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

LRB File No. 020-20; March 6, 2020

Vice-Chairperson, Barbara Mysko; Board Members: Maurice Werezak and Don Ewart

Counsel for the Applicant,
AlumaSafway, Inc.: Steve Seiferling and Jared M. McRorie

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

**Interim Application – Two-stage test – Arguable case and balance of convenience – Application dismissed.**

**Underlying unfair labour practice application – Applicable collective agreement – Balance of convenience favours Union – Requirement for non-compensable harm – Concern primarily financial.**

**Remedy equivalent to final relief – Not appropriate for extensive review of merits – Request premature.**

## REASONS FOR DECISION

**Background:**

**[1]** **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an application for interim relief filed by AlumaSafway Inc. ["Aluma"] against the International Association of Heat and Frost Insulators and Asbestos Workers, Local 119 [the "Union"]. The Union is the certified bargaining agent for a craft bargaining unit of insulators employed by Aluma. This Application was filed on February 7, 2020 and, on February 26, 2020, the Board held a hearing on the merits of the Application. At the close of that hearing, the Board proceeded to issue its decision verbally, dismissing the Application with written Reasons to follow.

**[2]** The interim Application pertains to the work to be performed on the Husky Upgrader shutdown in Lloydminster, Saskatchewan, expected to begin near the end of March, 2020 [the

"Work"]. On January 27, 2020, Aluma filed an unfair labour practice application pursuant to section 6-41 and clauses 6-63(1)(c), (d), and (h) of *The Saskatchewan Employment Act* ["Act"], alleging the following:

> *By email dated September 19, 2018, Local 119 provided an agreement to AlumaSafway Inc ("AlumaSafway") outlining terms and conditions applicable to the 2019 to 2021 maintenance work at the Husky Oil site in Lloydminster, Saskatchewan (the "Agreement").*
>
> *Acting as the Business Manager of Local 119, Chuck Rudder provided the Agreement as the terms and conditions that would apply to shutdown/turnaround work from 2019 to 2021.*
>
> *AlumaSafway relied on the Agreement in bidding on work for the shutdowns at the Husky Upgrader in Lloydminster, Saskatchewan. The AlumaSafway bid for the Husky work was based on the Agreement.*
>
> *Local 119 now claims that the Agreement, which was offered by Local 119, and relied upon by AlumaSafway in its bid for the Husky work, is invalid. The Agreement was never withdrawn. When AlumaSafway sought confirmatory signatures on the Agreement in January 2020, Local 119 refused.*
>
> *The refusal to sign the valid agreement constitutes be* [sic] *ad faith, as well as a failure or refusal to complete collective bargaining, contrary to the Saskatchewan Employment Act (the "Act").*
>
> *AlumaSafway states that the Agreement was valid, and Local 119's refusal to honour the Agreement would be a breach of the duty to bargain in good faith under the Act. In addition, Local 119 made a representation through your email, which was relied upon by AlumaSafway, to its detriment, in preparing the bid, and therefore Local 119 is estopped from withdrawing the Agreement.*
>
> *The definition of bargaining collectively includes an element that Local 119 must sign an agreement that has been accepted by both sides. Local 119 provided the Agreement, and AlumaSafway bid the Husky work based on the Agreement. Therefore the Agreement in* [sic] *binding, and Local 119 must sign the Agreement, and perform the work pursuant to the Agreement at the Husky site.*
>
> *AlumaSafway states that, if Local 119 fails or refuses to supply labour pursuant to the Agreement, Local 119 is in breach of the Act, including the failure or refusal to bargain collectively, to complete collective bargaining, and participation in unlawful strike action.*

**[3]** In reply, the Union states:

> *(a) At all material times, AlumaSafway's maintenance work at the Husky Upgrader has been carried out under the Allied Council Agreement. Attached as Exhibit A is AlumaSafway's most recent signed Participation Agreement. Attached as Exhibit B is correspondence from Vince Engel, President of the Saskatchewan & NWT Allied Council, confirming the enabling terms applied to AlumaSafway's maintenance work at the Husky Upgrader for shutdowns from 2017-2020, AlumaSafway's predecessor carried out work under these terms in 2017 and 2018.*
>
> *(b) AlumaSafway has been aware at all times of the process for approval of specific enabled terms, which includes written confirmation from the Allied Council pursuant to the Allied Council Agreement.*

