Saskatchewan
Labour Relations Board

THE UNITED ASSOCIATION OF JOURNEYMEN 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; December 28, 2023
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Allan Parenteau

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Certification Application – Hydroelectric Power Station – Work on Turbine Units – Union Seeking Construction Industry Certification – Nature of Work – Definition of Construction – Section 6-65 of *The Saskatchewan Employment Act* – Maintenance versus Construction.

Remitted to the Board – Apply Analytical Model – Consideration of Entire Context – Includes Work in Question, Overall Purpose of Work, Scope of Overall Project – Work Falls Into Construction Industry – Certification Ordered.

REASONS FOR DECISION

Introduction:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to a certification application filed by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 179 [Union] in relation to employees of Andritz Hydro Canada Inc. [Andritz], filed with the Board on December 13, 2019. The Union represents journeyman plumbers, steamfitters, pipefitters, welders, gasfitters, refrigeration mechanics, instrumentation mechanics and sprinkler fitters, including apprentices and foremen [pipe trades]. The certification application was filed under Division XIII of Part VI of *The Saskatchewan Employment Act* [Act], the Construction Industry division.

[2] The work in question was performed on six of the eight existing turbine units at the E.B. Campbell Hydro Power station located near Nipawin, Saskatchewan. The primary issue is whether the work performed by the pipe trades is construction or maintenance. If the work is found to be maintenance, then the certification application should be dismissed.

[3] The Board's original decision, dated January 22, 2021, was quashed by the Court of Appeal in a decision dated April 21, 2023. The matter was remitted to the Board for reconsideration, applying the proper principles in light of the Court's decision.

Arguments:

Union:

[4] The Court of Appeal found that the Board had identified the analytical model to be applied but failed to apply it. The Court did not take issue with the model set out by the Board or with any of the Board's findings of fact. The Board found that, in determining whether the work is construction or maintenance, the entire factual context is key. It is necessary to consider "not only the work in question, but also the overall purpose of the work, and the scope of the overall project".

[5] The Board found that the work carried out by the pipe trades was the reconstruction of the entire system or structure. The definition of "construction industry" includes "reconstructing". The evidence demonstrated that the old unit stopped operating because it was completely dismantled. It no longer existed. The pipe trades installed new pipe and piping systems in the stator pit, lower bracket, piping gallery and turbine gallery. The pipe trades installed all new piping, replacing 13 or 14 different systems. The new pipe was of a different material and quality that would last longer. There was work on the lube oil system and five or six other systems.

[6] The Court of Appeal did not interfere with the Board's finding that the work "viewed in its totality was the reconstruction of the entire system or structure".

[7] The goal of the project was to extend the operation of each unit by at least 50 years and to increase its generating capacity. The result of the work was that the capacity of each unit was increased by two megawatts.

[8] Andritz's definition of "construction" is overly narrow, covering only "brand new construction". This definition is contrary to the statutory definition. The Board properly rejected it.

Andritz:

[9] The starting point is the Project Agreement. The Agreement should be given effect save in exceptional circumstances. Four other trades have agreed that the work is maintenance. Also, the definitions included in the SaskPower agreement suggest that the work is maintenance.

[10] Even apart from the Agreement, the guidelines used by the Nova Scotia Board indicate that the work is maintenance. The work maintains an existing facility to ensure it operates properly and efficiently. It assists in the preservation of the functioning of the existing unit. It is necessary to refurbish, restore, and extend the life of the existing unit. Nothing is being added to the facility.

[11] The Union argues that there is a slight improvement in production at the overall facility. The replacement of old parts with new parts simply brings the facility up to designed production capacity based on current available technology. Furthermore, the work performed by the pipe trades did not result in a change in production capacity. Even if there is a slight increase in capacity, this increase is the result of the use of modern components. This is not the thrust of maintenance work.

[12] The Board's chosen approach requires a contextual consideration, which takes into account the work being performed, the overall purpose of the work, and the scope of the entire project. Although there was a nominal increase in capacity, the work was primarily intended to restore the capacity of the plant. The work enabled the facility to attain its design or production capacity. The nominal increase was an ancillary effect of modern materials. The existing design was maintained.

Analysis:

[13] The definition of "construction industry" is found at section 6-65 of the Act:

> ***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;*

[14] Maintenance work is not defined in the Act.

[15] In the original decision, the Board noted that the Union bears the onus of proving that the work consists of an activity or activities within the construction industry. The Board considered the

nature of the work taking into account the themes found in the case law. Among these themes was the fact that the overall context was central to determining whether the work was maintenance or construction. As the Board explained:

> *[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.*

[16] The Board also made the following findings of fact:

> *[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.*
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> *[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.*

[17] Having found that certain factors (taken alone) were indicative of maintenance work, the Board then proceeded to consider other evidence and made additional findings of fact:

> *[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.*
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> *[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.*

[18] The Board then found that there was an increase in generation capacity of two megawatts (MW) per unit. It decided that the increase in production capacity necessarily led to a conclusion that the work is construction.[1]

[19] The Court of Appeal commented on the Board's reasoning, and explained why it decided to quash the decision:

> *[51] I reach a different result, however, with respect to the Board's conclusion regarding the nature of the work that the pipe trade employees performed on the Project. With great respect, I find that the Board's determination on that point suffers from a failure of rationality internal to the reasoning process.*
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> *[52] In particular, in the Certification Decision, the Board identified that, as provided in the governing jurisprudence, the question of whether work is construction or maintenance under s. 6-65(a) always requires consideration of the entire context, which "includes not only the work in question, but also the overall purpose of the work and the scope of the overall project" (at para 109). Notwithstanding that expression of the need for a contextual analysis, the Board determined, only a few paragraphs later, that if any increase in production capacity whatsoever resulted from the work being performed, then that fact alone meant the work was construction and not maintenance. A conclusion that one factor, standing alone, can be determinative of such a question is rationally inconsistent with a framework in which the determination requires consideration of the entire context of factors. In other words, the decision is unreasonable because the Board failed to apply the analytical model it had explicitly identified was required.*
>
> *[53] In the result, that aspect of [the Board's decision] must be quashed.*

[1] *Original Decision*, at para 113.

[20] The Board has been directed to apply its analytical model by considering the entire context of factors in its determination of the nature of the work. In considering the entire context, the Board considers not only the work in question, but also the overall purpose of the work and the scope of the overall project.

[21] Andritz argues that the Board's starting point is the Project Agreement. In support of this argument, Andritz relies on the Nova Scotia guidelines, indicating that the agreement should be given effect, save in exceptional circumstances.

[22] The Board considered this argument in the original decision:

> *[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.*

[23] As such, the Board has determined that the agreement is not the starting point of its inquiry. The Union did not sign the agreement. It is the Board's role to determine the nature of the work. The Board must be careful not to encourage the whipsawing of a union into an agreement, which in the union's view, contains less beneficial terms.

[24] Nor is the agreement a reliable indicator of the nature of the work. At the most, it discloses the signatory trades' perception of the work. However, the characterization of the work by another trade is not determinative of the nature of the work being performed.[2] At the least, it is an arrangement to permit terms that provide benefit to Andritz and, perhaps, to the signatory unions.

[2] Even if it were, those characterizations were formed without the benefit of any Board decisions considering the meaning of "construction industry" under section 6-65.

[25] Andritz also argues that the SaskPower agreement is indicative of maintenance work. However, the SaskPower agreement does not apply to these circumstances. Instead, it applies to three coal fired power stations – Boundary Dam, Poplar River, and Shand.

[26] Furthermore, the definition of maintenance found at Article 4:00, while quite general, repeatedly uses the phrase "efficient operating condition". Meanwhile, Article 1:03 of the SaskPower agreement states:

> *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 Unions. The Unions, by this Agreement, completely understand the necessity of these extremes and agree to make every effort to fulfill the workforce requirements of the Employer.*

[27] The SaskPower agreement does not assist Andritz.

[28] The Board will proceed to consider the remaining facts.

[29] E.B. Campbell is located approximately 75 km northeast of Nipawin on the South Saskatchewan River.[3] Its overall generation capacity comprises approximately one third of the province's entire hydro generation capacity. It has the largest capacity, by a significant margin, of all of the hydroelectric stations in the province. Most of those stations - and a large proportion of the overall provincial capacity - are located in northern locations.

[30] In his testimony, Andritz's witness, Francoys Gauthier, acknowledged that an article he had authored had accurately described the scope of Andritz's work.[4] In it, he had explained that a goal of the project was to increase generation capacity. The article went on to explain that, by increasing capacity, Andritz was aiming to meet the increasing electricity demand in the region:

> *The Life Extension Program aims to meet increasing regional electricity demand and the newly refurbished units will generate 35 MW each at a rated net head of 32 m.[5] This is the biggest refurbishment contract for ANDRITZ Hydro in Canada to date.*

[31] This articulated goal had an articulated purpose – to meet increasing demand.

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[3] Exhibit U-2.
[4] Exhibit U-4.
[5] In his testimony, Gauthier described the increase as being "35 to 37". Either way, the increase remains approximately 6%.

[32] On a per unit basis, the plan was to increase the production capacity by two MW. One MW is one million watts.

[33] Although this is a relatively small amount compared to the entire provincial power system capacity, it cannot be described as "nominal".[6] 12 MW is approximately half of the capacity provided through the Manitoba Hydro Northern Power Purchase Agreement (25 MW) and is more capacity than exists in each of the components (Wellington, Waterloo, and Charlot River) making up the Athabasca Hydroelectric System.

[34] And, even if the systems map[7] were disregarded, two MW is approximately six percent of the existing per unit capacity. The overall project includes work on six units that would result in an overall increase of 12 MW. The overall increase is approximately one third of an entire unit.

[35] Although the piping and cooling designs did not change, Andritz did undertake engineering design work on this project.[8] At some point after performing that work, it advertised the anticipated capacity increase. The increase was a part of the project's objectives (even if secondary) and, as such, was a predictable and planned increase. The purpose of the project was not simply to return the system to its pre-existing or designed functionality, but rather, to enhance its function.

[36] Andritz asks the Board to follow the decision of the Nova Scotia Board in *Ainsworth*.[9] Clearly, the Board is not bound by *Ainsworth.* The Nova Scotia Board relied on its guidelines in coming to that decision. Those guidelines presume that the work is "normally maintenance". In Saskatchewan, it is sufficient that the union bears the onus to establish the nature of the work. The Board does not presume that work is normally maintenance. Work which is found to be maintenance is excluded from the Division XIII bargaining regime, and from the scope of work subject to the negotiations for which the representative employers' organization is the exclusive bargaining agent.

[37] Nor does *Ainsworth* present a persuasive factual comparison. There, the factual background involved residential and commercial buildings with heating systems that were converted from elements of oil heating to gas. The Board found that the "facility" was the building,

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[6] Exhibit U-2.
[7] Exhibit U-2.
[8] Exhibit U-4.
[9] *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*].

and therefore, it was relevant that there were no additions made to the buildings. The Board found that the conversions had nothing to do with the production capacity of the facilities (the buildings).

[38] By contrast, Andritz performed work in the industrial sector on the turbine units of a power station. The purpose of the power station, clearly, was to produce power. To use Gauthier's own description, "The unit is a turbine generator unit that produce[s] electricity from the water that is coming from the river". The capacity of the station to produce power was increased as a result of the work that Andritz performed.

[39] This type of work is done only every 50 or so years. As a result of the passage of time, it is not surprising that the decision was made to take advantage of improvements in technology to increase the overall production capacity. The fact remains, however, that a purpose of the project was to increase capacity. Because of the major investment involved, the customer would have benefited from having the improvements in technology included within the scope of the work.

[40] With respect to the generation capacity increase, the overall factual context is indicative of construction rather than maintenance work.

[41] Next, the Board in the original decision found that "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".[10] The work included the wholesale replacement of the critical part of the unit - which had to be manufactured. The Board summarized Gauthier's description of the work performed on the unit:

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

[10] *Original Decision*, at para 110.

[42] Later on, it was found that Gauthier had confirmed the following:

> *[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.*

[43] Gauthier had also described the scope of the work belonging to the pipe trades:

> *[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.*
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> *[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.*
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> *[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.*
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> *[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.*

[44] The Board heard evidence that to "avoid extensive work on a recurring basis, Andritz is taking some extra steps"[11] and that the work may be redone in another 50 years.

[45] The Board found that "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."[12]

[46] The Ontario Board has found that, depending on the context, the replacement of components may indicate either maintenance or construction work:[13]

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[11] *Original Decision*, at para 47.
[12] *Original Decision*, at para 111.
[13] *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).

> *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:*
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> > *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.*

[47] In other words, seemingly similar work may be found to be maintenance or construction. The context is key. This theme is repeated throughout the case law.

[48] Andritz argues that the Board should adopt the guidelines set out in the Alberta Board's decision in *Nason*[14]. However, the Board is bound by its governing statute. It must take note of the differences in the relevant statutory definition and the structure of bargaining. Unlike in Alberta, the definition of "construction industry" in Saskatchewan includes "reconstructing" and "repairing".[15] Unlike in Saskatchewan, Alberta's regime consists of three categories: construction, maintenance, and non-construction. Construction employees are certified separately from employees performing maintenance or non-construction work. Maintenance workers are organized along craft lines. In Saskatchewan, maintenance workers are excluded from the statutory craft-based bargaining regime.

[49] Furthermore, the Board found as follows in the original decision:

> *[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.*

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[14] *Construction Workers Union, CLAC Local 63 v Nason Contracting Group Ltd*., 2017 CanLII 64948 (AB LRB) [*Nason*].

[15] At the time of *Nason*, the Alberta definition was:

> (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
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> > (i) supplying, shipping or otherwise transporting supplies and materials or other products to or delivery at a construction project, or
> >
> > (ii) maintenance work;

The Board made this finding while reviewing the case law and, while doing so, reasoning that the case law provided general support for a determination based on the overall context of the work.

[50] The Board has observed that there was no piping added by the pipe trades and the cooling design and system diameter did not change. However, there was extensive work and replacement of parts, which when viewed in their totality, amounted to a rebuilding of the entire system. The pipe trades replaced all of the piping systems, each of which performed different functions. This included the braking system, the cooling water lines, the piping in the piping gallery, the high oil injection system, the piping in the turbine pit, among others. The pipe trades installed instruments in the penstock. Apart from the pipe trades' work, the critical part of the unit was manufactured and replaced. That is, it was new. The entire distributor and the outer stater frame were replaced. Almost everything was removed other than the embedded parts.[16]

[51] The fact that the piping had to be tied in is not determinative. The turbine units are the heart of the power plant. The purpose of the power station is to produce power. The turbine units are the primary means by which the power is produced. The turbine was almost completely dismantled and rebuilt. Granted, some aspects of the work were indicative of maintenance[17]. However, while there was a need to preserve the system for the next 50 years, the work went beyond preservation. The unit was reconstructed and Andritz took advantage of improvements in technology to enhance functioning. The unit's functioning, and that of the system and the plant, were enhanced. The work was not maintenance but construction industry reconstruction and altering (enhancement of function).

[52] In summary, the entire context, including the extensive work and replacement of parts, and the facts surrounding the increase in power generation suggest that the work of the pipe trades falls within the construction industry definition.

[53] For all of the foregoing reasons, the Board concludes that the work of the pipe trades for Andritz falls into the definition of construction industry pursuant to section 6-65 of the Act and is not excluded for being maintenance work. A certification order will issue.

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[16] *Original Decision*, at paras 51, 52.
[17] *Original Decision*, at para 106.

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

DATED at Regina, Saskatchewan, this **28th** day of **December, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson