SASKATOON PUBLIC LIBRARY BOARD, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL NO. 2669, Respondent Union and GOVERNMENT OF SASKATCHEWAN, Respondent and SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, SASKATCHEWAN JOINT BOARD, RETAIL WHOLESALE AND DEPARTMENT STORE UNION and THE CITY OF REGINA, Intervenors

LRB File No. 135-16; January 17, 2017

Chairperson, Kenneth G. Love Q.C.; Members: Don Ewart and Maurice Werezak

For the Applicant Saskatoon Public Library:	Kevin Wilson, Q.C. and Amy C. Gibson
For the Respondent Canadian Union of Public Employees	Juliana Saxberg
For the Respondent Government of Saskatchewan	Barbara Mysko
For the Intervenor Saskatchewan Government and General Employees' Union	Crystal Norbeck
For the Intervenor Saskatchewan Joint Board, Retail, Wholesale and Department Store Union	Ronni Nordal
For the Intervenor City of Regina	James McLellan

Board Jurisdiction – Board considers its jurisdiction to exclude "Supervisory Employees" from a bargaining unit on the application of an Employer.

Statutory Interpretation – Board considers provisions of *The Saskatchewan Employment Act* to determine its authority with respect to exclusion of "Supervisory Employees" from a bargaining unit.

Statutory Interpretation – Board employs the "Modern Rule" of Statutory Interpretation to inform its jurisdiction relating to an application to remove "Supervisory Employees" from an existing bargaining unit.

Application to exclude "Supervisory Employees" from an existing bargaining Unit by Employer – Board determines that its jurisdiction does not extend to granting an application by an employer to exclude "Supervisory Employees" from an existing bargaining unit.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** This is an application by the Saskatoon Public Library Board (the "SPLB") to *inter alia* remove supervisory employees, as defined in section 6-1(o) (the "Supervisory Employees"), from a bargaining unit of employees containing employees who are supervised by those supervisory employees (the "Supervised Employees") pursuant to section 6-111(3) and section 6-104(1)(g) of *The Saskatchewan Employment Act,* SS 2013, c S-15.1 (the "*SEA"*). The Supervised Employees and the Supervisory Employees are currently within the same bargaining unit as established by this Board's Order in LRB File No. 036-95 dated April 13, 1995, which Order certified The Canadian Union of Public Employees, Local 2669 ("CUPE") as the collective bargaining representative for that bargaining unit of employees.

[2] The Respondent, The Government of Saskatchewan becomes engaged in this matter as a result of an application made by CUPE regarding a constitutional question put forward by CUPE pursuant to *The Constitutional Questions Act, 2012*[1] and requesting the following relief:

> *An order that section 6-1(1)(o) and 6-11(3) and other sections of 6-11 pertaining to Supervisory Employees of the Saskatchewan Employment Act SS 2013, c S-15.1 ("SEA") are of no force or effect on the grounds that they unjustifiably infringe upon freedom of expression and association rights guaranteed under ss. 2(b) and 2(a) of the Charter of Rights and Freedoms.*

[3] The Intervenors, the Saskatchewan Government and General Employees' Union ("SGEU") and the Saskatchewan Joint Board, Retail Wholesale and Department Store Union ("RWDSU") were granted Public Law Intervenor Status by Board Order dated October 21, 2016, which status was limited as follows:

[1] S.S. 2012, c C-29.01

a) *Neither SGEU nor RWDSU shall be permitted to call evidence or to cross-examine witnesses;*

b) *SGEU and RWDSU may not bring or introduce any legal argument with respect to any issue other than:*

1. The Constitutionality of the provisions of the SEA concerning "supervisory employees";

2. The statutory interpretation of the provisions of the SEA concerning "supervisory employees"; and

3. The jurisdiction of the Board with respect to including or retaining "supervisory employees" within the same bargaining unit as non-supervisory employees.

c) *Any such arguments shall be supplemental to, rather than supportive of, any arguments advanced by CUPE.*

[4] At the commencement of the hearing of this matter in Saskatoon on November 29, 2016, the Board granted the Intervenor, the City of Regina, status as a Public Law Intervenor on the same basis as was granted to SGEU and RWDSU by the October 21, 2016 Order.

[5] At the request of some of the parties, the Board determined that it would seek the assistance of the parties to determine the nature and extent of its jurisdiction with respect to supervisory employees. That assistance fell into two (2) broad questions. The first was the nature and extent of the Board's jurisdiction pursuant to section 6-11(3) of the *SEA* and, second, was an employer entitled to bring an application such as this. It was agreed that the Board would consider the issue of its jurisdiction first and thereafter deal with the constitutional question put forward by CUPE. It was agreed at the outset of the hearing of this application that the constitutional question would not be argued or considered by the Board, but that the hearing and this decision would relate solely to the determination of the Board's jurisdiction in relation to the application made by SPLB.

Facts:

[6] No evidence was heard by the Board with respect to the statutory interpretation question. We have, as necessary, relied upon facts as plead by the parties in the application and Replies filed with the Board.

Relevant statutory provision:

[7] Relevant statutory provisions are as follows:

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; or

(ii) if authorized pursuant to this Part, a unit comprised of employees of two or more employers that is determined by the board as a unit appropriate for collective bargaining;

. . .

(o) ***"supervisory employee"*** *means an employee whose primary function is to supervise employees and who exercises one or more of the following duties:*

(I) independently assigning work to employees and monitoring the quality of work produced by employees;

(ii) assigning hours of work and overtime;

(iii) providing an assessment to be used for work appraisals or merit increases for employees;

(iv) recommending disciplining employees;

but does not include an employee who:

(v) is a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs;

(vi) acts as a supervisor on a temporary basis; or

(vii) is in a prescribed occupation;

. . .

(q) ***"unit"*** *means any group of employees of an employer or, if authorized pursuant to this Part, of two or more employers.*

. . .

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; or

(b) in the case of an application to move a portion of one

bargaining unit to another bargaining unit, if the portion of the unit should be moved.

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

(3) Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.

(4) Subsection (3) does not apply if:

(a) the employer and union make an irrevocable election to allow the supervisory employees to be in the bargaining unit; or

(b) the bargaining unit determined by the board is a bargaining unit comprised of supervisory employees.

(5) An employee who is or may become a supervisory employee:

(a) continues to be a member of a bargaining unit until excluded by the board or an agreement between the employer and the union; and

(b) is entitled to all the rights and shall fulfil all of the responsibilities of a member of the bargaining unit.

(6) Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.

(7)I n making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:

(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and

(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:

(i) the geographical jurisdiction of the union making the application; and

(ii) whether the certification order should be confined to a particular project.

. . .

Board powers
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

(ii)in the opinion of the board, the amendment is necessary;

Questions to be considered:

[8] This preliminary application raises two (2) significant questions which have not previously been considered by the Board. This application is one of many similar applications currently pending before the Board. The Board, with the consent of the parties, has selected this application to be the "test" case with respect to those pending cases. We are grateful to all of the counsel involved for their co-operation and for their insightful arguments both written and oral.

[9] The application raises two (2) broad questions related to the Board's jurisdiction with respect to inclusion of "Supervisory Employees", as defined in section 6-1(o) of the *SEA,* within the same bargaining unit as the employees which those Supervisory Employees are required to supervise. Both of these questions can be determined from the interpretation of the provisions of the *SEA* which came into force on April 29, 2016.

Analysis:

The Modern Rule of Statutory Interpretation:

[10] All of the parties are in agreement that the Board should interpret the provisions of section 6-11 of the *SEA* in accordance with the modern rule of statutory interpretation which recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. This rule was postulated by Driedger in *Construction of Statutes*[2] and adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.*[3]. The Court stated the rule as follows at paragraph 21:

> *Today there is only one principle or approach, namely, the words of 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 Parliament.*

[11] This rule of statutory construction has been adopted and utilized in numerous cases since *Rizzo*. In her rework of Drieger's work on Construction of Statutes, Ruth Sullivan in

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[2] 2d ed. 1983
[3] [1998] 1 SCR 27, CanLII 837

her work entitled *Sullivan on the Construction of Statutes*[4], provided the following as assistance to those tasked with the responsibility of interpretation of a particular statute[5].

> *At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, it compliance with the legislative text; (b) its efficacy, that is, it promotion of legislative intent; and (c) acceptability, that is the outcome complies with accepted legal norms; it is reasonable and just.*

[12] The modern rule also permits the use of extrinsic aids to assist in reaching the proper interpretation. The Saskatchewan Court of Appeal in *Arslan v Sekerbank TAS*[6] made the following statements concerning use of extrinsic aids at paragraph [62] *et seq*:

> *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 (CanLII) at para 48, [2006] 1 SCR 140, Bastarache J., for the majority, wrote:*
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> > *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 (CanLII), 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.*
>
> *[63] Historically, Canadian courts were distrustful of extrinsic aids to statutory interpretation. However, under the modern principle of statutory interpretation, courts have become accustomed to reading legislative provisions in their broad context, which now includes extrinsic aids that were formerly considered inadmissible. This is so because such aids are often part of the legal context or they provide evidence of external context. They may also serve as "a source of authoritative opinion about the meaning or purpose of legislation." In other respects, extrinsic aids lend to an understanding of the understanding on which the Legislature enacted the provision or statute in question. See Sullivan at 656-660.*
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> *[64] Here, the extrinsic aids to the interpretation of the EMJA include the statute book, the body of jurisprudence interpreting the EMJA, debates and proceedings before the Legislature, scholarly opinion by competent academic interpreters of the EMJA, and a report prepared by experts in the field and used in the legislative process.*

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[4] 6th ed. Markham: LexisNexis Canada 2014
[5] See also *Thompson v. Bear* [2014] SKCA 111 CanLII at para. [62]
[6] 2016 SKCA 77 (CanLII)

[13] In addition to the modern rule of statutory interpretation, we are also required to have regard for section 10 of *The Interpretation Act, 1995*[7] . This was confirmed by the Saskatchewan Court of Appeal in its decision in *McNairn v. U.A., Local 179*[8]. Section 10 provides as follows:

> *Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects.*

Context of the Provision:

[14] In order to place these provisions into their proper context, it is necessary to provide an overview of the scheme of the *SEA.* Part VI of the SEA replaced what was formerly a stand-alone statute, *The Trade Union Act*.[9] The *SEA*, like the former *Trade Union Act*, enacted a Wagner Act like model of labour relations. It provides for employees to have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.[10] The *SEA* provides this Board with the authority to make numerous determinations regarding the acquisition of bargaining rights, including the exclusive right[11] to determine whether a proposed bargaining unit constitutes an appropriate unit of employees for whom a trade union may be authorized to bargain collectively. This includes the power to require the employer to engage in good faith bargaining with those employees through a trade union chosen by those employees.

[15] In addition to the acquisition of bargaining rights, the *SEA* also provides for the termination of bargaining rights on the application of Employees within the bargaining unit or through abandonment. It also provides for the transfer of bargaining rights upon a raid by another union or a successorship or if those rights are transferred from one union to another, or if the employer moves from being governed by the Federal statute to being governed under the *SEA.*

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[7] S.S. 1995 c. I-11.2
[8] [2004] SKCA 57 (CanLII) at paragraphs 33-34
[9] R.S.S. 1978 c. T-17 (repealed)
[10] See Section 6-4
[11] Noranda Mines Limited v. Labour Relations Board of Saskatchewan [1969] SCR 898, CanLII 104 (SCC) at page 903 (SCR)

[16] As in this case, the *SEA* also provides for the Board to amend a collective bargaining certificate ("certification") to reflect changes that may have occurred in the composition of the bargaining unit.[12]

[17] Other aspects of the *SEA* deal with the Board's authority to grant relief with respect to Unfair Labour Practices, to become involved in disputes between a trade union and its members, control of strikes and procedures leading up to strikes and with respect to resolution of disputes through arbitration.

[18] The *Wagner Act* model represented in the *SEA* is an adversarial model that reflects the prevalent ying vs. yang between management of an enterprise and the labour utilized by that enterprise. It provides for managerial and confidential exclusions from the bargaining unit so that there will be some balance between the two (2) conflicting entities. Inserted between those parties is a trade union who represents the employees within the appropriate unit and who is the exclusive bargaining agent for that group of employees. In addition, the *SEA* requires that both parties negotiate for a collective agreement in good faith.

The Provisions read in their Ordinary and Grammatical Sense

[19] The start point for our analysis of these provisions is to determine the ordinary and grammatical sense of the words under consideration. The principal provision for the Board to consider is section 6-11(3). The whole of section 6-11 reads as follows:

> *6-11(1) If a union applies for certification as the bargaining agent for a unit or a portion of a unit 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; or*
>
> *(b) In the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.*
>
> *(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.*
>
> *(3) Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.*
>
> *(4) Subsection (3) does not apply if:*
> *(a) the employer and the union make an irrevocable election to allow the supervisory employees to be in the bargaining unit; or*

[12] See section 6-104(2)(f) and (g)

> *(b) the bargaining unit determined by the Board is a bargaining unit comprised of supervisory employees.*
>
> *(5) An employee who is or may become a supervisory employee:*
> *(a) continues to be a member of a bargaining unit until excluded by the Board or an agreement between the employer and the union; and*
> *(b) is entitled to all the rights and shall fulfil all of the responsibilities of a member of the bargaining unit.*
>
> *(6) Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.*
>
> *(7) in making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:*
> *(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and*
>
> *(c) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:*
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> *(i) the geographical jurisdiction of the union making the application; and*
>
> *(ii) whether the certification order should be confined to a particular project.*

[20] In the context of section 6-11, the ordinary and grammatical meaning of the provision is clear, that is, that subsection (3) is applicable only when the Board is dealing with the establishment of an appropriate bargaining unit, upon the application of a trade union, who is seeking to be certified by the Board as the exclusive bargaining agent for an appropriate unit of employees, as a part of an original certification application, or upon a raid of a portion of a unit. This interpretation is strengthened by the reference to the power to exclude persons from the bargaining unit "proposed by the union".

[21] As noted above, the Board is empowered to do numerous things in relation to the establishment of an appropriate bargaining unit. Typically, a union will, once it has acquired sufficient support for its application to represent a group of employees, make application to the Board to be certified to represent those employees. However, section 6-11 guides the Board in several respects with respect to the establishment of an appropriate unit. For example, an appropriate unit cannot contain employees who are not employees because they fall outside the definition of employee as found in section 6-1(h), i.e.: they are excluded under either part (A) or (B) of that definition (managerial or confidential exclusion).

[22] Subsection 6-11(2) confirms the Board's authority to exclude persons whom the union seeks to include within the bargaining unit, if inclusion of those persons would render the unit inappropriate for collective bargaining. An example of this might be the inclusion of persons who do not have anything in common with the majority of employees who the union seeks to certify, or who should themselves be a separate bargaining unit. In the construction industry, for example, it may be inappropriate to include pipefitters within a group of electrical workers. Additionally, some employees may not have a sufficient connection to the workplace or be determined to be contractors (as distinct from employees).

[23] Similarly, subsection 6-11(7) continues an amendment made to *The Construction Industry Labour Relations Act*[13] in 2010 which allowed the Board to deviate from what is known as the "Newbery Units", which are standard unit descriptions developed by the Board in the construction industry to allow for certification of units of journeypersons, apprentices etc. on a craft unit basis. In 2010, the legislature amended the *Construction Industry Labour Relations Act, 1992* to provide the Board with the flexibility to grant "all employee" unit certifications to trade unions notwithstanding the makeup of the trades that the union sought to represent. Notwithstanding that this provision was incorporated into the *Construction Industry Labour Relations Act*, the Board was required to have reference to it when exercising its authority under *The Trade Union Act* when determining the appropriate bargaining unit for collective bargaining.

[24] Also supportive of our interpretation are subsections 6-11(4) and (5). Subsection 6-11(4) allows for an employer and a trade union to enter into an irrevocable election to allow the Board to include supervisory employees within the same bargaining unit as the employees which they supervise. Once such an election is made, it cannot be retracted or revoked by either party.

[25] Such an election makes sense only in the context of an initial application to the Board when the appropriate unit of employees is being considered. Absent such an election, the Board is precluded from including supervisory employees within the same unit as the employees they supervise. Because supervisory employees are still entitled to union representation, i.e.: they are not managerial or confidential employees as defined in section 6-1(h), they can, themselves, be included within a separate bargaining unit and represented by the same or another trade union. This question is to be determined at the outset of the establishment of the bargaining relationship. To do so at another time, once the Board has

already determined an appropriate unit, would be a difficult situation as discussed in more detail below.

[26] Additionally, subsection 6-11(5) makes it clear that until such time as a supervisory employee is excluded by the Board, that employee continues to be a member of the bargaining unit and is entitled to all of the rights and shall fulfil all of the responsibilities of a member of the bargaining unit.

[27] For these reasons, this Board is of the view that the ordinary and grammatical meaning of subsection 6-11(3) is that it applies only in the context of an initial application by a trade union to represent a group of employees or a part of such a group.

Is this interpretation Harmonious with the other provisions of Part VI of the *SEA?*

[28] Once established by this Board, bargaining rights may be lost, transferred or amended through the operation of other provisions of the *SEA.* Bargaining rights may be lost through abandonment[14] or by employees' choice in decertifying their workplace[15]. They may be transferred through a successorship when a business that includes a certified bargaining unit is transferred, sold or otherwise disposed of.[16] They may also be transferred when the employees choose to have a different bargaining agent bargain collectively on their behalf.[17].

[29] The bargaining unit description may also be changed through an amendment[18] to that bargaining unit resultant from changes to position descriptions, job duties or job responsibilities within the prescribed bargaining unit or from changes to the definition of "employee" within the *SEA*.

[30] For the reasons which follow, we are of the view that the interpretation of section 6-11(3) as outlined above results in a harmonious reading of the provision consistent with the scheme of the *Act*, the object of the Act, and the intention of the Legislature.

[31] The disharmony that results from the interpretation espoused by the Applicant, and supported by the City of Regina, would permit an employer, as in this case, to seek, of its

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[13] SS 1992 c. C-29.11 (repealed)
[14] See s. 6-16
[15] See s. 6-17
[16] See s. 6-18
[17] See s. 6-10 (This type of change is sometimes referred to as a "raid")
[18] See s. 6-104(2)(f) and (g)

own accord, an amendment to an established bargaining unit prescribed by this Board without the participation of the certified trade union or the employees within that bargaining unit, is, we submit, clear.

[32] Firstly, such an interpretation flies in the face of the fundamental principle of Part VI of the *SEA* which is that employees "have the right to organize in and to form, join or assist unions and to engage in collective bargaining through "**a union of their own choosing**". [emphasis added]. If the Board were to support the employer's application by adoption of the interpretation sought by the Employer in this case, we would be permitting the Employer to factor into that choice.

[33] The *SEA* is clear that employer influence in the choice of a bargaining representative is not to be permitted. Section 6-5 of the *SEA* clearly interdicts any form of coercion or intimidation "that could reasonably have the effect of compelling or inducing a person to become or refrain from becoming **or continue to be or to cease to be a member of a union**". [emphasis added]

[34] Employer interference in the selection of a collective bargaining representative also constitutes an unfair labour practice.[19] This interdiction also includes a prohibition against an employer becoming engaged in the support of a trade union seeking to represent its employees as well as engaging in collective bargaining with an employer dominated labour organization.[20]

[35] Furthermore, if we were to adopt the interpretation favoured by the Employer in this case, we would be faced with a situation where employees who were formerly represented by a bargaining agent, are left unrepresented as a result of the Employer's application. In this case, there is no suggestion that the supervisory employees torn from the bargaining unit would have anyone representing their interests for collective bargaining, even though they remain eligible to be represented for collective bargaining and have that right.

[36] Additionally, these supervisory employees will likely have acquired rights and interests under the collective agreements previously negotiated; which rights and interests would cease if they were removed from the bargaining unit. This could include items such as

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[19] See s. 6-62(1)(a) and (i)
[20] See s. 6-62(1)(b) and (c)

seniority, wage rates, holiday and sick leave entitlements, insurance benefits and coverage, and pension rights. Additionally, some of these employees may have outstanding grievances in respect to the interpretation or implementation of the collective agreement, which grievances would cease to exist or to be prosecuted if they were removed from the bargaining unit.

[37] For these reasons, the Board finds that the interpretation espoused by the Employer does not provide harmony with the other aspects of the *SEA*.

[38] However, the interpretation espoused by the Board above integrates much more harmoniously with these other provisions. Firstly, it contemplates that the Board will make the determination of the appropriate unit of employees at the time of an initial application by a trade union for certification, or in the event that an application is made by a trade union to represent a part of a previously certified group of employees. This maintains the fundamental tenet of the *SEA,* being employee choice with respect to their bargaining representative.

[39] Because the application is not employer driven, there is no element of undue employer influence regarding the choice of bargaining representative, nor should there be any suggestion of coercion or intimidation on the part of the Employer in relation to such application as the Employer would be the Respondent to that application, not the initiator.

[40] Nor is there any concern regarding displacement of existing bargaining unit employees under the Board's interpretation. At the time an application is made, the parties may, by irrevocable election, determine to include supervisory employees within the same bargaining unit as the employees that they supervise, or, alternatively, the same trade union or another trade union may seek to represent those supervisory employees. Should the supervisory employees, at that time, determine not to be represented, they may do so and remain outside the scope of the bargaining unit. That is their choice alone.

[41] Finally, in the event that a trade union makes application to represent a portion of an existing bargaining unit, the Board has the authority under s. 6-104 (4) to make provision for the transfer or transition of benefit plans, programs or welfare trusts arising under a former collective agreement. It is noteable that no such authority exists[21] for the Board to make such orders when no other union is replacing the prior certified union in respect of those employees.

[21] See particularly s. 6-104(1) and the definitions contained therein.

Extrinsic Aids:

[42] As noted above in *Arslan v Sekerbank TAS*[22] reference to extrinsic aids to assist in the interpretation of statutory provisions is now widely accepted as assisting to frame the real intent of a legislative provision. However, the value of such extrinsic aids is limited when there is no ambiguity or more than one plausible reading to be given to the provisions under review.

[43] In *Bell ExpressVu Limited Partnership v. R*[23] at paragraphs 29 - 30, the Supreme Court had this to say about the use of extrinsic aids to statutory interpretation:

> *What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (Marcotte, supra, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (Westminster Bank Ltd. v. Zang, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in CanadianOxy Chemicals Ltd. v. Canada (Attorney General), 1999 CanLII 680 (SCC), [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, <u>each equally in accordance with the intentions of the statute</u>, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".*
>
> *For this reason, ambiguity cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and <u>thereafter</u> to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, supra, at pp. 4-5).*

[44] There is no ambiguity evoked when the statutory provisions under consideration here are read in the ordinary and grammatical sense harmoniously with the scheme of the *Act* as noted above. Since there is no ambiguity, which requires resolution, it is unnecessary to resort to extrinsic evidence to assist to resolve any such ambiguity.

[45] It appears that some of the confusion with respect to this provision comes from the incorrect use of the word "exclude" which was contained in some of the Hansard references

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[22] 2016 SKCA 77 (CanLII)

to which we were directed. At the time, the Human Services Committee was dealing with two (2) provisions, the definition of employee in section 6-1(h) and the definition of supervisory employee in section 6-1(o). Only persons who are not employees, i.e.: those excluded by virtue of the definition is section 6-1(h) are "excluded" from a bargaining unit because only "employees" can be granted rights under section 6-4 of the *SEA*.

[46] "Supervisory employees", as described in section 6-1(o) are still "employees" under the *SEA* and are entitled to the benefit of section 6-4. Those employees are not excluded from a bargaining unit, but rather cannot be included within the same bargaining unit with employees whom they supervise. This creates a situation where additional bargaining units may result because of this requirement.

[47] The application before this Board suffers from the same confusion which persisted in the Human Services Committee. Supervisory employees are not, by definition, "excluded" from the bargaining unit. The definition of "employee" in section 6-1(h) continues to include, what are now defined as supervisory employees, within that definition. As noted in the Hansard of May 10, 2013, at page 537, the Honourable Don Morgan, Minister of Labour Relations and Workplace Safety says:

> *The amendments include, firstly, clarifying the definition of employee to make it clear that employees whose primary duties are of a confidential nature and whose duties directly impact the bargaining unit cannot belong to a union. Similarly the definition of supervisory employee is being amended to clarify that the primary duties are to be supervisory in nature and that employees who are temporarily reasssigned to higher duties are not to be defined as supervisors. Employees that work alongside other employees doing the same job and who perform minor supervisory duties or occasionally step into a supervisory role on an occasional basis are not by definition a supervisory employee.*

[48] Had the legislature wished to exclude supervisory employees from any bargaining unit they would have, in our opinion, amended section 6-1(h) to include supervisory employees among those persons who are excluded from the definition of "employee". If excluded, those persons would not be employees under the *Act* and therefore would have no access to the scheme of collective bargaining established under the *SEA*. The legislature did not do that. Rather, they expressly provided for access to the *SEA* by supervisory employees and for the continuation of their rights and obligations under any certification in section 6-11(5),

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[23] [2002] 2 SCR 559, 2002 SCR 42 (CanLII)

for the entering into of an irrevocable election by an employer and an union, and for the establishment of a bargaining unit comprised of supervisory employees in section 6-11(4).

Section 10 of *The Interpretation Act:*

[49] The interpretation of section 6-11(3) as outlined above is also, in our opinion, consistent with section 10 of *The Interpretation Act.* That interpretation was arrived at through an analysis of the modern rule of statutory interpretation which is consistent with the requirements of section 10.[24]

Decision:

[50] The proper interpretation of section 6-10(3) of the *SEA* is that it must be restricted to applications made by a trade union for certification of a new unit of employees or in respect of applications made by a trade union to certify part of a current bargaining unit out of a larger bargaining unit. Accordingly, the application to remove supervisory employees from the unit of employees at the Saskatoon Public Library represented by the Canadian Union of Public Employees is dismissed. An appropriate order dismissing that aspect of the SPLB's application will accompany these reasons

[51] The hearing scheduled to commence on February 6, 2017 in Saskatoon shall continue in respect of the possible exclusion of employees, which the Employer alleges do not fall within the definition of employee in section 6-1(h) of the *SEA* and for the amendment of the Board's order with respect to any employees who are found to fall within that definition.

[52] This is an unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **17th** day of **January, 2017.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[24] See *R v. Lux* , [2012] SKCA 129 (CanLII) at paragraph 21 and *Cebryk v. Paragon Emterprises,* (1984) Ltd. [2010] SKCA (CanLII) at para 23