



**SASKATCHEWAN PROVINCIAL BUILDING & CONSTRUCTION TRADES COUNCIL,
Applicant v CHURCHILL RIVER EMPLOYEES' ASSOCIATION, Respondent and TRON
CONSTRUCTION & MINING LIMITED PARTNERSHIP, Respondent**

LRB File No. 050-20; March 31, 2020

Vice-Chairperson, Barbara Mysko; Board Members: Shawna Colpitts and Laura Sommerville

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Trades Council:

John Mosca

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Application for Production of Documents – Subsection 6-111(1) of *The Saskatchewan Employment Act* – Certification Application – First time certification for applicant – Building Trades Council granted Public Interest Intervenor status – Council seeks production of documents to assist in cross examining witnesses – Partial Production Order granted.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On March 16, 2020, the Saskatchewan Provincial Building & Construction Trades Council ["Council"] brought an application for production of documents and things pursuant to subsection 6-111(1) of *The Saskatchewan Employment Act* ["Act"]. This Application arises from the Board's decision in *Saskatchewan Provincial Building and Construction Trades Council v Churchill River Employees' Association (CREA)*, 2020 CanLII 10513 (SK LRB) ["*CREA No. 1*"].¹

[2] *CREA No. 1* arose from an uncontested certification application, brought by the Churchill River Employees' Association [CREA] in relation to the employees of Tron Construction & Mining Limited Partnership ["Tron"], filed September 18, 2019. The certification application is LRB File No. 209-19. CREA has not previously been certified to represent employees in a workplace in

¹ LRB File No. 218-19.

Saskatchewan. That being the case, CREA is required to satisfy the Board that it is a “union” as defined by clause 6-1(1)(p) of the Act.

[3] In *CREA No. 1*, the Council applied for intervenor status in the certification matter (LRB File No. 209-19). Its concerns are that CREA is employer-dominated and does not satisfy the necessary hallmarks of organizational legitimacy, and therefore does not meet the definition of a union under the Act. That intervenor application was considered on the basis of written materials, in line with past practice. Further to that application, the Board made the following Order:

...The Saskatchewan Provincial Building & Construction Trades Council is granted standing as a public law intervenor in LRB No. 209-19 to cross examine witnesses and make submissions with respect to whether Churchill River Employees' Association meets the definition of a Union in The Saskatchewan Employment Act.

[4] In relation to LRB No. 209-19, the Council now seeks production of the following documents and things from CREA in its “possession, custody or control, whether in hard copy or electronic form”:

- a. *Witness list and witness “will-says”;*
- b. *Copies of any contracts between (i) the CREA and (ii) Canadian Work Strategies or any parent organization, employee or other representative of Canadian Work Strategies;*
- c. *The C.V. or resume of Mark Phillips;*
- d. *The minutes of the foundational meeting of the CREA;*
- e. *The minutes of any and all CREA Executive Board meetings;*
- f. *Any by-laws, policies or rules adopted by the CREA membership or executive;*
- g. *Most recent version of the CREA constitution (if different from the version already filed);*
- h. *A blank or sample copy of any CREA membership card that was distributed to Tron employees or other prospective CREA members;*
- i. *Any correspondence between (i) the CREA (including representatives of the CREA in its inchoate form) and (ii) Canadian Work Strategies setting out or discussing the services to be provided by Canadian Work Strategies, and the terms on which those services are to be provided.*
- j. *Any correspondence between (i) the CREA (including representatives of the CREA in its inchoate form) and (ii) Tron relating to the formation of the CREA or the possible unionization of Tron employees. This request does not include correspondence that post-dates the filing of the instant certification application.*

[5] The Council also seeks production of the following documents and things from Tron in its “possession, custody and control, whether in hard copy or electronic form”:

- a. *Witness list and witness will-says;*
- b. *Any correspondence between (i) the CREA (including representatives of the CREA in its inchoate form) and (ii) Tron relating to the formation of the CREA or the possible unionization of Tron employees. This request does not include correspondence that post-dates the filing of the instant certification application.*

[6] Both CREA and Tron object to the Council's application for production and ask that it be dismissed. CREA states that it advised the Council, on March 3, 2020, that it was agreeable to providing copies of all records CREA intended to rely on at the hearing of its application.

[7] The hearing for the certification application was originally scheduled to be heard in April, 2020. After the Council filed this Application for Production, the Board adjourned that hearing, and others, due to the extenuating circumstances arising from the Covid-19 pandemic. For the purpose of this Application, the Board received written submissions and convened a telephone hearing to receive the parties' oral submissions. In coming to this decision, the Board reviewed all of the parties' arguments and associated authorities, found them useful, and is grateful for counsels' assistance.

Argument on Behalf of the Parties:

The Council:

[8] The Council says that its requests must be assessed against the *Air Canada* principles, the underlying certification application, and the Board's decision to grant the Council status as an intervenor. In the intervenor matter, the Board found that the Council may make a valuable contribution and assist the Board in making a decision. If the Council is unable to know in advance who the witnesses will be, and is unable to review a "bare minimum of relevant documents sufficient to prepare and conduct an informed and vigorous cross examination" then it will be unable to assist the Board in making a decision.

CREA:

[9] CREA argues that, in granting an intervention Order, the Board was clear that it did not want to encourage organizations to interfere or meddle in the proceedings of other parties. The Board attempted to control the prejudice to CREA through the design of its Order. To that end, the Council is not permitted to lead evidence – the Council was granted intervenor status for the purpose of cross examining witnesses and making submissions "only". The Order was "predicated on the Council not straying beyond matters of law"; and, the Council was permitted to intervene only if its intervention resulted in a "minimal increase in procedural complexity".

[10] If the Board wished to grant additional entitlements, such as entitlements to pre-hearing production and particulars, it would have done so. The Council's Application for Production is an attempt to circumvent the Board's Order, and it has led to further costs to the parties and to the precise prejudice and procedural complexity that the Board sought to avoid.

Tron:

[11] Tron argues that the Council's requests must be considered in the context of the Board's limited grant of intervenor status, which extends to cross examining witnesses and making submissions only. The Council has not been granted standing to participate in all aspects of the litigation process.

[12] Turning to the specific materials requested, Tron argues that the request for a witness list and witness will-says is inappropriate. Parties routinely engage in the cross examination of witnesses before the Board without such pre-hearing disclosure. As a respondent to the certification proceedings, Tron has no onus or burden of proof. Tron will make decisions about witnesses at the close of CREA's case. With respect to the second request (for communications between Tron and CREA), it is overbroad, a fishing expedition, and "fails to adhere to the clear limitations placed upon the Council's role".

[13] Having summarized the parties' arguments, the Board will next consider the governing statutory provisions and principles on the within application.

Applicable Statutory Provisions:

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

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:

[15] To begin, upon review of the parties' submissions, it is clear that a few preliminary remarks may be helpful. In short, the Board does not find it appropriate to limit the Council's participation

in this matter to such an extent that it is prevented from meaningfully exercising its rights as an intervenor.

[16] The Council applied for full intervenor status, which would normally include leading evidence in chief, cross examining witnesses, and making submissions. It did not apply for a production Order. The Board granted the Council intervenor status for the purpose of cross examining witnesses and making submissions. Neither the Order, nor the reasons in support of the Order, suggest that the Council is prevented from requesting or being granted a production Order for the purpose of meaningfully cross examining witnesses. Nothing in the intervention Order restricts the right of the Council to cross examine witnesses. In fact, the Board has made clear that it will benefit from the Council's assistance, including through the cross examination of witnesses.

[17] CREA argued that the Board's Order was predicated on the Council "not straying beyond matters of law", as demonstrated by the Board's Reasons at paragraph 62. Read in context, it is clear that the phrase "matters of law" was used in the Board's assessment of whether the intervention will transform the court into a political arena. It refers to the distinction between matters of law and matters of politics, not between matters of law and matters of fact. It does not place any restrictions on the Council's ability to cross examine witnesses.

[18] The foregoing considerations have guided the Board in its assessment of the Application for Production in this case. Next, the Board will consider and apply the general principles governing an application for production of documents and things.

[19] Pursuant to clause 6-111(1)(b) of the Act, the Board has the power 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.

[20] *United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited*, 2019 CanLII 107250 (SK LRB) sets out the governing principles on an application for production before this Board:

[9] The Board has confirmed on numerous occasions^[3] that on production applications, it will apply the criteria established by the Canada Industrial Relations Board in Air Canada, 1999 CIRB 3 (CanLII). Both parties agree that the Air Canada criteria should be applied to the Union's Disclosure Application:

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.*

[10] *The Board elaborated on the rules that apply to the pre-hearing production of documents, in Service Employees International Union (West) v Saskatchewan Association of Health Organizations ["SAHO"]:*

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.[4]*

[21] There are no statutory restrictions on the Board's power to make a production Order in favor of an applicant who is an intervenor.

[22] In granting intervenor status, the Board found that the Council had demonstrated that it may make a valuable contribution and assist the Board in making a decision and that it may provide a different perspective by raising relevant questions that may not be forthcoming from the parties. The Board has pointed out that the certification hearing will not likely benefit from the usual indicia of the adversarial process; nor can the Board expect or count on a vigorous cross examination of CREA's witnesses by Tron or assume that role itself.

[23] Requests for production are to be assessed on a case by case basis. First, the information requested must be arguably relevant to the issue to be decided. The issue to be decided here is whether CREA meets the definition of a union in the Act. To meet the definition of a union, the Board must be satisfied that CREA is a labour organization or association of employees that has as one of its purposes collective bargaining and is not dominated by an employer. The Board agrees with the Council that all of the categories of documents that it has requested are arguably relevant to the issue to be determined. The Board does not agree that all of the documents that could potentially fall into each of those categories are arguably relevant. Some of the categories are simply too broad.

[24] First, the Board is not persuaded that the requests for correspondence from either of the respondents relating to the formation of CREA or the possible unionization of Tron employees are sufficiently particularized such that the respondents can readily determine the documents sought. Such correspondence is capable of a broad interpretation. It is likely that any number of documents could constitute correspondence relating to the formation of CREA or the possible unionization of Tron employees.

[25] Except for the reference to “by-laws”, the Board finds that these following four requests are in the nature of an impermissible fishing expedition:

- a. *Copies of any contracts between (i) the CREA and (ii) Canadian Work Strategies or any parent organization, employee or other representative of Canadian Work Strategies;*
- b. *Any correspondence between (i) the CREA (including representatives of the CREA in its inchoate form) and (ii) Canadian Work Strategies setting out or discussing the services to be provided by Canadian Work Strategies, and the terms on which those services are to be provided.*
- c. *The minutes of any and all CREA Executive Board meetings; and*
- d. *Any by-laws, policies or rules adopted by the CREA membership or executive.*

[26] In this respect, the Board makes note of its approach to pre-hearing production, as outlined in *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*, 2012 CanLII 18139 (SK LRB) at:

...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.²

[27] The Board has indicated that the potential that CREA’s organizer may work as a labour consultant employed by Canadian Work Strategies raises questions that the Board wishes to have answered. However, on the facts before the Board, the request for contracts and correspondence involving Canadian Work Strategies is excessively broad, and an Order granting this request cannot be justified when assessing the potential probative value of the documents against the potential for prejudice.

[28] Likewise, the request for minutes of any and all CREA Executive Board meetings is excessively broad, and cannot be granted when assessing the potential probative value of the minutes against the potential for prejudice.

² *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*, 2012 CanLII 18139 (SK LRB) at para 44.

[29] The following requests are relevant, sufficiently particularized, and not in the nature of an impermissible fishing expedition:

- a. *The minutes of the foundational meeting of the CREA;*
- b. *Most recent version of the CREA constitution (if different from the version already filed);*
- c. *A blank or sample copy of any CREA membership card that was distributed to Tron employees or other prospective CREA members;*
- d. *Any by-laws ...adopted by the CREA membership or executive.*

[30] In relation to the four preceding requests, the Council has demonstrated a probative nexus between its positions in the dispute and the material being requested. These requests are targeted and specific. The potential prejudice of cross examining witnesses on these documents does not outweigh the probative value of doing so. CREA has indicated that it is willing to provide many of these documents, but only “if it intends to tender them as evidence at the hearing of this matter”. However, these are foundational documents, about which the Board will likely have questions. Therefore, the Board finds that it is appropriate to order the production of these documents to ensure that the Council may adequately prepare for the cross examination of witnesses and then provide assistance to the Board at the hearing.

[31] Next, the Board will consider the following requests:

- a. *A witness list and witness “will-says”;*
- b. *The C.V. or resume of Mark Phillips;*

[32] CREA has helpfully indicated that it is prepared to provide the names of its anticipated witnesses in advance of the hearing date. Tron has likewise indicated that it is prepared to provide “a summary of the identity of its intended witnesses, if any, along with a brief summary of the evidence each such witness is expected to provide to the Board to both of the CREA and the Council” after the close of the Council’s case. The Board has no reason to believe that either CREA or Tron will fail to do as indicated, having stated as much before this Board. The Board is therefore satisfied that it is not necessary to grant an Order that CREA and Tron produce their respective witness lists.

[33] Furthermore, under the circumstances, the Board does not find that ordering the production of witness will-says would provide any additional value, and could instead lay the groundwork for additional conflicts about the scope of the witnesses’ anticipated evidence. Having

said that, the Board does not expect that the parties' voluntary provision of such documents would have the same effect or create the same problems.

[34] Lastly, the Board will address the request for a C.V. or resume for Mark Phillips. This is an unusual request. First, there is no indication that CREA plans to call Mr. Phillips as an expert witness. Second, the Board is not persuaded that Mr. Phillips' entire work history is sufficiently probative to justify an Order for its production. Finally, it is unclear precisely what is intended by this request, for instance, whether Mr. Phillips is being asked to create a C.V. or resume, to update an existing C.V. or resume, or to produce an existing copy of a C.V. or resume, whether that C.V. or resume is updated or relevant or otherwise. On this point, the Board has previously found that it does not have statutory authority to require parties to create documents further to a production application.³

[35] The Board is not persuaded that the request for a C.V. or resume of Mr. Phillips is sufficiently particularized or probative to support a production Order.

Conclusion:

[36] For the preceding reasons, the Board makes the following Order pursuant to subsection 6-111(1) of the Act:

- a. Churchill River Employees' Association ["CREA"] is ordered to produce the following to the Saskatchewan Provincial Building & Construction Trades Council and to Tron Construction & Mining Limited Partnership seven (7) days prior to the commencement of the hearing of the certification application in LRB File No. 209-19:
 - i. The minutes of the foundational meeting of CREA;
 - ii. The most recent version of CREA's constitution (if different from the version already filed with the Board in this matter);
 - iii. A blank or sample copy of any CREA membership card that was distributed to Tron employees or other prospective CREA members;
 - iv. Any by-laws adopted by the CREA membership or executive.

³ *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*, 2012 CanLII 18139 (SK LRB) at para 37.

b. All other requests for pre-hearing production are dismissed.

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

DATED at Regina, Saskatchewan, this **31st** day of **March, 2020**.

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson