Saskatchewan
Labour Relations Board

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v TOWN OF PREECEVILLE, Respondent

and

TOWN OF PREECEVILLE, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, Respondent

LRB File Nos. 057-24, 065-24 and 076-24; December 6, 2024
Vice-Chairperson, Carol L. Kraft; Board Members : Lori Sali and Allan Parenteau

Counsel for the Applicant, Canadian Union of Public Employees: Dawid M. Werminski
(Respondent in LRB File Nos.: 065-24 & 076-24)

Counsel for the Respondent, Town of Preeceville: Steve Seiferling
(Applicant in LRB File Nos.: 065-24 & 076-24)

Build-up Principle – application for certification included 9 employees – Employer arguing application premature as it did not include six vacant positions – Board finds build up principle does not apply as increase not so dramatic or significant that essential representative character of union is brought into question.

Application for bargaining rights – Once vote is held, that is proper test of employee wishes – Retrospective evaluation of whether 45 percent support initially filed not necessary or appropriate.

Certification Application – volunteer firefighters are not employees.

Managerial and confidentiality exclusions – exclusions inapplicable to town foreman, administrative assistant, office assistance and arena operator.

Independent contractor – arena operator found closer to employee end of continuum than the independent contractor end.

REASONS FOR DECISION

Background:

[1] Carol L. Kraft, Vice-Chairperson: Canadian Union of Public Employees ("CUPE") has applied pursuant to section 6-9 of *The Saskatchewan Employment Act (the "Act")* for an order to be designated as the certified bargaining agent for the employees of the Town of Preeceville (the "Town" or "Preeceville" or "Employer").

[2] The Town objects to the Union's application on the basis that it is premature, and that a vote should not have been ordered because the application excludes approximately 18 positions. In the alternative, the Town argues a number of positions must be excluded from the bargaining unit.

Evidence:

The Board Record:

[3] CUPE filed its Application for Bargaining Rights (LRB File 057-24) on March 11, 2024 (the **Application")** proposing the following unit of employees as appropriate for the purposes of bargaining collectively:

> *That all employees employed by the Town of Preeceville in Preeceville, Saskatchewan, except the Town Administrator are an appropriate unit of employees for the purpose of bargaining collectively.*

[4] CUPE approximated that the proposed all employee bargaining unit would consist of nine employees of the Town. The only exclusion in the proposed bargaining unit was a position titled "Town Administrator". (This position has also been referred to as "Chief Administrative Officer" or "CAO". These titles are interchangeable for the purposes of this application and refer to the same position currently held by Lorelei Karcha.)

[5] On March 11, 2024, the Board officer sent the following e-mail to CUPE and Preeceville: "The Board Registrar requires the Employer to provide to the Board a list of employees employed within the scope of paragraph 3 (of the Application), with their mailing addresses, occupations and dates of hire (provided in an excel document) within three business days."

[6] On March 14, 2024, Lorelei Karcha, Chief Administrative Officer for the Town of Preeceville, sent a reply e-mail to the Board officer attaching a list of the Town of Preeceville Employees as of March 11, 2024 **(the "List").** The List named the following eight occupations:

> Shop Labourer 1.5
> Shop Labourer II
> Shop Labouer III
> Assistant Administrator
> Office Assistant
> Community Development & Recreation Co-ordinator
> Caretaker
> Caretaker

[7] On March 14, 2024, the Board officer sent the List to CUPE requesting the Union inform the Board if they believed there were discrepancies with the provided information.

[8] On March 14, 2024, the Board officer received an email from CUPE confirming the accuracy of the list with the exception of Wendell Ebbert.

[9] On March 15, 2024, the Board officer sent an email to the Town requesting the mailing address, occupation and hire date of Wendell Ebbert.

[10] On March 18, 2024, the Board officer received an e-mail from Seiferling Law advising that Seiferling Law had been retained by the Town of Preeceville. The email stated the following:

> *The one matter that I understand is outstanding is a request from the Board for the contact information, and hire date, for Wendell Ebbert. I can confirm that Mr. Ebbert is not an employee of the Town of Preeceville. He does have a contract to perform services, but is an independent contractor, and not an employee, of the Town. Since he is not an employee, he is not included on the employee list.*

[11] On March 18, 2024, the Board Registrar sent an email to Seiferling Law (and others) stating:

> *Thank you for your notification that you have been retained by the Town of Preeceville.*
>
> *Despite the Employer's position that Mr. Ebbert is not an employee, the Board has not determined if that is the case and, should an application proceed to vote, the Board seeks to cast the most inclusive net with any ineligible voters to be removed from the vote prior to tabulation.*
>
> *As such, I still require the mailing address, occupation and hire date of Wendell Ebbert and am directing the Employer to produce that information for me per s. 26 of The Saskatchewan Employer (Labour Relations Board) Regulations, 2021.*

[12] On March 18, 2024, Seiferling Law replied to the Board Registrar with the name, address and position of Wendell Ebbert. The "position" was stated to be "Independent Contractor", and the "Start Date" was described as "n/a – not an employee".

[13] On March 19, 2024, the Board directed an Order for a vote of the employees of the Town in accordance with s. 6-12 of the Act.

[14] On March 19, 2024, the Town filed an Objection to Conduct of Vote (LRB File No. 065-24) with respect to Wendell Ebbert being included as an employee of the Town.

[15] The Union filed a Reply on April 3, 2024. In it, the Union says that Wendell Ebbert is not an independent contractor and that given the nature of his work and services, he is an employee of the Town. The Reply is in the form of an Affidavit. It was sworn by Aimee Nadon, the organizer for CUPE, and sets forth the following:

> *(a) To the best of the Union's knowledge, the arrangement involving Mr. Wendell Ebbert's work, and services provided to the Town of Preeceville includes, but is not limited to the following:*
>
> - *The instruments, tools equipment, appliances and supply of materials used by Mr. Ebbert in relation to his role as an Arena Caretaker are supplied by the Town of Preeceville;*
> - *Mr. Ebbert owns and operates a separate contracting business, however, the duties he fulfills in his role as an Arena Caretaker are exclusively done for the benefit of the Town of Preeceville;*
> - *Mr. Ebbert Is paid bi-weekly by cheque;*
> - *Mr. Ebbert does not set his own hours nor does he have the freedom to reject his job duties nor opportunities. He is expected to open, close and maintain the Arena at regular hours as set by the Town of Preeceville;*
> - *Mr. Ebbert does not control the manner and the means of performing the work. Job expectations are set out by the Arena Board and Town Council;*
> - *For jobs at the Arena requiring additional support, such as heavy lifting or ice installation, Mr. Wendell relies on the Town Foreman or Shop Labourers for assistance;*

[16] On March 21, 2024, Seiferling Law sent an email to the Board Registrar stating that Preeceville has a number of volunteers, or employees, who are not included in the original List, but would properly be considered part of the CUPE application. This email included the following:

Position	***Number of Employees***	***Comments***
Volunteer Fire Chief	*1*	*Volunteer Position*
Volunteer Firefighter	*15*	*Volunteer Position*
EMO Co-ordinator	*1*	*Volunteer Position1*
Town Foreperson	*1*	*Currently Vacant* *Preeceville considers this a management position, and is currently seeking to fill it*
Seasonal Labourer (PT)	*1*	*May – Sept – Seasonal* *Currently vacant – seasonal*
Summer Students	*2*	*School Summer Break* *Currently vacant – school year*

[17] On April 3, 2024, the Town filed a Reply to the Union's Application for Certification. The Reply is a prescribed form in the form of a sworn affidavit. The Reply filed by the Town was sworn by the CAO, Lorelei Karcha on March 26, 2024. In Paragraph 5(b) of the Reply, Ms. Karcha says:

> *The Town employs a number of employees follows:*
> *a. Six full-time employees*
> *b. Two part-time employees*
> *c. One Chief Administrative Officer (or CAO), who is designated Administrator for the Town*
> *d. One volunteer Fire Chief*
> *e. 15 volunteer firefighters*
> *f. One Town Foreperson (currently vacant)*
> *g. One volunteer EMO Coordinator*
> *h. One seasonal labourer (May-September)*
> *i. Two summer students (generally May or July-August)*

[18] On April 9, 2024, the Town filed an Objection to conduct of Vote or Counting of Ballots (LRB File No. 076-24). It is in the form of an affidavit sworn by Lorelei Karcha on March 26, 2024. It sets out the reasons for the objection as follows:

> *1. The EMO Coordinator is a volunteer position with the Town which was not accounted for in the Union's application.*
>
> *2. The Fire Chief is a volunteer position which is not accounted for in the Union's application.*
>
> *3. There are 15 volunteer firefighters with the Town which are not accounted for in the Union's application.*
>
> *4. There are three seasonal workers, which is a significant number for a small workplace such as the Town, and the seasonal workers should have a say in the representational question, based on the build-up principle.*
>
> *5. Based on the positions above, the Union did not have the support required by section 6-9 of the Saskatchewan Employment Act to make the application.*

The Evidence at the Hearing:

[19] The Union called Tacey Goodsman, Recreation Director with the Town, Aimee Nadon, CUPE organizer, and Tammy Deskolchuk, Assistant Administrator with the Town.

[20] The Employer called one witness, Lorelei Karcha, the Chief Administrative Officer for the Town of Preeceville.

[21] Ms. Nadon is the CUPE organizer in Saskatchewan. She became involved with the employees from the Town in January 2024 when one of the Town employees contacted Ms. Nadon's colleague in Yorkton.

[22] She testified that the biggest reason the Town employees reached out to CUPE was because the town foreman had been fired without cause and job security was a concern to the Town employees.

[23] Ms. Nadon testified that CUPE represents a number of municipal organizations. She believed that the Town employees and CUPE were a good fit and she filed an application for certification of an "all employee unit" on behalf of CUPE.

[24] Ms. Nadon testified that the only exclusion identified in the proposed bargaining unit was the CAO role. She testified that it is not CUPE's practice to list as an exclusion anyone who is not an employee. Therefore, she made the decision not to include Town Council and volunteers as exclusions.

[25] Ms. Nadon testified that the volunteers were not invited to the information session because they are not employees.

[26] **Tacey Goodsman** testified on behalf of the Union. She is employed by the Town as the Recreation Direction and has been in that role since September, 2022. She reports to the CAO.

[27] She said the number of Town employees ranges between 9 and a high of 13 when the seasonal employee and summer students are hired.

[28] In March 2024, the date of the Application, she said that the following positions were vacant: 3 summer students, 1 seasonal shop labourer, the town foreman and the arena operator.

[29] She said the 3 summer students are hired for July and August. Two of the students work in the office. Their main role is working with the summer program for children, although they do a bit of cleaning bathrooms. The third summer student works in the shop and does weed whipping, and whatever they are able to do with their skill set. The seasonal shop labourer works from May to September.

[30] Ms. Goodsman testified that she works in the town administration office along with the Office Assistant, the Administrative Assistant and the CAO. During the summer months, the two rec summer students also work in the office. Because she works in the office, and sees what the other employees do, she testified that she is familiar with their day-to-day work.

[31] She described the work of the Administrative Assistant as doing payroll and answering the phones if the Office Assistant is out. She would also do "a little bit more tasks that would be delegated to her by the CAO".

[32] Ms. Goodsman described the Office Assistant role as answering phones, attending to people coming into the office to pay taxes or water bills and handling their payments. She also handled the water billing.

[33] Ms. Goodsman also testified that the Town employees worked in close proximity to one another.

[34] With respect to the arena operator, Wendell Ebbert, Ms. Goodsman testified that she was familiar with the work he does. She said a lot of his work is done independently; that he floats the ice, cleans bathrooms without anybody saying this is when you need to do it.

[35] A copy of a "Service Contract Agreement" between the Town of Preeceville and Wendell Ebbert dated October 1, 2023, was entered into evidence by the Union. The term of the Agreement was from October 1, 2023, to March 31, 2024 (the "Agreement"). In the Agreement Mr. Ebbert agrees to provide certain Services to the Town as Arena Operator.

[36] Ms. Goodsman was referred to the following portion of the Agreement:

> *ARENA MANAGER – MAINTENANCE OPERATION DUTIES:*
> - *Make and maintain the artificial ice at the arena in accordance with all policies and procedures set by the Preeceville Arena Board.*
> - *Operate and maintain all equipment at the Arena.*
> - *Perform all caretaking procedures at the Arena.*
> - *Perform building maintenance & repairs at the Arena.*
> - *Order and control supplies & inventory within budgetary limits.*
> - *Keep and maintain records, logs, schedule, etc. as required.*
> - *Coordinate/monitor ice usage and invoice and collect payments for ice usage as directed.*
> - *Must be present and available during all Arena Operating hours.*
> - *Must perform all work within safety guidelines established by the Town of Preeceville, the Preeceville Arena Board and Occupational Health and Safety.*
> - *Attend meetings of the Preeceville Arena Board when requested.*
> - *Perform such other related functions and duties as may be authorized or required by the Town Recreation Director or Preeceville Arena Board.*

[37] Regarding the reference to the "Arena Board" in the first bullet, Ms. Goodsman testified that it covers the day-to-day decisions on the arena. She said it is a board made up of four user

groups: Preeceville Figure Skating Club, Preeceville Minor Hockey, Preeceville Senior Pats and private renters who book the arena, for example, for birthday parties, or the school.

[38] Ms. Goodsman testified that she would check-in with Mr. Ebbert at the arena to talk to him about issues and to know what was happening in his job. She said her role was to report back to the CAO and the Arena Board and act as liaison between Mr. Ebbert and the CAO and Arena Board.

[39] She said the Preeceville Figure Skating Club, Preeceville Minor Hockey, and Preeceville Senior Pats all have regularly booked practice times during the season.

[40] She said the hours at the arena vary but most of the time the arena is open from about 3:30 p.m. to 10:00 p.m. Tournaments and games are held on weekends, once the season gets going.

[41] Ms. Goodsman also gave testimony regarding Appendix "B" of the Agreement.

[42] Appendix "B" of the Agreement set out duties under four headings:

- *Ice Caretaking and Maintenance*
- *Clean and Maintain areas in the skating ice arena and all the equipment contained therein*
- *Building Caretaking and Maintenance*
- *Other Duties*

[43] Under "*Ice Caretaking and Maintenance*" the following duties are listed: monitor and record ice surface temperatures and ice depth daily; edge the ice in corners and along dasherboards to correct ice thickness, follow blending patterns with the Zamboni to create a consistent ice surface, perform daily checks on the artificial ice plant, communicate and report any ice plant problems to the refrigeration company who maintains the ice plant, and the Town Recreation Director.

[44] The duties listed under "*Clean and Maintain areas in the skating ice arena and all the equipment contained therein*" and "*Building Caretaking and Maintenance*" relate primarily and extensively to cleaning equipment and cleaning the arena.

[45] Responsibilities under "*Other Duties*" require that Mr. Ebbert be present and available during scheduled skating arena events/programs and for locking and securing the facility. It also requires he communicate with and assist user groups within the facility and to report the ice

schedule programming to the Recreation Director, and “fulfill other related duties that may be assigned by the Arena Board and/or the Recreation Director in consultation with the caretaker.”

[46] Ms. Goodsman testified that in the previous years the Town employed an “assistant caretaker”, but that last year the position was no longer filled. She said it was supposed to be on Mr. Ebbert to find someone to assist him, but that he had trouble filling the position so it was not filled.

[47] Because the assistant caretaker position was not filled by the Town or by Mr. Ebbert, Ms. Goodsman testified that when Mr. Ebbert needed assistance in the arena, he would get one of the Town employees to help him, such as herself, the Town Foreman or the year-round shop Labourers. She said last year when he was unable to secure help “we all went out and helped him paint the ice".

[48] Another example of when Mr. Ebbert relied upon the Town employees involved moving the bleachers. Under the Agreement, Mr. Ebbert is required to “pull bleachers away and wash floors on a weekly basis”. She said when the heavy bleachers in the lobby area needed to be moved to be cleaned under, Mr. Ebbert would get the shop guys to help him once a week sort of thing.

[49] She was asked to approximate how many times in the last year Mr. Ebbert accessed help from herself or other Town employees. She approximated that in the last season (2023-24) Mr. Ebbert may have been unavailable to open or close the arena 5 or 6 times. She said it would fall to her or the Town Foreman or one of the shop Labourers to do it.

[50] As far as help with, for example, moving heavy bleachers, he would get the shop guys to help him once a week sort of thing. She said it was kind of hard to quantify but she agreed that it would be fair to say town employees provided assistance to Mr. Ebbert 20 times last year.

[51] She testified that this was the only job held by Mr. Ebbert in the winter. She said in the summer he did work seasonally for a provincial park and he does have a contracting business. She did not know if he was working for the park anymore but that he works as a general contractor in the summer building houses or putting in linoleum.

[52] Tammy Descalchuk testified on behalf of the Union. She is the Administrative Assistant (also referred to as the Assistant Administrator). She has occupied the role since May 2023.

[53] A copy of the Job Description for the Administrative Assistant was tendered into evidence. The Job Description lists the "Major Duties and Responsibilities" under various headings.

[54] Under the heading "Interpret and Apply Legislations", the listed duties largely consist of interpreting and applying various statutes and regulations.

[55] Under the heading "Supervision" it says the incumbent:

- *shall be under the direction of and responsible to the Chief Administrative Officer.*
- *shall be the direct supervisor of Designated Students*

[56] The duties listed under the heading "Keep Accounting Records" are as follows:

- *Issue receipts, do banking, maintain and balance Utility Roll, etc.*
- *Maintain accounts receivable and accounts payable*
- *Issue cheque enter date into book of original entry*
- *Maintain payroll records*

[57] The duties listed under the heading "Administrative" are as follows:

- *Explain individual's assessment and taxes*
- *Operate standard office equipment*
- *Maintain a filing system and records retention*
- *Liaise with other governmental jurisdictions*
- *Determine availability of grants*
- *Prepare budget relevant to areas of responsibility*
- *Assume duties of the Office Assistant in her absence*
- *Assume duties of the Administrator in her absence*
- *Deal with public*
- *Neat Personal Appearance*
- *Display a friendly and co-operative attitude*
- *Update Town website with bylaws, council minutes and public notices as necessary*

[58] The duties listed under the heading "Council" are as follows:

- *Prepare any literature, or reports as council sees fit to assign this position*
- *Attend any meetings that council assigns to this position*
- *Perform such other related functions and duties as may be authorized or required by the Chief Administrative Officer or by Council through the Chief Administrative Officer*

[59] The duties listed under the heading "Human Resource Management" are as follows:

- *Draft job descriptions*
- *Advertise jobs*
- *Participate in hiring and termination processes*
- *Supervise and direct employees – Work assigned is priority unless otherwise stated*

- *Train employees*
- *Ensure proper conduct, motivation and effectiveness of employees*
- *Evaluate employee performance*
- *Administer employee benefit plans*
- *Process workers compensation reports*
- *Prepare employee record of employment certificates and termination letters*

[60] Ms. Descalchuk testified in examination in chief that the majority of her duties consist of payroll, council payments and month end payments. She estimated this occupied about 80% to 85% of her time.

[61] She testified that she oversees the Office Assistant and that she helps her with water billing, answering telephones, and anything else that the CAO has her do.

[62] Also, if the CAO is away, Ms. Descalchuk testified that she will check the CAO's emails "just for payments, hospital closures, stuff like that". If there was an emergency situation while the CAO was away, she would text or call the CAO or Council. She would not make a decision on her own.

[63] Ms. Descalchuk testified that no one reports to her. When asked about the "designated students" listed in the Job Description, she said she assumed this referred to summer students, but that no one reported to her.

[64] She testified that she does not do any hiring or firing. She was involved in the interview process for the office assistant which involved her sitting in on all but one of the eight interviews. She said at the interviews she asked a couple of questions which had been provided to her.

[65] As to the actual hiring, she testified that she did not make any decision as to who would be hired. She was "consulted" and went through the "pros and cons" with the CAO of those she interviewed, i.e. what she thought about the interviews, but that she did not have a final say in who was hired.

[66] She agreed in cross examination that she does oversee the work of the office assistant and that she works more with that role than the CAO. She said that the office assistant reports to the CAO and any issues that do arise go to the CAO.

[67] Ms. Descalchuk also testified regarding the duties of the Office Assistant. She said that she oversees some of the Office Assistant's work and gives her duties.

[68] She testified that she had performed the office assistant role for about ten years before getting the job of Assistant Administrator. She described it as a "clerical role".

[69] With respect to evaluating employee performance, Ms. Descalchuk testified that she did sit in on the office assistant's six-month probation review because she was performing her old job and the CAO wanted input on how she thought the new hire was doing.

[70] She has never done any performance evaluation on any other town employees.

[71] She testified that she did not participate in the interview for the Town Foreman and that she was not involved in the hiring process for the Town Foreman position.

[72] Lorelei Karcha testified on behalf of the Town. She is the Chief Administrative Officer. She has worked for the Town for 21 years. She has been in the CAO role for about 15 years. Prior to that, she worked as the Office Assistant and Assistant Administrator.

[73] She testified that the Town is operated by 7 elected officials, consisting of the Mayor and 6 councilors. Their duties as well as her own are set out in *The Municipalities Act*. She said the Mayor and Council are the policy decision makers who then direct the day-to-day duties to her. She reports directly to Council.

[74] Ms. Karcha testified that as CAO she is responsible for the functions and powers assigned by legislation or directed by council through bylaw, resolution, or policy. She said this can include anything from financial management, operational management, human resources, public relations, and public safety. "Pretty much everything that goes along with running a town."

[75] When asked if she did this "all by herself" her reply was "No, there is other staff". She was then asked to talk about that and what positions the Town has. Her response is summarized as follows:

- *Currently we have 3 office staff:*
  - *Assistant Administrator,*
  - *Office Assistant, and*
  - *Community Development and Recreation Coordinator.*

- *In the shop we have 4 positions:*
  - *Town Foreman*
  - *Labourer I*
  - *Labourer 1.5*
  - *Seasonal Labourer*

- *Two shop positions are currently vacant:*
  - *Shop labourer 2; and*
  - *Shop labourer 3*

- *And then we have 3 summer students which work from July and August*

- *And we have 2 caretakers for the Town which take care of janitorial services in 4 or 5 buildings.*

[76] She agreed that this was a total of 14 positions.

[77] She testified that the Office Assistant, the Administrative Assistant, the Community Development and Recreation Officer, and the Town Foreman all report to her.

[78] Reporting to the Town Foreman is the four shop labourers, the seasonal labourer and one summer student.

[79] The Town Foreman did not testify. A copy of the Job Description for the Town Foreman was tendered as evidence by the Town. It states the hours of work as "Full Time – 80 hours per two-week period". Under the "General Statement of Duties" it says: "The incumbent shall be responsible for carrying out instructions within the Public Works, Transportation, and Environmental Departments". The Job Description included a number of headings.

[80] Under "Human Resource Management" the Job Description states:

- *Supervise and direct employees and contractors involved in providing services*
- *Ensure proper conduct, motivation and effectiveness of all assigned personnel*
- *Prepare daily work schedules consistent with efficient and effective planning principles*
- *Assess and report on the capabilities, qualities and performance of staff and make recommendations accordingly*
- *Recommend training courses and conferences for staff*
- *Participate in hiring process for subordinate staff*
- *Train subordinate staff*
- *Report to Chief Administrative Officer any employee issues and/or concerns.*

[81] The heading "Financial Administration" describes ordering inventory, completing time sheets for staff, scheduling staff, ensuring adherence with Council's decisions, policies and bylaws, keeping records of events such as sewer back-ups, water shut offs, properties staked out. The final item in the list states: "Report to the Administrator and consult on a day-to-day basis and as necessary with the Administrator".

[82] The heading "Public Relations/Communications" describes communicating Town policies and procedures in a competent and prudent manner; being easily available to staff, cooperate

with department heads regarding provision of equipment and staff; and attend council meetings once per month or when requested and be able to knowledgeably advise council.

[83] The heading “Operational Supervision” describes duties regarding the inspection of all projects, works and operations to ensure conformity and compliance with specifications and the Occupational Health and Safety Standards; maintenance of equipment, understanding of Town maps, and being actively involved in the manual work of the Town.

[84] The heading “Utilities Supervision” describes duties regarding water quality and sewer works systems.

[85] The heading “Miscellaneous” lists some operational functions. It also states that the incumbent “shall be required to work shift work as scheduled and overtime as required. It also includes in the list of duties: “Member of the Volunteer Preeceville Fire Department”.

[86] Ms. Karcha testified that the town Foreman has participated in hiring for the shop positions. He was part of the interview process. She testified that there is a Council Human Resources Committee (“HR Committee”) consisting of three appointed councillors. She testified that depending on whether the position they are working with was for the office or the shop, the HR Committee would request herself or the Town Foreman.

[87] She testified that if there was ever trouble with one of the staff that reports to the Town Foreman that the Town Foreman would bring that issue to her and then she would take it to Council to see how they wanted to address it.

[88] When asked if any employee discipline was to be implemented whether that would potentially be done by the Foreman, Ms. Karcha responded as follows:

> *Ummm…(pause)…I guess it depending on what council’s instruction was, ummm, if it was something ummm like council could request him to monitor something that somebody is doing, or something, he would do that because he’s overseeing those positions.*

[89] In cross examination, Ms. Karcha agreed that the Town Foreman does not have final say in terms of who is hired and not hired.

[90] She agreed that Town Council is responsible for the hiring, suspension and dismissal of all municipal employees as provided in the Town Administrative Bylaw No. 1-2024.

[91] She agreed that the Town Foreman does not make the decision regarding discipline of any of the shop workers.

[92] She further testified that if a conflict arose between a shop labourer and the Foreman relating to scheduling or the assignment of duties, that that issue would be brought to her. Also, the Foreman would not have the final say on how a dispute between the Foreman and a shop labourer would be resolved. She agreed it would be taken up the ladder. She said that if she was not able to resolve it then she would take it to Council, and they would have final say.

[93] With respect to interviewing for jobs, she agreed that both the Town Foreman and the Administrative Assistant have participated in the interview process and that she and Council do ask them for input and recommendations, but there is nothing binding Council to accept those recommendations.

[94] A copy of the job description for the Administrative Assistant (also known as Assistant Administrator) was tendered in evidence.

[95] Ms. Karcha's testimony regarding the position of Assistant Administrator was as follows:

- *That the Assistant Administrator has participated in a recent interview process to hire an office assistant;*
- *That during that process, she participated in seven of the eight interviews that took place. She did not participate in one interview because of a conflict of interest.*
- *That the Assistant Administrator prepared the hiring letters for the summer students on her instructions;*
- *The Assistant Administrator does oversee what the Office Assistant does on a daily basis and she participated in the six month probation evaluation of the Office.*

[96] A copy of the job description for the Office Assistant was tendered in evidence. Ms. Karcha's testimony regarding the position of Office Assistant was as follows:

- *that the position was generally to support herself as CAO and the Assistant Administrator. The Office Assistant has designated responsibilities plus whatever we give her to do.*
- *that the Office Assistant would have access to some of the same information as she has as CAO. She said that the Office Assistant would have access to her email if she and the Assistant Administrator were away.*
- *With respect to "some financial work" she testified that the Office Assistant handles all the accounts receivable, so money coming in, any payments to be processed, deposits, banking, invoicing;*

- *When asked about receivables and bank deposits, she said that the Office Assistant, the Assistant Administrator and herself as CAO can deposit money into the bank.*

- *She said the Office Assistant would not have direct access to the Town bank account. She said she would provide her statements to look at for whatever she would need to look for deposits and stuff like that.*

- *She said the Office Assistant also handles water billing. She said for the utility roll, they send out bills every 3 months for water and sewer to the residents. This responsibility forms a large part of her job and take a lot of time*

- *The Office Assistant is responsible for generating the billing, sending out the bills, collecting payment.*

- *She agreed that the Office Assistant would have access to information on rate payers in the town, that she would be able to search and find anyone in town, that she would be able to track whether they pay their bills or not. She agreed that the Office Assistant "has some general access to the financial information". When asked how often, she said every 3 months and then within that period there is the follow up with sending out reminders. When asked if this forms a large part of her job, she said "yes, it takes a lot of time".*

[97] Regarding Town volunteers, Ms. Karcha testified that they have a total of 17 volunteers consisting of the following:

- *The Fire Chief who is paid a $1500.00 yearly indemnity to take care of the fire department plus a $25.00 flat rate per call;*

- *15 firefighters who are paid a $25.00 flat rate per call; and*
- *The Emergency Measures Organization Co-ordinator (the "EMO Coordinator") who is paid an annual indemnity of $600.00.*

[98] In cross examination, Ms. Karcha provided the following testimony regarding the volunteer firefighters:

Q. If there is a fire in Preeceville they would be called?

A. Yes, in town.

Q. Responding to car accidents?

A. Yes

Q. Anything else?

A. I guess if there was another type of emergency when they got a 911 page.

Q. When an emergency call comes in, do all 15 firefighters show up?

A. No.

Q. So how does that work?

A. They have the choice to respond whether they are available or not.

Q. Do they get paged through an app?

A. We are set up through a 911 dispatch and they dispatch it to the chief and all members and each member has to respond whether they are available or not.

Q. So if a volunteer firefighter doesn't want to show up, they don't have to?

A. No, That's why it's a volunteer (chuckles)

[99] She agreed in cross examination that the volunteer firefighters do not work set hours and they do not have to show up for training.

[100] With respect to the Arena Operator, Ms. Karcha testified in examination in chief that this is the third contract the Town and Mr. Ebbert have entered into.

[101] The contract (referred to herein as the "Agreement") was referred to by three of the witnesses. Much testimony at the hearing focused on the Agreement. Mr. Ebbert did not testify.

[102] As noted, the Agreement outlines the Services Mr. Ebbert is required to provide in an Appendix (A). The Arena Operator Job Description and Arena Maintenance/Caretaking Procedures are outlined in an Appendix (B) to the Agreement.

[103] In the Agreement the Town agrees to pay Mr. Ebbert a designated sum of money on a biweekly basis plus GST. The Town also agrees to maintain Workers Compensation Coverage on behalf of Mr. Ebbert.

[104] Paragraph 7 of the Agreement was also referred to in evidence. It provides:

7. The Service Provider (Ebbert) shall be responsible for employing additional help to assist in fulfilling the Service requirements outlined in this Agreement. The Service Provider shall be responsible to schedule hours, train and supervise this employed (sic) help in relation to this service agreement.

[105] Ms. Karcha testified that when the Town first had a contract with Mr. Ebbert, the Town provided an assistant arena operator to assist him. The assistant operator was a Town employee. (Ms. Goodsman referred to this position as "assistant caretaker".)

[106] Last year the contract was changed to allow Mr. Ebbert to hire whoever he wanted to fulfil the terms of the agreement. Ms. Karcha testified that both the Town and Mr. Ebbert wanted the change.

[107] She agreed that Mr. Ebbert would have the ability to hire, fire, and discipline whomever he wants working for him.

[108] She testified that the Town did offer Mr. Ebbert a full-time year-round position. She said the Town tried to fill the position in numerous ways. Mr. Ebbert chose the option of being the arena operator for the winter.

[109] She agreed he operates the ice plant and is responsible for monitoring and recording surface ice temperature. The Town does not tell him how to do that.

[110] She said the Town does supply some of the equipment, like the Zamboni.

[111] In cross examination it was suggested to Ms. Karcha that while the agreement allows Mr. Ebbert to hire an assistant, no one was in fact hired by him. Ms. Karcha's response was that the only one she knew about was someone hired to come in for a couple of days.

[112] When asked how she learned that Mr. Ebbert had hired someone, she said that in one of their discussions, either before or after a tournament, she either asked Mr. Ebbert if he had help or he had just told her that he hired Greg to come assist him. She was not sure which way it came up.

[113] She agreed that Mr. Ebbert has relied upon the assistance of shop Labourers and that he also sought and received help from the Rec Director. She said for installing the ice there was a day or two the shop and rec director came to assist.

[114] She testified that the arena is open to the public as set out in the schedule and that the Town asks Mr. Ebbert to be there while it is open.

[115] She agreed that the Town supplied all of the equipment and tools that Mr. Ebbert uses to do his job, not just the Zamboni.

The Issues

[116] The Employer submits there are three issues to be decided:

a) Whether the CUPE Application was premature and should be dismissed based on the build-up principle;

b) Whether the CUPE Application was deficient in that the Application failed to meet the 45% threshold requirement set out in section 6-9 of the Act, for determining whether a vote should be ordered.

    i. This includes a determination of whether the "volunteer" workers, namely: the Fire Chief, the Firefighters, and the Emergency Measures Organization ("EMO") Coordinator are employees

c) In the alternative, if the Application is not dismissed under (a) or (b), then whether the appropriate bargaining unit must be one with a number of exclusions, which are not contained in the Union's Application. These are:

    i. Town Foreman
    ii. Assistant Administrator, and
    iii. Office Assistant

d) Whether the Arena Operator is an independent contractor or alternately, a manager.

Statutory Provisions:

[117] The following provisions of *The Saskatchewan Employment Act* 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;

…

Acquisition of bargaining rights

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

(2) When applying pursuant to subsection (1), a union shall:

(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and

(b) file with the board evidence of each employee's support that meets the prescribed requirements.

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.

…

Representation vote

6-12(1) *Before issuing a certification order on an application made in accordance with section 6-9 or amending an existing certification order on an application made in accordance with section 6-10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.*

(2) Notwithstanding that a union has not established the level of support required by subsection 6-9(2) or 6-10(2), the board shall make an order directing a vote to be taken to determine whether a certification order should be issued or amended if:

(a) the board finds that the employer or a person acting on behalf of the employer has committed an unfair labour practice or has otherwise contravened this Part;

(b) there is insufficient evidence before the board to establish that 45% or more of the employees in the proposed bargaining unit support the application; and

> *(c) the board finds that sufficient evidence of support mentioned in clause (b) would have been obtained but for the unfair labour practice or contravention of this Part.*
>
> *(3) Notwithstanding subsection (1), the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same 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; …*
> …

Discussion and Analysis:

[118] The Union bears the onus, on a balance of probabilities, to satisfy the Board that the proposed unit of "all employees" excluding the Town Administrator (also referred to as the Chief Administrator Officer) is an appropriate bargaining unit. Towards satisfying this onus, the Union must present evidence that is sufficiently clear, convincing and cogent. If the Board is satisfied that this onus is met, where an employer challenges the composition of a union's proposed unit, the onus then shifts to the employer to present evidence that is sufficient clear, convincing and cogent support its argument in favour of the exclusion of certain roles: *Canadian Union of Public Employees v Phoenix Residential Society,* 2023 CanLII 72599 (SK LRB.)

a) Whether the Application was premature and should be dismissed based on the build-up principle;

[119] The Town argues that at the time of the Application, 6 of the 14 positions were vacant. It argues that the Application was premature and should be dismissed on the basis of the build-up principle.

[120] As referred to in paragraph 76, Ms. Karcha testified that the Town currently has a total of 14 positions.[1]

[121] At the time of the Application, the following 6 positions were vacant: Shop Foreman, Labourer, 3 summer students and 1 seasonal labourer.

[122] Before addressing the Town's argument regarding the build-up principle, the Board finds the question of voter eligibility relevant.

[123] The Union says it is trite law that a position which is vacant at the time the Application is filed cannot have a say in this matter.

[124] The evidence is clear that the 6 vacant positions were positions that existed within the Town at the time of the Application but happened to be vacant.

[125] The Town Foreman position was vacant because of a recent termination.

[126] The fact that the vacant Labourer position was filled by the time the hearing commenced and another Labourer vacancy arose during that time, suggests that the Labourer position vacancy at the time of the Application was merely common employee turnover.

[127] The 3 vacant summer student positions and 1 seasonal Labourer position are recurring seasonal employees who only work a fraction of the year.

[128] No one in these 6 positions was able to vote because no one occupied these positions at the relevant date. In other words, there was no eligible voter in any of the 6 positions. This is not a case appropriately viewed through the lens of the build-up principle.

[129] The test for voter eligibility and the rationale for the test is well settled. As set out by the Board in *Platinum Track Services Inc. v Construction and General Workers' Union,* 2020 CanLII 19807 (SK LRB).

> *[32] Before issuing a certification order in accordance with section 6-9, the Board shall direct a vote of all employees eligible to vote. The Board has developed its own criteria for determining voter eligibility, namely, that an individual must be an employee both on the*

[1] However, as referred to in paragraph 6, the evidence shows that on March 14, 2024, Ms. Karcha provided the Board with the List of Employees as of March 11, 2024 which indicated that there were 8 employees, not including Mr. Ebbert. As referred to in paragraph 17, Ms. Karcha's affidavit sworn March 26, 2024 says the Town employed 12 employees as well as the 17 volunteer positions and her position.

> *date of the Certification Application and on the date of the vote. These two prerequisites are designed to encourage voting on behalf of those with a continuing interest in the representational question and a sense of ownership over the outcome of the vote. In this system, there is a degree of confidence that the results of the vote legitimize the union's representative status, solidify the relationship between the union and employer, and promote a constructive climate for collective bargaining negotiations. It is this panel's view that any departure from these criteria should be motivated by similar principles.*
>
> *[33] In Con-Force Structures Ltd. (Re), [1992] SLRBD No 40 ["Con-Force"], the Board had to consider whether to depart from the usual rule, and to take into account the existing recall rights, based in the collective bargaining agreement, of laid-off employees. In so considering, then Vice-Chairperson Hobbs outlined the principles that underlie the voter eligibility criteria, at 3 to 4:*
>
> > *The Board accepts that the rules it has developed achieve neither perfect predictability nor perfect democracy. They are necessarily, at best, a reasonable compromise intended to give effect to s. 3 [of The Trade Union Act, now subsections 6-4 and 6-13(2)(a) of the Act] by ensuring that the representation question is left in the hands of the people who have a legitimate interest in the issue while, at the same time, providing the direction these people require to convert s. 3 rights into a practical reality. These rules are not entirely inflexible, but there is a substantial onus upon any party who seeks to have the Board depart from them.*
> >
> > *In Saskatchewan, the general standard for determining voter eligibility when a representation vote is ordered, is that a person must be an employee on the date that the application is filed and on the date of the vote. In the construction industry, this rule is applied strictly and literally, in recognition of the transitory relationship between employers and employees in that industry. Outside the construction industry, there has been some softening of this rule. Some of the more common situations where the Board might make an exception to this rule are where an employee is on Workers' Compensation, maternity leave, sick leave, education leave, or on temporary lay-off. It is a factual question in each of these cases whether an employee's circumstances are such as to justify his participation…*

[130] This Board has noted that the test "is an imperfect test". Nevertheless "it remains as the best means for this Board to promote the twin goals of democracy and predictability: (*Atco Structures & Logistics Ltd. v Unit Here, Local 47,* 2014, CanLII 76053. At paragraph 48, the Board stated:

> *[49] For the benefit of the labour relations community, there must be a "bright line" test for eligibility to vote. If the Board vacillates or does not specify the rule, the result is both uncertainty and the necessity to litigate every different factual situation which may arise. That does not promote either predictability or judicial economy.*

[131] For the purposes of the "bright line" test, the Board interprets the "date of the vote" for mail-in ballots as the day that the ballots are mailed by the Board: *International Association of Heat and Frost Insulators and Allied Workers, Local 119 v Norther Industrial Contracting Inc.*, 2014 CanLII 63991 (SK LRB) at para 22; upheld on judicial review 2015 SKQB 204.

[132] The Board finds that based on the well established “bright line” test, there was no eligible voter in any of the 6 positions.

[133] The Town did not address the eligibility issue in its argument. Rather, it relies upon the build-up principle. The Board finds that the build-up principle does not apply in this case.

[134] The build-up principle allows for the Board to dismiss a certification application when the evidence establishes that within a short time following the date of the certification application, the work force in the proposed bargaining unit will substantially build up in size such that the workforce at the date of the application is insufficiently representative of the workforce.

[135] Both parties cited *United Food and Commercial Workers, Local 1400 v K-Bro Linden Systems Inc.,* 2015 CanLII 43773 (SK LRB) (“K-Bro”) in support of their arguments.

[136] It is noted in K-Bro, in paras 32 and 33 that the Board has rarely used the build-up principle to deny certification applications. In fact, the Board has endorsed the approach taken in Alberta, which limits the application of the build-up principle and uses it only sparingly and in compelling circumstances.

[137] The Board in *K-Bro* described the conflict between establishing a stable bargaining unit versus the right of future employees by referring to the Ontario Labour Relations Board seminal decision in *Emil Frant and Peter Waselovich,* [1957] 57 CLLC 18,057. In that decision, the Ontario Board stated:

> *In cases such as the present, the Board is faced, among other things, with the task of balancing the right, on one hand, of persons presently employed to collective bargaining and the right, on the other hand, of future employees to select a bargaining agent of their own choice. In the case of the first mentioned group, a refusal to certify or direct an immediate vote, as the case may be, tends to deprive them of their right to collective bargaining and, incidentally, their right to strike, for an indefinite period of time. But in the case of the latter group, an immediate certification or direction for a vote prevents them from exercising their right to select their own bargaining agent for a considerable period of time because of the provisions of The Labour Relations Act relating to termination of bargaining rights.*
>
> *Faced with this conflict of interests, the Board has, in the past, in some cases, refused to certify or order an immediate vote—and has directed that a vote be taken at a later date—where, on all the evidence, it appeared to the satisfaction of the Board that the employees did not constitute a substantial and representative segment of the work force to be employed. Of course, in such cases it must be established that there is a real likelihood that the increase in the work force will take place within a reasonable period of time and, if it appears that the build-up depends on factors beyond the control of the employer such as the saleability of products, the presence of sufficient workers, or the availability of materials for say, the purpose of plant expansion, the Board, instead of directing a vote to be held in*

> *the future, may certify or order an immediate vote depending on the membership position of the applicant.*

[138] In *K-Bro* this Board endorsed a decision of the Alberta Board in *Unite Here, Local 47 v SNC Lavalin O & M Logistics Inc*., 2012 CanLII 26870 (AB LRB) [*Unite Here*] where the Alberta Board ruled that the build-up principle should not derail a certification application for prematurity unless the "build-up is so 'dramatic' in terms of numbers or classifications" that it raises legitimate concerns about "the 'essential representative character' of the Union". (See: *Unite Here*, supra, at paragraph 22.)

[139] While the Supreme Court of Canada in *Labour Relations Board of Saskatchewan v The Queen et al,* [1969] SCR 898, CanLII 104 (SCC) confirmed this Board's jurisdiction to apply the "build up principle", this Board's jurisprudence clearly indicates that it is to be used sparingly and only in compelling circumstances.

[140] Also, for purposes of determining whether or not the build-up principle is engaged there should be evidence demonstrating at the time a certification application is filed what the build-up in the workforce is likely to be. See: *Construction Workers Union, Local 151 v Saskatchewan Labour Relations Board and Technical Workforce Inc.* (2017), 3 CLRBR (3d) 76 (SKQB), at paragraphs 83-83.

[141] The Employer argues the build-up in the workforce would consist of the six positions which were vacant at the time of the Union's Application: Town Foreman, Labourer, Seasonal Labourer I, and three summer students.

[142] The Employer submits that at the time of the application, 6 of the 14 positions were vacant. It argues that absent votes from almost 50% of the workers, it is impossible to gauge the wishes of the workers for the entire workforce for the Town. Accordingly, it argues the Union's Application should be dismissed.

[143] The Union argues that applying the build-up principle in this case is wrong given the temporary nature of four of the positions. The Union says the number of employees at the Town will decrease by four almost as quickly as it increased, and "the purported build-up will soon be a build-down."

[144] The Board finds that the compelling circumstances necessary to apply the build-up principle do not exist in this case. In fact, characterizing the circumstances of this case as a "build-up" is inaccurate.

[145] Further, and in any event, the alleged "build-up" is not so dramatic in terms of numbers or classifications that it raises legitimate concerns about "the 'essential representative character' of the Union" (*Unite Here*, supra, at para 22).

[146] As noted, of these 6 vacancies, the 3 summer students are hired for only 2 months out of the year. For the remaining 10 months of the year, those positions are vacant. Similarly, the seasonal labourer is hired only for 4 months of the year and for the remaining 8 months, the position is vacant.

[147] In addition to the four temporary positions, the alleged "build-up" included the Town Foreman and Labourer 1.

[148] The evidence shows that there are a total of four full-time Labourer positions with the Town: Labourer I, Labourer 1.5, Labourer 2 and Labourer 3.

[149] Ms. Karcha testified at the time of the hearing in August 2024, that Labourer 2 and Labourer 3 were vacant. Therefore, the Labourer 1 position that was vacant at the time of the Union's Application was filled prior to the Hearing, but then the Labourer 2 and Labourer 3 positions became vacant. (One of the Labourer positions was a new position which did not exist at the time of the Application.)

[150] The vacancies occurring with the Labourer positions, including the position which was vacant at the time of the Application, appear to be more consistent with challenges many employers face in keeping positions filled. The Town's intention to fill the Labourer position that was vacant at the time of the Application does not constitute a build-up. This sort of turnover is not consistent with the kinds of circumstances giving rise to the need for the application of the build-up principle.

[151] Similarly, the Town Foreman position which was vacant at the time of the Application, was vacant because the Town had terminated the individual in that role. The fact that the Town would be hiring someone in the future to fill this position cannot be characterized as a "build-up". This is, again, a normal workplace fluctuation.

[152] It is because of the fluctuating nature of the workforce in the construction industry that this Board rarely considers the build-up principle. In *Construction Workers Union, Local 151 v Saskatchewan Labour Relations Board and Technical Workforce Inc.,* 2017 SKQB 197 (CanLII), the Court of Queen's Bench referred to *Re: J.V.D. Mill Services Inc.* (2011), 2011 CanLII 2589 (SK LRB), 192 CLRBR (2d) 1 (Sask LRB), at para. 134, the Board said:

> *134 The Saskatchewan Board has only rarely considered the build up principle. In K.A.C.R., the Board made the following comments regarding this principle, referencing in support of the statement International Union of Operating Engineers Local 955 and Devon Sand and Gravel Ltd.:88.89.*
>
> > *It is only rarely that the buildup principle has been applied in the construction industry by any jurisdiction in Canada.* ***... The reason for that is clearly because the fluctuating nature of the work force as opposed to a rapidly expanding but relatively permanent work force in an industrial setting.***
> >
> > **(Emphasis Added)**

[153] This Board also takes notice of the BC Labour Relations Board's policy which holds that in those cases where the work force is low due to the normal fluctuation of an employer's work force, a successful application on the basis of it being premature will be rare: see *Sky-Hi Scaffolding Ltd. v. British Columbia Regional Council of Carpenters,* 2010 CanLII 9817 (BC LRB) at para. 9. This Board concurs with the BC Board in this regard.

[154] As stated, the build-up principle allows for the Board to dismiss a certification application when the evidence establishes that within a short time following the date of the certification application, the work force in the proposed bargaining unit will substantially build up in size such that the workforce at the date of the application is insufficiently representative of the workforce. The Board fails to see how the concern meant to be addressed by the build-up principle arises in the present circumstances.

[155] For the reasons given above, the Board finds that the build-up principle has no application in this case.

[156] The Employer argues that the Union had two options in the present case which it chose not to exercise: It could have waited until there was a full complement of employees to prepare and file an application; or it could have excluded some groups, such as the summer students, based on the short-term and temporary nature of student employment.

[157] The Employer does not address how long the Union should have waited for a "full complement of employees". The three summer students work for only two months in the summer,

July and August. At the time of the Union's application, the positions for Town Foreman and Labourer were vacant. As noted, Ms. Karcha testified that two of the Labourer positions (Labourer 2 and Labourer 3) were vacant at the time of the hearing. If Labourer 2 and Labourer 3 were not filled by the time the 3 students and 1 seasonal worker finished their terms, there would still be 6 vacancies. At what point is it appropriate for the Union to file an application?

[158] The evidence from the Union indicated that the application was made in March 2024 to "strike while the iron was hot". The Board heard evidence about the termination of the former Town Foreperson by the Town's Council and how that incident spurred the remaining employees to look for protection from the Employer, which ultimately led them to contact CUPE and initiate the process.

[159] Time is of the essence in conducting a vote: *Amalgamated Transit Union, Local 615 v Battlefords Transit System*, 2022 CanLII 99434 (SK LRB). It is unreasonable to expect that the Union should have waited for every position to be filled before it applied for bargaining rights.

[160] The Employer argues in the alternative, that "some groups, such as the summer students" should be excluded from the bargaining unit "based on the short-term and temporary nature of the summer student employment."

[161] As noted above, for purposes of determining whether or not the build-up principle is engaged, there should be evidence demonstrating what the build-up in the workforce is likely to be.

[162] The Town argues first and foremost that the build-up in the workforce includes these "short-term and temporary" positions. It says it is crucial that these positions be included in the vote. To be included in the vote, the Town must accept that these employees have a sufficiently substantial employment relationship to be considered an "employee" for the purposes of determining the issue of the level of support for an application for certification.

[163] The Town's alternative position that "some groups, such as the summer students" should be excluded from the bargaining unit "based on the short-term and temporary nature of the summer student employment" is a position that is entirely at odds with the essence of its own argument.

[164] The Union is, however, required to prove that the proposed bargaining unit is an appropriate unit, and the Board must ultimately determine whether the summer students and seasonal worker should be included in the bargaining unit.

[165] It is well established that the Union is required to prove that the proposed bargaining is an appropriate unit, and not the *most* appropriate. In *Canadian Union of Public Employees v Phoenix Residential Society*, 2023 CanLII 72599 (SK LRB), the Board, in finding that an appropriate bargaining unit had been proposed, stated:

> ***[46]*** *The Board has a general preference for larger, broadly-based units in workplaces because they tend to promote administrative efficiency and convenience in bargaining, enhance lateral mobility among employees, facilitate common terms and conditions of employment, eliminate jurisdictional disputes between bargaining units and promote industrial stability.[17] However, the size of a unit is only one factor amongst many that the Board may consider when determining whether it is appropriate. Others include whether the proposed unit of employees will be able to carry on a viable collective bargaining relationship with the employer, the community of interest shared by the employees in the proposed unit, organizational difficulties in particular industries, the promotion of industrial stability, the wishes or agreement of the parties, the organizational structure of the employer and the effect that the proposed unit will have upon the employer's operations, and the historical patterns of organization in the industry.[18]*
>
> ***[47]*** *In considering whether a proposed unit is appropriate, the Board is mindful of s. 6-4 of the Act, which acknowledges employees' rights to engage in collective bargaining through a union of their own choosing. It is also mindful of employees' rights under s. 2(d) of the Charter to engage in meaningful collective bargaining.[19] A proposed unit that will not permit employees to engage in meaningful collective bargaining will not be appropriate.*

[166] First, the exclusion of summer students and the seasonal worker is inconsistent with the preference for broader based bargaining units.

[167] Also, the test in determining whether an appropriate bargaining unit is proposed includes consideration for whether a sufficient community of interest exists amongst the group being proposed. The relevant factors of community of interest include: nature of the work performed; conditions of employment; skills of employees; administration; geographic circumstances; and functional coherence and interdependence: *Canadian Union of Public Employees, Local 1975 v. University of Saskatchewan Students' Union*, [2007] Sask. L.R.B.R. 656, LRB File No. 048-04.

[168] Taking these factors into account, the Board finds that the summer students and seasonal Labourer share a community of interest with the regular full-time Town employees. The evidence shows that the individuals hired in these positions are paid by the Town; they work closely with and under the guidance of the regular full-time Town employees. They work in the same locations as the full-time employees and under the same conditions.

[169] Aside from noting the short-term and temporary nature of their employment, the Town proffered no evidence or argument to support its claim that these positions should be excluded. The Board agrees with the Union's submission that the Employer did not, despite considerable and capable cross examination, elicit any evidence for why the proposed unit was inappropriate, aside from arguing that it failed to represent any of the volunteer positions.

[170] The proposed group of employees of the Town represents 14 employees. The Board finds that collectively, the group of employees proposed constitutes an appropriate bargaining unit. These positions all share a single employer. They all operate within the geographic boundaries of the Town, and even though not all the employees work out of the same physical location, the buildings in which they are employed are all located within close proximity to one another. The employees interact with one another and see each other regularly.

(b) **The Vote should not have been ordered as the Application was deficient for failing to meet the 45% Threshold requirement.**

[171] The Employer argues that the CUPE Application was deficient for failing to meet the 45% threshold required by section 6-9 of the Act and that a vote should not have therefore been ordered.

[172] The Employer argues that the volunteer firefighters are employees who were not included in the proposed bargaining unit. It argues that setting aside the Fire Chief and the EMO Co-ordinator and leaving the number of employees at 9 in the Union's application, there are a total of 24 employees: 9 from the Union's application and 15 firefighters. The Employer says CUPE would need to have cards signed by 11 employees out of the 24 to reach the 45% threshold and this, the employer argues, is mathematically impossible.

[173] The Town argues that no vote should have therefore been ordered, and the Application should be dismissed.

[174] The Town argues that the volunteer firefighters are employees and as employees. must be part of the "all employee" bargaining unit sought by the Union.

[175] The Town argues that there is no specific exclusion for volunteers in the definition of "employee". It says that the firefighters receive pay from the Town when they go out on calls or attend a meeting or training.

[176] The Town argues "[E]mployee" is broadly defined and unless specifically excluded, workers are presumed to be included in an 'all employees' bargaining unit, such as the one proposed by CUPE."

[177] Further, the Town argues that the Union was specifically put on notice that the Town considered the volunteers to be employees, yet the Union did not amend it application to exclude the volunteers.

[178] Whether the Union was put on notice that the Town considered the volunteers to be employees is of no relevance, particularly, if there is not reasonable basis to support the allegation that the volunteers are employees. The Union argues the Town is attempting to include this group "for the simple purpose of inflating the number of 'employees' at the Town of Preeceville. This is a reasonable observation.

[179] For the reasons that follow, the Board finds that the volunteer firefighters are not employees. Further, the evidence shows that they clearly do not share a community of interest with the proposed bargaining unit.

[180] While there is no specific exclusion for volunteers in the definition of "employee", the Board has some familiarity with the usual characteristics of an employer-employee relationship, and the case law which speaks to factors relevant to determining whether one is an employee in the context of labour relations.

[181] The Union's position is simply that volunteers are not employees and therefore were never contemplated as falling within the proposed bargaining unit.

[182] George W. Adams, *Canadian Labour Law*, loose-leaf (3/2023 - Rel 1) 2nd ed (Toronto: Thomson Reuters, 2023) at 6-55 notes: "The purpose of labour relations legislation is to regulate relations between employers and employees." The author states that it is incumbent on a trade union to show that the employees which it seeks to represent are covered by the legislation and are in fact the employees of the company.

[183] In this case, it is the Employer, not the Union, arguing for employee status.

[184] Both parties referred the Board to the *United Cabs*[2] decision which cited the criteria from *York Condominium* and the *Algonquin Tavern* used in determining when an employment relationship exists. While the parties rely upon these cases in relation to the employee/independent contractor issue, the Board finds the cases relevant to assessing whether the volunteer firefighters are employees.

[185] The *York Condominium* criteria is as follows:

> *a. The party exercising direction and control over the employees performing the work.*
> *b. The party bearing the burden of remuneration.*
> *c. The party imposing discipline.*
> *d. The party hiring the employees.*
> *e. The party with the authority to dismiss the employees.*
> *f. The party which is perceived to be the employer by the employees.*
> *g. The existence of an intention to create the relationship of employer and employees.*

[186] Applying these factors to the evidence, the Board finds that volunteer firefighters are not employees within the definition outlined in clause 6-1(1)(h) of the Act.

[187] First, it is apparent that the Town itself does not consider the volunteers to be employees. When asked by the Board clerk to submit a list of all Town employees, the CAO, Ms. Karcha on behalf of the Town, did not include any of the volunteers in her list.

[188] The Reply subsequently filed by the Town included the volunteers as employees, however, that is in clear contradiction to the initial information provided by the Town to the Board officer. Clearly the Town did not consider the volunteers to be employees when it replied to the Board's request for a list of employees. This contradiction was not addressed in evidence at the Hearing.

[189] The Board finds that the Town's initial response to the Board officer is a true reflection of who the Town considered to be employees. The subsequent Reply is more akin to argument and reflects the position advocated by the Town's counsel following his retention.

[190] This is further supported by the oral testimony of Ms. Karcha at the hearing. First, when asked to list the Town employees, she did not include any of the volunteer positions. Secondly,

---

[2] *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local 2014 v United Cabs Limtied Operating As United Cabs and Blue Line Taxi and The United Group,* 2019 CanLII 57383 (SK LRB) ["*United Cabs*"].

during cross examination she testified that the volunteers obviously did not have to respond when they received a call because they were volunteers.

[191] Further, the evidence indicates that the firefighters are not paid a salary or wages. Rather, they are paid an honorarium for attending calls and training. There was no evidence that the Town remitted any of the statutory deductions in terms of CPP or EI. There was no indication that the volunteer firefighters were entitled to vacation from the Town. None of the usual hallmarks of an employee/employer relationship exist.

[192] There is no evidence whatsoever that the volunteer firefighters or the EMO Coordinator were in any way subject to the control of the Town in the execution of their work. On the contrary, the evidence established that the Town had no control over the volunteers in terms of assigning work, managing performance, or scheduling training hours. There is no evidence to suggest that the Town hired, fired, or disciplined the firefighters.

[193] The Union argues that the very founding principles that exist in an employer-employee relationship are entirely absent when it comes to volunteer positions: the trade-off of one's time for expected remuneration, and the dependable expectation for performance that this trade-off creates

[194] The Union's point is demonstrated in *Merritt (City) v M.N.R.*, 1999 CanLII 537 (TCC). While this decision is not binding on the Board, the Board adopts the decision's rationale. The issue in that case was whether a volunteer firefighter for the City of Merritt was engaged in insurable employment. The evidence showed that the volunteer firefighters attended a training session for two hours every week. Attendance was not required.

[195] The court found that the volunteer firefighter was not an employee. It stated:

> *[13]…When a person is employed under a contract of service, that person has some obligation to respond to the needs of the employer. This is part of the "control test" concerning whether the payor (employer) has some control over the worker. On the facts of this case, the Appellant (employer) had no control over the Intervenor (firefighter) as to whether the Intervenor (firefighter) would respond to a particular call. This is an important factor because the only purpose of the Merritt Fire/Rescue Department is to respond to emergencies as they arise: either putting out a fire or rescuing a person in distress or doing both at the same time. Notwithstanding the emergency nature of the Department's purpose, the Intervenor (firefighter) at his own convenience could elect either to respond to a call from the Department or to ignore such a call; and the excise of his election either way would have no effect on his continuing status as a volunteer firefighter….*

[196] The Board also draws guidance from *Canadian Union of Public Employees, Local 3077 v. Lakeland Regional Library Board*, [1987] Oct. Sask. Labour Rep. 74, LRB File No. 116-86 ("*Lakeland")* where the Board considered the test for whether a person nominally identified as a "casual" worker has a sufficiently substantial employment relationship to be considered an "employee" for the purposes of determining the issue of the level of support for an application for certification. The test and the basis for the test is set out as follows

> *It has long been established that larger bargaining units are preferred over smaller ones, and that in an industrial setting all employee units are usually considered ideal. As a general rule the Board has not excluded casual, temporary or part-time employees from the bargaining unit.*
>
> *However, the Board has also applied the principle that before anyone will be considered to be an "employee", that person must have a reasonably tangible employment relationship with the employer. If it were otherwise, regular full-time employees would have their legitimate aspirations with respect to collective bargaining unfairly affected by persons with little real connection to the employer and little, if any, monetary interest in the matter.*

[197] The volunteer firefighters do not have a reasonably tangible employment relationship with the employer. As set out in the reasoning from *Lakeland,* the Board finds that it would be unfair to have the aspirations with respect to collective bargaining of the regular full-time employees affected by persons (i.e. the volunteer firefighters) with little real connection to the employer and little, if any, monetary interest in the matter.

[198] Based on the foregoing reasons, the Board finds that the volunteer firefighters are not employees.

[199] Therefore, the Employer's argument that it is impossible to meet the 45% threshold is moot.

[200] However, the question regarding whether the 45% threshold is to be revisited at a full hearing has been addressed by this Board and the Court of Appeal in *United Food and Commercial Workers, Local 1400 v Affinity Credit Union*, 2015 SKCA 14 (CanLII) ("*Affinity Credit Union*"). The Court accepted the Board's interpretation that the 45% threshold was not to be considered retrospectively once a vote was directed. The Court's analysis of the issue is at paras 8-26.

[201] The Board in *Amalgamated Transit Union, Local 615 v Battlefords Transit System*, 2022 CanLII 99434 (SK LRB)("*Amalgamated Transit Union")* applied similar reasoning under the provisions of the SEA:

> *[75] It is not the role of the Registrar or the Executive Officer to make a final determination before a hearing as to which of the Employer and Union is correct when there is a dispute as to the eligibility of certain people to vote. In this matter, given the dispute over the names, there was an issue whether the Union had filed sufficient evidence of support to trigger a vote pursuant to section 6-12 of the Act. As a result, out of an abundance of caution, the Board directed that the vote be held pursuant to clause 6-111(1)(v) of the Act. Given the decision of the Court of Appeal in United Food and Commercial Workers, Local 1400 v Affinity Credit Union[44], that caution was unnecessary. Based on the information filed by the Union, it had provided sufficient evidence of support for a vote to be held. The 45 percent threshold is not meant to be determined after a full hearing. The operative time for making that determination is when the application is filed with the Board, based on the information provided by the Union. Time is of the essence in conducting a vote. The Saskatchewan Employment (Labour Relations Board) Regulations, 2021 contemplate that a vote may be sealed, to allow for the Board to make a final determination respecting who was entitled to vote, after hearing full evidence. Once that determination is made, the votes can be counted.* ***Once a vote is conducted, no labour relations purpose is served in reviewing whether it should have been conducted. The wishes of the employees can be determined most clearly by counting the ballots. The employees have spoken and their wishes should be respected.***
>
> ***[Emphasis added]***

[202] This Board adopts the Board's reasoning from *Amalgamated Transit Union* that the *Affinity Credit Union* reasoning applies to the SEA. The wording of ss. 6-9 and 6-12 of the SEA do not contemplate a hearing in relation to the 45% issue. The 45% threshold is a "preliminary step" to be determined at the time of application that is not meant to be considered at a full hearing. The Board declines to depart from the Court of Appeal's jurisprudence.

(c) In the alternative, if the Application is not dismissed under (a) or (b), then the appropriate bargaining unit must be one with a number of exclusions, which are not contained in the Union's Application.

Managerial Exclusion

[203] In *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees,* 2019 CanLII 128791, this Board thoroughly canvassed the issue of managerial and confidential exclusions. It relied on the summary of relevant principles to be applied in assessing a request for a managerial exclusion as set out by the Board in *Canadian Union of Public Employees, Local 4777 v Prince Albert Parkland Regional Health Authority* 2009, CanLII 38609 (SK LRB):

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

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

[204] 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: *Saskatchewan Polytechnic*, at para 83.

[205] 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: *Saskatchewan Polytechnic*, at paras 92-93

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

[207] 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 and scheduling of work 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.

[208] The fact that a position may have a title of "manager" is not determinative. For example, in *Saskatchewan Liquor & Gaming Authority*, 1997 CarswellSask 823 (SK LRB), [1997] Sask LRBR 836, the Board refused to apply the managerial exclusion to liquor store managers, whose primary functions included the following:

> *(a) budget preparation and control;*
> *(b) supervision of staff;*
> *(c) scheduling of staff;*
> *(d) selection of staff;*
> *(e) first step grievance handling;*
> *(f) imposition of discipline, with direction from regional manager and human resources;*
> *(g) in-store staff training; and*
> *(h) assignment of work.*

[209] Precedents regarding arguably analogous positions may be reviewed by the Board, but 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.

[210] The Board will now consider these principles in relation to the Town Foreman and Administrative Assistant.

(i) Should the Town Foreperson be kept from the bargaining unit on the basis of the managerial exclusion?

[211] The Employer submits that the evidence on the Town Foreman shows that he is responsible for the shop, including the shop Labourers, seasonal labourer, and some of the summer students. He participates in interviews and performance assessments and makes recommendations on hiring, which counsel argues, are generally accepted. The Town Foreman also approves or denies leave requests, and vacation requests, and manages the shop on a day-to-day basis. The Employer says when it comes to conflict of interest, the Town Foreman's role makes many decisions which could be the subject of labour conflict, or grievances.

[212] The Union argues that this position has, at most, supervisory functions which do not rise to the level of managerial functions. The individual in this role may have assisted with the hiring process but did not have the final say on hiring.

[213] The Board finds that the evidence regarding the responsibilities of the Town Foreman does not establish that this position should be excluded on the basis of the managerial exclusion.

[214] With respect to hiring, it is clear that Council has sole authority to make decisions on hiring and on terminations. The evidence from Ms. Karcha indicates that the Town Foreman has participated in the interview process and that he may provide input and recommendations but that there is nothing binding Council to accept those recommendations.

[215] As is clear from the case law, it is not sufficient if the person can make recommendations but has no further input into the decision-making process.

[216] Regarding discipline, the evidence from Ms. Karcha indicates that the Town Foreman instructs and schedules the shop labourers, but that he does not make decisions regarding discipline of any of the shop workers. Any conflicts between a shop labourer and the Town Foreman would be addressed by herself and Council, if necessary; however, the Foreman would not have a final say in how such a dispute would be resolved.

[217] This situation is similar to that in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union v Davidson (Town),* 2023 CanLII 62778 (SK LRB), where this Board found the managerial and confidentiality exclusions did not apply to the Town Foreman. In that case, the Board noted that the Town Foreman's involvement in discipline was primarily as a conduit. He was required to report conduct potentially requiring discipline to the Town Administrator, and the Town Administrator relied on his information and advice. In practice, the Town Administrator had the final say regarding discipline and was responsible for administering it.

[218] Further, the Job Description tendered in evidence does not reveal the Town Foreman as having as a primary responsibility exercising authority and performing functions that are managerial in character. Most of the responsibilities have to do with operations. Some of the responsibilities such as training and monitoring staff, are in the nature of supervisory responsibilities, but not managerial responsibilities that would place the Town Foreman in an insoluble conflict of interest with employees in the proposed bargaining unit.

[219] Based on the evidence, the Board finds that the Town Foreman position at best provides a supervisory function. The person in this position instructs and schedules the shop labourers, but he does not make decisions regarding discipline. Any conflicts that arose between a shop labourer and the Town Foreman would be addressed by the CAO and Council, if necessary. In essence, the Town Foreman would simply be carrying out Council's direction on what to do regarding discipline.

[220] Similarly, with respect to hiring, the Town Foreman may make recommendations, but has no final say in who may be hired. The evidence of Ms. Karcha confirmed that the Town Foreman does not have authority to hire, promote, discipline or discharge employees.

[221] The Board is not satisfied that the Town Foreman position should be excluded from the proposed bargaining unit under the managerial exclusion. The authority and duties of this position would not create an insoluble conflict between that person's responsibilities to the Employer and their interests as a member of the bargaining unit. On the whole, the Board does not have clear, convincing and cogent evidence before it that establishes that the Town Foreman should be excluded from the proposed bargaining unit on the managerial exclusion.

(ii) Should the Administrative Assistant be kept from the bargaining unit on the basis of the managerial and confidentiality exclusions.

[222] The Employer suggests that the Assistant Administrator should be excluded from the bargaining unit on the basis of paragraph 6-1(1)(h)(i)(A), that is, that their "primary responsibility is to exercise authority and perform functions that are of a managerial character".

[223] The Employer argues for this exclusion based on the potential conflicts of interest in hiring and evaluations, coupled with the access to confidential information including the CAO's email and employee information on payroll and benefits.

[224] The Employer argues that the Administrative Assistant "steps into the CAO's position when the CAO is away and has access to her email account".

[225] The Job Description states that one of the duties of the Administrative Assistant is to "Assume duties of the Administrator in her absence".

[226] The evidence in this regard is that the Administrative Assistant has access to the CAO's email when the CAO is away. The Administrative Assistant testified that when the CAO was away, she will check the CAO's emails "just for payments, hospital closures, stuff like that". If

there was an emergency situation while the CAO was away, she would text or call the CAO or Council. She said would not make a decision on her own.

[227] The Board finds that Administrative Assistant's access to the CAO's email was essentially to monitor for payments and emergencies. If a matter did require action, she would contact the CAO or Council.

[228] Aside from the generalities referred to above, there was no evidence regarding the CAO's duties that the Administrative Assistant allegedly filled. Therefore, there was no evidence that she actually assumed the CAO's duties when the CAO was absent.

[229] Similarly, other than a suggestion that that correspondence from the Town's legal counsel would appear in the CAO's inbox, there was little evidence regarding the nature of the confidential information which the Administrative Assistant would access in the CAO's absence. There was no evidence that that the Administrative Assistant actually accessed any confidential information in the CAO's absence.

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

[231] The evidence of the duties the Administrative Assistant actually performs does not support a finding that the Administrative Assistant "steps into the CAO's position" when the CAO was away.

[232] With respect to the Town's argument that an exclusion is required based on the potential conflicts of interest in hiring and evaluations, the Board finds that the evidence does not support this allegation.

[233] In cross examination, it was put to Ms. Deskolchuk that duties like hiring, termination, discipline, and managing the staff could be delegated by the CAO to her or the Foreman. She replied: "They can be but they never happen."

[234] The Board is also mindful of the evidence of the CAO that Town Council is responsible for the hiring, suspension and dismissal of all municipal employees as provided in the Town Administrative Bylaw No. 1-2024.

[235] The evidence showed that the Administrative Assistant has no decision-making authority in relation to matters that affect the terms, conditions or tenure of employment of other employees. She has no managerial authority. The assertion that she participates in interviews, and a probationary evaluation is not sufficient. Neither is the fact that she prepared hire letters for summer students at the direction of the CAO, which she described as a "copy and paste".

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

Confidentiality:

[237] The next issue for the Board to determine is whether the Administrative Assistant position should be excluded from the proposed bargaining unit on the basis of paragraph 6-1(1)(h)(I)(B), the confidentiality exclusion.

[238] Like the managerial exclusion, the Board applies the confidentiality exclusion on as narrow a basis as possible: *University of Saskatchewan v Administrative and Supervisory Personnel Association,* 2007 CanLII 68769 (SK LRB) [*University of Saskatchewan*], at para 42. Its purpose is to ensure that an employer has access to necessary resources within a protected sphere of privacy. (*University of Saskatchewan v Administrative and Supervisory Personnel Association,* 2007 CanLII 68769 (SK LRB) [*University of Saskatchewan*], at para 42.

[239] In *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees*, 2019 CanLII 128791 (SK LRB) [*Saskatoon Public Library*], more recently relied upon in *Canadian Union of Public Employees v Resort Village of Candle Lake*, 2022 CanLII 66266 (SK LRB) ("*Candle Lake"),* the Board explained the competing rights it 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.*

[240] 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 a direct impact on the bargaining unit that the position would otherwise be included in.

[241] 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. 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.*

[242] In considering the confidentiality exclusion, the Board will examine the duties a position's occupant actually performs: *Saskatoon Public Library* at para. 68.

[243] 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

[244] The employer relies on *Saskatchewan Institute of Applied Science and Technology v. Saskatchewan Government and General Employees' Union*, 2009 CanLII 72366 (SK LRB) and the following paragraphs with emphasis in particular:

> *[56] The purpose of the statutory exclusion from the bargaining unit for positions whose primary responsibilities are to exercise authority and perform functions that are of a managerial character is to promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining (and to avoid muddying or blurring the lines between management and the bargaining unit). See: Hillcrest Farms Ltd. v. Grain Services Union (ILWU – Canadian Area), [1997] Sask. L.R.B.R. 591, LRB File No. 145-97.*
>
> *[57] The purpose of the statutory exclusion for positions that regularly act in a confidential capacity with respect to industrial relations is to assist the collective bargaining process by ensuring that the employer has sufficient internal resources (including administrative and clerical resources) to permit it to make informed and rational decisions regarding labour relations and, in particular, with respect to collective bargaining in the work place, and to permit it to do so in an atmosphere of candour and confidence. See: Canadian Union of Public Employees, Local 21 v. City of Regina and Regina Civic Middle Management Association, [2005] Sask. L.R.B.R. 274, LRB Files Nos. 103-04 & 222-04.*
>
> *[58] The Board has noted that, unlike the managerial exclusion, the duties performed in a confidential capacity need not be the primary focus of the position, provided they are regularly performed and genuine. In either case, the question for the Board to decide is whether or not the authority attached to a position and the duties performed by the incumbent are of a kind (and extent) which would create an insoluble conflict between the responsibilities which that person owes to his/her employer and the interests of that person and his/her colleagues as members of the bargaining unit. However, in doing so, the Board must be alert to the concern that exclusion from the bargaining unit of persons who do not genuinely meet the criteria prescribed in the Act may deny them access to the benefits of collective bargaining and may potentially weaken the bargaining unit. As a consequence, exclusions are generally made on as narrow a basis as possible, particularly so for exclusions made because of managerial responsibilities. See: City of Regina, supra.*

[245] The Employer argues this exclusion applies to the Administrative Assistant for essentially two reasons:

1. First, because she steps into the CAO's position when the CAO is away and has access to the CAO's email account, which would include emails from legal counsel providing advice to the Town on labour and employment issues; and

2. Secondly, because she deals with benefits for the Town, and maintains files on employees which contain benefits, payroll and other information.

[246] The employer emphasizes the need to ensure ***"that the employer has sufficient internal resources (including administrative and clerical resources)*** in paragraph 57 from *SIAST.* However, if the responsibilities of the role are not in relation to labour relations, business strategic planning, policy advice or budget implementation or planning that has a direct impact on the bargaining unit, the Board will not exclude the position simply because the Employer alleges it needs the positions for administrative or clerical support. In other words, an "insoluble conflict" will only arise where the employee acts in a confidential capacity in relation to the *labour relations, strategic planning, policy and budget planning and implementation planning that has a direct impact on the bargaining unit.*

[247] In *Community Health Services (Saskatoon) Association Ltd. v. Canadian Union of Public Employees, Local 974*, [2000] Sask. L.R.B.R. 326, LRB File No. 246-98, the Board stated the following with respect to purpose:

> *[15] In the E.C.C. International Inc. case, supra, the Board noted that the purpose of the confidential exclusion under s. 2(f)(I)(B) was to prevent a conflict of interest between an employee, whose job requires him or her to have access to confidential information related to his or her employer's labour relations, and his or her membership in the Union. The provision also permits an employer to freely discuss labour relations issues with a group of managerial and confidential employees without fear that the discussions will be inappropriately disclosed. The exclusion is granted with caution because of the serious consequences for the person holding such position - they are not permitted to belong to any trade union. In this regard, the Board must ensure that the job functions entail regular exposure to confidential labour relations information.*
>
> *(Emphasis added)*

[248] The evidence does not establish that the job requirements of the Administrative Assistant required her to have access to confidential information related to the Town's labour relations. The word "confidential" or any of its derivatives or synonyms are absent from the job descriptions provided by the Employer in relation to both the Administration Assistant position and the Office Assistant position. As well, Ms. Descalchuk testified that she currently operates as the Assistant Administrator and had approximately ten years of experience in the Office Assistant role. She testified to the effect that these roles are almost entirely administrative in nature.

[249] With respect to access to the CAO's email while the CAO was away, the evidence did not suggest that this occurred frequently. Nor did the evidence show that the email contains confidential information related to labour relations, aside from the Town's argument that it would include correspondence from the Town's legal counsel providing advice to the Town on labour and employment issues.

[250] The Town argued that the fact that the Administrative Assistant has access to the CAO's e-mail, which would include emails from legal counsel, is itself sufficient to apply the confidentiality exclusion.

[251] Periodic exposure to the arrival of email in the CAO's inbox does not mean that the role requires access to the correspondence itself. There was no evidence to suggest that the role of the Administrative Assistant required that she access the correspondence from legal counsel. The evidence does not show that this is a primary, regular or genuine function of the role. The Board

has clearly indicated in *Candle Lake* and in the decisions referred to therein, that mere access to confidential information is not sufficient to warrant exclusion from a bargaining unit.

[252] That an employer wishes to keep information confidential does not in itself justify excluding employees who have access to it from collective bargaining. It is not unexpected that employees, both non-unionized and unionized, are exposed to confidential information or access to confidential information in the work-place. Employees have an obligation to keep confidential information confidential. Similarly, employers have an onus to organize their business to avoid or minimize exposing confidential information to their employees.

[253] The Town provided no examples of instances when the Administrative Assistant was required to access confidential information regarding labour relations. Ms. Deskolchuk testified that there have been terminations of employees since she has been the Administrative Assistant but that she did not prepare the termination letter.

[254] The evidence showed that the Administrative Assistant deals with benefits for the Town, and maintains files on employees which contain benefits, payroll and other information. However, this is not confidential information "in relation to labour relations, business strategic planning, policy advice, or budget implementation or planning that has a direct impact on the bargaining unit that the position would otherwise be included in". These duties may be of a confidential nature, but they are not with respect to any of the four areas identified in the confidentiality exclusion.

[255] The Board finds that the evidence does not establish that the Administrative Assistant position should be excluded from the proposed bargaining unit on the basis of the confidentiality exclusion.

iii. Office Assistant:

[256] The Employer argues that the Office Assistant is slightly different from the other positions.

[257] The Employer argues that it is incumbent on the board when determining an appropriate bargaining unit to ensure that the employer has sufficient internal resources (including administrative and clerical resources) for labour relations purposes. The Employer argues the question cannot be whether the positions regularly perform the duties or exercise the powers, but whether the position always <u>has</u> the power to perform managerial functions or has <u>access</u> to confidential information, whether or not that access is used on a regular or daily, basis.

[258] The Employer argues that the Office Assistant supports the Assistant Administrator and CAO and that she has access to the CAO's email which is a general email – preeceville@sasktel.net.

[259] The Employer argues that the Office Assistant also has access to information on the residents of the Town as she performs the water billings, sends out bills and reminders, and works on collections. As clearly set out in *Candle Lake* at paras.67 and 68, this type of confidential information would not have a direct impact on the proposed bargaining unit.

[260] The Employer claims that through her support work, including support for the CAO, she would have access to confidential information, necessary to support the CAO and Assistant Administrator.

[261] The Employer argues that given the Board's pronouncement in *SIAST,* about the importance of having administrative and clerical support, and the fact that the Office Assistant provides that support to the CAO, the position should be excluded on the basis of the confidentiality exclusion.

[262] There was no evidence to suggest that this role or that of the Administrative Assistant had previously been utilized by the Town for any confidential human resources or labour matters . For instance, the Board heard evidence that prior to the organization efforts, a town foreman had been terminated without cause. There was no evidence that either the Office Assistant or the Administrative Assistant played any role in any part of that decision or the execution of it. Clearly the Town did not require either of these two positions as a support resource in that instance.

[263] As already stated, the Board must be satisfied that the office assistant's primary responsibilities relate to one or more of the four categories listed in subparagraphs 6-1(1)(h)(i)(B)(I) to (IV) of the Act and have a direct impact on the bargaining unit. The evidenced adduced at the hearing, and summarized earlier in these Reasons, is simply not sufficient to satisfy the exclusion. There is no basis to conclude that the Office Assistant's primary duties include activities of a confidential nature in relation to labour relations, business strategic planning, policy advice, or budget implementation or planning, and have a direct impact on the proposed bargaining unit.

[264] The Board finds that the evidence does not establish that the Office Assistant position should be excluded from the proposed bargaining unit on the basis of the confidentiality exclusion.

(d) Arena Operator – Independent Contractor or Employee

[265] The next question is whether Mr. Ebbert, the Arena Operator should be included in the bargaining unit.

[266] The Town's position with respect to the arena operator is that he is an independent contractor and not an employee of the Town. In the alternative, the Town argues the Arena Operator is managerial, given his ability to hire and fire, and his overall management of the arena in Preeceville.

[267] As the Board observed in *Saskatoon Open Door Society Inc.*, *supra*, at 217, "determination of the contractor employee relationship really is a matter of degree; the cases that are obviously black and white rarely come before the Board." The Board also noted in *Beatrice Foods Ltd.*, *supra*, at 305:

> *There are many details of a relationship which will yield clues as to whether its essential character is closer to employment or contract. As the Ontario Labour Relations Board pointed out in the Livingston Transportation decision, supra, when a tribunal such as ours is asked to make the determination, it is often a sign that the line of demarcation is difficult to discern under the circumstances.*

[268] This Board has stated in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Ser ices Works International Union v Comfort Cabs Ltd.,* 2015 19986 (SK LRB):

> *This Board has adopted various tests, guides and criteria for aiding in the determination as to whether someone is a dependent or independent contractor, including an "economic control" analysis….While it is useful for analytical purposes to identify the general approaches which the Board has employed in the past, it must be remembered that each "test" is in reality merely a guideline. No approach will be controlling in a particular case; nor will a particular set of criteria necessarily result in an unequivocal answer.*

[269] As previously noted herein, the criteria from *York Condominium* and the *Algonquin Tavern* are used in determining when an employment relationship exists.

[270] The *York Condominium* criteria is as follows:

> *a. The party exercising direction and control over the employees performing the work.*
> *b. The party bearing the burden of remuneration.*
> *c. The party imposing discipline.*
> *d. The party hiring the employees.*
> *e. The party with the authority to dismiss the employees.*

f. The party which is perceived to be the employer by the employees.
g. The existence of an intention to create the relationship of employer and employees.

[271] In *Saskatoon Open Door Society Inc.*, *supra*, the Board reviewed the evolution of the approach to the issue by the Board over the last two decades building from the seminal decision in *Montréal Locomotive Works*, *supra*. The eleven (11) factors enumerated in that case, at 215-16, as first described in *Algonquin Tavern*, *supra*, are as follows:

> *1. The use of, or right to use substitutes. It has been considered inconsistent with an employment relationship if one could fulfill the bargain with someone else's labour rather than one's own work and skill. This is significant however, only to the extent that it is the alleged employee who makes that decision.*
>
> *2. Ownership of instruments, tools, equipment, appliances or the supply of materials. These factors indicate something in the nature of a capital investment so that gains or tosses will depend upon something other than the individual's own labour. On the other hand, reliance upon another's financial or capital infrastructure for the essential tools is necessary for performance of the work is more likely to be associated with an employment relationship.*
>
> *3. Evidence of entrepreneurial activity. This factor is closely associated with ownership of tools and encompasses self-promotion, advertising, use of business cards, soliciting to develop "clients", the use of agents, and organizing one's "business" (by incorporation or otherwise) to take advantage of limited liability or the tax laws. It may be significant whether the individual has a "chance of profit" or "risk of loss"; that is whether business acumen, sensitivity to the needs of the market, astute investment, innovation, or risk taking, yield a reward or financial loss.*
>
> *4. The selling of one's services to the market generally. If the purchasers of individual's services are numerous and of diverse character, the individual looks more like an independent self employed person than an employee. If, on the other hand, an individual has a long standing and consistent relationship with one or a limited number of purchasers, he is more likely to be considered a "dependent" contractor or employee - especially if the circumstances or contractual relationship limit his ability to dispose of his skill to other purchasers, or his "prime customer" is given priority.*
>
> *5. Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes. Of course, few independent contractors are entirely free in this regard, but the question is one of the degree. A "self-employed" person has more scope for choice than an employee or dependent contractor who must look for the bulk of his work opportunities to one or restricted number of sources with whom he has "tied his fortunes".*
>
> *6. Evidence of some variation in the fees charged for the services rendered. This factor is less helpful when those services are standardized and the market is relatively competitive. In such circumstances, one would expect a uniform fee structure even if the individuals providing the services were doing so as "independent contractors", and individual employees may also bargain about their wage levels; however, the ability to bargain or fix the contract fee in accordance with the work or the purchaser's ability to pay, may indicate independent contractor or self employed status.*
>
> *7. Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the*

individual has become an essential element which has been integrated into the operating organization of the employing unit. Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and "place" of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the employer's organization. In the case of entertainers, the cases suggest that it may also be useful to determine the extent to which the artist's material or co-workers are influenced by the employer, that is, whether the artist is left to entertain in his own right, or whether his talents are moulded to conform with the employer's artistic vision or interests. Even an individual engaged for a short time may be considered "integrated" into the employer's operation in the manner of an employee, if he is required to devote the whole of his working time during the period to the service of the employer, promote its organization, or fill in his "non performing" time with unrelated ancillary duties. (See: Whittaker, supra.)

8. The degree of specialization, skill, expertise or creativity involved. If these are a dominant element in the relationship, the control test becomes less useful as an indicator of employee status, and in the absence of "integration" into the respondent's organization, the disputed individual is "self-employed" professional.

9. Control of the manner and means of performing the work - especially if there is active interference with the activity. However, it is the right to interfere rather than the ability to do so which is significant. The fact that a particular occupation involves technical skill, putting control of the details beyond the capacity of the employer, does not preclude a skilled employee from being so regarded, since the right to control may exist even though the ability to do so does not. Similarly, the power to discipline, withhold rewards, or terminate the relationship at will and without cause may indicate an employment relationship whether or not the employer exercises this power.

10. The magnitude of the contract amount, terms, and manner of payment. If the financial terms of the relationship approximate wages (for example, if deductions are made for income tax or other benefits are provided or if an individual is paid by the hour rather than the result) an employment relationship may be indicated. The magnitude of the contract amount can sometimes be significant, (although sports celebrities and professionals may be very highly paid yet still be "employees"; and independent professionals may charge an hourly rate rather than a block fee).

11. Whether the individual renders services or works under conditions which are similar to persons who are clearly employees. The employer's established employee complement may provide a useful benchmark against which the activities of its alleged independent contractors can be measured. If the so-called independent contractor substitutes for a firm's employees, or performs duties out of his ordinary line of work and similar to those of employees (for example, a trapeze artist also acting as a usherette, or a dancer also acting as a waitress) it is more likely that (s)he will be considered an employee.

[272] It is further acknowledged that the "statutory purpose" criterion is central to the analysis. The Board observed as follows in *Tesco Electric*, *supra*, at 59 and 60:

With respect to the final consideration: ... the statutory purpose of The Trade Union Act is to protect the rights of employees to organize in trade unions of their own choosing for the purpose of bargaining collectively with their employers. Accordingly, individuals should not be excluded from collective bargaining because the form of their relationship does not coincide with what is generally regarded as "employer-employee", when in substance, they might be just as controlled and dependent on the party using their services as an employee

> *is in relation to his employer. If the substance of the relationship between the individual and the company is essentially similar to that occupied by an employee in relation to his employer, then the individual is in fact an "employee" within the meaning of Section 2(f) of the Act and will be so designated by the Board, notwithstanding the form or nomenclature attached to that relationship.*

[273] A copy of a "Service Contract Agreement" between the Town of Preeceville and Wendell Ebbert dated October 1, 2023, was tendered in evidence by the Union. The term of the Agreement was from October 1, 2023, to March 31, 2024. In the Agreement Mr. Ebbert agrees to provide certain Services to the Town as Arena Operator.

[274] Both parties agree that the *York Condominium* and *Algonquin Tavern* factors are relevant to the Board's interpretation of the definition of employee in clause 6-1(1)(h) and its determination of whether Owners and Drivers are employees. The case law that has reviewed these factors consistently states that there is a continuum of relationships between a person who is unquestionably an employee and a person who is unquestionably an independent contractor, and that no one factor is determinative.

[275] The Union argues that the following factors weigh heavily in favour of Mr. Ebbert being considered an employee:

- He takes direction from the Town in terms of how the arena is operated
- There are guidelines he must follow set by the employer to ensure that the ice is of a certain quality
- Not only the Zamboni, but all of the tools he requires to do his job belong to the Town and remain on Town property. They are provided to Mr. Ebbert for the sole purpose of operating the Town's arena
- No evidence was heard that Mr. Ebbert, while working as an arena operator with the Town, provided this service to any other municipalities. There is an exclusivity to the use of his services, and it is likely that given the time constraints imposed on Mr. Ebbert, he would not be able to operate an arena elsewhere while in the employ of the Town of Preeceville.
- On his most recent contract, he was paid a regular set amount;
- He did not control his own hours or availability. When he was required to attend to the arena was at the discretion of the Town

[276] The Town argues that the following facts favour a contractor arrangement based on the *York Condominium* factors:

- The Agreements states that Mr. Ebbert is contracted to provide services to the Town
- Any additional services must be agreed between the Town and Mr. Ebbert
- He is responsible for hiring and firing any workers he seeks to have assist him
- He is responsible for disciplining any employees he hires
- He is responsible for paying anyone he hires to assist him at the arena
- He is paid bi-weekly plus GST
- His pay would change if he was determined to be an employee rather than a contractor
- He is given parameters of the work in the contract, but he decides how to perform the work and is responsible for running the arena on a day-to-day basis
- There is no possibility of discipline for a contractor – the parties agrees that there is a possibility of cancelling or terminating the contract on two weeks' notice from either party but there is no possibility of discipline
- The Town is not perceived as his employer, and the contract makes it clear that the Town and Mr. Ebbert had no intention of forming an employment relationship

[277] Next, the Board will review the evidence in the context of the eleven factors enumerated in *York Condominium* and *Algonquin Tavern.* It bears repeating that these factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[278] There is an overlap in the factors listed in both cases. One relevant factor listed in *York Condominium* which does not appear on the *Algonquin Tavern* list is *g. The existence of an intention to create the relationship of employer and employees.*

[279] The evidence from the Town is that the Town did not intend to create an employer/employee relationship. Mr. Ebbert did not testify. Any hearsay evidence regarding Mr. Ebbert's intent bears insufficient weight to support a finding of his intention.

The *Algonquin Tavern* factors:

- ***The use of, or right to use substitutes.***

[280] There was no evidence that Mr. Ebbert fulfilled his duties to the Town by hiring someone other than himself to do the work.

[281] The Agreement provided Mr. Ebbert with the authority or right to hire his own assistants. The provision states that he "shall be responsible for employing additional help to assist in fulfilling the Service requirements outlined in this Agreement."

[282] The evidence showed however, that Mr. Ebbert hired help only once. On that one occasion he hired someone to work a weekend during a tournament. On all other occasions, he relied upon the Town's employees to assist him. In previous years, the Town employed an assistant caretaker who assisted Mr. Ebbert. However, absent the assistant, Mr. Ebbert either performed those very tasks that were previously performed by a Town employee, or he relied upon Town employees to assist him in fulfilling his duties.

[283] The fact that Mr. Ebbert relied upon the Town employees to assist him does not support an independent contractor relationship.

[284] However, it is clear that Mr. Ebbert could have fulfilled his obligations to the Town with someone else's labour. To this end, the evidence supports an independent contractor relationship. The fact remains, though, that this only happened once.

- ***Ownership of instruments, tools, equipment, appliances or the supply of materials.***

[285] The equipment used to perform a contract can be a major investment and is, in a true independent contractor relationship, solely the choice of the contractor.

[286] Mr. Ebbert did not provide any of his own instruments, tools, equipment, appliances, nor did he supply any materials. He did not bear any risks or costs associated with owning and operating one's own equipment such as maintenance, replacement or fuel.

- ***Evidence of entrepreneurial activity.***

[287] There was no evidence before the Board that Mr. Ebbert engaged in self-promotion through advertising, the use of business cards, or any other means. In the course of providing services to the Town, he had little "chance of profit" or "risk of loss" since he was paid a set monthly salary.

- ***The selling of one's services to the market generally.***
- ***Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.***

[288] These two headings will be addressed together.

[289] While the Agreement does not preclude Mr. Ebbert from providing services to other parties, there was no evidence that he in fact provided services to anyone other than the Town during the contract period.

[290] As noted, Mr. Ebbert did not testify. The Board did hear evidence from one of the Union's witnesses that Mr. Ebbert did not perform any work for anyone else during the winter season. This evidence was unchallenged and uncontradicted. There was no evidence that he sold his services to anyone one else in the market. Had such evidence been available, it is reasonable to expect that the Board would have heard it. Accordingly, it is reasonable for the Board to infer that Mr. Ebbert worked exclusively for the Town during the time he worked as arena operator.

[291] This was the third contract between Mr. Ebbert and the Town for his services as arena operator. This rather long-standing and consistent relationship with the Town to the exclusion of other purchasers of his services, is more consistent with an employment relationship.

- ***Evidence of some variation in the fees charged for the services rendered.***

[292] Mr. Ebbert was paid a set rate. His salary or fees charged did not vary depending upon services rendered. However, the evidence does indicate that Mr. Ebbert has the ability to negotiate his contract price, and this may indicate independent contractor status, although individual employees may also bargain about their wage levels.

- ***Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit.***

[293] This was Mr. Ebbert's third contract with the Town. The evidence showed that he was required to be at the arena during the hours the arena was opened to the public. There was no evidence to suggest that he did not devote all of his working time to his role as arena operator with the Town. His relationship with the Town is more fairly characterized as "stable" than "casual". It is fair to regard him as part of, or integrated into, the employer's organizational structure.

[294] His reliance on the Town employees for assistance also supports an integration into the organizational structure.

- ***The degree of specialization, skill, expertise or creativity involved.***

[295] There is some degree of specialization, skill and expertise involved in the work performed by Mr. Ebbert in terms of making and maintaining the artificial ice at the arena. The Town as per the Agreement, described what it needed in terms of ice quality, and relied upon the skill and expertise of Mr. Ebbert to fulfill those requirements. This tends to support an independent contractor relationship.

[296] However, the evidence also suggests that a significant portion of Mr. Ebbert's work did not require any specialization, skill or expertise, and that the work he did perform was a part of or integrated into the Employer's organization. For instance:

a. Many of the duties assigned to Mr. Ebbert in the Agreement have little to do with the expertise associated with icemaking. The Agreement, Appendix "B" for example, provides a great deal of specific direction to Mr. Ebbert in terms of what he must do and how he must do it in relation to general cleaning, maintenance, and building care;

b. A significant portion of the Agreement relates to cleaning and maintenance of the arena. Further, the evidence suggests that most of the work previously done by the assistant caretaker, a town employee, was now being done by Mr. Ebbert;

c. The Agreement also requires that Mr. Ebbert coordinate/monitor ice usage and invoice and collect payments for ice usage as directed, and order and control supplies and inventory within budgetary limits.

- ***Control of the manner and means of performing the work - especially if there is active interference with the activity.***

[297] The Board finds that the Town did exercise some measure of control over the manner and means of Mr. Ebbert's performance. While Mr. Ebbert was relied upon to ensure the ice met the standards set by the Town, or decide how to install the ice, or ensure the arena was cleaned, he was required to work during the time that the arena was open to the public. He was required to "be present and available during scheduled skating arena events/programs". He was required to "attend meetings of the Preeceville Arena Board when requested". He was required to "perform

such other related functions and duties as may be authorized or required by the Town Recreation Director or Preeceville Arena Board."

[298] On the other hand, the Town did not have the power to control the manner and means of Mr. Ebbert's performance through discipline or compensation. Either party could terminate the agreement on two weeks' notice, but the Town did not discipline Mr. Ebbert. This would suggest an independent contractor relationship.

[299] Mr. Ebbert would be responsible for disciplining any employees he hires. However, there was no evidence to suggest that ever occurred and there was only one example referred to in evidence when he did hire someone. That one hiring event consisted of hiring someone to work a weekend tournament. In all other instances, Mr. Ebbert relied upon the Town employees to assist him.

[300] The Town did, however, control the "means" of his performance as it supplied all the tools equipment, as well as assistance from other Town employees.

- ***The magnitude of the contract amount, terms, and manner of payment***

[301] According to the Agreement, Mr. Ebbert was paid a set amount on a biweekly basis. The Town does not make any source deductions. Mr. Ebbert was required to maintain Workers' Compensation coverage. This arrangement is more consistent with an independent contractor relationship.

[302] The Agreement does, however, require the Town to pay mileage at the rate of $0.50 per kilometer "for required out of town travel" with Mr. Ebbert's personal vehicle. There was no evidence regarding when or why Mr. Ebbert might be required to travel out of town. Did the Town, for example, require Mr. Ebbert to travel out of Town? The evidence was silent on these questions.

[303] Secondly, as noted under the factor regarding ownership of tools and equipment, the fact that Mr. Ebbert was not subject to any risk associated with the costs of operating his vehicle is more consistent with an employee/employer relationship.

- ***Whether the individual renders services or works under conditions which are similar to persons who are clearly employees***

[304] Mr. Ebbert was the only arena operator. The services he performed regarding the ice and its care and maintenance were not similar to persons who are in fact clearly employees. However, it is relevant to note that many of the duties assigned to Mr. Ebbert were previously performed by a Town employee, the assistant caretaker.

[305] Furthermore, many of the duties assigned to Mr. Ebbert in the Agreement are very similar to the duties set out in the Job Description for the Town Foreman. These include, for example:

- *Order and control of supplies & inventory within budgetary limits.*
- *Keep and maintain records, logs, schedules, etc. as required.*
- *Must perform all work within safety guidelines as established by the Town*
- *Perform such other related functions and duties as may be authorized or required by the Town Recreation Director or Preeceville Arena Board*
- *Attend meetings of the Preeceville Arena Board when requested.*

[306] The evidence shows that he was required to be at the arena while the arena was in use. This would suggest that the Town controlled Mr. Ebbert's working hours much like it did the working hours of the Town employees.

[307] The evidence also shows that Mr. Ebbert performed many of the duties that had previously been performed by the assistant caretaker, who was a Town employee.

[308] In *Teamsters Union, Local 395 v. Regina Leader Post Group Inc*., 2007 CanLII 68773 (SK LRB) the Board, in finding that haulers were independent contractors provided a brief review for comparison:

> ***[32]*** *In Saskatoon Open Door Society Inc., supra, some of the characteristics of the relationship that were noted by the Board included: that the caretaker was able to control the manner in which he would fulfill the contract, that is, by his own labour alone or with the assistance or complete use of his own employees; that he could subcontract the work; that he was not restricted from pursuing other business activities; that he had assumed the risk of profit and loss, albeit that both were relatively minimal because of the modest size of the contract; and that the economic control over the enterprise was in his hands.*
>
> ***[33]*** *For strikingly similar reasons, the Board recently arrived at a similar conclusion in Lovatt, supra, finding that the applicant for rescission, a contract janitor, was not an employee within the meaning of the Act.*
>
> ***[34]*** *In Saskatchewan Government and General Employees' Union v. Rural Municipality of Meadow Lake, No. 588, [2001] Sask. L.R.B.R. 782, LRB File No. 140-01, the Board held that a landfill custodian was not an employee within the meaning of the Act, attaching a somewhat large degree of significance to the facts that the individual had unrestricted freedom to engage others to assist or wholly perform the work and that motivation and efficiency could significantly affect the degree of profit or loss.*

> ***[35]*** *In assessing the present situation, we are mindful that, while there are some differences in the work done by the individual haulers or the manner in which their contracts were acquired, the main characteristics of their function are substantially the same. The haulers are able to control the manner in which the work is done: solely by their own labour, the labour of their own employees, by subcontractors or any combination of these methods. The kind of equipment employed to perform the contract is a major investment and is solely their own choice – obviously the cost, size, fuel type, condition and efficiency of the vehicle may greatly affect the degree of risk of profit or loss. Fuel alone is a volatile-price commodity running into thousands of dollars a month for some haulers. The ability of the haulers to realize a greater or lesser profit is also dependent upon, inter alia, the vagaries of illness, vehicle breakdown and weather as well as personal motivation, work organization and procedural efficiency. All expenses associated with execution of their obligations under the contract are their responsibility. Renewal of the contracts is not assured and the terms of same are subject to new negotiation. The haulers are not eligible to participate in any of the employment benefit plans that are compulsory or optional for the Leader Post's employees.*
>
> ***[36]*** *The Leader Post is responsible for virtually no expenses related to the execution of the work. It makes no financial contributions for any expenses. It makes no source deductions (other than as required by the Workers' Compensation Board which the parties agreed was not determinative of the issue). The Leader Post does provide access to a fuel cardlock system for the convenience of the haulers but it is not mandatory that they use it and many do not.*
>
> ***[37]*** *Overall, the success or failure of the individual hauler's enterprise is dependent upon the efficient use of the capital and labour that he controls. The fact that in some cases the margin of operation or the potential for profit is slim has more to do with one's skill as an entrepreneur than alleged control by the Leader Post. This has often resulted in haulers deciding to give up routes, specializing in certain kinds of routes, acquiring other or additional routes, hiring employees, subcontracting routes or some of the work, turning the endeavour into a kind of shared spousal or even family enterprise or getting out of the business altogether.*
>
> ***[38]*** *For these reasons, we find that none of the haulers is an employee within the meaning of the Act. The application is dismissed.*

[309] Unlike the cases referred to in *Teamsters*, the Board notes that Mr. Ebbert did not control the manner in which he would fulfill his contract by engaging others to assist or wholly perform the work he was contracted to provide.

[310] Further, unlike the facts in *Teamsters,* Mr. Ebbert is not responsible for any expenses related to the execution of the work. The expenses, in this case were borne by the Town. This included the provision, maintenance and operating costs of equipment; the provision of labour in the form of access to and use of Town employees to assist Mr. Ebbert with the fulfillment of his contractual obligations; and payment of mileage.

[311] The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the

Board has considered the level of control the Town has over Mr. Ebbert's activities as a factor. However, other factors include whether Mr. Ebbert provides his own equipment, whether he hires own helpers, the degree of financial risk taken by Mr. Ebbert, the degree of responsibility for investment and management assumed by Mr. Ebbert, and his opportunity for profit in the performance of his or her tasks.

[312] The Board also finds that the reasons set out in Ms. Nadon's affidavit in the Union's Reply to the Town's objection to Mr. Ebbert being listed as an employee were supported by the evidence of the other witnesses.

[313] Applying the criteria from the cases referred to above, the Board finds that Mr. Ebbert is not an independent contractor. While some of the evidence does support an independent contractor relationship, based on the evidence as a whole, the Board finds that Mr. Ebbert is closer to the employee end of the continuum than the independent contractor end.

Managerial Exclusion:

[314] The Town argued that if Mr. Ebbert was not an independent contractor, that his position falls within the managerial exclusion, based on his overall running of the arena and his ability to hire and fire. The Town argues: "There is nothing clearer than the ability to hire and fire, in determining managerial responsibility, and we have evidence that Mr. Ebbert did hire at least one person to work for him at the arena during the 2023/24 season."

[315] While the agreement may provide Mr. Ebbert with the right to hire his own help, the evidence suggests that in practice that only happened once. That one hiring event consisted of hiring someone to work a weekend tournament. In all other instances, Mr. Ebbert relied upon the Town employees to assist him.

[316] As indicated in *Canadian Union of Public Employees, Local 4777 v Prince Albert Parkland Regional Health Authority,supra,* 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.

[317] Further, in assessing managerial authority, the Board considers the actual authority assigned to a position and the use of that authority in the workplace. The employer relies heavily on the fact that the agreement provides Mr. Ebbert with the right to hire his own help. Such authority would include the power to discipline and discharge. The evidence showed, however,

that the actual use of that authority was nominal. He only hired help on one weekend. On all other occasions when he required assistance he relied upon the Town's employees.

[318] The Board finds that the evidence does not establish that the managerial exclusion applies to Mr. Ebbert.

Decision:

[319] The Board considers an "all employee" bargaining unit to be an appropriate unit for collective bargaining. The Board's agent is directed to unseal the ballots and to tabulate the vote that was directed in this matter pursuant to s. 27 of *the Saskatchewan Employment (Labour Relations Board) Regulations, 2021*. The agent's report in Form 224 shall be advanced to a panel of the Board for its review and consideration in due course.

[320] That the Application made by the Town of Preeceville, being the Objection to Conduct of Vote in LRB File No. 065-24 is dismissed.

[321] That the Application made by the Town of Preeceville, being the Objection to Conduct of Vote in LRB File No. 076-24 is dismissed.

[322] An appropriate Order will accompany these Reasons.

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

DATED at Regina, Saskatchewan, this **6th** day of **December, 2024.**

LABOUR RELATIONS BOARD

Carol L. Kraft
Vice-Chairperson