SASKATOON CO-OPERATIVE ASSOCIATION LIMITED, Applicant v UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent and CRAIG THEBAUD, Respondent

LRB File No. 133-19; July 22, 2019

Vice-Chairperson, Barbara Mysko; Board Members: Maurice Werezak and Laura Sommervill

For the Applicant Employer:	Kevin C. Wilson, Q.C.
For the Respondent Union:	Crystal L. Norbeck
For the Respondent Craig Thebaud:	Self-Represented

Practice and Procedure – Production of documents – Employer seeks pre-hearing production of documents – Board considers application pursuant to section 6-111(1)(b) of *The Saskatchewan Employment Act* for an Order directing production of documents or things – Board applies the *Air Canada* principles to the Employer's request – Board makes an Order for production of a more restricted set of documents.

Employer brings unfair labour practice application pursuant to sections 6-7, 6-41, 6-63(1)(c) and 6-63(1)(h) of the Act – Whether a private individual, who is neither a member of the Union nor an employee can infringe subclause 6-63(1)(c) or 6-63(1)(h) of the Act and thereby commit an unfair labour practice – Matter has not been fully canvassed at preliminary stage of proceedings.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application for an order to preserve and produce documents [the "Application"] made on behalf of Saskatoon Co-operative Association Ltd. [the "Employer" and the "Saskatoon Co-op"]. Both the United Food and Commercial Workers, Local 1400 [the "Union"] and Craig Thebaud ["Thebaud"] are Respondents to this Application.

[2] The Employer brings this Application in relation to its underlying (amended) unfair labour practice application, brought pursuant to sections 6-7, 6-41, 6-63(1)(c), and 6-63(1)(h) of *The Saskatchewan Employment Act* [the "Act"], in LRB File No. 230-18. The amended unfair labour practice application was filed on June 11, 2019. The previous application was filed on November 8, 2018. Both Respondents have filed replies in relation to the original unfair labour practice

application, as well as the amended application. The Board will refer in its Reasons to the amended unfair labour practice application, unless otherwise stated.

[3] On May 29, 2019, the Employer wrote to the Board Registrar seeking a preliminary ruling from the Board on the production issue. The following day, the Registrar indicated that an application would be required in order for the Board to determine the issue. The Employer filed this Application on June 11, 2019. The matter was heard by the Board on June 26, 2019.

[4] The Employer states that the most recent collective agreement expired on November 19, 2016. Negotiations for a revised agreement began in February 2018. On October 29, 2018, the Union served the Employer with a strike notice, and commenced strike activity on November 1, 2018. Recently, the parties concluded a collective agreement that contains a second tier wage schedule, something that the Union had initially opposed.

[5] In the unfair labour practice application, the Employer alleges that the Union, in concert with Thebaud, strategized to remove and replace some of the Employer's Board of Directors, as a bad faith tactic to unwind the collective agreement and force the Union's bargaining position on the Employer. More specifically, the Employer says that the Union has an interest in removing the second tier wage schedule that it had originally opposed but now forms a part of the collective agreement. According to the Employer, Thebaud is a former representative of the Union who was acting implicitly or explicitly as an agent of the Union, operating under the instruction, direction and/or permission of the Union.

[6] According to the Employer's Application, the alleged strategy consists of a number of elements that can be summarized as:

a. A petition of Co-op members to remove certain of the Board of Directors through the governance process as set out in *The Co-operatives Act, 1996*;

b. A Facebook group called "Saskatoon Co-op Members for the Fair Treatment of Employees" [the "Petition Facebook Group"] administered by Thebaud;

c. An Annual General Meeting ["AGM"] scheduled for June 20, 2019, at which there are three director positions to be filled through election;

d. A series of town hall style meetings convened to discuss Co-operative Principles, which serve as a "support group" for the Union;

e. An organization called "Co-op Members for Fairness" [the "Election Facebook Group"], which is preparing a slate of candidates to run in the election;

f. The Union's offer to subsidize the purchase of 2,000 memberships in the Saskatoon Co-op;

g. The amalgamation of administrative teams for the two Facebook groups.

Argument on Behalf of the Parties:

[7] The Employer alleges that the Union and Thebaud have committed numerous unfair labour practices by collaterally attacking the bargaining process and collective agreement reached with the Employer, through their coordinated attempts to interfere with the Saskatoon Co-op's governance. Together, Thebaud and the Union have employed faux "grassroots" movements to act on their behalf in accomplishing their goals.

[8] The Employer says that, while its substantive allegations are well grounded, the merits are not before the Board at this time. Its production request is a matter of procedural fairness that, if granted, will promote the timely and efficient administration of the underlying matter. It will assist in clarifying the true issues in dispute, assist the parties in their preparations, facilitate potential settlement, and militate against ambush or unnecessary adjournments.

[9] In response to the Employer's earlier request for documents, the Union has allegedly provided an "irrelevant email chain" between a representative of the Union and Thebaud, and nothing further. Counsel for the Union has confirmed the existence of a private Facebook group used by the Union's bargaining committee to discuss "the strike and other bargaining issues". According to the Employer, Thebaud has provided no documents in response to the Union's request.

[10] Both the Employer and the Union rely on the *Air Canada* principles in support of their respective positions, albeit to a different effect. The Employer suggests that its requests satisfy all six principles. As for the question of prejudice, the issues of privilege can be determined in a separate process whereby the documents in issue are submitted to the Board for review.

[11] The Union argues that the Employer's Application suffers from a number of problems. First, the phrasing of the request is vague and not amenable to implementation. The use of the word "representatives" raises serious questions for a member-based organization and, to compound the problem, the core of the dispute pertains to who is, or was, representing the Union during the material times. Second, the requests do not confine themselves to matters that are

arguably relevant or that are sufficiently connected to the matters in issue. Third, the breadth of requests makes them unduly onerous on the Union. Fourth, the requested materials would likely include materials, including those related to the strike, that would be subject to labour relations privilege. Those matters can be resolved only after the scope of the request is appropriately narrowed.

[12] As to the latter point, the Board noted some discrepancies in the Union's argument. First, the Union says, in relation to the first set of requested documents, that the Board should deny the request rather than narrow it. Narrowing the request would create an unfairness for the Union. Overall, the Union provides the Board with suggestions for narrowing the requests, but resists acquiescing to those alternative suggestions. The Union argues that the Employer should be required to re-formulate its requests, so as to allow for a meaningful discussion about relevancy and production. Finally, in the conclusion to its written brief, the Union asks that the Employer's Application be dismissed and/or appropriately narrowed and redefined to reflect the real issues in dispute and the impact of the requests on the Union, with issues pertaining to privilege to be determined at a later date.

[13] In his Reply, Thebaud provides four objections to the production Application:

a. The only evidence before the Board is that there has been no collusion between the Union and Thebaud;
b. There is no known way of preserving and disclosing a Facebook page;
c. The evidence being sought is to answer a question that has already been answered in the Respondents' replies;
d. There has been no evidence of collusion that would call into question the Respondents' evidence.

[14] In the hearing, Thebaud added that the Employer's Application amounted to a fishing expedition.

[15] Thebaud also raises an objection on the basis that the documentation being requested engages the interests of third parties who were not served with notice of the hearing but would be impacted by a production order. The Board notes, however, that all parties who are named in the underlying application, and have an interest in the outcome of the production Application, were present and made submissions at the hearing on June 26, 2019.

Relevant Statutory Provisions:

[16] The following provisions of the Act are applicable:

Good faith bargaining
6-7 *Every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to this Part or by an order of the board.*

Parties bound by collective agreement
6-41*(1) A collective agreement is binding on:*
(a) a union that:
(i) has entered into it; or
(ii) becomes subject to it in accordance with this Part;
(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and
. . .
(c) an employer who has entered into it.
(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:
(a) do everything the person is required to do; and
(b) refrain from doing anything the person is required to refrain from doing.
(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.
(4) If an agreement is reached as the result of collective bargaining, both parties shall execute it.
(5) Nothing in this section requires or authorizes a person to do anything that conflicts with a requirement of this Part.
(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails.

Unfair labour practices – unions, employees
6-63*(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*
. . .
(c) to fail or refuse to engage in collective bargaining with the employer respecting employees in a bargaining unit if a certification order has been issued for that unit;
. . .
(h) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to a union or an employee.

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:

Preliminary Issue - Jurisdiction:

[17] The Union states that the Board does not have jurisdiction over the Saskatoon Co-op's election of its Board of Directors, further to *The Co-operatives Act, 1996*, and in turn, cannot take jurisdiction over the underlying unfair labour practice application. The Union has cited *The Co-operatives Act, 1996* in support of this objection but has provided few specifics as to how that Act precludes the Board's jurisdiction over the underlying application.

[18] The Union has not brought a summary dismissal application. Nor is the jurisdictional issue readily apparent, and so the case against the Union is presently proceeding. The current Application is based on the unfair labour practice application, and the Board cannot dismiss the existing Application on the basis that the Union may at some later date bring an application for summary dismissal for want of jurisdiction.

[19] The Employer has brought its unfair labour practice application pursuant to sections 6-7, 6-41, 6-63(1)(c) and 6-63(1)(h) of the Act. Each of these sections impose obligations on a union, in the form of good faith bargaining, the binding nature of a collective agreement, and the duty to engage in collective bargaining.

[20] On a related note, the Board inquired whether Thebaud is properly before the Board, being a private individual who is neither an employee of Saskatoon Co-op or a Union member. The Employer replied, relying on section 6-63(1)(c), that "any other person" can commit an unfair

labour practice under the relevant provision of the Act. The Employer suggested further that it is not necessary for the Board to find an agency relationship between the Union and Thebaud before ordering that Thebaud produce the requested materials.

[21] Section 6-63(1)(c) reads:

> *6-63(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*
>
> *…*
>
> *(c) to fail or refuse to engage in collective bargaining with the employer respecting employees in a bargaining unit if a certification order has been issued for that unit;*

[22] The Employer's unfair labour practice application, as framed, raises a question as to whether Thebaud, as a private individual, who is neither a member of the Union nor an employee, can be found to infringe subclauses 6-63(1)(c) or 6-63(1)(h) of the Act and to have committed the unfair labour practices, as set out. While the Employer does not appear to be suggesting that Thebaud has an obligation to directly engage in collective bargaining with the Employer, the Board is unable to dispose of this matter at a preliminary stage. The question raises a matter of statutory interpretation involving a unique factual matrix that must fall to be determined following comprehensive submissions from the parties.

[23] Having disposed of this issue for the present purposes, the Board will proceed to consider the relevant principles in relation to the production of documentation on behalf of both of the Respondents.

Preliminary Issue – Third Parties:

[24] Thebaud objects to the Application on the basis of third party privacy interests in the materials subject to the request. He says that third parties need to be served and given an opportunity to make submissions on their own behalf. Thebaud provides little to no detail as to the nature of the privacy interests allegedly engaged.

[25] The Employer says that Thebaud's objection ignores the implied undertaking rule, in that documents produced for the purpose of the hearing are to be used for only that purpose. Furthermore, Thebaud has not directly asserted or described a particular privilege over specific documents. If the Board prevents production on the basis of a third party privacy interest and/or

requires notice to every third party mentioned in relevant documents, it would never be in a position to order document production.

[26] The Board agrees that Thebaud's argument overlooks the operation of the implied undertaking rule. The rule operates such that documents produced for a Board proceeding must be used only for the purpose of the proceeding. All parties to the proceedings, who are in receipt of documentation for purposes of the proceedings, are subject to and expected to comply with this rule. Furthermore, a production order is not the same as a determination on admissibility. Documents that are disclosed and produced for purposes of litigation, do not become evidence in a proceeding unless and until they are found to be admissible. As for the question of privilege, not having the materials before it, it is appropriate for the Board to decide this Application according to the applicable principles, and determine any issues pertaining to privilege, at a later date.

Applicable Principles:

[27] It is generally necessary for the Board to identify the central issues on the underlying application in order to assess the merits of a production request.[1] In the current case, this exercise is complicated by a couple of factors: first, a unique and complex set of circumstances give rise to the allegations and the Board is not in a position to weigh the competing evidence at this stage of the proceedings; and second, there is an interrelationship between the various provisions of the Act engaged by the unfair labour practice application.

[28] Without predetermining the issues for the purpose of the substantive application, the Board tentatively finds that the central issue, for the current purposes, is whether the Union has breached its duty to bargain in good faith with the Employer through the actions, as alleged in the Employer's Application. This includes the alleged strategy to replace certain of the Saskatoon Co-op's Board of Directors. The secondary issue is whether, by allegedly participating in or fronting the Union's strategy, Thebaud has committed an unfair labour practice pursuant to section 6-63(1)(c) or 6-63(1)(h) of the Act.

[29] The Board has had many opportunities to consider the principles that guide the exercise of its authority to order document production. In doing so, it has consistently adopted and applied

[1] *UFCW, Local 649 v Federated Co-operatives Ltd,* 2018 CarswellSask 144 (SK LRB) ["*Federated Co-operatives*"] at para 16.

the principles as identified by the Canadian Industrial Relations Board in *A.L.P.A. v Air Canada*, [1999] CIRBD No. 3 ["*Air Canada*"]:[2]

> *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.*

[30] In applying the *Air Canada* principles, the Board starts from the premise that a production order is a discretionary order that is granted on a case-by-case basis.

[31] The Board does not seek to replicate the pre-hearing discovery process of the civil courts. Stated another way, it is not "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."[3] Doing so would undercut the Board's flexibility to promote the expedient resolution of disputes between parties, many of whom have ongoing relationships, participate in multiple Board proceedings, and have a high interest in mitigating the level of conflict between them. In balancing fairness to the parties with expediency in process, the Board must be careful to avoid endorsing extensive discovery procedures and sacrificing expediency for minimal gain.[4]

[32] The Respondents characterize this Application, on the whole, as a fishing expedition. However, it is not the case that every hint of a fishing expedition will attract the Board's wholesale denial of a production request. The Board has observed that a certain degree of fishing is

---

[2] See, for example, *United Brotherhood of Carpenters and Joiners of America, Local 1985 v Brand Energy Solutions (Canada) Ltd., et al*, 2018 CanLII 127660 (SK LRB) ["*Brand Energy*"]; SEIU-West v Voyager Retirement V Genpar Inc., 2016 CarswellSask 706 (SK LRB); *Federated Co-operatives, supra*; *SEIU-West*, *supra*.
[3] *Saskatchewan Assn. of Health Organizations v SEIU (West)*, 2012 CarswellSask 587 (SK LRB) ["*SAHO*"] at para 37.
[4] *SEIU-West v Atria Management Canada*, ULC, 2016 CarswellSask 658 (SK LRB) ["*SEIU-West*"] at para 7.

permitted, as it will most often be the case that the applicant will be at least partially unaware of the contents of the materials requested.[5] On the other hand, the applicant is not entitled, through the operation of a production order, to build a fresh case against a respondent.

[33] The Union suggests that requests for classes or general categories of documents are wholly inappropriate. It is true that when a party brings an application for the production of a large volume of documents, the Board is compelled to apply a proportionate level of scrutiny to the request. As the Board observed in *SEIU-West*, "the greater the number of documents for which disclosure is sought the greater the restrictions on a party's right to unlimited pre-hearing discovery".[6] Each request must be considered on a case-by-case basis, taking into account the practicality of responding to the request, as well as any fairness interests. In some cases, a request for categories of documents will be appropriate.

Application of *Air Canada* Principles:

[34] The Board wishes to make a few comments about the Application before it. Generally, the Board has found that the requests as formulated would have benefited from a higher standard of particularization. The Board expects that a production request will allow the person on whom it is served to readily determine the nature of the request, the documents sought, the relevant timeframe and the content. The greater the particularization, the easier it is to understand and comply with the request. Proper particularization is not just a box for the Board to check off; it is a practice that facilitates the expedient resolution of disputes over disclosure and production of materials, and encourages the timely resolution of the underlying disputes by ensuring that they come more quickly before the Board.

[35] Furthermore, absent sufficient particularization, it is challenging and sometimes impossible to assess the remaining criteria, including the extent to which a request is in the nature of a fishing expedition, whether there is the requisite probative nexus, and whether the probative value outweighs any prejudicial aspect of introducing the documents as evidence. When requests are not sufficiently particularized, it raises the question whether the Board should intervene and narrow the request so as to facilitate the expedient resolution of the substantive dispute. In some cases, the Board has opted to do so, where appropriate. In deciding whether this approach is appropriate, the Board must bear in mind its goal in promoting expediency while ensuring a fair

---

[5] *SAHO* at para 37.
[6] *SEIU-West* at para 31, citing *Air Canada* and *SAHO*.

process. The Board must also consider whether the specific narrowing of the request is apparent on the Application, such that the production order could have been anticipated by the parties.

[36] The Board has taken all of these considerations into account in making its decision on this Application. The Board will now turn to its analysis of each of the Employer's requests.

> ***Any and all correspondence (hard copy, digital, or social media) to or from representatives of UFCW and/or Craig Thebaud regarding the Petition:***

[37] The Board will first consider this request in relation to those documents that may be in the possession and control of the Union.

[38] The Union argues that the phrase "representatives of UFCW" is too vague to be capable of implementation. The Board agrees. The Employer provides no written definition of the phrase "representatives of UFCW". Therefore, the request as worded, is not sufficiently particularized to allow the Union to readily determine the nature of the request.

[39] In the hearing, counsel for the Employer suggested that the term "representatives" is intended to include and does include the following: employees of the Union; elected and appointed representatives of the Union; individuals paid by the Union or for whom expenses have been reimbursed; and individuals acting on behalf of or at the behest of the Union. The Board observes that any time a key term requires further clarification during the hearing, it is likely that the request is lacking in particularity. The Employer's own definition highlights the breadth of the term, and the potential practical implications for granting an order for correspondence to and/or from individuals described as representatives of the Union. It is clear that the term is open to interpretation and is therefore a source of potential further conflict.

[40] The Board is not satisfied that the Employer's definition cures the problems that arise from the term "representatives". By suggesting that the term "representatives" should include individuals who are acting on behalf of or at the behest of the Union, the Employer highlights additional concerns. The question of agency is central to the unfair labour practice allegations. For instance, the Union has objected to the allegation that Thebaud acts as the Union's agent. If there is any dispute over whether any other individual was "acting on behalf of or at the behest of" the Union, the implementation of the production order will cause further delay in the underlying proceedings.

[41] The inclusion of “social media” correspondence makes implementation more challenging. Does social media “correspondence” include only messages sent and received in Facebook pages? Does it include screenshots of posts or comments when there is an exchange between individuals? How does one define “social media”? The Employer was unable to provide satisfactory parameters around this aspect of the request. Given the breadth of social media platforms and their dynamic content, it is not appropriate or practical to simply order the production of social media correspondence.

[42] The Union argues that the word “regarding” is a fatally deficient form of particularization. The Board disagrees. Other words or phrases, for example, “supportive of”, would have required interpretative judgments resulting in increased disputes and potential delay in production of the materials and final resolution.

[43] The Union argues that it would be inappropriate for the Board to further define this request to make it more manageable, because in doing so, the Union’s ability to respond to the potential order would be abridged. The Board shares similar concerns. However, the Board must seek to balance the various interests of the parties in this dispute. The Board is reassured that the wording of the Employer’s request ensures that certain, more narrow orders could have been easily anticipated by the Respondents. For instance, the Employer’s request necessarily includes correspondence between the Union and Thebaud. Furthermore, the issue of a coordinated strategy is central to the issues in dispute.

[44] As for the request against Thebaud, the Board’s observations are identical. This request suffers from the same problems of defining “representatives” and “social media” correspondence. It is of no moment that the materials in the possession and control of Thebaud are likely fewer in number, than those materials in the possession and control of the Union. The analysis remains the same.

[45] The Employer’s case revolves around an alleged strategy as between Thebaud and the Union. The phrase “representatives” can be restricted to Union staff, only. “Staff” is relatively easy to understand and more practical to implement. The Board will therefore order that both parties provide any and all hard copy and digital correspondence between Union staff and Thebaud, regarding the Petition. For clarity, social media correspondence does not form a part of this Order. Furthermore, nowhere in the Orders subject to these Reasons should “digital correspondence” be taken to include “social media correspondence”.

Any and all posts, photos, messages, or comments published on social media (including without limitation Facebook) by representatives of UFCW and/or Craig Thebaud regarding the Petition:

[46] The Board's concerns with the definition of social media are equally relevant here. The Employer has, however, identified two Facebook groups referred to as the "Election Facebook Group", allegedly operated by the Co-op Members for Fairness, and the "Petition Facebook Group", administered by Thebaud.

[47] Counsel for the Union raises an issue as to whether the Union would have access to the group allegedly administered by the Co-op Members for Fairness. Counsel will be aware that, to the extent that a respondent does not have possession and control over the documents that are ordered, then that aspect of the order is spent. If the contents of the page are ordered to be produced, the first course of action is for the Union to determine whether it has possession and control, and then proceed accordingly.

[48] Thebaud argues that he is unable to produce material from the Petition Facebook Group, suggesting that to do so would be "impossible" and/or require countless screenshots. The Board agrees that an obligation to produce the entire contents of a Facebook page is onerous, and it raises questions as to whether to include private messages, photos separate from posts, visitor posts, comments attached to posts and associated replies, among other categories. The more general the production request, the more onerous it will be, and the more likely the Board will find it to be unreasonable.

[49] As for both the Election Facebook Group and the Petition Facebook Group, the contents are arguably relevant to the substantive matters before the Board. The request for any and all posts, photos, messages, or comments published on social media, is broad, but it can be more narrowly defined on the basis of the parties' submissions, so as to cover only the specific Facebook pages that have been mentioned. The production of the contents would not be in the nature of a fishing expedition. Practically speaking, the production of a narrower request is manageable through screenshots. Finally, there is a sufficient probative nexus between the Employer's positions in the dispute and the material requested, in relation to those two groups.

[50] The Board will therefore order that the Respondents produce any and all posts made by an administrator on the timelines of the Election Facebook Group and Petition Facebook Group. This Order does not include the comments in reply to those posts.

Any and all correspondence (hard copy, digital, or social media) to or from representatives of UFCW and/or Craig Thebaud regarding:

Saskatoon Co-op's 2019 Annual General Meeting:

[51] The Board agrees with the Union that this is an overly broad request. It would include correspondence related to AGM matters that bear no relation to the issues in dispute. Regardless of the volume of documentation involved, both Respondents would be faced with producing documentation that is likely irrelevant, responsive to a fishing expedition, and having questionable probative value. This request, as it pertains to both Respondents, is denied.

Any and all correspondence (hard copy, digital, or social media) to or from representatives of UFCW and/or Craig Thebaud regarding:

Promoting or subsidizing memberships in Saskatoon Co-op in 2018 or 2019:

[52] Outside of the phrase "representatives" and "social media", this request is more narrowly focused on the issues outlined in the unfair labour practice application. Once restricted to correspondence between Union staff and Thebaud regarding the promotion or subsidization of memberships in 2018 and 2019, the request is arguably relevant, sufficiently narrow, and satisfactorily probative. Furthermore, the more restricted version is appropriately particularized. The Board will therefore order that the Respondents produce any and all hard copy and digital correspondence between Union staff and Thebaud regarding promoting or subsidizing memberships in the Saskatoon Co-op in 2018 or 2019.

Any and all correspondence (hard copy, digital, or social media) to or from representatives of UFCW and/or Craig Thebaud regarding:

Election of members of the Board of Directors of Saskatoon Co-op at the 2019 Annual General Meeting:

[53] The Board's reasoning in relation to the immediately preceding request can be imported here. The Board finds that it is appropriate to restrict the related order to correspondence between Union staff and Thebaud regarding the election of members of the Board of Directors of Saskatoon Co-op at the 2019 Annual General Meeting. To this extent, the request is arguably relevant, sufficiently narrow, adequately particularized and satisfactorily probative.

Any and all correspondence (hard copy, digital, or social media) to or from representatives of UFCW and/or Craig Thebaud regarding:

Motions or proposed motions for submission or possible submission at the Annual General Meeting:

[54] The Board interprets this request to mean motions or proposed motions, rather than correspondence in relation to motions. Motions or proposed motions for submission or possible submission at the AGM are arguably relevant to the underlying issues. The request is sufficiently particularized such that the Union can readily determine the nature of the request, the documents sought, the timeframe and the content. It is not in the nature of a fishing expedition and there is a demonstrated probative nexus. On the foregoing basis, the Board finds that it is appropriate to order the production of any and all motions or proposed motions for submission or possible submission at the AGM.

[55] It is of no consequence that, according to the Union, no such motions or proposed motions exist. Subject to the parties' obligation to preserve relevant materials, implicit in a production order is that the Union produce those documents that are in the possession and control of the responding party, only. If a document does not exist, then it is not in the party's possession and control. Both parties are expected to make reasonable efforts in order to determine whether said documents are within their possession and control, and then proceed accordingly.

[56] As noted, the Board is not ordering "correspondence regarding motions" in response to this request. Even if correspondence was intended, the Board finds that such an order is inappropriate. The request as a whole was not included in the Employer's Application for production. In its brief, the Employer acknowledges this, but says that the request was included in its amended unfair labour practice application. It is clear that the Union is aware of this request, to the extent that it relates to motions or proposed motions.[7] However, it is unclear whether "correspondence regarding motions" was anticipated, and for this secondary reason, an order covering material beyond motions or proposed motions, is inappropriate.

[7] In its Reply it states that, "UFCW was not involved with crafting or submitting any resolutions for the AGM and was not officially involved at the AGM at all": *Union Reply* at para 11. In its brief, the Union states further that it has "denied that it participated in drafting any resolutions for the Co-op AGM: *Union Brief* at para 41.

Any and all correspondence (hard copy, digital, or social media) to or from representatives of UFCW and/or Craig Thebaud regarding:

Any meetings or "town hall meetings" held in advance of the 2019 Annual General Meeting to discuss the 2019 Annual General Meeting:

[57] This request seeks any and all correspondence in relation to meetings or town hall meetings held in advance of the AGM, meetings that allegedly serve as "support groups" for the Union. This request is too broad. The Employer has not demonstrated that there is a sufficiently strong "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 information.[8] Correspondence in relation to the meetings could uncover any number of issues unrelated to the issues engaged in the substantive application, whether administrative or logistical, in nature. This request fails, in relation to both Respondents, taking into consideration its breadth, relevance, and probative value.

Any and all correspondence (hard copy, digital, or social media) to or from representatives of UFCW and/or Craig Thebaud regarding:

Any correspondence in 2018 or 2019 directly with any candidates up for election to the Board of Directors of Saskatoon Co-op at the 2019 Annual General Meeting:

[58] This request is too broad. It fails to restrict the subject matter of the correspondence, and could therefore encompass a wide swath of material that is unrelated to the underlying issues. The Employer has failed to establish arguable relevance or the requisite probative nexus. On these bases, this request is denied in relation to both Respondents.

Decision on Production:

[59] The Board is concerned about any further delay in the hearing of the substantive unfair labour practice application, and wishes to ensure that the upcoming hearing proceeds in an expeditious manner. The Board has decided to narrow the production request, in the manner set out in the foregoing sections. The Board has not had an opportunity to review the materials, and for this reason, combined with the unusual set of factual circumstances, the labour relations privilege asserted by the Union remains unclear. In such cases, the Board has in the past dealt with privilege and confidentiality claims in the following manner:

---

[8] *Brand Energy* at para 34.

> *It should also be noted that in a pre-hearing request for 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 dispute 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 document in rendering its decision.*[9]

[60] While the Board urges the parties to cooperate to facilitate an agreement on any outstanding issues of privilege and confidentiality, taking into account the application of the *Wigmore* criteria[10], the Board finds that a similar process would be appropriate in this case.

Preservation Order:

[61] The Employer has asked, as an alternative, for a preservation order in relation to the requested documents. The Employer has provided no case law to support the Board's authority to make such an order. Without deciding that question, the Board will offer the following observations about the preservation of materials on an interim basis.

[62] First, all parties that come before the Board are expected to preserve relevant materials until the final disposition of the matter, including until all relevant appeals have been exhausted. When a relevant and potentially probative document is unavailable, and said absence is not accompanied by a satisfactory explanation, that absence may result in an adverse inference from the Board. The Employer has provided no reason why this is not sufficient for its purposes. Taking into account this expectation, the Board finds that the requested preservation order is unnecessary. The Employer's request for a preservation order is denied.

Conclusion:

[63] The Board makes the following Orders pursuant to section 6-111(1)(b) of the *Act*:

1. The Union and Thebaud shall produce the following materials, in their possession and control:

---

[9] *SAHO* at para 37.
[10] *Ibid* at para 59.

(a) Any and all hard copy and digital correspondence between Union staff and Thebaud regarding the Petition;

(b) Any and all posts made by an administrator on the timelines of the Election Facebook Group and Petition Facebook Group, not including the comments in reply to those posts;

(c) Any and all hard copy and digital correspondence between Union staff and Thebaud regarding the promotion or subsidization of memberships in the Saskatoon Co-op in 2018 or 2019;

(d) Any and all hard copy and digital correspondence between Union staff and Thebaud regarding the election of members of the Board of Directors of Saskatoon Co-op at the 2019 Annual General Meeting;

(e) Any and all motions or proposed motions for submission or possible submission at the AGM.

2. That all materials that are produced to the Employer must be produced to all parties; and

3. That any objections in relation to privilege or confidentiality may be determined by the Board upon application by a party.

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

DATED at Regina, Saskatchewan, this **22nd** day of **July, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson