Saskatchewan
Labour Relations Board

ANDRITZ HYDRO CANADA INC., Applicant v THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Respondent

LRB File No. 016-21; July 5, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Allan Parenteau

Counsel for the Applicant, Andritz Hydro Canada Inc.: Steve Seiferling

Counsel for the Respondent, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of The United States and Canada, Local 179: Ronni A. Nordal

Reconsideration Application – Underlying Certification Application – Division 13 – Construction Industry – Work does not fall within Maintenance Exclusion – Certification Application within Construction Industry granted.

Procedure on Reconsideration Application – Two-Stage Process – First Stage to be determined by Written Submissions – Assessment of Threshold Grounds – No basis to Reconsider Decision.

Remai Criterion #3 does not Apply – Decision relates to the work of the Pipe Trades – Work forms part of Overall Project – Decision does not foreclose Maintenance Work finding.

Remai Criterion #4 does not Apply – No issue of Inconsistency – Statute not Misapplied or Misconstrued – No Improper Reading in of "Replacement".

Remai Criterion #5 does not Apply – No Breach of Natural Justice – Legal interests are those of the parties – Decision based on evidence presented at hearing – No determination of validity of Project Agreement for Signatory Unions.

Remai Criterion #6 does not Apply – No Compelling Reason to Undertake Further Refinement of Decision – Construction Industry Regime – Role of Representative Employers' Organization and application of provincial collective agreement well established.

REASONS FOR DECISION

Introduction:

[1] Barbara Mysko, Vice-Chairperson: The Employer, Andritz Hydro Canada Inc., filed an application to reconsider the decision in *United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 v Andritz Hydro*

Canada Inc., 2021 CanLII 4217 (SK LRB), LRB File No. 279-19. In that decision, the Board granted the Union's certification application to represent employees working in the pipe trades for Andritz Hydro Canada Inc. in Saskatchewan.

[2] The certification application was filed pursuant to Division 13 of the Act, which permits collective bargaining to occur in the construction industry by trade on a province-wide basis. In its decision, the Board found that the work of the pipe trades was not properly characterized as maintenance work, and therefore, could not be excluded from Division 13 on that basis. The Employer has taken, and continues to take, the position that the work of the pipe trades is maintenance work, and it asks the Board to reconsider the certification decision for various reasons related to this principal concern.

[3] The Board's approach to reconsideration applications involves a two-stage process. The first stage requires that the Board decide whether any of the threshold grounds have been satisfied so as to justify reconsideration of the decision. The grounds are well-established and have been recited by the Board on many occasions. They were first articulated by the Board in *Remai Investment Corp. v Saskatchewan Joint Board, RWDSU*, [1993] Sask Lab Rep 103 (SK LRB) [*Remai*], as follows:

> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence.*
> 2. *If a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons.*
> 3. *If the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application.*
> 4. *If the original decision turned on a conclusion of law or general policy under the code which law or policy was not properly interpreted by the original panel.*
> 5. *If the original decision is tainted by a breach of natural justice.*
> 6. *If the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[4] The Employer relies for its reconsideration request on the third, fourth, fifth, and sixth grounds.

[5] For the current purposes, the parties agreed that the matter could be bifurcated such that the Board would consider the first stage of the reconsideration application by written submissions only, and then, if necessary, proceed to the second stage of the application by way of a *viva voce* hearing. For purposes of the first stage, the parties agreed that the pleadings as filed contained sufficient argument to allow the Board to consider and determine the issues. Therefore, the Board

is charged with considering the first stage of the reconsideration application on the basis of the materials, as filed.

[6] The Board is grateful to the parties for their efficient and practical approach to this matter.

Arguments of the Parties:

Employer:

[7] The first basis for reconsidering the decision is that it has operated in an unanticipated way and has had an unintended effect. There are two unintended effects. First, the Board has found, contrary to the relevant case law, that an increase in production capacity is decisive of the construction/maintenance question. The evidence before the Board was that, generally, there will be a slight increase in output whenever parts are replaced with new technology. Maintenance work frequently involves replacing old or failing technology with new technology. If a slight increase in output (which at the time of the decision was projected and not proven) is decisive then no work could ever be characterized as maintenance. Second, according to the decision the entire project consisted of construction work, not maintenance work. By making this broad declaration, the decision may have impacted other contracts negotiated by other trades. In particular, the parties to the Project Agreement agreed that the project is maintenance, and the decision creates confusion with respect to the viability of that agreement.

[8] The next basis is that the decision turned on a conclusion of law or general policy which law or policy was not properly interpreted by the original panel. Three separate issues are identified within this ground. First, the Board misinterpreted the law in Nova Scotia and Alberta as concluding that an increase in generation capacity is decisive, and erred by overlooking the other factors that should have been considered in assessing whether the work is included in the construction industry. Second, the Board ignored a definition of maintenance that had previously been accepted by the Union and the project owner, SaskPower. Third, the Board wrongly read the word “replacement” into the definition of “construction industry” contained in section 6-65.

[9] The decision is also tainted by a breach of natural justice. The conclusion with respect to the overall project impacts the interests of unions that were not in attendance at, or notified of, the hearing. It raises questions about the nature of the work being performed by the members of these unions. The Board should have provided notice to the affected third parties to ensure that those parties had an opportunity to make submissions.

[10] Lastly, the decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon, or otherwise change. This is the first decision in which the Board has had to define maintenance relative to construction, and it is precedential.

Union:

[11] The Union denies that the application satisfies any of the grounds set out in *Remai*.

[12] The decision has not operated in an unanticipated way. To appreciate this, the decision must be read in its full context. Read in this way, it is clear that the decision relates to the work of the pipe trades which forms a part of the overall project. It is specific to the work of the pipe trades.

[13] The Union disagrees that the decision turns on a question of law that was not properly interpreted by the Board. The question before the Board was whether the work in issue fell within the definition of construction. The Board was required to interpret its statute and apply it to the facts of this case; it did not define maintenance, and it was not involved in interpreting a strict question of law.

[14] There is no breach of natural justice. The decision relates only to the work of the pipe trades and therefore there is no merit to this argument.

[15] The decision is not precedential. The Act does not contain a definition of “maintenance” and therefore the Board was not required to define maintenance to reach its decision. The Board has not set a precedent with respect to the meaning of maintenance.

[16] Overall, the Employer is improperly attempting to re-litigate the case before the Board through the mechanism of a reconsideration application. A reconsideration application is not an appeal.

Applicable Statutory Provisions:

[17] The applicable statutory provisions are as follows:

> ***6-9****(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.*
> *…*
>
> ***6-11****(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:*

(a) if the unit of employees is appropriate for collective bargaining;…

…

(7) In making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:

(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and

(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:

(i) the geographical jurisdiction of the union making the application; and

(ii) whether the certification order should be confined to a particular project.

6-64*(1) The purpose of this Division is to permit collective bargaining to occur in the construction industry on the basis of either or both of the following:*

(a) by trade on a province-wide basis;

(b) on a project basis.

…

6-65 *In this Division:*

(a) "construction industry":

(i) means the industry in which the activities of constructing, erecting, reconstructing, altering, remodelling, repairing, revamping, renovating, decorating or demolishing of any building, structure, road, sewer, water main, pipeline, tunnel, shaft, bridge, wharf, pier, canal, dam or any other work or any part of a work are undertaken; and

(ii) includes all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection with a work mentioned in subclause (i), but does not include maintenance work;

6-115*(1) Every board order or decision made pursuant to this Part is final and there is no appeal from that board order or decision.*

(2) The board may determine any question of fact necessary to its jurisdiction.

(3) Notwithstanding subsections (1) and (2), the board may:

(a) reconsider any matter that it has dealt with; and

(b) rescind or amend any decision or order it has made.

(4) The board's decisions and findings on all questions of fact and law are not open to question or review in any court, and any proceeding before the board must not be restrained by injunction, prohibition, mandamus, quo warranto, certiorari or other process or proceeding in any court or be removable by application for judicial review or otherwise into any court on any grounds.

Analysis:

[18] The Board is guided by a well-established set of principles that have consistently been applied to reconsideration applications.[1] Central to these principles is the understanding that

[1] See, for example, *Canadian Union of Public Employees, Local 600-3 v Government of Saskatchewan (Community Living Division, Department of Community Resources)*, 2009 CanLII 49649 (SK LRB), at paragraph 21; *Kennedy v Canadian Union of Public Employees, Local 3967*, 2015 CanLII 60883 (SK LRB); *Reliance Gregg's v UA (Plumbers & Pipefitters)*, 2019 CanLII 120618 (SK LRB); *Grain Services Union v Saskatchewan Wheat Pool et al*., [2003] Sask LRBR 454*; City of North Battleford v Canadian Union of Public Employees, Local 287* [2003] Sask LRBR 288.

"Board decisions are to be considered final in all but exceptional circumstances": *Amalgamated Transit Union, Local 615 v City of Saskatoon*, 2018 CanLII 127679 (SK LRB). As an extension of this premise, the authority to reconsider a Board decision is applied sparingly. A reconsideration hearing is not to be treated like a hearing *de novo* or an appeal.

[19] This restrictive approach allows for certainty and finality to the Board's decisions. At the same time, the authority to reconsider its decisions provides the Board with flexibility to respond to circumstances that may result in an injustice, and to address important policy issues. The balance that is sought to be achieved was captured in the following passage from *Kennedy v Canadian Union of Public Employees, Local 3967*, 2015 CanLII 60883 (SK LRB) [*Kennedy*]:

> *9 The Board's authority and willingness to reconsider its prior decisions is often confused with a right of appeal. However, as Chairperson Bilson noted in the Remai Investment Corporation decision and as this Board has confirmed in numerous decisions since then, the power to re-open a previous decision must be used sparingly and in a way that will not undermine the coherence and stability of the relationships the Board seeks to foster. In other words, while the Board has authority to reconsider its own decisions, doing so is neither a right of appeal nor an opportunity for an unsuccessful applicant to re-argue and/or re-litigate a failed application before the Board. [] This Board's willingness to reconsider its prior decision is founded in the periodic need for the Board to address important policy issues arising out of our jurisprudence and/or to avoid injustices. However, the Board must balance the need for policy refinement and error correction with the overarching need for finality and certainty in our decision-making process. As a result, both our approach to reconsideration applications and the criteria upon which we rely establish a high threshold for any applicant seeking to persuade this Board to review a previous decision.*
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> *[citations removed]*

[20] The Board will proceed to consider whether any of the threshold grounds raised by the Employer have been satisfied so as to justify reconsideration of the decision. The Board will consider each of these grounds, in turn.

If the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application

[21] The Employer asserts that the decision precludes the Board, in a future case, from excluding work from the construction industry on the basis that it is maintenance work. This is because most if not all maintenance work involves replacing old or failing technology with new technology. This means that no work, or at least very little work, could ever be found to be maintenance.

[22] A critical issue with this argument is that it treats the terms "output" and "production/generation capacity" as interchangeable. This approach oversimplifies the analysis

contained in the decision. At paragraph 115, the Board observed that "[a]lthough the replacement of the pipes did not result in an increase in output, the overall project resulted in an increase in generation capacity." The Board explained why this influenced its final determination:

> *[113] The case law treats this finding as decisive. It is similar in effect to a finding that the work resulted in an addition to or an expansion to a facility; it stands in contrast to a finding that the work resulted in an increase in efficiency that did not result in an increase in production. The former necessarily leads to a conclusion that the work is construction; the latter does not.*
>
> *[114] This principle is not binding upon this Board, but it is persuasive, arising repeatedly and consistently in three jurisdictions with well-developed case law in this area. It is a rational, if not perfect, dividing line that provides a measure of predictability in the industry. The Board is persuaded to follow and apply this principle.*

[23] What this passage reveals is that the Board explicitly distinguished between an increase in production or generation capacity, on the one hand, and an increase in efficiency that does not result in a production increase, on the other hand. The decision does not conclude that work falling into the latter category cannot be found to be maintenance work. The Employer's argument overlooks this distinction and is therefore based on a faulty premise, meaning that the alleged unintended effect does not arise.

[24] The Employer also states that by declaring the entire project to be construction the Board has created confusion about the ability of the other unions to negotiate the Project Agreement. The signatory unions agreed that the work that they were performing was maintenance work, and the decision injects uncertainty into the negotiations of that agreement, and its sustainability.

[25] In considering this argument, it is necessary to review the nature and scope of the application that was the subject of the decision. The application was brought by the Union in relation to a proposed bargaining unit of employees working in the pipe trades for the Employer on the E.B. Campbell project.

[26] The Board did not expand the scope of the application; it defined the central issue as follows: "the central issue is whether the work performed by the pipe trades falls under the definition of construction industry, or whether it is excluded from the construction industry provisions, being maintenance work" (para 81).

[27] The Board reviewed the related case law and the approach, as revealed in that case law, to delineating the scope of the relevant facts. The Board observed that the cases have generally

assessed work in the context in which it was being performed, and then decided that it was appropriate to adopt that approach:

> *[109] To determine whether the work falls under the construction industry definition the case law routinely considers the entire context: this includes not only the work in question, but also the overall purpose of the work and the scope of the overall project. The Board agrees with this approach. It is practical. It promotes consistency and predictable results. On this basis, the Board will proceed to consider the overall project.*

[28] At paragraph 104, the Board identified the work in question as the work of the pipe trades in the context of the project undertaken at the E.B. Campbell power station. At paragraph 115, the Board explained that it must consider the overall purpose of the work and the scope of the overall project. The work of the pipe trades is a part of an overall whole. The Board based its conclusions on the work of the pipe trades, taken in context:

> *[115] In conclusion, the Board must consider not only the work in question, but the overall purpose of the work and the scope of the overall project. The work of the pipe trades is a part of a larger whole. Construction work involves the addition to an existing facility, or is undertaken for the purpose of or results in an increase of the design or production capacity of an existing facility. The pipe trades' work on the unit, including the replacement of the pipes, the piping systems, and the coolers, viewed in its totality was the reconstruction of the entire system or structure. Although the replacement of the pipes did not result in an increase in output, the overall project resulted in an increase in generation capacity. The work of the pipe trades falls into the definition of construction industry pursuant to section 6-65 of the Act.*

[29] The Board found that the work of the pipe trades fell within the definition of construction industry. It did not declare the entire project to be construction.

[30] The order resulting from the decision is binding only on the parties to the application before the Board. This case is not unlike many cases involving large construction or maintenance projects. More often than not, such large projects necessitate various trades coming together onsite to complete the work. The trades arrange their affairs with their respective contractors, and when disputes arise and applications are made to the Board, the Board receives evidence from the parties to the proceedings in question. The Board's ruling in this case is clearly intended to apply to the parties to the application before the Board on the basis of the evidence presented by those parties.

[31] Therefore, the Board's decision has not operated in an unanticipated way. The arguments advanced pursuant to this ground do not justify reconsidering the decision.

