electrical power systems sector extends well beyond the construction work undertaken by or for both OPG and Hydro One. The applicants refer to private sector participants constructing generating facilities and to OPG and Hydro One engaging in construction activity in new areas of endeavour that are outside the scope of the EPSCA collective agreement. There may well be other areas of construction activity, the applicants say, that come within the electrical power systems sector that would likely be well beyond the scope of the bargaining units the applicants currently represent in the electrical power systems sector.

None of the parties in that matter took issue with the applicants’ understanding of changes to the electrical power systems sector that resulted from the passage of the *Electricity Act, 1998*. The Board notes that the Board in *Ontario Hydro, supra* did not consider the impact of the *Electricity Act, 1998* on its analysis as it was unnecessary to do so in that case. The Board in *Ontario Hydro, supra* was determining whether the collective agreement by which the International Union of Operating Engineers, Local 793 (“Local 793”) and Ontario Hydro were bound extended beyond the electrical power systems sector and included the industrial, commercial and institutional sector. It determined the bargaining rights held by Local 793 in respect of Ontario Hydro were confined to the electrical power systems sector.

20. In light of the steps taken by the parties to the EPSCA collective agreements in the late 1970’s to define more precisely the scope of those agreements, the recommendations of the Ellis Report, the name the legislature used for the electrical power systems sector, the changes to the manner in which the generation and transmission of electric power is being regulated and constructed as a result of the *Electricity Act, 1998* described in *Ontario Power Generation, supra* and the fact that “any reasonable interpretation of the words themselves” would encompass the construction of privately-owned generation and transmission facilities, we are satisfied the scope of the electrical power systems sector goes beyond construction on what was once the property of Ontario Hydro. It is therefore open to the Board to find that a privately owned construction project comprising wind turbine electrical generators, transformers, transmission lines and associated building construction comes within the scope of the electrical power systems sector.

21. While we are satisfied that the scope of the electrical power systems sector as set out in section 126 of the Act can include the privately owned and developed construction projects that are the subject of this application, the question remains as to whether the work on those projects comes within that sector or comes within the industrial, commercial and institutional sector.

22. The Carpenters, Millwrights and IBEW argue that the projects are being constructed for private sector owners and ought to be considered industrial or commercial in nature in that they are manufacturing or generating electricity for the purposes of creating revenue and ultimately profits for their owners. The distinction between private and public ownership of electrical generation projects is critical, since the electrical power systems sector was, from the outset of being introduced into the Act, seen as being synonymous with the capital construction work carried out by or on behalf of Ontario Hydro. They submit that private enterprise producing power is a commercial undertaking and therefore the end use of the project, if the Board were to apply an end use analysis, is commercial or perhaps industrial.

23. Their counsel submitted that there are many examples over the past 25 years where the construction of co-generation facilities was carried out by contractors where they and the trade unions that represented their employees applied the ICI provincial agreements. They asserted that the construction work on private projects producing electricity by various means (hydraulic, gas powered co-generation, steam) was performed throughout the province under the ICI provincial collective agreements.

24. The Carpenters, Millwrights and the IBEW contend that the bargaining patterns in respect of privately owned electrical generating facilities demonstrate that such work has always been treated as coming within the industrial, commercial and institutional sector of the construction industry. Indeed, we note that the Board made a similar observation in *Ontario Hydro, supra* when it wrote at page 470:

The construction of privately-owned generation and transmission facilities (known now as Non-Utility Generators (“NUG”) and Co-Generation (“Co-Gen”) projects) to which both counsel referred, has been conducted largely since 1978, and has been, as far as this panel of the Board is aware (and counsel did not disagree), performed under ICI collective agreements. The Board and the parties are aware of this fact from other contexts than this case. The Board has never been called upon to determine which sector a NUG or a Co-Gen fell into. On the other hand, there has never been a dispute that required the Board to do so.

The Board did observe in that decision that no sector issue arose in respect of those privately owned generation and transmission facilities. Although a history of parties applying the ICI sector collective agreements to that type of work in the past militates against finding that those kinds of projects come within the electrical power systems sector, it remains for the Board to determine the issue raised in this case in respect of wind farms constructed at the behest of the Ontario government based on established principles.

25. The Millwrights, Carpenters and the IBEW also submit there are no distinctive work characteristics associated with the electrical power systems sector. Indeed, Professor Ellis came to the same conclusion in the Ellis Report when he wrote at page C.1-3:

The Act simply assumes the existence of a special division of the construction industry called the Electrical Power Systems Sector, the content and limits of which are determinable by “work characteristics”. And the difficulty is that there are no discernable “work characteristics” capable of determining the scope of the Electrical Power Systems sector in a manner

that would reflect the construction industry's actual understanding of the sector.

In a footnote to that passage, Professor Ellis wrote: "All of the sectors mentioned in Section 106 [now 126] suffer from the same lack of specific definition." The Board in *Ontario Hydro, supra* at page 457 made that same observation when it wrote: "...there are no distinguishing work characteristics to be found in the electrical power systems sector."

26. The applicants (and all of the parties except the Carpenters, Millwrights and the IBEW) submitted that the significant restructuring and break up of Ontario Hydro into its various component parts has resulted in significant changes in the way government policy in the area of electrical power generation and consumption will be implemented. While in the past, Ontario Hydro, as a Crown corporation, could be relied on to implement government policy, it is now clear that government policy has shifted the responsibility for meeting the electricity needs of this province to the private sector with an emphasis on new renewable energy sources. With these changes in government policy, they argue that different bargaining patterns have already developed and new bargaining patterns will develop because what was once the exclusive preserve of Ontario Hydro has now become the subject of private sector planning, development and construction. They argue that with these new types of construction taking place, trade unions and employers must focus on new ways to approach the problems that will arise.

27. The parties described in some detail the nature of the work done with respect to the construction of the wind turbines. Each of the two projects in question had a first phase where 66 wind turbine electrical generators were constructed. There is a second phase planned for each project with the addition of another 51 turbines. Each turbine is affixed to a tower that is supported by a large concrete base. Each tower and turbine have several components that must be erected (base, midsection and top of the tower, control console, turbine nacelle, hub section and fibreglass fan blades) on the base. The projects also involve the construction of transformer substations and several kilometres of high voltage transmission lines. The applicants contended the work characteristics associated with the wind turbine construction were unique and the construction of high voltage transmission lines was peculiar to the electrical power systems sector. The speciality subcontractors that erected the turbines had experience doing this kind of construction work in other jurisdictions and sought agreements with the trades that had the work experience and skills those speciality contractors considered best suited for wind turbine erection work. In effect, those contractors arrived in a jurisdiction where this work was being done for the first time and sought to replicate the collective bargaining patterns they had developed elsewhere. The applicants asserted that the regulatory framework, in which the construction of the project is subject to approval from the Ontario Energy Board, is also unique to the electrical power systems sector.

28. The applicants point out that their collective agreements do apply to the electrical power systems sector and they also have agreements with the contractors in respect of the industrial, commercial and institutional sector so that they might claim the work whether it was done as an ICI project or in the electrical power systems sector.

29. The parties other than Carpenters, Millwrights and the IBEW submitted that these projects are squarely within what the legislature intended by the electrical power systems sector. They argue that this proceeding is a classic end use case. They submit that the projects are devoted exclusively to converting wind power into electrical power and transmitting that electrical power to the Ontario power grid. This is not, they say, on the borders of the electrical

power systems sector. This is not a situation where the projects in issue are associated with some other industrial plant or pipeline. Rather, they are stand alone construction projects undertaken for the express purpose of generating and transmitting electricity for sale. As counsel for CUSW and Local 183 argued, if these two projects do not come within the electrical power systems sector then there cannot be an electrical power systems sector. These projects have an unambiguous end use of generating and transmitting electricity. The two projects on completion are connected to the power grid. They are, simply put, part of Ontario's electrical power system and therefore must come within the electrical power systems sector.

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

31. Moreover, it is in our view particularly significant that these two wind farm projects were initiated by the government of Ontario when it called for new electric generation capacity from renewable sources. When the construction work carried out for or by the Hydro-Electric Commission of Ontario and later Ontario Hydro was the entirety of the electrical power systems sector, it was clear that the electric power policy initiatives of the government directly affected the nature and extent of the construction work undertaken in that sector of the construction industry. Contractors, employers, trade unions and employees who worked in that sector and therefore the labour relations in that sector were directly affected by those policy initiatives. The construction work at the projects that are subject of these proceedings come within that category in that such work was carried out as a direct result of government policy initiatives in relation to the generation of electric power. It seems to us that a distinct characteristic of the construction work undertaken in the electrical power systems sector is the extent to which the projects are undertaken at the behest of the government (as distinct from a private sector initiative approved by government), monitored by government and are closely regulated by government.

32. We do not accept the contention of the Carpenters, Millwrights and the IBEW that simply because the electricity generated will be sold for a profit and will generate revenue for its owners means that they are commercial enterprises and must therefore come within the industrial, commercial and institutional sector. Pipelines are constructed to generate revenue and provide profits to the pipeline owners. No one, as far as we are aware, has ever suggested that pipeline construction comes within the ICI sector simply because the owners of the pipeline will derive revenue and profits from carrying product through their pipeline.

33. We have found, for reasons expressed earlier, that the electrical power systems sector extends beyond the construction work done for what was at one time Ontario Hydro on property that was at one time the property of Ontario Hydro. We are also of the view that although the work characteristics for some elements of the projects might well be distinctive, there really are not any significant work characteristics associated with construction in the electrical power

systems sector, other than government mandating the project where such constitution takes place as a part of its electric power policy, that are unique to construction in that sector. Bargaining patterns in the segment of the electrical power systems sector to which the EPSCA collective agreement applies are well established. In those areas of that sector falling outside the EPSCA collective agreement, there are not yet long standing bargaining patterns, but, as the employers and trade unions continue working in that part of the electrical power systems sector on new electrical generation and transmission projects, we anticipate, based on the collective bargaining relationships that have been created as a result of these two projects, new bargaining patterns will develop and emerge.

34. In the result, we conclude in this case that the end use of the projects is the best determinant of the sector into which those projects must be found. While we accept there is some commercial component to the end use of the construction of these two projects, the overwhelming and pre-dominant end use of the projects is the generation and transmission of electrical power exclusively for sale through the Ontario electric power grid.

35. The Board therefore declares that the construction project carried on in respect of the Prince Township Wind Farm and the construction project carried on in respect of the Lake Erie Shores Wind Farm both come within the electrical power systems sector of the construction industry.

“Harry Freedman”
for the Board