February 23, 2021

Samuel Schonhoffer
Gerrand Rath Johnson LLP
700 – 1914 Hamilton Street
REGINA SK S4P 3N6

Calen Nixon
MLT AIKINS
1500 - 1874 Scarth Street
REGINA SK S4P 4E9

Dear Mr. Schonhoffer and Mr. Nixon:

Re: LRB File No. 006-21; Interlocutory Application
Saskatchewan Government and General Employees Union v Parkland College and Western Trade Training Institute

Background:

[1] On October 2, 2020, Saskatchewan Government and General Employees Union ["SGEU"] filed an application[1] asking the Board to make an order pursuant to section 6-20 of *The Saskatchewan Employment Act* ["Act"] declaring Parkland College and Western Trade Training Institute ["WTTI"] to be one employer for the purposes of Part VI of the Act ["common employer application"]. SGEU asked Parkland College and WTTI [jointly, "Respondents"] to disclose a list of documents and they complied. SGEU was not satisfied that all relevant documents were disclosed. Accordingly, on January 14, 2021, it filed an Application for Disclosure and Production of Documents and Things and Particulars[2]. This preliminary application was heard on February 11, 2021 by Chairperson Susan Amrud and Board members Hugh Wagner and Mike Wainwright. These Reasons address that application.

Argument on behalf of SGEU:

[2] SGEU relies on *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*[3] ["*SEIU (West)*"] as establishing the principles to be applied by the Board in assessing applications for pre-hearing disclosure:

[1] LRB File No. 153-20.
[2] LRB File No. 006-21.
[3] 2012 CanLII 18139 (SK LRB).

> *[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:*
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> > *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).*

[3] In making its argument that the requested documents are relevant, SGEU relies on *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union v Comfort Cabs Ltd*[4] ["*Comfort Cabs*"], as setting out the prerequisites of a common employer declaration:

[4] 2015 CanLII 19986 (SK LRB) at para 61.

1. *The application must involve more than one corporation, partnership, individual or association and at least one of those entities must be a certified employer.*
2. *The subject entities must be "sufficiently related" to a unionized employer through their involvement in associated or related businesses, undertakings or other activities.*
3. *The subject entities must be operated under "common control and direction".*
4. *The designation must serve a valid and sufficient labour relations purpose, interest or goal. . . . In other words, there must be a compelling labour relations reason for making the declaration and the benefits of doing so must outweigh the mischief such declaration is likely to cause.* [citations removed]

[4] SGEU suggests that the Board adopt the approach in *Saskatoon Co-operative Association Limited v United Food and Commercial Workers*[5] ["*Saskatoon Co-operative Association*"] of narrowing rather than dismissing this application if the Board is of the view that the requests are too broad.

Argument on behalf of Parkland College and WTTI:

[5] The Respondents agree that the Board should rely on the *Air Canada* principles in determining this application, and also referred the Board to the consideration of this issue in *SEIU (West)*.

[6] The Respondents object to SGEU's approach that they describe as standing firm on a long list of very broad categories of disclosure requests, that was not narrowed to reflect the disclosure that was provided by the Respondents. In arguing that this would have been the proper approach, it refers to *Application for Disclosure and Production of Documents and Things United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited*[6].

[7] The Respondents agree with SGEU that the legal test for determining the common employer application is the test in *Comfort Cabs*, as described above. They argue that the various categories of documents requested in this application have nothing to do with the legal test to be satisfied in SGEU's common employer application. They are not related to the established factors. This means SGEU has failed to show a probative nexus between the documents requested and the issues in dispute.

Relevant Statutory Provisions:

[8] The following provisions of the Act are at issue in this application:

[5] 2019 CanLII 76933 (SK LRB).
[6] 2019 CanLII 107250 (SK LRB).

> ***Board may declare related businesses to be one employer***
> *6-20(1) On the application of any union or employer affected, the board may, by order, declare more than one corporation, partnership, individual or association to be one employer for the purposes of this Part if, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by one person through the different corporations, partnerships, individuals or associations.*
> *(2) Subsection (1) applies only to corporations, partnerships, individuals or associations that have common control or direction on or after October 28, 1994.*
>
> . . .
>
> ***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.*

Analysis and Decision:

[9] On December 11, 2020, SGEU provided the Respondents with a list of requested documents. On December 27, 2020, the Respondents provided documents in response to that request. On January 14, 2021, SGEU filed this application with the Board, requesting the same list of documents. In other words, the application was not modified to reflect the documentation received from the Respondents. On January 28, 2021, the Respondents filed a Reply to the application, indicating that it had provided all relevant documents. The Reply indicated that further documents were provided at the time of providing the Reply.

[10] SGEU breaks down the list of documents requested into two categories. The first category includes the first five requests:

1) Documents disclosing the courses and programs offered by WTTI and Parkland in 2019/2020, and planned for 2021.
2) Documents and correspondence relevant to the choice of offering courses at WTTI versus at Parkland and/or the distribution of course offerings at WTTI and Parkland.
3) Documents and correspondence relevant to the delivery of services as between WTTI and Parkland.
4) Documents and correspondence relevant to the purpose of WTTI's acquisition and operation by Parkland.
5) Documents and correspondence relevant to the purpose of Parkland operating WTTI and offering programs and services through WTTI.

[11] In its Written Submission, SGEU explains the need for this documentation as follows. To the extent WTTI is separate from Parkland, it is carrying on business as a substitute for the programming that would or could be offered by Parkland and by Parkland employees. In other words, WTTI is being used as an alternate vehicle for Parkland to offer courses and programming not through Parkland or its SGEU bargaining unit employees, when it suits Parkland to do so.

[12] In their Reply, the Respondents provide the following responses. First, all of these requests have been satisfied. Other than #1, all lack particularization and are overbroad. They also argue that #4 and #5 are fishing expeditions and not relevant to the common employer application.

[13] The second category of documents requested by SGEU are the following:

1) Budgetary documents and related correspondence relevant to the extent and nature of the budgetary/financial relationship between WTTI and Parkland.
2) Documents and correspondence relevant to the extent and nature of the operational relationship between WTTI and Parkland.
3) Documents and correspondence related to program integration between WTTI and Parkland.
4) Documents and correspondence relevant to the integration of service delivery between WTTI and Parkland.
5) Documents and correspondence relevant to the legal ownership and control of WTTI, including board of director meeting minutes, shareholders' agreements, and any other legal documents relevant to the ownership and control of WTTI by Parkland, Parkland employees, or Parkland directors and officers.
6) Documents and correspondence relevant to the integration of Parkland and WTTI employees and work/labour, including:
    a. The extent to which there is intermingling of WTTI and Parkland employees; and/or
    b. The extent to which Parkland employees perform labour/services at/for WTTI and vice versa (WTTI employees performing labour/services at/for Parkland).

[14] These documents, SGEU argues, are required for the following purpose. SGEU is alleging that WTTI and Parkland are effectively integrated and/or that Parkland controls WTTI, including through legal ownership and operational control, including through shared/Parkland principals, officers, directors, decision makers, administration, and staff.

[15] The Respondents provide the following responses. Again they argue that all of these requests have been satisfied. All lack particularization, are overbroad and are not relevant to the common employer application. With respect to #10 and #11, there is no probative nexus between the requests and the issues in dispute in the common employer application. Request #11 is a fishing expedition.

[16] In reviewing this application, the Board relies on *Saskatoon Co-operative Association*, which described the principles to be applied to an application for production of documents as follows:

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

[17] One of the requirements established by the *Air Canada* principles is that the requested information be arguably relevant. While it may be arguable that some of the documentation requested relates to the *Comfort Cabs* factors described above, because of the other deficiencies in the application, this issue does not need to be determined.

[18] The most significant problem with the current list of requests is that, other than #1 (which the Respondents indicate has been provided), the requests lack particularization. SGEU argues that because it does not know how the Respondents are organized, it does not know what to request. That is not a sufficient explanation for the lack of particularization. In their current form, the scope of the requests is too broad for the Board to be able to grant an Order for production of documents that the Respondents would know how to comply with. As noted in the *Air Canada* principles, the Respondents must be able to readily determine the nature of the request, the

documents sought, the relevant time frame and the content. With respect to time frame, other than #1, no time frame is indicated in any of the requests.

[19] As the Board has indicated on numerous occasions, it does not seek to replicate the pre-hearing discovery process of the civil courts. Seeking the production of all of these documents without further particularization suggests SGEU is embarking on a fishing expedition.

[20] SGEU has not sufficiently established a probative nexus between its position in the common employer application and the material being requested. In fact, when challenged on this issue by the Respondents, SGEU's response was to suggest that, if necessary, it would apply for an amendment of its common employer application to make the necessary connection.

[21] SGEU has not satisfied the Board that this application should be granted. In making this application, SGEU ignored the information it received from the Respondents. It did not refine its application to reflect the documents that were provided. It provides no explanation of its refusal to accept or believe the responses provided. The Board is not prepared to do the homework that SGEU should have done when it received the disclosure from the Respondents, and determine whether there are any specific requests still outstanding. Given the vagueness of the requests and the volume of documents provided in response (which the Board has not seen), the Board is not in a position to do so.

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

[23] The Application for Disclosure and Production of Documents and Things and Particulars is dismissed.

Yours truly,

Susan C. Amrud, Q.C., Chairperson
Labour Relations Board