Saskatchewan
Labour Relations Board

INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 119, Applicant v ALUMASAFWAY, INC., Respondent

LRB File No.045-20; August 10, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Mike Wainwright and Maurice Werezak

Counsel for the Applicant, International Association of
Heat & Frost Insulators and Asbestos Workers, Local 119: Greg Fingas

For the Respondent, AlumaSafway, Inc.: Steve Seiferling

Section 6-65 of *The Saskatchewan Employment Act* – Construction Industry – Maintenance Exclusion – Unionized Employer.

Product Quality Project – Work Performed by Insulators – Dispatched by Union – Disagreement about Binding CBA – Provincial Agreement or Maintenance Agreement.

Request for Deferral – Principles applicable to deferral request – Question about which CBA binds the parties – Request for deferral refused in part.

Work performed by the Insulators falls within the Construction Industry – Binding CBA is Provincial Agreement.

REASONS FOR DECISION

Introduction:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an unfair labour practice application filed by the International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 [Union] on March 9, 2020. The Union submits that AlumaSafway Inc. [Employer] has been engaging in an unfair labour practice (or contravention of the Act) within the meaning of sections 6-41(2)-(3) and 6-62(1)(r) of *The Saskatchewan Employment Act* [Act].

[2] On October 2, 2003, the Union was certified as the exclusive bargaining agent for all insulators, insulator apprentices and insulator foremen employed by Aluma Systems Canada Inc. in Saskatchewan in LRB File No 184-03. On June 29, 2017, the Union was certified as the exclusive bargaining agent for all insulators, insulator apprentices and insulator foremen employed by Safway Services Canada ULC in LRB File No 118-17. The certification orders bind the Employer following a merger of the two entities.

[3] AlumaSafway is a unionized employer pursuant to clause 6-65(h) of the Act, and is represented by CLR Construction Labour Relations Association of Saskatchewan Inc. [CLR] in the collective bargaining negotiations within the construction industry. Construction work performed by AlumaSafway is governed by the applicable provincial collective agreement for the insulators' trade division working in industrial construction [Provincial Agreement]. Since maintenance work was removed from the mandatory bargaining structure for the construction industry, the bargaining with respect to the collective agreements applicable to maintenance work has taken place outside of that regime, and has included bargaining for site-specific agreements.

[4] In this case, the Union dispatched its members to perform maintenance work at the K + S Legacy potash mine pursuant to the Project Maintenance Agreement [Maintenance Agreement]. In 2020, its members were assigned to perform what the Union believed to be construction work, but the Employer insisted on continuing to apply the Maintenance Agreement. The work in question was performed for purposes of product quality improvement, and was referred to as the Product Quality Project [PQ project]. The Union says it never agreed to apply the Maintenance Agreement to this work and therefore the Employer is in breach of its obligations pursuant to the Provincial Agreement. According to the Union, the wage rate of the Maintenance Agreement is lower than that of the Provincial Agreement.

[5] In its application, the Union seeks a declaration that the Provincial Agreement is applicable to the PQ project, a declaration that the Employer breached the Act and committed unfair labour practices, an order prohibiting the Employer from continuing to breach the Act and the Provincial Agreement, and an order to compensate the Union and its members. At the hearing, however, the Union clarified that it is seeking only confirmation that the Provincial Agreement is the applicable CBA at this time.

[6] The Employer says that the work at the K + S potash mine site is maintenance work. The PQ project consists of the replacement of a line to improve the quality of existing product flow to storage. The Maintenance Agreement states that "[m]aintenance work shall be work for replacement, renovation, revamp, and upkeep of the property, machinery, and equipment within the limits of the plant property." It is clear that the insulators' work falls within this definition. The application should therefore be dismissed. The Employer seeks an order of costs against the Union.

[7] The Employer also states that the appropriate avenue would have been to bring a grievance under the Provincial Agreement rather than taking the matter to this Board. The Union has failed to do so, but despite that, this matter should be deferred to that process, or dismissed.

[8] At the close of evidence at the hearing of this matter, the parties filed written briefs and authorities, all of which the Board has reviewed and has found helpful.

Evidence:

[9] As mentioned, the work in question is the PQ project which took place at the K + S potash mine site in 2020. K + S is a solution mine, which means that the minerals are mined through a brine extraction process. When deemed ready for market, the product is shipped to ports via rail. After attempting to bring the product to market, the company identified a serious product quality issue that had to be rectified to ensure that the product was saleable. It was this attempt at rectification that motivated the PQ project that is at issue in this dispute. In a presentation prepared by K + S, the PQ project is described as an ongoing quality improvement project, with a planned "handover" in 2019.

[10] The Union called three witnesses in this matter: Chuck Rudder [Rudder], Kelly Houston [Houston], and Claude Forest [Forest].

[11] Rudder is the Business Manager for the Union. He is the lead negotiator on behalf of the Union, and he has drafted the current wording of the Maintenance Agreement that was applied in this case. The Maintenance Agreement defines "maintenance" as follows:

> *Maintenance shall be work performed for replacement, renovation, revamp and upkeep of property, machinery and equipment within the limits of the plant property.*
>
> *The word "renovation" used with the terms of this Agreement and in connection with maintenance, is work required to restore by replacement or by revamping parts of existing facilities to restore efficient working conditions.*
>
> *The term "existing facilities" used within the terms of this Agreement, is limited to a constructed unit already completed and shall not apply to any new unit to be constructed in the future, which would increase the designed or production capacity of an existing unit; even though the new unit is constructed and/or connected to existing facilities on the same property or premises.*

[12] The following recognition and scope clause is included in the Maintenance Agreement:

> *1:01 The Employer recognizes the Union as the exclusive bargaining agent for a bargaining unit comprising all Heat & Frost Insulators & Allied Workers in the employ of the Employer engaged in supplemental contract maintenance work. This Agreement shall not*

apply to timekeepers, engineers, field office, clerical workers or to Employees above the rank of general foreperson. The scope of this Agreement covers work of a maintenance nature, that the owner elects to contract out and is in force or effect on the K+S Legacy Mine Site, this agreement shall be restricted to this specific project.

1:02 The Employer agrees to offer the conditions contained herein to the applicable members of the Union wherever necessary, workers working under the terms of this Agreement shall be dispatched from Union and shall be paid wages and benefits in accordance with the Appendices.

1:03 Maintenance work that the Employer performs involves maintaining operating units that in almost all cases must be kept running. This situation means that much of the work is of an emergency nature and therefore, will require at times the acceptance of extreme fluctuations in the labour demands made by the Employer and the Union. The Union, by this Agreement, completely understands the necessity of these extremes and agrees to make every effort to fulfil the workforce requirements of the Employer.

1:04 All work that is new construction shall be performed under the terms and conditions of Provincial Industrial Collective Agreement.

[13] Rudder became aware of the PQ project in January 2020. Apparently, the insulators' work was not included in the mark-up documentation. He heard about the work from the members and objected to the application of the Maintenance Agreement. His email to AlumaSafway, dated January 31, 2020, reads:

Good morning Don,

I received a call from the guys on site at K + S yesterday, there seems to be some confusion over new construction and maintenance. Their supervisor said its maintenance work, when clearly it is not.

Black & Mac just completed the new addition for what they are calling PQP project, which is new construction, and all employee's were paid accordingly.

If you could clarify that to site supervision and confirm that the Insulators working on that project are to be paid as per the Industrial agreement.

Trusting we are in agreement on this matter, however if you have questions, please do not hesitate to contact me.

Thank you,

Chuck Rudder

[14] Black replied, on February 3, 2020:

Good morning Chuck,

The PQP is the Product Quality Project, and under the Project Maintenance Agreement for K + S, it says "Maintenance shall be work for replacement, renovation, revamp and upkeep of property, machinery and equipment within the limits of the plant property."

This is purely a replacement line for the Potash to improve the quality of sale, so we deem [it] Maintenance work.

Please feel free to give me a call if you want to discuss in further detail.

Regards,

Don Black

[15] Rudder replied, on February 5, 2020:

Hi Don,

In regards to the PQP Project we continue to take the position that the work is new construction. If Aluma refused to pay the employee's as per the Industrial CBA, then let me know so that we can file the grievance.

Thank you,

[16] Rudder attended at the site and made some observations about the work. He testified that the reaction to his attendance was unusually cold.

[17] According to Rudder, the work involved the addition of a whole new system. He could not say whether this increased production. Rudder attends weekly meetings of the business managers for the various building trades, and it was there that he learned that all of the other trades (except insulators and the scaffolders covered under carpenters) were paid under the Provincial Agreement. The insulators were one of the last trades to start the work, as is to be expected. The start date for their work was in early January.

[18] Houston is a business representative for the Boilermakers' union. He worked on the project for a different contractor altogether. He first became aware of the project in or around March 2019.

[19] Houston testified about the jurisdictional mark-up document prepared by the contractor for whom he was working; that document provides a description of the work done by various trades. The trades listed include the pipe trades, electrical workers, boilermakers, ironworkers, and labourers.

[20] Forest is a Union member who worked for the Employer at K + S. He was first dispatched with AlumaSafway in December, 2018. He was dispatched to perform maintenance. The work was assigned by the foreman. He had previously worked for another contractor, Kaefer, for approximately four years from around 2013 to 2017.

[21] Leaving aside the PQ project, a typical work day on the site consisted of stripping insulation so other trades could perform inspections or replace the piping, or reapplying insulation

on the well or piping after it was fixed. Generally, the work was performed on pipes that were already in place or were being put back into place.

[22] In relation to the PQ project Forest insulated newly installed piping and worked on the newly installed fan and the new ducting. As part of the PQ project, a new scrubber was installed, there was a significant amount of new piping and new cable trays, and another partial floor was added to the structure.

[23] There were five insulators involved on the project. Forest worked alongside the other trades.

[24] The Employer called two witnesses: Don Black [Black] and Michael Furlong [Furlong].

[25] Black is the branch manager for AlumaSafway responsible for the K + S site. He explained that, as a result of the product quality issue, the company decided to revamp the entire line. He could not say exactly where on the line the problem arose. It was a big issue for them and manpower had to be increased to deal with it.

[26] When the first RFQ came out for the maintenance work, Black asked the insulators if they would enable the Maintenance Agreement. They knew that they were bidding against a lot of non-union companies. That is when Rudder sent him the Maintenance Agreement. At the time, AlumaSafway was bidding on RFQs for two years' worth of maintenance work at the K + S site. Until the email exchange in January or February, the Union had not disclosed any issue with the application of that agreement to the work being performed on site.

[27] Furlong works for AlumaSafway as the site superintendent for scaffolders and insulators on site. He has been working on the K + S site for five years. He explained that when the product is returned it is reclaimed into the tailings pond. Whenever a car comes back there is a loss in money.

[28] Jorgeson was the construction superintendent for K + S (there is also a maintenance superintendent), and was Furlong's contact for the PQ project. Furlong called Jorgeson and asked for an email outlining the scope of the project. At the time the email was sent, AlumaSafway was already performing the work on the PQ project. Furlong had heard that the scaffolders and insulators had concerns about whether the project was maintenance or construction.

[29] Jorgeson sent him an email in response to this request, describing the project as a "brownfield" project. That email, dated February 2, 2020, states as follows:

> *Mike,*
>
> *PQP (Product Quality Project) is being installed as a Brownfield project. Its purpose will be to improve the quality of the existing product flow to storage. This will be accomplished by installation of screening (for better sizing consistency) and install of a cooler that will allow the product to stand up to the shipping requirements.*
>
> *Due to Brownfield nature; scaffold is required for existing lighting, electrical, structural, building wall manipulation. Also, for install of new structural, piping, insulation, electrical, etc.*
> *This project does not increase the plant's production capacity, rather improves quality of production.*
>
> *Joel Jordison, PMP*
>
> *Construction Superintendent, CP&T*

[30] Furlong described the work as including the installation of new lines and a conveyer for shipping. Insulation was stripped from old pipes and installed on new pipes. Existing fans were replaced. A cooler was installed. Screening was installed. The new piping tied into existing pipes on site.

[31] According to Furlong, the project was no different from replacing old pipes with new ones. There was product flow before and after the project. The project did not result in any increase in production.

[32] The insulators were on a budget based on a quote given to K + S. The PQ project fell outside the normal maintenance budget. It was a capital project; there are no subcategories of capital projects. There was a specific schedule for the PQ project, including an end date.

[33] Following a visit by Rudder to the site, Furlong sent the following email, dated February 20, 2020:

> *Good Afternoon,*
>
> *Gents for future reference I would like to be contacted before having visitors to site so we are not disturbing the work flow as we are on a tight schedule/budget for PQP and I need to be notified when you leave please in case of muster or an evacuation. You can also contact Don Black if a site visit is required in the future.*

Arguments:

Union:

[34] The Union seeks confirmation that the Provincial Agreement applies to the insulation work performed as part of the PQ project.

[35] The Maintenance Agreement includes terms that are beneficial to the Employer to facilitate bidding on maintenance projects. The Union dispatched members to the site to perform maintenance work but later discovered that the members were performing construction work on the PQ project. The employees were paid according to the Maintenance Agreement, which provides for lesser wages than the Provincial Agreement.

[36] The Employer has argued that the Board should defer this matter to arbitration for want of jurisdiction. However, there is no dispute about the terms and conditions of employment for the Union's members. The dispute relates to which of the two agreements should be applied to the work. A deferral to arbitration could result in a finding that the chosen arbitrator lacks jurisdiction to award a remedy. The Board has the power, pursuant to s.6-111(1)(r), to decide which agreement applies. There is no reason to defer to processes which may lack the ability to resolve the dispute.

[37] Whether the work falls within the construction industry depends on the nature of the whole of the project, not just the portion of the work performed by the specific trade. Where work involves the addition to an existing facility or is undertaken for the purpose of or results in an increase in the design or production capacity of an existing facility it falls within the construction industry. Where work is necessary to restore a system or part of a system that is not functioning or is not functioning economically, that work is repair work.

[38] It is for the Board to determine whether the work is excluded from the construction industry for being maintenance work. The definitions contained in the Maintenance Agreement are not determinative. Voluntary arrangements do not supersede the statutory regime for collective bargaining. The Union points to subclause 6-70(1)(e) of the Act which reads:

> *(e) a collective agreement respecting the trade division that is made after the determination of the representative employers' organization with any person or organization other than the representative employers' organization is void.*

The fact that the workers were dispatched to a maintenance job is not a full answer to the question. The Union did not agree, through that dispatch, that this specific work was maintenance work.

[39] Still, even if the Board were to apply the terms of the Maintenance Agreement, the only conclusion to draw from its terms is that the insulation work is construction industry work. Neither the individual clauses nor the totality of clauses contained within that agreement support “a meaningful deviation from the standards established in the case law”.

[40] The project involved structural additions to the processing facility, and the installation of a new conveyor belt, screens and a cooler.

[41] The Union asks that the Board determine which collective agreement applies. If applicable, a grievance may then be processed under the appropriate collective agreement. The Union does not seek any further relief from the Board at this time.

Employer:

[42] The Employer asks the Board to dismiss the matter for want of jurisdiction. The Union has come to the wrong forum to resolve the dispute. The dispute relates to the meaning, application, or the alleged contravention of a collective agreement. The Union believes that its members are entitled to higher wages. This is the exact type of complaint that is intended to be addressed through the grievance process. A party does not cloak the Board with jurisdiction simply by filing an application with the Board.

[43] If the Board finds that it has jurisdiction over this matter, it should still see fit to dismiss the application. The definition of construction industry, contained in section 6-65 of the Act, explicitly excludes maintenance work. There is no definition of maintenance in the Act. The parties should be free to negotiate the meaning of maintenance work so as to structure their affairs. The parties have negotiated a Maintenance Agreement which defines maintenance and that definition of maintenance should govern the parties’ affairs.

[44] The Employer argues that the Board should follow the policy outlined by the Nova Scotia Board, which reads as follows:

> *(a) Save in exceptional circumstances (where the burden of proof shall be upon the person claiming them), the Panel will respect, and give effect to, "maintenance agreements" reached between an employer, employers or an employer's organization, on the one hand, and one or more construction trade unions on the other; …*

The starting point in any analysis should be the agreement that is being used. That agreement should be given effect save in exceptional circumstances. The agreement in this case is a maintenance agreement, and therefore, there is no need to consider the question any further.

[45] Even if the Board decides to go further, it should find that the work is properly classified as maintenance work. The Maintenance Agreement defines "maintenance". The insulators' work fits squarely within that definition. If the Board finds that the agreement is ambiguous, it should take into account that the Union drafted the agreement and therefore, to the extent that the definition is ambiguous, any ambiguity should be resolved in favour of the Employer.

[46] In the further alternative, the case law supports an interpretation of this work as maintenance work.

Applicable Statutory provisions:

[47] The following statutory provisions are applicable to this matter:

> ***6-1****(1) In this Part:*
> *(d) "collective agreement" means a written agreement between an employer and a union that:*
>
> *(i) sets out the terms and conditions of employment; or*
> *(ii) contains provisions respecting rates of pay, hours of work or other working conditions of employees;*
>
> *. . .*
>
> ***6-41****(1) A collective agreement is binding on:*
> *(a) a union that:*
> *(i) has entered into it; or*
> *(ii) becomes subject to it in accordance with this Part;*
> *(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and*
> *(c) an employer who has entered into it.*
>
> *(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:*
> *(a) do everything the person is required to do; and*
> *(b) refrain from doing anything the person is required to refrain from doing.*
>
> *(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.*
>
> *(4) If an agreement is reached as the result of collective bargaining, both parties shall execute it.*
>
> *(5) Nothing in this section requires or authorizes a person to do anything that conflicts with a requirement of this Part.*

(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails.

. . .

6-45*(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement*

…

6-62*(1)It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*

. . .

(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.

. . .

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.

(2) Nothing in this Division:

(a) precludes a union from seeking an order to be certified as a bargaining agent for a unit of employees consisting of:

(i) employees of an employer in more than one trade or craft; or

(ii) all employees of the employer; or

(b) limits the right to obtain an order to be certified as a bargaining agent to those unions that are referred to in a determination made by the minister pursuant to section 6-66.

(3) This Division does not apply to an employer and a union with respect to a certification order mentioned in subsection (2).

(4) If a unionized employer becomes subject to a certification order mentioned in subsection (2) with respect to its employees, the employer is no longer governed by this Division for the purposes of that bargaining unit.

(5) If there is a conflict between a provision of this Division and any other Division or any other Part of this Act as the conflict relates to collective bargaining in the construction industry, the provision of this Division prevails.

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;

…
*(d) "**representative employers' organization**" means an employers' organization that:*
(i) is the exclusive agent to engage in collective bargaining on behalf of all unionized employers in a trade division; and
(ii) if applicable, may be a bargaining agent to engage in collective bargaining on behalf of unionized employers that are parties to a project agreement;

. . .

*(h) "**unionized employer**", subject to section 6-69, means an employer:*
(i) with respect to whom a certification order has been issued for a bargaining unit comprised of unionized employees working in a trade for which a trade division has been established pursuant to section 6-66; …

***6-70**(1) When an employers' organization is determined to be the representative employers' organization for a trade division:*

(a) the representative employers' organization is the exclusive agent to engage in collective bargaining on behalf of all unionized employers in the trade division;
(b) a union representing the unionized employees in the trade division shall engage in collective bargaining with the representative employers' organization with respect to the unionized employees in the trade division;
(c) a collective agreement between the representative employers' organization and a union or council of unions is binding on the unionized employers in the trade division;
(d) no other employers' organization has the right to interfere with the negotiation of a collective agreement or veto any proposed collective agreement negotiated by the representative employers' organization; and
(e) a collective agreement respecting the trade division that is made after the determination of the representative employers' organization with any person or organization other than the representative employers' organization is void.

. . .

***6-111(1)** With respect to any matter before it, the board has the power:*

(l) to defer deciding any matter if the board considers that the matter could be resolved by mediation, conciliation or an alternative method of resolution;

. . .
(r) to decide any question that may arise in a hearing or proceeding, including any question as to whether:
(i) a person is a member of a union;
(ii) a collective agreement has been entered into or is in operation; or
(iii) any person or organization is a party to or bound by a collective agreement;

Analysis:

[48] There are two main issues raised on this application:

1) Should the application be deferred to the grievance process pursuant to section 6-111 of the Act?

2) Does the work fall under the definition of construction industry contained in section 6-65 of the Act?

Should the application be deferred to the grievance process pursuant to section 6-111 of the Act?

[49] The Employer has sought deferral on the basis of section 6-45 of the Act, which states:

> ***6-45****(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.*
> *…*

[50] Section 6-41 of the Act also states:

> ***6-41****(1) A collective agreement is binding on:*
> *(a) a union that:*
> *(i) has entered into it; or*
> *(ii) becomes subject to it in accordance with this Part;*
> *(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and*
> *(c) an employer who has entered into it.*
>
> *(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:*
> *(a) do everything the person is required to do; and*
> *(b) refrain from doing anything the person is required to refrain from doing.*
>
> *(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.*
> …

[51] Pursuant to subclause 6-111(1)(r), the Board has the power to decide any question that may arise in a proceeding, including, specifically, whether any person or organization is bound by a collective agreement.

[52] The Board exercises a general supervisory jurisdiction over the collective bargaining relationship. Where an unfair labour practice application has been filed, and that application raises an issue related to the meaning, application or alleged contravention of a collective agreement, the Board shares concurrent jurisdiction with an arbitrator.

[53] This means that deferral to an arbitrator is not automatic or even unconditional. It needs to be appropriate under the circumstances. A central question is whether the essence of the dispute relates to an alleged breach of the collective agreement or an alleged breach of the statute. While this distinction appears simple in theory, it is not necessarily a straightforward exercise to apply it in practice.

[54] The relevant distinction was described by the Board in *SGI v Saskatchewan Insurance Office & Professional Employees Union*, Local 397, 15 CLRBR (NS) 313, 1987 CarswellSask 863:

> *21 The essence of the complaint and the nature of the remedy sought are all important. If the complaint primarily seeks to enforce rights which owe their existence to The Trade Union Act and which have not or cannot be altered by private negotiation, then the Labour Relations Board will assume jurisdiction. If it primarily seeks to enforce rights which owe their existence to a collective bargaining agreement, then grievance and arbitration procedures embodied in the agreement itself should provide the exclusive recourse open to the parties. That approach may go some distance towards striking a reasonable balance between the already mentioned admonition of the Supreme Court of Canada in F.W. Woolworth Co. Ltd. (supra) and the same court's dictum in St. Anne Nackawic Pulp & Paper Co. Ltd., [1986] 1 SCR 704 at p. 721 that grievance and arbitration provisions in a collective bargaining agreement provide the exclusive recourse open to the parties to the agreement for its enforcement.*

[55] It must be remembered that the Board has a mandate to interpret and administer the provisions of the Code, but should, wherever possible, discourage parties from relying on the Board's process as an alternative to the grievance-arbitration process. The Board has an important objective of promoting the capacity and willingness of parties to collectively bargain. Related to this objective is the Board's supervisory responsibility over collective bargaining. The Board must seek to achieve a balance between recognizing an arbitrator's jurisdiction over the meaning, application or alleged contravention of a collective agreement, and continuing to exercise its authority pursuant to the Act.

[56] In deciding whether to defer, the Board considers the three-stage test as set out in *Communications, Energy & Paperworkers Union of Canada, Local 911 v ISM Information Systems Management Canada Corporation (ISM Canada)*, 2013 CanLII 1940 (SK LRB) [*ISM Information Systems*]:

> *[22] Our Court of Appeal in United Food & Commercial Workers, Local Union 1400 and The Labour Relations Board et al., established the following criteria for the Board to exercise its authority to defer to arbitration:*
>
> > *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*
> >
> > *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance arbitration procedure; and*
> >
> > *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

[57] Put succinctly, the issues to consider on an application for deferral to arbitration are three-fold:

- Is the dispute the same dispute?
- Can the grievance process resolve the dispute?
- Can the grievance process provide a suitable remedy?

[58] In this case, no grievance has been filed. This is not necessarily determinative, especially if the Board is to discourage inappropriate forum shopping. Instead, it underscores the importance of defining the nature of the dispute that has been brought before the Board.

[59] To define the dispute, it is necessary to consider its essential character, having regard for the substance of the dispute rather than the form. At its most basic, the dispute relates to which collective agreement is applicable to the work performed by the insulators on the PQ project. Underlying this dispute is a conflict over whether the work performed by the insulators falls within the construction industry, or whether it is excluded from the construction industry as maintenance work.

[60] In answering the Employer's request for a deferral, the Union relies on the following quote from *International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v AlumaSafway*, 2019 CanLII 120651 (SK LRB) [*AlumaSafway*]:

> *[68] The second question is whether the collective agreement empowers the resolution of the dispute. The parties disagree as to which collective agreement, and therefore which grievance arbitration procedure, is binding on them. The arbitration process arises from section 6-45 of the Act. Outside of the jurisdiction as set out in the Act, "[i]t is the collective agreement which establishes the source of the arbitrator's jurisdiction and defines the subject-matters over which he [or she] has authority".[10]*
>
> *[69] The Board has an interest in resolving disputes that involve an overall policy question pertaining to the existing system of collective bargaining. An arbitrator has jurisdiction to determine whether he or she has jurisdiction over a dispute and whether a matter is arbitrable. However, an arbitrator generally does not have jurisdiction over grievances filed under another collective agreement. The limits on an arbitrator's jurisdiction complicate the matter of bringing the current dispute before an arbitrator for final resolution.[11]*

[61] Of particular relevance to the current case is the Board's interest in resolving disputes that involve an overall policy question pertaining to the existing system of collective bargaining. In past cases, the issue of whether the work is excluded from the construction industry for being maintenance work has come before the Board in the context of certification applications pursuant to Division 13 of Part VI. In those cases, the Board has been tasked with considering the ordinary meaning of maintenance work. The Employer in this case is a unionized employer, as defined at

section 6-65 of the Act, and is bound by the Provincial Agreement. The parties have attempted to negotiate a definition of maintenance for purposes of the work being performed on the site. Any work that is found to be maintenance falls outside of the existing system of construction industry collective bargaining.

[62] The Board has explicit authority to decide whether any person or organization is bound by a collective agreement:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
> *. . .*
> *(r) to decide any question that may arise in a hearing or proceeding, including any question as to whether:*
> *(i) a person is a member of a union;*
> *(ii) a collective agreement has been entered into or is in operation; or*
> *(iii) any person or organization is a party to or bound by a collective agreement;*

[63] It is common practice for the Board to resolve issues related to which collective agreement binds the parties with respect to the work in issue. Two recent examples of such cases include *International Brotherhood Of Boilermakers v Edmonton Exchanger & Refinery Services Ltd*., 2020 CanLII 85158 (SK LRB) (determination of which collective agreement applies to the maintenance work being performed) and *AlumaSafway* (determination of which collective agreement applied to the work being performed at specific sites).

[64] The Employer relies on *University of Saskatchewan Faculty Association v University of Saskatchewan*, 2020 CanLII 40393 (SK LRB) to suggest that the Board should defer to the grievance process. However, this case did not relate to which collective agreement applied, but rather, to which MOA, negotiated pursuant to the collective agreement, applied, and therefore which dispute resolution process applied under the collective agreement. The parties had negotiated a process or processes for the resolution of disputes under the collective agreement (para 28), and both parties took the position that the Board could not interpret the collective agreement to determine which MOA applied to the resolution of the dispute. The Union also argued that no interpretation was required (para 21).

[65] The Employer also relies on *Saskatchewan Government and General Employees' Union v Mobile Crisis Services Inc*., 2019 CanLII 76953 (SK LRB). Here, the allegation was that the employer breached the terms of a settlement agreement made in the course of the grievance process. There was no question about whether the agreement was binding on the parties.

[66] Finally, the Union seeks only a determination of which collective agreement applies to this dispute at this time. This simplifies matters.

[67] The Board has concluded that it is appropriate to consider and determine which collective agreement applies to the PQ project work performed by the insulators. If the Provincial Agreement is binding, then the remaining issues with respect to the alleged unfair labour practice can be deferred until the grievance process is concluded.

Does the work fall under the definition of construction industry contained in section 6-65 of the Act?

[68] The question of whether work falls within the construction industry is a question to be determined in reference to the Act. Division 13, Part VI provides the framework for the collective bargaining regime specific to construction industry labour relations, including by specifying the parties to the negotiation of a collective agreement within the construction industry. Pursuant to section 6-70 of the Act, the representative employers' organization (REO) is the exclusive agent to engage in collective bargaining on behalf of all unionized employers in the trade division. A collective agreement between the REO and a union is binding on the unionized employers in the trade division.

[69] The definition of construction industry is contained in section 6-65 of the Act. Construction industry means the industry in which the activities of constructing, erecting, reconstructing, altering, remodelling, repairing, revamping, renovating, decorating or demolishing of any work or any part of a work are undertaken. According to subclause 6-65(a)(ii), 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, but does not include maintenance work. The use of the word "all" suggests that the activities and the machinery, etc. are to be interpreted broadly.

[70] Maintenance work is carved out of a broad definition of construction industry. As there is no definition of "maintenance work" in the Act it is necessary to determine its meaning.

[71] This case raises a question about the effect of a collective agreement on the characterization of the work as construction industry activity or maintenance work. In past cases, the issue of whether the work is excluded from the construction industry as maintenance has come before the Board in the context of certification applications pursuant to Division 13 of Part VI. Here, the Union is certified to the Employer. The Employer is a unionized employer. The REO

is the exclusive agent to engage in collective bargaining on behalf of all unionized employers in the trade division.

[72] In this case, the Union provided a maintenance agreement to the Employer for purposes of defining the scope of the work that would not be included in the construction industry, and therefore not covered by the Provincial Agreement. The Union provided and entered into that agreement, and then dispatched employees for the purpose of performing the maintenance work according to that agreement. The Employer suggests that this should be the end of the matter.

[73] The Board does not accept this argument. The Maintenance Agreement had been provided to AlumaSafway for purposes of bidding on RFQs for two years' worth of maintenance work at the K + S site. The fact of the Union having dispatched additional workers to perform the PQ project work is not indicative of whether the work was maintenance or construction. It cannot be the case that the Maintenance Agreement was entered into, and as a result, all of the work performed on site thereafter was deemed to be maintenance work, regardless of the nature of the work. Besides, Rudder became aware of the PQ project in January 2020, long after the agreement came into effect. He heard about the work from the members and then objected to the application of the Maintenance Agreement.

[74] Next, it is necessary to consider the effect of the defined scope of the agreement. In Nova Scotia, the Board will respect and give effect to maintenance agreements reached between an employer, employers or an employer's organization, on the one hand, and one or more construction trade unions on the other. In Alberta, the Board has made clear that the agreement may be used as a tool but is not necessarily determinative of the question as to whether the work is maintenance or construction.[1]

[75] In our view, it is necessary to maintain a measure of consistency in the operation of the construction industry registration system so as to maintain its integrity. The agreement is a tool but is not necessarily determinative of the question. It must be remembered that work which is found to be maintenance is excluded from the Division 13 bargaining regime, and from the scope of work subject to the negotiations for which the REO is the exclusive bargaining agent.

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[1] Alberta Labour Relations Board, *Policy and Procedure Manual*, Chapter 25(h), Effective: 1 December 2003 Construction vs. Non-construction at 2. See also, *J. Mason & Sons*, [1999] Alta LRBR 577 at para 29: while a "collective agreement may be of assistance, it is not determinative of whether work is construction or maintenance work for purposes of the Code".

[76] Even if it were determinative, the Maintenance Agreement supports an interpretation of the work as falling within the construction industry. It states that "maintenance shall be work performed for replacement, renovation, revamp and upkeep of property, machinery and equipment within the limits of the plant property". There is no question whether the work occurred within the limits of the plant property. It did. However, the work that was performed was not straightforward upkeep. Nor was it plain replacement work. Although there was significant replacement of parts, this term is too narrow to fit the true nature of the scope of the work.

[77] Of the terms included within the definition of maintenance, the most fitting are "renovation" or "revamp". The language in the agreement that expands on "renovation" and "revamp" suggests that these terms may be related:

> *The word "renovation" used with the terms of this Agreement and in connection with maintenance, is work required to restore by replacement or by revamping parts of existing facilities to restore efficient operating conditions.*
>
> *The term "existing facilities" used within the terms of this Agreement, is limited to a constructed unit already completed and shall not apply to any new unit to be constructed in the future, which would increase the designed or production capacity of an existing unit; even though the new unit is constructed and/or connected to existing facilities on the same property or premises.*

[78] Renovation is defined as "work required to restore". The key word is "restore". To restore is to put back to its original condition. In this case, it is not accurate to conclude that the work was required to restore. It was required to improve the quality of the product. It was necessary to make significant changes to the system to ensure that it could operate in the way that was originally intended and could produce a saleable product. The system was faulty and it needed to be changed, and a new process needed to be added.

[79] Renovation is also "work required to restore…by revamping parts of existing facilities to restore efficient operating conditions". Again, the key word is "restore". The work was not performed to restore a facility to efficient operating conditions. The term "existing facilities" is also defined, however, it denotes a further limitation on maintenance work in the context of "revamping parts" rather than an expansion of that work. The fact that the facilities for producing the product were largely pre-existing does not determine the nature of the work. The project tied into existing lines, but it also involved the replacement and addition of a significant number of parts, many of which were subject to the work of the insulators.

[80] The meaning of renovating and revamping are similar, however, “revamping”, on its own, includes a notion of improvement. As such, revamp extends beyond what is covered by the term renovation. However, it cannot be the case that “revamp” includes all improvements to the plant, regardless of their significance and the nature of the specific work being performed. To find as much would be to disregard completely the nature of construction industry work.

[81] The PQ project involved the installation of new parts to ensure that the product could withstand shipping conditions. This amounted to a significant change to the existing system, or the creation of a new process, and involved the enhancement of the function of the overall system. The project undertook to correct a flaw in the existing system. In our view, the combination of these facts takes the work outside of what was intended by the term “revamp” as contained in the agreement.

[82] The foregoing provisions support a characterization of the work as construction.

[83] The definition should also be read in conjunction with Article 1:03 of the CBA, which states:

> *1:03 Maintenance work that the Employer performs involves maintaining operating units that in almost all cases must be kept running. This situation means that much of the work is of an emergency nature and therefore, will require at times the acceptance of extreme fluctuations in the labour demands made by the Employer and the Union. The Union, by this Agreement, completely understands the necessity of these extremes and agrees to make every effort to fulfil the workforce requirements of the Employer.*

[84] Article 1:03 suggests that only in exceptional cases will the maintenance work involve a unit that is not running. Although not determinative of the question before the Board, this Article supports an interpretation of the work as being construction.

[85] Next, the Board will consider the meaning of “maintenance” pursuant to the common law with reference to section 6-65.

[86] In section 6-65, the terms used to describe the construction industry are constructing, erecting, reconstructing, altering, remodeling, repairing, revamping, renovating, decorating and demolishing. It is necessary to assign meaning to this language. Otherwise it is superfluous. In our view, these terms outline the general shape of the construction industry, which is covered by Division 13 collective bargaining.

[87] On the other hand, these terms are not necessarily determinative of whether the work falls within the construction industry or is excluded for being maintenance work. This is because all of

the activities undertaken, as described in the statute, are included within the construction industry (excluding maintenance work). Framed in this way, the definition acknowledges the overlap between construction and maintenance work, and suggests that the context within which the work is performed may assist in determining the appropriate characterization of the work.

[88] Along these lines, the Union asks the Board to consider in its deliberations the overall context of the project, relying on *Andritz*, at paragraph 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.*

[89] It is well established that work which is found to be construction work in one context may be found to be maintenance work in another. In other words, the physical work is not necessarily determinative; it is often the context within which it is performed that it is indicative of its appropriate characterization. Therefore, to determine whether work falls within the construction industry and is not excluded for being maintenance work, it is appropriate to consider the context within which the work is being performed. This includes the overall purpose of the work and the scope of the project. See, for example, *IBEW Local 424 v Transwest Dynaquip Ltd.*, [1994] Alta LRBR 99 [*Transwest Dynaquip*], at 113 and 115; *J. Mason & Sons*, [1999] Alta LRBR 577 [*J. Mason*] at paras 24, 25.

[90] Prior to the existing regime, the meaning of the word “maintenance” was considered in *Saskatchewan Construction Labour Relations Council, Inc. v Wright and Sanders*, 1982 CanLII 2686 (SK QB), [1982] 6 WWR 704 [*Wright and Sanders*]:

> *[23] Maintenance is defined in Webster’s Third New International Dictionary as, “the labour of keeping something in a state of repair or efficiency”. To maintain is to keep something in repair as in the upkeep of machinery and equipment to enable it to operate efficiently and in the manner in which it was designed to perform…*

[91] *Wright and Sanders* has since been cited and relied upon for purposes of defining the statutory exclusion of maintenance on many occasions. In *J. Mason*, the Alberta Board noted as follows:

> *40 In exploring the difference between new construction and maintenance, the CASCA Electric panel considered the reasoning of the Saskatchewan Court of Queen's Bench in an earlier 1982 decision. At that time, the Saskatchewan labour statute made no mention of "maintenance," and the word "construction" although used in the statute, was not a defined term. In determining what maintenance work is and whether it should be treated*

> *as something different from construction, the Saskatchewan Court stated in Saskatchewan Construction Labour Relations Council, Inc. v. Wright and Sanders, 1982 CanLII 2686 (SK QB), [1982] 6 W.W.R. 704 at 714-715:*
>
> > *Maintenance is defined in Webster's Third New International Dictionary as "the labour of keeping something in a state of repair of efficiency." To maintain is to keep something in repair, as in the upkeep of machinery and equipment to enable it to operate efficiently and in the manner in which it was designed to perform ...*
> >
> > *. . .*
> > *An examination of all of the material including the definition contained in the project agreements, an examination of related statutes [which included the Court's review of Alberta's statute at the time] and interpretations of those statutes and interpretations placed upon the information by the industry, lead me to conclude that there is a dichotomy between maintenance and construction. Maintenance is work that sustains or keeps up an operating facility to enable it to continue to operate efficiently and as designed. It is work on an existing facility and not the creation of a new or expanded work or facility which will create increased production or design capabilities.*
>
> *41 The CASCA Electric panel was not only influenced by the words of the Saskatchewan Court but also by the meaning given to maintenance by various Ontario labour relations decisions discussed in CASCA Electric. That is, maintenance is work sustaining a facility's ability to operate efficiently and as designed. It is work done on existing equipment to keep it functioning properly. As also as CASCA Electric notes [sic], Black's Law Dictionary describes the word "maintain" in this way:*
>
> > *the term is variously described as acts of repairs and other acts to prevent decline, lapse or cessation from existing state or condition; keep and repair; keep up; preserve.*
>
> *42 Admittedly, the cases discussed in CASCA Electric address the difference between new construction and maintenance. The Peace River Bridge work in question is certainly not new construction. Nonetheless, the dictionary definitions of "maintenance" remain of value…*

[92] The difficulty of determining the dividing line is disclosed by the following passage from *National Elevator & Escalator Assn. v I.U.E.C., Local 50*, [1991] OLRB Rep 555 (Ont LRB), a case cited in *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 v Francis H.V.A.C. Services Ltd.*, 2000 CanLII 13330 (ON LRB) [*Francis H.V.A.C.*]:

> *16 . . . Whether something is repair or maintenance work will depend upon the nature and purpose of the work in question in the context of the facility or system in or to which the work is being performed. Generally, work performed on existing equipment in an existing facility for the purpose of keeping the facility or a system in it operating properly before the facility or system has ceased to do so, is appropriately characterized as maintenance work. On the other hand, work involving the addition to or replacement of equipment for the purpose of either increasing the capacity of the facility or system, or restoring the ability of a facility or system to function properly, is appropriately characterized as repair work. The amount, apparent significance, or value of the work in question may be part of the context in which the assessment is properly made but are in no way determinative of the question.*

> *Similarly, whether a facility or system is shut down while the work in question is being performed may also be relevant, but will not be determinative.*

[93] The Board notes that, throughout the case law, beginning with *Wright and Sanders*, the language used to describe maintenance work is similar. The language includes terms such as "keeping something", "restoring", "sustaining", "operating efficiently or as designed", "preventing", and "preserving". In our view, all of these terms are consistent with the ordinary meaning of the term "maintenance".

[94] In this case, both parties urged the Board to follow the case law from various jurisdictions with experience in this particular area. In *Andritz*, the Board described some of the distinctions with the regimes found in Alberta, Nova Scotia, and Ontario:

> *86] The Board has reviewed these cases and has found them helpful. Some differences in the statutory regimes should be noted. For example, the Alberta legislation defines "construction" rather than "construction industry", and explicitly excludes maintenance from construction. "Repair" is not included in construction. Like Saskatchewan, the Nova Scotia and Ontario statutes define "construction industry" (which includes "repairing"). Unlike Saskatchewan, the Nova Scotia and Ontario statutes do not explicitly exclude maintenance from that definition. In Nova Scotia and Ontario, the maintenance exclusion has arisen through case law.*

[95] The case law from other jurisdictions is helpful to the extent that there is consistency in the terms used to describe the maintenance and construction distinction, and to the extent that there are similarities with the Saskatchewan regime. However, in part because of these distinctions, the Board's approach will necessarily reflect the Saskatchewan legislation, context, experience, and reasoning.

[96] For instance, unlike Nova Scotia, this Board does not start from the premise that the work is "normally maintenance". The Union is certified to this Employer within the construction industry. The Union has the onus to prove its case; it is not necessary to impose any greater onus on the Union under the circumstances.

[97] In summary, section 6-65 of the Act provides an outline of the construction industry in Saskatchewan. In addition to this, construction industry work, generally, may involve the addition to an existing facility, or work the purpose or results of which are to increase the design or production capacity of an existing facility. Maintenance is work on an existing facility to keep it in a state of repair. The word "keep" is important. It is not the creation of a new or expanded facility. To determine the nature of the work, it is appropriate to consider the context within which the work is being performed, which includes the overall purpose of the work and the scope of the project.

[98] In this case, the work performed by the insulators consisted of insulating newly installed piping and working on the newly installed fan and the new ducting. The overall project involved major changes to the line. As a part of the project, another partial floor had to be added. There was a significant amount of new piping, which tied into existing piping, and new cable trays and a new scrubber were installed. Existing fans were replaced. A cooler and screening were installed. A conveyer was installed.

[99] We do not agree with Furlong's description, which minimized the consequences of the work, that there was product flow before and after the project occurred. This work was not equivalent to simply replacing old components with new components. Prior to the completion of this work, product was being returned because it was not saleable and it was being held in the tailings pond, resulting in a loss of profit. Obviously, the system was not accomplishing the purpose for which it had been constructed.

[100] The project fell outside of the normal maintenance budget. It was considered a capital project. It is difficult to know what to make of the Construction Superintendent for K + S, who was Furlong's main contact for the project, describing the project as "brownfield". By the point at which Furlong requested the email, which email request was pre-empted by a phone call, Furlong was aware of concerns which had been raised by certain trades about the characterization of the project. The application of the "brownfield" label is not probative.

[101] Finally, the Employer objected to the admissibility of Houston's evidence and, in particular, the mark-up document prepared by the contractor who hired the boilermakers. In the Employer's submission, that evidence is not relevant, and the Board should account for its decision to admit that evidence in its written reasons.

[102] Clearly, the characterization of the work by another trade is not determinative of the nature of the work being performed, and that evidence is to be disregarded. It is the Board's role to make that determination. However, the presence of other trades on the site, and the work that those trades are performing may very well be relevant to determining the purpose and scope of the project. To find otherwise would be to draw an arbitrary and unworkable distinction.

[103] The evidence from other trades may help to complete what is otherwise an incomplete picture of the overall project. While it is very clear that the work which is at the center of this dispute is the insulators' work, the Board would be remiss to disregard the overall purpose of the work and the scope of the overall project. On the other hand, the evidence of the other trades, as

per the mark-up document, is quite general, and for this reason the Board has focused on the work as described through the testimony of witnesses and other documentary materials.

[104] In our view, the work performed by the insulators falls within the construction industry. The project consisted of altering, and to some extent repairing, the line, which was a part of a mine and therefore a work, within the meaning of subclause 6-65(a)(i). Altering and repairing fall within the definition of the construction industry. The insulators' work consisted of activities undertaken with respect to the system used in connection with that work pursuant to subclause 6-65(a)(ii).

[105] The fact that the overall project tied into existing lines is not determinative. The work was not intended to simply sustain and maintain an operating facility, nor was it intended to preserve the function of a system or part of a system. The work was meant to enhance the functioning of the system.

[106] The Employer relies on the Alberta Board's decision in *Construction Workers Union, CLAC Local 63 v Nason Contracting Group Ltd.*, 2017 CanLII 64948 (AB LRB) [*Nason*], for the proposition that major overhaul work and work involving the replacement of equipment are properly characterized as maintenance.

[107] *Nason* relies on the Alberta guidelines, which outline the following general distinctions, at 2-3:

> • ***Maintenance:*** *The replacement of significant equipment (and work related to this activity) where there is no increase in capacity or enhancement of function is normally maintenance work. An exception may be the replacement of an entire facility with no increase in capacity which may be more accurately characterized as construction.*
>
> • ***Construction:*** *The replacement of significant equipment (and work related to this activity) where there is an increase in capacity or enhancement of function is normally construction work. Also, the replacement of an entire facility with or without an increase in capacity may be construction work.*
>
> *…*
>
> ***Maintenance Work***
> *Maintenance work is defined as large-scale plant turn-around work. For example, an employer may close a pulp mill and bring in a contractor(s) to complete a major overhaul or replacement of equipment. Maintenance work also includes long-term maintenance contracts. This sort of work is often referred to a "Big M" maintenance. Maintenance contractors often (but not always) employ several trades (e.g., operating engineers, ironworkers, labourers, pipefitters) that work together to complete the turn-around.*
>
> ***Non-Construction Work***
> *Non-construction work (or "small M" maintenance) is defined as general repair work and maintenance outside of the scope of a major plant shutdown. For example, an employer may bring a contractor in to repair a blown power panel. The contractor in this circumstance often specializes in a single trade (e.g., electrical work).*

[108] In Alberta, there are three relevant categories: construction, maintenance, and non-construction. Construction employees are certified separately from employees performing maintenance or non-construction work. Unlike in Saskatchewan, maintenance bargaining units are craft-based.

[109] In contrast to Alberta, the Saskatchewan legislation includes the term “repair” within the definition of construction industry. Even so, this project was not the same as a major overhaul, otherwise known as turn-around work, as understood within the Alberta case law. The purpose of the project was not to return the system to its pre-existing or designed functionality. Nor was the work the type of ongoing repair and upkeep further to a service contract that is included within the meaning of maintenance in Alberta. This was a specific project for a well-defined purpose with a beginning and end date. Nor was it general non-construction upkeep and repair. This would, however, fall into the category of work in which there has been the replacement (and addition) of significant equipment (and work related to this activity) and an enhancement of function.

[110] The Employer also relies on a case from the Nova Scotia Board, *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 work in *Ainsworth* involved the replacement of two oil-fired boilers and the addition of a plate exchanger in connection with the conversion of the heating system to natural gas. The Board found that all that had changed was that the buildings were now heated by gas rather than oil and some mechanical equipment had been replaced. No additional capacity was added to the buildings. The work was found to be maintenance.

[111] The Board in *Ainsworth* relied on its guidelines in coming to that decision. While those guidelines are helpful, they presume that the work is “normally maintenance”. And, even if the Board were to apply those guidelines, they do not support the Employer’s argument because the work does not serve to preserve or restore.

[112] In conclusion, the Board has concluded that the work performed by the insulators on the PQ project falls within the construction industry and is not excluded for being maintenance work. Therefore, it is the Provincial Agreement which applies to this work and is binding on the parties. The application for an order determining whether the Employer engaged in an unfair labour practice is deferred until the grievance process is concluded. This panel will remain seized with this matter to hear further submissions from the parties with respect to the unfair labour practice

application should there be outstanding issues remaining between them that are not resolved by the grievance process.

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

DATED at Regina, Saskatchewan, this **10th** day of **August, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson