

ONTARIO LABOUR RELATIONS BOARD

3174-09-U International Brotherhood of Electrical Workers, Local 1739, Applicant v. **International Brotherhood of Electrical Workers, First District, Canada** and Edwin Hill, Responding Parties v. International Brotherhood of Electrical Workers, Local 353, Intervenor.

3175-09-U International Brotherhood of Electrical Workers, Local 894, Applicant v. **International Brotherhood of Electrical Workers, First District, Canada** and Edwin Hill, Responding Parties v. International Brotherhood of Electrical Workers, Local 353, I.B.E.W. Local 894 Welfare Trust Fund, I.B.E.W. Local 894 Pension Plan Trust Fund, Intervenors.

BEFORE: David A. McKee, Vice-Chair.

APPEARANCES: L.A. Richmond and Tom Leduc appeared on behalf of International Brotherhood of Electrical Workers, Local 1739; L.A. Richmond, John Gillett and T. Dorgan appeared on behalf of International Brotherhood of Electrical Workers, Local 894; Harold Caley, Doug Wray and Phil Flemming appeared on behalf of International Brotherhood of Electrical Workers, First District, Canada; James Robbins appeared on behalf of the IBEW Construction Council of Ontario; James Robbins and John Grimshaw appeared on behalf of the IBEW Electrical Power Council of Ontario; Susan Ursel and Steven Martin appeared on behalf of International Brotherhood of Electrical Workers, Local 353; Donald K. Eady and Susan Bird appeared on behalf of the I.B.E.W. Local 894 Welfare Trust Fund and the I.B.E.W. Local 894 Pension Plan Trust Fund.

DECISION OF THE BOARD: December 19, 2011

Introduction

1. These two applications are applications brought pursuant to section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the “Act”) alleging that the International Brotherhood of Electrical Workers (the “International Union” or the “IBEW”) violated sections 147 and 149 of the Act when it ordered Locals 894 and 1739 of the IBEW to merge with Local 353 of the IBEW. Other sections were specified in the initial applications but little reference was made to them in argument.

2. The IBEW is an international union that represents electricians, linemen and communications cabling specialists. It is a “parent union” for the purposes of sections 147 and 149. It has affiliated local unions throughout North America. The head of the IBEW is the International President, Mr. Ed Hill. He is based in Washington D.C. The First Vice-President, Mr. Phil Flemming, is the next level down in the hierarchy. He has responsibility for all of Canada.

3. International Brotherhood of Electrical Workers, Local 894 (“Local 894”) is a local union with a geographic jurisdiction covering the Regional Municipalities and Counties of Durham, Victoria, Peterborough, Northumberland and Haliburton. Its office is in Oshawa. Its Business Manager is Mr. John Gillette. International Brotherhood of Electrical Workers Local 1739 (“Local 1739”) is a local union with a geographic jurisdiction of the County of Simcoe and the Regional Municipality of Muskoka. Its office is in Barrie and its business manager is Mr. Tom Leduc. I have referred to them in this decision as the two “Local Unions”.

4. International Brotherhood of Electrical Workers, Local 353 (“Local 353”) is the Toronto local union with a geographic jurisdiction of Toronto, Peel and part of Halton (i.e., Board Area 8). Its business manager at the relevant time was Mr. Joe Fashion. It has a much larger membership than either of the other two locals combined.

5. The International Brotherhood of Electrical Workers – Construction Council of Ontario (“IBEW-CCO”) is a provincial council of trade unions to which all local unions in Ontario are affiliated. It intervened in these applications for purposes of protecting its interest as the bargaining agent of the Principal Agreement, the Province-wide collective agreement in the ICI sector (for purposes of section 162) and all other sectors except for certain specific agreements (e.g., the EPSCA collective agreement).

6. These applications allege that the International Union acted without just cause when it ordered the merger of Locals 1739 and 894 into Local 353 on January 8, 2010. Mr. Flemming held meetings with the local unions to discuss how the merger would be implemented, concluding on January 21, 2010. The merger was to be effective February 1, 2010, with a number of conditions on the merged local union. Pursuant to subsection 147(5) the merger has not been in effect since the two applications were filed on January 27, 2010.

7. The Local Unions allege that the International Union had no just cause to order the merger. I conclude that the International Union did have just cause to do something that affected the jurisdiction and autonomy of the Local Unions and that, of necessity, the change involved major structural changes to the Local Unions. That change would require the centralization of the key functions of the hiring hall, organizing and the use of stabilization or market recovery funds. It may be that a merger of the three local unions is the only way to effect this change. However, the decision to merge the Local Unions with Local 353 was taken without an awareness of certain problems in the merger, and as a result the Board is required to make certain directions pursuant to subsection 149 (4). The remedies ordered reflect these conclusions. Essentially the Board orders the parties back to where they were in December 2009, before the decision to merge was made, and requires them to address the structural changes necessary to the IBEW and the three local unions to address the serious issues that the Union as a whole faces.

Bias Motion

8. At the commencement of the first day set for hearing oral evidence, counsel for the Local Unions’ said he wished to make a motion. He stated that his motion was a request that I recuse myself on the grounds I was biased in favour of the International Union. He stated he was arguing on the basis of actual bias and a reasonable apprehension of bias.

9. While no notice had been provided to the Board, counsel for the Local Unions did send an e-mail to other counsel at the end of the day on the previous Thursday about his motion. One of the counsel for the International Union forwarded a copy of the e-mail with the comment "it would appear that [counsel] has not provided you with a copy of his e-mail". I did not reply.

On the morning of Monday, September 26, 2011, I provided counsel with a printed copy of the e-mail and asked if that was in fact his motion. He confirmed it was. The text of his e-mail is as follows:

As a courtesy I am advising that the Locals will take the position before the Board that Vice Chair McKee must recuse himself from this case as he is not impartial but biased in favour of the International Union or alternatively he appears to be biased in favour of the International Union.

This is based on his conduct in this case and in particular his conduct in refusing to hold a hearing, in reversing the order of proceedings, in limiting the evidence that can be called, in refusing to require the International Union to demonstrate just cause and in denying the Locals the right of cross examination of key witnesses. The proceeding now lacks all the attributes of a fair hearing and is being conducted contrary to the rules of natural justice in a democracy.

This motion is also based on the attached decision. Vice Chair McKee by that decision has effectively written sections 147 and 149 out of the Act and authorized International Unions to take any actions, including the merger in this case, without regard to the autonomy and jurisdiction of the Local Unions which are protected by the statute and without having to demonstrate just cause.

Vice Chair McKee through his actions in this case and his decision attached has prejudged the result in this proceeding and must allow an independent decision maker to determine this matter afresh.

10. I asked counsel if there were any facts he relied on other than the decisions in this case and the decision in *United Brotherhood of Carpenters and Joiners of America 1256 v. United Brotherhood of Carpenters and Joiners of America*, 2011 CanLII 52892 (ON LRB) (the "Carpenters' case"). He said that he relied exclusively on those decisions. I then requested him to address the issue of whether I should hear the motion at all, since I had said what I had to say in those decisions and thought further comment was unnecessary and inappropriate. Counsel addressed argument on the issue. I ruled that I would not hear the Local Unions' motion for the following reasons.

11. The motion is essentially a motion that I recuse myself because the decisions issued so far in this proceeding, and one earlier decision in another proceeding, demonstrate bias. On a subjective basis I have no concern whatsoever. I do not believe that I have prejudged this case and have no particular bias or inclination to favour any party or any class of parties in this or any application under sections 147 and 149. The Local Unions' argument then is that the decisions displayed a level of intellectual dishonesty that is evident to any reasonable person, or are so irrational as to be explicable only by bias on my part. The bias can only be said to stem from dishonesty or a concealed favouritism towards one party, or that I have deluded myself to the point where it is evident to any reasonable person other than myself that the decisions demonstrate bias.

12. I do not believe I should hear this motion. The decisions speak for themselves. The Court of Appeal in *Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353*, 2009 ONCA 749 (CanLII) found in that case that it was inappropriate for the Board to add to or "improve upon" its decision. While the facts of this case are not identical to those in

that case, the wisdom of letting a decision speak for itself, particularly where it is alleged that the decision itself demonstrates bias, is compelling. While I indicated that counsel was of course free to raise the issue before a court on an application for judicial review, I declined to hear it.

13. In addition, the fact that the dates for hearing the oral evidence had been set in March of 2011 to commence on September 26, 2011, the fact that the last decision in these applications was made on August 5, 2011, and the decision in the Carpenters' case was released on August 29, 2011, combined with the fact of the lack of any notice to the Board, suggested that the motion was made simply to delay the start of the proceedings.

14. Counsel for the Local Unions then demanded that I adjourn the proceeding and consult with my colleagues and the Chair of the Board about this decision before proceeding further. I declined to do so. Counsel then accused me of "showing contempt for [his] clients", and "believing [myself] so far above them and everyone else involved in this case" and that I was creating my own personal process and could give no appearance of, and could not conduct, a fair hearing. He said that I had no credibility with his clients.

15. He further stated that he would "write to the Board and write to the Minister" about this. The reference to the Board (presumably the Chair) is self-evident since all Vice-Chairs report to the Chair. The reference to the Minister is less evident. In all the time I have been a Vice-Chair I have never spoken to any Minister of Labour or any person from any Minister's office. Presumably this was a reference to the fact that Vice-Chairs are all appointed by Order-in-Council for a fixed term which may or may not be renewed, and that decision is made by Cabinet.

16. I advised counsel that he should feel free to take any steps that he felt were appropriate and that his clients instructed him to take. His response was "my job is to get you off this case and I'll do whatever I have to, to get you off." He then demanded, loudly, that I provide him with written reasons for my decision before the end of the day. I responded that I would provide reasons as and when appropriate. Nothing more was said about the motion and we proceeded to hear the first witness.

17. Counsel returned to this theme very briefly before commencing his final argument and after all of the oral evidence was heard. He stated that his clients had been deprived of a fair hearing because of the procedure adopted. He stated very briefly that I had done so by ordering a consultation in the face of what he said were disputed facts; that I had erred in "reversing" the proper order of proceeding; that I had erred in requiring the Local Unions to proceed first; that I had refused to permit them to bring a bias motion; that I had refused the Local Unions' motion to require the attendance of Mr. Ed Hill, the International President of the IBEW and certain other individuals; that I had refused to require Mr. Phil Flemming to produce certain notes and memoranda during his cross-examination; and by requiring will-say statements and limiting oral evidence to those statements. He attributed this to a desire on my part to shield the International Union from being required to give evidence and its reasons for the amalgamation of the three unions, and that this was evidence of bias or gives rise to a reasonable apprehension of bias. He elaborated on the statements for another minute or two and then went on to make final argument.

18. The prior decisions speak for themselves. I deal with the issues of process and what happened during the consultation below. The Local Unions may not like those rulings, but that is not itself evidence of bias, nor could it give rise to a reasonable apprehension of bias in the eyes of an objective observer informed of all the circumstances of the case. Although counsel did not ask for a ruling or response to his motion that I "declare a mistrial" and order the matter to be

heard by way of hearing rather than consultation in front of another panel before commencing his final argument, I decline to do so.

19. This level of vehemence was surprising at this stage of the process. The previous hearings and written submissions had all been carried on by all parties in a civil and professional fashion. There is nothing in the manner in which this application had progressed to this stage (nor in the previous Carpenters' decision) that provides any sort of context for this level of personal vituperation. I understand that counsel feels strongly about these particular provisions of the Act. He may well have been disappointed with the result in the Carpenters' case or others. We have all experienced the disappointment of not succeeding in a case we believed was significant and which we believed we should win. That is not the basis for a bias allegation (see *International Brotherhood of Electrical Workers* [1997] OLRB Rep. Nov/Dec 1005) nor is it any sort of reason for the language used in this motion and at other points in the proceeding.

Process

20. The process adopted by the Board is described to some extent in the previous decisions. Some of these decisions use vocabulary familiar to those who appear regularly before the Board without much explanation. In this case the Local Unions at various times during the hearing of the oral evidence described the process in the following terms: "I have no idea what the process is; it is your process, you make it up as you go along." In response to a suggestion by counsel for the International Union that he was being contemptuous of the Board and of the Vice-Chair in particular, he denied that he was, asserting that "I am contemptuous of the process; the process is a joke". Since the consultation process played a role in certain evidentiary rulings, and because the position of the Local Unions in final argument was that the process adopted made any fair hearing impossible, it is appropriate to set out the basis and operation of this consultation at this point.

21. Subsections 110 (16) to (21) provide as follows:

Practice and procedure

(16) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions.

Rules of practice

(17) The chair may make rules governing the Board's practice and procedure and the exercise of its powers and prescribing such forms as the chair considers advisable.

Same

(18) The chair may make rules to expedite proceedings to which the following provisions apply:

- 0.1 Section 8.1 (Disagreement by employer with union's estimate).
1. Section 13 (right of access) or 98 (interim orders).
2. Section 99 (jurisdictional, etc., disputes).
3. Subsection 114 (2) (status as employee or guard).

4. Sections 126 to 168 (construction industry).
5. Such other provisions as the Lieutenant Governor in Council may by regulation designate.

Effective date of rules

(19) Rules made under subsection (18) come into force on such dates as the Lieutenant Governor in Council may by order determine.

Special provisions

- (20) Rules made under subsection (18),
 - (a) may provide that the Board is not required to hold a hearing;
 - (b) may limit the extent to which the Board is required to give full opportunity to the parties to present their evidence and to make their submissions; and
 - (c) may authorize the Board to make or cause to be made such examination of records and such other inquiries as it considers necessary in the circumstances.

Conflict with Statutory Powers Procedure Act

(21) Rules made under subsection (18) apply despite anything in the *Statutory Powers Procedure Act*.

22. Rules 41.1 to 41.3 of the Board's Rules of Procedure provide:

RULE 41 EXPEDITED PROCEEDINGS

41.1 Rules 41.2 and 41.3 apply to the *Ambulance Services Collective Bargaining Act, 2001*, *Public Sector Labour Relations Transition Act, 1997*, s.32 of the *Local Health System Integration Act, 2006*, Part IV of the *Crown Employees Collective Bargaining Act, 1993*, section 61 of the *Occupational Health and Safety Act*, section 118(2) of the *Employment Standards Act, 2000*, sections 31, 37, and 71 of the *Colleges Collective Bargaining Act, 2008*, and sections 8.1, 13, 98, 99, 114(2) and 126 to 168 of the *Labour Relations Act, 1995*.

41.2 In order to expedite proceedings, the Board or Registrar may, on such terms as either considers advisable, consult with the parties, conduct a pre-hearing conference, issue any practice direction, shorten or lengthen any time period, change any filing or delivery requirement, schedule a hearing, if any, on short notice, or cancel such hearing, or make or cause to be made such examination of records or other inquiries as either considers necessary in the circumstances.

41.3 Where the Board is satisfied that a case can be decided on the basis of the material before it, and having regard to the need for expedition in labour relations matters, the Board may decide an application by limiting the parties' opportunities to present their evidence or to make their submissions, or without a hearing.

23. The ability to determine the Board's own practice and procedure is of course ultimately defined by the rules of natural justice. The essential issue in this case, as in most

consultations, is whether it was necessary to hear oral evidence to establish facts on which the Board would rely in making a final decision. This is more easily stated than decided.

24. The Board uses consultations most commonly in jurisdictional disputes: disputes between two craft construction unions about which trade should have been assigned particular work. Since Rule 41 was enacted, only two or three of the many jurisdictional disputes filed have involved any oral evidence at all. Jurisdictional disputes are based on well-defined principles, the relevant facts are usually easily determined on the basis of documentary evidence. In the case of "area practice" evidence (which trade is usually assigned to perform the work in a given geographic area) documentary evidence is often the only reliable evidence to consider.

25. Disputes about what sector of the construction industry a particular project falls in are conducted by consultation, but oral evidence is often heard. The level of technical detail of information about the work performed or the nature of the project is often such that oral evidence is needed to supplement the documentary evidence. When oral evidence is arguably required, the Board's practice is to require the party wishing to call the oral evidence to file a will-say statement. In some cases (e.g., *V. K. Mason Construction Co.*, [2009] OLRB Rep. Nov/Dec 985) the filing of a will-say statement led parties to agree to accept some of the will-say statements for what they were worth and argue the case on that basis.

26. Applications under sections 147 and 149 (often called "Bill 80" applications, referring to the Bill number by which sections were introduced into the Act) have proceeded by way of a full hearing before Rule 41 was created. Sections 147 and 149 were added to the Act only in 1995, and hence it would have been inappropriate to hold a consultation in those first few cases in any event. Consultations had been held in *International Brotherhood of Electrical Workers and Guild Electric*, [2006] OLRD No 1285; *United Brotherhood of Carpenters and Joiners of America*, [2009] OLRB Rep Nov/Dec 972; *United Brotherhood of Carpenters and Joiners of America*, 2011 CanLII 52892 (ON LRB); and *International Union of Bricklayers and Allied Craftworkers*, [2007] OLRB Rep Jan/Feb 101. I have sat as the Vice-Chair in some applications under section 147 and 149 that were held as hearings; for example *International Union of Bricklayers and Allied Craftworkers*, [2004] OLRB Rep Jan/Feb 101. In the latest Carpenters' case, no oral evidence was called as there were no material facts in dispute. In this case, for reasons set out in the decision of November 1, 2010, some oral evidence was heard.

27. Applications under sections 147 and 149 present a particular problem. They deal with either an assumption of control of a local union by the parent union or the imposition of a permanent structural change to that local union. In this case what is at issue is the continued existence of the two applicant local unions. In all such cases, many if not all members of the local union feel a visceral and intense identification with their home local which is just as intense as their connection and identification with their own trade. In this case, as well as some others, the members of a local union identify the existing structure with the preservation of job opportunities that they fear losing if that structure changes. These strong feelings are reflected in the way cases are presented. Some parties feel the need to state strongly felt opinions repeatedly to express the depth of their commitment to them. In addition, parties may feel keenly any real or perceived slights or injuries that must be explained in intense detail to provide a full airing of their feelings.

28. Whatever cathartic value such a hearing may have, the purpose of a proceeding before the Board is to ascertain relevant facts and applicable law, not to provide an opportunity for venting by the parties. In addition, the nature of proposed changes by a parent union are often seen by those who are affected by those changes to proceed from corrupt, improper or similarly

destructive desires on the part of the parent union. Sometimes they are, but less frequently than is supposed. Satisfying as it may be to see the source of the change, generally the decision-maker in the parent union, on the stand to be pilloried in cross-examination, the real question is whether oral evidence adds anything to the case. In this case the effective decision maker was Mr. Flemming, and he did in fact take the stand.

29. Further, an application under section 147 brings with it a mandatory statutory stay of the parent union's actions. Provided a local union has adequate financial resources, there is no particular incentive to reach a conclusion that brings with it the risk of a change to the status quo which is preserved by that stay. The Board currently schedules cases having regard to the availability of counsel. When hearing dates were cancelled in March, I set the number of dates that the parties estimated they would need to present their cases. Dates were not available until September. It is always possible that plans that a panel makes will prove unworkable and that dates must be adjourned and set for a time another 6 months away. However, there is an obvious cost to doing so as well as the inherent injustice caused by delay. In this case the hearing of oral evidence began 21 months after the applications were first filed. The time was necessary for the parties to prepare their cases, but those efforts were not to be lightly disregarded.

30. The process of identifying what the real issues are in any case requires a detailed statement of issues from the parties and may require an opportunity to reply to one another several times. In this case the parties took advantage of that opportunity more than once. The process enables the Board to identify where there are disputed facts that are likely material to the decision and hence require oral evidence for the resolution, and those where there is no difference, or no material difference between the parties. That assessment is one that may change over time and requires constant reassessment of the panel hearing the case.

31. A consultation process also requires that the parties focus early on in their case as to what facts they rely on or wish to establish. They must be able to identify the documents or witnesses they wish to call and what those witnesses will say. That requires an extensive opportunity for documentary discovery. Any document relevant to the issues and proceedings will be produced and they were in this case. (There is one evidentiary issue dealt with below where the local unions say they were deprived of the production of relevant documents.)

32. In this case I did permit the local unions to call oral evidence. In the decision of November 1, 2010 at paragraphs 17 to 42, I concluded:

35. Predicting the future is inherently uncertain. The applications refer only to the belief of the Local Unions that this will happen. In paragraph 19 of the application of Local 1739, the applicant states:

Equally important is the structure of the industry in Toronto. Most large electrical contractors have a large permanent workforce. With total mobility there will be little if any need to utilize the hiring hall of Local 353. In lean times it is more practical to impose a temporary layoff and simply to recall those temporarily laid off rather than use the hiring hall. In busy times, crews can be scheduled to minimize new hiring. The large contractors will be able to solidify the industrial model and use the hiring halls only for unusually large jobs. With the rights to name hire 50% of their employees the hiring hall of Local 353 becomes less and less important to the contractors. The chances of Local 1739 members actually been hired by these contractors are remote and small; these members know this.

36. There are no facts on which the members are said to “know this”. The Local Unions wish to call witnesses, specifically the two business managers of the two Local Unions, to testify to this issue. However, there is no indication of the factual basis on which they will seek to base their conclusions or any indication of what evidence they would give to address any factual issue.

37. Given that this case involves the merger of two smaller Local Unions into a much larger third Local Union, I conclude that it may be of value to hear this oral evidence from the two Local Unions. Each of the applicant Local Unions will be permitted to call one witness each, presumably the business manager of the Local to give evidence on this point only. However, given the lack of any factual particulars, the following conditions apply:

1) Local 894 and Local 1739 will provide a will-say statement with respect to the evidence that the two witnesses will give so that the other parties will know the case they have to meet on a factual basis. The will-say statements must be filed **on or before November 26, 2010**.

2) Time limits may be imposed on examination in chief and cross-examination for each of the two witnesses. It is impossible to say whether that will be necessary before seeing all of the will-say statements. Local 353 in particular may find its cross-examination severely limited.

3) If, following the receipt of the will-say statements, either International Union or Local 353 seeks to call a witness to give oral evidence in reply, the same conditions will apply to those witnesses. These will-say statements, if any, must be delivered **on or before December 22, 2010**.

33. While I did not realize it at the time, this amounted to an open-ended invitation to add any fact or statement to the will-say statements and ultimately to the oral evidence from the two declarants.

34. When the production of certain financial records of the intervening union, Local 353, was not made in a timely fashion, I cancelled three days of hearings on the motion of the two Local Unions. The cancellation of these days was effected despite the fact that the Local Unions ought to have been asking for the documents that should have been produced long before they were. They stated they wished to consider whether or not the addition of those documents to the record was something about which the two witnesses, who were to give oral evidence, had anything to say. In the end, they had very little to say about the financial statements in oral evidence (and did not add to their will-say statements), but it was still appropriate to adjourn those dates to ensure that the Local Unions had the opportunity to consider what other evidence they might wish to lead in response to those documents.

35. This process does reduce, and hopefully eliminate, the ability of a party to add to its case as it goes along. There is no inherent virtue in a disorganized hearing process, or litigation by ambush, much as both of them may have a particular tactical appeal.

36. Aside from a degree of organization, the process enables the parties and the Board to look at what is and what is not in dispute in this case. For example in this case, the International Union relied heavily on a report commissioned by the International Union from Mr. Tim Armstrong. Mr. Armstrong retained an economist, Mr. John O'Grady, who prepared certain statistical information and summaries. From these summaries, and from interviews with the persons identified to him as relevant parties, Mr. Armstrong arrived at certain recommendations to the International Union. The Local Unions disputed both the statistical analyses and the conclusions drawn. In response to a request for production of the data that underlay this statistical analysis, I ordered production of all of the raw data. The Local Unions had the data analyzed by an economist, Mr. Hugh Mackenzie and another organization, Strategic Insights. This led to a series of reports, responses and counter responses. Having reviewed all of them, I concluded in the November 1, 2010 decision that it was not necessary to hear oral evidence from the economists. That they had nothing more to say was evident from the number of reports filed. There were a number of other evidentiary matters that arose during the hearing of oral evidence that are dealt with below.

Evidentiary Rulings

37. During oral evidence the issue of process arose in a number of instances. I review some of these evidentiary rulings at this point, not because they are of significance in themselves but because the issue of process was so significant in the argument of the Local Unions. The first witness was Mr. John Gillette, Business Manager of Local 894. In chief he was asked about what conclusions he drew from the financial statements of Local 353 produced after the March 23, 2011 decision and filed by Local 353 in these proceedings. Counsel for the International Union objected to that question on the grounds that there was nothing in his reply will-say statement about it. That statement was filed after the financial statements have been produced. I ruled that the question was proper since Local 353 could hardly be permitted to file documents and call oral evidence on those documents to which the Local Unions could not reply in presenting their own case.

38. In the cross-examination of Mr. Gillette, counsel for the International Union sought to cross-examine him on the basis of certain documents in the International Union's response. Counsel for Local 894 objected on the grounds that it was not referred to in Mr. Flemming's will-say statements. I ruled that he could be cross-examined on it since the documents were clearly before the Board. Counsel for Local 894 responded "you are making up the rules as you go along. There is no evidence about this in Mr. Flemming's will-say statements. You are making up the rules, I'm trying to follow them but I don't understand them." I permitted the cross-examination to proceed.

39. At a later point, counsel for the International Union asked Mr. Gillett questions about the practice of Local 353 in permitting the layoff of employees in certain circumstances (payment of the health and welfare and pension premiums) without requiring those members to return to the hiring hall list, and Mr. Gillett's view of this practice. Counsel for Local 894 objected on the basis that this was not in Mr. Flemming's will-say statement. I ruled that the question was a proper one because it was cross-examination on a subject covered in examination-in-chief without objection. The same objection and the same ruling were made much later when counsel for the International Union sought to cross-examine a statement made by Mr. Gillett in his testimony in chief which had not been included in his will-say statement about his expectation that the membership of Local 894 would double or treble in 5 to 7 years.

40. During the examination of Tom Leduc, Business Manager of Local 1739, counsel for the Local Unions asked a question about how he had come to certain conclusions about a meeting that was called to implement the mergers that had been ordered. The International Union objected to the question. I asked counsel for an explanation as to why the issue had not been raised in the pleadings and will-say statements. Counsel replied: "OK, I am moving on from that if you don't think it's relevant, well I suppose you think nothing is relevant". I asked counsel to identify the basis on which he sought to pursue that line of questioning. He replied: "you make your own rules, it doesn't matter, if you're going to and if you don't care it doesn't matter. If you don't let them speak it is up to you". He then said he would address the same issue later. I was not therefore required to make any ruling.

41. There were three other evidentiary rulings that were of somewhat greater significance during the cross-examination of Mr. Flemming and I deal with them at the appropriate point in this decision.

Documentary Evidence

42. The Local Unions argued that the process left them uncertain as to what was and was not "evidence" for the purposes of these applications on several occasions. I did not and do not accept that submission. There were a great number of documents filed in these applications. No party challenged the authenticity of a single one of them. No party suggested at any time that the documents were deliberate misstatements of what they purported to record. That is, correspondence was sent and received as indicated by and to the parties whose names appear on the correspondence. The collective agreements and the trust fund documents were true copies of what they purported to be. The financial statements were accepted as the financial statements of the three local unions and the various trust funds for the years indicated. The reports of Mr. Armstrong and Mr. O'Grady were based on a summary and an analysis of certain other documents created in part by the three local unions. All parties had copies of all of those primary documents and no party asked them to be put before the Board. The expert reports are, of course, reports of those who composed them.

43. There was some question about the "minutes" taken during what the International Union called the Implementation Meetings in January of 2010. The author of those notes was not called as a witness. However, Mr. Flemming, Mr. Gillett and Mr. Leduc were all present at the meeting, and were all cross-examined on them.

44. Counsel asked repeatedly what status the documents had before the Board. I replied on each occasion that they were all documents before the Board and would be treated as true copies of what they purported to be without formal proof of their identity. Any and all of them would be given whatever weight was appropriate. At one point counsel for the Local Unions asked that certain documents be noted as exhibits (the three that were attached to his clients' will-say statements). I agreed to do so for ease of identification, but added that it made no difference in itself to the weight or value of the documents. After three documents were marked as exhibits, no one asked to have any the other documents marked as exhibits and all parties referred to a document filed in whatever manner they chose.

The Merits of the Applications

The Commencement of the International Union's process - Motive

45. The Local Unions allege that the genesis of the merger was a desire by certain large contractors based in Toronto to have complete and unrestricted mobility within the geographic area of the Local Unions and Local 353. It was, in their view, a decision on the part of the IBEW to "cave in" to the demands of these large contractors. They accuse the International Union of getting a poor deal as they received nothing in return for agreeing to this demand.

46. The difference between that statement and Mr. Flemming's evidence is more a matter of a rhetorical colour than of anything of substance. When asked in chief what had prompted a review of the situation of Local 353 and the two Local Unions, he said there were two things that caused him to do so: a review of the membership ratios compared to population (a very approximate measure of market share explained below) and complaints by large Toronto contractors about their desire to take their crews of Local 353 members into the geographic area of the two Local Unions. Mr. Flemming did not testify that he regularly reviews the membership ratios of local unions in Ontario or Canada (although he apparently receives those reports regularly) or that he had been noticing any changes among the ratios of the three local unions for any period of time. I conclude that the first time he began to consider the status of three local unions was at the instance of one or more of these large Toronto contractors. Certainly the Bank of Montreal project referred to in *IBEW local 1739 v IBEW and Guild Electric*, [2006] OLRD No. 1285 no doubt led to insistent and urgent demands on the International Union: in that case the International Union took control of the job from Local 1739. No doubt it was not the first or last time that Mr. Flemming received such complaints. The Local Unions filed a newsletter of the Electrical Contractors Association of Ontario ("ECAO") in which the executive vice president, Mr. Eryl Roberts, said in part:

These new markets are perfect for all ECAO electrical contractors, but require a different approach to performing the work if we, the mainstream contractors, are to be competitive against the non-union specialty firms. Opportunities to change strategic directions like this don't come along very often. The challenge for us will be to ensure that our labour pool and labour relations are assets, not liabilities, as we try to participate in this work.

Enhanced mobility makes the list of required changes due to fundamental shifts in the Ontario economy and contractor businesses.... The preferred solution is the amalgamation of local unions and a corresponding reduction in the number of area ECA's, but this is too long-term for consideration before 2010. As an alternative, full mobility makes sense and may even make the need for amalgamation irrelevant.

47. Given the tenor of this entire article, there is no doubt that the ECAO had been asking for that sort of thing for some time and in more locations than just Toronto. While Mr. Flemming said that he was not aware of this particular article, he testified that he was certainly aware of the contractors' complaints of this sort.

48. I accept the Local Unions' proposition that the genesis of the merger decision lay in the complaints of these contractors. There is nothing *per se* wrong with that. As the Board said in *Labourers' International Union of North America*, 2000 CanLII 12252 (ON LRB), (which was never litigated to a conclusion), where the Board was dealing with a challenge to the alteration of geographic jurisdiction of a local union, of sections 147 and 149:

8. The “Bill 80 amendments” were added to the Act in 1993, and focus on the internal affairs of *construction trade unions*. Those amendments do not foreclose a sensible restructuring of such unions to meet the collective bargaining challenges that they face. Construction trade unions are not frozen in the form that existed at the time that the statute was amended. Nor do local minorities have a statutory veto over trade union reorganization. On the other hand, the Bill 80 amendments do require a parent union to have “just cause” for any proposed changes, and prevent a parent union from using its institutional or constitutional clout to penalize Local unions that question the parent’s authority, or seek to preserve their local autonomy.

9. The Board’s job, therefore, is to balance these competing factional and institutional concerns, within the framework provided by the statute.

10. On the surface, Bill 80 appears to be about internal union affairs. But as this case illustrates, there may also be an impact on the allocation of work opportunities, as between groupings of union members. Moreover, employers may have an interest in these issues as well, because under the existing collective bargaining regime, employers are typically obliged to deal with whatever local union has jurisdiction in the geographic area in which the employer is operating. There is a province-wide scheme of ICI collective bargaining and there are often extended-area agreements in other sectors as well; but quite a bit of business is still carried on between individual companies and local unions – however those local unions are structured or restructured from time to time. So employers have an interest in the clear identification of the union entity with which they must interact.

49. There is certainly nothing wrong with a union that is prepared to listen to the complaints and issues of the employers with which it bargains. It is not evidence of bad faith to do anything other than take an uncompromising stance rejecting each and every demand and complaint of the employers with whom the union deals, even in circumstances where a parent union considers internal structural change to the union.

50. In response to questions in cross-examination Mr. Flemming said that when some of the contractors told him that they were not bothering to bid on large jobs in the area of the two Local Unions, he felt the need to investigate and respond. He also testified to his unsuccessful attempt to persuade one contractor, OZZ Electric, to bid on the Royal Victoria Hospital Project in Barrie. Not only is there nothing wrong with doing that, he was correct in doing so. As Mr. Flemming said, if contractors do not bid the work they do not get it. If they do not get it no member of the union will be working for them on the job. After all, the two largest hospital projects in the recent past in Simcoe and Muskoka (the Royal Victoria and Parry Sound Hospitals) were performed by non-union forces.

51. He testified that he did not regard responding to complaints by contractors as simply placating them. If they presented what he thought was a legitimate issue, or their complaint was indicative of a greater problem, then it was up to him to address that greater problem. The important question for him was whether the problem was a problem for the IBEW, not for contractors. When it was suggested to him in cross-examination that he had given in to a demand from contractors for greater mobility, he responded “it’s not about placating them, it’s about market share”. He denied he was looking for anything from the Toronto contractors in response to the decision to merge the Local Unions with Local 353. Similarly he responded at another point that the Local Unions “thought that this was about greater mobility. It is not. It is about

increasing the market share and increasing the numbers in the two jurisdictions [of Locals 894 and 1739]. It's hard to be three jurisdictions and do it together. [Without a merger] things would be the same."

52. His actions and his evidence given in the stand indicate that he did not simply do as contractors asked him to do. He looked at his own "rule of thumb" ratio measurement. It is a rule that he described as merely a rough guide. It assumes that the need for electricians in any given area is relatively constant, such that there should be an average of 2.5 electricians for each thousand persons in a given geographic area. A union that represented every single electrician in the area would have a ratio of 2.5 electricians per thousand population. This is an unrealistic objective, of course, but the size of the ratio is a rough guide. He said that he reviewed the ratio of the three local unions and noticed a large difference between Local 353 and the other two Local Unions.

53. While Mr. Flemming was not asked what those figures were, Mr. O'Grady in his report had done a quick calculation based on census data and membership evidence received from the three unions. While this is not very precise even as a rule of thumb since he used 2006 Census data and 2008 membership data, the ratios he arrived at were 1.6 for Local 353 and 0.51 for each of the two Local Unions.

54. Mr. Flemming did not act on the basis of the difference in ratios and contractor complaints. He took the further step of seeking an outside study to determine whether or not the complaints of contractors and the conclusion his rule of thumb yielded were correct.

55. The Local Unions spent much time in cross-examination and in argument asserting or attempting to prove that the entire process was merely giving in to contractors with no mutual benefit in return. I accept that the complaints of contractors played a large role in the genesis of Mr. Flemming's decision to undertake an examination of the state of affairs among these Local Unions. As noted, I do not accept the argument that there is something wrong with that. Whether Mr. Flemming was ultimately correct or not is a different matter, but responding to and assessing the validity of complaints and reviewing the performance of local unions is hardly an act that demonstrates a lack of just cause or of good faith.

56. Mr. Flemming retained Mr. Tim Armstrong, an independent expert in the field of labour relations to study the issues that concerned him. The Local Unions took an ambivalent attitude towards Mr. Armstrong. Initially their position was that he had been hired simply to justify a decision already taken by the International Union. During the argument about whether or not he could be called as a witness, the Local Unions described him as a respected and honest individual who came to the wrong conclusion based on the allegedly limited data he had before him. All this is beside the point. Mr. Armstrong did not make the decision; he made a recommendation. That was based on certain factual conclusions which Mr. Flemming accepted. Whether or not the factual conclusions stand up to analysis is the subject of a later part of this decision. Whether the facts support the reasons, and whether the reasons behind Mr. Flemming's decision are valid, is a matter of argument.

57. In fact, the Local Unions themselves raised a concern about Mr. Armstrong's impartiality with him at their first meeting. At their suggestion he retained Mr. O'Grady to compile the statistical data so that there would be no question of bias. As Mr. Armstrong says in his report at paragraphs 44 and 45:

At the initial meeting in Mr. Pender's office on July 6, 2009, the suggestion was made by both Mr. Pender and Mr. Gillette, with no disagreement from Mr. Leduc, that Mr. John O'Grady of Prism Economics, a highly-respected economist with very extensive experience in construction industry analyses, be retained, as Mr. Gillette put it, to ensure that the information and the data collected were both accurate and independently analyzed. I communicated this request to Vice-Pres. Flemming and in due course obtained his consent to secure Mr. O'Grady's agreement to perform this data collection and analysis function.

In meetings with Mr. O'Grady to describe the initial requests that I had made it to the Local unions for information, we refined and augmented the detailed requirements, and a letter from Mr. O'Grady to the three business managers was finalized. ...

There was no factual dispute about this recitation of events.

58. The Local Unions alleged that Mr. Flemming retained Mr. Armstrong because he perceived Mr. Armstrong generally to be in favour of the amalgamation of local unions and larger scale union structures. That may be. Mr. Armstrong himself says that in light of his experience in preparing reports for the United Association (in the Toronto area) and for the Carpenters' Union (over the entire Province) he had come to believe that consolidation of local unions and a larger scale union organization were generally a good thing. He came to that conclusion in this case as well.

59. There is nothing wrong with seeking advice from an expert whose views generally correspond to one's own. A recommendation for merger from someone known to be hostile to any change of any sort in any union structure would certainly be more significant, but it does not mean that this is the only sort of expert opinion with any weight. In the end the question is whether the factual analysis stands up.

60. What is more significant is the fact that the Local Unions were given all of Mr. O'Grady's data for analysis. The reports of Mr. Mackenzie and Strategic Insights are filled with criticism of Mr. O'Grady's approach and Mr. Armstrong's conclusions, and about the uses that can be made generally of the data. Neither presents any sort of analysis to suggest that the current structure is strategically best for the IBEW, or that it produces a greater benefit for anyone other than the members of the two Local Unions. Their "reply" to Mr. Armstrong and Mr. O'Grady is simply an assertion of the benefit of the current structure to members of the two Local Unions. They did not attempt to suggest a contrary view over the wider scope of the entire union. There is nothing wrong with putting forward the case of the benefits of the current structure to the two Local Unions. Indeed Mr. Flemming would have been well advised to pay more attention to them when the time came to making a decision. However the fact remains that the two Local Unions made no attempt to produce a better or contrary report to that of Mr. Armstrong about the Union as a whole (or that part of it that is represented by the 3 local unions) in the 21 months between the filing of these applications and the commencement of the oral evidence.

61. The Local Unions also spent some time attempting to demonstrate that the merger was in Mr. Flemming's mind when he retained Mr. Armstrong. That is not disputed. Mr. Flemming said that the word merger "may have been used" in his discussions with Mr. Armstrong, which is a rather striking understatement on his part. It was certainly part of the demands and complaints of Toronto contractors to Mr. Flemming. This was or should have been no particular surprise to

the Local Unions. Mr. Leduc said in his evidence that nothing was ever said about merger in the discussions with Mr. Flemming and Mr. Armstrong but that he suspected it was on the agenda. Mr. Leduc testified that he had a conversation in 2007 with Mr. Flemming in which Mr. Flemming asked him to consider a voluntary merger with Local 353. He did not give the context but it was not likely a passing fancy. In fact Mr. Armstrong's first letter to the three local unions, (attached to Mr. Flemming's letter of June 24, 2009) and indeed filed by the applicants with their applications lists a large number of areas for discussion including:

Would greater access to name-hiring and expanded mobility rights increase the volume of work and/or the competitiveness of organized contractors and contribute to the growth in union membership and employment? If so, how could this best be achieved (e.g., through restructuring, amendments to the collective agreement, etc.?)

That idea did not come out of the blue, but surely there are no forbidden areas of thought for a local trade union or for an International Vice President.

62. In addition to the statistical analysis compiled by Mr. Armstrong and Mr. O'Grady, Mr. Flemming relied on his sense of the different "cultures" of the three local unions, discussed further below. This is a more qualitative judgment, based in part on the Armstrong Report but primarily on his own observations.

63. Finally, the Local Unions submitted that the International President of the IBEW, Mr. Ed Hill, ought to have been required to testify and indeed offered to call to him as their own witness. Pursuant to the IBEW Constitution, any decision to merge local unions must be made by the International President. I declined to hear oral evidence from Mr. Hill as the evidence would not be material. It is evident that the entire process was undertaken at the insistence and desire of Mr. Flemming. It was he who heard the complaints of contractors and performed his own analysis of union membership ratios. It was he who decided to retain Mr. Armstrong to examine the state of the three local unions. He persuaded Mr. Hill to pay for the report, and for Mr. O'Grady's additional reports. It is he who recommended that the merger take place. Before Mr. Hill would approve the merger he requested Mr. Armstrong and Mr. Flemming to fly to Washington to put their case to him. The decision he made could only have been a reflection of Mr. Flemming's recommendations and conclusions. Mr. Flemming was of course in the stand and was cross-examined at great length.

64. Had the Local Unions had the opportunity to examine or cross-examine Mr. Hill I have no doubt that they would have been able to demonstrate that Mr. Hill had a less exact or detailed knowledge of the situation than Mr. Flemming. That is usually the case when the titular decision maker relies on the judgment of someone who is the effective decision maker. The motives of Mr. Flemming are not really in dispute, although the colourization attached to them by the Local Unions is different. Finally, it is always theoretically possible that the Local Unions might have discovered some hidden agenda that they had not even guessed at before. The purpose of oral evidence is to prove facts alleged, not to engage in a fishing expedition through uncharted waters.

Evidentiary Issues

65. There were two issues that arose during the cross-examination of Mr. Flemming, the first about raising a new issue in the case and the second about the production of a document.

66. In the cross-examination of Mr. Flemming, the Local Unions established that there were annual reports of membership for all local unions in Canada and the United States (although the form of the document was different in the United States for statutory purposes), and perhaps the “rule of thumb” ratio of membership to general population, for each year up to 2008. The Local Unions sought production of those documents. I refused the production for two reasons. First the request would lead to unreasonable delay. The documents were not in the hearing room and could not be obtained at a moment’s notice. To seek them on the second day of cross-examination would cause a delay in the proceedings. Delay is always a serious consideration, particularly in an application under section 147 and 149. As the Board said in *Labourers’ International Union of North America*, cited above:

11. In this context, it is quite important that “Bill 80 cases” be resolved expeditiously, so as not to interfere with ongoing collective bargaining needs – particularly in an environment in which economic activity and employment are transitory (i.e. employers and employees move from job to job or area to area in accordance with the vagaries of the marketplace). Indeed, the very structure of section 147 suggests that complaints which cite that section be resolved quickly, because section 147(5) undoes the organizational changes under review, until the Board has had an opportunity to consider the challenge – regardless of the ultimate merits of that challenge. In other words, the mere filing of a complaint prevents or reverses the organizational changes or actions initiated by the parent union, even if it ultimately turns out that they were entirely justified; and given the fluidity of the construction industry, it is not at all clear that the Board can (or should) redress the consequences of a challenge that turns out to be unfounded. Accordingly, it is desirable for the Board to deal with Bill 80 complaints as expeditiously as its resources permit.

67. More importantly, the basis of comparison of the performance and market share of local unions had been, up to that point in the case, focused exclusively on the three local unions in question. It is not appropriate to seek production of documents irrelevant to the case pleaded in an attempt to prove a new and different basis of comparison that had not been alluded to in any way before. Mr. Flemming was in cross-examination and would have had difficulty responding to what is in fact a new issue. He would be limited if not prohibited from speaking to counsel about what other facts and other documents might be relevant. It was simply not appropriate to add a new issue at that time.

68. Towards the end of cross-examination, the Local Unions sought to introduce a document and asked Mr. Flemming to confirm its contents. I did not see the document but was advised that it was a statement of union membership levels in all local unions in Ontario. I do not know if it referred to more than one year. I ruled this was similar to the production sought earlier and that the end of the third day of cross-examination was not the time to raise a completely new issue. Counsel for both Local Unions demanded to know “right now, on the record, when was the last time I ought to have been able to raise this”. I replied that I did not need to identify that time since it was too late at this point and that was all that was necessary to decide to make a ruling.

69. The final issue is more difficult to deal with. During the cross-examination of Mr. Flemming, the Local Unions asked about communication between Mr. Flemming and Mr. Hill, the International President, before the merger decision. Mr. Flemming testified that he had produced a written report to Mr. Hill which was part of his presentation to Mr. Hill seeking his approval of the merger. This is part of the presentation he made with Mr. Armstrong when

they attended in Washington. The Local Unions requested an order that the document be produced.

70. One of my concerns was the potential for delay. The Local Unions argued that they had previously sought production of such documents (without, of course, knowing what might actually exist) and that I had refused. I did not agree with this submission at the time it was made during cross-examination and I continue to be of that view. Counsel's letter of March 28, 2011 (to which he referred in argument) begins its list of requests with the phrase:

All documents respecting the relationship between T. E. Armstrong and/or J. O'Grady or their respective consultancies *on the one hand* and the IBEW its officers, counsel and representatives *on the other...*

[emphasis added]

71. This request did not seek production, in my view, of documents internal to the International Union. Rather it sought production of the communications between the International Union on the one hand and Mr. Armstrong and Mr. O'Grady on the other. If I am wrong about that, it was certainly what I said at the time. In the decision of April 28, 2011 I said:

The retainer

6. The Local Unions ask for production of "All documents of any kind respecting the relationship between T. E. Armstrong and/or J. O'Grady... and the IBEW and its officers that resulted in the Armstrong Report, including...". These documents are not arguably relevant. The Local Unions have alleged bias but have provided no real particulars of it.

7. The only suggestion of a basis for the assertion is the comment that TEAC has produced reports for other international unions that have recommended or been the basis of a recommendation that locals be merged. To attack a report by looking at the consultant's other clients proves nothing, any more than comments about what types of clients a lawyer represents provides any comment about the lawyer. Members of the criminal bar are quick to point out that no such inference can be legitimately drawn.

8. In the end, the report stands or falls on its own merits. The Armstrong Report suggests that the field of social psychology has identified certain characteristic responses to change or the prospect of major change: see paragraphs 35 to 38. It is also true that those who are retained to look for something will focus on that issue, and that such a focus may distort the final picture. The question is whether the result was an accurate and complete reflection of the reality that TEAC set out to examine. That depends on the evidence the Local Unions wish to present, not on the initial retainer. The documents sought are not arguably relevant to an issue pleaded in the applications.

72. No reconsideration of the decision was sought. The Local Unions did not at that time assert that I had misunderstood this request or read it too narrowly, nor did they attempt to redefine the request exclusively to matters internal to the International Union.

73. There is no question that the Local Unions did not know of the existence of this document before Mr. Flemming described it in his evidence. It would be difficult to describe it as a surprise however. Counsel was asking reasonably straightforward questions about what might

or might not exist, in the manner that one would start examination for discovery. There is, of course, no process of examination of witnesses for discovery. There is however an extensive process of discovery of documents, and these proceedings were adjourned once because the documents were not produced in a timely fashion.

74. However, I found this request for the report troubling. Contrary to the argument of the International Union, the document is relevant, whether or not it is probative of anything. I declined to order production for two reasons.

75. First, the document could have been and should have been sought previously. Regardless of what anyone concluded before that time, in the March 23, 2011 decision I stated that the hearing was not going to "go off the rails" again. That, combined with all of the earlier decisions, ought to have indicated to the parties that it was now time to focus what they wished to include and what they expected to see in their case, including any other documents that might exist for which production might be sought. It was certainly not an invitation to wait until cross-examination to turn their minds to what else might exist and to ask for them at that point.

76. That by itself might not have been a reason to refuse production, however. The question is also to what end the document might be put. The Local Unions sought to demonstrate that Mr. Flemming was motivated by the complaints from large Toronto contractors and that he had merger in mind before he even retained Mr. Armstrong. By that point in his cross-examination, these issues were not really in dispute. A document that would only prove what was already evident was not material to the decision the Board was required to make.

77. The only other potential significance of the document is that it might have disclosed some heretofore unidentified and unsuspected motive on the part of the International Union. There is no reason to expect that this is at all likely. It is merely possible. Accordingly, the request was only material if the Board was prepared to permit the Local Unions to engage in a rambling and unfocused search during cross-examination for some other case other than the one which they had pleaded. I declined to do so.

The Armstrong Report

78. Much was made of the Armstrong Report by both the International Union and the Local Unions, and particularly the process by which Mr. Armstrong gathered information and how it was analyzed. In my view this was somewhat misplaced on both sides.

79. The Local Unions reviewed the process by which Mr. Armstrong and Mr. O'Grady gathered information and attempted to demonstrate that the process failed to meet some of the rules of natural justice for statutory tribunals. This is not particularly helpful. Mr. Armstrong was not a statutory or consensual tribunal, nor was he making a decision. He was retained to prepare a report for the International Union which he delivered to the International Union for its own purposes. He owed no statutory or contractual duty to any of the local unions involved. It is evident that if the process were one that resulted in a situation where he did not gather all the relevant evidence or reviewed incorrect or misleadingly incomplete evidence, his findings and recommendations would be of less value. Logically any decision made on the basis of those findings and recommendations would be commensurately less defensible. As will be seen below, the findings compiled by Mr. Armstrong and Mr. O'Grady did not, in my view, suffer from the defects alleged by the Local Unions. To the extent that he draws certain factual or statistical conclusions, they are as reliable as such information can be.

80. The recommendations are based on a wider range of information than simply the statistical data and involved both deductive analysis and the application of Mr. Armstrong's judgement. The Local Unions conceded that on the basis of the information available to him, Mr. Armstrong's recommendations made some sense. In seeking to call Mr. Armstrong as a witness the Local Unions wanted to add to the information that he had and to dispute the conclusions to which he had come. Again, this goes to the value of his Report, which is a matter for the Board to weigh rather than for Mr. Armstrong to reconsider.

81. The International Union in argument placed, in my view, an excessive reliance on the recommendations made in the Report. Mr. Armstrong did not make the decision; the initiative to commence the investigation and the effective recommendation to President Ed Hill came from Mr. Phil Flemming. Ultimately the decision represents his conclusions about what needed to be done. What value he placed on the Report, and what he thought about the information and recommendations made by Mr. Armstrong, as well as Mr. Flemming's final decision, are what the Board will scrutinize.

Mr. Armstrong's Findings

82. Mr. Armstrong made both factual findings and recommendations based on those findings. The recommendations are discussed in greater detail below. However Mr. Armstrong does state at paragraph 54: "My recommendations, Section XV, are based on the findings set out in this section [section XIV]." Generally his findings were:

1. He drew no conclusions about the performance of any Local Union despite anecdotal evidence from certain contractors. He concluded that all three locals were making their best efforts with the resources that they had.
2. Membership growth was significantly greater in Local 353 than in the Local Unions.
3. The addresses of the members of the three local unions indicated that there were more members of the International Brotherhood of Electrical Workers living in the geographic area of the two Local Unions who were members of Local 353 than were members of the two Local Unions.
4. The market share of the two Local Unions was dwarfed by non-union contractors' share and was significantly less than CLAC contractors in significant areas of the economy.
5. Local 353's market share outperformed the other two, even taking into account the effect of the subcontracting obligations of a number of general contractors in Board Area 8.
6. Organizing and the use of stabilization funds to obtain work has led to a greater market share in Local 353's area than in the other two, despite the best efforts of Local 894 in organizing and the use of stabilization funds.

83. Based on these findings he concluded that the IBEW had a "competitive crisis" in competing with CLAC and non-union forces in the area of the two Local Unions, despite best efforts of both the Local Unions. For the reasons he sets out in his report, merger of the three local unions was the appropriate solution that he saw, although he does not address the details of how it should be done (see paragraph 86 of the Report).

84. The Local Unions dispute all of the statistical findings, which are based on the conclusions drawn in Mr. O'Grady's appendices to Mr. Armstrong's report, and the conclusions drawn from them. It is necessary to address each one.

Expert Reports

85. The Armstrong Report contained a number of appendices that were statistical analyses created by Mr. John O'Grady, of John O'Grady Consulting Ltd. Locals 1739 and 894 filed a number of expert reports in response to that statistical analysis. Two of them were prepared by Hugh Mackenzie and Associates. Both Mr. Mackenzie and Mr. O'Grady are widely recognized experts, both in the field of academic publications and practical consulting work that involves the use of statistical analysis. Both the Local Unions and the International Union referred extensively to the comments made by each of them in their various reports. I accepted those reports as reports of experts and will refer to them in detail in this decision.

86. Local 894 also filed a number of reports from a company named Strategic Insights Inc. In all of their reports the only description of the expertise of this company (but not the individuals who created these reports) is contained in a copy of a PowerPoint presentation which lists them as follows:

A consulting firm that has steered between \$5 million to \$250 million in new opportunities to our clients in the energy and infrastructure sectors

High-level government and industry connections in Ontario in the energy and infrastructure sectors

Experience, tools and resources to:

- conduct performance evaluations, market analysis and competitive intelligence
- assist companies and unions achieve their objectives

87. It lists as the advantages of working with Strategic Insight as:

- The Trust Factor:
key government players and executives of energy, infrastructure and manufacturing companies know and trust Insight's expertise and pay attention to our advice.
- We're Already Plugged In:
SI has a strong knowledge of the current state of play of Ontario energy and infrastructure issues. We know what perspectives will influence companies and governments.
- Skills Expertise in Analysis:
trained in market/competitive analysis by ex-CIA officers.

88. Beyond this there is no particular explanation of any expertise in terms of academic or practical work. One does not like to be impolite about reports received from a party that obviously finds the reports of value and has spent some time preparing. However, the purpose of a report from a third party is not to provide another means of putting forward a party's case. If the party held forth as an expert witness has no expertise, its comments are simply those of any third-party observer.

89. Much of the content of the first two reports from Strategic Insight repeated the evidence given by Mr. Gillett in the stand, or made submissions that were made, and frankly were made much better, by counsel for Local 894. For example it made a number of submissions with respect to a lack of "Due Process" on the part of the International Union. Strategic Insights does not claim to have any legal expertise as a basis for making their submissions.

90. Strategic Insights attempted a number of statistical analyses, particularly in its second report (the "Final" report dated October 14, 2010) which I found to be of no value at all for the reasons set out in Mr. O'Grady's response dated January 8, 2011. With all due respect, the continuing series of reports from Strategic Insights after that date (January 24, 2011, March 10, 2011 and July 14, 2011) and Mr. O'Grady's response to them dated June 28, 2011 demonstrate the wisdom of providing counsel involved in arguing a case before the Board only one right of reply each.

91. I am sure that Local 894 found the Strategic Insight Reports to be of value in formulating and focussing their case. They are not, however, submissions on which I can place any weight.

Membership Growth

92. The numbers here are not in dispute since they were provided by the local unions themselves. The only criticism of Mr. O'Grady's conclusions was that the time periods during which the three local unions were compared was different, presumably because of the data supplied. That is easily remedied by looking at all three local unions for the same time period. The Local Unions pointed out that to do that would not examine the membership changes in Local 353 during the early part of the decade when there was a recession. If Local 353's membership had declined during the recession, that would simply make its subsequent rise even more impressive, so it does not strike me that this criticism is particularly helpful.

93. Of course, Mr. O'Grady did not base his statistical analysis and recommendations on a comparison of identical time periods, and hence the figures below were never provided to Mr. Armstrong or Mr. Flemming. However the figures obtained by comparing identical time periods are either identical to the results to which Mr. O'Grady came or put Local 894 in a worse light. The figures for 2004 to 2009 are:

Local Union	2004	2009	% change	O'Grady's numbers
1739	209	246	+17.7%	+17.7%
894	569	532	- 6.5%	+22.8%
353	6,234	8,482	+ 36.1%	+36.1%

94. Mr. O'Grady and Mr. Armstrong compared those figures with the population growth in the areas. In the case of Local 1739 they concluded that growth in membership had not kept pace with the general population growth. Membership in Local 353 had grown 36.1% over five years compared to an annual population growth of 2.0%. No comparison was done for Local 894 although Mr. Armstrong noted that the membership had declined over the previous 4½ years. In summary, only Local 353 was maintaining a growth of members that corresponded to the growth of the population (and hence the need for electrical services) in their area.

95. One other area was analysed which is also a measure of the "health" of the local unions, that is the number of hours worked by those members over a 5 year period. Local 1739 shows an increase, although the figures obtained from the IBEW-CCO (based on their remittances) is higher than the figures provided by Local 1739. Those hours increased either from 239,000 to 405,475 (IBEW-CCO) or from 284,384 to 351,837 (Local 1739). In either case this was an increase in "hours per member" on an increasing membership base. The increase is greater than could be accounted for by an increased membership. Local 1739 did not offer any explanation as to why their figures differ from the IBEW-CCO. Local 894 suffered a decline in both members and hours worked from 2004 to 2008, although the low point was 2006. Local 353 showed, as indicated above, a membership growth of 36.1%, far in excess of population growth, and an increase in hours of 40.6%.

96. Mr. O'Grady's conclusion about the Local 353 figures was that "a sustained increase in both hours of employment and membership of this order of magnitude can only occur when market share is being gained." The same cannot be said for Local 894. Local 1739's growth has not kept pace with the population growth and the figures are unclear. It may be that this measurement demonstrates an increase in market share, although the final results of that market share are, as will be seen below, pallid at best.

97. Mr. O'Grady also quantified the "membership per thousand population" to derive the "rule of thumb" that Mr. Flemming had used. Describing his figures as an approximation, again based on figures that do not match in terms of time he concluded that the ratio of members to thousand persons of population was as follows:

Local 1739	0.51
Local 834	0.51
Local 353	1.61

98. That is, the ratio of Local 353 members to the general population in its area was three times as high as that of the other two local unions. However, Mr. O'Grady made no attempt to relate those ratios to the performance of the three local unions, presumably since he, like Mr. Flemming, considered that the ratio did not point to a single answer.

99. Mr. O'Grady made one finding that Mr. Armstrong relied on excessively. He compiled the figures for the number of times members of Local 1739 had travelled out of the local area for work purposes over the course of three, 3-year collective agreements. He concluded that during the 2007- 2009 period one third of the Local's membership had travelled outside the area of Local 1739 for the purposes of employment. He suggested that there might be a number of explanations for these figures, one of which was that the high proportion of travellers could raise questions about the Local's sustainability. He also offered a number of other explanations. Mr. Armstrong referred to that statistic at paragraph 84 of his Report, suggesting that it indicated an inadequate supply of work opportunities in the Local's area, and commented that travelling was not a useful growth strategy. Before one could draw any firm conclusions

about the significance of travellers from Local 1739, one would need to know how often the members travelled and for what period of time. One would also need to know the corresponding statistics for members of Local 353, particularly since it is their mobility that some Toronto contractors are most concerned about.

Organizing

100. This factor was not analysed particularly precisely. Mr. O'Grady notes that from May 2001 to July 31, 2009, Local 1739 was able to make only four applications for certification (all for the same employer) and only one resulted in a certificate. Mr. Armstrong recorded that Local 1739 had told him it had executed 23 Voluntary Recognition Agreement during the same time frame.

101. There are no statistics for Local 894. Mr. Armstrong simply says:

...I am satisfied on the basis of the material supplied directly to me by Local 894 as well as conclusions reached by O'Grady, that the Local is expending substantial efforts on organizing. Limitations on efforts in this regard relate to the fact that its revenues permit the engagement of only one organizer.

Local 894 did not provide the Board with whatever data it may have given to Mr. Armstrong nor did it provide any data at the consultation as to any results of organizing efforts it had undertaken. Mr. Armstrong's statement may simply be the result of Mr. Gillett's conversations with Mr. Armstrong. Mr. Gillett said that in response to that comment Local 894 hired another organizer, not because they expected the presence of another organizer to produce any result but because they wanted to show that they could afford to do so. His evidence was that the hiring of an organizer produced no results, which he blamed on the desire of the International Union to merge Local 894 with Local 353.

102. Mr. Armstrong found that Local 353 was in a different category. He said at p. 41:

[Mr. O'Grady] concludes that the vast majority of IBEW contractors in Ontario are resident contractors within Local 353's jurisdiction. From his description of Local 353's organizing activities he concludes that the preponderance of IBEW organizing in Ontario is done by Local 353.

Again this appears to be a reference to information supplied verbally rather than a statistical analysis. The only other evidence is that of Mr. Gillett who agreed that Local 353 had 9 organizers on staff, but did not think that more than 4 or 5 of them did real organizing work.

Members' Place of Residence

103. Mr. O'Grady came to certain conclusions about where the members of the three Local Unions lived. The figures are not disputed and are as follows:

IBEW Membership
Local 894, and Local 353 Living in Local 894's Geographic Jurisdiction

No. of Members in Local 894 (2008)	528
No. of Local 894 Members living Local 894's Geographic Jurisdiction	501
No. of Local 894 Members living Local 353's Geographic Jurisdiction	6
No. of Local 894 Members living Local 1739's Geographic Jurisdiction	1
No. of Local 894 Members living in other Locals' Geographic Jurisdiction	20
No. of Local 353 Members living Local 894's Geographic Jurisdiction (ICI)	1,133
No. of Local 353 Members living Local 894's Geographic Jurisdiction (other than ICI)	270
Total No. of IBEW Members living Local 894's Geographic Jurisdiction	1,914

IBEW Membership in Local 1739's Geographic Jurisdiction

Members of Local 1739 living in Local 353's geographical jurisdiction	2
Members of Local 1739 living in Local 894's geographical jurisdiction	3
Members of Local 1739 living in another Local's geographical jurisdiction	12
No. of Members of Local 1739 living in Local 1739's geographical jurisdiction	229
No. of Members of Local 353 living in Local 1739's geographical jurisdiction (ICI)	342
No. of Members of Local 353 living in Local 1739's geographical jurisdiction (other)	111
No. of IBEW Members of 1739 and 353 living in Local 1739's geographical jurisdiction	682

104. The issue is what significance this fact has. Mr. Armstrong and Mr. O'Grady's conclusion, upon which the International Union relies, concluded that most members of the IBEW living in the geographic areas of the two Local Unions have chosen to seek work in and through Local 353, not in and through the local unions that have jurisdiction over the areas in which they live. That is, the International Union asks the Board to conclude that the members do not see an employment benefit in seeking work through their home local.

105. Mr. Mackenzie comments:

The relationship between a member's residence and jurisdictional boundaries is completely irrelevant to the issue at hand, since jurisdictional boundaries are based on the location of the work, not the residence of the members. As far as the integrated labour market point is concerned, even if the point is conceded, is still to be demonstrated that a single local can function better in any greater labour market than three locals.

106. I am not sure what this means other than that the members of the IBEW living in the geographic area of the two Local Unions see greater work opportunities through Local 353, despite the fact that such work will often be at a greater distance from home to work for a member of the Local Unions. To some extent, as the Local Unions suggest, residence patterns may be explained by the cost of housing in Toronto. However the borders of Local 353 covered the entire Regional Municipalities of York and Peel and part of Halton Region (Halton Hills and part of Milton). It is those communities to which those who cannot afford the cost of housing in Toronto migrate. The explanation that housing costs are responsible for this pattern may have some validity in Durham just beyond the borders of the City of Toronto. The precise locations of the residences of members of Local 353 living in the geographic jurisdiction of Local 894 were neither produced by Local 353 nor sought by the Local Unions. The explanation about housing

costs was one advanced by Local 894, but is no more than a hypothetical possibility, and one that is unlikely except in one instance.

107. In a different context, the Local Unions put it more exactly. The Local Unions asserted that the fact that members of Local 353 live in the geographic areas of the two Local Unions did not create labour relations problems. IBEW members were clearly able to choose which local union they preferred and did so freely. Those who prefer to seek work through Local 353 have, as the Local Unions put it, voted with their feet (or more exactly with their cars). I agree. I would use the same phrase to describe the decision being made by these members. A majority of the IBEW members living in the geographic areas of the two Local Unions have concluded that they are better off economically in a distant local union other than the local union in whose jurisdiction they live. If one is to look to the membership as a source of information about the value of the two Local Unions in the area of providing job opportunities, the membership has spoken loudly and clearly.

108. This is significant given the organization of the IBEW. The 13 local unions that are parties to the Principal Collective Agreement are defined by geographic jurisdiction. They are not defined by sector or by the employees of a particular employer or utility, nor by a type of work. It is the function of the local union to promote and protect the interests of its members. Since geographic location is the only defining element of the local union's jurisdiction within the IBEW, one would expect to see at least generally that union members living in a geographic area would be the members that the local union is serving. In this case, the Local Unions do not serve the interests of most of the IBEW members living in their geographic area. Those members have chosen to look elsewhere.

Market Share

109. Market share was the most hotly contested analysis compiled by Mr. O'Grady. The analysis of the data that Mr. O'Grady consolidated and analyzed was criticized in reports from Mr. Hugh Mackenzie and from Strategic Insights. The Local Unions relied on Mr. Mackenzie's challenges to Mr. O'Grady's analysis as set out in his report. They made a much briefer reference to the six reports filed by Strategic Insights on behalf of Local 894.

110. In theory, the numbers to be arrived at involve very simple arithmetic. The task can be accomplished by assembling a list of all of the construction projects performed in a given area over a given time, determining which were performed by IBEW members and which by others and the ratio will demonstrate what percentage of the work each local union did. Addition and division are the only arithmetic operations that need to be used. However, the practical reality of obtaining those numbers is much more difficult. Obtaining data about all of the electrical work done in a year, and knowing the union or non-union affiliation of each contractor that worked on the project is difficult. The accuracy of the list of projects and the correctness of the identification of the union affiliation of persons who worked at the job, are major challenges.

111. The second question, assuming one arrives at a ratio that has some acceptable degree of accuracy, is what does it mean and why? Analysis, the conclusion about what the figures demonstrate, and what could be done to alter the patterns shown, is different from the task of assembling the data. Determining the cause of the present and making a prediction about the future is less precise, although we all do that every day of our lives. The difficulty with the reports of Mr. Hugh Mackenzie and some of the argument by all parties, was a failure to distinguish between the two.

1. How the data was assembled

112. Data with respect to construction activity in the area of the three local unions was collected from a database called Reed Construction Data. That is a very large, but by no means complete, list of construction projects in given geographic areas over particular times. These lists were then sent to each of the three local unions requesting them to do two things. First they were to "code" the projects of which they were aware in accordance with a standardized group of categories. These included IBEW resident Contractor; IBEW non-resident Contractor; non-union contractor; CLAC contractor; CUSW contractor; and CEP contractor. The 3 local unions were also asked to indicate if the project was incorrectly listed because the electrical work was not yet tendered; or there was no electrical work on the project; or it was not in the geographic area of the local union; or it was not covered by the Principal Agreement. The local unions were also asked to add any construction work of which they were aware which had not been recorded by Reed Data.

113. Mr. O'Grady did not suggest that the data produced results that reflected the exact market share of the three local unions. He produced charts for all three locals that showed the results from only the Reed Data plus the results from the Reed Data and the local unions' additions to the lists. He noted several times that the Reed Data did not track industrial projects reliably, and hence he had to add to the list of projects from Reed Data a second list compiled by the International Union. Finally Mr. O'Grady asked the Local Unions and Local 353 to supplement that with any other projects of which they were aware. He also noted in the Local 894 appendix that the Reed Data material may have miscoded some of the institutional and commercial work, although Local 894 had reviewed the list and provided some information where it was able (it was not always able to do so).

114. Hence the data has some flaws, and cannot be regarded as precisely accurate. Where possible, Mr. O'Grady sought confirmation from other sources of data such as the Ontario Construction Secretariat (drawing on the data of the Electrical Safety Association), one of whose functions is to collect data about the unionized sector of the construction industry. Those figures would not produce precisely accurate market share figures either, but they were confirmatory in the sense that they revealed the same trends.

115. The Local Unions, basing their argument on the reports filed in response, argued that the entire exercise was flawed. They alleged that it was completely unreliable because (1) it did not reveal Mr. O'Grady's methodology, and (2) failed to explain the weaknesses and limits of what the data might reveal. I accept neither of the Local Unions' arguments.

116. First, Mr. Mackenzie did not say that Mr. O'Grady's work was of no value because he did not explain his methodology. The portion of his second report in reply to Mr. O'Grady on which the Local Unions rely most heavily states:

It is evident from the report itself that the Reed Database is not complete, given the fact that the supplementary information added to the Reed Data added significantly both the number and value of the projects analyzed.

It is not clear how the IBEW data [from the International Union] were collected, and therefore it is not possible to determine whether or not there was a systematic bias in the identification of projects from the IBEW lists that were missing from the Reed data.

With respect to the two elements of the data assembly process that were in the hands of the locals, the material provided included the letter from Mr. O'Grady requesting that the locals review and code the projects in the Reed list according to a coding scheme proposed by Mr. O'Grady. *It is not clear from the material provided what methodology was used to comply with the request or whether or not the coding system was actually used.* What we do know is that none of the locals provided either annotated coding sheets or summary results for all of the code categories. No working papers were provided that would assist an outside observer in understanding how the information provided was interpreted for translation into the summary data provided in the report.

[emphasis added]

That is, he is talking about the methodology used by the three local unions in providing additional data to Mr. O'Grady. Obviously the two Local Unions knew what they did. If they provided no "working papers" then they know why. Their suspicions about Local 353 are dealt with below.

117. The same criticism is found in Mr. Mackenzie's first report at p.4:

These data were supplemented from two other sources: a list of major projects maintained by the IBEW at the international level; and information provided by each of the local unions themselves.

The data come from different sources. There can be no assurance that the process of winnowing and combining the lists for the purpose of the analysis was conducted consistently and reliably. Indeed, it is evident from Reed's description of its own data and from the amount of work that the local unions were expected to do to adapt the data for the purpose it served in the Armstrong Report that the base data were ill-suited for that purpose.

This is all very well, but Mr. Mackenzie did not say that the data from the International Union was incorrect, simply that he had no confirmation that the lists had been assembled in a manner that could be called "consistent and reliable." Had Mr. Mackenzie or the Local Unions been able to demonstrate a single error or omission from the International Union's list, this argument might have had some significance.

118. The second criticism (a failure to explain weaknesses) is simply incorrect. As will be seen below, Mr. O'Grady indicated frequently when data was inexact or unreliable and provided summaries that reflected different types of data to see if there were different results or different trends revealed by different data.

2. The value of the data

119. In his response Mr. Mackenzie argued that there was "no good model" by which to measure union density or market share of a particular union. He said at page 3 of the first report:

Eight years ago, one of the key recommendations of this major study was that the participants in the industry work together to develop a database and measurement tool that would enable the parties to measure reliably union density in the ICI construction industry in Ontario. To date, no such database and tool has been developed. Instead what we have in the current Armstrong report is a weak and incomplete dataset adapted from data sources that were not originally compiled for this purpose.

This argument is typical of much of the approach of the Local Unions. They asserted that the data assembled by Mr. O'Grady cannot be proof of anything because they do not meet the standard of the most rigorous academic models for statistical research. The fact that the real world produces different data from a controlled laboratory setting is true but does not lead to the conclusions that Mr. Mackenzie asserts. Indeed any attempt to gather data from sources other than a standard set of questions developed by statisticians and administered in a controlled environment will always have degrees of unreliability. That is no reason to write off the results as "completely useless". If that was the conclusion one wanted the Board to come to, surely it would be incumbent on the local unions to identify the data that was incorrect or how it would yield demonstrably false results. The position of the Local Unions appears to be that because the data and analysis were not perfect in a textbook sense, then it is impossible to know anything. On their view the only truly reliable information is from the business managers of the two Local Unions, who have an innate ability to know and understand everything that goes on within the geographic boundaries of their local union. I do not accept that proposition.

120. To be fair, Mr. Mackenzie does offer what he thinks might be a better way of determining the question of whether the merger of the three local unions can change the patterns identified by Mr. O'Grady. In his first report he says:

The only way to isolate the role of union structure from other factors would be to compare the IBEW's union presence with that of other unions whose structures resemble that recommended in the report. There may be other factors related to other trades that would make such a comparison difficult to make, however, all things being equal a data showing that union density was higher in the 894 and 1739 areas relative to the 353 area in other construction sector unions that were structured the way the report recommends would suggest that to be the case. No such data were presented. Accordingly even taking the data presented on face value, they offer no insight as to how IBEW's presence in Southern Ontario might be affected by the structural change being considered.

121. This is an attractive idea. Had the Local Unions undertaken such a study, perhaps relying on the International Union of Operating Engineers who work under a single Province-wide local, it might (or might not) have challenged Mr. O'Grady's conclusion. The Local Unions did not. The fact that such a study *might* do so does not undermine Mr. O'Grady's analysis.

3. The Reliability of the Data used by Mr. O'Grady

122. There is no dispute about what data was used, simply its completeness and its reliability.

123. Mr. Mackenzie's challenge in his first report was:

The data come from different sources. There can be no assurance that the process of winnowing and combining the lists for the purpose of the analysis was conducted consistently and reliably. Indeed, it is evident from Reed's description of its own data and from the amount of work that the local unions were expected to do to adapt the data for the purpose it served in the Armstrong Report that the base data were ill-suited for that purpose.

The Reed Construction Data service is intended to notify participants in the construction industry of the status of projects put out for tender. It does not include jobs not put out to tender. In many cases it does not identify either the general contractor or the electrical contractor. Although there is no specific size threshold cited in Reed's material, it is apparent from a review of the projects in the database (and understandably, given the purpose for which the data are provided) the project coverage is more extensive for large projects than for smaller projects.

The local unions were asked to review an extensive list of projects from the Reed database, code each project according to the scheme indicated and add to the list any projects of which the local unions were aware that were not on the list. This is not an easy task....

In general, in order to be able to draw a statistically valid conclusion from a set of data, the data must have been assembled on a consistent basis that is can be replicated [sic]. The Reed data, as processed for use in the Armstrong Report, do not meet that standard. Accordingly it is impossible to draw statistically valid conclusions from the data.

124. It is not apparent to me whether the Local Unions are saying that they did not do their work very well or that they do not believe anything Local 353 claims. Certainly if there was something missing from their own work there was plenty of opportunity to remedy that shortcoming.

125. Mr. O'Grady's reply to that criticism was as follows:

Mr. Mackenzie states that "The Reed Construction Data services is intended to notify participants in the construction industry of the status of projects put out for tender." In the first place, this is not strictly correct. If the project required a building permit, it is almost certain to have been included in the Reed Database. Second, it would be exceedingly rare for all components of a building project to be sole-sourced, though it is possible that some components might be sole sourced or performed directly by the general contractor. Third, as will be noted below we asked the Locals to add projects that were omitted from the project lists. In essence this would mean that adding projects sole-sourced to IBEW contractors but ignoring (for want of information) projects sole-sourced to non-IBEW contractors. In other words, if there was a bias it was to overestimate the share of the work performed by IBEW contractors. I should note that the IBEW-CCO subscribes to the Reed Construction Database and that I obtained a project lists by using their [the IBEW-CCO's] subscription to the database.

He then goes on to point out that his instructions to each of the three local unions were the same.

126. The objection of the Local Unions is that the data is not reliable or verifiable. The data was said not to be reliable because there was no systematic guarantee that the coding was done in a systematic or standard way since it was done by members of three local unions. That argument is very limited. While it is no doubt true that union officers and representatives may take a different approach to statistical analysis than undergraduate research assistants, the variables of information to be added to the list are extremely limited. The set of variables are not a difficult to apply. Was there electrical work on a project? If so, was the electrical work on a particular project done by IBEW, CLAC, non-union? The motivation of all three locals would have been at best identical: all three would wish to demonstrate that they had a high market share.

There is no suggestion as to why Local 353 would be less interested or less diligent. After all, the Local Unions' position is that the business managers of these two Local Unions are fully informed about activity in their Local Unions' area and they did not suggest that there was any need to assume a different set of facts for Local 353.

127. In his first response, Mr. O'Grady noted that Mr. Mackenzie had referred to an additional study conducted by the Ontario Construction Secretariat about the distribution of Electrical Safety Authority permits between IBEW and non-IBEW contractors. He points out that he relied on the same study in his appendices as additional proof of the same patterns. He concludes finally:

Mr. Mackenzie's report noted the OCS data but does not appear to take issue with the data or with the pattern that it reveals, though he offers his own explanation for that pattern. The picture painted by the OCS study is consistent with the picture painted by the analysis of Reed Data.

If the Local Unions are saying that the statistics were incomplete or erroneous, they would have been able to identify those errors by the time of the consultation.

4. Potential for Distortion

128. Whatever one might wish to say about the comparisons between the Local Unions and Local 353, the statistics for each local area are less likely to have inaccuracies that reflected negatively on the Local Unions. The Local Unions were given the Reed data and the International Union's list to create a list of projects. They were able to supplement the information by adding other projects not found on these two lists and by removing projects which had not gone ahead or work which did not contain any electrical component. Of the remaining projects they could identify those which have been performed by members of Locals 1739 and 894, and those who had been performed by non-union or CLAC contractors. If they were not familiar with a project listed on the Reed list of projects, they could have investigated it, if not by the time they were required to submit their results to Mr. O'Grady, then certainly by the time of the consultation. With respect to IBEW projects, there is no reason for any of the local unions not to add a project on which their members worked. That information would have been easily within each local's knowledge.

129. The potential for distortion arises from projects of which they might not know, because the employees were represented by CLAC or were not represented by a union at all. It is likely, though not necessary, that such projects would be smaller in scope. However if such projects are missing from a list of projects, the only distorting effect would be to overstate the market share of the IBEW contractors over that of the non-union and the CLAC contractors. There is no evidence that would lead me to conclude that any such distortion was any greater or less for any of the three local unions involved.

130. Asked to confirm certain statistical conclusions made by Mr. O'Grady, Mr. Leduc dismissed them as being "all Reed data... and therefore inaccurate". That is certainly not a statement I accept about the summaries compiled by Mr. O'Grady. At the very least the data came as much from Local 1739 as it did from Reed Data.

5. Was the Data Verifiable?

131. The other complaint is that the information is not verifiable. That is, Local 353 might have, deliberately or otherwise, coded its information incorrectly. Although the two Local Unions have no members or presence in the Toronto area, Local 894 did produce six reports from Strategic Insights about the Armstrong report. Strategic Insights makes no claim to expertise in data analysis, economics, or the law although they were prepared to comment on all three areas. If, however, they are as they say, able to perform "market analysis and competitive intelligence" and that they have been "trained in market/competitive analysis by ex-CIA officers", presumably they could have devoted some of their analysis to identifying errors in Local 353's data.

132. Finally, Mr. Mackenzie says that the results of the data were not replicable. At page 5 of his first report he says:

More specifically, in the course of this review, we attempted without success to replicate the findings of the Armstrong report. The IBEW provided the original request transmitted to the local unions, which included a proposed coding system for the Reed database list. The IBEW also provided a project list with report for Local 1739 showing the codes it requested as well as marginal clarifying notes. With respect to Local 894, the IBEW provided a copy of the Reed Construction Data list with hand-written annotations to some of the listed projects but with no reference to the request coding system. With respect to local 353, the IBEW provided computerized lists evidently prepared by the local, one showing union projects, one showing non-union projects and one showing projects not in the Reed database were added from other sources.

A detailed consideration of Local 353's review of the first 50 pages of the Reed data provided to that local revealed that approximately 50% of the projects on the list were excluded from their analysis for one reason or another. These projects may have been omitted because the local believed they had been cancelled, because the local believed the projects did not include any electrical work or for some other unspecified reason.

While it may be possible to replicate the union density percentages provided in the report from the Reed and other data following the same process as originally followed, it is not possible to replicate the results from the material provided. Thus the results cannot be tested and cannot be considered reliable.

133. Surely the question is not whether the representatives of Local 353 removed over half of the projects listed in the Reed Database reports. Obviously if the projects were never commenced or included no electrical work they should have been excluded. Locals 1739 and 894 were directed to do the same thing, and presumably did so. The question is not whether Local 353 removed projects from the list, but whether they were accurate in doing so. There is not one project identified as having been incorrectly removed from the list. In any event, if the sweep of the Reed Database is so wide that it captures a large number of projects that are irrelevant for this study, that fact reinforces its usefulness as the place to start.

134. Mr. O'Grady responded:

I confirm that all materials gathered in the course of preparing the appendices to the Armstrong Report were collected and turned over to

counsel for Locals 894 and 1739, per the Board's direction. No materials were withheld. To ensure there were no omissions, the material also included documents which counsel for the Locals could be presumed already to have, such as materials that were provided to me by the Locals themselves....

It was entirely open to Mr. Mackenzie to perform the exact same analysis of market share using the data. Mr. Mackenzie repeats the replication at page 6:

[quoted above]

This is incorrect. All information relevant to performing this analysis was applied and was accurately analyzed. The results of the analysis, therefore, can be tested and are reliable. In any event, since the coded lists were provided to me by the Locals, in the first place, that information was already in the hands of the Locals, their counsel and consultants. No information other than what was provided (and was already available) is required to perform the market share analysis.

135. Mr. Mackenzie did not reply directly to these statements. If the results of the data are not replicable, then surely Mr. Mackenzie tried to replicate them and could not. Was the difference a 0.5% difference or was it a 50.0% difference? No such analysis of the data is offered.

136. This is not simply a conflict to be reconciled by oral evidence. The Local Unions wished to call Mr. O'Grady and Mr. Mackenzie and examine them on their reports. I do not know how this particular difference would be resolved by oral evidence. Would the Board and the parties watch as Mr. O'Grady and Mr. Mackenzie tabulated the results? There is no shortage of replies and surreplies in these reports. If the Local Unions had come to a different result from the data than that arrived at by Mr. O'Grady, I would have expected them to say what that result was.

137. All that Mr. Mackenzie says in his second reply is:

[Mr. O'Grady's rebuttal] asserts that "the only departure from this [the Reed data] was if Locals 894 and 1739 provided additional data ". That is simply not true. It is clear from the material provided that the Reed data on their own are useless for the purpose of evaluating union density. Not only is the list of projects incomplete, but the data were not helpful in determining whether or not a project actually went ahead, whether or not there was electrical work involved in the project or which union, if any, represented the electrical workers on the job. All the information was provided by the local unions using their own (unspecified) resources. The accuracy of the data cannot be verified from the information provided. And it is self-evident that the projects included in the analysis found their way onto the list from a variety of different sources based on the judgments from a variety of different sources.

138. Whatever one may wish to say about the materials provided by Local 353, surely Mr. Mackenzie's clients could have taken the time to review their own data with him and ensured that that was accurate. Once he had a completely accurate set of data, then he would have been able to determine whether Mr. O'Grady's statistical analysis of the market share of at least those two Local Unions was or was not accurate. Once again there is no attempt to do that. In the absence of any demonstrable error, Mr. Mackenzie's criticism does not provide any significant challenge to Mr. O'Grady's analysis of the data.

6. Conclusions about Market Share

139. Mr. O’Grady’s conclusions about market share are summarized in the Appendices to the Armstrong Report. Mr. Armstrong accepted them as accurate for the purposes of his report. The conclusions are best set out in the same form as they appear in Mr. O’Grady’s appendices.

Local 1739

Figure No. 10
Construction Shares based on Reed Construction Data

Type of Construction	IBEW		Non-Union	CLAC	Total
	Resident Contractor	Non-Resident Contractor			
Industrial*	0%	36%	64%	0%	100%
Commercial**	0%	7%	76%	17%	100%
Institutional	8%	5%	77%	10%	100%
Residential	0%	31%	69%	0%	100%
Share of Total	3%	14%	74%	9%	100%

* The Reed Construction Database is not reliable for industrial work. See discussion below.

** Projects with split union/non-union codes were apportioned union/non-union equally

Two large industrial projects identified by the International’s project monitoring service were not included in the Reed Data coverage: Baxter Healthcare (\$2.0 million) and Midland Baker (\$3.0 million). When these projects are added to the above list, the IBEW share of industrial work increases to 49%.

Figure No. 10 suggests a number of trends:

1. The IBEW share of total construction is about 17%. (This rises to 18% with the inclusion of the two industrial projects omitted from the Reed Data coverage).
2. Non-resident contractors account for more than 80% of the IBEW share.
3. For industrial construction, the IBEW share is virtually half (if two projects not covered by Reed Data are included)
4. For commercial construction, the IBEW share is about 7%. Non-resident contractors account for all of that work.
5. For institutional construction, the IBEW share is around 13%. Resident contractors do about 62% of institutional work.
6. CLAC contractors do significantly more commercial work than IBEW contractors and almost (but not quite) as much institutional work as IBEW contractors. (IBEW: 13%, CLAC: 10%). It is also

important to note that the average size of the CLAC contracts in the institutional market was more than double that of the IBEW contractors. In other words, it is CLAC contractors that are enjoying the economies of scale and the reputation that comes from doing larger projects in the institutional market.

7. In the residential sector, IBEW contractors have a respectable share (31%), considering how difficult competitive conditions are in that sector. All of that work appears to be done by non-resident contractors.

Local 894

In the last six years, EPSCA work has accounted for about one-third of employment hours reported by Local 894. Figure No. 9 shows that this has varied from a low of 13% to a high of 49%.

Figure No. 9
Distribution of Hours between ICI and EPSCA
Local 894

	ICI	EPSCA	Total	EPSCA%
2003	838,406	423,318	1,261,724	34%
2004	888,883	846,077	1,737,960	49%
2005	894,324	662,429	1,556,753	43%
2206	732,440	111,200	843,640	13%
2007	765,208	183,878	949,086	19%
2008	806,063	231,193	1,037,256	22%
	4,925,324	2,461,095	7,386,419	33%

We cannot determine the distribution of ICI hours across industrial, commercial and institutional work, though it is likely, given Local 894's obvious strength in industrial construction, that the ICI hours are predominantly industrial.

Based on data supplied by Local 894, travellers account for a significant portion of hours worked. *Since 1988, travellers and members from other Locals working under mobility provisions have accounted for 24% of hours.* In some years this figure has been over 40%, while in others it has been in the single digits.

Industrial Construction in Local 894's Jurisdiction

The Reed Construction Data service does not track industrial projects reliably. The International maintains a list of large projects. Based on the International's list it is clear that Local 894 has a strong share of the industrial construction market. The data are not sufficiently comprehensive to formulate an accurate estimate. However, it is likely that Local 894's share of the industrial market is 70% or better.

Commercial and Institutional Construction in Local 894’s Jurisdiction

We compiled a list of all commercial and institutional projects reported by Reed Construction Data for the period January 1, 2008 to July 31, 2009. Some of these projects have not been put out to tender. Some have been completed, while others are in progress. Some projects may have been miscoded by Reed Construction Data and therefore reported more than once. For contract value, Reed Construction Data reports only the total estimated value of the project. The electrical share of the total value would vary, depending on the nature of the project. Local 894 vetted the list and identified, as far as possible, the status of these projects. There were many projects for which Local 894 was unable to identify the status. The list in Figure No. 10 summarizes the status of the commercial projects that have been awarded. Where Local 894 has filed for certification, we have classed the project as union. We include ‘employee associations’ in the non-union category.

Figure No. 10
Status of Identified Commercial Projects
In Local 894’s Geographic Jurisdiction

Non-Union	\$126,846,620	48%
CLAC	\$66,682,120	25%
Unknown	\$6,521,150	2%
CLAC / IBEW	\$2,000,000	1%
IBEW	\$61,796,370	23%
	\$263,849,260	100%

Figure No. 10 shows that, based on identified projects, Local 894’s share of the commercial construction market was around 23%. There were a number of projects for which the contractor could not be identified. It is likely that most of these were non-union. Consequently, the 23% figure could over-estimate the IBEW’s share of the commercial market. Around 58% of commercial work done by the IBEW is undertaken by non-resident contractors.

Figure No. 11 shows the results for the institutional market. Because one project (Lakeridge Hospital) dominates these numbers, we report the results both with and without this project:

Figure No. 10 [sic]
Status of Identified Institutional Projects
In Local 894’s Geographic Jurisdiction

All Projects		
IBEW	\$142,901,205	55%
Non-Union	\$117,919,435	45%
	\$260,820,640	100%
Excluding Lakeridge Hospital		
IBEW	\$51,401,205	30%
Non-Union	\$117,919,435	70%
	\$169,320,640	100%

Local 353
Figure No. 6
Estimates of Market Share
Based on Reed Data Projects

Sector	Total Number of Projects	Total Project Value	Total Number of IBEW Identified Projects	Total IBEW Identified Project Value	IBEW Share
Commercial	212	\$1,827,493,591	45	\$596,598,060	33%
Industrial	33	\$246,230,934	7	\$118,143,700	48%
Institutional	524	\$1,606,187,596	196	\$563,583,683	35%
Residential	107	\$874,577,027	32	\$527,794,191	60%
Residential-Condo	126	\$4,780,144,512	87	\$3,398,567,600	71%
Grand Total	1,002	\$9,334,633,660	367	\$5,204,687,234	56%

Figure No. 7
Estimates of Market Share
Based on Reed Data Projects
with Additional Projects Identified by Local 353 Added

Sector	Total Number of Projects	Total Project Value	Total Number of IBEW Identified Projects	Total IBEW Identified Project Value	IBEW Share
Commercial	233	\$4,029,993,591	66	\$2,799,098,060	69%
Industrial	39	\$2,279,230,934	13	\$2,151,143,700	94%
Institutional	528	\$2,976,987,596	205	\$1,934,383,683	65%
Residential	109	\$1,001,577,027	35	\$654,794,191	65%
Residential-Condo	144	\$7,748,144,512	105	\$6,366,567,600	82%
Grand Total	1,053	\$18,035,933,660	424	\$13,905,987,234	77%

As can be seen from Figures 6 and 7, the Local 353's share of the construction market, depending on the project list used, ranges from 33-69% in the commercial sector, from 48-94% in the industrial sector, from 35-65% in the institutional sector, from 60-65% in the residential sector, and from 71-82% in the condo sector. Overall, the data indicate that Local 353's share is between 56% and 77% of the construction market. The previous analysis of ESA permit data suggested a market share of 63% which is more or less intermediate between these two estimates. In any event, the data confirm that Local 353 has has [sic] a strong position in the construction market.

140. These statistical conclusions cannot be taken as precise and exhaustive statement of the market share of each of the Local Unions. I accept that there are weaknesses and uncertainties about the precise numbers. Because of the limitations of the data, there is no exact point by point comparison. They do, however, give a general idea of market share by sector at least over the period since 2004. More importantly, to the extent that they identify certain information for a particular period of time, they are, however, in my view, reasonably reliable. I do not accept the criticisms of Mr. Mackenzie. Overall, they do indicate relative sizes of market share and relative results of performance. The trends that they demonstrate are likely to be very accurate. To the extent there are weaknesses, they are as likely to be found in the figures

respecting the Local Unions as they are to be found in those relating to Local 353. What is most significant is that the Local Unions were unable to demonstrate even a single error in any of the compiled data. Their assertion that the results of Mr. O'Grady's report cannot be replicated is an unsupported assertion that the Local Unions have not attempted to demonstrate.

7. Analysis of these conclusions

141. It is evident that the market share of Local 353 was greater in every sector of the construction industry when compared to Locals 1739 and 894. Local 353's market share was significantly better than that of Local 1739 in all sectors. It was significantly better than Local 894 only in the industrial, residential and commercial sectors, and slightly better in the institutional sector. The question is not, however, who comes first in a statistical race, but what it means.

142. The measure of industrial activity was not as reliable as that of the other sectors as the Reed data did not track industrial project reliably and Mr. O'Grady relied more heavily on the list of projects supplied by the International Union, as supplemented by the Locals, for that sub-sector. Locals 894 and 353 demonstrated a good share of the available industrial work (70% and 94% respectively), while Local 1739's share was identified as 36%. For Local 894, industrial work is significant, as is work in the electrical power systems sector. The difficulty with that measure of success is that the amount of work is declining in the industrial sector. This was certainly Mr. O'Grady's conclusion, one that was echoed by all parties to these proceedings. What was significant for Mr. O'Grady was that Local 353 had responded to the decline in industrial activity by increasing its share of institutional and commercial markets (Appendix D, p.3) and the two Local Unions did not.

143. Mr. O'Grady also pointed out that the two Local Unions face a challenge that Local 353 does not – the Christian Labour Association of Canada ("CLAC"). Although Mr. O'Grady had no statistics for CLAC in Local 353's area, no party disputed that it was not a significant presence in the Greater Toronto Area. By contrast it is very significant in the area of the other two locals. In Local 1739's area CLAC is more significant in the commercial market, and is almost as strong as the IBEW in the institutional market. In Local 894's area the figures were provided only for the commercial market where CLAC holds a slightly larger share.

144. CLAC represents a greater challenge than non-union contractors in terms of organizing. CLAC is not an organization held in high esteem by any of the parties to this application. Whether one regards them as a legitimate trade union or not is irrelevant for this decision. CLAC is recognised as a trade union by the Board, is capable of filing applications for certification, and represents a real institutional threat to the IBEW in its quest to represent electricians. It is certainly a universal characteristic of collective agreements entered into by CLAC that the wage rates are lower than those negotiated by the IBEW, though not as low as non-union rates. They also provide no restriction on the mobility of employees whatsoever, unlike the IBEW's Principal Collective Agreement.

145. Certainly no one quarrelled with the proposition that it was harder to displace CLAC than to organize the unorganized. Interestingly, Mr. Mackenzie said in his first report:

At the same time, Locals 894 and 1739 operate in a more competitive union environment than does Local 353. The Christian Labour Association of Canada (CLAC) has a particularly active presence in the area around the GTA, but is virtually invisible within the GTA. This means that whereas

Local 353 has a relatively clear run at organizing activity in its area of jurisdiction, Locals 894 and 1739 face aggressive competition from CLAC in their areas of jurisdiction.

Mr. Mackenzie made this point as part of an explanation for why the IBEW market share might be less in the jurisdiction of the two Local Unions. However it is worth noting that he too regards CLAC as a significant challenge to the IBEW.

146. Finally Local 353 is far more present in the residential sector than either of the other two Local Unions. Indeed, as noted in part by Mr. O'Grady and confirmed by Mr. Leduc in his oral evidence, *all of the residential work in the area of Local 1739* was performed by contractors based in the Toronto area and using members of Local 353. Even then, these Toronto contractors and members are performing 31% of the available work. In Local 894's area no reference was made to the residential market at all, nor did Local 894 claim to have any presence there. The Local Unions pointed to the very high percentage of residential work that Local 353 does and argued that this is because there was no high-rise residential construction in their areas. The statistics are divided between "Condo" and "other residential". The two Local Unions treated it all as high-rise work as if the proposition were self-evident. There is no reason for making any such assumption. In the absence of any evidence, I would believe that any high rise residential renting is done with respect to units in buildings that are built as condominium units. The only exception seems to be public housing (municipal or non-profit). Given the ubiquity of the distinction among high rise and low-rise construction in the construction industry in the Toronto area and the difference in construction techniques among between the two types of construction, to suppose a distinction between two types of high rise construction and an absence of any reference to low rise construction is not reasonable. There is no reason to assume that the coders of the information from Local 353 would draw a meaningless distinction.

147. Certainly the contractors who perform almost one-third of the residential construction in Local 1739's area are, as Mr. Leduc testified, working on low-rise construction. Those Toronto contractors did not suddenly switch from high-rise to low-rise construction just because they crossed an IBEW local union boundary. The 60 or 65% share of the non-condo residential construction that is performed by Local 353 members is likely low rise in part, if not almost entirely. (I note that Mr. Leduc referred to 6 residential contractors resident in Local 1739's geographic area in his Reply will-say statement by name. No further evidence was filed with respect to those contractors, and certainly nothing offered by way of oral evidence.)

148. One additional feature of the landscape that applies only to Local 1739 is the fact that virtually all of the contractors who employ its members come from out of the area. Local area contractors perform 3% of the total construction work in the area.

149. The significance of the difference among sectors and the trends in increasing or decreasing market shares in each sector or sub-sector market is significant in respect of the changing economy of Ontario. Both Mr. Armstrong and Mr. O'Grady commented on general economic trends which they concluded were common both to Ontario and to North America in general. Construction work was, in their view, shifting from industrial to commercial and institutional work. The Local Unions referred to this as the "de-industrializing of the economy". Accordingly, greatest potential growth would come in those sectors of the construction industry other than industrial.

150. In addition they pointed out that demographic trends drive construction. Essentially the more people there are the more commercial and institutional construction will go on to service their needs.

151. Mr. Mackenzie dismissed that starting point as being "interesting local colour" but essentially of no value. Mr. O'Grady reiterated his comments in the Local 1739 appendix:

Population growth drives residential, commercial and institutional construction. Based on these projections, it should be expected that long-run constructing demand in these markets will be strong in Simcoe County, especially in the area served by Highway 400.

In his final report, Mr. Mackenzie accepted that proposition, but again said that "these projections are not relevant to an assessment of the relative performance of the locals". That is true, but the purpose of these studies was not to create an historical record. It was to examine the current situation as demonstrated over a few years, in order to project what will or should happen in the future.

Additional issues that may have affected the analysis

The effect of Bill 69 and the Toronto Working Agreement

152. The effect of section 160.1 of the Act (now repealed) and O/Reg 105/01, the regulation thereto had the effect of limiting the subcontracting clause in respect of electrical work to Board Area 8 in respect of, by now, 10 or 11 large general contractors, all but one of which are active in the area of the three Local Unions. In Board Area 8 they must use an electrical subcontractor bound to a collective agreement with the IBEW. They are not required to do so in the area of the Local Unions.

153. In addition, the greater density of union organization in Toronto means that, certainly within the City of Toronto general contractors who are not bound to a subcontracting clause (such as PCL) nonetheless prefer to use unionized electrical subcontractors. That is, of course, one of the advantages of greater union activity in a given area.

154. The effect of the Regulation is impossible to judge quantitatively. However, Local 894 is not entirely without such advantages. Its greatest sources of work are the two nuclear plants at Darlington and Pickering, and the GM plant in Oshawa. The EPSCA collective agreement guarantees that most if not all of the contractors who perform work on the Darlington and Pickering sites must employ members of Local 894 or members of other local unions referred through Local 894. The other source of work, the GM plant in Oshawa, is under no such obligation. However the historical hostility of the CAW to non-union contractors working in plants where it represents employees has had a beneficial effect for many construction unions in the Province of Ontario.

155. Local 1739 has no such feature in its area although many contractors bound to collective agreements with the Union have succeeded in obtaining contracts from the Honda plant in Alliston.

Size of Projects

156. The Local Unions argued that, given that the towns and rural areas in their geographic areas have a lower and less dense population pattern, the size of projects are likely to be smaller.

It was asserted that it is harder to organise smaller-scale employers, and harder to amass large quantities of work that make a difference to a statistical analysis. They also point to the ease of movement and the greater ability to ascertain information during organizing in an urban area.

157. However, this is not borne out by an analysis of the data. Using the data assembled by the Ontario Construction Secretariat to distinguish between union and non-union work based on the value of certificates issued by the Electrical Safety Authority (no project no matter how small that involves a new or modified connection to the grid of a utility proceeds without one), Mr. O'Grady produced the following chart:

Union/Non-Union Shares of ESA Permits by Permit Value

	IBEW	Non-IBEW
Permit Value: \$1-\$100		
Local 353	33%	67%
Local 894	12%	88%
Local 1739	20%	80%
Permit Value: \$101-\$500		
Local 353	39%	61%
Local 894	15%	85%
Local 1739	20%	80%
Permit Value: \$501-\$1,000		
Local 353	45%	45%
Local 894	26%	74%
Local 1739	18%	82%
Permit Value: \$1,001-\$5,000		
Local 353	49%	51%
Local 894	36%	64%
Local 1739	24%	76%
Permit Value: >\$5,000		
Local 353	64%	36%
Local 894	50%	50%
Local 1739	20%	80%
Permit Value: All		
Local 353	37%	63%
Local 894	14%	86%
Local 1739	19%	81%

As can be see from Figure No. 5, *Local 353's share of the electrical contracting market exceeds the share of the other two Locals in every size category and, in most cases, exceeds by a significant degree.* Overall, Local 353's share of the electrical contracting market is roughly double, and perhaps more, than the respective shares of the Locals 894 and 1739.

158. Mr. Mackenzie was critical of the use of the ESA permits data. He points out that the authors of the Ontario Construction Secretariat themselves expressed doubts about the quality of the data in the body of their own report (from which Mr. O'Grady drew the data). However what they said was:

This data and analysis does not result in a measure of market share. While the data provides a useful reference point of unionized construction activity by region, it should be used in conjunction with other potential measures of union activity [and he proceeds to give several examples].

Mr. Mackenzie emphasized the first sentence in bold. However, as is obvious, Mr. O'Grady was using the ESA permits data as a check or review of the other data he had assembled, just as the authors of the report Mr. Mackenzie cited suggested.

159. There is always an attraction of the argument that a large size will lead to economies of scale. Even Mr. Mackenzie noted this for different purposes. At page 6 of his first report he says:

The difference in economic structure between the Local 353's area and the areas of the other two locals is also significant. Reflecting its location in Canada's largest metropolitan area, Local 353's geographic jurisdiction tends to dominate the universe of large projects available to all three locals. This gives rise to economies of scale in organizing and servicing that there by disproportionately advantaged Local 353.

These economies of scale are, to some extent, lost when the geographic area over which the resources of a combined local union might need to be spread. However, it is unlikely that a single organizer will be more efficient or productive than one who is joined by others, permanently or for short periods of time, to conduct organizing campaigns.

160. On the other hand, it is certainly the experience of this Board that the great majority of applications for certification under the construction industry provisions of the Act refer to a bargaining unit of between 2 and 15 persons, with an average below 10. That is, organizing appears to be directed at, or more productive of an application for certification, when dealing with smaller scale contractors, and hence those likely to be working in less geographically dispersed areas.

Mr. Armstrong's Conclusions

161. Mr. Armstrong's conclusions are set out succinctly at paragraph 75 of his report:

The facts disclose that throughout the composite region covered by the jurisdictional boundaries of Locals 353, 1739 and 894, the IBEW is facing a competitive crisis. The causes are clear. Existing geographic boundaries are in fundamental conflict with both prevailing patterns of development and the residency of members and potential members. Moreover, the membership and consequently the limited resources of the two smaller Local unions, 1739 and 894, are insufficient to allow them to mount effective growth strategies within their geographic regions, especially in the commercial and institutional sectors. Existing boundaries prevent the much larger resources of Local 353 from being deployed beyond its overly restrictive boundaries. In short, the asymmetry between existing geographic lines of jurisdiction, on the one hand, and both residency and prevailing ex-urban development patterns, on the other, are in urgent need of rectification if the IBEW is to grow - some would argue survive - in this central core area of southern Ontario.

162. He specifically disclaimed reliance on any conclusions about imprudent or ineffective use of available resources. He declined to do a “comparative ranking of the relative competence of the three locals, or of their respective achievements”, since he had not attempted to inquire into those issues. He attributed the "crisis" in the areas of the Local Unions to the fact that the two Local Unions’ geographic boundaries presented no rational correspondence between membership residency, economic deployment and those boundaries. He concluded that the continued existence of the Local Unions would "perpetuate a situation that will inhibit the growth of work opportunities for the current and future members of all three of local unions". He attributed the opposition of Local 894 (and for his purposes assumed that the opposition was equally strong in Local 1739) to a fear of change that is common to all of us. He also made reference in his conclusions to the travel patterns of members of Local 1739, which I have found to be overstated.

163. He concluded that the solution was a merger of the three local unions. He was very brief about his reasons for that particular solution. They are set out at paragraph 86 to 89 of his work. I will deal with the substance of them below.

Mr. Flemming’s Considerations

164. Mr. Flemming accepted the findings and the conclusions of Mr. Armstrong’s Report as delivered to him. He did not claim to have reviewed the data and the conclusions in the same detail that I had done in this decision. It appeared to him to be correct and convincing. The expertise and authority of Mr. Armstrong as an expert in the world of Labour Relations generally and the construction industry in particular played a part in Mr. Flemming’s acceptance of the Report.

165. In addition, the Report confirmed some of the beliefs he held about the local unions to which he testified in his oral evidence. The existence of three local unions with three different sets of rules (both the collective agreement provisions and local hiring hall provisions) provided a limitation on the efficiency of contractors active in all three areas. There was basically no organizing in the residential sector by either of the two Local Unions, and they had a very weak position with respect to commercial and institutional work in those areas. The market share of the two local unions was just as low, or perhaps lower, than his rule of thumb ratio indicated. His own personal experience in attempting to assist contractors in their attempts to arrange economic bids for the Parry Sound Hospital and the Royal Victoria Hospital led him to the same conclusions as those to which Mr. Armstrong came about the difficulty confronting contractors bidding a large job, at least in the area of Local 1739.

166. In assessing those considerations, Mr. Flemming did not say that he simply accepted Mr. Armstrong's conclusions and gave the matter no further thought. Prior to retaining Mr. Armstrong, he had formed certain beliefs about Locals 894 and 1739. He believed that the two Local Unions had a very different "culture" from that of Local 353 and that this prevented a barrier to the growth of the two Local Unions. Further, Local 353 had a philosophy or an outlook that encouraged, promoted and advanced the organizing of the electricians not currently represented by the IBEW, which was not shared by the other two Local Unions. He concluded that "we need to spread a culture that exhibits that kind of result [i.e., Local 353's organizing success]."

“Culture of the three local unions”

167. The comparative talents of the three locals and a ranking of their relative competence was not a consideration for Mr. Armstrong. He said that his mandate did not direct him to a

consideration of such factors, and the evidence that he did have was either anecdotal or did not constitute empirical evidence on which he was prepared to comment (see paragraphs 76 and 78 of the Report). He looked at the relatively weak performance in obtaining market share and attributed it to small memberships and severely limited resources.

168. Mr. Flemming accepted this analysis but also testified that he considered a merger to be the appropriate action because of different "cultures" of Local 353 on the one hand and the Local Unions on the other. He was not pressed particularly about the details, but when asked to explain, he said that Local 353 seemed to have a culture of organizing that was lacking among the other two. Local 353 has succeeded in organizing and expanding their membership by a large number of people. He also said that he thought Local 353 was prepared to try innovative approaches to expanding their market share and that the other Local Unions did not seem to wish to do so.

169. The evidence of Mr. Gillett and Mr. Leduc is instructive in this regard. Their submissions and their oral evidence placed a great value on the fact that the current local union structure enabled their members to travel in a more restricted area to seek work opportunities. Mr. Gillett said none of his members would drive to Mississauga for work since that would involve driving across Toronto which would take one hour at 5:30 a.m. and two hours at other times during the day. He said in fact that Local 894 members who live in the Peterborough and Lakefield area would refuse to go beyond Port Hope or Clarington, even to the extent of refusing to work in Pickering, which is also in the geographic jurisdiction of Local 894. They certainly would not drive further than that to seek work.

170. Mr. Leduc, too, said that his members did not wish to travel outside of the area. He cited difficulty of crowded traffic in Toronto, the length of the drive and the reputation for violence of Toronto streets. He acknowledged that it would take 2 hours to drive from one end of the geographic jurisdiction of Local 1739 to the other, and that a substantial portion of his members have traveled outside the area to work when the necessity required them to do so.

171. All of us would like to travel a short distance as possible to work. That includes lawyers and Vice-Chairs. If one has arranged one's life to reduce travel time, it is difficult to criticise anyone else who shares the same desires. However, even within the geographic jurisdictions of the Local Unions, most members of the IBEW are prepared to travel considerable distances to look for work. There are more Local 353 members in each of the two local areas than there are members of the two Local Unions. All of them have opted to join the Local 353 because they are prepared to travel outside the area for virtually all of their work opportunities. It is of course the members of Local 353, employed by those large Toronto contractors about whom the Local Unions are concerned. They too on occasion travel out of the jurisdiction of Local 353 to obtain work. There is some mobility under the Principal Collective Agreement and the evidence of both Local Unions was that Toronto contractors exercise that right fully. As a value, travel within the geographic regions of Local 894 and Local 1739 would appear to be a priority for only a small number of members of the IBEW. It is a distinct and definite advantage to members of the Local Unions, but it is not a value that is shared by most other union members in the same geographic area.

172. In the view of both Mr. Gillett and Mr. Leduc, if a merger were to take place, large Toronto contractors would bring their crews from Toronto into the geographic areas of Locals 1730 and 894 and their members would see little or no work. They attributed this to a number of factors, which were expanded upon more precisely in argument. They believed that the preference of Toronto contractors for Local 353 members came from (a) the greater flexibility in

scheduling that arises from being able to move the same crews over a wider geographic area; (b) the hiring hall rules in Local 353 which allow them to temporarily lay off electricians and hence maintain crews they are familiar with; and (c) a general and unjustified dislike of members of their respective Locals. I accept that these fears are legitimate and real. The International Union ought to have paid more attention to them when looking at its proposed action. However the reality is that neither Mr. Gillett nor Mr. Leduc was prepared to address the causes of those preferences. There are some countervailing costs to using Local 353 members from Toronto. When those employees travel from Toronto they must be paid a travel allowance or in some cases room and board. Mr. Leduc testified that he checked the paycheques of Local 353 members working in his jurisdiction to ensure that they had been paid the correct amount, so they do represent an additional cost to a Toronto contractor. The only position of Mr. Gillett and Mr. Leduc was to focus on the negative consequences to their members of losing the barriers created by local union jurisdictions. Neither had, nor had in the past attempted, any proposal to lessen the negative perception held by these Toronto contractors nor to address the economic advantages presented by bringing in members of Local 353.

173. The narrowness of this concern is illustrated in another response of the Local Unions to one of the proposals made by the International Union during the merger implementation process. The International Union suggested that the Local 353 hiring hall rules be changed so that members who reside at addresses that were covered by the "postal code" areas of the former to Local Unions would be able to refuse work outside of their former geographic areas without losing their place on the list. Thus members were protected from an obligation to work outside of their former geographic area and could maintain their position closer to the top of the hiring hall list for those jobs that did come up in their local area. The Local Unions saw that system as being of no benefit to their members because the postal code designation would not distinguish between their current members and members of Local 353 who live in the current geographic areas of the two Local Unions. That group of Local 353 members is of course significantly more numerous than that of the members of the two Local Unions. Both Local Unions were concerned that they would be "swamped" by those members, despite their need to travel the same distances.

174. At the time the applications were filed, Local 353 had a program whereby it attempted to incorporate Internationally Trained Electricians ("ITE") into the IBEW. This has been a problem for the IBEW for some time (see *11206468 Ontario Ltd. c.o.b. as Quadracon*, [2000] OLRB Rep. Sept/Oct 989). There are of course persons who have received some training in electrical work in other countries who seek similar work here in Canada. They are difficult to organize or to incorporate into the IBEW as they are not fully certified electricians, although they may have worked as if they were. Local 353 developed a plan which would give them union membership, provide for lower wage rate while they were training, and add a regular training component to their work week so that they might qualify for a Certificate of Qualification as soon as possible. For reasons that are not provided to the Board, the program was discontinued by Local 353 as unworkable. However, both Mr. Gillett and Mr. Leduc criticized the plan. Obviously there was something wrong with the plan, but that is not what they focussed on. Mr. Gillett asked rhetorically "why bring more people in"? He said he would prefer to give a lower wage rate to the unemployed members of Local 894 and he regarded the ITE's as just "cheap labour for contractors while our members are unemployed". Mr. Leduc testified that he believed a statement made by the President of the Georgian Bay Contractors Association that Guild Electric and other Toronto contractors would "flood" the Barrie and Oshawa areas with ITE's because they were a cheap source of labour.

175. The primary threats to the IBEW identified by virtually every person and party in this proceeding were CLAC and non-union employers. Mr. Gillett said that CLAC was "not a major

presence in our area" and that there was simply "not much CLAC" in the area. For reasons set out above I accept the accuracy of the figures given in Mr. O'Grady's Appendix with respect to market share within the geographic area of each of the two Local Unions. With respect to Local 894, he shows that CLAC has a greater market share than Local 894 in the area of commercial construction. As indicated above, the only distortion in that figure might be to understate the non-union or the CLAC share of the market. Whether the CLAC market share is slightly above or slightly below that of Local 894, the reality is that in commercial work it has a very large presence. Mr. Gillett does not appear to have noticed them. Mr. Leduc was aware that CLAC contractors were active in his area. His only comment was that they all seemed to be from southwestern Ontario. That is, they were not his fault, and were certainly not something he had any plan to deal with.

176. Similarly both witnesses said that the non-union contractors active in their area were all from Toronto. That may well be true, but again it is a rather passive response to a problem that exists in the area. If they have been squeezed out of the area by Local 353, it is surely incumbent on the Local Unions to organize them. Both men said they had participated in organizing campaigns that involved several local unions because of the locations of all of an employer's projects.

177. In addition, Mr. Leduc agreed that the residential work done in Local 1739's area was all done by Toronto contractors employing Local 353 members. His perception was that they were contractors who had developed a relationship with a builder and followed that builder around from job to job. He said he approved of this kind of relationship and thought it was entirely appropriate. He certainly was not seeking any of that work for his members.

178. On the subject of the growth of their local union membership, both men were quite optimistic. Mr. Gillett said that he considered the growth of Local 894 to have been excellent. He boasted of the second-highest percentage growth rate in the Province over the previous nine years before the application. That may be true, but the membership of Local 894 has been steadily falling over the last 4½ years. Mr. Gillett said "we expect the membership of Local 894 to grow by two or three times in the next 5 to 7 years based on the existing plans on the books". He said further "we can't create work, but it is coming". When asked what plans there were "on the books", Mr. Gillett identified the two nuclear projects at Darlington and Pickering and the GM plant in Oshawa. These three locations are of course the current source of much, if not most of, the work available to Local 894 members. Mr. Gillett also acknowledged that there had been no growth in membership for the past two years (by which he appeared to mean the two years prior to his taking the stand).

179. Mr. Leduc did not address this issue directly since growth was not particularly a priority for him. He expressed satisfaction with the fact that it is able to provide a living to the 250 members of the Local. He relied on Mr. O'Grady's statistics when the result was favourable, and not when it was not. He believed Mr. O'Grady's report demonstrated that membership growth in Local 1739 was proportional to the growth of the population in the area. He dismissed Mr. O'Grady's conclusion that Local 1739 enjoyed only a 17 or 18% share of the market because it was "all Reed data" and not reliable, despite the fact that Local 1739 had been able to supplement the data. He said that the Local had a business plan which had been developed five years ago when a representative of the International Union asked to see one. However he did not indicate what that business plan was. He said that the Local had not revised this business plan in the last five years.

Approaches to Organizing

180. The position of both of the Local Unions is similar. They both attributed the low market share in residential, commercial and, to a lesser extent, institutional construction, to the difficulties of organizing employees in that sector. To put it bluntly they expect nothing will change because it cannot change. They assert that the greater degree of unionized market share in Local 353's area is due to factors such as the subcontracting provisions binding on 9 or 10 general contractors, and the greater number of large commercial projects and high-rise condominium projects in the Toronto area. Aside from that, they argue that the other sectors are simply much more difficult to organize and that nothing much more should be expected.

181. The Local Unions acknowledge that industrial work was once the major source of work for IBEW members and that work arising from industrial construction is decreasing due to what they characterize as the "de-industrialization" of Ontario. This deindustrialization of the Province is, in counsel's words, "not their fault". He points to a newsletter of Local 353 as proof of how it is simply not possible to organize in other sectors. The newsletter refers to what was then a plan of Local 353 to incorporate Internationally Trained Electricians into the IBEW. The business manager's article in the newsletter states:

... by using a negotiated ratio ITE's journey persons, as well as apprentices, we can establish competitive wage rates to win jobs that are presently going non-union. This is necessary in order to regain our competitive edge such as in the construction of:

Elementary & Secondary Schools	Small Hotels & Motels
Institutional Buildings	Outdoor Strip Malls
Elderly Care Centers	Retail Box Stores
Big Box Stores	Car Dealerships
Community Centers	Medical Clinics
Fire Halls	Health Clubs
Police Stations	EMS Buildings

The fact is that many of these ITE's are working on these types of projects for unscrupulous employers who take advantage of their employees that undercut our union wage rates.

Working cooperatively with our contractors to bid our former traditional work, the union expects to expand its influence on market share. To do nothing would mean that the work would continue to be built non-union.

182. There is no question that the newsletter identifies commercial and institutional projects as those where the IBEW has lost ground. However the article is about how Local 353 should respond to the fact that it needs to "win jobs that are mostly going non-union", "to regain our competitive edge", and "to expand [our] influence on market share". The ITE project was not continued and presumably did not produce any useful results for Local 353. However the article indicates a difference in attitude: Local 353 recognizes the problem and is taking steps (not all of which are guaranteed to be successful) to increase its representation in areas where the Union is losing ground.

183. The two Local Unions do not share that view. Mr. Gillett predicts a two or three-fold increase in membership, but only as work increases in its traditional sources of work, the nuclear stations at Pickering and Darlington, and General Motors. After the applications were filed it

hired one organizer, not because Local 894 thought it would produce any results (it did not) but just to show the International Union that it could afford to do so. Since these events all occurred after the application was filed, I do not need to deal with whether the lack of success for the organizer was the result of the impending merger (as Mr. Gillett suggests) or the result of a self-fulfilling prophecy. In fact Local 894's membership has fallen over the past four years, during part of which there was a major recession.

184. Local 1739 is content so long as its 250 members were adequately employed. Its ambitions go no further than that.

185. There is no question but that the effect of a greater degree of unionization in Toronto, the presence of large commercial projects in downtown Toronto, and the effect of the subcontracting clause on 9 or 10 general contractors in Board Area 8 have a positive effect on Local 353's market share. It is not possible to accurately assess precisely how much each factor has. There are no double-blind tests available. However it is also likely that the attitude and the different levels of resources of Local 353 are also responsible for Local 353's greater market share. More significantly, that attitude and base of resources from which to start is important if market share is endangered or shrinking.

Issues raised by the Local Unions during the course of these proceedings

186. The Local Unions argued that there were a number of issues that were not considered by Mr. Armstrong because the International Union did not identify them as issues or because his mandate did not direct him to those considerations. Whatever Mr. Armstrong might have thought of them, they are relevant considerations for this decision. However, the fact is that most of these issues have to do with whether or not the proposed merger would in fact have the advantages that Mr. Armstrong and Mr. Flemming foresaw, and difficulties in the implementation of the merger order.

Combined out of work lists

187. Both Local Unions are concerned that the size of the Local 353 out of work list will result in fewer job opportunities for the current members of Locals 894 and 1739. Mr. Gillett and Mr. Leduc both recounted anecdotal evidence of discussions they had had with members of Local 353 who provided them with horror stories about the lengthy waits to be dispatched to a job that they had suffered as members of Local 353. The fact that each of them has encountered a couple of disgruntled members from a local union with over 8,000 members proves nothing. Both Mr. Gillett and Mr. Leduc testified that no one had ever shown them an out of work list for Local 353. At no time was production of such a list sought in this proceeding.

188. It is not possible to assess this issue. The larger local union will have a greater number of job opportunities. Whether, overall, the number of jobs available to the average member will be higher or lower in a combined system is not a question the Board can answer on the basis of the evidence before it.

189. The greater concern expressed by the Local Unions is that the size of the Local 353 out of work list is not ascertainable. Local 353's appendix in the Principal Agreement permits an employer to lay off an employee without severing employment for the purposes of the hiring hall. The employer is obliged to pay health and welfare and pension premiums during that time and the employee need not report to the hiring hall. The employer may then recall him or her without making reference to the hiring hall. Locals 894 and 1739 operate differently. If an employee is

laid off due to lack of work, the employment relationship must be severed and the employee must return to the hiring hall and will be placed at the bottom of the list. When the employer wishes to increase its workforce, the employer must call the hiring hall and take whoever is at the top of the list of the relevant local. Hence the two Local Unions fear that the Local 353 list will move more slowly because an employer may simply recall employees to work without having resort to the hiring hall.

190. This is not an unreasonable concern. Mr. Flemming's evidence, while deliberately vague on the point, indicated that the "temporary layoff" process is one that the IBEW would prefer not be utilized. However Mr. Flemming recognized that it was also a practice which happened on an informal basis in all of the IBEW local unions whether the local union executive was aware of it or not. His view was that if Local 353 had chosen to regularize what happens under the table anyway and at least obtain the contributions of health and welfare and pension, he would not criticize it for doing so. However, the evidence indicates that this is generally not favoured among locals of the IBEW, and presumably because it, to some extent, replaces the hiring hall with individual employment relationships.

191. It may also allow employers to create a "favoured class" of employee, the employees that an employer finds the most productive and most amenable to its direction and deployment. That is true, but the reality in most of the unionized construction industry is that if an employer finds an employee to be unsatisfactory, the employer will simply lay off the employee for lack of work after a short period of time. If the employer values the employee, it will do its best to find or make work for him or her even in slow times. This is true for every building trades local union in Ontario.

192. The concern of the two Local Unions is legitimate, if perhaps somewhat overstated. The Board is aware that hiring halls operated by construction trade unions tend to have looser rules in Toronto and much tighter rules in other areas of Ontario. There is a real possibility that Toronto contractors would carry their crews into the regions currently serviced by Local 1739 and Local 894 and obtain only a limited number of workers, if any, from the hiring hall, who might not even come from the local area. This is not in and of itself a reason to refuse to make any structural changes. It has not prevented 70% of the members of the IBEW living in the two areas falling within the geographic jurisdiction of Locals 894 and 1739 from choosing Local 353 over either of the two Local Unions. If the difference in the hiring hall rules in the current structure of the IBEW provides a significant benefit to the 30% of the IBEW members living in those local areas who are members of the two Local Unions, at the expense of the remaining 70% who live in the same area, then it is hard to see a principled reason why they should continue to enjoy it.

193. It does however present a real issue as to the integration of the members of the two Local Unions into any form of structural change that involves Local 353, be it by way of merger or otherwise. This is an issue that the International Union failed to address at all. Local 353 offered nothing in the way of guarantees, as it was not asked to do so. It was an issue that needed to be addressed properly before any changes could be made. It is not, however, a reason to find that the International Union had no just cause to act in any fashion.

Scheduling Issues

194. The other reason that the Local Unions fear that their job opportunities will be lost to Toronto contractors who will bring their crews into the local areas arises from the manner in which those contractors operate. The two Local Unions are concerned that some of those contractors do not wish to have anything to do with them or their members. This is a perfectly

logical fear. After all, the complaints of the Toronto contractors have been loud and clear for some time, and the International Union paid heed to them. The one contractor (Internorth) who believed that the merger had taken effect did bring a crew composed exclusively of members of Local 353. Guild Electric, another large Toronto contractor, had no problem articulating its view of the members of Local 1739 in 2006 on the Bank of Montreal project (see *Guild Electric Ltd.*, [2006] OLRD No. 1285, paragraph 3).

195. Even leaving those views aside, the two Local Unions acknowledged that bringing its Toronto crews into the area would be attractive to a contractor in terms of the scheduling of its workforce. Simply, it is likely more efficient to shift crews among jobs when short delays occur on one job and the crew can be kept busy on another site for a few days. It also keeps crews together that are functioning well together and so working more productively.

196. This analysis sounds intuitively correct. However, what the two Local Unions are asserting is that the current system creates inefficiencies in a contractor's work and these inefficiencies lead to greater job opportunities for the members of the two local unions, and perhaps even for a greater number of members of both Local Unions and Local 353 than would otherwise be the case. To some extent any collective agreement creates inefficiencies: overtime payments limit the productive use of crews beyond eight hours a day, the obligation to permit stewards to devote time to settling grievances leads to unproductive time from the employer's perspective and so on. However, a strategy that will create or keep inefficiencies for the sole purpose of creating job opportunities, and perhaps more job opportunities than would otherwise exist, is a difficult value to promote. It does not have some other purpose, such as enabling the union to represent its members, or preventing an employer from demanding excessive time each day from its employees. In this case the International Union was not prepared to adopt a value predicated on inefficiencies, and that was an entirely appropriate choice to make.

197. Once again, however, a decision not to remain with the status quo is only the first question. In looking at what sorts of changes need to occur, the International Union should have been looking at the effect of a merged hiring hall with no restrictions on the members of the two Local Unions. The Toronto contractors have not been shy about expressing their desires and interests. At least in the short term, the effect of a merger might well lead to fewer job opportunities for members of Local 1739 and Local 894. The International Union's merger and implementation plan fails to address that issue at all.

Core Values

198. The two Local Unions argue that the International Union's decision runs contrary to one of the core values of the two Local Unions: the maximization of job opportunities for members of the local union. Indeed, they argued, this was a core value for any local union. I accept that this is a core value of any construction trade union. It is not the only core value: the securing of the best wages and benefits possible, the securing of the payment of those wages and benefits, the availability of a grievance arbitration procedure, and organizing the unorganized also come to mind. However, even accepting the maximization of job opportunities as a core value of the Local Unions, that does not mean that it is not also a core value of the IBEW as a whole. The International Union has an interest in ensuring that it provides the greatest number of jobs for the greatest number of members. In the long-term, activities such as organizing the unorganized will secure more work for union members. So too will ensuring that employers are able to bid competitively on the work on which IBEW members would like to work.

199. The Local Unions cited the use of the phrase "core value" from a decision dealing with an entirely different matter. In *International Brotherhood of Electrical Workers*, [1997] OLRB Rep Nov/Dec 1022 at paragraph 39 the Board said that "a local can reasonably dissent so long as its dissent does not irreparably affect the core values of the parent union". That is not what this case is about. The fact that the maximization of job opportunities for members of any union, local or international can be described as one of the core values of the union is not a particularly useful analytic tool.

200. The argument is, in the end, a circular one. Both of the two Local Unions and the International Union (and Local 353 for that matter) all share the same core value: the desire to maximize the job opportunities for their members. Each member of Local 1739 and Local 894 is also a member of the International Union. The pursuit of that core value by the International Union and by the Local Unions may conflict, regardless of whether the International Union's expectation that the pursuit of its agenda will in the end maximize job opportunities for the members of the Local Unions in a more significant way. It is not enough to say simply that the International Union's actions conflict with the core value of the two Local Unions. The question is whether the International Union had just cause to act to enforce its view of that core value, or the means of achieving that core value, over the views of the two Local Unions.

Stabilization Funds

201. Stabilization funds are funds maintained by a local union from deductions from the hourly pay of each member. The monies are used selectively to subsidize wage rates on specific jobs where competition from non-union contractors provides a threat to the bids of unionized contractors. This is a strategy used by all three local unions. The merger would effectively merge the three stabilization funds. The International Union acted on the assumption that the Local 353 stabilization fund was much larger than that of the other two.

202. Initially the two Local Unions asserted that the Local 353 stabilization fund was significantly in debt, and that the merger was designed to provide Local 353 with the assets of the funds of the other two local unions to shore up a shaky financial position. The issue was not argued that way at the end of the case.

203. Local 353 called Ms. Jane Clifford, the comptroller for the Local 353 Market Recovery and Stabilization Fund. The purpose of her evidence was to explain the audited statements of the Fund. The 2009 financial statement shows a deficit of \$4,445,706 (although page 1 of the auditors report suggests this is overstated by \$890,000). Contrary to what any layperson looking at such a statement would conclude, this is not a sign of insolvency. Liabilities are recorded when the commitment to "stabilize" a wage rate has been made. This would always be before a bid is submitted and hence there was always a level of uncertainty about the ultimate money to be paid out. It does not mean, in the end, that the work will actually go ahead, although it often does. Funds received from deductions from members' pay are recorded only when the money is received. Ms. Clifford's explanation is that the liabilities will be paid by future earnings of employees, including those on the stabilized jobs. That is not to say that the large deficit is not a matter of concern. In late 2009 Ms. Clifford advised the Executive Board of Local 353 that they needed either to restrict the number of commitments or to increase the hourly deductions taken to the fund. That suggestion had not been acted on as of the date of these applications.

204. The two Local Unions operate their stabilization funds in different ways. Local 1739 uses a combination of cash subsidies and a reduction of certain cost items in the wage and benefit

package. Local 894 relies more exclusively on subsidization of wages. Both Local Unions do not make a commitment to stabilize the job unless they have the funds in hand.

205. In the end, this is a difference between operating on a "going concern" basis and on a "windup" basis. Either option is a viable one. Indeed, Local 1739, given its very small membership and its limited resources, has likely taken the more appropriate course. A single project where the liability becomes greater than anticipated, or where an extension is necessary to keep a project going, has the capacity to overwhelm the financial resources of a small local. Local 353 has greater resources and a more diverse base of work for its membership. The "ultimate disaster" scenario, where virtually all work dries up and no more money is coming in to the fund (except from subsidized projects where the subsidy exceeds the amount deducted from each employee's paycheck) is a far more distant reality for Local 353.

206. These are both choices that are reasonably available to any of the local unions, although if acting prudently Local 1739 may only really have the pay-as-you-go option. The "going concern" approach takes greater risks (to be assessed in the context of size and diversification of the local's income) but likely leads to more stabilized projects and more work.

207. Mr. Flemming saw an advantage to combining the funds. More funds would be available for jobs in the area of the two Local Unions. The strength of Local 353's fund could be spread further. In one case, the Parry Sound Hospital project, Local 353 and Local 1739 had tried to cooperate by using both stabilization funds. Each, of course, was only prepared to subsidize the wages of its own members. The contractor refused to enter into such an arrangement with two different local unions, presumably because of the administrative inefficiency. While Mr. Flemming did not look at the financial position of the three stabilization funds, there is nothing in the end that would lead me to conclude that the merger was simply a "cash grab" or necessarily detrimental to the local union.

208. However it does not automatically follow that the merger of the three stabilization funds would be of benefit to the members of the two Local Unions. Greater financial clout would be available, but there is no guarantee that it would be used. As the Local 353 statements show, Local 353 was maximizing its use of stabilization funds within its own area. That fund is financed in part by members of Local 353 who lived in the geographic areas of the two Local Unions. It is their money that is being used to subsidize wages and jobs in Board Area 8, not in their home area. The merger will not increase the amount of money available from that group. The addition of payments from 800 members in the two Local Unions might increase the reach of those two previous funds if the same "going concern" approach to financing is taken. However a concentrated effort of organizing and capturing work in those areas or markets of the two Local Unions that are largely non-union will require a refocusing of the merged stabilization fund's priorities. This is a question that the International Union did not address at all.

Pension Funds, Health and Welfare Funds

209. The other area to which the International Union did not devote much thought was the benefit funds maintained for the benefit of employees of the two Local Unions. Much was made of the prejudice to these funds by any merger during the course of evidence and argument in this case. In fact the difficulties created are considerably less than was argued by the two Local Unions. However the fact remains that there are some difficulties, and the International Union barely turned its mind to the question of those benefit funds.

210. There are three pension plans to which the members of Locals 894 and 1739 belong. The first is a defined contribution benefit plan that covers only three individuals who are members of Local 894. Counsel for the Funds explained that this was a historical anomaly, based on funds transferred in from other local unions. The details are unclear. However, its last financial statement indicates that it has liabilities for pension benefits of \$377,646 and assets of \$725,474 (counsel did not refer to it).

211. The other two pension funds, one for each Local Union, are defined contribution plans that hold their contributions in a joint RRSP. Hence liabilities and assets are always roughly equal.

212. The Local 353 pension plan is a defined contribution benefit plan that provides benefits as defined by the trustees. Its asset holdings suffered reverses in 2008, as did most pension funds, and currently has an actuarial deficit. The two Local Unions calculated that \$0.86 per hour of current pension contributions for each member of Local 353, is being used to fund that actuarial deficit. I did not understand whether counsel was referring to the figures as at the date of the application or to current figures, nor where the figure came from. I see no reason not to accept that there is a funding deficiency that the members are required to address in the contributions.

213. Both Local 894 and Local 1739 operate Health and Welfare trust funds. These are typical funds that receive contributions for each hour worked under the collective agreement to create an hour bank for each contributing employee. Funds are drawn down from that hour bank entitlement each month to pay for various insured services. The only unique feature of these funds is the position of retirees under the Local 894 Fund. Part of the income of the Local 894 Health and Welfare plan is used to provide continuing benefit coverage to retirees, with no contribution from them. Whether these benefits are the same as those of active members or not was not put into evidence.

214. Mr. Flemming concluded that these funds should all be permitted to continue to exist, but only for existing members of the Local Unions. All other persons, and specifically new members, would become members of the Local 353 plans and would contribute to the Local 353 funds. He said he did this because he concluded that that was what the local unions wanted, although he did not ask them if they did want it. In cross-examination he said that if the Local Unions wish to merge their funds with the Local 353 funds, that would be fine with him as well. This answer was made in a rather off-hand manner and was not pursued in cross. However, it was common ground that at the implementation meetings in January, Local 353 had stated it would accept no liability for any of the funds of the other two Local Unions. Although on the facts as I have them, Mr. Fashion, then the Business Manager of Local 353, had no idea what those liabilities, if any, might be. The issues were never pursued.

215. The International Union had no information about the financial details of the various funds or what the state of the hour-bank balances of the members of the Local Unions might be. Whether the existing funds could be used to fund benefits until sufficient hour-bank credits had been built up in the Local 353 plan was never considered.

216. As the two Local Unions point out, Mr. Flemming's plan overlooks the financial consequences to these funds, particularly the health and welfare fund. A closed fund, one that receives no new members, is one in which the membership will age each year, consequently have a higher need for medical services, and thus increasing the cost of insured services. As members retire from employment, the group gets smaller and hence the administration costs are spread

over a smaller number of members. The continued payment of retiree benefits from the Local 894 fund will over time make the fund unsustainable. This is particularly so when the monetary contribution per hour for a health and welfare fund in Local 353's appendix to the Principal Collective Agreement will likely be the same for all members of Local 353.

217. The pension funds appear to be less of an issue. The small defined contribution benefit plan of Local 894 could be wound up tomorrow, perhaps very profitably for its three members (although there may be restrictions on what can be done with surpluses in the fund). The group RRSP funds could continue to function as before. If at some point the administrative costs of operating a group RRSP threatened to exceed the level that each member would pay for an individual RRSP (and why that should be the case I do not know) the Funds might be converted to individual locked-in RRSPs. I also do not know what the cost of winding up the fund would be, although it strikes me that it would be less than the amount usually paid to wind up a defined benefit pension fund.

218. I come to no conclusion about the advantages or the disadvantages of any proposed or possible changes. There is no sufficient evidence before me to come to any such conclusion one way or the other. The conclusion is not relevant at this point.

219. What is relevant is that the International Union failed to turn its mind to the problems associated with the existence of separate trust funds and how to deal with those funds during the process of a merger. I accept that the consequences of the "closed" Health and Welfare Fund are ultimately to threaten the viability of the Fund. The issue of retirees under the Local 894 Health and Welfare plan is also a significant issue. There may be other issues of equal significance. By failing to address those issues at all, International Union failed to address a significant issue that was a consequence of its proposed merger. It appears that the consequences are unnecessarily costly to the members of those funds.

Organizing

220. Mr. Flemming believed that the merger would provide two benefits to the Local Unions: greater resources available for organizing and a different emphasis on organizing by Local 353. The second issue is discussed above. The first, however, is only theoretically true. The resources of Local 353 are available, but the International Union did nothing to ensure that resources would be devoted to organizing in the geographic areas of the former Local Unions. Without in any way being critical of Local 353, it is not unreasonable to consider whether the priorities for organizing, at least in terms of geographic deployment of organizers, might be based on priorities identified by the core business area of the existing Local 353. There is no reason to assume that this would or would not happen. However, the International Union based its merger decision on the greater availability of organizing, as well as a different attitude to organizing. It is difficult to put much reliance on that factor when the International Union is prepared to rely on it only as a possibility without setting some level of expectation on the newly merged local.

The Decision of the IBEW

221. Mr. Flemming received the Armstrong Report. Its conclusions were generally in accord with his own beliefs and he was persuaded by the additional information that Mr. Armstrong had accumulated, either directly through his contacts or through the work of Mr. O'Grady. He accepted Mr. Armstrong's solution, that is, a merger of the three local unions, as the ideal solution. He decided to act swiftly.

222. He did not send a copy of the Report to the Local Unions. He consulted with Mr. Hill and arranged a meeting between himself, Mr. Hill and Mr. Armstrong to persuade Mr. Hill that the merger was the correct course of action. That is all well and good; the International Union ought to have thought through their course of action to make sure that all of the necessary decision makers are of a similar view.

223. However, the International Union felt that no consultation with the Local Unions was necessary or appropriate. Mr. Hill sent a letter to Mr. Flemming dated January 8, 2010 directing that Local 894 and Local 1739 be merged into Local 353. He directed Mr. Flemming to create a committee to discuss the terms of merger but went so far as to include certain items that were required to be part of any merger or arrangement:

- (i) there were to be permanent area offices in the location of Locals 894 and 1739;
- (ii) the current business managers should occupy an interim position on the Local 353 executive board until the next elections (2011).
- (iii) Local 353 was to amend its bylaws to provide for one permanent seat on its executive board for a "representative of former local 894" and for local 1739. (How they were to be chosen was left open).
- (iv) the existing health and welfare and pension funds of the former Local Unions were to continue in existence;
- (v) "There shall be fair and equitable treatment of former Local 894 and 1739 members with respect to job opportunities". (Again undefined).

224. On January 11, 2010 the two Local Unions were informed of the decision that Mr. Hill had already made. They were directed to appear at an implementation committee on January 15, 18, 19 and 20, 2010. Only in response to a request from the Local Unions did Mr. Flemming then provide them with a copy of the Armstrong Report.

225. Meetings were held on January 15, 18, 19, 20, 2010 and, at the request of the two Local Unions, on January 21, 2010. At the meeting of January 15, 2010, Mr. Flemming identified a number of issues that he thought were appropriate to discuss. The items on the list were all appropriate items to discuss in the context of a merger that had already been declared, but they were all directed at how that merger was to be effected. The discussion reflected what Mr. Flemming saw as the issues. The notes taken on behalf of Mr. Flemming, and the oral evidence of all three witnesses was that the Local Unions had very little to say in response. I can only conclude that this is because the meetings took place four days after the letter from Mr. Hill, which no doubt was like a bolt out of the blue to the Local Unions, and the fact that they were not able to discuss anything other than the details of a decision to which they were opposed. Only on January 21, 2010, at a meeting that they requested, were the Local Unions able to respond with proposals of their own that they would be willing to discuss. These proposals were alternatives to a merger or alternatives to the issue of dispatch and hiring halls, none of which was in accordance with the International Union's merger decision and therefore led to no meaningful discussion.

226. In a letter dated January 22, 2010 to Mr. Hill, Mr. Flemming reported on these meetings. After identifying the dates and the parties in attendance he commenced by saying:

Although all meetings were without incident and cordial, it was clear to me from the outset that Local Unions 894 and 1739 were vehemently opposed to the merger.

That should hardly have been surprising. The lack of participation in the major decision and the speed with which the International Union proceeded meant that no other response was likely.

227. The final merger was to be effective February 1, 2010. These applications were filed on January 27, 2010. The effect of subsection 147(5) was to freeze the actions of the International Union at that point.

Merger Terms

228. In Mr. Flemming's report to Mr. Hill, there were 18 items listed. Four of them are of significance for the purposes of this decision. Quoting from the letter these are as follows:

4. Health and Welfare/Trustees- the applicable H. & W. plans will remain status quo for members currently covered by those plans; trustees will remain and new trustees appointed, when necessary, according to the applicable plan text; new members will become members of the Local Union 353 plan.

5. Out of Work List - All members from the existing Local Unions 894 and 1739 that are now on their Local Union out of work list will have their names dovetailed onto Local Union 353's out of work list based on the date they became unemployed in their home Local Union.

6. Dispatch Procedure - one central dispatch list with procedures in accordance with Local Union 353 policies for ICI works, High Rise, Low Rise, Communication and Outside;..... With the new expanded geographical jurisdiction, postal code areas need to be established in order to determine the jobs the member can refuse and get the "pass". The International should maintain oversight to direct corrective measures on any abuses of dispatch, layoffs, and transfers.

7. Travel/Living Out Allowance (LOA) - to be addressed through contract negotiations except we should make a strong recommendation to implement the EPSCA language in the Local Union 353 Appendix.

229. During the hearing of this consultation, the Local Unions raised a number of issues about these proposals. While they might have raised them during the discussions at the Implementation meetings, it is understandable that they did not. The following issues are, in my view, legitimate concerns for the following reasons:

#4 Trustees:

In addition to the above issues, this order does not address how the trustees are to be elected. There may be a problem in holding elections given that a member is defined in most of the trust declarations to be a member of either Local 894 or Local 1739. If the locals are merged, the election may be problematic.

#5 and #6 Out Of Work List:

This provision does deal with the desire of some members of the Local Unions to refuse to accept work out of their local area, but it does not ensure that they will receive an equitable share of work opportunities in any place. Mr. Armstrong concluded that he could not rely on the anecdotal evidence from some contractors about the poor quality of workmanship or other complaints that they had about members of the two Local Unions. I assume for purposes of this decision that the complaints are groundless. That does not mean that certain contractors do not hold those beliefs. It is not very difficult for a Vice Chair, (who definitely lacks the expertise to operate a construction business that employs hundreds of electricians), to think of ways to hire employees for projects in downtown Toronto that would not be attractive to residents of Barrie or Oshawa and then after a few days to send them to work on new projects beginning in Orillia or Peterborough. This issue is simply not addressed.

#7 Travel and Board Allowance:

This is a good idea. However in the absence of any amendments to the Principal Collective Agreement, this is little more than a "pious hopes" provision. If the three local unions are merged, then the operation of the Principal Collective Agreement cannot be applied on its face to the operation of the out of work list. This must be addressed to some extent, and does require the consent of the ECAO to amend the collective agreement.

Disposition of these Applications

Statutory Context

230. The Local Unions argued that the actions of the International Union violated subsections 151(2), 156, 161(3), 162(2) and section 73, as well as sections 147 and 149. The essence of the argument with respect to the first mentioned sections was an assertion that once the local unions had been designated as affiliated bargaining agents to the employee bargaining agency designated by the Minister of Labour under the Province-wide bargaining provisions of the Act, then they could not be merged with another local union without interfering with their bargaining rights or contravening the designation by the Minister. The complete answer to this argument is section 68 of the Act:

68. (1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

231. The merger of two or more local unions does not extinguish or invalidate any bargaining rights or any other right privilege or duty. The successor acquires all the rights, privileges and duties of the predecessors which continue in full force and effect. The fact that a collective agreement may need to be amended, or at the very least that the employer parties need to be advised of the merger, does not invalidate or interfere with any bargaining rights. It is for that reason that mergers have been effected and new local unions created by most multi-local unions in the Province that are subject to designation orders without once requiring unions to go to the Minister for a restatement of a designation order. The issue in those cases is how the merger occurred. There is no statutory bar to a merger, voluntary or otherwise.

232. The Local Unions also alleged a violation of section 76 (intimidation and coercion). They did not address that section in argument. There is no basis for that assertion. I find no violation of section 76.

233. All parties agree that section 147 and 149 are engaged by the allegations in these applications. They provide:

Jurisdiction of the local trade union

147. (1) A parent trade union shall not, without just cause, alter the jurisdiction of a local trade union as the jurisdiction existed on May 1, 1992, whether it was established under a constitution or otherwise.

Notice

(2) The parent trade union shall give the local trade union written notice of an alteration at least 15 days before it comes into effect.

Determination of just cause

(3) On an application relating to this section, the Board shall consider the following when deciding whether there is just cause for an alteration:

1. The trade union constitution.
2. The ability of the local trade union to carry out its duties under this Act.
3. The wishes of the members of the local trade union.
4. Whether the alteration would facilitate viable and stable collective bargaining without causing serious labour relations problems.

Same

(4) The Board is not bound by the trade union constitution when deciding whether there is just cause for an alteration.

Complaint

(5) If a local trade union makes a complaint to the Board concerning the alteration of its jurisdiction by a parent trade union, the alteration shall be deemed not to have been effective until the Board disposes of the matter.

...

Interference with the local trade union

149. (1) A parent trade union or a council of trade unions shall not, without just cause, assume supervision or control of or otherwise interfere with a local trade union directly or indirectly in such a way that the autonomy of the local trade union is affected.

Same, officials and members

(2) A parent trade union or a council of trade unions shall not, without just cause, remove from office, change the duties of an elected or appointed official of a local trade union or impose a penalty on such an official or on a member of a local trade union.

Board powers

(3) On an application relating to this section, when deciding whether there is just cause, the Board shall consider the trade union constitution but is not bound by it and shall consider such other factors as it considers appropriate.

Orders when just cause

(4) If the Board determines that an action described in subsection (1) was taken with just cause, the Board may make such orders and give such directions as it considers appropriate, including orders respecting the continuation of supervision or control of the local trade union.

234. The Board has analyzed these sections on a number of occasions and I refer to some of that case law below.

Just Cause for Significant Structural Change or Merger

235. I conclude that the International Union had just cause to take action with respect to the structure and quite possibly the existence of the Local Unions. It was confronted with two local unions that were content with the status quo simply because it provided enough work opportunities for its existing members and that could not or would not respond to the challenges that faced them.

236. The International Union concluded that the economy of the Province is changing. No party disagreed with that proposition. The International Union also concluded that the IBEW was obliged to change with it. The Local Unions failed to understand that the industrial base which made up the one subsector of the construction industry, where they had a reasonably dominant market share, is declining. The largest industrial project in each of the two areas was one automaker whose future, at least in each location, is not an absolute certainty. The two large nuclear plants are likely to remain a continuing source of work, however, in Local 894's area. The two Local Unions do not have any significant market share in the sectors that are most likely to be the greatest source of construction work in the future: commercial, institutional and residential work. Their organizing efforts in these areas appear to be unsuccessful. Whether this is because of each Local Union's lack of resources (as Mr. Armstrong concluded) or a lack of a culture of aggressive organizing (another conclusion Mr. Flemming came to) does not matter. The Local Unions have no solution. They say their organizers are working well, but have little in terms of results to show for it. Local 353 is addressing the issue of organizing these sectors much more aggressively. There is no guarantee that they will be successful. However they are prepared to try and have identified areas where their efforts might be directed.

237. The challenge presented by CLAC as a rival organization was lost on the two Local Unions. In Local 1739's area, CLAC has a larger share of the commercial market and is very close to the IBEW's position in the institutional market (10% to 13%). In addition, Local 1739 has lost large institutional contracts to non-IBEW contractors. The performance of large contracts with a hospital gives such contractors the expertise, skill, the reputation and the commercial strength to compete with the largest IBEW contractor. I note as well from Mr. O'Grady's figures that all industrial and residential contractors are from outside the area of Local 1739. The position of Local 894 is less drastic, but just as important. CLAC has a slightly greater share of commercial market than does Local 894. It does not appear to be significant in other markets, and Local 894's share of the industrial market is much greater than that of Local 1739.

238. However, neither Local Union has an adequate response to the changing environment. Mr. Gillett of Local 894 did not realize that CLAC was active in his area at all. Mr. Leduc simply blamed the presence of non-union and CLAC contractors in other locals in Toronto and in southwestern Ontario that failed to organize their employees (an activity he apparently did not contemplate in his area).

239. The results of this limited market share are evident. Most members of the IBEW living in the geographic jurisdictions of the Local Unions belong to Local 353. There is no reason to conclude that these electricians like to travel long distances to work any more than do the members of the Local Unions. Indeed, one must assume the reverse in the absence of any evidence. It is a valid conclusion to find that these individuals, except for perhaps some number who live in Pickering near the Toronto border, have concluded that their economic interests are better served by being members of Local 353. Both Mr. Gillett and Mr. Leduc expressed a fear that if all of the IBEW members living in their geographic areas were to be added to an out of work list that was in some way restricted to members living in the current areas of the two Local Unions, this sudden influx of new individuals to the list would mean that there were insufficient work opportunities for any of them to make a living. Those living in the areas of the Local Unions who are members of Local 353 had indeed "voted with their feet". Had they not done so, both Local Unions would be unable to supply sufficient work opportunities to permit any of their members to make a living.

240. Finally, the International Union was faced with the complaints of Toronto contractors about restrictions on their ability to take crews from Toronto into the area of the two Local Unions. While at least some of these contractors no doubt put in terms of the quality of the employees they received from each Local Union, the International Union did not share that view and did not act on that basis. Aside from what may be isolated experiences that get blown up into emblematic stories, there is no dispute from the Local Unions that having more mobile crews was a situation that was to the contractor's advantage. Certainly it represented an advantage to a greater extent than the cost of the travel and perhaps board allowance for those who travel from Toronto. In addition, the collective agreements of CLAC, considered a competitive problem by all the local unions, do not contain restrictions on mobility, nor of course do non-union operations. When the time comes that Toronto contractors will not bid on large projects in the Local Unions' areas (particularly that of Local 1739 where non-resident contractors perform the vast majority of the work) this is a problem that needs to be addressed.

241. The Local Unions argued a position that has been rejected by the Board since its first decision under sections 147 and 149: the assertion that a parent union is not entitled to act unless it can demonstrate fault on the part of the local union. In this case, the Local Unions would define "fault" very narrowly: for instance that they are not insolvent; they are capable of

supporting their current (and in the case of Local 894, dwindling) membership; they are not at war with neighbouring locals; and to do the best they can with their existing resources.

242. This is an inadequate response to the reality in which the parties to these applications find themselves. The Local Unions and the parent International Union are not isolated and separate parties who deal with one another at arm's length. A member of the Local Union is a member of the IBEW. The Principal Collective Agreement contains provisions that require contractors based in other areas to hire and employ members of the Local Unions when performing work in their geographic area. It is a provincially negotiated agreement. The fact that the "non-resident" contractors are bound to a collective agreement that requires them to do so arises from organizing efforts by other unions and particularly Local 353. The restrictions on mobility are a function of the collective agreement. If all Local Unions were independent entities, the obligation to hire members of the two Local Unions would undoubtedly not be the same.

243. Similarly the International Union has an interest in preserving and enhancing the position of Local 353 and other neighbouring locals. Mr. Gillett and Mr. Leduc were prepared to blame Local 353 in particular and (for Mr. Leduc) the locals in southwestern Ontario for the presence of CLAC and non-union contractors in their area. It is equally legitimate for the International Union to be concerned about the effect on other parts of the Province of the non-union and CLAC contractors increasing their size, strength and reputation in the areas of the two Local Unions.

244. One of the factors that subsection 147(3) and 149(3) direct the Board to consider is the constitution of the union, although the Board is not bound by it. The right of an International Union to make changes in the local union structure under that constitution is not an answer to sections 147 and 149. The obligation to act only with just cause under these sections is an obligation on a parent union even though such a concept may be absent from the union's constitution. The recognition of the Constitution as a factor is a recognition of the fact that, where consensus is not present, and where an issue affecting the union as a whole must be addressed, then it is the international union, and only the international union, that has the authority to act. The "just cause" standard is required of an international union when it must address a conflict or a serious issue that engaged its supervisory authority.

245. The Board has defined just cause by reference to the "justness" of the result rather than of any process. In *International Brotherhood of Electrical Workers*, [1996] OLRB Rep. Feb 70, the parent union was faced with a conflict between the Local 1788 and the other local unions in the Province of Ontario. Certainly there is no question that Local 1788 was well organized, functioned extremely efficiently, and handled its bargaining rights and obligations well. In that case there was a conflict between Local 1788 and the other locals about the boundary where the work done by Local 1788 members left off and work to be done by members of the other local unions commenced. The International Union acted to define where that boundary lay. The Board determined just cause at paragraphs 72 to 90 and concluded:

89. The nature of section 147 and the factors which the Board is directed to consider under it requires that the Board not limit itself to an examination of the parent union's conduct in the decision-making process, and the factors which it considered. It may be that a parent union can do everything wrong in that respect and still end up with a decision which is fair and reasonable in the circumstances. That is, the question is not: "Could a parent trade union, acting honestly and looking at the situation and circumstances as a whole,

and weighing the interests of all concerned, have reached the conclusion and made the jurisdictional decision it did?" Instead, the question is: "Having regard to the evidence before the Board, does that parent union's decision yield a result which is fair and reasonable."

90. In a proceeding under section 147 the Board is limited to considering the four factors listed in subsection 147(3). The wording of section 147 taken as a whole also suggests that the Board's power is limited to determining whether there was just cause for the alteration of jurisdiction under scrutiny. The wording of the provisions stands in sharp contrast to that of subsections 149(3) and (4) (also part of Bill 80) which also require the Board to decide whether a parent trade union had just cause to interfere with the autonomy of a local trade union, or for removing local union officials from office, or changing their duties, but allows the Board to "consider such factors as it considers to be appropriate", and allows the Board to make whatever orders or directions it considers appropriate.

246. In applying the fourth paragraph of subsection 147(3) the Board stated at paragraph 95:

95. The second question relates to the broadest and most general factor which the Board is required to consider; namely, "whether the alteration would facilitate viable and stable collective bargaining without causing serious labour relations problems." This requires the Board to consider whether a legitimate collective bargaining purpose would be served by the alteration of jurisdiction which will not create significant labour relations problems; both as between the trade union entities involved, and as between those trade unions and their employer collective bargaining partners. It is important to consider the former not only because section 147 deals with what is fundamentally an internal trade union matter, but also because such questions also involve important issues of statutory rights, and generally have an impact on collective bargaining relations with employers (which is why the latter must also be considered).

and concluded at paragraph 102:

Further, we are satisfied that changing Local 1788's jurisdiction back to what it was intended to be, and which for most of its history it was, will more probably than not facilitate viable and stable collective bargaining without causing serious labour relations problems.

247. The Board adopted this test in *United Brotherhood of Carpenters and Joiners of America*, [2001] OLRB Rep Mar/Apr 491. In that case, as in this, there was no conflict between the applicant (the Lake Ontario District Council) and other local unions but it was in a similar position to the Local Unions in this case. That council of local unions was not responding well to the institutional organizing challenges facing the union (paragraph 109 to 11). See also *International Union of Bricklayers and Allied Craftworkers*, [1999] OLRB Rep. July/Aug 621 and *International Union of Bricklayers and Allied Craftworkers*, [2004] OLRB Rep. Mar/Apr 193 and *United Brotherhood of Carpenters and Joiners of America*, [2009] OLRB Rep. Nov/Dec 972.

248. The four factors the Board is to consider under section 147(3) do not set out any weight to be attached to any of them nor are they the exclusive factors to consider. The section leaves the ultimate assessment to the Board. The members of both Local Unions are opposed to

the merger. The ability of the Local Unions to carry out their duties under the Act, if defined in the narrowest of senses favours the two Local Unions. It is difficult to see, however, how that factor favours Local 894 with its declining membership, or Local 1739 that cannot staff large projects and has a tiny percentage of the local market, in the long term. The alteration will more likely than not in the long term facilitate viable and stable collective bargaining in that it will make it possible for the IBEW to respond to the challenges it faces in maintaining its bargaining strength through increasing market share, and will likely make it possible for the Union to address, though not necessarily entirely, the restrictions on the ability or the willingness of certain large contractors to bid work in the areas of the two Local Unions. Finally the International Union is the only party with the constitutional ability to address the challenges that face the Local Unions.

249. I find, therefore, that the IBEW had just cause under section 147 and 149 to make significant structural changes to the Local Unions to address the concerns of the IBEW as a whole and that those of structural changes may well have been a merger of the three local unions. The challenges facing the two Local Unions represented a clear danger to the future of the Local Unions themselves and the IBEW as a whole. The Local Unions could not or would not rise to the challenges before them and the International Union was required to act.

Implementation

250. The terms of the merger that were imposed by the International Union have certain defects. Once again the Local Unions sought to apply the “natural justice” standards that a court would apply to an administrative tribunal. The analogy is not an apt one. The International Union is not a third party adjudicator or a licensing authority dealing with applicants who assert they are entitled to apply for certain permissions or licenses. Courts have used the analogy of contract law in analysing the relationship of members to their unions and, the relationships among different components of the Union.

251. An International Union in this case chose to act unilaterally and impose changes with no consultation with the Local Unions involved. It may do so. However, if it does proceed in that fashion, it runs the risk of making mistakes because it does not have all of the facts before it when it makes its decisions. There are a number of problems with the merger that the International Union has ordered. Had it sought the views of the Local Unions, not simply on the issue of merger or other structural change but also the issues of how that change was to be effected and any problems or complications that might arise from any proposed course of action, those problems might have been avoided. The time devoted to the Implementation Meetings could just as easily have been used to discuss what the International Union proposed to do before it made a final decision.

252. The International Union offered no reason as to why it did not at least send a copy of the Armstrong Report to the Local Unions and ask for their comments. It may be that there is no option other than merger. The need for a single source of decision making about key issues of the operation of the allocation of work opportunities through the administration of the hiring hall, organizing non-IBEW electricians and operating the stabilization or market recovery funds are, at this point, obvious. The Local Unions’ case in these applications was one of total opposition to any changes, a resistance to any issue raised by the International Union and an exclusive focus on the potential harm to the members of the Local Unions. Litigation where the stakes appear to be all or nothing is not much of a setting for discussion, debate or compromise. Whether there are structural changes other than merger is not apparent to me. Had there been discussions between the International Union and the Local Unions as to the issues of the International Union, Mr.

Armstrong's Report, and the concerns of contractors being expressed to the International Union, another solution might well have emerged. Simply because it is not apparent to the Board at this point, does not mean that it may not exist.

253. The implementation meetings were not structured to foster that type of discussion. The decision to merge had already been made. The International Union expected resistance and opted for a speedy imposition of its desired solution. Indeed the Local Unions were unable to respond in a coherent manner until a day after the meetings scheduled by the International Union, and their proposals on their face do not appear to have been responsive to the real issues.

254. Even within the context of a merger, the speed with which the International Union was determined to proceed and the lack of effective consultation meant that the International Union did not have the necessary facts and therefore did not address the following very real issues:

Trust Funds:

The International Union lacked the facts necessary to make decisions to make options available to members of each of the trust funds. I have indicated above the questions that remain unanswered about even the pension funds. Specifically the merger does not address or even acknowledge the issue of the retiree benefit for members of Local 894 and what the cost of eliminating or carrying it would be.

Organizing:

This is a fundamental issue in the International Union's estimation. They were content to leave the organizing efforts to Local 353 and obtained no commitments or strategic plan to organizing in the area of the former Local Unions. What, if anything, was necessary was never addressed.

Out Of Work Lists:

As indicated, the International Union's solution clearly protected the interest of members who did not wish to travel far to work. It does not address the issue of the possibility of a Toronto contractor who may have an erroneous impression of the workmanship of members of either of the two Local Unions and might "bulk up" in Toronto before taking a job in Barrie or Oshawa. Mr. Flemming repeated in evidence a statement set out in his will-say statement (paragraph 42): "... in my experience, companies will not want to pay the extra costs [associated] with bringing existing Local 353 members - travel and room and board - *if they can find and rely upon local trades persons*. There will continue to be an economic incentive to employ IBEW members who live in the area." [my emphasis] The question is: how they will "find and rely on local trades persons" if it is their preference not to do so? As the Local Unions pointed out, in his report to the Plumbers' Union (the United Association), Mr. Armstrong proposed a transitional or phasing in of such changes to hiring hall and dispatch systems to ensure that members in some areas were not isolated and excluded from work opportunities. With all due respect, a general power granted to Mr. Flemming to ensure fair and equitable treatment of members of Local 894 and 1739 with

respect to job opportunities is not sufficient. It is not practical or possible for the International Vice President for Canada to run the Local 353 hiring hall. Protection and opportunity, even if only temporary, need to be discussed.

Two Local Unions:

With some justification, the International Union treated both of the Local Unions in the same manner. Indeed both Local Unions present the same unwillingness or inability to see the existential problems that they face and have no real strategy other than to continue to do what they were already doing. Local 894 may be in a somewhat better position because of the existence of the two large nuclear plants in its area. Local 1739 is in a far more fragile state, although its membership is growing and Local 894's is shrinking. Local 1739's membership is very small, its market share is negligible, and one wonders how it can continue to function at all. Whether or not this requires a different response or different action within the existing structural realignment or in terms of how a merger is effected is a matter that needs to be addressed with the two Local Unions. There may not need to be any distinction drawn between the two of them, but the issue should be least addressed.

Remedy

255. In argument both the International Union and the Local Unions maintained their absolutist positions. The International Union argued that if the Board concluded that it had just cause to effect a merger, any details about the manner in which it did so did not matter since the end result was one that was just and appropriate. The Local Unions argued their case as if it were a plea made under one of the 19th century causes of action in which one error on the part of the International Union resulted in complete success for the Local Unions. Neither position is appropriate and neither is responsive to the obligations of the Board under section 147 and 149.

256. The Trustees of the Local 894 trust funds took a different approach. They adopted the Local Unions' submissions asking that the applications succeed and the relief sought be granted. In the alternative, they relied on subsection 149(4) and asked the Board to require the International Union to address the issues (at least with respect to the trust funds) and to consult with the Local Unions and their members. They submitted that the Board should stay the merger until the parties agree among themselves on a resolution, provided that this resolution was acceptable to the Board. If these discussions were not successful, the Board should give the parties the right to come back and argue what should be done if there is no resolution. The Trustees asked the Board to remain seized for the purpose. Neither of the two major parties commented on this approach.

257. This is, with some variation, the most appropriate solution to these applications. Given the number of issues involved and the potential amount of information necessary, this is not the time for the Board to make any final order about what is to be done.

258. Therefore the Board makes the following declarations and orders:

- (i) The Board finds that the International Union had just cause to make significant and substantial structural changes to the two

Local Unions. At the very least, this would mean a single source of decision making about key issues of the operation of the allocation of work opportunities through the administration of the hiring hall, organizing non-IBEW electricians and operating the stabilization or market recovery funds. No alternative to merger with Local 353 is evident at this time.

- (ii) The International Union is directed to meet with Local 894, Local 1739, and Local 353 jointly, separately, or in any combination that is appropriate to discuss the following issues:
 - (a) Are there any alternatives to merger?
 - (b) What temporary or permanent features, if any, of the out of work list, dispatch system and hiring hall provisions are necessary to ensure equal opportunity of employment for members of Local 1739 and Local 894?
 - (c) What temporary or permanent structures need to be created to ensure that organizing efforts are conducted in the geographic areas of the two Local Unions?
 - (d) What changes are needed to the Principal Collective Agreement to give effect to any change agreed upon?
 - (e) What changes, if any, must be made with respect to the pension and the Health and Welfare trust funds and benefit plans established under them?
 - (f) What, if any, commitments or objectives must be identified for the operation of the one or more stabilization funds that will exist?

259. These discussions should commence as soon as possible and should be concluded on or before March 31, 2012 (unless all parties agree to an extension of time). If there is no resolution at that time, the parties may return to the Board to make submissions about what the Board ought to do at that point, and specifically if there are any orders that ought to be made pursuant to subsection 149(4).

260. In the event that it is required, the Board sets Monday, April 16, 2012 as a date to hear at that time the parties' submissions as to what the Board should do. If that date is inconvenient to any party, that party shall canvass the other parties for a common date and advise the Board within the next two weeks. Any date after April 16, 2012 is likely open to the Board. If it would be of assistance to the parties, the Board will endeavour to assign a Vice Chair other than this panel to assist the parties to reach a resolution. If that is not possible (and it may not be) this matter will proceed on April 16, 2012 or such other date as the parties agree on.

261. I remain seized to deal with any issues that arise in these applications.

"David A. McKee"

for the Board