Saskatchewan
Labour Relations Board

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

LRB File No. 279-19 & 078-20; January 22, 2021

Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Allan Parenteau

Counsel for the Applicant, United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179: Ronni A. Nordal, Q.C.

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

Certification Application – Division XIII – Construction Industry – Timeliness – Section 6-10 not Applicable – No Existing Certification – Use of Section 6-9 Appropriate.

Hydroelectric plant – Exclusion of Maintenance Work from Construction Industry – Replacement of Components or System – Increase Generation Capacity – Certification Granted.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to a Certification Application, brought by United Association of Journeymen and Apprentices of the Plumbing Pipefitting Industry, Local 179 [Union] in relation to employees of Andritz Hydro Canada Inc. [Andritz], filed with the Board on December 13, 2019. The Certification Application was filed under Division XIII of Part VI of the Act, the Construction Industry division. For the following reasons, the Board has decided to grant the certification order.

[2] Andritz is a supplier of electromechanical equipment and services for hydropower plants. The work in question was performed on the E.B. Campbell Hydro Power station located near Nipawin, Saskatchewan. SaskPower contracted with Andritz to carry out work on six of the eight existing turbine units at E.B. Campbell. One of these six units is to be completed each year, starting with Unit No. 3. On June 4, 2019, Andritz signed a Project Agreement with IBEW Local

529 and Ironworkers Local 771 relating to the project, and then the work began in August 2019. The Labourers, Operating Engineers, and Ironworkers also signed the Project Agreement.

[3] UA Local 179 represents journeyman plumbers, steamfitters, pipefitters, welders, gasfitters, refrigeration mechanics, instrumentation mechanics and sprinkler fitters, including apprentices and foremen.

[4] UA Local 179 submits that the following unit of employees is appropriate for the purpose of bargaining collectively with Andritz:

> *All journeyman plumbers, steamfitters, pipefitters, welders, gasfitters, refrigeration mechanics, instrumentation mechanics, sprinkler fitters and all apprentices and foreman connected with these trades employed by ANDRITZ CANADA INC. within the Province of Saskatchewan.*

[5] According to UA Local 179, there is no other union that claims to represent any of the employees in the unit as described, and only two employees belong to the unit in question. UA Local 179 says that the work being performed is construction work, and so therefore, a certification pursuant to Division XIII is appropriate.

[6] Andritz says that the work being performed is maintenance work, and therefore it falls outside of the Division XIII regime. Given that UA Local 179 has applied for a certification pursuant to Division XIII, and not pursuant to the general provisions of Part VI, the Certification Application must fail.

[7] IBEW Local 529 represents journeyman electricians, electrician apprentices, electrical workers and electrician foremen employed by Andritz through certification order LRB File No. 095-04 to the employer, VA Tech Escher Wyss Canada. For the purposes of the Certification Application, UA Local 179 accepts that Andritz is a successor employer to VA Tech Escher Wyss Canada. Andritz also has certification orders with Operating Engineers and Millwrights. It does not have a certification order with UA Local 179.

[8] This matter proceeded by Webex beginning on June 10 and 11, and then continuing on July 27 and 30, and August 24, 2020. Members of IBEW Local 529 were in attendance as observers, but not as participants.

Argument on Behalf of the Parties:

Application for Summary Dismissal:

[9] Andritz brought an application for summary dismissal of the Certification Application. Andritz sought summary dismissal on the basis that the appropriate application was not a Certification Application, but rather an application for a change in bargaining rights, and that said application was not filed within the timelines set out in section 6-10 of the Act.

[10] In response to the application for summary dismissal, UA Local 179 argued that section 6-10 of the Act does not apply to these circumstances. Section 6-10 applies only in cases where a union has been certified as the bargaining agent for a bargaining unit. In that case, another union may apply to the Board to be certified as the bargaining agent for the bargaining unit or for a portion of the bargaining unit. No union has been certified to represent this bargaining unit. Andritz appears to be equating collective agreements with certification orders.

[11] Prior to the hearing on the substantive matter, the Board considered the materials and the arguments and decided to orally dismiss the application for summary dismissal. In doing so, it reiterated the test on an application for summary dismissal pursuant to clause 6-111(1)(p) of the Act, which requires the applicant to prove that it is plain and obvious that the application discloses no reasonable chance of success. The Board found that it was not plain and obvious that the Certification Application would not succeed.

Certification Application:
UA Local 179

[12] On the main Application, UA Local 179 reiterated that section 6-10 does not apply to these circumstances. IBEW Local 529 is certified as the bargaining agent for members of the electrical trade, not members of the pipe trade. UA Local 179 is applying to represent members of the pipe trade. By signing on to the Project Agreement, IBEW Local 529 acknowledges that its certification extended only to electrical trades. According to the Project Agreement, Andritz recognizes IBEW Local 529 as the sole bargaining agent of members of the electrical trade. The pipe trades are recognized under the Project Agreement only as “other” or “additional” trades.

[13] The Project Agreement does not constitute a collective agreement with respect to members of the pipe trade. At the most, and this is not admitted, it is a collective agreement entered into by IBEW Local 529, and Andritz voluntarily recognized IBEW Local 529 as the bargaining agent for employees of the pipe trades (pipefitters and welders). Even if this were the

case, the case law makes clear that a collective agreement is not a certification and cannot be used as a shield to block a certification application.

[14] Next, UA Local 179 says that the work is captured by the "construction industry" definition contained in Division XIII of the Act. The construction industry extends beyond new construction. While Part VI does not contain a definition of "maintenance", the definition of "construction industry" provides guidance about what is not maintenance. That is, maintenance does not mean the activities of constructing, erecting, reconstructing, altering, remodeling, repairing, revamping, renovating, decorating or demolishing, which are all activities covered by the "construction industry" definition.

[15] While the work can be described in many ways, each of these descriptions falls under the "construction industry" definition. This includes reconstruction, altering, remodeling, repairing, revamping, constructing and erecting. On the whole, much of the work can be defined as repair. Repair is performed when some part of the machine is not functioning. That is what happened here.

[16] The work did not simply preserve or sustain the unit's functioning. The unit was dismantled and entirely rebuilt. The new and improved unit has a longer lifespan and increased generating capacity. The rebuild was not a matter of replacing only a small number of components. Granted, some of the components were refurbished and replaced, but there were many brand new components, including the runners, which are the heart of the unit. All piping and piping systems were new. The old unit no longer exists.

Andritz

[17] Andritz says that, at the time of UA Local 179's Certification Application, the employees subject to the proposed bargaining unit were members of, and dispatched by, another union, IBEW Local 529, which is certified to Andritz. That union signed the Project Agreement. The Project Agreement covered the supply of all of the trades required for the project, including pipefitters. UA Local 179 was aware that the project was covered by a wall-to-wall collective bargaining agreement which is in effect for the duration of the project.

[18] The present Application was not properly filed as an application for a change in bargaining rights, and was filed well outside the relevant timelines pursuant to the Act. For employees to make an application for a change in representation pursuant to section 6-10 of the Act, the application must be made not less than 60 days and not more than 120 days before the

anniversary date of the collective agreement or, if a collective agreement has not been concluded, the anniversary date of the certification order. The collective agreement was signed and effective between IBEW Local 529 and Andritz on June 4, 2019. The relevant open period would therefore be from February 12, 2020 to April 12, 2020.

[19] The Board can relieve against minor, typographical irregularities but it will not substitute one application for another or treat an application as a hybrid of two types of applications. Nor does the Board have "jurisdiction" to relieve against improper filing due to the specific timelines set out in the Act. The Certification Application should be dismissed on this basis.

[20] However, if the Board disagrees that it should dismiss the Application for a failure to file in accordance with section 6-10, then it should dismiss the Application because the work performed by the members of the proposed bargaining unit was not construction work. In assessing the work, the Board should review it as a whole. Taking this approach, the Board will find that nothing new was being constructed, and that instead, the work consisted of the refurbishment of an old unit, using existing parts, re-machined parts, and some replacement parts. This is maintenance work.

[21] Many unions, as well as SaskPower, support the characterization of the work as maintenance. For one, SaskPower advertised the project as involving the refurbishment of a unit. Furthermore, the SaskPower Maintenance Agreement defines maintenance work in a manner that is consistent with the work performed in this case. A number of unions agree and they have demonstrated that agreement by signing the Project Agreement.

[22] Andritz asks the Board to adopt the principles applied by the boards in Alberta and Nova Scotia. In particular, the Nova Scotia Board has developed guidelines, which if applied to the facts in this case, support the maintenance characterization. The first guideline suggests that the Board should defer to the Project Agreement, which confirms that the work is maintenance. This is a complete answer to the question before the Board. The remaining guidelines, if deemed necessary, each support the contention that the work is maintenance.

[23] Andritz acknowledges that there was a "slight improvement" in production at the overall facility, but this does not mean that the work is construction. The work of the pipe trades was "replacement work which did not see a change in production or capacity, with respect to the pipes and cooling systems which were replaced". The work "simply brings the facility up to designed production capacity, based on the current available technology".

[24] In summary, the work started with a hydro unit and ended with a hydro unit. This is not a new unit; it is a maintained unit. Likewise, the piping system is not a new piping system; it is a maintained piping system.

Evidence:

[25] During the hearing of this matter, the Board heard from five witnesses: Bill Peters [Peters], the UA Local 179 Business Manager; Daniel Moose [Moose], a UA Local 179 member; Dannen Reiss [Reiss], a UA Local 179 member; Garnet Greer [Greer], the IBEW Local 529 Business Manager, and Francoys Gauthier [Gauthier], a Project Manager with Andritz. All of these witnesses, at various points during their testimony, provided their view of the difference between maintenance and construction. Most of the witnesses also compared this project to other projects with which they were familiar.

[26] IBEW Local 529 represents persons in the electrical trades in the northern part of the province. Greer, the IBEW Local 529 Business Manager, and an electrician by trade, organized the call-outs for the pipe trades for this project. According to Greer, the pipe trades worked on the site as IBEW members - the International gave clearance to the Local to proceed in this fashion. In cross, Greer acknowledged the jurisdictional provisions of IBEW's constitution. According to Greer, the standard process was to provide employees with a copy of the Project Agreement, which he believes was done. Each of Moose and Blayne Cook [Cook] signed Organizing Clearances for UA Local 179 and Applications for Membership in IBEW. The start date for both Moose and Cook was December 9, 2019.

[27] Peters testified that he became aware of and asked for a copy of the Project Agreement on August 28, 2019. He was very displeased with it. First, the work was not maintenance, it was construction. Second, two other unions, not representing pipe trades, had entered into the Project Agreement and had purported to set the terms and conditions of work for pipefitters and welders. It was as though the Building Trades was attempting to whipsaw UA Local 179 into signing the Agreement. And, third, the terms of the Agreement were dissatisfactory.

[28] UA Local 179 did not negotiate the Agreement, and therefore it should not be bound by it. Peters has the exclusive right to negotiate on behalf of the Local. He acknowledged that the Local does work under the National Maintenance Agreement even though he has not signed it. The UA is also a signatory to the SaskPower Maintenance Agreement which defines "maintenance" as follows:

> *4:01 Maintenance shall be work performed for repair, replacement, renovation, revamp and upkeep of property, machinery and equipment within the limits of the plant property or other location related directly thereto.*

[29] Peters was adamant that the work in question is not maintenance. He asserted that he was not seeking a maintenance certification.

[30] Peters says that he was not aware of the job until the beginning of September 2019 when the Local was called upon to supply trades people. He did receive a letter by email, dated November 21, 2019, but he does not manage his email, and he did not see this letter until sometime after it was sent.

[31] In the letter, Greer recalled a monthly meeting of the Building Trades during which Peters had been asked whether he would be willing to supply pipefitters for the E.B. Campbell project. Peters had responded with a "hard no". Greer now explained that Andritz had requested two pipefitters, one with welding certifications. He asked if Peters was still taking the position that he would not be supplying manpower, and if so, informed him that they would "source through all means possible", and would make the pipe trades members of IBEW. Under the circumstances, he suggested that Peters dispatch through IBEW Local 529 and then proceed with certifying Andritz, or contact the lawyer and sign the Project Agreement.

[32] Peters explained that he did not follow up with Greer about the letter. He was disturbed by the whole situation. He was not going to supply people for this project. Besides, no one reached out and called him. That is how things are done. And, at a conference held that same month Greer seemed to be ignoring him, further evidence of the hostility between them. Greer testified that he later sent another letter by email dated November 25, 2019. In that letter, Greer explained that he had to source the manpower requirements for the job by the end of business that day.

[33] Peters has extensive experience in the pipe trades, and has visited many power stations, but he has not visited E.B. Campbell or any other hydroelectric station. Despite this, he believes that the unit was taken down to its foundation and that it is basically a different unit as a result of the work that was done on this project.

[34] Ultimately, IBEW Local 529 advertised for the pipe trades with an expected call-out of two months. Moose, who is a journeyperson pipefitter, was referred to Greer through Lyle Daniels, of the Building Trades. He then met with two Business Agents and was provided with clearance to work at the site. He signed the Organizing Clearance and the Application for Membership in IBEW.

The Application for Membership required Moose to acknowledge that he had received a copy of the "EB Campbell Project Labour Agreement, defining the terms and conditions of my employment." Moose explained that he undertook to work on the site with the intent to certify UA Local 179 to Andritz. The Organizing Clearance states that he is prepared to be employed for the purpose of organizing.

[35] Although Peters was not involved in these discussions, he was not going to deny work for people who needed to provide for their families.

[36] According to Moose, the scope of work was defined by general arrangement drawings. By the time the pipe trades had arrived, Unit No. 3 had been completed dismantled, and there were only embedded parts remaining in the pit. According to Moose, the working area was like a blank slate – totally stripped down. The other units were operational at the time.

[37] The pipe trades installed new pipe and piping systems in the stator pit, lower bracket, piping gallery and turbine pit. They also installed instruments in the penstock. This included pipes for the cooling system, the high pressure oil injection system, the oil fill and drain system, connection points in the piping gallery, and miscellaneous piping. At the tie points, they tied the stainless steel piping into the existing copper piping (and possibly carbon steel). As for the high pressure oil injection system skid, it was pre-manufactured but the pipe trades installed it. The pipe trades did perform work in the Motor Control Centre, but only in relation to two small tubing lines.

[38] According to Moose, the piping was all new; the shafts looked to be machined, and the inner ring was likely re-used. He said that he looked at the turbine pits of the other units and that the piping in Unit No. 3 did not follow suit with the design in those units. He said that they "re-routed" the pipes. He could not say whether the piping was the same diameter or not.

[39] He left the job when the work was about 85% to 95% complete. The unit was not yet operating.

[40] Reiss is a journeyman plumber and journeyman steamfitter. He was contacted by Moose about this project. Reiss began working on site in February, 2020, after this Application was made. He described the state of the unit when he arrived on site, and the scope of work he performed. By the time he left the site, approximately 95% of the piping had been installed. The other units were operating when the work was being performed.

[41] Reiss confirmed that the turbine pit was basically empty when he arrived, that he was involved in installing various pipes and piping systems, that all of the piping was new, and that the piping was replaced with stainless steel, which was an upgrade. He could not speak to whether this changed the output. He testified that some of the piping sizes were increased but he did not provide much detail.

[42] Greer visited the site in late February of 2020. He compared the work to maintenance performed on a car engine. In his view, the trades were opening “the lid” so that the engine could last another 60 years.

[43] Counsel for UA Local 179 voiced an objection, based on *Browne v Dunn*, 1893 CanLII 65 (FOREP) [*Browne v Dunn*], to the admission of evidence about a conversation that had allegedly taken place between Greer and Moose. The Board upheld counsel’s objection, finding that the line of questioning around the conversation ran afoul of the rule in *Browne v Dunn* and was therefore inappropriate and inadmissible. The Board explained that, if counsel intended to impeach a witness, it was necessary to give the witness an opportunity to provide an explanation by at least making a suggestion that he did not accept the witness’s side of it, and confronting the witness with the competing theory to avoid surprise. It was not enough to simply ask Moose whether he had any conversations with Greer.

[44] Gauthier, a mechanical engineer, was the Project Manager for Andritz and the leader of the team assigned to the project. According to Gauthier, the purpose of the overall project was to extend the life of the unit to ensure that it will last for another 50 to 70 years. The first two units were done eight or ten years ago, and the current project deals with the remaining six units, one unit per year.

[45] Andritz mobilized the site in mid-July and was given access to the unit at the beginning of August. The customer had to shut down the unit and perform a lockout procedure to give the trades safe access to the site to begin dismantling the unit.

[46] For these projects, it is expected that the dismantling should take about a month and a half. From September to January, work on the various components is performed. In the middle of January or February, the re-assembly takes place. Under normal circumstances, the job takes eight to nine months, and is completed in March. In 2020, the Covid-19 pandemic caused an interruption and these timelines were delayed.

[47] This project consists of a major overhaul. To work on the unit, the water has to be drained. Generally, this happens once every four to five years. To avoid extensive work on a recurring basis, Andritz is taking some extra steps. In another 50 years, the customer might redo this work or replace the unit entirely. According to Gauthier, the latter is a different type of project.

[48] At the E.B. Campbell site there are eight units in total, the intake building with gates for water entry, and the spillway for the water surplus. Andritz is performing work on the units and on the intake building but not on the spillway. The units are similar to each other. The powerhouse building has been on site for decades and will remain.

[49] The unit consists of the stater pit, lower bracket, turbine pit, piping gallery, distributor, scroll case, and penstock.

[50] In performing the work, Andritz starts with the theory that no work is required, and then performs a cleaning inspection to see if there are problems. The inspection is an opportunity for Andritz to assess the type and extent of work that is necessary.

[51] Gauthier described the work of dismantling the unit. Andritz took pictures of the unit beforehand to ensure that when it was put back together it would be in the same or better condition. Demolition was not included in the scope of work. Embedded components (for example, the scroll case and the stay ring), which could be removed only by demolishing the concrete, were not removed.

[52] Non-embedded wall-mounted connectors remained in place, and at least one other non-embedded part remained in place due to weight.

[53] The work on the unit, including the piping work, was performed according to drawings. Some of the components were cleaned, some repaired, some re-machined to improve the concentricity or alignment due to wear and tear over time, and some were completely replaced with new ones. Some of the repairs to components were done on site. Other components were sent to specialized shops to be repaired. Whether the repairs occurred on site depended on the size of the component and the nature of the work. Some of the components were replaced because they would not last for another 50 years without another major overhaul.

[54] For the embedded parts, re-machining was performed in the pit to improve the surfaces where necessary. Cleaning and painting were done where necessary. The scroll case was not re-painted.

[55] The following components were removed from the unit, worked on, and then re-installed:

a. Turbine shaft;
b. Lower bracket (cleaning, repair, repaint);
c. Upper bracket (cleaned and minor refurbishment);
d. Rotor spider (cleaning, inspection, repair [welding], painting).

[56] The following components were replaced with new parts:

a. Piping and coolers;
b. The bottom part of the turbine runner (the critical part of the unit). The shaft at the top was re-used;
c. The distributor, which was also original;
d. The outer stater frame.

[57] Components for the operating mechanism at the top of the turbine had to be replaced.

[58] Nothing was added to the unit.

[59] Gauthier described the scope of work belonging to the pipe trades, specifically. There are 13 or 14 systems in total, each of which performs different functions, including by transporting air, water, and oil. The pipe trades replaced the piping systems, including piping for the braking system; the cooling water lines at the stater pit level; piping in the piping gallery (to where the piping ties into the system); a high oil injection system; and piping in the turbine pit. They did no machining work.

[60] Throughout the piping systems, all of the copper and carbon steel was removed and replaced with stainless steel. The carbon steel that was replaced was old and corroded. Stainless steel is more resistant to corrosion. It is a higher quality, more expensive metal with a longer life. Carbon steel tends to clog. In their condition these pipes would not have sustained another 50 years.

[61] The scope of the pipe trades' work ended in the vicinity of the unit. Pipes to elsewhere were not within the scope of the work, so the replacement pipes had to be tied in. There was no change in the diameter of the system. Whether the pipes' wall thickness changed, Gauthier was unsure. However, piping was not added to the design. The output did not change - the design of the cooling of the unit did not change at all. It was a pure replacement. Only the material changed.

[62] Gauthier spoke to the work at the penstock, which brings the water to the unit from the river. There, the pipe trades installed instruments to take pressure measurements.

[63] In cross, Gauthier was asked about an article he had authored describing the scope of the project in some detail. According to his description, the goals of the project were two-fold: to extend the life of the project and to increase generation capacity. Every time a unit is refurbished it makes sense to take advantage of the available new technology to, if possible, increase capacity. The original power capacity of E.B. Campbell was 289 megawatts. The resulting increase amounts to approximately two megawatts per unit (35 to 37). Despite this, Gauthier said that the pre- and post-work units are almost identical.

[64] Gauthier acknowledged that the article accurately described the scope of the work, confirming the replacement of the runners, the distributor, the stator frame, core and windings, head gates, trash racks, hoists, gates and track rack guides; as well as the refurbishment of the turbine shaft, shaft seal, thrust and guide bearings, poles, brakes, "etc.". The runner diameter stayed the same.

Applicable Statutory Provisions:

[65] The following provisions of the Act are applicable:

> ***6-1****(1) In this Part:*
> *(a) "bargaining unit" means:*
> *(i) a unit that is determined by the board as a unit appropriate for collective bargaining; or*
> *(ii) if authorized pursuant to this Part, a unit comprised of employees of two or more employers that is determined by the board as a unit appropriate for collective bargaining;*
> *. . .*
> *(c) "certification order" means a board order issued pursuant to section 6-13 or clause 6-18(4)(e) that certifies a union as the bargaining agent for a bargaining unit[.]*
>
> *. . .*
>
> ***6-4****(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> *(2) No employee shall unreasonably be denied membership in a union.*
> *. . .*
>
> ***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.*
>
> *(2) When applying pursuant to subsection (1), a union shall:*

(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and

(b) file with the board evidence of each employee's support that meets the prescribed requirements.

6-10*(1) If a union has been certified as the bargaining agent for a bargaining unit, another union may apply to the board to be certified as bargaining agent:*

(a) for the bargaining unit; or

(b) for a portion of the bargaining unit:

(i) if the applicant union establishes to the satisfaction of the board that the portion of the bargaining unit that is the subject of the application should be separately certified as a unit appropriate for collective bargaining; or

(ii) if the applicant union is certified as the bargaining agent in another bargaining unit with the same employer or, in circumstances addressed in Division 14, with two or more health sector employers as defined in section 6-82 and the applicant union establishes to the satisfaction of the board that the portion of board of the bargaining unit that is the subject of the application should be moved into the other bargaining unit.

(2) When making an application pursuant to subsection (1), a union shall:

(a) establish that:

(i) for an application made in accordance with clause (1)(a), 45% or more of the employees in the bargaining unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; or

(ii) for an application made in accordance with clause (1)(b), 45% or more of the employees in the unit of employees proposed to be established or proposed to be moved from one bargaining unit to another have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and

(b) file with the board evidence of each employees' support that meets the prescribed requirements.

(3) Subject to subsection (4), an application pursuant to subsection (1) must be made not less than 60 days and not more than 120 days before:

(a) the anniversary date of the effective date of the collective agreement; or

(b) if a collective agreement has not been concluded, the anniversary date of the certification order.

(4) With respect to an application made pursuant to subclause (1)(b)(ii), the application must be made not less than 60 days and not more than 120 days before:

(a) the anniversary date of the effective date of any of the collective agreements with an employer mentioned in that subclause; or

(b) the anniversary date of the effective date of any of the certification orders governing an employer mentioned in that subclause.

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; or

(b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.

(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.

(3) Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.

(4) Subsection (3) does not apply if:

(a) the employer and union make an irrevocable election to allow the supervisory employees to be in the bargaining unit; or

(b) the bargaining unit determined by the board is a bargaining unit comprised of supervisory employees.

(5) An employee who is or may become a supervisory employee:

(a) continues to be a member of a bargaining unit until excluded by the board or an agreement between the employer and the union; and

(b) is entitled to all the rights and shall fulfil all of the responsibilities of a member of the bargaining unit.

(6) Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.

(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.

6-12*(1) Before issuing a certification order on an application made in accordance with section 6-9 or amending an existing certification order on an application made in accordance with section 6-10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.*

(2) Notwithstanding that a union has not established the level of support required by subsection 6-9(2) or 6-10(2), the board shall make an order directing a vote to be taken to determine whether a certification order should be issued or amended if:

(a) the board finds that the employer or a person acting on behalf of the employer has committed an unfair labour practice or has otherwise contravened this Part;

(b) there is insufficient evidence before the board to establish that 45% or more of the employees in the proposed bargaining unit support the application; and

(c) the board finds that sufficient evidence of support mentioned in clause (b) would have been obtained but for the unfair labour practice or contravention of this Part.

(3) Notwithstanding subsection (1), the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same union.

6-13*(1) If, after a vote is taken in accordance with section 6-12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:*

(a) certifying the union as the bargaining agent for that unit; and

(b) if the application is made pursuant to subclause 6-10(1)(b)(ii), moving a portion of one bargaining unit into another bargaining unit.

(2) If a union is certified as the bargaining agent for a bargaining unit:

(a) the union has exclusive authority to engage in collective bargaining for the employees in the bargaining unit and to bind it by a collective agreement until the order certifying the union is cancelled; and

(b) if a collective agreement binding on the employees in the bargaining unit is in force at the date of certification, the agreement remains in force and shall be administered by the union that has been certified as the bargaining agent for the bargaining unit.

Analysis:

[66] The Board will address the issues raised in this case, as follows:

i) Should the Application have been brought pursuant to section 6-10 of the Act, and is UA Local 179 therefore out of time?

ii) Does the work performed by pipefitters and welders at the E.B. Campbell Hydroelectric Power station fall under the definition of construction industry pursuant to section 6-65 of the Act, or is it maintenance work?

i) Should the Application have been brought pursuant to section 6-10 of the Act?

[67] The first issue is whether the Application should have been brought pursuant to section 6-10 of the Act. Andritz argues for this, stating that the employees were dispatched as members of IBEW Local 529 and were given clearance to work on the site under those conditions. The effective date of the Project Agreement is June 4, 2019, which means that the window for a change in representation is from February 12, 2020 to April 12, 2020. UA Local 179 has brought its Application pursuant to the wrong provision of the Act, and now is out of time. The Board does not have jurisdiction to consider an application that is filed outside of the applicable window, and it should dismiss the Application on this basis alone.

[68] To address this argument, it is necessary to consider sections 6-9 and 6-10 of the Act:

> ***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.*
>
> *(2) When applying pursuant to subsection (1), a union shall:*
> *(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and*
> *(b) file with the board evidence of each employee's support that meets the prescribed requirements.*
>
> ***6-10****(1) If a union has been certified as the bargaining agent for a bargaining unit, another union may apply to the board to be certified as bargaining agent:*
> *(a) for the bargaining unit; or*
> *(b) for a portion of the bargaining unit:*
> *(i) if the applicant union establishes to the satisfaction of the board that the portion of the bargaining unit that is the subject of the application should be separately certified as a unit appropriate for collective bargaining; or*
> *(ii) if the applicant union is certified as the bargaining agent in another bargaining unit with the same employer or, in circumstances addressed in Division 14, with two or more health sector employers as defined in section 6-82 and the applicant union establishes to the satisfaction of the board that the portion of the bargaining unit that is the subject of the application should be moved into the other bargaining unit. …*

[69] Section 6-9 allows a union to make an application for the acquisition of bargaining rights if a certification order has not been issued for the bargaining unit or a portion of the bargaining unit. On making such an application, a union is restricted only to circumstances in which a certification order has not been issued for the bargaining unit or a portion of the bargaining unit applied for, and in which the requisite support evidence has been filed. There is no time limitation.

[70] Section 6-10 allows another union to apply to the Board to be certified as bargaining agent if a union has been certified as the bargaining agent for that bargaining unit. Andritz alleges that section 6-10 is the appropriate avenue because IBEW Local 529 is the bargaining agent for the employees in question.

[71] Given the plain language of these provisions, the appropriate question is whether a certification order has been issued for the bargaining unit or a portion of the bargaining unit that is being applied for. UA Local 179 is applying for a bargaining unit consisting of all journeyman plumbers, steamfitters, pipefitters, welders, gasfitters, refrigeration mechanics, instrumentation mechanics, sprinkler fitters and all apprentices and foremen connected with these trades employed by Andritz within Saskatchewan.

[72] For the purposes of this Application, IBEW Local 529 is the certified bargaining agent for employees of Andritz falling within the bargaining unit described in LRB File No. 095-04. The unit is described as:

> *…all journeyman electricians, electrician apprentices, electrical workers and electrician foremen employed by VA Tech Escher Wyss Canada in Saskatchewan, north of the 51st parallel…*

[73] IBEW Local 529's certification does not cover employees working in the pipe trades. Andritz relies on a passage from Brown & Beatty's *Canadian Labour Arbitration* and on the decision in *Interprovincial Concrete Ltd. (1989)*, 6 LAC (4th) 137 (Hornung) [*Interprovincial Concrete*], to suggest that the parties are entitled to expand the bargaining unit by agreement. However, arbitration principles, which are intended to address the obligations of parties to a collective bargaining agreement, do not assist the Board in interpreting section 6-10 of the Act.

[74] The language of section 6-10 is plain. Further, the parties cannot by agreement certify a bargaining unit. The Project Agreement does not constitute certification; nor does it substitute for

certification in the manner suggested by Andritz. It is an agreement between parties, not an order of this Board.

[75] Furthermore, the terms of the Project Agreement do not support Andritz's argument. Section 4.1.2 recognizes IBEW Local 529 as the sole collective bargaining agent for "all General Foremen, Foremen, Journeymen Electricians, Apprentices and Electrical workers" employed by Andritz on the Project. The pipe trades are mentioned only by implication at section 5 through reference to "additional trades, in addition to those for which they are the exclusive bargaining agent".

[76] Andritz relies on the release signed by the employees, arguing that UA Local 179 both allowed the employees to work on the site and then challenged the fact that they were dispatched by IBEW Local 529. However, the intent of the "Organizing Clearance" is clear – the members were cleared to work for the purpose of organizing the work site. It was on this basis that UA Local 179 released its members to work on the site. This was not a secret to IBEW Local 529.

[77] Even if it could be said that IBEW Local 529 was voluntarily recognized as the bargaining agent for employees of the pipe trades, this does not constitute certification nor can it be used as a shield to block an application for certification. The Board made this clear in *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc*., 2017 CarswellSask 280 (SK LRB):

> *32 Another unique feature of this application is that CUPE is not arguing that its voluntary recognition status operates as a bar to another union seeking certification pursuant to section 6-11 of the SEA, for example, to represent the same group of employees. The jurisprudence of this Board is clear: voluntary recognition cannot defeat the ability of another union to seek, and to obtain, a certification Order. See for example: Canadian Messenger Transportation Systems Inc. and United Food and Commercial Workers, Local 1400, LRB File No. 091-90, [1990] Fall Sask. Labour Rep. 93; I.U.O.E. v. Henuset Pipeline Construction Ltd., LRB File Nos. 146-91, 188-91 & 195-91, [1991] 4th Quarter Sask. Lab. Rep. 64 (Sask. L.R.B.), and Chauffeurs, Teamsters & Helpers Union, Local 395 v. Inconvenience Productions Inc., LRB File No. 144-98, (2001), 74 C.L.R.B.R. (2d) 161 (Sask. L.R.B.).*

[78] Voluntary recognition does not prohibit another union from applying for a certification application or obtaining a certification order.

[79] UA Local 179 has properly made its Application pursuant to section 6-9 of the Act. Section 6-10 is not the appropriate route to potential certification. Given this, Andritz's timeliness argument must fail.

ii) Does the work performed by pipefitters and welders at the E.B. Campbell Hydroelectric Power station fall under the definition of construction industry pursuant to section 6-65 of the Act, or is it maintenance work?

[80] UA Local 179 has applied for a certification order pursuant to the construction industry provisions in Division XIII of the Act. In a certification application, the applicant bears the onus to establish on a balance of probabilities that the unit is appropriate for collective bargaining. The Board has discretion to determine an appropriate description for that bargaining unit.

[81] In this case, 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. In numerous decisions, including *CLR Construction Labour Relations Association of Saskatchewan Inc. v International Association of Heat and Frost Insulators and Asbestos Workers, Local 119*, 2016 CanLII 30542 (SK LRB), the Board has reviewed at length the nature of construction industry bargaining in Saskatchewan.

[82] This is the first occasion for the Board to address, in a written decision, the meaning of "maintenance work" which is excluded from the construction industry definition outlined in section 6-65.[1] Neither "maintenance" nor "maintenance work" are defined in Part VI of the Act.

[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".

[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.

[85] In interpreting "maintenance work", the parties rely on case law from Alberta, Nova Scotia, and Ontario. Unlike Saskatchewan, these provinces have a well-developed jurisprudence

[1] Apart from the dissenting opinion of Mr. Holmes in *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 v Reliance Gregg's Home Services*, 2018 CanLII 127680 (SK LRB).

considering and applying the distinction between construction/construction industry and maintenance.

[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.

[87] UA Local 179 says that the work falls under the definition of construction industry, primarily because it consisted of a total rebuild of the unit and because it resulted in an increase in the unit’s production capacity. In support of this argument, UA Local 179 cites *Construction Workers Union (CLAC), Local 63 v J. Mason & Sons Inc.*, 1999 CarswellAlta 1606, (AB LRB) [*CLAC v J. Mason*], in which the Alberta Board considered and applied the exclusion of maintenance work from the definition of construction, which reads as follows:

> *1(g) "construction" includes construction, alteration, decoration, restoration or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, dams, tunnels, bridges, railways, canals or other works, but does not include*
> *…*
> *(ii) maintenance work*

[88] In considering this exclusion, the Board cited *Saskatchewan Construction Labour Relations Council, Inc. v Wright and Sanders*, [1982] 6 WWR 704 [*Wright and Sanders*], a decision of the Saskatchewan Court of Queen’s Bench made prior to the enactment of the maintenance work exclusion in Saskatchewan:

> *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] 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.*

[89] The Board then turned to its earlier decision, *Bricklayers*, and provided insight into how it would categorize major repair work involving an enhancement to a plant's capacity:

> *45 We return now to Bricklayers', in which this Board addressed for the first time, a statutory definition of construction. This definition in the Construction Industry Collective Bargaining Act included "repair" but excluded "maintenance work." The work in question was the inspection, maintenance, and repair or replacement of refractory materials conducted at an industrial plant during periodic shutdowns. Prior to introduction of a statutory definition of construction in this Act, the terms maintenance and repair were generally understood in the industry to both refer to non-construction activities. Thus the difference in the meaning of "repair" and "maintenance work" for purposes of the Construction Industry Collective Bargaining Act, had to be decided.*
>
> *46 The Bricklayers' panel noted that specialized construction legislation carries with it the threat of industry wide industrial action, and that it would be surprising to see a legislative scheme that intended the kind of shutdown maintenance work regularly done on petrochemical and similar plants in Alberta to be caught up in a general construction industry dispute. Continuing at p. 299 of [1988] Alta.L.R.B.R. the panel noted:*
>
> > *Obviously new capital projects and major repairs that involved an enhancement to the plant's capacity, or a rebuilding as a result of a fire or some similar breakdown, would nonetheless be affected [by the construction provisions of the legislation]. However, we do not see, in the use of the word "repair" in the definition of construction, and given the exception of maintenance work which itself includes a repair aspect, an intention that all repair work of every kind fall within the construction industry, and thus construction legislation.*

(emphasis in original quotation changed from italics to underlining)

[90] The Alberta Board has cited *Wright and Sanders* more recently in *I.B.E.W., Local 1007 v EPCOR Utilities Inc*., 2004 CarswellAlta 1717 (AB LRB):

> *30 The distinction between "repair" and "maintenance" is not always clear. In the Canadian Oxford Dictionary "repair" is defined to mean, "restore to good condition after damage or wear" or to "renovate or mend by replacing or fixing parts or by compensating for loss or exhaustion" and among the definitions it gives to "maintain" is "preserve or provide for the preservation of (a building, machine, road, etc.) in good repair". Of similar effect is the Board's decision in CLAC, Local 63 v. J. Mason & Sons Inc., [1999] Alta. L.R.B.R. 577 (Alta. L.R.B.) in which the following definition of "maintenance" is quoted from the*

> *Saskatchewan Court of Queen's Bench in the case of Saskatchewan Construction Labour Relations Council Inc. v. Wright, [1982] 6 W.W.R. 704 (Sask. Q.B.) at 714: […]*

[91] Along the same lines, UA Local 179 relies on *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.*], a decision of the Ontario Board. In determining which collective agreement applied to the work in that case, the Board outlined its view of the distinction between construction and maintenance:

> *9 It is not difficult to find general definitions of the distinction between construction and maintenance in the Board's jurisprudence. Essentially construction work involves the addition to an existing facility, results in an increase of the production capability of a facility, or restores to a working order a system which has ceased to function or to function economically. Maintenance work sustains, maintains or preserves an operating facility or part thereof, and enables it to operate efficiently or to attain its production capacity.* […]

[92] The Board also made the apt observation that defining the applicable terms is not the most difficult part of the analysis:

> *10 The real difficulty comes in the application of this test to the facts in any particular dispute. The distinction is one which is never easy to draw. This is particularly so since the context in which the work is performed is frequently determinative of the issue. In Jaddco Anderson Limited, [1998] OLRB Rep. Feb 38 the Board wrote:*
>
> > *11. The Board in that case came to the conclusion that the dichotomy between construction and maintenance is based primarily on a factual context. It is an analysis of the factual underpinning of any given work which allows an adjudicator to decide whether the work is construction or maintenance. In certain situations replacements of components might lead to the conclusion that the work in that context is maintenance. However in another context the replacement of components when viewed in their totality might lead to a conclusion that the work is construction because when one replaces all the components he or she is in fact rebuilding the entire system or structure.*

[93] In *National Elevator & Escalator Assn. v I.U.E.C., Local 50,* [1991] OLRB Rep 555 (Ont LRB), a case cited in *Francis H.V.A.C*., the Board stressed the importance of assessing the context, with the assistance of some general guidelines:

> *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.*

[94] Andritz relies on the Nova Scotia guidelines, developed for the purpose of providing greater predictability in decisions related to the distinction between construction and maintenance. 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 Nova Scotia Board described these guidelines as follows:

> *24. Because the question of "maintenance" vs. "construction" has been so important, in order to create better predictability in decisions the Panel developed a policy - drawing from established jurisprudence - that spelled out how these questions would be analysed. That policy has been widely circulated and is available online. The Panel's policy document reads (in part) as follows:*
>
> *"Work" and the "Employer" in the Construction Industry*
>
> *The Construction Industry Panel of the Labour Relations Board (Nova Scotia), ("the Panel"), hereby issues the following guidelines pursuant to the Trade Union Act, R.S.N.S.,1989. c-475*
>
> *In determining whether (a) work being performed by owners or employers is "maintenance" which falls outside the definition of "construction industry" in section 92(c) of the Act, and/or (b) an employer or owner is an "employer in the construction industry" under section 92 (f) of the Act, the following guidelines shall apply:*
>
> *A. 1. The Panel has decided that, in cases under Part II of the Act, the first issue to be dealt with is whether the work involved is "maintenance" work or work covered by Section 92(c) of the Act.*
>
> *2. On this first issue of whether the work is "maintenance" or "construction" under section 92(c),*
>
> *(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;*
>
> *(b) The Panel will consider evidence bearing upon the following questions:*
>
> *(i) Does the work sustain and maintain an operating facility and enable that facility either to operate efficiently or to attain its designed or production capacity? If the answer is "yes", the work is normally "maintenance".*
>
> *(ii) Does the work assist in preserving the function of a system or part of a system? If the answer is "yes", the work is normally "maintenance".*
>
> *(iii) Is the work necessary to restore a system or significant part of a system that has ceased to function or to function economically? If the answer is "yes", the work is normally "maintenance".*
>
> *(iv) Does the work involve an addition to an existing facility? If the answer is "no", the work is normally "maintenance".*

> *(v) Does the work increase the designed or production capacity of an existing facility? If the answer is "no", the work is normally "maintenance".*
>
> *(vi) The size and complexity of the project in relation to the normal maintenance capacity and activities of an owner of a pre-existing facility may be taken into account in answering the above questions.*
>
> *The burden of persuading the Panel that the work falls outside the "normally maintenance" conclusion, in accordance with the above questions, rests with a party making such an assertion.*

[95] Andritz argues that the first of the Guidelines, that the Board will give effect to a maintenance agreement, should end the inquiry. Even if it does not, UA Local 179 bears the onus to prove that the exceptional circumstances have been met and that the Project Agreement does not determine the nature of the work in issue.

[96] The Board in *Ainsworth* decided that the work was maintenance, and its analysis of the question is worth reproducing in full:

> *25. We will address the six questions posed above, in turn, although those questions overlap to a degree.*
>
> *(i) Does the work sustain and maintain an operating facility and enable that facility either to operate efficiently or to attain its designed or production capacity? If the answer is "yes", the work is normally "maintenance".*
>
> *26. The gas conversions clearly were designed to sustain and maintain the core environment within the buildings. They had nothing to do with the buildings' "production capacity." Whatever facilities may exist in those buildings which would be reflected in their "production capacity," were unaffected by the replacement of the heating systems.*
>
> *(ii) Does the work assist in preserving the function of a system or part of a system? If the answer is "yes", the work is normally "maintenance".*
>
> *27. Clearly the work preserved the ability of the buildings to function, in the sense that they all require heat and (if applicable) hot water.*
>
> *(iii) Is the work necessary to restore a system or significant part of a system that has ceased to function or to function economically? If the answer is "yes", the work is normally "maintenance".*
>
> *28. Clearly, the owners of these buildings had decided that the buildings' systems were either antiquated and required replacement, or were less efficient than they could be with new gas systems.*
>
> *(iv) Does the work involve an addition to an existing facility? If the answer is "no", the work is normally "maintenance".*
>
> *29. In none of these cases, as far as the evidence reveals, was there any additional square footage being added to the buildings. No more residential space, offices, or industrial capacity was being added. Comparing the buildings before the conversion to the way they*

> *are (or will be) afterwards, all that has changed is that they are now heated by gas rather than oil, and to varying extents mechanical equipment has been replaced to accomplish that result.*
>
> *(v) Does the work increase the designed or production capacity of an existing facility? If the answer is "no", the work is normally "maintenance".*
>
> *30. Again, no additional capacity was being added to these buildings.*
>
> *(vi) The size and complexity of the project in relation to the normal maintenance capacity and activities of an owner of a pre-existing facility may be taken into account in answering the above questions.*
>
> *31. There was no evidence that would have allowed us to consider this factor. The sheer dollar amounts of the projects is not all that informative. Even if we were to find that some, or all of these projects represented larger than usual capital expenditures, that would not in itself be enough to cause us to characterize these maintenance jobs as construction.*

[97] Andritz says that the Alberta Board's reasoning in *Construction Workers Union, CLAC Local 63 v Nason Contracting Group Ltd.*, 2017 CanLII 64948 (AB LRB) [*Nason*] supports a finding that the work performed by the pipe trades at E.B. Campbell is maintenance work. In *Nason*, the Board recognized that large-scale plant turn-around work, including the replacement of equipment, is maintenance. However, it is helpful to review the Alberta Board's reasoning in context:

> *[19] Maintenance work (sometimes referred to as "Big M" maintenance) is described in Information Bulletin No. 11 as follows:*
>
> > *Alberta industry relies on the services of maintenance contractors. These contractors supply labour and expertise to maintain and repair industrial plants. They may perform "long-term contract" ongoing maintenance work at a plant or major "turn-around" maintenance during a plant shutdown or both.*
> >
> > *Most often, these employers have structured their operations to coincide with the various trade union hiring halls. That is, their activities rely on the traditional craft lines of the building trade unions. The Board's policy is to certify maintenance contractors on a craft-by-craft basis for maintenance work. The various eligible trades are the same as those used for the general construction industry.*
> >
> > *This policy applies to those contractors who are, or do work similar to, those signing the Building Trades General Presidents' Agreement. Many other employers do maintenance type work but they are not covered by this policy. This policy only applies to those primarily engaged in the business of long-term or turn-around industrial plant maintenance.*
>
> *[20] In the Board's Policy and Procedural Manual, the matter is addressed in similar terms in Chapter 25(h) at page 3 as follows:*
>
> > ***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 as "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).*
>
> ***Differentiating Between Maintenance and Non-Construction***
> *Generally speaking, the following is true:*
>
> • ***Maintenance****: Significant facility repair and upkeep (e.g., replacing equipment or facilities) where there is a plant shutdown is normally maintenance work. Also ongoing repair and upkeep where there is a long-term service contract is normally maintenance work.*
>
> • ***Non-construction****: General upkeep and repair is normally non-construction work unless there is a long-term maintenance contract*
>
> • ***Context****: It is important to examine not just the work in question, but the context in which it is being performed. What is the overall purpose of the work and what is the scope of the overall project? What is the nature of the company doing the 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:

> *Finally, in I.B.E.W., Local 353 v. Delta Catalytic Industrial Services Ltd., [1997] O.L.R.B. Rep. 979 (Ont. L.R.B.) the Board said:*
>
> > *24. This is too simplistic and microscopic an analysis. The nature of electrical work will inevitably mean that new hardware is installed as part of the work, whether it be wiring or electrical or electronic devices, but this does not inevitably mean that the work is "construction". In some cases, work of this nature may not be meaningfully different in concept from the installation of new piping, new iron plating or new insulation. While the raw material involved may be new, that fact alone will not necessarily be determinative. The Board still must consider the nature and purpose of the work, in the context of the particular facility, project, system, or machine in question. The replacement of an outdated electrical measuring device with an updated electronic measuring device, which may well be more efficient and enhance the measuring capability, will not necessarily be "construction" work, where that is all that is being changed, and where the nature and purpose of the system has neither changed nor has its overall capability or*

> *productivity been enhanced. The result will depend on the extent of the change and its nature and purpose. Similarly, the installation of new gauge wiring for old gauge wiring will not necessarily be "construction" work. It is the context and purpose of the work which must always be considered and not only the detail of the work that the particular trade is asked to perform.*
>
> *11 One of the clearest examples of a definitional problem is the distinction between the replacement of a system, and the replacement of a component. Generally speaking, the replacement of a system is construction work and the replacement of a component is maintenance work; see Quinard Limited, supra. This merely begs the question of what is a system and what is a component. For example, Ontario Hydro Services Company operates a transmission system for the transmission of power in Ontario. Replacing the entire system would be construction. Replacing 90 kilometers of poles under a live transmission line is also construction (I.B.E.W., Local 1788 v. Ontario Hydro, [1994] O.L.R.B. Rep. 1404 (Ont. L.R.B.)). To replace a single insulator on a single pole on a rural distribution line would clearly be the replacement of a component and therefore maintenance. What about one kilometer of line? What about one pole? One large steel transmission tower? In cases such as those, context is determinative. Thus in drawing on the Board's caselaw it is often more instructive to refer to the actual facts on which the decision is made by the Board than the formula articulated as the line between construction and maintenance.*

[100] Overall, each of the Alberta, Nova Scotia, and Ontario boards confirm that the context of the work is central to an assessment of whether the work is maintenance or construction. In Alberta, the relevant context includes not only the work in question, but the overall purpose of the work and the scope of the overall project. In Nova Scotia, the size and complexity of the project may be taken into account in relation to the normal maintenance capacity and activities of an owner of a pre-existing facility. The Ontario Board considers the nature of the work in the context of the particular facility, project, system, or machine in question.

[101] Taking into account the themes that emerge from the case law, the Board will proceed to consider whether the work in question falls into the definition of the construction industry under section 6-65.

[102] First, the Board has the discretion, and the responsibility, to determine whether the work falls under the definition of construction industry. The Project Agreement between Andritz and the other unions does not bring this inquiry to an end. UA Local 179 is not a party to that Agreement. Peters made his position abundantly clear. Granted, the employees have signed the Membership Application, but IBEW Local 529 does not have jurisdiction over the work of the pipe trades. Besides, it was no secret that the employees would be provided Organizing Clearances. By 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.

[103] The Board agrees that UA Local 179 bears the onus of proving that the work consists of an activity or activities within the construction industry. In our view, given that the Project Agreement does not bind UA Local 179, it is not necessary to prove the existence of exceptional circumstances. If the Board is wrong in this, it has nonetheless found that exceptional circumstances exist to permit the Board to consider whether the work falls under the construction industry definition.

[104] Next, the factual context is key to determining the nature of the work. The work in question is the work performed by the pipe trades in the context of the project undertaken at the E.B. Campbell power station. The work did not involve the creation of a new or expanded plant. The primary purpose of the project was to extend the life of the unit to ensure that it would last for another 50 plus years – to preserve the functioning of the system. A secondary purpose of the project, according to Andritz, was to take advantage of existing technology to increase the production capacity of the unit.

[105] UA Local 179 argues that the work of replacing pipes constitutes repair work and should be understood as a construction industry activity. Granted, a failure to maintain a facility or part thereof can lead to dysfunction in the system and to consequential repairs. This type of work will generally be found to fall under the construction industry definition. But similar work may also be necessary for the purpose of sustaining, preserving, and maintaining a system. The replacement of materials, including with updated materials that are more productive and efficient, does not inevitably mean that the work was construction. The context is paramount.

[106] Unit No. 3 was functioning immediately prior to the work; a shutdown procedure was required to dismantle the unit and perform the work. Andritz identified corrosion and other wear and tear caused by the passage of time. The replacement of the old pipes with stainless steel pipes was an improvement to provide better protection against corrosion and clogging, a longer lifespan, and an improvement in efficiency. The work was necessary, not to restore, but to preserve a system or a significant part of a system. These factors, taken alone, are indicative of maintenance work.

[107] There was extensive replacement of piping, piping systems, and coolers. All of the piping in the unit was replaced. The new material was an upgrade, being higher quality and more efficient. However, no piping was added to the design and the cooling design did not change. While it is unclear whether the wall thickness of the pipes was changed (only Reiss, a latecomer

to the work, testified generally that some pipe sizes were changed), there was no change in the diameter of the system. The output of the pipes did not change. The scope of the work ended in the vicinity of the unit, and tie-ins were installed to connect to piping outside of the unit.

[108] In general, whereas the replacement of a system is construction industry work, the replacement of a component is maintenance work. Despite Moose's "under the hood" observations of other units, the Board cannot conclude that the pipes were re-routed. Moreover, the cooling design did not change. However, there was an extensive material replacement. Most if not all of the piping was replaced. This raises the question: if most of the piping "components" were replaced does that mean that the entire "system" was rebuilt?

[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.

[110] Although nothing was added to the unit, the scope of the overall project involved an extensive replacement of existing parts, including the piping and coolers, the entire distributor, and the outer stater frame. A new runner was manufactured, installed and commissioned, albeit with the same diameter. The runner is the heart of the turbine unit. Other parts were "refurbished" and re-installed, including the turbine shaft.

[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.

[112] Furthermore, as a result of the upgrades performed on the overall project, there was an increase in generation capacity of two megawatts per unit (35 to 37). The Alberta, Ontario, and Nova Scotia Boards repeatedly and consistently find that work resulting in an increase in production capacity, or work the purpose of which is to increase production capacity, falls under the construction or construction industry definitions. The parties produced no case law to suggest that the consequence of an increase in production capacity depends on the extent of that increase.

[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.

[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.

[116] Finally, the appropriateness of the proposed bargaining unit is otherwise not contested. The proposed bargaining unit represents the standard bargaining unit for the construction industry drawn on craft lines, represented by the registered trade union that is a party to the provincial construction agreement. The Board has determined, pursuant to subsection 6-11(1) of the Act, that the unit of employees is appropriate for collective bargaining.

[117] For the foregoing reasons, the Certification Application is granted. An appropriate Order will accompany these Reasons.

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

DATED at Regina, Saskatchewan, this **22nd** day of **January, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson