Saskatchewan
Labour Relations Board

THE CITY OF REGINA Applicant v. REGINA CIVIC MIDDLE MANAGEMENT ASSOCIATION, Respondent

LRB File No. 156-18, November 5, 2018

Vice-Chairperson, Kenneth G. Love, Q.C.; Members: Mike Wainwright and Jim Holmes

For the Applicant:	Mr. Jim McLellan
For the Respondent:	Ms. Crystal Norbeck

Exclusions from Bargaining Unit - City of Regina applies to amend its certification order with one of its Unions to allow the creation of out of scope positions. Additional duties referenced by witnesses which were not apparent from job description.

Confidential Capacity Exclusion – Board reviews statutory provisions for exclusion of employees from bargaining unit. Board reviews purpose for and evidence provided with respect to the proposed position.

Provisional Determination vs. Amendment of Bargaining Unit – Board reviews purpose for provisional determination vs. an amendment of the bargaining unit with respect to the positions. Board determines that provisional order is the better solution in the circumstances. Board directs that additional positions to be created be evaluated in light of the actual duties performed by incumbent of proposed position.

REASONS FOR DECISION

Background:

[1] The City of Regina, (the "City") is a municipal corporation which is certified to bargain with a number of trade unions, including the Regina Civic Middle Management Association ("RCMMA" or the "Union"). As its name suggests, the RCMMA represents a number of middle management positions within the City's workforce.

[2] The City proposed to create a new position within its Finance Department, named Financial Business Partner, which position, the City felt should be outside the scope of any of its existing bargaining units. Only RCMMA took exception to the City creating the position as an out of scope position. When negotiations with RCMMA regarding the position failed, the City applied to the Board to have the Board determine if the bargaining order for the RCMMA bargaining unit should be amended to allow the City to create the position as an out of scope position.

Facts:

[3] The City is certified to bargain collectively with RCMMA by virtue of an Order of the Board dated May 2, 1990.[1] The City created a job description for the position of Financial Business Partner within its Finance Department. The creation of the position was in response to a Current State Assessment and Future State Plan for the Finance Department prepared by MNP LLP at the request of the City administration.

[4] The MNP plan spawned a Finance Department Business Plan which mandated a new Business Model for the Finance Department. This model sought to break away from the way the Finance Department had operated in the past, which was the provision of historical or current data to management, to embrace a more forward looking approach to budgetary management that sought to find solutions for issues faced by the City's administration such as the infrastructure deficit.

[5] The position was described in the Finance Department's November 14, 2017 Organizational Structure Implementation (Phase 1) document as being a "Senior Financial

Analyst, with the first such position to be filled in the 2018 budget year with an additional 2 positions created and filled in the 2019 budget year. These positions were to be created under the Director of Corporate Financial Support. The responsibilities for this area of the Finance Department was described in the Organizational Structure Implementation (Phase 1) document as being:

> Budget Analysis and Support: Monthly/Quarterly Reporting and Forecasting: Committee and Council Reports: Special Projects: Financial Training: Allocations: Internal Job Costing.

[6] The Finance Department, in conjunction with the City's Human Resources Department created a job description for what was then called the Financial Business Partner in early 2018. That job description was reviewed by the RCMMA. It was RCMMA's view that the position should be within its bargaining unit, not an out of scope position. The Finance Department, then revised the job description and again reviewed it with RCMMA. Again, RCMMA took the position that the position should be within the scope of its bargaining unit.

[7] In the job description which was provided to the Board, the Core Job Purpose for the position is described in the following terms:

> ***Core Job Purpose***
>
> *The Financial Business Partner provides senior financial advisory support to client Directors and Executive Directors related to regular and strategic financial management support partner departments and divisional goals and objectives. This position is involved in and responsible for complex and sensitive strategic work related to departmental financial planning and issues. This role works in an advisory capacity to senior management and is responsible for specific department and branch portfolios to provide budget, accounting and financial management information services to support the operations of all divisions and work groups in the corporation.*
>
> *The Financial Business Partner will head smaller work units that are the interface for budget and accounting services between operating departments and corporate financial and budget systems and processes. This includes the provision of budget and accounting support, including entries into the corporate financial systems and organizing and communicating financial and statistical information, reporting and financial analysis to staff of client departments. This position is also responsible to lead the development and management of consistent financial*

[1] This order was an amending order of a previous Board Order.

> *management reporting, including variance and capital carry forward processes for client departments.*

[8] RCMMA analyzed the job description and classified the position as being at a level which would be equivalent to other positions within the scope of the RCMMA.

[9] In response to a request by the RCMMA for particulars of the City's application, the City filed a Statement of Particulars with the Board on October 3, 2018, which was 4 business days prior to the hearing of this matter. In the Statement of Particulars, the City set forth the following as the responsibilities of the position:

> *The incumbent will work directly with all other Departments of the City of Regina in considering the specific value of particular programs performed by other employees of the City of Regina and whether the City of Regina:*
>
> *a. Should continue to deliver those services with City employees;*
> *b. Contract with external contractors to provide those same services;*
> *c. Discontinue providing the service entirely;*
> *d. Modify or reduce the level of service or otherwise limit the extent of the program or service;*
>
> *The incumbent will also work with Human Resources on costing analysis for negotiation strategies for collective bargaining purposes.*

[10] The Statement of Particulars was not a sworn response, but came from counsel for the City. Both of the City's witnesses testified as to the accuracy of this summary restatement of the position duties, notwithstanding that the proposed job description was somewhat vague in respect to a. – d. above and did not contain any reference to "costing analysis for negotiation strategies for collective bargaining purposes". This oversight was explained by Ms. Ms. Shultz as something which the Finance Department identified as a gap in service some 2 weeks prior to the hearing of this matter.

Relevant statutory provision:

> *6-104(2) In addition to any other powers given to the board pursuant to this part, the board may make orders:*
>
> > *(f) rescinding or amending an order or decision of the board made pursuant to clause (b), (c), (d) or (e) or subsection (3), or amending a certification order or collective bargaining order in the circumstances set out in clause (g) or (h), notwithstanding*

> *that a motion, application, appeal or other proceeding respecting or arising out of the order or decision is pending in any court;*
>
> *(g) amending a board order if:*
>
> *(i) the employer and the union agree to the amendment; or*
>
> *(ii) in the opinion of the board, the amendment is necessary;*
>
> *(h) notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of a certification order or collective bargaining order is pending in any court, rescinding or amending the certification order or collective bargaining order;*
>
> *(i) subject to section 6-105, determining for the purposes of this Part whether any person is or may become an employee or a supervisory employee;*

> ***6-105****(1) On an application made for the purposes of clause 6-104(2)(i), the board may make a provisional determination before the person who is the subject of the application actually performs the duties of the position in question.*
>
> *(2) A provisional determination made pursuant to subsection (1) becomes a final determination one year after the day on which the provisional determination is made unless, before that period expires, the employer or the union applies to the board for a variation of the determination.*

Employer's arguments:

[11] The City relied upon this Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v. Battlefords and District Co-operative Limited*[2], arguing that the evidence presented showed that the proposed position would perform duties which excluded it from the definition of "employee" in section 6-1(1)(h)(i)(B) of *The Saskatchewan Employment Act* (the *"SEA"*). That provision requires the Board to exclude from a bargaining unit any employee "whose primary duties include activities that are of a confidential nature in relation to any of the following and that have a direct impact on the bargaining unit that the person would be included in".

(I) labour relations;

(II) business and strategic planning;

(III) policy advice;

(IV) budget implementation or planning.

[12] The City argued that the incumbent in this position would, in the performance of his/her duties, be in conflict. This conflict, they argued would necessitate the removal of the position from the bargaining unit. The City argued that the position was strategic in nature whereas the positions within the scope of RCMMA were operational in nature.

[13] Alternatively, the City argued that, if the position was not excluded from the bargaining unit through an amendment to the existing order, that the position should be excluded provisionally pursuant to section 6-105.

Union's arguments:

[14] The Union filed a written argument and a book of authorities which we have reviewed and found helpful.

[15] The Union argued, relying upon the Boards decision in *RWDSU v. Beeland Co-operative Assn. Ltd.*[3], that exclusions from the bargaining unit should not be liberally granted. Rather, the onus fell upon the City to show that the inclusion of the position "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".[4]

[16] The Union argued that the position did not meet the criteria for exclusion based upon the confidentiality provisions of the *SEA*. It noted that the job description utilized terminology which suggested the positon had a subordinate role in the City hierarchy. It argued that there was no sound basis upon which to exclude the position from the bargaining unit. It also argued that the City, in its application had not requested that the position be provisionally excluded and the Board should not permit the City to amend its application at this late stage to include a provisional determination. The Union asked that the City's application be denied.

[17] In its arguments, the Union did not oppose the application on the basis of the necessity for the proposed amendment. Nor did it suggest that there was no material change shown with respect to the application

Analysis and Majority Decision:

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[2] 2015 CanLII 19983 (SK LRB)
[3] 2018 CanLII 68444 (SK LRB)
[4] See *Saskatchewan Institute of Applied Science and Technology v SGEU*, 2009 CanLII 72366 (SK LRB)

[18] In its submissions to the Board, the City acknowledged that it bore the onus of showing that the position fell outside the definition of "employee" in the *SEA*. It also acknowledged that it sought exclusion based upon the "confidential character" exclusion and not the "managerial character" exception in that definition. Given that the Union did not challenge the necessity or that a material change had not occurred to justify the proposed amendment, we have not addressed that issue in our reasons which follow.

[19] The Board had its first opportunity to consider the revised definition of "employee" contained within the *SEA* in its decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v. Battlefords and District Co-operative Limited*[5]. In that decision, the Board reviewed the new definitions provided for in the *SEA* in contrast to the previous provisions of *The Trade Union Act*. At paragraph (119), the Board described the exclusions in the following terms:

> *119) The provisions of the SEA related to collective bargaining still rely upon the Wagner Act at its root. It envisions a balance of collective bargaining between an independent and strong collective union and a sufficient management cadre to conduct collective bargaining. The nature of the exclusions provided for in the SEA have not changed. The definition continues to allow the exclusion of "persons whose primary responsibility is to exercise authority and perform functions that are of a managerial character", in keeping with the desire of the legislative scheme to avoid inclusion of management within the collective bargaining unit. Similarly, the "confidential capacity" exclusion insures that the process of collective bargaining can occur on as equal a footing as possible and that confidentiality is maintained***.**

[20] At paragraphs (121) and (122), the Board reviewed its previous jurisprudence in *SIAST v. SGEU*[6] and quoted from paragraphs [55] – [59] of that decision as follows:

> ***[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 exclusions have 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 and Department Store Union v. Remai Investments Corporation, [1997] Sask. L.R.B.R. 335, LRB File Nos. 014-97 & 019-97; and*

[5] 2015 CanLII 19983 (SK LRB)
[6] 2009 CanLII 72366 (SK LRB)

University of Saskatchewan vs. Administrative and Supervisory Personnel Association [2008] Sask. L.R.B.R. 154, LRB File No. 057-05.

[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.*

[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.*

[59] *Finally, the Board recognizes that employers and trade unions often negotiate scope issues and come to resolutions that may not be immediately apparent to the Board. In accepting these determinations, the Board acknowledges that the parties are in a better position to determine the nature of their relationship. The determinations that have been made by the parties can be of great assistance to the Board in understanding the maturity of the collective bargaining relationship and kinds of lines that the parties have drawn between management and its staff. However, in the Board's opinion, when it is called upon to make determinations as to scope, the benchmark for our determinations must be s. 2(f)(i) of the Act (the definition of an "employee") and our understanding of the purposes for which the statutory exemptions were included. While we are mindful of the agreements of the parties as to the scope, the genesis for our determinations must be The Trade Union Act and the jurisprudence of the Board in interpreting that statute.*

. . .

> ***122)*** *The labour relations scheme established pursuant to the SEA has not changed from that articulated by the legislature under The Trade Union Act. The purpose for which exemptions from the bargaining unit were created remains as set out above. The analysis of such positions may, depending upon the facts of each case, differ under the current provisions, but nevertheless, the purpose for which the exemptions have been placed in the legislation remains the same. Similarly, the definition of "employee" when placed within the context of the SEA supports the analysis above.*

[21] For a position to be excluded from the bargaining unit under the confidentiality exception, that position must have "primary" duties which have a direct impact on the bargaining unit and which fit within the 4 categories outlined in section 6-1(1)(h)(i)(B) of the *SEA*.[7] In making its determination, the Board will review the evidence before it and the proposed job description to determine if such primary duties are evident.

The Evidence before the Board:

[22] The Board heard evidence from 3 witnesses, 2 for the City and 1 for the Union. The evidence from the City's witnesses painted a picture of the duties of the Financial Business Partner as one who would have great influence on the management of the City in that it would assist Directors and Executive Directors in their analysis of budgetary and program options, some of which may have serious ramifications for the Unionized workforce. An example was that this position could be tasked with an analysis of the operations of the City's asphalt plant to determine if it remained the best option for the City to obtain supplies of asphalt which it used in various projects throughout the City. If, for example, the recommendation, following review, was to eliminate the plant, this would have an impact on employees employed in conjunction with that plant's operations.

[23] The Union's witness testified that he conducted (with others), a review of the job description proposed by the City. He testified that his analysis did not rate the position, based upon the proposed job description at a level which he felt justified its exclusion from the bargaining unit.

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[7] See Saskatchewan Polytechnic v. Saskatchewan Government and General Employees' Union 2018 CanLII 38248 (SK LRB) at paragraph 39.

[24] The job description itself, as noted in paragraph 7 above, does not provide much support for the accountabilities referenced by both of the City's witnesses. As noted by the Union, it utilizes phrases such as "advise", "support", "report", provide guidance", "participate", "analyze", "recommend", "assist", "involved in", "conduct research" etc. Notwithstanding the use of these words in the job description, the evidence from each of the City's witnesses was that the position had the capability of impacting on members of the bargaining unit. If so, this certainly has the potential to create an irresolvable conflict between the incumbent's loyalty to the employer versus his/her loyalty to the Union.

[25] The *SEA* creates 4 areas where the legislature foresaw potential conflicts that it considered to amount to an irresolvable form of conflict. These are:

- Labour relations
- Business strategic planning
- Policy advice
- Budget implementation or planning

[26] The position, as described by the City's witnesses, checks 3 of the above boxes insofar as the witnesses testified that it would be involved in costing collective bargaining proposals, would be involved in business strategic planning in assisting with the review of existing programs and making recommendations in respect of their continuation, amendment or cancellation. Finally, the evidence was that the position would be directly involved in budgetary planning across the organization.

[27] It is always difficult to have any certainty as to the impact upon a position when the job duties are just proposed rather than being performed by an incumbent. It is for that reason that 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[8].

Section 6-104(1)(g) vs. Section 6-105

[28] The City brings this application under section 6-104(1)(g) which is the Board's general authority to amend and order of the Board when the Board determines that the

[8] See paragraph 20 *supra*

amendment is “necessary”. Section 6-105 permits the Board to make a provisional determination as to whether a position should be placed within or out of the scope of the bargaining unit prior to the incumbent performing the duties of the position.

[29] In this case, clearly, the application is more properly framed under section 6-105 than section 6-104(1)(g). At the hearing of this matter, the City requested leave to amend its application to include an order under section 6-105. The Union resisted the amendment on the basis that the City was a sophisticated employer and had experienced counsel acting on its behalf. Additionally, the Union argued that the City did not disclose that the position was expected to be engaged in costing collective bargaining proposals until almost the date of the hearing of this matter.

[30] The Union makes a valid point with respect to its objection. There is some aspect of this application and the evidence which we heard which is not supported by the job description which was originally drafted by the City to justify the exclusion of the position from the bargaining unit.

[31] Nevertheless, the Board enjoys broad remedial powers with respect to the granting of amendments. Section 6-112(2) of the *SEA* permits the Board to amend its pleadings at any stage of the proceedings. Furthermore, we are directed that “all necessary amendments must be made for the purposes of determining the real questions in dispute in the proceedings”.

[32] In this case, the real question is whether or not this proposed position falls within or out of the scope of the bargaining unit. The application is more properly brought under section 6-105 rather than section 6-104(1)(g). If this is the real question to be determined, then the amendment requested by the City must be granted.

[33] However, in granting the amendment, we are permitted to permit the amendment “in any manner and on any terms that the board considers just”. Accordingly, we will consider that further in the granting of any remedy.

Section 6-1(1)(h)(B)

[34] In considering whether or not a position fits within the provisions of section 6-1(1)(h)(B), the definition requires that the activities that are of a confidential nature must be

"primary duties" and that they have a "direct impact on the bargaining unit". Those duties must also fall within the 4 areas of activities specified in that section.

[35] In this case, the City argued that the position would have a direct impact on all 5 of the bargaining units within the City of Regina, not just RCMMA. We cannot accept that argument as satisfying the requirements of the section insofar as no insoluble conflict would arise between the proposed position and any other bargaining unit other than RCMMA.

[36] The Statement of Particulars, as noted above provided as follows:

> The incumbent will work directly with all other Departments of the City of Regina in considering the specific value of particular programs performed by other employees of the City of Regina and whether the City of Regina:
>
> a. Should continue to deliver those services with City employees;
> b. Contract with external contractors to provide those same services;
> c. Discontinue providing the service entirely;
> d. Modify or reduce the level of service or otherwise limit the extent of the program or service;

[37] If these are, in the final result, the duties which this position performs, and these duties are the primary duties of the position, then those duties will, in our opinion, would have a direct impact on the RCMMA bargaining unit as well as other bargaining units within the City administration.

[38] As noted above, both of the City's witnesses confirmed these job duties and the primacy of those duties to the position. Furthermore, there was the additional element of costing of collective bargaining proposals which would have a similar impact. Accordingly, for the purposes of this analysis in relation to section 6-105 of the *SEA*, we accept that the proposed job duties will have the requisite impact so as to fall within section 6-1(1)(h)(B).

Majority Decision and Order:

[39] Given the uncertainty in the actual job duties of this position, it is necessary for us to balance the competing interests of the employee's right to be represented by a trade union for collective bargaining against the need for certain positions, as noted above, to be excluded from the bargaining unit to insure that collective bargaining can be assured and that employees

can have confidential information necessary to assist the employer in its management of the bargaining unit.

[40] If we relied solely upon the job description, it would be difficult to find sufficient support for the position to be excluded from the bargaining unit, even provisionally. However, the evidence and the job duties outlined by the City's witnesses paint a much different picture. That evidence leads us to the conclusion that a provisional determination should be made that the position should be provisionally excluded from the bargaining unit. Accordingly, our Order will issue provisionally excluding this current position from the bargaining unit.

[41] However, in consideration of the justness of this provisional order, we are reminded that the City anticipates the creation of an additional 2 positions. Those positions will not be provisionally excluded and, in the event that the Union does not agree to their exclusion, the question of their exclusion must be brought to the Board for determination based upon the actual duties performed by the incumbent in the current position.

[42] During that determination, the Board will also consider if the exclusion of this position will become permanent.

Dissent by Member Holmes:

[43] I have read the decision of the majority but with respect I cannot agree.

[44] There are in excess of 100,000 union members in Saskatchewan. Although the Labour Relations Board has the responsibility to issue certification orders, the Board does not regularly monitor the certification orders. For example, the Order in this case was last reviewed by the Board 28 years ago in 1990.

[45] The general practice is the Parties will negotiate in good faith to amend their order from time to time to address changes in organizational structure. The Parties are encouraged to file these updates with the Board but as we can see even large sophisticated organizations like the City of Regina do not always do so.

[46] If the Parties are unable to agree on whether a position is properly within the scope of the Certification Order, then they must refer it to the Board for a decision. Neither Party may act unilaterally nor may they resort to strike or lock out to settle the disagreement.

[47] For this Board to function and manage its public resources, the parties must engage in meaningful good faith discussions before referring the issue to the Board.

[48] In this case, the Parties began well. The City proposed he position be out of scope on June 5, 2018. When the Association did not agree, the City amended the job description to clarify its argument. The Association re-examined the proposed submitted by the City, using a mutually agreed metric which both evaluated the pay rate AND the issue of whether the position fell within the scope of the Certification Order. The Association decided it still did not agree. Bargaining in good faith does not require the Parties reach agreement, only that they honestly try. The City properly asked this Board for a determination on July 27, 2018.

[49] As the majority decision states: **If we relied solely upon the job description, it would be difficult to find sufficient support for the position to be excluded from the bargaining unit, even provisionally. However, the evidence and the job duties outlined by the City's witnesses paint a much different picture.**

[50] This neatly defines the procedural problem. The City bargained with the Association based on the job description and the Parties general knowledge of relationships and responsibilities in the City. When its argument was unconvincing to the Association, the City then advanced a separate argument, not to the Association but at the Board. This effectively undermined good faith negotiations. The testimony of witnesses in these hearings should supplement the job description providing the context, the positions relationship to other positions in the organization. It should not "paint a much different picture."

[51] It happens that sometimes in the course of a Board hearing, the definition of issue in dispute may shift and it is then appropriate for the Board to use its discretionary power under Section 6-112(2) and (3) to issue a decision that will resolve the real issue. This power is best used when the Parties are unsophisticated, and/or when the issues are complex and/or when the issues are contentious and relations have become confrontational. None of these conditions exist in this hearing.

[52] Nothing was revealed in the hearing that was already not known to the Applicant before the hearing began. By using its discretionary powers, the Board assumes the role of the City Human Resources Department, listening to the verbal description of the Department Head

of the position requirements and effectively creating a job description. In my respectful opinion, this is not the role of this Board.

[53] The application should be dismissed because the City failed to bargain in good faith prior to bringing the dispute to the Board.

[54] In the alternative, the application must fail because it does not meet the requirements of the Act.

[55] The rationale for the position is that the existing positions in the Department are too engaged in the routine assistance to other Departments to be able to conduct strategic analysis and planning with the City requires. This long term strategic analysis is necessary because the City continues to experience increasing demands with restricted resources. Early analysis like the 2015 Business Plan (Tab 8) speak of a "redeployment "not an expansion of staff.

[56] It does not appear that this redeployment ever took place. In an email dated May 8, 2018 sent on behalf of June Schultz, Finance director to all Finance All Staff (Tab 11) "To summarize there is no change to the work everyone is currently doing."

[57] The City approved two new position in the 2018 budget, one of which the Manager, Accounting Services appears to not have been disputed, and one which is the subject of this application, the Financial Business Partner. Two additional Financial Business Partners have been requested for the 2019 budget.

[58] The city response to its worsening financial crunch was to add four new management positions.

[59] Accepting however that an investment in strategic planning might result in overall efficiencies, does it automatically follow that efficiency results in a reduction in City's activity?

[60] The testimony of Director of Finance indicated one hypothetical example might be elimination of the City asphalt plant, although she did say she had no idea what such a review might show. Hypothetically the review might show that the City owning an asphalt plant

is cost effective and that the best course for the City would be expand its ability to supply other material needs.

[61] The Chair offered the example that the City might, following the example of the Provincial Government, stop providing public transit. A review might also show the City should expand public transit to meet its sustainability goals and tax parking lots more heavily to discourage sprawl and encourage efficient transit.

[62] One could give a series of examples offering alternate outcomes. A homelessness strategy could reduce policing costs and might attract provincial funding to reduce health and social service costs; investments in renewal energy could reduce the City's energy costs; some cities have reversed contracting out and resumed providing service directly.

[63] The Board obviously cannot and should not dictate how the City organizes its services. The point is that an objective strategic review cannot start from the premise that result must be a reduction in City staff or services.

[64] Even if we accept that the strategic reviews *might* have an impact on *some* bargaining units, we have no evidence of how it affects *this* bargaining unit except the general statement that there are members of this bargaining unit in almost every City Department.

[65] In the offered hypotheticals, the elimination of the asphalt plant would have a significant impact on one of the CUPE bargaining units but no suggestion was made how it would affect the bargaining unit that is the respondent in this application. Again arguably (but not necessarily) such reorganization might result in a greater need for middle managers to draft requirements, request tenders and monitor contractor performance.

[66] Similarly, the hypothetical elimination of public transit would effectively eliminate the Amalgamated Transit bargaining unit. The Board was offered no suggestion of what impact this would have on the RCMMA unit.

[67] The Board requires evidence, of impact on the bargaining unit, not vague hypothetical musings or ideological perspectives.

[68] Even if there were to be adverse effects on this bargaining unit, there is no evidence that t*his* position would cause that effect.

[69] The position researches strategic options and advises senior management. "This role works in an **advisory** capacity to senior management." (emphasis added) (Appendix B of the Application to Amend)

[70] The advice itself has no direct impact on the bargaining unit. "Decisions may be precedent setting and may evolve into policy but **are mitigated by oversight** of the Manager and clients." (emphasis added). ("Clients" in these discussions are not the citizens of Regina directly, but the City Departments serving the citizens.)

[71] In the organizational chart, the position reports to the Manager of Budget and Financial Services who reports to the Director Finance who reports to the Executive Director Finance and Corporate Services who reports to the City Manager.

[72] The Director of Finance made it clear that final major decisions are not made by Senior Management but, as is proper, by the Mayor and Councilors, the elected representatives of the citizens. She specifically referenced that a good deal of the City's financial problems stems from the decision of the previous Council to not implement mill rate increases for several years.

[73] It is clearly evident that the City has need for good solid financial research to make good decisions. It is equally evident that major decisions will not be made by the position that is the subject of this hearing.

[74] The final point in favour of the position being outside the bargaining unit is its role in costing collective bargaining. If this were true it would certainly fortify the argument for exclusion.

[75] The argument presented was that some two weeks prior to the hearing the City suddenly became aware it was incapable of properly costing its bargaining proposals. The details were vague, but it appears to arisen when the City Committee bargaining with the

Firefighters Union exceed its bargaining mandate on the eve of a referral of the dispute to interest arbitration.

[76] It took the City until October 3 to notify the Association, some two working days before this Hearing.

[77] The evidence is that the City has bargained for 28 years with this Association. It has bargained with some of its other 4 units for more than half a century. If the City is still incapable of costing its bargaining proposals, it is not a problem that will be resolved by this position.

[78] IN any case, the suggestion that this position will now become an integral part of the City collective bargaining process lacks a certain internal coherence. The stated rationale for this position has always been that the existing positions were too preoccupied with operational tasks to do the needed strategic planning and analysis. The Department has received approval for only one third of the strategic planners it needs. There is no guarantee the other positions will be approved. With the position not even posted, the City has now decided to assign the position the operational task of costing bargaining proposals. The City's newest argument contradicts its first argument.

[79] The right of employees to belong to a bargaining unit is a constitutional right. So is the right to belong to a bargaining unit that has not been weakened by unnecessary exclusions. This is the onus the City bears. It is an onus that must be met by fair bargaining and by evidence and by coherent argument.

[80] When application for exclusion could only be made annually, there was greater need for provisional exclusion orders for newly created positions. They remain appropriate when the preponderance of the evidence is clear. But where the evidence is only speculation it would be more appropriate to leave the position with its constitutional rights intact until such to me as it can be clearly shown, based firm evidence that the position must reasonably be excluded.

DATED at Regina, Saskatchewan, this 5th day of November, 2018.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Vice-Chairperson