The Labour Relations Board
Saskatchewan

SERVICE EMPLOYEES INTERNATIONAL UNION (WEST), Applicant v. SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS, CYPRESS REGIONAL HEALTH AUTHORITY, FIVE HILLS REGIONAL HEALTH AUTHORITY, HEARTLAND REGIONAL HEALTH AUTHORITY and SASKATOON REGIONAL HEALTH AUTHORITY, Respondents

- and -

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Applicant v. GOVERNMENT OF SASKATCHEWAN (MINISTRY OF HEALTH), SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS, KEEWATIN YATTHE REGIONAL HEALTH AUTHORITY, MAMAWEETAN CHURCHILL RIVER REGIONAL AUTHORITY and KELSEY TRAIL REGIONAL HEALTH AUTHORITY, Respondents

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS, REGINA QU'APPELLE REGIONAL HEALTH AUTHORITY, SUN COUNTRY REGIONAL HEALTH AUTHORITY, PRAIRIE NORTH REGIONAL HEALTH AUTHORITY, SUNRISE REGIONAL HEALTH AUTHORITY and PRINCE ALBERT PARKLAND REGIONAL HEALTH AUTHORITY, Respondents

LRB File Nos. 092-10, 099-10 & 105-10; April 4, 2012
Vice-Chairperson, Steven Schiefner; Members: Mr. Clare Gitzel and Mr. Duane Siemens

For the Applicant, SIEU-West:	Mr. Drew S. Plaxton.
For the Applicant, SGEU:	Ms. Juliana K.J. Saxberg.
For the Applicant, CUPE:	Ms. Crystal L. Norbeck. & Ms. Linda Dennis.
For the Saskatchewan Association of Health Organizations and all Respondent Regional Health Authorities:	Ms. Leah A. Schatz.
For the Government of Saskatchewan:	Mr. Curtis W. Talbot & Ms. Lee Anne Schienbein.

Practice and Procedure – Production of Documents – Unions seek production of documents during hearing – Board reviews procedures and principles applicable to production of documents both before and during hearing – Board notes that production request involved broad spectrum of documents and came late in proceedings - Board applies the "*Air Canada*" factors for determining whether or not production request is reasonable and appropriate under the circumstances – Board applies the "Wigmore" test for determining whether or not responsive documents are protected on the basis of privilege – Board orders production of some documents requested by applicant trade unions.

The Trade Union Act, s. 18(b).

REASONS FOR DECISION – PRODUCTION OF DOCUMENTS

Background:

[1] **Steven D. Schiefner, Vice-Chairperson**: These Reasons for Decision are confined to the issues of whether or not the Respondent, Saskatchewan Association of Health Organizations ("SAHO"), should be ordered to produce certain documents and things in its possession and/or whether or not any of the subject documents (or things) are protected by one or more forms of privilege. The request for the production of the subject documents was made jointly by the applicant trade unions following the close of the evidentiary portion of their respective cases and in the midst of evidence being called by SAHO[1]. SAHO resisted production of some documents on the basis of labour relations privilege and/or lack of relevancy. On the other hand, SAHO did agree to produce some of the subject documents but only through the witnesses it intended to call when they were on the stand. Further complicating the matters, the Government of Saskatchewan argued that some of the documents may be subject to, or protected by, a Crown privilege. Ms. Schienbein, counsel for the Government, noted that the documents that were the subject matter of the production request were not in possession of the Government and, thus, it was unable to assert its privilege until the subject documents were identified and produced to it by SAHO before being produced to the applicant unions.

[2] As indicated, the request for the production of the subject documents occurred in the midst of hearing evidence in proceedings before the Board. By agreement of the parties, the proceedings were adjourned to allow the parties an opportunity to prepare their respective submissions. The unions' application for the production of documents was heard by the Saskatchewan Labour Relations Board (the "Board") on March 8, 2012 in Regina, Saskatchewan.

[3] Certain background information is relevant and necessary to understand our determinations regarding the production of the requested documents.

Background:

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[1] Although the parties had discussed voluntary production of certain categories of documents, no formal request for an Order from the Board occurred until after the close of the evidentiary portion of the applicant trade unions' respective cases.

[4] The three (3) applicant trade unions represent health care providers working in various regional health authorities in this Province. All three (3) of the applicant trade unions have filed applications with this Board alleging that various unfair labour practices occurred during the collective bargaining that resulted in their most recent collective agreements.

[5] For example, the Service Employees International Union (West) ("SEIU-West") filed its application[2] with the Board on July 23, 2010. In its application, SEIU-West alleged that SAHO and certain regional health authorities (the regional health authorities with whom SEIU-West holds certification rights) had committed various unfair labour practices during collective bargaining that was then occurring between the parties. On February 9, 2011 (before the hearing into its application had commenced), SEIU-West filed an amended application with the Board indicating that collective bargaining had concluded and that the parties had agreed to the terms of a tentative new collective agreement[3].

[6] The Saskatchewan Government and General Employees' Union (SGEU) filed its application[4] with the Board on July 29, 2010. In its amended application[5], SGEU alleged that SAHO, together with certain regional health authorities (the regional health authorities with whom SGEU holds certification rights), had committed various unfair labour practices during the collective bargaining that occurred in negotiating the most recent collective agreement between the parties[6]. In its application (as amended), SGEU also named the Government of Saskatchewan (as represented by the Ministry of Health) as a respondent to its allegations. In its application, SGEU alleged that the Government of Saskatchewan aided and abetted and/or procured and counseled the commission of the unfair labour practices committed by SAHO in violation of s. 12 of the *Act*. In addition, SGEU also alleged that the Government of Saskatchewan itself committed certain unfair labour practices during the period of time and related to the collective bargaining that was then occurring between SGEU and SAHO (and affected regional health authorities).

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2 See: LRB File No. 092-10.
3 For the Period: April 1, 2008 to March 31, 2012.
4 See: LRB File No. 099-10.
5 As did the other applicants, SGEU filed an amended application with the Board on March 23, 2011 following the conclusion of a collective agreement between the parties.
6 For the Period: April 1, 2008 to March 31, 2012.

[7] Finally, the Canadian Union of Public Employees ("CUPE") filed its application[7] with the Board on August 5, 2010. In its amended application[8], CUPE alleged that SAHO, together with certain regional health authorities, had committed various unfair labour practices during the collective bargaining that occurred in negotiating the most recent collective agreement between the parties[9].

[8] While the three (3) applications were not identical, they bore sufficient similarities that on February 16, 2011 the Board agreed that all proceedings ought to be joined. The collective allegations against the Respondents arising out of these three (3) applications are numerous, broad ranging and overlapping. However, in the opinion of the Board, the real issues in dispute in these proceedings can be summarized as follows:

Allegations involving the Government of Saskatchewan (allegations by SGEU only):

- Whether or not the Government of Saskatchewan violated s. 12 of the *Act* by causing, directing or counseling SAHO (and the named regional health authorities) to engage in bad faith bargaining, in surface bargaining and/or in receding horizon bargaining or by aiding or abetting SAHO in any other violation of the *Act*.
- Whether or not the Government of Saskatchewan improperly interfered with or controlled collective bargaining through the imposition of its financial or other mandate, through the participation of one or more representatives of the Government at the bargaining table, and through writing directly to employees of the affected bargaining units and trying to convince said employees to accept SAHO's bargaining proposals and/or encouraging these employees to demand a ratification vote on one or more of SAHO's offers.
- Whether or not the Government of Saskatchewan improperly communicated with employees in a threatening or coercive manner with respect to the exercise of their rights under the *Act* contrary to s. 11(1)(a)

Collective allegations against SAHO and the named regional health authorities:

- Whether or not SAHO (and thus the named regional health authorities) violated s. 11(1)(c) by refusing or failing to bargain in good faith toward the conclusion of a collective agreement by one or more of the following means:

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7 See: LRB File No. 105-10.

8 As did the other applicants, CUPE filed an amended application with the Board on April 29, 2011 following the conclusion of a collective agreement between the parties.

9 For the Period: April 1, 2008 to March 31, 2012.

- By refusing to provide SEIU-West, SGEU and CUPE with the financial information they required (i.e.: specifically information with respect to SAHO's financial mandate for collective bargaining) when requested by representatives for the respective unions;
- By engaging in surface bargaining by proposing concessionary items during collective bargaining that SAHO knew (or ought to have known) would be unacceptable to SEIU-West, SGEU and CUPE, or any of them;
- By refusing to honour representations and agreements made at the bargaining table, by threatening to pull settled proposals and matters off the table if other terms were not agreed upon, and by imposing unreasonable deadlines on the acceptance of bargaining proposal by SAHO.
- By engaging in receding horizon bargaining by reducing its offers and/or proposals on the table;
- By attempting to unilaterally control and changing the bargaining agenda and procedures and/or by failing to follow through with the bargaining procedures that SAHO proposed.

o Whether or not SAHO (and the named regional health authorities) violated s. 11(1)(b) of the *Act* by interfering in the administration of the SEIU-West, SGEU and CUPE, or any of them, by one or more of the following means:

- By attempting to bargain directly with affected employees respecting terms and conditions of their employment;
- By trying to convince employees to accept SAHO's bargaining proposals and/or by encouraging members of the bargaining unit to demand a ratification vote on SAHO's final offer;

o Whether or not SAHO (and the named regional health authorities) violated s. 11(1)(a) of the *Act* by improperly communicating with affected employees by one or more of the following means:

- By communicating with affected employees in a threatening or coercive manner with respect to the exercise of their rights under the *Act*;
- By communicating with affected employees in a misleading manner.

[9] The Board began hearing evidence in the within applications on May 2, 2011. SEIU-West presented its evidence first, calling members of its bargaining team in the last round of collective bargaining; namely, Mr. William Robert (Bob) Laurie, the union's Director of Collective Bargaining and Enforcement, and Ms. Shawna Colpitts, the union's Director of Political Action and Education. SEIU-West also called other members of its bargaining unit,

including Mr. Mike Murphy and Ms. Tracy Lynn Fradett. Finally, SEIU-West called Ms. Barbara Cape, the President of SEIU-West. SEIU-West closed the evidentiary portion of its case on May 25, 2011, following five (5) days of testimony, including cross-examination of its witnesses. In presenting its evidence, SEIU-West tendered thirteen (13) exhibits in these proceedings, including three (3) cerlox books of documents. Collectively, the documents tendered by SEIU-West involved over three (3) inches of stacked textural material. The majority of SEIU-West's documents were presented to the Respondents and to the Board at the commencement of evidence by SEIU-West.

[10] SGEU began presenting its evidence on May 25, 2011 by calling members of its bargaining team in the last round, including Mr. Daniel Edward (Danny) Hinds, Mr. Bart Beckman, and Ms. Teresa (Tracy) Sauer. SGEU closed the evidentiary portion of its case on July 19, 2011, which was day nine (9) of these proceedings. In presenting its evidence, SGEU tendered nine (9) exhibits[10], including two (2) binders full of documents. Collectively, the documents tendered by SGEU involved approximately five (5) inches of stacked material. The majority of SGEU's documents were presented to the Respondents and to the Board at the commencement of evidence by SGEU.

[11] Finally, CUPE began presenting its evidence on October 24, 2011, calling the members of its bargaining team in the last round, including Ms. Suzanne Posyniak, a CUPE National Representative, Mr. Gordon Campbell, President of CUPE's Health Care Council, Ms. Sandra Seitz, Mr. Larry Staff and Mr. Darcy Bucsis. CUPE closed the evidentiary portion of its case on December 13, 2011, which was day fifteen (15) of the hearing. In presenting its evidence, CUPE tendered eleven (11) exhibits, including two (2) large binders full of documents and a cerlox book of documents. Collectively, the documents tendered by CUPE involved over six (6) inches of stacked material. The majority of CUPE's documents were presented to the Respondents and the Board at the commencement of evidence by CUPE.

[12] On December 13, 2011, concomitant with the close of evidence on behalf of the Applicant unions, Mr. Plaxton advised that Board that the applicant unions had recently asked SAHO to produce certain documents and indicated to the Board that these documents fell into three (3) categories of documents, including: the notes made by members of SAHO's bargaining team; documents justifying certain impugned economic statements made by SAHO in its

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[10] Including Exhibit A-1, the Affidavit of Shayne Kreitzer.

communications during the last round of collective bargaining; and documents supporting opinions stated by SAHO in its communications during the last round of collective bargaining. Prior to this date, there were no indications to the Board that the pre-hearing production of documents was either desired or was an issue in these proceedings.

[13] On December 13, 2011, SAHO began presenting evidence in defense of the claims made against it. The first witness called by SAHO was Mr. Jordan Jakubowski, a member of SAHO's bargaining team during the last round of collective bargaining. SAHO's direct examination of Mr. Jakuboski concluded on December 14, 2011; at which time, Mr. Plaxton indicated to the Board that the Applicant Unions were seeking production of certain documents prior to their cross-examination of Mr. Jakubowski. In this request, the applicant unions were seeking production of now five (5) categories of documents that were essentially as follows:

- Any notes or memoranda used by Mr. Jakubowski to refresh his memory prior to his testimony before the Board.
- Any notes or prepared statements used by Mr. Jakuboski to make statements on behalf of SAHO on specific dates during the last round of collective bargaining (i.e.: dates where specific events occurred at the bargaining table).
- Any notes or records prepared by any member of SAHO's bargaining team during specific bargaining dates (i.e.: related to specific events that occurred at the bargaining table).
- Bargaining bulletins or other documents distributed by SAHO to regional health authorities advising of the status or progress at the collective bargaining table.
- Any documents or research in the possession of SAHO that supported certain graphs that had been utilized by SAHO in its communications during the last round of collective bargaining.

[14] The hearing continued on February 6, 2012 at which time SAHO voluntarily produced a cerlox book of documents responsive (or at least partially responsive) to the documents requested by the three (3) unions. However, SAHO had redacted portions of certain notes prepared by Mr. Jakubowski. At the request of the applicant Unions, the Board agreed to

review the redactions that had been made of Mr. Jakubowski's notes. Having reviewed the redacted notes and having had an opportunity to compare the redacted notes with the originals, the Board orally ruled on February 10, 2012 that it was satisfied that the redactions were consistently done and appropriate. The Board indicated to the parties that it was satisfied that the redacted material did not appear to involve notes made by Mr. Jakubowski at the bargaining table and/or did not appear to contain a record of events that occurred at the bargaining table. In response to a question from Ms. Saxberg, counsel for SGEU, as to why the redacted material was not produced even if such were the case, the Board indicated to the parties two (2) reasons why it believed the redacted material need not be produced; firstly, the Board indicated that it was not satisfied that the redacted material was relevant; and secondly, the Board indicated that it was satisfied that the redacted material ought to be protected by labour relations privilege.

[15] Cross-examination of Mr. Jakubowski commenced on February 9, 2012 and concluded on February 10, 2012, being day eighteen (18) of the hearing.

[16] The next scheduled hearing date was February 27, 2012, with two (2) consecutive weeks of hearing dates having been set aside to hear SAHO's evidence. Prior to this date, the issue of the production of documents again arose between the parties. The applicant unions collectively requested voluntary production of documents from SAHO involving twenty-eight (28) categories of documents. In response, SAHO declined to voluntarily produce the majority of requested documents but did undertake to call particular witnesses and to produce, through those witnesses, certain documents partially responsive to the production request of the unions.

[17] At the commencement of the hearing on February 27, 2012, the issue of production of documents by SAHO came to the forefront. Ms. Dennis, counsel for CUPE, sought an Order from the Board directing SAHO to production documents responsive to the twenty-eight (28) categories of documents sought by the applicant unions. The Board indicated at that time that it required submissions from the parties on three (3) issues; (1) whether or not the requested documents were relevant to the within proceedings; (2) whether or not the requested documents were subject to any form of privilege; and (3) whether or not any "equitable" or other considers were relevant to the requested production in light of the timing of the request (i.e.: the production request having occurred after the hearing had already commenced and after the applicant unions' witnesses had already testified). After a brief adjournment, all parties indicated a desire to make written submissions to the Board on these issues. To which end, all parties agreed that

the evidentiary portion of the hearing would be adjourned until May 14, 2012; at which time, SAHO would resume presenting its evidence in defense of the claims against it (following a ruling by the Board on the unions' application for the production of documents).

[18] The production request from the applicant unions only involved documents (or things) in the possession of SAHO. The categories of documents (or things) sought by the applicant unions are as follows:

1. *Minutes from the CUPE side table negotiations as follows:*
    - a) *Minutes from the bargaining meeting of September 30, 2008 at the CUPE table taken by any person on the SAHO bargaining team, and speaking notes prepared in anticipation of the same.*
    - b) *Minutes from the bargaining meeting of October 30, 2008 at the CUPE table taken by any person on the SAHO bargaining team, and speaking notes prepared in anticipation of the same.*
    - c) *Minutes from the bargaining meeting of November 18 and 19, 2008 at the CUPE table taken by any person on the SAHO bargaining team and speaking notes prepared in anticipation of the same.*
    - d) *Minutes from the bargaining meeting of December 8, 2008 at the CUPE table taken by any person on the SAHO bargaining team and speaking notes prepared in anticipation of the same.*
    - e) *Minutes from the bargaining meeting of January 20, 2009 at the CUPE table taken by any person on the SAHO bargaining team and speaking notes prepared in anticipation of the same.*
    - f) *Minutes from the bargaining meeting of April 28, 2009 at the CUPE table taken by any person on the SAHO bargaining team and speaking notes prepared in anticipation of the same.*
    - g) *Minutes from the bargaining meeting of May 22, 2009 at the CUPE table taken by any person on the SAHO bargaining team and speaking notes prepared in anticipation of the same.*
    - h) *Minutes from the bargaining meetings of June 10, 15, 16, 2009 at the CUPE table taken by any person on the SAHO bargaining team and speaking notes prepared in anticipation of the same.*
    - i) *Minutes from the bargaining meetings of July 22, 23, 24, 2009 at the CUPE table taken by any person on the SAHO bargaining team and speaking notes prepared in anticipation of the same.*

2. *Minutes from the bargaining meetings between SAHO and SGEU taken by any person on the SAHO bargaining team, and speaking notes prepared in anticipation of the same.*
3. *Minutes from the bargaining meetings between SAHO and SEIU-West taken by any person on the SAHO bargaining team, and speaking notes prepared in anticipation of the same*
4. *Minutes of bargaining discussions of the four efficiencies, three pots of funds, the disclosure of the monetary package and/or movement to the coalition table.*
5. *Any document used by any SAHO witness to refresh their memory.*
6. *Notes taken by all SAHO witnesses of collective bargaining at the common table and meetings which were intended to produce a collective agreement.*
7. *Bargaining bulletins from SAHO to the Regional Health Authorities or person reporting to the same.*
8. *Any and all directions and/or input, meeting minutes or notes of conversations in which directions and/or input were conveyed from the HLRC, the Ministry of Health, or other entity to SAHO proposing concessions/efficiencies..*
9. *Any SAHO document, meeting minutes or notes of conversations in which there was discussion of the likelihood of achieving any of the concessions/efficiencies.*
10. *Directions to, meeting minutes or notes of conversations in which there was a direction to J. Jakubowski, A. Parenteau or G. Wall regarding the matters to be included in individual union proposal packages at the commencement of bargaining or at any time thereafter.*
11. *Directions to, meeting minutes or notes of conversations in which there was a direction to J. Jakubowski, A. Parenteau or G. Wall regarding the matters to be withdrawn in individual union proposal packages at the commencement of bargaining or at any time thereafter.*
12. *Direction from the HLRC, meeting minutes or notes of conversations in which direction was received from the HLRC regarding matters to be included in individual union proposal packages at the commencement of bargaining or at any time thereafter.*
13. *Directions from the HLRC, meeting minutes and notes of conversations in which direction was received from the HLRC regarding matters to be withdrawn from individual union proposal packages at the commencement of bargaining or at any time thereafter.*
14. *Calculations done in preparation of the graph, the western Canadian average (including data to support the contention that the BC health sector negotiations*

had resulted in 0% improvements) and the $80 million cost estimates and the $45 million ongoing maintenance cost estimates.

15. *Calculations done in preparation of the online or other retro calculator, and the retro calculations referred in advertising referencing retro pay losses.*
16. *Advertising budget figures both estimated and actual, including any cost share agreements with Regional Health Authorities and/or the HLRC.*
17. *Advertising budget figures, both estimated and actual, including any cost share agreements with Regional Health Authorities and/or the HLRC for the 2004 round of collective bargaining.*
18. *Documents noting HLRC or SAHO approval of advertising content, or meeting minutes or notes of conversations in which such approval was given.*
19. *Drafts of advertising content, including those which did not receive approval.*
20. *Any document, in which the content of advertising is discussed, or meeting minutes or notes of conversations in which that is discussed.*
21. *All documents relating to the conduct of the focus group testing.*
22. *All documents discussing, meeting minutes or notes of conversation in which there is a discussion of the timing of news releases, or the release of advertising.*
23. *All documents, meeting minutes, or notes of conversations in which the media relations strategy is discussed.*
24. *Briefing notes, memoranda or notes of conversations in which information is delivered to the Ministry of Health regarding collective bargaining.*
25. *Documents and other communications between SAHO, the Regional Health Authorities, the HLRC, the Ministry of Health or any other person whom from time to time SAHO referred to as their principals.*
26. *Documents and other communications between J. Jakubowski, A. Parenteau or G. Wall to SAHO reporting on collective bargaining.*
27. *Any documents describing meeting minutes or notes of conversations in which there is any description of the costing of the CUPE, SEIU-West and/or SGEU collective agreements.*
28. *Documents discussing meeting minutes or notes of conversations in which there was a discussion of the 274 day "loss of seniority" contract language.*

[19] The parties appeared before the Board on March 8, 2012, at which time the Board heard submissions from the parties on the production request made by the applicant unions. All parties provided written submissions to the Board, which we have read and for which we are thankful.

Argument of the Parties:

[20] SEIU-West argued that s. 18(b) was specifically added to the *Act* in 2005 to provide express authority to the Board to order pre-hearing disclosure of documents and things. Mr. Plaxton argued that that Board's authority in this regard is now very broad. For example, counsel argued that the reference to "things" in s. 18(b) was included to allow the Board to not only order the production of documents but to also order that documents be "created" responsive to particular requests. In other words, s. 18(b) gives the Board the authority to order the production of non-existent things.

[21] SEIU-West relied upon the decision of the Canadian Industrial Relations Board in *Air Line Pilots Association v. Air Canada, et. al.* [1999] CIRB No. 3, CIRB File Nos. 17342, 15352, 17343, 17344 and 17375, as defining the principles and approach that ought to be adopted by this Board in considering the unions' request for the production of documents in these proceedings. Mr. Plaxton argued that an application of the principles identified in the *Air Canada* case favoured the production of all of the requested documents.

[22] While Mr. Plaxton acknowledged that this Board has considerable discretion concerning both the production of documents and the evidence it will admit (or not admit), counsel argued that the Board must ensure that the applicant unions are not denied a fair hearing be restricting their access to any documents that may be relevant to the matters before this Board. Furthermore, Mr. Plaxton argued that this Board's discretion concerning the production of documents (and the admission of evidence) must be based upon a principled approached wherein the test for relevancy is broadly accepted and where any claims of privilege of any kind (that would restrict production of potentially relevant documents) are narrowly and cautiously applied.

[23] With respect to SAHO's claims that certain documents in its possession ought not be produced because of privilege, SEIU-West argued that this Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Canada Ltd.*, [1993] 3rd Qtr Sask. Labour Rep 114, LRB File No. 009-93 confirmed that a "labour relations privilege" is not a "class" privilege[11]; but rather it is a limited privilege that must be examined on a "case by case" basis. SEIU-West argued that this Board confirmed in the *WaterGroup* case that the

[11] Such as solicitor/client privilege.

appropriate test for the application of any claim of a labour relations privilege over documents is the "Wigmore" test[12] adopted by the Supreme Court of Canada in *Slavutch v. Baker*, [1976] 1 S.C.R. 254, [1975] 4 W.W.R. 620, 55 D.L.R. (3rd) 224, and confirmed in *R. v. Gruenke*, [1991] 3 S.C.R. 263. SEIU-West also argued that the onus is on the party claiming a document is privileged to demonstrate that all four (4) criteria in the Wigmore test are satisfied.

[24] SEIU-West took the position that, even if some of the desired documents are privileged, because the nature of the allegations in this proceedings extend to the strategies employed by SAHO at the bargaining table, it is necessary for the Board to pierce any privilege that may apply because the probabitive value of the potential evidence would outweigh any prejudice that may occur as a result of its disclose. SEIU-West also cautioned this Board that claims of privilege must not be used to prevent the discovery of wrong-doing on the part of the Respondents; particularly, wrong-doing of the kind claimed by the applicant unions in these proceedings.

[25] Finally, SEIU-West argued that, if any sphere of confidentiality exists between negotiators and their principals, parties such as the Government of Saskatchewan and the Health Labour Relations Council should not be protected by this privilege. In SEIU-West's opinion, the Government of Saskatchewan and the Health Labour Relations Council are third parties to its collective bargaining relations with SAHO (and the various regional health authorities) and thus no privilege should extend to any communications with them. If anything, SEIU-West argued that SAHO waived any privilege that it may have enjoyed in the communications with its negotiators by sharing this information with third-parties, such as the Government of Saskatchewan and members of the Health Labour Relations Council.

[26] CUPE relied primarily upon jurisprudence from labour relations arbitration[13] to argue that the overriding consideration of this Board ought to be ensuring that a fair hearing occurs and that doing so requires ensuring the applicant unions have access to any documents that may be relevant to the matters in dispute in these proceedings regardless of any privilege that may be asserted; regardless of the volume of responsive documents involved; and

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12 Referring to the principles for determining whether or not communications ought to be privileged as identified by John Henry Wigmore in Evidence in Trials at Common Law, Boston: Little, Brown & Co. 1961

13 Including *Government Employees Relations Bureau v. British Columbia Government Employees' Union* (Barbara Parsons, Grievor) (unreported), dated September 13, 1982; *Pacific Press Ltd. v. Vancouver New Westminster Newspaper Guild, Local 115*, (1982) 7 L.A.C. (3rd) 316; and *Becker Milk Co. Ltd. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1996) 53 L.A.C. (4th) 420.

regardless of the late timing of the request for production of these documents. CUPE argued a more modern approach is that claims of privilege and concerns about speed and economy of the Board's proceedings are subordinate to the desire for a fair and full hearing. CUPE argued that the more modern approach is to order the production of any potentially probative material and to deal with confidentiality or claims of privilege by placing limitations on the uses to which this material can be put and/or the dissemination of that information outside of the Board's procedures.

[27] SGEU echoed the arguments of CUPE that a more modern approach to claims of privilege would see production of the desired documents by SAHO, with conditions placed on the uses that can be made of these documents. SGEU relied upon the decision of the Supreme Court of Canada in *A.M. v. Ryan*, [1997] 1 S.C.R. 157, 143 D.L.R. (4th) 1, [1997] 4 W.W.R. 1, (1997) CanLII 403, as establishing a procedure that could be utilized by this Board to both permit access to sensitive or privileged documents. SGEU noted that "*Ryan* type orders had been used by adjudicators in labour relations arbitration. See: *British Columbia v. British Columbia Government Service Employees' Union*, [2005] 4. W.W.R. 634, 248 D.L.R. (4th) 462, (2005) BCCA 14 (CanLII).

[28] SGEU also argued that allegations of the nature asserted by the applicant trade unions, including bad faith in collective bargaining by SAHO and that the Government of Saskatchewan aided and abetted and/or procured and counseled the commission of one or more violations of the *Act*, were very serious and that evidence involving allegations of this nature ought to remove any foundation for any claim of privilege. In this regard, SGEU relied upon the decision of the Canadian Public Service Labour Relations Board in *Mohan v. Canada Customs and Revenue Agency*, [2005] C.P.S.L.R.B. No. 174, 2005 PSLRB 172, wherein Adjudicator MacKenzie ruled that privilege attaching to communications during grievance procedures is "*not absolute*" and that "*bad faith in representations at a grievance hearing would … remove the privilege attached to the communications*".

[29] Finally, all three (3) applicant unions disputed that they were embarking upon a "fishing expedition" with their production request. Firstly, they argued that the documents they sought were particularized to the greatest extent possible given that they did not have prior access to, or specific knowledge of, the documents they seek. The applicant unions argued that there is a clear nexus between the documents they now seek and the matters in dispute

between the parties. Secondly, they argued that "fishing" is permissible both for purposes of discovering evidence that may support their respective cases and to challenge or attack the defenses of the Respondents. To which end, counsel for CUPE quoted from the decision of the British Columbia Court of Appeal in *Cominco Ltd. v. Westinghouse Canada Limited*, (1979) 11 B.C.L.R. 142, wherein the court made the following comments on the subject of "fishing" as it relates to the production of documents:

> *Counsel said that one cannot embark on a fishing expedition. I find little help in that statement. I take it that a fishing expedition describes an examination for discovery that has gone beyond reasonable limits into areas that are not and cannot be relevant. In those waters one may not fish. In other waters one may. That one fishes is not decisive, it is where the fishing takes place that matters.*

[30] Simply put, the applicant unions argued that they need production of the desired documents to enable proper cross-examination of SAHO's witnesses and, without this information, they will be deprived of a fair hearing.

[31] In opposing the requested production, SAHO took the position that much of this information sought by the applicant unions was irrelevant to the matters in dispute between the parties and/or of limited probative value to this Board. Furthermore, SAHO argued that most of the documents sought by the applicant unions involved confidential bargaining information, such as internal communications produced by those charged with formulating and communicating SAHO's bargaining position and external communications. To which end, SAHO argued that the prejudice that would result from disclosure of much of the desired documents would far outweigh the probative value of the evidence that may be contained therein.

[32] SAHO relied upon this Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Canada Ltd*. [1993] 3rd Quarter Sask. Labour Rep. 114, LRB File No. 099-93, in asserting that much of the requested information was privilege based on the sensitive nature of the documents within the collective bargaining process. SAHO argued that an application of the "Wigmore" test would indicate that the injury associated with producing the desired documents would outstrip any probative value of the information contained therein. In SAHO's opinion, the best evidence in these proceedings will come from the witnesses that SAHO has undertaken to produce. To which end, SAHO argued that applicant trade unions' right to a fair hearing is unaffected because they will have the full opportunity to cross-examine SAHO's witnesses and to view SAHO's documents at that time.

[33] The Government of Saskatchewan took the position that some of the desired documents may be of a nature that the Crown would be entitled to claim immunity or privilege. However, the Government was not in possession of the documents sought by the applicant unions. As such, the Counsel asked that a procedure be incorporated into any production order(s) of this Board that would allow the Crown to inspect any documents produced by SAHO prior to the documents being provided to the applicant unions so that the Government of Saskatchewan would have an opportunity to assert any claims of privilege that were deemed appropriate.

Relevant Statutory Provisions:

[34] The relevant provisions of *The Trade Union Act* are as follows:

> ***18****. The board has, for any matter before it, the power:*
>
> *(b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing;*

Analysis:

[35] Until the *Act* was amended in 2005, this Board relied upon the general powers of a commissioner under *The Public Inquiries Act*, R.S.S 1978, c. P-38, to compel the attendance of witnesses to give evidence and production documents and things in proceedings before the Board. In 2005, the *Act* was amended[14] to give express authority to the Board to order production of documents (and things) and, in doing so, clarified that the Board could do so either prior to or during a hearing. Arguably, this amendment to the Act was intended to cure the limitations in the Board's authority identified by the court in *Pyramid Electric Corporation v. International Brotherhood of Electrical Workers, Local 529*, 1999 SKQB 114 (CanLII), 185 Sask. R. 82 (Q.B.) regarding pre-hearing production of documents.

[36] While the Board does not have a great deal of jurisprudence on the subject of production of documents in proceedings before the Board, certain practices and procedures have been established and/or evolved over the years. It may be helpful to start with a general overview of these practices and procedures.

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[14] By *The Trade Union Amendment Act, 2005*, S.S. 2005, ch. 30, s. 5, which came into force on May 27, 2005.

The Board's Practices and Procedures Regarding Production of Documents:

[37] Generally speaking, orders from this Board regarding the production of documents can occur in a number of fashions:

1. **Pre-hearing production**: A party to proceedings before the Board can now seek production of documents prior to the commencement of the hearing. Such applications are typically heard by the Board's Executive Officer. The Board's Executive Officer has delegated authority to grant Orders of production and typically does so based on broad and general principles of relevancy. Generally speaking, an applicant seeking pre-hearing production of documents must merely satisfy the Board's Executive Officer that the desired documents are arguably relevant and/or that there is some probative nexus between the documents or information sought and the matters in issue arising out of proceedings before the Board. However, the greater the number of documents sought, the stronger the probative nexus expected by the Board's Executive Officer, particularly so if considerable expense, time and effort is required to locate and produce the desired documents. In this regard, it is important to note that labour relations boards were established to provide an alternative to the formalistic procedures of courts of competent jurisdiction. While pre-hearing discovery and production of documents may be the norm in civil litigation, such procedures are not the norm in proceedings before tribunals, such as this Board. To which end, while a certain degree of "fishing" is permissible in a request for pre-hearing production of documents (i.e.: to seek out evidence in support of an allegation under the *Act*), it has not been the practice of this Board to grant broad-spectrum, non-specific or infinite production Orders to in essence, compel the kind of pre-hearing discovery of documents that occurs in civil courts. Similarly, s. 18(b) of the Act (as was the case with its predecessor provision) does not include authority to compel a party to "*create"* documents or things in response to a production request, such as a statement as to documents. See: *Pyramid Electric Corporation v. International Brotherhood of Electrical Workers, Local 529*, 2001 SKQB 216 (CanLII), 208 Sask. R. 118 (Q.B.). Simply put, the Board does not have the authority to invoke,

nor does it desire to replicate[15], the kind of discovery procedures or production of documents obligation commonly seen in a judicial setting.

It should also be noted that in a pre-hearing request for the production of documents, the Board's Executive Officer does not generally concern him/herself with issues of confidentiality or privilege; as the more common practice has been for disputes as the production of documents upon which a privilege is claimed to be resolved by a panel of the Board (either prior to or at the commencement of the hearing). In other words, parties are expected to locate and produce the documents set forth in any production Order of the Board's Executive Officer, save any documents upon which privilege may be claimed. Responsive documents upon which privilege are claimed are delivered to the Board (either the panel seized to hearing the proceedings or another) to determine whether or not production of the disputed documents is appropriate. This practice enables the parties to make representations to the Board on the claims asserted and enables the Board to have the benefit of viewing the disputed documents in rendering its decision. This practice was employed by the parties and the Board in *International Brotherhood of Electrical Workers, Local 529 v. Sun Electric (1975) Ltd., et. al.*, [2002] Sask. L.R.B.R. 362, LRB File No. 216-01, and in subsequent proceedings, [2002] Sask. L.R.B.R. 698, LRB File No. 216-01.

2. ***Subpoena Duces Tecum***: A party to proceedings before the Board may also seek production of documents by means of a *subpoena duces tecum*. The major difference is that with this procedure, the desired documents (or things) are produced at the hearing. A *subpoena duces tecum* is not a means of pre-hearing production of documents, as the compulsion on the subject of the subpoena is merely to bring the responsive documents to the hearing. Subpoenas are issued administratively by members of the Board (typically the Chairperson or Vice-Chairperson) and, generally speaking, issues of relevancy of documents and/or claims of privilege are not assessed at the time of issue as the signator is in no position to assess these issues. Rather, issues related to relevancy or claims of privilege are determined by a panel of the Board either prior to or at the

[15] In our opinion, the timely resolution of outstanding labour relations disputes is of real importance in maintaining an amicable labour-management relationship. Because time is of the essence, our procedures must promote efficiency and speed in the resolution of labour relations disputes.

commencement of the hearing. In this regard, it is important to note that a *subpoena* is not a means to obtain the production of either irrelevant or privileged documents. Any person named therein may apply to the Board to have it vacated and/or modified. While a subpoena may be quashed or modified by the Board in advance of a hearing (for example, if the Board is satisfied the subpoena has been obtained for an improper or coercive purpose or if the evidence sought by the subpoena is clearly irrelevant to the real issues in dispute between the parties), the more common practice is for the witness to attend the hearing with his/her documents and for claims or disputes to be resolved by the Board at that time. The Board's practice regarding the issuance of *subpoenas duces tecum* was acknowledged and accepted by the Saskatchewan Court of Appeal in *Wal-Mart Canada Corp. v. United Food and Commercial Workers, Local 1400, et. al.*, [2005] 112 C.L.R.B.R. (2d) 212, 2004 SKCA 154 (CanLII).

3. **Production of Documents during a Hearing**: Finally, this Board has long held the authority to compel the production of any document or thing touching on the matters in issue between the parties during a hearing. The Board's authority extends to any document (or thing) that the Board deems necessary to enable the full investigation of the matters upon which the Board has been asked to inquire. While the Board's authority is undoubtedly broad, this authority is also discretionary and the practical application of this authority has tended to be limited to the production of specific documents. For example, in *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp., et. al*., LRB File No. 069-04, this Board ordered a witness called by Wal-Mart (Ms. Ginter) to seek out and to determine if certain enumerated documents were in the possession of Wal-Mart and, if so, to produce such documents. The existence or potential existence of these documents arose during cross-examination of the witness. This was one of two impugned production Orders of the Board upheld by the Saskatchewan Court of Appeal in *Wal-Mart Canada Corp., supra*. In upholding the impugned production Orders of the Board, the Court of Appeal was satisfied that the requested documents were sufficiently particularized in the Board's Orders and that the documents were sought from a witness assumed to have corporate knowledge sufficient to able her to identify the responsive documents. It this regard, it is interesting to note that the Court of Appeal upheld this Board's

production Order specifically because it did not require Wal-Mart to produce "*all documents in its possession*".

[38] In our opinion, the present application for the production of documents is unique in a number of important respects. Firstly, the parties did not engage in any form of voluntary exchange of documents prior to the commencement of the hearing; nor did they give any indication to the Board, prior to the hearing of evidence, that production of document was an issue or even necessary. Certainly, the question of the proper production of documents did not arise as an issue before the Board in these proceedings until after the testimony of all witnesses of the applicant unions had concluded and they had essentially wrapped upon the evidentiary portion of their cases. Secondly, the scope of documents sought is very broad and would undoubtedly involve a significant amount of work on the part of SAHO to find and produce the desired documents; certainly hundreds (if not thousands) of more pages of documents would be involved; in a case that is already document intensive. In this regard, we note that some of the categories of documents sought have a nexus to Mr. Jakubowski's testimony and arguably the existence and/or relevance of these documents only became known because of Mr. Jakuboski's testimony. However, the majority of the documents now sought would appear to be of a kind normally obtained by way of a pre-hearing application for the production of documents. Arguably, the range of documents now sought is akin to the kind of pre-hearing discovery of documents associated with proceedings in the civil courts (i.e.: "*all documents within the possession of …").* Finally, while this Board has broad authority to order the production of documents both prior to and at a hearing, the late timing of a broad request for the production of documents is troubling to the Board from both a procedural fairness perspective and the desire to not squander the scarce resources of either this Board or the parties. With respect to procedural fairness, one can only assume that the late timing of a request for the production of such a broad range of documents by the applicant unions was strategic; intended to elicit the maximum production of documents, while shielding the applicant unions' own witnesses from the potential of a similar production request. Even if the timing of the applicant unions' request is otherwise, there can be no doubt that the late request for the production of documents has delayed these proceedings, consumed this Board's resources, and ambushed the Respondents.

[39] In our opinion, the appropriate way to proceed with the applicant unions' request for the production of documents is to first identify the principles that ought to guide our

determinations with respect to the production of documents at this stage in the proceedings and then to apply these principles to each of the desired categories of documents.

Principles Applicable to the Production of Documents once a Hearing has commenced:

[40] **The Timing of an Application seeking Production of Documents**: In our opinion, broad-spectrum requests for general production of documents are now[16] more properly made prior to the commencement of a hearing. Doing so allows the parties an opportunity to cooperate, if cooperation is possible, and, if not, it provides the Board with the opportunity to address issues, such as relevancy, privilege and abuse of process, prior to or at the commencement of a hearing. If a large number of disputed documents are sought, these issues can also be efficiently addressed by the parties and the Board as a procedural matter. Doing so allows for the most efficient conduct of hearings before the Board and avoids, to the greatest extent possible, delay. Doing so also prevents the timing of production applications to obtain a strategic advantage over an opposing party.

[41] The applicant unions argued that any restriction on their right to seek production of documents, even at this late stage in the hearing, would offend the principles of natural justice by potentially denying them access to documentary evidence that may have probative value. With all due respect, we do not agree for a number of reasons. Firstly, any of the applicant unions could have sought production of the majority of their desired documents in the many months prior to the commencement of the within hearing. In the alternative, the applicant unions, or any of them, could have sought production of these documents in February of 2011 when this Board made its procedural ruling to join the within applications. In the alternative, the applicant unions could have sought production of the desired documents in May of 2011 when the evidentiary portion of these proceedings began. In our opinion, the right of the applicant unions to go fishing for documents began to fade with the calling of their respective witnesses and the conclusion of the evidentiary portions of their respective cases. The practicality of this conclusion is apparent when one considers that there is no procedural obligation on a respondent to call any witnesses following the conclusion of the evidentiary portion of an applicant's case. Secondly, the right of the applicant unions to cross-examine, and to seek production of documents arising out of such examination, is unfettered. Essentially, what fades and then expires when a party closes the evidentiary portion of their case, is the fishing season;

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[16] In light of the amendment to s. 18 in 2005.

the period of time when the parties have the right to seek broad-spectrum production of documents (i.e.: the kind of production that may have been available through the Board's pre-hearing procedures or even at the outset of the hearing). In this regard, we note that the Canada Industrial Relations Board came to this same conclusion in the *Air Canada* case at para 34.

[42] For purposes of clarity, we do not wish to imply that a party can not seek production of documents once a hearing has commenced or after they have closed their respective cases. To the contrary, all parties clearly have the right to seek (and even tender) documentary evidence through someone else's witness either in support of an allegation under the *Act* or for the purpose of attacking the defense of an opposing party or the credibility of a witness. However, for the most part, once a hearing has commenced and certainly once a party has closed the evidentiary portion of their case, fishing season is over. The onus is on the party seeking a broad-spectrum production of documents after a hearing has already commenced to explain their delay in seeking such documents. Certainly, once a party has closed the evidentiary portion of their case, extraordinary justification is required to do so.

[43] Finally, some may argue that this rule of procedure is inconsistent with the kind of production Orders that have previously been issued by this Board, such as in *Wal-Mart Canada Corp, supra*. In our opinion, the amendment to s. 18 of the *Act* in 2005 gave this Board procedural authority it previously did not enjoy at the time of the *Wal-Mart* case. This new authority was intended to enhance the Board's pre-hearing procedures. The exercise of this Board's procedural authorities under s. 18 is discretionary. In our opinion, to the extent that a party's right to seek production of documents at a hearing may be restricted from that which may have previously been available or from that which might have be obtained through a pre-hearing application, such restriction is justified by the efficiency gained in the Board's proceedings and the avoidance of potential procedural unfairness to responding parties.

[44] **Desired documents must be relevant**: While the test for relevance was not seriously in dispute in these proceedings, the extent to which a party may embark upon a fishing expedition through discovery of documents in proceedings before this Board does warrant some consideration. As indicated, this Board does not have; nor do we wish to replicate; the kind of discovery procedures or the kind of production of document obligations commonly seen in a judicial setting. Generally speaking, an applicant seeking production of documents must satisfy the Board that the desired documents are arguably relevant and/or that there is a probative

nexus between the documents or information sought and the matters in issue arising out of proceedings before the Board. The greater the number of documents sought, the stronger the probative nexus expected by the Board, particularly so if considerable expense, time and effort is required to locate and produce the desired documents. As we have indicated, it is also an expectation of this Board that such request will occur early in the proceedings whenever possible.

[45] In our opinion, the principles identified by the Canada Industrial Relations Board in *Air Canada*, supra, are well-founded and provide a pragmatic approach to the production of documents that balances the competing interests arising out of a production request in a labour relations context. These principles were set forth in para. 28 of that decision and have become known as the "*Air Canada"* factors:

> *From these awards flow the following principles, which may be suitably applied to the present case.*
>
> 1. *Requests for production are not automatic and must be assessed in each case.*
> 2. *The information requested must be arguably relevant to the issue to be decided.*
> 3. *The request must be sufficiently particularized so that the person on whom it is served can readily determine the nature of the request, the documents sought, the relevant time-frame and the content.*
> 4. *The production must not be in the nature of a fishing expedition; that is, the production must assist a complainant in uncovering something to support its existing case.*
> 5. *The applicant must demonstrate a probative nexus between its positions in the dispute and the material being requested.*
> 6. *The prejudicial aspect of introducing the evidence must not outweigh the probative value of the evidence itself, regardless of any possible "confidential" aspect of the document.*

[46] It is also important to note that, in the *Air Canada* case, the Canada Board acknowledged that there are a number of restrictions on a party's right to seek production of documents in labour relations proceedings and that these restrictions grow in intensity with the greater the number of documents sought and the greater the potential for involving confidential or privileged information. In this regard, we do not accept the argument of the applicant unions that their right to seek out and obtain potentially relevant documents ought to be the dominant factor in our determination. In determining any request for the production of documents, this Board must weigh a number of factors; including a number of competing factors; with the

importance of any particular factor shifting with the circumstances under which the request is made (such as in the case of late requests for the production of documents).

[47] **Claims of Privilege**: Two (2) claims of privilege arise in these proceedings; firstly, the Crown immunity/privilege and secondly, the so-called "labour relations privilege".

Crown Immunity/Privilege:

[48] With respect to the Crown privilege, we are satisfied that some of the desired documents may be of a nature that the Crown is entitled to claim immunity or privilege and, if such claim is accepted by this Board, such documents should not be produced. By definition, the documents sought by the applicant unions are not in the possession of the Crown. As such, we are satisfied that a procedure must be incorporated into any production Order of this Board that will allow officials of the Government of Saskatchewan to inspect any documents to be produced in response to any production order of this Board and an opportunity for the Crown to exercise any rights it may hold over these documents, should it choose to do so.

Labour Relations Privilege:

[49] We note that this Board has considered the existence and application of a "labour relations privilege" for certain documents in but a few cases. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Canada Ltd*. [1993] 3rd Quarter Sask. Labour Rep. 114, LRB File No. 099-93, this Board applied the "Wigmore" test[17] to conclude that the notes of members of an employer's negotiating team, which were prepared for and taken during negotiations for collective bargaining, were protected by a labour relations privilege. The Board went on to conclude that this was not a class or "blanket" privilege; rather this was the kind of privilege that must be assessed on a case by case basis. After applying the "Wigmore" test to the notes of members of the employer's bargaining team and concluding that these documents should not be produced, the Board made the following comments relevant to these proceedings:

> *There can be little doubt that the production of a negotiator's notes and other materials could have this destructive consequence. The process of collective bargaining sanctioned by the legislature is by nature an adversarial one in which the parties are guided by self-interest. If adverse parties are to reach an*

[17] Referring to the principles for determining whether or not communications ought to be privileged as identified by John Henry Wigmore in Evidence in Trials at Common Law, Boston: Little, Brown & Co. 1961, accepted and applied by the Supreme Court of Canada in *R. v. Gruenke*, [1991] 3 S.C.R. 263, File No. 21410.

> *agreement, they must be able to negotiate in conditions where they feel confident that they can speak freely and forcefully if need be, explore options and take reasonable risks. Creating these conditions for negotiations is a legitimate objective and requires outside third parties like this Board to exercise great restraint when they are requested by one party to call the other party to account for what it said at the bargaining table. A failure to exercise this restraint would have the effect of inhibiting discussion, thereby impeding progress towards collective bargaining agreements, and diverting the attention and resources of the parties from arriving at a settlement.*
>
> *In this case, we must take into account, on the one hand, the status of negotiations for collective agreements as a primary object of the statute, the inherent role of negotiators in the statutory scheme of collective bargaining and the need for confidentiality between principal and negotiator if the negotiation process is to work in a straightforward and effective manner. We must also consider, on the other hand, the variety of material that negotiators have in their possession and the infinite number of contexts in which it may be relevant. On weighing these considerations, the Board has decided that in proceedings under The Trade Union Act, it will neither create a blanket privilege over this material nor require negotiators to produce their bargaining books simply because they acknowledge that they exist or that they refreshed their memory from those books in preparation for a hearing before the Board. Rather, the Board will require that persons seeking access to this material must specify what information they are looking for so that any intrusion into this material can be minimized. The Board will then weigh carefully the relevance of the point in issue, the availability of alternative sources of proof and whether the inquiry leads into an area of legitimate privilege.*

[50] In *Saskatchewan Government and General Employees' Union v. Government of Saskatchewan*, [1999] Sask. L.R.B.R. 404, LRB File No. 114-99, the Board, relying upon its earlier decision in *WaterGroup, supra*, declined a request by the Saskatchewan Government Managers' Association (SGMA) to have access to the Government of Saskatchewan's bargaining files to counter claims made by SGEU with respect to the negotiation of a scope issue. In refusing to order production of the desired documents, the Board made the following observations:

> *In the present case, counsel for SGMA claims that it requires access to the Government of Saskatchewan's bargaining files to counter claims made by SGEU with respect to the negotiation of the scope issue. In our view, it is not readily apparent that the documents requested would be necessary for this purpose. The results of collective bargaining are generally set forth in the collective agreements reached by the parties, copies of which are readily available to all parties in these proceedings. If during the course of the hearing, reference is made by SGEU or the Government of Saskatchewan to negotiating notes or materials that otherwise may be privileged, the Board may require the disclosure of some or all of the negotiating documents. Otherwise, the Board is not convinced that production of the negotiating notes serves a purpose more important and essential than is served by maintaining the confidentiality of such materials. No order will be made in respect of such materials.*

[51] Counsel for SEIU-West argued that this Board's decision in *WaterGroup, supra*, was wrongly decided. Council for SGEU argued that, if not wrongly decided, the decision in the *WaterGroup* case has been overtaken by more recent jurisprudence that would see fewer claims of privilege and greater production of potentially confidential or privileged documents. With all due respect, we are not persuaded by either of these arguments.

[52] We are satisfied that the "Wigmore" test continues to be the appropriate vehicle for determining whether or not communications made in a labour relations context are protected by a qualified privilege. The application of this privilege is assessed on a case by case basis following an analysis of four (4) criteria, namely that:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
> (4) The *injury* that would inure to the relations by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

[53] Certain observations regarding the application of the "Wigmore" test to labour relations communications may be of assistance to understanding the determinations we have made regarding the production of documents in these Reasons for Decision.

[54] In our opinion, the need for confidentiality in the relationship between a negotiator and his/her principals has remained unchanged since this Board examined the relationship in the *WaterGroup* case. The confidential relationship between a negotiator and his/her principals promotes and enables collective bargaining to occur and is the kind of relationship that must be protected. In our opinion, this sphere of confidentiality is essential to both orderly and rational collective bargaining at the bargaining table and the ongoing industrial relationship between employers and trade unions. The importance of confidentiality in labour relations is the reason that employees who regularly act in a confidential capacity with respect to labour relations are removed from the bargaining unit. These employees are denied the benefits of collective bargaining precisely because of the importance for confidentiality in labour relations. Collective bargaining only works when the parties are able to make rational and informed decisions regarding their respective bargaining strategies and then have those strategies brought to the

table by their negotiators. In our opinion, piecing the confidentiality that surrounds the communications between negotiators and their principals, save in exceptional circumstances, would have a destructive effect on collective bargaining in this province and would quickly undermine the objectives of the *Act*.

[55] Furthermore, the sphere of confidentiality recognized by this Board in the *WaterGroup* case includes not only the relationship between principals and their negotiators but also includes any number of persons and third parties engaged in providing research, expertise and guidance to both employers and trade unions on their respective collective bargaining strategies. In our opinion, employers have the right to consult with, share information, and take advice from consultants, researchers and other employers in formulating their collective bargaining strategies, just as trade unions have the right to consult with, share information and take advice from the national representatives, sister unions, consultants, and labour affiliates. In our opinion, communications of this nature also fall within the sphere of qualified privilege.

[56] The applicant unions argued that we should permit greater disclosure of confidential information and use "*Ryan*" type orders[18] to prevent the subsequent misuse of this information outside of our proceedings. With all due respect, we are not persuaded by this argument. Collective bargaining is an inherently adversarial process, where the stakes are often very high and where the process is never really over. To quote John P. Sanderson from The Art of Collective Bargaining[19], "

> *A collective agreement does not spring from the earth in final form or arrive by accident. It is created by the efforts and energies of negotiators who struggle to reach unanimity without self-destructing. The collective bargaining process is adversarial in nature and represents a process in which two parties, starting from opposite and competing positions, arrive at a cease-fire arrangement or accommodation for a specific period of time. When a collective agreement expires, the parties then renegotiate the terms to form the next collective agreement.*
>
> *Collective bargaining is not, in a phrase, a group of persons sitting down "to reason together". More accurately, collective bargaining is an example of applied politics, a means to reach a result, namely, the resolution or suspension of competing interests for the length of time covered by the collective agreement. It is an opportunity for negotiators for an employer and a union to discuss mutual problems, concerns and priorities, and to fashion appropriate compromises and solutions. The collective bargaining process is itself neutral and it is only*

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18 Referring to the procedure set forth in *A.M. v. Ryan, supra*.

19 The Art of Collective Bargaining (Second Edition) (Aurora, Ontario: Canada Law Books Inc, 1981), page 1.

> *invested with life and substance when people, called negotiators, begin to interact and react at the bargaining table.*

[57] Simply put, a collective bargaining relationship is not over upon the conclusion of a collective agreement. The relationship continues; items for both sides are carried forward to the next round of collective bargaining. In fact, the next round of collective bargaining is already upon these parties; as their collective agreements are about to or have expired. In our opinion, "*Ryan*" type order would be of limited value in these proceedings as such orders would do little to avoid the harm associated with production of the kind of documents sought by the applicant unions. By way of analogy, this Board doggedly protects the confidentiality of membership and support evidence. The confidentiality of this evidence serves the purpose of encouraging workers to avail themselves of the Board's certification procedures. In our opinion, a "*Ryan*" type order would be of limited comfort to workers seeking to organize and little value in preventing the misuse of this confidential information should it be found to be probative in proceedings before the Board.

[58] Finally, counsel for SGEU argued that this is the kind of case where the Board is required to engage in a "forensic" analysis of what occurred at collective bargaining. Certainly, the involvement of the Government of Saskatchewan is an issue in these proceedings and adds a new dimension to the proceeding. Whether or not a "forensic" type analysis by this Board into the conduct of these or any other parties during collective bargaining is appropriate has yet to be determined. However, as noted by this Board in the *WaterGroup* case, not all material used for collective bargaining is worthy of protection and, as seen in *Zhang v. Treasury Board (Privy Council Office)*, [2010] C.P.S.L.R.B. No. 47, 2010 PSLRB 46 (CanLII), even privileged material may be required to be produced if deemed necessary to ensure a fair hearing. In our opinion, a case by case analysis continues to be the most appropriate means for the Board to determine whether or not particular documents are worthy of protection on the basis of the labour relations privilege and/or whether or not the circumstances require production, even in the case of communications falling within a sphere of privilege. In this regard, we can do no better than to repeat the findings of this Board in the *WaterGroup* case:

> *On weighing these considerations, the Board has decided that in proceedings under The Trade Union Act, it will neither create a blanket privilege over this material nor require negotiators to produce their bargaining books simply because they acknowledge that they exist or that they refreshed their memory from those books in preparation for a hearing before the Board. Rather, the Board will require that persons seeking access to this material must specify what*

> *information they are looking for so that any intrusion into this material can be minimized. The Board will then weigh carefully the relevance of the point in issue, the availability of alternative sources of proof and whether the inquiry leads into an area of legitimate privilege.*

Review of the Specific Disclosure Requested by the Unions:

[59] For the foregoing reasons, we are satisfied that the "*Air Canada"* factors continue to provide a pragmatic approach to determining whether or not the production of the desired documents is reasonable and appropriate in these proceedings. We are also of the opinion that the "Wigmore" test continues to be the appropriate vehicle for determining whether or not responsive documents ought to be shielded from such production on the basis of privilege.

[60] In applying the "Wigmore" criteria, the onus is clearly on the party claiming the privilege to demonstrate to the Board that the first three (3) factors are satisfied. While there is a nominal onus on the party claiming the privilege to also satisfy the fourth (4^{th}) criterion, in our opinion, once a party has demonstrated that desired documents falls within a sphere of privileged communications, for practical purposes, the onus shifts to the party seeking production to demonstrate that the probabitive value of the desired documents outweighs the prejudicial effect or injury associated with disclosure of such documents. Generally speaking, once a party has established that communications originated within a sphere of privilege, the legal battleground in applying the *Wigmore* test occurs in weighing the competing interests set forth in the fourth (4th) *Wigmore* factor, as can be seen in this Board's decision in *SGEU v. Saskatchewan, supra*. Thus, when seeking documents that originated within a sphere of privileged communications, including the kind of qualified privileged recognized by this Board for certain labour relations activities, it is easier to overcome the *prima facie* protection of this privilege if the documents sought have been carefully limited to only those documents that are clearly necessary to matters in issue before the Board. The more crucial the evidence and the more refined the production request, the easier it is to overcome the privilege.

[61] With these general principles in mind, we turn to each of the categories of document sought by the applicant unions.

1. Minutes from the CUPE side table negotiations [involving specified dates] taken by any person on the SAHO bargaining team, and speaking notes prepared in anticipation of the same.

2. Minutes from the bargaining meetings between SAHO and SGEU taken by any person on the SAHO bargaining team, and speaking notes prepared in anticipation of the same.

3. Minutes from the bargaining meetings between SAHO and SEIU-West taken by any person on the SAHO bargaining team, and speaking notes prepared in anticipation of the same

4. Minutes of bargaining discussions of the four efficiencies, three pots of funds, the disclosure of the monetary package and/or movement to the coalition table.

6. Notes taken by all SAHO witnesses of collective bargaining at the common table and meetings which were intended to produce a collective agreement.

[62] The requested documents set forth in categories 2, 3 and 6 involve a broad search for "all documents" of a particular type; the document requested in categories 1 and 4 are each slightly more refined (category 1 by date and category 4 by subject). In our opinion, responsive documents to all of these categories would clearly fall within the sphere of confidentially for collective bargaining documents protected by the labour relations privilege. However, we note that SAHO has agreed to produce the notes of its lead negotiators; being Mr. Jakowbowski, Mr. Parenteau, Ms. Wall and SAHO's lead negotiator(s) at the common table. As such, we need not weigh the competing factors relevant to whether or not these particular documents should be produced. The only issue for us to decide is when these documents should be produced. In the interest of avoiding further delay in these proceedings, in our opinion, SAHO should produce these documents in advance of calling further witnesses. The procedure for production will be dealt with latter in these Reasons for decision.

[63] The applicant unions also seek the minutes/notes prepared by other members of SAHO's bargaining team (not just SAHO's lead negotiators), and SAHO resists the production of these documents. In our opinion, these additional documents need not be produced. Firstly, in light of the production of the notes of the lead negotiators for each of SAHO's bargaining team, the incremental probative value of these addition notes is insufficient to justify the prejudicial effect of production of this type of material. The documents requested in categories 2, 3, & 6 are "unfocussed" and thus gather the greatest volume of privileged information. The documents set forth in category 1 are only slightly more refined by limiting the request to fourteen (14) specific days when bargaining occurred. The documents set forth in category 4 are at least refined to the occasions when specific topics were discussed. However, in our opinion, the potential probative

value of these documents does not justify the injury that would result from their production. Having considered the arguments of the parties, we are not satisfied that the production of these additional documents is either appropriate or necessary at this stage in the proceedings.

5. Any document used by any SAHO witness to refresh their memory.

[64] There is no existing obligation on a witness to produce the material with which they refreshed their memory prior[20] to testifying before the Board; nor do we wish to impose such an obligation. As such, this category of requested documents represents the greatest potential for violation of the rule against fishing. It is wholly undefined and arguably infinite. As such it violates the *Air Canada* factors. This request indiscriminately seeks production of documents, including privileged communications, without any attempt to focus the search and limit its injurious impact. Having considered the arguments of the parties, we are not satisfied that the production of this category of documents is either appropriate or necessary. Responsive documents need not be produced.

7. Bargaining bulletins from SAHO to the Regional Health Authorities or person reporting to the same.

[65] SAHO has agreed to provide these documents to the applicant trade unions and, if they have not already done so, they should produce them prior to the next witness taking the stand. For purpose of clarity, prior production of documents is not a general requirement of this Board. However, we are satisfied that, in the interest of efficiency, it is appropriate in these proceedings.

8. Any and all directions and/or input, meeting minutes or notes of conversations in which directions and/or input were conveyed from the HLRC, the Ministry of Health, or other entity to SAHO proposing concessions/efficiencies..

9. Any SAHO document, meeting minutes or notes of conversations in which there was discussion of the likelihood of achieving any of the concessions/efficiencies.

10. Directions to, meeting minutes or notes of conversations in which there was a direction to J. Jakubowski, A. Parenteau or G. Wall regarding the matters to be included in individual union proposal packages at the commencement of bargaining or at any time thereafter.

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[20] Unlike witnesses who use notes to refresh their memory during a hearing.

11. Directions to, meeting minutes or notes of conversations in which there was a direction to J. Jakubowski, A. Parenteau or G. Wall regarding the matters to be withdrawn in individual union proposal packages at the commencement of bargaining or at any time thereafter.

12. Direction from the HLRC, meeting minutes or notes of conversations in which direction was received from the HLRC regarding matters to be included in individual union proposal packages at the commencement of bargaining or at any time thereafter.

13. Directions from the HLRC, meeting minutes and notes of conversations in which direction was received from the HLRC regarding matters to be withdrawn from individual union proposal packages at the commencement of bargaining or at any time thereafter.

26. Documents and other communications between J. Jakubowski, A. Parenteau or G. Wall to SAHO reporting on collective bargaining.

[66] In our opinion, all of these categories of documents are protected by labour relations privilege. They collectively involve a broad spectrum search for documents involving the formulation of SAHO's bargaining strategies and communications to and from SAHO's negotiators at the bargaining table. In our opinion, all these kinds of communications fall within the sphere of confidentiality which is necessary for orderly and rational collective bargaining to occur. The fact that some of these communications involved the Health Labour Relations Council (HLRC) does not undermine or alter the privilege they enjoy as the subject of all of these communications is SAHO's bargaining positions and strategies at the bargaining table with the applicant unions. As we have indicated, in our opinion, both employers and trade unions have the right to consult with a variety of third parties in developing their collective bargaining strategies.

[67] Furthermore, in applying the "Wigmore" test, we are not satisfied that the probative value these documents may contain relative to the matters in issue in these proceedings is sufficient to justify their production; particularly so given that, collectively, these categories of documents would essentially cover "all" communications to and from SAHO's bargaining team. At this late stage in the proceedings, it is difficult not to view such request, given the breadth of documents requested, as anything other than a "fishing" expedition. In our opinion, dividing it up into multiple parallel requests, may improve the particularization, but collectively these requests involve a broad-spectrum search for privileged documents. Having considered the arguments of the parties, we are not satisfied that the production of these additional documents is either appropriate or necessary at this stage in the proceedings.

14. Calculations done in preparation of the graph, the western Canadian average (including data to support the contention that the BC health sector negotiations had resulted in 0% improvements) and the $80 million cost estimates and the $45 million ongoing maintenance cost estimates.

15. Calculations done in preparation of the online or other retro calculator, and the retro calculations referred in advertising referencing retro pay losses.

[68] SAHO has undertaken to produce the documents. As with the other documents, in our opinion, SAHO should produce these documents prior to calling their next witness.

16. Advertising budget figures both estimated and actual, including any cost share agreements with Regional Health Authorities and/or the HLRC.

17. Advertising budget figures, both estimated and actual, including any cost share agreements with Regional Health Authorities and/or the HLRC for the 2004 round of collective bargaining.

18. Documents noting HLRC or SAHO approval of advertising content, or meeting minutes or notes of conversations in which such approval was given.

19. Drafts of advertising content, including those which did not receive approval.

20. Any document, in which the content of advertising is discussed, or meeting minutes or notes of conversations in which that is discussed.

21. All documents relating to the conduct of the focus group testing.

22. All documents discussing, meeting minutes or notes of conversation in which there is a discussion of the timing of news releases, or the release of advertising.

23. All documents, meeting minutes, or notes of conversations in which the media relations strategy is discussed.

[69] With these categories of documents, the applicant trade unions are essentially seeking "all" documents relating to or involving, SAHO's communication strategies (i.e.: its strategies and activities involving communications with members of the bargaining unit and the public) during the last round of collective bargaining. At this late stage in the proceedings, it is difficult not to view such request, given the breadth of documents collectively requested, as something of a "fishing" expedition. On the other hand, the communication activities that occurred during the last round of collective bargaining is a matter that is squarely in issue in these proceedings, including the content, frequency, and mode thereof. In our opinion, an application of the *Air Canada* factors would dictate that some, but not all, of these categories of documents should be produced by SAHO; specifically those documents in categories 16, 17, 18,

and 20. With respect to those documents in categories 19, 21, 22 and 23, these requested documents are either too vague or their nexus to the matters in issue in these proceedings too tenuous or too remote, or both; particularly so at this late stage in the proceedings.

[70] In applying the "Wigmore" test, it is not possible to conclude, as a group, that the documents responsive to these categories of documents would have originated within a sphere of protected communication or, even for those that did, whether such documents would justify protection on the basis of privilege. In our opinion, it is less probable (but not impossible) that communications by an employer to its employees or to the public regarding collective bargaining would be protected by the labour relations privilege. However, for purposes of clarity, this should not be taken as a ruling that no privilege may be claimed with respect to responsive documents in categories 16, 17, 18, and 20. Rather, we simply find that it is not possible for us to apply the "Wigmore" test to these particular categories of documents without seeing them first. As such, SAHO shall identify documents responsive to these categories. The documents identified by SAHO shall be produced in accordance with the procedure set forth in these Reasons for Decisions; provided however that if, after identifying responsive documents, SAHO wishes to assert privilege on any individual document or seeks to redact portions thereof, SAHO shall make application to the Board for a determination on a case by case basis.

24. Briefing notes, memoranda or notes of conversations in which information is delivered to the Ministry of Health regarding collective bargaining.

[71] This category of requested documents is troubling. Firstly, this category of documents is simply too vague and/or broad for this late stage in the proceedings. Secondly, the nexus between responsive documents and the matters in issue in these proceedings is remote. Responsive documents would involve communications to the Ministry of Health; not communications from the Ministry, which communications may have been probative of the allegations regarding the Government's involvement in collective bargaining. It is difficult to image how responsive documents to this category would be probative as any matters in issue in these proceedings. Furthermore, responsive documents would fall within the sphere of SAHO's protected communications precisely because they involved the status of collective bargaining. It is difficult to see how the probative value of these documents could outweigh the prejudice associated with their production. Having considered the arguments of the parties, we are not satisfied that the production of this category of documents is either appropriate or necessary.

25. Documents and other communications between SAHO, the Regional Health Authorities, the HLRC, the Ministry of Health or any other person whom from time to time SAHO referred to as their principals.

[72] This category of documents is simply too vague and the nexus between responsive documents and the matters in issue in these proceedings is remote to justify production; particularly so, at this late stage in the proceedings.

27. Any documents describing meeting minutes or notes of conversations in which there is any description of the costing of the CUPE, SEIU-West and/or SGEU collective agreements.

[73] This category of documents is potentially overly broad, depending on how it is interpreted. It is unclear whether or not the applicant unions seek costing information on each individual proposal arising during collective bargaining (i.e.: assuming such detailed costing was undertaken by SAHO) or merely the total cost of each of the three (3) collective agreements that resulted from the cost round of collective bargaining. In either event, the "costing" of collective agreements has been identified as an issue in these proceedings; although the nexus between this information and the matters in issue in these proceedings remains rather vague. In our opinion, an application of the *Air Canada* factors (potentially a generous application thereof) would indicate that this category of documents should be produced by SAHO. This should not be taken as a ruling that no privilege may be claimed with respect to responsive documents in these categories. Rather, we find that it is not possible for us to apply the "Wigmore" test to the particular categories of documents without seeing them first.

28. Documents discussing meeting minutes or notes of conversations in which there was a discussion of the 274 day "loss of seniority" contract language.

[74] While this category of documents is rather specific, the nexus between this information and the matters in issue in these proceedings was not satisfied. The applicant trade unions did not establish that this information was arguably relevant to the matters in dispute. As such, an application of the *Air Canada* factors would indicate that this category of documents should not be produced by SAHO.

Conclusion:

[75] For the foregoing reasons, we have concluded that SAHO shall produce documents responsive to categories 1, 2, 3, 4, 6, 7, 14, 15, 16, 17, 18, 20, and 27. With respect to categories 1, 2, 3, 4 and 6, SAHO need only produce the responsive documents made by

SAHO's lead negotiators at the respective bargaining tables. With respect to categories 16, 17, 18, 20, and 27, we have indicated that we are unable to apply the "Wigmore" test to determine whether or not responsive documents are protected by privilege without first seeing the documents. If, after identifying responsive documents, SAHO wishes to assert privilege on any individual document or seeks to redact portions thereof, SAHO shall make application to the Board for a determination on a case by case basis, unless agreement is reached otherwise by the parties.

[76] Finally, in any of the categories of documents were production has been directed, we make no determination on the issue or application of the Crown immunity/privilege. Prior to any documents being provided by SAHO to the applicant unions, such documents shall first be provided to the Government of Saskatchewan, who shall be provided a reasonable period of time to inspect said documents. Any documents, upon which the Government of Saskatchewan does not seek to claim privilege, shall be promptly provided to the applicant unions. If the Government of Saskatchewan wishes to claim privilege on any documents produced by SAHO, such documents shall not be produced to the applicant unions and the Government of Saskatchewan shall make application to the Board for a determination on a case by case basis, unless agreement is reached otherwise by the parties.

DATED at Regina, Saskatchewan, this **4th** day of **April, 2012.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson