



SASKATOON PUBLIC LIBRARY BOARD, OPERATING AS THE SASKATOON PUBLIC LIBRARY, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL NO. 2669, Respondent

LRB File No. 193-17; December 19, 2019

Chairperson, Susan C. Amrud, Q.C.; Board Members: Gary Mearns and Jim Holmes

For Saskatoon Public Library Board,

operating as the Saskatoon Public Library: Robert Frost-Hinz

For Canadian Union of Public Employees,

Local No. 2669: Sachia Longo

Amendment of Certification Order to exclude new positions – Board excludes Assessment and Continuous Improvement Analyst and Service Enhancement and Project Analyst from bargaining unit under both managerial exclusion and confidentiality exclusion – Board excludes Systems Engineers under confidentiality exclusion – All exclusions granted by provisional determination pursuant to s. 105 of *The Saskatchewan Employment Act*.

Amendment of Certification Order to exclude new positions – Board denies Employer’s application to exclude Technical Support Analysts from bargaining unit – Mere access to confidential information is not sufficient to meet test for confidentiality exclusion.

REASONS FOR DECISION

Background:

[1] **Susan C. Amrud, Q.C., Chairperson:** In 2017, the Saskatoon Public Library Board, operating as the Saskatoon Public Library [“Employer”] embarked on a process of reorganization to, in its words, modernize and provide community-led librarianship. This proposed reorganization led to an Application to the Board¹ to amend its Certification Order with the Canadian Union of Public Employees, Local No. 2669 [“Union”] to exclude a number of new positions from the bargaining unit, including four Disputed Positions:

- Assessment and Continuous Improvement Analyst [“ACI Analyst”]
- Service Enhancement and Project Analyst [“SEP Analyst”]
- Systems Engineers

¹ LRB File No. 193-17.

- Technical Support Analysts ["TS Analyst"].²

[2] The hearing of this Application took place on February 20 to 23, 2018, before then Vice-chairperson Graeme Mitchell and panelists Jim Holmes and Gary Mearns. Vice-chairperson Mitchell was appointed as a Justice of the Court of Queen's Bench on September 21, 2018. The parties agreed that this matter could be concluded by Chairperson Amrud listening to the recording of the hearing and then issuing this decision in conjunction with the other members of the panel, following one more day of argument, which took place on November 29, 2019.

Evidence:

[3] The Employer called four of its out-of-scope employees as witnesses: Audrey Sanders, Director of Human Resources; Laura Warner, Director of Corporate Services and Facilities; Adam Elliott, Manager of Information Technology Services; and Beth Cote, Director of Public Services.

[4] The Union called three witnesses: Albert La, Information Support Technician and Kim Searle and Susan Emson, both of whom have served as Union representatives on the Joint Job Evaluation Committee (which will be discussed in more detail below).

[5] The Job Description for the ACI Analyst was filed as Exhibit E-6. The Position Overview reads as follows:

The Assessment and Continuous Improvement Analyst is responsible for creating and monitoring both physical and electronic systems that compile meaningful assessment information for Saskatoon Public Library (SPL) public services and programs.

The Assessment and Continuous Improvement Analyst assists and coordinates the research and analysis of public services, programs and internal workflow processes for the preparation of improvement recommendations and assessment reports. This position works in collaboration with Senior Managers, Analysts and relevant employees to develop and administer assessment tools for outcome evaluation, develop service plans, evidence-informed reports and recommendations, complete community needs assessments, and collect and analyse data required for strategic planning.

This position will assume a vital leadership role in project teams relating to change management, service level updates and capital projects; this will include, evaluating current programs, establishing goals and objectives, providing recommendations, implementing updated services and programs, and measuring key success factors.

This role will be responsible for identifying and recommending improvements for budgeting, staffing and operational efficiencies including the automation of tasks, and then supporting the implementation of approved recommendations. This position will prepare highly

² The Application seeks additional exclusions from the bargaining unit and the removal of exclusions from the bargaining unit that were agreed to by the Union.

confidential information relating to Strategic Planning, budget, employee allocations, continuous improvement assessments and operational analysis; therefore it is paramount that this position is responsible for maintaining security and confidentiality in all aspects of work. This position will be responsible for leading and implementing changes throughout SPL that may have an impact on terms and conditions of employment practices within the organization.

This position works to support the needs of our community in alignment with SPL's Community-Led service model and Strategic Plan.

The Assessment and Continuous Improvement Analyst may be required to adjust work priorities and assume responsibility for the portfolios covered by the Service Enhancement and Project Analyst.

[6] The Job Description for the SEP Analyst was filed as Exhibit E-5. The Position Overview is set out as follows:

The Service Enhancement and Project Analyst is responsible for ensuring improved service offerings and initiatives are properly managed and implemented.

This position is responsible for positively inspiring change throughout Saskatoon Public Library, supporting employees through change and managing the identifiable elements of change, including new software, technologies, policies and processes, services, employee groups and space re-design.

The Service Enhancement and Project Analyst works in collaboration with Senior Managers, Analysts and relevant employees to plan and coordinate projects. This position will ensure project charters are clear and required resources are available, identify learning and development opportunities, evaluate training outcomes, meet deadlines, make policy and procedure recommendations, and identify and mitigate risk through project management.

This position will assume a vital leadership role in project teams relating to change management, service level updates and capital projects; this will include, evaluating current programs, establishing goals and objectives, providing recommendations, implementing updated services and programs, and measuring key success factors.

This role will be responsible for identifying and recommending improvements for budgeting, staffing and operational efficiencies including the automation of tasks, and then supporting the implementation of approved recommendations. This position will prepare highly confidential information relating to Strategic Planning, budget, employee allocations, continuous improvement assessments and operational analysis; therefore it is paramount that this position is responsible for maintaining security and confidentiality in all aspects of work. This position will be responsible for leading and implementing changes throughout SPL that may have an impact on terms and conditions of employment practices within the organization.

This position works to support the needs of our community in alignment with SPL's Community-Led service model and Strategic Plan.

The Service Enhancement and Project Analyst may be required to adjust work priorities and assume responsibility for the portfolios covered by the Assessment and Continuous Improvement Analyst.

[7] The ACI Analyst and SEP Analyst are new roles that will report to the Senior Manager of Planning. Neither will have direct reports. The ACI Analyst is primarily a researcher while the SEP Analyst will focus on project management. Both will have access to confidential information and attend planning meetings with senior management. They will be involved at the planning stage of proposed changes to the Employer's operations, when the information being discussed is still confidential. This will include access to confidential labour relations, strategic planning, policy advice and budget implementation and planning information.

[8] The Job Description for the Systems Engineer was filed as Exhibit E-7. It includes the following Position Overview:

The Systems Engineer is responsible for systems design, implementation and maintenance, technical support and security aspects of the Information Technology (IT) infrastructure systems and services.

This position ensures Saskatoon Public Library's (SPL) IT services, policies and practices are appropriate for the organization and meet the needs of each location. The Systems Engineer maintains a high degree of security and exercises confidentiality and discretion in managing SPL systems. The Systems Engineer evaluates all existing IT infrastructure, provides recommendations based on SPL's needs and best practices, and implements improvements under the direction of the Manager, Information Technology Services. This position is responsible for monitoring the security of SPL servers and audits of confidential information and file systems.

The Systems Engineer is responsible for preparing business cases with detailed budget plans and project plans to the Manager, Information Technology Services. This role completes project work within the approved budget and reports any variations from to the Manager, Information Technology Services.

This position works to support the needs of our community in alignment with SPL's Community-Led service model and Strategic Plan.

[9] Compared to the job description for the Systems Administrator that this position will replace, the main additional tasks will be monitoring the security of servers, auditing access to restricted files and preparing business cases.

[10] The Job Description for the TS Analyst was filed as Exhibit E-8. It includes the following Position Overview:

The Technical Support Analyst provides user support for hardware, software applications, operating systems, peripherals, devices, and network connectivity of all technology within the Saskatoon Public Library (SPL). This position is responsible for performing all duties in a customer service-oriented and proactive way. The Technical Support Analyst maintains a high degree of confidentiality and discretion.

This Technical Support Analyst is responsible for maintaining the security of the system including confidential and sensitive files within the system. This position is responsible for monitoring the security of SPL servers and audits of confidential information file systems.

This position works to support the needs of our community in alignment with SPL's Community-Led service model and Strategic Plan.

[11] The main purpose of this position is to provide user support. Unlike the Information Support Technician that it will replace, this position will also have a role in monitoring security of servers and auditing access to restricted files.

[12] The Employer has not yet hired an ACI Analyst or SEP Analyst. In the Information Technology (IT) Department, the staff currently consists of the out-of-scope Manager, one Systems Administrator (in-scope), Network Administrator (vacant in-scope position) and four Information Support Technicians (in-scope). The Employer's plan is to convert the Systems Administrator and Network Administrator positions to Systems Engineers, and the Information Support Technician positions to TS Analysts. The Employer's proposal is that all IT staff will be excluded from the bargaining unit.

Argument on behalf of the Employer:

(a) Procedure

[13] The first issue for the Board to address is whether the Employer followed the proper procedure with respect to the classification of the Disputed Positions. It says it did. The proper procedure was described in *Donovel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*³:

[28] An employer must adhere to the following steps in determining the proper assignment of the work and the position:

- 1. notify the certified union of the proposed new position;*
- 2. if there is agreement on the assignment of the position, then no further action is required unless the parties wish to update the certification order to include or exclude the position 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 under ss. 5(j), (k) or (m);*
- 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.*

[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

³ 2006 CanLII 62948 (SK LRB).

of its obligation to bargain collectively under s. 11(1)(c) of the Act: See, University of Saskatchewan, infra.

[14] The Employer says it notified the Union of the proposed new positions in two letters in the summer of 2017⁴. The Union and Employer also met and bargained in good faith with respect to the proposed restructuring. Through this process they agreed to all additions and deletions to the Certification Order, other than the four Disputed Positions. When it became clear to the Employer that an agreement could not be reached on those four positions, it made this Application to the Board.

(b) Material Change

[15] The next issue, the Employer states, is whether it is required to demonstrate that a material change in circumstances has occurred that would justify an amendment to the Certification Order. The general rule is that an employer must prove a material change in circumstances. However, it says, that requirement does not apply if the positions in question are new positions, as the Disputed Positions are:

[50] The rationale for the requirement for material change in instances other than where a provisional determination is sought for a newly created position is simple. It imposes a requirement that a material change be demonstrated in the duties or responsibilities in the position with respect to which the scope amendment is sought. However, in the case of a newly created position, there is no previously reviewed duties or responsibilities which the Board has considered as to whether the position met the criteria in s. 2(f) of the Act.

[51] In the case of an application under s. 2(m) or s. 5.2 of the Act, there is no baseline and the creation of the position, in and of itself, is sufficient to invoke the Board's authority. This is clear from the previous decisions of the Board dealing with s. 2(m) and s. 5.2 applications regarding newly created positions. Where, however, the Board is dealing with existing employees whose job duties and responsibilities are changing, the Board has considered the materiality test.⁵

[16] In the alternative, if the Employer must demonstrate that there has been a material change in circumstances, it submits that the reorganization of the library and the creation of the new positions are that material change. More specifically, it argues that the adoption of community-led librarianship, which led to the restructuring and the creation of the ACI Analyst and SEP Analyst positions is a material change; the vast changes in technology the Employer needs to undertake and the need to secure digitally stored confidential information, which has not been adequately

⁴ Exhibit E-2: letter dated July 19, 2017 and Exhibit E-3: letter dated August 29, 2017, both from the Director of Libraries and CEO of the Employer to the President of the Union.

⁵ *Saskatchewan Institute of Applied Science and Technology v Saskatchewan Government and General Employees Union*, 2012 CanLII 79022 (SK LRB) ["SIASIT I"].

addressed in previous years by the Employer, constitute the material change with respect to the Systems Engineer and TS Analyst positions.

(c) Necessity

[17] The final issue for the Board to address is whether the amendments are necessary. The creation of these new positions, which were not dealt with by the Board at the time the Certification Order was last amended would, in the Employer's opinion, necessitate an amendment to the Order.⁶

[18] To determine whether it is necessary to amend the Certification Order to exclude the Disputed Positions, the Board must consider whether their job duties place them outside the definition of employee in subclause 6-1(1)(h)(i) of *The Saskatchewan Employment Act* ["Act"] under either:

(A) a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character ["managerial exclusion"]; 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 ["confidentiality exclusion"].

[19] The Employer argues that the ACI Analyst and SEP Analyst should be excluded on the basis of both exclusions, and that the Systems Engineers and TS Analysts should be excluded on the basis of the confidentiality exclusion.

(d) Managerial exclusion

[20] The Employer relies on two descriptions of the purpose of the managerial exclusion. The first is set out in *Saskatchewan Institute of Applied Science and Technology v. Saskatchewan Government and General Employees' Union* ["SIASST I"]:

The purpose of the statutory exclusion from the bargaining unit for positions whose primary responsibilities are to exercise authority and perform functions that are of a managerial

⁶ *Health Sciences Association of Saskatchewan v Unifor, Local 609*, 2015 CanLII 43776 (SK LRB).

character is to promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining (and to avoid muddying or blurring the lines between management and the bargaining unit). See: Hillcrest Farms Ltd. v. Grain Services Union (ILWU – Canadian Area), [1997] Sask. L.R.B.R. 591, LRB File No. 145-97.⁷

[21] Another description of the purpose of the managerial exclusion was set out in *Canadian Union of Public Employees, Local 4928 v. Saskatchewan Society for the Prevention of Cruelty to Animals*:

The primary purpose of excluding persons from the bargaining unit on the basis of the managerial exemption is to ensure that persons who can affect the economic lives of other employees are not placed in a conflict of interest by including them in a bargaining unit. In our view, in the present circumstances, the Coordinator of Investigative Services exercises a sufficient degree of managerial authority to affect the economic lives of the other employees in the bargaining unit. To include this position in the bargaining unit would place the incumbent in an insoluble conflict of interest with other members.⁸

[22] The Employer then referred to the summary of relevant principles set out by the Board in *Canadian Union of Public Employees, Local 4777 v. Prince Albert Parkland Regional Health Authority*⁹ [*“Prince Albert Parkland”*]:

The Board considered and dealt with all of the cited cases in University of Saskatchewan, supra. That case set forth the following principles to be considered:

- 1. The determination of whether a position falls to be excluded is primarily a factual one.*
- 2. Exclusions on the basis of managerial responsibility should be made on as narrow a basis as possible.*
- 3. A person to be excluded must have a significant degree of decisionmaking authority in relation to matters which affect the terms, conditions or tenure of employment of other employees. A high degree of independence to make decisions of a purely professional nature is not sufficient.*
- 4. The job functions which the Board considers central to the finding of managerial status includes the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as directing the workforce, training staff, assigning work, approving leaves, scheduling of work, and the like are more indicative of supervisory functions, which do not, in themselves, give rise to conflicts which would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit.*
- 5. In assessing managerial authority, the Board considers the actual authority assigned to a position and the use of that authority in the workplace.*
- 6. The authority bestowed on a managerial employee must also be an effective authority; it is not sufficient if the person can make recommendations, but has no further input into the decision-making process. (citations omitted)*

⁷ 2009 CanLII 72366 (SK LRB) at para 56.

⁸ 2009 CanLII 43954 (SK LRB) at para 46.

⁹ 2009 CanLII 38609 (SK LRB) at para 66.

[23] The ACI Analyst, it argues, will be responsible for creating and monitoring the physical and electronic systems that will compile assessment information for the Employer's public services and programs, analyzing the information that is compiled and making recommendations for improvements based on this analysis. His or her responsibilities will include identifying and recommending improvements for budgeting, staffing and operational efficiencies, as well as supporting the implementation of approved recommendations. The Employer argues that these recommendations could have a direct impact on the terms and conditions of Union members' employment. This makes the position sufficiently managerial to be excluded from the bargaining unit.

[24] The SEP Analyst will be responsible for ensuring the proper management and implementation of improved service offerings and initiatives. As will the ACI Analyst, the SEP Analyst will collect and analyze data and provide recommendations for improvements of the Employer's operations. These recommendations may concern budgeting, staffing and operational efficiencies. He or she will also be responsible for preparing confidential information relating to strategic planning, budget, employee allocations, continuous improvement assessments and operational analyses. The SEP Analyst will have a leadership role in strategic planning. He or she will recommend changes in policy, procedure and workflow and evaluate the financial impact of service enhancements. These responsibilities could directly impact the terms and conditions of employment of Union members.

(e) Confidentiality exclusion

[25] With respect to the confidentiality exclusion, the Employer refers to *University of Saskatchewan v. Administrative and Supervisory Personnel Association*¹⁰ [*"University of Saskatchewan"*]:

In Bank of Nova Scotia, supra, a decision of the Canada Labour Relations Board, the Board set out a three-part test for a confidential exclusion at 537, which may be summarized as follows:

- 1. The confidential matters must be concerning industrial relations, not general industrial secrets and not information that the union or its members have knowledge of (salaries, performance appraisals, etc.) or information that may be obtained from other sources (personal history, family information, etc.);*

¹⁰ 2007 CanLII 68769 (SK LRB) at para 47.

2. *The disclosure of that confidential information must adversely affect the employer; and*
3. *The person must be involved with the confidential information as a regular and not occasional part of their duties, and that simple access to such information through employer laxity does not suffice.*

[26] However, the Employer argues that, given the more detailed description of the confidentiality exclusion in the Act, as compared to *The Trade Union Act*, the reference to “industrial relations” in the first criterion should now be taken to refer to “labour relations, business strategic planning, policy advice and budget implementation or planning”. As well, with respect to the third criterion, as the Act does not require the person to be acting “regularly” in a confidential capacity, this requirement should be revised to require an analysis of whether the “primary duties” of the person include involvement with confidential information.

[27] The Employer submits that this interpretation was adopted by the Board in *Saskatchewan Polytechnic v Saskatchewan Government and General Employees’ Union*¹¹ [“*SaskPoly II*”]:

[60] With respect to the confidentiality exception, the requirement under The Trade Union Act was to “regularly act”, whereas now the requirement is to have “primary duties” which include the 4 areas set out in subclauses (B)(I) to (IV).

...

[68] In order to be excluded under this heading, the position must have primary duties which include activities of a confidential nature in respect to:

- (I) labour relations;*
- (II) business strategic advice;*
- (III) policy advice;*
- (IV) budget implementation or planning.*

[28] The Employer argues that the Board’s exclusion of the Manager of Institutional Research and Analytics in *Saskatchewan Polytechnic v. Saskatchewan Government and General Employees’ Union*,¹² [“*SaskPoly I*”] would lead to a similar conclusion in this matter, with respect to the ACI Analyst and SEP Analyst:

However, it is clear from Ms. Pereira’s testimony that this position will have a primary responsibility for business strategic advice in the analysis of student and other data which will direct Sask. Poly in the operation of its business operations, which could have a marked impact on the bargaining unit should that data show that a change of direction is required. Sask. Poly’s business is education and it offers a wide variety of education at its various locations. Analysis of its business data is fundamental to the provision of strategic business advice to Sask. Poly and will be provided, in part, by this position.

¹¹ 2018 CanLII 53153 (SK LRB).

¹² 2018 CanLII 38248 (SK LRB) at para 57.

[29] The Employer acknowledges that simple access to confidential information is not enough. The involvement with that confidential information needs to be a part of their primary duties. It refers, however, to the following description of the purpose of the confidentiality exclusion:

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 & 222-04.¹³

[30] As part of his or her primary duties, the Employer argues, the ACI Analyst will collect and analyze confidential information relating to budgeting, employee allocation and the Employer's operations. He or she will need insight into the strategic plan and budget to collect the appropriate information, analyze it and provide recommendations. The disclosure of this confidential information would adversely affect the Employer.

[31] To fulfill activities that are part of his or her primary duties, the SEP Analyst will have access to confidential information regarding labour relations, strategic planning, policy advice and budget implementation and planning. To collect the appropriate information, analyze the information and provide recommendations, the SEP Analyst will need insight into the strategic plan and budget. The disclosure of the confidential information the SEP Analyst will work with, such as discontinuance of services, allocation of resources or abolishment of positions, would adversely affect the Employer.

[32] The Systems Engineers will be responsible for the IT systems' design, implementation and maintenance, and for the technical support and security of the IT infrastructure systems and services. They will be responsible for preparing business cases with detailed budget plans and project plans. As part of their primary duties, the Systems Engineers will maintain the security of all IT systems and data, which includes confidential files relating to human resources, labour relations, finance and budget planning and implementation. They will be responsible for designing the auditing systems to monitor who accesses confidential information. This will require them to have access to confidential files to set up auditing standards. To fulfill their primary duties, they will need unlimited access to all files, including files with confidential information regarding labour

¹³ *SIAST I*, at para 57.

relations, human resources, strategic planning and budget. Disclosure of this information would adversely affect the Employer.

[33] The Employer argues that, unlike the current Information Support Technician positions, the TS Analysts will be responsible for monitoring systems operations and notifying management regarding misuse of the Employer's systems. They will also be responsible for reviewing auditing logs and reporting any employee misuse they discover. Monitoring for misuse could result in employee discipline. Requiring the TS Analysts to monitor and report on Union employees puts their responsibilities in conflict with their membership in the Union. The Employer also suggests that, to be able to provide technical support services to out-of-scope employees, the TS Analysts must also be out-of-scope because of the risk that they will see a confidential file name or otherwise access confidential information while doing that work.

[34] The Employer asks that all four Disputed Positions be excluded from the bargaining unit. In the alternative, the Employer requests that the Board make a provisional determination excluding the Disputed Positions from the bargaining unit pursuant to section 6-105 of the Act.

Argument on behalf of the Union:

(a) Onus of Proof

[35] The Union argues that the Employer bears the onus of proof in this matter:

*The Board, in its decision in RWDSU v. Battlefords and District Co-operative Limited, considered an application for amendment of an existing certification Order. In that decision, at paragraph 124, the Board confirmed that the onus of proof in amendment applications fell upon the proponent of the amendment. In making that determination, the Board relied upon its earlier jurisprudence in CUPE, Local 4777 v. Prince Albert Parkland Regional Health Authority et al.*¹⁴

[36] The Employer, it submits, has not provided the Board with sufficiently clear, convincing and cogent evidence to satisfy that onus.

(b) Managerial exclusion

[37] With respect to the application of the managerial exclusion, as does the Employer, the Union refers the Board to the six principles set out in *Prince Albert Parkland*.¹⁵

¹⁴ *Saskatchewan Government and General Employees Union v Wheatland Regional Centre Inc.*, 2015 CanLII 80544 (SK LRB) at para 58.

¹⁵ See paragraph [22], above.

[38] The Union argues that the evidence does not support the exclusion of the ACI Analyst from the bargaining unit on the basis of the managerial exclusion. This employee will not have a significant degree of decision-making authority in relation to matters that affect the terms, conditions or tenure of employment of other employees. The evidence was that this employee will analyze and provide reports to senior management to allow the Employer to improve its operations. While it is possible that the Employer might rely on the data collected to abolish positions, it might also lead to new positions. The potential impact of the ACI Analyst should not be assumed to be negative towards Union members. The evidence also indicated that it would not be up to the ACI Analyst whether a position was abolished or created. The primary responsibility of this position is not to exercise authority. This position will have no employees over whom it has authority; and it does not have the final say as to whether staffing should be increased or decreased.

[39] Similarly, the SEP Analyst will not exercise managerial authority over any employees. He or she will not have unilateral authority to make changes; the SEP Analyst will make recommendations to senior management, who will make the decisions.

[40] Neither of these Analysts will have direct management responsibility. The assertion in the job description that the SEP Analyst will work with management is not sufficient. The primary responsibility must be to exercise authority and perform functions of a managerial character. There is no evidence of these positions performing any functions of a managerial character, let alone it being their primary responsibility.

[41] The Union also argues that, given there is no incumbent in either the ACI Analyst or SEP Analyst position, there was a lack of clarity in the evidence respecting the duties that each will perform. This leads to a conclusion that the Employer has not provided the Board with the necessary clear, convincing and cogent evidence required to support its Application.

(c) Confidentiality exclusion

[42] With respect to the confidentiality exclusion, the Union refers to the three part test relied on in *University of Regina v University of Regina Faculty Association*¹⁶ [*“University of Regina”*]

¹⁶ 2014 CanLII 4554 (SK LRB) at para 24.

and *University of Saskatchewan*¹⁷. It argues that, in *University of Saskatchewan*, the Board found that mere access to confidential information is not sufficient to justify an exclusion:

The Board has also had the opportunity, on a number of occasions, to consider whether an individual should be excluded from a bargaining unit on the basis of s. 2(f)(i)(B), that is, whether the individual “regularly act[s] in a confidential capacity with respect to the industrial relations of his or her employer.” Such confidential information must relate to the industrial relations of the employer and does not include mere access to such information (see for example, E.C.C. International Inc., supra, at 275). As with managerial exclusions, these exclusions are made “on as narrow a basis as possible” and “it is not sufficient that someone who would otherwise fall within the definition of employee perform incidentally or occasionally tasks which are of a . . . confidential nature” (see Government of Saskatchewan, supra at 547).¹⁸

[43] While the definition of the confidentiality exclusion in the Act has changed from what *The Trade Union Act* provided, the rationale for the exception and its narrow applicability have not. Under the definition of employee in the Act, it is necessary to show that the primary duties of a position include activities that are confidential in relation to one of the four listed items: labour relations, business strategic planning, policy advice or budget implementation or planning.

[44] The confidential duties must also be shown to have a direct impact on the bargaining unit. The difference between a direct impact and an indirect impact was explained by the Board in *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc.*¹⁹ [“*Verdient Foods*”]:

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 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.

[45] The ACI Analyst and SEP Analyst positions do not satisfy the criteria to be excluded from the bargaining unit under the confidentiality exclusion. They will analyze and collect data and suggest improvements. The final decision as to whether any of their recommendations are

¹⁷ See paragraph [25], above.

¹⁸ At para 42.

¹⁹ 2019 CanLII 76957 (SK LRB) at para 118.

implemented will be made by senior management. The Union argues that their positions are similar to the communications coordinator that the Board determined, in *Health Sciences Association of Saskatchewan v Unifor, Local 609*²⁰, did not meet the criteria for exclusion:

. . . The major change is that the communications coordinator would be invited to attend the annual HSAS board retreat during which meetings, confidential matters, including matters related to collective bargaining, strategic planning, and policy advice would be discussed. However, there was no indication that the communications coordinator would play any role in the provision of any confidential information (other than perhaps in relation to the member survey), be involved in collective bargaining, or provide strategic advice.

[46] The evidence did not indicate that these two positions will have a direct impact on the bargaining unit. They might make recommendations that could have an impact on the bargaining unit, but any decision as to whether the bargaining unit is directly impacted would come from senior management. They might attend meetings where their recommendations are discussed, but they will not be involved in collective bargaining.

[47] With respect to the ACI Analyst and SEP Analyst, the evidence shows only that these positions are expected to inform budgets and strategic outcomes. They will not make budgetary decisions. While they will have access to business strategic planning or policy advice, the Employer provided no evidence that they will have a direct impact on the bargaining unit.

[48] With respect to the Systems Engineers and TS Analysts, much of the evidence focused on the question of their access to confidential information like budgeting, human resources or labour relations. The Union argues that mere access to confidential information is not enough²¹. Even if they see a confidential file name in the course of their duties, their seeing it does not have a direct impact on the bargaining unit.

[49] The Systems Engineers will perform work updating the Employer's database design and systems design, including the public service side and systems involved with the City of Saskatoon. Dealing with those systems will not have a direct impact on the bargaining unit. The Employer did not establish that their having access to confidential files means that their primary duties include activities that are confidential and will have a direct impact on the bargaining unit. Maintaining security of all systems and data, including confidential files relating to human resources, labour relations, finances and budget, does not have a direct impact on the bargaining unit.

²⁰ *Supra*, at para 47.

²¹ *University of Saskatchewan; Elmwood Residences Inc. v Service Employees International Union, Local 333*, 2005 CanLII 63090 (SK LRB).

[50] The Union referred the Board to two decisions of the Ontario Labour Relations Board that considered applications for exclusion of IT employees²². In *Canadian Blood Services*, that Board held:

Technical Support Analyst

12. *The parties agree there are currently only two individuals in this classification, working in the Toronto location. They appear to agree on the role of this position as supporting and maintaining the Toronto Centre's computer and voice/data communication systems, and developing software applications. However, where they disagree is the extent, if any, that the position is allowed access to confidential labour relations information. CBS contends that the incumbents have unrestricted access to that information by virtue of their obligation to deal with systems problems experienced by users/employees/managers who are employed in a confidential capacity in matters relating to labour relations. The union denies this, although the basis for the denial is not set out in any detail.*

13. *In my view, the factual difference between the parties is immaterial to the issue as to whether Technical Support Analysts are employees. Over the years, the Board has consistently held that mere access to confidential labour relations information is not, in and of itself, conclusive in status disputes. Generally, there must be regular and material involvement in confidential matters of labour relations in order for the statutory exemption to apply. See *York University*, [1975] OLRB Rep. Dec. 945; *Wellington Separate Support Staff Association*, [1993] O.L.R.D. No. 3368; *The Dufferin County Board of Education*, [1995] OLRB Rep. November 1364; *Alliance Employees' Union (A.E.U.)*, [1997] O.L.R.D. No. 1002; *Elliot Lake (City)*, O.L.R.D. No 3946) CBS's allegations do not suggest such a regular and material involvement in respect of the Technical Support Analyst. Nothing in the job description for the position suggests that the incumbents would be required to analyze or absorb meaningfully the content of labour relations data or information to which they might have access. The situation does not appear to be like the one faced by the Board in *Ontario Secondary School Teachers Federation*, [1991] O.L.R.D. No. 305, where a municipal employee, with exclusive access to all of the municipality's computer data, was required daily to retrieve computer information, and sometimes assist employees to make corrections to computer files. In the course of her work, the employee saw the municipality's bargaining proposals. The Board determined that the individual was not an employee for purposes of the Act. The case before me does not involve allegations of fact similar to the facts in that matter.²³*

[51] The Union argues that this Board has adopted the approach used by the Ontario Board, in *University of Saskatchewan*²⁴:

A summary of the approach used by the Ontario Labour Relations Board, which is followed in principle in Saskatchewan, is encapsulated by the following comments in G.W. Adams, Canadian Labour Law, 2nd ed., (Aurora: Canada Law Book, 2007) at 6-26:

²² *Ontario Public Service Employees Union and its Locals 106 v. Canadian Blood Services Centres Toronto/Hamilton/London/ Ottawa/Ontario*, 2003 CanLII 4675 (ON LRB) ["*Canadian Blood Services*"]; *Service Employees International Union Local 1 Canada v. Scarborough Centre for Healthy Communities*, 2012 CanLII 12871 (ON LRB) ["*Scarborough Centre*"].

²³ Section 1 of the *Ontario Labour Relations Act, 1995* being interpreted in that decision provided that "no person shall be deemed to be an employee . . . who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations".

²⁴ At para 44.

The Ontario Labour Relations Board applies the confidential employee exclusion with a view to balancing the rights of employees to collective bargaining with the rights of the employer to confidentiality. The board strives to provide the greatest degree of access to collective bargaining consonant with employees not being placed in a position of conflict of interest where their interests as members of the bargaining unit would interfere with the performance of their job functions on behalf of the employer. To this end, the board has developed a rule that an employee will be excluded from the bargaining unit as a “confidential employee” where that person’s access to confidential information is not merely “incidental” but rather is of such a nature that disclosure of facts within the employee’s knowledge would materially jeopardize the employer’s collective bargaining position.²⁵

[52] In *Scarborough Centre*, the Ontario Board provided the following analysis in reaching its conclusion that information support coordinators should not be excluded from the bargaining unit:

34. As a result, SCHC submitted the IS Coordinators are an integral component of the investigation team as they are the only two employees capable of monitoring computer/e-mail use, retrieving information from SCHC’s computer systems, and conducting the requisite technical aspects of an investigation.

35. However, we disagree with the characterization that the IS Coordinators conducted an investigation for Ms. Joaquin. Rather, there was no evidence the IS Coordinators take part in any substantive or meaningful way with the investigations conducted by Ms. Joaquin. Indeed, Mr. Sequeira testified they have never been asked to investigate a file and Mr. Lewis testified they have never been asked to edit or analyse the contents of a file. Rather, they simply facilitated Ms. Joaquin’s investigation by accessing information, enabling Ms. Joaquin to conduct the actual investigation. To the extent they access another employee’s e-mail or documents, it is comparable to their opening a physical file cabinet and removing and delivering a file to Ms. Joaquin, without opening it. Accordingly, we are of the view this does not constitute conducting “an investigation”. In any event, the extent of the IS Coordinators’ involvement in any such investigation is incidental and rare.

36. SCHC also relied on the IS Coordinators’ monitoring of employee cell phone and BlackBerry usage, which it pointed out may result in discipline, as well as their advance notice of dismissals, which will include bargaining unit employees, to argue their inclusion in the bargaining unit would place them in a position of conflict.

...

38. We are not persuaded reviewing invoices for cell phone and BlackBerry use in this context qualifies as the IS Coordinators being employed in a confidential capacity related to labour relations in the way it was contemplated under subsection 1(3)(b). In the first instance, we find that in monitoring the cell phone and BlackBerry usage, the IS Coordinators perform essentially a clerical or administrative function in identifying those invoices on which monthly usage exceeds the base service. There is no independent judgement or investigation required. Further, there may be perfectly reasonable explanations for such overage – or not. In any event, this is not a determination the IS Coordinators are required to make as part of their current job duties.

²⁵ The current edition includes substantially the same paragraph, but with the following wording added at the end of the final sentence: “and such involvement should be at the core of the person’s job functions”, George W. Adams, *Canadian Labour Law*, 2nd ed. Thomson Reuters Canada Limited (loose-leaf updated August 2019, release 73) at para 6.400.

39. *In addition, there was no evidence suggesting that overages are a regular occurrence. It is perhaps telling that the IS Coordinators have been approving the BlackBerry and cell phone invoices since June 2011, and reviewing them for overages since September/October 2011, yet there was no communication to employees regarding the need to be attentive to their base rate usage until January 2012. Further, there is still no formal policy in that regard. Accordingly, we find this aspect of their role is incidental to their general responsibility of approving payment of the invoices, and is not sufficiently significant to constitute a material or core duty.*

40. *Regarding the prior knowledge of the need to terminate employee access to the electronic system, we again find there is no reason to believe this will be anything more than an infrequent and incidental matter in addition to the IS Coordinators' core duties which, on its own, is largely administrative and is not sufficient to bring them within the parameters of being employed in a "confidential capacity in matters relating to labour relations".*

[53] In the Union's submission, the duties of the IS Coordinators considered in *Scarborough Centre* are so similar to those of the TS Analysts that it inevitably leads to the inclusion of the TS Analysts in the bargaining unit.

[54] The Union argues that it would be possible to say that a cleaner might have access to confidential files when cleaning an office after staff have gone home. This is not enough to remove a cleaner from a bargaining unit. The cleaner would be expected to abide by the Employer's confidentiality policies and his or her duty of fidelity to the Employer, and not improperly access files. At the same time, the Employer is expected to take reasonable care to ensure files are properly protected. The same comments apply to the TS Analysts.

[55] With respect to the second criterion set out in *University of Saskatchewan*, the Union argues that the Employer must prove that the disclosure of the confidential information to which the Systems Engineers and TS Analysts might have access would materially jeopardize the Employer's collective bargaining position.²⁶

[56] The Union relied on the evidence of Ms. Searle regarding her role on the Joint Job Evaluation Committee as an example of a situation where Union members have access to confidential information relating to labour relations. Those employees are not excluded from the bargaining unit because that access does not undermine the Employer's ability to collectively bargain. The Union also referred to Ms. Emson's evidence that she has access to confidential information of patrons; she also has access to confidential information of other employees through their use of a scheduling program called ComVida, in which she sees information about her co-

²⁶ *University of Regina*, at para 27.

workers such as their use of vacation leave and sick leave. This access to confidential information is not sufficient to require her exclusion from the bargaining unit.

[57] The evidence of the Employer indicates that the TS Analysts will be more user-focused than the Systems Engineers. The Employer argues that they need access to the entire IT system so they can help any employee regardless of what position the employee is in and what files the employee might have on his or her computer. The Union disagrees that such access, if provided, would be sufficient to satisfy the confidentiality exclusion. The Union also rejects the Employer's suggestion that an in-scope TS Analyst could not post a media release; immediately after it is posted it is accessible to the public.

[58] The Union urges the Board to ensure that any exclusions are made on as narrow a basis as possible. It is important not to overstate or conflate the possibility of a conflict with an actual insoluble conflict:

... 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.²⁷

Relevant Statutory Provisions:

[59] The following provisions of the 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;

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.

²⁷ *SIAST I*, at para 58.

Board powers

6-104(2) *In addition to any other powers given to the board pursuant to this Part, the board may make orders:*

(g) *amending a board order if:*

- (i) *the employer and the union agree to the amendment; or*
- (ii) *in the opinion of the board, the amendment is necessary;*

...

(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;*

Provisional determination of employee

6-105(1) *On an application made for the purposes of clause 6-104(2)(i), the board may make a provisional determination before the person who is the subject of the application actually performs the duties of the position in question.*

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

[60] The following provision of the (now repealed) *Trade Union Act* is also relevant to the interpretation and continuing application of decisions made pursuant to this provision:

(f) **“employee”** means:

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

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

Analysis and Decision:

(a) *Preliminary Issues: Procedure, Material Change, Necessity, Onus of Proof*

[61] When the Employer decided to create new positions, and was of the view that they should be excluded from the scope of the bargaining unit, its first step was to notify the Union and bargain in good faith with a view to determining whether they could negotiate an agreement. Both parties agree that occurred. In the absence of an agreement, the Employer is to apply to the Board for a determination. That is the Application before the Board in this matter. In other words, the Employer followed the required procedure. The Union concurs.

[62] The next issue for the Board to consider is whether the Employer is required to provide, and if so has provided, evidence of a material change in circumstances. The Union was not entirely clear with respect to whether it agreed that the Systems Engineer and TS Analyst positions qualified as new positions. The Board is satisfied that all four of the Disputed Positions

are new positions. The Board has determined on numerous occasions that the creation of new positions is sufficient to satisfy the requirement of a material change in circumstances.²⁸

[63] The sole issue for the Board, then, is whether an amendment to the Certification Order is necessary. A recent decision of the Board summarized the issues to be considered on an Application by an employer to amend a Certification Order to expand the list of exclusions from a bargaining unit:

[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:

- *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.²⁹

²⁸ See, for example, *SIASST II*.

²⁹ *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 496 v Beeland Co-operative Association Limited*, 2018 CanLII 91973 (SK LRB).

[64] In determining whether an amendment to the Certification Order is necessary, the Union asserts that the onus of proof is on the Employer. The Board agrees. It is well established that the onus is on the Employer to satisfy the Board that the four Disputed Positions are not employees within the meaning of clause 6-1(1)(h) of the Act and should therefore be excluded from the Union's bargaining unit.³⁰

(b) Managerial Exclusion

[65] The determination of whether the ACI Analyst and SEP Analyst positions meet the criteria to be excluded under the managerial exclusion requires a careful review of the stated purposes of the exclusion: to promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining; to avoid muddying or blurring the lines between management and the bargaining unit; and to ensure that persons who can affect the economic lives of other employees are not placed in an insoluble conflict of interest by including them in a bargaining unit³¹.

[66] *Prince Albert Parkland* set out the principles to be applied. The determination requires a careful consideration of the specific facts in each case. The exclusion of positions from the bargaining unit should be made on as narrow a basis as possible. Requiring particular consideration here are the following questions:

- Will these positions have a significant degree of decision-making authority in relation to matters that affect the terms, conditions or tenure of employment of other employees?
- Will these positions have the ability to influence labour relations?
- What authority is assigned to these positions? Is it an effective authority? It is not sufficient if the person can make recommendations, but has no further input into the decision-making process.

[67] In the consideration of this issue, both parties referred to Board decisions³² that have considered the difference in the wording of this exclusion under *The Trade Union Act* and the Act. For ease of reference, *The Trade Union Act* description is:

³⁰ *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v Battlefords and District Co-operative Limited*, 2015 CanLII 19983 (SK LRB).

³¹ *SIASST II; Canadian Union of Public Employees, Local 4928 v Saskatchewan Society for the Prevention of Cruelty to Animals*, *supra*.

³² *Saskatchewan Government and General Employees Union v Wheatland Regional Centre Inc.*, *supra*; *Health Sciences Association of Saskatchewan v Unifor, Local 609*, *supra*.

a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character.

The description in the Act is:

a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character.

[68] In other words, the only difference is the removal of the word “actually”. The Board noted in passing in those decisions that this means an employer must now prove only that the persons in question have a primary responsibility to “exercise authority”, not “actually exercise authority”. The question the Board did not consider in detail, though, is what is the difference between these two phrases. It did not consider that the removal of an adverb such as “actually”, which does not change the meaning of the verb it purports to modify, is more reasonably interpreted as modernizing drafting than changing the meaning. The enactment of Part VI of the Act entailed a significant number of changes to *The Trade Union Act* that have been interpreted by the Board to have been made for the purpose of simplifying or otherwise modernizing the language, rather than changing the substance of the provision. A careful review of this change leads to a conclusion that this was the intent and result here. Accordingly, decisions that interpreted the meaning of “actually exercise authority” continue to apply to the interpretation of “exercise authority”.

[69] The usual case before the Board when considering the managerial exclusion deals with deciding whether the person in question has sufficient authority over specific employees who report directly to him or her. In this case, the Board is looking at a situation where the ACI Analyst and SEP Analyst will potentially have managerial authority with respect to all Union employees. The Board has determined that they cannot properly carry out their job duties if they are in the Union. Given their ability to affect the economic lives of the other employees, to place them in the Union would create an insoluble conflict for them. It would undoubtedly blur the lines between management and the bargaining unit.

(c) Confidentiality exclusion

[70] In considering the confidentiality exclusion, the Board has an obligation to balance a number of important competing rights: the rights of individual employees to not be unnecessarily denied access to collective bargaining; the right of the Union to not have its collective strength weakened by an unnecessary reduction of the bargaining unit; and the right of the Employer to

make rational and informed decisions regarding labour relations, business strategic planning, policy and budget implementation and planning, in an atmosphere of candour and confidence.

[71] Both the Employer and the Union relied on *Verdient Foods*:

[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.

...

[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 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.

[72] In *Verdient Foods*, the confidential information to which the positions in question had access were described as trade secrets, information relating to customers, research and development and intellectual property. As a result, the Board came to the conclusion that the Lab Technicians and Lab Analysts should remain in the bargaining unit.

[73] Unlike the positions at issue in *Verdient Foods*, the ACI Analyst, SEP Analyst and Systems Engineers' primary duties will include providing confidential information and advice to senior management in relation to labour relations, business strategic planning, policy advice and/or budget implementation or planning. This confidential information and advice will have a direct impact on the bargaining unit.

[74] The Union argues that the ACI Analyst, SEP Analyst and Systems Engineer do not meet the criteria to be excluded under the confidentiality exclusion because they are not the final decision-makers when it comes to issues of labour relations, business strategic planning, policy advice or budget implementation or planning. The final decision-makers in the Employer's organization are the Board members. To adopt the Union's interpretation would mean no employees of the Employer would satisfy these criteria. While the Board agrees that the

exclusions must be interpreted narrowly, the Board does not agree that would be a reasonable interpretation. These positions will be directly involved in budget planning and project planning. The evidence demonstrated that they will be part of the decision-making team.

[75] In *Regina (City) v. C.U.P.E., Local 21*³³, the Board dealt with a similar situation, and issued the following caution:

Modern organizational structures and the devolution of complex responsibilities complicate the task of the Board still further. In the City of Regina case which was quoted earlier, the Board made the following comment:

Modern enterprises often employ persons who are charged with the responsibility of handling sophisticated or sensitive information, or of applying skilled professional judgement to inquiries initiated by an employer, or of formulating policy options which may be considered by management. To exclude all such persons from the definition of "employee" in The Trade Union Act would be to deny the benefits of collective bargaining to a wide range of persons who, while highly skilled and educated, have no direct control or influence on the terms and conditions under which their colleagues work of a kind which would either create a conflict of interest inimical to healthy collective bargaining, or render them less vulnerable to unilateral employer determination of their own terms and conditions of employment.

[76] In that case the Board concluded that certain supervisors and superintendents should remain in the bargaining unit:

The picture created by the evidence, however, is of employees who are important sources of information and whose expertise and knowledge is a valued commodity, rather than of persons whose positions are the site of truly independent decision-making authority in relation to matters which would have a direct and significant impact on the terms and conditions of employment of employees in the bargaining unit.³⁴

[77] That is not the situation here. The Board is of the view that the primary duties of the ACI Analyst, SEP Analyst and Systems Engineer positions are more comparable to those of the Public Affairs Consultant considered in *University of Regina* and the Manager of Institutional Research and Analysis considered in *SaskPoly I*, both of whom were excluded from the bargaining unit.

[78] The Employer is planning wholesale changes to its operations. To enable it to undertake those changes on the basis of well-thought-out and well-researched information and recommendations, it came to the conclusion that it requires the assistance of two new positions: the ACI Analyst and the SEP Analyst. To properly carry out their primary duties, the people in

³³ 1995 CarswellSask 851, [1995] S.L.R.B.D. No. 45, [1995] 3rd Quarter Sask. Lab. Rep. 153 at para 25.

³⁴ At para 30.

these two positions will need to be fully immersed in the strategic planning and budget processes. They can only fully perform their roles if their positions are placed outside the scope of the bargaining unit. The evidence of the Employer, which the Union acknowledged, is that the ACI Analyst and SEP Analyst positions are complementary and, to some extent, overlapping. The Systems Engineers will perform similar work, but will be more focused on providing advice and recommendations respecting the role of modernized IT systems in those processes. A determination that these three positions should remain in the bargaining unit would place them in an insoluble conflict of interest.

[79] These three positions will have access to information about the possible reduction of the workforce, the change or abolishment of positions or the increase or decrease of employment hours, during the planning stages, when the need for confidentiality is high. They may also receive confidential information that pertains to the purpose, goals and objectives of the analysis and improvements, such as information relating to labour relations, business strategic planning or budget planning. This information is needed to develop the monitoring systems, analyze the information and provide recommendations.

[80] They represent the kind of internal resources that are necessary to enable the Employer to make informed and rational decisions regarding labour relations, strategic planning, policy and budget planning and implementation. In reviewing their job descriptions, it is necessary to consider the reason they will have access to the information and how it will be used by the employee, to determine whether it will have a direct impact on the bargaining unit. The Board must also respect the intention of the Legislature, in elaborating on the description of the confidentiality exclusion. The Legislature has established that the kind of work described in subparagraphs 6-1(1)(h)(i)(B)(II) to (IV) can also have a direct impact on the bargaining unit. The Board is satisfied that the primary duties of these three positions will have a direct impact on the bargaining unit.

[81] The Union suggests that the Employer must prove that the direct impact these positions will have on the bargaining unit will be negative. It argues that the potential for the ACI Analyst, SEP Analyst or Systems Engineers to make a recommendation that has a positive impact on the bargaining unit means they do not meet the criteria to be excluded under the confidentiality exclusion. The Board disagrees. There is nothing in the confidentiality exclusion that describes direct impact in that manner.

[82] The disclosure of the information described above, to which the ACI Analyst, SEP Analyst and Systems Engineers will have access, could adversely affect the Employer.

[83] In *University of Regina*, the Board provided the following helpful guidance respecting the review of proposed exclusions from a bargaining unit:

In the Early Childhood Intervention case, the Board first examined the duties and responsibilities that were expected to be performed by the new position to determine whether the performance of those duties and responsibilities would place the incumbent into an insoluble conflict with members of the bargaining unit and the extent to which those duties would be regularly performed. In doing so, the Board looked beyond the position's job title and beyond the words set out in the draft job description and considered the evidence as to why the position was created and the operational deficient it was intended to rectify. The Board then reflected on whether or not it was satisfied that the duties and responsibilities assigned to the position were genuine and necessary. In doing so, the Board looked for indications that management had not merely "sprinkled" the proposed new position with managerial duties and/or functions of a confidential nature for the purpose of obtaining an unnecessary exclusion (for a position that would otherwise have fallen within the definition of "employee"). In that case, the Board was satisfied that the duties and responsibilities of the disputed position were intended to rectify legitimate operational deficits within the employer's management structure.³⁵

[84] In reviewing the evidence, the Board has considered whether the Employer has inserted into the job descriptions managerial duties and/or functions of a confidential nature merely for the purpose of obtaining an exclusion for a position that would otherwise fall within the definition of employee. While the Job Descriptions for the Disputed Positions include some examples of this³⁶, distilled down to their core duties and the responsibilities expected of these new positions, the Board is satisfied that three of the four Disputed Positions meet the test to be excluded from the bargaining unit on the basis of the confidentiality exclusion. They will not incidentally or occasionally perform tasks of a confidential nature; in their primary duties they are expected to have input and influence in the Employer's decision-making processes with respect to labour relations, strategic planning, policy and budget planning and implementation.

[85] However, the Employer has not satisfied the Board that the TS Analysts should be excluded from the bargaining unit. The Employer has currently organized itself so that if an out-of-scope employee requires IT user support, only the IT Manager can provide that assistance. The Board does not agree that the possibility that a TS Analyst might see the name of a confidential file while providing technical support to an out-of-scope employee is sufficient to satisfy the confidentiality exclusion. There is nothing in their job description that would suggest

³⁵ At para 26.

³⁶ For example, the inclusion of the statement that the Systems Engineer "receives confidential information".

that their primary duties include activities of a confidential nature. Mere access to the information is insufficient. Any access that might occur would be merely incidental. The duties to be assigned to the TS Analysts are remarkably similar to the positions at issue in *Scarborough Centre*. The Board adopts the rationale of the Ontario Board set out in paragraph [52], above, and its conclusion on that issue:

We agreed the Board should avoid findings that require the restructuring of an employer's operations. SCHC is also, of course, free to set up its data storage and security system as it chooses, and to determine what if any files it wishes to further password protect. However, if SCHC, in this day of sophisticated technological skills on the part of large segments of the population, fails to password protect files it does not want readily accessed, it does so at its own peril, and the IS Coordinators should perhaps be the least of its concerns. In any event, as indicated above, the fact SCHC may indeed choose in the future, not to password protect files which they view as related to confidential labour relations cannot result in an exclusion of the IS Coordinators from the bargaining unit, as simple access is insufficient to give rise to the concerns addressed by subsection 1(3)(b).³⁷

[86] The Employer placed significant emphasis on the new role for TS Analysts of auditing: reviewing who has accessed or tried to access confidential information. This monitoring and reporting is insufficient to justify excluding the TS Analysts from the bargaining unit. Their role is simply to identify and report anomalies they find in monitoring the audit logs. They have no role in any discipline that may result from that report.

[87] The Employer and Union have a Joint Job Evaluation system that applies to the classification of new Union positions for the purpose of determining the appropriate pay band. The Terms of Reference for this system is set out in the collective agreement. The information that Union members have access to as members of the Joint Job Evaluation Committee does not meet the criteria in the confidentiality exclusion. Neither does the confidential information to which Ms. Emson has access. Neither does the confidential information which the TS Analysts may see while performing their trouble-shooting tasks for out-of-scope employees. The Board will not exclude an employee from his or her right to Union representation because of some generalized concern of the Employer about employee discretion.

³⁷ At para 47.

(d) Conclusion

[88] The Board has determined that amendments to the Certification Order are necessary. Accordingly, with these Reasons an Order will be issued making the agreed to changes to the Certification Order and a provisional determination that the Assessment and Continuous Improvement Analyst, Service Enhancement and Project Analyst and Systems Engineer positions are excluded from the bargaining unit. A provisional determination will allow the parties the opportunity to re-evaluate these positions after they have been staffed and the persons hired have commenced exercising their duties and responsibilities. The Technical Support Analysts will not be excluded from the bargaining unit.

[89] The parties provided Briefs of Law and Books of Authorities that the Board has reviewed and found helpful in its deliberations. While not all have been mentioned in these Reasons, all were considered in reaching a conclusion. It was also not possible to refer to all of the oral and written evidence heard by the Board, but again, the Board thanks the parties for providing a clear and detailed description of the current workplace, the proposed work of the new positions and the rationale for their creation.

DATED at Regina, Saskatchewan, this **19th** day of **December, 2019**.

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson