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

LRB File No. 071-19; December 13, 2019
Vice-Chairperson, Barbara Mysko; Board Members: Allan Parenteau and Aina Kagis

For the Applicant International Association of Heat & Frost Insulators and Asbestos Workers, Local 119: Greg Fingas
For the Respondent AlumaSafway, Inc.: Steve Seiferling

Unfair Labour Practice Application – Section 6-41 and clause 6-62(1)(r) of *The Saskatchewan Employment Act* – Alleged contravention of collective agreement – Dispute as to applicable agreement.

Mootness – Employer agreed to apply Project Agreement – Tangible and concrete dispute has not disappeared – Dispute is not moot – Unnecessary to consider whether to exercise discretion.

Jurisdiction – Deferral – Section 6-45 – Board has jurisdiction, pursuant to clause 6-62(1)(r), to determine whether employer has contravened obligation, prohibition or other provision of Part VI – Jurisdiction to consider binding collective agreement – Remainder of issues deferred.

Maintenance Sector – Alternative bargaining arrangements – National Maintenance Agreement – Project Agreements for Specific Sites – Effect of Project Agreement upon Expiry – Employer bound by Project Agreement.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On March 25, 2019, the International Association of Heat and Frost Insulators and Asbestos Workers, Local 119 ["Local"] filed an application for an unfair labour practice against AlumaSafway Inc. ["AlumaSafway"] pursuant to subsections 6-41(2) and 6-41(3) and clause 6-62(1)(r) of *The Saskatchewan Employment Act* ["Act"]. On October 2, 2003, the Local was certified as the exclusive bargaining agent for all insulators, insulator apprentices and insulator foremen employed by Aluma Systems Canada Inc. in Saskatchewan; and on June 29, 2017, the Local was certified as the exclusive bargaining agent for all insulators, insulator apprentices and insulator foremen employed by Safway Services Canada ULC.[1] These

[1] LRB File No 184-03; LRB File No 118-17.

two entities have since merged to become AlumaSafway. The certification orders bind AlumaSafway following that merger.

[2] The Local alleges that AlumaSafway has failed to recognize that it is bound by a Project Agreement in relation to work performed on a SaskPower site, beginning in March, 2019. AlumaSafway states that it was not bound by that agreement during the relevant timeframe. Starting in the end of July or early August 2019, the Employer agreed to be bound by the agreement for the work performed, but that agreement was purely voluntary.

[3] In its Application, the Local requests the following relief:

a. A declaration that the Project Agreement is the collective agreement applicable to the work of the bargaining unit at the SaskPower sites;
b. A declaration that AlumaSafway has breached the Act and committed unfair labour practices;
c. An order prohibiting AlumaSafway from continuing to breach the Act and the Project Agreement; and
d. An order compensating the Local and its members for all losses arising from AlumaSafway's breaches, including:
    a. Making payments as would have been paid had AlumaSafway complied with the Project Agreement; and
    b. Reimbursing employees for tools required to be purchased due to AlumaSafway's refusal to comply with the Project Agreement.

[4] In its submissions, the Local also requested that the Board order that its Decision and Reasons be posted.

[5] The Board heard evidence from two witnesses on behalf of the Local, Chuck Rudder ["Rudder"], the Business Manager for the Local and former President of the Building Trades Council, and Vince Engel ["Engel"], formerly a Vice President of the International, Responsible for Western Canada. A number of documents were entered into evidence through these witnesses. No witnesses testified on behalf of the Employer. The basic outline of the facts is as follows.

[6] To start, the Construction Labour Relations Association of Saskatchewan Inc. ["CLR"] bargains on behalf of employers, and all of the Local's agreements are signed by the CLR. Warren Douglas ["Douglas"] is the CLR's President.

The Project Agreement

[7] In 2008, the Saskatchewan Building and Construction Trades Council ["Building Trades Council"] and the CLR entered into a Project Agreement for Power Plant Maintenance related to three SaskPower sites ["Project Agreement"] – Boundary Dam Power Station; Poplar River Power Station; and Shand Power Station. The term of the Project Agreement was June 29, 2008 to June 30, 2013. On May 3, 2013, the Building Trades Council, through Terry Parker, wrote to the CLR serving notice, pursuant to Article 20.00 of the then existing Project Agreement, to negotiate revisions. The resulting Project Agreement had a term of December 22, 2013 to December 31, 2018.

[8] Rudder was involved in bargaining that Project Agreement in his capacity as then President of the Building Trades Council. According to Rudder, after the removal of maintenance from the construction bargaining regime, the Project Agreement carried on. When it came to negotiating the Project Agreement, the CLR and the Building Trades continued to represent the employers and the unions.

[9] The Project Agreement, expiring December 31, 2018, contains the following recognition and scope clause reads:

> *1:01 The Employer recognizes the Unions as the exclusive bargaining agent for a bargaining unit comprising all Employees in the employ of the Employer engaged in supplemental contract maintenance work. This Agreement shall not apply to timekeepers, engineers, field office, clerical workers or to Employees above the rank of general foreperson. The scope of this Agreement covers work of a maintenance, repair, renovation and demolition nature that the owner elects to contract out, and is in force or effect on the particular job site for crafts prepared to work under the terms and conditions of this Agreement.*
>
> *1:02 The Employer agrees to offer the conditions contained herein to the applicable crafts wherever necessary, crafts working under the terms of this Agreement shall be dispatched from their respective hiring halls and shall be paid wages and benefits in accordance with the Appendices.*
>
> *[…]*

[10] The Duration and Amendment clause reads:

> *21:01 This Agreement shall be in full force and effect from December 22, 2013 until midnight, December 31, 2018 and thereafter from year to year provided that at any time not more than sixty (60) days and not less than thirty (30) days before the expiry date or any extended term thereof, either Party may give to the other Party written notice to negotiate a revision thereof and should such notice be given, the*

> *Parties shall, in accordance with the Saskatchewan Trade Union Act, bargain collectively with a view to renewal or revision of this Agreement or the conclusion of a new Agreement.*
>
> *The parties to this Collective Agreement may, by mutual consent in writing, modify the terms and conditions of this Agreement by way of Appendices to accommodate any project.*

[11] The Project Agreement remains in force and effect from year to year following its expiry. If a party wishes to negotiate revisions to the Project Agreement, that party may give notice within the timeline set out.

[12] On October 25, 2018, the CLR served written notice to the affiliated unions to commence negotiations to renew the Project Agreement.[2] According to Rudder, there was no evidence of an intention to bargain any other agreement at the local level.

[13] On December 10, 2018, the CLR sent out a reminder about the upcoming bargaining meetings scheduled for December 14, 2018. When bargaining proceeded on December 14, Rudder was in attendance on behalf of the Local. JT Yarosloski ["Yarosloski"] was in attendance on behalf of AlumaSafway. The CLR was represented.

The National Maintenance Agreement

[14] The General Presidents' Maintenance Committee for Canada ["GPMC"] is a committee consisting of Vice-Presidents of various trades representing the maintenance sector in Canada. Brett McKenzie ["McKenzie"] is the Executive Director of the GPMC.

[15] On October 15, 2013, the GPMC through S.M. Smillie ["Smillie"], notified its members of an upcoming meeting (November 6, 2013) to review a working agreement pertaining to the creation of a province-wide National Maintenance Agreement ["NMA"] for Saskatchewan. Smillie explained:

> *…Through the discussion process the participants indicated that there may be some opportunities for our maintenance contractors to secure both short term and long term maintenance contracts at various facilities which are not currently covered by existing maintenance agreements or currently being executed under the terms and conditions of the existing construction agreements.*

[2] The notice was given outside the sixty-day timeline, which is relevant only to the negotiation of revisions, and not the continued effect of the Project Agreement.

[16] The current NMA was negotiated in or around 2016. Engel participated in those negotiations on behalf of the Building Trades. The NMA remains in force and effect from year to year:

> *24.100 This Agreement shall become effective January 1, 2015 and will remain in full force and effect until December 31, 2016 and from year to year thereafter unless written notice to terminate or modify the Agreement is filed by either party at least ninety (90) days prior to the expiry date.*

[17] There is a Memorandum of Understanding, effective August 12, 2018 until June 30, 2021, to provide for amendments to the NMA. On May 28, 2018, McKenzie sent an email, which was received by Rudder, in error:

> *Dear Participants:*
>
> *After appropriate consultation with the Committee Members and signatory employers an MOU has been executed for the Saskatchewan National Maintenance Agreement.*
> …

[18] Rudder observed that the NMA was the International's initiative, and insists that the locals were not consulted.

[19] Engel sat on the national Building Trades Council representing the International in relation to the NMA. There, Engel held the voting rights for, and had the voice of, the Union. Engel's role is to support the Local as much as possible and represent it in the various organizations of which he is a member. Engel does not dictate the negotiation of local agreements. The International does not negotiate the rates in the provincial agreements. On cross, Engel acknowledged that at the GMPC, he represents one vote as to the applicability of the NMAs.

[20] According to Engel, in the negotiations leading up to the NMA there were extensive, sometimes heated, discussions about bringing the NMA into Saskatchewan, specific to the SaskPower sites. As a result of those discussions, the NMA was approved on the understanding that it would never be applied to workplaces where there were pre-existing bargaining rights. It would be used only to obtain work that was non-unionized. It was with those assurances that the NMA was signed. According to Engel, the NMA is intended to be an intermittent agreement for one or more trades for scenarios involving short term maintenance work, for example, shut downs, outages, or unexpected work.

[21] Engel testified that signing the NMA is challenging, due to the vast geographical distance among the signatories, and so electronic signatures are used. In November, 2018, McKenzie

called Engel requesting his signature for the Saskatchewan NMA. Engel agreed, finding it unusual to receive a call for this purpose but believing that his signature was being applied to the NMA as a matter of routine business. During the phone call, there was no discussion of SaskPower projects. Through the circumstances that followed, he later came to realize that this was no matter of routine business.

[22] On November 27, 2018, the GPMC held its Annual General Meeting ["AGM"]. There is an item at the end of the minutes, entitled "Sask Power and Sask Allied Council Agreement". It reads:

> *The Committee discussed whether or not it was time to transition in the province of Saskatchewan and use the existing Saskatchewan NMA for all maintenance work. The consensus was that there were no issues using the NMA for work at Husky and any of the Sask Power sites. Work at these sites has been historically executed under the Allied Council and Sask Power agreements.*

[23] Engel did not recall this item being on the agenda and believes that this discussion occurred after he left the meeting.

[24] During the AGM, Engel received a call from Rudder, asking if Engel was aware that AlumaSafway was bidding on SaskPower work through the NMA. Engel indicated that he was unaware, but then recalled the earlier phone call from McKenzie. At the break Engel approached McKenzie about the issue. McKenzie indicated that there was nothing he could do. At a later break, Engel approached an AlumaSafway representative, who confirmed Engel's fears. According to Engel, McKenzie seemed to be attempting to derail the conversation.

[25] There was only one other union representative from Saskatchewan at the meeting, and this person did not represent the insulators. Engel's alternate was present at the meeting, but according to Engel, that individual had no voting rights for that meeting.

[26] On November 28, 2018, Engel emailed Rudder:

> *In confidence Chuck, I spoke to Brett and he said he knew Aluma bid Sask Power under NMA and could not stop them from doing so, there is nothing in the agreement to stop them. I asked why we weren't in the loop and he says he forgot to tell me.*
> *Nice.*

[27] Rudder had no role in bargaining the terms of the NMA. The Local is not a party.

[28] At the December 14 meeting, Yarosloski confirmed that AlumaSafway had made two bids on SaskPower work – one bid under the Project Agreement, and another with the NMA in case the Project Agreement bid was not successful.

[29] The Employer and SaskPower signed a Construction Agreement, effective March 1, 2019, confirming that the work was awarded based on the NMA. The Local had no input into the Construction Agreement. Engel is unaware of any previous occasion in which the NMA has been applied to the specific SaskPower sites.

[30] During the hearing, much attention was paid to Rudder's email, dated January 25, 2019, to Douglas. In the email, Rudder writes (without quotation marks): "we are prepared to have our employers use the NMA for the Saskpower Maintenance work". Rudder was cross-examined at length over this statement, the inference being that the Local had expressed a willingness to "have our employers" use the NMA, despite Rudder's repeated and unfailing insistence to the contrary. Rudder explained that, in this email, he was quoting Douglas' previous threat, made during negotiations. This interpretation is supported by Douglas' reply to that email: "As I recall it, I stated something to the effect of the NMA would be a fallback position for our contractors if a suitable resolution on the Saskpower Agreement could not be reached".

Current Project Agreement

[31] As a result of negotiations, the parties concluded a renewed Project Agreement with a term of February 3, 2019 to December 31, 2023, signed by a representative of the CLR on behalf of employers. The renewed Project Agreement contains the same provisions pertaining to recognition and scope as set out above, and contained in the previous Project Agreement.

[32] Article 11:02 of the current Project Agreement sets out a subsistence allowance which reads:

> *11:02*
>
> *(a) The Employer will provide the Employee subsistence allowance toward the expense of their board and lodgings in the amount of one hundred and thirty-five ($135.00) per day worked. Subsistence shall be paid for recognized holidays which fall on a Tuesday, Wednesday and Thursday provided the employee works the day prior to and the day following the recognized holiday.*
>
> *The subsistence allowance will be reviewed after three years. The review will take into consideration the relevant market factors to determine if a change needs to be made and is subject to the client's approval.*
>
> *(b) Any subsistence request for days not worked is subject to client approval and proof of payment receipt that follows CRA guidelines.*

> *(c) In unique circumstances where an Employee works an excessively long shift and the shift is the Employee's last shift prior to lay off, the Employer may provide one (1) additional day's subsistence allowance.*
>
> *The additional day's subsistence allowance is intended to provide the Employee the opportunity to rest after the last shift prior to returning home. Employees accepting the allowance are expected to use it to acquire appropriate rest.*

[33] Rudder takes the position that, according to the Project Agreement, an employer is obliged to supply the tools. AlumaSafway refused to supply tools for the job in question. He explains in an email, dated March 1, 2019, to Sean Sylvestre ["Sylvestre"], Director/General Manager – Canadian Plains of AlumaSafway:

> *…*
> *As to the matter of tools, in Maintenance, the employer has to supply the tools. If the agreement is silent on the matter for the employer and the union as to what tools to supply and by whom, then we supply the manpower, you supply the tools.*
>
> *I will let this serve as notice, that the workers are to either have their tools supplied.*

[34] The GPMC provides a different interpretation, suggesting that "should the Contractor not supply the employee with tools, he or she is responsible for reporting to work with those tools [.]"

[35] Rudder replied to the GPMC's interpretation:

> *That's not my interpretation.*
>
> *Also, how is it that an employer is using the NMA on a site that has a Maintenance Agrement of record.*
>
> *This committee gave their word and commitment to the Building trades, that if we approved its use in SK, that it would not touch Husky or Saskpower sites!*
>
> *Whats your interpretation of that!*
>
> [sic]

[36] When asked what agreement and clause he was referring to, Rudder replied, "Take your pick, Saskpower has a tool room language. Any agreement that doesn't say specify [sic] what tools we supply, we don't; Simple as that."

Manpower Requests

[37] A number of manpower requests were entered into evidence. Among these is a manpower request for a maintenance project at the Shand site for Aluma Systems with an order date of

December 6, 2018 and a start date of December 7, 2018. Rudder explained that the SaskPower Project Agreement was applied to this agreement.

[38] Additional requests made by AlumaSafway include:

- Request ordered March 19, 2019: Start date March 19, 2019 for “NMA SaskPower Sites”;
- Request ordered March 25, 2019: Start date March 27, 2019 for Boundary Dam Site;
- Request ordered March 25, 2019: Start date April 2, 2019 for Poplar River Site;
- Request ordered March 27, 2019: Start date April 5, 2019 for Boundary Dam Site;
- Request ordered April 24, 2019: Start date April 26, 2019 for BD3 Outage.

[39] Rudder complied with the request for referrals under the NMA on a without prejudice basis, in order to avoid any work disruptions to the project.

Arguments of the Parties:

The Local

[40] The Local is opposed to what it characterizes as AlumaSafway’s attempt to vacate an agreement to which the Local is a signatory, in favour of an agreement to which it is not a signatory. At all material times since certification, collective bargaining for Project Agreements has been carried out through the CLR on behalf of the employers and coordinated by the Building Trades Council on behalf of the unions, including Local 119. The bargaining structure has been maintained voluntarily. In 2013, after the construction industry bargaining process was no longer mandatory, the union gave its notice to bargain and bargaining proceeded. In 2018, the CLR gave notice to bargain.

[41] There was no evidence of anything other than an intention to maintain the existing bargaining structure. Around November 22, McKenzie sought to secure a signature for the NMA, which was ultimately applied to the Memorandum of Understanding used to establish the working conditions at the SaskPower sites. Evidently, the bidding process was discussed before the AGM, rather than after.

[42] Subsequent to that, bargaining took place to renew the Project Agreement and a representative of AlumaSafway was in attendance at a key session in December. It was only in March, 2019 that AlumaSafway entered into the Construction Agreement with SaskPower, over which the Local had no input.

[43] Due to the application of the NMA, members received lesser compensation than they were guaranteed pursuant to the Project Agreement. First, the Local entered into evidence two pay stubs from an employee, showing that the difference in the subsistence pay rate between the two agreements was $5 per hour. According to Rudder, a "rough calculation" based on a regular work day of 10 hours, multiplied by the number of employees on the sites, comes to approximately $3600. This is based on the period during which the NMA was used from "sometime in" March, 2019 until the beginning of August. Second, Rudder testified that AlumaSafway had agreed that if employees brought their own tools to the site, AlumaSafway would pay the full provincial agreement rate at $39.80 per hour, which was above the rate provided in the NMA.

AlumaSafway

[44] AlumaSafway argues that it has voluntarily recognized the Project Agreement for work at the SaskPower sites in the past, but has not authorized the CLR or any other third party to bargain on its behalf in relation to the SaskPower maintenance work. AlumaSafway has not signed off on Project Agreements and has not been directly engaged in collective bargaining. AlumaSafway bid and performed work under the NMA. Engel signed off on, or authorized his signature for, the NMA. Engel's signature binds the Local.

[45] AlumaSafway has, however, voluntarily recognized the Project Agreement in relation to the work performed at the SaskPower sites since around July or August 2019. Given AlumaSafway's voluntary recognition of the Project Agreement, the legal issues are moot; the Local's purported reasons for requesting a declaration are no longer in issue. Alternatively, if the Board disagrees with the assertion that the issues are moot, the Board lacks the necessary jurisdiction to grant the requested relief.

Applicable Legislative Provisions:

[46] The following statutory provisions are applicable:

> ***6-1****(1) In this Part:*
> *. . .*
>
> *(d)* ***"collective agreement"*** *means a written agreement between an employer and a union that:*
> *(i) sets out the terms and conditions of employment; or*
> *(ii) contains provisions respecting rates of pay, hours of work or other working conditions of employees;*
>
> *(e)* ***"collective bargaining"*** *means:*
> *(i) negotiating in good faith with a view to the conclusion of a collective*

agreement or its renewal or revision;
(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;
(iii) executing a collective agreement by or on behalf of the parties; and
(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union;

...

6-41*(1) A collective agreement is binding on:*
(a) a union that:
(i) has entered into it; or
(ii) becomes subject to it in accordance with this Part;
(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and
(c) an employer who has entered into it.
(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:
(a) do everything the person is required to do; and
(b) refrain from doing anything the person is required to refrain from doing.
(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.
(4) If an agreement is reached as the result of collective bargaining, both parties shall execute it.
(5) Nothing in this section requires or authorizes a person to do anything that conflicts with a requirement of this Part.
(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails
. . .

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

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

...

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

…

6-103*(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*

(2) Without limiting the generality of subsection (1), the board may do all or any of the following:
(a) conduct any investigation, inquiry or hearing that the board considers appropriate;
(b) make orders requiring compliance with:
(i) this Part;
(ii) any regulations made pursuant to this Part; or
(iii) any board decision respecting any matter before the board;
(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act;

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

Preliminary Issue – Mootness

[47] The Board will first consider the preliminary argument that AlumaSafway's concession about the current work has rendered the dispute moot. In making this argument, AlumaSafway relies on the test set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CanLII 123 (SCC) ["*Borowksi*"]:

> *1) Has the requisite tangible and concrete dispute disappeared, rendering the issues in dispute academic? and*
>
> *2) If so, should the Board nevertheless exercise its discretion to hear the case?*

[48] The *Borowski* test is straightforward. In the first stage, the adjudicator considers whether the tangible and concrete dispute has disappeared, rendering the issues academic; in the second stage, the adjudicator decides whether, having determined that the tangible and concrete dispute has disappeared, it should hear the case anyway. In this characterization, a case is considered moot if it does not present a concrete controversy. Even if it does not present a concrete controversy, the adjudicator may decide it is appropriate to exercise its discretion to hear the case, taking into account certain established principles:

> *1) The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system….*
>
> *2) The second broad rationale on which the mootness doctrine is based is the concern for judicial economy….*
>
> *3) The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. …*
>
> *Borowski* at 358 to 362.

[49] Therefore, the Board's decision whether to hear the case is ultimately a discretionary determination.

[50] In brief, the Board is not persuaded by this argument. While AlumaSafway argues that the main issue is moot, it nevertheless maintains that the Project Agreement does not apply to the work in issue. The fact that AlumaSafway has now chosen to voluntarily recognize the Project Agreement does not eliminate the controversy raised through this Application. The question remains – of the agreements presented, which agreement, if any, properly binds the parties in relation to the work at the SaskPower sites, or more specifically, to the work that began in or around March, 2019?

[51] The comparison to *Borowski* is wanting. In *Borowski*, the legislation was struck down and the "raison d'être of the action" had disappeared.[3] Here, the raison d'être remains. AlumaSafway has not conceded any of the issues that are before the Board. No issues have disappeared. AlumaSafway is not entitled to resolve a matter on a go-forward, without prejudice basis, and then claim that said agreement renders moot any earlier, outstanding disputes.

[52] As the tangible and concrete dispute has not disappeared, it is not necessary for the Board to proceed to the second stage to determine whether to hear the case. AlumaSafway's mootness argument is rejected.

Preliminary Issue – Jurisdiction

[53] Next, the Board will consider AlumaSafway's jurisdictional argument. The argument has two components, which the Board will assess in turn.

[54] First, AlumaSafway argues that the Board does not have jurisdiction to grant the requested relief. According to AlumaSafway, the Local's request for relief is based on a dispute arising from a collective bargaining agreement. The origin of the dispute engages section 6-45 of the Act, which provides that all disputes between the parties to a collective agreement are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.

[55] Second, AlumaSafway argues that the Board lacks jurisdiction to "rule on the applicability" of the NMA or the Project Agreement to the parties in the current case. Despite this, AlumaSafway acknowledges that the Board has jurisdiction over "broad questions such as deciding on whether or not a collective agreement is in force at all".

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[3] At 357.

[56] Indeed, the Board has the power, pursuant to clause 6-111(1)(r), to decide any question that may arise in a hearing or proceeding, including any question as to whether a collective agreement has been entered into or is in operation or whether any person or organization is a party to or bound by a collective agreement:

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

The power provided pursuant to clause 6-111(1)(r) is a broad power, an interpretation that is supported by the use of the phrases, "any question" and "including". The further specification, as per (ii) and (iii), ensures that the Board's power to decide the questions outlined therein is clear.

[57] In this case, the question as to whether "the agreement applies to the parties" is equivalent to whether the collective agreement is in operation or whether a party is bound by the collective agreement. AlumaSafway alleges that it is not bound by the Project Agreement except to the extent that it has voluntarily recognized it, for example, in relation to the current work at the SaskPower sites. It is not bound by the current agreement for the work that took place at the SaskPower sites during the preceding months.

[58] AlumaSafway relies for this argument on *Saskatoon (City) Police Commissioners v Saskatoon (City) Police Assn*, 2001 SKCA 82 ["*Saskatoon Police Commissioners*"] and *International Brotherhood of Electrical Workers, Local 2038 v Waiward Steel LP*, 2019 CanLII 57388 (SK LRB) ["*Waiward*"]. These cases are distinguishable. First, *Saskatoon Police Commissioners* pertained to whether the dispute was arbitrable under the terms of the collective agreement, not whether the parties were bound by the agreement. Second, in *Waiward*, it was unnecessary for the Board to consider whether it had jurisdiction to award the requested remedies because it found that there was no collective agreement between the parties. Nonetheless, the Board found that it had jurisdiction over the question of whether there was a collective agreement between the parties, at all.[4]

[59] The current application is filed pursuant to subsections 6-41(2) and 6-41(3) and clause 6-62(1)(r) of the Act. The Board has jurisdiction, pursuant to clause 6-62(1)(r) to determine whether

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[4] At para 75.

an employer has contravened an obligation, a prohibition or other provision of Part VI imposed on or applicable to an employer. Read together, section 6-41 and clause 6-62(1)(r) provide the Board with jurisdiction over this dispute, and with authority to determine whether AlumaSafway has contravened Part VI and therefore committed an unfair labour practice by failing to do what it is required to do in accordance with the provisions of a collective agreement.

[60] Subsection 6-41(1) states that a collective agreement is binding on a union that has entered into it and an employer who has entered into it. It does not require that a union be certified. Subsection 6-41(2) states that a person bound by a collective agreement must, in accordance with the provisions of the collective agreement, do everything the person is required to do. A failure to meet a requirement of subsection (2) is a contravention of Part VI. According to clause 6-62(1)(r), it is an unfair labour practice for an employer to contravene an obligation, a prohibition or other provision of Part VI imposed on or applicable to an employer.[5]

[61] Section 6-45 states that all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration.[6]

[62] The Board has on many occasions acknowledged that, where an unfair labour practice application has been filed, and that application raises an issue related to the meaning, application or alleged contravention of a collective agreement, the Board shares concurrent jurisdiction with an arbitrator.[7] On those applications, the Board's jurisdiction arises from the unfair labour practice provisions in the Act. Many of the related cases were decided pursuant to *The Trade Union Act*, RSS 1978, c T-17 ["*The Trade Union Act*"]. In *The Trade Union Act*, there is neither a provision similar to section 6-41, nor a provision that creates an unfair labour practice arising from the breach of a collective agreement.

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[5] Distinguishable from *Saskatchewan Government and General Employees' Union v Mobile Crisis Services Inc*., 2019 CanLII 76953 (SK LRB), in which the essential character of the entire dispute was the meaning, application or alleged contravention of a collective agreement.

[6] However, the Board notes that the legislature has chosen to use the phrase "are to be" rather than "shall", "must", or "may", all of which are helpfully defined in the Legislation Act. "Are to be" as a phrase does not benefit from such a definition.

[7] See, for example, *Communications, Energy & Paperworkers Union of Canada, Local 911 v ISM Information Systems Management Canada Corporation (ISM Canada)*, 2013 CanLII 1940 (SK LRB); *Canadian Union of Public Employees, Local 3736 v North Saskatchewan Laundry and Support Services Ltd*., [1996] Sask LRBR 54 at 60; UFCW, *Local 1400 v Saskatchewan (Labour Relations Board)*, 1992 CanLII 8286 (SK CA). *The Trade Union Act*, now repealed, uses the word "violation" instead of "contravention".

[63] Still, deferral to an arbitrator is not automatic or even unconditional. It needs to be appropriate under the circumstances. As explained by the Board in *Canadian Union of Public Employees, Local 3736 v North Saskatchewan Laundry and Support Services Ltd*., [1996] Sask LRBR 54 at 60:

> *It is our view that the jurisdiction of this Board and of an arbitrator under a collective agreement must, in many cases, be viewed as concurrent. Consequently, it will continue to be necessary for this Board, depending on the circumstances of each case, to confront the question of when we should exercise our discretion to defer a question to an arbitrator.*

[64] In deciding whether to defer, the Board takes into account its proper role, as well as the important policy objective of promoting the capacity and willingness of the parties to engage in collective bargaining on their own accord. The Board must be careful not to encourage parties to come to the Board as a forum of first resort for resolving disputes as to the meaning, application or alleged contravention of a collective agreement. The Board should give full consideration to the value of ensuring that the parties are equipped to resolve their differences through collective bargaining, and after collective bargaining, through the very processes that they have established and set out in the collective bargaining agreement.

[65] Generally speaking, the Board will defer to the grievance-arbitration process contained in a collective agreement where the dispute relates to the meaning, application or alleged contravention of a collective agreement and complete relief can be achieved through that process.[8] In deciding whether to defer, the Board considers the three-stage test as set out in *Communications, Energy & Paperworkers Union of Canada, Local 911 v ISM Information Systems Management Canada Corporation (ISM Canada)*, 2013 CanLII 1940 (SK LRB) ["*ISM Information Systems*"]:

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

[8] See, *Administrative and Supervisory Personnel Association v University of Saskatchewan*, 2005 CanLII 63020 ["*ASPA*"] at para 26.

> *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

Whether a party has filed a grievance is not determinative.[9]

[66] AlumaSafway, in relying on this test, argues that arbitration is the appropriate forum, and is the forum through which the Local should have properly proceeded, if it had proceeded at all.

[67] Applying the test to the current case, the first question is whether the dispute before the Board and the dispute intended to be resolved by the grievance-arbitration procedure are the same dispute. As neither party has filed a grievance with the Board, the answer to this question is, paradoxically, both theoretical and self-evident. The dispute "intended" to be resolved if one were filed would, of course, be the same dispute.

[68] The second question is whether the collective agreement empowers the resolution of the dispute. The parties disagree as to which collective agreement, and therefore which grievance arbitration procedure, is binding on them. The arbitration process arises from section 6-45 of the Act. Outside of the jurisdiction as set out in the Act, "[i]t is the collective agreement which establishes the source of the arbitrator's jurisdiction and defines the subject-matters over which he [or she] has authority".[10]

[69] The Board has an interest in resolving disputes that involve an overall policy question pertaining to the existing system of collective bargaining. An arbitrator has jurisdiction to determine whether he or she has jurisdiction over a dispute and whether a matter is arbitrable. However, an arbitrator generally does not have jurisdiction over grievances filed under another collective agreement. The limits on an arbitrator's jurisdiction complicate the matter of bringing the current dispute before an arbitrator for final resolution.[11]

[70] The third stage of the test deals with remedy. Among other remedies, the Local seeks to have AlumaSafway disciplined under the unfair labour practice provisions, as a result of what it claims is a breach of the Act, and seeks to regulate AlumaSafway's conduct in the future. The

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[9] As the Union acknowledged in *ASPA* at para 20.
[10] Brown and Beatty, *Canadian Labour Arbitration*, 4th ed (Toronto: Thomson Reuters, 2017) 4:0000, 4-1. The legislation may also provide additional sources of jurisdiction. In the absence of a collective agreement, section 6-48, for example, is a source of jurisdiction in the case of a termination or suspension of an employee.
[11] This is true whether one adopts the so-called consolidative or constructionist theories of third party inclusion in labour arbitrations. See, for example, *Hilltop Manor Cambridge and SEIU, Local 1 (Rai Coordinator), Re* 2018 CarswellOnt 8971, 136 CLAS 98, 293 LAC (4th) 148.

realization of these remedies is complicated by the jurisdictional limits as described in the second stage.

[71] In arguing that arbitration is the appropriate forum for the adjudication of this dispute, AlumaSafway relies on the Board's decision in *Administrative and Supervisory Personnel Association v University of Saskatchewan*, 2005 CanLII 63020 ["*ASPA*"]. In *ASPA*, the issue was whether a specific document formed a part of an existing collective agreement, an issue over which, generally, the union had agreed the arbitrator had jurisdiction.[12] In its analysis, the Board relied on *International Brotherhood of Electrical Workers, Local 2067 v SaskPower*, [1998] Sask LRBR 95 ["*IBEW, Local 2067*"], a case involving allegations that the employer's conduct had altered the terms of the collective agreement. In *IBEW, Local 2067*, it was "impossible" to decide the unfair labour practice allegations without deciding whether the employer had in fact breached the provisions in issue. This was exactly the issue that the arbitration board had already been asked to determine, and on these bases, deferral was appropriate.

[72] This case is distinguishable from *ASPA*. Here, the Local says that AlumaSafway is bound by the Project Agreement; AlumaSafway states that it is not bound by the Project Agreement unless it has explicitly recognized that agreement on a voluntary basis. The questions about the meaning, application or alleged contravention of one agreement or another are ancillary to the main dispute over the binding collective agreement. For the foregoing reasons, the Board finds that it is appropriate to consider and render a decision in relation to which agreement has been entered into, is in operation, or is binding upon the parties.[13]

[73] Next, the Board will turn to the substantive analysis of whether AlumaSafway is bound by the Project Agreement in relation to the work in issue. To begin, both parties acknowledge that, in order for the Board to find that AlumaSafway is bound by the Project Agreement, it must do so on the basis of voluntary recognition. Voluntary recognition is a condition in which a collective bargaining relationship may be established independent of the provisions of the Act and independent of a Board order.

[74] In arguing for this proposition, the Local relies on the Board's decision in *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc*., 2017 CanLII 44004 (SK LRB) ["*CUPE*"]. The application in *CUPE* arose as a result of the

[12] At para 24.
[13] See, also clause 6-111(1)(r) of the Act.

employer's discovery, apparently to its surprise, that the union with which it had been bargaining for decades was not certified, and the employer's subsequent declaration that bargaining was therefore at an end. In response to the employer's conduct, the union alleged that it had committed certain unfair labour practices, including by failing to recognize the union as the exclusive bargaining agent for the employees and by failing to bargain collectively with the union.

[75] In that case, the Board observed that the union had previously been voluntarily recognized, and "numerous collective bargaining agreements [had] been negotiated between the parties, the most recent of which expired on December 31, 2015".[14] After the employer made its declaration, the union proceeded to obtain certification orders from the Board. The employer then agreed to bargain collectively with the union but took the position that it was negotiating a first agreement, as opposed to a renewal of an agreement.

[76] The Board described the main question this way:

> *[33] Rather, this unfair labour practice application raises the unique question of what, if any, protection CUPE may claim under the SEA after URSU withdrew its voluntary recognition of CUPE as the bargaining agent for URSU's employees. At the outset, this necessitates an assessment of the legal status of the collective agreement that expired on December 31, 2015.*

[77] The Board found that the agreement which had expired on December 31, 2015 was a "collective agreement" as defined in clause 6-1(d) of the Act, and through the operation of subsection 6-39, which reads:

> ***6-39****(1) Except as provided in this Subdivision, every collective agreement remains in force:*
> *(a) for the term provided for in the collective agreement; and*
> *(b) after the expiry of the term mentioned in clause (a), from year to year.*
> *(2) Subject to subsection (3) and section 6-40, a collective agreement is deemed to have a term of one year after the date on which it becomes effective if the collective agreement:*
> *(a) does not provide for a term;*
> *(b) provides for an unspecified term; or*
> *(c) provides for a term of less than one year.*
> *(3) The term of a collective agreement concluded pursuant to section 6-25 is:*
> *(a) two years after the date on which it becomes effective; or*
> *(b) any longer term that the parties agree on.*

[78] Even absent a certification order at the time of expiry, the collective agreement remained in force from year to year pursuant to clause 6-39(1)(b) of the Act.[15]

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[14] At para 2.
[15] At para 7.

[79] The current case, like *CUPE*, raises an "unusual question of statutory interpretation on which there is little jurisprudence to offer guidance".[16] Here, this problem is amplified by the unique dynamics of the maintenance sector and the various adjustments made in the uneasy transition from the former regime. It is also complicated in that, while maintenance is no longer a part of the construction sector, collective bargaining relationships based on voluntary recognition are most often found in relation to construction work.

[80] In assessing a claim of voluntary recognition, the Board must take into account a primary purpose of the legislative regime, which is to facilitate access to representational rights. Collective bargaining relationships that are established through the Act have the advantage of ensuring majority support for the bargaining agent, on the part of the voting employees in an appropriate unit. Majority support, as expressed through the Act, gives a certain legitimacy to the status of the union as the exclusive bargaining agent.

[81] Usually, evidence of majority support for the bargaining agent is not available in cases where the agent is voluntarily recognized. Here, the Local enjoys majority support as demonstrated by its certification orders. Both the Certification Order dated June 29, 2017 with Safway Services Canada, ULC, and the earlier Certification Order dated October 2, 2003, with Aluma Systems Canada Inc, establish the Local as the union representing a majority of employees in the bargaining unit of insulators.

[82] There is no question whether the Project Agreement is a collective agreement. In accordance with clause 6-1(1)(d), it is a written agreement between an employer and a union that sets out the terms and conditions of employment. Although it is not signed by the union, it is signed by its representatives, being the Building Trades. The Local alleges that the signature of the CLR representative, and the surrounding context, are sufficient for purposes of binding AlumaSafway, as employer.

[83] In *CUPE*, a key determinant for a finding of voluntary recognition was the longstanding collective bargaining relationship between the parties. Here, the Local argues that the Project Agreements have been negotiated through a similar process over a period of time with no notice of any intention to disrupt that bargaining relationship. Until 2013, those negotiations took place in the construction industry. Even then, while it was mandatory to bargain on a trade division

[16] At para 34.

basis, it was voluntary to bargain on a local basis. Following that, the further voluntary step was added to continue to negotiate through the CLR. At no point was there any indication of a desire to disrupt that system. Even if the NMA arose from an entirely voluntary bargaining relationship, which it did not, AlumaSafway's reliance on the NMA was invalid. By relying on the NMA, AlumaSafway ignored the Project Agreement and the existing, supporting bargaining structure, and unilaterally imposed its preferred terms and conditions.

[84] Here, like in *CUPE*, AlumaSafway has suggested that it has the ability to unilaterally determine whether it is recognizing the Local as the exclusive bargaining agent for the employees, and therefore whether it is recognizing the Project Agreement, despite the negotiating history and related orders. AlumaSafway has also raised an issue as to whether it provided authority to the CLR to bargain the agreement, which was then signed by the CLR. Furthermore, Rudder acknowledged in cross examination that direct evidence of the CLR's authority to bargain on behalf of AlumaSafway was lacking.

[85] On the question of bargaining authority, the Local relies on indirect evidence, consisting of three primary elements. First, AlumaSafway supplied employees through the Project Agreement in the previous cycle, therefore giving written notice of its agreement to and compliance with the terms of that agreement. Second, AlumaSafway is represented by the CLR which was the party that gave notice to bargain. Third, the presence of one of AlumaSafway's employees at the bargaining table indicates an ostensible authority to bargain.

[86] Furthermore, it suggests that many of the entities in the maintenance sector continue to negotiate, conclude, and rely on agreements that are created through third party representatives. The parties presumably do this because they perceive this approach, at the present time, as beneficial and relevant to the maintenance sector, albeit a holdover from the construction industry era.

[87] Based on the evidence, the Board agrees that there is a history of reliance on the Project Agreements in the maintenance sector. The existence of the Project Agreement, and its intended application to SaskPower sites was apparent to AlumaSafway representatives. Even the GPMC acknowledges that "[w]ork at these sites has been historically executed under the Allied Council and Sask Power agreements". AlumaSafway was put on notice as early as November 27, 2018 that the Local disagreed with the application of the NMA to the upcoming work at the SaskPower sites. If, in fact, the GPMC and AlumaSafway proceeded to participate in a discussion about

transitioning to the NMA at these sites, at that same meeting, this discussion seems rather underhanded.

[88] AlumaSafway seems to suggest that it can pick and choose the most beneficial agreement, according to its needs, despite the negotiating history. The Local holds the exclusive bargaining rights under certification orders that bind and have bound AlumaSafway, and its predecessors, since 2003. The evidence, while not extensive, suggests that AlumaSafway had previously accepted its responsibilities under the Project Agreement on SaskPower sites, right around the time that it was making its bids to SaskPower for the upcoming work. AlumaSafway suggests that Yarosloski was a mysterious presence at the bargaining table, or perhaps an observer, which is an unlikely suggestion. According to Rudder, three or four employers were represented at the bargaining table in December, and one of those employers was AlumaSafway.

[89] The Local relies on *Burns Meats Ltd. v UFCW, Local 139*, 1984 CarswellOnt 1066 [“*Burns Meats*”]. In that case, the Employer had previously bargained through the national set of negotiations. The union’s preference was to continue with that national set, but the Employer’s preference was to revert back to the provincial certification order and bargain with respect to the single site in the province. In its decision, the Ontario Board dealt with the jurisdiction of the Board in relation to a bargaining unit certified under the *Labour Relations Act* in Ontario. The Board held, in relation to nation-wide bargaining, that "[f]or the respondents to pursue that objective to impasse is inconsistent with the scheme of the Act that bargaining shall be in respect of a bargaining unit for which a trade union has exclusive bargaining rights".[17] As the Board in *Burns Meats* explained, “the critical starting point for collective bargaining is the bargaining unit”.[18]

[90] Similarly, the Local relies on the fact that it holds exclusive bargaining rights. The Employer comes before the Board seeking to enforce an agreement apparently made with another party, two steps removed from the Local, as a basis to dispense with its obligations relative to the Local’s collective bargaining rights. The NMA does not apply to or even impose any obligations on the Local, besides, for example, minor roles in the grievance procedure. All signatories to it are international unions, none of which are parties to the certification orders. The Employer suggests that it has the sole discretion to dictate and choose between collective bargaining agreements which might theoretically apply to the work being performed with no regard for the parties’ existing expectations, collective agreements, or certification orders.

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[17] At para 27.
[18] At para 21.

[91] AlumaSafway also relies on its characterization of the Project Agreement as being expired, stating that the "Union cannot properly claim an Unfair Labour Practice with regard to an expired agreement". This is despite the fact that both the Project Agreement and the NMA were theoretically "expired" at the time that the bidding took place, that both agreements include a duration clause from "year to year", and that the Project Agreement had been renewed by the time the work began. Subsection 6-39(1) of the Act states that every collective agreement remains in force after the expiry of the term provided for in the collective agreement. In short, the Project Agreement has not been expired, in the sense of being inoperative, during any of the material times.

[92] The more appropriate question is whether the unfair labour practice provisions, and clause 6-62(1)(r) specifically, apply to agreements in circumstances involving voluntary recognition. In Saskatchewan, there is a lack of definition around the full extent of legal status accorded to voluntary recognition agreements. But, for the following reasons, the Board finds that clause 6-62(1)(r) does apply to circumstances involving voluntary recognition.

[93] As a starting point, as the Board concluded in *CUPE*:

> *[42] As even the Board in Heartland Livestock, supra, conceded there is some scope for a voluntarily recognized union to seek protection under a labour relations statute such as the SEA. Thus, to determine whether a voluntarily recognized union can access the SEA, it is necessary first to identify the nature of the right which the union asserts, and whether a purposive interpretation of the SEA will accommodate such a right. As noted earlier, this becomes a question of statutory interpretation…*

[94] In *CUPE*, the Board performed a purposive analysis of the legislation, taking into account the legislative objectives of the Act and the surrounding statutory context. The Board described the legislative objectives in this way:

> *[56]…Part VI is intended to govern how all manner of industrial relations are to be conducted in Saskatchewan. Its objective is to encourage and enhance stable labour-management relationships, and to that end a paramount principle enshrined in Part VI is that all parties should comply with their statutory duties to bargain in good faith. Offering limited statutory protection to a collective agreement achieved by an uncertified union and an employer, and ratified by its members, can only assist in maintaining labour peace in the workplace…*

[95] As for the surrounding statutory context, the Board noted that "permitting a collective agreement like URSU's to come within Part VI is not incompatible with other provisions of that

Part".[19] The Board acknowledged the exclusion of four unfair labour practice provisions, where the impugned activities involve uncertified unions[20], but then made the observation that the inoperability of certain unfair labour practice provisions does not mean that "an employer is able to wholly ignore a collective agreement with an uncertified union that is legally enforceable by virtue of other provisions of Part VI".[21]

[96] The Board adopts the reasoning set out in *CUPE* such that clauses 6-1(1)(d) (definition of collective agreement), 6-1(e) (definition of collective bargaining), and 6-1(p) (definition of union), and section 6-39 (period in force) are "elastic enough to include collective agreements between a voluntarily recognized union and an employer".[22] As the Board in that case explained, "none of [these provisions] reference a certification Order nor stipulate that the union must be certified as the exclusive bargaining agent of the employees as a pre-condition of their operation".[23]

[97] Further to section 6-7, every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to Part VI or by an order of the Board. According to section 6-41, a collective agreement is binding on a union that has entered into it and on an employer who has entered into it. A collective agreement means a written agreement between an employer and a union that sets out the terms and conditions of employment; or contains provisions respecting rates of pay, hours of work or other working conditions of employees.

[98] The Board in *CUPE* recognized the risks inherent in denying voluntary recognition status in appropriate circumstances:

> *[61] … At the very least, it would signal that in a voluntary recognition situation, employers can unilaterally withdraw [their] recognition of the uncertified union, terminate all collective bargaining arrangements, and, effectively, resurrect employers' ability to contract individually with [their] employees. The modern rule of statutory interpretation together with section 10 of The Interpretation Act, 1995, counsel against interpreting a statutory provision in a way that would work an injustice, unless the provision itself states otherwise.*

The Board finds this passage particularly relevant in the current case.

[99] AlumaSafway compares the current case to *Waiward*, and seems to suggest that there is a parallel with respect to timing. The following passage, from *Waiward*, is of assistance:

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[19] At para 57.
[20] See, subsection 6-62(7) of the Act.
[21] At para 59.
[22] At para 55.
[23] *Ibid.*

> *[107] It is unclear how the Council could have bound Waiward to the use of affiliate members for sub-contracting work, through the operation of the Pre-Job, when the Pre-Job was prepared after the tendering process had been completed. The bids were submitted almost two months prior to the completion of the Pre-Job. During this time, Kovatch admitted that he was aware that other non-IBEW sub-contractors were bidding on the work. In order to be competitive, presumably with other sub-contractors, Kovatch signed the enabling document. Westwood was verbally awarded the contract to Westwood prior to the completion of the Pre-Job. Kovatch testified that Waiward became bound to award the work to an IBEW sub-contractor as of the completion of the Pre-Job, after the bids had already been submitted.*

[100] Among the many issues identified in *Waiward* was the fact that the Pre-Job had been prepared after the tendering process had already been completed. The timing is similar to this extent: the completion of the existing Project Agreement took place after the tendering process began. However, that is where the similarities end. In *Waiward*, no evidence was led to support the assertion that Pre-Jobs had been previously or traditionally recognized as collective agreements. The argument pertaining to the Pre-Job was that it incorporated by reference the collective agreement, with which the Board disagreed, in part because the Pre-Job was not signed by the Building Trades Council.

[101] Additional issues included:

> *[109] IBEW argues that the Pre-Job meets the criteria of a collective agreement. It sets out the terms and conditions for Waiward's employment of members of the Council's affiliates. Waiward argues that the Pre-Job was based on a template provided by the Council. It was not signed by a representative of the Council or of IBEW. It was not intended to be a comprehensive and binding agreement of the work to be performed, but instead was a planning document.*
>
> *[110] The Board notes that, on its face, the Pre-Job fails to satisfy the definition of a collective agreement as per the Act. The document, while written, is not signed by the Council or by IBEW. And while it sets out certain terms of employment for a number of trades, it does not set out the terms of employment for IBEW. Rather than a collective agreement, the more accurate characterization of the Pre-Job is as a planning document.*

[102] The facts in the current case are very different.

[103] Based on the evidence in the present case, it is likely that the tendering process began prior to November 27, 2018. The work began in and around March, 2019. AlumaSafway and SaskPower signed a Construction Agreement, effective March 1, 2019, confirming that the work was bid and awarded based on the NMA. The Project Agreement came into effect on February 3, 2019. The previous Project Agreement continued to be in effect until that time. Therefore, during all material times, there was a Project Agreement in effect.

[104] The Board finds that the Project Agreement is in operation and is binding upon the parties in relation to work on the SaskPower sites as of March 1, 2019. Other than through argument, the Local's evidence is uncontested. Based on that evidence, a historical bargaining relationship has been established. On October 25, 2018, the CLR served written notice to the affiliated unions to commence negotiations to renew the Project Agreement. It appears that the CLR intended to maintain the existing bargaining structure. The fact that there was a discussion item at the GPMC AGM does not change this. Apart from the absence of Engel from that discussion, the notion that there was a consensus to transition to the NMA stands in direct contradiction with the continued negotiation of the Project Agreement. The negotiations were initiated by the CLR before the AGM, and continued after the AGM, resulting in a renewed Project Agreement.

[105] The Local is the exclusive bargaining agent, and unlike in many voluntary recognition cases, AlumaSafway is bound by the existing certification orders. AlumaSafway, through its representative, ought to have been aware of the Local's disagreement with a supposed transition to the NMA. In light of its bargaining relationship and its awareness of this controversy, AlumaSafway should not be entitled to rely on a Memorandum of Understanding that was signed under false pretenses. It appears that AlumaSafway has attempted to circumvent the Local by negotiating directly with the International. In doing so, it should not be permitted to unilaterally choose its negotiating partner, in denial of its bargaining relationship, and based on whichever terms are more favourable to its business model.

[106] The Local asks the Board to confirm the Project Agreement governing AlumaSafway's work at the SaskPower sites, declare that AlumaSafway has breached the Act by committing unfair labour practices, prohibit AlumaSafway from continuing to breach the Act and the Project Agreement, and compensate employees for all losses arising out of the unilateral application of the NMA. The Local asks further that these Reasons be posted at the SaskPower sites so that employees are aware that they can count on their Local to bargain on their behalf.

[107] Given the foregoing analysis of section 6-45, the Board has decided to defer the issues as to remedy pending the completion of the grievance-arbitration process, pursuant to the Project Agreement. The Local made the valid comment that it would be more efficient for the Board to deal with the entire case, inclusive of remedy. However, the Board finds that the issues with respect to the interpretation of the subsistence pay and tools provisions of the Project Agreement

are more appropriately addressed through the grievance-arbitration process, or by way of negotiation on behalf of the parties.

[108] For the foregoing reasons, the Board cannot at this time declare that AlumaSafway has committed an unfair labour practice by contravening an obligation pursuant to clause 6-62(1)(r), and failing to do everything a person is required to do, pursuant to subsection 6-41(2). The Union brought this Application pursuant to clauses 6-41(2) and (3). Together with clause 6-62(1)(r), clauses 6-41(2) and (3) provide for a contravention of Part VI if it is found that a person bound by a collective agreement has failed to do everything the person is required to do. Therefore, a disposition pursuant to clause 6-62(1)(r) would first require a finding of a breach under the Collective Agreement, pursuant to the arbitration process. It is more appropriate for the Board to consider the request for an order to post, at that time.

[109] Finally, given the Board's disposition in this matter, it is unnecessary to consider AlumaSafway's request for costs.

[110] Based on the foregoing, the Board makes the following Orders:

a. AlumaSafway is bound by the Project Agreement for Power Plant Maintenance as the governing collective agreement at the SaskPower sites, being Boundary Dam Power Station; Poplar River Power Station; and Shand Power Station, as of March 1, 2019;

b. The Union's unfair labour practice application, LRB File No. 071-19 shall be deferred until the grievance process, pursuant to the Project Agreement for Power Plant Maintenance, is concluded;

c. The hearing of this application is adjourned *sine die* with the proviso that it may be renewed before the Board by either party on notice to the other side should there be outstanding issues remaining between them that were not resolved by the grievance process.

[111] The Board extends its gratitude to counsel for their helpful submissions.

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

DATED at Regina, Saskatchewan, this **13th** day of **December, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson