

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, Applicant v TOWN OF DAVIDSON, Respondent

LRB File No. 014-23; July 14, 2023

Chairperson, Michael J. Morris, K.C.; Board Members: Lori Sali and Kris Spence

Counsel for the United Steel, Paper and Forestry
Rubber, Manufacturing, Energy, Allied Industrial
and Service Workers International Union:

Samuel Schonhoffer

Counsel for the Town of Davidson:

Yvon Prefontaine

Application for bargaining rights – Appropriateness of bargaining unit – Unit proposed by Union appropriate.

Eligibility to vote – Casual employee – Casual employee eligible to vote - Employed at time of application and time of vote.

Post-application evidence – Section 6-107 of *The Saskatchewan Employment Act* – Board refuses to consider evidence respecting events after certification application filed.

Managerial exclusion – Town Foreman position – Board not satisfied position required to be excluded on basis of managerial exclusion.

Confidentiality exclusion – Town Foreman position – Board not satisfied position required to be excluded on basis of confidentiality exclusion – Position able to be included in bargaining unit.

REASONS FOR DECISION

Background:

[1] **Michael J. Morris, K.C., Chairperson:** These are the Board's reasons regarding a certification application brought by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union [Union] with respect to the Town of Davidson [Town].

[2] The Union requests certification of a bargaining unit described as follows:

*All employees of the Town of Davidson except for the Town Administrator, the Director of Recreation and Culture, the AGT Centre Manager of Operations, the Fire Chief and Deputy Fire Chief, and all seasonal summer employees.*¹

[3] The primary dispute between the parties is whether the Town Foreman should be included in the bargaining unit or excluded on the basis of the managerial or confidentiality exclusions. A second issue is whether a casual employee, Leila McDonnell [Ms. McDonnell], is eligible to vote for the purposes of the representation vote. Finally, the parties disagree about whether the Board should consider evidence post-dating January 24, 2023, being the date the Union's certification application was filed.²

Evidence:

Evidence on behalf of the Union

[4] The Union called Trent Thomson [Mr. Thomson], Town Foreman, and Matthew Harris [Mr. Harris], Public Works Department employee.

[5] Mr. Thomson was hired as the Town Foreman in October of 2018. As Town Foreman, he reports to the Town Administrator, Yvonne Jess [Ms. Jess], and is responsible for the general management of all aspects of the Town's Public Works Department, including its water and sewer systems.³ The Public Works Department usually employs 4 full-time employees, including Mr. Thomson. It currently employs Mr. Thomson and two other full-time employees, Mr. Harris and James Malang [Mr. Malang]. These employees report to Mr. Thomson. Other employees who report to Mr. Thomson according to the Town's personnel policy include the landfill staff.⁴

[6] Mr. Thomson described the bulk of his duties as involving hands-on work, including physical labour and maintaining and operating equipment. He described his administrative duties as relatively minimal. These include stopping by the Town office in the morning to see if there are particular issues needing to be dealt with and leading a half-hour shop meeting with Public Works employees at the start of their shifts. Public Works employees work from 7 a.m. to 4 p.m., Monday to Friday, unless there are circumstances which require their attention at other times, such as snow clearing. Mr. Thomson acknowledged that the Public Works Department doesn't receive

¹ Application for bargaining rights dated January 24, 2023, para 3.

² Three other matters should be mentioned, for the record. First, the Town did not dispute that an "all employee" bargaining unit with limited exclusions could be certified. Second, the Town withdrew its objection to the position of office clerk being included in the bargaining unit. Third, the parties agreed that the job description of Assistant Town Administrator should not, at this time, be listed as excluded from the bargaining unit, though this is without prejudice to the Town's ability to apply for it to be excluded if such a position is intended to be filled.

³ Exhibit E-1, Town Foreman job description.

⁴ Exhibit E-2, Town of Davidson personnel policy.

work orders from the Town office. If there are requests for service from residents the Town office will contact him to address them, but it will also occasionally contact his employees directly.

[7] Mr. Thomson acknowledged that he is a member of the Town's Public Works Committee, which is described in more detail below.

[8] Mr. Thomson has primary responsibility for setting the agenda for the Town's Public Works Committee. He provides the draft agenda to Ms. Jess, who types it out and circulates it. The Public Works Committee consists of 4 councillors (including the mayor), Ms. Jess and himself. It makes recommendations on public works expenditures but cannot approve them; approval comes from Town Council.

[9] Mr. Thomson views his role on the Public Works Committee as bringing forth issues which require addressing. He tended to downplay his role in making recommendations, though the Committee's minutes clearly reflect him having done so, including with respect to prioritizing expenditures. Mr. Thomson agreed that he was the only one on the Committee with in-depth knowledge of the issues being dealt with by the Public Works Department. He is typically responsible for obtaining quotes for matters and presenting them to the Committee.

[10] When asked about his role in signing contracts for work required by the Public Works Department, Mr. Thomson initially replied "absolutely none", stating his authority to authorize expenses does not exceed \$2,000. However, he acknowledged signing a contract for a robotic cleaning and inspection of the Town's drinking water reservoir, quoted at \$6,662.50 plus taxes,⁵ which ultimately cost substantially more. This work was discussed at the Public Works Committee before Mr. Thomson signed the contract.⁶ In cross-examination, Mr. Thomson said he was "not in the habit of signing contracts" for work required by the Public Works Department. He also said he didn't know if the aforementioned contract was the only contract he had signed on behalf of the Town or, in his words, "one of twenty".

[11] Mr. Thomson does not believe he has a role in the creation of the Town's budget; he only makes recommendations for what to fix, though there are costs associated with the repairs.

[12] Mr. Thomson suggested that only about 5 per cent of his annual hours are devoted to managerial or supervisory responsibilities. He indicated that he has no role in scheduling

⁵ Exhibit U-26, contract between Town and Scantron Robotics Inc., dated May 6, 2022.

⁶ Exhibit E-8, March 8, 2022 Public Works Committee meeting minutes.

employees or approving overtime. However, he did acknowledge hiring Ms. McDonnell to assist with garbage pickup on Thursdays beginning in January of 2023 after it was determined that an additional employee was needed to do so. He also acknowledged that he has the authority to direct Public Works employees, and does at times, especially for big jobs, though “the guys are pretty autonomous”.

[13] Mr. Thomson acknowledged some involvement in the hiring of employees, though he suggested that Ms. Jess is ultimately responsible for hiring. Mr. Thomson denied hiring 3 seasonal employees in 2021 for the Public Works Department, indicating they were hired by “the office” with the approval of Council. In Mr. Thomson’s view, there is essentially an understanding that those who had previously worked during the summer could come back for subsequent summers. With respect to the 2023 seasonal employees, Mr. Thomson said that as far as he was concerned Ms. Jess had hired them. Mr. Thomson did not interview them. In his words, “what I knew was they needed to be hired”. He asked Ms. Jess to send an email to them doing so.

[14] Mr. Thomson agreed that he had jointly interviewed James Malang [Mr. Malang] with Ms. Jess prior to Mr. Malang being hired, and jointly agreed to hire him. However, he noted that the paperwork associated with the hiring was carried out by the Town office. Mr. Thomson has no office; he works out of the Town shop, which is a separate building.

[15] Mr. Thomson testified regarding a powered mobile equipment course he had taught to the Public Works employees, noting that this was required for occupational health and safety purposes. Mr. Thomson is a member of the Town’s occupational health and safety committee. On the minutes for the May 13, 2022 committee meeting he is listed as a management member, along with the Town Administrator and Recreation Director, but he is also listed as a worker co-chairperson, along with Doug Torrie [Mr. Torrie].⁷

[16] Mr. Thomson also noted that he has made recommendations regarding employee training to the Public Works Committee, including the specific training that a particular employee should receive. Mr. Thomson agreed that the training a particular employee receives can affect their pay.

[17] Mr. Thomson suggested that his involvement in employees’ performance reviews is reluctant and minimal. Public Works employees are asked to fill out their own performance reviews, after which they attend a meeting with Ms. Jess to discuss them. This year, Mr. Thomson was upset that he had been asked to put comments on the employees’ performance reviews in

⁷ Exhibit E-16, Occupational Health Committee minutes for the May 13, 2022 meeting.

advance of their meetings with Ms. Jess, which he also attended. He indicated that before this year (2023), he had no role in attending such meetings with employees. According to him, Ms. Jess conducted them.

[18] Aside from events in March of 2023 relating to the termination of Mr. Torrie, described below, Mr. Thomson has not disciplined any employee who has reported to him. Generally, Mr. Thomson tended to portray himself as reluctantly reporting matters requiring discipline to Ms. Jess and preferring to act more as an advocate for the employee involved than as a manager.

[19] For example, in June of 2022 Mr. Torrie was issued two written warnings by Ms. Jess after Mr. Thomson reported incidents to her. The first involved Mr. Torrie backing a piece of equipment into another employee's vehicle. In his evidence Mr. Thomson admitted reporting this incident, but suggested the employee's vehicle was parked in a bad spot and that she was at least as much at fault as Mr. Torrie. Notably, however, the written warning indicated that this incident followed others in which Mr. Torrie had operated equipment without due care and attention. Along with the written warning, Mr. Torrie was required to take a defensive driving course.

[20] The second written warning in June of 2022 was for Mr. Torrie moving a chemical drum on his own despite Mr. Thomson having directed the Public Works employees not to do so the previous day. In cross-examination Mr. Thomson initially stated that he didn't recall the incident, that it was "a long time ago", and that he may have reported it to Ms. Jess, but he later agreed that he did in fact report it to Ms. Jess. Notably, the Occupational Health Committee minutes for the May 13, 2022 meeting, which both Mr. Thomson and Mr. Torrie attended, mention "Trent has given instructions that no one is to handle the barrels of chemical by themselves, there must be 2 able bodied bodies to assist at all times."⁸

[21] Unlike previous matters, Mr. Thomson administered the discipline relating to Mr. Torrie in March of 2023.

[22] Mr. Thomson testified that on March 11th Mr. Torrie was driving a Town truck when he collided with the Town's water plant, causing damage to both the truck and the building. Mr. Torrie had driven to the plant in spite of Mr. Thomson directing that no one should do so because of inclement weather. Mr. Thomson reported the incident to Ms. Jess, and they agreed that Mr. Torrie should be suspended while the incident was investigated. Mr. Thomson characterized himself as "going along" with Ms. Jess' decision, and that he was too tired to defend Mr. Torrie,

⁸ Exhibit E-16, p 3.

or argue on his behalf. Both Ms. Jess and Mr. Thomson signed the suspension letter dated March 12th,⁹ but Mr. Thomson indicated that on reflection Mr. Torrie shouldn't have been disciplined at all because it was actually safe for him to go to the plant at the time he did so. According to Mr. Thomson, he heard Mr. Torrie's side of the story at some point between March 11th and 15th. This was to the effect that Mr. Torrie had used the truck's brakes but could not stop, and the collision with the building ensued.

[23] Mr. Thomson acknowledged signing Mr. Torrie's termination letter on March 15th.¹⁰ He indicated that a Public Works Committee meeting occurred on March 14th, and that an *in camera* session was held to discuss Mr. Torrie. At that time, Mr. Thomson indicated that the consensus was that Mr. Torrie needed to be terminated. Mr. Thomson recalls a comment about Mr. Torrie potentially being too old for the job, and Mr. Thomson worrying about his own employment because of this. Mr. Thomson attended the Town office on March 15th and signed the termination letter after Mr. Jess provided it to him. He testified that Ms. Jess said "the lawyer said you have to sign". In Mr. Thomson's view, however, he doesn't make any decisions regarding discipline; he views this as being done by the Town Administrator or Council.

[24] When directed to the Town's employee discipline policy, dated February 18, 2014, Mr. Thomson acknowledged the existence of the following statement:

3. Disciplinary measures may be administered by the Town Foreman, Town Administrator (Asst. Administrator in Administrator's absence), or Council as a whole (not individual members of Council).¹¹

[25] Mr. Thomson testified that, despite the policy, the only time he has imposed discipline was in March of 2023, with respect to Mr. Torrie.

[26] Mr. Thomson acknowledged that he is paid about \$10 more per hour than the next highest paid Public Works employee, and that he is the leader of the group. He also acknowledged that, like the Town's Director of Recreation and Culture, a position the Union concedes should be excluded from the bargaining unit, he reports to the Town Administrator.

[27] Mr. Harris testified after Mr. Thomson.

⁹ Exhibit U-20, suspension letter dated March 12, 2023.

¹⁰ Exhibit E-21, termination letter dated March 15, 2023.

¹¹ The discipline policy was enclosed with the termination letter, as part of Exhibit E-21.

[28] Mr. Harris indicated that he has been a Public Works employee for over four years. He recalled speaking to the Mayor and being interviewed by the Town Administrator afterward. He indicated that Mr. Thomson had no involvement in his hiring.

[29] Mr. Harris indicated that he works Monday to Friday, from 7 a.m. to 4 p.m. For daily work, he reports to Mr. Thomson, but he also indicated that he's been in the position long enough that he just knows what to do. According to Mr. Harris, on a day-to-day basis Mr. Thomson's job is "pretty much the same" as his.

[30] Mr. Harris acknowledged that Mr. Thomson leads the morning meetings at the shop but said he doesn't always know where the Public Works employees are throughout the day. Mr. Harris also said that Mr. Thomson doesn't need to direct people to work extra hours because the employees will simply go to work themselves if something needs to be done.

[31] Mr. Harris indicated that he was the one who contacted Ms. McDonnell about assisting with the garbage pickup in January of 2023, but acknowledged that Mr. Thomson had allowed him to do so. Mr. Harris also acknowledged that he advises Mr. Thomson regarding when he intends to take days off.

Evidence on behalf of the Town

[32] The Town called Mayor Elaine Ebenal [Ms. Ebenal], Councilor Keith Lapeudre [Mr. Lapeudre] and Ms. Jess, the Town Administrator.

[33] Ms. Ebenal was the first witness for the Town.

[34] Ms. Ebenal has been the mayor since November of 2020 and leads the Town Council, which includes 6 councilors as well as herself. As mayor, Ms. Ebenal is by virtue of her office a member of all of the Town's committees, including the Public Works Committee.

[35] Ms. Ebenal explained that Mr. Thomson sets the agenda for the Public Works Committee, though others can add to the agenda. The Committee makes its decisions by consensus. It relies on Mr. Thomson's recommendations for what needs to be funded, though it is not bound by his recommendations, and approval of funding is ultimately at the discretion of Council, not the Committee. Council considers the Committee's recommendations at Council meetings. Mr. Thomson does not attend Council meetings. Another member of the Committee presents its recommendations to Council.

[36] Ms. Ebenal was directed to the Public Works Committee mandate,¹² and in particular, its stated purpose of helping to set priorities for equipment and capital asset repair under the Town's Asset Management Plan. Ms. Ebenal indicated that this information must come from Mr. Thomson, as Town Foreman. His role is to identify issues, obtain quotes and provide recommendations to the Committee. While other Committee members may have general knowledge of the condition of some infrastructure, such as roads or leaking roofs, they rely on Mr. Thomson's first-hand and specialized knowledge as Town Foreman, including with respect to the Town's water and sewer systems. On occasion, other Committee members will obtain quotes for certain things. One such circumstance involved a councilor sourcing pricing on tires for a piece of equipment; another involved a councilor making inquiries about a company and product which could be used for a particular roadway.

[37] Ms. Ebenal was directed to the Town's annual budget. With respect to matters relating to public works, she advised that budgeting for specific matters originates with Mr. Thomson providing information that is discussed at the Public Works Committee to agree upon a recommendation, which must ultimately be approved by Council.

[38] Ms. Ebenal was directed to the Town's personnel policy.¹³ She acknowledged that Council has discretion to set the hours of work of Public Works employees, that Council is responsible for approving leaves of absence, and that Council has the sole discretion to grant employees sick leave without pay.

[39] Ms. Ebenal stated that Mr. Thomson is responsible for determining who he wants to hire as seasonal summer employees. She was directed to the minutes of the March 9, 2021 Public Works Committee meeting wherein the first discussion item is the recommendation to hire three particular individuals as summer staff.¹⁴ Ms. Ebenal indicated that the recommendation was from Mr. Thomson, noting Ms. Jess had only started as Town Administrator a few days earlier. Ms. Ebenal's view is that Mr. Thomson requests that the hiring paperwork be done out of the Town office as he has no office and works out of the Town shop. Ms. Ebenal is unsure if Mr. Thomson has a work email address. In spite of Mr. Thomson deciding who he wants to hire as a seasonal summer employee, Ms. Ebenal agreed that the Public Works Committee determines how many such employees may be hired, and the wages they will be paid.

¹² Exhibit E-3, Public Works Committee Mandate, adopted November 15, 2022.

¹³ Exhibit E-2, personnel policy.

¹⁴ Exhibit E-5, Minutes of March 9, 2021 Public Works Committee meeting.

[40] Mr. Torrie is the only employee that the Town has terminated during Ms. Ebenal's tenure as Mayor. Ms. Ebenal recalled Mr. Thomson requesting an *in camera* meeting at the Public Works Committee's March 14, 2023 meeting. During this meeting Mr. Thomson mentioned that Mr. Torrie had some good skills, including his water treatment certificate, and asked if the members of the Committee could provide justification for why Mr. Torrie should not be fired. No members did so. In Ms. Ebenal's view, the decision to terminate Mr. Torrie was for Mr. Thomson and Ms. Jess.

[41] Mr. Lapeudre was the second witness for the Town.

[42] Mr. Lapeudre's evidence was very limited. He has been a councilor since February of 2022, and has sat on the Public Works Committee since April of 2022. Mr. Lapeudre indicated that on one occasion within the last six months Mr. Thomson had to be prompted to provide his opinion or recommendation on a matter, instead of simply volunteering it. Mr. Lapeudre expressed concern that if the Town Foreman position is included in the bargaining unit it could be difficult to know whether the information being brought to the Committee by the Town Foreman is for the benefit of the Town, or for the benefit of the bargaining unit. Mr. Lapeudre did not elaborate on this concern.

[43] Ms. Jess was the Town's final witness.

[44] Ms. Jess has been the Town Administrator for the Town since March of 2021, having previously worked in a similar role for other municipalities for many years.

[45] Ms. Jess was directed to the Town Foreman job description, which has been in place since she became the Town Administrator.¹⁵ She noted that the performance review for the Town Foreman mirrors the position's job description, and that she conducted performance reviews of Mr. Thomson in both 2022 and 2023.

[46] Ms. Jess indicated that she seeks Mr. Thomson's input when preparing the Town's annual budget and relies on same. Approximately 50 per cent of the Town's budget is for Public Works, and her practice is to do a line-by-line review with Mr. Thomson for allocation purposes. Ultimately, Council is responsible for approving the budget.

¹⁵ Exhibit E-1, Town Foreman job description.

[47] Mr. Thomson provides Ms. Jess with the draft agenda for the monthly Public Works Committee meeting, which she types up, and emails to Committee members. Ms. Jess takes notes which she turns into meeting minutes. These are provided to Mr. Thomson for his review prior to Ms. Jess sending them to Council.

[48] In terms of hiring, Ms. Jess said both she and Mr. Thomson interviewed Mr. Malang for a Public Works position and agreed that he should be hired. She and Mr. Thomson discussed an appropriate offer, including the salary, and Ms. Jess wrote it up. With respect to seasonal summer staff, Ms. Jess described her involvement as being limited to writing a letter, because Mr. Thomson has no computer or office. In her view, selection of the seasonal summer staff is Mr. Thomson's responsibility. He tells Ms. Jess "Here's the ones we're hiring; write them a letter". She is unaware of any policy whereby previous seasonal summer employees are automatically rehired for subsequent years. If the Director of Recreation and Culture hired any seasonal summer employees for the Public Works Department rather than Mr. Thomson, including in 2022, this would have been because Mr. Thomson delegated his responsibility to that person.

[49] Ms. Jess stated she and Mr. Thomson interviewed Mr. Thomson's direct reports in both 2022 and 2023 for the purposes of their performance reviews. This contradicted Mr. Thomson's evidence, as he had stated he had not participated in such interviews before 2023. Ms. Jess' evidence was corroborated by her and Mr. Thomson's signatures appearing alongside the employees' signatures on the 2022 performance reviews, dated January 25, 2022.¹⁶

[50] In terms of training for Public Works staff, Ms. Jess advised that Mr. Thomson advises her who requires training, and she registers those staff for training based on his advice.

[51] Ms. Jess was directed to the Town's personnel policy, which grants her the sole authority to determine certain matters with respect to employees, including setting their probationary period, approving carryover of vacation leave, and authorizing special leave in excess of the maximum otherwise allowed. Ms. Jess mentioned that she had never been asked to approve holidays for any of the Public Works employees, other than on May 18, 2023, when Mr. Harris asked if he could have time off to attend the proceedings before the Board.

[52] Regarding the discipline of Mr. Torrie, Ms. Jess discussed the written warnings given to Mr. Torrie since she has been Town Administrator, and Mr. Thomson's involvement with same. With respect to the incidents where Mr. Torrie backed into another employee's vehicle and

¹⁶ Exhibit E-3A, 2022 employee performance reviews.

unsafely moved a chemical drum, Ms. Jess confirmed that Mr. Thomson reported both of these incidents to her, and she issued the written warnings based on his advice. A third incident involving Mr. Torrie allegedly smoking in a Town vehicle on Christmas in contravention of policy was reported by a member of Council. Mr. Thomson was involved in the meetings with Ms. Jess and Mr. Torrie when the written warnings were given to Mr. Torrie.

[53] Unlike the written warnings, the March 2023 suspension and termination letters for Mr. Torrie were signed by Mr. Thomson.

[54] Ms. Jess described Mr. Thomson phoning her on Saturday, March 11th, indicating that Mr. Torrie had traveled to the water plant in inclement weather after Mr. Thomson had told him not to. Mr. Torrie had crashed a Town vehicle into the building and caused damage to both the vehicle and the building. Mr. Thomson told Ms. Jess that he couldn't defend Mr. Torrie, and they agreed that he should be suspended. Both she and Mr. Thomson signed the letter suspending Mr. Torrie, and Mr. Thomson provided it to him.

[55] Ms. Jess contacted legal counsel to get advice on how to deal with Mr. Torrie. The termination letter that was eventually signed by Mr. Thomson and provided to Mr. Torrie was the result of legal advice received by Ms. Jess.

[56] Ms. Jess recalled the *in camera* portion of the Public Works Committee meeting on March 14th, where Mr. Thomson asked if the members could think of a reason to keep Mr. Torrie on as an employee. Mr. Thomson mentioned that Mr. Torrie was the only Public Works employee with a certain level of water treatment certification. Ultimately, no one on the committee provided reasons to not terminate Mr. Torrie's employment.

[57] On March 15th Mr. Thomson attended to the Town office and Ms. Jess provided him with the letter and enclosures for Mr. Torrie's termination.¹⁷ Mr. Thomson signed the letter and provided it and its enclosures to Mr. Torrie afterward. With respect to whose decision it was to terminate Mr. Torrie, Ms. Jess said that it was Mr. Thomson's decision to make.

[58] Ms. Jess was directed to the Town's employee discipline policy¹⁸ and acknowledged that it contemplates a potential appeal to the Town Administrator, and ultimately to Council, following discipline imposed by the Town Foreman:

¹⁷ Exhibit E-21, termination letter dated March 15, 2023, and enclosures.

¹⁸ Exhibit E-21, Employee Discipline Policy, as one of the enclosures with the March 15, 2023 termination letter.

8. Appeal Process: *An employee is entitled to request a meeting to discuss any discipline matter with his immediate supervisor and the Town Administrator. In the event that a satisfactory resolution to the problem cannot be achieved at that level, the employee may request a meeting with the Town Administrator. This request must occur within three (3) working days of the incident. The Administrator will, after meeting with the employee and hearing the employee's version of events, investigate the matter, and provide a written response to the employee within one (1) week of the date of the meeting. A copy of this written response will be placed on the employee's personnel file. If the employee wishes to further appeal the decision, a request to meet with the Town Council can be submitted through the Town Administrator. This request shall be in writing, and shall outline the employee's reason(s) for appeal. The Town Council will endeavour to meet with the employee within one (1) week of receipt of the written request. The Town Council's decision in the matter will be final, and will be communicated to the employee in writing within three (3) working days of their meeting. If this timeline cannot be met, all efforts will be made to keep the employee informed of when the decision will be made.*

[59] Ms. Jess indicated that this appeal process was not engaged by Mr. Torrie, and that she was not sure how it would work if he had attempted to do so.

Argument on behalf of the Union:

[60] The Union argues that the evidence is overwhelmingly to the effect that the Town Foreman position is effectively a "working foreman" position, with limited supervisory or managerial responsibilities, and no evidence that such responsibilities are the position's primary responsibilities. The managerial exclusion in s. 6-1(1)(h)(i)(A) is therefore inapplicable. The argument with respect to the confidentiality exclusion in s. 6-1(1)(h)(i)(B) is even weaker than the argument for the managerial exclusion. The Town Foreman's primary duties do not include confidential activities regarding labour relations, business strategic planning, policy advice, or budget implementation or planning that have a direct impact on the bargaining unit.

[61] The Union submits that the Board has consistently stated that the managerial and confidentiality exclusions must be applied on as narrow a basis as possible, and that this accords with employees not being unnecessarily deprived of their *Charter*-protected right of freedom of association.

[62] In examining the Town Foreman's duties, the Union urges the Board to focus on the actual duties performed by Mr. Thomson, rather than the managerial authority he could theoretically exercise.

[63] The Union characterizes the Town Foreman's involvement in the Public Works Committee as in the nature of a consultant, for the purposes of budgeting. It emphasizes that although the Town Foreman sets agendas and informs the committee regarding what may need repair or

replacement and costing for same, recommendations are developed at the committee by consensus, and the Town Council is the ultimate approver of expenditures. The Union submits that the Town Foreman has virtually no ability to approve expenditures on his own. It notes that the quote for the robotic cleaning and inspection of the Town's drinking water reservoir mentioned earlier in these reasons was discussed at the Public Works Committee before Mr. Thomson signed the contract.¹⁹ The Union also submits that the recommendations that come out of the Public Works Committee are not confidential, in that they need to be considered by the Town Council for approval, as a matter of public record.

[64] In the Union's view, the Town is making an atypical argument for the Town Foreman to be excluded on the basis of the confidentiality exclusion. It submits that where positions have been excluded on this basis, they have tended to be fully immersed in matters directly affecting human resources. Here, the Town Foreman's involvement in budgetary matters is circumscribed by the area he has direct responsibility over and is advisory only. Further, to the extent individual employees are directly impacted, his advice primarily relates to what equipment or training is needed for them to do their jobs. The Union submits that this type of advice and involvement is not what is envisioned by the confidentiality exclusion.

[65] With respect to the managerial exclusion, the Union suggests that the Town Foreman may be characterized as a supervisory employee, at most. The job is not primarily managerial. To the extent there are managerial responsibilities, they are primarily in the nature of supervisory responsibilities, and on the margin of the Town Foreman's day-to-day duties.

[66] The Union points to most of the Town Foreman's day being spent in "hands on" duties, similar to the employees who report to him. He is seen as a working supervisor by his direct reports, rather than as a manager.

[67] In terms of his involvement in hiring, the Union points to Mr. Thomson's evidence that he had some input into Mr. Malang's hiring, and had some involvement in hiring Ms. McDonnell for casual work, but had no involvement in hiring seasonal summer employees or anyone else. In terms of direction, supervision and scheduling of employees, the Union points to the limited time spent with employees during the morning meeting and employees' overall independence in completing their tasks.

¹⁹ Exhibit E-8, March 8, 2022 Public Works Committee meeting minutes.

[68] The Union admits that Mr. Thomson has involvement in training employees but emphasizes that the powered mobile equipment course he taught had a pre-determined result: everyone would pass. He had no intended gatekeeping role in this regard. With respect to Mr. Thomson's role in occupational health and safety, the Union emphasizes that he can continue to have responsibility in ensuring occupational health and safety requirements are met, whether or not he is in-scope.

[69] With respect to performance reviews, the Union emphasizes that employees fill out their own reviews and submits that it is the Town Administrator who is actually conducting the reviews with employees, even though the Town Foreman is in attendance.

[70] With respect to discipline, the Union emphasizes that prior to the certification application being filed, the Town Foreman never administered any discipline. This was always done by the Town Administrator, in spite of the employee discipline policy contemplating discipline being administered by the Town Foreman. Mr. Thomson reported incidents to Ms. Jess, but Ms. Jess administered the discipline.

[71] The Union argues that it would be an error for the Board to consider post-application evidence, particularly because the Town has increased the Town Foreman's involvement in disciplinary matters since the application was filed: i.e., with respect to the suspension and termination of Mr. Torrie. The Union submits that the Board's typical approach is to refuse to consider post-application evidence in certification applications, absent exceptional circumstances justifying doing otherwise. This discourages parties from consciously or unconsciously changing employment circumstances to align with their desired ends in an application, which the Union says the Town has done in this case.

[72] In its written argument, the Union analogizes the Town Foreman position to the Home Operator Supervisor position in *Wheatland Regional Centre*²⁰, which the Board determined could be in-scope. The Union also analogizes the Town Foreman to the foreman in *R.M. of Estevan*, another position which the Board determined could be in-scope.²¹

²⁰ *Saskatchewan Government and General Employees Union v Wheatland Regional Centre Inc.*, 2015 CanLII 80544 (SK LRB) [*Wheatland Regional Centre*].

²¹ *International Union of Operating Engineers Hoisting and Portable and Stationary, Local 870 v. Rural Municipality of Estevan No. 5*, 2002 CanLII 52888 (SK LRB) [*R.M. of Estevan*].

[73] With respect to Ms. McDonnell's eligibility to vote, the Union submits that she had a sufficient connection to the workplace as a casual employee, a position which is within the scope of the proposed bargaining unit, at the time the certification application was filed and at the time of the vote. Therefore, her vote should be counted.

Argument on behalf of the Town:

[74] The Town argues that the Town Foreman must be excluded from the bargaining unit on the basis of both the managerial and confidentiality exclusions. The Town requests that the Board prefer the evidence of other witnesses where there is any conflict with the evidence of Mr. Thomson, and requests that the Board consider the post-application evidence with respect to Mr. Thomson's involvement in Mr. Torrie's termination, as this was the culmination of the progressive disciplinary process for Mr. Torrie. The Town takes no position on the eligibility of Ms. McDonnell to vote, but notes that she had worked few hours as a casual employee before the certification application was filed.

[75] With respect to the managerial exclusion, the Town argues that the Town Foreman exercises a significant degree of decision-making authority in relation to matters which affect the terms, conditions and tenure of employment of employees reporting to him.

[76] The Town Foreman exercises independent authority to direct his staff's work and to ensure sufficient staff are working on any given day (i.e., scheduling). He is involved in hiring, is responsible for training his staff, and recommends which staff should be funded for specialized training. The training recommended by the Town Foreman, if completed, can and does have an impact on employees' wages. The Town Foreman plays a critical role in conducting performance reviews for employees, since the Town Administrator has neither the subject matter expertise nor the time to supervise and observe them.

[77] The Town Foreman plays a critical role in the disciplinary process for Public Works employees. As their supervisor, he is required to supervise them. In 2022, Mr. Torrie was disciplined by Ms. Jess, but this was as a direct result of the reporting of the incidents to her by Mr. Thomson. Further, the Town Foreman can independently administer discipline in accordance with the Town's employee discipline policy, and Mr. Thomson did do so, when he terminated Mr. Torrie. While this occurred after the certification application was filed, the Town submits that it should be considered, since it was the natural culmination of the progressive discipline process. The Town terminates very few employees, and the Board needs this evidence to understand how

the process works in practice. The Town notes that Mr. Torrie being terminated by the Town Foreman rather than the Town Administrator preserved his right to appeal his termination to the Town Administrator, according to the employee discipline policy. Further, the policy always contemplated the Town Foreman being able to terminate an employee, both before and after the certification application.

[78] The Town notes that the Town Foreman reports directly to the Town Administrator, similar to the Director of Recreation and Culture, which the Union agrees should be an out-of-scope position. Notably, however, the Director of Recreation and Culture has no role in the Town's employee discipline policy, unlike the Town Foreman.

[79] The Town submits that there is no person in the Town's small organizational structure other than the Town Foreman who can supervise, instruct, guide and evaluate the Public Works employees. The frequency with which a person performs managerial duties is not determinative; the nature of the authority granted to a position over in-scope employees may be sufficient even though it is rarely exercised.

[80] The Town emphasizes that the Public Works Department requires approximately half of the Town's annual budget and that the Town Foreman plays a critical role in developing and administering the budget. Some of his input comes through the monthly Public Works Committee meetings, for which he provides 90% of the agendas' content, and at which he regularly provides recommendations. Some of his input comes when he does a line-by-line review of the proposed annual budget with the Town Administrator. The Town also points to the evidence showing the Town Foreman having signed at least one significant contract on its behalf, in spite of his reluctance to admit having done so.

[81] The Town argues that the Town Foreman's ability to influence Public Works funding places him in an insoluble conflict with the bargaining unit, as more funding for equipment purchases, for example, means less money available to pay bargaining unit members. Alternatively, unnecessary training might be recommended, solely to justify pay increases for bargaining unit members. The Town argues that these circumstances justify exclusion of the Town Foreman position from the bargaining unit based on the confidentiality exclusion, as well as the managerial exclusion.

[82] The Town also argues that including Mr. Thomson in the bargaining unit could be problematic for occupational health and safety purposes, particularly if he is reticent to report safety concerns or violations because of allegiance to fellow bargaining unit members.

[83] Like the Union, the Town also refers to *Wheatland Regional Centre*. However, the Town likens the Town Foreman position to the Industry Supervisor position in that case, which was excluded from the bargaining unit, as opposed to the Home Operator Supervisor position, which was included. The Town suggests that the foreman in *R.M. of Estevan* is not comparable to the Town Foreman because that position had limited authority and no involvement in budgetary matters or setting the work conditions for employees in the bargaining unit.

Relevant Statutory Provisions:

[84] The following provisions of *The Saskatchewan Employment Act*²² are the most relevant to the matters in issue:

Interpretation of Part

6-1(1) In this Part:

(a) “bargaining unit” means:

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

(b) “certification order” means a board order issued pursuant to section 6-13 or clause 6-18(4)(e) that certifies a union as the bargaining agent for a bargaining unit;

...

(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;

²² *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act].

...

Determination of bargaining unit

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

(a) *if the unit of employees is appropriate for collective bargaining; ...*

...

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

...

Certification order

6-13(1) *If, after a vote is taken in accordance with section 6-12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:*

(a) *certifying the union as the bargaining agent for that unit; ...*

...

(2) *If a union is certified as the bargaining agent for a bargaining unit:*

(a) *the union has exclusive authority to engage in collective bargaining for the employees in the bargaining unit and to bind it by a collective agreement until the order certifying the union is cancelled; ...*

...

Power to reject certain evidence

6-107 *If an application is made to the board for a certification order, the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring or occurring after the date on which that application is filed with the board in accordance with the regulations of the board.*

Analysis and Decision:

[85] There are four issues which must be addressed by the Board:

- i. *Is an "all employee" bargaining unit appropriate?*
- ii. *Should Ms. McDonnell's ballot be included in the tabulation of the representation vote?*
- iii. *Should the Board consider evidence respecting events after the certification application was filed?*
- iv. *Should the Town Foreman position be excluded under either the managerial or confidentiality exclusions?*

[86] The issues will be addressed in turn.

i. Is an “all employee” bargaining unit appropriate?

[87] The Town does not suggest that the requested “all employee” bargaining unit with limited exclusions (e.g., seasonal summer staff) is inappropriate. Its position is that the Town Foreman position is not an “employee” position that can be placed in the unit. Per s. 6-1(1)(h) of the Act, a person who is subject to the managerial or confidentiality exclusions is not an employee for the purposes of Part VI of the Act. In other words, they must be out-of-scope.

[88] Leaving aside the Town Foreman position, the Board is satisfied that the proposed bargaining unit is appropriate based on the principles recited in *North Battleford Community Safety Officers*.²³ It is a sufficiently broad unit whose members appear to share a community of interest. The Board has certified small bargaining units in other municipalities,²⁴ and it is not concerned about the proposed unit’s viability.

ii. Should Ms. McDonnell’s ballot be included in the tabulation of the representation vote?

[89] The Board has endorsed a bright line test governing an individual’s eligibility to vote on the representational question. The individual must be employed at the time the application is filed and remain employed at the time of the vote.²⁵ The bright line test provides predictability for parties, and there is no reason to depart from it with respect to Ms. McDonnell.

[90] Ms. McDonnell was employed as a casual employee at the time the certification application was filed. She had recently begun assisting with the garbage pickup and had done some other casual work for the Town in the fall of 2022. Casual employees are intended to be included in the bargaining unit and are mentioned in the Town’s personnel policy.²⁶ Ms. McDonnell continued to be employed as a casual employee at the time of the vote. Her ballot will be included in the tabulation, if she voted.

²³ *North Battleford Community Safety Officers Police Association v City of North Battleford*, 2017 CanLII 68783 (SK LRB) [*North Battleford Community Safety Officers*], at paras 54-58.

²⁴ See, for example, *Canadian Union of Public Employees v Resort Village of Candle Lake*, 2022 CanLII 66266 (SK LRB) [*Resort Village of Candle Lake*].

²⁵ *Sheet Metal Air Rail Transportation (S.M.A.R.T.), Local 296 v Vent Pro Mechanical Inc.*, 2021 CanLII 13649 (SK LRB) at para 47; *Northern Industrial Contracting Inc. v International Association of Heat and Frost Insulators*, 2015 SKQB 204, at paras 30-31.

²⁶ Exhibit E-2, personnel policy, p 1.

iii. *Should the Board consider evidence respecting events after the certification application was filed?*

[91] In a certification hearing, the Board has the absolute discretion to reject evidence concerning anything occurring after the certification application is filed, pursuant to s. 6-107 of the Act:

6-107 *If an application is made to the board for a certification order, the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring or occurring after the date on which that application is filed with the board in accordance with the regulations of the board.*²⁷

[92] The purpose of this section, generally, is to discourage a party from effecting or changing circumstances in the workplace to bolster its position in a pending certification application. There is no point in attempting to do so if the post-filing circumstances will not be considered by the Board.

[93] In *Impact Products*, the Board indicated that it will generally not consider evidence with respect to evidence of support or withdrawal of support for a union after a certification application is filed.²⁸ The reasoning for this is “to prevent the manipulation of support, either for or against the trade union, after an application has been filed.”²⁹ The Board indicated that similar logic applies to evidence concerning an employer ceasing to operate after a certification application is filed. Considering such evidence could encourage closure as a response to a certification application, or at least require the Board to inquire into whether a closure is motivated by anti-union animus, or a sham to avoid unionization.³⁰

[94] In *Canora Ambulance*, citing *Impact Products*, the Board stated that its usual practice on certification applications is to disregard post-application evidence, with the logic for this practice being to “prevent manipulation of support, either for or against the trade union, after an application has been made”.³¹ In *Canora Ambulance* the Board refused to admit evidence that the employer engaged in an amalgamation after the certification application was filed, stating that no reason was advanced for it to deviate from the “usual and expected practice” of refusing to consider evidence of post-application circumstances.³²

²⁷ Act, s 6-107.

²⁸ *United Steelworkers of America v Impact Products, a Division of General Scrap and Car Shredder Ltd.*, LRB File No. 180-96, Reasons for Decision dated October 29, 1996 [*Impact Products*].

²⁹ *Impact Products*, p 2.

³⁰ *Impact Products*, p 3.

³¹ *Saskatchewan Government and General Employees Union v Canora Ambulance Care (1996)*, 2014 CanLII 28134 (SK LRB) [*Canora Ambulance*], at para 27.

³² *Canora Ambulance*, at para 30.

[95] In *ICT Industrial*, the Board had to consider the eligibility of certain employees to vote in a certification application.³³ The issue was whether the Board should consider post-application evidence to determine the nature of the work the employees were doing, as this could affect whether they fell within a proposed bargaining unit for the purposes of the representation vote. After citing s. 6-107 of the Act, the Board determined that it would not consider post-application evidence, stating the following:

[103] Similarly, by choosing the time period leading up to the application, there is no opportunity for a party to alter the work being assigned to the subject employees and less opportunity for a party to manipulate the outcome of the certification application.

...

[107] In summary, the Board is not persuaded that there is a sufficient policy justification for including within the representative time period the events that occurred after the application was filed. As such, the Board will determine which time period, leading up to but not including the date of the application, is reasonably representative of normal responsibilities.³⁴

[96] In *Technical Workforce Inc.*, Madam Justice Dawson considered whether the Board erred in relying upon post-application evidence to apply the “build-up principle” in a certification hearing.³⁵ While no reference was made to s. 6-107, Justice Dawson concluded that the Board should not have considered the post-application evidence. It was required to address the facts known as of the date of the application, which did not suggest a significant build-up was expected:

[85] The Board here applied the test of the build-up principle at the date of hearing as opposed to the date of the certification application. This is unreasonable. Any acceptable and defensible interpretation must address the facts known at the date of the application. The Board’s interpretation is not defensible.³⁶

[97] The Town referred to the Nova Scotia Labour Relations Board’s decision in *Saint Mary’s University*³⁷ and suggested that it explains the policy rationale for considering or refusing to consider post-application evidence in this case. In *Saint Mary’s University*, the Board explained that:

³³ *ICT Industrial Inc. v The United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*, 2022 CanLII 122753 (SK LRB) [*ICT Industrial*].

³⁴ *ICT Industrial*, at paras 103, 107.

³⁵ *Construction Workers Union, Local 151 v Saskatchewan Labour Relations Board and Technical Workforce Inc.*, 2017 SKQB 197 (CanLII) [*Technical Workforce Inc.*].

³⁶ *Technical Workforce Inc.*, at para 85.

³⁷ *Canadian Union of Public Employees, Local 4406 v Board of Governors of Saint Mary’s University*, 2001 CanLII 59708 (NS LRB) [*Saint Mary’s University*].

4. ... A common concern is not to allow flexibility on the evidential cut off date to become an opportunity for employers to "puff up" or "cut down" job functions over a period to distort or manipulate the evidence for the purposes of the proceeding in order to achieve a desired outcome.

...

6. ... To be clear, what we are saying is that the Board is in principle concerned to determine the nature of the position at the date of application, but in exceptional circumstances may be willing to hear evidence as to what incumbents have done after the date of application if it helps retrospectively to clarify the nature of the position (as originally defined). This is one of those exceptional cases - but the exceptions must not be allowed to swallow the rule in the future, and the Board will no doubt be vigilant in this matter.³⁸

[98] The Town notes that s. 6-107 is not an absolute bar to the Board considering post-application evidence in a certification application, and suggests that the post-application evidence it seeks to have the Board consider – particularly with respect to Mr. Thomson suspending and terminating Mr. Torrie, but also with respect to his participation in post-application Public Works Committee meetings – fits into the “retrospective clarification” exception identified in *Saint Mary’s*.

[99] The Board agrees with the Town that s. 6-107 is not an absolute bar to the Board considering post-application evidence in a certification application. By necessary implication, the fact that the Board may in its absolute discretion reject any post-application evidence means that it may also rely on such evidence, in appropriate circumstances.

[100] With respect to the Board’s discretion being “absolute”, reference may be had to the Supreme Court’s decision in *Comeau’s Sea Foods*.³⁹ In that case, the responsible minister was vested with the absolute discretion to issue fishing licenses under the *Fisheries Act*. Justice Major, for the Court, stated that in spite of the minister’s discretion being absolute, it still needed to be exercised in good faith based on relevant considerations, and not arbitrarily.⁴⁰ While *Comeau’s Sea Foods* was a case dealing with the ministerial exercise of discretion rather than a quasi-judicial tribunal’s exercise of discretion, the Court’s reasoning applies to the exercise of the Board’s discretion under s. 6-107.

[101] Here, the Board is not satisfied that the post-application evidence sought to be relied upon by the Town is both necessary and persuasive to retrospectively clarify what the Town Foreman’s job responsibilities were when the certification application was filed.

[102] The Board will address the evidence with respect to discipline first.

³⁸ *Saint Mary’s University*, at paras 4, 6.

³⁹ *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, 1997 CanLII 399 (SCC), [1997] 1 SCR 12 [*Comeau’s Sea Foods*].

⁴⁰ *Comeau’s Sea Foods*, at para 36.

[103] Until the certification application was filed, Mr. Thomson administered no discipline with respect to Public Works employees. Rather, he reported conduct which could warrant discipline, and discipline was administered by Ms. Jess, the Town Administrator. Notably, this occurred for relatively minor discipline, written warnings, which could have been administered by Mr. Thomson rather than Ms. Jess according to the Town's employee discipline policy.

[104] It was only after the certification application was filed that Mr. Thomson began administering any discipline, and significantly, discipline of a greater degree than the written warnings which had been administered by Ms. Jess. Mr. Thomson signed Mr. Torrie's suspension letter with Ms. Jess, and Mr. Thomson alone signed the letter terminating Mr. Torrie's employment. Mr. Thomson received no legal advice with respect to Mr. Torrie's termination; Ms. Jess did. Further, Mr. Thomson was presented with the letter terminating Mr. Torrie by Ms. Jess after it had already been drafted.

[105] In the Board's view, the post-application evidence respecting Mr. Thomson's involvement in Mr. Torrie's suspension and termination is consistent with his actual job responsibilities being changed after the certification application was filed. If Mr. Thomson was actually responsible for administering all forms of discipline from warnings to termination prior to the certification application being filed, why did he administer no discipline for Public Works employees during this period, and why was the Town Administrator doing so for relatively minor forms of discipline? The change from Mr. Thomson administering no discipline to him solely administering the ultimate form of discipline, termination, is stark. Further, there was no evidence that Mr. Thomson not administering discipline prior to the application being filed (and Ms. Jess doing so) was contrary to Mr. Thomson's role or the Town's expectations of him.

[106] On the basis of the foregoing it would be unreasonable to rely upon the post-application evidence respecting Mr. Thomson's involvement in Mr. Torrie's suspension and termination to conclude what his actual job responsibilities were when the certification application was filed. Accordingly, the Board elects to reject this evidence.

[107] The Town identifies the Public Works Committee meetings of February 14, 2023,⁴¹ March 14, 2023⁴² and April 11, 2023⁴³ as being relevant post-application evidence. This evidence does not pose the same concerns as the post-application evidence with respect to discipline. It does

⁴¹ Exhibit E-12, Minutes of February 14, 2023 Public Works Committee meeting.

⁴² Exhibit E-13, Minutes of March 14, 2023 Public Works Committee meeting.

⁴³ Exhibit U-15, Minutes of April 11, 2023 Public Works Committee meeting.

not evince changed job responsibilities for the Town Foreman. Rather it is consistent with the evidence regarding Mr. Thomson's participation in the Public Works Committee meetings prior to the certification application being filed.

[108] The Board agrees with the Town's statement that "[t]he Town Foreman had always been an essential member of the Public Works Committee since its establishment well before the Application date."⁴⁴ Because of this, however, it is unnecessary for the Board to rely on post-application evidence to retrospectively clarify the Town Foreman's role on the committee as of the date of filing.

[109] To conclude this discussion, the Board is satisfied that it has sufficient evidence before it concerning matters up to the date the certification application was filed, being January 24, 2023, to understand the Town Foreman's duties and role as of that date. Accordingly, it is relying on that evidence for the purposes of the application, and not post-application evidence.

iv. Should the Town Foreman position be excluded under either the managerial or confidentiality exclusions?

[110] The Town has argued that both the managerial and confidentiality exclusions apply to the Town Foreman position, so both must be considered by the Board. The Town must point to sufficiently clear, convincing and cogent evidence that either of the exclusions is necessary.⁴⁵

[111] With respect to the purposes of the managerial exclusion and the considerations in determining whether it applies, the Board refers to its decision in *Saskatchewan Polytechnic*,⁴⁶ which provides a useful summary:

[77] Pursuant to subparagraph 6-1(1)(h)(i)(A), a position falls outside the definition of employee if its primary responsibility is to exercise authority and perform functions that are of a managerial character. There is no definition in the Act of "managerial character". Instead, the Legislature has left it to the Board to determine the meaning of that phrase. In doing so, the Board draws on its extensive case law considering this issue.

[78] As explained by the Board in Saskatoon Public Library, it is necessary to consider the purposes of the exclusion in assessing whether it applies to the position in question:

[65] The determination of whether the ACI Analyst and SEP Analyst positions meet the criteria to be excluded under the managerial exclusion requires a careful review of the stated purposes of the exclusion: to promote labour relations in the

⁴⁴ Written submission of the Town, para 82.

⁴⁵ *Wheatland Regional Centre*, at para 63; *Resort Village of Candle Lake*, at para 54.

⁴⁶ *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*, 2022 CanLII 45399 (SK LRB) [*Saskatchewan Polytechnic*].

workplace by preserving clear identities for the parties to collective bargaining; to avoid muddying or blurring the lines between management and the bargaining unit; and to ensure that persons who can affect the economic lives of other employees are not placed in an insoluble conflict of interest by including them in a bargaining unit[31].

[79] *The Board in Prince Albert Parkland described the principles and factors to be considered in making the determination:*

[66] 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 (para 36)*
- 2. Exclusions on the basis of managerial responsibility should be made on as narrow a basis as possible (para 37)*
- 3. A person to be excluded must have a significant degree of decision-making 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. (para 38)*
- 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. (para 38)*
- 5. In assessing managerial authority, the Board considers the actual authority assigned to a position and the use of that authority in the workplace. (para 38)*
- 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. (para 38)*

[112] In *Saskatchewan Polytechnic*, the Board confirmed that the six enumerated principles from *Prince Albert Parkland*, although stated in relation to the managerial exclusion in the (now repealed) *Trade Union Act*, continue to apply to the managerial exclusion in s. 6-1(1)(h)(i)(A) of the Act:

[80] *Prince Albert Parkland* was decided based on the managerial exclusion contained in the (now repealed) *Trade Union Act*. The only difference between that exclusion and the current exclusion is that the word “actually” has been removed. The previous exclusion was for “a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character”; the exclusion now reads “a person

whose primary responsibility is to exercise authority and perform functions that are of a managerial character". The Employer suggests that the removal of "actually" should be interpreted as a substantive change.

[81] In *Saskatoon Public Library*, at paragraph 68, the Board found that the removal of "actually" is more reasonably interpreted as a modernization of language than as a substantive change. The reason for this is that the word "actually" does not change the meaning of the verbs, "exercise" and "perform", that it purports to modify. The presence or absence of "actually" is immaterial to the interpretation of the exclusion. Therefore, the cases that interpret the exclusion, as it was worded prior to the removal of the word "actually", continue to apply. By extension, the principles and factors outlined in *Prince Albert Parkland* continue to apply.⁴⁷

[113] In order for the managerial exclusion to apply, there must be an insoluble conflict between a position's occupant's responsibilities to the employer and the interests of employees within the bargaining unit:

[83] *To be excluded there must be an insoluble conflict between the responsibilities owed to the Employer and the interests of the persons and colleagues as members of the bargaining unit. As the Board has explained, "[b]ecause such a conflict is in many cases a matter of degree, it is impossible to state any one test which can be used to determine whether a particular person falls on one side of the line or the other."*^[1] The assessment is highly fact specific. Depending on the circumstances, some factors may be more relevant than others.⁴⁸

[114] While the managerial exclusion will only apply where an individual's primary responsibility is to exercise authority and perform functions that are of a managerial character, the proportion of work time spent performing managerial functions is not necessarily determinative of the issue:

[92] ... As the Board found in *University of Saskatchewan*, the amount of work time spent performing managerial functions may be indicative of whether a position's primary responsibility is managerial. Or it may not be. It depends on the circumstances. Just as a large number of direct reports may be relevant in determining whether managerial duties are primary, so may a small number. The question is whether the whole of the circumstances indicates that the managerial responsibility is primary.

[93] At the same time, the nature of a position's power over in-scope employees may be sufficient even though it exercises that power infrequently. For instance, in *SPCA*, the position's power, while exercised infrequently, was sufficient to meet the test for a managerial exclusion. Of relevance was the fact that the position was the head of the largest division in the workplace.⁴⁹

⁴⁷ *Saskatchewan Polytechnic*, at paras 80-81.

⁴⁸ *Saskatchewan Polytechnic*, at para 83.

⁴⁹ *Saskatchewan Polytechnic*, at paras 92-93.

[115] In *SPCA*,⁵⁰ mentioned in the above extract from *Saskatchewan Polytechnic*, the Board made a similar observation:

[43] *In Service Employees International Union, Local 333 v. Lutheran Sunset Home Corp. at Lutheran Riverside Terrace, [2002] Sask. L.R.B.R. 695, LRB File No. 184-02, the Board commented that the proportion of work time spent performing managerial functions is not necessarily determinative of the issue and, with respect to the relevance of job descriptions, stated at 692:*

The proportion of work time spent performing managerial functions is not determinative of the issue – even persons with undisputed independent authority to discipline and terminate employees may rarely be called upon to exercise such authority. Position descriptions often bear limited similarity to the way the job is actually performed. Indeed, such descriptions often contain duties and responsibilities that, on the face of the description, the incumbent may independently exercise, but which in practice may only be exercised with the approval of, or made as a recommendation to, a superior. In the end, it is the real performance of the job that is important.⁵¹

[116] In determining what managerial functions a position is required to perform the Board places greater emphasis on the duties an incumbent actually performs, rather than those in their job description or other documents.⁵²

[117] As indicated above, the job functions which the Board considers central to the finding of managerial status include 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.

[118] The Board has previously held that the authority to independently administer minor discipline is not sufficient to warrant application of the managerial exclusion, nor is responding to grievances on behalf of the employer at early stages when the responses are effectively under

⁵⁰ *Canadian Union of Public Employees, Local 4928 v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2009 CanLII 43954 (SK LRB) [SPCA].

⁵¹ SPCA, at para 43.

⁵² *University of Saskatchewan v. Administrative and Supervisory Personnel Association*, 2007 CanLII 68769 (SK LRB) [University of Saskatchewan], at para 38.

the direction of other persons. In *Saskatchewan Liquor & Gaming Authority*,⁵³ after emphasizing the importance of “actual” versus “paper” managerial authority and functions,⁵⁴ the Board stated:

69 *In matters of discipline and discharge, managers are the eyes and ears of SLGA in the workplace and have significant responsibility for and over work performance. In addition, while such managers generally lack authority to institute discipline, except for minor admonitory discipline, they do report to management on employee problems and do recommend discipline or corrective measures, when needed. However, managers do not have authority to make effective determinations regarding discipline and discharge; rather, in our view of the evidence, they have authority to recommend discipline or discharge with the effective decision resting with the regional manager. The ability of managers to deal with an emergency situation by suspending employees pending an investigation of an incident is an accepted supervisory power within the store system, and is available to in-scope supervisors as well as managers. This emergency authority does not alter the overall assessment of the disciplinary authority bestowed on the manager.*

70 *With respect to the administration of the collective agreement, managers accept grievances, investigate work disputes and respond to grievances at Step 1. They are also responsible for ensuring implementation of employer policies related to anti-harassment, occupational health and safety, security, customer relations and the like. This work, however, is performed with and under the direction of the regional manager and human resources branch. Managers play an important role in funnelling human resource issues to SLGA through the regional manager; however, the level of authority of a manager in relation to collective agreement administration is not sufficiently effective to exclude the position from the definition of employee.*⁵⁵

[119] In *Prince Albert Parkland*,⁵⁶ the Board refused to exclude a position whose job description included responsibility for hiring, disciplining and dismissing staff, and whose incumbent testified as to her full authority with respect to hiring decisions. The Board concluded that the majority of her duties were supervisory in nature, as opposed to managerial:

[76] *Her specific job duties include responsibility “for hiring, discipline and dismissal of staff as required within the department.” She testified that she had full authority to hire staff and was involved in the review of applications, screens them for basic competencies, selects candidates she wishes to interview, conducts interviews and makes the hiring decision. In that regard, she enjoyed the same ability to hire employees as the Assistant Director of Environmental Services.*

[77] *The majority of her duties, however, are supervisory in nature. While she was involved in corrective discipline, it was on a day to day basis and was not usually taken through to the “progressive discipline” process. She kept records of staff performance and monitored staff performance.*

[78] *She did not participate in the grievance procedure. She had infrequent contact with the Union with respect to grievances and complaints (once a month). While she testified*

⁵³ *SGEU v Saskatchewan Liquor & Gaming Authority*, 1997 CarswellSask 823, [1997] Sask. LRBR 836 [Saskatchewan Liquor & Gaming Authority].

⁵⁴ *Saskatchewan Liquor & Gaming Authority*, at para 66.

⁵⁵ *Saskatchewan Liquor & Gaming Authority*, at paras 69-70.

⁵⁶ *Canadian Union of Public Employees, Local 4777 v Prince Albert Parkland Regional Health Authority*, 2009 CanLII 38609 (SK LRB) [*Prince Albert Parkland*].

that she had the same power to deal with grievances and complaints as the Assistant Director, there was no evidence that she attended grievance meetings or that she imposed progressive discipline. Her testimony was that she usually makes recommendations and asks for advice from the Assistant Director.

[79] *This position does not deal with budgets and is not involved in collective bargaining or the formulation of collective bargaining proposals.*

[80] *This position does not meet the criteria for exclusion set out above. As noted in point four, above, her duties are principally supervisory as distinct from managerial. As a result, this position should be within the scope of the bargaining unit.⁵⁷*

[120] By way of contrast, the Board has applied the managerial exclusion where a position with supervisory responsibility over two employees had no ability to independently discipline (or hire) employees, in *Wheatland Regional Centre*.⁵⁸ In that case, the Board placed some emphasis on the industry supervisor position's placement in the organizational chart, and particularly that it was at a similar level to an agreed-upon excluded position.⁵⁹

[121] Though precedents regarding arguably analogous positions may be reviewed by the Board, each case must be decided on its own facts to determine whether a position exercises a sufficient degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of employees to place its occupant in an insoluble conflict of interest with employees in the bargaining unit.

[122] Like the managerial exclusion, the Board applies the confidentiality exclusion on as narrow a basis as possible.⁶⁰

[123] In order for the exclusion to apply, the position's primary duties must include activities that: (i) are of a confidential nature; (ii) in relation to labour relations, business strategic planning, policy advice, or budget implementation or planning that has/have a direct impact on the bargaining unit that the position would otherwise be included in.⁶¹

[124] Determining whether the position's primary duties include the abovementioned activities does not depend on a mathematical calculation.⁶²

⁵⁷ *Prince Albert Parkland*, at para 80.

⁵⁸ *Wheatland Regional Centre*, at paras 14 and 72-76.

⁵⁹ *Wheatland Regional Centre*, at para 77.

⁶⁰ *University of Saskatchewan*, at para 42.

⁶¹ Act, s 6-1(1)(h)(i)(B).

⁶² *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees*, 2019 CanLII 128791 (SK LRB) [*Saskatoon Public Library*], at para 63.

[125] In *University of Saskatchewan*, citing *Hillcrest Farms*, the Board indicated that the purpose of the confidentiality exclusion is to ensure that an employer has access to necessary resources within a protected sphere of privacy.⁶³

[126] In *Saskatoon Public Library*, the Board explained the competing rights the Board must balance when considering 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.*⁶⁴

[127] As aforementioned, the relevant knowledge or advice (labour relations, business strategic planning, policy advice, or budget implementation or planning) must be both confidential from the employer's perspective and have a direct impact on employees in the bargaining unit the position would be in.

[128] Confidential knowledge or advice that can have a direct impact on employees in the bargaining unit can include (but is not limited to) for example, knowledge or advice related to collective bargaining (e.g., contract negotiation, grievance administration, etc.), the discontinuation of some or all work, or prioritizing some work over other work. In *Saskatoon Public Library*, the following circumstances sufficed for the confidentiality exclusion to apply to three positions:

[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.

⁶³ *University of Saskatchewan*, at para 45.

⁶⁴ *Saskatoon Public Library*, at para 70.

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.⁶⁵

[129] In considering the confidentiality exclusion, the Board will closely examine the duties a position's occupant actually performs.⁶⁶

[130] Like the managerial exclusion, the Board must consider whether the position's occupant, on account of their duties to the employer, will be placed in an insoluble conflict of interest with employees in the bargaining unit.⁶⁷

[131] The Board will now proceed to summarize its key findings of fact from the evidence that was tendered, exclusive of the post-application evidence.

[132] The Board finds as follows:

- a) The Town Foreman reports to the Town Administrator and is responsible for supervising two to three full-time employees in the Public Works Department, and an equal or lesser number (combined) of casual and seasonal summer employees in the Public Works Department,⁶⁸ though the seasonal summer employees will not be in the proposed bargaining unit. The number of bargaining unit employees who will be supervised by the Town Foreman is significantly less than the 15 employees the Union estimated were in the proposed bargaining unit as of January 24, 2023.⁶⁹
- b) The Town Foreman is responsible for the general management of all aspects of the Town's Public Works Department, including the water and sewer utility system. The Department's work is primarily concerned with regular operational tasks (e.g., garbage pickup, snow clearing, operation and maintenance of the water and sewer utility system), but can also involve minor repair or improvement work (e.g., on Town equipment and buildings or property). Major maintenance, repairs or improvements (e.g., road resurfacing, and significant water and sewer infrastructure maintenance, repairs or

⁶⁵ *Saskatoon Public Library*, at paras 78-79.

⁶⁶ *Saskatoon Public Library*, at para 68.

⁶⁷ *Saskatoon Public Library*, at para 78.

⁶⁸ While the Town's organizational chart shows the landfill staff reporting to the Town Foreman, the Board heard no evidence about them, and the Town indicates that the Public Works Department staff and landfill staff are "one and the same": Town's written argument, para 103.

⁶⁹ Application for bargaining rights, dated January 24, 2023.

improvements) are done by external contractors. Quotes for this type of work are typically obtained by the Town Foreman.

- c) The Town Foreman is required to be a “working foreman”, and he performs the same hands-on operational tasks as the employees in the Department. He is “on the tools” every day, so to speak. He holds a meeting with the employees in the morning where who is doing what is discussed. The Town Foreman is able to direct employees to do specific tasks and will do so, particularly in relation to larger projects, but much of the work that needs to be done on a daily basis is routine, and employees perform it with little or no direction.
- d) As part of his responsibility for managing the Public Works Department, the Town Foreman attends the Public Works Committee meeting once a month. He effectively sets the agenda for the meeting, though others can and do contribute to it. The Town Foreman has first-hand and specialized knowledge of infrastructure or equipment issues which require funding. He presents quotes from third parties to address these issues, along with his recommendations. His recommendations are often accepted by the Committee, which operates by consensus, but not always. The Committee’s recommendations must be approved by Town Council to be effective.
- e) The Town Foreman does not incur significant unanticipated or atypical expenditures without bringing them to the Public Works Committee. This occurred for the robotic cleaning and inspection of the Town’s drinking water reservoir, and the Committee’s minutes regularly reflect discussion about needing to repair or replace equipment such as a mower, sweeper, truck, tractor, etc.
- f) Aside from infrastructure and equipment issues, the Town Foreman keeps the Public Works Committee apprised of personnel issues at the Public Works Department, including training he recommends should be funded for certain employees, and who is expected to be hired as seasonal summer staff.
- g) The Town Foreman assists the Town Administrator with reviewing the Town’s proposed annual budget. The Town Administrator relies on the Town Foreman to confirm that her line entries for items related to the Public Works Department are reasonable based on previous years’ actual expenses and anticipated upcoming expenses. The budget is ultimately approved by Town Council. Some of the expenses which are approved are

regular year-over-year type expenses (e.g., fuel), while others are for atypical expenses which have been recommended by the Public Works Committee.

- h) The Town Foreman is involved in the hiring of Public Works Department employees. His recommendations after jointly interviewing candidates for permanent full-time employment with the Town Administrator are a key consideration in such hiring. He can independently hire former Public Works Department employees, such as Ms. McDonnell, as a casual employee to fill shifts on an as-needed basis. Her hiring to assist with garbage pickup in January 2023 was necessary because an extra employee was needed for the Town to comply with occupational health and safety requirements. The Town Foreman can also make effective recommendations on who to hire as a summer seasonal employee, though such employees are outside the proposed bargaining unit and the number of such employees who should be hired is determined by consensus at the Public Works Committee.
- i) The Town Foreman is directly responsible for training, scheduling, supervising and evaluating Public Works Department employees. His knowledge and observations are critical for ensuring employees work safely and effectively. The Town Foreman is required to inform the Town Administrator regarding any training which may need to be funded for Public Works Department employees, so that she can arrange payment for same. An employee with more training can receive more pay. The Town Foreman is required to provide accurate and meaningful input into the performance reviews for employees, which are jointly conducted by him and the Town Administrator. These performance reviews can impact the terms of employment (e.g., pay) of Public Works Department employees.
- j) While the employee discipline policy identifies the Town Foreman as having authority to administer discipline, in practice the Town Foreman reports any conduct which may require the administration of discipline to the Town Administrator. The Town Administrator relies on the Town Foreman's information and advice when meeting with the involved employee. The Town Foreman is also expected to be in attendance at such meetings and does attend. The practice of having the Town Administrator administer discipline rather than the Town Foreman may be explained by the fact that the Town Foreman is required to work alongside a small group of Public Works employees on a daily basis, and this practice is more conducive to maintaining a "team" atmosphere in the Public Works Department than if discipline were administered by the Town Foreman.

[133] With the above findings of fact set out, the Board will explain its reasoning with respect to the requested exclusions. The Board will address the managerial exclusion first, then the confidentiality exclusion.

[134] The Town has not established that the managerial exclusion should be applied to the Town Foreman.

[135] The Board begins from the premise that exclusions on the bases of ss. 6-1(1)(h)(i)(A) and (B) should be made on as narrow a basis as possible. A person's right to engage in collective bargaining through a union should not be unnecessarily limited.

[136] In reviewing the Town Foreman's duties, the Board is unable to conclude that his primary responsibility is to exercise authority and perform functions that are of a managerial character.

[137] The Town Foreman position is in the nature of a working foreman. He performs the same operational tasks as other employees in the Public Works Department.

[138] In addition to his "hands-on" work, the Town Foreman undoubtedly has responsibilities with respect to the employees who report to him. These include training, scheduling, and supervising Public Works Department employees. However, the Board has held that such functions are in the nature of supervisory functions, which do not in themselves give rise to the type of management-union conflict that can arise in other functions, such as administering discipline.⁷⁰ To the extent training requires funding, the Town Foreman does not have the final say on whether funding will be provided.

[139] The Town Foreman's involvement in performance evaluations is important, given his ability to observe and act as a conduit of information and advice to the Town Administrator. However, as held in *Saskatchewan Liquor & Gaming Authority*, acting as the "eyes and ears of [the employer] in the workplace and hav[ing] significant responsibility for and over work performance"⁷¹ does not equate to a position needing to be excluded. To the extent the Town Foreman is not acting as an appropriate conduit of information and advice for the purposes of performance evaluations, which are jointly conducted with the Town Administrator, this is a performance management issue which can be addressed with the Town Foreman.

⁷⁰ *Prince Albert Parkland*, at para 66.

⁷¹ *Saskatchewan Liquor & Gaming Authority*, at para 69.

[140] While the Town Foreman's involvement in hiring is important, hiring is also governed by factors beyond his control. The Town Administrator is involved in the decision to hire permanent full-time employees. The Town Foreman's authority to hire previous seasonal staff as casual staff has only been exercised when compliance with occupational health and safety requirements required an extra employee for garbage pickup. The number of required seasonal summer employees and their rates of pay is something the Public Works Committee determines, and the number of required employees tends to be the same number year-over-year. Further, such employees will be out-of-scope, dispelling any potential for increased loyalty to them on account of their being bargaining unit members.

[141] Similar to his role in performance reviews, the Town Foreman's involvement in discipline is primarily as a conduit. He is required to report conduct potentially requiring discipline to the Town Administrator, and the Town Administrator relies on his information and advice. In practice, the Town Administrator has the final say regarding discipline and is responsible for administering it. The Town Foreman must be candid with his information and advice, but is not required to be the ultimate decision-maker. The evidence before the Board does not suggest that there were any impediments to appropriate discipline being imposed via this method, when required, up until the date the certification application was filed. Based on the Town's employee discipline policy, a similar method will need to be used for employees reporting to the Director of Recreation and Culture post-certification. If either the Town Foreman or the Director were to not fulfill their functions in this method, they might expect to be performance managed.

[142] The Town Foreman's involvement with the Public Works Committee and assisting the Town Administrator with preparing the annual budget is important work, but the Town Foreman does not have independent decision-making authority with respect to significant expenditures for equipment and infrastructure. He provides information regarding the condition of the equipment and infrastructure the Public Works Department is responsible for maintaining, and the cost to remedy any deficiencies. Some of this information, especially the costing of remedial options, originates with third parties. The Town Foreman's opinion on options is an important consideration in the Public Works Committee's achieving of consensus, but it is not determinative. The Town Foreman assists the Town Administrator in preparing a draft annual budget, but his role is to provide input and to confirm estimates previously arrived at through other sources (e.g., previous years' expenses and matters discussed at the Public Works Committee), not to add new unanticipated expenditures to the budget.

[143] In sum, the Board is not satisfied that the Town Foreman is not an “employee” because of the managerial exclusion in s. 6-1(1)(h)(i)(A) of the Act.

[144] Similar to the managerial exclusion, the Town has not established that the confidentiality exclusion should be applied to the Town Foreman.

[145] The Board is unable to conclude that the Town Foreman’s primary duties involve activities of a confidential nature with respect to labour relations, business strategic planning, policy advice, or budget implementation or planning that have a direct impact on the bargaining unit.

[146] While not determinative, the Board concludes that the majority of the Town Foreman’s duties involve “hands on” operational work, similar to the work performed by the employees he supervises.

[147] The input the Town Foreman provides into Public Works Committee meetings is important, but it is in the nature of “these are the things that require attention in order for us to maintain our operations, and here are estimates for costing”. It is difficult to categorize it as confidential strategic planning or policy advice. In terms of budget implementation and planning, the recommendations of the Committee are presented to the Town Council, in a public forum. The Town Council meets shortly after the Committee.

[148] In terms of the information and advice the Town Foreman provides or is privy to at the Public Works Committee, while it may indirectly impact members of the bargaining unit (i.e., needing to fix the water treatment plant means there could be less money for pay raises), this circumstance arises in all workplaces, which have limited resources and competing demands for those resources, whether they have unionized employees or not. Employees are expected to identify issues with training, infrastructure or equipment, including for safety reasons, and to do so knowing that remedying the problems will take funds away from a finite pool of resources. Failing to identify known issues for the personal gain of oneself or another is a performance management issue. The possibility of a supervisor doing so is not a sufficient reason to exclude them from a bargaining unit. The same logic applies to the possibility of a supervisor manufacturing reasons for unnecessary training or certification which could have a consequential effect of increasing an employee’s pay.

[149] In sum, the Board is not satisfied that the Town Foreman is not an “employee” because of the confidentiality exclusion in s. 6-1(1)(h)(i)(B) of the Act.

[150] The result of these reasons is that the Board finds that the bargaining unit proposed by the Union is appropriate, and that both Ms. McDonnell and Mr. Thomson were eligible to vote in the representation vote. The Board's agent is directed to tabulate the vote in accordance with s. 27 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021*.

[151] This is a unanimous decision of the Board. An appropriate order will issue.

DATED at Regina, Saskatchewan, this **14th** day of **July, 2023**.

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson