

**Labour Relations Board  
Saskatchewan**

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333, Applicant v. BETHANY PIONEER VILLAGE INC. operating as BIRCH MANOR, Respondent**

LRB File No. 036-06, November 6, 2007

Chairperson, James Seibel; Members: Bruce McDonald and Ken Ahl

For the Applicant: Rod Gillies  
For the Respondent: Kevin Wilson

**Certification – Practice and procedure – Statement of employment – In order to determine whether casual worker has sufficiently substantial employment relationship to be included on statement of employment, Board looks at real employment connection and monetary interest in outcome of certification application – Board applies test to casual employees, thereafter removing certain casual employees from statement of employment.**

***The Trade Union Act, ss. 5(a), 5(b) and 5(c).***

**REASONS FOR DECISION**

**Background:**

[1] Service Employees International Union, Local 333 (the "Union") has applied, pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act"), for an order to be designated as the certified bargaining agent of a unit of employees of Bethany Pioneer Village Inc. (the "Employer") carrying on business at Middle Lake, Saskatchewan as the operator of Birch Manor, an assisted living residence. The Employer also operates a nursing home, Aspen Manor, and three multi-unit independent-living apartment buildings. All of the facilities are located on the same grounds along with some storage buildings. Birch Manor is joined to Aspen Manor by a hallway. The Union does not seek to represent employees working at Aspen Manor – the Union already represents a bargaining unit of those employees.

[2] The description of the proposed bargaining unit is as follows:

*All employees of Bethany Pioneer Village Inc., employed at Birch Manor in*

*or near the Village of Middle Lake, Saskatchewan, save and except persons excluded by the Saskatchewan Trade Union Act, such as administrator, coordinator and confidential secretary.*

[3] The Union had filed a previous application for certification of the employees at Birch Manor on February 10, 2006 which it withdrew a short time thereafter. In that application, the Employer filed a statement of employment listing 16 persons as employees. The present application was filed about 6 weeks later on March 24, 2006.

[4] In the present application, the Union estimated there were 16 employees in the proposed bargaining unit. In its reply to the application, the Employer stated there were 20 employees in the proposed unit, sought no other exclusions and did not dispute the appropriateness of the unit. The statement of employment lists 20 persons in the following occupational classifications: assisted living aide (17); maintenance worker (2); electrician (1). At the hearing, counsel for the Employer advised that the name of Paul (or Joel) Pelant (sp.), a summer student, should be added to the statement of employment but that it was not seeking to add a second summer student, Brendan Righter. According to the Employer, that would make the number of employees 21.

[5] The Union took the position that 6 persons should not be listed on the statement of employment for the purposes of determining the level of support for the application as they were not employees on the date the application was filed. Those persons, with their occupational classifications as listed on the statement of employment, are as follows:

- Assisted living aides (4): Monique McDougall, Ruth Pudrycki, Michell Heidecker, and Doreen Dobrohoczki;
- Maintenance worker (1): Derek McDougall; and,
- Electrician (1): Lyal Heidecker.

[6] The Union also took the position that Mr. Pelant, a summer student employed in 2005, should not be added to the statement of employment.

[7] Glenn McDougall is the administrator of Birch Manor. Monique McDougall is his

spouse and Derek McDougall is his son.

**Evidence:**

Laurine Demeter

**[8]** Laurine Demeter has been employed as an assisted living aide at Birch Manor since 1997. She was called to testify on behalf of the Union. There are 39 residents at Birch Manor ranging in age from 60 to 99 years. The residents live relatively independently in private rooms and have a common dining room. A few residents are wheelchair bound, a few are mentally challenged and a few have dementia. While the nursing home, Aspen Manor, is connected to Birch Manor by a hallway, Ms. Demeter testified that the residents of the former facility are more dependent than the residents of the latter facility and the employees working at Birch Manor do not work at Aspen Manor. Aspen Manor is already unionized.

**[9]** Birch Manor consists of its main residence building and 21 independent-living apartments in 3 units of 7 apartments each. The main duties of the assisted living aides at Birch Manor are meal preparation, clean-up of the kitchen and eating area after each meal and scheduled cleaning of the common areas, hallways, bathroom and boardroom. They do not clean residents' rooms or apartments. They may also assist residents who request food outside of scheduled meal times. While home care workers attend between 7 am and 9 am each day to provide personal care assistance to those residents who require it, the assisted living aides render such assistance outside those hours. The administrator of Birch Manor, Glenn McDougall, resides with his family in a house on the grounds.

**[10]** Ms. Demeter testified concerning certain of the persons listed on the statement of employment who are disputed by the Union. With respect to Ms. Pudrycki, Ms. Demeter stated that she knows Ms. Pudrycki and had never seen her working at Birch Manor as an assisted living aide or in any capacity at all. She pointed out that Ms. Pudrycki's name does not appear on the assisted living aides' posted work schedule through the period from October 16, 2005 to April 1, 2006 – a period of more than five months prior to the filing of the application for certification on March 24, 2006.

**[11]** With respect to Ms. McDougall, Ms. Demeter pointed out that her name first appeared on the assisted living aides' work schedule written in by hand for a single shift on March 21, 2006 -- the only shift for which she was scheduled to work before the filing of the application for certification. The schedule indicates that Ms. McDougall was to work the day shift from 7 am to 3 pm. On that day Ms. Demeter worked an afternoon shift from 4 pm to 8 pm. She did not see Ms. McDougall and has never seen her working at Birch Manor as an assisted living aide.

**[12]** With respect to Michell Heidecker, Ms. Demeter testified that she is married to purported electrician Lyal Heidecker. Lyal Heidecker's mother, Marjorie Heidecker, is a member of the Birch Manor board of directors. While Michell Heidecker's name first appears written in by hand on the last page of the assisted living aides' work schedule for the period March 5, 2006 to April 1, 2006, the schedule does not indicate that she was to work on any day or for any hours during that period -- all of the days in that row are blank. Ms. Demeter stated that she had never seen Michell Heidecker work as an assisted living aide at Birch Manor. However, she did say that she believed that Michell Heidecker may have done some spring and fall housecleaning at Birch Manor but did not know if it was a regular thing.

**[13]** With respect to Ms. Dobrohoczki, Ms. Demeter testified that she knows Ms. Dobrohoczki and had never seen her name listed on the Birch Manor assisted living aides' work schedule and had never seen her work as an assisted living aide. Ms. Demeter stated, however, that she knew that Ms. Dobrohoczki sometimes cleaned and painted a vacated residence room when called by the Birch Manor coordinator, Jean Schuler. Such cleaning and painting is not among the assisted living aides' duties. In her years at Birch Manor, Ms. Demeter said she herself had performed such cleaning on a couple of occasions outside of her regular hours when the coordinator could not get anyone else to come in to do it—she was paid for the extra time in cash with no source deductions at a rate lower than the regular assisted living aide rate of pay. Ms. Demeter said that in an average year two to five residence rooms might be vacated and require such cleaning.

**[14]** With respect to the summer student, Mr. Pelant, Ms. Demeter testified that he was a high school student who performed ground maintenance for the entire Bethany Pioneer Village site -- not just Birch Manor -- during the summer of 2005. All of the maintenance workers may

work at any of the buildings on the site.

**[15]** With respect to Derek McDougall, purported maintenance person, Ms. Demeter testified that she had ever only seen him install a sound system in the dining room and change tap washers and make small repairs in the kitchen.

**[16]** With respect to Mr. Heidecker, the purported employee electrician, Ms. Demeter said she had never seen him working as an electrician at Birch Manor.

**[17]** In cross-examination, Ms. Demeter agreed that there are a number of casual assisted living aides who work perhaps a couple of shifts per month at Birch Manor, such as in a relief capacity, who are listed on the statement of employment and who are not disputed by the Union.

Glenn McDougall

**[18]** Glenn McDougall has been employed as the administrator of Bethany Pioneer Village including Birch Manor for some 19 years. He testified that Aspen Manor is a special care home associated with the Saskatoon Health Region represented by the Saskatchewan Association of Health Organizations (“SAHO”). Birch Manor, however, is privately-funded and a “separate operation” from Aspen Manor. Glenn McDougall said that Bethany Pioneer Village has no employees for the apartment units *per se* and uses employees of Aspen Manor and Birch Manor for some of the duties associated with the apartments.

**[19]** Glenn McDougall testified that there are “casual employees” working in maintenance, in the kitchen, at painting and cleaning and doing inventory. Some employees are listed as aides “for payroll purposes.” The amount of time that casual employees work varies; they may not work at all in some months but may work one or two shifts in other months. Examples include Mary Ellen La Brash and Betty Teiber, both listed on the statement of employment.

**[20]** With respect to his spouse, Ms. McDougall, Glenn McDougall testified that she had worked for Bethany Pioneer Village for almost 18 years doing office work like typing and

photocopying and the occasional pick up of items. Sometimes she did this work on a volunteer basis and other times she was paid. He said that she and Ms. Pudrycki regularly did the annual inventory for both Birch Manor and Aspen Manor. Referring to payroll records, Glenn McDougall stated that, during the weeks of March 11, 2006, March 18, 2006 and March 25, 2006, Ms. McDougall worked 5 hours with Ms. Pudrycki entering inventory pricing in advance of the physical count; doing the physical count for about 11 hours over 2 days and then entering the results into the computer for about 4 hours. Glenn McDougall said Ms. McDougall would have been paid perhaps \$150.00 in the past year.

**[21]** Glenn McDougall said that Ms. McDougall was on the assisted living aides' schedule for a shift on March 21, 2006 for orientation in that capacity. In cross-examination, however, he admitted that the other 1.5 shifts she worked in March 2006 as an ostensible assisted living aide were in replacement of the co-ordinator Ms. Schuler, whose position the Employer agrees is excluded from the proposed bargaining unit.

**[22]** Glenn McDougall testified that Ms. McDougall and 3 other persons listed on the statement of employment filed on the present application were not listed as employees on the statement of employment filed on the initial certification application about a month earlier in February 2006, because they were not in the Employer's payroll system. This, he said, was because over the years many casual employees were paid cash and did not receive a T4 slip nor were workers' compensation levies paid on their behalf. When he found out that this probably should be remedied, these people were not yet in the Employer's system and were missed on the first statement of employment. For example, he said that while Mr. Heidecker was hired as electrician in May 2005, he had not worked many hours by February 2006 and was overlooked in the payroll system. In cross-examination, Glenn McDougall said that they "sort of are employees," and he was concerned about Revenue Canada, so "the safest course of action was to run them through the payroll." Glenn McDougall admitted that he had asked the accountant for Birch Manor about it because "it was not an overwhelming thing that kept [him] up at night." He said he thought, "let's just put them fully as payroll employees," because it "would just be an extra expense to ask the auditors."

**[23]** When asked about the timing of the change in cross-examination, Glenn

McDougall stated to the effect that he “was in the process of lining things up to do it and got interfered with by the first certification application,” and “once the application was withdrawn, [he] thought, ‘let’s do it ‘. It was mainly the workers’ compensation that was bothering [him].”

**[24]** With respect to Ms. Dobrohoczki, Glenn McDougall testified that she primarily performed cleaning and painting of vacated rooms in both Birch Manor and Aspen Manor or anywhere in the Bethany Pioneer Village complex as required. Such cleaning and painting could take up to two days to complete. Ms. Dobrohoczki worked varying hours depending on the number of vacancies in any given time period. Glenn McDougall said that, although Ms. Dobrohoczki was hired three or perhaps five years ago, she had not been entered into the payroll system until shortly before the present application was filed – the record shows her date of hire as March 6, 2006 as an “enriched living aide” of 12.5 hours during the weeks of March 11, 2006 and March 18, 2006.

**[25]** With respect to Michell Heidecker, Glenn McDougall testified that she had worked for approximately 1.5 years primarily doing the heavier spring and fall cleaning, including walls and outside windows. Glenn McDougall said he had recently called Michell Heidecker to advise her that he was going to put her into the payroll system and she would be issued a T4 slip. He said he also asked her if she would like to work in the kitchen as a casual call-in. Glenn McDougall said Michell Heidecker did her 1-day orientation but did not say when. The payroll system shows her date of hire as March 14, 2006 as an “enriched living aide.” Glenn McDougall referred to a cheque paid to Michell Heidecker on December 12, 2005 for \$1,040.00 for fall cleaning.

**[26]** With respect to Ms. Pudrycki, Glenn McDougall testified that she had been doing the annual inventory for Bethany Pioneer Village along with Ms. McDougall for the past 16 to 18 years. However, Ms. Pudrycki was not entered into the payroll system until shortly before the present application was filed. Her date of hire as “enriched living aide” is listed as March 10, 2006. She worked 6 hours pricing inventory the week of March 11, 2006. However, she is older than 65 years of age and has never worked as an assisted living aide. In cross-examination, Glenn McDougall agreed that Ms. Pudrycki would have worked approximately 18 hours in the past year, all on inventory, half the time in respect of each of Birch Manor and Aspen Manor.

**[27]** With respect to Mr. Heidecker, Glenn McDougall testified that he is a licensed electrician and was hired by Birch Manor in the spring of 2005. Glenn McDougall referred to the minutes of a meeting of the board of directors of Bethany Pioneer Village Inc. on April 28, 2005 where it was resolved that the board “approve a casual Birch casual (sic) position for electrical work @ \$19.00/hour.” Glenn McDougall said that although Mr. Heidecker was hired in early May 2005, he did not do any electrical work until November 2005. Glenn McDougall said that this could have been either because no electrical servicing work was required or because Mr. Heidecker, who is also a farmer, was involved in farm work until then. The payroll records for Mr. Heidecker show that he worked 18 hours during the period April 28, 2005 to March 11, 2006. Glenn McDougall agreed that was typical for the electrical work in a one-year period and said that perhaps one-half of those hours were for work at Aspen Manor.

**[28]** With respect to Derek McDougall, Glenn McDougall testified that he had done some casual maintenance work for 10 years or so until he left to go to fire-fighting school. When he returned, he was put back on the payroll. The payroll record shows his hire date as “temporary maintenance worker” on June 20, 2005. Glenn McDougall indicated that, although Derek McDougall was a Birch Manor employee, he would do maintenance work anywhere in the Bethany Pioneer Village complex as required. Glenn McDougall also indicated that each of Birch Manor and Aspen Manor hired a permanent maintenance person who would work in either facility or elsewhere in the Bethany Pioneer Village complex as required. However, although the nominal Aspen Manor maintenance person, Mr. Kohl, is a member of the bargaining unit at Aspen Manor, no breakdown is made of the work performed by either Mr. Kohl or Derek McDougall as to where it was done in the complex – it is simply assumed that it works out equally. Glenn McDougall stated that Derek McDougall was a casual employee as opposed to a part-time employee. Whether Derek McDougall is called in depends on whether there is a “special project,” on whether night or weekend work is required and on his own availability. At the time of the hearing, Derek McDougall had been working at another job for a few weeks, but his father did not know if it was full-time, however, he still worked at Birch Manor on the sound system.

**[29]** With respect to summer student (Mr. Pelant) Glenn McDougall testified that while he intended to bring him back for the summer of 2006, he had not yet communicated that to Mr. Pelant and was not certain whether Birch Manor could afford it. Glenn McDougall said that Mr.



Pelant could have been hired the summer before as a result of the permanent Aspen Manor maintenance worker having had a heart attack but he was not sure. In any event, the permanent employee had since returned to work.

**[30]** In cross-examination, with respect to the inventory work done by Ms. McDougall and Ms. Pudrycki, Glenn McDougall advised that, while they did the inventory for both Birch Manor and Aspen Manor, they were paid for all of their hours for the work through Birch Manor only. That is, for the inventory work they did in March 2006 on behalf of both facilities, they put all their hours through Birch Manor and were paid by Birch Manor alone. However, notwithstanding this, they have not been members of the bargaining unit of the employees at Aspen Manor.

**[31]** Further in cross-examination, with respect to Ms. Dobrohoczki, Glenn McDougall advised that, prior to March 2006, she was paid for her cleaning and painting work through either Birch Manor or Aspen Manor depending on which facility she did the work in but that since then she was being paid only through Birch Manor regardless of which facility she worked in. He admitted that she might be doing work at Aspen Manor that should come out of that facility's budget.

**[32]** Glenn McDougall stated that he did not consider the work at Aspen Manor with respect to maintenance, painting and cleaning to be the work of the bargaining unit at that facility as there was a clause in the collective agreement that allowed the contracting out of certain work. He considered it to be work that was contracted from Birch Manor.

**[33]** With respect to the office work done by his spouse, Ms. McDougall, Glenn McDougall stated that it included typing, but not respecting anything concerning employee or resident confidential information. Ms. McDougall photocopied the sheets for the weekly sing-a-long. She was infrequently paid some cash for office work but would receive a cheque for the inventory work. She also did a lot of tasks as a volunteer "up until a few months before [the present application]." Since Ms. McDougall was oriented as an assisted living aide on March 21, 2006, she had worked 1.5 shifts as an emergency relief only when the coordinator could not find anyone else.

**[34]** With respect to the persons who appear on the statement of employment filed on the present application who were not on that filed on the previous application for certification, Glenn McDougall said that, before they were added to the payroll system, they were paid in cash or by cheque and no source deductions were made or T4 slips issued for the income. As an example, he said that Michell Heidecker would attend at the office and simply advise of the number of hours she did cleaning or would leave it written on a scrap of paper and the secretary would make out a cheque. Although they all had been paid a flat \$10.00/hour prior to March 2006 (except Mr. Heidecker), they had been paid the standard starting wage at Birch Manor of \$11.25/hour since being entered in the payroll system. On the books, their work had previously been listed as “purchased services” – it is not recorded as salary or wages. He was not sure there was any paper trail with respect to the hours worked and services rendered. With respect to the cheque to Michell Heidecker for \$1,040.00 in December 2005, Glenn McDougall said there was no cheque stub and that it was likely recorded as “maintenance expense” the same as payment to persons like plumbers and carpenters. He agreed that she was paid the same as “any contractor coming in up to March 2006.” He also agreed that it would have been the same for any cheque made to Ms. Dobrohoczki.

**[35]** In cross-examination, with respect to the payroll codes on some of the documents, Glenn McDougall was unsure why they would indicate that some of the disputed employees were paid under certain payroll codes. For example, why Ms. Dobrohoczki, Michell Heidecker and Ms. Pudrycki were paid under the code for “kitchen duties” when they had not done any.

**[36]** While seniority has relevance at Birch Manor in terms of severance and vacation under labour standards legislation and for choice of vacation dates, Glenn McDougall could not explain why all of the persons added to the payroll system in March 2006 had a seniority date in March 2006 even though they had supposedly been working for Birch Manor for years, except to say that it was the date on which each was entered in the system.

**Arguments:**

**[37]** Mr. Gillies, counsel on behalf of the Union, filed a brief of his argument which we have reviewed and appreciate. Counsel argued that none of the seven persons disputed by the

Union should be counted in determining the level of support for the certification application on the grounds that they had no sufficient and reasonably tangible employment relationship with the Employer operating as Birch Manor and were not employees on the date the present application was filed.

**[38]** Counsel pointed out that none of Ms. McDougall, Ms. Pudrycki, Michell Heidecker or Ms. Dobrohoczki was listed on the statement of employment filed in the first application for certification. None had worked as an assisted living aide – their alleged occupational classification – prior to the filing of the present application, with the exception that Ms. McDougall had received a one-shift orientation three days prior. Prior to March 2006 all of them, along with Mr. Heidecker, had been paid in the same manner as any other contractor, noted in the Employer’s accounting records as “purchased services.” None was present on the Employer’s seniority list prior to March 2006.

**[39]** Counsel pointed out that Ms. McDougall did not sign her TD-1 form until April 1, 2006, yet her seniority date is listed as March 10, 2006 and she had allegedly been working as a Birch Manor employee for some 18 years. Any hours she did work with respect to office tasks or inventory was apparently split between Birch Manor and Aspen Manor. Ms. Pudrycki worked only approximately 9 hours in the year before the present application was made all in respect of inventory in March 2006. Presumably, the time was split between Birch Manor and Aspen Manor. Michell Heidecker had done spring and fall cleaning since sometime in 2004. She was paid by cheque in a significant amount yet her hours were apparently not recorded or accounted for. Ms. Dobrohoczki has never been on the assisted living aides’ work schedule and was never seen working as an assisted living aide by Ms. Demeter. She apparently works 20 to 30 hours per year at cleaning and painting – that is, perhaps 2 to 2.5 hours per month. She was always paid as a contractor. When Ms. Demeter did the same work, at the request of the Employer’s coordinator, she did the work outside her scheduled hours as an assisted living aide and was paid in cash with no source deductions at a rate less than the aide rate of pay.

**[40]** Mr. Gillies pointed out that Mr. Heidecker, although ostensibly hired in April 2005, did no work at all until November that year. In all, prior to the filing of the present application Mr. Heidecker worked only 16 hours in 4 months from November 2005 to March 2006, including

January 2006 in which he worked no hours – again, presumably, at least half the hours were in respect of work at Aspen Manor. This is less than 1.5 hours a month over 11 months. This is despite the fact that in the Employer's payroll system to which Mr. Heidecker was added in March 2006 he is described as a permanent full-time employee at 37.5 hours per week over 5 days.

**[41]** Counsel asserted that Derek McDougall did not have a sufficiently tangible connection to the workplace to be counted for the purposes of determining the level of support for the application. He was paid approximately \$4,000 in 2005 – according to counsel this represents about 6 hours per week. In the first three months of 2006, his work hours had fallen to about 2.5 hours per week. At least half of this time was allegedly spent doing work for Aspen Manor or other buildings in the complex.

**[42]** With respect to Mr. Pelant, counsel argued that there was no sufficient tangible employment relationship. No specimen signature was provided by the Employer as required. No plans had been made for his return to employment.

**[43]** In summary, counsel submitted that the statement of employment had been manipulated for the purpose of defeating the legitimate aspirations of the employees.

**[44]** In support of his arguments, counsel referred to the following decisions of the Board: *Saskatchewan Government and General Employees' Union v. Saskatoon Community Mediation Services*, [2004] Sask. L.R.B.R. 323, LRB File No. 179-04; *Public Service Alliance of Canada v. Aramark Canada Ltd.*, [2001] Sask. L.R.B.R. 891, LRB File No. 202-01; *International Union of Painters and Allied Trades, Local 739 v. L.C.M. Sandblasting and Painting Ltd.*, [2001] Sask. L.R.B.R. 854, LRB File No. 152-01; *Service Employees International Union, Local 299 v. Vision Security and Investigation Inc.*, [2000] Sask. L.R.B.R. 121, LRB File No. 228-99 (March 7, 2000) ("*Vision Security and Investigation Inc., March 2000*"); *Communications, Energy and Paperworkers Union of Canada v. Prairie Publishing Ltd.*, [1999] Sask. L.R.B.R. 568, LRB File No. 163-99; *United Food and Commercial Workers, Local 1400 v. The Tropical Inn, operated by Pfeifer Holdings Ltd. and United Enterprises Ltd.*, [1997] Sask. L.R.B.R. 87, LRB File Nos. 305-97, 313-97, 374-97, 375-97 & 376-97; *Canadian Union of Public Employees, Local 3077 v. Lakeland Regional Library Board*, [1987] Oct. Sask. Labour Rep. 74, LRB File No. 116-86; *Saskatchewan*

*Joint Board, Retail Wholesale and Department Store Union v. Choiceland Auto Service Ltd.*, [1986] Feb. Sask. Labour Rep. 66, LRB File No. 249-85.

**[45]** Mr. Wilson, counsel on behalf of the Employer, filed a brief of his argument which we have reviewed and appreciate. Counsel submitted that all of the persons listed by the Employer should properly be considered for the purposes of determining the level of support for the application.

**[46]** Counsel pointed out that both Mr. Heidecker and Derek McDougall were listed on the statement of employment filed on the first application for certification, that their status had not changed before the present application was filed and that they each had a tangible connection to the workplace.

**[47]** Counsel submitted that each of Ms. McDougall, Ms. Pudrycki, Michell Heidecker and Ms. Dobrohoczki was a relatively long-term employee and had a tangible employment connection. Counsel submitted that they were no different than other casual employees listed on the statement of employment who the Union did not dispute. With respect to their payroll seniority dates, counsel asserted that they were simply for the convenience of the system and that there was no art to it – they are irrelevant. Counsel argued that there was no evidence that the statement of employment had been manipulated as alleged by counsel for the Union – they simply had not yet been entered into the system by the time the first certification application was made.

**[48]** Mr. Wilson further argued that it was unfair to average any hours that any of the persons in question worked in March 2006 over a longer period of time prior thereto. He also argued that it was unfair not to consider hours worked by any of them at Aspen Manor because they did so as Birch Manor employees – the fact that they worked in the other facility did not make them Aspen Manor employees otherwise one would have to consider the hours worked by Aspen Manor employees at Birch Manor as being performed by them as Birch Manor employees.

**[49]** Counsel asserted that neither Ms. McDougall nor Derek McDougall should be excluded from consideration because of their family ties to the administrator, Glenn McDougall. In small towns, such relationships are common among workers. There was no evidence that Glenn

McDougall discussed or would discuss confidential matters with his spouse.

**[50]** In support of his arguments, counsel referred to the following decisions of the Board: *Prairie Publishing Ltd.*, *supra*; *Saskatchewan Government Employees Union v. Rural Municipality of Paddockwood*, No. 520, [1999] Sask. L.R.B.R. 470, LRB File Nos. 059-99 & 087-99 to 093-99; *Cavanagh v. Canadian Union of Public Employees, Local 1975 and University of Saskatchewan Students' Union*, [2003] Sask. L.R.B.R. 217, LRB File No. 047-03; *United Steelworkers of America v. Doepker Industries Ltd.*, [2000] Sask. L.R.B.R. 258, LRB File No. 016-00.

### **Analysis and Decision:**

**[51]** The main issue in the present case is the status of the 7 persons disputed by the Union with respect to the question of majority support for the application. The question is essentially one of mixed fact and law depending upon the particular circumstances of each case. Whether a person is an “employee” within the meaning of the *Act* in respect of any kind of application made under the *Act* is within the exclusive jurisdiction of the Board.

**[52]** The test, and basis for the test, as to whether a person nominally identified as a “casual” worker has a sufficiently substantial employment relationship to be considered an “employee” for the purposes of determining the issue of the level of support for an application for certification was outlined by the Board in *Lakeland Regional Library Board*, *supra*, as follows, at 74:

*It has long been established that larger bargaining units are preferred over smaller ones, and that in an industrial setting all employee units are usually considered ideal. As a general rule the Board has not excluded casual, temporary or part-time employees from the bargaining unit.*

*However, the Board has also applied the principle that before anyone will be considered to be an "employee", that person must have a reasonably tangible employment relationship with the employer. If it were otherwise, regular full-time employees would have their legitimate aspirations with respect to collective bargaining unfairly affected by persons with little real connection to the employer and little, if any, monetary interest in the matter.*

**[53]** Accordingly, the Board has looked particularly at two aspects: real employment

connection and monetary interest in the outcome. This dictum has been applied since by the Board in numerous decisions including, to name a few, *Retail, Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd.*, [1996] Sask. L.R.B.R. 337, LRB File No. 115-96, *Vision Security and Investigation Inc.*, March 2000, *supra*, and *Aramark Canada Ltd.*, *supra*, where the standard was referred to as a “sufficiently tangible employment relationship.”

**[54]** In *Aramark Canada Ltd. and Vision Security and Investigation Inc.*, March 2000, both *supra*, as in many other cases of this kind, the Board engaged in an analysis of the number of hours worked by the persons in dispute over a particular – but not necessarily the same in every case – period of time, as a significant measure of connection with the workplace in order to determine the tangibility of the employment relationship. In each case the Board determined what it deemed to be a reasonable ratio of hours worked over the period of time as evidence that a sufficiently tangible employment relationship existed and that the particular individual had a sufficiently reasonable monetary interest in the matter but recognized that, while this might be the best way to determine the issue, it may appear to be somewhat arbitrary. In *Service Employees International Union, Local 299 v. Vision Security and Investigation Inc.*, [2000] Sask. L.R.B.R. 121, LRB File No. 228-99 (February 21, 2000), the Board stated as follows at 125:

*In Retail, Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd., [1996] Sask. L.R.B.R. 337, LRB File No. 115-96, the Board acknowledged that the process for determining "employee" status for casual or on-call staff may be decided by criteria that appear somewhat arbitrary. Nevertheless, the Board is required to make the decision using some criteria that captures the majority of persons who have a tangible employment relationship with the employer.*

**[55]** In *Vision Security and Investigation Inc.*, March 2000, *supra*, at 155, the Board observed that different criteria may pertain in different cases depending on the facts, as follows:

*The criteria adopted by the Board in each case must be responsive to the facts of each situation and the Board is not bound to adopt identical criteria in every case dealing with casual employees. Because of this uncertainty regarding employee status, parties are encouraged to seek a determination of employment criteria early in the process of a certification through a request for a preliminary determination.*

**[56]** In *Vision Security and Investigation Inc.*, March 2000, *supra*, the Board determined that the threshold should be 35 hours worked in the fourteen-week period prior to the filing of the application for certification, based on the nature of casual work in the security industry. The Board stated as follows at 154:

*In this case, the Board has determined that any person who worked 35 hours in the 14 week period covered by the Ceredian documents filed by the Board should be included on the statement of employment. This would include employees who worked one football game every two week period. In our view, in this industry, this is a minimal standard. It takes into account the casual nature of the events work by including many casual employees, while not unfairly interfering with the legitimate aspirations of regular full-time and part-time employees to be represented by a trade union.*

**[57]** Similarly, after considering the nature of the industry, in *Lakeland Regional Library Board*, *supra*, the Board included substitute librarians, who replaced regular branch librarians during annual holidays, sick days, bereavement and other leaves who worked a minimum of 30 hours in the calendar year of the application. However, in more casual labour markets, such as the taxi industry, the Board has set different criteria for determining employment status. In *Retail, Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd.*, [1996] Sask. L.R.B.R. 337, LRB File No. 115-96, the Board included employees who had worked at least two shifts per week over the three month period prior to the certification date.

**[58]** One point of departure in the present case from the foregoing precedents is that, at least until March 2006, only days before the application for certification was filed, all of the disputed persons, except Derek McDougall and Mr. Pelant, were treated by the Employer as piece-work labourers – in some cases they were paid in cash at less than the assisted living aide rate of pay; no employment source deductions were made; and no workers' compensation levies were paid on their behalf; no T4 slips were issued for income tax purposes; payment for their work, if it was recorded, was described in the Employer's ledger as "purchased services." In our opinion, these characteristics indicate that the Employer did not consider these persons to be employees with any concrete connection with the workplace, but piece-work or casual labourers. Nothing really changed in March 2006. The making of them into "employees" on paper in the



Employer's payroll system is of no real moment – nothing had changed in terms of their relationship with the Employer and “saying it does not make it so.”

**[59]** The employment classifications of Ms. Pudrycki, Michell Heidecker, Ms. Dobrohoczki are all listed as “assisted living aide” on the statement of employment but there is no evidence that they worked as such. Only Michell Heidecker's name has ever appeared on the aides' work schedule, but no hours worked are indicated. Certainly the taking of inventory, general office work, heavy spring and fall cleaning and the cleaning and painting of vacated rooms are not the ordinary duties of an assisted living aide. Ms. Demeter testified that, when she was called upon to do the latter work, it was by her own choice, outside of her scheduled hours as an aide and with payment in cash at less than her regular rate of pay. Whatever Ms. Pudrycki, Michell Heidecker and Ms. Dobrohoczki are, they are not assisted living aides. It is certainly passing strange that they are described as such in the Employer's payroll system, to which they were added days before the present application was filed. In any event, the only documentary evidence of hours worked by any of them in any capacity in approximately the month prior to the application being filed indicates as follows:

- *Ms. Pudrycki worked 6 hours in the week ending 11 March 2006 and 8 hours the week ending 1 April 2006, all with respect to inventory -- her total gross earnings were \$160.59;*
- *Michell Heidecker did not work;*
- *Ms. Dobrohoczki worked 4 hours the week ending 11 March 2006 and 8.5 hours the week ending 18 March 2006 – her total gross earnings were \$140.27.*

**[60]** There is no evidence that any of them otherwise worked in the three months prior to the application being filed. None of these disputed individuals was called to testify to rebut these facts or in clarification of their status.

**[61]** With respect to Ms. McDougall, somewhat strangely she had been added to the Employer's payroll system as a permanent full-time assisted living aide effective March 10, 2006, prior to receiving a one-shift orientation for that position on March 21, 2006. She did not otherwise work as an aide prior to the application being filed. She worked some hours in March 2006 with

respect to inventory and as relief for the Employer's coordinator, Ms. Schuler, a position agreed by the parties to be out-of-scope of the proposed bargaining unit. According to the payroll record provided by the Employer, Ms. McDougall worked 5 hours doing inventory during the first two weeks of March 2006 her total gross earnings for which were \$56.28. There is no firm evidence that she otherwise worked in any capacity during the three months prior to the present application being filed. She was not called to testify to rebut these facts or in clarification of her status.

**[62]** According to the Employer's payroll records, which indicates his hire date as November 15, 2005 and his length of service date as February 18, 2006, Mr. Heidecker is a permanent casual electrician. He was ostensibly hired in April 2005. He did not work at Birch Manor at all until November 2005. From then until the present application was filed he worked a total of 18 hours. According to Glenn McDougall, this would be the typical number of hours of electrical work required by the entire Bethany Pioneer Village complex on an annual basis -- i.e., an average of approximately 1.6 hours per month. Only 4.5 of those hours were worked in the three months prior to the application, 3.5 hours in February 2006 and one hour in March 2006, for which he was paid the total gross amount of \$77.97.

**[63]** In our opinion, in all of the circumstances described above, none of Ms. Pudrycki, Michell Heidecker, Ms. Dobrohoczki, Ms. McDougall or Mr. Heidecker has a sufficiently tangible employment relationship or sufficient monetary interest to warrant being considered as an employee with respect to the determination of the level of support for the certification application. Their individual hours worked during the three months prior to the filing of the application range from a low of zero (Michell Heidecker) to a high of 12.5 (Ms. McDougall). The records disclose that none of them earned more than \$170.00 in total during this period. To include them on the statement of employment with respect to the representation issue would be to contribute to the potential defeat of the aspirations of legitimate employees with a real interest in the outcome.

**[64]** The same determination pertains to the student employed during the summer of 2005, Mr. Pelant. There is no evidence that he had any intention of returning and Glenn McDougall was unsure whether the Employer could afford to have him. Mr. Pelant's position is simply too tenuous.

**[65]** The situation is different with respect to Derek McDougall. He earned more than \$4,000 in 2005 and worked 30 hours in the month of January 2006. He had since been seen working on Birch Manor's sound system. Although he was working at another job, we accept that it is temporary. He has always been paid with source deductions and a T4 slip issued for tax purposes. In our opinion, in all of the circumstances, Derek McDougall is legitimately listed on the statement of employment as he has a sufficiently tangible employment relationship.

**[66]** Therefore, the names of Ms. Pudrycki, Michell Heidecker, Ms. Dobrohoczki, Ms. McDougall and Mr. Heidecker shall be removed from the statement of employment for the purposes of determining the representation issue.

**[67]** The Union has filed evidence of support for the application for certification from a majority of the employees. There is no issue between the parties as to the appropriateness of the proposed bargaining unit and we find that it is appropriate. An Order for certification will issue describing the bargaining unit as follows:

*All employees of Bethany Pioneer Village Inc. operating as Birch Manor at or near Middle Lake, Saskatchewan, except the administrator, coordinator and confidential secretary.*

**DATED** at Regina, Saskatchewan, this **6th** day of **November, 2007**.

**LABOUR RELATIONS BOARD**

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James Seibel,  
Chairperson