CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, Applicant v CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 342, Respondent

LRB File No. 159-21; April 19, 2022
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Mike Wainwright

Counsel for the Applicant, Canadian Union of Public Employees, Local 1975: Brent Matkowski

Counsel for the Respondent, Canadian Office and Professional Employees Union, Local 342: Stephen F. Legault

Last offer vote – Section 6-35 of *The Saskatchewan Employment Act* – Whether the Board has Discretion not to Tabulate the Vote – Nature of Discretion Described – No Issue as to whether Collective Bargaining Occurred or Last Offer Presented.

Request for Interim Relief – Non-Compliance with Regulations – Union Relies on Unfair Labour Practice Application against Different Employer – Employer not a Party to Unfair Labour Practice Application – Union Failed to Establish Irreparable Harm.

Tabulation to Proceed – Request for Interim Relief Dismissed.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On December 8, 2021, the Employer applied for a last offer vote pursuant to section 6-35 of *The Saskatchewan Employment Act* [Act]. The Employer is CUPE, Local 1975, and is subject to an order, dated March 24, 2021, certifying COPE, Local 342, as the representative bargaining agent for a bargaining unit of office employees.

[2] In making the present application, the Employer has complied with section 11 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* [Regulations], which states that an employer who intends to apply for an order pursuant to section 6-35 shall file an application in Form 8 (Application to Conduct Vote). There are no deficiencies on the face of the application.

[3] The Union was provided ten business days to file a reply to the application. It filed its Reply late, on January 21, 2022. The Employer confirmed that it did not object to the Reply being accepted for filing by the Board. In its Reply, the Union admits that, prior to certification, the parties were in a voluntary recognition arrangement resulting in the conclusion of collective agreements. It admits that on November 18, 2021 the Employer made the offer that is the subject of the current application and the Union declined the offer on November 30, 2021.

[4] The Union's Reply indicates that the bargaining process has been frustrated due to the Employer's actions, which are related to the actions of the provincial organization, CUPE Saskatchewan, and another local, CUPE, Local 5430. The relevant portions of the Reply state the following:

> *3. The following statements are specifically denied:*
>
> *(a) The parties have engaged in bargaining, both prior to and after the March 24, 2021, order of the Board, and have been unsuccessful at reaching an agreement.*
>
> *4. The following statements are specifically commented on:*
>
> *(a) The parties have engaged in bargaining, both prior to and after the March 24, 2021, order of the Board, and have been unsuccessful at reaching an agreement.*
>
> *Comment: The parties were continuing to bargain, with COPE 342 Vice-President, Nathan Markwart, as lead negotiator for the Union, when on September 2, 2021, the umbrella organization of the Applicant, CUPE Saskatchewan, issued a threat to terminate Mr. Markwart's employment unless he refrained from bargaining any CUPE contracts. That threat is now the subject of a matter before the board, LRB File No. 127-21, scheduled for hearing on March 10 and 11, 2022. The bargaining process had yet to run its course, and the union feels further bargaining sessions may be fruitful.*
>
> *5. The following is a concise statement of the material facts which are intended to be relied on in support of this reply:*
>
> *(a) Bargaining has been frustrated by the actions of CUPE Saskatchewan and CUPE 5430, on September 2, 2021, with future bargaining sessions already booked for Sept 23 & 24, Oct. 14 & 15 and Nov. 8 & 9. At that time, the union was forced to cancel the bargaining sessions with CUPE 1975 under the threat of the Vice-president of COPE 342 being terminated, but advised the employer that the union would be happy to set new dates once LRB No. 127-21 was resolved.*
>
> *(b) The Applicant, CUPE 1975 is inextricably linked to LRB File No. 127-21 as its representatives were not only involved in the decision-making process involving issuing the threat to Mr. Markwart, but are potential witnesses in the proceeding, as evidenced by paragraph (h) of the Reply of CUPE Saskatchewan in LRB File No. 127-21.*
>
> *(c) The final offer, attached to the Employer's Application contains at least 10 major concessions. The Union believes the Employer is taking advantage of a situation that it helped to create, to either attain a more favourable contract, through misuse of the Board's power, or to provide an opportunity and a reason to lock out the lone COPE 342 bargaining unit member from the workplace, in an effort to put further*

> *pressure on the Union to capitulate to the alleged Unfair Labour Practice committed by CUPE Saskatchewan.*

[5] The parties to LRB File No. 127-21 are COPE, Local 342; CUPE Saskatchewan; and CUPE, Local 5430. CUPE, Local 1975, which is the Employer in the current case, is not a party to that application. The Union has not asked that the Employer be added as a party to that application. Nor has the Union filed an unfair labour practice application listing the Employer as a respondent.

[6] On February 22, 2022, the Board issued a Direction for Vote on the Employer's last offer. The Board directed that a vote by secret ballot be conducted among all eligible employees, who were employed within the bargaining unit as of December 8, 2021, to determine whether the said employees wish to accept the Employer's last offer. The Union admits that it was appropriate for the Board to direct that the vote be taken at that time but suggests that the Board can now exercise discretion not to tabulate the vote. To be more precise, the Union asks the Board to stay the tabulation of the vote until after the Board's decision is issued in LRB File No. 127-21. The Union says that it will make a decision about its "next steps" on receipt of that decision.

[7] On March 1, 2022, the application for vote on last offer came up on Motions Day. The Board scheduled a date to consider whether the Board has discretion not to tabulate the vote. The Board set deadlines for the parties to submit written argument. The hearing on the issue was held on April 1, 2022. The tabulation of the vote has been placed on hold, with the Employer's consent, in the interim.

Analysis and Decision:

Extent and Nature of Board Discretion:

[8] The question before the Board raises an issue of statutory interpretation in relation to section 6-35 of the Act. Section 6-35 states:

> ***6-35****(1) At any time after the parties have engaged in collective bargaining, any of the following may apply to the board to conduct a vote among the employees in the bargaining unit to determine whether a majority of employees voting are in favour of accepting the employer's last offer:*
>
> > *(a) the union;*
> > *(b) the employer;*
> > *(c) any employees of the employer in the bargaining unit if those employees represent at least 45% of the bargaining unit or 100 employees, whichever is less.*
>
> *(2) On receipt of an application pursuant to this section, the board shall direct that a vote be taken.*

> *(3) Only one vote with respect to the same dispute may be held pursuant to this section.*
>
> *(4) On the recommendation of a labour relations officer, a special mediator or a conciliation board or if the minister considers it to be in the public interest, the minister may require the board to order a vote on the employer's last offer.*
>
> *(5) A vote required in accordance with subsection (4) may be in addition to a vote taken on an application pursuant to subsection (1).*
>
> *(6) If a majority of votes cast favour acceptance of the employer's last offer:*
>
> > *(a) a collective agreement is thereby concluded between the parties; and*
> > *(b) the collective agreement is to consist of the terms voted on and any other matters agreed to by the union and the employer.*

[9] To determine whether the Board has discretion in its application of section 6-35, it is necessary to engage in an exercise of statutory interpretation, and to do so in accordance with the modern principle. *Ballantyne v Saskatchewan Government Insurance*, 2015 SKCA 38 (CanLII) [*Ballantyne*] outlines the proper approach to such an exercise:

> *[19] The leading case with respect to statutory interpretation is the Supreme Court of Canada's decision in Re Rizzo & Rizzo Shoes Ltd., 1998 CanLII 837 (SCC), [1998] 1 SCR 27 [Rizzo Shoes]. A number of principles set out in that case are applicable to the case at hand, namely:*
>
> > *1. The words of an Act are to be read in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its objects, and the intention of the legislature (See: Rizzo Shoes at para. 87). (See also: Saskatchewan Government Insurance v Speir, 2009 SKCA 73 at para 20, 331 Sask R 250; and Acton v Rural Municipality of Britannia, No. 502, 2012 SKCA 127 at paras 16-17, [2013] 4 WWR 213 [Acton]).*
> >
> > *2. The legislature does not intend to produce absurd consequences. An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent or if it is incompatible with other provisions or with the object of the legislative enactment (See: Rizzo Shoes at para. 27).*
> >
> > *3. Any statute characterized as conferring benefits must be interpreted in a broad and generous manner (See: Rizzo Shoes at para. 21). This principle is enshrined in s. 10 of The Interpretation Act, 1995, SS 1995, c. I-11.2 (See: Acton at paras. 16-18).*
> >
> > *4. Any doubt arising from difficulties of language should be resolved in favour of the claimant (See: Rizzo Shoes at para. 36).*
>
> *[20] In Sullivan on the Construction of Statutes, 6th ed (Markham: LexisNexis, 2014) at 28-29, Ruth Sullivan sets out three propositions that apply when interpreting the plain meaning of a statutory provision:*

> *1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.*
>
> *2. Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.*
>
> *3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.*
>
> *[21] In sum, in interpreting s. 123(1) of the Act, the ordinary meaning of the words of that provision must be read in the context of the Act as a whole and in the context of Part VIII in particular. It is also important to keep in mind the purpose of the Act and the legislature's intention in enacting the provision. The provision is benefit conferring and accordingly must be given a broad and purposive interpretation. It must also be interpreted in a manner that will not lead to absurdities. With this background in mind, I turn to the Commission's decision in this case.*

[10] Section 2-10 of *The Legislation Act* states:

> ***2-10****(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.*
>
> *(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.*

[11] Section 6-35 states that an applicant may apply to the Board to conduct a last offer vote "at any time after the parties have engaged in collective bargaining". In addition to the existence of exclusive bargaining rights, there are two primary requirements for an application pursuant to section 6-35. The first is that the parties have engaged in collective bargaining; the second is that there is a last offer: *Calokay Holdings Ltd. v UFCW, Local 1400*, 2016 CarswellSask 275 [*Calokay*] at paragraph 18.

[12] "On receipt of an application" pursuant to section 6-35, the Board "shall direct that a vote be taken". The phrase "on receipt of an application" identifies the trigger for the Board's actions, being the Board's receipt of an application. An application is considered filed with the Board, and therefore received, if it satisfies the basic requirements set out in the Act and the Regulations, or where the Board has waived compliance with technical requirements.

[13] The information provided on an application allows the Board to make an initial determination as to whether the primary requirements have been met, by demonstrating the

existence of exclusive bargaining rights, the fact of collective bargaining, and the presentation of a last offer. The materials that must be attached to the application include a copy of the certification order, a copy of the employer's last offer, and a list of the names and addresses of the employees in the bargaining unit as of the date on which the application was filed.[1]

[14] There is no issue as to whether the primary requirements have been satisfied in this case.

[15] First, after having reviewed the pleadings and written arguments filed in this matter, the Board asked counsel for the Union whether there was still a question about whether the parties had engaged in collective bargaining, as that term is defined in Part VI of the Act. In his argument and in response to the Board's line of inquiry, counsel for the Union stated unequivocally that there is no such question remaining, that the Union is not arguing bad faith bargaining, and that the issue of whether the parties engaged in collective bargaining is not outstanding. Therefore, there is no live question as to whether the parties have engaged in collective bargaining.

[16] Second, in *Calokay*, the Board indicated that "there must be a clear, definitive and unequivocal last offer from the employer, which offer would resolve all matters remaining in dispute between the parties, and which has been presented to the union as a last offer, before the Board will be called upon to order a vote".[2] Where a last offer is so deficient that it cannot result in a collective agreement being concluded, the Board may exercise its discretion not to direct that a vote be taken until the issues with the last offer have been resolved:

> *[24] In this fact situation, the Board has determined that notwithstanding the vagueness of the Employer's last offer, that it would nevertheless order the requested vote. There may, however, be situations where such a request may be considered to lack sufficient clarity, definition or be so equivocal that a final collective agreement could not result if the vote was to be determined to be in favour. Where a last offer is such that, [it] does not address all of the matters in issue between the parties and, if it is accepted, the result would not be a collective agreement [it] may not be permitted to proceed and should, in our opinion be adjourned by the Board pending resolution of a last offer which does not contain the defects outlined above.*

[17] The Board explained that employees should know the terms and conditions of employment that will be impacted by their vote. After the vote is tabulated in favour of the collective agreement, and the collective agreement is concluded, there is no opportunity for a refinement of the last offer.

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[1] Section 11 and Form 8 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021*.
[2] At para 21.

[18] The Union does not suggest that the last offer lacks any of the attributes listed in *Calokay*. Instead, the Union's objection is that the Employer "is taking advantage of a situation that it helped to create, to either attain a more favourable contract, through the misuse of the Board's power, or to provide an opportunity and a reason to lock out the lone CUPE 342 bargaining unit member from the workplace". This objection is not a complaint about whether the offer is clear, definitive, or unequivocal.

[19] In addition, the casting of ballots has already taken place; it is only the tabulation that remains. Neither party suggests that the Board should have delayed directing that the vote take place.

[20] Given that neither of the two prerequisites is in issue, the next question is whether the Board has discretion to delay the tabulation or set aside the vote for another reason.

[21] To consider this question, it is necessary to consider the entire context of the provision, in its grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.

[22] Section 6-35 states that on receipt of an application, the Board "shall direct that a vote be taken". Here, the first issue is what is meant by "direct that a vote be taken". Read in isolation, this phrase raises a question about whether the Board is to direct only that the votes be cast or to direct both that the votes be cast and be tabulated. To determine the meaning of this phrase, it is necessary for the Board to consider the entire context.

[23] Subsection 6-35(6) states that if a majority of the votes cast favour acceptance of the last offer a collective agreement is thereby concluded. Subsection (6) is straightforward, signaling that the tabulation is the necessary step following the casting of the votes. Subsection (6) applies equally to subsection (4) which provides for the circumstances in which the Minister may require the Board to "order a vote" on the employer's last offer. In this respect, the phrases "direct that a vote be taken" and "order a vote" are treated the same.

[24] The general provisions dealing with votes provide some assistance in discerning what it means to "take" a vote. Section 6-22 states:

> ***6-22****(1) All votes required pursuant to this Part or directed to be taken by the board must be by secret ballot.*
>
> *(2) A vote by secret ballot is not required among employees in a bargaining unit*

> *consisting of two employees or fewer.*
>
> *(3) An employee who has voted at a vote taken pursuant to this Part is not competent or compellable to give evidence before the board or in any court proceedings as to how the vote was cast.*
>
> *(4) The results of the vote mentioned in subsection (1), including the number of ballots cast and the votes for, against or spoiled, must be made available to the employees who were entitled to vote.*

[25] By referring to votes that are required pursuant to Part VI and votes that are directed to be taken by the Board, the Legislature has recognized that not all votes that are directed to be taken are also required by Part VI. The Board has discretionary authority, for example, pursuant to clause 6-111(1)(v), to order a vote be taken at any time before a hearing or proceeding has been finally disposed of by the Board. Subsection 6-22(4) states that the results of either vote must be made available to the employees who were entitled to vote. To be sure, section 6-22 deals with the mechanics of secrecy in voting. However, it suggests that, whether a vote is required or is not required but is directed to be taken anyway, the default process is that a vote will be tabulated.

[26] Section 6-23, which deals with the supervision of votes, treats the voting process in a similarly holistic fashion, inclusive of the tabulation:

> ***6-23*** *On the application of the affected union or an affected employee or on its own motion, the board may:*
>
> *(a) require that a vote required pursuant to this Part, or directed to be taken by the board, be supervised, conducted or scrutinized by the board or a person appointed by the board;*
>
> *(b) establish the manner and time in which the vote is required to be conducted and when and how notice of the vote must be provided to those entitled to vote;*
>
> *…*

[27] Clauses (a) and (b) suggest that the Board may require that the "vote" be supervised, conducted or scrutinized by the Board or an appointee. There is no separate authority for requiring that a tabulation be supervised, conducted or scrutinized. There is no separate mention of the tabulation at all. This is despite the Board's often central role in that process. The tabulation is treated, not as a distinct process, but as a part of the voting process.

[28] The phrase "direct that a vote be taken" is used in two other circumstances in Part VI, both of which involve applications to cancel certification orders: sections 6-15 and 6-17. Pursuant to section 6-15, if the Board is satisfied that the certification order would not have been granted but

for an unfair labour practice, the board shall direct that a vote be taken of the employees in the bargaining unit, and if the majority of votes favour cancelling the order, the order shall be cancelled. This provision is unlike section 6-35 in that it requires that the Board consider and decide whether it is satisfied that an unfair labour practice has occurred, first, and if satisfied, to then direct that a vote be taken. It is similar, however, in signaling that the tabulation is the necessary step following the casting of the votes. This makes sense given the object of the provision being to discourage the improper or illegal acquisition of bargaining rights.

[29] Section 6-17, which provides for an application to cancel a certification order for loss of support, is more comparable to section 6-35. It states that the Board shall direct that a vote be taken on receipt of an application pursuant to subsection (1) of that provision. It also signals that the tabulation is the necessary step following the casting of the votes. Where a party brings an objection to the vote it generally does so pursuant to section 6-106, which provides explicit authority to the Board to dismiss any application made in specific circumstances.

[30] The phrase “direct a vote” is used in section 6-12. This provision provides for a representation vote before the Board issues a certification order or amends one. Pursuant to section 6-13, if, after a vote is taken in accordance with section 6-12, the Board is satisfied that a majority of votes that are cast favour certification of the union, the board shall issue a certification order. The phrase “before the Board issues” as opposed to “on receipt of an application” suggests greater discretion as to the timing of the direction for vote. The phrase “if…the board is satisfied” may also suggest greater discretion as to the tabulation. The discretion demonstrated by section 6-12 is supported by the Board’s well-established and broad discretion to determine the appropriateness of a bargaining unit, pursuant to section 6-9.

[31] In summary, the phrase “direct that a vote be taken”, in section 6-35, refers to the entire vote inclusive of the tabulation. This is consistent with the holistic approach to the voting process disclosed by the general provisions. It is also consistent with the absence of any language suggesting that the Board has greater or separate discretion in relation to the tabulation.

[32] The next issue is whether the Board is required to direct a vote upon receipt of an application. Professor Sullivan explains that the word “shall” is always imperative and will never confer discretion:

> *“Shall” and “must” are always imperative (binding); neither ever confers discretion. But they may or may not be mandatory; that is, breach of a binding obligation or requirement may*

> *or may not lead to nullity. The mandatory-directory distinction reflects the fact that there is more than one way to enforce an obligation.*[3]

[33] Similarly, section 2-30 of *The Legislation Act* states that the word "shall" in an enactment shall be interpreted as imperative. However, according to section 2-2 of that Act, section 2-30, and therefore the interpretation of "shall" as imperative, is presumed to apply unless a contrary intention appears in Part 2 of *The Legislation Act* or in an enactment. Applying section 2-2 of *The Legislation Act*, the Board must ask, then, whether a contrary intention appears. To determine whether there is a contrary intention it is necessary to review Part 2 of *The Legislation Act*, *The Saskatchewan Employment Act* and in particular Part VI, and the Regulations.

[34] First, it is obvious there is no contrary intention disclosed by Part 2 of *The Legislation Act*.

[35] Next, there is no contrary intention disclosed by section 6-35, read in isolation, or in relation to the general provisions.

[36] Furthermore, the imperative language of section 6-35 stands in contrast with that of section 6-25, which provides for assistance in concluding a first collective agreement. On receipt of an application pursuant to subsection 6-25(1), the Board "may" require the parties to request the Minister to appoint a third party or, if a period of 120 days has elapsed since the appointment, "may" conclude terms of the first collective agreement or order arbitration to conclude terms of the agreement. In *Workers United Canada Council v Amenity Health Care LP*, 2021 CanLII 40225 (SK LRB) [*Amenity Health Care*], the Board found that, after a period of 120 days has elapsed, it continues to have discretion to decide whether to make an order to conclude terms.

[37] In *Amenity Health Care*, the Board relied on a central purpose of Part VI, being the promotion and facilitation of good faith collective bargaining. When it comes to collective bargaining, the Board's role is as a supervisor of process rather than as an adjudicator of outcomes. The Board's role is consistent with the expectation that the parties will develop within their organizations the necessary skills and relationships to sustain healthy collective bargaining. By providing that the Board may conclude terms of a collective agreement, section 6-25 permits an exception to the Board's usual role in relation to collective bargaining. A permissive interpretation of section 6-25 is consistent with that role.

[38] In relation to section 6-35, the Board's assessment of purpose has the opposite effect. The Board in *Calokay*, at paragraph 23, concluded that the purpose of the provision is "to provide

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[3] *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 92.

a form of safety valve for negotiations between a union and the employer", and that, therefore, the Board's discretion pursuant to section 6-35 is narrow.

[39] Section 6-35 provides an avenue by which the employees in a bargaining unit may make it known whether they approve of the final offer and thereby guarantee the conclusion of the collective agreement and an end to the existing round of bargaining. Whatever the result, the final offer vote shifts the focus away from the process of collective bargaining and permits the finalization of the collective agreement, placing control over finalization with the employees. This ability to shift the focus to the employees may be useful in cases in which the employer believes that the union did not take the final offer to the membership or believed that the bargaining committee was not representing the employees' wishes.

[40] Section 6-35 is a strategic tool for transferring power from the parties to the employees. An applicant is permitted to make an application at any time after the parties have engaged in collective bargaining. The Board is reluctant to interfere with parties' collective bargaining strategies in the absence of an allegation of bad faith bargaining.

[41] On the other hand, there are specific circumstances in which the Legislature has clearly expressed an intent to permit the Board to exercise discretion to set aside a vote pursuant to section 6-35, beyond the aforementioned prerequisites. These circumstances are the exception rather than the norm, arising where there are issues with the reliability or legitimacy of the vote.

[42] For example, clause 6-62(1)(a) of the Act makes it an unfair labour practice for an employer to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by Part VI. It is a right of an eligible employee to vote further to a direction for vote issued pursuant to section 6-35. The Board has broad discretion, pursuant to section 6-104 of the Act, to grant an appropriate remedy where it finds that an unfair labour practice has been committed.

[43] In *Calokay*, the union had applied to the Board for an interim order preventing a vote on the employer's last offer, or in the alternative, an interim order sealing the results of the vote until certain applications were heard and decided. There were outstanding unfair labour practice applications against the employer, which the union argued would, if substantiated, call into question the legitimacy of any supervised vote. One of these was an application alleging a breach of clause 6-62(1)(a) of the Act.

[44] The union's argument was summarized by the Board:

> *14 The Union argued that where there is a connection between an alleged unfair labour practice and a last offer vote such that the reliability and validity of that vote is called into question, the Board has the jurisdiction to delay or seal the results of the vote until a determination is made in respect of the unfair labour practices.*

[45] The Board accepted the union's argument, finding that conduct which gives rise to an unfair labour practice may have the effect of impacting a reasonable employee in the exercise of their right to freely express their opinion on the final offer:

> *29 On the face of the applications which the Union has filed for the numerous unfair labour practice applications, the Board is satisfied that an arguable case exists that the employees may have been intimidated or coerced to such a degree that a reasonable employee, that is someone of reasonable intelligence and possessed of reasonable fortitude and resilience would not be able to freely express their opinion on the proposed last offer. In an application for interim relief, it is not necessary that the Board find as a fact that this behavior exists, but merely that there is an arguable case for such conduct to be found.*
>
> *30 It is a touchstone of the SEA as there was under the former Trade Union Act that employees are free to exercise their rights without fear, without intimidation, without coercion, or other external pressures. Whether or not such influences are present in this case will be for another day. However, we are satisfied that an arguable case exists.*
>
> *31 We concur with the British Columbia Labour Relations Board[12] that conduct which gives rise to an unfair labour practice may well have the effect of impacting a reasonable employee in the exercise of his/her right to freely express their opinion on the proposed final offer.*

[46] The Board granted interim relief, ordering that the ballot box be sealed and remain in the possession of the Board Agent pending further order of the Board.

[47] Consistent with this, subsection 27(7) of the Regulations outlines certain prohibited practices in voting:

> *(7) No person shall:*
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> *(a) fail to comply with any directions or instructions given by an agent respecting the conduct of the vote;*
>
> *(b) interfere, or attempt to interfere, with a person who is voting;*
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> *(c) attempt to obtain information as to how a person has voted or is about to vote;*
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> *(d) canvass or solicit votes within 20 metres of a polling place while the vote is being conducted; or*
>
> *(e) display, distribute or post a campaign sign, button or other similar material within 20 metres of a polling place while the vote is being conducted.*

[48] The process for objecting to the conduct of a vote is set out at section 27 of the Regulations. Section 27 requires a party to file an application in Form 25 within three business days after the conclusion of the voting period or the counting of the ballots. If an Objection to Conduct of Vote alleging interference with voting was filed in accordance with the Regulations, it would be absurd for the Board to find that it did not have discretion to set aside a vote.

[49] The process outlined in subsection 27(7) suggests that such an application must be made in a timely manner. This is consistent with the Board's objective to conduct votes expeditiously. To reduce the potential for coercion of employees who are voting, a tactic which is not as uncommon as it should be, the Board aims to conduct votes in short order following receipt of an application.

[50] Similarly, section 6-106 discloses an intention that contradicts, in specific circumstances, the imperative operation of section 6-35. That provision permits the Board to "reject or dismiss any application made to it by an employee or employees if it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent". Although less common, employees are among the parties that are permitted to bring an application for a last offer vote pursuant to section 6-35. The Board has discretion to set aside a vote where the requirements of section 6-106 have been established. To find otherwise would contradict the object of section 6-106. As with an Objection to Conduct of Vote, an inquiry pursuant to section 6-106 is likely to occur after the votes have been cast.

[51] These examples, although not representative of the case before the Board, illustrate that the Board has some discretion, despite the clear wording of section 6-35, to set aside a vote in specific circumstances. These circumstances relate directly to the statutory objective to promote and protect employee choice and the legitimacy of the results of the vote.

[52] To further consider the scope of the Board's discretion, the British Columbia case law provides a helpful point of comparison. The B.C. legislation, section 78 of the *Labour Relations Code*, RSBC 1996, c 244, includes similar language:

> ***78****(1) Before the commencement of a strike or lockout, the employer of the employees in the affected bargaining unit may request that a vote of those employees be taken as to the acceptance or rejection of the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties, and if the employer*

> *requests that a vote be taken, the associate chair must direct that a vote of those employees to accept or reject the offer be held in a manner the associate chair directs.*
>
> *(2)Before the commencement of a strike or lockout, the trade union that is certified as the bargaining agent of the employees in the affected bargaining unit may, if more than one employer is represented in the dispute by an employers' organization, request that a vote of those employers be taken as to the acceptance or rejection of the offer of the trade union last received by the employers' organization in respect of all matters remaining in dispute between the parties, and if the trade union requests that a vote be taken, the associate chair must direct that a vote of those employers to accept or reject the offer be held in a manner the associate chair directs.*
>
> *(3)If a vote under this section favours the acceptance of a final offer, an agreement is thereby constituted between the parties.*
>
> *(4)The holding of a vote or a request for the taking of a vote under subsection (1) or (2) does not extend any time limits or periods referred to in section 60 or 61.*
>
> *(5)Only one vote in respect of the same dispute may be held under subsection (1) and only one vote in respect of the same dispute may be held under subsection (2).*
>
> *(6)If, during a strike or lockout, the minister considers that it is in the public interest that the employees in the affected bargaining unit be given the opportunity to accept or reject the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties, the minister may direct that a vote of the employees in the bargaining unit to accept or reject the offer be held forthwith in a manner the minister directs.*
>
> *(7)If, during a strike or lockout, more than one employer is represented in the dispute by an employers' organization and the minister considers that it is in the public interest that the employers comprising the employers' organization be given the opportunity to accept or reject the offer of the bargaining agent for the employees last received by the employers' organization in respect of all matters remaining in dispute between the parties, the minister may direct that a vote of those employers to accept or reject the offer be held forthwith in a manner the minister directs.*

[53] In *Horizon Operations Ltd. v Communication, Energy and Paperworkers Union of Canada, Local 2000 and Graphic Communications International Union*, 2000 CanLII 27532 (BC LRB) [*Horizon*], at paragraph 18, the B.C. Board found that its discretion is limited to a "fairly narrow review of the last offer vote application":

> *17 The concept of ensuring that the application was "properly made" was carried over by the Board into the NAP Building Products' line of cases cited earlier. In BCLRB No. B158/95, the Board stated that the application would be reviewed to ensure that it had been properly made, "both from a procedural and a substantive perspective" (paragraph 7). However, the panel commented on the "substantive perspective" as follows:*
>
> > *In terms of the substance of a s. 78 application, the Employer properly acknowledged before us that a final offer package cannot contain a proposal which could not be taken to impasse. See Vancouver Symphony Society and I.A.T.S.E., Local 118 (1993), 17 CLRBR (2d) 161 (BCIRC No. C3/93). The Board can review a last offer to ensure that there are no provisions which are illegal or inconsistent with the scheme of the Code. On the other hand, the Board's discretion does not*

> *extend to a consideration of the merits or reasonableness of proposals contained in a last offer. (para. 8)*
>
> *18 As can be seen from the above quotation, the Board's discretion is limited to a fairly narrow review of the last offer vote application. In BCLRB No. B332/95, the Board summarized its "hands off approach" to last offer vote applications in the following manner:*
>
> > *Therefore, to summarize, the Board will scrutinize the activities of an employer in respect of its actions or communications surrounding a last offer. It will also examine a last offer to ensure there are no provisions which are illegal or inconsistent with the principles of the Code. However, the Board will otherwise take a "hands off" approach to the contents of a last offer, that if accepted, will form the settled terms of a collective agreement. (para. 27)*
>
> *19 Consequently, I do not find, as with previous Board panels, that the Board should be scrutinizing last offer vote applications by initially making a determination as to whether bargaining in good faith has taken place. A last offer vote application is a bargaining tool to be utilized by an employer once in a collective bargaining dispute. It is a serious step for an employer to take and was initially intended to be used when the union either would not take the employer's last offer to the membership or the employer felt the union's bargaining committee was not representing employee wishes. Since that time, whether that has been in the form of Section 137 of the Act or Section 78 of the Code, employers have been utilizing last offer vote applications more tactically or strategically in their collective bargaining disputes. Regardless of how the section of the Code is being utilized in a collective bargaining dispute, the Board has consistently been reluctant to interfere in parties' collective bargaining strategies - except in such cases where a position being taken is illegal or is inconsistent with the statutory scheme of the Code (such as taking certain issues to impasse - see Northwood Pulp & Timber Ltd. and Communications, Energy & Paperworkers' Union of Canada, Local 603, BCLRB No. B271/94, (1994), 23 CLRBR (2d) 298 or the Vancouver Symphony Society and I.A.T.S.E., Local 118, IRC No. C3/93, (1993), 17 CLRBR (2d) 161, for example). In my view, so too should the Board be reluctant to interfere with applications made under Section 78 if the applications are procedurally correct, do not contain illegal issues such as issues which cannot be taken to impasse, or do not violate Code principles.*
>
> *20 Having said that, I also do not feel that one division of the Board should turn a blind eye to proceedings in another division of the Board. The bargaining in bad faith charges are not before me -- they are before Vice Chair Hickling. I do not find that their existence alone acts as a bar to the last offer votes proceeding. I do accept, however, that if there appears to be a connection between the outstanding unfair labour practice complaints and the last offer vote applications, then to allow the last offer vote applications to be counted without the findings on the complaints being made would be inconsistent with the collective bargaining principles of the Code, and Board procedure.*

[54] In *Horizon*, the B.C. Board stayed the tabulation due to an existing unfair labour practice application alleging bad faith bargaining. In the absence of a similar application, the B.C. Board is reluctant to scrutinize last offer vote applications “by initially making a determination as to whether bargaining in good faith has taken place”. The Board will simply review the applications to ensure they are procedurally correct and to ensure that the offers do not contain illegal clauses or violate statutory principles.

[55] This approach is consistent with this Board's established prerequisites for an application pursuant to section 6-35, and with its current process.

[56] At the hearing, counsel advised that the Union is alleging that the Employer has interfered with internal union affairs, pursuant to clause 6-62(1)(b) of the Act. Clause 6-62(1)(b) establishes that interference with internal union affairs, as described, is an unfair labour practice. A party seeking a remedy for a breach of clause 6-62(1)(b) is required to file an application describing the facts on which the allegations are based with reasonable particularity to permit the board and the party against whom the allegation is made to determine the nature and extent of the allegation.[4] No such application has been filed.

[57] Setting aside the issues with the form of the Union's request, the Board does not have discretion to delay the tabulation or set aside the vote for the reasons described by the Union. In concluding as much, it is important to note that counsel for the Union has admitted that collective bargaining, as defined in Part VI, has taken place. The Union has explicitly not argued bad faith bargaining. The Union has not argued that the reliability or legitimacy of the vote is in question. The Board is not persuaded that the objective of protecting internal union affairs, isolated from any allegation of bad faith bargaining or interference with the vote, brings a matter within the narrow set of circumstances engaged by section 6-35.

[58] Section 6-35 is a strategic tool meant to transfer the power from the parties to the employees. This transfer of power is permitted to occur at any time after collective bargaining has taken place. Given the Board's limited role, it does not interfere in parties' collective bargaining strategies in the absence of an allegation of bad faith bargaining. The provision does not permit the Board to entertain questions about whether a party could have gotten a better deal, whether a party made concessions, or about whether the bargaining process was too short, in isolation from larger issues about whether the parties engaged in collective bargaining, whether a final offer was presented that was not deficient, and whether the voting process was reliable and legitimate. As long as the prerequisites are present and the voting process was satisfactory, the application should proceed.

[59] Next, the Board will turn to consider the form of the Union's request.

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[4] See, sections 7 and 14 of the Regulations.

Request for Interim Relief:

[60] In its written submissions, the Union asks for an interim order to seal the ballots pending the outcome of the unfair labour practice proceedings in LRB File No. 127-21.

[61] In seeking interim relief, the Union relies on the Board's authority to make interim orders, pursuant to section 103 of the Act. The Union has not complied with the requirements set out at section 15 and Form 12 of the Regulations. Among these requirements is an affidavit of the applicant or other witness in which the applicant or witness identifies with reasonable particularity the facts on which the alleged contravention is based, the party against whom the interim relief is claimed, and any exigent circumstances associated with the application or the granting of interim relief.

[62] As the Board explained in *Andritz v Plumbers and Pipefitters*, 2021 CanLII 37010 (SK LRB) [*Andritz*], at paragraph 23, the failure to file an affidavit in support of an application for interim relief may be fatal. The filing of affidavit evidence responds to the second part of the test on an interim application:

> *[29] The second part of the test relates to the balance of convenience, or as the Employer describes it, the balance of harms. At this stage, the Board considers whether the balance of convenience weighs in favour of granting the stay. The Employer is required to provide a description of the harm that will ensue if the order is not granted, with a view to demonstrating a meaningful risk of irreparable harm. The Board considers a variety of factors, including whether a sufficient sense of urgency exists to justify the stay. The Employer must demonstrate that the labour relations harm in not ordering a stay outweighs the labour relations harm in ordering it.*

[63] Similarly, the Court of Queen's Bench in *KDM Constructors LP v International Union of Operating Engineers*, 2021 SKQB 302 (CanLII) confirmed the need for "clear evidence to establish irreparable harm", citing numerous authorities for that principle. Among these authorities are two cases from the Federal Court of Appeal:

> *[32] I also note a decision of the Federal Court of Appeal in A. Lassonde Inc. c Island Oasis Canada Inc., 2000 CanLII 29582 (CAF), [2001] 2 FC 568 (FCA) at 578-79, where a unanimous court confirmed the need to provide an evidentiary basis to establish irreparable harm. While these comments are in relation to a dispute over the use of a trademark, they are relevant to the discretionary nature of an interlocutory injunction and the position that a stay should not be granted without an evidentiary basis:*
>
> > *… [W]e should not lose sight of the remedy sought and the purpose which the procedure in question seeks to achieve. The appellant applied for an interlocutory injunction, that is an injunction that would prevent it from suffering irreparable harm while it is awaiting a final ruling on its rights. That is the very essence of the action taken and the remedy desired. In such circumstances, assuming that irreparable*

> *harm exists by exempting the party seeking the remedy from presenting evidence of it would be for all practical purposes to conclude that the remedy is appropriate and must be granted the moment a party alleging an infringement of its rights asks for it. This conflicts with the very nature and purpose of the interlocutory injunction, which is a discretionary and equitable remedy, the obtaining of which depends on the likelihood of irreparable harm, which it would be unfair to assume in view of the drastic consequences, namely the prohibition of any commercial activity, that will result for the party against which the injunction is issued. [TRANSLATION]*

[33] In Universal Aide Society v Canada (Minister of National Revenue – M.N.R.), 2009 FCA 107, [2009] 4 CTC 209, a unanimous Federal Court of Appeal provided the following commentary on establishing irreparable harm, albeit in a decision to revoke the registration of a charity:

[16] The second element of the test was described by Sopinka and Cory JJ. in RJR-MacDonald, at page 341, as follows:

> *At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application. "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.*

[17] We are not persuaded that the applicant has met this element of the test. The applicant has failed to provide any evidence to demonstrate that it will suffer irreparable harm if the revocation of its status as a registered charity is allowed to proceed. While the applicant's memorandum of fact and law correctly asserts that reputational harm is an example of irreparable harm, the applicant has not provided any evidence of any actual harm, reputational or otherwise, that it will suffer if the requested order is not granted. …
…

[64] To be sure, the Board in *Andritz* observed that the record of witness evidence from an underlying decision may be a suitable substitute "where the evidence being relied upon has been stated with reasonable particularity". Clearly, if affidavit evidence is to be accepted for purposes of determining whether to make an interim order, *viva voce* evidence is more than sufficiently reliable for that purpose.

[65] However, the evidence being relied upon in the current case has not been stated with reasonable particularity. What the Union has put before the Board is not a transcript or other record but a summary of testimony given by a witness during the hearing in LRB File No. 127—21 in March, 2022. Not only is the summary itself hearsay, it is unsworn hearsay contained in the brief filed by the Union's counsel on the Union's behalf.

[66] Perhaps more importantly, the parties in LRB File No. 127-21 are not the same parties as those before the Board in the current matter. For the Board to be able to grant interim relief, there must be a pending proceeding before the Board. This is confirmed by the Act and the Regulations.

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. The implication of the phrase "pending the making of a final order or decision" is that the interim order or decision made relates to the same parties as those for whom the final order or decision is expected to be made. Along similar lines, Form 12 asks the applicant to indicate in which proceedings "pending before the board" the applicant is seeking interim relief.

[67] The Board has serious concerns with the fairness of proceeding in the manner requested by the Union. The Union is asking the Board to make an interim order against an Employer due to testimony that allegedly put the Employer's actions in issue. This testimony was given in a hearing in which the Employer was not a party. Having not been a party, the Employer did not have an opportunity to question or refute the testimony. It would be unfair for the Board to rely on that testimony, and even more unfair to rely on a summary of that testimony, to grant an order that could have the effect of abridging the Employer's rights under the Act.

[68] The Board asked counsel for the Union whether he could provide any cases in which an interim order was issued in relation to parties who were different than those in the main application. He was unable to provide any such case. He relied, however, on the phrasing in the cases that suggests that if there is a "connection" between the outstanding allegations and the last offer vote, the Board should stay the tabulation of the vote pending the outcome of the outstanding proceedings: See, *Horizon*, at paragraph 20; *Open Learning Agency v Faculty Association of the Open Learning Agency*, 2002 CanLII 52973 (BC LRB) [*Open Learning*], at paragraph 11.

[69] A review of these cases reveals that in each case the employer, who had filed the application for a last offer vote, had been accused, in a related proceeding, by the union or unions of an unfair labour practice. The word "connection" was used in the general sense, based on the facts that were before the boards in those cases. The Union's argument that the word "connection" suggests that this Board has authority to invoke legal consequences against a party due to another party's actions in a related case overlooks this context.

[70] The Board asked counsel for the Union why, if the Union were concerned about the tabulation proceeding, it did not file an unfair labour practice application against the Employer. The response was two-fold. First, the Union had not known that the Employer was as deeply involved in the alleged interference with the bargaining committee until the Union representatives heard the testimony presented at the hearing of LRB File No. 127-21. Second, the decision in that

matter had not yet been issued and therefore the Union had not decided on its next steps. These responses are not satisfactory. The Union has not provided any accounting for the time that elapsed between the hearing in LRB File No. 127-21 and the hearing in the current matter, a period of approximately three weeks.

[71] Nor are these explanations consistent with the timing of the relevant events. The Union filed its Reply in the current matter on January 21, 2022. It explains its current approach by suggesting that it received the relevant information implicating the Employer, and therefore supporting the allegations it makes in the Reply, only after it filed the Reply, in March 2022.

[72] There is also a lack of clarity and finality to the Union's requested remedy, being a stay of the tabulation pending the issuance of the decision in LRB File No. 127-21. The Board asked counsel about the apparent lack of finality in the Union's request for relief. Counsel acknowledged the concern and suggested that the Board stay the tabulation pending the issuance of the decision, with the addition of another two weeks to provide the Union time to decide on its next steps. The Board does not grant interim orders pending a decision being made by a party, particularly in the absence of an existing, underlying application between the parties.

[73] In conclusion, the Board does not have discretion to stay the tabulation for the reasons presented by the Union in this case. Nor has the Union provided the Board with the requisite foundation, such as an underlying application and reliable evidence of irreparable harm, to ground a request for an interim order.

[74] For these reasons, the Board will order that the tabulation proceed. The request for an interim order is dismissed.

[75] The Board extends its gratitude to the parties for their submissions relating to this matter, all of which were reviewed and considered.

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

DATED at Regina, Saskatchewan, this 19th day of **April, 2022.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson