Saskatchewan
Labour Relations Board

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant v. BRAND ENERGY SOLUTIONS (CANADA) LTD., Respondent

- and -

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant v. ALUMA SYSTEMS CANADA INC., Respondent

- and -

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant v. SAFWAY SERVICES CANADA ULC, Respondent

- and -

THE INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 119, Applicant v. ALUMA SYSTEMS INC. and SAFWAY SERVICES CANADA ULC, Respondents

- and -

ALUMA SYSTEMS INC. and SAFWAY SERVICES CANADA ULC, Applicants v. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Respondent

- and -

ALUMA SYSTEMS INC. and SAFWAY SERVICES CANADA ULC, Applicants v. THE INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 119, Respondent

LRB File Nos. 127-18, 128-18, 129-18, 135-18, 177-18 & 178-18; October 29, 2018
Chairperson, Susan C. Amrud, Q.C.; Members: Mike Wainwright and John McCormick

For United Brotherhood of Carpenters and Joiners of America, Local 1985:	Heather M. Jensen
For The International Association of Heat & Frost Insulators and Asbestos Workers, Local 119:	Greg Fingas

For Aluma Systems Inc. and Safway Services Canada ULC:	Larry Seiferling, Q.C. Steve Seiferling
For Brand Energy Solutions (Canada) Ltd.:	Christopher Lane, Q.C.

PRACTICE AND PROCEDURE – Production of documents – Successorship/common employer applications to be heard separately – Applications for production of documents also heard separately.

PRACTICE AND PROCEDURE - Production of documents – Presumption that documents identified in *EllisDon* will be disclosed for successorship application – Further requests assessed using *Air Canada* principles – Applicants not required to rehearse their evidence in response to pre-hearing disclosure request.

REASONS FOR DECISION – PRELIMINARY MATTERS

OVERVIEW

[1] **Susan C. Amrud, Q.C., Chairperson:** On February 8, 2018, Construction Workers Union, CLAC Local 151 ["CLAC"] filed an Application for Bargaining Rights[1] for employees of Brand Energy Solutions (Canada) Ltd. ["Brand"]. That application has spawned many additional applications meant to address the issue of which union(s) have bargaining rights with respect to Brand's employees. Those applications included two Applications for Employer Successorship, one that alleges that Brand and Aluma Systems Inc. ["Aluma"] are successor employers to Aluma Systems Canada Inc. and Safway Services Canada, ULC ["Safway"], brought by The International Association of Heat & Frost Insulators and Asbestos Workers, Local 119[2] ["Insulators"], and one that alleges that Brand is a successor employer to Brand Scaffold Systems of Canada Inc., Aluma Systems of Canada Inc. and ThyssenKrupp Safway Inc., brought by the United Brotherhood of Carpenters and Joiners of America, Local 1985[3] ["Carpenters"].

[2] At a hearing on June 21, 2018, the Board determined that the Applications for Employer Successorship filed by the Insulators and Carpenters would be heard first, before the other related applications. Those applications are set to be heard by the Board on November 13 and 14, 2018.

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[1] LRB File No. 030-18.
[2] LRB File No. 049-18. Amended Application filed September 10, 2018; consented to by Brand and Aluma/Safway September 17, 2018.
[3] LRB File No. 052-18.

[3] The Insulators, Carpenters and Aluma/Safway[4] have all made requests for production of documents that they state have not been responded to in full or at all. On September 12, 2018 the Board heard argument on the following applications for production of documents:

(a) Notice of Application for Orders for Disclosure and Production of Documents and Things and Particulars Re: Brand Energy Solutions (Canada) Ltd. dated June 7, 2018 (filed by the Carpenters)[5];

(b) Notice of Application for Orders for Disclosure and Production of Documents and Things and Particulars Re: Aluma Systems Canada Inc. dated June 7, 2018 (filed by the Carpenters)[6];

(c) Notice of Application for Orders for Disclosure and Production of Documents and Things and Particulars Re: Safway Services Canada, ULC dated June 7, 2018 (filed by the Carpenters)[7];

(d) Notice of Application for Disclosure and Production of Documents and Things and Particulars dated June 18, 2018; modified by letter dated June 29, 2018 (directed to Aluma and Safway, filed by the Insulators)[8];

(e) Request for Production and Particulars dated August 27, 2018 (directed to the Carpenters, filed by Aluma/Safway)[9]; and

(f) Request for Production and Particulars dated August 27, 2018 (directed to the Insulators, filed by Aluma/Safway)[10].

[4] All of the parties agree that the Board should rely on *Prairie Arctic Regional Council of Carpenters, Drywallers, Millwrights v EllisDon Corporation*, 2014 CanLII 100507 (SK LRB) ["*EllisDon*"] in making this decision. Several key paragraphs were cited:

> *[36] In several decisions, including Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. WaterGroup Companies Inc., [1993] 1st Quarter Sask. Labour Rep. 252, LRB File No. 009-93, United Food and Commercial Workers, Local 1400 v. P.P. Bottlers Ltd., [1997] Sask. L.R.B.R. 249, LRB File No. 017-97, United Brotherhood of Carpenters and Joiners of America, Local 1985 v. PCL Construction Group Inc. et. al., (2003)*

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[4] Aluma and Safway are represented by the same counsel, who has advised the Board that they are in the process of merging into one entity. Accordingly, they will frequently be treated as one entity in these Reasons.

[5] LRB File No. 127-18.

[6] LRB File No. 128-18.

[7] LRB File No. 129-18.

[8] LRB File No. 135-18

[9] LRB File No. 177-18.

[10] LRB File No. 178-18.

85 C.L.R.B.R. (2d) 57, [2002] Sask. L.R.B.R. 120, LRB File No. 192-01, and Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers, et. al v. Tercon Industrial Works Ltd., [2012] 212 C.L.R.B.R. (2d) 134, LRB File Nos. 162-10, 163-10 & 164-10, this Board has discussed the onus on an applicant (i.e.: the party filling an application) to provide sufficient specificity in his/her pleadings (i.e.: in the application) so that the party against whom a complaint is made is able to read the applicant's application and get a clear understanding of when, how and by whom, the Act was alleged to have been violated. On the other hand, the Board does not expect an applicant to provide a complete rehearsal of the evidence upon which he/she intends to rely in his/her application. In deciding whether or not an applicant has sufficiently particularized their allegations, the Board takes into consideration the nature of the issues in dispute between the parties. The Board also takes into consideration any practical or informational disadvantages that a party may be operating under. For example, there is generally a lower expectation on an unrepresented applicant. There is also a lower expectation on an applicant to particularize a complaint that involves the status of a respondent (such as in successorship or related employer cases) than in a conduct-based complaint (such as unfair labour practices). See: PCL Construction Holdings Ltd.

. . .

[74] In numerous cases, this Board has outlined its approach to pre-hearing document production in the construction sector. See: International Brotherhood of Electrical Workers, Local 2038 v. Sun Electric (1975) Ltd., Alliance Energy Limited and Mancon Holdings Ltd., [2002] Sask. L.R.B.R. 362, LRB File No. 216-01. Although not in the context of the construction sector, this Board conducted a general review of its procedures for pre-hearing production of documents in Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra. In doing so, the Board made the following comments we find instructive:

> *[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).*

[75] Having reviewed the extensive list of information and documents desired by the Carpenters, the Ironworkers and the Labourers, we find that only a few of the enumerated items properly fall within the scope of the kind of limited pre-hearing disclosure procedures anticipated by this Board. As we have repeatedly indicated, we do not desire to replicate the kind of extensive pre-hearing procedures commonly utilized in a judicial setting. See: Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra. Simply put, the scope of pre-hearing document production permitted by this Board is not as extensive as that desired by the applicants in these proceedings. Pre-hearing disclosure of the extent desired by the unions would signal a fundamental change in this Board's pre-hearing procedures and would see this Board moving into the kind of discovery processes that we have consistently sought to avoid.

[76] On the other hand, there is no doubt that successorship and common employer applications tend to involve complicated fact situations, particularly so in the construction sector where enterprises often operate as groups of interconnected companies. Furthermore, the majority of the most probative evidence in these cases tends to be in the sole possession of employers. Furthermore, while employers are understandably reluctant to make public their inner working, often the most probative evidence does not tend to be controversial; the legal significance of that evidence (in terms of the application of Saskatchewan's labour relations regime) is often in dispute; but the evidence, itself, is generally not in dispute. In this regard, there are certain categories of evidence that tends to expedite preparation for hearings and for which it makes little sense to require an applicant to wait until its counsel has its first opportunity to cross-examine the employer's witnesses before it can obtain access to this information. In our opinion, the routine provision of certain information by employers in successorship/common employer cases in the construction sector will tend to expedite hearings, will tend to avoid pre-hearing delays, will tend to assist the parties in preparing their cases, and will generally promote a more efficient use of this Board's scare resources.

[77] In our opinion, the following categories of information are properly the subject of a pre-hearing request for document production in successorship/common employer cases in the construction industry (assuming an applicant has demonstrated an arguable case):

1. *A listing of the key personnel for each respondent corporation.*
2. *A listing of all works or undertakings performed by each respondent corporation in the Province of Saskatchewan with a value in excess of $25,000 since 2012 (the year before the first application was filed with the Board), including the location and dates of such works or undertakings, together with a listing of the number and type of trades persons employed by the respondent corporations for each such work or undertaking.*
3. *A listing of all offices, buildings or premises owned or leased by each of the respondents in the Province of Saskatchewan since 2012.*
4. *A listing of any equipment leased or owned by each of the respondents that is located in the Province of Saskatchewan since 2012.*
5. *Copies of personnel, safety and employment manuals effective for each respondent corporation in the Province of Saskatchewan, if any for the years 2012 and 2013.*
6. *Copies of any insurance policies covering works or undertakings performed in Saskatchewan since 2012.*
7. *Copies of any insurance policies covering assets held in Saskatchewan since 2012.*
8. *Copies of any contracts or agreements between any of the named respondents wherein one respondent supplies labour to any other respondent for works or undertakings in the Province of Saskatchewan since 2012.*
9. *A statement from each of the respondents as to whether or not any of their capital is pooled with any of the other named respondents in these proceedings.*
10. *A statement from each of the respondents as to whether or not they report to any of the other named respondents in these proceedings.*

[78] In our opinion, the information contained in each of the above captioned items satisfies the "Air Canada" criteria. For example, all of the listed information is arguably relevant to allegations of successorship or common employer status or both. Furthermore, we find that each of these categories is sufficiently particularized. We are mindful that requiring the production of this information and/or these documents could involve considerable expense, time and effort. Certainly, if documents are produced for each of these items, compliance could involve a significant number of documents. However, we are satisfied that there is a strong probative nexus between this information and the matters in dispute between the parties. In our opinion, the strength of the probative nexus associated with each of these categories of information is sufficient to justify the expense, time and effort associated with providing this information, whether compliance is in the form of a list, a statement or production of responsive documents. In our opinion, the provision of this information will tend to avoid any further pre-hearing delays by assisting the parties in preparing their respective cases.

(a) Application by Carpenters against Brand

[5] The Carpenters argue that four of their requests have not been answered in full[11]:

> #12: Disclosure of the identity of the "parent" company or companies in the "Brand Group", whether the same be "Brand Energy & Infrastructure Services" or otherwise and disclosure of all directors and shareholders of this corporation for the years 2015 to present.
>
> #21: All and any documents evidencing the relationship between this respondent and the parent company of the Brand Group be it Brand Energy & Infrastructure Services or any other corporate or other entity disclosing the financial relationship between the subsidiary company and the parent company and the subsidiary and the other respondent corporations in the application within or any other member of the "Brand Group", including direction, control, finances and corporate governance.
>
> #23: Particulars and disclosure of all bids and contracts concerning work in relation to what is known as Husky Energy from the years 2015 to present.
>
> #24: Particulars of any communications between this respondent and the other named respondents, the Brand Companies and members of the "Brand Group" or anyone on any of their behalf concerning bidding on work and obtaining contracts for work with Husky Energy from the years 2015 to present, including disclosure of all and any communications, whether in writing or otherwise and production of all communications in writing or memoranda made in relation to such communications, if not disclosed in the above.

[6] With respect to #12, the Carpenters state that the request for the disclosure of all shareholders of this corporation for the years 2015 to present has not been provided. Their view is that ownership is a key issue. Brand's position is that this information is not relevant and that it was requested and denied in *EllisDon*.

[7] With respect to #21, Brand argues that this information applies more to the common employer applications than the successorship applications, so they do not believe they should be required to produce this information now. They also argue that this same information was requested and denied in *EllisDon*, it lacks probative value, and is a very broad request, of very sensitive documents. The Carpenters are of the view that it does not matter if some of the

[11] The numbers referred to are the numbers by which the various requests were identified in the applications for production of documents.

information requested is more relevant to the common employer issue; all disclosure should be provided now. In their view, this relationship is a central issue in the successorship application.

[8] The Carpenters indicate that they received a partial response to the requests in #23 and #24. They seek confirmation that the information provided is all of the information that exists on this issue from 2015 to the present. Brand states that it provided the requested contracts respecting the Husky Energy work. They acknowledge that there may be probative value to bid documents, but there are no bid documents for 2018. Brand noted that they provided an email that showed the 2018 work was not bid on but was awarded to Brand under a Master Services Agreement they had with Husky Energy. They also noted that in *EllisDon* comparable information was requested and denied.

[9] In general, Brand states that in reviewing these disclosure requests, the Board should first consider the nature of the application for which disclosure is requested, in this case, successorship. Brand does not agree with the Carpenters' assertion that the Board should order the production of information now that relates only to the common employer issue; part of the reason for hearing the successorship applications first is to potentially avoid the time and resources required to deal with the common employer issue. The Carpenters argue that it is not practical to separate those claims at this stage. Without seeing the documents, they cannot agree that the documents would only apply to the common employer issue, and not to successorship, given the overlap in the relevant considerations in those issues. They also argue that even if the information applies only to the common employer issue that does not mean it should not be provided now. It is an efficient use of the time of the Board and the parties to eliminate the need for multiple preliminary hearings.

[10] Brand also objects to disclosing further information on the basis that the Board should not allow a fishing expedition. The Carpenters state that their requests cannot be characterized as a fishing expedition. They are not looking for a claim; they have advanced a claim and are looking for documents to help them satisfy the onus that is on them to prove that claim, and to ensure all relevant evidence is before the Board.

[11] Brand states that *EllisDon* sets out the ten categories of documents that must be produced; the other information requested by the Carpenters does not have to be provided. The requirement in *EllisDon* for a probative nexus between the requested information and the successorship claim leads to the denial of the vast majority of what the Carpenters have

requested. Brand's position is that it has complied with the ten categories. What is in dispute is a handful of the remaining 17 requests that were made and that they have disclosed even more than *EllisDon* would have required. They object to the outstanding requests on the basis of the time and effort that would be required to try to find those documents, but also because they are documents of a private nature. They should not be required to be shared unless there is a strong probative nexus between the requested information and the matters in dispute between the parties.

[12] The Carpenters' view is that each case must be dealt with on its own facts. The facts here are not identical to *EllisDon*. *EllisDon* does not fetter this panel's discretion.

(b)/(c) <u>Applications by Carpenters against Aluma and Safway</u>

[13] In these applications the Carpenters state that five of their requests have not been answered in full:

> #1: A listing of the key personnel for this respondent (and any changes from 2016 to present).
>
> #12: Disclosure of the identity of the "parent" company or companies in the "Brand Group", whether the same be "Brand Energy & Infrastructure Services" or otherwise and disclosure of all directors and shareholders of this corporation for the years 2015 to present.
>
> #21: All and any documents evidencing the relationship between this respondent and the parent company of the Brand Group be it Brand Energy & Infrastructure Services or any other corporate or other entity disclosing the financial relationship between the subsidiary company and the parent company and the subsidiary and the other respondent corporations in the application within or any other member of the "Brand Group", including direction, control, finances and corporate governance.
>
> #23: Particulars and disclosure of all bids and contracts concerning work in relation to what is known as Husky Energy from the years 2015 to present.
>
> #24: Particulars of any communications between this respondent and the other named respondents, the Brand Companies and members of the "Brand Group" or anyone on any of their behalf concerning bidding on work and obtaining contracts for work with Husky Energy from the years 2015 to present, including disclosure of all and any communications, whether in writing or otherwise and production of all communications in writing or

memoranda made in relation to such communications, if not disclosed in the above.

[14] With respect to #1, the Carpenters argue that in the construction industry, key personnel is an important indicia when the Board is considering a successorship application and determining the relationship between two entities. Aluma/Safway noted that they provided a list of personnel. They are prepared to go back and confirm that this is the full list for the entire timeframe requested.

[15] With respect to #12, #21, #23 and #24, the issues and arguments are the same as those on the application discussed above, (a) Application by Carpenters against Brand. The Carpenters provided the same submissions and Aluma/Safway adopted Brand's above-noted submissions.

(d) <u>Application by Insulators against Aluma and Safway</u>

[16] The Insulators made an application for what they describe as the routine documents that *EllisDon* requires Aluma/Safway to disclose. The original application requested these documents since 2016. On June 29, 2018, they modified that request to ask for the documentation back to 2004. In its Amended Reply to the successorship applications, filed June 20, 2018, Aluma indicates at paragraphs 5(c) and (d) that a different company, Aluma Systems Canada Inc., was certified to the Insulators in 2003, that company wound up its operations in 2005, and since November 2005 Aluma has voluntarily recognized the Insulators in Saskatchewan. The Insulators state that immediately after Aluma amended its Reply to make this assertion about its change in status in 2005, the Insulators amended their document request to ask for the standard *EllisDon* documents back to 2004 to address this new assertion[12].

[17] Aluma/Safway's response was that there are no records. They state that, according to the Saskatchewan Corporate Registry, in 2004 the originally certified company ceased to exist. Two other companies, that were not certified, formed a new company in Saskatchewan in 2004. Aluma/Safway state that they have no corporate documents or corporate knowledge respecting the requested information; they have provided all the documents they have.

[12] Letter dated June 29, 2018 from Mr. Fingas, counsel for the Insulators, to Mr. Seiferling, counsel for Aluma/Safway, attached to the Reply by the Insulators to the document production application by Aluma/Safway.

[18] The Insulators counter that this is not a remotely plausible or logical assertion, especially given the factual assertions Aluma/Safway are making about what happened in that time period. Employers are required by *EllisDon* to disclose certain documents so that unions can make their case for successorship. If Aluma/Safway do not have their corporate history at hand they should be required to seek it out from their parent company. The Insulators say Aluma/Safway have to make a reasonable effort to find that information within the Brand Group. It is not plausible to assert that there are no documents to show the disposition of the company that they say no longer exists.

[19] The Insulators argue that *EllisDon* distinguishes between routinely disclosed information and further information that is subject to an analysis in accordance with the principles established in *Air Canada Pilots Association v Air Canada et al.*, [1999] CIRBD No. 3 ["*Air Canada*"]. They reject the assertion that just because particular documentation was not required in *EllisDon* that it cannot be the subject of disclosure in a subsequent case.

(e)/(f) <u>Applications by Aluma/Safway against Carpenters and Insulators</u>

[20] Aluma/Safway made the following disclosure requests of the Carpenters and Insulators, in response to which they have received no disclosure:

> Documents, particulars, and things that Local 119 [Insulators] and Local 1985 [Carpenters] are relying upon with respect to successorship, including any documents, particulars, and things showing:
>
> 1) That there was a transfer, or disposition, of a business, as set out by the Supreme Court of Canada in *Lester*, and in the cases from the courts and the Board that followed, including:
>
> a. Any documentation showing the date of the alleged disposition or transfer;
>
> b. Any documentation, information, or particulars, with respect to the details of the alleged disposition or transfer;
>
> c. Any communication, including documentation or emails, in the possession of your client with respect to the alleged disposition or transfer; and
>
> d. Any communication, including documentation or emails, in the possession of your client with respect to bids, enablement, or any other

discussions regarding the work of any of the respondents in LRB File No. 049-18 on the Husky Oil project from 2016 to present.

2) That any such transfer or disposition of a business was as a "going concern", as set out in the jurisprudence of the Board; including:

a. Any documentation, particulars, or communication showing a transfer of assets with respect to any of the respondents.

b. Any documentation, particulars, or communication showing a transfer of equipment with respect to any of the respondents.

c. Any documentation, particulars, or communication showing a transfer of work with respect to any of the respondents.

d. Any documentation, particulars, or communication showing a transfer of employees with respect to any of the respondents.

e. Any communications in the possession of your client discussing, referring to, or containing reference to Aluma, Safway, Brand, or the Husky Oil Upgrader work.

[21] Aluma/Safway states that all they are asking for is documentation related to the two-part test for successorship set out in *Lester (W.W.) (1978) Ltd v UAJAPPI, Local 740*, [1990] 3 SCR 644, namely, that, for a successorship to exist there must be a disposition of a business as a going concern. Their position is that they are entitled to know what documents the Carpenters and Insulators intend to rely on at the hearing to prove the date and manner of disposition. They want the relevant documents in the unions' knowledge or possession, especially respecting the date of disposition, so they are not caught by surprise. If a party was to be presented with a document or particular at the hearing for the first time, this would cause a delay in the hearing. *EllisDon* requires, in the interests of fairness, that parties are entitled to know, in general terms, what is alleged against them.

[22] The Carpenters' view is that the Aluma/Safway request is for pre-hearing disclosure of the documents they may file in the hearing, rather than production of documents uniquely in the Carpenters' possession. They argue that this is not required by *EllisDon* and is contrary to the Board's practice; there is no need for one party to rehearse all evidence it intends to rely on at the hearing to satisfy the requirement that the responding party has enough information to know the case to be met. The disclosure requested by Aluma/Safway is not required under *The Saskatchewan Employment Act*; it is an attempt to replicate civil proceedings, something the Board has always avoided. The unions have an onus to prove their claims and to do that they require documents that are only in the possession of Aluma, Safway and Brand.

Aluma/Safway's request is quite different; they are not asking for documents that are uniquely in the possession of the unions, but what documents the unions intend to rely on at the hearing.

[23] Based on *EllisDon* they argue that in a status based case the union is expected to provide fewer particulars than in a conduct based complaint like an unfair labour practice complaint. There is a recognition in Saskatchewan that the knowledge of the union is different in these two categories of cases and that difference affects the production principles that apply in each case.

[24] In the alternative, the Carpenters argue that they cannot provide an answer as to which documents they intend to rely on at the hearing before they have a complete answer to their production request. Any order for production against the unions should be effective only after the unions receive the employers' documents.

[25] The Insulators' Reply indicates that it is unable to respond to Aluma/Safway's request until they fully respond to its request. Applicant unions are generally not required to provide detailed particulars; an employer cannot flout its routine disclosure obligations and then suggest the union has to provide particulars about issues over which it has been withholding information. It is unfair to expect the unions to provide details of their case when they have outstanding requests for documentation respecting the case.

RELEVANT LEGISLATIVE PROVISIONS

[26] Section 6-18 of *The Saskatchewan Employment Act* applies to the successorship claims:

> ***Transfer of obligations***
> *6-18(1) In this Division, "disposal" means a sale, lease, transfer or other disposition.*
>
> *(2) Unless the board orders otherwise, if a business or part of a business is disposed of:*
>
> > *(a) the person acquiring the business or part of the business is bound by all board orders and all proceedings had and taken before the board before the acquisition; and*
> >
> > *(b) the board orders and proceedings mentioned in clause (a) continue as if the business or part of the business had not been disposed of.*
>
> *(3) Without limiting the generality of subsection (2) and unless the board orders otherwise:*
>
> > *(a) if before the disposal a union was determined by a board order to be the bargaining agent of any of the employees affected by the disposal, the board order*

is deemed to apply to the person acquiring the business or part of the business to the same extent as if the order had originally applied to that person; and

(b) if any collective agreement affecting any employees affected by the disposal was in force at the time of the disposal, the terms of that collective agreement are deemed to apply to the person acquiring the business or part of the business to the same extent as if the collective agreement had been signed by that person.

(4) On the application of any union, employer or employee directly affected by a disposal, the board may make orders doing any of the following:

(a) determining whether the disposal or proposed disposal relates to a business or part of a business;

(b) determining whether, on the completion of the disposal of a business or part of the business, the employees constitute one or more units appropriate for collective bargaining;

(c) determining what union, if any, represents the employees in the bargaining unit;

(d) directing that a vote be taken of all employees eligible to vote;

(e) issuing a certification order;

(f) amending, to the extent that the board considers necessary or advisable:

(i) a certification order or a collective bargaining order; or

(ii) the description of a bargaining unit contained in a collective agreement;

(g) giving any directions that the board considers necessary or advisable as to the application of a collective agreement affecting the employees in the bargaining unit referred to in the certification order.

(5) Section 6-13 applies, with any necessary modification, to a certification order issued pursuant to clause (4)(e).

[27] Sections 6-103 and 6-111 of *The Saskatchewan Employment Act* set out powers of the Board to order disclosure of information:

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

(2) Without limiting the generality of subsection (1), the board may do all or any of the following:

(a) conduct any investigation, inquiry or hearing that the board considers appropriate;

(b) make orders requiring compliance with:

(i) this Part;

(ii) any regulations made pursuant to this Part; or

(iii) any board decision respecting any matter before the board;

(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act;

(d) make an interim order or decision pending the making of a final order or decision.

Powers re hearings and proceedings
6-111(1) With respect to any matter before it, the board has the power:

(a) to require any party to provide particulars before or during a hearing or proceeding;

(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 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:

(i) to summon and enforce the attendance of witnesses;

(ii) to compel witnesses to give evidence on oath or otherwise; and

(iii) to compel witnesses to produce documents or things;

ANALYSIS AND DECISION

[28] The applications to be considered by the Board on November 13 and 14, 2018 are the successorship applications. Consideration of the common employer applications will, if necessary, be considered at a later date. It is through this lens that the Board considered the document production applications. The decision that the Board made at the hearing on June 21, 2018 to split these two issues applies equally to the document production issues. Any document production requests that apply only to the common employer applications will not be considered or granted at this time. If necessary, they can be brought before the Board again at a later date.

[29] As noted earlier, all of the parties relied on this Board's decision in *EllisDon* as the starting point for the Board in its consideration of these six applications. The parties also all agreed that the *Air Canada* principles should guide the Board's deliberations.[13] The Board agrees.

[30] Paragraph 29 of *Air Canada* also provides useful guidance:

The Board will assess the competing interests of the parties against the proper disposition of the case. In evaluating the competing interests, the Board will be inspired by the principles set out above. It will be particularly mindful of the prejudice that may be caused by ordering the wholesale production of sensitive business records and weigh the probative value of the production against the labour relations interest in disposing of the case. Even if the business records are to be admitted on a confidential basis, the applicant still has the onus of establishing a prima facie case that the material has some bearing on the case it

[13] The principles are reproduced at paragraph [4].

> *seeks to put forward and that its value outweighs the prejudice to the respondent. Absent this probative value, these documents will not be ordered disclosed.*

[31] With respect to the applications by Aluma/Safway, the Board also considered *SEIU-West v. Voyager Retirement V Genpar Inc.*, 2016 CanLII 79627 (SK LRB), where the Board adopted the following principle in reviewing requests for sufficient particulars:

> *We do not interpret the requirement for the provision of sufficient particulars, in any case, to contemplate a complete rehearsal of evidence and argument in exchange between the parties prior to a hearing. What is necessary is that an applicant make it clear what conduct of the respondent is the subject of their complaint and how this conduct, in the view of the applicant, falls afoul of the Act. In assessing the degree to which an applicant has met this requirement, the Board must be guided not only by our desire to ensure a fair hearing but by the demands placed upon us by the objectives of efficacy and timeliness in our proceedings.* (para 17)

[32] In coming to its conclusions the Board also considered the written submissions provided by Aluma/Safway and the Carpenters and the very helpful submissions provided by all of the parties at the June 21 and September 12, 2018 hearings.

[33] The Board has reached its decisions based on the following principles:

- There is a presumption that the ten *EllisDon* categories of information will be disclosed in response to a pre-hearing request for document production in a successorship case.
- *EllisDon* does not fetter the discretion of the Board to consider other document production requests. Requests for further document production will be assessed using the *Air Canada* principles.
- The Board does not intend to replicate the extensive pre-hearing procedures commonly used in the courts.
- In making a document production order, the Board does not expect an applicant to provide a complete rehearsal of the evidence on which it intends to rely at the hearing.

[34] With respect to applications (a), (b) and (c), LRB File Nos. 127-18, 128-18 and 129-18, the Board makes the following rulings.

1. In applications (b) and (c), paragraph #1, the applicants request confirmation that the information provided respecting key personnel is complete for the entire timeframe requested. The respondents agreed to this request. The Board orders that the requested confirmation be provided or, in the alternative, that the further information required to satisfy this requirement be provided.

2. With respect to the information requested in paragraph #12, the Board orders that the requested shareholder information is not required to be disclosed. This information was requested, but not ordered, in *EllisDon*. The applicants have not satisfied the Board that any of the *Air Canada* principles require it to be disclosed on a pre-hearing application, or that it is arguably relevant to the successorship application.

3. With respect to the information requested in paragraph #21, the Board orders that the requested information is not required to be disclosed. This information was requested, but not ordered, in *EllisDon*. The applicants have not satisfied the Board that any of the *Air Canada* principles require it to be disclosed on a pre-hearing application. In particular, the applicants have not satisfied the Board that there is a sufficient probative nexus between the requested information and the successorship application to require it to be disclosed on a pre-hearing application.

4. With respect to the information requested in paragraph #23, the applicants are asking that the respondent confirm that the information provided is all of the available information for the requested timeframe. The Board orders that the requested confirmation be provided or, in the alternative, that the further information required to satisfy this requirement be provided. While this information may not have been required by *EllisDon*, there is a strong probative nexus to the facts in dispute between the parties.

5. With respect to the information requested in paragraph #24, the Board orders that the requested information is not required to be disclosed. The applicants have not satisfied the Board that there is a strong enough probative nexus between the requested information and the matters in dispute to justify the expense, time and effort that would be required to locate and produce this very broadly described category of information.

[35] With respect to application (d), LRB File No. 135-18, the Board makes the following rulings:

1. The respondents shall make further efforts to obtain the requested information for the full timeframe requested, including inquiring of its parent company and any other entities within the Brand Group that may be reasonably expected to hold the requested information. Aluma and Safway, through their Amended Replies to the Successorship Applications, established the probative nexus for this information.

2. The respondents shall provide information respecting the searches made to obtain the requested information.

[36] With respect to applications (e) and (f), LRB File No. 177-18 and 178-18, the Board makes the following rulings:

1. The Carpenters are ordered to disclose to Aluma/Safway any documents in their possession, that have not been provided to them by Aluma, Safway or Brand, that provide evidence supporting the successorship claim made by the Carpenters in LRB File No. 052-18.

2. The Insulators are ordered to disclose to Aluma/Safway any documents in their possession, that have not been provided to them by Aluma, Safway or Brand, that provide evidence supporting the successorship claim made by the Insulators in LRB File No. 049-18. The Board agrees that, as drafted, these applications go beyond a pre-hearing request for document disclosure. The unions are not required to rehearse their cases; if they have documents uniquely in their possession, disclosure of only those documents is what is required at this point.

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

DATED at Regina, Saskatchewan, this **29th** day of **October, 2018.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson