Saskatchewan
Labour Relations Board

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v FIRE & FLOWER INC., Respondent

LRB File No. 184-22, 055-23, 167-22, & 187-22; May 31, 2023
Vice-Chairperson, Barbara Mysko; Board Members: Lloyd Zwack and Kris Spence

Counsel for the Applicant, United Food and Commercial Workers Union, Local 1400:	Heath Smith
Counsel for the Respondent, Fire & Flower Inc.:	Daniel S. Weber and Ania Konikowski

Applications to Amend Pleadings – Application for Production – Underlying Certification and Unfair Labour Practice Applications.

Applications to Amend Pleadings – Section 6-112 – Defect Amended – Application to Amend Unfair Labour Practice Application Granted – Delay to be Determined at Substantive Hearing – Application to Amend Reply Partially Granted.

Application for Production – Solicitor-Client Privilege – Litigation Privilege – Litigation but not Solicitor-Client Privilege Waived – Subsection 6-111(1) of *The Saskatchewan Employment Act* – Partial Production Ordered.

Application for Production – *Air Canada* Factors – Overbreadth of Request – Timeline of Request Not Consistent with Underlying Application – Requests Denied.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: The Union has brought an application for the production of documents and an application to amend its existing unfair labour practice application. The underlying applications consist of the Union's certification application in relation to employees of the Employer, Fire & Flower Inc., the Union's unfair labour practice application against the Employer, alleging breaches of sections 6-5, 6-6(2)(d), 6-62(1)(a), 6-62(1)(b), and 6-62(1)(i) of *The Saskatchewan Employment Act* [Act], and the Employer's unfair labour practice application, alleging breaches of 6-5, 6-6(2)(d), 6-22, 6-63(1)(a), and 6-63(1)(h). The Employer's application names as respondents, in addition to the Union, two individuals in their personal capacity – Lily Olson and Mackenzie Lawrence.

[2] The Employer also seeks to amend its reply to the Union's proposed amended unfair labour practice application.

[3] The underlying certification application was filed on October 18, 2022. A Direction for Vote was issued on October 26, 2022. The voting period was from October 26 to November 16, 2022. The Union and the Employer filed their unfair labour practice applications on November 8 and November 16, 2022, respectively.

[4] The certification and unfair labour practice applications were originally set to be heard by the Board from April 10 to 13, 2023. Shortly into the evidence on the first day, the Union learned that it was missing some of the documents that the Employer was using to make its case. The Union sought an adjournment of the proceedings for the purpose of obtaining these documents, reviewing them, possibly conducting interviews, and then deciding on its next steps. That adjournment was granted. After a series of additional adjournment requests, including a later joint request for an adjournment, the parties made very little progress in the proceedings.

[5] In the end, the hearing dates were practically spent. The Union advised that it intended to bring additional applications arising from the documents that it had received. The Board set the relevant dates for the filing and exchange of materials and for the hearing of the applications, being May 23. On April 12 and April 17, the Union filed the application for production and the proposed amendments, respectively. The Union also filed an application to exclude a document, which it has since withdrawn. Following the Union's filing of its applications, the Employer filed its replies.

[6] The Employer later called the Board to advise that it intended to file affidavit evidence to support its arguments on the application for exclusion and the application to amend. In response, on May 3, 2023, the Board wrote to the Employer advising that "it would be best practice to formally inform the Board in writing" when seeking to file an affidavit to prevent delays, and directed the Employer's counsel to send any such request to the Registrar's attention, copying all of the parties". On May 11, 2023, the Employer delivered a letter to the Board (copying the Union's lawyer) providing "notice of its intention to file and rely on affidavit evidence". The two affidavits were provided to the Board on May 12 and May 15, approximately 3 business days and 2 business days prior to the deadline for the exchange of briefs in these matters.

[7] In the meantime, the Board scheduled a case management conference to address the issue of the affidavits and other procedural issues. The case management conference was held

on May 15. At the case management conference, the Board indicated that it would not accept the Employer's filing of the affidavits given the delay it would cause in the upcoming hearing.

[8] With that background established, the Board will proceed to consider the applications before it.

Application to Amend Unfair Labour Practice Application:

[9] The Board will first consider the Union's proposed amendments to its unfair labour practice application. The Union did not file a formal application to amend its existing application. It asks the Board to remedy this deficiency pursuant to section 6-112 of the Act.

[10] In the proposed amendments the Union alleges, generally, that the Employer has breached clause 6-62(1)(j) of the Act, which establishes it as an unfair labour practice for an employer:

> *(j) to maintain a system of industrial espionage or to employ or direct any person to spy on a union member or on the proceedings of a labour organization or its offices or on the exercise by any employee of any right provided by this Part;*

[11] The Union also alleges specifics, that is, that the Employer, on or about April 4, 2023, filed with the Board 63 documents, which include four email chains between representatives of the Employer and employees and an individual with the title, Assistant General Manager. The Union alleges that this latter individual, in the email of November 1, 2022, had interacted with the Union representative, Lily Olson, only to collect information about the Union's organizing drive on behalf of the Employer. In the email, the individual states:

> *If I hear anything else, I will let you know. In the meantime, if you have questions just ask and I will send it off to Lily [Olson] to see what her response is.*

[12] The Union says that the emails from employees (not the Assistant General Manager) appear in the documents that the Union currently possesses as having been "unbidden" and yet provide details of the Union's organizing drive to the Employer.

[13] In relying on section 6-112, the Union says that it included in the proposed amended application the grounds it was relying on for the amendments, and therefore, the Employer has experienced no prejudice as a result of the Union's not having filed an application. The Board agrees. This is an appropriate case in which to exercise its discretion pursuant to subsection 6-112 to amend a defect in the proceedings and to treat the proposed amendments as an application

to amend. The Employer has suffered no prejudice from the Union not having filed an application but having filed, only, the proposed amendments to the application. The Union has provided the grounds upon which it wants to make these amendments and the Employer has had an opportunity to respond. The Employer had all of the information it needed to respond.

[14] Next, the Board must consider whether to allow the amendments to the application as filed. The Employer's primary argument opposing the Union's amendments is that the Union has delayed in making the application to amend. The Employer relies on the 90-day timeline set out at subsection 6-111(3) of the Act, which states:

> *(3) Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.*

[15] It says that the Union knew or ought to have known of the underlying circumstances 150 days prior to filing its "application to amend". The Employer also asserts that the Union has presented no countervailing considerations such that it should be permitted to make the requested amendments. The Employer acknowledges that subsection 6-111(3) "provides the Board with the discretion to refuse to hear any allegation of an unfair labour practice" after the passage of the 90-day timeline.

[16] However, at the case management conference, the Board indicated that it would not accept the affidavit evidence proposed to be filed by the Employer. The Board also indicated that if the Employer applied to amend its pleadings to raise the issue of delay the Board would consider that application. Only after that would it be possible for the Board to address delay, and then, only in the context of whether the issue was raised in a timely manner, and not in the context of whether the Union could amend its application. In other words, the issue of delay, if the amendments were allowed, would have to be addressed at a later date, following the Board's disposition with respect to the proposed amendments. As indicated below, the amendments to the Employer's reply alleging delay have been allowed.

[17] Therefore, the Union's application to amend its unfair labour practice application is granted, and the amendments are allowed. The issue of delay may be addressed through evidence and argument at the substantive hearing on the unfair labour practice application should the Employer choose to pursue that issue.

Application to Amend Reply:

[18] Next, the Employer seeks to amend its reply to the Union's unfair labour practice application. The Union states that it consents to the proposed amendments. For the following reasons, some of these proposed amendments fall outside what the Board will allow.

[19] The Employer's proposed amendments were not carefully prepared. For one thing, the Employer underlined everything in the proposed amended pleadings instead of the usual approach of underlining only those items that are proposed to be amended. The latter approach facilitates the review of those proposed amendments. The former approach is unhelpful and invites misunderstandings. Whether or not an amendment is particularly consequential it is necessary for both the Board and the parties to have clear and explicit notification of the amendments that are being proposed.

[20] Two proposed amended replies were filed by the Employer. The first is dated April 25, 2023. The second is dated May 16, 2023. The first amended reply was filed in response to the Union's proposed amendments to its unfair labour practice application. It includes a proposed amendment which compares to the original reply in the following way:

> Original Reply at paragraph 2:
>
> *(a) Section 2: Fire & Flower is in the "Cannabis Retail" business.*
>
> Amended Reply, dated April 25, 2023, at paragraph 2:
>
> *(a) Section 2: Fire & Flower is a corporation registered in Saskatchewan, operating a business in Saskatchewan, and is an "employer" in accordance with the Act.*

[21] This amendment is not responsive to the Union's amendments. Given the second amended reply, it also appears to have been made in error. It is not allowed.

[22] The first amended reply also adds clause 3(d):

> *(d) Fire & Flower denies that it discriminated, as alleged or at all.*

[23] This amendment is not responsive to the Union's amendments. It was not addressed in the Employer's written submissions. It is possible that it is meant to capture, albeit imprecisely, the amendments allowed on the first day of the hearing, as discussed below. It is not allowed.

[24] The first amended reply proposes to amend clause 5(f):

> *(f) Fire & Flower puts the Union to the strict proof of any alleged adverse consequences and breaches.*

[25] This amendment is not responsive to the Union's amendments; given its minor nature, however, the Board will allow it.

[26] Lastly, the first amended reply also includes two additions to the original reply, both falling under the "concise statement of material facts" at paragraph 5:

> *(c) Fire & Flower denies that it engaged in systematic efforts to collect information about the Union or its certification efforts and further, if information was provided to Fire & Flower, it was done so voluntarily.*
>
> *. . .*
>
> *(h) Fire & Flower files the within amended reply without prejudice to its argument that the Union's unfair labour practice application/amendment is untimely.*

[27] Both of these amendments are responsive to the Union's amendments and are allowed.

[28] The second proposed amendments to the reply, dated May 16, 2023, were filed the day after the Board in the case management conference permitted the Employer to apply to amend its reply to raise the issue of delay.

[29] The Employer included allegations with respect to delay at clauses 5(d), (e), and (f) of the proposed amended reply, all of which are allowed. It also removed the statement at clause 5(h) set out in the reply dated April 25, 2023. This amendment is relevant and is allowed.

[30] In the second proposed amendments, the Employer also added to its concise statement of material facts at clause 5(g). A related statement in the amended reply dated April 25, 2023 was located at clause 5(c). In the proposed amended reply dated May 16, 2023, the new statement has been moved to clause 5(g). In addition to the location of the statement, the proposed changes are as underlined here: "In the alternative, Fire & Flower denies that it engaged in systematic efforts to collect information about the Union or its certification efforts and further, if information was provided to Fire & Flower, it was done so voluntarily and/or was prompted by the Union and/or its agents.

[31] This amendment has nothing to do with delay. The Employer did not address this amendment in its written submissions. Given the circumstances under which the Board permitted the Employer to make a second set of proposed amendments, it is inappropriate. It is not allowed.

[32] The Employer also made a proposed amendment to the statements admitted in paragraph 2 of the reply. In the amended reply dated April 25, the Employer admitted that:

> *(a) Section 2: Fire & Flower is a corporation registered in Saskatchewan, operating a business in Saskatchewan, and is an "employer" in accordance with the Act.*

[33] In the reply dated May 16, the Employer dropped this entire admission and instead admits only:

> *(a) Section 2: Fire & Flower is in the "Cannabis Retail" business.*

[34] This amendment is consistent with the original reply before it was amended on April 25.

[35] Given that the first amendment has not been allowed, there is no need to consider this proposed amendment. It cannot be allowed.

[36] Furthermore, this amendment has nothing to do with delay. The Employer did not address this amendment in its written submissions. It is likely a correction of an error made on April 25.

[37] The Employer has also dropped the word "threaten" from clause 5(c) – another possible error. This amendment has nothing to do with delay and is not allowed.

[38] In summary, the following amendments to the amended reply dated April 25 (proposed on May 16) are allowed:

a) The addition of allegations with respect to delay at clauses 5(d), (e), and (f).

b) The removal of the statement at clause 5(h).

[39] In conclusion, the following overall amendments to the original reply are allowed:

a) The addition found at clause 5(f) of the amended reply dated April 25 as here underlined:

> *Fire & Flower puts the Union to the strict proof of any alleged adverse consequences <u>and breaches</u>.*

b) The addition of the phrase found at clause 5(c) of the proposed amended reply dated April 25:

> *Fire & Flower denies that it engaged in systematic efforts to collect information about the Union or its certification efforts and further, if information was provided to Fire & Flower, it was done so voluntarily.*

c) The addition of allegations with respect to delay found at clauses 5(d), (e), and (f) in the proposed amended reply dated May 16.

[40] These amendments may be made to paragraph 5 of the original reply to the Union's unfair labour practice application.

[41] In the future, the Board expects that more care will be taken to prepare the pleadings and materials in this matter. The various amendments, apparent errors, and re-amendments, especially given the content of those amendments, were unnecessary and could have been prevented.

[42] Finally, the Board will order that the parties re-file their pleadings to reflect not only the amendments allowed by the Board as outlined above, but also the amendments allowed by Order of the Board on April 10, pursuant to section 6-112, as follows:

a) Union's application for bargaining rights, paragraph 2:

   i. Name changed to reflect the true name of the Employer, Fire & Flower Inc.

b) Employer's reply to Union's unfair labour practice application:

   i. Clause 5(c), as found in the original reply: remove "discriminate".

   ii. Paragraph 5, add clause: "There has been no discrimination by Fire & Flower to the organization or interference with the formation or administration of a labour organization".

   iii. Paragraph 3, add clause: "Fire & Flower denies that it has interfered in the selection of a union pursuant to s. 6-62(1)(i)".

[43] Copies of the fully amended pleadings are necessary to ensure that the amendments allowed and made to date are abundantly clear.

[44] Lastly, if the parties are anticipating filing any additional applications to amend their pleadings, the Board would encourage them to have discussions with each other before doing so.

Application for Production of Documents*:*

General

[45] The next question is whether to allow the Union's application for production and if so, to what extent. There are two primary questions raised by this application. The first is whether the Board should order production of the unredacted versions of the email exchanges. The second is whether the Board should order production of the remaining documents sought by the Union.

[46] The Board's authority to order the production of documents is found at subsection 6-111(1) of the Act:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *(a) to require any party to provide particulars before or during a hearing or proceeding;*
>
> *(b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing or proceeding;*
>
> *(c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:*
>
> *(i) to summon and enforce the attendance of witnesses;*
>
> *(ii) to compel witnesses to give evidence on oath or otherwise; and*
>
> *(iii) to compel witnesses to produce documents or things;*

Unredacted Versions of Email Exchanges

[47] The Employer objects to the production of these documents on the basis that they are subject to both solicitor-client and litigation privilege. Both parties rely on the principles applicable to solicitor-client and litigation privilege as set out at *R. v Husky Energy Inc*., 2017 SKQB 383 (CanLII) [*Husky*]. As a starting point, the Court in *Husky* explains that the documents must be reviewed by the decision-maker to determine whether the claims of privilege are legally valid. The party claiming privilege bears the onus of establishing the existence of privilege on a balance of probabilities.

[48] It is well established that solicitor-client privilege is as close to absolute as possible. It is to be set aside only in the most unusual circumstances. As per *Husky*:

> *[17] The scope of solicitor-client privilege is broad. It applies to all communications made with a view to obtaining legal advice. As the Supreme Court noted in Maranda v Richer, 2003 SCC 67, at para 22, [2003] 3 SCR 193, quoting from Descôteaux v Mierzwinski, 1982 CanLII 22 (SCC), [1982] 1 SCR 860:*

> *In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within a framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.*
>
> *[18] The party asserting solicitor-client privilege bears the burden of proof in an application such as this one. In order to establish solicitor-client privilege, that party must demonstrate, on a balance of probabilities, that the document or record in question is a communication between solicitor and client, which entails the seeking or giving of legal advice, and is intended by the parties to be confidential: Redhead Equipment, at para 31; Solosky at 837.*

[49] Solicitor-client privilege is intended to protect the relationship, as expected, between the solicitor and client. To establish solicitor-client privilege, the lawyer must be acting in the capacity as lawyer. Documents which come into the possession of the lawyer are not automatically privileged. It is not necessary that the communications request or offer advice; what matters is whether the communications can be placed within the continuum of communication in which the lawyer provides advice. If the "communication forms part of that necessary exchange of information, the object of which is the giving or receiving of legal advice, it is protected by solicitor-client privilege".[1]

[50] Litigation privilege, by contrast, protects the adversarial process. It is time-limited, relates to unrepresented parties and non-confidential documents, and is to be applied more narrowly than solicitor-client privilege. For litigation privilege to exist litigation must be the dominant purpose of the document's preparation (not simply one of the purposes). The litigation in question (or related litigation) must be pending or reasonably anticipated. If the document would have been prepared or would have come into existence in the absence of the litigation, it is not protected by litigation privilege.

[51] Both solicitor-client and litigation privilege may be waived, either expressly or implicitly, where fairness so demands. The onus of establishing waiver is on the party who asserts it. Solicitor-client privilege may be found to have been waived if the client puts the "substance of the legal advice into issue, and attempts to rely on it to establish an element" of the claim or defense.[2]

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[1] *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104, 360 DLR (4th) 176, cited at *R. v Husky Energy Inc.,* 2017 SKQB 383 (CanLII) [*Husky*], at para 20.
[2] *Husky*, at para 33.

Litigation privilege may be found to have been waived if the party discloses a portion of the material covered by the privilege. The central question is whether fairness and consistency require the production of the material.[3]

[52] The Employer also argues that the documents sought are not relevant or material to the Union's claims that the Employer has engaged in unfair labour practices or to the Union's application for certification.

[53] The materials in question are the documents referred to by the Employer as Tabs 20, 21, 22, and 23 of its production materials. The Board will consider each of these documents, in turn.

Tab 20

[54] The redacted portion of this document is subject to solicitor-client privilege and need not be produced. The redacted communication forms part of the necessary exchange of information, the object of which is the giving or receiving of legal advice.

[55] The Union argues that waiver has occurred through the release of the email dated November 1, 2022, entitled "Union Talking Points". The Board is not persuaded that there has been any waiver. There is no unfairness in maintaining solicitor-client privilege over the redacted portions of this document.

[56] There will be no order for production in relation to Tab 20.

Tab 21

[57] A section of the redacted portion of this document is subject to solicitor-client privilege; the remainder of the redacted portion is not subject to solicitor-client privilege but is subject to litigation privilege. For the reasons provided in relation to Tab 20, the section subject to solicitor-client privilege need not be produced.

[58] However, litigation privilege has been implicitly waived. The Employer has produced the email dated November 1, 2022 entitled "Union Rep Incident". The Employer in its unfair labour practice application put in issue the events that are described in this email. The Employer has suggested that the effect of the Union's and the individuals' actions is to unduly influence the employees to encourage membership in and/or support of the Union. The Employer states that their actions have had a negative impact on the employees' freewill and choice in respect of

[3] *Ibid*, at para 34.

membership in and/or support for the Union. Therefore, the issue of voluntariness is directly in issue.

[59] The context of the email entitled “Union Rep Incident” is relevant to the determination of that issue and the email has been produced by the Employer out of its complete context. It would be unfair to prevent the Union from testing the related evidence, that is, the context within which the email was sent and received.

[60] There will be an order for production of the following material contained in Tab 21:

a) Email dated November 1, 2022 4:58 PM

b) Email dated November 1, 2022 5:01 PM

Tab 22

[61] As with Tab 21, Tab 22 includes a portion subject to solicitor-client privilege and a portion subject to litigation privilege. There has been no waiver of solicitor-client privilege. For the same reasons as provided in relation to Tab 21, litigation privilege has been waived. The Employer in its unfair labour practice application has put in issue the events of October 29, 2022. These events form part of the foundation for the Employer’s allegations about the employees’ voluntariness. The email has been produced out of its complete context.

[62] There will be an order for production of the following material contained in Tab 22:

a) Email dated October 29, 2022 7:22:36 PM

Tab 23

[63] There will be no order for production in relation to Tab 23, for the same reasons as given in relation to Tab 20.

Remaining Production Requests

[64] The next issue is whether the Board should order production of the documents sought by the Union in the second half of its production application. These documents are:

> *…all correspondence between the Employer and individual employees, and between the Employer and individual employees, and between the Employer and groups of employees, not already filed…, related to unionization, including, but not limited to:*
>
> *a) The Employer’s opinions of unionization;*

b) The Employer's opinions of UFCW Local 1400;

c) The Employer's opinions of unions;

d) The process of unionization;

e) The Employer's opinions of the effects of unionization upon its business and/or other businesses;

f) The Employer's instructions or suggestions for opposing unionization;

g) The Employer's instructions or suggestions for gathering information about the Union or the Union's organizing efforts;

h) The Employer's interpretations of The Saskatchewan Employment Act;

i) Information about the Union's campaign for unionization;

j) The Employer's claims about the Union or unionization.

[65] For the applicable principles, the parties rely on *Application for Disclosure and Production of Documents and Things United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited*, 2019 CanLII 107250 (SK LRB) and *Saskatchewan Government and General Employees Union v Parkland College and Western Trade Training Institute*, 2021 CanLII 12999 (SK LRB) [*SGEU*]. The Employer cites the following excerpt from *SGEU*:

> *[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"]:*
> >
> > > *1. Requests for production are not automatic and must be assessed in each case;*
> > >
> > > *2. The information requested must be arguably relevant to the issue to be decided;*
> > >
> > > *3. The request must be sufficiently particularized so that the person on whom it is served can readily determine the nature of the request, the documents sought, the relevant time frame and the content;*

> *4. The production must not be in the nature of a fishing expedition; that is, the production must assist a complainant in uncovering something to support its existing case;*
>
> *5. The applicant must demonstrate a probative nexus between its positions in the dispute and the material being requested;*
>
> *6. The prejudicial aspect of introducing the evidence must not outweigh the probative value of the evidence itself, regardless of any possible "confidential" aspect of the document.*
>
> *[30] In applying the Air Canada principles, the Board starts from the premise that a production order is a discretionary order that is granted on a case-by-case basis.*
>
> *[31] The Board does not seek to replicate the pre-hearing discovery process of the civil courts. Stated another way, it is not "the practice of this Board to grant broad-spectrum, non-specific or infinite production Orders to in essence, compel the kind of pre-hearing discovery of documents that occurs in civil courts." 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.*
>
> *[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.*

[66] To assess relevance, it is necessary for the Board to identify the issues raised in the underlying applications. In the Union's unfair labour practice application, it alleges that the Employer has breached sections 6-5, 6-6(2)(d), 6-62(1)(a), 6-62(1)(b), 6-62(1)(i), and now 6-62(1)(j) of the Act, and has, in part, interfered with, intimidated and/or coerced employees in the exercise of a right conferred by Part VI and has interfered in the formation and selection of a union. The Union alleges that the Employer has through its communications attempted to portray

the Union as deceitful and untrustworthy and has provided false information and made false attributions to the Union as a pretext to interfere with the employees' choice whether to organize.

[67] It is well established that, pursuant to subsection 6-62(2), an employer is not prohibited from communicating facts and its opinions to employees. However, this provision does not give an employer the right to interfere with, intimidate or coerce employees in the exercise of a right conferred by Part VI or interfere in the formation and selection of a union.

[68] Generally speaking, the Employer's communications to employees expressing its opinions about unionization, its opinions and claims about the Union, its opinions about unions generally, its opinions and claims about the process of unionization, and its opinions about the effects of unionization upon its business are all arguably relevant to the issues, broadly defined, that have been raised in the Union's application. The Employer's communications to employees expressing its opinions about the effects of unionization on other businesses are also arguably relevant, broadly defined. It is not difficult to imagine the relevance of a communication in which an employer describes the potential impact on other businesses as a metaphor for the potential future of the Employer's business.

[69] The request for the Employer's communications with employees about "(i) information about the Union's campaign for unionization", while not precisely worded, is arguably relevant if understood to mean "communications about the Union's campaign for unionization". The Employer's communications to employees in which it gives instructions or suggestions for opposing unionization and for gathering information about the Union and its organizing efforts are also arguably relevant.

[70] Again, generally speaking, all of these requests disclose a probative nexus between the Union's positions in the dispute and the material being requested. However, when the scope of the requests and the relevant timeframes are taken into account, the probative nexus becomes less clear. *Re Canada Post Corp. and C.U.P.W.* (1994), 43 LAC (4th) 285 (Burkett) describes the link between the probative nexus and the nature of the request being made (when setting limits on a subpoena for documents):[4]

> *The test that has been used to establish the outer limits of a subpoena duces tecum is that of prima facie, or arguable or demonstrative relevance ... The point is that arguably there must be a probative nexus between the information sought and the issue to be decided. Furthermore, where production of a great number of documents is sought, the probative*

[4] As cited in *A.L.P.A. v Air Canada*, [1999] CIRBD No 3, 1999 CarswellNat 3215, at para 24.

> *nexus must be sufficiently strong as to warrant the time and expense of locating and producing these documents.*
>
> *(page 287)*

[71] The lack of a timeframe in the application, the later timeframe suggested by the Union, and the timeframe contemplated by the underlying unfair labour practice application are problematic, and undercut the relevance and probative value of the documents requested.

[72] The Union's unfair labour practice application focuses on events that occurred after the certification application was filed. The Union in the application states that the certification application was filed on October 18, 2022. It then lists communications that occurred during the voting period in October and November 2022. At paragraph 3 of Schedule "A" to the application, the Union states that the "balloting process remains ongoing". To be sure, paragraph 3 of the Form states that an unfair labour practice "has been and/or is being engaged in by the respondent". However, it goes on to say, "by reason of the following facts", which the Union has listed as including only the matters that are alleged to have occurred in October and November 2022.

[73] The Union relies for its requests on the documents subject to redactions which were created in October and November 2022. Those documents were brought to the Union's attention through the Employer's late production of 63 documents. The Union does not raise or rely on any documents made prior to October 2022.

[74] It appears that the Employer's misplaced approach of not providing the Union with document production until requested part way through the hearing has exacerbated the Union's distrust of the Employer. However, not only did the Union not anticipate through the language included in its application any timeframe prior to the filing of the certification application, it has presented no evidence that the Employer's production raised objective concerns about alleged breaches during any prior timeframe. Instead, its application has focused on the Employer's communications after the certification application was filed which were allegedly made so as to influence the representation vote.

[75] 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".[5] However, the applicant is not entitled, through the operation of a production order, to build a fresh case against a respondent"[6], or put another way, to "discover whether [one] has a case at all".[7] The question is whether the production assists the applicant in uncovering something to support its existing case. Although the Board accepts that the voting period forms part of a series of events that results in the determination of the representation question, the Union has not put in issue the organizing drive prior to the voting period, nor has it provided objective evidence for its concerns with any other timeframe.

[76] The Employer in its unfair labour practice application has put in issue no timeframe other than what was outlined by the Union.

[77] The Board has in the past amended applications for production so as to narrow the issues and expedite proceedings.[8] However, the suggested amendment to the timeframe, starting at the beginning of the organizing drive in May 2022, does not address the concerns of the Board. The Union's requests are in the nature of a fishing expedition.

[78] In addition, the request found at clause (h) is not sufficiently particularized and must fail on that basis alone. It seeks the Employer's communications with employees about its interpretations of *The Saskatchewan Employment Act*. The Employer would not be readily able to determine the nature of the request, the documents sought, or their content. At the hearing, the Union conceded that clause (h) could result in the production of irrelevant documentation and suggested a limiting phrase, being "related to unionization". In the Board's view, this suggested amendment remains overbroad.

[79] In summary, the second part of the Union's application for production, listing categories of documents sought to be produced, is dismissed.

Conclusion:

[80] Finally, on the first day of the hearing, the Board marked the agreed statement of facts conditional upon receipt of a legible copy of Tab 3 of that statement. The lawyers for the parties undertook to provide that document to the Board. This was not done. Therefore, the Board hereby Orders that the parties file said document with the Board by June 16, 2023.

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[5] *Saskatoon Co-operative Association Limited v United Food and Commercial Workers*, 2019 CanLII 76933 (SK LRB), at para 32 [*Saskatoon Co-operative*].
[6] *Ibid*.
[7] *Air Canada*, at para 27, citing *The Becker Milk Company Limited*, [1974] OLRB Rep Oct 732.
[8] See, *Saskatoon Co-operative*.

[81] The following additional orders will issue:

a) The Union's application to amend its unfair labour practice application is granted, and the proposed amendments are allowed;

b) The Employer's applications to amend its reply to the Union's unfair labour practice application are granted in part, and the proposed amendments are allowed in part. The following amendments may be made to paragraph 5 of the Employer's original reply:

i. The proposed addition found at clause 5(f) of the amended reply dated April 25, as here underlined:

Fire & Flower puts the Union to the strict proof of any alleged adverse consequences <u>and breaches</u>.

ii. The proposed addition of the following phrase found at clause 5(c) of the proposed amended reply dated April 25:

Fire & Flower denies that it engaged in systematic efforts to collect information about the Union or its certification efforts and further, if information was provided to Fire & Flower, it was done so voluntarily.

iii. The proposed addition of allegations with respect to delay found at clauses 5(d), (e), and (f) in the proposed amended reply dated May 16.

c) The parties shall re-file their pleadings to reflect the amendments allowed by the Board as outlined above and the amendments allowed by Order of the Board on April 10, pursuant to section 6-112, as outlined in these Reasons, on or before June 16, 2023.

d) The Employer shall produce the following material to the Union, Lily Olson, and Mackenzie Lawrence on or before June 16, 2023:

i. Email dated November 1, 2022 4:58 PM and email dated November 1, 2022 5:01 PM contained in Tab 21;

ii. Email dated October 29, 2022 7:22:36 PM contained in Tab 22.

e) The remainder of the Union's application for production is dismissed.

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

DATED at Regina, Saskatchewan, this **31st** day of **May, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson