UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 8933, APPLICANT v SASKATCHEWAN MUTUAL INSURANCE COMPANY, RESPONDENT

LRB File No 055-17; April 5, 2019
Vice-Chairperson, Barbara Mysko; Board Members: Bettyann Cox and Joan White

Counsel for the Applicant Union:	Heather M. Jensen
Counsel for the Respondent Employer:	Kevin C. Wilson, Q.C. and Carolyn Wilson

Unfair Labour Practice – Unit is an "all-employee" bargaining unit – New position automatically in bargaining unit unless agreement or order from the Board – Board finds that the Employer refused or failed to bargain pursuant to clause 6-62(1)(d) of *The Saskatchewan Employment Act* – Board declines to make a determination as to whether the position fits into managerial or confidential exclusions.

Unfair Labour Practice – Remedy – Board applies usual remedy which is to place parties in the position that they would have been in, had the failure to bargain in good faith not occurred – Board declares position is in-scope unless and until agreement or order of the Board.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On March 24, 2017, the United Steelworkers, Local 8933 (the "Union") filed an unfair labour practice application (the "Application") against Saskatchewan Mutual Insurance Company (the "Employer"), relying on clause 6-62(1)(c) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1. In its Application, the Union alleges that the Employer created and posted a new position (the "IT Supervisor" or "Position") and unilaterally declared that it was out-of-scope. On April 3, 2017, the Employer filed its Reply to the Application.

[2] The hearing of this Application took place on July 26 and 27, 2017 before then Vice-Chairperson Graeme Mitchell and panelists Bettyann Cox and Joan White. Vice-Chairperson Mitchell was appointed as a Judge of the Court of Queen's Bench on September 21, 2018. The parties agreed that this matter could be concluded by either the Chairperson or the incoming Vice-

Chairperson listening to the recording of the hearing and then issuing this decision in conjunction with the other members of the panel.

[3] Both the Union and the Employer have filed Briefs of Law in support of their respective arguments. In their briefs and in oral argument, counsel for the parties have relied upon clause 6-62(1)(d) of *The Saskatchewan Employment Act,* which reads:

> ***Unfair labour practices – employers***
> *6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
> *. . .*
> *(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;*

[4] The Board has reviewed the materials filed and has found them helpful. In light of the parties' submissions, the Board has considered and decided this Application on the basis of clause 6-62(1)(d) of *The Saskatchewan Employment Act*.

Onus of Proof:

[5] The onus of proof on an unfair labour practice application lies with the Union.[1] On this Application, the Union must demonstrate, on a balance of probabilities, that the Employer failed or refused to engage in collective bargaining with representatives of the Union pursuant to clause 6-62(1)(d) of *The Saskatchewan Employment Act*. The evidence presented must be "sufficiently clear, convincing and cogent".[2]

[6] Under clause 6-62(1)(d), "anti-union animus" is not a necessary precondition to the Board finding an unfair labour practice.

Facts:

[7] The Union is certified as the bargaining agent for all employees of the Employer except specified exclusions, as set out in Board Order dated November 4, 1970 ("Certification Order"):

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[1] See, for example, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 496 v Beeland Co-operative Association Limited*, 2018 CanLII 91973 (SK LRB); *Button v United Food and Commercial Workers, Local 1400*, 2011 CanLII 100501 (SK LRB), at para 62.

[2] See, for example, *R.W.D.S.U. v Sakundiak Equipment*, 2011 CarswellSask 756, [2011] SLRB No 28, 205 CLRBR (2d) 139; *United Food and Commercial Workers, Local 1400 v Calokay Holdings Ltd*., 2016 CanLII 74282 (SK LRB); *Elmwood Residences Inc. v SEIU-West*, 2018 CanLII 38247 (SK LRB) citing *F.H. v McDougall, 2008 SCC 53 (CanLII)*, [2008] 3 SCR 41, at paras 46, 49 per Rothstein J.

The Labour Relations Board…hereby makes an order:

(a) Determining that all employees of the Saskatchewan Mutual Insurance Company, except the general manager, secretary-treasurer, chief accountant, private secretary to the general manager, private secretary to the chief underwriter, claims manager, chief underwriter, inspectors and a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, employed in the City of Saskatoon, in the Province of Saskatchewan,

are an appropriate unit of employees for the purpose of bargaining collectively;

[8] The parties have negotiated additional exclusions to the bargaining unit, not reflected in the Certification Order. These exclusions are outlined in Article 1 (the "Scope Clause") of the governing Collective Agreement, dated June 1, 2011 to May 31, 2016:

1:01 This Agreement shall apply to all employees of the Saskatchewan Mutual Insurance Company, employed in the City of Saskatoon, in the Province of Saskatchewan, except as stated in Clause 2. The words "Employee" or "Employees" where used in this agreement, shall mean any person or persons covered by this Agreement.

1:02 Excluded from this Agreement shall be any person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, any person who is an integral part of the Company's management or any person who is regularly acting in a confidential capacity in respect of the industrial relations of the Company

-and-

President & C.E.O. *Claims Adjusters*
Vice Presidents *Marketing Reps*
Managers *Payroll & Benefits Administrator*
Supervisors ***Broker Services Coordinator***
Corporate Secretary

[9] The exclusions in bold have been in effect since the Collective Agreement was ratified in 2013.

[10] After the expiry of the Collective Agreement in 2016, the parties made a series of unsuccessful attempts to bargain revisions to the agreement. According to the Union's Application, negotiations ultimately broke down and a successful strike vote was held on December 8, 2016. Following the strike vote, the parties made another attempt at a settlement. At or near the close of negotiations, the Employer made a proposal which was predicated on accepting language that the Union had previously deemed unacceptable, by February 7, 2017.

[11] In its written Application, the Union describes the subsequent events:

> *(a) On or about February 15, 2017, the employer created and posted a new position for the IT department and unilaterally declared the position was out of the scope of the bargaining unit.*
>
> *(b) Currently, the employer's Information Technology Department is comprised of (3) three in scope Information Technology Analyst II positions and (1) one out of scope Technical Supervisor.*
>
> *(c) The union says none of the job duties of the new Information Technology Supervisor are managerial, and none of the duties of this position require placing the position out of scope of the current collective agreement.*
>
> *(d) The union says that this position was created to ensure that the employer had access to an out of scope employee capable of performing the duties normally performed by the IT Analyst Level II positions in the event of strike activity.*
>
> *(e) The union says that, in creating the new Information Technology Supervisor position and unilaterally declaring it to be out of scope, the employer has moved an in scope position out of scope without the union's prior agreement.*
>
> *(f) The union says the employer is not entitled to act unilaterally by assigning a position out of scope of the bargaining unit without obtaining the agreement of the union or an order from the Board.*
>
> *(g) The union says when the employer purported to unilaterally create a new out of scope position in absence of agreement or an order of the Board, the employer is in violation of its duty to bargain collectively pursuant to section 6-62(1)(c).*
>
> *(h) The fact that the position is named "Information Technology Supervisor" is not determinative of the issue of whether it is included in the bargaining unit.*

[12] The Employer denies the Union's allegations. The Employer states that it was permitted to place the IT Supervisor position out-of-scope pursuant to the Scope Clause. The Employer also puts forward alternative arguments, specifically:

> (a) the Position is properly excluded from the bargaining unit being that its primary responsibility is to exercise authority and perform functions of a managerial character pursuant to section 6-1(l)(h)(i)(A) of *The Saskatchewan Employment Act*;
>
> (b) the Position is properly out-of-scope being that it involves activities that are of a confidential nature relating to labour relations, business strategic planning, policy advice or budget implementation or planning pursuant to section 6-1(l)(h)(i)(B) of *The Saskatchewan Employment Act*; and/or

(c) the Position is properly excluded as it is a supervisory employee as defined by section 6-1(l)(o) of *The Saskatchewan Employment Act*.

[13] The Employer further denies that by creating the IT Supervisor position it had moved an in-scope position out of the scope of the bargaining unit.

[14] In May 2017, the Union filed (3) three grievances in relation to the IT Supervisor position, alleging that the incumbent was performing in-scope duties. The Employer objected to the Union bootstrapping the grievances through this Application.

Witnesses:

[15] The Board heard from (3) three witnesses – (2) two Union witnesses and (1) one Employer witness. The parties entered numerous exhibits through the witnesses, all of which the Board has reviewed prior to preparing these Reasons.

[16] (2) Two of the witnesses described the roles and responsibilities of the IT Supervisor position. This testimony goes to the necessity of excluding the IT Supervisor position from the bargaining unit on the basis of confidential or managerial duties. For the reasons as described in this decision, the Board has found that it is not appropriate to make a determination as to whether the Position is excluded on either of these bases. It is therefore unnecessary to recite this evidence in the Reasons.

Neil Vogel:

[17] Neil Vogel (“Vogel”) was the Union’s first witness. Vogel had been working as an IT Analyst II in the IT Department since December 2013. He had recently resigned. As an in-scope employee, Vogel was a member of the union, and had previously served as recording secretary, and then Executive Vice-President (since May 2017). As of April 2016, Vogel had also become a first-time member of the bargaining team.

[18] According to Vogel, the IT Department oversees IT security, operates and manages server infrastructure, provides end user support for others in the office, and is responsible for maintaining communications. The Department also makes purchases of necessary capital equipment and provides occasional back-up for the Broker Services Coordinator. A significant portion of the IT Department's work relates to an enterprise operating system named Odyssey. The IT Department is responsible for formulating solutions to problems that arise within the system. After Odyssey was introduced, there was a marked increase in the workload of the IT Department.

[19] The IT Department is now and has historically been a small department. As of February, 2017, the IT Department consisted of (3) three IT Analyst IIs and (1) one Vice-President. Vogel was openly concerned about the Department's workload. For that reason, he had recommended that the Employer hire an IT Analyst I to allow the rest of the team to focus on more complicated projects.

[20] On February 15, 2017, an IT Department meeting was held. It was there that the Vice-President, Technology and Corporate Secretary, Kerri Heuchert ("Heuchert") announced the creation of the IT Supervisor position. According to Vogel, Heuchert had "referenced that it was going to be a management position" and "it was assumed that it was out-of-scope". Heuchert suggested that the IT Supervisor position would permit her to accomplish more senior management work. The posting for the position went up later that day.

[21] According to Vogel, the Union was not consulted about placing the Position out-of-scope. Nor did it agree. On cross-examination, Vogel acknowledged that he learned of a position during a bargaining session, at which time he assumed that said position, whatever it was, was out-of-scope.

[22] When asked, Vogel spoke candidly about his interest in applying for the IT Supervisor position. Vogel felt that it would be unethical to apply for an out-of-scope position while sitting as a member of the negotiating team, and so he objected to the timing. He wanted the Employer to delay the creation of the Position until such time as everyone "could fairly apply".

[23] Vogel did not apply for the Position, but Matt Leson, an IT Department staff member, did apply and was ultimately successful. His start date, April 3, 2017, was chosen to coincide with the start date for another newly created position, the IT Analyst I, for which Susan Estanislao

("Estanislao") was hired. According to Vogel, the IT Analyst I position had since become the "front end" for end user support and had taken over much of the day-to-day work of the IT Analyst IIs. An IT Support Technician position was created on July 3, 2017 to provide coverage during Estanislao's approaching maternity leave.

[24] On cross, Vogel acknowledged that 45-50 of the existing SMI staff (out of a total of 75) are Union members and that the Union had proposed returning some of the out-of-scope staff to the bargaining unit. Furthermore, while the IT Supervisor position has a small staff complement, it is not the only one. In fact, the Accounting Supervisor has only four positions reporting to it.

[25] Vogel also agreed that the Employer had communicated the following reasons for the creation of the IT Supervisor position: (1) the Position would cover day-to-day management to allow the VP to take a more strategic role in running the department; (2) Odyssey had increased the workload with no accompanying management of the flow of incoming work and the IT Supervisor could act as a gatekeeper; (3) There was a need for a liaison with other departments and for the prioritization of work; (4) There were upcoming multi-year projects that had heavy IT components; and (5) A company risk assessment had identified succession planning as a risk to the company.

[26] Lastly, Vogel acknowledged that the Employer had at one time discussed implementing the IT Supervisor position a year prior to the actual start date.

[27] Vogel also described the day-to-day work of the IT Supervisor, from his perspective.

Mike Pulak:

[28] Mike Pulak ("Pulak") is a staff representative for the United Steelworkers in the Saskatoon area. He has served in this role since 2009. As a staff representative, Pulak participates in bargaining, training, organizing, and arbitrations. Bargaining takes up approximately 60 to 70% of his time. Pulak was a member of the bargaining team in the most recent round of negotiations.

[29] Pulak testified that he was involved in the prior negotiations resulting in the ratification of the governing Collective Agreement. That round lasted approximately 27 months. He described the negotiations as "by far the most difficult" he had ever negotiated in "10 plus years of over 40

contracts". The parties reached resolution, but only after the Employer had served the Union with notice of a potential lock-out.

[30] Pulak reviewed the Scope Clause and observed that the exclusions in bold type were implemented with the ratification of the governing Collective Agreement. He claimed that the Union had since been trying to revisit positions not considered "true" supervisors so as to "broaden our footprint" and increase the size of the bargaining unit. He stated that re-opening the Collective Agreement was an opportunity to revisit this issue.

[31] According to Pulak, the Union benefits from the language of Article 14:07 of the CBA, which reads:

> *14:07 In the establishment of new classes or if there is a significant change to the job content of any existing job classes, the Company agrees to negotiate with the Union a rate of pay and a probationary period.*

[32] While Pulak provided his interpretation of this provision, the Board has not relied on this provision in its determination of the Employer's obligation in this case.

[33] According to Pulak, the Employer had not advised the Union that it had intended to create the IT Supervisor position or to reorganize the Employer's workplace. Furthermore, the Employer later created (2) two additional supervisor positions in different departments without prior notice. The Union received notice of the other supervisor positions in mid-March. There was no proposal as to scope on the table at this time.

[34] The Union had not yet filed any grievances as it was "still exploring" and did not "want to file frivolous grievances". Pulak testified that the "Union" believed that the Employer created the IT Supervisor position because the parties had reached an impasse in bargaining. Pulak described the current case as a "test case". He admitted that the Union had submitted no formal objections to the other supervisor positions.

Matt Leson:

[35] Matt Leson ("Leson") accepted the offer of the IT Supervisor position in March 2017, and started in the new role on April 3, 2017. Prior to this time, he had been working alongside Vogel

as an IT Analyst II. At the time of the hearing, Leson had been in the new role for approximately (4) four months. Leson reports directly to the Vice President, Technology and Corporate Secretary, Kerri Heuchert, and supervises a staff of four, for a total department staff of six people. Reporting to Leson is the Information Technology Support Technician, Information Technology Analyst I position, and Information Technology Analyst II positions.

[36] The balance of Leson's testimony was focused on his role and responsibilities as IT Supervisor.

Comment on the Evidence:

[37] Through its cross examination, the Employer elicited information about the expressed business purposes driving the creation of the IT Supervisor position. While interesting, this evidence is not determinative of the questions that are before the Board, that is, whether the Employer had an obligation to bargain and if so, whether it failed or refused to comply.

Relevant Statutory Provisions:

[38] The following provisions of *The Saskatchewan Employment Act* are applicable to this matter:

> ***Interpretation of Part***
> *6-1(1) In this Part:*
> *(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;*
>
> *…*
> *(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.
(7) In making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:
(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and
(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:
(i) the geographical jurisdiction of the union making the application; and
(ii) whether the certification order should be confined to a particular project.

Unfair labour practices – employers
6‑62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:

. . .

(c) to engage in collective bargaining with a labour organization that the employer or a person acting on behalf of an employer has formed or whose administration has been dominated by the employer or a person acting on behalf of an employer;

> *(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;*

> ***General powers and duties of board***
> *6‑103(1) Subject to subsection 6‑97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*
> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
> *(a) conduct any investigation, inquiry or hearing that the board considers appropriate;*
> *(b) make orders requiring compliance with:*
> *(i) this Part;*
> *(ii) any regulations made pursuant to this Part; or*
> *(iii) any board decision respecting any matter before the board;*
> *(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes*
> *of this Act;*
> *(d) make an interim order or decision pending the making of a final order or decision.*

> ***Board powers***
> *6-104(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
> *(a) requiring an employer or a union representing the majority of employees in a bargaining unit to engage in collective bargaining;*
> *(b) determining whether an unfair labour practice or a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board is being or has been engaged in;*
> *(c) requiring any person to do any of the following:*
> *(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;*
> *(ii) to do any thing for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board;*
> *(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;*

Argument on Behalf of the Parties:

Argument: The Union

[39] The Union argues that the Employer has unilaterally created a new position, and placed it out-of-scope in the absence of an agreement or an order, thereby offending the principles set out in *S.G.E.U. v Wascana Rehabilitation Centre*, [1991] 3rd Quarter Sask. Labour Report 56, LRB File No. 234-90 ("*Wascana Rehabilitation*"); *Donovel v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2006 CanLII 62948 (SK LRB) ("*Donovel*"); and *Battlefords and District Cooperative Ltd. v R.W.D.S.U.*, Local 544 (2015), 257 CLRBR (2d) 74

(SK LRB) ("*Battlefords*"). The Union says that the Employer's conduct is a failure or refusal to collectively bargain with the Union pursuant to clause 6-62(1)(d) of *The Saskatchewan Employment Act*, and therefore amounts to an unfair labour practice.

[40] The Union mentions two modifications to the legislative framework, which it says support its argument. First, unlike the predecessor legislation, subsection 6-1(1) of *The Saskatchewan Employment Act* defines "bargaining unit". Second, subsection 6-41(6) states that the *Act* prevails over collective agreements in the event of a conflict. These provisions read as follows:

> ***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;*
>
> ***Parties bound by collective agreement***
> *6-41 (6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails.*

[41] The Union says that the Employer created the Position, advertised it, and filled it while the parties were engaged in collective bargaining. It says that it was created to ensure that the Employer had an out-of-scope position to perform the duties of the IT Department in the event of strike activity. It says further that the Employer provided no notice of the creation of the Position. Whether the Board determines the Position is in-scope or out-of-scope is immaterial to a finding of an unfair labour practice.

[42] Although the Scope Clause clearly excludes "Supervisors", the Union says that the Position did not exist at the time the Collective Agreement was bargained and the Union was not aware if or that the Position was being contemplated. The Employer should not be given "free reign" to exclude any position by naming it "supervisor" or "manager". According to the Union, previous Board decisions support a positive duty to bargain exclusions in relation to an all-employee bargaining unit.

[43] The Union says that it is not asking this Board to revisit the supervisor positions that were in existence when the parties concluded the Collective Agreement in 2013. It says only that it wishes to enforce the Employer's obligation to bargain the creation of new positions.

[44] Finally, the Union says that the Position is not a management or a confidential position in the manner contemplated by *The Saskatchewan Employment Act*. The Union says that, in determining whether the Position is excluded as a non-employee, it is necessary to look beyond job titles and position descriptions and to consider the primary duties and responsibilities performed in the Position. In order to be excluded as a manager, the duties and responsibilities of the Position must place the incumbent in conflict with the bargaining unit such that labour relations and collective bargaining could not function.

[45] Finally, the Union states that the statutory exclusion of supervisory employees does not apply to this case, and in any event, the Position does not meet the definition in *The Saskatchewan Employment Act*.

[46] The Union seeks a declaration that the Employer has committed an unfair labour practice, and a further declaration that the Position is within the scope of the existing bargaining unit, unless and until the parties agree to exclude the Position or unless and until further order of the Board excluding the Position. Lastly, the Union seeks an order requiring the Employer to bargain collectively with the Union.

Argument: The Employer

[47] The Employer maintains that the issues on this Application are straightforward. According to the Employer, the Union has the burden to make out the elements of its Unfair Labour Practice Application, on a balance of probabilities, and has failed to do so.

[48] The Employer says that the bargaining unit is not an "all-employee" unit, as demonstrated by the enumerated exclusions in the Certification Order and Scope Clause. *Battlefords* only applies to "all-employee" bargaining units. The Union misconstrues *Battlefords* by arguing that it applies to this case.

[49] Even if this were an "all-employee" bargaining unit, there is no obligation to bargain a matter that has already been bargained before. The Employer points to the Scope Clause in the

Collective Agreement as a complete answer to the issues raised in this Application. It submits that the Position is one of the agreed-upon exclusions as per the Scope Clause. That should be the end of the matter.

[50] The Employer says that it had no obligation to bargain with the Union for the exclusion of the Position beyond what it had already bargained. The Board has a policy of accepting amendments to the certification order through the collective bargaining process. If the Union prefers that the Position be in-scope, it must bargain the Position back into the bargaining unit or apply to the Board.

[51] In the alternative, the Employer says that the Position is properly excluded under the managerial, confidential and/or supervisory exclusions. First, the Position is properly excluded from the bargaining unit as its primary responsibility is to exercise authority and perform functions of a managerial character. Second, the Position involves activities that are of a confidential nature relating to labour relations, business and strategic planning, policy advice and budget implementation or planning. Third, the Position is a supervisory employee and is therefore properly excluded from the bargaining unit.

[52] The Employer says that there is no evidence that the Position was created to ensure coverage for the IT Department in the event of strike activity.

[53] Finally, the Employer says that the Union is estopped from bringing this Application. It says that the Union had represented to the Employer on more than one occasion that it did not take issue with the Position being out-of-scope. The Union has a pattern of acknowledging or acquiescing to the exclusion of supervisor positions. The Employer says that the Union's inaction in relation to other positions "fundamentally destroys its entire argument".

Jurisdiction:

[54] The Employer says that the Board has jurisdiction to determine whether the employee is properly out-of-scope in the absence of an application to amend the Certification Order.

[55] The Union objects, stating that the Employer's reliance on the Scope Clause raises questions about the Board's jurisdiction. While the Board has jurisdiction to determine whether

the Employer breached the duty to bargain, the Union argues that an arbitrator is the exclusive authority to resolve differences arising out of a collective agreement. Further:

> *The Board has jurisdiction to determine whether the duty to bargain regarding scope of newly created positions has been violated, and further (if the Board decides to deal with the issues raised in the employer's reply where there is not application to do* [sic] *modify the scope of the bargaining unit), whether the position qualifies as an "employee" as defined in the Act.*

[56] The Board will generally defer to an arbitrator when an unfair labour practice application engages issues involving the interpretation of a collective bargaining agreement in relation to which a grievance has also been filed. However, a deferral is by no means automatic. Where an application engages issues of interpretation, the jurisdiction of the Board and an arbitrator under a collective agreement is concurrent. The Board has jurisdiction to consider issues that are incidental to the unfair labour practice application, including the interpretation of the collective agreement.

[57] It cannot be that if a Union files an unfair labour practice application with the Board, on the basis of the Employer's alleged failure or refusal to negotiate, that the Board is barred from considering whether the Scope Clause is determinative of that application. If interpreting the Scope Clause is necessary for determining the application, then the Board should be free to do so, where appropriate.

[58] In the present case, the Board has jurisdiction to consider the Unfair Labour Practice Application before it. To decide whether the Employer failed to bargain, this Board must decide whether the Position was already excluded from the bargaining unit, such that the Employer has no obligation to bargain. The Board also has jurisdiction to consider whether the individual is an employee pursuant to clause 6-104 (2)(i) of *The Saskatchewan Employment Act*.

Analysis:

General Principles

[59] In Saskatchewan, the Board has held that newly created positions in an all-employee bargaining unit remain within the bargaining unit unless excluded by an order of the Board or by

agreement of the parties: *Wascana Rehabilitation*, *Donovel*, *Battlefords*. For shorthand, the Board will refer to this approach as the "*Battlefords* principle" for the remainder of these Reasons.

[60] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 496 v Beeland Co-operative Association Limited*, 2018 CanLII 91973 (SK LRB) ("*Beeland*"), the Board confirmed the process required to be followed. In *Beeland*, the Board cited *Health Sciences Association of Saskatchewan v Unifor*, Local 609, 2015 CanLII 43776 (SK LRB), at paragraph 22:

> *The required steps were clearly set out by the Board in its decision in Donovel (Re). At paragraph 28, the Board outlined those steps as follows:*
>
> 1. *Notify the certified union of the proposed new position;*
> 2. *If there is agreement on the assignment of the new position, then no further action is required unless the parties wish to update the certification order to include or exclude the positions in question;*
> 3. *If agreement is not reached on the proper placement of the position, the employer must apply to the Board to have the matter determined…; and*
> 4. *If the position must be filled on an urgent basis, the employer may seek an interim or provisional ruling from the Board or agreement from the union on the interim assignment of the position.*
>
> *[citation removed]*

[61] In *Donovel*, the Board also noted:

> *[29] An employer is not entitled to act unilaterally by assigning the position as out-of-scope of the bargaining unit without obtaining the agreement of the union or, failing such agreement, without obtaining an order from the Board, or the employer will be in violation of its obligation to bargain collectively under s. 11(1)(c) of the Act[.]*
>
> *[citations omitted]*

[62] An employer is not entitled to act unilaterally by excluding positions. Therefore, in the absence of the aforementioned steps, a position remains in-scope. The employer commits an unfair labour practice by placing a newly created position out-of-scope of an all-employee bargaining unit.

[63] The Employer in the current case argues that the bargaining unit is not an all-employee bargaining unit and, so therefore, *Battlefords* does not apply. The Employer says that the Certification Order lists certain positions that are excluded from the bargaining unit and that this enumeration demonstrates that the unit is not an all-employee unit. The Employer makes a similar

argument in relation to the Scope Clause. The exclusions for "claims adjusters", "marketing reps" and "broker services coordinator" are not managerial and are therefore indicative of something other than an all-employee bargaining unit.[3]

[64] We disagree. The label "all-employee bargaining unit" is a term of art if not a perfect description. Certification orders and scope clauses commonly refer to "all employees" of an employer "except for" specified positions. The enumeration of excluded positions does not transform an all-employee bargaining unit into something other than an all-employee bargaining unit.

[65] This interpretation is supported by the wording of the certification Order at the centre of the *Donovel* case:

> *(a) Determining that all employees employed by Scott National Company Limited in or in connection with its place of business in Regina, in the Province of Saskatchewan, except the District Manager, Warehouse Superintendent, Sales Manager, Salesmen, Manager's Secretary, Paper Division Secretary, the caretakers covered in the Board's certification order in respect of the Building Service Employees' International Union, Local 330 (formerly The Caretakers and Elevator Operators Federal Union No. 175) dated November 6, 1947, and a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity,*
>
> *are an appropriate unit of employees for the purpose of bargaining collectively;*

[66] The Board in *Donovel* characterized the unit as "all-employee" as follows:

> *That is, in workplaces with an "all employee" bargaining unit, such as that in the present case, new positions are automatically within the scope of the bargaining unit unless bargaining with the union results in an agreement that the position is out-of-scope, or application to the Board by the employer results in a decision to the same effect.*[4]

[67] In the Certification Order in the current case, the Board determined that:

> *(a) ... <u>all employees</u> of the Saskatchewan Mutual Insurance Company, except the general manager, secretary-treasurer, chief accountant, private secretary to the general manager, private secretary to the chief underwriter, claims manager, chief underwriter, inspectors and a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, employed in the City of Saskatoon, in the Province of Saskatchewan,*

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[3] The Employer argued that Pulak testified that the bargaining unit was not an all-employee bargaining unit, which the Board has not found on the evidence. Even if this were the case, the definition of the bargaining unit is a determination to be made by this Board.

[4] *Donovel* at para 26.

> *are an appropriate unit of employees for the purpose of bargaining collectively;*
>
> *[emphasis added]*

[68] The wording of the Scope Clause employs similar language to that of the Certification Order, as follows:

> *all employees of the Saskatchewan Mutual Insurance Company, employed in the City of Saskatoon, in the Province of Saskatchewan, except…*
>
> *[emphasis added]*

[69] In this case, the language of the Scope Clause is typical of an all-employee bargaining unit. As *Donovel* makes clear, listing an exclusion or exclusions for non-managerial positions or classifications does not transform a bargaining unit into something other than an all-employee bargaining unit. Nor does the number of excluded positions.

[70] All-employee bargaining units, by presuming inclusion and listing exclusions, seek to avoid the series of amendment applications that result from under-inclusive units. This Board has explained the rational for all-employee bargaining units in *Wascana Rehabilitation*:

> *Assigning new positions into the bargaining unit until the Board orders otherwise is consistent with the Board's practice of placing the onus, in exclusion applications, on the employer. In addition, it coincides with the reasoning which prompted all boards to adopt the "all-employee" description of the bargaining unit over the enumerative or classification list method. One of the critical considerations why the "all-employee" method of unit description replaced the enumerative or classification method was to avoid the endless applications which arose every time the employer re-organized, changed position titles or created new positions. "All-employee" units accommodate these changes without the necessity of an application to the Board. The only time an application to the Board is required is when the employer wishes to have a new position excluded.*
>
> *Finally, assigning new positions into the unit, pending the Board's order, is also consistent with both orderly collective bargaining and the objects and philosophy of The Trade Union Act. It serves the interests of all parties in that it avoids the necessity of an employer having to risk an unfair labour practice in order to have the exclusion issue of a position determined. To countenance an approach that would allow unilateral exclusions from an existing certification order would inevitably lead to industrial instability because if effectively encourages parties to ignore their contractual, as well as their statutory rights and obligations. Where the Board has a choice between to practices: on based upon unilateral action and one based upon respect for the Board's order, until changed in accordance with the provisions of The Trade Union Act, the Board will obviously prefer the latter.*[5]

[5] *S.G.E.U. v Wascana Rehabilitation Centre*, [1991] 3rd Quarter Sask. Labour Report 56, LRB File No. 234-90 at 59.

[71] In all-employee bargaining units, the certification order lists exclusions, not inclusions. In this way, all-employee bargaining units protect bargaining rights by placing the onus on the employer to apply to exclude a position from the unit. In comparison, the "enumerative or classification" approach lists inclusions, not exclusions. In this latter approach, the Union would historically have had to bring an application to the Board whenever it wished to place a position in the bargaining unit. Now, in the context of all-employee bargaining units, the "only time an application to the Board is required is when the employer wishes to have a new position excluded". The exclusion of a position does not transform a bargaining unit into something other than an all-employee bargaining unit.

[72] Having established that the unit in issue is an all-employee bargaining unit, it is necessary to determine whether there is any other reason *not* to apply *Battlefords* to the current case. According to *Battlefords,* newly created positions in an "all-employee" unit remain within the bargaining unit unless excluded by order of the Board or by agreement of the parties. The *Battlefords* approach applies to all newly created positions. In this case, the IT Supervisor is a newly created position. If *Battlefords* applies, then the Employer is required to negotiate.

[73] In considering this question, this Board finds guidance in subsection 6-4(1) of *The Saskatchewan Employment Act*, which states:

> *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.*

[74] The right of employees to form and to choose a union is a central tenant of labour relations. This statutory right is reinforced through the constitutional protection for a meaningful process of collective bargaining providing employees with the degree of choice necessary to enable them to determine and pursue their collective interests.

[75] In its oral argument, the Employer readily acknowledges that it did not negotiate when the Position was created. It says that there is no issue in dispute about whether the Employer did or did not negotiate for the exclusion of the IT Supervisor position because it did not. The Employer says, rather, that it had no obligation to negotiate. In response, the Union says that this fact alone proves that the Employer committed an unfair labour practice.

[76] Given the Employer's acknowledgment, it is unnecessary for the Board to consider whether negotiations over this newly created position actually occurred (after it was created).

[77] Nonetheless, it is worthwhile to consider the content of the duty to bargain. On this point, the Board in *Battlefords* said:

> *[85] The duty to bargain collectively requires that the parties meet and bargain in good faith, making a genuine attempt to find a resolve to their disagreement over the status of this position. However, the duty to bargain collectively does not, as a corollary, require that the parties reach an agreement. They must only try to achieve a resolve to their disagreement.*

[78] The Employer and Union clearly have not met and bargained in a genuine attempt to find a resolve to their disagreement over the status of the Position.

[79] In another vein, the Employer argues that the Position is already excluded from the bargaining unit, as it falls into the "category" of supervisor excluded from the Collective Agreement. The creation of a new position does not negate the Scope Clause. "Even if this was an all employee bargaining unit, the parties have already bargained the exclusion of Supervisors" and "[t]here is no obligation to somehow bargain again".[6]

[80] In support of this argument, the Employer cites this Board in *Battlefords*:

> *58) Wascana has not been overturned or otherwise distinguished by this Board. In Wascana, the Board described two methods whereby a position could be excluded from the bargaining unit. Those were:*
>
> 1. *It may be excluded through the process of collective bargaining;*
> 2. *If attempts at bargaining have failed, it [the employer] can apply for an amendment*
>
> *to the certification order pursuant to section 5(j), (k), or (m) of The Trade Union Act.*

[81] The problem is that the *Battlefords* test is wholly incompatible with the Employer's argument. *Battlefords* is clear that an Employer cannot unilaterally place a newly created position out-of-scope without agreement or an order from the Board. Exclusions should not be treated lightly. The principle underlying the *Battlefords* test protects the integrity of the bargaining unit and the right of employees to bargain collectively.

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[6] *Employer's Brief* at para 49.

[82] The IT Supervisor is a newly created position. The Position was not in existence when the Certification Order was made or when the exclusion was being negotiated in the Scope Clause.

[83] The Position has not been excluded through the process of collective bargaining. While the Employer says that the negotiated Scope Clause "conclusively governs which positions are considered in and out of scope", the Board finds that it does not conclusively govern a supervisor position that was not in existence at the time of ratification. To allow the Employer to unilaterally attach the "Supervisor" label to a position and place it out-of-scope would substantially erode the well-established principle in *Battlefords*.

[84] Furthermore, despite the Employer's assertion to the contrary, the Union's past practice in relation to the other supervisor positions is not determinative. Just because the Union did not object to the Employer placing those positions out-of-scope does not mean that it was not entitled to so object. In light of the *Battlefords* test, it cannot be that this "issue" has "already been dealt with".[7] *Battlefords* applies to newly created positions and the IT Supervisor position is a newly created position.

[85] The following factors further support the Board's decision in this case: (1) There is no Board order excluding supervisors from the bargaining unit; and (2) the IT Supervisor position is the first and only IT Supervisor in the company, and the only supervisor position in the IT Department.

[86] The Employer relies on (3) three cases, all of which were decided prior to this Board's decision in *Wascana Rehabilitation*. The timeframe is relevant because *Wascana Rehabilitation* was "the first opportunity the Board [had] to directly address the issue and delineate its policy".[8]

[87] Citing *Saskatchewan Government Employees Association v Saskatchewan Liquor Board* (1981), 32 Sask LR 37 ("*Saskatchewan Liquor Board*"), the Employer says that the policy of the Board has been to accept negotiated scope clauses where they result in a less inclusive unit than that described in the certification Order. In *Saskatchewan Liquor Board*, this Board relied on *Beverage Dispensers and Culinary Workers Union Local 835 v Terra Nova Motor Inn* (1975), 2 SCR 749, as follows:

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[7] *Employer Brief* at para 46.
[8] *Wascana Rehabilitation* at 60.

> *…Certainly, once a collective agreement has been negotiated, with its specification of employees covered thereby, they become the work force, whether in the same or larger numbers (according to business exigencies) around which the administration of the collective agreement proceeds; and subsequent renewal collective agreements may, as a result of employer business developments or union importunities, or both, vary the job categories which those agreements cover. […]*[9]

[88] *Saskatchewan Liquor Board* must be interpreted and applied in a manner that is consistent with the required process set out and confirmed by the Board in *Wascana Rehabilitation*, *Donovel*, and *Battlefords*. The IT Supervisor was a new position and was not covered by the existing Scope Clause.

[89] The Employer also relies on *Regina General Hospital v C.U.P.E., Local 176* (1988) Fall Sask Labour Rep 35 ("*Regina General Hospital*") as affirmation of *Saskatchewan Liquor Board*, in recognizing and accepting restrictions of scope achieved through collective bargaining. *Regina General Hospital* pre-dates the *Wascana Rehabilitation/Donovel/Battlefords* decisions. Furthermore, it deals with just the kind of scenario that *Battlefords* serves to discourage.

[90] In *Regina General Hospital*, the employer had created an out-of-scope position with duties and responsibilities that were almost identical to those of an in-scope position, and then fit it into an existing exclusion. The employer had essentially re-classified the position and placed it out-of-scope. Given these circumstances, the Board framed the issue as whether the first position (the pre-existing position) which was in-scope, could be removed from the bargaining unit by the employer without negotiation or Board order. The Board found that the position had been within the scope of the unit since 1978, and was not removed from the unit by agreement or in a manner contemplated by the legislation. Instead, "the employer simply unilaterally treated it as being out-of-scope".[10]

[91] The Employer also cites *City of Regina v Regina Civic Middle Management Association and C.U.P.E., Local 21* (1990) Summer Sask Labour Rep 86 ("*City of Regina*"). It is noteworthy that the Board in that case declared that "neither the creation and filling of 18 new positions, nor the alteration or abolition of 40 existing positions is a matter that The Trade Union Act requires to

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[9] *Saskatchewan Liquor Board* at 40.
[10] *Regina General Hospital* at 38.

be bargained with or consented to by the union".[11] *City of Regina* simply does not reflect the state of the law post-*Battlefords*.

[92] Having considered the Employer's arguments, the Board finds that there is no reason not to apply *Battlefords* to the current case.

Estoppel:

[93] Finally, the Employer relies on estoppel. It says that the Employer had discussions with a Union representative, who did not take issue with the creation of the Position. Instead, the Union representative actually expressed an interest in applying.

[94] The Employer's argument is based, in part, on the testimony of Vogel. Vogel did not "object to the creation of the position", assumed that it would be out-of-scope, and in fact, was more interested in securing his ability to apply than in objecting to its creation. His main concern was whether "we could all fairly apply for it" while bargaining was ongoing. Vogel testified that he believed that it was not a fair way of "rolling out the position".

[95] The Employer relies on the doctrine of equitable or promissory estoppel expressed by Denning C.J. in *Combe v Combe*, [1951] 1 All ER 767 at 770:

> *The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made to him but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.*

[96] The Employer suggests that Vogel, through his words and conduct, indicated to the Employer that the Union would not take issue with the Position being out-of-scope. Indeed, Vogel testified that he expected nothing less. It was for this very reason that Vogel decided that it was unethical to apply. But whether Vogel had an expectation of the Position's status cannot be determinative of whether he or anyone else in the Union had provided a "promise or assurance which was intended to affect [their] legal relations". There is nothing in the evidence to suggest

[11] *City of Regina* at 91.

that Vogel was the Union's official spokesperson on this issue, or that these discussions were formalized so as to have the effect as suggested by the Employer.

[97] Promissory estoppel is an equitable defense, the principles of which are well-established. The party asserting the defense bears the onus. It is true that the law of promissory estoppel prevents parties from proceeding with certain actions. The party relying on that branch of estoppel must establish that the other party has, by words or conduct made a promise or assurance that was intended to affect the legal relationship and be acted on. The Employer must establish not only that it acted on the promise or assurance, but also that such promise or assurance changed its position in some way.

[98] It is not enough to assert that a member of the bargaining team assumed the Position would be out-of-scope. First, said assumption, even expressed and discussed aloud with the Employer, falls short of a promise or assurance. Second, even if Vogel's words and conduct were a promise or assurance, said promise or assurance does not relate to the central issue, which is whether the Position was negotiated. Third, the quality and nature of the interaction between Vogel and the Employer, on this point, cannot be taken to represent the Union's position as to the Employer's duty to negotiate. For the foregoing reasons, the Board concludes that the Union did not express an assurance or promise not to rely on its right to negotiate the creation of new positions. Put another way, there was no *promise* or *assurance* not to rely on the required steps in *Battlefords*.

[99] The Employer also suggests that the Union failed to take issue with the latter (2) two supervisor positions. It points to the Union's conduct as demonstrating a pattern of acknowledgment of or acquiescence to the Employer's conduct. The Employer states that it placed these positions out-of-scope in the absence of any grievances, unfair labour practice applications, or mere protest on behalf of the Union.

[100] As Pulak testified, these positions may or may not represent "a hill to die on". On this point, it is reasonable for the Union to make determinations as to how and where to allocate its litigation resources. The Union's conduct in relation to those positions has little to no bearing on the Board's finding in the current case. The Union's conduct cannot retroactively alter the Employer's obligation to negotiate in relation to a previously created position. Furthermore, to the extent that the Employer relies on previously created supervisor positions to support its estoppel argument,

there is simply inadequate evidence of relevant conduct that would rise to the level of a promise or assurance impacting the legal relationship between these two parties.

[101] The Employer also stated that the grievances, which were in the early stages at the time of the hearing, demonstrate that the IT Supervisor position is properly out-of-scope. The Board does not agree. It is open to the Union to take advantage of the legal avenues that are available to it.

Managerial and Confidentiality Exclusions:

[102] The Employer states that the Board may look to the definition of employee as set out in section 6-1(h)(i) of *The Saskatchewan Employment Act* if it wishes to evaluate whether the Position is properly excluded.

[103] In essence, the Employer invites the Board to determine whether the Position should be excluded from the bargaining unit for not meeting the definition of "employee" under *The Saskatchewan Employment Act*. In the normal course, the Employer would bring an application to the Board for an amendment to the Certification Order so as to allow for such a determination. As this Board explains in *Beeland*, "[t]he creation of a new position will necessitate an amendment if that position is determined by the board to fall outside the definition of employee".[12]

[104] The Employer has brought no such application. This is consistent with the Employer's argument that it has no duty to negotiate the creation or placement of this Position. The Employer argues that it is not required to apply to the Board for a managerial or confidential exclusion. It says that the parties, through Article 1.02 of the Collective Agreement, "have agreed to a blanket exclusion for managerial and confidential capacity positions that may be created" and as "long as the position meets that test, there is no obligation on the Employer to apply to the Board". [13]

[105] The purpose of the *Battlefords* approach is to protect the employee's right to collective bargaining. While the Board may, in certain circumstances, justifiably exclude positions from a bargaining unit, it must undertake this exercise cautiously. The employee's right to organize, form unions, and collectively bargain must be the cornerstone of the Board's analysis.[14] Exclusions

[12] *Beeland* at para 16.
[13] *Employer's Brief* at para 77.
[14] Section 6-4(2) of *The Saskatchewan Employment Act*.

should not "be granted so liberally as to frustrate the objective of extending access to collective bargaining as widely as possible."[15]

[106] The Board is tasked with the responsibility of enforcing the provisions of *The Saskatchewan Employment Act*. It would be improper for the Board to construct a bypass around collective bargaining by making a determination on the definition of employee in the absence of: 1) an acknowledgment by the Employer of its duty to negotiate; and (2) the absence of any history of negotiation or attempt to negotiate in relation to this newly created position.

[107] Furthermore, a determination on the managerial or confidentiality exclusions could alter the balance of bargaining power between the parties. At this juncture, it is sufficient for the Board to declare that the duty exists.

[108] For the aforementioned reasons, the Board will not make a determination as to whether the Position falls into one of either the managerial or confidential exclusions.

Supervisory Exclusion:

[109] The Employer says, in the alternative, that the Position is a Supervisory Employee, as defined pursuant to section 6-1(1)(o) of *The Saskatchewan Employment Act*, and is thereby excluded from the bargaining unit.

[110] The Employer's argument is in conflict with the Board's decision in *Saskatoon Public Library Board v Canadian Union of Public Employees, Local No 2669*, 2017 CanLII 6026 (SK LRB) ("*Saskatoon Public Library*"). In that case, the Board considered the application of the "supervisory exclusions" pursuant to section 6-11 of *The Saskatchewan Employment Act*, which reads:

> ***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.*

[15] *Battlefords* at para 118.

(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.

[111] The Board held that section 6-11(3) applies:

> *…only when the Board is dealing with the establishment of an appropriate bargaining unit, upon the application of a trade union, who is seeking to be certified by the Board as the exclusive bargaining agent for an appropriate unit of employees, as a part of an original certification application, or upon a raid of a portion of a unit.*

[112] In the current case, the Board is not dealing with an original certification application or a raid of a portion of the unit.

[113] The Employer acknowledges the holding in *Saskatoon Public Library* but suggests that the definition of "supervisory employee" remains relevant to the Board's determination. According to the Employer, if the Position meets the definition of "supervisory employee", it is not "permitted" to be in-scope.

[114] This cannot be. The Board has determined that the Position cannot be placed out-of-scope in the absence of negotiation or an order from this Board following an application to amend the Certification Order. Whether the Position meets the definition of "supervisory employee" changes nothing. The Employer is required to negotiate the creation of a new position. Under the circumstances, the Board cannot carve a path, based on supervisory status, to circumvent the duty to negotiate.

[115] "Supervisory employees", as defined in *The Saskatchewan Employment Act*, are employees. On an application for an amendment, the Board decides whether a new position falls *outside* the definition of employee and therefore necessitates an amendment. The Board in *Beeland* described the process as follows:

> *[16] The next question, then, is whether an amendment to the description in the certification order of the scope of the bargaining unit is necessary. The creation of a new position will necessitate an amendment if that position is determined by the Board to fall outside the definition of employee. The decision is to be made on a case by case basis. The Board has stated on numerous occasions the purpose for the exclusion of persons from a bargaining unit in accordance with that definition […]*

[116] The Employer's argument is analogous to the "community of interest" argument made in *Beeland*, to which the Board replied:

> *[10] The Union argues that the law to be applied to these applications is well-established: any new position is assumed to be in-scope unless the Employer and Union agree or the Board orders otherwise. There is no compelling evidence in this case that the constitutional right to collectively bargain should be taken away from these employees. […] The case law makes it clear that community of interest is not a test for excluding employees from a bargaining unit.*

[117] For the foregoing reasons, the Employer's request for an exclusion on the basis of the definition of "supervisory employee" must fail.

Remedy:

[118] The Board has found that the Employer erred in treating the IT Supervisor position as out-of-scope without first entering into an agreement with the Union or obtaining an order from the Board. The Board must structure a remedy that appropriately responds to this finding and return the parties to the "*status quo ante*".[16] As this Board has stated in *Moose Jaw Firefighters' Association Local 553 v Moose Jaw (City)*, 2016 CanLII 36502 (SK LRB):

> *[140] It is well-established that when structuring a remedy, the Board's over-arching goal "is generally to place the parties into the position they would have been but for the commission of the unfair labour practice." This means the remedy crafted must seek to achieve "a labour relations purpose, that is, generally speaking, to insure collective bargaining and foster[] a good and long term relationship between the parties to the dispute."*

[119] For the foregoing reasons, the Board finds that requiring the parties to negotiate is the most appropriate, and frankly, only remedy that places the parties in the position they would have been but for the commission of the unfair labour practice.

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[16] *United Food and Commerical Workers, Local 1400 v Calokay Holdings Ltd.,* 2016 CanLII 74282 (SK LRB) at para 141.

[120] In conclusion, the Board makes the following Orders pursuant to clauses 6-103(2)(c), 6-104(2)(b), and 6-111(1)(s) of *The Saskatchewan Employment Act*:

(a) That there will be a declaration that Saskatchewan Mutual Insurance Company committed an unfair labour practice contrary to clause 6-62(1)(d) of *The Saskatchewan Employment Act* by hiring an IT Supervisor and treating the position as an out-of-scope position in the absence of an agreement or an Order from this Board;

(b) That there will be an order that the IT Supervisor position is within the scope of the bargaining unit unless and until the parties agree to exclude the position or unless and until further order of the Board excluding the position; and

(c) That there will be an order that the Employer post a copy of the Board's Order and Reasons for Decision at the Employer's office in Saskatoon, in a location accessible to employees, for at least two weeks, commencing within 7 days of the date of the Order.

[121] The Board expects that the Employer will be afforded a reasonable amount of time to fully implement the administrative aspects of part (b) of the foregoing order.

DATED at Regina, Saskatchewan, this **5th** day of **April, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson