LABOUR RELATIONS BOARD
Saskatchewan

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529, Applicant v. MUDJATIK THYSSEN MINING JOINT VENTURE, Respondent

LRB File No. 271-00; May 8, 2003
Vice-Chairperson, James Seibel; Members: Hugh Wagner and Brenda Cuthbert

For the Applicant: Drew Plaxton
For the Respondent: Kevin Wilson

Practice and procedure – *Res judicata* – Parties and general subject matter in present case same as in certification proceedings but constitutional issue withdrawn from certification proceedings – No evidence was adduced and no determination was made by Board on merits on constitutional issue in certification proceedings – Doctrine of *res judicata* does not apply.

Practice and procedure – Abuse of process – Employer bound to obey certification Order unless and until Order amended, stayed or quashed – Employer refused to obey Order – Employer's actions worthy of censure but do not constitute abuse of process such that Board should decline to determine constitutional issue.

Estoppel – Conduct – Employer withdrew constitutional issue from certification proceedings and certification Order issued - Union attempts to use estoppel to bar employer from raising constitutional issue as defence to allegations that employer has refused to obey certification Order – Board must ensure scope of Order is amended if necessary and therefore imperative that constitutional issue be determined.

Constitutional law – Jurisdiction of Board – Uranium mine – Board's task is to determine whether work performed by electricians at uranium mine is so vital, essential or integral to production mining operation as to bring electricians within federal jurisdiction – Activities of electricians in this case performed for no reason other than to advance mining process and mining operation directly dependent on work of electricians – Electricians' work vital and essential to mining operation and therefore within federal jurisdiction.

Remedy – Certification – Rectification plan – Employer bound to abide by certification Order and refused to do so – Board finds violation of *The Trade Union Act* and the Board's decision in

certification proceedings – Board orders employer to file rectification plan and orders further hearing to deal with appropriate remedy for violation.

***The Trade Union Act*, ss. 5(e)(ii) and 5.1.**

REASONS FOR DECISION

Background:

[1] Pursuant to an Order of the Board dated May 9, 2000, in LRB File No. 140-99 (the "certification Order"), International Brotherhood of Electrical Workers, Local 529 (the "Union") is designated as the bargaining agent for a unit of employees of Mudjatik Thyssen Mining Joint Venture (the "Employer"). The Union filed the present application pursuant to ss. 5 (d), (e) and (g) of *The Trade Union Act*, R.S.S. 1978, c. T-17 ("the *Act*") alleging that the Employer committed an unfair labour practice or a violation of the *Act*, in refusing to comply with the certification Order and implement the terms and conditions of the extant collective agreement (i.e., the provincial electrical agreement) with respect to all of the employees in the bargaining unit described in the certification Order. The Employer's position is that certain of its employees ostensibly within the scope of the bargaining unit – electricians at a producing uranium mine – are employed in an undertaking that is within the legislative jurisdiction of the federal government and are not subject to the jurisdiction of the Board or covered by the certification Order.

[2] In an Order dated August 29, 1975 (LRB File No. 192-75) the Board designated the Union as the certified bargaining agent for:

> *all electrical foremen, journeymen electricians, apprentice electricians, and electrical helpers employed by Thyssen Mining Construction of Canada Ltd. in the Province of Saskatchewan North of the 51st parallel.*

[3] In 1999, the Union filed an application (LRB File No. 140-99) for, *inter alia*, a declaration that the Employer was the successor to Thyssen Mining Construction of Canada Ltd. In its reply filed in LRB File No. 140-99 on June 23, 1999, the Employer objected that the appropriate jurisdiction was federal, as follows:

> *The Application for Certification has not been brought in the proper forum as the purpose of each of the projects is the extraction of uranium and accordingly the appropriate jurisdiction is federal jurisdiction.*

[4] However, on January 31, 2000, the Employer (which was then represented by different counsel than in the present application) made significant amendments to its reply including, for reasons not disclosed to the Board in the present hearing, the withdrawal of the constitutional jurisdiction objection. The issue was not raised or argued at the hearing before the Board in February, 2000. The Board granted the successorship application, issuing the certification Order for a bargaining unit comprising:

> all, journeymen electricians, electrician apprentices, electrical workers and electrician foremen employed by Mudjatik Thyssen Mining Joint Venture in Saskatchewan north of the 51st parallel.

[5] In the Board's Reasons for Decision in LRB File No. 140-99, reported at [2000] Sask. L.R.B.R. 332, it is noted that the Employer had employees at three uranium mine locations in northern Saskatchewan: Cluff Lake, Cigar Lake and McArthur River. In the Board's summary of the evidence of Carmen Firlotte, the Employer's Human Resources Coordinator, the Employer's involvement at these locations is described as follows, at 334-35:

> *The Mudjatik Thyssen Cigar Lake Joint Venture was formed in order to bid on the construction of a test mining facility at Cigar Lake; the Mudjatik Thyssen Cluff Lake Joint Venture was formed in order to bid for contract mining at Cluff Lake; and the Mudjatik Thyssen [McArthur River] Joint Venture was formed in order to bid on Cameco's McArthur River Project.*

However, the Employer had withdrawn its objection to the Board having jurisdiction to make an order including the employees at Cluff Lake and evidence of the specific activities of the Employer's electrician employees at each of the three locations apparently was not adduced at the hearing.

[6] Subsequent to the issuing of the certification Order, the Employer applied the terms and conditions of the collective agreement to its electrical trade division employees at the Cigar Lake and McArthur River locations, but refused to do so at the

Cluff Lake location. The Employer maintained that, while the subject employees at the first two locations were engaged in construction of the mining facility, the employees at Cluff Lake were engaged in the production mining of uranium, which is an undertaking under federal jurisdiction.

[7] The Employer took no action to obtain clarification, amend the scope, or obtain a partial stay of, or to seek to quash, the certification Order. Rather, it simply refused to abide by the certification Order as concerns the employees in question, requiring the Union to take action if it was not willing to acquiesce to the Employer's ignoring of the Order.

[8] The present application seeks the following relief: an order specifically declaring that the collective bargaining agreement applies to the employees in question; orders fixing and determining the monetary loss suffered by employees and the Union as a result of violations of the *Act* and the Order of the Board in LRB File No. 140-99, and requiring the Employer to pay such sums to certain employees and the Union.

[9] The application came on for hearing in February, 2001. Neither party had the appropriate witnesses from northern Saskatchewan available at that time. The Board appointed its Investigating Officer to investigate and report with respect to the nature and kind of work being performed at the worksites in question. The Investigating Officer filed his report on April 21, 2001. The hearing of the application continued on November 20, 2001.

[10] At the hearing before the Board, the Employer did not dispute that its electrical trade division employees at Cigar Lake and McArthur River were engaged in mine construction and were properly covered by the certification Order of this Board and the applicable collective agreement. The issue was whether its electrical trade division employees, or any of them, at Cluff Lake were engaged in mine construction or the production mining of uranium, the former, the Employer admitted, being a matter under provincial jurisdiction and the latter being a matter under federal jurisdiction.

Evidence:

[11] Robert McLeod is a journeyman electrician with many years' experience and has been the Union's business agent for more than five years. Mr. McLeod confirmed that the Employer had fulfilled its obligations under the certification Order and the collective agreement with respect to employees in the bargaining unit at the Cigar Lake and McArthur River locations, but refused to do so at Cluff Lake. By the time of the hearing, however, the Employer had no employees in the electrical trade division at Cigar Lake or McArthur River. Mr. McLeod submitted that the Employer's workforce at Cluff Lake had shrunk considerably since the certification Order was issued, but that the nature of the work performed by the employees there, which according to him was "construction" or "maintenance," had not changed.

[12] Pat Novicki has been a journeyman electrician for some 25 years and has worked at the Cluff Lake site for 18 years. He is presently Chief Electrician – which he said is like a working foreman – and a member of the Union. The Employer's employees apart from the electricians are not unionized. The employees of the mine's owner, Cogema Resources, are unionized.

[13] Mr. Novicki described the operations, structures and activities at the Cluff Lake site. There are two mines situated approximately three kilometres apart. The older mine is known as the "DP" mine and the more recently constructed mine as the "DJ" mine, comprising both open-pit and hardrock underground mining operations. In the underground operations, the voids in the rock that are left when the ore is removed are filled with huge quantities of concrete to keep the mine structure stable. "Shotcrete" is also applied to mined surfaces for stability and as a radiation shield. The uranium ore is refined at the on-site mill into "yellowcake."

[14] Mr. Novicki said he is employed by the Employer which supplies labour to the mine owner, Cogema Resources, on an hourly rate basis. The Employer's work force at Cluff Lake comprises electricians, mechanics, miners, underground drivers, ore haulers, a surface yard person, clerical staff and an engineer.

[15] Mr. Novicki said that when he first started working at Cluff Lake only the DP mine existed. There were permanent buildings for the employees of the then owner,

Amok, engaged in geology and engineering, an office and shop building, the mill, a concrete batch plant, a shotcrete plant, a trailer that served as an electrical office, and trailers for construction workers. Since then, the DP site has been decommissioned, the surface portal to the underground has been sealed, the trailers and geology and engineering building have been removed, and the shop and offices sit empty.

[16] The DJ mine started up about eight years ago. Contractors built the initial building for the surface portal to the underground containing compressors, transformers, switching gears and a fresh air "raise." Mr. Novicki said that he and other electricians were involved in the construction of the portal, wired the shops and offices and installed the electrical substations. He said that they have also made any subsequent additions and changes to the electrical systems and installations. The mill, cafeteria and employee residences are a few kilometers from the sites of the mines themselves.

[17] For many years, the underground mining operation was performed using electrically powered machinery. The method of mining has changed from using electrical machinery to drilling, blasting and ore removal by diesel-powered "scoops." Power is supplied by a diesel plant situated at the main mill three kilometres from the mine. A 14,000-volt surface grid is transformed to 4160 volts and then, by underground substations, to 600 volts. The Employer is responsible for the operation and maintenance of this system, but its electricians do not perform work at the mill, cafeteria or residences.

[18] Mr. Novicki said the ongoing electrical work primarily consists of providing power by lengthy cables to underground mining machinery, installing and removing pumps, lights and ventilation equipment, and related maintenance and repairs to systems, mining equipment machinery and the concrete and shotcrete plants. As the mine is advanced, temporary electrical installations are made drawing from the surface grid. These are later converted to permanent installations that draw from the underground substations. As an area is abandoned, the equipment and cable are salvaged and recycled.

[19] For the underground mining operation, the ventilation is supplied by primary surface fans that force the air underground where it is distributed by secondary

fans to the work areas. During the winter, propane burners heat the air before it is sent underground. The pumping equipment used to deal with the accumulation of water in the mine is installed and removed by the electricians. Some of it is permanent, but most of it is temporary. The lighting systems are minimal. Again, some are permanent, most are temporary.

[20] At one time there were up to five electricians on site; now, there are usually two or three. The bulk of their work has shifted from maintaining and repairing electrical mining equipment to laying in and removing the installations described above necessary for the mining operation. This shift has occurred because of the change in the method of mining from using electrical machinery to drilling and blasting. From time to time, when the Employer is short of employees, the electricians are assigned to perform other kinds of labourer jobs, such as operating the concrete batch plant. Mr. Novicki said there is limited interaction between the electricians and the Employer's other employees.

[21] In September, 2001, Mr. Novicki began to keep a log that differentiated the electricians' work time between what he considered "construction" work and other work. He estimated that of the total 1017 work hours performed between September 13, 2001 and November 6, 2001, 207 hours were spent on "construction" work. Approximately 98 of the 207 hours was related to a surface extension to the main electrical grid and work at the sand plant. The work at the sand plant – some 88 of the 98 hours – is a twice-yearly occurrence. Most of the balance of the 207 hours was related to the installation and salvage of temporary underground electrical lines. He estimated that over the course of a year, approximately ten per cent of the electricians' time is spent replacing existing installations that have been damaged or are worn out.

[22] In the past, electricians assisted in the construction of a sand washing/screening plant to supply the concrete and shotcrete plants. It was set up by a contractor in an empty building at the DP site. Mr. Novicki and others brought the power from the main grid out to the plant and transformed it down. However, he acknowledged that the plant's components were either pre-wired or were installed by the contractor's own employees.

[23] In cross-examination, Mr. Novicki acknowledged that the DP mine, and the Cluff operation as a whole are in the process of winding down. Complete shutdown is scheduled for sometime in 2002. He also acknowledged that, over the years, construction work has been sporadic, with significant periods between projects. There are no significant capital projects presently under development. He further acknowledged that, over his approximately 17 years' employment at Cluff Lake, perhaps two to three per cent of his time has been spent in relation to the construction of buildings. Mr. Novicki agreed that usually only approximately five percent of the electricians' time is spent working on the surface, although this has lately increased to perhaps ten per cent as the mining operations slow. He also agreed that all of the electrical work that he does is in some way either directly related to or in support of the underground mining operation. He explained that what he referred to in his evidence in chief as "underground construction" is the installation of temporary electrical lines to advance the mine that are later converted to permanent lines or removed. Mining cannot advance without the lines because they provide power for ventilation, pumping and lighting.

[24] At the time of the hearing, because of the slowdown in mining operations, Mr. Novicki estimated the general breakdown of his work time as follows: 10 percent underground maintenance; 30 percent repair and salvage of equipment; 60 percent miscellaneous jobs.

[25] Carmen Firlotte has been the Employer's human resources coordinator for the past six years. She testified that the Employer was set up in 1997 in order to "team up" with northern First Nations bands in the development and operation of uranium mining. She estimated that, in November, 2000, the Employer had 50 employees at Cluff Lake, 42 at Cigar Lake and 160 at McArthur River. At that time, the latter two sites were not in production. The work at McArthur River comprised the sinking of a shaft and development of the mine in advance of actual production. In her words, the Employer's work at Cluff Lake comprises "contract mining." The Employer or its predecessor, Thyssen Mining Construction of Canada Ltd. ("TMCC"), has been involved at Cluff Lake since 1984.

[26] According to Ms. Firlotte, the Communications, Energy and Paperworkers' Union is certified by the Canada Industrial Relations Board to represent the employees of the owner of the mine at Cluff Lake, Cogema Resources. She said that Human Resources Development Canada ("HRDC") has assumed regulation of labour relations at Cluff Lake. In a letter from HRDC to the Employer dated December 1, 1995, HRDC advised that its Legal Services Branch had given the opinion that the Employer's operation came under federal jurisdiction. In 1995, HRDC investigated the fatality of one of the underground mining employees of the Employer's predecessor at Cluff Lake, TMCC, and made certain recommendations. TMCC was convicted of an offence and fined under the *Canada Labour Code*, R.S.C. 1985, c. L-2 in relation to the accident.

[27] Effective January 1, 1996, TMCC obtained a certificate pursuant to the *Canada Labour Standards Regulations*, C.R.C. 1978, c. 986 allowing it to average the hours of work of its employees at Cluff Lake specifically including electricians. In 1997, TMCC provided a notice of group termination under the *Canada Labour Code* to HRDC.

[28] Ms. Firlotte could not explain why the issue of constitutional jurisdiction with respect to the Employer's enterprise at Cluff Lake was withdrawn before the hearing in LRB File 140-99. The Employer is represented by different counsel on the present matter than at the hearing of that matter.

Arguments:

[29] Before addressing the issue of jurisdiction over labour relations of the subject employees at Cluff Lake, Mr. Plaxton, counsel for the Union, made several preliminary arguments: (1) that the issue of jurisdiction is *res judicata*, having been determined by the Board in LRB File No. 140-99; (2) that, in the circumstances, it constitutes an abuse of the Board's process for the Employer to deal with the issue by refusing to implement the certification Order with respect to the Cluff Lake employees, forcing the Union to make the present application, and raising the matter as a defence, when the Employer could have applied for reconsideration of the Board's Order; and, (3) that, having elected not to proceed with the issue and present the relevant evidence during the hearing of LRB File No. 140-99, the Employer is estopped from doing so now.

[30] With respect to the jurisdictional issue, Mr. Plaxton asserted that, while s. 92(10)(c) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 and s. 18 of the *Nuclear Energy Act*, R.S.C. 1985, c. A-16, provide that uranium mines and the production of uranium are matters of federal jurisdiction, one starts with the rebuttable presumption that the labour relations of enterprises operating wholly within the Province is a matter of provincial jurisdiction. Counsel argued that to rebut this presumption it must be demonstrated that the work in question is integrally part of the federal undertaking and that the labour relations thereof is integrally bound up with it. He said that the construction of facilities that are intended to carry on an undertaking within federal jurisdiction once they are built is a matter of provincial jurisdiction because the undertaking does not exist until the facility is constructed. He further asserted that additional or ongoing construction that takes place once the facility is in production is also a matter of provincial jurisdiction.

[31] Counsel pointed out that the definition of "construction industry" in s. 2(e) of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11 (the "*CILRA, 1992*"), includes not only "constructing" and "erecting," but, *inter alia*, "reconstructing, altering, remodeling, repairing, revamping, renovating," and "maintaining." He said that the subject employee electricians routinely install, repair and maintain electrical systems at Cluff Lake, and their primary work at the present time is salvage and odd jobs.

[32] Counsel likened the status of the Employer's electricians at Cluff Lake to that of the employees of the contractor providing catering and housekeeping services to the owner at another uranium mine in *United Steelworkers of America v. Six Seasons Catering Ltd*., [1992] 3rd Quarter Sask. Labour Rep. 80, LRB File No. 018-92; application for judicial review dismissed (1992), 106 Sask. R. 190 (Sask. Q.B.); affirmed (1993), 116 Sask. R. 123 (Sask. C.A.). In that case, in granting an order for the certification of a unit comprising the subject employees, the Board determined that the application had "nothing to do with any employees of [the mine owner] or any employees who are actually employed in the mining operation." The Board observed, at 81, that "the producing, refining and treatment of uranium and all services and activities in the operational areas of the mine are performed exclusively by [the mine owner's] employees, who are members of the federal bargaining unit."

[33] In support of his client's position, counsel cited the decision of the Ontario Labour Relations Board in *United Brotherhood of Carpenters & Joiners of America, Local 2486 v. Manitou Mechanical Ltd.*, [1978] OLRB Rep. July 657, where it was held that while a conveyor system in a uranium mine, when installed, would be an integral part of the mining operation, its installation was not, and, rather, was a matter of provincial jurisdiction.

[34] Counsel also referred to the decision of the Canada Labour Relations Board in *Piotrowski v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170*, [1986] 67 di 19, where it was held that the reconstruction by a contractor of a portion of an interprovincial pipeline that was wholly within British Columbia was under provincial jurisdiction as there was no physical or operational connection between the contractor's operations and those of the owner of the pipeline.

[35] Counsel also referred to the decision of the Board in *The Canadian Association of Fire Bomber Pilots v. The Government of Saskatchewan*, [1993] 1st Quarter Sask. Labour Rep. 202, LRB File No. 164-92, application for judicial review dismissed (1993) 119 Sask. R. 161 (Sask. Q.B.), in which it was determined that the pilots employed by the government to fly water bombers were engaged in the core activity of the suppression of forest fires, a matter of provincial jurisdiction, rather than in the federal sphere of aeronautics.

[36] Counsel likened the position of the electricians in the present case who install and remove systems to provide lighting and air to, and to remove water from, the areas of the mine where ore extraction is taking place, to that of someone who supplies diesel fuel for the machinery or generator, i.e., while they are closely connected with the mining operation, they are not integral or essential to the actual production, refining or treatment of uranium ore and share no interchangeable skills with the miners.

[37] Mr. Plaxton also referred to the decision of the Federal Court of Appeal in *Reference re Canada Labour Code (Antioch Construction)* (1986), 34 D.L.R. (4th) 228, a reference made by the Canada Labour Relations Board respecting the constitutional

jurisdiction to entertain a union's application for certification with respect to employees of companies that entered into contracts with Canadian National Railways for the replacement of wooden railway bridges with steel and concrete bridges on its line in northern British Columbia. Each of the British Columbia Labour Relations Board and the Canada Labour Relations Board had declined jurisdiction in favour of the other. In determining that the labour relations of the employers came under provincial authority, the Court extensively reviewed the historical precedents and enunciated certain criteria for making the determination, which is explained in more detail, *infra*.

[38] Mr. Wilson, counsel for the Employer, filed a comprehensive written brief that we have reviewed and appreciate. He argued, firstly, that insofar as the certification Order purports to apply to the labour relations of the employees of an employer engaged in a federal undertaking, it is a nullity. He asserted that there was no abuse of process because the challenge of an order that is a nullity may be made at any time. In a similar vein, counsel asserted that the matter of federal or provincial jurisdiction was not *res judicata,* and that the principle of estoppel did not apply, because, if the labour relations regarding the subject employees is under federal jurisdiction, the certification Order cannot change that.

[39] Secondly, with respect to the issues of *res judicata* and estoppel, Mr. Wilson argued that if the matter is under federal jurisdiction, the Board's previous decision is a nullity in any event.

[40] Finally, with respect to the jurisdictional issue, counsel referred to the decision of the Supreme Court of Canada in *Ontario Hydro v. Ontario Labour Relations Board, et al.,* [1993] 3 S.C.R. 327, where, in a 4:3 decision, the Court determined that federal labour relations legislation applied to certain employees of Ontario Hydro at its nuclear electrical generating stations. He argued that the decision in *Manitou Mechanical, supra*, was distinguishable from the present case, because the installation of the conveyor system in that case was a limited enterprise completed before mining commenced, and upon the completion of which the involvement of the contractor and its employees was at an end.

[41] Citing *Ontario Hydro* and the earlier decisions of the Supreme Court of Canada in *Northern Telecom Canada Ltd. v. Communications Workers of Canada (Northern Telecom (No. 1))*, [1980] 1 S.C.R. 115 and *Northern Telecom Canada Ltd. v. Communications Workers of Canada (Northern Telecom (No.2))*, [1983] 1 S.C.R. 733, Mr. Wilson asserted that the appropriate test was whether the "normal and habitual" activities of the Employer in the present case were practically and functionally integrated with the core federal undertaking of uranium mining. Counsel drew a distinction between the construction of a uranium mine facility before it goes into production and activities related to actual mine production, and drew an analogy to the decision of the Board in *United Association of Plumbers and Pipe Fitters of the United States and Canada, Local 488, v. Henuset Rentals Ltd*., [1977] Oct. Sask. Labour Rep. 32, LRB File No. 422-77; application for judicial review dismissed (1979), 96 D.L.R. (3d) 651 (Sask. Q.B.); affirmed [1981] 1 W.W.R. 748 (Sask. C.A.); leave to appeal to the Supreme Court of Canada dismissed, where it was held that the labour relations concerning the construction of an inter-provincial pipeline came under provincial jurisdiction until the pipeline was completed.

[42] Finally, Mr. Wilson argued that the fact that HRDC had assumed jurisdiction with respect to an accident at the mine involving one of the Employer's employees was a relevant consideration.

Analysis and Decision:

Preliminary Objections

[43] Counsel for the Union raised three objections to the Board hearing the issue of the constitutional jurisdiction for the labour relations of the employees in question: (1) that the matter is *res judicata*, having been determined by the Board in LRB File No. 140-99; (2) that it is an abuse of process for the Employer to force the Union to bring this application, by refusing to implement the certification Order; and, (3) that the Employer is estopped from objecting to the terms of the certification Order on the constitutional ground, having withdrawn the issue in LRB File No. 140-99.

[44] In our opinion, the doctrine of *res judicata* does not apply. While the parties and the general subject matter in the present case are the same as were before

the Board on the application for certification in LRB File No. 140-99, the specific issue of the constitutional jurisdiction of electricians involved in production mining was withdrawn before the hearing by that panel: no evidence was adduced with respect to the issue and no determination was made on the merits.

[45] The second objection is really one respecting the process by which the issue of constitutional jurisdiction now has come to be heard by the Board, and which, the Union suggests, should disentitle the Employer from raising the issue at this time. We are of the opinion that the Employer was bound to obey the certification Order unless and until it was amended, stayed or quashed. Ideally, and fairly, the Employer ought to have taken appropriate steps to obtain a remedy for what it subsequently deemed to be an overly broad order. If indeed the certification Order is excessive in its scope, the Employer stood by and knowingly allowed the Order to issue in the form sought by the Union, having withdrawn its objection to jurisdiction over the labour relations of the employees in question. While the Employer's motivation remains unexplained, and its actions in refusing to abide by the Order may be worthy of censure, we do not find that they constitute an abuse of process such that the issue of constitutional jurisdiction should not now be resolved.

[46] The third objection relies on the assertion of the doctrine of estoppel to bar the Employer from raising the jurisdictional issue as a defence to allegations that it has refused to obey the certification Order, having elected to withdraw the issue as a defence to the scope of Order in the proceeding in which it was made. While the issue of constitutional jurisdiction for labour relations is one that is within the authority of the Board to determine, it is trite to say that the Board properly cannot issue an order the scope of which exceeds its jurisdiction. Our decision to proceed to determine the matter is driven by the necessity to ensure that the scope of the Order is amended if necessary. It is imperative that the issue of constitutional jurisdiction be determined.

[47] We agree with counsel for the Union that when the Employer apparently came to doubt its strategy in withdrawing the jurisdictional issue from its reply to the certification application, and, therefore, from consideration by the Board, it ought to have initiated proceedings to deal with its concerns rather than ignore the Order, which on its face it was bound to obey until the Order was amended, stayed or quashed. In our

opinion, any disruption and expense occasioned by the unexplained actions of the Employer in withdrawing the issue from consideration on the certification application, when it should most naturally have been then determined, and later forcing the issue by refusing to recognize the Order, can be remedied through a "make whole" type of order. More will be said on this point at the end of these Reasons. In any event, we have determined to consider the jurisdictional issue raised by the application.

Constitutional Jurisdiction for Labour Relations

[48] The issue we must determine is whether the labour relations between the Employer and the electrician employees in question (i.e., those at the Cluff Lake operation) is a matter within provincial jurisdiction, and, therefore, within the jurisdiction of the Board under the *Act* or whether it is a matter within federal jurisdiction.

[49] The first general principle, found in *Toronto Electric Commissioners v. Snider*, [1925] 2 D.L.R. 5 (P.C.), is that the federal Parliament has no authority over labour relations as such or over the terms of a contract of employment which is exclusively within provincial competence over property and civil rights. The exception to this principle, enunciated in *In re the validity of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (S.C.C.) (the "*Stevedores' Case*"), is that Parliament may assert exclusive jurisdiction over such a matter if it is an integral part of its primary competence over some singularly federal subject.

[50] In the present case, there is no issue between the parties that nuclear energy, including the production mining of uranium ore, is exclusively within the jurisdictional competence of the federal Parliament pursuant to the *Constitution Act, 1867* and the *Nuclear Energy Act* (formerly the *Atomic Energy Control Act*)*, supra*, that the Employer is engaged in such activity, and that the labour relations of such core undertaking, consonant with the principle enunciated in the *Stevedores' Case*, *supra*, is within the legislative competence of the federal Parliament. However, where the parties disagree is as to the extent of that core undertaking and whether, in all the circumstances, the activities of the Employer's electricians are integral to such core undertaking, and, therefore, within federal jurisdiction, or are in the nature of "construction" or otherwise within provincial competence over property and civil rights.

[51] The distinction is illustrated by the decision of the Supreme Court of Canada in *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc.*, [1979] 1 S.C.R. 754, a case that considered whether Quebec minimum wage laws and construction industry labour relations legislation applied to the employees of a contractor engaged in the construction of Mirabel Airport. Like nuclear energy, aeronautics is a subject under exclusive federal authority. The majority of the Supreme Court of Canada held that the labour relations of the persons involved in the construction of the airport was not an integral part of federal competence over aeronautics, which included such core activities as aerial navigation and airport operation, but not construction before such core activities commenced.

[52] In *Northern Telecom (No. 1), supra*, the Supreme Court of Canada considered the issue of constitutional jurisdiction over the labour relations of the supervisors of Northern Telecom, which supplied telephone equipment and installation services under contract to Bell Canada for its national and international telephone network.[1] Dickson J., for the majority, summarized the principles enunciated by Beetz, J. in *Montcalm*, as follows, at 132:

> *(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.*
>
> *(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.*
>
> *(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.*
>
> *(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.*
>
> *(5) The question whether an undertaking, service or business is a*

[1] The Court dismissed the appeal on the grounds that the parties had failed to provide a sufficient factual base for it to arrive at an appropriate decision.

> *federal one depends on the nature of its operation.*
>
> *(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.*

[53] Dickson, J also described a method to determine constitutional jurisdiction in labour matters, at 132, which may be summarized as follows:

1. Examine the operation which is at the core of the federal undertaking to determine the extent of the undertaking;

2. Examine the particular subsidiary operation engaged in by the employees in question to determine the "normal or habitual activities" of the subsidiary operation as "a going concern";

3. Determine the "practical and functional relationship" of those activities to the core federal undertaking; the relationship necessary to bring the labour relations of the subsidiary operation within the sphere of federal competence must be characterized as "vital", "essential" or "integral."

[54] In relation to the last point, Dickson, J. approved of the observation by the British Columbia Labour Relations Board in *Arrow Transfer Co. Ltd*., [1974] 1 Can. L.R.B.R. 29, at 34-5, that the judgment in each case "is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship." Dickson, J. further stated that an important factor in relating the undertakings is the "physical and operational connection" between them, declaiming as follows at 134-135:

> *Here, as the judgment in Montcalm stresses, there is a need to look to continuity and regularity of the connection and not be influenced by exceptional or causal factors. Mere involvement of the employees in the federal work or undertaking does not automatically import federal jurisdiction. Certainly, as one moves away from direct involvement in the operation of the word or undertaking at the core, the demand for greater interdependence becomes more critical.*

[55] Dickson J. went on to state that to determine the jurisdictional question it is necessary to ascertain certain kinds of "constitutional facts," as follows at 135:

> *On the basis of the foregoing broad principles of constitutional adjudication, it is clear that certain kinds of "constitutional facts", facts that focus upon the constitutional issues in question, are required. Put broadly, among these are:*
>
> *(1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;*
>
> *(2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;*
>
> *(3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;*
>
> *(4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system and, in particular, the extent of the involvement of the installation department in the operation and institution of the federal undertaking as an operating system.*

[56] The principles enunciated in *Northern Telecom (No. 1)* were applied by the Federal Court of Appeal in *North Canada Air Ltd. v. Canada Labour Relations Board* (1980), 117 DLR (3d) 206 (leave to appeal to the Supreme Court of Canada denied), where it was held that a company that services and certifies the avionic equipment of an aircraft company as its habitual and normal activity is a vital or integral part of the aeronautics undertaking and its labour relations is therefore under federal jurisdiction.

[57] That the question of integration is a factual one is illustrated by the fact that a single business can engage in constitutionally separate activities. In *Canadian Pacific Railroad v. Attorney General of British Columbia*, [1950] 1 D.L.R. 721 (the "*Empress Hotel Case"*), the Judicial Committee of the Privy Council determined that the Empress Hotel, owned by the CPR, did not form part of the undertaking of the railway business of the CPR, not because the hotel business and the railway business are fundamentally different, but because the two undertakings were not integrated. The

case illustrates that the focus of the inquiry is on the service provided by the subsidiary operation to the federal undertaking and the degree of integration between the two.

[58] In *Northern Telecom (No. 2), supra*, the Supreme Court of Canada had occasion to revisit the issue of the constitutional authority over the labour relations of the telephone installer supervisors, this time with an appropriate factual base, and to provide a practical example of the application of the test outlined in *Northern Telecom (No. 1)*. The Court determined that the work of the installers was sufficiently integral to the core undertaking of telecommunications to bring their labour relations under federal authority. Estey, J., for the majority, at 755, described the fourth "constitutional fact" enunciated by Dickson, J. in *Northern Telecom (No. 1)*, *supra*, in relation to the examination of the physical and operational connection between the core federal undertaking and the subsidiary operation, as "the principal and dominant consideration":

> *The principal and dominant consideration in determining the application of the principle enunciated in the Stevedores' case is an examination of "the physical and operational connection" between the installers of Telecom and the federal core undertaking, the telephone network, and in particular the extent of the involvement of the installers in the establishment and operation of the federal undertaking as an operating system. I have here taken the liberty of paraphrasing in the terminology of the present record consideration numbered 4 above as enunciated by Dickson J. in the 1980 judgment of this Court.*

[59] In concurring reasons, Dickson, J. (as he then was), at 772, refers to the same principle as "the most critical factor" in determining constitutional jurisdiction.

[60] Referring to the factual evidence of integration, Estey, J. continued as follows, at 766-767:

> *The almost complete integration of the installers' daily work routines with the task of establishing and operating the telecommunications network makes the installation work an integral element in the federal works. The installation teams work the great bulk of their time on the premises of the telecommunications network. The broadening, expansion and a refurbishment of the network is a joint operation of the staffs of Bell and Telecom. The expansion or replacement of the switching and transmission equipment, vital in itself to the continuous operation of the network, is closely integrated with the*

> *communications delivery systems of the network. All of this work consumes a very high percentage of the work done by the installers.*
>
> *While it undoubtedly simplifies and clarifies the debate to attempt to define the work of the installers as being either the last step in manufacture or the first step in the operation of the telecommunications network, it is in part misleading to do so. Where the product loses its functional identity upon installation in a large system, it perhaps is not completely accurate to describe its integration as related to its manufacture. Manufacturing in its ordinary connotation refers to the fabrication of a product either from raw material to the complete finished state or the assembly of components and sub-assemblies into a finished product. Here the transmission and switching equipment as such are complete either on delivery to Bell or prior to its connection to the network. The connection to the network is simply putting the product, when finished, to work. The network is not complete without the product but the product is complete without the network. Thus it can be said with accuracy and logic that the installation is a step in the expansion or reconstitution of the federal works, the operating telecommunications network.*

[61] Although the majority found that the installers came under federal jurisdiction, it was not without some hesitation. Estey, J. commented on this point at 767-768, but referred to certain "overpowering factors" that led him to decide as he did:

> *The characterization of the nature of the service rendered by the installer is not a clear-cut and simple process which can produce but one answer. Other tribunals have reached the opposite result from my conclusion, which I have reached with much hesitation and after much consideration of the views advanced by others in support of their conclusions. Several factors, however, seem to me to be overpowering. It seems to me that the assignment of these labour relations to the federal sphere reflects the nature of the work of the employees in question, the relationship between their services and the federal works, the geographic realities of the interprovincial scope of the work of these employees transcending as they do several provincial boundaries, and the close and complete integration of the work of these employees and the daily expansion, refurbishment and modernization of this extensive telecommunication facility.*
>
> (emphasis added.)

[62] In his concurring reasons, Dickson, J. also commented that the situation was "close to the boundary" between federal and provincial jurisdiction. However, he

provided some direction regarding the relevance of characterizing the work of the installers as “construction” or “maintenance” in relation to the constitutional analysis of labour relations, specifically stating that the work of the installers, which was continuing and ongoing, could not be characterized as “construction” in the sense in which that term was used in *Montcalm*, *supra,* where the work was of limited duration. That is, whether construction or maintenance, the work of the installers was integral to the core federal undertaking. Dickson, J. stated, at 773-774:

> *This is not construction in the sense in which construction was held to be under provincial jurisdiction in Montcalm. In Montcalm, once the airport was completed, the construction workers would have nothing more to do with the federal undertaking. Bell Canada's operations are much different. The nature of Bell Canada's telecommunications system is that it continually is being renewed, updated, and expanded. Bell's system is highly automated, constantly being improved. It is the installers who perform this task. Although their job is not "maintenance" in the strict sense of the word, I think it is analytically much closer to maintenance than to ordinary construction of a federal undertaking. The installers' work is not preliminary to the operation of Bell Canada's undertaking; the work is an integral part of Bell Canada's operation as a going concern. It was earlier noted the installers have no contact with the rest of Telecom employees. In contrast, they do have contact with, and must closely co-ordinate their work with, Bell Canada employees. In this overall context, installation is not the end of the manufacturing process. It is not even properly described as the beginning of the operation of the federal undertaking. It is simply an essential part of the operations process. The installers' work is not the same kind of participation in the day-to-day operations of the federal undertaking as was present in the Stevedoring case or the Letter Carriers' case, supra, in the sense that Telecom installers ordinarily do not directly service users of the federal undertaking. That does not, however, render the installers' work any less vital to the federal undertaking.*
>
> *I agree with the conclusion expressed by Chief Justice Thurlow in the Federal Court of Appeal [at p. 202]:*
>
> > *But the feature of the case that appears to me to be of the greatest importance and to point with telling effect to the conclusion that the jurisdiction is federal is the fact, as I see it, that what the installers are doing, day in day out, during 80% of their working time, is participating in the carrying on of the federal undertaking itself which by reason of its nature requires a constant program of rearrangement, renewal, updating and expansion of its*

> *switching and transmission system and the installation of telecommunications equipment designed to carry out that need. With 80% of the work these installers are doing on a continuing basis being work done in Bell's undertaking, I am of the opinion that there is a foundation for the assertion of federal jurisdiction over their labour relations and that the Board should assume and exercise it in accordance with the Canada Labour Code. Further, in my view, the fact that 20% of the installers' work is not done for Bell does not change the conclusion.*
>
> *Although I think this case is very close to the boundary line between federal and provincial jurisdiction, I am persuaded that the installers fall under federal jurisdiction.*
>
> (emphasis added.)

[63] The distinction between work of limited duration and an ongoing continuous relationship between the core federal undertaking and the subsidiary operation was highlighted in *Reference re Canada Labour Code (Antioch Construction)*, *supra*, a 1986 reference by the Canada Labour Relations Board to the Federal Court of Appeal. The Court determined that the constitutional jurisdiction over the labour relations of employees of a contractor engaged by Canadian National Railways to replace wooden railway bridges with steel and concrete bridges on a section of its line situated wholly in British Columbia was provincial. Applying the test enunciated in *Construction Montcalm* and *Northern Telecom (No. 1)*, both *supra*, that is, to examine the facts of the relationship between the contractor's operation and the principal's core federal undertaking from a functional and practical point of view, the Court determined, at 245, that the requisite high degree of operational integration did not exist – any such integration was temporary – and that, whether the work was considered construction or maintenance, the work was "discrete in nature and limited in duration," and, unlike the work of the installers in *Northern Telecom (No. 2)*, *supra*, the work had "no aspect of continuity or permanence." That is, whether the work was characterized as "construction" or "maintenance" was largely irrelevant, rather, what was important was the degree of its connection and integration with the core federal undertaking. The Court stated, at 237-38:

> *A possible interpretation of Beetz J.'s words [in Construction Montcalm] is that the decisive distinction is that between construction and maintenance, and it was to such a position that Laskin C.J.C.(supported by Spence J.) in the minority strongly*

> *reacted. . . It appears to me, with respect to a construction – maintenance dichotomy this was not the gravamen of the majority decision in Construction Montcalm as is made clear by the Court's decisions in the two subsequent Northern Telecom decisions.*

And further, at 243:

> *I conclude from the two Northern Telecom cases that the critical factor in determining constitutional jurisdiction in such cases is the "macro-relationship" between the subsidiary operation and the core federal undertaking. The facts of this relationship should be examined from a functional, practical point of view, and for federal jurisdiction to be established (1) there must be a high degree of operational integration and (2) it must be of an ongoing nature. Construction Montcalm, therefore must also be interpreted in this light.*

[64] In *Reference re Canada Labour Code (Antioch Construction)*, *supra*, the Federal Court of Appeal cited with approval two previous decisions of the Court regarding the jurisdictional issue. In *Re Bernshine Mobile Maintenance Ltd. and Canada Labour Relations Board* (1985), 22 D.L.R. (4th) 748, and *Highway Truck Service Ltd. and Canada Labour Relations Board* (1985), 62 N.R. 218, the Court held that businesses under contract to provide, respectively, tire repair and tractor-trailer washing services, and continuous maintenance services, to a company engaged in interprovincial trucking, were vital, essential and integral to the operation of that undertaking and were under federal jurisdiction. That is, the contracting out of the work did not necessarily render it severable from the core undertaking.

[65] In *Central Western Railway Corporation v. United Transportation Union, et al.*, [1990] 3 S.C.R. 1112, the majority of the Supreme Court of Canada elucidated certain previous decisions of the Court – particularly the *Stevedores' Case*, *supra*, and *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178 (the *Letter Carriers' Case*) – in relation to the dependence of a core federal undertaking upon a group of workers as tending to support federal jurisdiction over those workers. At 1136-1138, Dickson, J. (as he then was) stated as follows:

> *The issue of whether the federal government has jurisdiction over the labour relations of a work or undertaking not in itself federal has been before this Court on a number of occasions. The basic*

criteria for deciding this issue were addressed in Reference re Industrial Relations and Disputes Act, [1955] S.C.R. 529 (the Stevedores' case), a case which concerned the constitutional validity of Parliament's attempt to regulate the labour relations of stevedores by means of a predecessor to s. 4 of the Canada Labour Code. In the Stevedores' case, the undisputed federal undertaking was the international and interprovincial flow of cargo carried by ships into and out of the port of Toronto. The loading and unloading services were supplied to the ship owner and the cargo shippers by a stevedoring company, which was in no way connected, through corporate ownership, to the shipping concerns. The goods were unloaded by the stevedores [page1137] and then were placed upon domestic land-operating transport facilities for onward transportation to the consignee.

This Court found the legislation in question to be intra vires the federal government. In an eight to one decision, the stevedoring operations were found to be an integral or essential part of the interprovincial or international transportation of goods by ship. The operational connection and integration between the federal undertaking and the stevedores was complete -- the stevedores were an essential "link in the chain" of the federal operation. Effective performance of the federal undertaking would not be possible without the services of the stevedores. Federal jurisdiction there seems to have been based on a finding that the core federal undertaking was dependent to a significant degree on the workers in question.

The above reading of the Stevedores' case was verified in Letter Carriers' Union of Canada v. Canadian Union of Postal Workers, [1975] 1 S.C.R. 178 (Letter Carriers'), where the same issue was considered. In Letter Carriers', the Canadian Union of Postal Workers challenged the jurisdiction of the Saskatchewan Labour Relations Board to certify a union for the respondent company. The respondent company had a number of contracts with Canada Post for the delivery and collection of mail, these contracts comprising 90 per cent of the respondent company's business. In finding that the employees of the respondent company fell under federal jurisdiction, the court seems to have been much influenced by the dependence of the post office upon its subcontractors for mail delivery. Ritchie J., speaking for the Court, held, at p. 183:

> *In my opinion the work so described which is performed by these employees is essential to the function of the postal service and is carried out under the supervision and control of the Post Office authorities ... . [Emphasis added.]*

> *He later commented, at p. 186, that the work of the respondent company's drivers "was an integral part of the effective operation of the Post Office".*
>
> *Both the Stevedores' and Letter Carriers' cases indicate that dependence of a core federal work or undertaking upon a group of workers tends to support federal jurisdiction over those workers.*

[66] In *Central Western*, in finding that the short line railway in question was not sufficiently integrated with CN's interprovincial rail operation to bring it under federal jurisdiction, the Court observed, at 1147, that:

> *…something more than physical connection and a mutually beneficial commercial relationship with a federal work or undertaking is required for a company to fall under federal jurisdiction.*

[67] This sentiment was recently echoed by the Ontario Labour Relations Board in *Supply Chain Express Inc*., [2001] OLRD No. 4694, at para. 62, where it stated that "the fact that the activities of the two operations may be complementary or mutually beneficial is not sufficient to point to integration."

[68] In 1993, the Supreme Court of Canada determined that constitutional jurisdiction over the labour relations of a single employer and its employees may be divided depending upon the functional integration of the activities of discrete groups of employees with the core federal undertaking. In *Ontario Hydro*, *supra*, a union applied to the Ontario Labour Relations Board for certification as bargaining agent of a unit of employees of Ontario Hydro that included some employees that worked at its nuclear generating plants. In a 4:3 decision the Court held that only those employees actually employed on or in connection with facilities for the production of nuclear energy are federally regulated – that is, those engaged in using nuclear reactors to generate heat energy. However, those employees involved in using the heat energy produced by the reactors to produce steam to run the turbines, which in turn run the generator, are provincially regulated since they are engaged in the production of electricity no differently than persons engaged in producing electricity by use of non-nuclear means to power turbines or generators.

[69] The constitutional jurisdiction over labour relations is a notoriously difficult issue to grapple with, as was recently observed by the British Columbia Labour Relations Board in *Murrin Construction Ltd. v. Construction and Specialized Workers' Union, Local 1611* (2002), 80 C.L.R.B.R. (2d) 42, at 52-54:

> *23. Canada's complex constitutional arrangements on the division of powers have often given rise to confusion and administrative difficulty. There is no doubt today that the federal Parliament has jurisdiction to regulate labour and employment relations in respect not only of the federal public sector but also in relation to that portion of the private sector falling within federal jurisdiction. However, the line between federal and provincial jurisdiction is not easy to draw, and has produced decisions that are difficult, of not impossible, to reconcile on the facts.*
>
> *29. The determination whether a particular enterprise… constitutes an integral part of a federal undertaking calls for a close and careful analysis of the relationship between them. There is no universal template, no single comprehensive test that can be applied with mathematical precision to produce a result with which everyone will necessarily agree. Rather the principles enunciated in the cases have to be applied flexibly, in a manner attentive to the facts of the particular case: Central Western Railway, at p. 19 D.L.R.*
>
> *33. Thus, the characterization of an enterprise as provincial is not always clear-cut. It has frequently led to disagreements between federal and provincial boards, between the boards and the courts, between different levels of courts, and between judges in the same court. …A careful analysis of the facts suggest that it is difficult, if not impossible, to reconcile a number of these decisions.*

[70] The challenge in coming to terms with the issue is also illustrated by the comments of Estey, J. and Dickson, J. in *Northern Telecom (No. 2)*, *supra*, that that case was "close to the boundary," the close decision of the Supreme Court of Canada in *Ontario Hydro*, *supra*, and the division of that Court in most of the other cases decided by it cited above.

[71] One begins with the undisputed proposition made in *Toronto Electric Commissioners* and the *Stevedores' Case*, and in *Construction Montcalm*, all *supra*, that the onus is upon the party claiming that federal jurisdiction over labour relations applies

in a given situation to prove the facts necessary to establish that such jurisdiction applies rather than that of the provincial legislature.

[72] In *Northern Telecom (No. 1)* and *Northern Telecom (No. 2)*, both *supra*, the Supreme Court of Canada laid down the framework for analyzing the issue: that is, the determination of the "constitutional facts" necessary to answer the questions posed by Dickson, J. in *Northern Telecom (No. 1)*, enumerated earlier in these Reasons, recognizing that the fourth such fact – the physical and operational connection between the work performed by the Employer's electricians and the core federal undertaking of uranium mining – is the "principal and dominant consideration."

[73] As the cases demonstrate, the inquiry in a given case cannot apply the principles dictated by the Supreme Court of Canada in a rigid manner, but must be flexible and sensitive to the particular facts of the case – uranium mining is very different from telecommunications, aeronautics, trucking, railroading and shipping, and even nuclear power generation. Thus, in *Murrin Construction*, *supra*, at 56, a case involving a contractor performing track stabilization work for CN, Vice-Chair Hickling of the British Columbia Board adapted Dickson, J.'s formulation of "constitutional facts" in *Northern Telecom (No. 1)*, *supra*, and accepted the following seven factors as a guide to the process of determination of jurisdiction:

> *(i)* *The nature of the relationship between the core federal worker undertaking and the enterprise in question.*
>
> *(ii)* *The nature of the operations as determined by reference to the normal or habitual activities of the business as a going concern: Central Western Railway, at p. 18 D.L.R.*
>
> *(iii)* *The extent of functional integration between the federal undertaking and the enterprise in question: Central Western Railway, at p.20 D.L.R.*
>
> *(iv)* *The degree of dependence of the federal undertaking on the services provided: see Central Western Railway, at p. 20 D.L.R.*
>
> *(v)* *Whether the services provided are of a discrete or temporary nature or characterized by some degree of consistency or permanence: Reference re Canada Labour Code, at p. 245 D.L.R., and Construction Montcalm, at pp. 658 – 659 D.L.R.*

(vi) *That it is not necessary that the employees work exclusively in connection with the federal work or undertaking, provided that the services rendered are the main and principal part of its business: Letter Carriers, at p. 112 D.L.R.*

(vii) *Whether the services are best described as discrete construction projects or ongoing maintenance: Bernshine, at p. 18.*

[74] A similar approach was adopted by the Canada Labour Relations Board in *Canadian Guard's Association v. Pinkerton's of Canada Ltd*., [1990] 90 CLLC 16,061, where it was determined that the services of employees providing pre-boarding screening at an airport was vital, essential and integral to the core federal undertaking of aeronautics.

[75] Adopting a similar approach for our analysis, we are concerned with determining the degree of the "practical or functional integration" between the core federal undertaking and the work done by the Employer's electrician employees at Cluff Lake.

[76] The Employer in the present case is involved in contracting with the mine owner to carry out both mine construction and the actual mining of uranium. The Employer does not dispute that its activities as a construction company before a uranium mine begins production are within provincial jurisdiction as concerns labour relations. Indeed, this is consistent with the approach taken by the Supreme Court of Canada in *Construction Montcalm* and the *Northern Telecom* cases, both *supra*. Hence, the Employer does not dispute the jurisdiction of the Board and the certification Order as concerns its employees at Cigar Lake and McArthur River. Its construction contracts at those locations are separate from its contract for production mining at Cluff Lake.

[77] Counsel for the Union suggested that the answer to the jurisdictional question in the present case lies in determining whether the work performed by the Employer's electrician employees at Cluff Lake is characterized as primarily "construction" or ongoing "maintenance," based upon an assumption that the former would fall under provincial jurisdiction and the latter under federal jurisdiction. However, as *Northern Telecom (No. 2)*, *supra*, makes clear, "construction" per se has no independent constitutional status. Myriad and conflicting cases demonstrate that the

distinction between “construction” and “maintenance” is anything but clear. (We should interject here to say that, in our opinion, the fact that the *CILRA, 1992*, *supra*, includes “maintenance” activity in its definition of “construction industry” is irrelevant to the issue of constitutional jurisdiction in the present case.) As pointed out above, in *Reference re Canada Labour Code (Antioch Construction)*, *supra*, the Federal Court of Appeal stated that the “construction versus maintenance” issue was not the basis of the decision in *Construction Montcalm*, *supra*. Rather, the latter case established that the nature of the activity of the subsidiary enterprise is relevant to assessing the nature and degree of its practical or functional integration with the core federal undertaking. This approach was demonstrated in the *Northern Telecom* decisions.

[78] The activities carried on by the Employer’s electricians at Cluff Lake are of two broad types. Some, including the installation of underground electrical lines, substations, lighting, ventilation and pumping systems, and repair and maintenance of electrical mining machinery, are directly in aid of the immediate ore mining process. Others, including the surface extension of the electrical grid, material salvage and work at the sand plant are less directly related to mining activity. According to Mr. Novicki, the former activities comprise a large and continuing majority of the electricians’ work time. By contrast, the bulk of the time spent engaged in the latter activities was at the sand plant, which is a semi-annual occurrence.

[79] While many of the electricians’ activities, with, perhaps, the exception of the sand plant operation, material salvage and mining equipment repair, could be broadly categorized under the popular notion of what comprises “construction,” as the case law demonstrates, such classification is not particularly helpful. Rather, what is significant is the degree of practical and functional integration of the electricians’ activities with the core mining function. In *Construction Montcalm*, *supra*, it was not so much important whether the project in question was construction of an airport that governed the jurisdictional assignment of its labour relations, as the fact that the employer was *a* typical and ordinary construction contractor, as explained in *Murrin Construction*, *supra*, at 59-60:

> *Typically, such contractors and their employees work successively or simultaneously on several projects which have little or nothing in common. Their ordinary business is building. What they build*

> *is accidental and there is nothing specifically federal about their ordinary business: per Beetz J. at pp. 658-659 D.L.R. To accept the employer's submission that jurisdiction depended upon the nature of the project would be to disregard the elements of continuity in construction, and to focus upon casual or temporary factors, contrary to prior decisions of the courts such as Letter Carriers, supra. The case was distinguishable from the situations in which persons had been employed temporarily in the continuous operation of a federal service, or Stevedores Case, where the employees concerned were employed exclusively with reference to a federally regulated operation.*
>
> *. . .Construction Montcalm was not concerned with the running of a functioning airport. At the time in question, Mirabel Airport was a construction site. The erection of buildings and the construction of the runways were so far removed from aerial navigation or the operation of the airport that it could not be said to be an integral part of aeronautics or of any other field reserved to federal competence.*

[80] With respect to characterizing the nature of the operation, *Construction Montcalm* and the *Northern Telecom* cases, all *supra*, emphasize the examination of the normal and habitual activities of the business and the continuity and regularity of the connection with the core undertaking without regard to exceptional or casual factors. In *Construction Montcalm*, upon completion of the airport structure, the employees in question would have no involvement with the federal undertaking of airport operation. Their work was limited and temporary, with a defined end point. Their work was like that of the Employer's electrician employees in the present case, who were involved with the construction of the mine and ancillary structures at Cigar Lake and MacArthur River, which was finite and preliminary to the operation of the mine.

[81] The fact that much of the work of the Employer's electricians at Cluff Lake could be described as "electrical construction" is not in itself determinative of the issue. As observed in *Murrin Construction*, *supra*, at 61:

> *The issue is not whether the work of Murrin's employees is interchangeable with that performed by similarly qualified people on construction projects under provincial jurisdiction, but whether their work is functionally integrated into the operations of CN to such a degree as to lead to the conclusion that it falls into the federal field.*

[82] However, neither is it determinative of the issue that the electricians' sphere of work is part of, or subsidiary to, the Employer's global contract to carry out the uranium mining operation. *Ontario Hydro*, *supra*, demonstrated that the labour relations of some the employees of an employer engaged in the larger enterprise of nuclear power generation might come under federal jurisdiction and others under provincial jurisdiction, depending on their integration with the core federal undertaking. And, as established in *Central Western Railway*, *supra*, it is not enough that there is a physical connection or a mutually beneficial commercial relationship between two operations, even if one is a subsidiary component of the core enterprise.

[83] The case law demonstrates, however, that the extent of exclusivity of operations is a relevant factor in determining whether the operational integration of the enterprises is exceptional or casual, or regular and of significant duration. For example, in the *Letter Carriers Case*, while the employer had an outside delivery business, 90 per cent of the employer's gross income was derived from mail delivery contracts with the Post Office; in *Northern Telecom (No. 2), supra*, Telecom's work for Bell Canada represented some 80 per cent of the work of its installers; in *Bernshine*, *supra*, the employer held out its vehicle maintenance services to the public, but the vast majority of its work was performed for one federally regulated interprovincial trucking company. That is, the operational integration between the federal undertaking and the subsidiary operation does not have to be complete.

[84] As *Central Western Railway,* the *Letter Carriers Case* and the *Stevedores Case* demonstrate, the dependence of the federal undertaking upon the services provided by a group of workers may support the finding that they come under federal jurisdiction. That is, the effective operation of the federal undertaking is not possible without them. Regarding the *Stevedores Case*, Dickson, J. observed in *Central Western Railway*, at 1137, that:

> *Federal jurisdiction there seems to have been based on a finding that the core federal undertaking was dependent to a significant degree on the workers in question.*

[85] And, regarding the *Letter Carriers Case*, he observed that in that case it was found that the work of the mail delivery subcontractors was “an integral part of the effective operation of the Post Office.”

[86] The concept of “dependency” is not really a separate factor, but rather, indicative of the degree to which the subsidiary undertaking is vital, essential and integral to the federal undertaking. It is the dependence of the federal undertaking on the subsidiary operation that will bring the latter into federal jurisdiction.

[87] Illustrations of a degree of dependency that did not result in bringing the subsidiary activity within the federal jurisdiction of the core undertaking are the catering services at a uranium mine in *Six Seasons Catering*, *supra*; the cleaning services at a uranium refinery in *Reliable Window Cleaners (Sudbury) Limited*, [1982] OLRB Rep. Nov. 1714; parking services at an airport in *Toronto Auto Parks (Airport) Limited*, [1978] OLRB Rep. July 682; a duty free shop located on federal land at a border crossing in *Blue Water Bridge Duty Free Shop Inc*., [1988] OLRB Rep. Feb. 109; and, building cleaning at an airport in *Service d’Entretien Avant-Garde Inc. v. Canada Labour Relations Board* (1986), 26 D.L.R. (4th) 331 (Que. S.C.). In *Reliable Window Cleaners*, the Ontario Labour Relations Board found that the employees had no direct involvement with the operations of the refinery or the handling of any prescribed substance, stating, at 1717:

> *In our view, while these services are reasonably incidental to the Eldorado’s refinery operation, they are not an essential or integral part of it.*

[88] In the present case, the task is to determine whether the work performed by the electricians at Cluff Lake is so vital, essential or integral to the production mining operation as to bring them within federal jurisdiction.

[89] The normal and habitual activities of the electricians include the installation of underground electrical lines, substations, lighting, ventilation, and pumping systems, and the repair and maintenance of electrical machinery. While, generically, such activities are not much different from those that might be performed by electricians on construction projects undoubtedly within provincial jurisdiction, in the present case, these activities are performed for no reason other than to advance the mining process.

Other activities performed by the electricians – sand plant operation, material salvage, above ground electrical construction – are infrequent and/or irregular, and consume only a minor part of their work time. The substantial portion of the electricians' work is performed at or near, and directly in aid of, the uranium mining operation. The mining operation is directly dependent on the work performed by the electricians. The bulk of the work of the electricians is vital and essential to the mining operation. Their functions are integral to the activity at the mining face, providing ventilation and power and removing water.

[90] The functional and practical integration of the electricians in the mining process in the present case is more complete than that of the installers with Bell in *Northern Telecom (No. 2)*, *supra*; the mining operation is at least as dependent upon the work of the electricians as the dependence of the Post Office on the delivery subcontractors in the *Letter Carriers Case*, *supra*, or of shipping on the dock workers in the *Stevedores Case*, *supra*; the work of the electricians directly in aid of the mining process is regular and continuous, as opposed to the finite nature of ordinary construction illustrated in *Construction Montcalm, supra*.

[91] The work performed by the electricians at Cluff Lake is vital, essential or integral to the mining operation, and, therefore, is within federal jurisdiction. They are not within the scope of the certification Order. While on its face the original Order was clearly intended to apply to the electrician employees at Cluff Lake – any issue of jurisdiction having been withdrawn by the Employer – It is not necessary to amend the form of the certification Order. These reasons for decision will serve to amend and clarify its scope. The Order is intended to apply to, and can only apply to, employees within provincial jurisdiction. If and when the parties are unable to agree on the application of the Order, application may be made to the Board for determination.

Violation of the Act and Remedy

[92] Pursuant to s. 5(a) of the *Act*, the Board has the jurisdiction to determine whether a unit of employees is appropriate for the purposes of bargaining collectively. This it did based on the evidence adduced and without objection by the Employer. As stated earlier in these Reasons, the Employer must bear full responsibility for the form in which the original certification Order was issued, and the intention of the Board, as

evidenced by the Reasons for Decision in LRB File No. 140-99, that it cover all of the Employer's electrician employees described therein, including those at Cluff Lake. It was not for the Employer to unilaterally determine that the scope of the Order was in error – an error that it in fact induced – and then refuse to obey the Order as it saw fit without doing anything further about it. Failing the taking of steps to seek reconsideration of the decision, or to vary, amend, stay or quash the Order, the Employer was bound to abide by the Order. Its refusal to do so constituted a violation of the *Act* and of the decision of the Board in LRB File No. 140-99.

[93] Undoubtedly, there has been unwarranted trouble and expense for the Union occasioned by the Employer's violation, the full extent of which is not known at present. The Board Registrar is directed to set a time and date for the matter of an appropriate remedy for the violation to be heard by the Board. Pursuant to s. 5.1 of the *Act*, the Employer is directed to file a plan for rectifying the violation no later than 14 days before the date of such hearing.

DATED at Regina, Saskatchewan, this **8th** day of **May, 2003.**

LABOUR RELATIONS BOARD

James Seibel,
Vice-Chairperson