CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v RESORT VILLAGE OF CANDLE LAKE, Respondent

LRB File No. 150-21; July 26, 2022
Chairperson, Susan C. Amrud, Q.C.; Board Members: Maurice Werezak and Jenna Moore

For Canadian Union of Public Employees: Jake Zuk

For Resort Village of Candle Lake: Mitchell Holash, Q.C.

Application for bargaining rights – Administrative assistants are employees within the meaning of Part VI of *The Saskatchewan Employment Act*.

Application for bargaining rights – Bargaining unit consisting of three administrative assistants is appropriate for collective bargaining – Order granted that votes be tabulated.

Board has jurisdiction to hear application – Essential character of issue in this matter does not arise from dispute respecting meaning, application or alleged contravention of collective agreement entered into by Employer with separate bargaining unit of employees.

Administrative assistants are not bound by collective agreement entered into by Employer with separate bargaining unit of employees – Exclusions from bargaining unit to be made on as narrow a basis as possible.

REASONS FOR DECISION

Background:

[1] **Susan C. Amrud, Q.C., Chairperson:** The application before the Board in this matter is an application for bargaining rights filed by the Canadian Union of Public Employees ["Union"] on behalf of three administrative assistants employed by the Resort Village of Candle Lake ["Employer"].[1] However, some background is required to fully understand the issues raised in this matter.

[2] On May 7, 2007, the Board issued a Certification Order binding the Union and the Employer, with respect to the following bargaining unit: "all employees employed by the Resort

[1] LRB File No. 150-21.

Village of Candle Lake in Saskatchewan, excluding the Resort Village Administrator and provisionally excluding the Administrative Assistant".[2] The provisional exclusion became permanent on May 7, 2008, as neither party applied to the Board for a variation of the Order. Since that time the parties have bargained modifications to the scope clause in their collective agreements. The scope clause in the current collective agreement (January 1, 2020 – December 31, 2022) reads as follows:

> *3.01 This agreement shall cover all Employees employed by the Employer except the Resort Village Administrator, Assistant Administrator, Administrative Assistant(s), Maintenance Manager and Payroll Manager.*[3]

[3] On October 15, 2021, Local 4838 of the Union filed an Application to Amend the 2007 Certification Order, to include in the bargaining unit employees working in the classification of Administrative Assistant.[4] On November 9, 2021, following receipt of the Employer's Reply, the Union withdrew that application. The Union filed the Application for Bargaining Rights at issue in this matter on November 17, 2021. It proposes a bargaining unit of all administrative assistants employed by the Employer. At the beginning of the hearing into this matter the Union suggested that the two applications could be considered as alternatives by the Board. However, because the Application to Amend had been withdrawn, the Board ruled that was not an option.

Evidence:

[4] All three administrative assistants employed by the Employer gave evidence, as did the Chief Administrative Officer (CAO). Besides the CAO, the Employer employs four other out-of-scope managers: Manager of Public Works, Manager of Finance, Planning and Development Manager and Manager of Recreation and Community Development. The Employer also employs an out-of-scope Community Service Officer/Sargent who operates outside the administration and reports to the CAO in his role as Chief of Police. In a workforce of 14 employees, 9 are out-of-scope.

[5] In fall of 2020, following an election that saw the entire Resort Village council replaced, consultants were brought in to review the office. In the reorganization that followed, the CAO and Public Works Manager were released and the administrative assistants were all reassigned to new duties.

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[2] LRB File No. 035-07.
[3] Exhibit E3.
[4] LRB File No. 130-21.

[6] Peggy Watt is the Reception Administrative Assistant ["RAA"]. She has been employed by the Employer since 2014. She worked as parks and recreation administrative assistant for a month, then as RAA until 2018, when she added payroll clerk to her duties. She returned to the role of RAA as part of the reorganization effective November 1, 2021. The job description for the RAA sets out the following duties:

> 1. *Greets customers at the customer counter and on the phone, responds courteously and constructively to public requests and complaints by providing or obtaining the appropriate information and/or directing to appropriate person.*
>
> 2. *Receives all payments including but not limited to: utility, tax, general invoicing, parks and recreation invoicing, planning department activities, building and development permits, dog licenses, government grants and other payments.*
>
> 3. *Prepare deposits of cash, cheques and debit slips.*
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> 4. *Complete property tax searches and certificates.*
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> 5. *Manages pre-authorized tax and or other fee payments.*
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> 6. *Maintain the RV Park and business license records, agreements, invoicing, collections and inquiries.*
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> 7. *Processes cemetery service requests by coordinating plot sales, perpetual care sales and determining interment details. Refers interment details internally and externally.*
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> 8. *Provides regulations, permits and direction regarding the installation of monuments at the cemetery.*
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> 9. *Assists with researching information such as legislation, bylaws, reports, contracts, files, minutes and any other assigned matters.*
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> 10. *Orders office supplies and maintains office filing system.*
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> 11. *Acts as a back-up to the Finance Administrative Assistant when required.*
>
> 12. *Assists with the preparation of annual audit working papers.*
>
> 13. *Assists as required with the preparation of the annual financial plan.*
>
> 14. *Participates in various special projects and any other duties as assigned.*[5]

[7] With respect to #9, Watt described this duty as occasionally helping someone find a bylaw or copies of minutes. She has no role with respect to council meetings. With respect to #11, Watt indicated that in the absence of the finance administrative assistant ["FAA"] she will do payroll. With respect to #12 and #13, her role is to find copies of documents requested by the auditors

[5] Exhibit U2.

(*e.g.*, receipts). Any requests are made to Watt by the Manager of Finance. She has no involvement with Union bargaining or grievances. She does not attend *in camera* meetings of council. She sees confidential information respecting land development and supplier bidding that comes into the office.

[8] Bonnie Kalynowski has been employed by the Employer since 2018. She started initially as RAA. Her description of the duties of that job were consistent with Watt's description. In November 2020 she became the FAA. In this role she assisted the CAO with building permits, by receiving the applications and reviewing them to determine whether all necessary information was included. The permits were then reviewed by the Planning and Development Manager and the Building Inspector, whose job it is to determine whether they will be approved. Following their approval, Kalynowski prepared the invoice and permit and documented it on a spreadsheet. She attended hearings of the appeal board strictly as an observer. She also received invoices from vendors, coded them, entered them into accounts payable, ran cheques and filed the paperwork. She had no role respecting payroll and no role respecting the Union.

[9] In the November 2021 restructuring, Kalynowski was assigned to the role of Planning/Administration Administrative Assistant ["PAAA"]. She reports to both the Planning and Development Manager and the CAO. The job description for PAAA sets out the following duties:

> 1. *Attends meetings of Council, Committees, Public Hearings, and other meetings as required by Council or the CAO.*
>
> 2. *Creates monitors and maintains confidential in camera, employment, commercial and legal files.*
>
> 3. *Prepares and records minutes of all in camera, Committee of the Whole, Public Hearings, and regular Council meetings and is responsible for any assigned follow-up from Council or Committee of the Whole meetings.*
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> 4. *Assists with researching information such as legislation, bylaws, reports, contracts, files, minutes and any other assigned matters.*
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> 5. *Prepares agenda and Council packages for Council meetings as directed by CAO.*
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> 6. *Assists with posting information on the Resort Village's website and other social media applications to keep the organization and the general public informed and current about projects, events and policies.*
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> 7. *Ensures that Resort Village property lists are kept current and accurate.*
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> 8. *Receives, distributes and disseminates incoming mail (both electronic and hard copy) for Council and CAO.*

9. *Assists the CAO with the human resources function including recruitment and retention, training and development, performance management, health, safety, and wellness ensuring compliance with applicable laws and regulations and in a confidential manner.*

10. *Ensures efficient and effective conventional and electronic record-keeping systems are in place for the CAO and personnel files and all required data, documents, reports, and correspondence are maintained in accordance with legislation and corporate policy.*

11. *Performs administrative and clerical support for the Chief Administrative Officer as required.*

12. *Ensures that the Resort Village property lists are kept current and accurate.*

13. *Maintains and schedules meetings for Council and the CAO as required.*

14. *Assists the CAO with the development of by-laws, preparations for civic elections and any related projects.*

15. *Provides administrative and technical support to the Manager of Planning and Development related to the processing and tracking of development and building permit applications, including stop work orders, and public or in-camera presentations to Councils, boards and/or commissions related to the approval and appeal processes on behalf of the Resort Village.*

16. *Assists with asset management.*

17. *Assists as required with the preparation of the annual budget.*

18. *Performs other duties as may be assigned from time to time.*[6]

[10] With respect to #1, #3 and #5, she prepares agendas and attachments that are sent to council and released to the public. Over the last couple of months she has started attending council *in camera* sessions. However, when legal, litigation, labour or personnel issues are discussed, she is asked to leave the meeting. After a council meeting she prepares a task sheet from the minutes and attends the meeting where the managers discuss it. She indicated that she does not carry out the duties described in #2, and there has been no discussion of her performing those duties. With respect to #4, she indicated this would involve, for example, if council was considering a new bylaw on a particular topic, contacting other municipal offices to determine what their bylaws say on the issue. She indicated that she does not carry out the duties described in #7[7], and that those duties are performed by the Manager of Finance. Her only involvement in any of the issues noted in #9 is to post job ads online. With respect to #10, she indicated that for new hires she will prepare a file for the CAO that includes an employee's resume, educational certificates and letter of offer. With respect to #14, she has no role respecting elections and she

[6] Exhibit U3.
[7] #7 and #12 are identical.

is not involved in the development of bylaws. With respect to #15, she indicated that she performs strictly clerical tasks such as formatting correspondence and printing notices. She indicated that she performs no duties respecting #16 or #17. She has no role in Union bargaining. She indicated that she spends 80 to 90% of her time preparing agendas and minutes for council and committee meetings. She has had no discussions with anyone in management about taking on more duties. She has not performed any duties related to preparing documents for bargaining with the Union or preparing the annual budget, but she was not aware whether these events have occurred since she started this new role.

[11] Glenda Trach has been employed by the Employer since November 2020. She started as RAA. When the reorganization occurred in November 2021 she was assigned the role of FAA. She reports to the Manager of Finance. The job description for FAA sets out the following duties:

1. *Performs accounting functions related to: all general functions; accounts payable; and maintains accurate records of requisitions and invoices.*
2. *Processes accounts for payment and invoices for services rendered.*
3. *Processes approved invoices to accounts payable system.*
4. *Reconciliation of accounts payable.*
5. *Balances and processes payable reports to ensure prompt payment.*
6. *Process requisitions in accordance with approved policies and procedures and responds to and investigates accounts payable inquiries.*
7. *Maintain various ledgers and balance these ledgers to the General Ledger.*
8. *Assists with the preparation of annual audit working papers.*
9. *Assists as required with the preparation of the annual financial plan.*
10. *Competed all year-end financial requirements using Munisoft modules.*
11. *Assists in the organizing and mailing of the annual tax statements.*
12. *Prepares journal entries and adjustments as required.*
13. *Provides back-up and support to the Manager of Finance as required and acts in the capacity of Manager in the absence of the Manager from the workplace.*
14. *Provides back-up to the Reception Administrative Assistant when required.*
15. *Performs other duties as may be assigned from time to time.*[8]

[8] Exhibit U4.

[12] In this new role she spends 2 to 3 days per week (40-60% of her time) doing payroll duties: accepting timecards, having them signed by the supervisor, putting the information from them into the system, processing benefits, etc. With respect to #1 to #4, when invoices come in, she makes sure proper accounts are noted, and she pays them by cheque. She processes 20 to 50 invoices per week. With respect to #5, she prepares the reports referred to for review by the Manager of Finance. With respect to #7 she indicated that she does not maintain the ledgers. With respect to #8, if the auditors ask to see specific documents, the Finance Manager asks her to find them; she does not interact with the auditors. She has no role respecting #9. The duties specified in #10 and #12, Trach indicated, are performed by the Manager of Finance. With respect to #11, the Manager prints the tax statements; Trach folds them, inserts them in envelopes and mails the envelopes. With respect to #13, Trach indicated that most of the Manager's duties would have to await her return. With respect to #14, on the other hand, she can take over all of the RAA's duties in her absence. She has no involvement in the creation of the annual budget, in Union and Employer meetings, in strategic planning about finances or labour relations, or in bargaining with the Union. The only confidential documents she sees are employees' personal information she requires to do payroll, *e.g.*, social insurance numbers. She works directly with the Manager of Finance if she (Trach) is having issues or the manager needs confirmation on something she has done. She has no involvement with anything the manager is working on. She has no labour relations training, she does not attend council meetings or prepare presentations for council. She has had no involvement in preparing the budget, financial plan or audit, but has been told that she potentially could be involved in the future. Since she commenced her current role, the Employer has been through the budget cycle, but she was not involved.

[13] The CAO, Brent Lutz, testified on behalf of the Employer. He commenced work as CAO for the Employer on January 1, 2022. He indicated that all of the managers are new to their roles, as of January 1, 2022, and new to the community, except the Manager of Finance. The Manager of Finance has been in that role for less than one year; previously she was the FAA. He noted that the Planning and Development Manager position is once again vacant, and the Manager of Public Works position will be vacant at the end of this month. The community of Candle Lake is challenging to oversee as it has approximately 1100 full time residents, but during the summer months that grows to approximately 5,000 to 6,000 people. Winter months and shoulder seasons can also see an influx of people, depending on the weather.

[14] He indicated that the season for building the budget is from the end of September until the end of March. He also noted that the collective agreement with Local 4838 of the Union for the existing bargaining unit will expire at the end of this year, so he expects bargaining to commence in the fall. While he indicated that the trigger for work on the audit is the third quarter financial statement he then indicated that it actually commences in January. Section 185 of *The Municipalities Act* requires resort villages to complete their audited financial statements by June 15 in each year. He indicated that in 2022 the auditors asked for over 1000 documents to verify, and it was up to the administrative assistants to find them. He indicated that he will require clerical support in preparing the financial plan, and to assemble the information he will require to prepare for collective bargaining. With respect to the planning and development responsibilities that he is now performing, he indicated that he requires clerical support, and that the documents involved include confidential competitive information of the businesses involved. Other information he works with that requires confidentiality is with respect to legal matters, land purchases and developments, and labour relations matters. He indicated that the volume of litigation and legal work is more than he expected. All of it involves confidential information. He relies on the administrative assistants to provide him with information for this purpose.

[15] Lutz indicated that council sees this confidential information. Almost every meeting of council includes an *in camera* session for which agendas and information are prepared and provided by the PAAA. Over the last four months, unless the information to be discussed during the *in camera* sessions personally impacts her, she has been present during those sessions.

[16] With respect to the duties in the job descriptions that the administrative assistants indicated they are not doing, Lutz had a number of explanations: they are doing the work but just did not understand the jargon in the job description; he asked the new managers to do the administrative work initially, and transfer it to the administrative assistants when the managers thought they could do it; there has not yet been an opportunity to train them to do the work. It is his expectation that at some point they will be doing all of the duties described in the job descriptions. In his view, all of them will at some point be working with confidential information respecting policy, budget, labour relations and strategic planning.

[17] He also referred to applications for disclosure that the Employer receives pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act*. He indicated that requests for information can be quite complicated, requiring hundreds of documents to be released and thousands of documents to be reviewed. The role of the administrative assistants is to look for

documents that may be relevant to the requests; the managers then review the documents to determine what will be released. Kalynowski's evidence was that the office has not received any applications recently. Both Watt and Kalynowski indicated that their role was just to receive the applications and the fees.

[18] On cross-examination Lutz confirmed that none of the administrative assistants have a role in labour relations between the Employer and the current bargaining unit. He admitted that *The Municipalities Act* requires considerably more transparency than a private sector employer would be subject to. He indicated that the confidential information that the administrative assistants might see would relate to zoning, bids and competitive information from vendors.

Argument on behalf of Union:

[19] The Union acknowledges that on an application for certification the Union bears the legal onus, on a balance of probabilities, of showing that the proposed bargaining unit is appropriate. The Employer, however, bears the evidentiary burden of presenting evidence to support any proposed exclusions:

> *This Board concurs with the Board's analysis in Wheatland Regional Centre. It is important to clarify the difference between the burden of proof and the onus. It cannot be denied, as asserted by Amenity, that the Union bears the legal burden of proof to establish on a balance of probabilities the proposed unit is an appropriate one for collective bargaining purposes. However, if an employer contests the composition of a proposed unit on the basis for example, that some individuals function as managers or, as in this case, qualify as supervisory employees, then the evidential burden or onus, as opposed to the legal burden of proof, shifts to the employer to present evidence supporting its argument for exclusion. Notwithstanding this shift in the evidentiary onus, the over-arching burden of proof in a certification application remains upon the union.*[9]

[20] The evidence must be sufficiently clear, convincing and cogent.[10] The exclusions must be made on as narrow a basis as possible.[11]

[21] Clause 6-1(1)(h) of *The Saskatchewan Employment Act* ["Act"] defines "employee". Under section 6-4 of the Act "employees" have a 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 definition of employee is key to a determination of this matter. The Union argues that the Employer has not

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[9] *Workers United Canada Council v Amenity Health Care LP*, 2018 CanLII 8572 (SK LRB) at para 59.
[10] *United Food and Commercial Workers, Local 1400 v Calokay Holdings Ltd.*, 2016 CanLII 74282 (SK LRB).
[11] *Saskatchewan Institute of Applied Science and Technology v Saskatchewan Government and General Employees' Union*, 2009 CanLII 72366 (SK LRB); *Early Childhood Intervention Program, Regina Region Inc v Government and General Employees' Union*, 2013 CanLII 53367 (SK LRB).

met its evidentiary burden of showing that the administrative assistants have primary duties of a confidential nature in relation to labour relations, business strategic planning, policy advice or budget implementation or planning.

[22] The Union argues that much of the evidence related to the extent of the access the administrative assistants have to confidential labour relations or budgeting information. The Board has held that mere access is not sufficient:

> *The Board has also had the opportunity, on a number of occasions, to consider whether an individual should be excluded from a bargaining unit on the basis of s. 2(f)(i)(B), that is, whether the individual "regularly act[s] in a confidential capacity with respect to the industrial relations of his or her employer." Such confidential information must relate to the industrial relations of the employer and does not include mere access to such information (see for example, E.C.C. International Inc., supra, at 275). As with managerial exclusions, these exclusions are made "on as narrow a basis as possible" and "it is not sufficient that someone who would otherwise fall within the definition of employee perform incidentally or occasionally tasks which are of a . . . confidential nature" (see Government of Saskatchewan, supra at 547).*[12]

[23] In order for any of the administrative assistant positions to be excluded based on their confidential duties, first, it is necessary to show that their primary duties include activities that are confidential in relation to labour relations, business strategic planning, policy advice or budget implementation or planning. Second, the confidential duties must have a direct impact on the bargaining unit in question.[13]

[24] In *Saskatchewan Mutual Insurance Company v United Steel*[14] ["*SMI*"], the Board noted that while the Board has shown a historical tendency to allow for a single out-of-scope clerical position where the employer demonstrates a need for labour relations and confidential assistance, the exclusion is not a foregone conclusion. The onus continues to rest with the Employer to demonstrate that the proposed exclusion is legitimate in the context of this specific workplace. The Union argues that the Employer has not met its onus of showing that any of the administrative assistants are tasked with duties that meet the test. Their work has no direct impact on the existing bargaining unit or the proposed bargaining unit.

[25] Specifically, there was no evidence that the RAA is engaged in any confidential capacity duties. The FAA has access to basic payroll information and financial invoices; she is not

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[12] *University of Saskatchewan v Administrative and Supervisory Personnel Association*, 2007 CanLII 68769 (SK LRB) at para 42.
[13] *Health Sciences Association of Saskatchewan v Unifor, Local 609*, 2015 CanLII 43776 (SK LRB).
[14] 2020 CanLII 76678 (SK LRB).

engaging in any financial research with respect to business strategy or budget implementation. There is no evidence that she is engaging in or ever will engage in labour cost data reports for the purpose of collective bargaining. She is not a party to any labour relations or strategic planning information that would compromise the Employer's relationship with the Union.

[26] The PAAA's work has no direct impact on the existing or proposed bargaining units. She prepares the agenda and materials for council meetings and minutes of those meetings. The agendas and minutes are all publicly accessible on the Employer's website. The annual audited financial reports and annual budgets are also publicly accessible, as required by *The Municipalities Act*. The balance of her time is spent processing building permits and corresponding with the third-party permit approval body. She is not present in discipline meetings or *in camera* grievance discussions. She has no access to legal files, discipline files or confidential labour relations documents. Her job description has been sprinkled with vague duties relating to human resources, nondescript confidential responsibilities and labour relations adjacent tasks that are not primary or even secondary aspects of her position. While she may have access to confidential information, it is not confidential information that directly impacts labour relations. The Union also disputes the Employer's argument that there are crucial labour relations duties that fall within the scope of her position that she has yet to be involved in. The Union argues that if the Employer seriously intended to involve her in confidential labour relations or strategic planning meetings, it would have started integrating her into that process by now.

[27] The Union also disputes the Employer's reliance on any involvement of the administrative assistants in the preparation of the annual budget and the financial audit documents, as these are also publicly accessible via the Employer's website.

[28] Ultimately, a level of transparency and disclosure required of municipalities by *The Municipalities Act* distinguishes municipal employers from private sector employers:

> *117(1) Any person is entitled at any time during regular business hours to inspect and obtain copies of:*
>
> > *(a) any contract approved by the council, any bylaw or resolution and any account paid by the council relating to the municipality;*
> >
> > *(b) the statements maintained by the administrator in accordance with section 142 and the debentures register;*
> >
> > *(b.01) the official oaths or affirmations taken by members of council pursuant to section 94;*

> *(b.1) the municipality's financial statements prepared in accordance with section 185 and auditor's report prepared in accordance with subsection 189(1);*
>
> *(b.2) the financial statements of any controlled corporation prepared in accordance with section 187 and an auditor's report prepared in accordance with subsection 189(1);*
>
> *(c) any report of any consultant engaged by or of any employee of the municipality, or of any committee or other body established by a council, after the report has been submitted to the council, except any opinion or report of a lawyer;*
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> *(d) the minutes of the council after they have been approved by the council; and*
>
> *(e) any other prescribed report or document.*

[29] In this context, the Union argues, there are very few strategic, budgetary, contractual or labour relations decisions that the public is not entitled to access. The Employer's claims of confidential duties are minimal, and in many instances speculative, to the extent that they cannot support interference with these employees' constitutional right to engage in collective bargaining through the Union.

[30] Turning then to the appropriateness of the proposed bargaining unit, the Union relied on the four principles summarized by the Board in *North Battleford Community Safety Officers Police Association v City of North Battleford*[15] ["*North Battleford CSO*"]:

> *[55] First, the Board should scrutinize the bargaining unit that has been proposed by the union in question from the perspective of whether it is appropriate for purposes of future collective bargaining with an employer. The central question is whether it is an appropriate unit, not the optimal one. In Canadian Union of Public Employees v Northern Lakes School Division No. 6422 [Northern Lakes School Division], the Board framed this inquiry as follows:*
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> > *The basic question which arises for determination in this context is, in our view, the issue of whether an appropriate bargaining unit would be created if the application of the Union were to be granted. As we have often pointed out, this issue must be distinguished from the question of what would be distinguished from the question of what would be* [sic] *the most appropriate bargaining unit.*
> >
> > *The Board has always been reluctant to deny groups of employees access to collective bargaining on the grounds that there are bargaining units which might be created, other than the one which is proposed, which would be more ideal from the point of view of collective bargaining policy. The Board has generally been more interested in assessing whether the bargaining unit which is proposed stands a good chance of forming a sound basis for a collective bargaining relationship than in speculating about what might be an ideal configuration.*
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> *[56] Second, generally speaking the Board's preference is for larger, broadly based units so as to avoid issues of certifying an under-inclusive unit. In Saskatchewan Joint Board,*

[15] 2017 CanLII 68783 (SK LRB).

Retail, Wholesale and Department Store Union v O.K. Economy Stores (A Division of Westfair Foods Ltd.) 24 [O.K. Economy] a case cited by both the Applicant and the City, former Vice-Chairperson Hobbs explained this preference as follows at page 66:

> *In Saskatchewan, the Board has frequently expressed a preference for larger and few bargaining units as a matter of general policy because they tend to promote administrative efficiency and convenience in bargaining, enhance lateral mobility among employees, facilitate common terms and conditions of employment, eliminate jurisdictional disputes between bargaining units and promote industrial stability by reducing incidences of work stoppages at any place of work (see [United Steel Workers of America v Industrial Welding (1975) Limited, 1986 Feb. Sask. Labour Rep. 45]). . . .*
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> *This does not mean that large is synonymous with appropriate. Whenever the appropriateness of a unit is in issue, whether large or small, the Board must examine a number of factors assigning weight to each as circumstances arise.*

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

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

[58] Fourth, units that may be characterized as "under-inclusive" may be certified as appropriate in certain circumstances. The leading case on this issue appears to be Graphic Communications International Union, Local 75M v Sterling Newspapers Group, a Division of Hollinger Inc. [Sterling Newspapers Co.]. In this decision, former Chairperson Gray on behalf of the majority of the Board (Member Carr dissenting), reviewed the Board's prior jurisprudence on under-inclusive units, including authorities cited by counsel in this matter such as Canadian Union of Public Employees, Local 1902-08 v Young Women's Christian Association et al., and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Saskatchewan Centre of the Arts. She summarized her analysis as follows at para. 34:

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

[31] The Union argues that the administrative assistants share a community of interest. They are the only clerical staff in the Employer's operations and frequently work together. They share the same basic job title and the primary duties in each role are clerical in nature.

[32] With respect to intermingling, there is no evidence of any intermingling between the administrative assistants and the members of the existing bargaining unit. They do not work side by side; there is no collaboration or direction provided. This is a common distinction in the municipal sector, often referred to as "inside" and "outside" workers. It is not unprecedented, in larger municipalities, for inside workers and outside workers to have separate bargaining units.

[33] The Union acknowledges that this is a small unit, but small size is not immediately disqualifying. The fact that a bargaining unit of outside workers already exists should not preclude these employees from accessing their constitutional right. The right of employees excluded from a bargaining unit, to organize into a separate bargaining unit was acknowledged in passing in *Service Workers International Union, Local 299 v Canadian Blood Services*[16], a decision that dismissed an application for amendment of an existing bargaining unit:

> *The Union commented that, if the Board requires a change in circumstances, it would be more difficult for the incumbent to join an existing bargaining unit than to apply to be certified in a different bargaining unit. While we cannot comment on the ease with which the incumbent could exercise his rights under s. 3 of the Act to join a trade union of his choosing, given the requirement that any unit applied for must still be an "appropriate unit," that option is available to him, as it is for the incumbents in the other excluded positions who are still "employees" within the meaning of the Act. In this regard, we note that there is another certification Order in this workplace involving a bargaining unit of nurses represented by the Saskatchewan Union of Nurses.*

[34] With respect to viability, the Union argues that the Board should not presume the proposed bargaining unit will fail based on its relatively small size. Any concerns about the viability of the proposed bargaining unit are speculative and must not override the employees' right to access collective bargaining.

[35] The current Certification Order did not determine that the administrative assistants are not employees within the meaning of the Act. It merely determined that they were not included in that bargaining unit. The existing Certification Order and collective agreement do not and will not apply to them.

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[16] 2007 CanLII 68757 (SK LRB) at para 31.

Argument on behalf of the Employer:

[36] The Employer argues that the Board lacks jurisdiction to hear this application, based on section 6-45 of the Act. Since there is a collective agreement between the parties, this dispute can only be resolved through arbitration.[17] The collective agreement is binding on the Union, by virtue of Article 5.2 of the Union's Constitution[18], because Local 4838 entered into the Agreement. The administrative assistants are also bound by the collective agreement, because they are named in it. Section 6-41 of the Act provides that a collective agreement is binding on every employee of an employer who is affected by it. They are affected by the collective agreement because it refers to their positions and expressly excludes them from its benefits and obligations. The Employer suggests that this matter is a disguised attempt by the Union to get around the protection of the Certification Order and collective agreement. The administrative assistant position is not a new job position; it has been an existing job position since at least the date the existing Certification Order was granted in 2007.

[37] The Employer relies for this submission on *ExxonMobil Canada Properties v Hebron Project Employers' Association*[19] ["*ExxonMobil*"]:

> *[99] I prefer the approach of the applications judge when he stated that ExxonMobil's rights are subordinated to the labour relations regime set up by the SPO [Special Project Order] and that ExxonMobil will necessarily be "affected by outcomes" flowing from the collective agreement that is legitimated by the SPO. ExxonMobil need only be regarded as being "bound" by the arbitrator's ruling in the same way as a citizen is bound by the general law and the precedents emanating from the courts. Even if ExxonMobil may not be subject to the law of contempt for failure to abide by a specific arbitrator's order, it will be subject to an obligation to refrain from interfering with the rights of workers which have been determined and declared as part of the operation of the SPO regime and to which all persons, including ExxonMobil, participating in or receiving the benefits of the activities contemplated by the regime are subject. Thus, if it acts in a manner that undermines, frustrates or derogates from rights so created, it will be subject to such other civil obligations and penalties, such as the tort of inducing breach of contract, that protect the rights created.*
>
> *[100] Indeed, even with respect to the one occasion when the arbitrator referred to ExxonMobil being "bound" he did not say that ExxonMobil was bound "by the award"; instead he said it was bound "by the <u>outcome</u> of the award." That phraseology can also be interpreted in a manner consistent with the characterization of the effect of the award described by the applications judge.* [emphasis added by NLCA]

[38] This, the Employer argues, means that even though ExxonMobil was not a party to the collective agreement, it was nevertheless affected by the agreement, in a comparable manner to

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[17] *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 (CanLII); *Yashcheshen v Law School Admission Council Inc.*, 2021 SKCA 149 (CanLII).
[18] Exhibit E1.
[19] 2017 NLCA 28 (CanLII).

the way in which the administrative assistants are affected by the collective agreement in this matter.

[39] Further, the Employer submits that if the Legislature had intended for only members of the Union to be bound by the collective agreement, it would not have used the expansive wording "every employee of an employer . . . who is included in or affected by it". The Employer argues that this interpretation of section 6-41 is bolstered by comparison to subsection 6-38(2) of the Act, which refers to "All members of the union who are in the bargaining unit affected by the collective agreement".

[40] The Employer argues that implicit in this application is a request for this designation to supersede the existing Certification Order and/or to supersede the scope provision in the existing collective agreement. The Employer argues that the Board does not have jurisdiction to order the substitution of a new scope clause into either the existing Certification Order or collective agreement.[20] The current collective agreement provides that the administrative assistant positions continue to be appropriately of an out-of-scope character and therefore properly outside of the bargaining unit. The Union and Employer have bargained the out-of-scope nature of the administrative assistant positions, and the Union has received value for that collective bargaining result.

[41] Next the Employer argues that the administrative assistants are not employees within the meaning of the Act, and therefore do not have a right to make an application pursuant to section 6-9 of the Act. They argue that the Board must look beyond the job title and job description and consider the evidence, including whether the duties assigned are genuine and necessary.[21] The Employer argues that the responsibilities, duties, job specifications and requirements of the administrative assistant job descriptions are of a managerial character and/or include activities of a confidential nature in relation to labour relations, business strategic planning, policy advice and budget implementation and planning.

[42] The Employer argues that the Board determined in *City of Regina v Regina Civic Middle Management Association*[22] that municipal employers are entitled to have excluded clerical staff, to handle the clerical/administrative side of collective bargaining.

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[20] *Kindersley & District Co-operative Ltd v RWDSU* (1998) CarswellSask 787 (SKCA).
[21] *SMI*, *supra* note 14.
[22] 2018 CanLII 127659 (SK LRB).

[43] The Employer also relied on *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v Sternson Limited*[23] to argue that viewing and working with confidential budget proposals, salary offers and discipline matters or typing documents related to such matters justifies exclusion. Assistants who prepare budget plans that involve confidential information are appropriately excluded from the bargaining unit.[24]

[44] The Employer argues that the administrative assistants perform duties of a managerial character. Their duties are of a managerial character because they are essential to the exercise of management functions. The duties that the Employer argues satisfy this test are described as follows:

> Planning / Administration Administrative Assistant:
>
> i. attends meetings that are of a confidential or managerial nature.
> ii. creates, and maintains confidential in camera, employment, commercial and legal files.
> iii. prepares agendas involving business strategic planning, policy advice and budget implementation.
> iv. receives and reviews incoming mail of a confidential and/or managerial nature.
> v. assists the CAO and in doing so performs human resources functions of a confidential and managerial nature.
> vi. assists with the annual budget which includes highly confidential information regarding salary of Employer personnel.
> vii. is primarily involved with the clerical and administrative side of collective bargaining, including discipline matters, salary offers, costing collective bargaining proposals and reviewing existing programs and making recommendations about their continuation in the context of budget planning.
>
> Finance Administrative Assistant:
>
> i. primary duties include involvement in information in the ledgers, accounts payable, and requisitions that are of a confidential nature, or of managerial character.
> ii. assists the Manager of Finance and also assists with the annual financial plan, both of which require business strategic planning, or budget implementation.
> iii. is primarily involved with the clerical and administrative side of collective bargaining, including discipline matters, salary offers, costing collective bargaining proposals and reviewing existing programs and making recommendations about their continuation in the context of budget planning.

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[23] 1984 CanLII 982 (ON LRB).
[24] *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees*, 2019 CanLII 128791 (SK LRB).

Reception Administrative Assistant:

i. has frequently acted as the back up FAA, a position that involves dealing with confidential information and managerial responsibilities.
ii. assists with the annual audit, and preparation of annual financial plan, which involves dealing with confidential information, business strategic planning and budget implementation.
iii. reports to the Manager of Finance on matters involving confidential information and budget implementation.
iv. is primarily involved with the clerical and administrative side of collective bargaining, including discipline matters, salary offers, costing collective bargaining proposals and reviewing existing programs and making recommendations about their continuation in the context of budget planning.[25]

[45] As a result, the Employer argues, the primary responsibilities, job specifications, requirements and actual performance of duties of the administrative assistant positions are of a managerial character and/or include activities of a confidential nature in relation to labour relations, business strategic planning, policy advice and budget implementation and planning, all of which have a direct impact on the bargaining unit. These job duties are not merely incidental and are genuinely required for the proper functioning of the Employer.

[46] With respect to whether the administrative assistants perform duties of a confidential nature the Employer points to a number of factors. With respect to the PAAA, the CAO requires support in his functions, which include all of the enumerated factors. The current Manager of Finance was previously the FAA. The FAA has significant responsibilities and duties not all of which she has carried out yet. In her triage function, the RAA directs the public's concerns and is responsible for the intake of money. She could be the Acting Manager of Finance, in the absence of the Manager of Finance and FAA.

[47] Next the Employer argues that section 6-9 does not apply to the administrative assistants because a Certification Order has already been issued in this workplace. The Certification Order expressly resolves issues of scope respecting the administrative assistants. The Union cannot challenge that determination over 14 years after it was made. It was required to make that application by May 7, 2008.

[25] Brief of Law on Behalf of the Respondent, The Resort Village of Candle Lake, paras 55 to 57.

[48] Finally, the Employer argues that the Union has not satisfied its onus of establishing that the proposed unit would be an appropriate unit for collective bargaining. There is no discrete skill or other boundary surrounding the unit that easily separates it from other employees. There is intermingling between the proposed unit and other employees. There is a lack of bargaining strength in the proposed unit. There is a realistic ability on the part of the Union to organize a more inclusive unit. There exists a more inclusive choice of bargaining units. Two bargaining units in a workplace of 14 people would not be appropriate. The Employer is already challenged in dealing with labour relations issues. The proposed bargaining unit would be unreasonable, unworkable, impractical and untenable.

Relevant Statutory Provisions:

[49] The parties referred to the following provisions as relevant in this matter:

> *6-1(1) In this Part:*
>
> *. . .*
>
> *(h) "employee" means:*
>
> *(i) a person employed by an employer other than:*
>
> *(A) a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character; or*
>
> *(B) a person whose primary duties include activities that are of a confidential nature in relation to any of the following and that have a direct impact on the bargaining unit the person would be included in as an employee but for this paragraph:*
>
> *(I) labour relations;*
>
> *(II) business strategic planning;*
>
> *(III) policy advice;*
>
> *(IV) budget implementation or planning;*
>
> *(ii) a person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining; and*
>
> *(iii) any person designated by the board as an employee for the purposes of this Part notwithstanding that, for the purpose of determining whether or not the person to whom he or she provides services is vicariously liable for his or her acts or omissions, he or she may be held to be an independent contractor;*
>
> *and includes:*
>
> *(iv) a person on strike or locked out in a current labour-management dispute who has not secured permanent employment elsewhere; and*
>
> *(v) a person dismissed from his or her employment whose dismissal is the subject of any proceedings before the board or subject to grievance or arbitration in accordance with Subdivision 3 of Division 9.*
>
> *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.*
>
> *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.*

6-41(1) A collective agreement is binding on:

(a) a union that:

(i) has entered into it; or

(ii) becomes subject to it in accordance with this Part;

(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and

(c) an employer who has entered into it.

(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:

(a) do everything the person is required to do; and

(b) refrain from doing anything the person is required to refrain from doing.

6-45(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.

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

. . .

(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 as defined in clause 6-1(1)(o) of this Act as that clause read before the coming into force of The Saskatchewan Employment Amendment Act, 2021.

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

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

Analysis and Decision:

Background:

[50] The application before the Board in this matter is an application for bargaining rights by three administrative assistants employed by the Employer. Unless the Board finds that they are not employees within the meaning of Part VI of the Act, they had three choices for how to proceed to exercise their statutory and constitutional right to engage in collective bargaining with their Employer:

- Agree to have the Union apply to the Board for an Order amending the current Certification Order between the Union and the Employer, to add them to the existing bargaining unit.

- Ask the Union, when it enters into collective bargaining with the Employer for a new collective agreement to replace the agreement that is set to expire at the end of 2022, to include a request that the scope clause be amended to add them to the bargaining unit.

- Agree to have the Union apply to the Board for a Certification Order for a separate bargaining unit consisting of their three positions.

[51] The advice they received indicated that it might be difficult to meet the test set out in the Act to choose the first option. Since the application to exercise that option was withdrawn, no determination was made by the Board respecting whether the test was or was not met. Filing then withdrawing that application has no effect on their ability to choose one of the other options available to them. There was no requirement on them to agree to the second option. They were entitled to and did choose the third option. It might have been more convenient for the Employer, and possibly also the Union, for them to have chosen one of the other options. That is not a criterion that the Board takes into consideration in making this decision.

[52] Section 6-4 of the Act recognizes that all 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". As the Board noted in *Workers United Canada Council v Amenity Health Care LP*[26] ["*Amenity Health Care*"]: "(t)his statutory statement of public policy is reinforced by the constitutional guarantee of freedom of association found in section 2(d) of the *Canadian Charter of Rights and Freedoms*"[27]. The Board is to be guided by these statements in determining the questions at issue in this matter.

[53] Normally on an application for bargaining rights, the first issue considered by the Board is the appropriateness of the proposed bargaining unit. Then, if the Board finds the proposed bargaining unit is appropriate, it turns to the question of whether any proposed members of that bargaining unit should be excluded because they are not employees within the meaning of Part VI of the Act. In this matter the Employer argues that none of the proposed members of the proposed bargaining unit are employees within the meaning of Part VI of the Act. Therefore, in this matter, the Board will first consider whether any of the administrative assistant positions meet the definition of "employee" in clause 6-1(1)(h) of the Act.

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[26] *Supra* note 9.
[27] At para 85.

Onus of Proof:

[54] The parties agree that while the Union bears the legal burden of proof to establish on a balance of probabilities that the proposed bargaining unit is appropriate for collective bargaining, the evidentiary burden falls on the Employer to present evidence supporting its argument for exclusion of all of the administrative assistants.[28] The onus is on the Employer to satisfy the Board that these positions should be excluded from the bargaining unit. In meeting their burdens of proof, both parties must provide evidence that is sufficiently clear, convincing and cogent.

Managerial Exclusion:

[55] The Employer suggests that the administrative assistant positions should be excluded from the bargaining unit on the basis of paragraph 6-1(1)(h)(i)(A), that is, that their "primary responsibility is to exercise authority and perform functions that are of a managerial character". To meet this criterion, the Board has held that it will consider factors such as:

- Authority to fundamentally affect the economic lives of other employees, for example by hiring, firing, promoting, demoting or disciplining employees;
- Direct control or influence on the terms and conditions under which other employees work, to an extent that would create a conflict of interest inimical to healthy collective bargaining;
- Significant degree of decision-making authority in relation to matters that affect the terms, conditions or tenure of employment of other employees;
- Power to discipline and discharge, the ability to influence labour relations, the power to hire, promote and demote;
- Authority to exercise independent discretion to significantly affect the terms and conditions of other employees.[29]

[56] No evidence was led that any of the administrative assistant positions have any of these powers. The Employer argues that their duties are of a managerial character because they are essential to the exercise of management functions. That is not the test. The duties listed at paragraph [44] are not managerial duties and, for the most part, are not performed by the administrative assistants.

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[28] *Amenity Health Care*, *supra* note 9, at para 59.
[29] *University of Saskatchewan v Administrative and Supervisory Personnel Association*, *supra* note 12 at paras 35 to 41.

[57] *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees*[30] is a recent decision of the Board that thoroughly canvassed the issue of managerial and confidential exclusions. It relied on the summary of relevant principles to be applied in assessing a request for a managerial exclusion, as set out by the Board in *Canadian Union of Public Employees, Local 4777 v Prince Albert Parkland Regional Health Authority*[31]:

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

[58] In applying those principles, the Board stated:

> *[66] Prince Albert Parkland set out the principles to be applied. The determination requires a careful consideration of the specific facts in each case. The exclusion of positions from the bargaining unit should be made on as narrow a basis as possible. Requiring particular consideration here are the following questions:*
>
> *- Will these positions have a significant degree of decision-making authority in relation to matters that affect the terms, conditions or tenure of employment of other employees?*
>
> *- Will these positions have the ability to influence labour relations?*

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[30] *Supra* note 24.
[31] 2009 CanLII 38609 (SK LRB) at para 66.

> *- What authority is assigned to these positions? Is it an effective authority? It is not sufficient if the person can make recommendations, but has no further input into the decision-making process.*

[59] The administrative assistants have no decision-making authority in relation to matters that affect the terms, conditions or tenure of employment of other employees; they have no ability to influence labour relations; they have no managerial authority. The assertion that they will work with management is not sufficient. The Act requires that their primary responsibility must be to exercise authority and perform functions of a managerial character. The Board was provided with no evidence that the administrative assistants perform any functions of a managerial character. They are important sources of information, and their expertise and knowledge is a valued commodity, but they do not have any managerial responsibilities or authority.

[60] The Board finds that the Employer has not provided sufficiently clear, convincing and cogent evidence that any of the administrative assistants should be excluded from the bargaining unit on the basis of the managerial exclusion.

Confidentiality Exclusion:

[61] The next issue for the Board to determine is whether any of the administrative assistant positions should be excluded from the proposed bargaining unit on the basis of paragraph 6-1(1)(h)(i)(B), the confidentiality exclusion. This provision requires both that the primary duties of a position include activities that are confidential in relation to labour relations, business strategic planning, policy advice or budget implementation or planning and that these confidential duties have a direct impact on the bargaining unit.

[62] In *SMI* the Board granted an application by an employer to amend a Certification Order to exclude an executive assistant from the bargaining unit. In determining that the position should be excluded on the basis of the confidentiality exclusion, the Board stated:

> *[54] In Saskatoon Public Library, the Board provided helpful guidance for assessing the confidentiality exclusion:*
>
> > *[70] In considering the confidentiality exclusion, the Board has an obligation to balance a number of important competing rights: the rights of individual employees to not be unnecessarily denied access to collective bargaining; the right of the Union to not have its collective strength weakened by an unnecessary reduction of the bargaining unit; and the right of the Employer to make rational and informed decisions regarding labour relations, business strategic planning, policy and budget implementation and planning, in an atmosphere of candour and confidence.*

> *[55] It is a purpose of the confidentiality exclusion to ensure that the Employer has sufficient internal resources to permit it to make rational and informed decisions with respect to labour relations and collective bargaining, and to permit it to do so in an atmosphere of candour and confidence. The Board must consider whether the duties would create an insoluble conflict between the responsibilities which that person owes to the Employer and the interests of that person and his/her colleagues in the bargaining unit. Due to the potential to deny an individual access to the benefits of collective bargaining and to erode the bargaining unit, such exclusions are made on as narrow a basis as possible.*
>
> *[56] The Employer relied on a series of cases, decided pursuant to the previous legislation, that support the exclusion of a single position providing clerical and administrative support of a confidential nature. Throughout these cases, the Board recognized that an employer who is obligated to engage in a collective bargaining relationship will likely require some administrative or clerical support.*

[63] The Board would pause here to note that the definition of employee with respect to exclusions on the basis of confidential duties is significantly different in the Act than it was in *The Trade Union Act*. In paragraph 2(f)(i)(B) of *The Trade Union Act*, the exclusion was described as follows: "a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer". Therefore, caution must be exercised in applying decisions made by the Board on this issue prior to the implementation of the Act.

[64] The Board in *SMI* then reviewed a series of decisions made prior to the enactment of the Act, and therefore prior to the enactment of the new description of the confidentiality exclusion. With respect to the changes, the Board noted:

> *[65] The current legislation excludes from the definition of employee a person whose primary duties include activities that are of a confidential nature in relation to any of the four listed categories and that have a direct impact on the bargaining unit the person would be included in as an employee. The question before the Board is whether the position's primary duties include the activities as described. The Employer's evidence focuses on activities that are of a confidential nature in relation to one of the listed categories, labour relations. It also touches on activities that are of a confidential nature in relation to business strategic planning, policy advice, and budget planning.*
>
> *. . .*
>
> *[67] The Board must look beyond the job title and the job description and consider the evidence, including whether the duties assigned to the position are genuine and necessary. As for whether the Employer "sprinkled" the proposed new position with confidential duties for the purpose of obtaining an exclusion, there is evidence of that here, as there was in Saskatoon Public Library. For example, the Board is not persuaded that the EA will be preparing labour cost data for purposes of collective bargaining, performing research for discipline and grievance matters, performing research for strategic planning, or providing opinions or advice. The Board will consider the request for an exclusion without regard for these duties.*
>
> *[68] First, the Board is satisfied that the duties of the EA position are intended to rectify legitimate operational deficits within the Employer's structure. The Board is persuaded that*

> *the Employer's operations, in particular at the Executive level, have been impeded in the absence of this role.*

[65] The final question considered by the Board in *SMI* is set out as follows:

> *[71] The remaining question is whether these activities will have a direct impact on the bargaining unit the person would be included in as an employee. In our view, the requirement for a "direct impact" does not necessarily foreclose the exclusion of an administrative position from the bargaining unit. Each case must be decided on the facts. Here, the EA's significant integration with the role of the President, the Executive team, and the Board, is sufficient to establish a direct impact. The EA will be an important and central resource to ensure that the President and the Executive team are performing their duties in an effective and efficient manner.*
>
> *[72] The EA job description states that,*
>
> > *The Executive Assistant learns the role of the President and of others in the Executive Management Team in order to help them complete their tasks effectively and efficiently.*
>
> *[73] The EA will help the Executive team "complete their tasks effectively and efficiently". "Among these tasks are handling confidential matters relating to the Board of Directors and employee relations; budgets and financial matters; and business and strategic planning for SMI and its Board of Directors". The EA will be taking over the labour relations activities that Gaddess is currently performing. The EA will also be involved in recruitment, discipline, and terminations.*

[66] The Board is not satisfied that any of the administrative assistants' primary duties include activities of a confidential nature in relation to one or more of the four listed categories. It is not sufficient to prove that they incidentally or occasionally perform such tasks. The Board is not persuaded that the Employer's operations would be impeded by the inclusion of the administrative assistant positions in the proposed bargaining unit. As in *SMI*, the job descriptions and the list provided by the Employer in its Brief of Law[32] are sprinkled with confidential duties that the administrative assistants do not actually perform.

[67] The evidence also focused on a number of examples of confidential information that the administrative assistants may have access to that would not have a direct impact on the proposed bargaining unit, *e.g.*, land development, supplier bidding, zoning, land purchases, competitive information of businesses, applications for development permits. This kind of confidential information does not relate to any of the four listed categories. This is not the kind of confidential information contemplated by the Act that would justify depriving any of the administrative assistants of their constitutional right to engage in collective bargaining.

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[32] See para [44].

[68] The Employer also emphasized its responsibilities pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act*. Watt's evidence did not indicate that she had a role in processing or reviewing documents to determine which would be suitable to release. Kalynowski also indicated that she had no role in the process. Trach was not asked about this issue. Lutz, on the other hand, indicated that all of the administrative assistants have been involved in this process. He did not indicate in his evidence that any of the information reviewed pertained to labour relations, business strategic planning, policy advice or budget implementation or planning, or that it would have a direct impact on the bargaining unit. The evidence indicated that dealing with these applications is not a primary duty of any of the administrative assistants.

[69] At the current time, none of the administrative assistants perform duties that would require them to be excluded from the bargaining unit. The job descriptions contain some vague aspirational or speculative references that might qualify as confidential functions, however there was no evidence before the Board that the administrative assistants were performing those kinds of duties or that there was a serious intention to have them perform those duties. Since they were assigned their new roles on November 1, 2021, there was no impediment to the Employer involving them in these duties, as they are not members of the current bargaining unit. The evidence was clear that none of the administrative assistants, including the PAAA, had any involvement in or sometimes even any awareness that these activities were occurring.

[70] There was no evidence of significant integration of any of the administrative assistants with the managers. The administrative assistants in this matter perform tasks more akin to the in-scope administrative assistant referred to in *SMI*.

[71] In *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc.*[33] ["*Verdient Foods*"] the Board described the requirement in the Act that the confidential duties must have a direct impact on the bargaining unit:

> *The primary duties of the position must be of a confidential nature and have a direct impact on the bargaining unit. This impact must be direct, not indirect. It is not apparent, on the evidence, that the duties of these positions, in relation to any confidential data, have a direct impact on the bargaining unit or place the positions in a labour relations conflict with the rest of the proposed bargaining unit. The positions' duties in relation to the confidential information would not undermine the adequacy of the employer's internal resources to make informed and rational decisions regarding labour relations. At Verdient, labour relations decisions are made by managers. Neither of these positions are providing confidential information or advice to managers in relation to labour relations, or confidential information or advice that would have a direct impact on the bargaining unit in relation to*

[33] 2019 CanLII 76957 (SK LRB) at para 118.

> *labour relations, as a regular part of their responsibilities. If these positions are placed in the bargaining unit, doing so will have no measureable impact on the Employer's ability to proceed to make informed and rational decisions regarding labour relations in an atmosphere of candour and confidence.*

[72] The administrative assistants in this matter are equivalent to the positions at issue in *Verdient Foods* in that they do not provide confidential information or advice to managers in relation to labour relations, or confidential information or advice that would have a direct impact on the bargaining unit in relation to labour relations. In *Verdient Foods*, the confidential information to which the positions in question had access were described as trade secrets, information relating to customers, research and development and intellectual property. As a result, the Board came to the conclusion that the Lab Technicians and Lab Analysts should remain in the bargaining unit. Similarly here, the confidential information to which the administrative assistants have access is not information that would have a direct effect on their bargaining unit.

[73] The Employer described the decision in *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees*[34] as finding that assistants who prepare budget plans that involve confidential information are appropriately excluded from the bargaining unit. The Board disagrees with that description. For example, in that decision, in deciding to exclude the Assessment and Continuous Improvement Analyst and Service Enhancement and Project Analyst from the bargaining unit, it described their duties as follows:

> *[78] The Employer is planning wholesale changes to its operations. To enable it to undertake those changes on the basis of well-thought-out and well-researched information and recommendations, it came to the conclusion that it requires the assistance of two new positions: the ACI Analyst and the SEP Analyst. To properly carry out their primary duties, the people in these two positions will need to be fully immersed in the strategic planning and budget processes. They can only fully perform their roles if their positions are placed outside the scope of the bargaining unit. The evidence of the Employer, which the Union acknowledged, is that the ACI Analyst and SEP Analyst positions are complementary and, to some extent, overlapping. The Systems Engineers will perform similar work, but will be more focused on providing advice and recommendations respecting the role of modernized IT systems in those processes. A determination that these three positions should remain in the bargaining unit would place them in an insoluble conflict of interest.*
>
> *[79] These three positions will have access to information about the possible reduction of the workforce, the change or abolishment of positions or the increase or decrease of employment hours, during the planning stages, when the need for confidentiality is high. They may also receive confidential information that pertains to the purpose, goals and objectives of the analysis and improvements, such as information relating to labour relations, business strategic planning or budget planning. This information is needed to develop the monitoring systems, analyze the information and provide recommendations.*

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[34] *Supra* note 24.

> *[80] They represent the kind of internal resources that are necessary to enable the Employer to make informed and rational decisions regarding labour relations, strategic planning, policy and budget planning and implementation. In reviewing their job descriptions, it is necessary to consider the reason they will have access to the information and how it will be used by the employee, to determine whether it will have a direct impact on the bargaining unit. The Board must also respect the intention of the Legislature, in elaborating on the description of the confidentiality exclusion. The Legislature has established that the kind of work described in subparagraphs 6-1(1)(h)(i)(B)(II) to (IV) can also have a direct impact on the bargaining unit. The Board is satisfied that the primary duties of these three positions will have a direct impact on the bargaining unit.*
> . . .
>
> *[84] . . . They will not incidentally or occasionally perform tasks of a confidential nature; in their primary duties they are expected to have input and influence in the Employer's decision-making processes with respect to labour relations, strategic planning, policy and budget planning and implementation.*

[74] None of the administrative assistants are fully immersed in the strategic planning or budget processes. They do not provide advice or recommendations with respect to labour relations, strategic planning, policy or budget planning or implementation. In their primary duties they are not expected to have input and influence in the Employer's decision-making processes with respect to labour relations, strategic planning, policy and budget planning and implementation.

[75] The Employer relied on *City of Regina v Regina Civic Middle Management Association*[35] for support for its argument that municipal employers are entitled to have excluded clerical staff to handle the clerical/administrative side of collective bargaining. The position at issue in that decision is not comparable to the administrative assistant positions at issue in this matter. Its duties were described by the Board as follows:

> *[22] . . . The evidence from the City's witnesses painted a picture of the duties of the Financial Business Partner as one who would have great influence on the management of the City in that it would assist Directors and Executive Directors in their analysis of budgetary and program options, some of which may have serious ramifications for the Unionized workforce.*
> . . .
> *[26] The position, as described by the City's witnesses, checks 3 of the above boxes insofar as the witnesses testified that it would be involved in costing collective bargaining proposals, would be involved in business strategic planning in assisting with the review of existing programs and making recommendations in respect of their continuation, amendment or cancellation. Finally, the evidence was that the position would be directly involved in budgetary planning across the organization.*

[76] The work of the administrative assistants in this matter does not include budgetary or program analysis, costing, strategic planning, making recommendations respecting programs or budget planning.

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[35] *Supra* note 22.

[77] The Employer relied on a 1984 decision of the Ontario Labour Relations Board[36] in which executive secretaries who typed confidential budget proposals, salary offers, discipline letters and bargaining proposals were excluded from a bargaining unit. The Board does not find that decision helpful in making a decision in this matter. First, the decision does not provide information respecting the statutory provision pursuant to which the exclusion determination was made. Further, none of the administrative assistants in this matter perform any of the duties relied on in that matter.

[78] Any shortcoming in the evidence to justify an exclusion, the Employer argues, is because of the short tenures of the incumbents in their positions. The Employer is in a period of transition. The Board does not accept this argument. The Employer has chosen not to impose duties on the administrative assistants that meet either the managerial or confidentiality exclusions. Lutz indicated that budget preparation occurs in the September to March timeframe and the preparation of audited financial statements from January to June. This means the administrative assistants were in their current positions during those timeframes, and they had no involvement in these tasks. He also acknowledged that *The Municipalities Act* requires council meetings to be open to the public.[37] Of course, some portions of those meetings can be held *in camera* and some portions of the material considered at the *in camera* sessions may be confidential at that time. The onus was on the Employer to satisfy the Board that the primary duty of one or more of the administrative assistants is to prepare confidential information for those meetings that is with respect to labour relations, business strategic planning, policy advice and/or budget implementation and planning that will have a direct impact on the bargaining unit. This it failed to do.

[79] The Employer is not entitled to one out-of-scope administrative assistant. The exclusion of even one administrative assistant is not a foregone conclusion. The onus is on the Employer to demonstrate that the exclusion is required in this workplace. The Board must make its decision of the basis of the evidence it heard to determine whether the criteria for an exclusion has been met.

[80] The Board is not prepared to deny the administrative assistants their statutory and constitutional right to join a union on the basis of the Employer's argument that it might assign

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[36] *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v Sternson Limited*, *supra* note 23.
[37] Sections 119 and 120.

such duties to them in the future. Granting this application will leave the Employer with 5 out-of-scope employees (plus the out-of-scope Community Service Officer) in a workforce of 14 people. This is more than enough to allow the Employer the resources it requires to carry out duties respecting labour relations, business strategic planning, policy advice and budget implementation and planning that will have a direct impact on the new bargaining unit. The Employer will continue to have significant resources to make rational and informed decisions respecting labour relations, business strategic planning, policy and budget implementation and planning in an atmosphere of candour and confidence. There will be no insoluble conflict between the responsibilities which the administrative assistants owe to the Employer and their own interests.

[81] The Board finds that all three administrative assistant positions are employees within the meaning of Part VI of the Act.

Appropriateness of Bargaining Unit:

[82] The next issue, then, is whether the proposed bargaining unit is appropriate for collective bargaining. In *Amenity Health Care*, the Board stated:

> *[61] Determining what qualifies as an appropriate unit for collective bargaining purposes is one of the most important tasks assigned by the Saskatchewan Legislature to this Board. In Saskatchewan Federation of Labour et al. v Saskatchewan (Attorney General), Ball J., a former Chairperson of this Board, emphasized the significance of the Board's authority set out in then section 5 of The Trade Union Act which has now been superseded by section 6-11 of the SEA. He stated:*
>
> > *The SLRB is created by The Trade Union Act. Its powers are, and have always been, described in general terms. Unlike labour legislation in some other jurisdictions, The Trade Union Act is not and does not purport to be a code. The manner in which SLRB carries out its duties and responsibilities is very much dependent upon how its members exercise their discretion and implement what they perceive to be the policy goals of the statute.*
> >
> > *. . . . . .*
> >
> > *Pursuant to s. 5 of The Trade Union Act, the SLRB has an absolute discretion to determine appropriate bargaining units. Section 5(a) of The Trade Union Act states:*
> >
> > > *5 The board may make orders:*
> > > *(a) Determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
> >
> > *[T]here is little, if any, guidance in The Trade Union Act with respect to the rather elastic term "appropriate". Section 5(a) does not obligate the SLRB to identify the*

> *most appropriate unit; the SLRB certified any unit it deems appropriate for the purpose of bargaining collectively.*
>
> *The Board's determination of the size and shape of an appropriate bargaining unit has significant public policy implications. It establishes the line between "employees" who will, in the event of certification, be represented by the union, and "managers" who will represent the employer. In a less than all employee unit, it establishes the line between employees who will, and employees who will not be, represented by the union. Thus, its determination is critical to the union's capacity to secure certification as the employees' bargaining representative, the employer's continuing ability to manage the business, the relative strengths of the parties during the collective bargaining process, the eventual content of a collective agreement and whether or not the bargaining process will result in a strike or lockout. Its determinations affect not only the immediate concerns of the parties to the dispute; in some cases, particularly those involving larger bargaining units or workers providing essential services, they can affect the collective good of the community as a whole.* [Emphasis added in *Amenity Health Care*]

[83] In *North Battleford CSO*, the Board granted an application for bargaining rights with respect to a small unit, being six people. The Board there found that it could not be seriously contended that the six employees did not share a community of interest. They had the same job duties and the same job title and were not interchangeable with other workers; their job responsibilities were not shared by others; it was possible to draw a rational and defensible boundary around the proposed bargaining unit. There was no intermingling of job duties between the employees in the proposed bargaining unit and other employees. Finally, the Board stated:

> *[78] The Board acknowledges that the unit proposed by the Applicant is a small one. Yet as we have stated in a number of our prior Decisions, the relatively small size of a proposed bargaining unit does not disqualify it from being an appropriate unit for certification purposes.*

[84] In *North Battleford CSO* the Board relied on the following statement in *Canadian Union of Public Employees v The Board of Education of the Northern Lakes School Division No. 64*[38]:

> *The Board has always been reluctant to deny groups of employees access to collective bargaining on the grounds that there are bargaining units which might be created, other than the one which is proposed, which would be more ideal from the point of view of collective bargaining policy. The Board has generally been more interested in assessing whether the bargaining unit which is proposed stands a good chance of forming a sound basis for a collective bargaining relationship than in speculating about what might be an ideal configuration.*

[85] In this matter, there can be no legitimate argument that the administrative assistants do not share a community of interest. They perform similar duties; they use similar skills to carry out

[38] [1996] Sask LRBR 115 (SK LRB).

those duties. There is little connection with the members of the existing bargaining unit, and no overlap or intermingling of job duties.

[86] The description of the bargaining unit establishes the line between employees who will and employees who will not be represented by the Union. The relatively small size of a proposed bargaining unit does not, in and of itself, disqualify it from being an appropriate unit.[39]

[87] With respect to viability, the Board noted in *North Battleford CSO*:

> *[83] The Board acknowledges that it is extremely difficult to assess with any degree of certainty whether the proposed unit will be viable in the longer term. However, we note the City already has had considerable experience with a small bargaining unit comprised of its fire-fighters, albeit a unit somewhat larger in size than the proposed unit at issue here. Certainly, there was no evidence led before us to suggest the existence of that unit had disadvantaged its members in any way, or that it had created workplace instability for the City.*

[88] The Board notes that the same rationale would apply in this matter. The existing bargaining unit consists of only five employees. No evidence was brought before the Board that it is not viable. It cannot be presumed that the proposed bargaining unit will fail because of its size. There is no evidence to show that the proposed unit is likely to fail in its objective to represent the collective bargaining interests of its members.

[89] The Board also noted in *North Battleford CSO* that the Board's preference for larger bargaining units is aimed at avoiding issues of certifying an under-inclusive unit, enhancing lateral mobility and eliminating jurisdictional disputes between bargaining units. None of those factors is at issue in this matter. As the Board concluded on that issue in *North Battleford CSO*, large is not synonymous with appropriate. In fact, section 6-22 of the Act contemplates that a bargaining unit may be composed of "two or fewer" employees.

[90] The Board agrees with the Employer that it is unusual to have two bargaining units in a workforce of 14 people. It is also unusual to have 5 out-of-scope managers in a workforce of 14 people. There is no evidence before the Board respecting why the existing bargaining unit excluded the administrative assistant. As the Union noted, all that the existing Certification Order did was to make a determination that the administrative assistant was not a member of that

[39] *Amenity Health Care*, *supra* note 9; *North Battleford CSO*, *supra* note 15.

bargaining unit. It did no more than draw a line between the employees who were, and the employees who were not, to be represented by the Union.

[91] The Board is satisfied that the proposed bargaining unit is an appropriate bargaining unit.

Jurisdiction of Board to Hear Application:

[92] The Employer made a number of arguments in this matter respecting whether the Board had jurisdiction to hear this application. First it argued that since the essential character of the dispute between the Union and the Employer in this matter is based on an interpretation of the existing collective agreement, the Board has no jurisdiction to hear this matter. It relied on *Northern Regional Health Authority v. Horrocks*[40] where the Supreme Court of Canada held that since the essential character of the complaint in that matter alleged a contravention of a collective agreement, it fell squarely within the mandate of an arbitrator, pursuant to a provision similar to section 6-45 of the Act.

[93] The Employer also referred to *Yashcheshen v Law School Admission Council Inc.*[41], which referred in *obiter* to section 6-45 of the Act. What it also confirmed is that in determining the application of a section like 6-45, it is necessary to first undertake an analysis of the essential character of the application.

[94] The essential character of this matter does not arise from the interpretation, application, administration or contravention of the collective agreement or affect the interpretation of the collective agreement between the Employer and the existing bargaining unit. The scope clause in that collective agreement will not change or be affected by the decision in this matter. The issue in this matter is not whether the administrative assistant positions are included in the existing bargaining unit. The issue is first, whether the administrative assistants are employees within the meaning of Part VI of the Act and second, if they are, whether a bargaining unit consisting of the administrative assistants is an appropriate unit for collective bargaining.

[95] Next the Employer argues that the collective agreement between the Employer and the existing bargaining unit is binding on the administrative assistants such that they are not entitled to make this application to establish a separate bargaining unit. It bases this argument on the wording of clause 6-41(1)(b) of the Act, which states that a collective agreement is binding on

[40] *Supra* note 17.
[41] *Supra* note 17.

every employee of an employer "who is included in or affected by it". The Employer argues that they are affected by it in that it refers to their positions and expressly excludes them from the benefits and obligations in connection with being part of the existing bargaining unit. The Employer goes further and argues that they are excluded on the basis of their managerial character – but the collective agreement does not say that. As the Employer pointed out, there is no evidence before the Board respecting why they have been excluded from the bargaining unit. In the Reply the Employer filed in this matter, the Employer stated that the existing Certification Order expressly resolved the issue of scope of the administrative assistants. In argument, it admitted that this was not the case.

[96] The Employer submits that this argument is supported by the decision of the Court of Appeal of Newfoundland and Labrador in *ExxonMobil*. In that decision, an arbitrator found in favour of the union on a grievance, and then the project owner purported to deny the employees access to the project property, thwarting the arbitrator's decision that the employees be allowed to return to work. The Court found that, even though not a party to the collective agreement, the owner was bound by the outcome of the arbitration award. This was because the project was being undertaken pursuant to a Special Project Order (SPO), which had been issued pursuant to provisions of the *Labour Relations Act* of Newfoundland and Labrador that have no equivalent in Saskatchewan:

> *[21] By the time the SPO was drafted and enacted, the basic structure of the project regime would have already been worked out among all the main participants. Indeed, as noted already, the collective agreement pre-dated the SPO. ExxonMobil and its co-venturers were the ultimate beneficiaries of the project. They needed access to a project site at which their contractors could carry out the required work. The SPO gave them that along with the prospect of labour peace throughout the project. In that way, they had some guarantee that the project could proceed as contemplated. The contractors engaged by ExxonMobil also benefitted because they had a guarantee of relative labour peace and had access to the site to carry out their contracted work. The unions also had the benefit of a regime that eliminated jurisdictional disputes within their own ranks and a site-wide regime for resolving job disputes between employees and their individual employers. To achieve these benefits, each participant had to give up something: the unions, their right to bargain collectively on a union-employer basis; the contractors, the right to exercise management rights individually in respect of their own employees and the individual unions (subject to the grievance arbitration process); and ExxonMobil, the right to manage and employ their property rights in a manner inconsistent with the operation of the regime from which they were benefitting. It was an example of the principle of "he who receives the benefit must also shoulder the associated burden" (See Halsall v. Brizell, [1957] Ch 169). The process only worked because each participant became part of an integrated benefit-burden whole.*
>
> *. . . .*
>
> *[82] The only remaining basis upon which ExxonMobil could therefore maintain that it could nevertheless revoke site access privileges was to assert the primacy of their proprietary rights as "owner". There not being a violation of the ExxonMobil policy (as found by the arbitrator) and no "other unacceptable conduct as deemed by [ExxonMobil]" having been*

> *alleged, the assertion of the ability of unrestrained property rights is all that ExxonMobil is effectively left with.*

[97] Under the heading "The Nature of the Legal Regime Created by the Special Project Order", the Court found:

> *[87] Unless one was prepared to give primacy to the assertion of property rights regardless of how doing so would undermine a legislative policy that was being enforced for the benefit for all, one is driven to the conclusion that the rights flowing from the imposed collective agreement were intended by the legislature to have primacy over all other rights at the site that impacted on collective bargaining, which in accordance with section 2(1)(f) of the Act, relates to "terms and conditions of employment and related matters" (emphasis added). The jurisprudence based on notions of privity of contract that has had some currency in some other labour relations contexts is irrelevant in the current context where the regime is subject to an SPO.*

[98] The Court then considered the applicability of *Bisaillon v. Concordia University*[42]:

> *[89] Bisaillon involved an entirely different issue (the extent to which a labour arbitrator's jurisdiction derived from a collective agreement ousted the jurisdiction of the courts) and its statement of the law, as applied to the material facts of that case cannot be considered to be controlling and does not dictate any result in the current case. In any event, the statements of LeBel J, which assert that inasmuch as an arbitrator's jurisdiction and authority derive from the collective agreement under which he or she is appointed is necessarily limited to binding only those who are parties to the agreement, are unremarkable in themselves. They simply assert a privity of contract concept in the labour relations context. Those comments, however, presuppose that the authority of the arbitrator is derived solely from the agreement. In the current case, however, the issue is whether the existence of the SPO regime imposes any greater restriction on non-parties who are involved in the operation of that regime with respect to labour relations matters. The arbitrator and the applications judge distinguished other cases based on privity of contract (Finning and Bantrel) on the basis that they did not deal with a special project regime. In like manner, the Bisaillon decision can also be distinguished on the same basis. Jurisdiction is derived, at least in part, from a different foundation that is outside of the collective agreement itself.*

[99] Under the heading of The Significance of Being "Bound" by an Arbitration Award, the Court found:

> *[98] It is sufficient to conclude that ExxonMobil, like all other participants in and beneficiaries of the SPO regime, must respect that legal regime, including the decisions that flow out of it. That would include the obligation to refrain from undermining the regime of which it is a beneficiary. It must thus accept the labour relations and other related rulings of an arbitrator whose role is integral to the operation of the regime and which generally declare the legal situation on the site in the same way in which every citizen must abide by the law and the jurisprudence that emanates from the courts.*
>
> *[99] I prefer the approach of the applications judge when he stated that ExxonMobil's rights are subordinated to the labour relations regime set up by the SPO and that ExxonMobil will*

[42] 2006 SCC 19, [2006] 1 S.C.R. 666.

> *necessarily be "affected by outcomes" flowing from the collective agreement that is legitimated by the SPO. ExxonMobil need only be regarded as being "bound" by the arbitrator's ruling in the same way as a citizen is bound by the general law and the precedents emanating from the courts. Even if ExxonMobil may not be subject to the law of contempt for failure to abide by a specific arbitrator's order, it will be subject to an obligation to refrain from interfering with the rights of workers which have been determined and declared as part of the operation of the SPO regime and to which all persons, including ExxonMobil, participating in or receiving the benefits of the activities contemplated by the regime are subject.*
>
> *[100] Indeed, even with respect to the one occasion when the arbitrator referred to ExxonMobil being "bound" he did not say that ExxonMobil was bound "by the award"; instead he said it was bound "by the outcome of the award." That phraseology can also be interpreted in a manner consistent with the characterization of the effect of the award described by the applications judge.* [emphasis added by NLCA]

[100] A thorough review of that decision makes it clear that the Newfoundland and Labrador Court of Appeal was not making the general determination argued by the Employer, that even though not a party to the agreement, ExxonMobil was bound by the arbitrator's decision. In fact, the Court went to great lengths to emphasize several times that the result in that matter arose from the special circumstances in that case in which the project was being undertaken pursuant to a Special Project Order made under provisions of the *Labour Relations Act* of Newfoundland and Labrador that have no equivalent in Saskatchewan.

[101] Next the Employer argues that its interpretation of section 6-41 is supported by comparing the wording of that section to the wording of subsection 6-38(2), which reads:

> *6-38(2) All members of the union who are in the bargaining unit affected by the collective agreement mentioned in subsection (1) are entitled to vote in the ratification vote.* [emphasis added]

[102] By using the wording "included in or affected by", the Legislature must have intended section 6-41 to have a broader application:

> *6-41(1) A collective agreement is binding on:*
>
> *(d) a union that:*
>
> *(i) has entered into it; or*
>
> *(ii) becomes subject to it in accordance with this Part;*
>
> *(e) every employee of an employer mentioned in clause (c) who is included in or affected by it; and*
>
> *(f) an employer who has entered into it.* [emphasis added]

[103] Can it be argued that the administrative assistants are "affected by" the collective agreement between the Employer and the existing bargaining unit, on the basis of the scope clause that indicates that it does not cover them? Neither party provided the Board with a definition of "affect", but the following definitions are readily available:

> *To produce an effect upon (someone or something).*
> *To act on and cause a change in (someone or something).*
> *To cause illness, symptoms, etc., in (someone or something).*
> *To produce an emotional response in (someone).*
> *To influence (someone or something).*[43]
>
> *To have an influence on someone or something, or to cause a change in someone or something.*[44]
>
> *To act upon; influence; change; enlarge or abridge.*[45]

[104] These definitions indicate that an argument can be made that the administrative assistants are affected by the collective agreement, because they are named in it. An argument can also be made that they are not affected by it, because it specifically says that it does not apply to them. In making a determination respecting which argument to adopt, the Board is guided by the requirement that the exclusion of positions from a bargaining unit is to be made on as narrow a basis as possible. The Board therefore finds that the administrative assistants are not affected by or bound by the collective agreement between the Employer and the existing bargaining unit.

[105] Section 6-41 also says that the Union is bound by the collective agreement. Would it be a reasonable interpretation of this provision to find that this means the Union cannot make this application? The Board finds that would not be a reasonable interpretation. The Board finds that the Union is bound by the current collective agreement only with respect to the current bargaining unit. This application is not, as the Employer suggests, a request for an Order to supersede the existing Certification Order and/or the existing collective agreement. The collective agreement and its scope clause do not prevent the Union from making this application.

[106] Finally, the Employer relies on *Kindersley and District Co-operative Ltd v Retail, Wholesale And Department Store Union*[46] to argue that the Board does not have jurisdiction to amend the scope clause in a collective agreement. In that case, the Board granted an amendment to the scope clause in a certification order, ordered that the new scope clause superseded the

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[43] www.merriam-webster.com/dictionary.
[44] https://dictionary.cambridge.org/dictionary/english.
[45] https://thelawdictionary.org.
[46] *Supra* note 20.

scope clause in the collective agreement, and ordered that the collective agreement applied to the employees brought into the bargaining unit by the amendment. The Court of Appeal held:

> *[34] . . .In my opinion, while s. 5 of the Act gives the Board the power to rescind or amend a decision or order of the Board and the power to order the parties to bargain collectively, it does not give the Board the power in the absence of exceptional circumstances, which do not exist in this case, to enter into the bargaining process and impose the terms of the collective bargaining agreement on the new parties to the collective bargaining agreement.*

[107] That decision is not relevant to the Application for Bargaining Rights being considered by the Board in this matter. That decision may have been relevant to the effect of an amendment, if Local 4838 had not withdrawn the amendment application, and had been successful in that application. However, that application is not before the Board. The Board is not being asked to amend the scope clause in the existing Certification Order or the existing collective agreement. The existing collective agreement will not apply to the administrative assistants unless the Employer and Union agree that it should apply.

Conclusion:

[108] In conclusion, with these Reasons, the Board will issue an Order that:

a) The ballots held in the possession of the Board Registrar pursuant to the Direction for Vote issued in this matter on November 19, 2021, be tabulated in accordance with *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021*;

b) The results of the vote be placed in Form 24 and advanced to a panel of the Board for its review and consideration.

[109] The Board thanks the parties for the comprehensive oral and written submissions they provided, which the Board has reviewed and found helpful. Although not all of them may have been referred to in these Reasons, all were considered in making this decision.

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

DATED at Regina, Saskatchewan, this **26th** day of **July, 2022.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson