



**UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v VERDIENT FOODS INC., Respondent**

LRB File No. 040-19; July 29, 2019

Vice-Chairperson, Barbara Mysko; Board Members: Don Ewart and Maurice Werezak

For the Applicant Union: Dawn McBride, Heath Smith  
Counsel for the Respondent Employer: John R. Beckman, Q.C., Kathryn S. Melnychuk

**Certification Application – Application for an all-employee bargaining unit at a fractionation plant – Employer objects on the basis that the unit is not appropriate for purposes of collective bargaining – Board determines that an all-employee unit is appropriate for purposes of collective bargaining.**

**Certification Application – Employer objects to the inclusion in bargaining unit of positions on the basis of supervisory and confidentiality exclusions – Employer has not met onus of demonstrating that the positions satisfy the definition of supervisory employee – Employer has not met onus of demonstrating that the positions fall into the exclusion on the basis of confidentiality.**

**Certification Application – Practice and Procedure – Employer and Union apply to amend pleadings on basis of evidence presented – New position since date of Application – Evidence of vacant position not included in Employer list – Union alleges Employer has changed terms and conditions in breach of statutory freeze – Board grants amendments to pleadings in order to determine the issues in dispute.**

## **REASONS FOR DECISION**

### **Background:**

[1] **Barbara Mysko, Vice-Chairperson:** United Food and Commercial Workers, Local 1400 [the “Union”] has brought this Application for Bargaining Rights [the “Application”] in relation to employees at Verdient Foods Inc. [the “Employer” or “Verdient”]. Verdient is a company based in Vanscoy, Saskatchewan, in the business of dry fractionating of peas into protein and starch powder.

**[2]** In its Application, the Union seeks bargaining rights in relation to a bargaining unit described as:

*All employees employed by Verdient Foods Inc. in Vanscoy, Saskatchewan excluding the General Manager, Operations Manager, QA Coordinator, Controller, Production Supervisor, Maintenance Coordinator, Maintenance Supervisor, Office Administrator, and any employee above the rank of manager.*

**[3]** In its Reply, the Employer seeks exclusions from the bargaining unit for the following positions: QA/QC Inspectors ["Inspectors"], Administrative Assistant, and Lab Technicians ["Lab Techs"]. "QA/QC" stands for quality assurance and quality control.

**[4]** The Board held a hearing on the Application on July 10, 11, and 22, 2019. The evidence at the hearing disclosed that the Maintenance Supervisor and the Office Administrator positions no longer exist, the one-time Production Supervisor is now referred to as the Plant Supervisor, and the individual who had previously occupied the Office Administrator position, now occupies the Accounting Clerk position. The evidence also revealed the existence of three positions that were not reflected in the parties' pleadings.

**[5]** Further to the evidence, the Union and the Employer seek amendments to their respective pleadings. The Union applies to amend the proposed bargaining unit description in the following manner:

*All employees employed by Verdient Foods Inc. in Vanscoy, Saskatchewan excluding the General Manager, Operations Manager, QA Coordinator, Controller, ~~Production Supervisor~~, Plant Supervisor, Maintenance Coordinator, ~~Maintenance Supervisor~~, ~~Office Administrator~~, Accounting Clerk, supervisors, and any employee above the rank of manager.*

**[6]** The Employer seeks an amendment to its Reply to request the exclusion of additional positions: the Lab Analyst, the QA/QC Technician, and the Accounting Clerk.

**[7]** The Employer offers that it is prepared to formally amend its Reply to reflect those proposed exclusions, if required. It relies on section 6-112 of the Act to suggest that, in the current case, the Board may allow the Employer to amend its Reply on any terms that the Board considers just. Furthermore, subsection 6-112(2) directs that all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings. According to the Employer, its desired amendments are necessary amendments for the purpose of determining the real issues in dispute.

**[8]** The Employer allocates its proposed exclusions in the following manner:

- a. Inspectors and Technicians - Supervisory employee exclusion;
- b. Lab Techs and Lab Analysts - Confidentiality exclusion.

**[9]** The Application was filed on February 22, 2019. The Board issued a Direction for Vote on March 4, 2019, and proceeded to mail out a Notice of Vote with a deadline of March 18, 2019. The Employer filed a Reply to the Application on March 5, 2019, prior to which it noted an objection to the vote proceeding by way of mail-in ballot. At the hearing, counsel for the Employer indicated that it was not, however, making a formal objection to the conduct of the vote, as that matter had in effect been resolved. The ballots in this matter remained sealed.

**[10]** At the hearing, the Board heard evidence from four witnesses on behalf of the Union, being: Lily Olson, Martin Lapointe, Ashleigh Yanko, and Jeannette Caprice Wagenaar; and evidence from two witnesses on behalf of the Employer, being: Myrna McIvor and Amanda Barbosa. Both parties made oral argument and filed written submissions in support of their respective positions, all of which the Board has reviewed and found helpful in making its determination in this matter.

**Evidence:**

**Lily Olson [“Olson”]**

**[11]** Olson is the national representative for Local 1400 [the “Local”], and as the national representative, her primary responsibility is to organize workplaces. There was nothing particularly unusual about the organizing drive in this case, other than the fact that it had been filed with the federal Board, initially, and had to be re-filed with the provincial Board. Olson indicated that she did not personally meet with the majority of the employees, but that they were very eager to organize. The Local has in the past organized what Olson considers to be similar workplaces, and two out of three of those workplaces are organized along all-employee lines.

**[12]** Olson spoke briefly to the responsibilities of the Inspector position but was unable to provide much in the way of detail. She readily admitted that she was unable to speak to the duties of the Lab Tech.

**Martin LaPointe [“LaPointe”]**

**[13]** LaPointe started working for Verdient on March 12, 2018 as a Lab Tech, and by August 2018 was promoted to Inspector. In April 2019, Lapointe was terminated from his employment with Verdient. His entire employment at Verdient lasted approximately 13 months. Lapointe was involved in organizing the workplace, and the circumstances of his termination are subject to a related proceeding before this Board.

**[14]** Lapointe described the duties of an Inspector. According to Lapointe, Inspectors have no authority to change the conditions of employment for the employees in the workplace, and while they can request that processes be changed, they have no authority to make those changes. Inspectors have no authority for the approval of budgets. They do not assign work to employees or conduct merit assessments. When they observe an employee underperforming or failing to conform to expectations, Inspectors may report their observations but are not permitted to direct the appropriate response. Inspectors do not act as temporary supervisors. They have no authority to hire, fire, or discipline employees.

**[15]** Lapointe worked as a Lab Tech for a period of time at Verdient, and so he was able to provide detail about their associated job responsibilities. In brief, the Lab Tech position is responsible for checking the quality of the raw material and product and for performing overall lab maintenance.

**[16]** While there was no Lab Tech job description presented at the hearing, there was a job description for the Lab Analyst. Lapointe reviewed that latter job description, noting any discrepancies between his duties as a Lab Tech and the roles and responsibilities listed for the Lab Analyst role. In contrast with the job description for a Lab Analyst, Lapointe recalled that when he worked as a Lab Tech he did not prepare Certificates of Analysis, prepare lab trend and results reports, maintain the environmental program, deal with third parties' results, train Inspectors on lab equipment or lab problems, or fill in for Inspectors. Lapointe noted that some of these discrepancies could be attributed to the fact that the Inspector positions were not in place when Lapointe held the Lab Tech position.

**[17]** In cross, Lapointe acknowledged that if the quality of the material, product, or the process is not to standard, then Inspectors are expected to catch errors and determine whether adjustments need to be made before the process is compromised. When they conclude that changes are necessary, they may have to inform the Lead Operator so as to ensure the changes

are made. If, however, the Inspectors observe that an employee is making mistakes repeatedly, they need to inform management rather than attempting to solve the problem themselves.

**Ashleigh Yanko [“Yanko”]**

**[18]** Yanko has been employed with Verdient for approximately two years, and is currently working as a Lab Analyst, a position that she assumed after the Application was filed and approximately two months before the hearing was held.

**[19]** Yanko is the only Lab Analyst working at Verdient. She reports directly to Amanda Barbosa, head of the QA/QC Department. Ninh Cao [“Cao”], an individual who did not testify at the hearing, held the position of Lab Analyst for a period of time before Yanko moved into the role. It was clarified later in the hearing that Cao had left her employment with Verdient approximately a year earlier. When Yanko was working as a Lab Tech, she “reported” to Cao. Since Yanko has moved into the Lab Analyst role, there have been no Lab Techs working at Verdient.

**[20]** In response to counsel’s query, Yanko agreed that “team environment” is a fair characterization of the workplace at Verdient, in that everyone has to work together to ensure that the mechanisms are operating properly. According to Yanko, the Lab Analyst manages all aspects of the lab functions, working with, “watching over”, or “monitoring the work performance” of the Inspectors. In turn, the Inspectors monitor the Operators. The Inspectors report to Yanko all sample results. Operators are responsible for operating the equipment and the employees working in maintenance are in charge of ensuring that the equipment is functioning properly.

**[21]** When asked whether she has the authority to discipline employees, Yanko replied “no”, and explained that she can tell the Inspectors, for example, that they are not wearing the proper attire, but does not have the authority to issue a warning. She has no authority to change conditions of employment for other employees. When asked whether she has any authority for setting the plan for the department, she indicated that she cannot determine when products are taken up, but she can inform other employees of the best timing for performing a test. She has no role in the payment of wages or benefits; no role in scheduling hours or assigning overtime; and no role in issuing work appraisals or making merit assessments. As for whether she assigns work or monitors the work of employees, she offered that she asks the Inspectors to assist her in the lab and to assist her in the receiving of trucks, among other tasks.

**[22]** Yanko spoke briefly to her previous role as a Lab Tech, indicating that she had no role in disciplining or terminating other employees; no role in paying wages or benefits; and no role in scheduling hours or assigning work. She did not set terms or conditions of employment; did not set plans for the department; and did not conduct work appraisals or merit assessments. Management is responsible for hiring, firing, discipline, and scheduling.

**[23]** On cross, Yanko discussed the role of intellectual property at Verdient, stating that it is a significant feature of the Employer's operations. She could not recall if she signed a confidentiality agreement when she started working at Verdient, but she understood very clearly that the company's trade secrets are not to be shared.

**Jeanette Caprice Wagenaar ["Wagenaar"]**

**[24]** Wagenaar has been employed with Verdient since August, 2018, and is currently working as a Technician in the newly minted home craft room, a "department" that develops new products for a partner company. As recently as two weeks prior to the hearing, Wagenaar made the transition from her previous position as an Inspector in the main plant to her current position in the home craft area. She coordinates the department, including "what goes in and out", "what the operators are going to do that day", analysis and approval of the product, and the operation of the machines. She started working in the home craft area sometime in April and as recently as two weeks ago assumed the new title that goes along with the extra responsibilities. When she assumed the new title, she reviewed the job description for the position.

**[25]** As an Inspector, she worked from a list, provided by management, outlining the tasks that needed to be accomplished, and was involved in coordinating the approach to accomplishing those tasks. She was charged with the task of ensuring that processes were being followed correctly and with reporting non-conformances. She was able to suggest improvements to a particular process but did not have the authority to provide the final approval for any process. Inspectors are the bridge between the workers and management, in that they are involved in monitoring the quality of work performed by other employees, and they represent the first step in the disciplinary chain. They have authority to document and re-train employees, but do not have authority to discipline or terminate. Nor do they have authority to change the terms and conditions of employment.

**[26]** Inspectors serve as a type of investigator of non-conformances on behalf of management. While Inspectors do not typically recommend discipline for employees they do recommend

corrective action. If an employee chooses not to take the corrective action as recommended, Inspectors can advise management so that management can determine whether and how to follow up. Discipline of employees in the QA/QC Department is meted out by the manager of the department. The General Manager and Controller are in charge of hiring and firing.

**[27]** As Inspector, Wagenaar explained that she was a “keeper of confidential information”, including information related to customers as well as research and development. Wagenaar signed a confidentiality agreement when she was hired with Verdient, along with all other employees.

**[28]** Verdient operates as a team environment. Everyone has to work together to ensure smooth operations. For example, the Inspectors work with the Lead Hands, the Lab Analyst, and the Operators. Most Inspectors are untrained in the mechanical aspects of the plant, and so they work with the Operators to ensure awareness of the impacts of the mechanics on the results.

**[29]** On cross, Wagenaar explained that she monitors quality of work and initiates the start of the discipline process, although corrective action is up to management. Problems relate to either the procedure or the person. Inspectors can change procedures, but when it comes to personnel, Inspectors must report the problem to management.

### **Myrna Mclvor [“Mclvor”]**

**[30]** Mclvor has worked as Verdient’s Controller since around November 2018. Usually, she can be found working in the office where she carries out her duties in relation to general operations, financial matters, and, currently, shipping and receiving. Also situated in the office is the Accounting Clerk who reports directly to Mclvor, handling accounts payable, payroll, and acting as “our in-house human resource”.

**[31]** During her testimony, Mclvor provided a general overview of the operation of the plant, including the various departments and functions. She reviewed two organizational charts. The first organizational chart purportedly represents the workplace as of the date of the Application in February, 2019, and the second, as of the date of the hearing. According to the charts, a lot has changed in a few short months between the filing of the Application and the hearing. A few of those changes can be summarized in list form:

- a. In the place of the Plant Manager is the Operations Manager. The Plant Manager is no longer listed on the organizational chart;

- b. The Office Administrator position has been eliminated;
- c. The Shipping/Receiving position is vacant;
- d. A management group absent from the first chart is now displayed above the rank of General Manager;
- e. Where the Lab Tech position was displayed in the first chart, the Lab Analyst position is displayed. The Lab Tech position is no longer included;
- f. Numbers for maintenance have changed. There are no longer any numbers listed for the Lead Hands, Operators, or Inspectors.

**[32]** Mclvor provided further detail in relation to some of these changes. As for the Lab Tech position, Mclvor confirmed that Yanko had worked as a Lab Tech until she was promoted into the Lab Analyst position. Yanko had already been performing aspects of the Lab Analyst role and so it made sense to officially move her into the position. There are no longer any Lab Techs working at Verdient. There are now more Inspectors than there were previously. In addition to these changes, a home craft room has opened.<sup>1</sup> “Home craft” is involved in the production of human grade flour, a highly competitive business with worldwide potential and significant product development.

**[33]** Mclvor reviewed the Inspector job description and confirmed that it was an accurate reflection of the responsibilities and accountabilities of the position. Inspectors act as management’s “eyes and ears” to ensure that policies and procedures are being followed. The expectation is that, if the concern is minor, Inspectors can document the problem and conduct a re-training for the relevant employee. If they are not comfortable with proceeding in that fashion, they can report their concern up the chain. The Inspectors have in the past been asked by the Lead Operator not to report non-conformances. When the Inspectors reported this to management personnel, management decided to implement rotating shifts to prevent the development of close, potentially conflictual relationships. Inspectors work in shifts, generally with one Inspector on shift at a time.

**[34]** Mclvor reviewed the responsibilities and accountabilities listed in the Lab Analyst job description, and tentatively confirmed that Yanko would have been performing all of those duties as of February, 2019. She offered, however, that the head of the QA/QC Department would be better equipped to confirm the details of Yanko’s roles and responsibilities.

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<sup>1</sup> Mclvor used the word “room” rather than “department” to describe the new home craft area.



[35] Mclvor was asked whether she had viewed a copy of the Lab Tech job description. She offered that she had searched for the job description, but could find no such description saved on the available drive. Mclvor explained further that all of the Lab Techs had been hired before she commenced her employment with Verdient, and have clearly reviewed the descriptions during their hiring process, even though she has not.

[36] During their shifts, Lab Techs and Lab Analysts are free to visit the production floor but, due to their specific responsibilities, are generally found in the lab. Technically, the Inspectors report to the Lab Techs. As for the Inspectors and the Lab Analyst, the reporting structure is the same. Inspectors interact with Lab Analysts or Lab Techs almost hourly.

[37] Lab Techs and Lab Analysts have access to the lab drive. They also prepare Certificates of Analysis. The Operators and Lead Hands do not have access to these certificates, as they contain the composition of the starch and protein.

#### **Amanda Barbosa [“Barbosa”]**

[38] Barbosa has been working at Verdient for a little over two years. She is employed as the QA/QC Department Coordinator. As the head of the QA/QC Department, Barbosa is charge of process verification and product food safety. She is also in charge of audits and ensuring smooth customer communication. She reports to the General Manager. Although she works in the office at most times, she can be found in the lab and on the production floor daily, working to ensure that things are running smoothly.

[39] Barbosa described the functions of the Inspectors. Inspectors test samples from the production floor, ensure that the samples meet specifications, and instruct the Lead Hands and Operators on necessary changes to the machine parameters. The management team is not on the floor at all hours, and so the Inspectors act as their “eyes and ears”, monitoring compliance with policy and procedure. Inspectors independently investigate non-conformances so that they can mitigate them. In the event of non-compliance, the Inspectors are expected to approach the guilty party to discuss, and record if an action is taken. If they are unable to solve the problem independently, for example, if they experience resistance, they raise the issue or communicate corrective actions with Barbosa. Barbosa is not present in the facility at all hours. Inspectors are capable of addressing safety problems or issues with specifications. But when Barbosa receives calls on evenings or weekends, she may provide the Inspectors with a roadmap to resolving the issue.

**[40]** Inspectors understand the process of the plant, and so are able to investigate issues of contamination and mitigate risk, independently, and without permission from Barbosa. Inspectors ensure that the Operators and Lead Hands are completing records correctly and monitor compliance with policies, for example, ensuring that proper attire is worn. They train some of the Lead Hands on aspects of food safety of the plant. Inspectors provide a report via email to Barbosa after every shift, and these reports are relied upon for trending results to allow management to make certain business decisions. Inspectors help Barbosa in revising certain documents, but Barbosa is the final approver.

**[41]** Barbosa testified about the confidential aspect of the work at Verdient. Inspectors' shift reports go to Barbosa and the other Inspectors, only. Access to the lab drive is very restricted. Only the Lab Analyst, the Inspectors, and Barbosa have access. This information can assist an individual in understanding the whole process, which is confidential.

**[42]** Inspectors can generally be found on the production floor. Barbosa speaks with them four or five times daily, over the phone, and two or three times weekly, in person. They discuss with Barbosa any issues that they are unable to navigate themselves.

**[43]** Barbosa explained how it came to be that Yanko was moved into the Lab Analyst position. Cao was the first Lab Tech at Verdient. When Yanko was hired as a Lab Tech, Cao was moved into the Analyst role. When Cao left the company, Yanko approached Barbosa about filling Cao's position, but was informed that she was not ready for the responsibilities. At the time of the Application, Yanko was the only individual working in the lab. About two months ago, it became apparent that Yanko was ready to move into the Analyst role, and she was transitioned accordingly.

**[44]** Barbosa reviewed the Lab Analyst job description. Of the responsibilities and accountabilities listed there, most apply equally to both positions, except:

- a. The requirement to prepare lab trend and results reports for the Inspectors was implemented as an improvement and did not apply to the Lab Techs;
- b. Lab Techs have had a lesser role in the maintenance of the environmental program;
- c. Lab Techs used to advise the Analyst or Barbosa about ordering requirements, but the Lab Analyst now has that responsibility;

- d. The Lab Techs have had a lesser role in keeping track of and ensuring lot numbers are being used correctly;
- e. The Lab Techs have had a lesser role in analyzing laboratory data to see trends or potential problems.

**[45]** Both positions verify if Inspectors are following procedures, safety and cleaning protocols. They have the authority to speak directly to the Inspectors if there is a minor occurrence, but if the matter rises to a more serious level, they raise the issue with Barbosa.

**[46]** Barbosa stated that no one reports directly to the Lab Analyst or Lab Tech, and that both positions report directly to her. Both the Lab Analyst and the Lab Tech work mainly in the lab but can be found on the production floor once daily. On a daily basis, the Lab Analyst interacts with shipping and receiving, as well as the Inspectors. On a daily basis, the Lab Tech interacts with production to some degree, shipping and receiving, and the Inspectors. Once daily, both positions attend to the office to update Barbosa.

**[47]** Barbosa explained some of the discrepancies between the two organizational charts and the description of the bargaining unit in the within Application. The Plant Supervisor, who has also been referred to as the Production Supervisor, supervises the Lead Hands and Operators. The terms “plant” and “production” amount to the same thing. The management position listed on the latest organizational chart as “Operations Manager” is the same as the previously listed position, “Plant Manager”. Finally, while there are still four Inspectors at Verdient, there has been some turnover. For instance, Lapointe is no longer an employee with Verdient; and Wagenaar moved into the Technician role.

**[48]** On cross, Barbosa confirmed that none of her direct reports have the authority to “write up” other staff or suspend them for non-compliance. Operators may also report an observed non-compliance, but it is not their responsibility to do so. According to Barbosa, this sets the Inspectors apart. If anyone observes a problem with production, there is an expectation that they will report the observation, as a part of the Verdient team, but this expectation to report does not translate into a core responsibility.

**[49]** When there is a problem with an employee in her department, Barbosa has decision-making authority, but likes to keep the General Manager informed and so generally seeks input from him. Barbosa confirmed that the management team, in one form or another, has authority for disciplining and terminating employees, making decisions about conditions of employment,

making plans for the company and the respective department, and making choices about wages and benefits. Department heads assign work, assign schedules and overtime, and appraise work and conduct merit assessments.

**[50]** Everyone in the company signs a confidentiality agreement.

**Argument of the Parties:**

**[51]** The Union argues that the Employer has not met its evidentiary burden in relation to either of the proposed categories of exclusions, being the supervisory employee exclusion or the confidentiality exclusion. As for supervisory employees, none of the proposed positions have as their primary purpose the supervision of employees, nor do they perform any of the duties enumerated in the supervisory employee definition. Likewise, none of the positions are suitably managerial in character, being inconsequential to the labour relations dynamic in the workplace.

**[52]** Managerial exclusions must be made on a narrow basis, taking into account the legislative and constitutional protections for collective bargaining. Despite the Employer's urging, the Union has come across no examples of the Board reaching the conclusion that the existence of trade secrets or intellectual property justify excluding an individual from a bargaining unit on the basis of confidentiality. An employee's responsibility to respect the confidentiality of trade secrets has nothing to do with collective bargaining. If the Employer's arguments are found to support a confidentiality exclusion, this finding will invite employers to manipulate the managerial exclusions to serve their own purposes.

**[53]** The Employer disputes the appropriateness of the bargaining unit, and contends that four positions should be excluded, being the Inspectors, the Technicians, the Lab Techs, and the Lab Analysts. The importance of excluding the disputed positions is understood with the benefit of context. Verdient's fractionation process is highly technical and operates within an exceptionally competitive industry. The QA/QC Department is charged with ensuring the quality and integrity of the company's product and ensures that employees are complying with processes, procedures and policies.

**[54]** The Employer suggests that the Union bears the onus to prove on a balance of probabilities that it should be certified as the exclusive bargaining agent for the proposed unit. The Board must be satisfied that the proposed unit is appropriate. The highly specialized nature of Verdient's operations cannot be compared with all-employee units at flour or oat mills. There

is no community of interest between the QA/QC Department and the Production and Maintenance Departments. There is an inherent conflict between the disputed positions and undisputed positions and it is necessary to exclude the disputed positions to address that conflict.

### Relevant Statutory Provisions:

[55] The following provisions of the Act are applicable:

#### **Interpretation of Part**

**6-1(1)** In this Part:

(a) **“bargaining unit”** means:

(i) a unit that is determined by the board as a unit appropriate for collective bargaining; or

(ii) if authorized pursuant to this Part, a unit comprised of employees of two or more employers that is determined by the board as a unit appropriate for collective bargaining;

...

(h) **“employee”** means:

(i) a person employed by an employer other than:

(A) a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character; or

(B) a person 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 the person would be included in as an employee but for this paragraph:

(I) labour relations;

(II) business strategic planning;

(III) policy advice;

(IV) budget implementation or planning;

(ii) a person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining; and

(iii) any person designated by the board as an employee for the purposes of this Part notwithstanding that, for the purpose of determining whether or not the person to whom he or she provides services is vicariously liable for his or her acts or omissions, he or she may be held to be an independent contractor;

and includes:

(iv) a person on strike or locked out in a current labour-management dispute who has not secured permanent employment elsewhere; and

(v) a person dismissed from his or her employment whose dismissal is the subject of any proceedings before the board or subject to grievance or arbitration in accordance with Subdivision 3 of Division 9;

...

(o) **“supervisory employee”** means an employee whose primary function is to

supervise employees and who exercises one or more of the following duties:

- (i) independently assigning work to employees and monitoring the quality of work produced by employees;
  - (ii) assigning hours of work and overtime;
  - (iii) providing an assessment to be used for work appraisals or merit increases for employees;
  - (iv) recommending disciplining employees;
- but does not include an employee who:
- (v) is a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs;
  - (vi) acts as a supervisor on a temporary basis; or
  - (vii) is in a prescribed occupation;

...

**Right to form and join a union and to be a member of a union**

- 6-4(1)** Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.  
**(2)** No employee shall unreasonably be denied membership in a union.

**Determination of bargaining unit**

**6-11(1)** If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:

- (a) if the unit of employees is appropriate for collective bargaining; or
  - (b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.
- (2)** In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.
- (3)** Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.
- (4)** Subsection (3) does not apply if:
- (a) the employer and union make an irrevocable election to allow the supervisory employees to be in the bargaining unit; or
  - (b) the bargaining unit determined by the board is a bargaining unit comprised of supervisory employees.
- (5)** An employee who is or may become a supervisory employee:
- (a) continues to be a member of a bargaining unit until excluded by the board or an agreement between the employer and the union; and
  - (b) is entitled to all the rights and shall fulfil all of the responsibilities of a member of the bargaining unit.
- (6)** Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.

**Proceedings not invalidated by irregularities**

**6-112(1)** A technical irregularity does not invalidate a proceeding before or by the board.

*(2) At any stage of its proceedings, the board may allow a party to amend the party's application, reply, intervention or other process in any manner and on any terms that the board considers just, and all necessary amendments must be made for the purpose of determining the real questions in dispute in the proceedings.*

*(3) At any time and on any terms that the board considers just, the board may amend any defect or error in any proceedings, and all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*

## **Analysis:**

### **Preliminary Issue - Amendments:**

**[56]** Both the Union and the Employer rely on section 6-112 of the Act to request amendments to their respective pleadings. The Union seeks amendments to the proposed bargaining unit on the basis of the evidence that was presented during the hearing. All of the Union's requested amendments pertain to the exclusions from the proposed unit, and may be described as follows:

- a. Removal of reference to the Maintenance Supervisor position, which no longer exists;
- b. Removal of reference to the Office Administrator position, which no longer exists;
- c. Change in terminology from Production Supervisor to Plant Supervisor;
- d. Exclusion of the Accounting Clerk;
- e. Exclusion of all supervisory employees.

**[57]** As for the Employer, in addition to the Accounting Clerk, the Employer seeks exclusions for the Laboratory Analyst and the Technician. The Technician position has been created since the filing of the Application. The Lab Analyst position has been in existence, although not consistently filled, for at least a year. If the Employer had wanted to exclude the Lab Analyst position, it had plenty of time to alert the Union to its intention. Neither the Lab Analyst nor the Technician positions were included on the list provided by the Employer in relation to the within Application or in relation to the federal application.

**[58]** The amendments requested by the Union are either necessary to determine the real questions in dispute or are relatively minor amendments reflecting the quality of information received by the Union about the composition of the workplace. That information was primarily in the possession and control of the Employer, and was at times incomplete, inaccurate, and disclosed in a less than timely manner. Furthermore, the majority of the Union's amendments are necessary consequences of the evidence that arose throughout the hearing. In the case of supervisory employees, the requested amendment is necessary to comply with the statutory

requirement to exclude supervisory employees from bargaining units in newly certified workplaces. For these reasons, the Board finds that it is appropriate to grant the requested amendments to the Union's Application.

**[59]** The Employer's amendments are not equivalent. The Employer asks that the Board exclude two positions that came to the Union's attention either during the hearing proper or shortly before. The Union argues that that Employer has violated the statutory freeze by changing terms and conditions of employment since the filing of the Application. The Union also argues that, if this requested is granted, it could create an unfairness for the Union, who was unprepared to fully respond to the exclusion requests. The Board shares this concern. On the other hand, the Employer has suggested that the Lab Analyst and Technician positions are substantially similar to the Lab Tech and the Inspector, about which the Union has had plenty of notice. For this latter reason, the Board will grant the request to amend the Employer's Reply. This concession is not intended to be a conclusion or an analysis of the issue pertaining to the statutory freeze, but strictly a determination for the purposes of determining the real questions in dispute on this Application.

**[60]** Both parties requested that their pleadings be amended to exclude the Accounting Clerk. Clearly, both parties wish that the Board exclude this position from the proposed bargaining unit, and so it is appropriate to grant this requested amendment.

**Onus of Proof:**

**[61]** The Union bears the onus on the Application, such that it is required to demonstrate, on a balance of probabilities, that it should be certified as the exclusive bargaining agent for the proposed bargaining unit. To satisfy this burden, the Union is required to present evidence that is "sufficient clear, convincing, and cogent".<sup>2</sup>

**[62]** At the outset of the hearing, the Board addressed a disagreement between the parties about the appropriate order of evidence. The Union suggested that the Employer was required to proceed first, by laying the foundation for the exclusions that it was seeking. The Employer disagreed with the Union's suggested approach, citing *Workers United Canada Council v Amenity*

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<sup>2</sup> *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41 at paras 46 and 49, as cited in *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v Energy Crane Service*, 2018 CanLII 91958 (SK LRB) ["Energy Crane"] at para 10.



*Health Care LP*, 2018 CanLII 8572 (SK LRB) [*"Amenity Health Care"*], at para 59, in support of its position that the Union should proceed first:

*[59] This Board concurs with the Board's analysis in Wheatland Regional Centre. It is important to clarify the difference between the burden of proof and the onus. It cannot be denied, as asserted by Amenity, that the Union bears the legal burden of proof to establish on a balance of probabilities the proposed unit is an appropriate one for collective bargaining purposes. However, if an employer contests the composition of a proposed unit on the basis for example, that some individuals function as managers or, as in this case, qualify as supervisory employees, then the evidential burden or onus, as opposed to the legal burden of proof, shifts to the employer to present evidence supporting its argument for exclusion. Notwithstanding this shift in the evidentiary onus, the over-arching burden of proof in a certification application remains upon the union.*

**[63]** The Board considered the parties' respective arguments and directed the Union to lead evidence first, followed by the Employer. The Union was aware of the exclusions sought by the Employer, to the extent that said exclusions were articulated in the Employer's Reply. If anything unusual or unanticipated arose in the course of the Employer's evidence, the Union would have the opportunity to apply to present evidence in reply. As it turned out, the Union took advantage of this opportunity after hearing the evidence about the composition of the workplace.

**[64]** While the significance of an evidentiary burden can at times be perplexing, it may assist the parties to review the following passages from Sopinka et al., *The Law of Evidence in Canada*, 5<sup>th</sup> ed, Markham: LexisNexis Canada, 2018:

**3.7** *The term "evidential burden" means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue. [...]*<sup>3</sup>

[...]

**3.26** *A major source of confusion is the failure to describe the effect of the satisfaction of an evidential burden. A party who has the evidential burden must point out the evidence on the record or adduce evidence to the satisfaction of the trial judge. The party who has an evidential burden is not required to prove a fact or issue either on a balance of probabilities or beyond a reasonable doubt. In this sense, "the discharge of an evidential burden proves nothing – it merely raises an issue."*<sup>4</sup>

**5.37** *The defendant may be able to satisfy her or his evidential burden by pointing to evidence in the plaintiff's case, by cross-examining witnesses called by the plaintiff, or by adducing evidence as part of her or his case. [...]*<sup>5</sup>

[citations omitted]

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<sup>3</sup> Sopinka et al., *The Law of Evidence in Canada*, 5<sup>th</sup> ed, Markham: LexisNexis Canada, 2018 at 94 [*"Sopinka"*].

<sup>4</sup> *Ibid* at 104

<sup>5</sup> *Ibid* at 210.

[65] While the Employer has the evidential burden to present evidence supporting its argument for the proposed exclusions, the legal burden of proof in a certification application remains with the Union. On this basis, the parties proceeded to present evidence in the order as directed by the Board.

### **Applicable Principles:**

#### ***Appropriateness of Bargaining Unit:***

[66] The principle question on a certification application is whether, pursuant to section 6-11 of the Act, the proposed unit of employees is appropriate for collective bargaining. In addressing this question, the Board does not ask whether the proposed unit is the most appropriate bargaining unit available, but rather, whether it is an appropriate bargaining unit.<sup>6</sup> It is not for the Board to query whether a better or more appropriate bargaining unit could potentially be created.

[67] In determining whether a unit is appropriate, the Board may include or exclude persons in the unit proposed by the Union, pursuant to subsection 6-11(2) of the Act. Under-inclusive units are, in many cases, considered non-viable and inappropriate for purposes of collective bargaining. To ensure that it is upholding the purposes of the Act, the Board has a preference for “larger, broadly based units”,<sup>7</sup> a preference that was aptly explained by the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v O.K. Economy Stores (A Division of Westfair Foods Ltd.)*, [1990] Fall Sask Labour Rep 64 [“O.K. Economy”], at page 66:

*In Saskatchewan, the Board has frequently expressed a preference for larger and few bargaining units as a matter of general policy because they tend to promote administrative efficiency and convenience in bargaining, enhance lateral mobility among employees, facilitate common terms and conditions of employment, eliminate jurisdictional disputes between bargaining units and promote industrial stability by reducing incidences of work stoppages at any place of work [..]*

*This does not mean that large is synonymous with appropriate. Whenever the appropriateness of a unit is in issue, whether large or small, the Board must examine a number of factors assigning weight to each as circumstances arise.<sup>8</sup>*

[68] In *North Battleford Community Safety Officers Police Assn. v North Battleford (City)*, 2017 CanLII 68783 [“North Battleford”], the Board cited and relied on *O.K. Economy* for its enumeration

<sup>6</sup> *CUPE v Northern Lakes School Division No 64*, [1996] SLRBD No 7, [1996] SLRBR 115, as cited in *North Battleford v City of North Battleford*, 2017 CanLII 68783 (SK LRB) [“North Battleford”] at para 55.

<sup>7</sup> *North Battleford* at para 56.

<sup>8</sup> *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v O.K. Economy Stores (A Division of Westfair Foods Ltd.)*, [1990] Fall Sask Labour Rep 64 at 66, as cited in *North Battleford* at para 56.

of certain, relevant factors to consider in determining whether a proposed unit is appropriate for purposes of collective bargaining:

*57 Third, this Board has identified, and regularly applied, a number of relevant factors, of which size of the proposed unit is but one, to determine whether the proposed unit is an appropriate unit for purposes of bargaining collectively with the employer. Those factors were helpfully enumerated in O.K. Economy as follows, again at page 66:*

*Those factors include among others: whether the proposed unit of employees will be able to carry on a viable collective bargaining relationship with the employer; the community of interest shared by the employees in the proposed unit; organizational difficulties in particular industries; the promotion of industrial stability; the wishes or agreement of the parties; the organizational structure of the employer and the effect that the proposed unit will have upon the employer's operations; and the historical patterns of organization in the industry.*

*The Board recognizes that there may be a number of different units of employees which are appropriate for collective bargaining in any particular industry.*

**[69]** Under-inclusive units will be found to be inappropriate in certain circumstances, outlined in the seminal Saskatchewan case, *Graphic Communications International Union, Local 75M v Sterling Newspapers Group, a Division of Hollinger Inc.*, [1998] SLRBD No 770, at 780:

*From this review of cases, it would appear to the Board that under-inclusive bargaining units will not be considered to be appropriate in the following circumstances: (1) there is no discrete skill or other boundary surrounding the unit that easily separates it from other employees; (2) there is intermingling between the proposed unit and other employees; (3) there is a lack of bargaining strength in the proposed unit; (4) there is a realistic ability on the part of the Union to organize a more inclusive unit; or (5) there exist a more inclusive choice of bargaining units.*

**[70]** The foregoing principles frame the Board's analysis and determination as to whether the proposed unit is appropriate.

**[71]** The Employer suggests that there is no community of interest as between the QA/QC Department and the Production and Maintenance Departments. Due to the highly specialized, technical and confidential nature of Verdient's operations, the inclusion of all of the employees in the same bargaining unit would detrimentally impact Verdient's operations. The Employer points to what it considers to be an inherent conflict between the disputed positions and the undisputed positions, suggesting that this conflict demonstrates the extent to which the proposed bargaining unit is inappropriate.

[72] The Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 496 v Beeland Co-operative Association Limited*, 2018 CanLII 91973 (SK LRB) [“Beeland”] considered the applicability of the community of interest test in the context of an application to amend a certification order. The Board confirmed that the test applies in determining whether a position should be included in a bargaining unit proposed by a union, or in the context of an application for an amendment, in relation to which of two or more bargaining units a disputed position belongs:

[23] *As the Employer pointed out, the question of the applicability of community of interest to determination of this issue has already been decided by this Board. In University of Saskatchewan v. Administrative and Supervisory Personnel Association*, 2007 CanLII 68769 (SK LRB)[7], the Board stated the following:

[29] *In response to the use of the factor of community of interest, the Association stated that such a factor is irrelevant as concerns whether a position should be excluded from all bargaining units, including its own. The Association submitted that “community of interest” is a test of inclusion, that is, its use is restricted to two situations: (i) determining whether, on a certification application, a position should be included in the bargaining unit proposed by a union; or (ii) determining, on an application for amendment, to which of two or more bargaining units a disputed position belongs.*

[30] *We agree with the interpretation advanced by the Union. The community of interest factor has been utilized by the Board to determine, on applications for certification or applications to “add-on” a group of employees to an existing certification order, whether the position in question should be included in the proposed or established bargaining unit (see for example, Centre of the Arts, supra, and St. Thomas More College, supra, cited by the University, both of which involved add-on applications). In Arch Transco, supra, the Board stated at 637:*

[18] *The concept of community of interest among employees is a tool that can be used to assess the viability of a proposed bargaining unit. In Southern Ontario Newspaper Guild Local 87 v. Harlequin Enterprises Ltd., OLRB Rep. 226, the Ontario Labour Relations Board described this relationship, at 232:*

*The question is not “is there a community of interest amongst the employees for whom the union seeks certification?” but “is there a sufficient community of interest amongst those employees for whom certification is sought that the resulting unit is viable for collective bargaining purposes?”. The Board, in effect, assesses whether the bargaining unit sought is viable and viability reflects a sufficient community of interest nexus amongst the employees to sustain collective bargaining. Thus, community of interest is not an independent, mechanical exercise but with (sic) rather, goes to the issue of viability.*

[73] According to the Union, the community of interest analysis is not pertinent to the Employer's objections. The Employer has applied to exclude certain positions on the basis of supervisory or confidential exclusions. The community of interest analysis sets out a test of inclusion, not exclusion. The proposed unit is an all-employee unit. The description of the proposed unit, as an all-employee unit, has not been disputed.

[74] The Board agrees that the community of interest analysis is utilized, on certification applications, to determine whether a position should be included in a proposed unit. But the Board remains charged with determining whether the proposed unit is appropriate for purposes of collective bargaining. As part of that determination, the Board must consider whether there is the requisite community of interest among the employees who are purported to be represented through the proposed unit.

[75] Community of interest goes to the question of viability. It is one factor to be considered when determining whether the unit put forward by the Union is a viable one. The question is whether there is a sufficient community of interest among the proposed employees such that the resulting unit will be viable for collective bargaining purposes.<sup>9</sup> The fact that the Union has applied for bargaining rights in relation to an all-employee unit does not preclude the Board, in theory, from considering whether the employees within the proposed unit share the requisite community of interest.

[76] Nonetheless, the Union's observation is pertinent, in that the Employer has sought exclusions for supervisory and managerial employees. Those exclusions are to be determined by this Board on the basis of specific factors and criteria. The community of interest test applies to the *employees* who are to be represented through the vehicle of the *proposed bargaining unit*. If the Board determines that one or another of the disputed positions meets the supervisory or managerial definitions, then those positions are excluded from the bargaining unit. If they do not meet the criteria of the statutory exclusions, and the proposed unit is otherwise deemed appropriate, they will be included in the unit.

[77] When assessing the appropriateness of a proposed unit, the Board's task is to assess whether the proposed unit forms a sound basis for collective bargaining, taking into account the

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<sup>9</sup> *Beeland*, at para 23, citing *University of Saskatchewan v Administrative and Supervisory Personnel Association*, 2007 CanLII 68769 (SK LRB), at para 30, citing *Communications, Energy and Paperworkers Union of Canada v Arch Transco Ltd.*, [2000] Sask LRBR 633, citing *Southern Ontario Newspaper Guild Local 87 v Harlequin Enterprises Ltd.*, OLRB Rep 226 at 232.

specific circumstances of the case. There is no definitive test for assessing the appropriateness of a proposed bargaining unit, but the Board takes guidance from the factors outlined in the relevant case law, demonstrative of the labour relations purposes of the Act. The Board adopts and applies the factors outlined in *O.K. Economy* and assigns the proper weight to each factor, for purposes of the context of this case.

**[78]** The Board finds that the proposed bargaining unit, being an all-employee bargaining unit, is sufficient for the purposes of the Act. The size of the unit, being an all-employee unit, is not under-inclusive. On the evidence, there is no other, more inclusive unit available. While it is impossible to predict the long-term viability of any unit, the Board finds, in theory, that an all-employee bargaining unit in this workplace is viable.

**[79]** Related to the question of viability, is the assessment of whether there is a sufficient community of interest among the employees in the proposed unit. The evidence discloses that there is significant, regular, and sometimes daily interaction between and among the employees of different departments, including employees of the QA/QC Department and employees of the Production and Maintenance Departments. The repeated characterization of the work environment as a “team environment” is inescapable. The fact that certain employees are privy to confidential information, and others are not, does not detract from the expectation that employees adopt a team approach to working together in order to achieve the common objectives that are set by management.

**[80]** As for historical forms of organization in the industry, little evidence was led as to the organization of the plant protein industry. Olson did mention two milling operations, specializing in flour and oats, that have a history of certifying all-employee bargaining units. The Employer suggests that Verdient could not be compared with these other mills, due to the highly technical and specialized nature of its operations, but led no specific evidence on the precise distinctions with these other mills. The evidence pertaining to this factor was relatively minimal, and lacking in detail, from both parties, and for this reason the Board assigns this particular factor relatively less weight.

**[81]** In assessing the appropriateness of a proposed bargaining unit, the Board may take into account the organizational structure of the Employer and the effect that the proposed unit will have upon the Employer’s operations. The Employer has suggested that the responsibilities of the disputed positions are such that they place the individuals in those positions in an insoluble

conflict with the other non-management positions in the workplace. The inference is that the Employer's organizational structure has developed as a response to the necessary functions of a highly specialized organization, in which the monitoring of compliance with expectations and standards of process, policy, and product, are crucial to the success of the company's overall viability.

**[82]** While this is a relevant factor, the Board must, when undertaking an assessment of this factor, be guided by the labour relations purposes of the Act. The Employer has sought specific exclusions from the bargaining unit. The requisite analysis of the proposed exclusions for managerial positions and supervisory employees present a principled framework for assessing the labour relations consequences of the alleged conflicts, as described. Such a determination is most appropriately made in reference to the tests developed in relation to those statutory exclusions, which the Board will proceed to undertake in the following sections.

**[83]** There was no evidence led on the issue of organizational difficulties in the industry as a whole.

**[84]** In summary, the Board finds that the proposed unit is appropriate for collective bargaining, subject to its further consideration of the disputed positions.

***Supervisory Employee Exclusion:***

**[85]** The Employer seeks an exclusion for the Inspectors and the Technicians on the basis that they satisfy the definition of supervisory employee pursuant to subclause 6-1(1)(o) of the Act. There is no irrevocable election in this case.

**[86]** Supervisory employees are a distinct category under the statutory regime, in that they neither fall within a bargaining unit of non-supervisory employees, nor outside of the protections for collective bargaining for non-employees. The Board in *Amenity Health Care* explained that, for this reason, the interpretative approach to supervisory employees "need not be unduly narrow".<sup>10</sup> Rather, the definition of supervisory employee should be construed in its grammatical and ordinary sense harmoniously with the scheme of the Act. As the Board explains:

*[111] Since "supervisory employees", unlike employees in a managerial capacity, are not deprived of protections under the SEA, including the right to organize and to seek*

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<sup>10</sup> *Amenity Health Care* at para 111.

*certification, the Board's interpretive approach to these provisions need not be unduly narrow. This is consistent with this Board's holding in Saskatoon Public Library<sup>53</sup> in relation to supervisory employees, generally. While it is true that the purpose underlying subsection 6- 11(3) is to avoid conflicts of interest or divided loyalties in the workplace, which is the same as that underlying the managerial exemption, it does not follow that the narrow interpretive approach for determining whether an employee qualifies as a manager should operate when assessing if a disputed employee exercises supervisory functions. The concerns identified in Garda<sup>54</sup>, for example, do not arise with the same stringency. As a consequence, clause 6- 1(1)(o) should be construed in its "grammatical and ordinary sense harmoniously with the scheme of the [SEA]", to quote from Tran.*

**[87]** Nonetheless, the Employer has the evidentiary burden to demonstrate that the positions fall within the definition of supervisory employee.

**[88]** The applicable test was described by the Board in *Amenity Health Care*:

*[112] ... That said, applying the interpretive principles identified above, it is necessary to begin by considering this provision as a whole. It opens by stating that a "supervisory employee" is one whose primary or principal employment function is to supervise other employees, and goes on to identify four (4) "duties" which are functions traditionally performed by supervisors. The SEA definition only requires that the employee in question fulfills one (1) of these four (4) duties in order to qualify as a prima facie "supervisory employee".*

...

*[115] As is apparent such an inquiry involves two (2) stages. The first stage asks whether the primary function of the employee in question is to supervise fellow employees. Second, if the answer to this question is "yes", then it is necessary to determine whether those supervisory duties performed by a team leader are "ancillary" to "the work he or she performs"? The Board undertakes this inquiry below.*

**[89]** At the outset of its inquiry, the Board must consider whether the position's primary function is to supervise employees. This Board observes that in previous, related case law, this Board has sought guidance in this determination by assessing whether the position in question performs one or more of the enumerated duties.<sup>11</sup> This Board will proceed on this basis, subject to the following observations.

**[90]** The Board notes that the two phrases contained in the definition of supervisory employees<sup>12</sup> are "joint and several" conditions precedent to a determination of whether an employee is properly found to be a supervisory employee. These conditions precedent are informative of the existence or application of the other. To explain, an employee who performs

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<sup>11</sup> *Amenity Health Care* at para 116.

<sup>12</sup> That is, "an employee whose primary function is to supervise employees" and "who exercises one or more of the following duties".



one or more of the enumerated functions must perform at least one of those functions as a part of its primary function as a supervisory employee. The following are the four enumerated duties, of which the position must perform at least one:

*(i) independently assigning work to employees and monitoring the quality of work produced by employees;*

*(ii) assigning hours of work and overtime;*

*(iii) providing an assessment to be used for work appraisals or merit increases for employees;*

*(iv) recommending disciplining employees;*

**[91]** The Board will consider each of the enumerated duties in turn.

**[92]** The Board pauses to note that the Employer helpfully summarized its view of the evidence that came before the Board in the course of the hearing. The Board will proceed to consider the evidence, as represented by the Employer, taking care to describe relevant discrepancies it found on its own assessment.

**[93]** To be found to be performing the first enumerated duty, an employee must be found to be independently assigning work to employees and monitoring the quality of work produced by employees. This is a conjunctive duty, as it is a requirement that the position be both assigning work to employees and monitoring the quality of work produced by employees.

**[94]** The Employer's evidence of responsibilities relevant to this first enumerated duty, as summarized in its brief, includes the following:

- a. Monitor employees to ensure they are following correct procedures;
- b. Monitor the quality of work performed by Operators;
- c. An expectation to report to management if a process is not being followed;
- d. Management provides the Inspectors with a list of what needs to be accomplished, and the Inspectors coordinate how to accomplish those objectives during their shift;
- e. Sending daily emails to management at the end of the shift about any issues or non-conformances encountered, including whether any employees failed to follow protocol.

**[95]** Based on these responsibilities, as described, the Inspectors are certainly involved in a degree of monitoring of other employees. There is also some suggestion that they are coordinating the accomplishment of certain objectives. It is not, however, apparent that the Inspectors are assigning work to other employees, whether independent of management or not. As was demonstrated by the Employer's own witnesses, including Barbosa, management is responsible for determining Verdient's objectives and assigning work to employees. Even so, it is not sufficient for assessing the existence of this duty to find that an employee monitors other employees in the workplace. They must also be found to be assigning work. The employees must be both monitoring and assigning work, and those duties must be performed as a part of their primary function.

**[96]** The Employer compared the current case to the decision in *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v Energy Crane Service*, 2018 CanLII 91958 (SK LRB) [*Energy Crane*]. In *Energy Crane*, the Board found that an employee who described himself as the "eyes and ears" of management did not perform the duties of a supervisory employee as contemplated by the legislation.<sup>13</sup> The employee did not have, as primary responsibilities, any duties that might fall into the enumerated list.

**[97]** The Employer states that the Inspectors and Technicians are more than simply the "eyes and ears" of management but also have the primary responsibility of monitoring the quality of work produced by the employees. They oversee the production floor to ensure employees are complying with policies and procedures and when problems arise they are expected to deal directly with Lead Hands and Operators to ensure that the problems are resolved. It may be accurate to say that the Inspectors monitor the quality of work produced by employees, in the sense that they monitor compliance with policies and procedures, but it is not true that they regularly and holistically monitor the employees' overall work performance.

**[98]** Even if the Employer's characterization were accurate, it is not sufficient to have the responsibility to monitor the quality of the employees' work without also having the responsibility to assign work to employees. The Board cannot, on the evidence, conclude that these positions perform the first enumerated duty.

**[99]** The second duty involves the assigning of hours of work and overtime. There is no evidence of the Inspectors or the Technicians performing this duty. If anything, there was

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<sup>13</sup>*Energy Crane* at paras 36 to 39.

evidence that Inspectors approached management with concerns that persuaded management to make changes to the Inspectors' own schedules. None of the witnesses suggested that Inspectors or Technicians assign hours or overtime to other employees at the workplace.

**[100]** The third duty is described as providing an assessment to be used for work appraisals or merit increases for employees. The Inspectors identify and investigate certain issues of process and performance. They are characterized by the Employer as the go-betweens for management and other positions within the workplace. They observe compliance on the floor and report their observations to management for purposes of corrective action. Inspectors do not provide assessments to be used for work appraisals or merit increases. An assessment, for the specific purpose of work appraisals or merit increases, is a more formalized process than the actions undertaken by the Inspectors in this workplace.

**[101]** The last enumerated duty is described as recommending disciplining employees. The Employer suggests that the Inspectors perform this role. As evidence of this, the Employer points to certain evidence, including:

- a. The overall expectation that Inspectors report to management if a process is not being followed;
- b. The observation that Inspectors are the first step in the disciplinary procedure;
- c. Inspectors' responsibility for the identification and investigation of a work performance problem;
- d. Inspectors' reporting function, in reporting those issues to management who may then impose a corrective action. The Employer refers to this as "recommending corrective actions";
- e. Inspectors' responsibility to report to management about non-conformances, including if any employee is not performing properly;
- f. Inspectors' responsibility to make a list of non-conformances, indicating any corrective actions taken in response to those non-conformances, and making recommendations;
- g. The Inspectors' authority to direct the Operators to make adjustments if product quality is not meeting standard;
- h. Inspectors' authority to inform employees if they are breaching protocol and to review relevant expectations with employees;

- i. Inspectors' ability to work with employees to help them make corrections when mistakes are being made. When the mistakes are repeated, Inspectors report to management that they were unable to fix the issue;
- j. The expectation that Inspectors deal with non-conformances or performance issues directly with Operators without referring the matter to Barbosa first;
- k. Inspectors' responsibility to report policy breaches.

**[102]** The evidence discloses that the Inspectors have a reporting function that arises when they observe non-conformances. They also have the ability to speak to employees about their observations, review expectations, and discuss and determine corrective actions. The Employer suggests that the reporting function, which results in management imposing a corrective action, amounts to recommending corrective actions. This reporting function, combined with the ability to determine or even recommend corrective actions, is not equivalent to a duty to recommend discipline for employees. Recommending corrective actions is not equivalent to recommending discipline. Inspectors do not have the function or the ability to issue reprimands, suspend employees, remove privileges, or take any other disciplinary actions against other employees, and it is certainly not the case that recommending discipline is a duty that is performed by Inspectors as a primary function.

**[103]** The evidence discloses that the Inspectors have a greater responsibility for processes and policies than for personnel concerns. Upon observing that a process is not functioning properly, Inspectors can make suggestions to management about improving aspects of the process. When personnel issues arise, on the basis of apparent or repeated non-compliance or under-performance in a particular role, it is up to management to address those issues.

**[104]** The Employer suggests that the Technicians operate on a higher level than the Inspectors but perform similar functions and have substantially similar primary responsibilities. While Wagenaar suggested that she "coordinates" the home craft area, her evidence does not disclose that this coordinating function translates into independently assigning and monitoring the quality of work; assigning hours; providing assessments; or recommending discipline. There is no evidence suggesting that the Technician position performs any of the enumerated functions, differently from the Inspector position, such that it should be considered a supervisory employee.

**Confidential Exclusion:**

**[105]** Pursuant to subsection 6-4(1) of the Act, employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their choosing. This right, as expressed through subsection 6-4(1), guides the Board's determination as to whether to exclude a position on the basis of a managerial exclusion, including on the basis of confidentiality.

**[106]** The Employer argues that the Lab Tech and Lab Analyst positions should be excluded on the basis of their access to confidential data, used for strategic business planning. According to the Employer, access to the data places the individuals in those positions in a conflict with the rest of the proposed unit. In relation to confidential data, the Lab Tech and Lab Analyst positions are substantially similar. Both positions are involved in the handling and analysis of highly confidential material. Both have access to the lab drive. The Lab Tech and Lab Analyst produce and record data that amounts to intellectual property, and certain equipment used by the positions are trade secrets. Management uses the data and trend reports prepared by the individuals working in these positions to make business decisions.

**[107]** In support of this argument, the Employer relies on the Board's decision in *Saskatchewan Institute of Applied Science & Technology v S.G.E.U.*, 2009 CanLII 72366 (SK LRB) ["SIAST"]. In SIAST, the Board outlined the purpose of the confidential exclusion:

*[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.*

**[108]** In *SIAST*, the Board considered the proposed exclusions, on the basis of confidentiality, of the Recruitment and Retention Analyst and the Representative Workforce Consultant. The Board found that both positions were properly outside the scope of the bargaining unit, representing as they did, “internal resources that are necessary and desirable to enable the Employer to make informed and relational decisions regarding industrial relations with the Union”.<sup>14</sup> The Board pointed out that the purpose of the confidentiality exclusion is “to advance and promote collective bargaining and, it does so, by ensuring that the Employer has access to appropriate internal resources, including topic specialists on matters affecting labour relations”.<sup>15</sup>

**[109]** The Employer portrays the reference to “topic specialists” as a pertinent description of the Lab Tech and Lab Analyst positions, being as they are both responsible for collecting data on the quality of the products and the quality of the work performed by employees in developing products and meeting customer specifications. If the data and trending reports indicate that the products are not meeting appropriate specifications, Verdient will have to make business decisions that could directly impact the employment and day-to-day operations of other positions included in the bargaining unit.

**[110]** As the Board observes in *SIAST* at paragraph 5, “it is not so much the confidential or sensitive nature of the information which the disputed position has access to, it is the uses to which that information is being put that places the disputed position within the confidential exemption”. The *SIAST* positions, geared toward recruitment, retention, and accomplishing a representative workforce, researched and worked on issues with a direct impact on labour relations. The impact was clear on the evidence. It was apparent that there was an “insoluble conflict” that would arise as a result of placing those positions in the bargaining unit in issue.

**[111]** The Employer also relies on *Saskatchewan Polytechnic v SGEU*, 2018 CarswellSask 98, 20 CLRBR (3d) 176 [*“Sask Poly”*]. In *Sask Poly*, the Board decided that the Manager, Institutional Research and Analysis, should be excluded from the bargaining unit on the basis of the confidentiality exclusion. The Board found that the analysis of student and related data would impact the Employer’s business operations, and in turn, impact the bargaining unit. The Manager’s analysis of the business data played a key role in the provision of strategic advice to the Employer. The Board found that there was a link between the analysis of student records, and

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<sup>14</sup> *SIAST* at para 74.

<sup>15</sup> *Ibid.*

the potential for altering entrance requirements for a particular program. This, in turn, could have an impact on staffing levels. While the labour relations link described in *Sask Poly* seems more tenuous than the link described in *SIAST*, there is a fundamental distinction between the Board's conclusions in those two cases, and the disputed positions here.

**[112]** In considering whether to exclude the proposed positions on the basis of the confidentiality exclusion, the Board must remember that such a determination amounts to a finding that the proposed position does not qualify as an employee, as defined for purposes of Part VI of the Act. An exclusion on the basis of confidentiality is akin to a managerial exclusion. Managerial exclusions are narrowly defined, interpreted, and applied, because by their nature, they deny access to the protections for collective bargaining available to employees under the Act. These protections should not be interfered with lightly.

**[113]** The Board in *Beeland* described the purpose of the exclusions of positions of a managerial and confidential character:

*[16][...] The Board has stated on numerous occasions the purpose for the exclusion of persons from a bargaining unit in accordance with that definition:*

- *Authority and functions of a managerial character: 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).*
- *Duties of a confidential nature: To assist the collective bargaining process by ensuring that the employer has sufficient internal 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.*

*[17] The parties cited numerous cases that apply this test. A recent decision of this Board, issued after the enactment of the Act, states as follows:*

*The Board has, on many occasions, been required to balance the independence of a union from management influence with the right of those employees to be represented for the purposes of collective bargaining. This Board, like most boards across Canada has taken the view that the exclusion of persons on managerial or confidential grounds should not be granted so liberally as to frustrate the objective of extending access to collective bargaining as widely as possible.*

*[18] In Saskatchewan Institute of Applied Science & Technology v. SGEU, 2009 CarswellSask 897, the Board cautioned, at paragraph 58:*

*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.*

*[citations removed]*

**[114]** Verdient suggests that access to trade secrets and other confidential information places the Lab Tech and Lab Analyst in the type of insoluble conflict contemplated by the legislation due, in part, to the business decisions either made by management or likely to be made by management, on the basis of that information. The Board has to disagree.

**[115]** The confidentiality exclusions serve a labour relations purpose, stated succinctly and precisely by the Board in *Beeland* as follows:

*Duties of a confidential nature: To assist the collective bargaining process by ensuring that the employer has sufficient internal 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.*

**[116]** The Employer, in its brief, states that,

*Verdient likely needs to make business decisions about what the company can change to ensure it is not wasting time and resources in preparing an unsatisfactory product. These business decisions may have a direct impact on the employment and day-to-day operation of other positions that are included within the proposed bargaining unit.<sup>16</sup>*

**[117]** The Employer is required to satisfy its evidentiary burden to demonstrate that the disputed positions should be excluded from the proposed bargaining unit. At best, the Employer's argument amounts to speculation about an undefined and indirect impact on the bargaining unit.

**[118]** The primary duties of the position must be of a confidential nature and have a direct impact on the bargaining unit. This impact must be direct, not indirect. It is not apparent, on the evidence, that the duties of these positions, in relation to any confidential data, have a direct impact on the bargaining unit or place the positions in a labour relations conflict with the rest of the proposed bargaining unit. The positions' duties in relation to the confidential information would not undermine the adequacy of the employer's internal resources to make informed and rational decisions regarding labour relations. At Verdient, labour relations decisions are made by

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<sup>16</sup> *Employer Brief* at para 71.



managers. Neither of these positions are providing confidential information or advice to managers in relation to labour relations, or confidential information or advice that would have a direct impact on the bargaining unit in relation to labour relations, as a regular part of their responsibilities. If these positions are placed in the bargaining unit, doing so will have no measureable impact on the Employer's ability to proceed to make informed and rational decisions regarding labour relations in an atmosphere of candour and confidence.

**Conclusion:**

**[119]** Accordingly, the Board concludes that the Employer has failed to meet its evidentiary onus to demonstrate that the disputed positions fall into either of the supervisory employee definition or the confidentiality exclusion. Furthermore, the Board has no reason to depart from the parties' wishes to exclude the Accounting Clerk position, based on the evidence.

**[120]** There are no necessary amendments to the voters list. Marina Tim, who is working as the Accounting Clerk, was previously subject to the exclusions requested by the Union, and so was not included in the Notice of Vote.

**[121]** The Board makes the following Orders pursuant to sections 6-11, 6-12, and 6-103 of the Act:

- a. That the following unit qualifies as an appropriate bargaining unit:

*All employees employed by Verdient Foods Inc. in Vanscoy, Saskatchewan excluding the General Manager, Operations Manager, QA Coordinator, Controller, Plant Supervisor, Maintenance Coordinator, Accounting Clerk, Supervisors, and any employee above the rank of manager.*

- b. That the ballots held in the possession of the Board Registrar pursuant to the Direction for Vote issued on March 4, 2019, in the within proceedings be unsealed and the ballots contained therein tabulated in accordance with *The Saskatchewan Employment (Labour Relations Board) Regulations*.
- c. That the results of the vote be placed into Form 21, and that form be advanced to a panel of the Board for its review and consideration.

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

**DATED** at Regina, Saskatchewan, this 29th day of July, 2019.

**LABOUR RELATIONS BOARD**

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Barbara Mysko  
Vice-Chairperson