UNIVERSITY OF REGINA FACULTY ASSOCIATION, Applicant v CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 397, Respondent

LRB File Nos. 162-23 and 195-23; March 22, 2024
Chairperson, Michael J. Morris, K.C.; Board Members: Vince Engel and Allan Parenteau

Counsel for the Applicant, the University of Regina Faculty Association:	Jared M. McRorie and Walker A. Paterson
Counsel for the Respondent, Canadian Office and Professional Employees Union, Local 397:	Daniel S. LeBlanc

Summary dismissal – Clause 6-111(1)(p) of *The Saskatchewan Employment Act* – No arguable case – Employer seeking summary dismissal of Union's application to vary provisional determination excluding Executive Financial Manager position from bargaining unit – Board determines Union has pled an arguable case – Union's application permitted to proceed.

Onus – Application to vary provisional determination within one year of provisional determination – Onus is on applicant seeking variation, being the Union in this case.

REASONS FOR DECISION

Background:

[1] Michael J. Morris, K.C., Chairperson: These are the Board's reasons with respect to a summary dismissal application[1] brought by the University of Regina Faculty Association [Employer]. While the Employer acts as a union for employees of certain post-secondary institutions, including the University of Regina, it is before the Board in its capacity as a unionized employer with respect to its own relatively small workforce.

[2] The Canadian Office and Professional Employees Union, Local 397 [Union] is the certified bargaining agent with respect to the Employer's workforce.

[3] On November 25, 2022, the Board issued reasons and accompanying orders with respect to the Employer's applications to provisionally exclude the Executive Financial Manager [EFM]

[1] LRB File No. 195-23.

position from the bargaining unit[2] and to amend the certification order, accordingly.[3] See: *University of Regina Faculty Association v Canadian Office and Professional Employees Union, Local 397*, 2022 CanLII 111251 (SK LRB) [Provisional Decision]. The EFM position was a new position which was unoccupied at the time of the Provisional Decision. The Board excluded the EFM position from the bargaining unit on a provisional basis, based on the confidentiality exclusion in s. 6(1)(h)(i)(B) of *The Saskatchewan Employment Act* [Act].[4] It rejected the Employer's submission that the EFM position should also be excluded based on the managerial exclusion in s. 6(1)(h(i)(A).[5]

[4] As a result of the Provisional Decision, the relevant certification order stated (emphasis added):

> *THE LABOUR RELATIONS BOARD, pursuant to clause 6-104(2)(g) and section 6-105 of The Saskatchewan Employment Act, and having rescinded the Order in LRB File No. 004-10, dated March 17, 2010, HEREBY ORDERS:*
>
> *(a) that all employees of the University of Regina Faculty Association except the Executive Director in the Province of Saskatchewan is an appropriate unit of employees for the purpose of bargaining collectively;*
>
> *(b) that the Canadian Office and Professional Employees Union, Local 397, a union within the meaning of The Saskatchewan Employment Act, represents a majority of employees in the bargaining unit set out in paragraph (a);*
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> *(c) that the University of Regina Faculty Association, the employer, bargain collectively with the union set out in paragraph (b), with respect to the bargaining unit set out in paragraph (a);*
>
> *(d) that the position of Executive Financial Manager is provisionally excluded from the bargaining unit set out in paragraph (a) and shall become a final exclusion one year after the date on which this Order is made unless, before that period expires, one of the parties to this Order applies to the Board for a variation of this Order.*[6]

[5] The EFM position has been filled since the Provisional Decision. This has caused the Union to file an application to amend the abovementioned order.[7] The Union's grounds and requested relief are stated as follows:

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[2] LRB File No. 002-22.
[3] LRB File No. 003-22.
[4] Provisional Decision, at paras 59-63. Note: Dissenting reasons were provided by Member Holmes.
[5] Provisional Decision, at paras 55-58.
[6] Order issued November 25, 2022, in LRB File Nos. 002-22 and 003-22. In addition to this order, a separate order was issued to rescind the certification order in LRB File No. 004-10, dated March 17, 2010. No other orders were issued as a result of the Provisional Decision.
[7] Application in LRB File No. 162-23.

> *In its November 25, 2022 Order, the Board provisionally excluded the position of Executive Financial Manager ("EFM") from the bargaining unit. That position has now been staffed for approximately 11 months.*
>
> *In practice, the position falls within the definition of employee in s. 6-1(1)(h) of the Saskatchewan Employment Act. It does not fall within either the "Managerial" or Confidentiality" exclusions.*
> *…*
>
> *Paragraph (d) of the order should be entirely removed.*[8]

[6] The Employer filed a reply to the Union's application.[9] Its reply maintains that the confidentiality exclusion continues to apply to the position, that the managerial exclusion also applies, and that the Union has not identified how the EFM position does not hold the duties which grounded the Board applying the confidentiality exclusion on a provisional basis.

[7] In addition, the Employer has applied to summarily dismiss the Union's application. The Union filed a reply to the Employer's summary dismissal application and both parties filed written arguments with the Board. The parties' arguments are detailed below.

[8] Neither party was able to locate a decision from the Board addressing similar circumstances; that is, a union applying to vary a provisional determination within the one year period before it becomes a final determination. Consequently, amongst other things – including the overarching issue of whether the Union has pled an arguable case - they have each made arguments respecting which of them carries the onus in the Union's application to vary the provisional determination.

Argument on behalf of the Employer:

[9] The Employer submits that the Union's application must fail because it discloses no arguable case. In the Provisional Decision, the Board determined that the EFM position should be provisionally excluded under the confidentiality exclusion. More particularly, the Board based its reasoning on the EFM undertaking the following anticipated duties (emphasis added):

> ***[61]*** *The EFM will not be the final decision-maker on issues of labour relations, business strategic planning, policy or budget implementation or planning, but that is not the test. Based on Ritenburg's evidence a number of the EFM's functions lead to a conclusion that the EFM's primary duties include activities of a confidential nature that will have a direct impact on the bargaining unit, in the areas of labour relations, strategic planning, policy advice and budget planning and implementation, for example:*

[8] Application in LRB File No. 162-23.
[9] Reply in LRB File No. 162-23.

> (a) *Assist in budgeting and planning based on requirements put forward by the Finance Committee and Executive and knowledge of previous years including by providing financial advice.*
>
> . . .
>
> (d) *Provide recommendations on costing including where cost reductions are necessary or advisable including on reductions or modifications to staffing.*
>
> (e) *Provide financial advice, information, and assessments to the Executive Director and participate in the decision-making process where such decision-making impacts finances.*
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> …
>
> (p) *Act as a negotiator on the side of management in collective bargaining and fulfill all duties and obligations regarding same, including by preparing for management: costing assessments (including providing opinions on staff reductions, wage reductions, and on other aspects of labour), budget and planning opinions and assessments, and providing input and recommendations on amendments to the collective bargaining agreement that would be beneficial to management.*

> ***[62]*** *The evidence demonstrated that the EFM's primary duties will require them to be directly involved in budget and other planning. They will be part of the decision-making team. They will have access to confidential information relating to labour relations, business strategic planning, policies and budget planning for purposes that will have a direct impact on the bargaining unit. The EFM's primary duties will include providing confidential information and advice to Ritenburg and the board in relation to labour relations, business strategic planning, policy and budget implementation and planning. This confidential information and advice will have a direct impact on the bargaining unit. The EFM will be in an insoluble conflict with the members of the bargaining unit.*

[10] The Union has not identified which of these primary duties are not being performed by the EFM. Further, the Union is well-aware that the EFM is acting as a negotiator on the side of management in collective bargaining. This primary duty carries with it the other duties noted in the extract above – being those described in (a), (d) and (e) – because the EFM's role on the Employer's bargaining team is based on the incumbent doing those duties, as well.

[11] In effect, the Union is seeking to relitigate matters that have already been decided in the Provisional Decision, without having pled a material change in circumstances. The Employer submits that the Union's deficient pleadings mirror the circumstances in *Tercon*, where the Board made the following comments:

> ***[160]*** *In Form 5 in the regulations to the Act, paragraph 6 makes it clear that the applicant is to "state clearly and concisely all of the relevant facts of the employer and the dates of such acts, relied upon to indicate company domination". This requirement is more than a mere direction or suggestion to the parties, but rather gives rise to a requirement that the applicant properly complete the form and, in doing so, provide facts in support of the application.*
>
> ***[161]*** *The original applications were determined by Vice-chairperson Schiefner to "contain little more than a bare allegation and no supporting facts. As such they are in violation of the procedural expectations of the Board and stand vulnerable to an application*

> *for summary dismissal". Vice-Chairperson Schiefner went on to say in that same paragraph "[A] party against whom a complaint or application is made should be able to read the applicant's pleadings and get a clear understanding of when, how and by whom, the Act was alleged to have been violated…"*
> …
> ***[165]*** *As pointed out by Vice-chairperson Schiefner in his decision regarding the review of the Executive Officer's order requiring the applicants to provide particulars in relation to their application, "If an applicant is unable to allege facts that could, if proven, result in a Board Order or remedy, then there is little (arguably no) justification or utility in an application proceeding further". …*
>
> ***[166]*** *On many occasions, the Board has stated that it does not at this stage assess the strengths or weaknesses of the Applicant's case, but simply seeks to determine, based on the application and/or written submissions filed (in this case the particulars) discloses facts that, if proven, would form the basis of a violation of the Act.*[10]

[12] The Employer contends that, in these circumstances, the Board should apply the doctrine of *res judicata* to dismiss the Union's application. The Union has not alleged a material change in circumstances since the Provisional Decision. As such, the requirements for the application of the doctrine of *res judicata*, as set out by the Supreme Court in *Danyluk*,[11] are met: (a) the same question has been decided; (b) the decision was final, subject to a material change in circumstances; and (c) the parties to both proceedings are the same.

[13] Fundamentally, the Union is attempting to impose a reverse onus on the Employer through its application. As the moving party, it is the Union that must plead sufficient facts to disclose a material change in circumstances from the Provisional Decision. Its vague pleading that the EFM does not "in practice" fall within either the managerial or confidentiality exclusions is insufficient. Were this matter to proceed beyond the summary dismissal stage, to the merits, it would be the Union's onus to establish that the Provisional Decision ought to be varied. For example, in *CUPE, Local 4777*, the Board explicitly noted that the applicant union bore the onus to establish that existing out-of-scope positions should be moved in-scope:

> *[13] This case is similar to the above noted cases, except that here, the Union is seeking to include positions not previously within the bargaining unit, and which positions were previously excluded from the bargaining unit by Order of the Board. It would be illogical to require an onus in the case where an Employer sought to exclude positions from within the bargaining unit, but to have no onus where the Union is the applicant and wishes to have those positions included within the bargaining unit. Such an onus of proof is consistent with the usual onus which falls upon an applicant to prove its application. (See:*

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[10] *Tercon Industrial Works Ltd. v Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers*, 2011 CanLII 8881 (SK LRB) [*Tercon*], at paras 160-161, 165-166.
[11] *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460 [*Danyluk*].

> *Saskatoon Regional Health Authority v. Service Employees' International Union, Local 333, 2009 CanLII 2051 (SK L.R.B.), LRB File No. 296-04.*[12]

[14] The Union's contention that a different onus applies here because the existing order was made on a provisional basis is wrong. It would make a mockery of the Board if an applicant were allowed to apply for a remedy on no basis whatsoever, and then offload the entire burden for their own application onto the other party, and this is exactly what the Union is attempting to do. It is the Union's onus to establish a material change in circumstances since the Provisional Decision. Otherwise, the doctrine of *res judicata* prevents the Provisional Decision from being varied. The Employer refers to following comments in *ASPA*:

> [**26**] … *It would seem that without a "change in circumstances," the matter would be res judicata (either because of the certification order having been issued by the Board or through an order resulting from an amendment application) or it could be seen as interference by the Board with an agreement reached between the parties concerning scope. …*[13]

[15] The Employer's submissions conclude with the following:

> *37. The Union has not plead material facts to substantiate their claims and cannot rely on unsupported conclusory assertions in their pleadings to find an arguable case, nor are they entitled to subvert the onus which rests upon them by creating a reverse onus, where the Employer is obligated to disprove their case.*
>
> *38. The Union has not pleaded an arguable case because they have failed to show a material change in circumstances, and failing to even allege how the EFM does not genuinely hold the duties already found to render the position out-of-scope. The Union simply seeks to relitigate a case that has already been decided in breach of the principle of res judicata. Consequently, the Union's application must be summarily dismissed.*[14]

Argument on behalf of the Union:

[16] The Union frames its argument as follows:

> 1. *This case is about the appropriate process for an application under s. 6-105(2) of the Act. In short, what happens if a party does not wish a provisional determination to be become permanent? What are the evidential burdens, and what onus is on each party?*
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> 2. *Until and unless an exclusion from unionization is permanent, the onus is on the employer to justify exclusion. This is as true when seeking a permanent exclusion as when seeking a provisional exclusion. The onus remains on the Employer in either case.*

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[12] *Canadian Union of Public Employees, Local 4777 v. Prince Albert Parkland Regional Health Authority*, 2009 CanLII 38609 (SK LRB) [*CUPE, Local 4777*], at para 13.
[13] *University of Saskatchewan v Administrative and Supervisory Personnel Association*, 2007 CanLII 68769 (SK LRB) [*ASPA*], at para 26.
[14] Employer's reply submissions, paras 37-38.

> 3. *On the facts of this case, the pointed question is whether the union is required to establish that confidential information is not being shared with the contested employee, or is the employer required to establish that confidential information is being shared?*
>
> 4. *If confidential information is being shared, that information is – by definition – not available to the union. The union cannot plead those facts which it cannot know. Placing such a burden on the union, at this stage, is contrary to the Union's right to a strong bargaining unit.*
>
> 5. *Thus, the burden of proving a permanent exclusion is on the Employer. The Board cannot know whether the Employer meets this burden until and unless a full hearing is held on the merits.*[15]

[17] The Union highlights that the Provisional Decision excluded the EFM position on the basis of the confidentiality exclusion, but that the position has been filled since the Provisional Decision.

[18] To the extent a material change in circumstances is required to avoid the doctrine of *res judicata*, the Union submits that the filling of the position is the material change. At this point, the Board is concerned with the EFM's actual duties, as opposed to the position's anticipated duties.

[19] The Union has pled that, in practice, the EFM is not performing duties which justify the position's exclusion from the bargaining unit under either the managerial or confidentiality exclusions. The Union notes that the basis for the position's exclusion in the Provisional Decision was the confidentiality exclusion. By definition, confidential information is information that the Union will not be privy to. Unions will rarely have direct evidence that the occupant of an excluded position is *not* receiving confidential information. Therefore, the Union has pled what it is able to.

[20] The Union highlights that the Provisional Decision contemplated the application that it has made (emphasis added):

> ***[64]*** *Based on the evidence provided by the Employer in the EFM job description and Ritenburg's evidence, the Board has determined that an amendment to the Certification Order is necessary. The Board has decided to grant a provisional Order excluding the EFM from the bargaining unit. A provisional determination will allow the parties the opportunity to re-evaluate this position after it has been staffed and the person hired has commenced exercising their duties and responsibilities. If, once the position is filled, it turns out that the EFM is not performing the duties that the Employer is now contemplating that they will perform, the safeguard of the provisional determination provides a remedy for the Union to return to the Board for a reassessment of the position. For this reason, a provisional Order is appropriate.*[16]

[15] Union's submissions, paras 1-5.
[16] Provisional Decision, para 64.

[21] The Union maintains that the onus to justify continued exclusion of the EFM position, in the context of its application, is on the Employer.

[22] The Union submits that if a provisional exclusion is made pursuant to s. 6-105(1), there is a statutory right to apply to have the position assessed, in practice, pursuant to s. 6-105(2).

[23] Once the position is staffed, the onus falls on the Employer to establish that, based on the occupant's actual duties, the position must be excluded. The Union argues that if this were not the case, the language in s. 6-105(2) would be redundant. It submits that a party can always apply to amend a certification order to add previously excluded positions to a bargaining unit, provided it can satisfy the Board that this is appropriate. It points to *CUPE, Local 4777*, where the Union was seeking to add positions which had been excluded from the bargaining unit for seven years. It was not prohibited from applying to do so, but it bore the onus on its application.

[24] An application to vary a provisional determination within one year of the determination must contemplate something different, and it does. The onus to justify continued exclusion remains on the Employer. The Union states:

> *a. In this context, the onus has not flipped, as no permanent exclusion applies.*
>
> *b. If the onus flips immediately upon order of provisional exclusion pursuant to s. 6-105(1), then the provisional provision is of no effect. It makes no difference and is redundant. Such an interpretation would be contrary to the well-established proposition that legislation should be read as a whole, and in a manner which gives meaning to the words of a statute.*
>
> *c. The provisional provision of the Act is impactful only if within the year following such order, the onus remains on the Employer to prove that the position should be permanently excluded. The role of s. 6-105 is not to provide the union with the ability to apply to include a position within the bargaining unit – for which it bears the onus. A union may make that application at any time, as the union did in CUPE 4777. Rather, the sole unique contribution of s. 6-105, is preserving the Employer's obligation if the union should challenge the provision within one year.*
>
> *d. If this were not so, a provisional determination places all parties in the exact position of a permanent exclusion with respect to amending the certification order pursuant to the general provisions in s. 6-104(2)(g). This cannot have been the legislature's intent.*[17]

[25] The doctrine of *res judicata* does not apply, since both the Provisional Decision and s. 6-105(2) contemplate the Union returning to the Board, once the EFM position has been filled. The position has been filled and the Union has alleged that its occupant is not performing duties that require her exclusion from the bargaining unit. The Employer has not requested particulars from

[17] Union's submissions, para 32.

the Union, in terms of "how it intends to prove any fact which may be required of it."[18] The Union says – with respect to its pleading that the EFM is an employee within the meaning of the Act - "[t]he asserted fact, if proven, grounds the remedy sought by the Union."[19] Further, while the Employer has alleged that the EFM performs duties which justify exclusion under the confidentiality and managerial exclusions, the Employer's allegations have not been tested, including through cross-examination.

[26] Paragraph 59 of the Union's submissions contains its arguments in a nutshell:

> *59. This case turns upon the Board's assessment of the EFM position in practice. The Board has never yet conducted [this] inquiry. It is properly called upon to do so here. In seeking the exclusion, URFA bears the onus.*[20]

Relevant Statutory Provisions:

[27] The following provisions of the Act are relevant:

> ***6-1****(1) In this Part:*
> *…*
> *(h) "employee" means:*
>
> *(i) a person employed by an employer other than:*
>
> *(A) a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character; or*
>
> *(B) a person whose primary duties include activities that are of a confidential nature in relation to any of the following and that have a direct impact on the bargaining unit the person would be included in as an employee but for this paragraph:*
>
> *(I) labour relations;*
> *(II) business strategic planning;*
> *(III) policy advice;*
> *(IV) budget implementation or planning;*
>
> *…*
>
> ***6-104*** *…*
>
> *(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
> *…*
>
> *(g) amending a board order if:*
>
> *(i) the employer and the union agree to the amendment; or*

[18] Union's submissions, para 57.
[19] Union's submissions, para 57.
[20] Union's submissions, para 59.

> *(ii) in the opinion of the board, the amendment is necessary;*
>
> *…*
>
> *(i) subject to section 6-105, determining for the purposes of this Part whether any person is or may become an employee or a supervisory employee as defined in clause 6-1(1)(o) of this Act as that clause read before the coming into force of The Saskatchewan Employment Amendment Act, 2021;*
>
> *…*
>
> ***6-105****(1) On an application made for the purposes of clause 6-104(2)(i), the board may make a provisional determination before the person who is the subject of the application actually performs the duties of the position in question.*
>
> *(2) A provisional determination made pursuant to subsection (1) becomes a final determination one year after the day on which the provisional determination is made unless, before that period expires, the employer or the union applies to the board for a variation of the determination.*
>
> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *…*
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*
>
> …

Analysis and Decision:

a. The test for summary dismissal on the basis of "no arguable case"

[28] The Employer applies to dismiss the Union's application pursuant to clause 6-111(1)(p) on the basis that it discloses no arguable case. The test for summary dismissal on this basis is stated in *KBR Wabi*:

> *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant is able to prove everything alleged in his/her claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
>
> *2. In making its determination, the Board may consider only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his/her claim.*[21]

[29] The Board has also provided the following comments with respect to the test, in *Roy*:

> ***[9]*** *Generally speaking, summary dismissal is a vehicle for the disposition of applications that are patently defective. The defect(s) must be apparent without the need for weighing of evidence, assessment of credibility, or the evaluation of novel statutory interpretations. Simply put, in considering whether or not an impugned application ought*

[21] *International Brotherhood of Electrical Workers, Local 529 v KBR Wabi Ltd.*, 2013 CanLII 73114 (SK LRB) [*KBR Wabi*], at para 79. See also *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB), at para 8.

> *to be summarily dismissed, the Board assumes that the facts alleged in the main application are true or, at least, provable. Having made this assumption, if the Board is not satisfied that the main application at least discloses an arguable case, and/or if there is a lack of evidence upon which an adverse finding could be made, then the main application is summarily dismissed in the interests of efficiency and the avoidance of wasted resource.*[22]

[30] In essence, if the Union has not pled facts which, if accepted, could ground the relief it seeks, its application should be summarily dismissed. On the other hand, if it is not plain and obvious that the Union's application will fail, it should be permitted to proceed.

b. The Provisional Decision

[31] It is helpful to begin the Board's analysis with what led up to the Provisional Decision, and why provisional determinations under s. 6-105(1) are made by the Board, generally.

[32] By virtue of a certification order dated March 17, 2010, the Union was the bargaining agent for an all-employee unit with respect to the Employer.[23] The only position excluded from the unit was the Executive Director position.[24] In 2021, the Employer created the EFM position and proposed that it be out-of-scope.[25] The Union disagreed with the Employer's proposal. Consequently, before filling the position, the Employer applied to the Board, requesting a provisional determination pursuant to s. 6-105(1). This was in accordance with the process described in *Donovel*,[26] and affirmed in more recent jurisprudence, including the Provisional Decision:

> *[43] The first issue before the Board is whether the Employer followed the required procedure in this matter[20]. The Board agrees with the Employer that it did. It notified the Union of the proposed new position, and sought its agreement that the position be created outside the bargaining unit. When the Union would not agree, the Employer filed these applications. As of the date of the hearing, the Employer had not hired an EFM.*[27]

[33] The purpose in obtaining a provisional determination, from an employer's perspective, is to avoid unilaterally declaring a newly created position as out-of-scope with respect to an all-employee unit.[28] According to *Donovel*, doing so puts the Employer in breach of its obligation to bargain collectively with the Union:

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[22] *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB) [*Roy*], at para 9.
[23] Provisional Decision, para 2.
[24] Provisional Decision, para 2.
[25] Provisional Decision, para 4.
[26] *Donovel v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2006 CanLII 62948 (SK LRB) [*Donovel*], at paras 27-28.
[27] Provisional Decision, para 43.
[28] *Donovel*, at para 29.

> ***[29]*** *An employer is not entitled to act unilaterally by assigning the position as out-of-scope of the bargaining unit without obtaining the agreement of the union or, failing such agreement, without obtaining an order from the Board, or the employer will be in violation of its obligation to bargain collectively under s. 11(1)(c) of the Act: See, University of Saskatchewan, infra.*
>
> ***[30]*** *In practical terms, however, if the employer fails to bargain with the certified union, the union may file an unfair labour practice application and/or an application under s. 5(m), accompanied by an application for interim assignment of the position if appropriate in the circumstances.*[29]

[34] While *Donovel* was decided under *The Trade Union Act*, the same principles continue to apply under the Act.[30] No doubt the Employer had these principles in mind when seeking a provisional determination from the Boad.

[35] As a practical matter, absent a union's consent to a new position being out-of-scope with respect to an all-employee unit, an employer will seek a provisional determination before filling it. Filling it and unilaterally declaring it out-of-scope is a violation of the employer's obligation to bargain collectively. On the other hand, filling it as an in-scope position pending a determination by the Board will presumably prevent its occupant from carrying out those duties which the employer says warrant its exclusion, pending the Board's determination.

[36] A provisional determination, such as that made in the Provisional Decision, provides the parties with the certainty they require with respect to the newly created position being in-scope or out-of-scope, once filled.

[37] The Board made that determination, concluding that the to-be-filled position ought to be provisionally excluded based on the confidentiality exclusion. The certification order was amended to reflect the provisional determination, and the fact that the exclusion of the EFM would be made final absent an application to vary it within a year.[31] The Provisional Decision also acknowledged the Union's ability to apply to have the appropriateness of the exclusion reassessed, if it turned out that the EFM did not actually perform the duties the Employer contemplated they would perform.[32]

[38] Now, that application has been made. The EFM position has been filled.

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[29] *Donovel*, at paras 29-30.
[30] *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*, 2022 CanLII 45399 (SK LRB), at para 69.
[31] See para 4 of these reasons.
[32] Provisional Decision, para 64.

c. *Res judicata* (issue estoppel)

[39] The Employer has argued that the Union's application should be summarily dismissed based on *res judicata*. In doing so, it has referenced the Supreme Court's decision in *Danyluk*, which dealt with issue estoppel. In *Toronto (City) v CUPE, Local 79,* the Supreme Court explained that issue estoppel is a branch of *res judicata* that has three preconditions for it to be invoked:

> *23 Issue estoppel is a branch of res judicata (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, per Binnie J.). ...*[33]

[40] In *Abbott Laboratories*, the Court of Appeal commented upon issue estoppel and related doctrines, and the principles which are common to all of them, as identified by the Supreme Court in *Figliola*:

> *[39] It is helpful, in addressing the remaining issues in these appeals, to understand that res judicata (i.e., issue estoppel and cause of action estoppel), collateral attack and abuse of process are all "doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness" (British Columbia (Workers' Compensation Board) v Figliola, 2011 SCC 52 at para 25, [2011] 3 SCR 422 [Figliola]; see also Toronto City at paras 52–53). After considering these doctrines for the majority in Figliola, Abella J. identified their common principles, which she said "exist to prevent unfairness by preventing 'abuse of the decision-making process'", quoting from Danyluk v Ainsworth Technologies Inc., 2001 SCC 44 at para 20, [2001] 2 SCR 460 [Danyluk]. The common principles include (Figliola at para 34):*
>
> - *It is in the interests of the public and the parties that the finality of a decision can be relied on (Danyluk, at para. 18; Boucher, at para. 35).*
> - *Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (Toronto (City), at paras. 38 and 51).*
> - *The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (Boucher, at para. 35; Danyluk, at para. 74).*
> - *Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (TeleZone, at para. 61; Boucher, at para. 35; Garland, at para. 72).*

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[33] *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77 [*Toronto (City) v CUPE, Local 79*], at para 23.

- *Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (Toronto (City), at paras. 37 and 51).*[34]

[41] Here, the Board does not conclude that issue estoppel prevents the Union's application.

[42] Fundamentally, the Provisional Decision contemplated the Union making an application within one year if the Union was of the view that the EFM, in practice, was not performing the duties contemplated in the Provisional Decision. This was in conformity with s. 6-105(2). The Provisional Decision could not be characterized as final until the passage of one year without an application to vary it.

[43] Further, the Union's application will, of necessity, require the examination of an issue that could not have been addressed in the Provisional Decision: Whether the EFM, in practice, is an employee within the meaning of the Act.

[44] Of the three prerequisites for issue estoppel to apply, per *Danyluk*, only the third (same parties) is clearly satisfied.

[45] In considering the principles applicable to issue estoppel and similar doctrines, per *Abbott Laboratories*, it is apparent that the Union is not seeking to relitigate an issue that has been finally decided. It is availing itself of a process described in the Provisional Decision which is in accordance with s. 6-105(2) of the Act. The Board has no concerns at this point that the Union's application, in the words of Abella J. in *Figliola*, unfairly commits an "abuse of the decision-making process".

d. Arguable case

[46] Simply put, the Employer's argument is that the Union has not pled sufficient facts to establish that the EFM is not performing confidential duties that require the position to be excluded. In addition, it submits that the Union is aware that the EFM is performing duties in the context of management-side collective bargaining that place her in an insoluble conflict of interest with employees in the bargaining unit.

[47] In response, the Union argues that it has pled what it can. By definition, the Union will not be aware of the activities of a confidential nature which are being carried out by the EFM. This knowledge will be with the EFM, and the Employer.

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[34] *Abbott Laboratories, Ltd. v Spicer*, 2023 SKCA 55 [*Abbott Laboratories*], para 39.

[48] The Board concludes that the Union's argument is persuasive, for the purposes of addressing the sufficiency of its pleadings.

[49] At this point the Union is applying to vary the determination made in the Provisional Decision. That determination rested entirely on the confidentiality exclusion applying to the EFM position, based on its anticipated duties. The determination was based on the position being expected to serve as an advisor to the Executive Director and the Employer's board, but not as a final decision-maker.[35] Accordingly, even if it is accepted that the EFM serves as a representative for management in collective bargaining – as submitted by the Employer (though not pled by the Union) – that is not necessarily dispositive regarding whether the EFM ought to be excluded. To put it plainly, serving as a conduit for information passing between the Union and the Employer in the context of collective bargaining does not necessarily make an individual privy to confidential management-side information. They may simply be "the face" of management, and acting purely as an agent.

[50] The Board notes that the Employer has referenced its decision in *Tercon*, and in particular, the extract reproduced at paragraph 11 of these reasons. The Board does not find the extract particularly relevant to the matter before it, for several reasons. First, the Board notes that *Tercon* was decided before the Board's decision in *KBR Wabi*, which articulates the test currently employed in summary dismissal applications. Second, the comments in *Tercon* were made with a view to applications which plead a violation of the Act (such as an unfair labour practice). This is apparent from the Board's references to *P.A. Bottlers Ltd.*[36] and *WaterGroup Companies Inc.*,[37] cases in which unfair labour practices were alleged. It is also apparent from the Board's comments at paragraph 166 of *Tercon*,[38] with *Tercon* itself being a case involving a "bare allegation" that a union was company-dominated. Third, the concern identified in *Tercon* – a respondent needing to know the case to meet – does not arise in the application presently before the Board. Here, the Employer is aware that what is in issue is whether, in practice, the EFM performs duties which warrant the EFM's continued exclusion based on the confidentiality exclusion. Again, the Provisional Decision foretold that this matter may need to be adjudicated.

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[35] Provisional Decision, paras 61-62.
[36] *UFCW, Local 1400 v P.A. Bottlers Ltd.*, [1997] Sask. LRBR 249 [*P.A. Bottlers Ltd.*].
[37] *SJBRWDSU v WaterGroup Companies Inc.*, LRB File No. 009-93, reasons dated March 8, 1993 [*WaterGroup Companies Inc.*].
[38] *Tercon*, at para 166: "On many occasions, the Board has stated that it does not at this stage assess the strengths or weaknesses of the Applicant's case, but simply seeks to determine, based on the application and/or written submissions filed (in this case the particulars) discloses facts that, if proven, would form the basis of a violation of the *Act*."

[51] In effect, the Union has pled that the EFM is not performing the confidential duties identified in the Provisional Decision. In the Board's view, this is sufficient to clear the "arguable case" hurdle. If the Union's pleading is accepted as true, exclusion of the EFM from the bargaining unit may no longer be appropriate. Accordingly, it would be inappropriate to summarily dismiss the Union's application.

e. Onus

[52] At this point – the summary dismissal stage - it is not strictly necessary for the Board to address which party bears the onus on the Union's application to vary the determination made in the Provisional Decision. However, since both parties have addressed the issue, the Board will do so.

[53] The Board will begin by outlining the application the Union has filed.

[54] The Union has brought an application to amend the certification order issued along with the Provisional Decision. In doing so, it has used Form 14, which is the appropriate form for an application under clauses 6-104(2)(f), (g) or (h) of the Act. Though the Union's application does not reference which of these clauses its application relies upon, it is apparent that an order amending the certification order would rely upon subclause 6-104(2)(g)(ii):

> ***6-104*** *…*
>
> *(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
>
> *…*
>
> *(g) amending a board order if:*
>
> *…*
>
> *(ii) in the opinion of the board, the amendment is necessary;*

[55] Insofar as the Union's application requires a determination of whether the incumbent of the EFM position is an employee within the meaning of the Act,[39] the Union's submissions suggest that it relies upon s. 6-105(2), rather than clause 6-104(2)(i), though neither provision is referenced in its application. Both of these provisions are reproduced below, for convenience:

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

[39] Act, s 6(1)(h).

> *(i) subject to section 6-105, determining for the purposes of this Part whether any person is or may become an employee or a supervisory employee as defined in clause 6-1(1)(o) of this Act as that clause read before the coming into force of The Saskatchewan Employment Amendment Act, 2021;*
>
> …
>
> ***6-105*** *…*
>
> *(2) A provisional determination made pursuant to subsection (1) becomes a final determination one year after the day on which the provisional determination is made unless, before that period expires, the employer or the union applies to the board for a variation of the determination.*

[56] In the Board's view, each of ss. 6-105(2), 6-104(2)(i) and 6-104(2)(g)(ii) are engaged by the Union's application.

[57] As mentioned earlier, subclause 6-104(2)(g)(ii) is a general provision for amending a certification order, where necessary. Clause 6-104(2)(i) is the primary provision under which the Board makes orders regarding whether any person is or may become[40] an employee within the meaning of the Act. Subsection 6-105(2) establishes when a provisional determination under s. 6-105(1) becomes a final determination: one year after the day on which the provisional determination is made unless, before that period expires, the relevant employer or union applies for a variation of the determination.

[58] In effect, the Union's argument with respect to which party bears the onus on its application is this: Subsection 6-105(2) has no meaningful work to do within the scheme of the Act if it doesn't place the onus on the Employer to justify the continued exclusion of a position when a variation application is made within a year of a provisional determination.

[59] In considering the Union's argument, the Board must give effect to the modern principle of statutory interpretation, which is incorporated into s. 2-10 of *The Legislation Act*:

> ***2-10****(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.*
>
> *(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.*[41]

[60] The Board is also mindful of the Court of Appeal's guidance on how to apply the modern principle, in *Arslan v Şekerbank T.A.Ş.*:

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[40] For the purposes of a provisional determination under s. 6-105(1).
[41] *The Legislation Act*, SS 2019, c L-10.2, s 2-10.

> *[59] Under the modern principle, the court first forms an initial impression as to the meaning of a legislative provision from its text (i.e., its "grammatical and ordinary sense"). Then, so as to infer what the Legislature intended to enact, the court will take into account the purpose of the provision and all relevant context. As this suggests, the latter part of the inquiry involves the contextual determination of legislative intent.*
>
> *…*
>
> *[62] As noted, even where the court's initial impression of a legislative provision is readily arrived at, the court is required to consider the broader context to read the provision "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." In Atco Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board), 2006 SCC 4 at para 48, [2006] 1 SCR 140, Bastarache J., for the majority, wrote:*
>
> > *This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.*[42]

[61] For ease of reference, s. 6-105(2) is reproduced again:

> ***6-105*** *…*
>
> *(2) A provisional determination made pursuant to subsection (1) becomes a final determination one year after the day on which the provisional determination is made unless, before that period expires, the employer or the union applies to the board for a variation of the determination.*

[62] On initial impression, the purpose of s. 6-105(2) is to identify a rule and an exception to it. The rule is that a provisional determination pursuant to s. 6-105(1) becomes a final determination within one year of its making. The exception to the rule's operation is if an application to vary the provisional determination is made within the one-year period.

[63] The party seeking avoidance of the rule, by engaging the exception, must apply to the Board to vary the provisional determination. In practical terms, this will of course be the party that is dissatisfied with the impact of the provisional determination. While in this case it is the Union, in another case it could be an employer. It should be recalled that a provisional determination is made before anyone actually performs the duties of the position in question. It is conceivable, for example, that a provisional in-scope determination proves unworkable when the position is staffed and its occupant is required to undertake their duties. In practice, its occupant may find

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[42] *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77, at paras 59 and 62.

themselves in an insoluble conflict of interest with employees in the bargaining unit, in spite of what was anticipated at the time of the provisional determination.

[64] What is the purpose of a provisional determination being made final, in the absence of an application to vary it within a year? A valid labour relations purpose would seem to be to provide the parties with some certainty with respect to the position being in-scope or out-of-scope, in spite of the initial determination being made on the basis of anticipated duties only. Within one year of a provisional determination, a position will ordinarily have been staffed. Accordingly, the parties will have had the opportunity to assess its function(s) within the workplace, in practice. Subsection 6-105(2) contemplates the parties having assessed the position's function(s) in practice, and both having standing to apply to vary a provisional determination for a position in light of the duties its occupant actually performs. Should either party fail to do so, and attempt to apply for a position to be included in or excluded from the bargaining unit *after* one year from the provisional determination, they will be applying to vary a final determination, rather than a provisional determination.

[65] A final determination is, as its name implies, more difficult to vary than a provisional determination.[43] In many cases, attempting to vary a final determination will cause the responding party to consider pleading the doctrines of *res judicata* or abuse of process. Further, the Board may, on its own initiative, ensure that its processes are not abused.

[66] Subsection 6-105(2) ensures that a party that legitimately disputes whether a position's actual functions (once filled) align with a provisional determination can challenge the determination, provided the application is made within one year of the provisional determination. Such an application cannot be subject to the doctrines of *res judicata* or abuse of process. Once a provisional determination becomes final, however, these doctrines may come into play.

[67] Because subsection 6-105(2) deems a provisional determination to be a final determination after one year, absent an application to vary it, it plays an important bookmarking role. In *Canadian Blood Services*, the Board held that in order for it to consider an amendment application on its merits (not within the context of an application to vary a provisional determination

[43] This is not to say that final determinations cannot be varied. The Board may reconsider its decisions, pursuant to s. 6-115(3). The criteria the Board considers in deciding whether to reconsider a decision are noted at paragraph 8 of *Corps of Commissionaires, North Saskatchewan Division v United Food and Commercial Workers*, 2021 CanLII 71335 (SK LRB). Further, a change in circumstances may prevent an application to vary a determination from being subject to the doctrine of *res judicata*. This is discussed at paragraphs 52-54 of *KDM Constructors LP v Construction and General Workers Union*, 2022 CanLII 52912 (SK LRB).

within one year of the determination), the applicant must establish, as a precondition, that there has been a material change in circumstances since the date of the order sought to be amended.[44] In effect, this means that, absent an application to vary a provisional determination within one year, an applicant seeking to affect the deemed final determination after one year must establish a material change from circumstances as they existed at the one-year mark. Where a party has permitted a provisional determination to become a final determination in spite of its concerns about the (filled) position being in-scope or out-of-scope, it therefore does so at its own risk. More particularly, it may not be able to establish the material change from the one-year mark for the Board to consider its request.

[68] Viewed as such, subsection 6-105(2) has meaningful work to do within the legislative scheme. Moreover, it has a purpose other than that submitted by the Union.

[69] Generally, there is nothing inherently unfair in requiring a party seeking variation of an interim or interlocutory order from bearing the onus to establish that it ought to be varied.[45]

[70] Notably, s. 6-105(2) makes no mention of which party bears the onus when an application is made to vary a provisional determination. As the Board has noted previously, the onus usually falls on the applicant to prove its application and establish that the relief it seeks is appropriate.[46] Further, the current proceeding is not the type of proceeding in which the Legislature expressly contemplated imposing a reverse onus.[47]

[71] Considering all of the foregoing, the Board concludes that the Union bears the onus to establish that the circumstances contemplated in the Provisional Decision as justifying the EFM's exclusion from the bargaining unit do not exist, now that the EFM position has been filled. It is open to the Union to request issuance of any subpoena(s) that it may require in order to present its case.

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[44] *Service Workers International Union, Local 299 v Canadian Blood Services*, 2007 CanLII 68757 (SK LRB) [*Canadian Blood Services*]. See also *Varsteel Ltd. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5917*, 2018 CanLII 127675 (SK LRB), at paras 47-50.

[45] See, for example, *Bauscher-Grant Farms Inc. v. Lake Diefenbaker Potato Corp.*, 1999 CanLII 12463 (SK KB), at para 19: "An applicant seeking to vary the terms of an interlocutory injunction has the onus of demonstrating a change in circumstance such as to fairly justify a variation", referencing *F.P. Bourgault Industries Cultivator Division Ltd. v. Nichols Tillage Tools Inc.*, 1989 CarswellSask 332 (SK QB).

[46] *CUPE, Local 4777*, at para 13;

[47] See, for example, ss. 2-8(2), 3-36(4), 3-80, 3-81, 5-40, 6-62(5).

[72] To the extent the Employer may rely upon bases for exclusion of the EFM position other than those accepted in the Provisional Decision, such as those which might support its exclusion under the managerial exclusion, it is of course the Employer's obligation to satisfy the Board of their applicability.

f. Disposition

[73] The Union's application will be permitted to proceed. An appropriate order will accompany these reasons.

[74] This is a unanimous decision on behalf of the Board.

DATED at Regina, Saskatchewan, this **22nd** day of **March, 2024.**

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson