Saskatchewan
Labour Relations Board

REGINA EXHIBITION ASSOCIATION LIMITED, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, Respondent

LRB File Nos. 010-24 and 150-23; May 30, 2024
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Kris Spence

Counsel for the Applicant, Regina Exhibition Association Limited: Calen Nixon

Counsel for the Respondent, Canadian Union of Public Employees: Dawid M. Werminski

Application for Summary Dismissal – No Arguable Case – Plain and Obvious that Original Application Defective – Summary Dismissal Granted.

Existing Certification Order – RWDSU Exclusive Bargaining Agent for Employees of REAL – Positions Created After Certification Order – Surveillance Officers – Agreement Between RWDSU and REAL – Excluding Surveillance Officers from Scope.

Original Certification Application – Section 6-9 of *The Saskatchewan Employment Act* – CUPE Seeking to Certify Surveillance Officers – Surveillance Officers Subject to Exclusive Bargaining Rights of RWDSU – Section 6-9 Applies If Certification Order Not Issued for All or Portion of Unit – CUPE Cannot Organize Surveillance Officers Pursuant to Section 6-9.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application for summary dismissal filed by Regina Exhibition Association Limited [Employer]. The original application is a certification application filed by Canadian Union of Public Employees [CUPE] in relation to the surveillance officer position located in the Employer's operations department. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union [RWDSU] holds multiple certification orders in relation to the employees of the Employer, including a certification order for all employees in the operations department. The Employer and RWDSU have entered into an agreement to place the surveillance officer position out-of-scope of the relevant bargaining unit.

[2] Through this application for summary dismissal, the Employer argues that CUPE's certification application is patently defective.

[3] The Board provided notice to RWDSU of the certification application and of the deadline to file an application to intervene. RWDSU did not file an application to intervene or attempt to participate in these proceedings, other than to express its support for the certification application.

[4] The Employer has sought that the summary dismissal matter be determined without an oral hearing. Further to this, the Board sought and received written submissions from the Employer and CUPE. The matter was assigned to a panel of the Board, consisting of Aina Kagis, Kris Spence, and then Chairperson Morris, K.C. After Chairperson Morris was appointed as a Judge of the Court of King's Bench on April 22, 2024, the parties agreed that this matter could be concluded by the Vice-Chairperson reviewing the submissions and then issuing a decision in conjunction with the other members of the panel.

[5] For the following reasons, the Board has decided to grant the application for summary dismissal. It is plain and obvious that the certification application is destined to fail.

Relevant Procedural Details and Underlying Facts:

[6] Section 6-9 is the standard avenue by which a union will apply to acquire bargaining rights on behalf of a proposed bargaining unit. Section 6-10 is a secondary avenue that applies where there is a proposed change in union representation.

[7] Form 2, which is the form CUPE used in the underlying certification application, specifies on its face that it is applicable to sections 6-9 and 6-10 of the Act. Section 5 of the Board's Regulations[1] also makes clear that Form 2 is used for applications made pursuant to section 6-9 and pursuant to section 6-10.

[8] Question 6 (contained in Form 2) is pertinent for determining whether the application should proceed pursuant to section 6-9 or pursuant to section 6-10. Question 6 asks:

> *Does any other union or other labour organization, to the knowledge of the undersigned, claim to represent any of the employees in the unit of employees described in paragraph 3 of this application or in any part of the unit?*

[9] If the applicant responds in the affirmative, the applicant is to then provide the name and contact information for that union or labour organization.

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[1] *The Saskatchewan Employment (Labour Relations Board) Regulations*, *2021*.

[10] In this matter, CUPE responded "No" to Question 6 and provided no contact information for any union.

[11] CUPE has provided no indication that it had intended to bring the certification application pursuant to 6-10 either initially or in the alternative.

[12] In any event, a basic requirement of an application made pursuant to section 6-10 is that it be made within the open period, as outlined at subsection 6-10(3). The open period is not less than 60 days and not more than 120 days before the anniversary date of the effective date of the collective agreement. CUPE has made no suggestion that the certification application was brought within the open period.[2]

[13] Next, there are multiple certification orders between the Employer and RWDSU.[3] For the current purposes it is not necessary to describe each of these orders. However, one of these orders is of particular relevance to this case. That order is identified as LRB File Nos. 202-93 & 212-93, and it describes the bargaining unit as follows:

> *…all employees of the Regina Exhibition Association Ltd. In the City of Regina employed in the Operations Department and the Box Office, except the Manager of Operations, Superintendent of Facilities, Superintendent of Janitorial Services and Box Office Supervisor, are an appropriate unit of employees for the purpose of bargaining collectively…*

[14] To facilitate the Board's consideration of the summary dismissal application, the parties entered into an agreed statement of facts. The facts as agreed are as follows:

> *Surveillance Officers employed by the Employer are operations department employees. The Surveillance Officer position was first introduced on or about May 5th, 2017.*
>
> *Surveillance Officers are out of scope pursuant to written agreement dated May 15, 2017, between the Employer and [RWDSU].*
>
> *Surveillance Officers have never been in-scope employees in RWDSU's bargaining unit.*
>
> *Neither the current collective agreement nor any former collective agreements between the Employer and RWDSU treat Surveillance Officers as in-scope employees.*

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[2] While not necessary for the determination of this matter, the certification application was made on October 18, 2023 and REAL's reply to the certification application, which is not refuted, states:

> …the current collective agreement initially had a term of April 1, 2018 to March 31, 2022. It was extended one year until March 31, 2023 and, recently, it was extended for one further year, until March 31, 2024.

[3] LRB File Nos. 011-90; 202-93 & 212-93; 058-94;168-94; 118-97.

[15] In other words, the surveillance officers have been carved out of the operations department unit by agreement of the parties.

[16] Finally, in CUPE's reply to the summary dismissal application, National Representative Aimee Nadon indicates that RWDSU supports CUPE's certification application:

> *. . .*
>
> *i) On or about November 3, 2023, contact was made between myself and Garry Burkart of RWDSU.*
>
> *j) CUPE communicated with RWDSU to gauge the situation from their perspective and to avoid potentially disrupting the plans and intentions of a fellow labour organization.*
>
> *k) As a member of the Canadian Labour Congress, CUPE abides by a no-raid pact.*
>
> *l) CUPE proceeded to file its application LRB File No. 150-23 with the understanding that RWDSU had no intention to bring the unit of Surveillance Officers employed at REAL in-scope and that it had RWDSU's support to organize the Surveillance Officers.*

[17] As mentioned, RWDSU has confirmed its support to the Board.

Arguments of the Parties:

Employer

[18] The certification application discloses no arguable case. The issue before the Board is not complex. It is primarily a legal question that can be determined given the agreed statement of facts filed by the parties.

[19] CUPE's position is irreconcilable with the principle of exclusive collective bargaining and is based on a flawed premise that pertains to which employees can be organized and by whom in relation to existing and prevailing certification orders.

[20] The Board does not have the jurisdiction to issue certification orders that are non-exclusive. RWDSU has exclusive bargaining rights in relation to the proposed bargaining unit. The proposed bargaining unit falls within the scope of the extant certification order. RWDSU's exclusive bargaining rights include the right to negotiate the scope of the unit and to seek the amendment of the unit pursuant to clause 6-1(1)(h) of the Act. It is an unfair labour practice for a union to fail or refuse to engage in collective bargaining with respect to employees in a unit if a certification order was issued for that unit.

[21] CUPE's application undermines and contradicts the exclusive rights granted to RWDSU through the certification order. CUPE does not have standing to seek a determination as to whether the surveillance officers are "employees" under Part VI of the Act, and the Board does not have jurisdiction to make such a determination in the context of the underlying application:

> *Accordingly, for employees who are out of scope by agreement between the parties to a certification order, if another union argues that they should be in-scope "employees" pursuant to s. 6-1(1)(h) of the SEA, the consequence of that determination is that the employees would be in-scope within the extant bargaining unit, not a new one.*[4]

[22] If a position falls within a certification order, it is subject to the bargaining rights of the applicable bargaining agent. These rights include the right to bargain whether that position is excluded from the scope of the unit. It is a policy of the Board to ensure that a bargaining unit description facilitates expansion and contraction. Whether the parties could have anticipated the creation of a new position at a later date is, therefore, of no consequence.

[23] The certification application is a collateral attack on the existing certification order. It is an indirect appeal of the Board's decision to grant exclusive bargaining rights to RWDSU.

CUPE

[24] The Employer has not met the bar for an application for summary dismissal.

[25] Due to the agreement between RWDSU and the Employer, the surveillance officers have not benefited from the collective agreements that presently exist or from union membership at all.

[26] Under the Act, there are two bases for excluding individuals from a bargaining unit – the managerial exclusion and the confidentiality exclusion. The surveillance officers are not subject to either of these exclusions. Therefore, CUPE is not seeking to organize workers who are exempt from being included in a bargaining unit. To the contrary, by the time CUPE filed its application, "[w]hatever the basis was of the May 2017 agreement struck between REAL and RWDSU…the unit of Surveillance Officers had wrongfully been excluded from union representation for over five years".[5]

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[4] *Employer Brief of Law*, at para 35.
[5] *CUPE Brief of Law*, at para 18.

[27] Although the surveillance officers fall under the operations division of the Employer's structural organization, they comprise a separate unit of employees. When the certification orders were issued, the parties could not have contemplated the creation of that unit.

[28] Certification orders are not intended to be "impenetrable" or "everlasting". The agreement between the parties to place the workers out of scope is as legitimate or relevant as an exclusion contained in a scope clause of a collective agreement. The Employer is asking the Board to place undue weight on the certification orders and to ignore the agreements.

[29] If the Board grants the summary dismissal application, it will place the ability of the surveillance officers to exercise their *Charter* freedom of association in limbo. It will also encourage parties to agree to exclude units of employees in order to circumvent collective bargaining.

[30] The unit of surveillance officers has been bereft of union representation for over six years. It is not realistic to suggest that these employees have the option of seeking the assistance of RWDSU.

[31] This matter is unique. There is merit in the Board examining the issues raised by CUPE. It is not plain and obvious that the certification application will fail.

[32] In the alternative, CUPE makes a request of the Board:

> *…In the event that CUPE is incorrect, CUPE would ask the Board to outline the proper steps and a timeline that should be undertaken by REAL and RWDSU to respect the wishes of these workers.*

Analysis:

[33] The question before the Board is whether the original application – the certification application – discloses no arguable case, is patently defective, and should therefore be summarily dismissed. The Employer bears the onus to demonstrate that the certification application should be dismissed.

[34] The Board's summary dismissal power is found at clause 6-111(1)(p) of the Act:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
> *…*

> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*

[35] The Board may determine the summary dismissal application without an oral hearing, pursuant to clause 6-111(1)(q).

[36] The applicable test for summary dismissal is summarized in *KBR Wabi*[6]:

> *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant is able to prove everything alleged in his/her claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
>
> *2. In making its determination, the Board may consider only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his/her claim.*

[37] In the present case, the parties have filed an agreed statement of facts to assist the Board in determining the summary dismissal application.

[38] In considering an application to summarily dismiss, the Board assumes that the facts alleged in the original application can be proven. Whatever defect it identifies as supportive of a summary dismissal must be obvious without the weighing of evidence or the assessment of witness credibility.[7]

[39] Taking these principles into account, it is appropriate for the Board to consider the parties' agreed statement of facts in deciding whether to summarily dismiss. When considering it, the Board will not be required to weigh any evidence or make any findings of fact. Doing so will not create any prejudice for either party.

[40] The Board's decision to rely on an agreed statement of facts can be distinguished from the decision in *ATCO*[8]. There, the parties sought to proffer dueling affidavits in relation to an application for summary dismissal. The Board observed that its ability to consider "'any document referred to in the application upon which the applicant relies to establish his/her claim' is not an

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[6] *International Brotherhood of Electrical Workers, Local 529 v KBR Wabi Ltd*., 2013 CanLII 73114 (SK LRB) [*KBR Wabi*], at para 79.
[7] *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB) [*Roy*], at para 9.
[8] *ATCO Frontec Ltd. v United Food and Commercial Workers Union, Local 1400*, 2024 CanLII 13528 (SK LRB) [*ATCO*].

invitation to an applicant to file affidavit evidence, generally".[9] The Board was not persuaded that there was any basis for considering the affidavit evidence.

[41] Next, in considering whether the original application discloses an arguable case, the Board must begin by reviewing the claim made by the applicant. In this case, CUPE has brought a certification application pursuant to section 6-9 of the Act. The Board must determine whether the application, brought in this manner, has a reasonable chance of success.

[42] In considering this question, the Board will begin by observing that the bargaining unit, outlined in the relevant certification order[10], is functionally an all-employee unit. The relevant wording of the order is, "all employees of the Regina Exhibition Association Ltd. In the City of Regina employed in the Operations Department". The parties, in the agreed statement of facts, have agreed that the surveillance officers are "operations department employees".

[43] It is well established that newly created positions remain in an all-employee bargaining unit until the parties agree or the Board makes an order to exclude those positions from the unit. The Board explained the rationale underlying this principle in *Wascana Rehabilitation*:[11]

> *10 Assigning new positions into the bargaining unit until the Board orders otherwise is consistent with the Board's practice of placing the onus, in exclusion applications, on the employer. In addition, it coincides with the reasoning which prompted all boards to adopt the "all-employee" description of the bargaining unit over the enumerative or classification list method. One of the critical considerations why the "all-employee" method of unit description replaced the enumerative or classification list method was to avoid the endless applications which arose every time the employer reorganized, changed position titles or created new positions. "All-employee" units accommodate these changes without the necessity of an application to the Board. The only time an application to the Board is required is when the employer wishes to have a new position excluded.*
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> *11 Finally, assigning new positions into the unit, pending the Board's order, is also consistent with both orderly collective bargaining and the objects and philosophy of The Trade Union Act. It serves the interests of all the parties in that it avoids the necessity of an employer having to risk an unfair labour practice in order to have the exclusion issue of a position determined. To countenance an approach that would allow unilateral exclusions from an existing certification order would inevitably lead to industrial instability because it effectively encourages parties to ignore their contractual, as well as their statutory rights and obligations. Where the Board has a choice between two practices: one based upon unilateral action and one based upon respect for the Board's order, until changed in accordance with the provisions of The Trade Union Act, the Board will obviously prefer the latter.*

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[9] *ATCO* at para 35.
[10] LRB File Nos. 202-93 & 212-93.
[11] *S.G.E.U. v Wascana Rehabilitation Centre*, 1991 CarswellSask 545, [1991] SLRBD No 15.

[44] If the parties agree through the process of collective bargaining to exclude a position, they may also apply to have the certification order amended to mirror their agreement. As per *Donovel*:[12]

> *[28] An employer must adhere to the following steps in determining the proper assignment of the work and the position:*
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> 1. *notify the certified union of the proposed new position;*
> 2. *if there is agreement on the assignment of the position, then no further action is required unless the parties wish to update the certification order to include or exclude the position in question;*
> 3. *if agreement is not reached on the proper placement of the position, the employer must apply to the Board to have the matter determined under ss. 5(j), (k) or (m);*
> 4. *if the position must be filled on an urgent basis, the employer may seek an interim or provisional ruling from the Board or agreement from the union on the interim assignment of the position.*
>
> *[29] An employer is not entitled to act unilaterally by assigning the position as out-of-scope of the bargaining unit without obtaining the agreement of the union or, failing such agreement, without obtaining an order from the Board, or the employer will be in violation of its obligation to bargain collectively under s.11(1)I of the Act: See, University of Saskatchewan, infra.*

[45] In the present case, when the position of surveillance officer was created within the operations department, the parties were subject to a certification order over "all employees of the Regina Exhibition Association Ltd. In the City of Regina employed in the Operations Department". As a result, the surveillance officers belonged in the bargaining unit of operations department employees subject to an agreement by the parties or an order of the Board.

[46] As outlined in the agreed statement of facts, the parties agreed to exclude the position only ten days after its creation. However, the timing of that agreement, and its ultimate duration, have no bearing on whether the position had initially belonged in the bargaining unit, nor, contrary to CUPE's argument, do they suggest that the surveillance officers comprise a separate bargaining unit.

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[12] *Donovel v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2006 CanLII 62948 (SK LRB).

[47] Having determined as much, the Board must next consider whether a union can rely on section 6-9 to certify a unit comprised of a position which, pursuant to the extant certification order, belongs in the bargaining unit described therein.

[48] In doing so, the Board must first interpret the relevant statutory provisions in line with the modern principle.[13]

[49] The modern principle has been incorporated into subsection 2-10(1) of *The Legislation Act*, which states:

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

[50] When interpreting statutory provisions, the Board is guided by the Court of Appeal's direction in *Arslan*:[14]

> *[59] Under the modern principle, the court first forms an initial impression as to the meaning of a legislative provision from its text (i.e., its "grammatical and ordinary sense"). Then, so as to infer what the Legislature intended to enact, the court will take into account the purpose of the provision and all relevant context. As this suggests, the latter part of the inquiry involves the contextual determination of legislative intent.*

[51] The primary provision in this case, section 6-9, states:

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

[52] Section 6-9 specifies that a union may, at any time, apply for a certification order for a proposed unit "if a certification order has not been issued for all or a portion of that unit". In other words, it is a basic prerequisite of an application brought pursuant to section 6-9 that a certification order has not been issued for all or a portion of the unit.

[53] The initial impression of section 6-9 is that the "unit of employees" that is the object of an application must not be subject to a certification order. Section 6-9 does not leave the impression

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[13] See, *University of Saskatchewan v Administrative and Supervisory Personnel Association*, 2021 CanLII 12946 (SK LRB), at paras 57-59.
[14] *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77 (CanLII).

that the parties' agreement, altering the scope of the unit as set out in the certification order, can determine the scope of a unit that may be subject to a certification application.

[54] In interpreting section 6-9, the Board does not stop, however, at its initial impression. The Board must proceed to consider the meaning of section 6-9 in its entire context.

[55] CUPE argues that the Employer and RWDSU have reached a subsequent agreement as to scope, that said agreement means that the certification order is spent, that the surveillance officers are out-of-scope, and that CUPE's certification application for a bargaining unit of surveillance officers is therefore appropriate.

[56] The case law provides insight into the "purpose and scheme of the legislation, the legislative intent and the relevant legal norms"[15], relevant to interpreting section 6-9 and its application to "spent" certification orders.

[57] CUPE relies on *SMI*[16], and in particular, on the following excerpt from that decision:

> *[64] George W. Adams, Canadian Labour Law […] notes that in Ontario, for example, a certification order is effectively spent once the parties "have given a more detailed meaning and expression to the description in the negotiation of a collective agreement". […]*
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> *[citations removed]*

[58] *SMI* stands for the proposition that a "CBA scope clause that is negotiated after the issuance of a certification order defines the parameters of what may be excluded in the future from the bargaining unit".[17]

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[15] *Arslan*, at para 62, citing *Atco Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 48, [2006] 1 SCR 140.
[16] *Saskatchewan Mutual Insurance Company v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 8933*, 2021 SKCA 137 (CanLII) [*SMI*].
[17] *SMI*, at para 72. See also, *St. Elizabeth's Hospital v Saskatchewan (Labour Relations Board)*, 1996 CanLII 7165 (SK KB), at para 14, quoting the Board's decision:

> In our view, the often-quoted statement that a certification order is "spent" once a collective agreement has been concluded does not mean that the certification order automatically disappears into the void after a round of collective bargaining. At the very least, there must be some indication that the bargaining unit description set out in that order has been replaced by something else which is the product of an agreement between the parties. Indeed, we think the view advanced by Mr. Welden that the Union is entitled to rely on the scope of the bargaining unit contained in the certification Order unless the scope has been explicitly altered at some later stage is correct.

[59] However, despite having negotiated an amended scope clause, the parties remain subject to the duty to bargain collectively:[18]

> *[67] A useful interpretation of the line of cases describing the effect of a certification order once the parties have concluded a CBA is also found in Nova Scotia Government and General Employees Union v Metro Community Living Support Services Ltd., 2017 NSCA 15 at para 28, 411 DLR (4th) 131, where the court restored the provincial Board's decision that, while the precise wording of the certification order is spent, in those circumstances the collective bargaining relationship that the order spawned continues to operate.*

[60] In the words of the Court of Appeal, the collective bargaining relationship spawned by the certification order continues to operate even when the precise wording of the order is spent.

[61] While the Board's general policy is to respect the parties' agreements as to scope, it retains discretion to refuse to recognize an agreement. The Board in *Saskatchewan Liquor Board*[19] explained that there "are two possible circumstances" where the Board might refuse to recognize an agreed-to scope that differs from the scope as outlined in the certification order: where the Board finds that the unit is not appropriate and where the unit violates the right of employees to be represented by a union "within the unit defined by the Board".

[62] In that case, the Board proceeded to find that the union, which had agreed to exclude certain positions from the scope of the unit, could only change its position through the collective bargaining process. Nonetheless, the employer had a duty to collectively bargain in respect of those positions:

> *The positions in issue are included in the certification order. It follows that the employer is required to bargain in good faith with respect to those positions. The union has bargained these persons out of scope. It can only change this position by the collective bargaining process. Should the employer refuse to bargain collectively in good faith with respect to the positions in issue, it would be found guilty of an unfair labour practice. The Board has no power to amend a collective agreement which is what, the union is in effect asking it to do in this case.*

[63] What these cases establish is that the parties may negotiate changes to the scope of the unit. When the parties negotiate changes to the scope of the unit, it is that negotiation that determines whether the scope of the unit is expanded or retracted. Stated differently, the parties are free to negotiate inclusions and exclusions from the bargaining unit that is outlined in the certification order, but the parties alone have the authority and the duty to bargain in relation to

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[18] *SMI*, at para 67.
[19] *SGEU v Saskatchewan Liquor Board*, LRB File No. 256-80, at 4.

the scope of that order. The parties' ability to negotiate with respect to positions that come within the scope of the order is an aspect of their negotiating power. When the parties agree to seek an amendment to the scope of the order (by order of the Board), they agree to renounce that aspect of their negotiating power.

[64] Or, as was succinctly argued by the Employer in this case:

> *…the labour relations regime is one of inherent trade-offs. That is bargaining, in a nutshell.*[20]

[65] The foregoing interpretation of the parties' rights and obligations is consistent with the wording of section 6-9, which allows for a certification application only "if a certification order has not been issued for all or a portion of that unit", and not, for example, "if a scope clause has not excluded the [proposed] unit".

[66] The converse language is used in section 6-10, confirming that the reference point for determining the applicable statutory provision for a (purported) third-party certification application is the existing certification order:

> ***6-10****(1) If a union has been certified as the bargaining agent for a bargaining unit, another union may apply to the board to be certified as bargaining agent:*
>
> *(a) for the bargaining unit; or*
>
> *(b) for a portion of the bargaining unit:*
>
> *(i) if the applicant union establishes to the satisfaction of the board that the portion of the bargaining unit that is the subject of the application should be separately certified as a unit appropriate for collective bargaining; or*
>
> *…*

[67] The purposes underlying section 6-9 and section 6-10 are affirmed by section 6-13, which outlines a union's obligations upon certification:

> ***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:*
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> *(a) certifying the union as the bargaining agent for that unit; and*

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[20] *Reply Brief of Law*, at para 17.

> *(b) if the application is made pursuant to subclause 6-10(1)(b)(ii), moving a portion of one bargaining unit into another bargaining unit.*
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> *(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; and*
>
> *(b) if a collective agreement binding on the employees in the bargaining unit is in force at the date of certification, the agreement remains in force and shall be administered by the union that has been certified as the bargaining agent for the bargaining unit.*

[68] Pursuant to clause 6-13(2)(a), if a union is certified "as the bargaining agent for a bargaining unit", it 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".

[69] The union's exclusive authority is the foundation of the negotiating relationship with the employer and the rights and obligations that the union has in relation to the employees. Due to the union's exclusive authority, it is an unfair labour practice for the union to fail or refuse to engage in collective bargaining "respecting employees in a bargaining unit if a certification order has been issued for that unit":

> ***6-63****(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*
>
> *…*
>
> *(c) Ito fail or refuse to engage in collective bargaining with the employer respecting employees in a bargaining unit if a certification order has been issued for that unit;*

[70] CUPE suggests that, at the time of the certification order being issued, the Employer and RWDSU could not possibly have contemplated the creation of the surveillance officer position, and therefore, the certification order should be given less weight in delineating the scope of RWDSU's exclusive authority to collectively bargain. However, *Wascana Rehabilitation* and *Donovel* make clear that a position upon its creation is assigned to an all-employee bargaining unit, subject only to agreement or Board order. Whether the parties might have contemplated the creation of a particular position at the time of the certification order is of no consequence.

[71] It would be impossible to administer inclusions and exclusions from all-employee units on the basis of what the parties might have contemplated at the time of the order. As explained by the Board in *Wascana Rehabilitation*, a critical consideration in opting for the "all-employee method was to avoid the endless applications which arose every time the employer reorganized, changed position titles or created new positions".[21] The all-employee method provides for certainty and practicality upon the creation of positions, and with that certainty and practicality, a degree of protection of employees' rights.

[72] A related set of purposes underlies the exclusive authority of a union to collectively bargain for the employees included in the certification order. As the Employer points out:[22]

> . . .
>
> *10. By way of explanatory example, if the CUPE Application were allowed to proceed, RWDSU could thereafter apply, with the requisite proof of support, to organize the managerial employees or confidential capacity employees within the purview of the existing bargaining units for which CUPE is the certified bargaining agent (or successor bargaining agent).*
>
> *11. An employer responding to a certification application in such a scenario would be put to the task of justifying and defending the facts and legal conclusions supporting the out of scope status of the managerial or confidential capacity of the excluded employees, both to another union and before the Board.*
>
> *12. Such a situation depends upon the underlying legal conclusion that bargaining rights are, in fact, not exclusive and that orders of the Board are not final and determinative.*
>
> *13. As a matter of policy, there would be no certainty and therefore no benefit or purpose to negotiating the scope of a bargaining unit, let alone seeking the determination of the same by the Board, as another union could seek to represent the excluded employees. There would be no finality to the Board's orders and no stability to approved bargaining units.*

[73] It is not imperative that the Board be aware of the parties' reasons for excluding the surveillance officers. The Board has taken the approach of respecting the line drawn by the parties "unless there are other indications that the exclusion of positions relates to an issue of appropriateness".[23] As explained in *SGEU*:[24]

> *76 It is not always possible to know with certainty the grounds on which positions were excluded unless the Board has actually heard evidence and ruled on the inclusion or exclusion of positions from the bargaining unit. There is always a great deal of give and take in the design of bargaining units, both at the time of certification and on amendment*

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[21] *Wascana Rehabilitation*, at para 10.
[22] *Summary Dismissal Application,* at para 13.
[23] *Re S.G.E.U.*, 2001 CarswellSask 912, [2001] SLRBD No 23 [*SGEU*], at para 77.
[24] *Ibid*, at para 76.

> *applications. In many amendment applications, the Board simply rubber stamps agreements reached between parties during collective bargaining. This is not to say that the Board does not take its overall duty for determining who is and is not an "employee" seriously; however, it does recognize the fluidity both of the definition of "employee" and the application of the definition to the facts of each work place.*

[74] Even an agreement that positions were not employees does not necessarily prevent the parties from later coming to an agreement that the positions are employees:

> *…As a result, we find that SGEU and the Government may agree to alter the list of excluded positions, the effect of which is to include the 673 positions in the bargaining unit. The positions were originally excluded on grounds that they performed functions of a managerial or confidential basis in relation to the Government's labour relations. The parties now agree that the positions are "employees" under the Act, and, as such, they fall properly within the intended scope of the certification Order…*

[75] If a certification order has been issued for all or a portion of the unit applied for, the application by a union who is not a party to that certification order is, in its essential character, a raid of the existing unit, and must therefore be made pursuant to section 6-10, which allows for a certification application "[i]f a union has been certified as the bargaining agent for a bargaining unit".[25]

[76] As explained in *IATSE v Casino Regina and PSAC*[26], for the Board to consider carving a unit of employees out of an all-employee unit, the application must be brought within the open period:

> *[20] This is a difficult argument to accept. This Board can only rely on the clear wording of the PSAC certification Order, which grants PSAC an "all employee" unit. For the Board to consider carving out a unit or a classification of employees from the PSAC "all employee" unit, the application must be brought within the open period. In the decision International Brotherhood of Electrical Workers, Local 2038 and Monad Contractors Ltd. And Construction Workers Association (CLAC) Local No. 151 Affiliated with the Christian Labour Association of Canada, [1985] April Sask. Labour Rep. 49, the Board states at p. 50:*
>
> > *This application is essentially intended to "carve out" a craft unit of employees from the all employee unit which the intervenor was certified to represent on October 3, 1984. That being the case, the application must be made during the "open period" created by Section 5(k) of the Trade Union Act.*
>
> *(See also: Canadian Union of Public Employees, Local No. 7 v. City of Regina and Regina Civic Middle Management Association, [1986] May Sask. Labour Rep. 46 at p. 47 and Canadian Union of Public Employees, Local No. 3926 v. Board of Education of Deer Park*

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[25] Again, section 6-10 does not state a certification application may be made if a union has been certified or "a scope clause has excluded the unit".

[26] *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of The United States, Its Territories and Canada, Local No. 295 v Saskatchewan Gaming Corporation (Casino Regina)*, 2003 CanLII 62875 (SK LRB).

School Division of Saskatchewan and Deer Park Employees Association, [2000] Sask. L.R.B.R. 349).

[77] As mentioned, CUPE has made no suggestion that it has brought the certification application within the open period.

[78] CUPE argues that, if the certification application were not allowed (and if the Employer and RWDSU were to maintain their agreement in perpetuity), the surveillance officers would be prevented from ever having union representation despite coming within the definition of employee under the Act.

[79] It is inaccurate to suggest that the surveillance officers are prevented from having union representation. First, RWDSU and the Employer have the power to negotiate to bring the surveillance officers back into the bargaining unit. They agreed to exclude the surveillance officers from the unit; they can agree to include them. Second, CUPE may bring a certification application pursuant to section 6-10. Even if CUPE were reluctant due to the no-raid pact with RWDSU, there is no legal principle that allows for an exception in these circumstances. Furthermore, it is clear that RWDSU supports CUPE's certification attempt.

[80] Finally, the present case can be distinguished from *Moose Jaw Police Commissioners*.[27] There, the issue was whether the employer had committed an unfair labour practice by refusing to cooperate with the grievance process as set out in its collective agreement with CUPE. The collective agreement incorporated a position that was *prima facie* included by certification order in the bargaining unit of another union, MJPA[28]. The union filed a grievance alleging an improper selection process for that position.

[81] The employer took the position that CUPE had no jurisdiction over the position and applied for summary dismissal of the unfair labour practice application. The Board noted that, pursuant to section 6-45, all differences between the parties to a collective agreement, including whether a matter is arbitrable are to be settled by arbitration.[29] It also observed that the "definition of collective bargaining includes 'negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union'. The Board found that the employer had not discharged its onus to prove that there was no arguable

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[27] *Moose Jaw Board of Police Commissioners v Canadian Union of Public Employees*, 2022 CanLII 90620 (SK LRB) [*Moose Jaw Police Commissioners*].
[28] Moose Jaw Police Association.
[29] *Moose Jaw Police Commissioners*, at para 66.

case of a breach. Again, the breach in question pertained to whether the employer was refusing to cooperate with the grievance process as set out in its collective agreement.

[82] The present case does not allege the commission of an unfair labour practice due to a refusal to bring a dispute to a grievance. The certification application has been brought pursuant to section 6-9.

[83] In closing, CUPE makes a request in the alternative scenario that the Board does not accept its argument:

> *In the event that CUPE is incorrect, CUPE would ask the Board to outline the proper steps and a timeline that should be undertaken by REAL and RWDSU to respect the wishes of these workers.*[30]

[84] Implicit in this request is a suggestion that one or both of the parties to the certification order have failed to bargain in good faith. This application for summary dismissal is not the forum for making such a determination.

[85] Given all of the foregoing Reasons, it is plain and obvious that CUPE's certification application, brought pursuant to section 6-9, is patently defective and has no reasonable chance of success. The Employer's application for summary dismissal is granted and the certification application is dismissed.

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

DATED at Regina, Saskatchewan, **30th** day of **May, 2024**.

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson

[30] *CUPE Brief of Law*, at para 37.