



SASKATCHEWAN BUILDING TRADES COUNCIL, Applicant v WOODLAND CONSTRUCTORS LTD., Respondent

LRB File Nos. 015-23 and 119-23; September 8, 2023

Chairperson, Michael J. Morris, K.C.; Board Members: Aina Kagis and Grant Douziech

Counsel for Saskatchewan Building Trades Council:

Greg D. Fingas

Counsel for Woodland Constructors Ltd.:

Michael Vos and Lori Brienza

Application for pre-hearing production of particulars or documents or things – Subsection 6-111(1) of *The Saskatchewan Employment Act* – Order made requiring pre-hearing production and filing of particulars.

REASONS FOR DECISION

Background:

[1] Michael J. Morris, K.C., Chairperson: On September 5, 2023, the Board issued an order requiring pre-hearing production and filing of particulars by Woodland Constructors Ltd. [Woodland] further to an application by the Saskatchewan Building Trades Council [Council], with reasons to follow.¹ These are those reasons.

[2] The Council is an intervenor in a successorship application brought by Construction Workers' Union, CLAC Local 151 [Local 151] with respect to Technical Workforce Inc. [TWI]² and Woodland, having been granted the following standing by the Board on May 31, 2023, in *Saskatchewan Building Trades Council v Construction Workers Union, CLAC Local 151 et al*, 2023 CanLII 46607 (SK LRB):

[59] ...

- a. *The Council is granted limited standing as a public law intervenor in LRB File No. 015-23 to cross-examine witnesses and make argument regarding whether a disposal of a business or part of a business occurred from TWI to Woodland, pursuant to s. 6-18 of the Act; ...*³

¹ A copy of the order is annexed hereto.

² TWI is the unionized employer from which Woodland is alleged to have acquired (part of) a business; more particularly, certain construction-related work for Graham Construction at the Cargill Seed Crushing Plant in Regina and the Great Plains Power Station in Moose Jaw.

³ *Saskatchewan Building Trades Council v Construction Workers Union, CLAC Local 151 et al*, 2023 CanLII 46607 (SK LRB), para 59.

[3] On July 7th, following a decision that the successorship application would be heard by the Board before three related applications,⁴ the Board scheduled a hearing for September 14th and 15th, and October 31st.

[4] On August 8th, the Council filed an application for pre-hearing production of particulars or documents or things pursuant to s. 6-111 of *The Saskatchewan Employment Act* [Act].⁵ Woodland filed a reply on August 22nd and both the Council and Woodland filed written submissions. All submissions were received by August 31st, and reviewed by the Board.

[5] In its application, the Council sought:

An order for the production of the following documents and information no later than 7 days prior to the hearing of the Underlying Application:

1. *A listing of Woodland's key personnel in Saskatchewan.*
2. *A listing of all works or undertakings performed by Woodland in Saskatchewan with a value in excess of \$25,000 since January 1, 2022, including the location and dates of such works or undertakings, together with a listing of the number and type of trades persons employed by each employer for each such work or undertaking.*
3. *A listing of all offices, buildings or premises owned or leased by Woodland in the Province of Saskatchewan since January 1, 2022.*
4. *A listing of any equipment leased or owned by Woodland that has been located in the Province of Saskatchewan since January 1, 2022.*
5. *Copies of any insurance policies covering works or undertakings performed by Woodland in Saskatchewan since January 1, 2022.*
6. *Copies of any insurance policies covering assets held by Woodland in Saskatchewan since January 1, 2022.*
7. *Copies of any contracts or agreements wherein Woodland provided work or labour to Technical Workforce Inc. ("TWI"), or TWI provided work or labour to Woodland, for works or undertakings in the Province of Saskatchewan since January 1, 2022.*
8. *A statement from Woodland as to whether it:*
 - (a) *reports to TWI or Graham Construction;*

⁴ *Construction Workers Union, CLAC Local 151 v Woodland Constructors Ltd.*, 2023 CanLII 58549 (SK LRB) [Sequencing Decision].

⁵ *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act].

(b) has received assistance from TWI or Graham Construction or any personnel thereof in:

(i) preparing bids for work in Saskatchewan since January 1, 2022; or

(ii) recruiting or hiring employees in Saskatchewan since January 1, 2022.

9. A listing of Woodland's bids and other attempts to do work in Saskatchewan since 2022 as well as copies of any bids or proposals, subject to redaction of any sensitive financial information.⁶

Argument on behalf of the Council:

[6] The Council submitted that it required pre-hearing production in order to effectively cross-examine and make argument with respect to Local 151's successorship application. In the Council's view, Woodland's provision of documents to Local 151 but denial of the same documents to it had no rational basis, and put it at a disadvantage for the hearing.

[7] The Council submitted that the scope of its pre-hearing production request was reasonable, and that the types of documents it sought were presumptively subject to disclosure in a construction industry successorship application. The Council relied upon the Board's decisions in *EllisDon*⁷ and *Brand*⁸ to support this argument.

[8] The Council also submitted that the implied undertaking rule alleviated any concerns Woodland might have about producing documents within the context of the successorship application, citing the Board's decision in *Saskatoon Co-operative Association*.⁹

Argument on behalf of Woodland:

[9] Woodland argued that as an intervenor rather than a party with a direct interest in the successorship application the Council did not have the same right to pre-hearing production as Local 151.

⁶ Council's application dated August 8, 2023, para 3.

⁷ *Prairie Arctic Regional Council of Carpenters, Drywallers, Millwrights v Ellisdon Corporation*, 2014 CanLII 100507 (SK LRB) [*EllisDon*], at paras 77-78.

⁸ *United Brotherhood of Carpenters and Joiners of America, Local 1985 v Brand Energy Solutions (Canada) Ltd.*, 2018 CanLII 127660 (SK LRB) [*Brand*], at para 33.

⁹ *Saskatoon Co-operative Association Limited v United Food and Commercial Workers*, 2019 CanLII 76933 (SK LRB) [*Saskatoon Co-operative Association*], at para 26.

[10] Woodland submitted that only the applicant in a construction industry successorship application is entitled to any presumption that pre-hearing production will be made to it, since the applicant bears the onus on its application.

[11] Woodland also submitted that the Council's requested production was overbroad and excessive, and that it was unnecessary for the Council to receive a large amount of confidential and privileged information.¹⁰ The Council could meaningfully participate if provided with "the list of witnesses, written evidence and/or agreed statement of facts (if any), and the documents that the parties to the Successorship Application intend to put forth and rely on at the hearing", which Woodland was already willing to provide.¹¹

Applicable statutory provisions:

[12] The following provisions of the Act are relevant:

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.

...

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:*

...
(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;

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;

¹⁰ Woodland did not provide specifics regarding which requested information was confidential or privileged.

¹¹ Woodland's written submissions with respect to the Council's application for production, at para 28.

(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:

[13] The Board has considered applications for the pre-hearing production of documents on numerous occasions and has consistently applied the *Air Canada* principles¹² in considering whether to exercise its discretion to compel production.

[14] The *Air Canada* principles are quoted in *EllisDon*:

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.*¹³

[15] The second *Air Canada* principle requires that requested information must be arguably relevant to an issue to be decided. The issues to be decided are defined by the parties’ pleadings. In the successorship application before the Board the primary issue to be decided is whether Woodland acquired (part of) a business from TWI.

[16] With respect to the construction industry and “successorship/common employer” applications therein, the Board has provided guidance on what types of information respondent employers might reasonably be expected to be asked to produce in advance of a hearing. In *EllisDon*, the Board identified ten categories of information, without distinguishing between

¹² *ALPA v Air Canada*, [1999] CIRBD No. 3 [*Air Canada*].

¹³ *EllisDon*, at para 74.

categories which were relevant to *only* a successorship application or *only* a common employer application (emphasis in paragraph 78 added):

[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. ... ¹⁴*

[17] In *Brand*, the Board made the following statements:

[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.*

¹⁴ *EllisDon*, at paras 77-78.

- *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.¹⁵

[18] Respectfully, these statements from *Brand* may result in confusion, particularly insofar as they may be interpreted to suggest that the Board will automatically order production of the ten categories of information listed in *EllisDon* in any construction industry successorship application.

[19] To be clear, the first *Air Canada* principle (along with all others) applies to requests for production in successorship and/or common employer applications in the construction industry. Requests for orders compelling production are not automatic and must be assessed in each case. Further, the second *Air Canada* principle limits orders for production based on the issues to be decided in the underlying application. This requires an examination of the pleadings in the underlying application.¹⁶ Accordingly, it is not appropriate to treat all applications for production in construction industry successorship or common employer applications alike. Indeed, in *EllisDon* the Board identified the different matters in issue in a successorship application versus a common employer application.¹⁷ That said, *EllisDon* remains helpful in articulating categories of information that respondent employers might reasonably expect an applicant union to request prior to a hearing. However, when requesting a production order from the Board, applicants should be prepared to articulate why requested information is arguably relevant and ought to be produced, in accordance with the *Air Canada* principles, and not presume that production will be ordered solely because of the type of underlying application involved (e.g., a successorship application in the construction industry).

[20] Intervenors are able to apply for pre-hearing production under the Act.¹⁸ Where an intervenor has been granted standing to challenge the evidence and argument of an applicant, having access to relevant information in advance of the hearing may be necessary.¹⁹ In granting the Council standing to cross-examine witnesses in the successorship application the Board contemplated the Council putting documents to witnesses, including documents which could be harmful to the position(s) advanced by Local 151 and/or Woodland. Allowing Local 151 or

¹⁵ *Brand*, at para 33.

¹⁶ *EllisDon*, at para 63: "In our opinion, the starting point for the evaluation of the sufficiency of a respondent's pleadings and/or requests for provision of information or production of documents is an analysis of the allegations of the applicants."

¹⁷ *EllisDon*, at paras 65-69.

¹⁸ *Saskatchewan Provincial Building & Construction Trades Council v Churchill River Employees' Association*, 2020 CanLII 26173 (SK LRB) [CREA], at para 21.

¹⁹ *CREA*, at para 30.

Woodland to gatekeep all documents from the Council, other than those they rely upon, would undermine the potential value of the Council's participation in the hearing.

[21] In its application and written submissions to the Board the Council in large part relied upon the Board's abovementioned comments in *EllisDon* and *Brand* to persuade the Board to order the production it sought. Respectfully, it did not do much to "connect the dots" for the Board, insofar as how some of the requested information may be relevant with respect to matters in issue. For example, in this particular successorship application, how does it assist to know what insurance policies Woodland carried (in the absence of a common employer allegation, where the other respondent employer might be named as an additional insured on policies, for example)? Notably, the ten categories of potentially relevant information described in *EllisDon* appear to have been premised on equivalent information being sought from both the previous employer(s) and the current employer(s) - note the references to "each respondent" in the passage quoted at paragraph 16 of these reasons. Here, no information was being sought from TWI.²⁰

[22] In spite of the Board's concerns regarding the limited reasoning the Council provided to support its broad-based production request, the Board was satisfied that certain (potential) foundational documents were encompassed within it. These included:

- Woodland's proposal(s) or bid(s) which resulted in it being awarded the contracts referenced in paragraph 3(b) and (c) of its reply in LRB File No. 015-23 [the Graham Contracts];
- Contracts or agreements between TWI and Woodland related to Woodland's acquisition of the Graham Contracts;
- A list of the key personnel employed by Woodland near the time it commenced work on the Graham Contracts;
- A list of the equipment and vehicles, if any, transferred from TWI to Woodland, as alleged in paragraphs 8(b) and (c) of Schedule "A" to Local 151's application in LRB File No. 015-23.

[23] The Board determined that production of this information to the Council was in accordance with the *Air Canada* principles. More particularly, the information is arguably relevant, sufficiently particularized, and potentially probative with respect to the allegations in Local 151's pleadings. Further, the Board's order could contemplate the redaction of sensitive financial information from documents, in order to alleviate any concerns with respect to disclosure of same.

²⁰ As referenced in the Sequencing Decision, at paras 8 and 25, the Council had previously indicated that it would be seeking documents from both TWI and Woodland.

[24] The Board also determined that the Council's application for the disclosure of information was sufficiently broad for the Board, in considering it, to consider the appropriateness of ordering Woodland to specifically plead in response to the following allegations in Local 151's application, to the extent that it has not specifically admitted same:

8. *The particulars of the sale, lease, transfer or merger are shown by the manner in which the business is run and the Work is performed. TWI's key personnel, equipment and crews are doing, under the name of Woodland, the exact same Work that TWI was doing, including that:*
 - (a) *there was a transfer of certain key management and trades personnel that were performing the Work for TWI and are now performing the Work for Woodland, including:*
 - (i) *Sally Penner, Labour Advisor;*
 - (ii) *Gerry Barry, Workforce Manager;*
 - (iii) *four Superintendents;*
 - (iv) *six General Foremen; and*
 - (v) *over 100 trades personnel,*
 - (b) *TWI transferred IT-related equipment, such as personal computers, laptops and cell phones, to Woodland;*
 - (c) *TWI transferred leases over superintendents' vehicles to Woodland; and*
 - (d) *The Collective Agreement was transferred from TWI to Woodland.*
9. *Moving forward from the successorship TWI will not compete with Woodland for industrial sector work.²¹*

[25] The Board concluded that clarity regarding Woodland's position with respect to the above would assist all involved in the hearing, not least the Board.

[26] Woodland's having provided much of the information sought by the Council to Local 151 was an important consideration for the Board in issuing the order it did.

[27] Woodland admitted that it had received a request from Local 151 for substantially the same documents and information sought by the Council,²² and that it had provided documents to

²¹ Application of Local 151 in LRB File No. 015-23, Schedule "A", paras 8-9.

²² Woodland's reply to the Council's application for production, at para 7: "Woodland is in the process of responding to substantially the same request for documents and information made by Local 151 in the course of pre-hearing discovery."

Local 151 in response to its request.²³ Woodland conceded that these documents were arguably relevant to Local 151's successorship application, but argued that only Local 151 should be entitled to pre-hearing production.²⁴

[28] In effect, in having disclosed documents to Local 151 in response to its "substantially similar"²⁵ request and conceded the arguable relevance of those documents to the successorship application, Woodland's admissions and conduct satisfied the Board that the application of the *Air Canada* principles would have supported an order for production of those documents to Local 151. Accordingly, the issue for the Board was whether ordering production of the same documents to the Council would raise different or additional considerations.

[29] The Board took into account that Local 151 is the party with the onus in the successorship application. Unlike Local 151, the Council has no onus. However, its standing is premised on it potentially assisting the Board in determining whether a successorship occurred. In order to provide meaningful assistance, the Council cannot operate at a serious information deficit in comparison to Local 151. Put another way, its potential assistance would be diminished if it were only permitted to see those documents that Local 151 considered helpful to its application.

[30] The Board considered that the Council has no existing relationship with Woodland or its employees, and that Woodland expressed concerns regarding the Council having access to confidential or privileged information. While Woodland did not identify any particular confidential or privileged information it sought to shield from production, the Board nevertheless proceeded on the basis that such information could be contained within what Woodland had voluntarily produced to Local 151.

[31] The Board determined that Woodland's concerns regarding the potential production of confidential or privileged information to the Council could be addressed through an appropriately crafted order.

²³ Woodland's written submissions with respect to the Council's application for production, at paras 21-22: "...Woodland notes that Local 151 has made substantially the same request for documents and information as that included in the Disclosure Application. Woodland has responded to Local 151's request. ...Given such documentation has already been provided to the party with a direct interest in the Successorship Application... there are no reasons or justifications similar to those in *CREA* weighing in favour of an order granting the Council its request for pre-hearing discovery. ..."

²⁴ Woodland's written submissions with respect to the Council's application for production, at para 26: "On this basis, while the information requested by the Council in paragraph 3 of the Disclosure Application is arguably relevant to the Successorship Application, such pre-hearing discovery should be limited exclusively to Local 151 as the party alleging that a successorship has taken place."

²⁵ Woodland's written submissions with respect to the Council's application for production, at para 4.

[32] The Board notes that it has previously confirmed the operation of the implied undertaking rule with respect to its proceedings.²⁶ That said, it considered it appropriate for its order to specify who would be able to view the documents produced to the Council, what use could be made of them, and their return or destruction at the conclusion of the proceedings. The order provides clarity for the parties in these respects.

[33] The Board's order included a provision permitting documents over which any form of privilege was claimed to be withheld until the applicability of the claimed privilege was determined by the Board. Accordingly, Woodland would not be prejudiced by having to disclose such documents to the Council in advance of a ruling from the Board.

[34] Finally, the Board considered it appropriate to grant leave to Woodland and the Council to request any clarification with respect to the order that may be required.

[35] These reasons are unanimous on behalf of the Board.

DATED at Regina, Saskatchewan, this **8th** day of **September, 2023**.

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson

²⁶ *Saskatoon Co-operative Association*, at para 26.



IN THE MATTER OF

An application for pre-hearing production of particulars or documents or things pursuant to
The Saskatchewan Employment Act,

BETWEEN:

Saskatchewan Building Trades Council

APPLICANT

- and -

Woodland Constructors Ltd.

RESPONDENT

BEFORE:

Michael J. Morris, K.C., Chairperson

)

DATED at Regina, Saskatchewan, on

Aina Kagis

)

Grant Douziech

)

the **5th** day of **September, 2023**.

ORDER

THE LABOUR RELATIONS BOARD, pursuant to section 6-103 and clauses 6-111(1)(a) and
(b) of *The Saskatchewan Employment Act*, **HEREBY ORDERS:**

- (a) Woodland Constructors Ltd. [Woodland] shall produce to the Saskatchewan Building Trades Council [Council] copies of those documents that it has produced to Construction Workers Union, CLAC Local 151 [Local 151] in response to Local 151's substantially similar request for production, which for clarity is referenced by Woodland in paragraph 7 of its reply to this application and in paragraphs 21 and 22 of its written submissions with respect to this application, by September 8, 2023, at 5 p.m.
- (b) If not encompassed in paragraph (a) of this order, Woodland shall produce copies of the following documents to the Council by September 8, 2023, at 5 p.m.:

- i. Woodland's proposal(s) or bid(s) which resulted in it being awarded the contracts referenced in paragraphs 3(b) and (c) of its reply in LRB File No. 015-23;
 - ii. Contracts or agreements between Technical Workforce Inc. [TWI] and Woodland related to Woodland's acquisition of the contracts referenced in paragraphs 3(b) and (c) of Woodland's reply in LRB File No. 015-23;
 - iii. With respect to the abovementioned documents, Woodland may redact any sensitive financial information from same prior to producing them to the Council;
 - iv. The Board may determine the propriety of any redactions, if not agreed as between the parties.
- (c) If not encompassed in paragraph (a) of this order, Woodland shall produce to the Council by September 8, 2023, at 5 p.m., a list of its key personnel employed as of January 10, 2023 to fulfil the contracts referenced in paragraphs 3(b) and (c) of its reply in LRB File No. 015-23; alternatively, rather than a list, Woodland may produce copies of pre-existing documents which are relevant to establishing the identity of the said key personnel.
- (d) If not encompassed in paragraph (a) of this order, Woodland shall produce to the Council by September 8, 2023, at 5 p.m., a list of the equipment and vehicles, if any, transferred to it from TWI as alleged in paragraphs 8(b) and (c) of Local 151's application in LRB File No. 015-23; alternatively, rather than a list, Woodland may produce copies of pre-existing documents which are relevant to establishing the alleged transfer, if any.
- (e) To the extent they are not specifically admitted via paragraph 2(a) of Woodland's reply in LRB File No. 015-23, Woodland shall file particulars by September 8, 2023, at 5 p.m., which respond to the averments made in paragraphs 8 and 9 of Schedule "A" to Local 151's application in LRB File No. 015-23.

- (f) All documents produced to the Council as a result of this order shall be maintained in strict confidence by the Council and may only be viewed by those involved in LRB File No. 015-23 through the provision of legal services to the Council or those providing instructions to legal counsel on behalf of the Council, unless otherwise ordered by the Board.
- (g) All documents produced to the Council as a result of this order shall only be used for the purposes of the proceedings in LRB File No. 015-23, unless otherwise ordered by the Board.
- (h) The Council shall return to Woodland or destroy all documents produced to it as a result of this order at the conclusion of the proceedings in LRB File NO. 015-23, unless otherwise ordered by the Board.
- (i) Should Woodland claim any form of privilege with respect to any of the documents required to be produced as a result of this order, it shall advise the Board and the Board shall convene a process to determine the applicability of any claimed privilege prior to the document being required to be produced.
- (j) Woodland and the Council have leave to request any clarification with respect to this order that may be required.

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson