October 24, 2017

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Barristers and Solicitors
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Attention: Mr. Thomas W.R. Ross

Gerrand Rath Johnson LLP
Barristers and Solicitors
400 – 1900 Albert Street
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Attention: Ms. Crystal Norbeck

Dear Ms. Norbeck and Mr. Ross:

Re: LRB File No. 119-17 – *International Brotherhood of Electrical Workers, Local 2038 v AECOM Production Services Ltd.* – Unfair Labour Practice Applications - Application for Production of Documents

A. Introduction

[1] AECOM Production Services Ltd. [AECOM] brings this application for production of documents in the context of an ongoing hearing into an unfair labour practice commenced by the International Brotherhood of Electrical Workers, Local 2038 [Union], pursuant to section 6-104 of *The Saskatchewan Employment Act*, SS 2013, cS-15.1 [*SEA*]. The Union's Unfair Labour Practice application was filed this Board on June 16, 2017. It alleges that AECOM committed a series of unfair labour practices during an on-going organizing drive taking place at the Employer's worksite at the Boundary Dam Power Station located at, or in close proximity to, Estevan, Saskatchewan.

[2] One of the allegations contained in the Union's Unfair Labour Ppractice application relates to communications AECOM had with its employees after the Union had filed a certification application on June 12, 2017[1], but prior to the conclusion of the vote by secret ballot which this Board had directed on June 22, 2017[2]. The Union's

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[1] LRB File No. 111-17, Application for Bargaining Rights dated June 12, 2017,
[2] See: Direction of Vote dated June 22, 2017, LRB File No. 111-17

assert these communications amounted to inappropriate employer communication contrary to subsection 6-62(1)(a) of the *SEA*.

[4] AECOM's application proceeded by way of telephone conference call before the Board comprised of Members Maurice Werezak, Steven Seiferling, and myself, as Vice-Chairperson, on October 12, 2017. We are seized with the underlying applications, and, as noted, have already heard a number of days of testimony. The hearing into these applications is set to resume on October 30, 2017 with further hearing days scheduled into January 2018. AECOM was represented by Mr. Thomas W.R. Ross. The Union was represented by Ms. Crystal Norbeck.

[5] At the conclusion of the conference call, the Board reserved its decision. The fact that the hearing will resume in a few days necessitates a quick resolution of AECOM's production application. As a result, we have decided to issue this Letter Decision.

[7] For reasons outlined below, the Board concludes that AECOM's application should be allowed in part.

B. <u>Relevant Board Jurisprudence Respecting Applications for Production of Documents</u>

[8] The Board recently summarized the relevant legal principles applied in applications for document production in *SEIU-West v Atria Management Canada, ULC, Atria Retirement Canada, Ventas Canada Retirement III LP, Calgarian Retirement Group Ltd., Primrose Chateau Retirement Group Ltd.*[3] [*Atria Management*]. In its Reasons for Decision, the Board commencing at paragraph 14 stated:

> ***[14]*** *In recent years, the Board has had the opportunity to consider its' jurisdiction to make orders respecting the production of documents in matters pending before it. To date, all of these authorities have been decided under section 18(b) of The Trade Union Act, RSS 1978, c.T-17. See especially: Service Employees International Union (West) v Saskatchewan Association of Health Organizations, 2012 CanLII 18139 (SK LRB), 2012 CanLII 18139, 210 CLRBR (2d) 229 (SK LRB) ["SAHO"]; Lapchuk v Saskatchewan Government and General*

[3] LRB File Nos. 093-16 & 094-16, 2016 CanLII 74281, 281 CLRBR (2d) 212 (SK LRB)

Employees' Union, 2014 CanLII 16077, 2014 CanLII 16077 ["Lapchuk"], and Prairie Arctic Regional Council of Carpenters, Drywallers, Millwrights et al. v EllisDon Corporation et al., 2014 CanLII 76048 ["Prairie Arctic"].

[15] *The history of the Board's authority to order document production was outlined briefly in SAHO as follows:*

> *[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 [by The Trade Union Amendment Act, 2005, S.S. 2005, c. 30, s. 5 which came into force on May 27, 2005] 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 144 (CanLII), 185 Sask. R. 82 (Q.B.)regarding pre-hearing production of documents.*

[16] *We pause to observe that the text of section 18(b) of The Trade Union Act is identical to section 6-111(b) of the SEA. As a consequence, we accept that the various Decisions of the Board interpreting section 18(b) apply with equal force to the interpretation of section 6-111(b).*

[17] *In these authorities, the Board made it clear that as an administrative tribunal we must resist emulating the more formalized pre-trial discovery procedures common in the civil courts. The over-arching public policy objective that the Board seeks to achieve is to resolve industrial relations disputes in as expeditious and fair a manner as possible. Yet, extensive pre-trial discovery regimes sometimes may sacrifice expedition with little to no obvious benefit to achieving a fair and timely resolution of such disputes which is the Board's ultimate goal. Accordingly, we endorse the following statement from Prairie Artic, supra:*

> *[50] As this Board clearly stated in Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, (2012)210 C.L.R.B.R. (2d) 229, 2012 CanLII 18139 (SK LRB), LRB File Nos. 092-10, 099-10 & 105-10, even if we had greater authority, it would not be our intention to replicate the kind of pre-hearing discovery processes utilized in a judicial setting. Labour relations boards were established to provide an alternative to the formalistic procedures of our courts. While pre-hearing discovery and production of documents may be the norm in civil litigation, such procedures are not the norm in proceedings before the Board. Simply put, this Board has no desire to replicate the kind of discovery procedures commonly seen in a judicial setting. While we have the authority to compel respondents to provide much of the information desired by the applicant trade unions in these proceedings, in our opinion, doing so, would*

> *begin the process of replicating the type of pre-hearing discovery processes that we seek to avoid.*

[19] *In SAHO, the decision referred to in the above-quoted passage, the Board took the opportunity to provide an overview of its prior practice respecting document production. In relation to pre-hearing disclosure requests, former Vice-Chairperson Schiefner stated at paragraph 37:*

> ***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, 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.*

> ***[19]*** *When making the determination about a pre-hearing request for production of documents and information under section 6-111(b) of the SEA, this Board has, at least since International Brotherhood of Electrical Workers, Local 529 v Sun Electric (1975) Ltd., Alliance Energy Limited and Mancon Holdings Ltd., [2002] SLRBR 362, LRB File No. 216-01, adopted and applied criteria first identified by the Canada Industrial Relations Board in Air Canada Pilots Association v Air Canada et al., [1999] CIRBD No. 3 ["Air Canada"]. See also: Industrial Wood and Allied Workers of Canada, Local 1-184 v Edgewood Forest Products Inc. and C & C Wood Products Ltd., 2012 CanLII 51715 (SK LRB) at para. 12 per Chairperson Love.*

> ***[20]*** *The Air Canada criteria are six-fold and provide as follows:*

> 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.*

> ***[21]*** *Subsequently, the Board's adoption of these criteria received the imprimatur of the Saskatchewan Court of Queen's Bench in Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers et al. v Saskatchewan Labour Relations Board et al., 2011 skqb 380 (CanLII); 210 CLRBR (2d) 35, at para. 144 per Popescul J. (as he then was).*

[9] For ease of reference, the clauses of subsection 6-111(1) most relevant to AECOM's application read as follows:

> ***6-111****(1)* *With respect to any matter before it, the board has the power:*
> *. . . . . .*
> *(b) to require any party to produce documents or things that may be relevant to a matter before it and do so before or during a hearing or proceeding;*
> *(c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:*
> *. . . .*
> *(iii) to compel witnesses to produce documents or things;*
> *. . . . .*
> *(j) to conduct any hearing or proceeding using a means of communication that permits the parties and the board to communicate with each other simultaneously[.]*

C. AECOM's Application for Production of Documents

1. The Framing of the Application

[10] Mr. Ross particularized somewhat AECOM's request for production in a letter to the Board dated October 10, 2017 as follows:

> *[T]his letter supports the Employer's request that* *<u>the Board order the Union to produce copies of all written communications sent to the employees during the Union's organizing campaign relevant to the ongoing application</u>.*
>
> *The Union in its Unfair Labour Practice Complaint, alleges that the Employer's communication to employees, now entered as Exhibit 24 in the hearing of this matter (the "****Employer Communication****"), exceeds the bounds of employer free speech prescribed by s. 6-62(2) of The Saskatchewan Employment Act (the "Act").*
>
> *In addition to the Employer Communication, the two communication sent by the Union to members of the proposed bargaining unit already form part of the record in the hearing of this matter as Exhibits 26 and 30 (together the "Union Communications"). Exhibit 26 is clearly a direct response to the Employer Communication. [Emphasis added.]*

[11] During oral submissions, Mr. Ross elaborated on this broad request stating that AECOM sought production of all Union communications that were "broadly sent out to employees". In addition to the flyers already put into evidence, this request would include similar written communications, as well as text messages from the Union or its representative, Mr. Chris Unser.

[12] Respecting the chronological parameters of this request, Mr. Ross suggested AECOM wanted all such communications made prior to and including June 13, 2017, the day AECOM first learned of the organizing drive taking place at its work site.

[13] Mr. Ross indicated that he was not opposed to anonymizing these messages if there was a danger of identifying the recipient of the message. As well, he stated that he was not seeking disclosure of communications that would be impressed with some kind of privilege, most notably solicitor-client privilege.

[14] AECOM relied on a number of decisions from this and other Boards, in particular, *Atria Management*[4]; *Securitas Canada Ltd. v UFCW Local 1400*[5] [*Securitas Canada*]; *Graham Bros. Construction Ltd. v International Union of Operating Engineers, Local 793*[6] [*Graham Brothers*], and *Bolton Railings Ltd. v LIUNA, Local 183*[7] [*Bolton Railings*].

2. <u>The Union's Response to AECOM's Application</u>

[15] Ms. Norbeck, on behalf of the Union opposed AECOM's application for a number of reasons.

[16] First, she argued that AECOM's application coming as it did in the middle of the hearing was untimely, and should be dismissed for that reason. She relied in particular on this Board's Decision in *SEIU-West v Saskatchewan Association of Health Organizations*[8] [*SAHO*] in support of her position. In that case, former Vice-Chairperson Schiefner had this to say respecting a production of documents application brought in mid-hearing:

> ***[41]*** *….In our opinion, the right of the applicant…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*

[4] *Ibid.*
[5] LRB File No. 165-14, 2015 CanLII 43778 (SK LRB)
[6] (2001), 76 CLRBR (2d) 231(ON LRB)
[7] [2013] OLRD No. 4397 (ON LRB)
[8] 2012 CanLII 18139, 210 CLRBR (2d) 229 (SK LRB)

> *following the conclusion of the evidentiary portion of an applicant's case. Secondly the right of the applicant…to cross-examine and to seek production of documents arising out of such examination, in unfettered. Essentially, what fade and then expires when a party closes the evidentiary portion of their case, is the fishing season, 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 cannot 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 of 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 document after a hearing has already commenced to explain their delay in seeking such documents. Certainly, one a party has closed the evidentiary portion of their case, extraordinary justification is required to do so.*

[17] Second, Ms. Norbeck argued that the kinds of documents for which AECOM seeks disclosure are privileged. She invoked two (2) forms of privilege: litigation privilege and labour relations privilege. On either ground, she asserted, the production of the documents in question could not be ordered. On this aspect of her argument, she relied on *SAHO*[9]; *Blank v Canada (Department of Justice)*[10] [*Blank*], and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v WaterGroup Canada Ltd.*[11][*WaterGroup*].

[18] Third, and in the event neither of her first two (2) arguments carried the day, Ms. Norbeck argued that the request for documents was too wide-ranging. She noted that the allegations of inappropriate employer communication were narrow and pertained to a specific time period. These allegations, she emphasized, had not changed since the day the Union's Unfair Labour Practice application was filed, yet until now AECOM had never sought such broad disclosure.

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[9] *Ibid.*
[10] 2006 SCC 39
[11] [1993] 3rd Quarter Sask. Labour Rep. 114, LRB File No. 099-03

D. Analysis and Decision

[19] The Board has concluded that a limited order for disclosure of documents is warranted in this matter. Accordingly, we allow AECOM's application in part, for the following reasons.

[20] First, the Board disagrees with the Union that AECOM's application should be dismissed for reasons of timeliness. *SAHO*, it is true, discourages production applications commenced "late in the day". However, AECOM has not closed its case, and, it appears, it will be calling evidence for a least a few more hearing days. In our view, there is no strong reason to dismiss this application as untimely.

[21] That said, the timing of this application is certainly a consideration the Board may take into account when crafting the scope of the disclosure order, and we have done so here. See especially: *SAHO*, *supra*, at paragraph 42, and *Air Canada*, *supra*, at paragraph 34.

[22] Second, the Board has concluded that the Union's claims of privilege are without merit. The Board very recently reviewed the principles surrounding various forms of privilege including litigation privilege, and labour relations privilege. See: *CB, HK & RD v Canadian Union of Public Employees, Local No. 21, CUPE National and City of Regina*[12] [*CB, HK & RD*]. The Board does not intend to rehearse that analysis here but it does persuade us that the Union's claims of privilege cannot succeed in this case.

[23] Respecting the claim of litigation privilege, the Board concludes it must fail because the dominant purpose of the Union's communications for which AECOM now seeks disclosure is not litigation related. Those communications were intended to encourage employees to vote in support of unionization. Indeed, some of those communications have already been introduced into evidence and were very public documents. In no way could they be described as documents even the "substantial

[12] LRB File Nos. 035-15, 035-16 & 037-15 dated October 3, 2017, especially at paras. 31-45.

purpose" of which was anticipation of future litigation. See generally the discussion at paragraphs 33 and 34 of *CB, HK & RD.*

[24] Respecting the claim of labour relations privilege, the Board concludes that it, too, must fail. As noted in *CB, HK & RD* at paragraph 40, "[l]abour relations privilege is more accurately characterized as an application in the labour relations context of the Wigmore criteria for identifying when privilege may be claimed for communications made within a confidential relationship". Suffice it say, in the Board's opinion, the kinds of communications for which AECOM seeks production do not satisfy the four (4) part Wigmore test.

[25] Before leaving this particular issue, the Board notes that it has in the past extended labour relations privilege to various aspects of the collective bargaining process. For example, in *WaterGroup*[13], the Board declined a request for disclosure of a negotiator's notes and related materials. This has been the consistent practice of this Board since that time. Having reviewed the Ontario Board's decisions in both *Graham Brothers*[14], and *Bolton Railings*[15], it would appear that the Ontario Board's approach differs from this Board's, and those cases are distinguishable.

[26] Turing to the substance of AECOM's request, we begin by noting that the allegation of inappropriate employer communication is narrow and related to discrete events. To put it in context, we reproduce the assertions relevant to this application found in the Union's Amended Amended Unfair Labour Practice application below:

> *48. On or about June 23, 2017, representatives of AECOM distributed a document entitled "What working for AECOM can do for you…" to employees, in their lunch trailer. The title of the document alone suggests that certifying with IBEW 2038 would somehow impact their status as "working for AECOM". The letter was read aloud by Mr. Doepker to the employees during a meeting following their break. Additionally, this document contains intimidating and coercive language and tone and was provided to the employees in a captive audience situation. IBEW 2038 takes the position that some of the information contained in the [sic] is false, misleading and/or incomplete. . .*

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[13] *Supra* n. 11.
[14] *Supra* n. 6.
[15] *Supra* n. 7

> *49. On or about June 23, 2017 and following the distribution of the letter from AECOM reference [sic] above, Jeff Sweet, President of IBEW 2038 wrote to Grant Doepker, AECOM Project Coordinator, and requested an opportunity to meet with the employees at the job site, during their regularly scheduled break…*
>
> *50. Mr. Doepker responded to Mr. Sweet on June 26, 2017 refusing Mr. Sweet's request for an onsite visit due to operational requirements.…*

[27] A further relevant factual consideration is that none of AECOM's representatives knew anything about the Union's organizing drive until its certification application was filed with this Board on June 13, 2017. The Board has consistently heard testimony from AECOM's witnesses that they were totally unaware of any union organizing taking place at the work site prior to that date.

[28] In the Board's view these two (2) dates – June 13, 2017 and June 23, 2017 – should serve as the parameters for any production order. The Board recognizes and the parties acknowledge that certain communications between the Union and AECOM's employees during that time period have already been disclosed. Yet, there may be other broadly based communications that the Union sent out to employees during that time frame. There is "probative nexus" to quote the fifth factor set out in *Air Canada*, *supra*, between the Union's allegations of inappropriate employer communications and the documents for which AECOM seeks production.

[29] Accordingly, the Board directs that any communications the Union had with AECOM employees from June 13, 2017 to June 23, 2017, including flyers or text messages should be disclosed. The kind of communications contemplated by the Board relate to communications respecting the vote to determine whether certification should be granted. AECOM indicated that it would agree to anonymizing the names of recipients of such communications. As well, the Union is entitled to withhold texts or written materials which may be impressed with solicitor-client privilege. Apart from these stipulations, all other communications the Union had with AECOM employees during that time period should be disclosed.

D. <u>Conclusion and Order of the Board</u>

[30] For the foregoing reasons, the Board makes the following Orders pursuant to subsections 6-103(2) and 6-111(1)(b) of the *SEA*:

> **(1)** **That** the Union should produce all its communications, including flyers or text messages, made by its representatives to AECOM employees between June 13, 2017 and June 23, 2017;
>
> **(2)** **That** any information that could identify a recipient should be redacted from the communication in question;
>
> **(3)** **That** any dispute respecting the application of, or compliance with, this Order may be raised with the Board at the hearing scheduled to recommence on October 30, 2017, and
>
> **(4)** **That** in all other aspects, AECOM'S application for production of documents is dismissed.

[31] An appropriate Board Order will accompany these Reasons for Decision.

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

Yours very truly,

Graeme G. Mitchell, Q.C.
Vice-Chairperson