If the original decision turned on a conclusion of law or general policy under the code which law or policy was not properly interpreted by the original panel

[32] In *Kennedy*, the Board provided a helpful explanation of the origins and purpose of this ground, as well as its scope:

> *[20] The fourth permissible ground for an application for reconsideration permits the Board to re-examine a prior decision in circumstances where the original decision turned on a conclusion of law or general policy which was not properly interpreted by the Board in the first instance. […] While it understandable why some applicants may see this ground as a general right of appeal on questions of law, a closer examination reveals that the scope of this particular ground is quite narrow. As Chairperson Bilson noted in the Remai Investment Corporation decision, this ground arose out of larger jurisdictions, where it is common for multiple panels to hear similar kinds of applications at the same time. These jurisdictions desire to maintain a uniform approach by their panels and, if divergence occurs on important issues of law and policy, this ground permits these boards to revisit its prior decisions if necessary to maintain uniformity. As a result, this ground is generally restricted to circumstances where there is an inconsistency between the decisions rendered by different panels on an important issue of law or policy. However, this ground has also been relied upon by the Board to re-examine a prior decision in circumstances where it is alleged the Board misapplied or misconstrued its enabling statute. […]*
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> *[citations removed]*

[33] The Employer has not suggested that there is an inconsistency between the decision and other decisions of this Board. Therefore, there is no relevant question of uniformity to be addressed.

[34] For this reason, the Board will focus its analysis on whether it misapplied or misconstrued the statute. At the outset, it is important to observe that there is no definition of maintenance in the Act. The Board was charged with determining whether the work was properly characterized as maintenance work for the purpose of the Division 13 exclusion. The Board focused on the factors to be considered in assessing whether the work is maintenance work. This was a question of mixed fact and law.

[35] The Board reviewed the relevant case law from the other jurisdictions and considered which factors were applicable to a determination of the question in this case. The Employer argues that the Board misconstrued the case law in assessing which factors were applicable. In our view, this is not equivalent to an argument that the Board misconstrued or misapplied the statute. It is therefore not an argument that properly falls within the scope of this ground.

[36] In case the Board is wrong in this, it may be helpful to review the case law cited by the Employer. In particular, the Employer relies on the Nova Scotia Board's decision in *United*

Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, UA Local 56 v Ainsworth Inc., 2011 CanLII 152214 (NS LRB) [*Ainsworth*]. The Employer says that the Board wrongly construed an increase of generation capacity as decisive.

[37] However, the Employer's argument is based on two faulty premises. The first is that which has already been described – the implicit, but inaccurate, suggestion that the Board used the terms "output" and "generation/production capacity" in an interchangeable fashion.

[38] The second arises from the Nova Scotia guidelines for the purpose of assessing the distinction between construction and maintenance. In *Ainsworth*, the Board described these guidelines, which include the following:

> *(v) Does the work increase the designed or production capacity of an existing facility: If the answer is "no", the work is normally "maintenance".*

[39] The Employer suggests that this guideline allows for a scenario in which production capacity is increased but the relevant work is still found to be maintenance. This characterization is not supported by the wording of the guideline. The guideline does not indicate that if the answer is "yes" the work may not be construction. It says that if the answer is "no", the work is normally maintenance. Even then, however, the work may still be found to be construction.

[40] The Employer also suggests that the Board ignored other, relevant factors. This argument indirectly seeks a review of the decision on a standard of reasonableness. To be sure, however, the decision contains an extensive analysis of multiple factors, including the analysis as outlined at paragraphs 102 to 111. Following this analysis, and prior to its analysis of the issue of generation capacity, the Board concluded:

> *[111] Within this context, the pipe trades' extensive work on the unit, including the replacement of the pipes, the piping systems, and the coolers, viewed in its totality was the reconstruction of the entire system or structure.*

[41] Therefore, the Board's decision did not rest on one factor to the exclusion of any others.

[42] Next, the Employer says that the Board overlooked the definition of maintenance in the SaskPower Agreement. Again, this argument indirectly seeks a review of the decision on a standard of reasonableness. Nonetheless, evidence with respect to the agreement is described at paragraph 28 of the decision.

[43] Lastly, the Employer argues that the Board has wrongly read the word "replacement" into the definition of "construction industry". To fully consider this argument, it is helpful to review Professor Sullivan's explanation of the meaning of the phrase "reading in" (as compared with "reading down"), as contained in *Sullivan on the Construction of Statutes*:

> ***7.14*** *Reading in is different. It does not purport to operate within the scope of the legislative text, but rather to expand that scope to matters that are neither explicit nor implicit in the legislation. It expands legislation to matters that cannot come within any plausible understanding of the wording adopted by the legislature.*[2]

[44] Did the Board expand the scope of the definition beyond matters that are explicit or implicit in the legislation? To determine whether it did, it is necessary to review the definition, found at section 6-65. Subclause (a)(i), which defines the meaning of "construction industry", does not include the word "replacement" among the activities that comprise the industry. However, subclause (a)(ii) indicates that the industry includes "all activities" undertaken as described.

[45] The Board's task was to consider whether the activities in question were excluded for being maintenance work. The Board acknowledged that the scope of the "activities" as set out in subclause (a)(ii) is broad:

> *[83] UA Local 179 suggests that "maintenance" does not mean the activities included in the definition of the construction industry, being, "constructing, erecting, reconstructing, altering, remodeling, repairing, revamping, renovating, decorating or demolishing".*
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> *[84] The Board would state this differently. Construction industry "includes all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection with a work mentioned in subclause (i), but does not include maintenance work" [emphasis added]. The legislature has acknowledged the potential for overlap between the activities of the construction industry and maintenance work, and has provided the Board with the discretion to determine whether the work in question is maintenance and therefore excluded from the construction industry definition.*

[46] The Board reviewed the existing approaches to evidence of replacement work:

> *[98] The Alberta policy outlined in Nason suggests that work involving the replacement of equipment does not inevitably fall within the definition of construction in that province.*
>
> *[99] The Ontario Board has also confirmed that the replacement of equipment does not necessarily mean that the work in question is construction. It is important to consider both the context and the purpose of the work. The Board should avoid drawing simplistic conclusions about the implications of replacing old equipment with new equipment:…*

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[2] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis), 2014.

[47] The Board then considered whether the extent of the work, including the replacement of parts, was sufficient to constitute the reconstruction of the system or structure, and found that it was:

> *[111] Within this context, the pipe trades' extensive work on the unit, including the replacement of the pipes, the piping systems, and the coolers, viewed in its totality was the reconstruction of the entire system or structure.*

[48] Therefore, it is clear that the decision did not read the word "replacement" into subclause (a)(i). The definition of "construction industry" consists of two parts. The Board considered "all activities" as described by subclause (a)(ii). Those activities included the extensive replacement work that was performed by the pipe trades.

[49] As was made clear in *Kennedy*, the scope of this ground is to be interpreted in a narrow fashion. Most of the Employer's arguments extend beyond the usual scope, and are not properly the subject of a reconsideration application. In respect of those arguments, the Employer has not raised a relevant question of uniformity nor a question of the Board having misapplied or misconstrued its statute.

[50] The Employer's last argument falls more squarely within the scope of what is contemplated by this threshold ground. However, this argument must also fail. The Board did not "read in" to the statute so as to expand the scope of the definition beyond matters that are explicit or implicit in the legislation. Therefore, the premise of the argument is incorrect and the argument offers no basis to reconsider the decision.

[51] For all of the preceding reasons, the Board is not persuaded that the arguments advanced pursuant to this ground provide a sufficient basis to reconsider the decision.

If the original decision is tainted by a breach of natural justice

[52] Pursuant to this ground, the Employer again says that the decision has called into question the work being performed by other building trades and the work as characterized by the project owner. Those organizations were directly affected by the Board's decision but were not given notice that the Board would make a decision that would impact their interests.

[53] It is well established that the duty of procedural fairness stipulates that, before a decision is made that has an adverse impact on a person's legal interests, the person should be advised and provided an opportunity to respond. Along similar lines, it is expected that parties will make

arguments before the Board to advance their own interests and will generally refrain from purporting to advance the interests of those who are not present.

[54] The Employer does not suggest that the Board's decision relied on any evidence other than that which was presented by the parties in the course of the hearing. Nor does the Employer suggest that the Board denied party status to any person who claimed a direct or other interest, or that the Board extended the application of its order to parties that were not before it. Nor is there any current, related intervenor application before the Board. The reasons for the decision were made public, and no such application was filed.

[55] Finally, the Employer does not suggest that there was a breach of natural justice that had an impact on either of the parties before the Board, except to suggest by implication that the Board's decision might have consequences for the Employer's contractual relationship with other unions.

[56] The decision and order binds only the parties. The Board did not include external parties in the scope of its declaration. The Board made no determination of the validity of Project Agreement for the signatory unions.

[57] In short, the Board is not persuaded that the original decision is tainted by a breach of natural justice. Therefore, the arguments made pursuant to this ground provide no basis for reconsidering the decision.

If the original decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon, or otherwise change

[58] The Board in *Kennedy* provided a helpful explanation of the scope of this ground:

> *[25] The final permissible ground for an application for reconsideration deals with circumstances where the original decision was precedential and amounted to a significant policy adjudication. Simply put, this ground permits the Board to take a "second look" when it makes major new policy adjudications or when it departures [sic] from past jurisprudence on a significant issue. However, in both cases, the matters in issue must have significant impact on the labour relations community in general. See: Construction Labour Relations Association v. Canadian Association of Industrial Mechanical and Allied Workers, Local 17, [1979] 3 Can. L.R.B.R. 153. See also: Saskatchewan Government Employees' Union v. Mary Banga, [1994] 1st Quarter Sask. Labour Rep. 291, LRB File No. 014-94.*

[59] According to the Employer, the decision marked the first occasion in which the Board considered the definition of maintenance work in the context of its exclusion from the Division 13

regime. The Board should consider the Employer's many concerns within this context. The Board should also consider the restrictions on bargaining as contained in sections 6-69 and 6-70 of the Act, which could pose problems for the existing, negotiated Project Agreement.

[60] At paragraph 82 of the decision, the Board acknowledged that it was the "first occasion for [it] to address, in a written decision, the meaning of 'maintenance work' which is excluded from the construction industry definition outlined in section 6-65." Therefore, it could be argued that the Board's analysis of the factors to be considered is precedential.

[61] However, a finding that a decision is or may be precedential does not necessarily mean that it should be reconsidered. The Employer has provided no persuasive reason for the Board to undertake any further refinement of the decision. The Board did not foreclose a finding that work, which may involve an increase in efficiency, be excluded from the construction industry regime. Moreover, the Board's conclusion rested on both its finding that there was an increase in generation capacity and its finding that the system or structure was being reconstructed. The Board's consideration of the overall context was supported by extensive case law and by factors such as practicality, consistency, and predictability.

[62] Nor does the existence of the construction industry bargaining regime provide any compelling reason to undertake a further refinement of decision. The regime, including the role of the representative employers' organization, is well-established. The consequences of a certification application under Division 13 are clear. In filing the application, the Union put the Employer on notice that it wished to be bound by the provincial agreement.

[63] As revealed by the decision, much of the evidence and argument focused on which of the two agreements should govern the parties' relationship. The Board found that through its actions the Employer had taken on the risk of being bound by the provincial agreement. As explained at paragraph 102, "[b]y permitting IBEW Local 529 to supply the additional trades under the Project Agreement, over Peters' objections to the characterization of the work contained in that Agreement, Andritz took the risk that it could be bound by the provincial construction agreement." Not only is the application of the provincial agreement a predictable result of a construction industry certification order, the Board made its decision on the basis of the facts specific to the application, which included the Employer's agreement with IBEW.

[64] In conclusion, the Employer has not persuaded the Board that it would be appropriate to re-open the decision for reconsideration. The application is therefore dismissed.

[65] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **5th** day of **July, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson