The Labour Relations Board
Saskatchewan

SASKATCHEWAN HUMAN RIGHTS COMMISSION, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1871, Respondent

LRB File No. 082-10; December 15, 2011
Chairperson, Kenneth G. Love, Q.C.; Members: Greg Trew and Maurice Werezak

For the Applicant: Mr. Kevin Wilson, Q.C.
For the Respondent Union: Ms. Elaine Ehman

Exclusion from Bargaining Unit - Employer applies for additional exclusions to bargaining unit within the open period – Union opposes exclusions on basis that current job duties bring employees within the definition of "Employee".

Material Change - Employer provides evidence of changes in duties for positions affected by the application – Employer provides evidence of a legislative change in the mandate of the Employer – Employer undertakes new direction under "four pillars", being a renewed mandate for the organization.

Onus of Proof - Board places onus on Employer to prove that employees or those with revised job duties fall outside the definition of "Employee". Board satisfies some positions should be excluded, but other positions where job duties have not yet changed are given only provisional exclusion under s. 5(m) and s. 5.2

Trade Union Act s. 2(f), 5(k), 5(m) and 5.2

REASONS FOR DECISION

Background:

[1] The Saskatchewan Human Rights Commission, (the "Employer" or the "Commission") is a statutory tribunal established pursuant to *The Saskatchewan Human Rights Code*[1]. The Canadian Union of Public Employees, Local 1871 is certified to represent a unit of employees of the "Employer by an Order of the Board dated November 6, 1989, LRB File No. 081-89, described as follows:

> *…all employees employed by the Saskatchewan Human Rights Commission in the Province of Saskatchewan, except the Director, the Assistant Director and*

[1] R.S.S. 1979 c. S-24.1

> *the Administrative Assistant, are an appropriate unit of employees for the purpose of bargaining collectively.*

[2] On June 29, 2010, within the open period prescribed in Section 5(k) of *The Trade Union Act*, R.S.S. 1878, c.T-17 (the "*Act*"), the Employer requested an amendment to the current certification Order pursuant to Sections 5(j), (k), and/or (m). The amendment sought the amendment of the current order so as to read as follows: (proposed changes underlined)

> *…all employees employed by the Saskatchewan Human Rights Commission in the Province of Saskatchewan, except the Chief Commissioner, the Manager of Operations, Senior Staff Solicitor, Supervisor of Mediations and Investigations, Human Resources Coordinator, Budget Coordinator and Commission Secretary, are an appropriate unit of employees for the purpose of bargaining collectively.*

[3] There was no issue between the parties with respect to some of the proposed changes to the bargaining unit. It was agreed that the title "Director" was now called the "Chief Commissioner". Similarly, the title of "Assistant Director" is now called the "Manager of Operations". There was, however, no agreement with respect to the other positions which remain in dispute, and in respect of which evidence was called by the parties.

Facts:

[4] The Employer called Ms. Rebecca McLellan, the Manager of Operations, as its only witness. Ms. McLellan provided background concerning the operations of the Employer as well as the roles played by some of the employees of the Employer. The Union called (4) four witnesses, Julie Powell, the President of the Union, William Rafoss, the Supervisor of Mediations and Investigations, Genevieve Leslie, the Staff Solicitor and Janice Gingill, the Senior Staff Solicitor. There was little discrepancy in the evidence adduced by the parties. Therefore, I will not attribute particular evidence to any party, except as may be necessary to differentiate a particular aspect of the evidence.

[5] Ms. McLellan gave a brief history of the Employer. She provided the Board with an organizational chart showing the current employee positions within the Commission. She testified that in January, 2009, Judge David Arnot was appointed as the new Chief Commissioner for the Employer. The appointment of Judge Arnot was, she testified, done to bring a fresh direction to the Employer, including a commitment to develop a more comprehensive and effective public education focus for the Employer.

[6] After some internal review, she testified, the Employer embarked upon a course to reposition itself to meet the goal of becoming recognized as a model of best practice for the people of Saskatchewan.[2] That goal was to be implemented through what was called "The Four Pillars". These were:

1. to continue to support and enhance its best practice of effective complaint processing and gatekeeping for the Saskatchewan Court of Queen's Bench;
2. focused/directed mediation;
3. systemic advocacy; and
4. civics education.

[7] In support of these goals, the Legislature passed Bill 160 which made amendments to the legislation governing the Commission. These amendments were to allow the Commission to pursue its goals as set out above, as well as provide for adjudication of Human Rights complaints by the Court of Queen's Bench.

[8] Ms. McLellan also described the operation of an executive committee implemented by Judge Arnot, for the management of the Commission. This committee was comprised of Judge Arnot, herself, the Supervisor of Investigations and Mediation, and the Senior Staff Lawyer. She described the committee as a group of employees who would be involved in management issues. She testified that the changes required to implement the (4) four pillars and comply with the legislative mandate provided in Bill 160 would require all committee members to be involved in human resources issues and their impact upon staff.

[9] She noted that change to the business organization would be required which might involve some activities currently being undertaken being discontinued and other activities ramped up. This, she testified would have an impact on staff throughout the organization.

[2] See Exhibit E-3 "The Vision – The Goal"

[10] For ease of reference, we will deal with the evidence presented concerning the positions in dispute. Following the outline of that evidence, we will also outline the issue between the parties concerning that position.

Human Resource Coordinator and Budget Coordinator

[11] The evidence established that both of these positions had morphed out of the Administrative Assistant position which was excluded from the bargaining unit in the 1989 Board Order. Over time, the position of Administrative Assistant had been split into two half time positions with the responsibilities divided between the Human Resources Coordinator and the Budget Coordinator.

[12] Also, since 1989, the half time positions had crept up to .7 time positions which they were at the present time. Ms. McLellan testified that it was intended to increase these positions to full time positions and to rename the positions to Manager, Human Resources and Manager, Finance and Administration.

[13] The current collective agreement between the parties excluded these positions from the scope of the bargaining unit. That exception reads: "…one part-time Human Resource Co-ordinator and one part-time Budget Co-ordinator".

Issue between the Parties

[14] The issue with respect to these two positions was that the Union argued that they saw no rationale for the increase of the positions to full time positions.

Supervisor of Mediations and Investigative Services

[15] This position was currently occupied by Mr. Rafoss, who testified with respect to the nature of the work which he performed. Ms. McLellan also provided testimony regarding how this position was expected to perform different duties under a revised job description and with a change in title to Director of Resolution.

[16] This position supervises what is currently the largest group of employees within the Commission. The Commission employs both full time and casual investigators who are

charged with the investigation of complaints made to the Commission. Investigation of complaints by these employees was the primary function of the Commission prior to adoption of the (4) four pillars and the amendments in Bill 160.

[17] Ms. McLellan and Mr. Rafoss differed slightly in their testimony insofar as the supervisory responsibility of the position. Mr. Rafoss testified that he supervised the work of the investigators, but did not supervise the investigators. While Ms. McLellan basically agreed with this summary, she felt that the position should have more supervisory responsibility and should be involved in direct supervision of the investigative staff.

[18] Ms. McLellan provided a copy of a revised job description for the position which was to be renamed, Director of Resolution. That position, along with usual supervisory responsibilities such as approval of annual leave requests from investigators, and approval of training programs for investigators would involve the incumbent to, among other things:

- *Recruit, interview, train, supervise, evaluate and oversee performance management for intake staff, investigators, mediators and summer students.*
- *Provide coaching to staff members with regard to the filing, investigation, mediation, and disposition of complaints; participates in case management conferences.*
- *Ensure the collective bargaining agreement is followed by staff, and acts in first step of grievance procedure on behalf of the employer.*
- *As a member of the Executive Committee, participate in discussions on organizational issues, policy development, strategic planning and human resource issues.*

[19] Ms. McLellan noted that there were often issues that arose which the Supervisor should and could have handled, such as conflicting annual leave requests and training requests which got bumped up to her to handle. Similarly when issues arose in the workplace with respect to performance of staff subject to supervision by this position, there were problems. Ms. McLellan provided a copy of an email sent to her from a Union representative. In that email, the Union recognized that the incumbent was in a conflict position being within the Union, but having to act on behalf of Management. That email reads, in part:

> *I would like to suggest that as the in scope supervisor, Bill not attend the meetings on Monday. Certainly as management you will be acting on his reports (and I fully expect him to perform his duties of in-scope supervisor and report all*

> *of his concerns to you)* ***but it places him in a difficult position*** *and at this time I don't believe that it would be very productive. [Emphasis added]*

[20] Also, the incumbent was very active in the Union. He was a past president of the Local and has sat as a member of the Union's bargaining committee since he joined the Employer in 1983.

[21] Both Ms. McLellan and Mr. Rafoss testified that the Executive Committee did not function well, at present, because he was often excluded from any discussions regarding strategic planning and human resource issues due to being within the scope of the unit. Ms. McLellan testified that the Executive Committee was intended to be the main catalyst for change within the Commission and that the committee would both set and implement the strategic direction and implement changes needed to reach the new goals under the (4) four pillars, which changes could have a profound impact on current employees and their roles.

[22] Mr. Rafoss testified that he did not see any conflict between his role as Supervisor of Mediations and Investigative Services and his role as a member of the union. He reviewed the new job description for the Director of Resolution. He testified that he did not see substantial differences between the job description for the Director of Resolution and the current position. In cross examination, he acknowledged that in his current role, that he did not discipline employees. He acknowledged that while he had input, he did not make the final decision.

[23] In his testimony, he described his current role as being a supervisor, not a manager. He acknowledged that if he was required to issue discipline that would put him in a difficult and conflicted position. He insisted that discipline is not what he does because he's not management.

[24] He acknowledged that he saw his role as being someone who supervised the day to day work. As such a supervisor, he noted that if an employee wanted to carry over vacation time, that he would not make that decision, but would "kick it over" to management to decide.

[25] With respect to his participation in the Executive Committee, he acknowledged that the committee was not functioning well at present. He testified that he did not think his

opinion was being valued. He acknowledged that he would be in conflict if he was asked to deal with issues involving the workplace.

Issue between the Parties

[26] The issue between the parties was the impact of the changed role for the Director of Mediations under the (4) four pillars and the role of the incumbent in the current position of Supervisor of Mediation and Investigative Services.

Senior Staff Solicitor

[27] The incumbent of this position also testified with respect to proposed changes to the job description of this position which Ms. McLellan introduced in her testimony.

[28] Ms. McLellan had described an enhanced role for the Senior Staff Solicitor in her testimony and introduced a new job description for that role. She described the current function of the Senior Staff Lawyer and the revised role this position would assume under the new strategic direction for the Commission.

[29] The evidence established that the Employer had previously made an application to the Board[3]. That application, like the one here, was based upon a need recognized by the Commission for their in-house counsel to provide legal advice concerning collective bargaining, labour and employment law advice, and legal issues related to employee benefits.

[30] The testimony established that this application was made at the time a change was being made in the position of Senior Staff Lawyer (i.e.: the incumbent had resigned to go into private practice and a new Senior Staff Lawyer was being recruited). Prior to making the application, the issue was discussed with the union, the union advised management that they believed that the position should remain in scope.[4] The application did not proceed and was ultimately withdrawn by the Commission.

[31] The revised job description for the Senior Staff Solicitor included a number of revised duties. These included:

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[3] LRB File No. 102-06
[4] See Exhibit E-15.

- *Provides legal advice and support to the Chief Commissioner and management staff in regard to employment and labour law, collective bargaining, performance management, settlement of labour disputes and SHRC human resource policy and procedures, and collective bargaining agreement interpretation.*

- *Acts as legal counsel for employer in arbitration hearings.*

- *As a member of Executive Committee, participates in formulation of policies, plans and objectives for the Commission.*

[32] In her testimony, Ms. Gingell, acknowledged that she did not, at present, perform the above noted duties. She acknowledged that if she were required to advise on termination of employees or collective agreement interpretation that she would be in conflict if the position remained within the scope of the bargaining unit.

[33] Ms. Gingell testified that she believed that there would be significant additional work for her and the other staff solicitor resultant from the changes to implement the (4) four pillars. In particular, she noted that the new directed mediations would require significant legal advice.

[34] She also testified that at present she has no involvement in discipline issues. If there is an issue, she sends it to management. She testified that she does not currently participate as a member of management in respect to labour relations.

Issue between the Parties

[35] The issue between the parties was the impact of the changed role for the Senior Staff Lawyer under the (4) four pillars and the revised role under the revised job description.

Commission Secretary

[36] The testimony established that currently, there was no administrative support staff outside the scope of the bargaining unit. As a result, Ms. McLellan testified that this often meant that out of scope staff, including herself, routinely performed administrative tasks related to labour relations of the Employer. This included such things as typing reports, filing of confidential materials, awaiting confidential faxes, keeping minutes of meetings and other administrative and clerical tasks.

[37] Both Ms. McLellan and Ms. Powell testified that the performance of some of these duties resulted in a grievance being filed by the union regarding bargaining unit work being performed by management. Testimony established that following a meeting between the union and Ms. McLellan, the grievance was placed in abeyance, but it remains outstanding.

Issue between the Parties

[38] The issue between the parties was whether or not the Commission Secretary should be excluded from the bargaining unit.

Employer's Arguments:

[39] The Employer argued that the change to the Commission's mandate and its strategic direction under the (4) four pillars represented a material change in the operations of the Commission since its inception and the Board's certification. It noted that the (4) four pillars will require a significant redirection and refocusing of the commission and is likely the most dramatic change which the commission has undergone since its creation.

[40] With respect to the Director of Resolution (formerly the Supervisor of Mediations and Investigations), the Senior Staff Solicitor, and the Commission Secretary, the Employer argued as follows:

Director of Resolution

[41] The Employer described the current situation and the job duties of the Supervisor of Mediations and Investigations as creating a dysfunctional situation. The Employer argued that the current position did not perform necessary management functions, preferring to hand those off to the Director of Operations, who was at a disadvantage in trying to manage the employees within the work unit since her offices were in Regina and the Supervisor of Mediations and Investigations and most of his staff were resident in Saskatoon. As a result, there was ineffective or no management of these staff.

[42] This situation, the Employer argued, in addition to being dysfunctional, was also illogical insofar as, absent any active management, performance problems were left unaddressed or employees were not provided proper training or performance evaluation.

[43] The Employer noted that the Executive Committee was not functional at present with the Supervisor of Mediation and Investigative Services having to be excluded from some discussions that involved personnel or management issues.

[44] As a result of these problems, the Employer argued that it added duties to the position as described in the job description for the Director of Resolution, which duties, it argued, put the position outside the definition of "employee" in Section 2(f) of the *Act*. In particular, it argued that the position of Director of Resolution would be required to regularly act in a confidential capacity with respect to the industrial relations of the Employer.

Senior Staff Solicitor

[45] The Employer made a similar argument with respect to the new position of Senior Staff Solicitor. It argued that the revised duties would require the incumbent of that position to also regularly act in a confidential capacity with respect to the industrial relations of the Employer.

[46] These revised duties, it argued would require the Senior Staff Solicitor to regularly engage in both advising the Commission regarding labour relations, but also to act as its counsel with respect to grievance arbitration and in collective bargaining. This role it argued was inconsistent with membership in the Union as the incumbent would be in conflict in most instances.

[47] The Employer also argued that the Senior Staff Solicitor position, where it existed within other Canadian Human Rights Commissions, was excluded from the scope of the bargaining unit.

Commission Secretary

[48] The Employer argued that there was a need for someone to act in a confidential capacity at a clerical level, to support the commission in respect of its industrial relations work. It argued that there was currently no-one within the organization who could act in such a confidential capacity in an administrative role.

[49] In addition, the Employer noted that the new job description specifically added duties to the position which would require that the Commission Secretary regularly act in a confidential capacity with respect to the industrial relations of the Employer.

[50] With respect to the positions of Human Resource Manager and the Manager, Finance and Administration, the Employer argued that the Union's objection to the exclusion, based upon a full time versus part time analysis was not a relevant factor to be considered.

[51] The Employer argued that the positions have been agreed to be outside the scope of the unit since the 1995 collective agreement on a part time basis. The Employer noted that over the years, the workloads in these positions have increased so as to require them to be staffed full time.

[52] In support of their position, the Employer filed a written argument which we have reviewed and found helpful.

Union's Arguments:

[53] With respect to the position of Supervisor of Mediations and Investigations, the Union argued that the revised job descriptions materially amended the current job descriptions. They argued, however, that there was no material change to justify such a change in job duties.

[54] The Union noted that they were, and remain willing to negotiate with respect to exclusions from the bargaining unit. They argued that the industrial relations "file" at the commission was not so complicated that it needed to have these positions removed from the bargaining unit. They argued that, even as a Union member, the Supervisor of Mediations and Investigations could adjudicate 1st level grievance disputes.

[55] The Union argued that the Commission staff were highly trained and professional employees that did not require a great deal of supervision.

[56] The Union argued that the onus of showing the positions should be excluded fell upon the Employer and that the Employer had failed to satisfy this onus.

[57] The Union argued that the Employer has sufficient resources to deal with industrial relations which would allow them to function in the event of a strike, to allow them to participate in collective bargaining, and to allow the day to day management of the Commission.

[58] The Union cited the Board's decision in *C.U.P.E., Local 4777 v. Prince Albert Parkland Regional Health Authority et al*[5], arguing that the Commission Secretary should be considered by the Board in the same fashion as the Confidential Secretary was dealt with in that decision.

[59] The Union also cited *S.I.A.S.T. v. S.G.E.U.*[6] arguing that this case should be relied upon with respect to the two currently excluded positions, the Manager of Human Resources and the Manager, Finance and Administration.

[60] The Union argued, citing *C.U.P.E., Local 21 v. City of Regina et al*[7] and *S.L.G.A. v. S.G.E.U. et al*[8] in support of its argument that previous decisions of the Board had permitted in scope supervisors who performed management duties to remain within the bargaining unit.

[61] In support of its argument that there was sufficient depth of management already excluded from the bargaining unit, the Union cited *C.U.P.E., Local 4928 v. Saskatchewan Society for the Prevention of Cruelty of Animals*[9] and *Regina Public Library Board v. C.U.P.E., Local 1594*[10]

[62] In support of its position, the Union filed a book of authorities which we have reviewed and found to be of assistance.

Relevant statutory provisions:

[63] Relevant statutory provisions of the *Act* provide as follows:

> *2 In this Act:*
>
> *(f) "employee" means:*

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[5] [1999] CanLII 38609, LRB File No. 011-09
[6] [2009] CanLII 72366, LRB File No. 079-09
[7] [2005] CanLII 63086, LRB File Nos. 103-04 & 222-04
[8] [1997] S.L.R.B.R. No. 68, 43, C.LR.B.R. (2d) 251, LRB File Nos. 037-95 & 349-96
[9] [2009] CanLII 43954, LRB File No. 198-08
[10] [2009] CanLII45865, LRB File No. 055-09

(i) a person in the employ of an employer except:

(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character; or
(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer;

…

5 The board may make orders:

(j) amending an order of the board if:

(i) the employer and the trade union agree to the amendment; or

(ii) in the opinion of the board, the amendment is necessary;

(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:

(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or

(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;

notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

. . .

(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;

. . .

5.2(1) On an application pursuant to clause 5(m), the board may make a provisional determination before the person who is the subject of the application is actually performing the duties of the position in question.

(2) A provisional determination made pursuant to subsection (1) becomes a final determination after the expiry of one year from the day on which the provisional determination is made unless, before that period expires, the employer or the trade union applies to the board for a variation of the determination.

Analysis:

[64] It is clear that the onus of proving that the positions of Director of Resolution, Senior Staff Solicitor and Commission Secretary should be excluded from the bargaining unit

falls upon the applicant, in this case, the Employer.[11] However, since the positions of Director of Human Resources, and Director, Finance and Administration are already excluded from the bargaining unit, the onus falls upon the Union to show that they should be returned to the bargaining unit.

[65] The issue of a material change in circumstances was also recently dealt with by the Board in *Health Sciences Association of Saskatchewan v. S.A.H.O., Respondent and SEIU-WEST, Interested Party*[12]. In this case, the Employer sought to argue that there was insufficient "material change" to support an application to the Board for an amendment in the open period.

[66] As was the case in the Health Sciences case, clearly, the changes at the commission to institute the (4) four pillars and the amendments to its governing legislation which substantially changed its mandate and authority are sufficient "material change" to clothe the Board with authority to review its certification Order and to make amendments as required.

[67] In *S.I.A.S.T. v. S.G.E.U.*[13], the Board summarized the purpose for exclusion of employees from the bargaining unit. At paragraphs [56] – [59], the Board says:

> ***[55]*** *The Board has on many occasions articulated helpful criterion for the making of such determinations but has also concluded that there is no definitive test for determining which side of the line a position falls (i.e.: within or outside the scope of the bargaining unit). Simply put, the Board's practice has been to be sensitive to both the factual context in which the determination arises and the purpose for which the exclusion have [sic] been prescribed in the Act. The Board tends to look beyond titles and position descriptions in an effort to ascertain the true role which a position plays in the organization. See: Grain Service Union (ILWU Canadian Area) v. AgPro Grain Inc., [1995] 1st Quarter Sask. Labour Rep. 243, LRB File No. 257-94; Saskatchewan Joint Board, Retail, Wholesale an Department Store Union v. Remai Investments Corporation, [1997] Sask. L.R.B.R. 335, LRB File Nos. 014-97 & 019-97; and University of Saskatchewan vs. Administrative and Supervisory Personnel Association [2008] Sask. L.R.B.R. 154, LRB File No. 057-05.*
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> ***[56]*** *The purpose of the statutory exclusion from the bargaining unit for positions whose primary responsibilities are to exercise authority and perform functions that are of a managerial character is to promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining (and to avoid muddying or blurring the lines between management and the bargaining unit). See: Hillcrest Farms Ltd. v. Grain Services Union (ILWU – Canadian Area), [1997] Sask. L.R.B.R. 591, LRB File No. 145-97.*

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[11] See *Prince Albert Parkland Regional Health Authority* Supra note 5 at paragraph 11 & 14.
[12] [2011] CanLII 64023, LRB File No. 027-11
[13] *Supra* note 6.

> ***[57]*** *The purpose of the statutory exclusion for positions that regularly act in a confidential capacity with respect to industrial relations is to assist the collective bargaining process by ensuring that the employer has sufficient internal resources (including administrative and clerical resources) to permit it to make informed and rational decisions regarding labour relations and, in particular, with respect to collective bargaining in the work place, and to permit it to do so in an atmosphere of candour and confidence. See: Canadian Union of Public Employees, Local 21 v. City of Regina and Regina Civic Middle Management Association, [2005] Sask. L.R.B.R. 274, LRB Files Nos. 103-04 & 222-04.*
>
> ***[58]*** *The Board has noted that, unlike the managerial exclusion, the duties performed in a confidential capacity need not be the primary focus of the position, provided they are regularly performed and genuine. In either case, the question for the Board to decide is whether or not the authority attached to a position and the duties performed by the incumbent are of a kind (and extent) which would create an insoluble conflict between the responsibilities which that person owes to his/her employer and the interests of that person and his/her colleagues as members of the bargaining unit. However, in doing so, the Board must be alert to the concern that exclusion from the bargaining unit of persons who do not genuinely meet the criteria prescribed in the Act may deny them access to the benefits of collective bargaining and may potentially weaken the bargaining unit. As a consequence, exclusions are generally made on as narrow a basis as possible, particularly so for exclusions made because of managerial responsibilities. See: City of Regina, supra.*

With this background, then, it is necessary to review each of the disputed positions to determine which side of the line they belong.

Manager of Human Resources and Manager, Finance and Administration

[68] There was little dispute between the parties as to the evolution of these positions from the excluded position of “Administrative Assistant”. The evidence of the parties was consistent that these two positions evolved out of that excluded position, which evolution was recognized and authorized by the union within the scope provisions of the collective agreement.

[69] It is common ground that these two positions began as half time positions, but gradually crept up to .7 time positions, and now, according to the Employer are required to be full time positions.

[70] Because these positions are already excluded from the bargaining unit either by virtue of the Board’s order on LRB File No. 081-89 or by the Collective Bargaining Agreement, there is little evidence to show that they should not continue to be excluded. As noted above, the onus falls upon the Union to show that these positions should not now be excluded. They have failed to satisfy this onus.

[71] The positions of Manager of Human Resources and Manager, Finance and Administration shall be excluded from the bargaining unit.

Director of Resolution (Manager of Mediation and Investigations)

[72] The analysis of this position brings us to the consideration not of what duties and responsibilities of the position currently require the incumbent to perform but, rather what the proposed duties will be as set out in the revised job description. This leads to an analysis of the proposed duties to determine if those duties, if performed by the incumbent in the position would exclude them from the definition of employee in Section 2(f) of the *Act*. If so, then the Board may make either an absolute determination under Section 5(m) of the *Act*, or a provisional determination under Section 5.2 of the *Act*.

[73] Under Sections 5(m) and 5.2 of the *Act*, the Board may make a determination before the person who is the subject of the application is actually performing the duties of the position. Such analysis is appropriate here since the revised job duties have not, as of the hearing date, been performed by the incumbent.

[74] In order for the Employer to adapt to its new mandate, change will be required within the organization, which will include the new position of Director of Resolution. That position is expected to be a part of the management team which will direct the transformation of the Employer to reach its new mandate.

[75] It is clear that the current situation is not workable. The Supervisor of Mediations and Investigations does not participate as a member of the management team, nor does he exercise authority and actually perform functions that are of a managerial character. The evidence was that rather than make relatively simple management decisions (i.e.: annual leave or training requests) he defers those decisions to the Manager of Operations who is ill suited from both a direct supervisory role and a geographic issue (being located in Regina and not where the majority of the supervised employees work) to make such decisions.

[76] The revised job description envisages the incumbent undertaking a significant managerial role in supervision and discipline of employees subject to his supervision, including acting as the person to determine the first step of the grievance procedure. More important, as

noted above, is the participation of the incumbent as a full member of the management team, through his participation in the Executive Committee, which is charged with planning and implementation of the transformational change within the organization. This participation will require the incumbent to regularly act in a confidential capacity with respect to the industrial relations of the Employer, be it in respect of collective bargaining strategy, or with respect to new work assignments of employees, transfer, layoff, or even termination of employees necessary to implement the new mandate.

[77] In *E.C.C. International Inc.,*[14] the Board determined that "it is not necessary that all or a substantial portion of the position's work time will be spent on confidential matters, but rather that such duties will be regularly performed, genuine and significant, though not necessarily time consuming."

[78] The expected functions of this new position, under the revised job description clearly meet the criteria for exclusion under Section 2(f)(i)(B).

[79] However, the revised duties and the expectations regarding those duties are speculative at this point, as the incumbent has yet to commence these duties. Therefore we are of the opinion that this position should be excluded from the bargaining unit on a provisional basis only pursuant to Section 5.2 of the *Act*. That provision provides that the provisional exclusion will not become final until the expiry of one year from the date of this determination. That period will allow the parties to, not only engage in collective bargaining regarding the position, but will also allow for a more factual determination of the actual duties performed by this position during that year. If the Union believes that the criteria for permanent exclusion have not been reached, then an application for variation of this determination may be made.

Senior Staff Solicitor

[80] The analysis above also, in our opinion, pertains to the Senior Staff Solicitor position. The new job duties will require the Senior Staff Solicitor to regularly act in a confidential capacity with respect to the industrial relations of the Employer, be that in giving legal advice to the Commission regarding interpretation of the collective agreement, personnel matters, advising

[14] [1998] Sask. L.R.B. R. 268 at 277

in respect of grievances filed, or acting as counsel for the Commission on arbitrations under the collective agreement.

[81] Again, however, the performance of these duties is speculative. We are likewise of the opinion that that this position should be excluded from the bargaining unit on a provisional basis only pursuant to Section 5.2 of the *Act*.

Commission Secretary

[82] The position of the Commission Secretary is different from the other two positions dealt with under Sections 5(m) and 5.2 of the *Act*. While the Commission Secretary is not currently performing any work which would require that she be outside the scope of the unit, there is clearly a need for administrative assistance in dealing with the industrial relations of the Employer.

[83] It is planned that the Commission Secretary will take on additional responsibility to provide confidential clerical and administrative support with respect to the industrial relations of the Employer, be that being responsible for taking minutes at the Executive Committee, typing collective bargaining proposals, preparing materials for use in collective bargaining, or otherwise supporting the out of scope employees with respect to the industrial relations of the Employer.

[84] The Commission Secretary will have regular use of and involvement in the Industrial relations of the Employer. As noted above, in paragraph 79, "it is not necessary that all or a substantial portion of the position's work time will be spent on confidential matters, but rather that such duties will be regularly performed, genuine and significant, though not necessarily time consuming". The evidence provided has satisfied the Board that this position ought to be excluded from the bargaining unit.

[85] However, given the nature of the work and the obvious need for administrative and clerical assistance for the Employer, we do not think that it is necessary to make this determination on a provisional basis. In *C.U.P.E. v. Town of Moosomin*[15] *the Board says:*

> *Though it is perhaps exaggerating the position of the Board to suggest that every employer is entitled to one excluded employee to maintain confidential records*

[15] [1994] 2nd Quarter Sask. L.R.B.R. 92 at 95, LRB File No. 038-94

> *and documents, the Board is certainly sensitive to the implications of the introduction of a collective bargaining regime for the administrative system of an employer. It is often the case that the demands of a collective bargaining relationship will require the addition of a confidential capacity for management which may not have been necessary prior to the certification of the trade union.*

[86] In normal circumstances, an employer would have the ability to have one confidential secretary excluded from the bargaining unit to act as a support for the industrial relations of the employer. That was recognized by the Board in its 1989 order when the position of "Administrative Assistant" was excluded from the bargaining unit. That position morphed into the dual positions of Human Resource Manager and Manager, Finance and Administration dealt with above. However, with the transformation of the Administrative Assistant position into those two positions, the benefit of having someone to assist in the administration of the organization who is able to deal with confidential matters involving the industrial relations of the Employer was lost. It is therefore, we believe, appropriate to restore this administrative support to the Employer as originally intended by the Board.

[87] For these reasons, the position of Commission Secretary will be excluded from the bargaining unit.

Decision:

[88] The application will be granted. The Board's Order dated November 6, 1989 shall be amended to read as follows:

> *UNDER SECTION 5, CLAUSES (a), (b) AND (c) OF THE TRADE UNION ACT*
>
> *The Labour Relations Board hereby makes an order:*
>
> *(a) determining that all employees employed by the Saskatchewan Human Rights Commission in the Province of Saskatchewan, except the Chief Commissioner, the Manager of Operations, Senior Staff Solicitor, Director of Resolution, Human Resources Coordinator, Budget Coordinator and Commission Secretary, are an appropriate unit of employees for the purpose of bargaining collectively;*
>
> *(b) determining that the Canadian Union of Public Employees, Local Union 1871, a trade union within the meaning of The Trade Union Act, represents a majority of employees in the appropriate unit of employees set forth in paragraph (a);*
>
> *(c) requiring The Saskatchewan Human Rights Commission, established pursuant to The Saskatchewan Human Rights Code, the employer, to*

bargain collectively with the trade union set forth in paragraph (b), with respect to the appropriate unit of employees set out in paragraph (a);

(d) that the positions of Director of Resolutions and Senior Staff Solicitor are provisionally excluded from the bargaining unit pursuant to sections 5(m) and 5.2 of The Trade Union Act, which provisional determination will become final only after the expiry of one year from the date of this Order.

DATED at Regina, Saskatchewan, this **15th** day of **December, 2011**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson