Saskatchewan
Labour Relations Board

UNIVERSITY OF SASKATCHEWAN, Applicant v ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION, Respondent and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCALS 9, 2669, 3462 AND 1594, SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION and SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Intervenors

LRB File No. 254-16; February 16, 2021
Chairperson, Susan C. Amrud, Q.C.; Board Members: Bert Ottenson and Mike Wainwright

For University of Saskatchewan:	David M. Stack, Q.C. and Kit McGuinness
For Administrative and Supervisory Personnel Association:	Gary L. Bainbridge, Q.C.
For Canadian Union of Public Employees Locals 9, 2669, 3462 and 1594:	Valerie Harvey
For Saskatchewan Joint Board, Retail, Wholesale and Department Store Union:	Ronni A. Nordal, Q.C
For Saskatchewan Government and General Employees' Union:	Crystal L. Norbeck

Application for amendment of bargaining unit to remove supervisory employees granted – Modern principle of statutory interpretation leads to an interpretation of supervisory employee provisions that make them applicable to existing bargaining units.

Interpretation of definition of supervisory employee – Employees supervised must be in same bargaining unit – Determination of whether supervision is primary function requires quantitative and qualitative analysis.

REASONS FOR DECISION

I. BACKGROUND:

[1] Susan C. Amrud, Q.C., Chairperson: On December 4, 2012, Bill 85, *An Act respecting Employment Standards, Occupational Health and Safety, Labour Relations and Related Matters and making consequential amendments to certain Acts* (*The Saskatchewan Employment Act*), was tabled in the Legislature. It received Royal Assent on May 15, 2013 and came into force on April 29, 2014. The former *Trade Union Act*, with a number of policy changes, was included in its provisions as Part VI. For the purposes of this application the most significant of those policy changes affect which workers could be or continue to be members of a bargaining unit. These

changes were effected in two ways: the definition of “employee” was amended such that a larger group of workers no longer enjoys the right to join a union; and a category of workers was established as a subset of employees, called “supervisory employees”. These workers continue to be employees for the purposes of Part VI; the only restriction put on them is that they can no longer be in the same bargaining unit with employees they supervise.

[2] On November 15, 2016, the University of Saskatchewan [“University”] filed an Application to Amend[1] the Administrative and Supervisory Personnel Association [“ASPA”] bargaining unit as described by the Board in its Order granted November 1, 2001[2]. The University submits that the bargaining unit includes employees who supervise other members of the same bargaining unit, contrary to subsection 6-11(3) of *The Saskatchewan Employment Act* [“Act”]. The Board granted intervenor status as exceptional intervenors to Canadian Union of Public Employees [“CUPE”] Locals 1975, 9, 2669, 3462 and 1594 by Order dated August 8, 2017[3], with no restrictions on their participation. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union [“RWDSU”] was granted public law intervenor status[4], as was Saskatchewan Government and General Employees’ Union [“SGEU”][5]. Their participation was subject to the restrictions that:

> *a) Neither SGEU nor RWDSU shall be permitted to call evidence or to cross-examine witnesses;*
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> *b) SGEU and RWDSU may not bring or introduce any legal argument with respect to any issue other than:*
>
> *1. The Constitutionality of the provisions of the SEA concerning “supervisory employees”;*
>
> *2. The statutory interpretation of the provisions of the SEA concerning “supervisory employees”; and*
>
> *3. The jurisdiction of the Board with respect to including or retaining “supervisory employees” within the same bargaining unit as non-supervisory employees.*
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> c) *Any such arguments shall be supplemental to, rather than supportive of, any arguments advanced by CUPE*.[6]

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[1] LRB File No. 254-16.
[2] LRB File No. 108-01.
[3] LRB File No. 003-17. CUPE Local 1975 withdrew its participation by letter dated October 17, 2018.
[4] *Saskatchewan Joint Board, Retail, Wholesale & Department Store Union v Administrative and Supervisory Personnel Association*, 2019 SKQB 309 (CanLII).
[5] LRB File No. 121-20.
[6] *Saskatchewan Joint Board, Retail, Wholesale & Department Store Union v Administrative and Supervisory Personnel Association*, *supra*, at para 7.

[3] At the hearing of this matter, RWDSU indicated that, even though it had leave to bring argument respecting the constitutionality of the supervisory employee provisions, it was choosing not to raise that issue.

[4] The University, ASPA and CUPE filed an Agreed Statement of Facts, and the University called five witnesses. Colin Weimer, Director of Employee Relations for the University, gave evidence about the difficulties he encountered with having ASPA employees and their supervisors in the same bargaining unit. Four witnesses were then put forward, pursuant to the following agreement between the University and ASPA:

> *The University and ASPA would together identify four or so example positions and would call evidence regarding these positions. There are more ASPA positions that potentially fall within the "supervisory employee" category, but we would only ask the board to rule on the statutory interpretation question and these four positions and leave it to the parties to attempt to resolve any dispute over any other positions that would be disputed after reviewing the board's decision.*[7]

Each of those witnesses – Sarah Sotvedt, Kevin Bitinsky, Christina Dolan, Sabrina Kehoe – gave evidence respecting their duties, as they relate to the definition of "supervisory employee" in clause 6-1(1)(o) of the Act.

II. RELEVANT LEGISLATIVE PROVISIONS:

[5] The following provisions of the Act were considered in this matter:

> ***Interpretation***
> *1-2(1) In this Act:*
> *(f) "prescribed" means prescribed in the regulations made by the Lieutenant Governor in Council.*
>
> ***Interpretation of Part***
> *6-1(1) In this Part:*
> *(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;*

[7] Email from David M. Stack, Q.C. to Jonathan Swarbrick (Board Registrar) dated January 6, 2020.

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.

Acquisition of bargaining rights
6-9(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.

Change in union representation
6-10(1) If a union has been certified as the bargaining agent for a bargaining unit, another union may apply to the board to be certified as bargaining agent:

(a) for the bargaining unit; or

(b) for a portion of the bargaining unit:

(i) if the applicant union establishes to the satisfaction of the board that the portion of the bargaining unit that is the subject of the application should be separately certified as a unit appropriate for collective bargaining; or

(ii) if the applicant union is certified as the bargaining agent in another bargaining unit with the same employer or, in circumstances addressed in Division 14, with two or more health sector employers as defined in section 6-82 and the applicant union establishes to the satisfaction of the board that the portion of the bargaining unit that is the subject of the application should be moved into the other bargaining unit.

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.

Transfer of obligations
6-18(4) On the application of any union, employer or employee directly affected by a disposal, the board may make orders doing any of the following:

(f) amending, to the extent that the board considers necessary or advisable:
(i) a certification order or a collective bargaining order; or
(ii) the description of a bargaining unit contained in a collective agreement;

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;

[6] Section 3 of *The Labour Relations (Supervisory Employees) Regulations* ["Regulations"] provides as follows:

Certain occupations not included
3(1) For the purposes of clause 6-1(1)(o) of the Act, employees in the following occupations are not supervisory employees:
(a) registered psychiatric nurse, as defined in The Registered Psychiatric Nurses Act;
(b) registered nurse, as defined in The Registered Nurses Act, 1988;
(c) non-commissioned officer, within the meaning of The Police Act, 1990;
(d) foreman, general foreman and journeyperson in the construction industry.
(2) For the purpose of clause (1)(d), the construction industry:
(a) is the industry in which the activities of constructing, erecting, reconstructing, altering, remodelling, repairing, revamping, renovating, decorating or demolishing any building, structure, road, sewer, water main, pipeline, tunnel, shaft, bridge, wharf, pier, canal, dam or any other work or any part of a work are undertaken; and
(b) includes all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection with a work mentioned in clause (a), but does not include maintenance work.

[7] Subsection 33(2) of *The Saskatchewan Employment (Labour Relations Board) Regulations* ["Board Regulations"] states:

Application for reconsideration
33(2) An employer, union or other person directly affected by a decision or order of the board may apply to the board to reconsider that decision or order.

[8] This matter revolves around the proper interpretation of the provisions of the Act and the Regulations that apply to supervisory employees, particularly clause 6-1(1)(o) and subsections 6-11(3) to (6) of the Act and section 3 of the Regulations. Those provisions will be referred to in these Reasons as the supervisory employee provisions.

III. STATUTORY INTERPRETATION OF SUPERVISORY EMPLOYEE PROVISIONS

Argument on behalf of University:

[9] In *Saskatoon Public Library Board v Canadian Union of Public Employees, Local No. 2669*[8] ["*Saskatoon Public Library*"], the Board decided:

> *The proper interpretation of section 6-10(3)* (sic) *of the SEA is that it must be restricted to applications made by a trade union for certification of a new unit of employees or in respect of applications made by a trade union to certify part of a current bargaining unit out of a larger bargaining unit. Accordingly, the application to remove supervisory employees from the unit of employees at the Saskatoon Public Library represented by the Canadian Union of Public Employees is dismissed. An appropriate order dismissing that aspect of the SPLB's application will accompany these reasons.*

[10] The University argues that the decision in *Saskatoon Public Library* is wrong and that, in considering this application, the Board is not bound to follow it:

> *However helpful uniformity might be, the Board is not bound by its previous decisions and may decide each case in the light of its particular circumstances.*[9]

[11] The legislation is clear that the supervisory employee provisions were intended to apply to all workplaces, so that the interests of the supervised and supervisors are appropriately served by separate bargaining units. The supervisory employee provisions must be read in their entire context and in their grammatical and ordinary sense in harmony with the rest of the Act, the legislative objectives of Part VI of the Act and the Regulations and the intention of the Legislature.[10]

[12] Applying the modern, contextual approach to statutory interpretation, the supervisory employee provisions plainly and specifically instruct the reader that supervisory employees are not to be included in a bargaining unit of employees they supervise. If there is any doubt regarding the intention of the Legislature, consideration of the debates in the Legislature as recorded in Hansard respecting the supervisory employee provisions removes any question that the interpretation of subsection 6-11(3) of the Act in *Saskatoon Public Library* is wrong. The Minister of Labour Relations and Workplace Safety did not say that supervisors would not be allowed into new bargaining units; he said the provisions will allow for people to be taken out of bargaining

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[8] 2017 CanLII 6026 (SK LRB) at para 50.
[9] *Burt v. Armadale Publishers Limited*, 1975 CanLII 809 (SK CA).
[10] *Ballantyne v Saskatchewan Government Insurance*, 2015 SKCA 38 (CanLII).

units. Debates in the Legislative Assembly are admissible as evidence, being relevant to both the background and purpose of the provisions.[11]

[13] The University's position is that the supervisory employee provisions were designed to remedy a conflict inherent with supervisors being in the same bargaining unit as the employees they supervise. The primary policy objective of the supervisory employee provisions was to remove the conflict of interest that existed between supervisory employees, their union and their employer, in an effort to promote stability between labour and management in the workplace.

[14] The provisions do not limit the rule to applying only to future bargaining units. Clause 6-11(5)(a) of the Act makes this clear through its use of the phrase "An employee who is or may become a supervisory employee". A plain reading of this phrase provides concrete evidence of the Legislature's intention that the supervisory employee provisions apply to pre-existing certification orders. The use of the words "who is" indicates an intention to remove supervisory employees from existing bargaining units.

[15] The Act requires the exclusion of supervisors from an existing bargaining unit. The Legislature, however, provided two express limitations to this rule: the potential for a union and employer to enter into an irrevocable election that it not apply and a two-year delay in its implementation.

[16] If the supervisory employee provisions apply only to new bargaining units, the irrevocable election would have very little, if any, meaning. It is far more reasonable to interpret the irrevocable election as providing parties with existing bargaining units the opportunity to maintain those existing units if they agree to do so.

[17] The purpose of the transition provision in subsection 6-11(6) was to allow employers and unions two years in which to discuss and potentially negotiate irrevocable elections for existing bargaining units. If subsection 6-11(3) was meant to apply only to future applications for certification, there would have been no need to include the two-year delay in its implementation. There is no reasonable basis as to why the Legislature would include a two-year transition provision, other than to provide employers and unions with existing bargaining relationships an opportunity to negotiate a resolution. If the supervisory employee provisions are interpreted as suggested in *Saskatoon Public Library*, very little meaning, if any, would be given to the transition provision. The debates in the Legislature recorded in Hansard clearly demonstrate that the two-

[11] *R v Morgentaler*, 1993 CanLII 74 (SCC); [1993] 3 SCR 463.

year transition period was included to deal with the effect of the provisions on existing certification orders.

[18] There is no basis to suggest that the Legislature intended to establish a two-tier labour relations regime with fundamentally different rules applying to workplaces and bargaining units based solely on when those workplaces were certified. If the Legislature had intended to limit the application of the supervisory employee provisions only to future certification orders, such a fundamental limitation would have been included with the other limitations described in subsections 6-11(4) to (6).

[19] If existing bargaining units are excluded, absurd results could occur. The interpretation adopted in *Saskatoon Public Library* leads to a number of consequences that are illogical, incoherent and incompatible with other provisions and the object of the legislation. For example, if existing units bring applications to add new employees to their units, would the existing complement of supervisors remain in-scope but the supervisors of the add-on employees be excluded? Or would the amendment application bring the whole bargaining unit under the supervisory employee provisions? If an application is made due to multiple unionized operations being combined into a new bargaining unit, such as on the transfer of a business, and the supervisory employee provisions apply to some but not all of the units, would those provisions apply to the combined bargaining unit? An interpretation that provides for the application of the supervisory employee provisions to all bargaining units provides clear direction to unions and employers about what the answers are to these questions.

[20] The University also points to the following paragraphs in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* ["*Monsanto*"][12] where the Supreme Court of Canada approved of reference to integrated regulations to assist in the determination of the appropriate interpretation of a statute:

> *35 As a last point, it is worth commenting on the approach of the majority judgment of the Tribunal in disregarding the regulations in construing the meaning of s. 70(6). While it is true that a statute sits higher in the hierarchy of statutory instruments, it is well recognized that regulations can assist in ascertaining the legislature's intention with regard to a particular matter, especially where the statute and regulations are "closely meshed" (see R. v. Campbell, [1999] 1 S.C.R. 565, at para. 26; Sullivan and Driedger on the Construction of Statutes (4th ed. 2002), at p. 282). In this case, the statute and the regulations form an integrated scheme on the subject of surplus treatment and the thrust of s. 70(6) can be gleaned in light of this broader context.*

[12] 2004 SCC 54 (CanLII), [2004] 3 SCR 152.

[21] The Regulations specifically enumerate certain occupations to which the provisions do not apply. It makes no sense for the Regulations to specifically carve out certain occupations if the provisions were only to apply to new certifications. That interpretation would render the Regulations essentially meaningless.

[22] The University also rejects ASPA's argument that the Board should treat this application as a reconsideration of *Saskatoon Public Library*. This is an application for an amendment of the ASPA bargaining unit, not for reconsideration of a decision to which the University was not a party. The University had no standing to make an application for reconsideration of that decision.[13] That does not deprive it of the right to bring forward its own case and argue for a different approach to the legislation.

Argument on behalf of ASPA:

[23] ASPA's position is that there is negligible, if any, difference between the factual and legal issues in this application and *Saskatoon Public Library*, and therefore the Board should dismiss this application. The Board cannot sit on appeal of its own decision.

[24] ASPA argues that *Saskatoon (City) v Amalgamated Transit Union, Local 615*[14] ["*ATU*"] applies to the University, such that the University's only options were to either seek judicial review or apply for reconsideration of *Saskatoon Public Library*:

> *. . . the Union's options were to (a) seek judicial review on the basis that the Board had decided a matter not before it and had done so without giving the Union an opportunity to make submissions, or (b) ask the Board to reconsider its decision. However, the Union did not pursue either of these options.*

[25] By proceeding as it has, the University is making an impermissible collateral attack on *Saskatoon Public Library*:

> *In Figliola, the Supreme Court explained, at paragraph 28, that the rule against collateral attack attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings and, more specifically, "… prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route".*[15]

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[13] *Communication, Energy and Paperworkers Union of Canada v. J.V.D. Mill Services*, 2011 CanLII 152054 (SK LRB).
[14] 2017 SKCA 96 (CanLII) at para 47.
[15] *ATU*, at para 42.

[26] Next ASPA states that this is a disguised application for reconsideration. It argued at length that the University had not satisfied the Board's well-established criteria respecting when it will reconsider a decision.

[27] Section 6-11 of the Act only allows an application to determine a bargaining unit to be brought by a union and not by an employer. ASPA argues that the supervisory employee provisions only apply when an application for a new certification order is being considered by the Board.

[28] ASPA relies on the phrase in subsection 6-11(3) indicating that the Board "shall not include in a bargaining unit any supervisory employees" as support for its argument that the supervisory employee provisions only apply to the establishment of new bargaining units, and not to the amendment of existing bargaining units. The certification order in this case has been in place since 1978. The existing bargaining unit was determined to be appropriate for collective bargaining at that time. Those employees in the bargaining unit who might be considered supervisory employees if the application for certification was being considered today have already been "included" in the bargaining unit, prior to the supervisory employee provisions being added to the Act.

[29] While ASPA does not argue that subsection 6-11(3) is unconstitutional, it submits that the broader constitutional context should be taken into account in applying the Act. Any interference with existing collective bargaining rights should be done only by the clearest statutory language. The language in subsection 6-11(3) is not sufficiently clear to justify such interference. ASPA points to the purpose of Part VI of the Act as emphasizing an employee's right to organize or join a union of their own choosing and to protect bargaining rights and the right to associate.[16]

[30] ASPA submits that the irrevocable election provided for in subsection 6-11(4) is consistent with an interpretation that it applies only when a bargaining unit is being established.

[31] Subsection 6-11(5) allows supervisory employees to continue to be included in a bargaining unit until they are excluded by Board order or agreement between the union and employer. Their collective bargaining rights are preserved unless and until their removal can be justified through the employee-based democratic process established under section 6-9 or 6-10 of the Act.

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[16] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 SCR 3.

[32] With respect to the phrase "who is or may become", in subsection 6-11(5) of the Act, this is not a reference to a free-standing jurisdiction of the Board to exclude supervisory employees; it is a reference to the Board's right to exclude such individuals when a new application for certification is made, for example, a raid application where the whole bargaining unit is being sought to be certified or a carve out application where a portion of a bargaining unit is sought to be certified by a different union.

[33] The purpose of the two-year transition period in subsection 6-11(6) was to allow unions that were in the process of certification to continue using the previous rules.

[34] ASPA argues that *Saskatoon Public Library* is consistent with the presumption in statutory interpretation against retrospective application of newly-enacted rules, relying on the following two excerpts from *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue* ["*Gustavson Drilling*"][17]:

> *First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of the amending statute.*
>
> *. . .*
>
> *Second, interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: Spooner Oils Ltd. v. Turner Valley Gas Conservation Board, at p. 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception. The only rights which a taxpayer in any taxation year can be said to enjoy with respect to claims for exemption are those which the Income Tax Act of that year give him. The burden of the argument on behalf of appellant is that appellant has a continuing and vested right to deduct exploration and drilling expenses incurred by it, yet it must be patent that the Income Tax Acts of 1960 and earlier years conferred no rights in respect of the 1965 and later taxation*

[17] 1975 CanLII 4 (SCC), [1977] 1 SCR 271 at pages 279/80 and 282/283.

> *years. One may fall into error by looking upon drilling and exploration expenses as if they were a bank account from which one can make withdrawals indefinitely or at least until the balance is exhausted. No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.*

[35] The interpretation suggested by the University would interfere with the vested or existing rights of the supervisory employees in their bargaining unit. If the Legislature intended to remove their bargaining rights protections, it must say so explicitly and clearly, and it did not. The presumption, therefore, should be that the Legislature did not intend to strip employees of their existing bargaining unit status and the rights flowing from that status, such as seniority, grievance and representation rights.

[36] While the interpretation in *Saskatoon Public Library* could lead to two similar workplaces with different bargaining unit compositions, depending on when they became certified, ASPA states this is not unusual. The Board's goal is not to ensure that all similar workplaces have identical bargaining units, but that they each have an appropriate bargaining unit.

[37] ASPA argues that the Regulations cannot be used in the interpretation of section 6-11 of the Act because they expressly say that they are for the purposes of clause 6-1(1)(o). Additionally, the reference in the Regulations to, for example, nurses simply means that if a new certification order is sought for nurses in a workplace in the future, it will be unnecessary to enter into an irrevocable election.

[38] Reliance on Hansard excerpts cannot outweigh the clear language of the legislation. Hansard cannot outweigh the statutory purposes and interpretations of the Act.

[39] ASPA also relies on two decisions of the Court of Appeal for Saskatchewan[18] that hold that there is a presumption of continuity concerning union support. There is a presumption of continued support as a result of the original certification order. The Board does not sweep in new employees without a basis for demonstrating support[19] and accordingly cannot sweep out employees without evidence of support for that action. The vested rights and express wishes of employees, demonstrated through a democratic process, cannot be undermined at the employer's whim.

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[18] *Army & Navy Department Store Ltd. v Retail Wholesale and Department Store Union*, 1962 CanLII 279; 39 WWR 311 (SK CA); *Prince Albert Co-operative Association Ltd v Retail, Wholesale and Department Store Union, Local 496*, 1982 CanLII 2384; [1983] 1 WWR 549 (SK CA).
[19] *Saskatchewan (Re),* [2001] SLRBD No. 23.

Argument on behalf of CUPE:

[40] As does ASPA, CUPE argues that there is no reason for the Board to depart from its decision in *Saskatoon Public Library*. In that decision the Board correctly applied the modern principle of statutory interpretation. The University has overstated the relevance of the Hansard debates. Because no ambiguity exists when the provisions are read in their ordinary and grammatical sense in accordance with the intentions of the Act, there is no need for the Board to resort to extrinsic evidence.

[41] CUPE submits that the application of the supervisory employee provisions only on a go-forward basis represents a delicate balance between the government's stated purpose of reducing possible conflicts of interest within bargaining units and the fact that in-scope supervisors have acquired rights and interests in collective agreements with respect to, for example, wages, benefits, pensions, seniority, vacation leave and sick leave.

[42] CUPE shares ASPA's view that the Regulations are not relevant to the proper interpretation of section 6-11 of the Act. This is because they say that certain occupations are not to be considered supervisory employees "for the purposes of clause 6-1(1)(o)".

Argument on behalf of RWDSU:

[43] RWDSU argues that while clause 6-104(2)(i) of the Act grants jurisdiction to the Board to determine whether any person is a supervisory employee, it does not provide jurisdiction with respect to exclusion of supervisory employees from a bargaining unit.

[44] It argues that the choice of union representation is a right of workers and they must be allowed to exercise that right without any interference from their employer. Sections 6-9 and 6-10 of the Act set out the two ways that a union acquires bargaining rights on behalf of a unit of employees for the purpose of collective bargaining. On an application under one of those sections, the Board determines the bargaining unit, in accordance with section 6-11 of the Act. The prohibition in subsection 6-11(3) against the inclusion of supervisory employees in a bargaining unit with those they supervise only applies on an application made by a union under section 6-9 or 6-10.

[45] An employer can bring an application under section 6-18 or 6-104 of the Act, but subsection 6-11(3) does not apply to applications brought under either of those sections.

[46] RWDSU argues that statutory interpretation must be based on a reading of the ordinary and grammatical meaning of the words used, read harmoniously with the scheme of the Act. There is no reason to resort to extrinsic evidence such as Hansard. It noted that the Board has indicated[20] that caution must be used in relying on Hansard to inform statutory interpretation:

> *The Union relies on excerpts from Hansard to inform the Legislature's intention in preventing double-breasting in circumstances where it was previously permitted. While Hansard evidence may be admitted as relevant to assessing the background and purpose of legislation, adjudicators must be mindful of any issues with reliability, and should assign Hansard evidence the appropriate weight, taking that into account. This caution is particularly relevant when the excerpts provided represent only limited sections from the debate on the subject-matter in question.*

[47] Relying on *Ituna Investment LP v Industrial Alliance Insurance and Financial Services Inc.*[21], RWDSU argues that there is a strong presumption against retroactive application of legislation, that should be applied to the interpretation of section 6-11:

> *[238] Côté summarizes this concern with the temporal operation of statutes or regulations as follows at pages 132-33:*
>
> > *While the statutes are silent on the general principle of non-retroactivity, judicial expressions of it are, as we shall see, numerous, if not always felicitous.*
>
> *Wright J.'s dictum in Re Athlumney [[1898] 2 QB 547 at 551-2] is frequently cited in this connection:*
>
> > *Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.*
>
> *The Supreme Court of Canada has often expressed similar views:*
>
> > *The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. [See Gustavson Drilling (1964) Ltd. v Minister of National Revenue [1977] 1 SCR 271 at 279]*
>
> *The rule against retroactive operation must be distinguished from the presumption of non-interference with vested rights, its close relative with which it has been most commonly confused in case law. Until recently, most decisions considered a statute to be retroactive not only if it operated in the past but also if it affected, either for the past or the future, the exercise of vested rights.*
>
> *Craies, for example, defines "retrospective" as follows:*

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[20] *International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v Book Insulations Ltd.*, 2019 CanLII 98480 (SK LRB) at para 51.

[21] 2019 SKQB 75 (CanLII).

> *A statute is deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. [See W.F. Craies, Craies on Statute Law, 7th ed (London: Sweet & Maxwell, 1971) at 387]*

[48] While RWDSU acknowledges that the Board is not bound by its prior decisions, it argues that they must be considered and given significant precedential value.

[49] It also echoes ASPA's argument that a decision of the Board can only be varied through an application for reconsideration or an application for judicial review. This application is a collateral attack on *Saskatoon Public Library*. It argues that the requirements of finality, predictability, impersonality and objectivity require the Board to follow *Saskatoon Public Library* as it was not unreasonable and cannot be fairly distinguished.

Argument on behalf of SGEU:

[50] As with the other unions, SGEU agrees with the outcome in *Saskatoon Public Library*.

[51] It argues that the modern principle of statutory interpretation supports its position. In this regard it refers to *Arslan v Şekerbank T.A.Ş.* ["*Arslan*"][22].

[52] SGEU argues that in the appropriate interpretation of section 6-11 of the Act, subsections (2) to (7) flow from subsection (1), and therefore only apply "if a union applies". The Board cannot determine the appropriate bargaining unit on an application by an employer.

[53] This interpretation, it says, is consistent with the legislative intent as established in subsection 6-4(1) of the Act, and confirmed by the Board in, for example, *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 8933 v Saskatchewan Mutual Insurance Company*[23]:

> *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.*

[54] The ordinary and grammatical meaning of the supervisory employee provisions must be interpreted in a manner that is consistent with other provisions of Part VI regarding the acquisition

[22] 2016 SKCA 77 (CanLII).
[23] 2019 CanLII 43212 (SK LRB) at para 74.

and termination of bargaining rights, including sections 6-9, 6-10, 6-14 to 6-16 and 6-17. According to SGEU these provisions demonstrate that only unions can apply to obtain or alter a bargaining unit.

[55] SGEU argues that industrial peace and stability is promoted by the Board's preference for larger bargaining units[24]. Industrial harmony and stability are promoted by keeping existing bargaining units intact.

Analysis and Decision:

[56] This application requires the Board to carefully consider certain principles that apply to every application it determines.

Principles:

[57] First, the Court of Appeal for Saskatchewan has recently reaffirmed the proper approach to statutory interpretation, in *Arslan*:

> *[59] Under the modern principle, the court first forms an initial impression as to the meaning of a legislative provision from its text (i.e., its "grammatical and ordinary sense"). Then, so as to infer what the Legislature intended to enact, the court will take into account the purpose of the provision and all relevant context. As this suggests, the latter part of the inquiry involves the contextual determination of legislative intent.*
>
> *. . .*
>
> *[62] As noted, even where the court's initial impression of a legislative provision is readily arrived at, the court is required to consider the broader context to read the provision "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." In Atco Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board), 2006 SCC 4 at para 48, [2006] 1 SCR 140, Bastarache J., for the majority, wrote:*
>
> > *This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.*
>
> *[63] Historically, Canadian courts were distrustful of extrinsic aids to statutory interpretation. However, under the modern principle of statutory interpretation, courts have become accustomed to reading legislative provisions in their broad context, which now includes extrinsic aids that were formerly considered inadmissible. This is so because such aids are often part of the legal context or they provide evidence of external context. They may also serve as "a source of authoritative opinion about the meaning or purpose of legislation." In other respects, extrinsic aids lend to an understanding of the understanding*

[24] *Canadian Union of Public Employees v Turning Leaf Services Inc.*, 2017 CanLII 85455 (SK LRB).

> *on which the Legislature enacted the provision or statute in question. See Sullivan at 656-660.*
>
> *[64] Here, the extrinsic aids to the interpretation of the EMJA include the statute book, the body of jurisprudence interpreting the EMJA, debates and proceedings before the Legislature, scholarly opinion by competent academic interpreters of the EMJA, and a report prepared by experts in the field and used in the legislative process.*
> . . .
> *[67] The EMJA is certainly an integrated piece of legislation. It is not an extension of common law structures. It completely displaces enforcement measures available under prior law. These conclusions are borne out by the scheme of the EMJA itself, the object of the EMJA, the legislation repealed upon its enactment and, lastly, by the debates in the Legislature regarding its passage.*

[58] The Court reviewed the speeches made by the Minister of Justice on the motion for second reading of the bill in the Legislature and on introduction of the bill for consideration in the Standing Committee on Intergovernmental Affairs and Justice, as well as the comments of the Opposition critic and a public servant in consideration of the bill by the Committee. The Court concluded this review of Hansard with the following comment:

> *[70] . . . Moreover, the foregoing opinions are by no means binding on this Court, even though they do have some persuasive force and are worth taking into account under the modern principle of statutory interpretation.*

[59] Since *Saskatoon Public Library*, the modern principle of statutory interpretation has also been adopted by the Legislature, in subsection 2-10(1) of *The Legislation Act*:

> *2-10(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.*

[60] Second, as far back as 1993 the Supreme Court of Canada confirmed in *R. v. Morgentaler*[25] that debates of the Legislative Assembly are admissible as evidence, being relevant to both the background and purpose of the legislation:

> *In determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable: Reference re Residential Tenancies Act, 1979, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714, at p. 723, per Dickson J. This clearly includes related legislation (such as, in this case, the March regulations and the former s. 251 of the Criminal Code), and evidence of the "mischief" at which the legislation is directed: Alberta Bank Taxation Reference, supra, at pp. 130-33. It also includes legislative history, in the sense of the events that occurred during drafting and enactment; as Ritchie J., concurring in Reference re Anti-Inflation Act, supra, wrote at p. 437, it is "not only permissible but essential" to consider the material the legislature had before it when the statute was enacted.*

[25] 1993 CanLII 74 (SCC); [1993] 3 SCR 463.

> *The former exclusionary rule regarding evidence of legislative history has gradually been relaxed (Reference re Upper Churchill Water Rights Reversion Act, 1984 CanLII 17 (SCC), [1984] 1 S.C.R. 297, at pp. 317-19), but until recently the courts have balked at admitting evidence of legislative debates and speeches. Such evidence was described by Dickson J. in Reference re Residential Tenancies Act, 1979, supra, at p. 721 as "inadmissible as having little evidential weight", and was excluded in Reference re Upper Churchill Water Rights Reversion Act, supra, at p. 319, and Attorney General of Canada v. Reader's Digest Association (Canada) Ltd., 1961 CanLII 84 (SCC), [1961] S.C.R. 775. The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation. Indeed, its admissibility in constitutional cases to aid in determining the background and purpose of legislation now appears well established. See Reference re Anti-Inflation Act, supra, at p. 470, per Beetz J. (dissenting); R. v. Edwards Books and Art Ltd., supra, at p. 749; Starr v. Houlden, supra, at pp. 1375-76, 1404 (distribution of powers); R. v. Whyte, 1988 CanLII 47 (SCC), [1988] 2 S.C.R. 3, at pp. 24-25; Irwin Toy Ltd. v. Quebec (Attorney General), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at pp. 983-84 (Charter); and R. v. Mercure, 1988 CanLII 107 (SCC), [1988] 1 S.C.R. 234, at pp. 249-251 (language rights). I would adopt the following passage from Hogg, supra, as an accurate summary of the state of the law on this point (at pp. 15-14 and 15-15):*
>
> > *In determining the "purpose" of a statute in this special sense, there is no doubt as to the propriety of reference to the state of law before the statute and the defect in the law (the "mischief") which the statute purports to correct. These may be referred to under ordinary rules of statutory interpretation. Until recently, there was doubt about the propriety of reference to parliamentary debates (Hansard) and other sources of the "legislative history" of the statute. The relevance of legislative history is obvious: it helps to place the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it. Legislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. But the interpretation of a particular provision of a statute is an entirely different process from the characterization of the entire statute for purposes of judicial review. There seems to be no good reason why legislative history should not be resorted to for the latter purpose, and, despite some earlier authority to the contrary, it is now established that reports of royal commissions and law reform commissions, government policy papers and even parliamentary debates are indeed admissible. [Footnotes omitted.]*
>
> *I would therefore hold, as did Freeman J.A. in the Court of Appeal, that the excerpts from Hansard were properly admitted by the trial judge in this case. In a nutshell, this evidence demonstrates that members of all parties in the House understood the central feature of the proposed law to be prohibition of Dr. Morgentaler's proposed clinic on the basis of a common and almost unanimous opposition to abortion clinics per se. I will return to the evidence below.*

[61] Third, the Court of Appeal for Saskatchewan has confirmed[26] that the Board is not bound by its previous decisions:

> *. . . Moreover, the Board is not required to follow its previous decisions. As Culliton C.J.S. said in Burt, Davis, Popoff, et al. v. Armadale Publishers Limited et al. 1975 CanLII 809 (SK CA), [1976] 1 W.W.R. 350 at 353 "[h]owever helpful uniformity might be, the Board is*

[26] *Loraas Disposal Services Ltd. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 1998 CanLII 12407 (SK CA), 172 Sask R 227, 48 CLRBR (2d) 219, at para 16.

> *not bound by its previous decisions and may decide each case in the light of its particular circumstances."*

[62] In this application, therefore, the Board is to determine the appropriate interpretation of the supervisory employee provisions by considering not just their wording, but also the scheme and object of Part VI of the Act, the purpose of the supervisory employee provisions and the intention of the Legislature. This includes reference to extrinsic aids such as Hansard. The Board is also to give serious consideration to past decisions of the Board that interpreted these provisions, particularly *Saskatoon Public Library*. Taking into account these principles of statutory interpretation, the Board has considered the supervisory employee provisions.

Grammatical and Ordinary Sense of Supervisory Employee Provisions:

[63] The first step, according to *Arslan*, is to form an initial impression as to the meaning of the supervisory employee provisions from their text.

[64] Subsection 6-11(1) of the Act states:

> *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.*

[65] Subsection (1) applies only if a union applies for certification. Subsection (2) then goes on to provide discretion to the Board to be applied "[i]n making the determination required pursuant to subsection (1)":

> *(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.*

[66] Subsection (3) provides a rule that the Board must apply when determining an appropriate bargaining unit. However, subsection (3) is not restricted, as is subsection (2), to applying only when making the determination required pursuant to subsection (1):

> *(3) Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.*

[67] This is a free-standing rule that applies whenever the Board is determining an appropriate bargaining unit. This interpretation is bolstered by the wording of subsection 6-11(7), which

commences with the phrase “In making the determination required by subsection (1)”. Those words are glaringly absent from subsection (3).

[68] In interpreting subsection (3), *Saskatoon Public Library* says:

> *[20] In the context of section 6-11, the ordinary and grammatical meaning of the provision is clear, that is, that subsection (3) is applicable 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. This interpretation is strengthened by the reference to the power to exclude persons from the bargaining unit “proposed by the union”.*

[69] There is no support in subsection (3) for this interpretation. Subsection (3) does not say that it is applicable only to the establishment of a bargaining unit. The phrase “proposed by the union” does not appear in subsection (3). The Board does not consider the fact that subsections (2) and (7) limit their application to cases where the Board is making the determination required by subsection (1) but there is no such limitation on the application of subsection (3). This interpretation is not consistent with the ordinary and grammatical sense of subsection (3).

[70] Subsections (4) to (6) then go on to set out exceptions to the rule established by subsection (3):

> *(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.*

[71] First, subsection (4) allows an employer and a union to enter into an irrevocable election to allow supervisory employees to be in a bargaining unit. Second, it allows the Board to certify a bargaining unit composed entirely of supervisory employees. This second exception would allow any supervisory employees who are removed from a bargaining unit to form their own bargaining unit, since they continue to be employees for the purposes of Part VI. This provision refutes the argument that by allowing for the amendment of a bargaining unit to remove supervisory employees the Legislature has eliminated their right to join a union.

[72] Subsection (5) provides a further exception to subsection (3):

> *(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.*

[73] Subsection (5) clarifies that an employee who "is" a supervisory employee did not cease to be a member of the bargaining unit on the coming into force of the supervisory employee provisions. That person continues to be a member of the bargaining unit pending Board order or an agreement between the employer and the union. It also provides that an employee who "may become" a supervisory employee also continues to be a member of the bargaining unit pending Board order or agreement between the employer and the union. These employees are comparable to employees who become non-employees, by reason of changes to the definition of "employee" or changes to their job duties. Subsection (5) clearly contemplates the removal of supervisory employees from an existing bargaining unit where it provides that they continue to be members of the bargaining unit until they are "excluded by the board".

[74] The Board appeared to acknowledge this in *Saskatoon Public Library* when it stated:

> *[29] The bargaining unit description may also be changed through an amendment to that bargaining unit resultant from changes to position descriptions, job duties or job responsibilities within the prescribed bargaining unit or from changes to the definition of "employee" within the SEA.* (emphasis added)

[75] In reviewing subsections 6-11(4) and (5), *Saskatoon Public Library* stated:

> *[24] Also supportive of our interpretation are subsections 6-11(4) and (5). Subsection 6-11(4) allows for an employer and a trade union to enter into an irrevocable election to allow the Board to include supervisory employees within the same bargaining unit as the employees which they supervise. Once such an election is made, it cannot be retracted or revoked by either party.*
>
> *[25] Such an election makes sense only in the context of an initial application to the Board when the appropriate unit of employees is being considered. Absent such an election, the Board is precluded from including supervisory employees within the same unit as the employees they supervise. Because supervisory employees are still entitled to union representation, i.e.: they are not managerial or confidential employees as defined in section 6-1(h), they can, themselves, be included within a separate bargaining unit and represented by the same or another trade union. This question is to be determined at the outset of the establishment of the bargaining relationship. To do so at another time, once the Board has already determined an appropriate unit, would be a difficult situation as discussed in more detail below.*

[76] Other than suggesting that this interpretation makes sense, and that applying the provisions more broadly would be difficult, the Board provides no justification for its assertion that subsections (4) and (5) are supportive of its interpretation. Then it goes on to contradict itself by adding the following:

> *[26] Additionally, subsection 6-11(5) makes it clear that until such time as a supervisory employee is excluded by the Board, that employee continues to be a member of the bargaining unit and is entitled to all of the rights and shall fulfil all of the responsibilities of a member of the bargaining unit.* (emphasis added)

[77] The interpretation of subsections 6-11(4) and (5) in *Saskatoon Public Library* are not consistent with their ordinary and grammatical sense.

[78] Subsection (6) provides for a transition period of two years after the supervisory employee provisions come into force before the exclusion of supervisory employees from bargaining units is to be applied by the Board:

> *(6) Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.*

[79] *Saskatoon Public Library* did not address how a two-year transition period would support its interpretation of subsection 6-11(3). The Board agrees with the University that the only reasonable interpretation of the transition provision is that its purpose was to allow employers and unions two years in which to discuss and potentially negotiate irrevocable elections for existing bargaining units.

Purpose and relevant context:

[80] In considering whether the application of the supervisory employee provisions to an amendment application brought by an employer would result in a harmonious reading of the provision consistent with the scheme of the Act, the object of the Act, and the intention of the Legislature, *Saskatoon Public Library* stated:

> *[32] Firstly, such an interpretation flies in the face of the fundamental principle of Part VI of the SEA which is that 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**". If the Board were to support the employer's application by adoption of the interpretation sought by the Employer in this case, we would be permitting the Employer to factor into that choice.*
>
> *[33] The SEA is clear that employer influence in the choice of a bargaining representative is not to be permitted. Section 6-5 of the SEA clearly interdicts any form of coercion or intimidation "that could reasonably have the effect of compelling or inducing a person to become or refrain from becoming **or continue to be or to cease to be a member of a union**".*
>
> *[34] Employer interference in the selection of a collective bargaining representative also constitutes an unfair labour practice. This interdiction also includes a prohibition against an employer becoming engaged in the support of a trade union seeking to represent its*

> *employees as well as engaging in collective bargaining with an employer dominated labour organization.* (emphasis added in original)

[81] There is no explanation of why such an interpretation would mean that employers are factoring into, influencing or interfering with the choice of union. Unlike an amendment to remove a non-employee from a bargaining unit, supervisory employees removed from a bargaining unit continue to be employees under Part VI and continue to "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". The only limitation placed on this right is that they must exercise these rights in a bargaining unit separate from the employees that they supervise. Neither the Legislature, through the enactment of the supervisory employee provisions, nor the University in making this application, are taking away from the supervisory employees the right to engage in collective bargaining through a union of their own choosing.

[82] A significant concern for the Board in *Saskatoon Public Library* appears to be the following:

> *[36] Additionally, these supervisory employees will likely have acquired rights and interests under the collective agreements previously negotiated; which rights and interests would cease if they were removed from the bargaining unit. This could include items such as seniority, wage rates, holiday and sick leave entitlements, insurance benefits and coverage, and pension rights. Additionally, some of these employees may have outstanding grievances in respect to the interpretation or implementation of the collective agreement, which grievances would cease to exist or to be prosecuted if they were removed from the bargaining unit.*

[83] This is consistent with the situation that occurs when an employee is declared to be a non-employee and removed from a bargaining unit. It therefore does not provide support for the interpretation of the supervisory employee provisions adopted by the Board in *Saskatoon Public Library*. This issue will be discussed in more detail, below.

Intention of the Legislature:

[84] Finally, the Board erred in *Saskatoon Public Library* when it considered the issue of the use of extrinsic aids. It stated:

> *[42] As noted above in Arslan v Sekerbank TAS reference to extrinsic aids to assist in the interpretation of statutory provisions is now widely accepted as assisting to frame the real intent of a legislative provision. However, the value of such extrinsic aids is limited when there is no ambiguity or more than one plausible reading to be given to the provisions under review.*
>
> *[44] … Since there is no ambiguity, which requires resolution, it is unnecessary to resort to extrinsic evidence to assist to resolve any such ambiguity.*

[85] That is not the proper application of the modern principle of statutory interpretation. While the Board referred to *Arslan*, it ignored the instructions that the Court of Appeal laid out in that case:

> *[59] Under the modern principle, the court first forms an initial impression as to the meaning of a legislative provision from its text (i.e., its "grammatical and ordinary sense"). Then, so as to infer what the Legislature intended to enact, the court will take into account the purpose of the provision and all relevant context. As this suggests, the latter part of the inquiry involves the contextual determination of legislative intent.*
>
> *. . .*
>
> *[62] As noted, even where the court's initial impression of a legislative provision is readily arrived at, the court is required to consider the broader context to read the provision "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." In Atco Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board), 2006 SCC 4 at para 48, [2006] 1 SCR 140, Bastarache J., for the majority, wrote:*
>
> > *This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading. . .* (emphasis added)

[86] The unions are incorrect in their arguments that Hansard can only be referred to if the Board first makes a determination that the legislation is ambiguous. This issue was recently considered by the Board in *United Food and Commercial Workers, Local 1400 v Moose Jaw Co-operative Association*[27], which acknowledged that the approach taken in *Saskatoon Public Library* on this issue is incorrect:

> *[61] The Union suggests that this Board can take judicial notice of Hansard in considering legislative intent. The Employer disagrees, saying that the Board cannot take Hansard into account unless the legislation in issue is ambiguous or in conflict with other legislation. On this topic, this Board stated in Saskatoon Public Library Board v Canadian Union of Public Employees, Local No. 2669, 2017 CanLII 6026 (SK LRB) that, "the value of such extrinsic aids is limited when there is no ambiguity or more than one plausible reading to be given to the provisions under review". Having found that there was no ambiguity, the Board decided that it was "unnecessary to resort to extrinsic evidence to assist to resolve any such ambiguity."*
>
> *[62] Ruth Sullivan takes a more nuanced view of the use that can be made of extrinsic evidence:*
>
> > ***23.15 Must the legislation be ambiguous?*** *It is sometimes said that the courts should not look to extrinsic materials, even though the materials otherwise would be admissible, unless the legislation to be interpreted is ambiguous. This constraint is a vestige of the plain meaning rule.*

[27] 2019 CanLII 43225 (SK LRB).

> ***23.16*** *To say that a provision is not ambiguous, that its meaning is clear or "plain", is a conclusion reached at the end of interpretation. It is a judgment that can appropriately be made only in light of all the available evidence of legislative meaning and intent. The issue, then, is whether the assistance afforded by extrinsic materials - as legal context, as evidence of external context, as evidence of legislative intent, or as authoritative opinion evidence – should be included in the initial work of interpretation.* (emphasis added)

[87] As in *Arslan*, the Board in this case has the benefit of significant amounts of extrinsic evidence in the form of debates in the Legislature. The University provided evidence of numerous excerpts from Hansard that support its argument that the supervisory employee provisions are meant to apply to existing bargaining units.

[88] The first exchange occurred on December 5, 2012, during Question Period:

> ***Mr. Forbes****: — Thank you, Mr. Speaker. Mr. Speaker, the change to the labour law to remove co-workers from their union wasn't asked for anybody who is in a union. At best it creates confusion and bureaucracy. At worst it creates divisions in the workplace. Mr. Speaker, no one voted for changing the structure of workplaces and making it more onerous for employees and employers. Why would the Sask Party introduce legislation that creates confusion, more bureaucracy, and divisions in our workplaces?*
>
> ***The Speaker****: — I recognize the Minister of Advanced Education.*
>
> ***Hon. Mr. Morgan****: — Mr. Speaker, we had two situations that arose during the last number of years. The first one was people that handled or had access to confidential information. These were people that were preparing mandate letters, developing budget documentation. These people were sometimes in scope. How unfair is it to that person to expect them to make a determination how they are to vote when they know the employer's bottom line and know how the budget process is, and how the mandate is to be there? It is incredibly awkward for that individual and even more awkward for that individual to discuss it with their co-workers.*
>
> *We think the appropriate course of action is to have those people removed from being in-scope, so they are not in an awkward position with their workers.*
>
> *We also think, Mr. Speaker, that the other area is people that are in a supervisory position; if you were in the position of hiring, firing, doing performance evaluations, determining wage or salaries, disciplining somebody, that it is inappropriate for you to be in the same collective bargaining group as the people that you're disciplining. How do you go to a meeting with them? How do you vote? How do you determine who's going to be on the executive of the local? Mr. Speaker, it just makes sense.*[28] (emphasis added)

[89] On March 5, 2013, during debate of the Motion to give Second Reading to Bill 85, *The Saskatchewan Employment Act*, the Opposition made these comments:

> *So the view of the SGEU is that this attempt to split supervisors out of the main bargaining unit is definitely cause for concern. But a provision in this section is even more dangerously*

[28] Saskatchewan, Legislative Assembly, Debates and Proceedings (Hansard), 27th Leg, 2nd Sess (5 December 2012) at 2394-2395.

> *out of step with established labour relation principles because it gives employers the power to veto supervisors' rights to remain with their existing bargaining unit.*
>
> *. . .*
>
> *This bill will give the employer the right to determine how these supervisory employees will be represented. No longer do they have the choice to see how they or where they will belong and choose where they need to belong.*
>
> *There are all kinds of costs and consequences that are going to come out of this. First of all, splitting established bargaining units by determining that the supervisors have to be in a unit of their own is going to result in all kinds of conflicts and administrative difficulties. I mean, just think about it. This unprecedented move will create deeper human resource problems that are going to have a long-term impact on the quality and effectiveness of the Saskatchewan public service. Is that what this government wants? I really hope not, but it appears that it may very well be.*
>
> *You're going to see all kinds of extra issues in any kind of public service bargaining process. There's going to be doubling of two sets of collective bargaining, two different contracts, two distinct terms of employment such as hours of work, two unique grievances procedures, two classification plans, two pay scales, two benefit scales, two pension plans, two of any administrative committee, such has occupational health and safety committees. I mean the list is long, Mr. Deputy Speaker.*[29] (emphasis added)

[90] The Opposition made further comments respecting the supervisory employee provisions during debate on the Second Reading Motion, on March 12, 2013:

> *So one of the first things this law does is it actually moves or deprives thousands of people who are currently in unions from their ability to continue to be a member of the union. There's provisions in the legislation around this definition of supervisor that requires there to be basically an exclusion of people who supervise others in work units.*
>
> *Now I don't think that the government really talked to employers about this or employees when they brought this in. We're not entirely sure where it came from, but this particular clause alone is going to have a substantial effect on many existing collective agreements that incorporate people from different levels of employment within a job situation. And so there's another example of something that, I think, was included in here but it hadn't really been discussed with people who were going to be directly affected by it.*[30] (emphasis added)

[91] When Bill 85 was being considered by the Standing Committee on Human Services on May 10, 2013, the following exchange occurred:

> ***Mr. Forbes**: — Okay. There has been some concerns, especially if you take out the supervisory employee, and you've done some work around that. But I note that in the nurses' response on March 1st that they did talk about how, you know, we're trying to get to a larger, more sectoral type . . . Maybe sectoral's not the right word. But larger groups of employees or bargaining seems to be more efficient, more effective than to have smaller*

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[29] Saskatchewan, Legislative Assembly, Debates and Proceedings (Hansard), 27th Leg, 2nd Sess (5 March 2013) at 2519 (Ms. Sproule).
[30] Saskatchewan, Legislative Assembly, Debates and Proceedings (Hansard), 27th Leg, 2nd Sess (12 March 2013) at 2651 (Mr. Nilson).

groups. And that's been the concern that's been raised is that we may see in health and other areas where you start to have all sorts of different smaller bargaining units, whereas before it was a move towards larger groups of bargaining so . . . I don't know if that's . . . And again it's whether it's an intended or unintended consequence of this, but if you could comment on that.

***Hon. Mr. Morgan**: — I'm going to let Mr. Carr speak to it, but we talked earlier about what we felt the definition of a supervisory employee was, and when there should be groups of people that shouldn't be in the same union where they don't have a commonality of interest or where somebody is in a supervisory position with regard to another one. And we heard pretty strongly that where there's issues on other people don't like supervising each other. You have the situation, I think I used the example that, on early in the week, one employee is disciplining another employee or in a supervisory position, and later in the week they go to the union meeting and they're electing a shop steward. And then how does that play, relate to what took place on the workplace? You know, if you have one person that's a shop steward and another person that's the supervisor, where do you end up with that?*

So that relates to the issue of, you know, we change the scope of supervisors and we'll take those people out of scope so that somebody that's in a true disciplinary fashion with respect to another employee moves out. And then we want to try and minimize or reduce the number of, if we had to have two groups within, and it's possible that you don't have a commonality of a group within and you may have to subdivide them.

The Labour Relations Board I think has a practice they don't like to see, and I don't think employers . . . [inaudible] . . . they have multiple different unions within. So our expectation is that their application of the Act would be that there would not be a great number of . . . [inaudible] . . . for that. You know, of course we don't want to interfere with their autonomy or their ability to make the determinations, but we think the way the framework is, it should not have an impact but will allow for people to be taken out of scope where they're in a supervisory position.

. . .

***Mr. Forbes**: — So other unions had this concern. I think CUPE had this concern, SGEU had this concern. What kind of impact would it have on SGEU?*

***Hon. Mr. Morgan**: — I can't answer that because SGEU didn't . . . We didn't participate in the re-crafting of the language. We used the discussions with SUN. And we took it forward and asked, you know, we raised it at the advisory committee saying, this is what we're proposing to do. And I don't . . . Well they're not supportive of it, period.*

***Mr. Forbes**: — Period, yes. So that'll be interesting. Let's just take SGEU or CUPE, which is more of a, I think the term is, health service provider. Is that the language that in the health region, if you have . . . And so, what the impact that will have in terms of, while this is a change, a tightening up, what will be the implication in terms of bargaining, in terms of more bargaining units or potential bargaining units or people out of the union?*

***Hon. Mr. Morgan**: — We're expecting not to see a change in the number of bargaining units or not a significant change. Although there's no doubt, you know, we've now moved to a point where we have a flatter management structure as a result of well, lean and a variety of other things. So there's no doubt because of those types of changes and who's doing management or supervisory work, it will move a number of people out.*

We didn't focus on a number or a target. We focused on what the positions were, what the roles were, and the principles that were behind it. So we crafted it back and forth, and that's why we used the other terms in it, lead hand. And that was so that we were identifying what we did not want to have happen, which would be somebody that is sort of the supervisor

> *of the day, you know, where four or five people go out to repair a roadway or a culvert. Well that's not the goal of it, but when you're doing performance evaluations, you're doing discipline or that*.[31] (emphasis added)

[92] The following year, on April 28, 2014, during consideration of Bill No. 128, *The Saskatchewan Employment Amendment Act, 2013* by the Standing Committee on Human Services, the following exchange occurred:

> ***Mr. Forbes**: — One of the concerns is around the definition of a supervisory employee, particularly where there's multi-bargaining units under one employer such as health care. And it's apparent that both health care unions and health sector employers have noted that this is not a manageable change, that they could lead to some problems, particularly when it comes to managing relief situations, and could lead to multiple bargaining units adding to the bureaucracy of bargaining. So how do you intend to deal with that problem?*
>
> ***Ms. Parenteau**: — There is the possibility that you would have more than one bargaining unit than they currently do today because of the supervisory employee definition. But again after consultation, we've brought in a House amendment that clearly states that the primary duties have to be supervisory in nature. They have to hire, fire, discipline — those types of activities — to be considered. So that really did clarify that it's a much narrower definition than the broad one. And actually the definition went on to explain that it did not include people that act as supervisors on a temporary basis.*
>
> ***Mr. Forbes**: — And when you talk about House amendments, that was what we did last spring right at the end.*
>
> ***Hon. Mr. Morgan**: — That's correct.*
>
> ***Mr. Forbes**: — Okay.*
>
> ***Hon. Mr. Morgan**: — We had a lot of discussion when we were doing the consultation and from the advisory committee as to the real fine distinctions between who is in a supervisory role and who isn't. There was a lot of shades of grey. You had some people refer to some people that would work on a shift that they would be a lead hand, and that that was sort of one of the terms, you know, that the person was a lead hand, weren't really a supervisor. They were sort of in control for that shift as far as giving people directions; you know, you're standing in line here. You're doing this. You're doing whatever else. And then the one that, you know, you could have a lead hand that was responsible for 50 or 60 people controlling any number of things, and the definition was incredibly broad.*
>
> *Another one was the role of a head nurse. That was one that came out of health care. And you could have somebody on a night shift where there would be four nurses working on a ward. One of them would be designated as the head nurse because you had to have one, but it was really four people that were, you know, not very much of a supervisory role other than, for the sake of definition, they had to have one. But yet you could have a busy surgical ward that would have a couple of dozen people, and the head nurse on that one could be responsible for any number of things. And so they would, out of the collective agreement, have the same title but the work that they were doing is vastly different.*

[31] Saskatchewan, Legislative Assembly, Standing Committee on Human Services, Hansard Verbatim Report, 27th Leg, 2nd Sess (10 May 2013) at 547, 560.

> *So that's where we tried to use the term whose primary function was to try and provide better clarity, or try and eliminate a lot of the shades of grey that existed under the existing terminology that allowed for all those vagaries to exist.*
>
> ***Mr. Forbes**: — Getting back to the fact that we might create more bargaining units, do you have, have you had a sense over the past year, is this going to be the case? Or is this an unfounded worry or concern?*
>
> ***Hon. Mr. Morgan**: — I don't think we can answer that right now. We haven't heard from anybody that said, oh yes, we definitely are going to. When they get into that, you know, there's that two-year period they've got to try and bring applications or resolve, but we haven't heard a lot of questions about, oh how are we going to do this, how are we going to do that? It may be, once the Act is enforced, that people start addressing their minds to it, but we haven't had people coming out trying to . . .*[32] (emphasis added)

[93] Because of the significance of the policy change reflected by the supervisory employee provisions, they were debated at length. These excerpts make it abundantly clear that the intention of the Legislature was that the supervisory employee provisions were to apply to existing bargaining units. As in *R v Morgentaler*, this evidence demonstrates that members of all parties in the Legislature understood the central feature of the proposed provisions, in this case to provide for the removal of supervisory employees from their bargaining units. These excerpts provide further information respecting the purpose of the supervisory employee provisions, and the "mischief" they were meant to correct. In *Arslan* the Court of Appeal states that the Board is required to consider this context in arriving at the proper interpretation of the supervisory employee provisions.

Relevance of Regulations:

[94] ASPA and CUPE argue that the Regulations cannot be used in the interpretation of section 6-11 of the Act because they say they are for the purposes of clause 6-1(1)(o) of the Act. This argument displays a clear misunderstanding of statutory interpretation. Subclauses 6-1(1)(o)(v) to (vii) set out a list of employees who are not supervisory employees. Subclauses (v) and (vi) provide specific examples of excluded employees. Subclause (vii), on the other hand, authorizes the Lieutenant Governor in Council to add further exceptions to this list, by regulation. This means that whenever the term "supervisory employee" is used in Part VI, its proper interpretation is found in clause (o), as modified by the Regulations. As in *Monsanto*, here clause 6-1(1)(o) and subsections 6-11(3) to (6) of the Act and the Regulations form an integrated scheme on the subject of the application of the supervisory employee provisions; the proper interpretation of the supervisory employee provisions can be gleaned in light of this broader context. The Regulations provide further

[32] Saskatchewan, Legislative Assembly, Standing Committee on Human Services, Hansard Verbatim Report, 27th Leg, 3rd Sess (28 April 2014) at 786-787.

support for an interpretation of the supervisory employee provisions as applying to existing bargaining units.

Collateral attack/disguised reconsideration application:

[95] The Board does not accept ASPA's argument that this application is a collateral attack on *Saskatoon Public Library*. The University did not have the option of seeking judicial review or reconsideration of that decision because it was not a party to that application. *ATU* is inapplicable to this matter. ASPA acknowledged this in oral argument.

[96] The same applies to ASPA's suggestion that this is a disguised reconsideration application, and that the Board should dismiss the University's application on the basis that it has not satisfied those criteria. What ASPA fails to mention is that the Board's jurisprudence[33] and Board Regulations are abundantly clear that a reconsideration application may only be made by a person "directly affected" by the original decision. The University was not directly affected by *Saskatoon Public Library*, therefore it had no standing to make an application for reconsideration of that decision. To suggest that the Board could reconsider that decision and come to a different result in that decision, in the absence of any representation from the Saskatoon Public Library Board, would lead to an absurd result.

Applicability of previous Board decisions:

[97] The unions appear to base their arguments on the assumption that because the Board has issued one decision interpreting the supervisory employee provisions that it can never consider that issue again. Not only does the Board consider and reconsider past decisions in every matter it hears, the law is clear that the Board is not bound by its past decisions. While consistency in decision-making is optimal, the Board is not required to follow a decision that is clearly wrong.

[98] ASPA referred the Board to a decision of the Court of Appeal for Saskatchewan ["*Graham Construction*"][34] that overturned a decision of the Board, in part, on the basis that it did not respect past jurisprudence of the Board. However, a careful reading of that decision shows the following:

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[33] See, for example, *Communication, Energy and Paperworkers Union of Canada v JVD Mill Services*, 2011 CanLII 152054 (SK LRB).

[34] *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Graham Construction and Engineering Ltd.*, 2008 SKCA 67 (CanLII).

> *[6] … It is not the fact of the disagreement of this decision with other jurisprudence, alone, that makes the Board's decision unreasonable, but rather that the reasoning from other decisions demonstrates that a declaration of abandonment is not available in this case.*
> *. . .*
>
> *[88] These are the bases upon which the decision appears to be unreasonable:*
>
> > *1. It does not respect the past jurisprudence of the Board that has seen abandonment used in rare cases as a means of a de facto rescission power;*
> >
> > *2. It does not respect the past jurisprudence of the Board which: (i) places an onus on the employer to explain why no employees had been hired; (ii) has never found abandonment where there have been no employees in the bargaining unit; and (iii) has not found abandonment where there is province-wide bargaining in the construction industry; and*
> >
> > *3. It asks the Unions to explain the basis for their inactivity without a foundation for abandonment in the first place.*
>
> *[89] Since these bases rely, in part, upon a comparison with past decisions of the Board, it is necessary to consider Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles. In Domtar, the question was whether divergent interpretations of the same legislation by two administrative tribunals constitutes unreasonableness. The Supreme Court of Canada answered this question negatively. L'Heureux-Dubé J., writing for the Court, said:*
>
> > *This process has led to the development of the patently unreasonable error test. If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would, in my opinion, constitute a serious undermining of those principles. This appears to me to be especially true as the administrative tribunals, like the legislature, have the power to resolve such conflicts themselves. The solution required by conflicting decisions among administrative tribunals thus remains a policy choice which, in the final analysis, should not be made by the courts.* (emphasis added by Court of Appeal)
>
> *[91] While this is the first time the Court has been asked to rule on the question of whether the Board has the authority to find abandonment, it is a power that has already been exercised by the Board and, I have found, that the assumption of such a power is not unreasonable. It is not, however, an unlimited power. Domtar does not mean that the law pertaining to abandonment need not be determined. Legislative silence does not mean that there are no legal contours to the power to declare that bargaining rights have been abandoned. Prior decisions of this and other Labour Boards are our only recourse to determine the content of the power. Thus, I have concluded that the jurisprudence of this Board and from elsewhere is a factor to be considered in reviewing the within decision.*

[99] The Court of Appeal decided to overturn the decision in question relying in part on subsequent Board decisions that refused to follow this one and described it as an aberration. Applying the rationale in *Graham Construction* to the current application leads the Board to the conclusion that *Saskatoon Public Library* must be treated as an aberration. It ignored previous Board jurisprudence applicable to applications made by employers for the amendment of a

certification order on the basis that an employee or group of employees no longer properly belonged in the previously established bargaining unit. The proper test to be applied by the Board is whether the employer has satisfied the Board that the amendment is necessary. In this case, the Board reverts to that previous jurisprudence and finds that the University has satisfied the Board that an amendment is necessary. As a result of the new supervisory employee provisions, certain employees of the University can no longer remain in the current ASPA bargaining unit.

[100] What would the Board have done in this case or in *Saskatoon Public Library* if, instead of making an application to amend the certification order to remove employees from the bargaining unit on the basis that they are supervisory employees, the employer had made an application to amend the certification order to remove them from the bargaining unit on the basis that they were no longer employees? The Board would have analyzed their job duties to determine whether they satisfied the criteria in the definition of employee then in place. If they did not, whether or not the worker's job duties had changed, the change in the definition of employee when the Act was proclaimed into force in 2014 would provide the change in circumstances that would necessitate an amendment to the bargaining unit description. This same analysis should have been used by the Board in determining the application of the supervisory employee provisions in *Saskatoon Public Library*, and will be used by the Board in determining their application in this matter.

Effect on existing rights:

[101] ASPA argues that applying the supervisory employee provisions to existing bargaining units would disregard the rule of interpretation that new statutory provisions are not to be given retrospective effect. However, applying the supervisory employee provisions to existing bargaining units does not give them retrospective effect. As the Supreme Court of Canada explained in *Gustavson Drilling*:

> *The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of the amending statute.*
>
> *It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception. The only rights which a taxpayer in any taxation year can be said to enjoy with respect to claims for exemption are those which the Income Tax Act of that year give him. The burden of the argument on behalf of appellant is that appellant has a continuing and vested right to deduct exploration and drilling expenses incurred by it, yet it must be patent that the Income Tax Acts of 1960 and earlier years conferred no rights in respect of the 1965 and later taxation years. One may fall into error by looking upon drilling and exploration expenses as if they were a bank*

> *account from which one can make withdrawals indefinitely or at least until the balance is exhausted. No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.* (emphasis added)

[102] Applying that reasoning to the current application, the Board finds that the supervisory employee provisions do not purport to deal with the status of supervisory employees in years prior to the date of their implementation; they do not reach into the past and declare that the law or the rights of supervisory employees as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as the supervisory employees employed by the University is concerned, is to deny for the future a right to continue to be a member of the current ASPA bargaining unit. As the Supreme Court noted in *Gustavson Drilling*, it is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights. No one has a vested right to continuance of the law as it stood in the past; it is imperative that legislation conform to changing social needs and governmental policy. Unions, employers and employees may plan their affairs in reliance on the laws remaining the same; they take the risk that the legislation may be changed. Implementation of the supervisory employee provisions was just one of many changes introduced when the Act came into force. Now that the two-year transition period has passed, unions, employers and employees must govern their affairs in accordance with the supervisory employee provisions. In arguing to the contrary, ASPA has ignored the differentiation between vested rights and antecedent rights as explained in *Gustavson Drilling*.

[103] ASPA's arguments suggest that once a bargaining unit is established, it cannot be changed, except on an application by the union. This argument, of course, ignores the ability of the Board under section 6-104 of the Act to amend a certification order. The Board regularly grants amendment orders that remove employees from bargaining units when the applicant, often the employer, satisfies the Board that the amendment is necessary.

[104] ASPA argues that Part VI of the Act emphasizes employees' rights to organize or join a union of their own choosing and that the purpose of the labour relations scheme enacted by Part VI of the Act is to protect bargaining rights and the right to associate. While this is true, it is subject to exceptions. The right to join a union is not unlimited. It has always been limited to "employees", as that term is defined in the applicable legislation. If, even on the application of their employer, the Board decides that a person whose position previously satisfied the definition of "employee" no longer does, the Board can and routinely does make an order determining that person is no

longer an employee within the meaning of Part VI of the Act. In that case, the person loses their ability to join a union and the rights they had pursuant to their former union's collective agreement.

[105] Although not before the Board on this application, it is interesting to note that at the same time that the supervisory employee provisions were implemented, the definition of "employee" in Part VI was modified. When drafting the revised definition of employee, rather than add the workers who meet the definition of supervisory employee into the exceptions in the definition of employee, thereby depriving them of the right to join a union, the Legislature chose instead to establish a subset of employees, that it called supervisory employees. Those workers continue to be employees within the meaning of Part VI of the Act, meaning they continue to enjoy the rights granted to employees by that Part, including the right to join a union of their choosing.

[106] What the unions overlooked in their arguments is that supervisory employees continue to be employees within the meaning of that term in Part VI of the Act. They are not losing the rights that accrue to them by virtue of that status. Whether they will suffer any decrease in wages or benefits is a matter of speculation at this point. These matters may be the subject of negotiation between the affected employees and the University (as they would be if the Board had instead been asked to determine and had agreed that they no longer meet the definition of employee). Alternatively, it will be the subject of negotiations between the University and their union, if they decide to exercise their right to join a union of their choosing. As the University noted, these employees continue to have the same rights and protections pursuant to statute and common law that other employees enjoy.

[107] This application seeks an amendment to the bargaining unit. However, in this situation, any workers who are removed from the existing bargaining unit because they are "supervisory employees" will continue to be "employees" within the meaning of Part VI of the Act. This means they do not lose their right to join a union. Workers who are found to be supervisory employees have the right to determine whether they will join a union of their choosing, including ASPA. The only restriction implemented by the Act is that they form a separate bargaining unit. The Board does not accept ASPA's argument that they have a vested right to remain in that bargaining unit.

Conclusion:

[108] In summary, the Board has come to the conclusion that the proper interpretation of the supervisory employee provisions is that they apply to existing bargaining units. The Board will

apply them when it receives an application to amend an existing certification order to remove supervisory employees from a bargaining unit that includes employees that they supervise.

IV. APPLICATION OF SUPERVISORY EMPLOYEE PROVISIONS TO FOUR EXAMPLE POSITIONS

Background:

[109] Having determined that the University has properly brought this application, the Board now turns to the issue of which, if any, of the positions occupied by the four employees who gave evidence before the Board satisfy the definition of supervisory employee thus making it necessary to amend the certification order to remove them from the bargaining unit.

[110] As noted in the Hansard excerpts quoted above, the definition of supervisory employee proposed in Bill 85 was amended on Third Reading, before the Act was passed. The original wording was:

> *(o) "supervisory employee" means an employee who regularly exercises one or more of the following duties:*
> *(i) supervising employees;*
> *(ii) independently assigning work to employees and monitoring the quality of work produced by employees;*
> *(iii) scheduling hours of work or overtime;*
> *(iv) providing comments to be used for work appraisals and merit increases for employees;*
> *(v) recommending discipline of employees.*

[111] After the amendment, the wording adopted by the Legislature when the Act was passed, reads as follows:

> *(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.*

[112] As noted above, subsection 3(1) of the Regulations prescribes additional occupations that are excluded from this definition:

(a) registered psychiatric nurse, as defined in The Registered Psychiatric Nurses Act;
(b) registered nurse, as defined in The Registered Nurses Act, 1988;
(c) non-commissioned officer, within the meaning of The Police Act, 1990;
(d) foreman, general foreman and journeyperson in the construction industry.

Argument on behalf of University:

[113] The University argues that all four of the witnesses who gave evidence at the hearing of this matter are supervisory employees.

[114] It relies on *Workers United Canada Council v Amenity Health Care LP*[35] ["*Amenity Health Care*"]:

> *[111] Since "supervisory employees", unlike employees in a managerial capacity, are not deprived of protections under the SEA, including the right to organize and to seek certification, the Board's interpretive approach to these provisions need not be unduly narrow. This is consistent with this Board's holding in Saskatoon Public Library in relation to supervisory employees, generally. While it is true that the purpose underlying subsection 6-11(3) is to avoid conflicts of interest or divided loyalties in the workplace, which is the same as that underlying the managerial exemption, it does not follow that the narrow interpretive approach for determining whether an employee qualifies as a manager should operate when assessing if a disputed employee exercises supervisory functions. The concerns identified in Garda, for example, do not arise with the same stringency. As a consequence, clause 6-1(1)(o) should be construed in its "grammatical and ordinary sense harmoniously with the scheme of the [SEA]", to quote from Tran.*
>
> *[112] Admittedly, clause 6-1(1)(o) of the SEA is curiously drafted. That said, applying the interpretive principles identified above, it is necessary to begin by considering this provision as a whole. It opens by stating that a "supervisory employee" is one whose primary or principal employment function is to supervise other employees, and goes on to identify four (4) "duties" which are functions traditionally performed by supervisors. The SEA definition only requires that the employee in question fulfills one (1) of these four (4) duties in order to qualify as a prima facie "supervisory employee".*
>
> *[113] That does not end the matter, however. The provision goes on to exclude three (3) groups of employees. These are employees who but for this statutory exclusion would otherwise qualify as supervisory employees, namely: "a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs"; "a supervisor on a temporary basis", or employees who fall within a prescribed occupation. For present purposes, it is the exclusion found in sub-clause 6-1(1)(o)(v) that is relevant – "a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs".*
>
> *[114] How, one may ask, can an employee whose "primary function" it is to supervise employees, at the same time claim those duties are "ancillary to the work he or she performs"? While this inquiry appears illogical on its face, it is the inquiry upon which the SEA requires all counsel and this Board to embark?*
>
> *[115] As is apparent such an inquiry involves two (2) stages. The first stage asks whether the primary function of the employee in question is to supervise fellow employees. Second, if the answer to this question is "yes", then it is necessary to determine whether those*

[35] 2018 CanLII 8572 (SK LRB).

> *supervisory duties performed by a team leader are "ancillary" to "the work he or she performs"? The Board undertakes this inquiry below.* (emphasis added in original)

[115] Relying on *Amenity Health Care*, the University states that the inquiry into whether an employee is a supervisory employee is a two-step process. First the Board must determine whether their primary function is to supervise other employees. This is ascertained by determining whether the employee's primary function involves at least one of the responsibilities listed in clause (o). If the answer to that question is yes, then the Board must determine whether those supervisory duties are ancillary to the work they perform or fit within one of the other exceptions. If so, then the employee is not a supervisor and need not be excluded from the bargaining unit.

[116] The University also relies on *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc.*[36]:

> *[89] At the outset of its inquiry, the Board must consider whether the position's primary function is to supervise employees. This Board observes that in previous, related case law, this Board has sought guidance in this determination by assessing whether the position in question performs one or more of the enumerated duties. This Board will proceed on this basis, subject to the following observations.*
>
> *[90] The Board notes that the two phrases contained in the definition of supervisory employees are "joint and several" conditions precedent to a determination of whether an employee is properly found to be a supervisory employee. These conditions precedent are informative of the existence or application of the other. To explain, an employee who performs one or more of the enumerated functions must perform at least one of those functions as a part of its primary function as a supervisory employee. The following are the four enumerated duties, of which the position must perform at least one:*
>
> > *(i) independently assigning work to employees and monitoring the quality of work produced by employees;*
> > *(ii) assigning hours of work and overtime;*
> > *(iii) providing an assessment to be used for work appraisals or merit increases for employees;*
> > *(iv) recommending disciplining employees.*

[117] To be classified as a supervisory employee, the University says, the employee's primary role must be one of the enumerated responsibilities listed in subclauses (o)(i) to (iv), and the employee must not fall within one of the exceptions contained in subclauses (o)(v) to (vii).

[118] With respect to Sotvedt, the University states that her evidence indicated that supervisory tasks are a core responsibility of her job, and that she spends about 75% of her time discharging these supervisory functions. These functions are ongoing and directly connected to the work she

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[36] 2019 CanLII 76957 (SK LRB).

performs. The nature of her work is fundamentally different than the work of her reports. She performs all of the duties described in subclauses (o)(i) to (iv) with respect to the four to six ASPA members who report to her.

[119] The University states that Bitinsky testified that 20 ASPA members report directly to him. He stated that these supervisory tasks are the prime function of his job. He estimated that he spends at least 60% of his time discharging these supervisory functions; they are ongoing and directly connected to the work he performs. The nature of his work is fundamentally different from the work of his reports. He performs all of the duties described in subclauses (o)(i) to (iv).

[120] The University states that Dolan indicated that four ASPA members report directly to her and another three report indirectly to her. She stated that supervisory tasks are a core responsibility of her job and take up approximately 25% of her time. They are ongoing and directly connected to the work she performs. The nature of her work is fundamentally different than the work of her reports. She performs all of the duties described in subclauses (o)(i) to (iv).

[121] The University states that Kehoe has 15 ASPA members who report directly to her. She stated that supervisory tasks are a core responsibility of her job and take up approximately 25% of her time. They are ongoing and directly connected to the work she performs. The nature of her work is fundamentally different than the work of her reports. She performs all of the duties described in subclauses (o)(i) to (iv).

Argument on behalf of ASPA:

[122] Relying on *Amenity Health Care*, ASPA argues that the onus is on the University to satisfy the Board that the witnesses are supervisory employees:

> *[59] . . . However, if an employer contests the composition of a proposed unit on the basis for example, that some individuals function as managers or, as in this case, qualify as supervisory employees, then the evidential burden or onus, as opposed to the legal burden of proof, shifts to the employer to present evidence supporting its argument for exclusion. Notwithstanding this shift in the evidentiary onus, the over-arching burden of proof in a certification application remains upon the union.*

[123] ASPA states that an employee's primary function must be supervisory and that primary function must involve at least one of the enumerated responsibilities, in order for that employee to be a supervisory employee. While some of the affected employees perform work that includes some of the duties set out in clause (o), it is questionable whether one or more of those duties form part of the primary function of all of the affected employees.

[124] ASPA also argues that the analysis as to whether one's primary duties are supervisory in nature must be confined to members of the same bargaining unit. In this case, many of the supervisory duties performed by ASPA members are in relation to CUPE Local 1975 employees, which is beyond the purview of the supervisory employee provisions. Again, ASPA refers to *Amenity Health Care* on this issue:

> *[104] The definition of "supervisory employee" found in clause 6-1(1)(o), together with the statutory prohibition on including supervisory employees in the same bargaining unit as employees whom they supervise absent an irrevocable election located in sub-section 6-11(3), are very recent innovations in Saskatchewan.*

[125] In analyzing whether supervising employees is the primary function of a supervisory employee, ASPA argues that the Board is to apply a quantitative analysis. It points to the opening words of clause (o), which say "an employee whose primary function is to supervise employees". It argues that an employee can only have one primary function, and refers to the following definitions of "primary":

> *95. "Primary" is defined in the Merriam-Webster dictionary as follows:*
>
> *of first rank, importance, or value: principal*
>
> *96. It is defined in the Cambridge Dictionary in these terms:*
>
> *more important than anything else; main*[37]

[126] ASPA argues that the evidence indicates that supervising employees is not the primary or main duty of either Dolan or Kehoe. Dolan indicated that supervising employees was part of her job, but not her primary function. She also stated that more than half of the 25% of her time that she spends supervising employees is spent supervising CUPE Local 1975 members. Kehoe noted that supervising was one of the core responsibilities of her job but not the core responsibility.

[127] With respect to Sotvedt and Bitinsky, neither of their job profiles uses the word supervise or any derivative of that word. Sotvedt's employees go to her as a subject matter expert, rather than as a supervisor. Bitinsky's supervision appeared to come primarily through team meetings. ASPA argues that this type of guidance, support, coaching and direction falls more within the duties performed by gang leaders, lead hands and team leaders. While the University does not

[37] Written Submissions on behalf of the Union, Administrative and Supervisory Personnel Association, October 15, 2020.

use that terminology, these are the kinds of duties the Legislature was attempting to carve out of the definition of supervisory employees when it added those exceptions to the definition.

[128] CUPE, RWDSU and SGEU did not provide argument on this issue.

Analysis and Decision:

[129] Clause 6-1(1)(o) of the Act, as modified by the Regulations, sets out the criteria that must be met before an employee will be considered a supervisory employee. Two criteria must be met to satisfy the definition. First, the University must prove that the employee's primary function is to supervise employees. If it can satisfy that hurdle, it must also satisfy the Board that the employee exercises one or more of the duties enumerated in subclauses (o)(i) to (iv).

[130] In *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) v Riide Holdings Inc.*[38] ["*Riide Holdings*"], the Board held:

> *[43] The next decision for the Board is whether Owners are supervisory employees of the drivers, and therefore cannot be placed in the same bargaining unit with them. As in United Cabs, the Board finds that they do not meet the necessary criteria to be characterized as supervisory employees. To meet the definition of supervisory employee, clause 6-1(1)(o) of the Act requires the Employer to prove two things. First, it must prove that the Owners' primary function is to supervise employees. If it can satisfy that hurdle, it must also satisfy the Board that an Owner is an employee who exercises one or more of the duties enumerated in subclauses (o)(i) to (iv):*
>
> > *(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.*
>
> *[44] Again, Owners do not meet either of those criteria. As noted above, their primary function is not to supervise employees. Neither do they: independently assign work to employees and monitor the quality of work produced by employees; assign hours of work and overtime; provide an assessment to be used for work appraisals or merit increases for employees; or recommend disciplining employees. As a result, there is no impediment to Owners and drivers being placed in the same bargaining unit.*

[131] The Board notes that this was also the analysis undertaken in *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc.*, as follows:

> *The Board notes that the two phrases contained in the definition of supervisory employees are "joint and several" conditions precedent to a determination of whether an employee is*

[38] 2019 CanLII 86848 (SK LRB).

> *properly found to be a supervisory employee. These conditions precedent are informative of the existence or application of the other. To explain, an employee who performs one or more of the enumerated functions must perform at least one of those functions as a part of its primary function as a supervisory employee.*[39]

[132] First, then, the Board must consider whether each of the employees who gave evidence in this matter is "an employee whose primary function is to supervise employees". An issue arises in the interpretation of that phrase in this matter that the Board has not previously had an opportunity to consider. Clause (o) makes no reference to a requirement that the employees they supervise must be in the same bargaining unit. As noted by ASPA, in *Amenity Health Care* the Board made that assumption. However, in that case and in all of the cases that the Board has decided since clause (o) was enacted, none of the workplaces involved had more than one union. The Board agrees with ASPA that, when the words of clause (o) are read in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its objects, and the intention of the Legislature, that is the only reasonable interpretation. The purpose of the amendment is to put supervisory employees in a separate bargaining unit from the employees they supervise. CUPE Local 1975 members are already in a different bargaining unit than their ASPA supervisors. Therefore, any supervision of CUPE Local 1975 members by the four ASPA members who gave evidence before the Board will be disregarded.

[133] The other issue that the Board must consider in assessing this criterion is determining whether supervising employees is the "primary function" of these four employees. ASPA suggests that the Board apply a quantitative analysis to the interpretation of the word "primary". However, the definitions of "primary" provided by ASPA indicate that it is also capable of a qualitative interpretation: "of first rank, importance or value"; "more important than anything else". The Board finds that the analysis is not just quantitative, especially in a situation like this in which the supervised employees are expected to independently exercise so much control over the carrying out of their responsibilities.

[134] The second criterion that must be met is that supervisory employees must exercise "one or more" of the duties enumerated in subclauses (i) to (iv):

> *(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.*

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[39] 2019 CanLII 76957 (SK LRB), at para 90.

[135] Given that “independently assigning work” and “monitoring the quality of work” are both included in subclause (i), the Board has previously interpreted this to mean that this is a conjunctive duty, as it is a requirement that both parts of this subclause be satisfied[40].

[136] If an employee satisfies both of these criteria, the next step is to determine whether any of the exceptions spelled out in subclauses (v) and (vi) and the Regulations apply to the employee:

> *(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;*
> *. . .*
> *(a) registered psychiatric nurse, as defined in The Registered Psychiatric Nurses Act;*
> *(b) registered nurse, as defined in The Registered Nurses Act, 1988;*
> *(c) non-commissioned officer, within the meaning of The Police Act, 1990;*
> *(d) foreman, general foreman and journeyperson in the construction industry.*

[137] ASPA did not argue that any of the exceptions in the Regulations applied to the four employees who testified. The Board finds that none of them applies. There is no evidence that any of those employees were acting as supervisors on a temporary basis. That then leaves subclause (v). While the Board queried the interpretation of this provision in *Amenity Health Care*, it appears clear that, by adding this provision through the amendment of clause (o) during consideration of Bill 85, the Legislature intended to emphasize that the supervisory duties must be the employee’s primary function, and that employees whose supervisory duties are ancillary to their work are not the kind of employees meant to be covered by the definition. ASPA argues that the Board should consider the four witnesses as, at most, team leaders and therefore specifically excepted from the definition of supervisory employee.

[138] In light of these general comments, the Board has assessed each of the employees who gave evidence. In reviewing their evidence, the Board has kept in mind the following caution in *Riide Holdings*:

> *[45] The Board agrees with the Union that the terms of the Services Agreement are not determinative, any more than a job title or job description would be for an employee in a more traditional workplace. The Board must make its assessment on the basis of the duties the Owners actually perform, and whether those duties create an insoluble conflict between the responsibility the Owners owe to the Employer, and the interests of Owners and drivers as members of a bargaining unit.*

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[40] *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc.*, 2019 CanLII 76957 (SK LRB), at para 93.

[139] As noted in *Amenity Health Care*, the onus is on the University to satisfy the Board that these employees are supervisory employees. However, as it goes on to say, since supervisory employees are not deprived of protections under the Act, the Board's interpretive approach to these provisions need not be unduly narrow.

Sarah Sotvedt:

[140] Sarah Sotvedt is the Residence Student Life Manager. Her Job Profile[41], which she adopted as accurate, lists her Primary Purpose and Accountabilities as follows:

> ***Primary Purpose and Accountabilities***
>
> *To develop and maintain comprehensive Residence Student Life program within the University's Voyageur Place, College Quarter, Graduate House and McEown Park Residence complexes. This involves developing and delivering relevant training, direction, support and coaching to Student Life Staff, including Residence Life Coordinators (RLC) and Faculty-in-Residence (FIR). The incumbent supports student leader groups including the Resident Assistant (RA) Teams and the Residence community through working closely and collaborating with SESD, the USSU, the GSA and College and Administrative Units to work towards an exceptional Residence Life experience.*
>
> *Managers are technical leaders responsible for providing guidance and support to teams. They have deep technical knowledge of the work their teams perform and potential issues. Managers provide technical oversight to delivery teams and drive solution development, service delivery and customer orientation. Managers are responsible for identifying talent needs, providing development opportunities and ensuring effective allocation of the resources available.*
>
> *Managers have somewhat broad based organization operations experience or highly specialized functions, and are functional experts, executors, and team leaders. Managers execute strategic leadership, oversee and ensure the effective running of their area of responsibility with organization wide impact. Managers act as a conduit for communication between staff and decision making leaders across the portfolio.*

[141] Four ASPA members report directly to her; normally there would be two more, but they were laid off because of Covid. Three of those four members are Student Life Coordinators, who each have approximately 26 Residence Assistants and six to eight Residence Instructional Staff (non-unionized) reporting to them.[42] She estimated that she spends 75% of her time supervising the ASPA members who report to her.

[142] While her Job Profile does not use the word "supervise", it is clear that her primary function, quantitatively and qualitatively, is supervising employees who are members of the ASPA bargaining unit. Some of the terminology found in her Job Profile that evidence this are:

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[41] Exhibit E-3.
[42] Exhibit E-4: Sarah Sotvedt – ORG Chart.

developing and delivering relevant training, direction, support and coaching; providing guidance and support; providing technical oversight; identifying talent needs, providing development opportunities and ensuring effective allocation of the resources available; team leader; strategic leadership; oversee and ensure the effective running of her area of responsibility; responsible for people resources; provides all aspects of leadership; identifies key opportunities to develop individuals that will enhance and align their skills and abilities; leads Student Life staff; defines monthly/weekly/daily goals and targets for teams; identifies key talent, creating an environment where talent can develop and deliver high value add services to clients. Her oral evidence confirmed that she performs these functions.

[143] Her testimony confirmed that she carries out all of the duties described in subclauses (i) to (iv) and that her supervisory duties are not ancillary to her work. They are her primary function.

[144] The Board finds that Sarah Sotvedt is a supervisory employee. It is necessary to amend the certification order to remove her position from the bargaining unit.

Kevin Bitinsky:

[145] Kevin Bitinsky is the Manager of Enterprise Systems. His Position Profile[43] lists his Primary Purpose and Nature of Work as follows:

> ***Primary Purpose***
>
> *As a key member of the Enterprise Systems management team, the Manager, Enterprise Systems will lead and manage staff in support of the university's goals and strategic priorities and in keeping with the university's Information Technology plan. The work of this position will focus on key partners: University Relations, Consumer Services, Facilities, and Research Services. The manager will play a key role in the development and delivery of the systems required for partners' business processes, and will identify and establish processes and technology for effective service delivery and support, with an emphasis on customer service and user experience.*
>
> ***Nature of Work***
>
> *The Manager, Enterprise Systems provides vision, leadership, direction and best practices for the systems enabling University Relations, Facilities, Consumer Services, and Research Services to meet the needs of students, instructors, researchers, faculty, staff, the broader university community, and external stakeholders. The manager and team are responsible for ensuring that the changing information systems needs of business partners in the supported units are well understood, anticipated, planned for, and excellently supported. Work is done in the context of enterprise architecture and executed utilizing a DevOps methodology. This position is responsible for identifying talent needs and talent development, developing the team's skills and capabilities, and ensuring effective allocation of the resources available.*

[43] Exhibit E-5.

[146] Approximately 20 ASPA members report directly or indirectly to him[44]. He does not create work product; he ensures his team can do and are doing their work. As with Sotvedt, his Position Profile does not use the word "supervise", but it indicates that he performs many tasks that are supervisory in nature: lead and manage staff; provide vision, leadership, direction and best practices; identify talent needs and talent development; develop the team's skills and capabilities; inspire positive, confident teams; identify key opportunities to develop individuals; responsible for all aspects of the employee lifecycle including recruitment, training and development, assignment of duties, performance assessment and planning, and if required, discipline up to and including termination; provides regular technical guidance and support; defines monthly/weekly/daily goals and targets for teams; identifies key talent, coaches and mentors. He estimated that he spends at least 60% of his time supervising the ASPA members who report to him. His primary function, quantitatively and qualitatively, is supervising employees.

[147] His testimony confirmed that he carries out all of the duties described in subclauses (i) to (iv) and that his supervisory duties are not ancillary to his work. They are his primary function.

[148] The Board finds that Kevin Bitinsky is a supervisory employee. It is necessary to amend the certification order to remove his position from the bargaining unit.

Christina Dolan:

[149] Christina Dolan is the Director of Undergraduate & Career Services at the Edwards School of Business. Her Position Profile[45] lists her Primary Purpose and Nature of Work as follows:

> ***Primary Purpose:***
>
> *The Director provides leadership and vision to the Edwards School of Business and is responsible for overseeing all administrative aspects of the undergraduate Bachelor of Commerce (B.Comm.) degree program and certificate programs in business administration and Aboriginal business administration.*
>
> ***Nature of Work:***
>
> *The Director operates efficiently as a leader in a high-volume, multi-tasking environment. He/she demonstrates good judgment, discretion and routinely makes tough, balanced decisions. The Director also proactively manages change in a resource-constrained environment.*
>
> *The position requires significant interaction with deans, department heads, faculty, staff, students and other administrative personnel on campus as well as the ability to develop*

[44] Exhibit E-6; Kevin Bitinsky – ORG Chart.
[45] Exhibit E-7.

> *and maintain relationships with key stakeholders outside the university (including donors, alumni and parents of prospective students). The Director also provides leadership to ASPA and CUPE 1975 employees within the Student & Faculty Services Office and Career Services' Office.*
>
> *The Director is responsible for the decisions that impact the long-term focus of undergraduate and certificate programs in Edwards. He/she is responsible for the planning and execution of all recruitment and retention strategies. The Director is required to make decisions regarding award allocation and co-curricular funding, functions with autonomy and is entrusted with a large portfolio of responsibilities.*

She noted that Career Services now also falls under her umbrella, but otherwise the Position Profile is accurate.

[150] Six ASPA members report directly or indirectly to her[46]. In her evidence she stated that part of her job is supervising ASPA members but it is not her primary purpose. She estimated that 25% of her time is devoted to supervising the five employees (two CUPE Local 1975 and three ASPA) who report directly to her. She also observed that since the CUPE Local 1975 roles are more task oriented, those employees need more direction and would encompass more of her time. Her Position Profile includes approximately a page and a half of Accountabilities, including the following short section on People Leadership:

> ***People Leadership:***
>
> - *Provide vision, support and guidance to the staff members within the Student & Faculty Services Office and Career Services office, including: directing their activities and supervising progress; motivating them to work effectively; providing opportunities for career development and advancement; tracking vacation days, sick days and EDOs; and evaluating performance in order to provide timely and constructive feedback.*
>
> - *Provide representation during the absence of the Associate Dean, Students and Degree Programs.*

[151] Her testimony confirmed that she carries out all of the duties described in subclauses (i) to (iv). However, it is clear, from her Position Profile and from her evidence, that supervising employees is not her primary function, either on a quantitative or qualitative basis. Those duties are ancillary to the work she performs.

[152] The Board finds that Christina Dolan is not a supervisory employee.

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[46] Exhibit E-8; Edwards School of Business Organizational Structure.

Sabrina Kehoe:

[153] Sabrina Kehoe is the Manager of the Teaching, Learning and Student Experience (TLSE) Service Team. Her Job Profile[47], which she adopted as accurate, lists her Primary Purpose and Nature of Work as follows:

> ***Primary Purpose:***
>
> *To provide leadership in the development, implementation and evaluation of innovative, efficient, and effective planning, assessment, research, reporting, marketing, communications, and financial services for the VPTL portfolio.*
>
> ***Nature of Work:***
>
> *This position reports directly to the VPTL and works closely with the VPTL and directors and other managers within the TLSE portfolio. The Manager leads the portfolio's central service team which serves the senior leadership team as well as units within the portfolio of Teaching, Learning and Student Experience.*
>
> *The position will be responsible for integrating previously separate staff from former Student Enrolment and Services Division and the former Centre for Continuing and Distance Education (CCDE) into a service team, and for creating goals and priorities for the unit. The Manager will supervise approximately sixteen ASPA employees once the integration is complete (with some staff in coordinator roles). The Service Team provides expertise and service related to planning, assessment, research and reporting, marketing and communications, and financial analysis to the VPTL portfolio. The unit also provides oversight to the planning, coordinating, development, assessment, and continuous improvement of all unit programs and services within the portfolio. The Manager fosters a customer-service oriented, collaborative and creative team environment, effectively prioritizes and meets multiple and competing deadlines, and identifies opportunities for mutually beneficial partnerships within and outside of the portfolio. The Manager also undertakes and/or project manages strategic special projects for the portfolio and/or the university as determined by the VPTL senior leadership team.*

[154] She testified that the process of integrating staff from other areas, referred to in paragraph three above, is now complete. She has 16 ASPA members who report directly to her[48]. Her accountabilities include the following duties that pertain to supervision: directs and manages the staff, functions and activities of Service Team; leads, directs, and motivates the team in their activities, including: unit planning activities, recruitment and hiring of staff, professional development of staff, performance reviews of all staff, determining or approving all work priorities and distribution of workload; provides oversight; sets priorities and goals and ensures that the unit and its activities are aligned with the TLSE portfolio and the University's Integrated Plans. She estimated that 20 to 25% of her time is spent on supervision; she performs all of the tasks described in subclauses (i) to (iv).

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[47] Exhibit E-9.
[48] Exhibit E-10; Sabrina Kehoe – ORG Chart.

[155] In Kehoe's opinion, supervision is one of her core responsibilities but not the core responsibility. While this statement appears to be at odds with her job description, she attributed this to both her management style, which is to foster a collaborative team environment, and the way her position is set up. Managers of other units set the priorities of her ASPA employees; the ASPA employees are accountable to those managers, to ensure they are meeting the business needs of the units that require their support. The evidence submitted by the University with respect to Kehoe does not satisfy the Board that supervision of ASPA members is her primary function. Her evidence leads to the conclusion that supervisory duties are ancillary to the work she performs.

[156] The Board finds that Sabrina Kehoe is not a supervisory employee.

Conclusion:

[157] As noted above, before the hearing began the University and ASPA asked the Board to rule on these four positions and allow them to attempt to resolve any dispute over any other ASPA positions that the University believes also meet the definition of "supervisory employee". The original amendment application filed by the University listed 64 ASPA positions that it considered to be supervisory employees; at the hearing the University filed an updated list that included 49 ASPA positions that it proposed be removed from the bargaining unit. In Weimer's evidence he stated that he thought the number of supervisory employees was approximately 70. If necessary, they may return to the Board for a determination of the status of any unresolved positions.

[158] The Board will not issue an updated certification order at this time, but will await further correspondence from the University and ASPA when they are ready to proceed with that step.

[159] The Board is grateful to the parties for the significant amount of submissions provided to assist in its deliberations. All was carefully considered in reaching this decision.

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

DATED at Regina, Saskatchewan, this **16th** day of **February, 2021.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson