

**GRAIN & GENERAL SERVICES UNION, Applicant v WESTERN PRODUCER PUBLICATIONS LIMITED PARTNERSHIP/WESTERN PRODUCER PUBLICATIONS GP INC., Respondent**

LRB File No. 073-23; December 14, 2023

Chairperson, Michael J. Morris, K.C.; Board Members: Shawna Colpitts and Laura Sommerville

Counsel for the Applicant, Grain & General Services Union: Samuel I. Schonhoffer

Counsel for the Respondent, Western Producer Publications Limited Partnership/Western Producer Publications GP Inc: Steve Seiferling and Gillian Fortlage

**Successorship – Historical documents – Admissibility – Business records under s. 52 of *The Evidence Act* – Principled exception to the hearsay rule – Clause 6-111(1)(e) of *The Saskatchewan Employment Act* – Board admits several documents into evidence under the principled exception to the hearsay rule.**

## REASONS FOR DECISION

### Background:

[1] **Michael J. Morris, K.C., Chairperson:** These are the Board's reasons regarding the admissibility of certain documents in a successorship application brought pursuant to s. 6-18 of *The Saskatchewan Employment Act*<sup>1</sup> [Act].

[2] By way of brief background, the successorship application pertains to the publication known as The Western Producer. Western Producer Publications Limited Partnership/Western Producer Publications GP Inc. [Employer] is the current owner of The Western Producer. The Employer and the Grain & General Services Union [Union] are in a dispute regarding whether a certification order issued by the Board in 1950,<sup>2</sup> and amended in 1960,<sup>3</sup> applies to the Employer's workforce. From the Employer's perspective, the crux of the dispute is whether The Western Producer "was owned, controlled and at some point, disposed of, by the certified business named in LRB File No. 123-49, Modern Press Limited."<sup>4</sup> The Union's position is that Modern Press

---

<sup>1</sup> *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act].

<sup>2</sup> Order dated March 17, 1950, issued in LRB File No. 123-49.

<sup>3</sup> Order dated July 8, 1960, issued in LRB File No. 072-60.

<sup>4</sup> Employer's brief of law regarding admissibility of documents, para 5. Modern Press Limited is the employer listed in the March 17, 1950 and July 8, 1960 orders.

Limited was a subsidiary of the Saskatchewan Wheat Pool [Pool] that published The Western Producer for a period of time, and that the Pool sold The Western Producer to GVIC Communications Inc. in 2002.<sup>5</sup> It is apparent that establishing the relationship between Modern Press Limited, The Western Producer and the Pool, if any, will require an examination of circumstances from many decades ago.

**[3]** On November 27 and 28, 2023, the Board heard evidence in the successorship application. More particularly, the Union called two witnesses: Mr. Steve Torgerson, its General Secretary, and Mr. Hugh Wagner, its previous General Secretary. During their evidence, both Mr. Torgerson and Mr. Wagner referred to certain documents whose admissibility is contested by the Employer. These documents were marked for identification purposes during the hearing. On November 30, 2023, the Board received written submissions and heard oral argument with respect to the documents' admissibility. Afterward, it reserved its decision, to be rendered with written reasons. These are those reasons.<sup>6</sup>

**[4]** The documents in issue are listed in the following table. They were obtained by Mr. Torgerson from the locations listed.

Marked as	Description of document	Obtained from
U-32	Copy of document entitled "25 <sup>th</sup> Annual Report of Saskatchewan Co-operative Producers Limited", dated 1949.	McGill University, online archives.
U-34	Copy of document entitled "Saskatchewan Co-operative Producers Limited Twenty-Sixth Annual Report", dated 1950.	McGill University, online archives.
U-35	Copy of document entitled "Saskatchewan Co-operative Producers Limited Twenty-Eighth Annual Report", dated 1952.	McGill University, online archives.
U-36	Copy of document entitled "Saskatchewan Wheat Pool Thirty-Fourth Annual Report for the Year Ended 31 <sup>st</sup> July, 1958".	McGill University, online archives.
U-43	Copy of letter dated February 6, 1976 with attached memorandum of same date, from R.H.D. Phillips.	University of Saskatchewan Archives, R.H.D. Phillips fonds.
U-44	Copy of memorandum bearing a date of January, 1976 (unsigned), from R.H.D. Phillips.	University of Saskatchewan Archives, R.H.D. Phillips fonds.

<sup>5</sup> The 2002 sale is noted in *Grain Services Union Canada v Saskatchewan Wheat Pool, Heartland Livestock Services (324007 Alberta Ltd.)*, 2003 CanLII 62870 (SK LRB), at para 6.

<sup>6</sup> The Employer advised the Board that it did not intend to call evidence, and did not need to await these reasons in order to make that determination.

Marked as	Description of document	Obtained from
U-28	Copy of a stapled booklet entitled "The Inside Story of Modern Press and The Western Producer, Saskatoon, Saskatchewan".	University of Regina Archives.
U-29	Copy of extracts from the book "From Prairie Roots: The Remarkable Story of Saskatchewan Wheat Pool", authored by Garry Fairbairn.	Union's office.
U-30	Copy of "War vets formed Modern Press in 1923", article in the February 22, 1998 issue of the Saskatoon Sun.	University of Saskatchewan Archives, R.H.D. Phillips fonds.
U-26	Copy of obituary for Robert Keith Dryden.	Saskatoon Star-Phoenix website.
U-22	Copy of write-up regarding Bill Bradley.	Saskatchewan Agricultural Hall of Fame website.

**[5]** The parties agree that the documents are hearsay evidence, insofar as they are intended to be admitted for the truth of their contents. The parties also agree that hearsay evidence is presumptively inadmissible in proceedings before the Board, unless the Board relies upon a common law or statutory exception for its admission. The Board agrees with the parties on these points, but also notes that the Board may consider hearsay evidence by consent of the parties,<sup>7</sup> and that some documents (though not those described in the above table) were admitted by consent.

#### **Argument on behalf of the Union:**

**[6]** The Union begins by noting that the Board is empowered, pursuant to clause 6-111(1)(e) of the Act, to "receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the Board considers appropriate, whether admissible in a court of law or not".<sup>8</sup> This includes hearsay evidence.

**[7]** The Union submits that it has not refused to tender witnesses who could provide first-hand evidence regarding matters discussed in the documents. Such witnesses simply don't exist, given the dated nature of the matters referenced in the documents. Accordingly, refusing to admit the

<sup>7</sup> *Saskatchewan v Racette*, 2020 SKCA 2, at para 43: "While hearsay evidence is presumptively inadmissible, it is routinely admitted in civil trials with the consent, or lack of objection, of the opposite party. In this matter, the documents containing the anonymous hearsay were admitted by express consent and the testimony regarding the documents was not objected to."

<sup>8</sup> As such, clause 6-111(1)(e) operates as a statutory exception to the hearsay rule.

documents would deprive the Board of relevant information with respect to the successorship application. Further, the Union submits that admitting a document does not require the Board to pre-determine the weight it may give to it.

**[8]** The Union submits that the Board should first consider whether documents can be admitted as business records, pursuant to s. 52 of *The Evidence Act*<sup>9</sup>, and if not, it should go on to consider whether they should be admitted under the principled exception to the hearsay rule.<sup>10</sup> Finally, if neither s. 52 of *The Evidence Act* nor the principled exception to the hearsay rule permit a document to be admitted, the Union submits that the Board should rely upon clause 6-111 (1)(e).

**[9]** The Union points to *CPR v Saskatchewan*<sup>11</sup> as an analogous case where the Court was required to determine the admissibility of historical documents in the absence of a witness who could be cross-examined with respect to their contents. In that case, the Court admitted the documents under the principled exception to the hearsay rule, after answering the following questions in the affirmative:

(a) *Is the admission of the documents reasonably necessary, in the sense that there is no other convenient way of presenting the evidence contained in them?*

(b) *Is the evidence contained in the documents reliable, in the sense that there is some indication that the documents are trustworthy?*<sup>12</sup>

**[10]** In addressing the first question, the Court inferred from the age of the documents - between 37 and 105 years old - that there was no one who could provide first-hand knowledge with respect to their authenticity and the truth of their contents.<sup>13</sup> The Union submits that the same inference can be drawn with respect to many of the documents it seeks to have admitted. In addressing the second question, the Court noted that the documents in issue, by their very nature, had inherent reliability.<sup>14</sup> They included correspondence and memoranda of meetings among high-ranking representatives of the parties, and correspondence and memoranda among high-ranking government officials.<sup>15</sup> The circumstances in which the documents were written

<sup>9</sup> *The Evidence Act*, SS 2006, c E-11.2 [*The Evidence Act*].

<sup>10</sup> Per the test developed by the Supreme Court of Canada in *R v Khan*, [1990] 2 SCR 531 [*Khan*], and subsequent cases.

<sup>11</sup> *Canadian Pacific Railway Company v Saskatchewan*, 2022 SKQB 28 [*CPR v Saskatchewan*].

<sup>12</sup> *CPR v Saskatchewan*, para 46.

<sup>13</sup> *CPR v Saskatchewan*, para 53.

<sup>14</sup> *CPR v Saskatchewan*, at paras 61-62.

<sup>15</sup> *CPR v Saskatchewan*, para 61.

substantially negated the possibility that the author was untruthful or mistaken.<sup>16</sup> Again, the Union submits that similar reasoning applies to documents it seeks to have admitted.

[11] The Union emphasizes that the inability to cross-examine a witness regarding the truth of a document's contents cannot be determinative with respect to its admissibility. If it were, the principled exception to the hearsay rule could not be applied to documents.

[12] With respect to U-32, U-34, U-35 and U-36, the Union submits that these documents can be admitted as business records pursuant to s. 52 of *The Evidence Act*. They are copies of annual reports for the entity that came to be known as the Pool, and its subsidiary companies. The reports would have been relied upon by the Pool and its subsidiaries, and included audited financial statements. The Union analogizes the documents to the 1890 and 1897 annual reports of the Department of Indian Affairs that were admitted as business records by the British Columbia Supreme Court in *Cowichan Tribes*.<sup>17</sup> Alternatively, it says the documents meet the necessity and reliability criteria for admission under the principled exception to the hearsay rule.

[13] With respect to U-43 and U-44, copies of the letter and memoranda authored by R.H.D. Phillips, the Union submits that they are admissible as business records under s. 52 of *The Evidence Act*, or under the principled exception to the hearsay rule. The Union emphasizes The Western Producer letterhead and the signature of Mr. Phillips on the documents comprising U-43, and the consistencies between the January 1976 Phillips-authored memorandum (U-44) and the February 6, 1976 signed memorandum that is contained as part of U-43.

[14] With respect to U-28, a copy of the booklet entitled "The Inside Story of Modern Press and The Western Producer, Saskatoon, Saskatchewan", the Union submits that this document should be admitted under the principled exception to the hearsay rule. It notes that Mr. Wagner testified regarding Mr. Phillips' involvement in producing the booklet. Mr. Wagner also testified that the booklet was accurate insofar as it described the operations of The Western Producer in the 1970's.<sup>18</sup> The booklet includes a foreword by Mr. Phillips, who is identified as Editor and Publisher.

[15] With respect to U-29, extracts from Garry Fairbairn's book "From Prairie Roots: The Remarkable Story of Saskatchewan Wheat Pool", the Union emphasizes that Mr. Fairbairn is deceased, according to Mr. Torgerson's communications with Mr. Fairbairn's brother. The book

---

<sup>16</sup> *CPR v Saskatchewan*, para 63.

<sup>17</sup> *Cowichan Tribes v Canada (Attorney General)*, 2021 BCSC 235 [*Cowichan Tribes*], at paras 140 and 149.

<sup>18</sup> Mr. Wagner became employed by the Union in 1975, and one of the first bargaining units he had responsibility for was that containing employees of The Western Producer.

was published by Western Producer Prairie Books, and authored by an individual who was directly involved with the Pool's Printing and Publishing Division.<sup>19</sup> In terms of what it hopes to specifically rely upon from the book, the Union points to an extract indicating that in 1931 the Pool acquired Modern Press Limited as a subsidiary corporation. The Union submits that the extract should be admitted under the principled exception to the hearsay rule.

**[16]** With respect to U-30, a copy of a Saskatoon Sun article from 1998, the Union submits that it should be admitted under the principled exception to the hearsay rule. It submits that the author, an individual who submitted the article on behalf of the Saskatoon Municipal Heritage Advisory Committee, would have had no motive to fabricate a narrative with respect to the historical events described in the article.

**[17]** With respect to U-26, a copy of the obituary for Robert Keith Dryden, the Union submits that there is no reason to believe that the obituary contains falsehoods. It establishes Mr. Dryden's death on October 11, 2016, and some of his biographical details, including that he worked for the Western Producer. The Union asks that it be admitted under the principled exception to the hearsay rule.

**[18]** With respect to U-22, a copy of a write-up regarding Bill Bradley from the Saskatchewan Agricultural Hall of Fame [SAHoF] website, the Union similarly submits that there is no reason to believe that the write-up contains falsehoods. The write-up indicates that Mr. Bradley was nominated for the SAHoF in 1985 and died in 1995, and that he was promoted to executive editor of the Western Producer in 1948. The Union seeks admission of the SAHoF write-up under the principled exception to the hearsay rule.

**Argument on behalf of the Employer:**

**[19]** The Employer's position is that the Union has not demonstrated that any of the documents should be admitted under s. 52 of *The Evidence Act*, the principled exception to the hearsay rule, or pursuant to clause 6-111(1)(e) of the Act.

**[20]** The Employer notes that the documents are presumptively inadmissible, and questions why the Union did not issue a subpoena duces tecum for a witness from The Western Producer or Viterra Inc. (which acquired the Pool) to bring historical documents to the hearing, rather than

---

<sup>19</sup> According to Mr. Wagner, Mr. Fairbairn was managing editor of The Western Producer for a number of years. Mr. Wagner identified the book from which the photocopies were made as having been given to him while he worked for the Union.

relying upon documents obtained from public archives, or elsewhere. The Employer submits that Mr. Torgerson's inquiries of a senior labour relations business partner at Viterra Inc. were insufficient to establish that the company did not possess any of the documents in issue.<sup>20</sup>

**[21]** The Employer submits that the Union has not met the requirements for any of the documents to be admitted under s. 52 of *The Evidence Act*, because it has not called evidence from anyone other than witnesses employed by the Union. More particularly, it has not tendered evidence from anyone employed by "the business" whose (alleged) business records it seeks to admit.

**[22]** The Employer acknowledges that the principled exception to the hearsay rule requires an examination of whether the tendered evidence is both necessary and reliable. With respect to the necessity requirement, the Employer submits that the Board must ask whether it is reasonably necessary to rely upon the hearsay evidence.<sup>21</sup> With respect to reliability, the Employer submits that the Board must ask whether the evidence has sufficient circumstantial guarantees of trustworthiness, or threshold reliability, to justify its admission. During oral argument, the Employer submitted that the older a document is, the more difficult it is to determine its reliability.

**[23]** The Employer submits that threshold reliability has not been established for any of the documents in issue. It notes that newspaper articles, promotional materials and books<sup>22</sup> are meant for public consumption, and may be written to be intriguing and enjoyable, rather than strictly factual.<sup>23</sup> With respect to documents the Employer describes as "internal documents relating to business", being U-32, U-34, U-35, U-36, U-43 and U-44, the Employer submits that such documents "could easily contain conflicting information, colloquialisms, inflated facts, etc."<sup>24</sup> The Employer also submits that threshold reliability is difficult to establish when, for at least some of the documents, it is not possible to establish who authored them.

**[24]** With respect to U-22 and U-26, the Employer submits that the Union ought to have obtained death certificates to establish that Mr. Bradley and Mr. Dryden are deceased. The

---

<sup>20</sup> Mr. Torgerson testified that he was told by the individual, Ms. Johnson, that Viterra Inc. did not have the type of historical documents he was interested in. Ms. Johnson was unable to locate any, and had "asked around" regarding them, as well.

<sup>21</sup> Employer's brief of law regarding admissibility of documents, para 28.

<sup>22</sup> The Employer places U-22, U-26, U-28, U-29 and U-30 in these categories.

<sup>23</sup> Employer's brief of law regarding admissibility of documents, para 30.

<sup>24</sup> Employer's brief of law regarding admissibility of documents, para 31.

Employer also suggests that the Union could have called a witness from the entity which posted the documents on the internet, being the SAHoF or the Saskatoon Star-Phoenix.

**[25]** With respect to U-30, the 1998 Saskatoon Sun article entitled “War vets formed Modern Press in 1923”, the Employer submits that the Union has not explained why the author of the article could not be called, and that the article does not identify the sources for the information it relates.

**[26]** With respect to U-29, extracts from Mr. Fairbairn’s book, the Employer acknowledges that Mr. Fairbairn is deceased, but questions whether the factual information the Union seeks to rely upon, being what occurred in 1931, can meet threshold reliability.

**[27]** With respect to U-28, the copy of the booklet entitled “The Inside Story of Modern Press and The Western Producer, Saskatoon, Saskatchewan”, the Employer submits that its threshold reliability is compromised in the absence of knowing who wrote what in the document, and when.

**[28]** With respect to U-43 and U-44, copies of the letter and memoranda authored by R.H.D. Phillips, the Employer acknowledges that these documents were donated to the University of Saskatchewan, but submits that that doesn’t establish that they were actually sent to anyone else.

**[29]** With respect to U-32, U-34, U-35 and U-36, the Employer submits that copies of the Pool’s annual reports should have been obtained through Viterra Inc., and that if they had been so obtained, the Employer might not be arguing their admissibility at all.

#### **Relevant Statutory Provisions:**

**[30]** Section 52 of *The Evidence Act* is relevant:

*52(1) Subject to this section, a copy of an entry in a record kept by a business is admissible in any proceeding as proof, in the absence of evidence to the contrary, of the entry, and of the acts, transactions, occurrences and events recorded in the entry.*

*(2) A copy of an entry in a record kept by a business shall not be received in evidence pursuant to this section unless it is first proved that:*

*(a) the record was, at the time of the making of the entry, one of the ordinary records of the business;*

*(b) the entry was made in the usual and ordinary course of business;*

*(c) the record is in the custody or control of the business or its successor; and*

*(d) the copy is a true copy.*



(3) *The proof described in subsection (2) may be given by the manager or accountant of the business or by any person employed by the business who has knowledge of the record, and may be given orally or by affidavit.*

[31] Clause 6-111(1)(e) of the Act is also relevant:

**6-111(1)** *With respect to any matter before it, the board has the power:*

...

*(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the board considers appropriate, whether admissible in a court of law or not;*

### **Analysis and Decision:**

#### **i) Law**

[32] The Union relies upon s. 52 of *The Evidence Act*, the principled exception to the hearsay rule, and clause 6-111(1)(e) of the Act.

[33] Section 52 of *The Evidence Act* sets out the requirements for a copy of a business record to be admitted through the provision. The party tendering the copy must establish that the record was, at the time it was made, one of the ordinary records of the business, that the information contained in it was entered in the usual and ordinary course of business, that the record is in the custody or control of the business or its successor, and that the copy of the record is a true copy. The proof to satisfy these requirements may be given by a business' manager or accountant, or anyone employed by the business who has knowledge of the record.

[34] In *B.L.*,<sup>25</sup> the Court of Appeal adopted the following principles with respect to the admission of business records pursuant to s. 52 of *The Evidence Act*.

*[24] In S.V. (Re), 2002 SKQB 499, 228 Sask.R. 161 the court dealt with investigation records, assessments and case plans, social histories and an application for exceptional funding, all proffered by the Ministry as admissible pursuant to s. 31 of the Saskatchewan Evidence Act (as it then was) or alternatively pursuant to the common law business records exception. In that case, Ryan-Froslic J. determined that virtually none of the documents were admissible because they contained summaries or condensed versions of the act, transaction or occurrence or opinions they purported to record. In making that ruling respecting admissibility under the statutory business records provision she relied on Setak Computer. At para. 30, Ryan-Froslic J. summarized the principles of Setak as follows:*

*(i) The evidence must be a writing or record produced by a business as that term is defined in the statutes. At pages 647-648 of the Setak Computer Services Corp. decision, Justice Griffith made reference to the fact that the Ontario statutory*

<sup>25</sup> *B.L. v Saskatchewan (Social Services)*, 2012 SKCA 38 [B.L.].

provision was "...cast in very broad terms so as to encompass practically every type of writing utilized in connection with any business".

(ii) *The writing or record must be made in the usual and ordinary course of a business (See: page 649 of the Setak decision).*

(iii) *It must be in the usual and ordinary course of the business to make such writing or record (See: pages 649-650 of the Setak decision).*

(iv) *The writing or record must be made at the time of or within a reasonable time after the act, transaction, occurrence or event it is introduced as evidence of (See: page 651 of the Setak decision).*

(v) *Business records are not proof of the validity of any opinion expressed therein (See: page 652 of the Setak decision where Justice Griffith quoted with approval the case of Adderly v. Bremner, 1967 CanLII 308 (ON SC), [1968] 1 O.R. 621 (Ont. H.C.), which stated that opinions would not be accepted as evidence unless given by a duly qualified expert).*

(vi) *Lack of personal knowledge does not affect the admissibility of the writing or record (See: page 652 of the Setak decision).*

To these principles Ryan-Froslic J. added an additional principle:

31 . . . *The writing or record must be of an act, transaction occurrence or event; [i.e. a positive happening which is routinely recorded.]*

[25] *These principles will normally guide the determination of whether records are admissible pursuant to ss. 50-52 of The Evidence Act.*<sup>26</sup>

**[35]** In *B.L.*, the requirements under s. 52 were satisfied by an officer from the Regina Police Service testifying with respect to the Regina Police Service records in issue.<sup>27</sup>

**[36]** The principled exception to the hearsay rule is a common law exception that has been developed by the Supreme Court of Canada. In *Bradshaw*,<sup>28</sup> the Court confirmed that hearsay evidence is presumptively inadmissible because it is often difficult for the trier of fact to assess its truth. However, it can be admitted under the principled exception if the criteria of necessity and threshold reliability are met on a balance of probabilities.

**[37]** The concept of necessity is flexible and can accommodate diverse situations. In *Smith*, the Court stated:

*As indicated above, the criterion of necessity must be given a flexible definition, capable of encompassing diverse situations. What these situations will have in common is that the relevant direct evidence is not, for a variety of reasons, available. Necessity of this nature*

<sup>26</sup> *B.L.*, at paras 24-25.

<sup>27</sup> *B.L.*, at para 44.

<sup>28</sup> *R v Bradshaw*, 2017 SCC 35, [2017 1 SCR 865 [*Bradshaw*].

may arise in a number of situations. *Wigmore*, while not attempting an exhaustive enumeration, suggested at §1421 the following categories:

- (1) *The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing [by cross-examination]. This is the commoner and more palpable reason. . . .*
- (2) *The assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources . . . . The necessity is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.*

*Clearly the categories of necessity are not closed. . . .*<sup>29</sup>

**[38]** In *CPR v Saskatchewan*, Mr. Justice Kilback considered the necessity requirement with respect to documents that were between 37 and 105 years old. He inferred, based on their age, that there was no one with knowledge of them who could testify first-hand with respect to their authenticity and the truth of their contents.<sup>30</sup> On this basis, he was “satisfied that there is no other convenient way of presenting the evidence contained in them and that the criterion of necessity is met.”<sup>31</sup>

**[39]** The concept of reliability is concerned with threshold reliability for admissibility, not ultimately reliability (the weight a document is given in fact-finding, if admitted). In *Bradshaw*, the Court stated that threshold reliability can be established in two ways: by showing that there are adequate substitutes for testing the truth and accuracy of the hearsay evidence (procedural reliability), or that there are sufficient circumstantial or evidentiary guarantees that the hearsay evidence is inherently trustworthy (substantive reliability):

*[28] Procedural reliability is established when “there are adequate substitutes for testing the evidence”, given that the declarant has not “state[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination” (Khelawon, at para. 63). . . . Substitutes for traditional safeguards include a video recording of the statement, the presence of an oath, and a warning about the consequences of lying . . . . However, some form of cross-examination of the declarant, such as preliminary inquiry testimony . . . or cross-examination of a recanting witness at trial (B.(K.G.) [1993 CanLII 116 (SCC), [1993] 1 SCR 740]; R. v. U.(F.J.), 1995 CanLII 74 (SCC), [1995] 3 S.C.R. 764), is usually required. . . .*

*[30] A hearsay statement is also admissible if substantive reliability is established, that is, if the statement is inherently trustworthy . . . . To determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement . . . .*

*[31] While the standard for substantive reliability is high, guarantee “as the word is used in the phrase ‘circumstantial guarantee of trustworthiness’, does not require that reliability be*

<sup>29</sup> *R v Smith*, 1992 CanLII 79 (SCC), [1992] 2 SCR 915 [Smith], at 933-934.

<sup>30</sup> *CPR v Saskatchewan*, at paras 51-53.

<sup>31</sup> *CPR v Saskatchewan*, at para 54.

*established with absolute certainty” (Smith, [1992 CanLII 79 (SCC), [1992] 2 SCR 915] at p. 930). ... Substantive reliability is established when the statement “is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken” (Smith, at p. 933); “under such circumstances that even a sceptical caution would look upon it as trustworthy” (Khelawon, at para. 62, citing Wigmore, [Evidence in Trials at Common Law (2nd ed. 1923), vol. III] at p. 154); when the statement is so reliable that it is “unlikely to change under cross-examination” (Khelawon, at para. 107; Smith, at p. 937); when “there is no real concern about whether the statement is true or not because of the circumstances in which it came about” (Khelawon, at para. 62); when the only likely explanation is that the statement is true (U.(F.J.), at para. 40).<sup>32</sup>*

**[40]** In *CPR v Saskatchewan*, Mr. Justice Kilback was satisfied that the documents in issue - correspondence and memoranda of meetings among high-ranking representatives of the parties, and correspondence and memoranda among high-ranking government officials - had inherent reliability by their very nature. Accordingly, he considered them to have substantive reliability, for the purposes of threshold reliability.<sup>33</sup>

**[41]** If the criteria of necessity and threshold reliability are met, a decision-maker may still refuse to admit hearsay evidence under the principled exception where its probative value would be outweighed by its prejudicial effect.<sup>34</sup> That said, where there is no other way to reasonably adduce relevant evidence, the law may “be reluctant to blow out the last candle”.<sup>35</sup> Ultimately, if hearsay evidence is admitted, the weight to be given to it, if any, remains to be determined in the final fact-finding analysis.<sup>36</sup>

**[42]** As aforementioned, the Union also draws the Board’s attention to clause 6-111(1)(e) of the Act, which authorizes the Board “to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the board considers appropriate, whether admissible in a court of law or not”. This provision expressly authorizes the Board to admit evidence which might not be admitted based on the jurisprudence which guides the courts.

**[43]** The Board has previously stated that it tries, as much as possible and practical, to follow the evidentiary rules employed by the courts.<sup>37</sup> This is for good reason. The rules employed by the courts are designed to ensure procedural fairness. However, clause 6-111(1)(e) of the Act establishes that they are not required to be adhered to, without exception. Ultimately, the Board

<sup>32</sup> *Bradshaw*, at paras 28, 30-31. Emphasis in original.

<sup>33</sup> *CPR v Saskatchewan*, at para 64.

<sup>34</sup> *Bradshaw*, at para 24; *CPR v Saskatchewan*, at para 65.

<sup>35</sup> *CPR v Saskatchewan*, at paras 39-40.

<sup>36</sup> *CPR v Saskatchewan*, at paras 196, 200.

<sup>37</sup> *Amenity Health Care LP v Workers United Canada Council, Tanya Parkman and Gwen April Britton*, 2018 CanLII 68441 (SK LRB), at para 74.

may rely upon evidence that may not be admitted in a court provided doing so is reasonable and fair, keeping in mind the context of the proceeding and the purpose for which the evidence is tendered.

**ii) Application to the documents in issue**

**[44]** The Board concludes that the Union has not met the statutory requirements for any of the documents to be admitted under s. 52 of *The Evidence Act*. More particularly, the Union has not tendered the evidence required by subsections 52(2) and (3) with respect to any of the documents. It did not tender oral or affidavit evidence from anyone from The Western Producer or Viterra Inc. Accordingly, it is unnecessary for the Board to examine the applicability of s. 52 any further.

**[45]** The Board will proceed to examine whether the documents should be admitted under the principled exception to the hearsay rule or, if necessary, pursuant to clause 6-111(1)(e) of the Act.

*a) Copies of annual reports from 1949, 1950, 1952, 1958 (U-32, U-34, U-35, U-36)*

**[46]** At the outset, the Board notes that these documents were obtained from the McGill University online archives. They appear to have been proficiently scanned and added to the online archives by someone. Each of U-32, U-34 and U-35 bear a stamp for Purvis Hall Libraries, McGill University, from July of 1953. It appears likely that they were each stamped on July 14, 1953, though the precise date on U-35 is illegible. The Board infers that Purvis Hall Libraries received copies of the 1949, 1950 and 1952 annual reports in July of 1953, and that these documents were at some point thereafter scanned and added into the McGill University online archives. The 1958 annual report, U-36, does not bear a library stamp on its cover. Regardless, the Board infers that it was received by McGill University, and scanned and added to the McGill University online archives at some point after it was printed by the Pool.

**[47]** The Board is satisfied that U-32, U-34, U-35 and U-36 are true copies of annual reports printed by the Pool. The fact that the copies originated from McGill University rather than Viterra Inc. does not affect the Board's conclusion with respect to the documents' authenticity. University archives are relied upon by researchers on a daily basis, and the Board infers that McGill University has reasonable processes in place to ensure that it is not making documents whose authenticity is suspect available for research purposes.

**[48]** Given the age of the annual reports, the Board infers that there is no one who could provide first-hand evidence with respect to the truth of their contents. Assuming a 25-year-old person played some role in the creation of the 1958 annual report - presumably a junior role - that person would be at least 90 years old if alive today.

**[49]** In terms of the necessity criterion, and mindful of the question posed in *CPR v Saskatchewan*, the Board is satisfied that there is no other convenient way of presenting the evidence contained in the annual reports. The necessity criterion is met.

**[50]** With respect to reliability, the Board is satisfied that the annual reports have sufficient substantive reliability to meet the threshold reliability criterion. The annual reports would have had many eyes on them before being printed, including those of chartered accountants responsible for signing off on audited financial statements. The Pool's directors would have been expected to honestly report matters pertaining to its organizational structure, including the identity of the Pool's subsidiaries.

**[51]** The Board is satisfied on a balance of probabilities that the necessity and reliability criteria are met for U-32, U-34, U-35 and U-36. The Board does not conclude that the documents' probative value would be outweighed by any prejudicial effect. U-32, U-34, U-35 and U-36 will be admitted into evidence under the principled exception to the hearsay rule.

*b) Copies of R.H.D Phillips letter and memoranda from 1976 (U-43 and U-44)*

**[52]** Mr. Torgerson made copies of the letter and memoranda which are housed in the R.H.D. Phillips fonds at the University of Saskatchewan Archives. The Board infers that the R.H.D. Phillips fonds are comprised of documents that were in the possession of Mr. Phillips, and subsequently provided to the University of Saskatchewan Archives. The Board has no concerns with the authenticity of the documents Mr. Torgerson located in the fonds, and accepts that he made true copies of them. Mr. Torgerson described U-43 as consisting of a letter and a two-page memorandum held together by a paper clip, and U-44 as being a six-page memorandum which was located in the same collection of documents.

**[53]** The Board infers that R.H.D. Phillips is the author of the documents comprising U-43 and U-44 since they bear his name as author. Mr. Wagner testified that Mr. Phillips is deceased.<sup>38</sup> The Board is satisfied that the necessity criterion is met.

**[54]** The Board is satisfied that threshold reliability for U-43 and U-44 is made out based on substantive reliability. The documents were authored by Mr. Phillips in his capacity as “Director of the Division”, which based on Mr. Wagner’s evidence, the Board understands to mean the Printing and Publishing Division of the Pool. The letterhead in U-43 identifies Mr. Phillips as “Editor and Publisher and Director of Modern Press”, next to The Western Producer logo. U-44 refers to Modern Press as “the trade name for the printing and publishing division of Saskatchewan Wheat Pool”, and the publisher of The Western Producer.<sup>39</sup> Mr. Phillips’ authoritative position with respect to Modern Press and The Western Producer substantially negates the possibility that he was untruthful or mistaken with respect to the matters of fact described in U-43 and U-44. The fact that the six-page memorandum (U-44) is unsigned does not, in itself, cause the Board to question its threshold reliability. Information in the signed two-page memorandum is consistent with information in the unsigned lengthier memorandum.<sup>40</sup>

**[55]** The Board is satisfied on a balance of probabilities that the necessity and reliability criteria are met for U-43 and U-44. The Board does not conclude that the documents’ probative value would be outweighed by any prejudicial effect. U-43 and U-44 will be admitted into evidence under the principled exception to the hearsay rule.

*c) Copy of “The Inside Story of The Western Producer and Modern Press” booklet (U-28)*

**[56]** Mr. Torgerson copied this booklet from the University of Regina Archives. He described it as a glossy stapled booklet that appeared to have been professionally put together. The Board is satisfied that Mr. Torgerson made a true copy of the booklet.

**[57]** Mr. Wagner described being shown this booklet by Mr. Phillips; he described it as Mr. Phillips’ “baby”. The Board understands this to mean that the booklet was a project that Mr. Phillips was keenly interested in. The last page of U-28 states “[t]his brochure was produced in its entirety at Modern Press.” It contains a foreword by Mr. Phillips and a photograph of the Modern Press

---

<sup>38</sup> The Employer acknowledged that Mr. Phillips is deceased, in oral argument.

<sup>39</sup> Mr. Wagner’s evidence confirmed that the Modern Press building, in the 1970’s, had exterior signs identifying Modern Press as the publisher of The Western Producer.

<sup>40</sup> For example, see points (i), (ii) and (iii) on the first page of each memorandum, the three bullet points on the second page of the two-page memorandum and points (i)-(iii) on the second page of the six-page memorandum, and points (1)-(4) on the last page of each memorandum.

building, which Mr. Wagner described as depicting the building before it moved to a different location in 1977. Mr. Wagner testified that the descriptions of The Western Producer's Editorial and Circulation Departments corresponded with his own knowledge of those departments, as of 1975. Employees in those departments were included in the Union's bargaining unit for The Western Producer, for which Mr. Wagner was responsible. The Board infers that the booklet was printed by Modern Press no later than 1977, making it at least 46 years old.

**[58]** In terms of the necessity criterion, the Board notes the age of the document and the historical matters described therein, and poses the question asked in *CPR v Saskatchewan*: Is the admission of U-28 reasonably necessary, in the sense that there is no other convenient way of presenting the evidence contained in it? The Board answers this question in the affirmative.

**[59]** With respect to threshold reliability, the Board accepts Mr. Wagner's evidence that the booklet was Mr. Phillips' "baby". In terms of objectively ascertainable factual information contained in it, such as the Pool's relationship with Modern Press Limited and The Western Producer over the years, concerns over sales "puffery" do not arise. On the contrary, it is reasonable to infer that those employed by The Western Producer may have made reasonable efforts to ascertain such facts, where necessary, particularly given the booklet was Mr. Phillips' "baby". The Board is satisfied that threshold reliability is established by substantive reliability for U-28.

**[60]** The Board is satisfied on a balance of probabilities that the necessity and reliability criteria are met for U-28. The Board does not conclude that the document's probative value would be outweighed by any prejudicial effect. U-28 will be admitted into evidence under the principled exception to the hearsay rule.

d) *Extracts from "From Prairie Roots: "From Prairie Roots: The Remarkable Story of Saskatchewan Wheat Pool" (U-29)*

**[61]** Mr. Wagner recalled receiving this book while employed with the Union, and Mr. Torgerson copied extracts from the book for the purposes of the hearing before the Board.<sup>41</sup> The book was copyrighted in 1984. The Board accepts that its author, Mr. Fairbairn, is deceased, and therefore unable to give evidence with respect to why he wrote what he did. From the Union's perspective, the extract it seeks to rely upon begins on page 128. In this extract, Mr. Fairbairn describes events which occurred in 1931 with respect to Modern Press Limited and the Pool. The Board infers that

---

<sup>41</sup> The book itself was also displayed during the witnesses' evidence.



there is no one with first-hand knowledge regarding these events who would be able to give evidence regarding them.

**[62]** The Board considers the necessity criterion met for the extract due to Mr. Fairbairn's death and the dated nature of the events described therein.

**[63]** The Board concludes that threshold reliability for the extract is met based on substantive reliability. The book was published by a division of the Pool, Western Producer Prairie Books, and authored by an individual who was managing editor of The Western Producer for a number of years. Professionally published books tend to be reviewed and edited prior to their publication. Further, the Board infers that Mr. Fairbairn had access to whatever material he may have required from the Pool for the purposes of fact-checking.

**[64]** The Board is satisfied on a balance of probabilities that the necessity and reliability criteria are met for U-29, specifically with respect to the extract sought to be relied upon by the Union.<sup>42</sup> The Board does not conclude that the document's probative value would be outweighed by any prejudicial effect. U-29 will be admitted into evidence under the principled exception to the hearsay rule.

e) *Copy of "War vets formed Modern Press in 1923", article in the February 22, 1998 issue of the Saskatoon Sun (U-30)*

**[65]** Mr. Torgerson obtained this document from the R.H.D. Phillips fonds at the University of Saskatchewan Archives. The Union seeks to admit the article for its statements regarding what occurred with respect to Modern Press Limited, The Western Producer and the Pool in 1931. In essence, it seeks to admit the article under the principled exception to the hearsay rule as additional evidence to that contained in the abovementioned extract from Mr. Fairbairn's book.

**[66]** Notably, the Union tendered no evidence suggesting that the author of the article is unable to give evidence with respect to it. This presents a challenge for the necessity criterion. Further, the article does not cite any sources for the statements contained in it. Given these circumstances, the Board refuses to admit the article under the principled exception to the hearsay rule. Further, it declines to admit it pursuant to clause 6-111(1)(e) of the Act, for the same reasons.

f) *Copy of obituary for Robert Keith Dryden from Saskatoon Star-Phoenix website (U-26)*

---

<sup>42</sup> The Board has limited its analysis to this extract, at this point. Should the Union seek to rely on other extracts, it remains open to the Board to consider their potential admissibility.

**[67]** The Union seeks to tender this document for the purpose of establishing that Mr. Dryden is deceased, and to establish that he worked for The Western Producer at certain points in time. Notably, the Employer has consented to the admission of a document which provides similar information, being an October 17, 2016 article from The Western Producer's website entitled "Former WP Editor Keith Dryden dead".<sup>43</sup> More specifically, amongst other information, the article states that Mr. Dryden's "years in journalism began in 1946 as a WP reporter before he moved for a couple of years each to Regina's Leader Post and Calgary's Albertan, returning to the WP in 1960."

**[68]** From the Board's perspective, the article which has already been admitted into evidence provides more relevant biographical detail regarding Mr. Dryden for the purposes of the successorship application than the obituary. Given the article is already in evidence, there is no need for the obituary to be admitted. In other words, the necessity criterion for the principled exception to the hearsay rule has not been met. Further, the Board declines to admit the obituary pursuant to clause 6-111(1)(e) of the Act.

*g) Copy of write-up regarding Bill Bradley from Saskatchewan Agricultural Hall of Fame website (U-22)*

**[69]** The Union seeks to admit this document to establish that Mr. Bradley died in 1995 and was promoted to executive editor of The Western Producer as of 1948. Similar to the obituary for Mr. Dryden, the Employer has already consented to the admission of a document that provides this information, being a June 29, 1995 article from The Western Producer's website entitled "Well-known Saskatchewan publisher dies".<sup>44</sup> Amongst other information, the article states that Mr. Bradley joined the Western Producer in 1941, was promoted to executive editor in 1948, where he remained for four years, until his departure in 1952.

**[70]** Given the abovementioned article from The Western Producer is already in evidence, there is no need for the SAHoF write-up to be admitted. In other words, the necessity criterion for the principled exception to the hearsay rule has not been met. Further, the Board declines to admit the SAHoF write-up pursuant to clause 6-111(1)(e) of the Act.

---

<sup>43</sup> Exhibit U-27.

<sup>44</sup> Exhibit U-21.

**iii) Conclusion**

**[71]** The Board admits the following documents into evidence as exhibits: U-32, U-34, U-35, U-36, U-43, U-44, U-28 and U-29. The weight the Board may assign to any of these exhibits remains to be determined.

**[72]** The Registrar will contact the parties to set a date for the Board to hear closing arguments in the successorship application, via WebEx. The parties will be directed to serve and file any written argument they intend to rely upon in advance of the selected date.

**[73]** This is a unanimous decision of the Board.

**DATED** at Regina, Saskatchewan, this **14<sup>th</sup>** day of **December, 2023**.

**LABOUR RELATIONS BOARD**

---

Michael J. Morris, K.C.  
Chairperson