*(c) On September 19, 2018, Local 119 provided to AlumaSafway draft terms for shutdown turnaround work for 2019 to 2021: see attached Exhibit C, correspondence with attachment ("Draft Terms").*

*(d) AlumaSafway did not purport to accept the Draft Terms at any point prior to January 20, 2020. To the contrary, AlumaSafway's response to the Draft Terms was to reject them and seek further concessions which were not offered: see correspondence attached as Exhibit D. This constitutes a rejection of the Draft Terms in law, such that AlumaSafway was no longer entitled to accept them.*

*(e) AlumaSafway did not provide any further indication of any position on the Draft Terms until January 20, 2020. To the extent AlumaSafway retained any entitlement to accept the Draft Terms after rejecting them (which is not admitted by expressly denied), the Draft Terms expired in any event based on the lack of any acceptance within a reasonable time, and may not be snapped up by AlumaSafway sixteen months after they were presented and rejected.*

*(f) AlumaSafway took no steps to confirm any understanding as to the status of the draft terms prior to bidding for 2020 shutdown work. AlumaSafway could not reasonably have relied on Draft Terms which were rejected through direct discussion, and never requested to be confirmed through the established Allied Council process or otherwise.*

*(g) At no time has AlumaSafway provided Local 119 with notice to bargain the terms and conditions established by the Allied Council Agreement pursuant to the Saskatchewan Employment Act.*

*(h) Local 119 has been at all relevant times, and remains now, prepared to supply workers to AlumaSafway in accordance with the terms of the applicable collective agreement for work at the Husky Upgrader, being the Allied Council Agreement as enabled.*

*(i) Local 119 thus requests that the within application be dismissed.*

**[4]** In the interim Application, Aluma applies to the Board for the following order:

*AlumaSafway is seeking an interim Order from the Board requiring Local 119 to supply labour pursuant to the terms and conditions set out in the Agreement, provided by Chuck Rudder on September 19th, 2018, pending a final determination of this matter by the Board.*

**[5]** In essence, Aluma seeks a declaration from the Board that the terms and conditions contained in the agreement, or draft agreement, provided by Chuck Rudder on September 19, 2018 [the "Rudder Agreement"], and not the Allied Council Agreement [the "ACA"], is the agreement that governs the Work.

**Argument on Behalf of the Parties:**

**[6]** Briefly, Aluma argues that the Union sent to Aluma a written contract with clear and defined terms. Aluma sought clarification of the terms and when it received that clarification, it accepted the contract and proceeded to bid on the pertinent Work. The Union is attempting to renege on a

binding contract, one that was negotiated and relied upon by Aluma. It is estopped from doing so. Furthermore, pursuant to subsection 6-41(4) of the Act, the Union is required to sign off on the negotiated collective agreement; a failure to do so constitutes bad faith bargaining.

**[7]** If the Union is permitted to renege on this agreement, then Aluma will suffer both irreparable harm and substantial financial loss. By contrast, any harm faced by the Union is minimal. Upon review of the evidence, the Board should conclude that the Rudder Agreement is enforceable and declare that it applies to the Work. The *status quo* militates in favour of this result.

**[8]** According to the Union, Aluma seeks an order declaring the applicability of draft terms that were discussed on a voluntary basis, but never accepted or ratified. The Rudder Agreement was nothing more than a draft proposal that was not accepted and Aluma's reliance ignores the clear course of dealings between the parties. The Union's decision to explore voluntary bargaining in 2018, through the provision of draft terms, does not result in binding obligations. The ACA has applied to Aluma's work at the Husky Upgrader at all material times, and remains in effect. Aluma accepted the ACA enabling terms through a Participation Agreement, and those terms apply to work that takes place from 2017 to 2020. No party has given notice to terminate or renegotiate the ACA.

**[9]** Aluma could seek a remedy, through the underlying application or through arbitration, for any losses arising from the application of the wrong agreement. Should the Board ultimately determine that the Rudder Agreement applies to the Work, the Union accepts that its organization, and not the individual employees, would be responsible for any resulting losses.

**Applicable Statutory Provisions:**

**[10]** The following provisions of the Act are applicable:

> ***6-1****(1) In this Part:*
> *…*
> *(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.*

***6-39****(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.*

***6-63****(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*

*…*
*(c) to fail or refuse to engage in collective bargaining with the employer respecting employees in a bargaining unit if a certification order has been issued for that unit;*
*(d) to declare, authorize or take part in a strike unless:*
*(i) a strike vote is taken; and*
*(ii) a majority of the employees who vote do vote in favour of a strike;*
*…*
*(h) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to a union or an employee.*

***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 consider 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.*

**[11]** The following provisions of the Regulations are also applicable:

***15****(1) An employer, other person or union that intends to obtain an interim order pursuant to clause 6-103(2)(d) of the Act shall file:*

> *(a) an application in Form 12 (Application for Interim Relief) with the registrar;*
> *(b) an affidavit of the applicant or other witness in which the applicant or witness identifies with reasonable particularity:*
> *(i) the facts on which the alleged contraventions of the Act are based, including referring to the provision or provisions of the Act, if any, that are alleged to have been contravened;*
> *(ii) the party against whom the relief is requested; and*
> *(iii) any exigent circumstances associated with the application or the granting of the interim relief;*
> *(c) a draft of the order sought by the applicant; and*
> *(d) any other materials that the applicant considers necessary for the purposes of the application.*

*(2) Subject to subsection (3), every affidavit filed pursuant to clause (1)(b) must be confined to those facts that the applicant or witness is able of the applicant's or witness's own knowledge to prove.*

*(3) If the board is satisfied that it is appropriate to do so because of special circumstances, the board may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.*

*(4) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subsection (3), the source of the information must be disclosed in the affidavit.*

*(5) Before filing an application pursuant to this section, the applicant shall contact the registrar and, on being contacted, the registrar shall set a date, time and place on which the application is returnable.*

*(6) On being notified pursuant to subsection (5) of the date, time and place of the hearing, the applicant shall serve a copy of the application, along with the materials referred to in the application, on the party against whom the interim relief is claimed within:*

> *(a) subject to clause (b), at least three business days before the date set for the hearing; or*
> *(b) any shorter period that the executive officer may permit.*
>
> *(7) Before the hearing, the applicant shall file proof of service of the application for interim relief mentioned in clause (1)(a).*

**Facts:**

**[12]** The basic outline of the facts is as follows.

**[13]** On September 19, 2018, Rudder sent the following email to Nilson ["Nilson"] and Rick Moran, representatives of Aluma:

> *Hi Neil,*
>
> *Attached is an agreement for the Shutdown turnaround work for 2019 to 2021, which is confidential in Nature.*
>
> *Highlights or lowlights, whichever you want to call them are;*
>
> *39.00 per hr Mon – Friday*
>
> *1 ½ O.T. Sat & Sun with an hourly shift premium attached of 3.00 per hr.*
>
> *Ratio is 1-1 for first 16 then 2 JM -1 there after.* [sic]
>
> *Read through it all, and if you have questions, do not hesitate to contact me.*
>
> *Regards*

**[14]** The attached agreement was entitled "Shutdown/Turnaround Maintenance Agreement for the [Husky] Lloydminster Heavy Oil Upgrader Site Lloydminster, Saskatchewan".

**[15]** On September 19 and 20, 2018, Matthew Sell ["Sell"] sent two emails requesting clarification about the terms, to which Rudder responded. The following is the relevant email exchange between the parties:

> September 19, 2018, 4.12 p.m.:
>
> *Hi Chuck*
> *Neil asked me to email you directly and we are wondering if you would clarify if the $3.00 premium applies to the 1.5x overtime or to both 1.5 time and 2 times overtime*
>
> *Although it may be rare in this situation they may need to work a statutory holiday during the month of the shutdown and foreman and up will likely work a hot shift during the big shutdown 12 hours paid 13 so need to understand the premium if you could help.*
>
> *Thanks*

…
Response from Rudder at 4:21 p.m.:

*Premium is only Sat & Sundays where 1 ½ applies. Does not apply to 2x time.*
…
September 20, 2018, 11:30 a.m.:

*Hi Chuck*
*1 more question on Saturdays and Sundays is the overtime premium paid up to 12 hours and then Doubletime and for week days if the work is a 5-8 shift is the overtime premium paid for up to 12 hours as per the current MOU's that are in place in Saskatchewan?*

*Also is there anything that can be done on the Straight time pay for A&D testing? All testing here is on the workers time but we pay for the test?*
*Please let me know*
*Thanks*
*Matt*
…
Response from Rudder at 11:34 a.m.:

*Hours after 10 are double, we can do 1 hour for the A/D testing.*

**[16]** There is no evidence before the Board outlining any communications for the years 2018 or 2019 in relation to the Rudder Agreement. According to Aluma, Aluma was not successful in its bids for Husky work in 2019, but was successful for work commencing in 2020. In preparation for that work, at 12:03 p.m. on January 20, 2020, Nilson sent an email to Rudder, and the following exchange took place:

*Good morning Chuck: It looks like this agreement was never signed. As AlumaSafway is getting ready to mobilize men to site, we should formalize it. Can you contact Rick M and we can get dual signatures and put this one to bed? Thanks…Neil*

Response from Rudder on January 20, 2020 at 12:31 p.m.:

*Hi Neil,*
*The Sun has long since set on this Draft Agreement we offered to Aluma.*
*The last agreement we worked under was the Allied council agreement, which we agreed to Enable for x 1 ½ on Saturdays, and 0.75 cents under the JM rate.*
*We consider this the agreement of record for the 2020 shutdown.*

*Thank you,*

Email from Rick Moran on January 20, 2020 at 4:23 p.m.:

*Hello Chuck*

*So approx….16 months ago this contract came out for bid from Husky. As you can plainly see below you gave us this particular contract to use in our bidding. We used this contract to bid this work. Your promise is clear. So I don't understand how you could back out of this now when the bid has been awarded based on your promise. Just because time has elapsed since the bid was completed and awarded does not give you the right to change your mind and refer to Sunsets and draft agreements as your reasoning for this abrupt*

*change. You have been aware of this contract for a long time and you choose to let the clock tick down to zero and then try to force change after we are actually starting the contract this month and actually on site setting up.*

*There is no option for us here. I don't want lower or higher contract options. Just the ones promised to us at the time of bidding.*

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Response from Rudder on January 21, 2020 at 8:04 a.m.:

*Rick,*

*The Draft agreement was just that a Draft of a potential agreement for Husky. Never signed by either party, so it remains a "DRAFT AGREEMENT".*

*If you recall, we enabled the 2017-2020 shutdown through the Allied Council, (see attached) therefore we will still honor those enabled terms through the Allied Council agreement.*

*Your attempt at claiming that the Confidential unsigned Draft Agreement is somehow binding, is absolutely absurd, furthermore, for you to suggest that I somehow let this clock tic down, on a Draft Agreement that I forwarded off to Aluma, where it sat apparently until yesterday is even more absurd. I also cant fathom, how you claim there was some sort of promise made by the union, that we have now broken.*

*The Enabled terms we gave you through the Allied Council Agreement is the only commitment we ever made for this work, and we will continue to honor that commitment.*

*Thank you,*

**[17]** The full title of the ACA is Project Agreement for a Maintenance Service Contract for the Husky Lloydminster Upgrader, Lloydminster, Saskatchewan between LML Industrial Contractors Ltd. and the Saskatchewan and Northwest Territories Allied Council, dated September 1, 2014 to April 30, 2018. Also included in the evidence are: a Participation Agreement, dated January 17, 2017; an enabling letter from Vince Engel ["Engel"], President of the Allied Council, dated February 19, 2016; and an enabling letter from Engel, dated January 17, 2017.

**Analysis:**

**[18]** Aluma has brought the within Application pursuant to clause 6-103(2)(d) of the Act. Clause 6-103(2)(d) states that the Board may make an interim order or decision pending the making of a final order or decision. As the applicant, Aluma bears the onus to demonstrate that the requested interim relief is appropriate. The Board's power to grant interim relief is discretionary. In exercising its discretionary power, the Board must be careful to ensure that there are solid labour relations purposes for doing so.

**[19]** There are two primary preconditions to an application for interim relief, both of which are satisfied in the current case. First, there must be an underlying application to which the grant of interim relief is ancillary. Second, there must be a formal application along with affidavit evidence. As for the first precondition, Aluma has filed an application alleging an unfair labour practice, which is pending a hearing on the merits. As for the second precondition, Aluma filed affidavits of Rick Moran, Matthew Sell, and Mike Moran, all representatives of Aluma.

**[20]** The Board in *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc*., 2019 CanLII 57377 (SK LRB) ["*Verdient Foods*"] provided the following description of the test to be applied on interim applications:

> *[21] The Board's power to grant interim relief is discretionary.[6] In considering the governing legal principles, the Board in Active Electric Ltd. (Re), [2018] SLRBD No 11, recited and relied on excerpts from Saskatchewan Government and General Employees' Union v Saskatchewan (Government), 2010 CanLII 81339 (SK LRB) ["SGEU"]. The pertinent summary from SGEU reads as follows:*
>
> > *[30] Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Board utilizes a two-part test to guide in its analysis: (1) whether the main application raises an arguable case of a potential violation under the Act; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Property Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn), [1999] Sask. L.R.B.R. 190, LRB File No. 131-99. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668, LRB File No. 083-10. As with any discretionary authority under the Act, the exercise of the Board's authority to grant interim or injunctive relief must be based on a sound labour relations footing in light of both the broad objectives of the Act and the specific objectives of the section allegedly offended.*
> >
> > *[31] In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strength or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case". See: Re: Regina Inn, supra. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668, LRB File No. 083-10. The Board has also used terms like*

> *whether or not the applicant is able to demonstrate that a "fair and reasonable" question exists (which should be determined after a full hearing on the merits) to describe this portion of the two-part test. See: Re: Macdonalds Consolidated, supra. Simply put, an applicant seeking interim relief need not demonstrate a probably violation or contravention of the Act as long as the main application reasonably demonstrates more than a remote or tenuous possibility.*
>
> *[32] The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suite Hotel (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00. In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. See: Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership, [2000] Sask. L.R.B.R. 223, LRB File No. 079-00. The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. See: Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Regina Exhibition Association Limited, et. al., [1997] Sask. L.R.B.R. 667, LRB File No. 266-97; United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Con-Force Structures Limited, [1999] Sask. L.R.B.R. 599, LRB File No. 248-99; and International Association of Fire Fighters, Local 1318 v. South Saskatchewan 911, [2001] Sask. L.R.B.R. 97, LRB File No. 037-01. In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. See: Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc., [2000] Sask. L.R.B.R. 219, LRB File No. 076-00.*

> *[22] It is by now well established that the legal principles governing interim applications under The Trade Union Act, RSS 1978, cT-17 ["The Trade Union Act"] remain applicable to interim applications under the current legislation.[7]*
>
> *[23] The Board, in assessing an application for interim relief, must make a determination on a case-by-case basis, giving consideration to multiple factors, including: the particular facts of the matter, the goals of the Act, the policy objectives of the provision alleged to have been violated, and the nature of relief sought.[8]*
>
> *[24] The Board is not in a position to make determinations on disputed facts, assess credibility, or weigh evidence.[9] […]*

**[21]** Richards C.J.S., for the Saskatchewan Court of Appeal in *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc*, 2011 SKCA 120 (CanLII) ["*Mosaic*"], helpfully summarized the appropriate approach of the courts in deciding whether to grant interlocutory injunctions:

> *[113] In the interest of clarity, it may be useful to recapitulate the basic points which have been developed in the course of these reasons and to summarize the approach a judge*

> *should typically take when deciding whether to grant interlocutory injunctive relief. This can be done as follows:*
>
> > *(a) The judge should normally begin with a preliminary consideration of the strength of the plaintiff's case. The general rule in this regard is that the plaintiff must demonstrate a serious issue to be tried, i.e. the plaintiff must have a claim which is not frivolous or vexatious. If the plaintiff raises a serious issue to be tried, it is necessary for the judge to turn to the matters of irreparable harm and balance of convenience.*
> >
> > *(b) Irreparable harm is best seen as an aspect of the balance of convenience. The general rule here is that the plaintiff must establish at least a meaningful doubt as to whether the loss he or she might suffer before trial if an injunction is not granted can be compensated for, or adequately compensated for, in damages. Put another way, the plaintiff must demonstrate a meaningful risk of irreparable harm. If this is done, the analysis turns to the balance of convenience proper.*
> >
> > *(c) The assessment of the balance of convenience is usually the core of the analysis. In this regard, the relative strength of the plaintiff's case, the relative likelihood of irreparable harm, and the likely amount and nature of such harm will typically all be relevant considerations. Depending on the particulars of the case, strength in relation to one of these matters might compensate for weakness in another. Centrally, the judge must weigh the risk of the irreparable harm the plaintiff is likely to suffer before trial if the injunction is not granted, and he or she succeeds at trial, against the risk of the irreparable harm the defendant is likely to suffer if the injunction is granted and he or she prevails at trial. That said, the balance of convenience analysis is compendious. It can accommodate a range of equitable and other considerations.*
> >
> > *(d) The judge's ultimate focus in considering whether to grant interlocutory injunctive relief must be on the overall equities and justice of the situation at hand.*

**[22]** In short, the substantive test is two-fold. The first stage of the test asks whether the underlying application raises an arguable case. This is not a rigorous standard. In assessing the potential for an arguable case, the Board considers whether the underlying application discloses facts that, if established at the full hearing, would prove the alleged claim. The Board does not focus on the relative strengths or weaknesses of the case.

***Arguable Case***

**[23]** While Aluma relies on the arguable case threshold, it acknowledges that the higher threshold of strong *prima facie* case may be more appropriate. Aluma argues that it has met both thresholds.

**[24]** The Saskatchewan Court of Appeal, in *Mosaic*, acknowledged that the bar may be set higher in cases where the applicant has requested the equivalent of final relief:

> *[48] Before leaving this point, let me also say that in endorsing the general use of the serious issue to be tried standard, I do not mean to foreclose the possibility of there being*

> *some limited exceptions to its overall applicability. The Supreme Court expressly recognized, in RJR-MacDonald, that significant attention to the merits of the plaintiff's case is required (a) where the interlocutory relief will in effect amount to a final determination of the action such as, for example, in an application to enjoin picketing, and (b) where the plaintiff's case presents itself as a simple question of law. There might arguably be other limited circumstances where a higher threshold is still appropriate. Obviously, it would not be wise to attempt to identify or analyze them in the abstract.*

**[25]** The preceding passage alludes to the following comments of the Supreme Court in *RJR-MacDonald v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311:

> *Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294, at p. 1307:*
>
> > *Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.*

**[26]** The Board agrees that, where the applicant has requested a remedy that amounts to a final determination, it makes eminent sense to engage in a more extensive review of the merits of the underlying application before granting the requested relief. It is also noteworthy that, in the foregoing passage, the Supreme Court suggests that it is appropriate to grant the equivalent to a final determination only in a narrow set of circumstances.

**[27]** In the current case, the Board is not persuaded that the parties' exchange in relation to the Rudder Agreement, alone, discloses facts that if established at the full hearing would prove the alleged claim. Granted, if an agreement was reached between the Union and Aluma following the initial email in September, 2018, then that Agreement may prevail over the working conditions of the employees called out to the upcoming Work. However, Rudder appears to have presented a proposed agreement to Aluma for review. An Aluma representative reviewed part or all of that proposed agreement, and then asked certain questions for clarification. After that, there is no evidence to suggest that Aluma communicated its agreement, until after the bidding had already occurred.

**[28]** This lack of apparent evidence does not preclude Aluma from presenting more or better evidence at a hearing on the underlying application, or from otherwise persuading the Board through a more comprehensive presentation of arguments. Aluma relies primarily on subsection 6-41(4) of the Act, which makes clear that if "an agreement is reached as the result of collective bargaining, both parties shall execute it"; however, a prerequisite to the requirement pursuant to subsection 6-41(4) is that an agreement was reached.[1] To counter Aluma's argument, the Union says that any collective bargaining that may have occurred in this instance was purely voluntary, no agreement was reached through collective bargaining, and the Union's proposal has since expired.[2] All of these arguments will have to be more fully examined at the main hearing.

**[29]** Aluma also relies on the principle of estoppel, placing particular reliance on the following passage from *Excelsior Life Insurance Company v Saskatchewan*, 1987 CanLII 4715 (SK QB):

> *[27] Cartwright, J., in Meduk et al. v. Soja et al., 1958 CanLII 34 (SCC), [1958] S.C.R. 167; 12 D.L.R. (2d) 289, dealt with the general rule as to estoppel, where at p. 175 he stated:*
>
> > *"The general rule as to estoppel by matter in pais is satisfactorily stated in Halsbury's Laws of England (3rd Ed.), vol. 15 (1956), s. 338, p. 169, as follows:*
> >
> > > *'Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood, or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.'"*
>
> *[28] In Canada and Dom. Sugar Co. v. Can. National (West Indies) SS. Ltd., 1946 CanLII 300 (UK JCPC), [1946] 3 W.W.R. 759; [1947] AC 46; 116 L.J.R. 385; [1947] 1 D.L.R. 241 (P.C.), Lord Wright viewed estoppel as a substantive rule of law. At p. 764, he stated:*
>
> > *"Estoppel is a complex legal notion, involving a combination of several essential elements - the statement to be acted upon, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law."*

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[1] See, *CUPE, Local 59 v City of Saskatoon*, 2010 SKQB 116 at 15, citing *Saskatoon (City) v CUPE*, *Local 59*, 2009 CanLII 67430 (SK LRB), at para 68, "For the reasons outlined above, and based upon the evidence presented to the Board, the conclusion is that there was an understanding between the parties as to how the retroactive payments were to be made…"

[2] The Union relies on *Haggerty v The Toronto Dominion Bank*, 2008 BCSC 1923 for the notion that, after the passage of a reasonable period of time, the proposal expires.

**[30]** Aluma suggests that it can demonstrate, and has demonstrated, that the Union made a representation that was relied upon by Aluma, and is therefore estopped from reneging on the Rudder Agreement. The Union suggests that no such representation was made. On the current evidence, it is not apparent that the representation was sufficiently unambiguous that a reasonable person would understand that it was intended to be acted upon.

**[31]** One matter that raises questions for this panel is the wording of the "Participation Agreement" for the Project Agreement for a Maintenance Service Contract, which states,

> *The signatory Contractor to this document, through its authorized representatives, agrees to be bound by all of the terms and conditions of the subject matter Agreement for all work performed during the spring 2017 shutdown at the Husky Lloydminster Upgrader in Lloydminster Saskatchewan.*

**[32]** On the other hand, the letter dated February 19, 2016 from Vince Engel, President of Saskatchewan and Northwest Territories Allied Council, to Rick Moran states:

> *This letter will verify and confirm that for the Husky Lloydminster Upgrader insulation/scaffold contract for shutdowns 2017-2010:*[3]
>
> *Article 13:01 of the Maintenance Service Contract at the HLU will be enabled and in particular the first 10 hours of overtime on Saturdays may be calculated and paid at time and one half (1.5) x the regular rate of pay and not double time (2)x as stated in Article 13:01.*
> *…*

**[33]** At this stage of the proceedings, and for purposes of the arguable case threshold, the Board is compelled to accept the evidence on its face, and refrain from making credibility assessments or from drawing conclusions on the facts. If, in fact, there is an absence of formalized agreements as to the prevailing working conditions, then a question may arise about what terms and conditions apply. Taking this into account, the Board finds that Aluma has met the low threshold of an arguable case. At the same time, the Board is not persuaded that this is an appropriate case for an extensive review of the merits. The right that the applicant seeks to protect is not one that must be exercised immediately or not at all; nor does any potential result impose such hardship on the applicant as to remove any potential benefit of proceeding to a hearing on the merits. Furthermore, the existing materials raise questions about the Project Agreement that cannot be answered through affidavit evidence alone.

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[3] Dates as set out in original.

***Balance of Convenience/Balance of Harms***

**[34]** Moving on to the second stage of the test, the Board is guided by the direction as outlined in *Saskatchewan Government and General Employees' Union v Saskatchewan (Government)*, 2010 CanLII 81339 (SK LRB) ["*SGEU*"], and cited in *Verdient, supra*, at paragraph 21:

> *... In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. … The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted… In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. …*
>
> *[citations removed]*

**[35]** The first question is whether there is a sufficient sense of urgency to justify the desired remedy. Aluma has suggested that the Work was anticipated to begin about five weeks after the date of the hearing on the interim Application. The reason Aluma is experiencing "urgency" is because the Work is about to begin. It cannot be that if Aluma had brought the underlying, and then the Interim Application, some months earlier, that its timeliness would place it at a disadvantage in succeeding on the interim Application. In this case, whether the application is truly urgent is more appropriately assessed by considering the nature of the substantive issue, as follows.

**[36]** The Union says that Aluma's requested remedy is both in the nature of final, monetary relief and is premature. For this argument, the Union relies on *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 568 v Signal Industries (1998) Ltd*, 2018 CanLII 127661 (SK LRB) ["*Signal*"], citing *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v Prairie Micro-tech, Inc*., [1994] SLRBD No 62:

> *[34] In Re Prairie Micro-tech Inc.[23], the Board elaborated upon what an applicant needs to demonstrate on this aspect of the inquiry. At pp. 5 & 6, the Board says:*[4]
>
> > *Whether it is described as an interlocutory injunction or an interim order. . .what the Board is being asked to do is to issue an order for relief in circumstances where there is no opportunity for the parties to present evidence, and no full consideration can be given to the merits of the complaints enumerated in the application. Under these conditions, it is our view that the applicant must be required to show that there will be some prejudice to them which cannot be fairly addressed if they are required to await the full hearing and determination of the main*

[4] In the original decision, the quote is at 6.

> *application. There are, no doubt, circumstances in which the Board would issue orders pursuant to Section 5.3 without putting the applicant to such a test, but in this kind of case, where we are being asked to issue an order without the benefit of a hearing, we feel it is necessary that the applicant provide us with a persuasive rationale for granting relief in the form of a description of the harm which will accrue to them if the order is not granted.*

**[37]** In *Signal*, the Board found that the applicant Union had not demonstrated that the expected damage was non-compensable or that an interim order prior to the shut-down of the business was not premature.

**[38]** Here, Aluma's primary complaint is financial. If the Rudder Agreement is not immediately applied, then Aluma may be compelled, by virtue of the Union's position, to issue call-outs on the basis of a higher wage rate. However, if the Board later finds that the Rudder Agreement is the applicable agreement, then there is a dispute resolution process available to Aluma to attempt to recoup any losses, whether through arbitration or otherwise.

**[39]** Aluma disputes the characterization of its complaint as purely financial, suggesting that it is likely to suffer from uncertainty and potential reputational harm. However, there is nothing stopping Aluma from issuing call-outs on the basis of the ACA pending determination of the unfair labour practice, and then recouping any difference should a determination be made in its favour. In this way, Aluma can maintain control over the potential for reputational harm. Any other uncertainty arises directly from the potential for financial loss.

**[40]** Despite Aluma's insistence otherwise, the Union does stand to suffer labour relations harm if the Board imposes a collective agreement that is later found not to be binding. Aluma seeks an order imposing lower wage rates than the members might otherwise be entitled to, until this matter is sorted out. It is entirely foreseeable that some members, willing to accept the terms of the ACA, would not be willing to accept the terms of the Rudder Agreement.

**[41]** Aluma asks the Board to grant an order in line with the *status quo*, which it says favours the application of the Rudder Agreement. However, the evidence discloses that the agreement that governed the maintenance work at the Husky Upgrader, at least in the past, was the ACA; this does not advance Aluma's argument. Still, both parties seem to rely on the concept of *status quo* to urge the Board to prematurely choose sides and determine which agreement is binding on the parties. The Board declines the invitation. It is not appropriate for the Board to predetermine

the merits of the underlying application at this stage. The concept of maintaining the *status quo* is helpful in many interim cases, but not here.

**[42]** In conclusion, the Board finds that Aluma's primary concern is monetary and therefore compensable and not irreparable, and is not sufficiently urgent to justify an interim remedy. The balance of convenience, taking into account the potential for monetary damage, favours the Union. Lastly, Aluma seeks a predetermination of the merits of the underlying application, which the Board is not prepared to make. Aluma's application for interim relief is hereby dismissed.

**[43]** This is a unanimous decision of the Board.

**DATED** at Regina, Saskatchewan, this **6th** day of **March, 2020.**

**LABOUR RELATIONS BOARD**

Barbara Mysko
Vice-Chairperson