Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v. RANCH EHRLO SOCIETY and EHRLO COMMUNITY SERVICES INC., Respondents

LRB File Nos. 108-07; November 21, 2008
Vice-Chairperson, Angela Zborosky; Members: Kendra Cruson and Bruce McDonald

For the Applicant: Drew Plaxton
For the Respondent: Brian Kenny, Q.C.

Bargaining unit – Appropriate bargaining unit – Board discusses policy of preferring larger more inclusive bargaining units to smaller less inclusive bargaining units and of avoiding fragmentation of employees in workplaces.

Bargaining unit – Appropriate bargaining unit – Union seeks under-inclusive bargaining unit - Whether bargaining unit should include caseworkers providing services in group homes of residential treatment facility for youths – Employees in proposed unit have no discrete skill and no other rational and defensible boundary can be drawn around proposed unit without caseworkers – There is intermingling between those in the proposed unit and the caseworkers – There was a realistic ability on part of union to organize a more inclusive unit – Board deciding caseworkers must be included in bargaining unit in order for unit sought to be an appropriate unit.

***The Trade Union Act*, ss. 3, 5(a), (b) and (c).**

REASONS FOR DECISION

Background:

[1] The United Food and Commercial Workers Union, Local 1400 (the "Union") applied to be designated as the certified bargaining agent for a unit of employees of Ranch Ehrlo Society (the "Ranch") and Ehrlo Community Services Inc. ("ECS") (collectively referred to as the "Employer"). The Employer consists of two related non-profit charitable organizations providing a range of assessment, treatment, education and support services to children and youth, operating various residential, educational, and counseling programs. Although the composition of the proposed bargaining unit changed throughout the course of the hearing, the bargaining unit initially proposed by the Union in its application dated August 31, 2007, states as follows:

> *All employees of Ranch Ehrlo Society and Ehrlo Community Services Inc., including all employees working in Schaller College/Avant-Garde and any and all other programs undertaken by the said employers in the province of Saskatchewan except: the President, the Vice-President(s), the Directors, the Program Managers, the Unit Managers, the caseworkers, all administration employees, all persons employed as a teacher who must as a condition of employment be a member of the Saskatchewan Teachers' Federation, and any employees above the rank of Manager.*

[2] The reply filed by the Employer asserted that the proposed bargaining unit is not appropriate for the purpose of collective bargaining in that caseworkers should not be excluded. The Employer alleged that a more inclusive bargaining unit would include caseworkers and that caseworkers share a community of interest with the other employees proposed to be included within the unit. The Employer also asserted that there is intermingling between the caseworkers and those in the proposed unit and that there is no reasonable basis to exclude caseworkers from the proposed unit because to do so would lead to an artificial separation of that group of employees from those within the proposed unit.

[3] The Union estimated that there were approximately 365 employees in the proposed unit on the date the application was filed. In the Employer's statement of employment filed with the Board, the Employer stated that there were 444 employees in the proposed bargaining unit (including caseworkers, of which there were 23). Further, the Union indicated in its application that if it has not filed evidence of a majority of support by the employees in an appropriate unit, that it requests that the Board order a vote to be conducted pursuant to the *Act*.

[4] Immediately prior to the application for certification being filed, the Board received a valid revocation of support from one individual who had filed evidence of support for the application. The Union was notified of this fact.

[5] A pre-hearing was held with the Board's Registrar on November 30, 2007 at which time the parties resolved some of their outstanding issues related to the statement of employment.

[6] The application was heard by the Board on February 19, 20 and 22, 2008.

[7] At the outset of the hearing, the parties indicated that the issue to be decided by the Board was whether or not the caseworkers should be included in the proposed bargaining unit. The Union did not include caseworkers in the proposed bargaining unit set out in its application and it seeks to have the unit it applied for declared an appropriate one without the inclusion of caseworkers. On the contrary, the Employer takes the position that the unit sought by the Union is not appropriate and that in order to be appropriate, it must include the caseworkers. Therefore, with the exception of the caseworkers, the following proposed bargaining unit description that was agreed upon by the parties at the outset of the hearing was as follows:

> *All employees of Ranch Ehrlo Society and Ehrlo Community Services Inc., including all employees working in Schaller College, Avant-Garde and/or any other programs undertaken by Ranch Ehrlo Society and Ehrlo Community Services Inc., in Saskatchewan except president, vice-president(s), directors, program managers, unit managers, quality improvement assistant, supervisor of Ehrlo Daycare, administration employees, persons employed as teachers who must as a condition of employment be members of the Saskatchewan Teachers' Federation, persons employed in the pre-trades construction programs, and persons who provide professional therapeutic services outside the group home setting, are an appropriate unit of employees for the purpose of bargaining collectively.*

[8] The parties agreed that if caseworkers are necessarily part of an appropriate bargaining unit, the bargaining unit description remains as above. On the other hand, if the unit sought by the Union is an appropriate one, "caseworkers" will be added to the end of the list of excepted positions.

[9] Throughout the course of the hearing, the parties continued to work at an agreement concerning the composition of the statement of employment. Ultimately, the parties agreed on a statement of employment that included 418 employees (23 of whom were in the disputed caseworker classification).

[10] However, this was not the end of the parties' agreements as to the composition of the statement of employment or the proposed bargaining unit description. In the weeks following the hearing, the Board received correspondence from the parties that indicated that the parties had agreed that the employees of Schaller College would be excluded from the proposed bargaining unit. The parties also referred to two employees listed on the statement of employment, clarifying that one is included in the proposed bargaining unit and one should be considered a caseworker, bringing the total number of caseworkers included in the 418 employees listed, to 24. In that correspondence, the parties included their revised and final proposed bargaining unit description (with "caseworkers" appearing in parentheses due to their status being in issue on this application):

> *All employees employed by Ranch Ehrlo society and Ehrlo Community Services Inc., including all employees working in Avant Garde College and or any other program undertaken by Ranch Ehrlo Society and Ehrlo Community Services Inc., in Saskatchewan, except President, Vice-President(s), Directors, Program Managers, Unit Managers, Quality Improvement Assistant, Supervisor of Ehrlo Day Care, Administration and Information Technology Employees, persons employed as Teachers who must as a condition of employment be members of the Saskatchewan Teachers' Federation, employees working in Schaller College, persons employed in the Pre-trade Construction Programs, employees of Ehrlo Counseling Services and Therapists who provide therapeutic services outside of the group home setting* ***(and Case Workers)****, are an appropriate unit of employees for the purposes of bargaining collectively.*

[11] The parties and legal counsel are to be commended for their efforts in reducing the many issues in dispute to only that of the status of the inclusion/exclusion of the caseworkers.

Evidence:

[12] The parties agreed that the Employer would proceed with its evidence first, followed by the Union. The Employer called the evidence of Malcolm Neill, Vice-President of ECS, and Linda Meyer, Vice-President- Programs South for the Ranch. In reply, the Union called the evidence of Brandi Tracksell, a national servicing representative of the Union and the representative primarily involved in the organizing drive.

Malcolm Neill

[13] Although Mr. Neill has held his current position of vice-president of ECS for approximately three years, he has held other positions with the Ranch, including assistant director of residential care and treatment (seven years), unit manager (seven years), and child and youth care worker (three years).

[14] Mr. Neill testified that both the Ranch and ECS are non-profit corporations. They are both registered charitable organizations. They each operate with an independent volunteer board of directors, with the only overlap of directors being that the chairperson of each board is a director on the other board. He acknowledged that they are associated charities and that occasionally, senior staff from the Ranch are on secondment to ECS. Mr. Neill explained that the Ranch provides assessment, treatment, education and support services for children and youth referred to the program. The Employer has residential and educational programs in Pilot Butte, Regina, Prince Albert, Buckland campus outside of Prince Albert and Corman Park campus outside of Saskatoon. Services are provided primarily to youth ages 13 to 18 (70%), while 10% of the residents are 12 and under and 20% are over 18 years of age. The focus of the services at the Ranch are rehabilitative and the services include specialized assessments and counseling, special education, residential care with 24-hour supervision, recreation, and individual and group work projects. Initially only the Ranch existed, but over time, the agency began to develop a number of community-based services and it therefore established ECS as a separate organization to provide these services. Currently, ECS provides housing for low-income families and single mothers, sports programming for inner-city youth, individual counseling for children and families (outside the group home setting), the Avant-Garde College of esthetics and cosmetology, and the pre-trades construction program.

[15] As the vice-president of ECS, Mr. Neill acts as the chief operating officer and reports to Geoff Pawson, the president and CEO of ECS, while working directly with the volunteer board of directors. He has five individuals who report to him: the director of housing, the director of counseling, the principal of Avant-Garde, the coordinator of sport venture, and the coordinator of community vocational programs.

[16] Mr. Neill testified that the director of housing is responsible for the low income housing units and has a manager and site manager reporting to her. ECS owns 60 units of affordable housing and works with provincial and community organizations to obtain additional housing and to promote home ownership, primarily for individuals and families on some form of social assistance. Some of the housing units are specifically made available to teens and young mothers.

[17] The director of counseling is responsible for a program that delivers a broad range of counseling services. It is the host agency for the Cognitive Disability Association and it also provides individual counseling services through referrals from employers, employee and family assistance programs, and through victims' services. The director of counseling supervises one clerical person, two therapists and three employees working with the "cognitive disability strategy."

[18] Mr. Neill testified that Avant-Garde is a fully licensed independent vocational school which focuses on cosmetology and esthetics. Its courses are available to be taken by any members of the public. The principal of Avant-Garde has five esthetics and cosmetology instructors (four full-time and one part-time) and one receptionist reporting to her.

[19] The sport venture coordinator is responsible for two community based sport programs: the equipment library and four no-cost sports leagues (hockey, football, basketball and soccer).

[20] In addition to Avant-Garde, ECS operates a second vocational program, through the coordinator of community vocational programs, which involves a pre-trade construction program. The specific programs offered may vary from time to time and are generally funded with the assistance of the federal government. Participation in the program is limited to individuals receiving some form of government assistance and while the average age of the participants is 18 – 25, they may range from 16 to those in their 30's. Under the coordinator are four project leaders and nine program recipients. These positions are seasonal in nature and their numbers may vary. The program recipients receive wages and are hired and treated as employees.

[21] Mr. Neill testified that the Union's application for certification includes 7 of the 19 above named positions (the number of 19 excludes the vocational/pre-trades construction programs which numbers vary and are seasonal). Those that are in the proposed bargaining unit include: the site manager reporting to the director of housing, the coordinator of sport venture, and the five instructors working at Avant-Garde. Therefore, the employees that are not included in the proposed bargaining unit include: the director of counseling and her reports (therapists, those working in the cognitive disability strategy, and one clerical); the Principal of Avant-Garde and her receptionist; and the coordinator of community vocational programs as well as her four project leaders and the nine program recipients. Mr. Neill noted that the Employer and Union have agreed to exclude all receptionists and clerical employees as part of a broad definition of "administration."

[22] Mr. Neill also testified concerning the nature of the operation of the Ranch. He stated that Mr. Pawson is also the president and CEO of the Ranch. There are four vice-presidents that report to Mr. Pawson, including (i) the vice-president of programs south (held by Ms. Meyer who also testified at the hearing) whose work focuses on the residential treatment programs in Pilot Butte and Regina; (ii) the vice-president of programs north, whose work focuses on the residential treatment programs in and near Prince Albert and Saskatoon; (iii) the vice-president, director and principal of education who is responsible for the campus schools, regular education programs and the Schaller College; and (iv) the vice-president of administration, who is responsible for various administrative and support functions of the organization.

[23] Under Ms. Meyer, holding the position of vice-president of programs south, are five "directors of programs," each being responsible for one or more "treatment programs," which is the term the Employer uses to describe either a single group home or an independent living program. Reporting to each of those directors are "unit managers" and "caseworkers," of which there is generally one of each for each treatment program/group home. In cross-examination, Mr. Neill acknowledged that unit managers and caseworkers appear at the same level on the organizational chart. Reporting to the unit manager are the youth care/personal support leaders and youth care/personal

support workers as well as the housemothers.[1] There is one unit manager for each residential treatment program (i.e. group home or independent living home) who is responsible for the staff and the youth in that home. The youth care leaders/workers and the housemothers are included in the bargaining unit sought by the Union. The caseworkers are the position in dispute between the parties – the Union has not sought to include them while the Employer asserts that they must be included in the unit in order for the unit to be "an appropriate" one.

[24] The organizational structure under the vice-president of programs north fairly closely mirrors that of the south, except that there are two directors and an office assistant above the level of the unit managers. For the unit manager level and below, the programs north and programs south have the same structure, and again, the caseworker position is in dispute between the parties while the parties have agreed that the unit sought appropriately includes the youth care leaders/workers and the housemothers.

[25] The vice-president, director and principal of education has a director and two vice-principals that report to her. This area of the operation is responsible for the education of residents and includes, for example, the Schaller Education Centre in Pilot Butte where youth attend the Schaller School. Residents also receive education in the regular school system as well as through rented classroom space in schools around Regina. Schaller College, a private vocational school teaching information technology, also falls within this program area (although its employees are excluded from the bargaining unit sought based on the agreement of the parties). Underneath the positions of the director and two vice-principals are the "program managers" and the teachers, who are accredited teachers that are excluded from the bargaining unit sought because they belong to the Saskatchewan Teachers' Federation. Also reporting to director and two vice-principals are a number of positions which the parties have agreed are appropriately included within the bargaining unit sought, that is, educational assistants, job coaches and student support workers. Mr. Neill acknowledged in cross-examination that the unit

[1] The identifying terms "youth care" or "personal support" in relation to both the leaders and the workers is simply a means to identify the age group of the youths with which the leader or worker is dealing. When the employee is dealing with younger youth, the term "youth care" is used but with older youth, the term "personal support" is used. For the sake of convenience, we will refer to all of these employees as either "youth care leader" or "youth care worker."

sought by the Union included all of the employees in the area of education except management and those that belonged to the Saskatchewan Teachers' Federation.

[26] The final vice-president, that of administration, has several individuals reporting to her, including those in the areas of communications, facilities, secretarial services, the director of Ehrlo Daycare, information technology, coordinator of volunteer services, and director of human resources. All of these positions (along with those employees that report to them) are excluded from the unit sought, by the agreement of the parties, except for those in the classification of "early childhood educators," who report to the supervisor of Ehrlo Daycare. In cross-examination, Mr. Neill indicated that the Daycare is likely under the "administration" part of the operation because it originated as a day care in Regina for the children of Ranch employees (i.e. as an employee benefit) but that when the staff did not use all the spaces, they opened it up to the community.

[27] Mr. Neill agreed with Union counsel that the majority of the employees of the Employer were in the bargaining unit sought by the Union – some 70 -80%. Mr. Neill agreed that of the approximately 500 employees of the Employer below the manager/director level, some 45 belong to the Saskatchewan Teachers' Federation and approximately 30 more are excluded by reason of the agreed to bargaining unit description. It was also pointed out that while most of those employees work at the Ranch, there are some in the proposed unit that work at ECS.

[28] In cross-examination, Mr. Neill testified further about the composition of the residential treatment programs. He stated that there were the following programs in the following areas:

	Residential Treatment Programs	**Educational Programs**
Prince Albert	5	1
Corman Park	2	1
Pilot Butte	5	1
Regina	14	1

[29] Mr. Neill acknowledged that the qualifications of caseworkers (the classification in dispute) and the therapists with ECS were similar positions, although the caseworker position calls for a master's degree while the therapist position requires a master's or doctoral degree. He stated that there are exceptions to this educational requirement for caseworkers but was not aware of the details. Mr. Neill also stated that the caseworkers' duties were different in that the ECS therapists do not participate with others as part of a treatment team (they do one-on-one counseling). He stated that the person accessing the ECS therapist still lives at home. Union counsel referred Mr. Neill to several job descriptions of those positions outside the proposed bargaining unit, including that of a therapist, to demonstrate that they were all at the same level as the caseworker in the sense they report to someone at the director level. Mr. Neill acknowledged that the unit managers and caseworkers put together and supervise a treatment plan while those below actually carry out its terms. He also stated that while the unit managers are solely responsible for the evaluation of other staff in the group home (the youth care workers/leaders and housemothers), the caseworkers have no one under their supervision and have no input into the evaluation of any staff. He acknowledged that only very occasionally has a caseworker performed some work outside the group home at which he or she is assigned, whether it be at a different group home or as a contract assignment with ECS. He stated that there has never been an instance where a therapist from ECS has performed work in a group home. With respect to career progression, Mr. Neill stated that many of the caseworkers started out as youth care leaders/workers and/or housemothers at the Ranch, whereas, of the four therapists employed at ECS, two came from the Ranch (i.e. were youth care workers or leaders) while two were recruited from outside the Ranch.

[30] Mr. Neill testified that he believes that to exclude caseworkers from the proposed bargaining unit would create a barrier between the caseworker and the rest of the members of the treatment team. If the caseworkers were excluded, they would be the only non-management staff on the treatment team in the group home to be excluded from the bargaining unit. Mr. Neill expressed his belief that excluding caseworkers would negatively affect how the team functions in terms of serving the best interests of the youth under their care.

Linda Meyer

[31] As stated, Ms. Meyer holds the position of vice-president of programs south, a position she had held for approximately one year as of the date of the hearing. Prior to her appointment to this position, she has held the positions of senior director of counseling services with ECS (for nine years) as well as three positions with the Ranch: assistant director of residential care and treatment with the Ranch (for two years), case worker (five years) and unit manager (two years). She testified that while she was a unit manager in a group home, she had one housemother and six child and youth care workers reporting to her. As a caseworker, she worked in three group homes over a five year period (while she obtained her master's degree). As the assistant director of residential care and treatment, she was responsible for intake and stabilization for all treatment programs in Pilot Butte.

[32] Ms. Meyer testified that when she moved to ECS in 1998, she assumed a leadership role in development of the counseling services there. Therapists were hired to provide separate, one-on-one counseling with children and families in the community. She stated that the therapists she supervised at ECS did not work in a group home at any time; they at no time utilized the team approach currently used in the Ranch treatment programs.

[33] Ms. Meyer testified that as the vice-president of programs south, she reports directly to the president and CEO. She is responsible for all of the residential treatment programs in Pilot Butte and Regina, as well as the supported living programs. Ms. Meyer stated that sixteen of the nineteen caseworkers actively working for the Ranch at the time of the hearing are employed by the Ranch in the south part of the province and are under her responsibility (there are 23 caseworkers in total but four are on a maternity leave). She stated that five directors report to her; each director is responsible for three to four group homes with one of the directors also being responsible for the family treatment program and another having responsibility for many supported living programs. With respect to each of the "treatment programs" or "group homes," Ms. Meyer testified that five are intake and stabilization programs where each home has a unit manager and one caseworker (plus a half-time caseworker for three of the homes); eight programs/ homes provide group living services (this is where a youth moves to after being in an intake and stabilization home) with one unit manager and one caseworker in

each home; and three are group homes providing services to developmentally disabled youth (these are smaller group homes) where two caseworkers cover the three homes and there is a unit manager in each home. She stated that she is also responsible for 12 supported living programs which are not considered group homes (they may be apartments where one or two adults live together) and that there are two unit managers but no caseworkers assigned to work in these programs.

[34] The complement of employees in each group home is similar. There is typically one unit manager, one caseworker, two full time youth care leaders, five to six full-time and one to two part-time/casual youth care workers, and one housemother. There are usually ten youth residents in each home.

[35] Ms. Meyer testified that all of the caseworkers work in an office in a group home, except for two: one is the half-time caseworker who provides assistance at one of the large, intake and stabilization group homes in Pilot Butte, while another is part of a team that provides services in the total family treatment program (a different type of program where services are provided in the family's home).

[36] Ms. Meyer explained the history of the use of caseworkers in the Ranch's treatment of youth. Prior to 1978, the Ranch's program was not run as an "expert", clinically-driven program and that clinical services were only an "add-on" service. In 1978, caseworkers began to be hired and provided their services across the Ranch. In 1994, the model of delivery of clinical services changed and caseworkers were trained and hired to work in each group home program. This is when the Ranch began to provide complete services within the group home setting through a full integration of clinical and residential treatment.

[37] Ms. Meyer testified in detail concerning the qualifications, duties and responsibilities of the caseworker with reference to the job description entered into evidence. The role description, as set out in the job description entered into evidence, states as follows:

> *The Case Worker provides clinical leadership and resources to their assigned unit. The CW provides clinical assessment, counseling, and group work services to youth and families. The*

> *CW provides clinical and therapy advice to residential and educational teams. The CW provides a key communications link between stakeholders through written reports, consults, and daily communication. The CW contributes significantly to a positive therapeutic environment. The CW reports directly to a Director of Residential Care and Treatment.*

[38] Ms. Meyer stated that the caseworker has specialized knowledge and experience in order to make a clinical assessment about the youth coming into the program. Once a youth is in the program, the team, which includes the caseworker, unit manager, youth care leaders and workers, as well as the housemother, works on a collaborative basis to continuously assess, develop and change the treatment plan, evaluating goals and determining outcomes. The caseworkers also assist the team by providing specialized clinical knowledge to help other members of the team understand the youth's problems and develop and carry out their treatment. The team synthesizes the information learned about the youth to identify strengths and challenges. Neither the assessment nor the treatment is done solely by the caseworker. In addition to this role, the caseworker may, if it is part of the treatment plan, provide one-on-one counseling with a youth resident.

[39] Ms. Meyer also explained that the caseworker is the "communications link" with both external stakeholders, such as family or a referring social worker, or internal stakeholders, such as the unit manager or a teacher. The caseworker also communicates verbally with the youth and other members of the team, particularly when a worker comes on shift. The team in the group home maintains a "daily communications log" for all team members to hand write information concerning the youth, such as activities, sports or issues of concern. Ms. Meyer also described the computerized communication management system that all members of the team have access to and use. It is used to record critical information such as the youth's contacts, demographics, critical incident reports, treatment goals, treatment plans, and information related to ongoing assessment. It is a tool used to help with the ongoing assessment of the youth's treatment program.

[40] The caseworker plays a leadership role in the group home by developing the team members' clinical understanding and by guiding members of the team toward meeting therapy goals and objectives. The caseworker is also responsible for developing

quality relationships within the team and also with families, funding agencies and the community. By using information from other members of the team, the caseworker is responsible for making referrals to other treatments sources such as, for example, a psychiatrist.

[41] With respect to the "accountabilities" listed in the job description, Ms. Meyer testified that the caseworker, as with other members of the team, is responsible to advocate on behalf of the youth – both internally through the assessment and development of the treatment plan, and externally, with families or referral agencies. Differences of views by members of the team are resolved using a collaborative approach. The job description states that the caseworker, in conjunction with the unit manager and clinical professionals, is required to develop individual and group treatment plans. The caseworker also integrates the youth's treatment program with the educational program. The caseworker provides a leadership role with respect to implementation of individual and group treatment plans and, with input from other members of the team, ensures the completion of documents and records for external stakeholders. As indicated in the job description, the caseworker also assists in identifying the youths' healthcare needs and represents youth at treatment conferences, meetings, and family consultations.

[42] The job description indicates that the caseworker collaborates with the unit manager with respect to providing training for the team members. Ms. Meyer stated that the group home team meets twice per month – either for a training session or to present clinical information about the youths. The caseworker must participate in all of those meetings. In cross-examination, Ms. Meyer stated that other staff hold regular meetings as well. The unit manager meets monthly with the program director and vice-president. The caseworkers have a monthly meeting with the program director. The housemothers meet every two months with the vice-president. The youth care leaders also meet every two months with both the program director and the vice president. The purposes of all of these meetings are varied; discussions at the meetings may involve upcoming activities and camps, the physical aspects of the buildings, educational goals, residents' clothing, treatment plans, required resources, etc.

[43] While the caseworker has no responsibilities related to the preparation of the budget (this is the unit manager's duty), the caseworker may have some influence, although not necessarily direct input, into items to include in budget related to specific treatment goals of the youth residents.

[44] With respect to the required education for the caseworker position, Ms. Meyer testified that the job description calls for a master's degree in a related area which could include psychology, social sciences, education or social work. However, she testified, not all caseworkers have this educational qualification. Seven of the 19 active caseworkers do not have such a degree but are working toward obtaining it. A master's degree is not a requirement for any of the other positions in the group home, including the unit manager. Ms. Meyer testified that there is also a youth care worker currently working toward obtaining her master's degree and that there have been other youth care workers/leaders in the past that have done so, whether to qualify for the caseworker position or merely out of interest. With respect to registration in a professional association, Ms. Meyer testified that the Employer supports registration in professional associations and stated that there is some assistance provided for paying the required fees. She stated that it is expected that, over time, a caseworker will be registered with a professional association (once they have completed any necessary educational requirements), but acknowledged that youth care workers/leaders and housemothers are not required to register with a professional association.

[45] With respect to the required experience for the position of caseworker, Ms. Meyer stated that it is important that the individual have some understanding of working with youth and some working knowledge of child, family and youth legislation. She also stated that necessary experience has often been gained as a result of working as a youth care worker or leader. She stated that 10 of the current 19 caseworkers were previously a youth care worker/leader at the Ranch. Ms. Meyer also observed that occasionally, caseworkers move back to the position of youth care worker/leader and knows of four instances where this has occurred. In cross-examination, she acknowledged that these were instances where the youth care worker/leader had been filling the caseworker position temporarily (i.e. in the case of a maternity leave by the caseworker).

[46] Ms. Meyer referred to a code of ethics which was entered into evidence, stating that it applies to all employees of the Ranch, including the caseworkers. She noted that the first principle, titled "Responsibility to the Client," requires all employees of the Ranch to be responsible for advocacy of the youth, both internally and externally.

[47] With respect to working conditions, Ms. Meyer testified that all employees, including caseworkers, are included in the group benefit plan. More than thirty human resources policies are in place at the Ranch and all are of general application to all employees at the Ranch, including caseworkers. In cross-examination, Ms. Meyer testified concerning other working conditions affecting Ranch employees as well as the therapists working at ECS. With respect to wages, caseworkers and unit managers are paid on a monthly basis while the other employees in the group home are paid on an hourly basis. Caseworkers and unit managers are not paid over-time wages.

[48] Ms. Meyer was cross-examined concerning the comparability of wages among the many positions, with reference to a very detailed and structured pay grid for all employees of the Ranch that sets out the classifications, "pay bands" and "pay levels" based on the individuals' positions and qualifications, and a pay grid which sets out the wages in 10 steps of progression for each pay band and pay level. The caseworkers are paid at either "pay band" E, level 4 (if they have a degree) or pay band G, level 2 (if they have a master's degree). Ms. Meyer agreed that these were the same pay rates as for the "clinical family worker" (degree only) and the "clinical family worker or therapist" (master's degree), respectively. The Board notes that the pay grid indicates that the pay difference for those with a master's degree as opposed to an undergraduate degree is significant (over $9000 annually). Ms. Meyer denied that unit managers are paid an amount similar to either the caseworkers or therapists, indicating that unit managers are paid significantly more than any caseworker (the unit managers and other managers/directors/vice-presidents were not included on the Employer's pay grid entered into evidence). With respect to youth care leaders with a degree, they are placed at pay band E, level 1, which pays approximately $370 per year less than a degreed caseworker. Youth care leaders without a degree are placed at pay band D, level 5, which pays about $2000 per year less than with a degree. With respect to the ten steps of progression through the pay grid, Ms. Meyer indicated that it is based on performance, as assessed by management: the program director and the vice-president determine the

pay progression of both the unit managers and the caseworkers and it is the program director and unit manager (and occasionally the vice-president) who make the pay determinations concerning the youth care workers, youth care leaders and the housemothers.

[49] In re-examination, it was pointed out to Ms. Meyer that the pay grid includes an additional classification of a caseworker, the only caseworker working at ECS, whose position is entitled "cognitive disability consultant." The pay for this position is between that of a caseworker with a degree and a caseworker with a master's degree.

[50] With respect to hours of work within the group home setting at the Ranch, the unit manager typically works Monday to Friday, 10:00 a.m. to 6:00 p.m., the caseworker works Monday to Friday 9:00 a.m. to 5:00 p.m., the housemother works daily from either 7:30 a.m. to 3:30 p.m. or 7:00 a.m. to 3:00 p.m., and the youth care workers and leaders have various shifts (ranging from eight to 12-hours), covering 24 hours per day, seven days per week. Ms. Meyer acknowledged that the caseworkers have some ability to negotiate the times they are at work, while the youth care workers/leaders and housemothers do not.

[51] Ms. Meyer testified that the caseworkers have no managerial or supervisory responsibilities. They do not participate in any hiring decisions and are not involved in nor do they have any power to discipline or fire employees. These are generally the decisions of the unit manager and sometimes the program director. The caseworker has no responsibility to supervise any staff; that is the unit manager's role. Furthermore, the caseworker is not involved in the evaluation of staff or their advancement. It is the unit manager or the program director that performs these functions, including the assessment of an employee on probation (in which case, human resources staff are also occasionally involved). It is only the unit manager who may approve overtime work by members of the team. Ms. Meyer testified that the caseworkers are in the same position as the rest of the staff in that if they observe conduct by any employee for which discipline may be warranted, they have an obligation to report it to management, which would be either the unit manager or the director.

[52] With respect to coverage if an employee is away, Ms. Meyer stated that if the unit manager is away, the program director has responsibility for the duties of that position, but a youth care leader may instead be assigned the duties of the unit manager. The caseworker never covers for the unit manager in her absence. When the caseworker is absent or on vacation leave, no one fills the position.

[53] Ms. Meyer was cross-examined extensively concerning the comparability of the positions of caseworker (working at the Ranch) and therapist (working at ECS). The "role description" of the caseworker from the job description is set out above. The following is the "role description" for a therapist at ECS:

> *The Therapist provides clinical leadership and resources to families referred to Ehrlo Community Services. The Therapist provides clinical assessment, counseling, and group work services to youth and families. The Therapist provides a key communications link between stakeholders through written reports, consults, and daily communication. The Therapist contributes significantly to a positive therapeutic environment within ECS. The Therapist reports directly to the Director of Ehrlo Counseling Services.*

[54] In cross-examination, Ms. Meyer stated that it was her view that the caseworkers at the Ranch and the therapists at ECS do not have similar jobs. While acknowledging that the job descriptions are similar in content, she stated that the method of daily work as well as the training and expertise required for each position is very different. She stated that while they are both involved in the provision of clinical services and both may report to a "director," the model of delivery of their services makes their jobs very different. She stated that the caseworker works as part of a treatment team, whereas the therapist does not. She stated that the caseworker's ability to work collaboratively with a team is very different than a therapist, whose abilities are focused on providing treatment to an individual, one-on-one. While they may both make independent clinical decisions, the therapist escalates decisions to her director, whereas the caseworker escalates it within the program home to the unit manager (the job description also says the decision may be escalated to an "assistant director" but there are none so employed at the Ranch). In addition, she stated, the clinical responses of each are often very different because the caseworker responds with the input of the team and in combination with the residential treatment program, including the educational

program. In addition, with respect to "operational/cross functional abilities," the therapist makes use of various educational, community and other ECS services, whereas the caseworker has knowledge of and makes use of educational, residential, and administrative Ranch and ECS technologies, all of which supports Ms. Meyer's explanation that the caseworker draws on the internal supports of the team and the Ranch's resources to fully integrate the treatment plan for the youth. She stated that the therapist must develop treatment plans alone, as a clinician only, and only in conjunction with the youth and parent(s). Any others with whom a therapist might consult (such as a youth's teacher or a police officer) is done only with the permission of the youth and in those cases, would be limited to background information only. She acknowledged that she is aware of only four occasions over her entire career with the Employer, where the caseworker or therapist has moved from one position to the other; however, she maintained that "at times," one could do the other's job, but that there are different skills required for each.

[55] In cross-examination, Ms. Meyer maintained that while the job descriptions suggest that it is the caseworker and unit manager that are the ones responsible for the development of the individual and group treatment programs, and that the youth care leader position description says that they only "provide recommendations" regarding the treatment plan and that they "assist" in the implementation of the plan, it is not only up to the caseworker and unit manager to develop the treatment program. She was firm that the development of the treatment plan is done with the collaboration and participation of all members of the team. She denied that a psychologist (i.e. the caseworker) is the only person with the knowledge necessary to develop a clinical program, again stating that treatment programs are always developed in consultation with the team. She explained that the treatment plan is not static; it is constantly changing through input from the "line staff" (although not always the housemother) and the team's ongoing assessments. Ms. Meyer stated that she is the one ultimately responsible if something goes wrong with a treatment plan. However, she also stated that she would review all aspects of the plan with members of the team to determine what went wrong and that it is the unit manager and the caseworker who would be responsible for the plan.

[56] Ms. Meyer was also cross-examined in relation to what occurs when a grievance or complaint is filed by a youth against one of the staff members. Ms. Meyer

indicated that there may have been ten such formal complaints across the province over the course of the previous year but that most of the time, the complaint is simply a concern expressed by a youth that needs to be "problem solved." She stated that there is no specific process that is followed with all complaints. The process may begin where the youth has made a complaint to a teacher, youth care worker or a unit manager. When a complaint is received, it is reported to the unit manager of that home who will, in turn, report that complaint to the program director. The program director investigates the complaint or directs the unit manager to do so, sometimes with the involvement of the caseworker. If the youth cannot speak on her or his own behalf, the caseworker, unit manager or director will advocate for the youth. If the complaint concerns a caseworker, the unit manager and program director would likely bring the youth and caseworker together to attempt to problem solve the matter. If the matter involves a physical altercation, it is the program director, through the unit manager, that notifies the police.

[57] In her examination-in-chief, Ms. Meyer testified that it is her belief that the integrated team treatment model, which, in her view, is critical to the Ranch's approach to residential treatment of youth, would suffer if the caseworkers are left out of the Union's proposed bargaining unit. In cross-examination, Ms. Meyer stated that she was aware that the teachers working for the Employer were represented by a union, but she could not point to any particular difficulties that resulted from educational assistants not being in the teachers' bargaining unit, although, she did state that she believes that those two groups of employees are not integrated in their work in the same way that caseworkers are with other members of the treatment team. Ms. Meyer stated that all those within the group home program are an integral part of the team and should all be included in the proposed bargaining unit, with the exception of the unit manager, who leads the team and has managerial authority over the members of the team. She denied that the unit managers and caseworkers are on an equal footing, indicating that they have different roles. She also denied that the caseworker is the primary person responsible for clinical care – she sees that as the primary responsibility of the unit manager. When asked in cross-examination how the workplace could be disrupted by exclusion of the caseworkers from the bargaining unit, Ms. Meyer responded that with the model under which they operate, specifically, the integration of clinical and residential treatment knowledge and experience, and because teaching and therapy comes in the "every day moments of the lives" of the youth, it is important not to create an artificial dividing line between members

of the team, a line which the Employer has worked hard over last 12 years to ensure was not drawn. She expressed her belief that if the caseworkers are not in the bargaining unit, a division between the clinical and residential parts of the team would occur and the caseworkers would no longer be viewed by the others as "part of the team." She believes that the youth care workers/leaders and housemothers might also view the caseworkers as different from themselves and she believes it would interfere in their relationship, possibly leading to less collaboration.

[58] Ms. Meyer also stated in cross-examination that she has researched the models of care and treatment used in youth treatment centers, hospitals, special care homes, residential treatment facilities and other institutions providing psychiatric services to determine if there are any other workplaces in Canada that operate with a similar treatment model, specifically, that of combining residential treatment and clinical services using a collaborative process. She stated that she could not find any.

Brandi Tracksell

[59] Ms. Tracksell testified that she has been employed as a national representative of the Union since September 2007 (shortly after this application was filed) and that prior to that, she worked for the Union for approximately four years on special projects, mostly conducting organizing drives. She stated that throughout that time, she conducted about 20 organizing drives in Saskatchewan, Alberta, the Northwest Territories and Ontario. She stated that the Union represents workers in a number of industries, including manufacturing, retail, service, security, financial and special care homes. In cross-examination, she acknowledged that the Union primarily represents employees in the manufacturing and retail sectors and in that regard, primarily those in grocery stores and some hotels. The Union holds one certification for a financial services company and one for a special care home. Ms. Tracksell was involved in the organizing of that special care home, stating that the home cares for 20 – 30 residents - seniors and some individuals with disabilities. She noted that there is some recreation planning and vocational training for those with disabilities. Ms. Tracksell acknowledged that the Union does not hold any certifications in any residential treatment facilities, group care homes, jails or closed custody facilities and has no experience organizing a residential treatment facility. When it was suggested that she has no experience from which to draw a conclusion that excluding caseworkers would create a problem with the bargaining unit,

she agreed she had no direct experience but stated that her work experience would suggest it would not be a problem to exclude the caseworkers from the proposed bargaining unit.

[60] Ms. Tracksell testified that she began the organizing drive of the employees of this Employer in approximately May of 2007. She obtained the assistance of the national director of organizing for the Union as well as the assistance of five to ten other organizers, primarily staff of the Union. She stated that while some support cards were signed prior to July 2007, the majority of them were obtained during a one month period starting near the end of July 2007. She stated that they encountered some difficulties with organizing because of the large geographical area over which the Employer operates and because during the summer, a number of the staff take the youth on summer camping trips and were therefore inaccessible.

[61] Ms. Tracksell stated that their organizing efforts were initially directed at youth care workers, youth care leaders and housemothers. Through the course of the organizing drive, they discovered that the Employer also had employees working at Schaller College and Avant Garde, as well as employing educational assistants. After focusing on the youth care workers, youth care leaders and housemothers, the Union sought the support of the educational assistants and the early childhood educators. She stated that they were attempting to seek the support of what she referred to as “the front line workers,” those who spent the majority of their time with the youth, who often worked shift-work, and who were not “professionals” or held degrees. She stated that they did not find out about the pre-trades construction program until after the statement of employment had been filed in these proceedings.

[62] Ms. Tracksell testified that the groups of employees they contacted expressed concern about job security, being overworked and underpaid, and not having enough rest after camping trips. They felt they had greater concerns about job security and pay rates than did the professionals such as the psychologists, social workers, speech pathologists and caseworkers. Also, they had little contact with the administrative personnel. These individuals expressed a strong connection to the youths and indicated to Ms. Tracksell that they felt part of a team and had common goals. They indicated to her that they felt there was already a distinction in the workplace between them and the

professionals. In cross-examination, Ms. Tracksell stated that she did not believe those distinctions might be underscored if caseworkers were excluded from the bargaining unit. Also in cross-examination, Ms. Tracksell acknowledged that even without caseworkers in the bargaining unit, there would be distinctions in the employees' terms and conditions of employment.

[63] Ms. Tracksell testified that the employees she spoke to stated that they did not want caseworkers included in the bargaining unit. They indicated that the youths' complaints often went to the caseworkers and that this created a conflict of interest between them and the caseworkers. In cross-examination, Ms. Tracksell stated that that the few she had spoken to had issues with this in the past. In one such instance that was relayed to her, a complaint was brought by the youth to a caseworker after a physical altercation broke out with a youth worker and that this led to the caseworker "looking down" on the youth worker. In another instance, it was reported to Ms. Tracksell that after a physical altercation with a youth, the youth care worker was encouraged not to file a complaint with the police, knowing that in court, the caseworker would be there advocating for the youth. They expressed a concern that including caseworkers in the unit would lead to a lack of cohesiveness. They felt that the caseworkers and unit managers worked closely together, they acted "superior," and worked as a team of management. Ms. Tracksell stated that the Union did not approach caseworkers for this reason but also because they had heard that the caseworkers did not wish to be a part of the bargaining unit. In cross-examination, she acknowledged that the Union did speak with five or six caseworkers (she personally spoke with only two of those), none of whom wished to join the Union. She stated that these caseworkers saw a need for a union which included the front line staff and that they felt they did not have a similar community of interest with those front line staff.

[64] Ms. Tracksell expressed her belief that the unit applied for is a viable one and, in fact, is the best possible unit. They share a community of interest in terms of their rates of pay, job security issues, occupational health and safety concerns, and issues about client-ratios. She stated that there are similar treatment facilities that exist that have more than one union representing the employees, pointing to hospitals in particular, that have multiple bargaining units. She suggested that these facilities also use a team approach. She suggested that every workplace now uses a "team" approach yet

representation lines often run through the teams without operational difficulties. She pointed out that Dojack Centre in Regina is a unionized workplace and one to which the employees of the Employer compare their rates of pay. In conclusion, Ms. Tracksell stated that she did not believe that this was the right unit in which to include caseworkers.

[65] We note that in the course of Ms. Tracksell's examination-in-chief, Employer counsel raised an objection concerning the hearsay nature of much of Ms. Tracksell's evidence, in particular, her several reported statements of fact and opinion from the employees she spoke to. He also objected to the entry of evidence of the opinions held by Ms. Tracksell. Union counsel pointed out that the Employer's witnesses also gave opinion evidence concerning the reasons why caseworkers should be included in the bargaining unit. The Board ruled that it would allow into evidence the statements purportedly made to Ms. Tracksell for the purposes of the Board knowing the information the Union had acted upon in conducting its organizing drive as it did. However, the Board indicated that because of the hearsay nature of the evidence of the employees' opinions and beliefs, the Board might afford little weight to it if it was being proffered for the truth of those statements; in other words, as a means to establish that the unit applied for was appropriate. In addition, the Board indicated it would apply appropriate weight to the personal beliefs as expressed by any of the witnesses themselves.

Arguments:

The Employer

[66] Mr. Kenny, on behalf of the Employer, filed a brief of law and argument, which we have reviewed. The Employer argued that the bargaining unit sought by the Union is inappropriate in that it does not include a significant category of employees, that being the caseworkers. The Employer submitted that the bargaining unit sought by the Union is not appropriate without the inclusion of the caseworker classification.

[67] The Employer submitted that s. 5(a) of the *Act* requires the Board to determine what is "an appropriate unit of employees for the purpose of bargaining collectively." The Employer pointed out that it is not the Union's position that the caseworkers are not "employees" within the meaning of the *Act*, only that it is inappropriate to include them in the bargaining unit it seeks.

[68] The Employer argued that the present case is similar to that considered by the Board in *St. Thomas More College Faculty Union*, [2003] Sask. L.R.B.R. 426, LRB File No. 105-02, where the Board indicated that the starting point for consideration of whether a proposed bargaining unit is appropriate is consideration of the issues of community of interest and fragmentation of those employees left unrepresented. The Employer also referred to the Board's decision in *Health Sciences Association of Saskatchewan v. St. Paul's Hospital, Saskatoon and Service Employees' International Union, Local 333*, [1994] 1st Quarter, Sask. Labour Rep. 269, LRB File No. 292-91, where the Board stated that the general approach to the determination of an appropriate unit is to consider a rather common list of factors, which factors may have different weight in different circumstances, and make a pragmatic assessment of what best serves the objectives of the promotion of collective bargaining while still allowing employees access to collective bargaining, noting that collective bargaining is most effective if the unit is defined on the most inclusive basis possible. The cases establish that the Board favours larger bargaining units, yet realizes that a smaller and less ideal bargaining unit might be appropriate, if it is viable. The Employer argued that this is a unique and special workplace where damage could be done to the operations if caseworkers are excluded. At the same time, the Employer noted that it is not asking for an "ideal unit," as that would, in its view, be an "all-employee unit."

[69] The Employer also referred to the Board's decision in *International Alliance of Theatrical, Stage, Employees and Moving Picture Machine Operators of the United States and Canada v. Saskatchewan Centre of the Arts*, [1992] 3rd Quarter, Sask. Labour Rep. 143, LRB File No. 126-92 where the Board defined the concept of "community of interest" as requiring a consideration of the employees' skills, duties, working conditions and interests. The Board also stated that if there are very significant differences between the employees such that a serious conflict of interest arises, then the community of interest is said to be insufficient.

[70] The Employer also referred to the Board's decision in *Canadian Union of Public Employees, Local 1975 v. University of Saskatchewan Students' Union*, [2007] Sask. L.R.B.R. 656, LRB File No. 048-04 where the Board followed the British Columbia Labour Relations Board's decision in *Island Medical Laboratories Ltd.*, (1993) B.C.L.R.B.

No. B308-93, which states that the relevant factors of community of interest include: nature of the work performed; conditions of employment; skills of employees; administration; geographic circumstances; and functional coherence and interdependence.

[71] The Employer submitted that when the factors of community of interest are applied to the determination of whether the unit sought by the Union is an appropriate one, the Board must conclude that it would be inappropriate to exclude caseworkers from the proposed bargaining unit. There is a significant integration of the duties performed by the caseworkers and the youth care worker/leaders; they work as a team and their duties are interdependent and interrelated, with all in the same group home working together with the same youth. They work together to develop and implement a treatment plan, to assess that plan, and to continuously make modifications to that plan. There is continuity over time in both the youth and the staff assigned to work with them. All are expected to advocate for the youth under their care. There is frequent daily interaction between all staff in the group home. All employees use a computerized communications program to track assessments and treatments of the youth. There is a high degree of functional coherence and interdependence, as was made clear by Ms. Meyer's testimony, and this unique approach has been consciously fostered and developed within the group homes. The Employer submitted that the Board should be loath to interfere with what has proven to be a successful treatment model for an organization that takes care of the most troubled and challenged youths.

[72] The Employer pointed out that many of those in the proposed unit share similar working conditions as the caseworkers. They all work on a day-to-day basis with the same youth in the same facility. Everyone deals with the same treatment plans for each youth. The problems and challenges of the youth are the problems of all staff in the group home. They have access to the same group benefits and are subject to the same policies and procedures, including the same code of ethics. While the caseworkers work Monday to Friday and the youth care workers/ leaders work around the clock, it must be noted that other positions in the proposed bargaining unit, such as housemothers, day care staff, the educational assistants and the employees of Avant-Garde, also work day time hours, Monday to Friday.

[73] The Employer submitted that there are few differences between caseworkers and others in the proposed unit. While the educational qualifications of caseworkers are set at a higher level, it should be noted that not all caseworkers have the required master's degree and that some of the youth care workers/leaders are working toward such a degree along with the caseworkers. While the caseworkers must have certain clinical qualifications to provide counseling, all employees have to have similar skills in terms of their daily care and treatment of youth residents.

[74] The Employer submitted that the evidence shows that there is significant mobility between the caseworkers and the youth care workers/leaders in that of the 23 caseworkers, 10 have previously been youth care workers/leaders.

[75] The Employer pointed out that caseworkers have no managerial functions, unlike the unit managers in each group home. The Employer also pointed out that if caseworkers are excluded from the bargaining unit, they will be the only non-management employees working in the group home who will not receive the representation of the Union.

[76] The Employer submitted that to exclude caseworkers from the proposed bargaining unit would create a division between those employees and others working in the group home who are in the proposed unit. These divisions would be counter-productive and go against the long developed plan of an integrated team approach to the care and treatment of youth residing in the group homes. The Employer suggested that this could lead to situations where youth care workers/leaders may be less willing to confide in caseworkers because they are not part of the Union, or if the problem could attract discipline, they may be required to have a shop steward present for all such conversations. In addition, in the event of a labour dispute, the caseworkers would not be aligned with their colleagues.

[77] The Employer also argued that one must consider the caseworkers' prospects for representation should they be excluded from this bargaining unit. Their numbers are few, particularly compared to the large numbers belonging to the proposed bargaining unit, and the Employer suggests that it is unlikely this small group would even

form together to create their own bargaining unit. The Employer also pointed out that even if they attempted to do so, their bargaining strength would be questionable.

The Union

[78] The Union argued that its proposed bargaining unit is appropriate. Its proposed bargaining unit has always been an under-inclusive one and the Employer has never objected to that. The Union stated that it is impossible to have an all-employee unit in any event, given that the teachers are represented by their own union. The Union submitted that the Employer's arguments deal with an all-employee vs. an under-inclusive unit and are therefore inapplicable. The Union suggested that a more appropriate analogy in terms of the type of services provided is hospitals, where multiple bargaining units are the norm. In this case, the Union is seeking to represent what it refers to as the "front-line" staff or the core workers. From the beginning, it has not sought to represent the therapists, the IT staff, the trades' people, and all of the administrative staff. Of the approximately 500 employees working for the Employer, the Union stated that it seeks to represent approximately 419 employees.

[79] The Union relied on the Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canadian Pioneer Management Group and Canadian Pioneer Employees' Union*, [1978] May Sask. Labour Rep. 37, LRB File No. 661-77, to support the long held notion that the Board must decide whether the proposed unit is "an appropriate" unit and not the "most appropriate" unit, and that the vast majority of employees should not be denied union representation just because the inclusion of a few is not sought by the union. As stated in *Communications, Energy & Paperworkers Union of Canada v. Prince Albert Community Workshop Society Inc.*, [1995] 2nd Quarter, Sask. Labour Rep. 294, LRB File No. 019-95, the choice is often a balance of two competing policy interests – facilitating collective bargaining vs. promoting industrial stability by avoiding the multiplicity of bargaining units. The Union also referred to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores Limited, a Division of Westfair Foods Limited,* [1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89 where the Board said that the focus must be on the viability of the unit, noting that there already is some fragmentation in the present workplace. The Board stated in that case that the appropriate factors for the Board's consideration are the viability of the unit, the community of interest of those in the proposed unit,

organizational difficulties in the industry, the promotion of industrial stability, the wishes or agreements of the parties, the employer's organizational structure and the effect the unit will have on operations, and the historical patterns of organizing in the industry.

[80] The Union submitted that the Board has, in the past, certified more under-inclusive bargaining units than the one in the present case, most notably in the newspaper industry, and referred to the Board's decisions in *Graphic Communications International Union, Local 75M v. Sterling Newspapers Group, a Division of Hollinger Inc.*, [1998] Sask. L.R.B.R. 770, LRB File No. 174-98 (a certification order granted in relation to pressroom employees) and *The Newspaper Guild Canada/Communication Workers of America, CLC, AFL-CIO, IFJ v. Sterling Newspapers Group, a Division of Hollinger Inc.*, [1999] Sask. L.R.B.R. 5, LRB File No. 187-98 (a certification order granted in relation to the editorial department). When questioned by the Board as to whether the Union was relying on organizing difficulties as a reason to certify an under-inclusive bargaining unit, the Union responded that it was, but only to the extent that these employees are geographically dispersed and because the summer season is a difficult time to organize when the staff are accompanying the youth on camping trips.

[81] The Union submitted that while it agreed that the caseworkers will "rise or fall" together in terms of their exclusion or inclusion in the bargaining unit, not all caseworkers work in a group home and not all group homes have a caseworker. The Union submitted that should the Board accept the Employer's argument concerning the inclusion of caseworkers, then the two caseworkers not working in the group home must be excluded because there is no issue of their inclusion on a "team." The Union pointed out that there is a position virtually identical to that of caseworkers, that is, therapists, and the Union does not seek to represent them. The Employer has taken no issue with that exclusion.

[82] The Union sees the Employer's argument as primarily based on community of interest concerns and asks the Board not to elevate the concept. Community of interest is only one factor to be considered when determining whether the unit put forward by the Union is a viable one.

[83] The Union relied on *Communications, Energy and Paperworkers Union of Canada v. Arch Transco Ltd.*, [2000] Sask. L.R.B.R. 633, LRB File No. 060-00, for the proposition that the community of interest factor addresses the question of whether those in the proposed bargaining unit have a sufficient community of interest with each other, not whether others outside the proposed unit might also have a community of interest with those in the bargaining unit. The Union also argued that community of interest should be assessed in the labour relations sense and it does not involve a consideration of the alignment of the interest of the youth in the group home.

[84] The Union argued that the Board should ignore the opinions of the witnesses of the Employer that excluding the caseworkers from the unit would damage the operations of the teams in group homes and that employees would not longer cooperate and work together. The Union suggested that the Employer's attitude was a paternalistic one and pointed out that the Employer has no industrial relations experience in a unionized setting and therefore has no basis for such an opinion. The Union suggested that an employee's choice to belong to a union would have no impact on their dedication to a cause – they merely seek better terms and conditions through collective bargaining. Regardless, the Union pointed out, there already exists a division between the line staff and the professionals by reason of their status as such. The Union also stated that to suggest that if the caseworkers are excluded the youth care workers would no longer confide in them is without a basis and is unfair to the youth care workers. In addition, the Union argued, the Employer has failed to establish any administrative difficulties that might be present by excluding the caseworkers from the proposed bargaining unit. The Union submitted that the Employer has taken the position it has merely to dilute support for the Union. The Union referred to the Board's decision in *Retail, Wholesale and Department Store Union v. Nelsons Laundries Limited, operating as Arthur Rose Cleaners/Sask Linen Services*, [1993] 1st Quarter, Sask. Labour Rep. 242, LRB File No. 254-92, where the Board stated that administrative convenience of the employer is not determinative of the issue of appropriateness. The test is whether there is "insurmountable difficulty" for the employer to separately determine terms and conditions of this group even though there is a high degree of integration in the administrative structure.

[85] The Union also argued that the "team" concept was essentially over-rated. Many workplaces operate with work teams. Furthermore, the Union argued, the Employer's description of how the team in the group home operates is unrealistic when one examines the job functions. The "team" actually operates with two strata – the unit manager and caseworker who are responsible for developing the treatment plan, and the youth care workers and leaders who make contributions to the treatment plan (they make "suggestions" and "recommendations") and implement the plan. The Union argued that this division makes sense because the caseworker is the only "clinician." The Union acknowledged that the Board's decision in *City of Saskatoon v. Canadian Union of Public Employees, Local 47 and Saskatoon Civic Middle Management Association*, [2002] Sask. L.R.B.R. 471, LRB File No. 254-01, indicates that the professional status of an individual is not determinative, but noted that regardless, one member of the "team," the unit manager, will not be part of the proposed bargaining unit, by way of the agreement of the parties. The Union submitted that the situation is similar to that in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.,* [1994] 3rd Quarter Sask. Labour Rep. 87, LRB File No. 088-94, where the Board found that teamwork and harmony could still be fostered without two groups of employees in one bargaining unit. The bargaining unit that is proposed consists of those who wish to bargain collectively.

[86] The Union submitted that a consideration of the factors in the *Island Medical* case would not lead to a conclusion that an appropriate unit must include the caseworkers. The Union suggested that the terms and conditions of employment of caseworkers are different than for the youth care workers and leaders: they work set hours, five days per week; they are paid monthly and do not receive overtime pay; their educational requirements are different; and they have more flexibility in terms of how and when they perform their work. The Union also pointed out that there is no intermingling *per se* – only four employees have moved back to the youth care worker/leader positions (and these moves were as a result of filling a caseworker's temporary leave) and ten have moved to the caseworker position from the youth care worker/leader position. In any event, the Union argued, the exclusion of the caseworker position from the bargaining unit would not prevent these moves from occurring. The Union pointed out that there have been more instances of intermingling between the caseworkers and the

therapists and there is no dispute between the parties that therapists do not belong in the proposed unit.

[87] The Union also argued that there will be an actual conflict of interest if caseworkers are required to be in the bargaining unit by reason that youths often use a caseworker as their advocate/confidante in the event of a dispute between the youth care worker and the youth.

[88] The Union also relied on the following cases: *Construction and General Workers Union, Local 180 v. Saskatchewan Writers Guild*, [1998] Sask. L.R.B.R. 107, LRB File No. 361-97; *Hotel Employees & Restaurant Employees Union, Local 767 v, Regina Exhibition Association Ltd.*, [1986] October Sask. Labour Rep. 43, LRB File No. 015-86; *United Food and Commercial Workers Union, Local 1400 v. Highline Manufacturing Inc.*, [2002] Sask. L.R.B.R. 386, LRB File No. 122-02; and *University of Saskatchewan Faculty Association v. University of Saskatchewan*, [1995] 1st Quarter Sask. Labour Rep. 201, LRB File No. 127-94.

The Employer's Reply

[89] In reply, the Employer attempted to distinguish several of the cases cited by the Union and pointed out that the five situations in which an under-inclusive bargaining unit will not be accepted, as set out in *Sterling Newspapers Group* (LRB File No. 174-98), *supra*, all apply to the case before us: there is no physical boundary (the house in which the team works) or functional boundary (the group works as a team) that easily separate this group of employees; there is intermingling between the youth care workers/leaders in the proposed unit and the caseworkers; there is a lack of bargaining strength in relation to those caseworkers excluded from the proposed unit; there is a realistic ability by the Union to organize a more inclusive unit, given that there are only 23 caseworkers to be added; and there exists a choice of a more inclusive unit.

[90] The Employer expressed concern that once there is a collective bargaining regime in the workplace, a certain inertia follows, and therefore, if an important classification such as the caseworker is left out, the Board must be sure that the unit applied for is appropriate. The Employer argued that if the caseworkers cannot be in this unit, they will likely be denied access to bargaining as they would not have the necessary

bargaining strength to form their own unit. The Employer suggested that the Board must be most concerned with the longer term bargaining regime in this unique workplace and not simply allow the Union to "cherry pick" who should and should not be in the bargaining unit.

Relevant Statutory Provisions:

[91] Relevant statutory provisions include ss. 3 and 5(a), (b) and (c) of the *Act*, which provide as follows:

> *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> *. . .*
>
> *5 The board may make orders:*
>
> *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
>
> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*

Analysis and Decision:

[92] There is only one issue for the Board to decide. It is whether the bargaining unit proposed by the Union is an appropriate unit for the purpose of bargaining collectively. While the Union took the position that it is, the Employer took the position that it is not an appropriate unit without the inclusion of the caseworkers.

[93] As stated in the many decisions we will review in our analysis, the Board is required in this case to balance two important policy considerations: (i) facilitating the right of employees to organize in and join a union of their choice, a right enshrined in s. 3 of the *Act*; and (ii) the need for viable and stable collective bargaining structures and the avoidance of fragmentation and a multiplicity of bargaining units. Also as stated in the many decisions referred to herein, the test is not whether the unit sought by the Union is the "most appropriate" unit, but only whether it is "an appropriate" unit.

[94] The unit sought by the Union is under-inclusive in many respects. Because the teachers working for the Employer belong to the Saskatchewan Teachers' Federation, the Union is prevented from seeking a true "all-employee" unit. However, aside from the teachers, the Union seeks a unit that does not include many other employees of the Employer, including the caseworkers, therapists, administration and clerical employees, IT employees, the Daycare director, the quality improvement assistant, the employees in the pre-trades construction vocational program, and of course, those considered management, including unit managers. We were also advised, following the hearing, that the Union no longer seeks to include those working at Schaller College.

[95] There are a number of Board decisions that set out the factors the Board should consider in determining whether a proposed bargaining unit is an appropriate one. While noting that the Board prefers larger, more inclusive units and avoids fragmentation and the multiplicity of bargaining units, it will consider a range of factors to make its determination of whether the unit sought is an appropriate one. In *Hotel Employees and Restaurant Employees, Local 767 v. Courtyard Inns Ltd.*, [1988] Winter Sask. Labour Rep. 51, LRB File No. 116-88, at 51:

> *…the Board considers a number of factors, including whether the proposed unit would be viable, whether it would contribute to industrial stability, whether groups of employees have a particular community of interest, whether the proposed unit would interfere with lateral mobility among employees, historical patterns of organization in the particular industry, and other concerns of the employees, the union and the employer.*

[96] Also, in *O.K. Economy Stores Ltd., supra*, the Board stated at 66:

> *This does not mean that large is synonymous with appropriate. Whenever the appropriateness of a unit is in issue, whether large or small, the Board must examine a number of factors, assigning weight to each as circumstances require. There is no single test that can be applied. Those factors include among others: whether the proposed unit of employees will be able to carry on a viable collective bargaining relationship with the employer; the community of interest shared by the employees in the proposed unit; organizational difficulties in particular industries; the promotion of industrial stability; the wishes or agreement of the parties; the organizational structure of the employer and the effect that the proposed unit will have upon the employer's operations; and the historical patterns of organization in the industry.*

[97] Finally, in *Health Sciences Association of Saskatchewan v. Board of Governors of South Saskatchewan Hospital Centre (Plains Hospital)*, LRB File Nos. 421 85 and 422-85, the Board stated:

> *Whenever the Board is faced with a choice of two or more bargaining structures, both of which are appropriate for the purpose of bargaining collectively, it will choose the one most appropriate for the promotion of long-term industrial stability. Beyond that it has not established an exhaustive set of rules for determining an appropriate bargaining unit. Depending on the nature of the case, it may look at any number of factors, including the history of collective bargaining, the nature of the employer's operations, the size and viability of the proposed unit, the nature of the work performed by the employees and any particular community of interest they might have, the interchangeability of personnel, the expressed views of the employees, the union and the employer, any agreements between the parties, and so forth.*

[98] A very comprehensive review of the Board's past decisions concerning the appropriateness of under-inclusive bargaining units is contained in the decision of *Graphic Communications International Union, Local 75M v. Sterling Newspapers Group, A Division of Hollinger Inc*., [1998] Sask. L.R.B.R. 770, LRB File No. 174-98. In that case, the union sought to represent all employees in the press room at the Leader-Post, a Regina daily newspaper owned by the employer. Despite its under-inclusiveness, the Board determined it to be an appropriate unit for the purposes of collective bargaining. The Board set out the factors it relied on in reaching this decision, at 776 – 781:

First, in assessing the viability of the proposed bargaining unit, we note that the employees are a discrete group who possess special skills and who are distinguishable from other employees in the newspaper. There is little interchange between the press room employees and other departments of the newspaper. Historically, press room employees have enjoyed a craft status. The unit is viable in terms of its ability to engage in effective collective bargaining with the Employer because the members of the bargaining unit control over the printing process.

Second, although the Board generally prefers all employee bargaining units over small craft or departmental units, the Board will maintain a flexible approach to the establishment of bargaining units in industries which have proven difficult to organize. In this instance, an all employee bargaining unit was applied for by TNG in 1996 and was unsuccessful. The Employer has operated without any union representation since 1982. The longest period of union representation at the Employer was the Regina Typographical Union, Local 657 who held a certification from August 8, 1950 to March 7, 1975.

The Board is faced in this instance with choosing between the rights of employees to organize and the need for stable collective bargaining structures that will endure the test of time. It is clear from the decisions in other jurisdictions that the "most" appropriate bargaining units in this industry consist either of wall-to-wall units or two bargaining units, one consisting of the front end employees, including office, administration and editorial, and one consisting of the production workers, including pressmen. Such a configuration would likely result in stable and effective labour relations, in the sense that the Union would have a significant constituency within the workplace to bargain effectively with the Employer. The ultimate viability of smaller, less inclusive, bargaining units is, in our experience, and certainly in the past experience with this Employer, more tenuous over the long run. The proposed unit can be described in this sense as an under-inclusive unit.

The Board faced a similar dilemma in Hotel Employees & Restaurant Employees Union Local 767 v. Regina Exhibition Association Ltd., [1986] Oct. Sask. Labour Rep. 43, LRB File No. 015-86, where the applicant, which had previously unsuccessfully applied to represent all employees in the food services department of the employer, applied a second time to represent only the concessions department of the food services department. On the second application, the Board held as follows, at 45:

> *The fundamental purpose of The Trade Union Act is to recognize and protect the right of employees to bargain collectively through a trade union of their choice, and* ***an unbending policy in favour of larger units may***

> ***not always be appropriate in industries where trade union representation is struggling to establish itself. It would make little sense for the Board to require optimum long term bargaining structures if the immediate effect is to completely prevent the organization of employees.*** *In effect, the Board is compelled to choose between two competing policy objectives; the policy of facilitating collective bargaining, and the policy of nurturing industrial stability by avoiding a multiplicity of bargaining units.* ***Where the Board is of the view that an all employee unit is beyond the organizational reach of the employees it is willing to relax its preference for all employee units and to approve a smaller unit.***
>
> ***This does not mean, however, that the Board will certify proposed bargaining units based merely on the extent of organizing. Every unit must be viable for collective bargaining purposes and be one around which a rational and defensible boundary can be drawn.***

In the Regina Exhibition Association Ltd. case, supra, the Board found that the smaller bargaining unit comprised of concession workers was an appropriate bargaining unit.

Bargaining units that may be considered to be under-inclusive in their scope have been found by the Board to constitute appropriate units in a variety of sectors including the service sector (see Regina Exhibition Association Ltd., supra and Retail, Wholesale and Department Store Union v. Nelson Laundries Limited, [1993] 1st Quarter Sask. Labour Rep. 242, LRB File No. 254-92); casinos (see Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd., [1992] 4th Quarter Sask. Labour Rep. 75, LRB File No. 182-92; restaurants (see Hotel Employees and Restaurant Employees International Union, Local 767 v. Gene's Ltd., [1984] July Sask. Labour Rep. 37); financial sector (see Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canadian Pioneer Management Group, [1978] May Sask. Labour Rep. 37, LRB File No. 661-77); and non-profit sector (see Construction and General Workers Union, Local 180 v. Saskatchewan Writers Guild, [1998] Sask. L.R.B.R. 107, LRB File No. 361-97.

In some situations, however, the Board has refused to certify bargaining units that are composed of fewer employees than the total employee compliment in the business. In Hotel Employees and Restaurant Employees International Union, Local 767 v. Courtyard Inns Ltd., [1988] Winter Sask. Labour Rep. 51, LRB File No. 116-88, the Board found that a unit of maintenance employees

in a hotel was not an appropriate unit for the following reasons, at 51:

> *. . . the historical pattern of organization of large hotels in Saskatchewan like the Regina Inn indicates that bargaining units significantly larger than the one applied for by the applicant in this case have been considered appropriate. There is no indication that a larger unit would unreasonably inhibit union organization, and there is no suggestion that maintenance employees possess a particular community of interest that would make it inappropriate to include them in a larger unit. The proposed bargaining unit comprises a numerically insignificant number of employees and the Board has serious doubts about its viability for collective bargaining purposes. The maintenance employees in question are not so highly skilled that they would be difficult to replace or that a withdrawal of their services would put much economic pressure on the employer. Finally, if the unit applied for in this case were appropriate, then other units of comparable size would also be appropriate which would lead to piecemeal certifications, a multiplicity of bargaining units and industrial instability.*

In Canadian Union of Public Employees, Local 1902-08 v. Young Women's Christian Association et al., [1992] 4th Quarter Sask. Labour Rep. 71, LRB File No. 123-92, the Board refused to carve out a unit of daycare workers from an "all employee" bargaining unit. The Board commented as follows, at 73:

> *In determining whether a proposed unit of employees is an appropriate one for the purpose of bargaining collectively, this Board makes a decision which is of unique importance in terms of the implementation of the public policy objectives guiding the institution of collective bargaining. These policy objectives were outlined in a decision of the Ontario Labour Relations Board in International Federation of Professional and Technical Engineers v. Canadian General Electric Co. Ltd., [1979] OLRB Rep. Mar. 169, at 171:*
>
> > *In assessing the suitability of a proposed unit, the* ***Board is generally guided by two counter-balancing concerns. Firstly,*** *having regard to the proposed unit itself,* ***the Board looks to whether the employees involved share a sufficient community of interest to***

> ***constitute a cohesive group which will be able to bargain effectively together. Secondly**, looking to the employer's operation as a whole, **the Board assesses whether a proposed unit is sufficiently broad to avoid excessive fragmentation of the collective bargaining framework. A proliferation of bargaining units is not normally conducive to collective bargaining stability.** Not only may it place significant strains on an employer who would be required to bargain with each group, but it may also hamper the employees' ability to bargain effectively with the employer. Under the umbrella of these two guiding principles, the Board seeks to give effect to an equally important concern: the freedom of association guaranteed to employees in section 3 of the [Ontario] Act.*

*There is a **range of factors**, some of which were put forward for consideration at this hearing, which may affect the balance of these policy goals in any particular case; some of these were listed in the decision of the Board in Health Sciences Association v. South Saskatchewan Hospital Centre [1987] Apr. Sask. Labour Rep. 48, LRB File Nos. 421-85 & 422-85]. Counsel for the applicant Union suggested that the **wishes of the employees to be represented by a particular bargaining agent must be given a high priority** in this regard, and pointed as well to the **community of interest of this cohesive group of employees**.*

These factors are clearly important, and the Board must take seriously any indication of strong attachments of employees, to each other and to a particular bargaining agent. These factors are not determinative, however. Counsel for the applicant Union reminded us that the Board should be prepared to certify a unit which does not satisfy all requirements which the ideal bargaining unit might meet; as a general proposition, this is quite accurate. A situation in which the Board is asked to choose between two differently-constituted bargaining units is distinguishable, however, from a situation in which some less than ideal bargaining unit is contrasted with no collective bargaining at all.

Where the choice is available, the Board will attempt to decide which is the more appropriate, if not most

> *appropriate, bargaining unit. A case cited by counsel for the applicant Union, the South Saskatchewan Hospital Centre decision, supra, suggested that where such a choice is presented, the Board will choose the unit "most appropriate for the promotion of long-term industrial stability."*

Another example of the Board refusing to certify an under-inclusive bargaining unit is found in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Centre of the Arts, [1995] 4th Quarter Sask. Labour Rep. 52, LRB File No. 175-95. In that case, the union applied to represent employees in four of seven departments of the employer's operations. The Board distinguished the factual situation in the Centre of the Arts case, supra, from the one dealt with previously in The Regina Exhibition Association Ltd. case, supra, as follows, at 59-60:

> *In our view, the situation of this Employer differs significantly from that of the Regina Exhibition Association Limited. Though there are large numbers of casual employees involved in both cases, the bargaining units proposed in the Regina Exhibition cases were based on small and distinct groupings of employees. Here, though the seven departments have been designated to serve particular administrative and accounting purposes, it is difficult to draw a line between them in terms of the workforce. There is little to differentiate the employees in different departments in terms of their skills or experience, and there is considerable and growing cross-over of employees from one department to another.* ***Though it was possible to draw a rational boundary around the wheelers and dealers at the casino or the employees in the concessions in the Exhibition cases, it is more difficult to draw a line through the pool of employees in this case in any way which can be defended****.*
>
> *...*
>
> ***In this case, we have concluded that any line drawn on the basis proposed by the Union would be essentially arbitrary.*** *Though the departmental divisions have been made for certain purposes, the employees in the seven departments really constitute a pool of casual labour which is used without strict regard to these divisions. The inclusion of some of the departments and the exclusions of others could only, in our opinion, have a negative effect on the employees in*

> *terms of their ability to obtain more hours by working across departments, and create anomalies in terms and conditions as the cumulative impact of distinctions between those represented by the Union and those without representation began to make itself felt.*

In Saskatchewan Government Employees' Union v. Gabriel Dumont Institute of Native Studies and Applied Research Inc., [1989] Winter Sask. Labour Rep. 68, LRB File No. 118-89, the Board declined to find a bargaining unit comprising employees of one division of the Institute as an appropriate bargaining unit. The Board intimated that there was insufficient evidence related to any difficulties in organizing on a broader basis within the Institute, at 71:

> ***There was no evidence that a larger unit is beyond the organizational reach of the union, nor is there any other discernable labour relations reason that would compensate for the difficulties, actual and potential, for employees and employer alike, that the proposed unit would create.***

From this review of cases, it would appear to the Board that ***under-inclusive bargaining units will not be considered to be appropriate in the following circumstances: (1) there is no discrete skill or other boundary surrounding the unit that easily separates it from other employees; (2) there is intermingling between the proposed unit and other employees; (3) there is a lack of bargaining strength in the proposed unit; (4) there is a realistic ability on the part of the Union to organize a more inclusive unit; or (5) there exists a more inclusive choice of bargaining units.***

Overall, the Board is satisfied in this application that the press room employees are a sufficiently skilled and discrete craft group to justify their separate certification. There is no evidence that the press room employees are regularly interchanged with employees in other departments. They obviously have a sufficient ability to bring the work of the newspaper to a halt and possess sufficient bargaining power to render them a viable collective bargaining unit. In addition, there is recent history establishing the difficulty of organizing on a more inclusive basis and a past history of lack of success in organizing in this sector in Saskatchewan. Finally, there is no existing bargaining unit that would be more suitable for the employees in question. For these reasons, and the reasons stated above, although the unit proposed is not the most appropriate bargaining unit, the Board is convinced that the proposed unit is, nevertheless, appropriate for collective bargaining.

> *This finding does signal that the Board is placing more emphasis in this instance on the rights of the employees in the press room to be represented by a union of their own choosing than we are with the long-term stability of the bargaining relationship. There is no doubt that the history of organizing in this industry throughout Canada has produced a fragmented maze of craft and industrial units resulting in jurisdictional disputes and prolonged labour disputes. The Employer's concern for the long term consequences of fragmented bargaining is justified in the overall context of what has occurred in the industry in other provinces.*
>
> *In Saskatchewan, however, the industry has not been plagued by any problems related to multiple bargaining units because it has remained, by and large, unorganized. At this stage, we believe we are justified in permitting GCIU to certify on an under-inclusive basis in order to ensure that the right of employees to organize is given the primacy it is entitled to under s. 3 of the Act. At some point in the future, it may be necessary for the Board to rationalize bargaining units in this sector; however, as stated in The Regina Exhibition Ltd. case, supra at 45, "it would make little sense for the Board to require optimum long term bargaining structures if the immediate effect is to completely prevent the organization of employees."*
>
> [**emphasis added**]

[99] Therefore, based on the decision in *Sterling Newspapers Group Inc*., *supra*, and the authorities referred to therein, an under-inclusive unit will not be appropriate where:

(1) there is no discrete skill or other boundary surrounding the unit that easily separates it from other employees;

(2) there is intermingling between the proposed unit and other employees;

(3) there is a lack of bargaining strength in the proposed unit;

(4) there is a realistic ability on the part of the Union to organize a more inclusive unit; or

(5) there exists a more inclusive choice of bargaining units.

[100] For the reasons that follow, we have determined that the bargaining unit sought by the Union is not an appropriate unit. In our view, caseworkers must be included in the proposed bargaining unit in order for it to be an appropriate unit. In reaching this conclusion, we have considered the case law cited by both the Union and

the Employer, and in particular, the factors set out in *Courtyard Inns*, *O.K. Economy Stores*, and the *South Saskatchewan Hospital Centre*, all *supra*, however, our analysis which follows will consider each of the factors listed in *Sterling Newspapers*, a number of which would provide an independent basis for our conclusion that the unit sought by the Union is not an appropriate unit.

[101] However, before examining each of those factors, we wish to make one comment about the agreements the parties put to us concerning the composition of the bargaining unit. As previously mentioned, throughout the course of the hearing and even in the weeks following the hearing, the parties advised the Board of certain agreements they had made concerning the bargaining unit description, composition of the statement of employment and the various exclusions from the bargaining unit. While the parties are to be highly commended for their cooperation with each other in this regard, the Board had a somewhat difficult time understanding the reasons for those agreements. This was compounded by the fact that little or no evidence was led concerning the basis for the inclusion or exclusion of certain groups of employees. For the most part then, the Board will assume that the parties were correct in reaching the agreements that they did, in the sense that what was ultimately put forward to the Board, (aside from the live issue concerning the caseworkers), is "an appropriate unit for the purpose of bargaining collectively." This is not to say that the agreements of the parties have no relevance at all to the Board's conclusions (see *O.K. Economy Stores, supra*) in that at times, it may be necessary to assess some of the factors of appropriateness in light of the classifications of employees that are in or out of the proposed unit. Therefore, throughout the course of the analysis, the Board may refer to the agreements of the parties, as necessary.

[102] We will turn to the factors listed in *Sterling Newspapers, supra*, and set out the basis for our conclusion that the unit sought is not an appropriate one without the inclusion of the caseworkers.

(1) There is no discrete skill or other boundary surrounding the unit that easily separates it from other employees

[103] This factor is concerned with the issue of community of interest and the question of whether a rational and defensible boundary can be drawn around the proposed bargaining unit. It is also concerned with the factors of the interchangeability of

personnel, the employer's organizational structure and the effect of the proposed unit on the operations.

[104] As stated in *Arch Transco, supra*, the factor of community of interest goes to the question of viability – whether the proposed unit is a viable one for the purposes of collective bargaining. The Union suggests that this case stands for the proposition that the Board should only be concerned with the community of interest of those within the proposed unit and not whether any individuals outside the proposed unit might have some community of interest with those in the proposed unit. In our view, this is not quite accurate because the Board is also concerned with whether the certification of the proposed unit causes fragmentation in the workplace. In *Communications, Energy and Paperworkers' Union of Canada v. Hollinger Canadian Newspapers, LP o/a The Saskatoon Star-Phoenix Newspaper,* [2000] Sask. L.R.B.R. 760, LRB File No. 276-99*,* the Board considered whether any "tag-end" group was created if it certified an under-inclusive unit. Also in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association,* [1992] 4th Quarter Sask. Labour Rep. 75, LRB File No. 182-92*,* the Board considered whether other groups of employees might be disadvantaged by the description of the proposed unit.

[105] The factor of community of interest necessitates our examination of the similarities of skills, qualifications, duties and work environment of the employees. When examining community of interest as a factor, it is important to note that there will always be some differences as between the included employees' skills, duties and working conditions, by the simple reason that there is often more than one classification of employees in a bargaining unit. However, in this case, it is our view there are a number of differences in the skills, qualifications and duties of employees the Union proposes to include in the unit and that there is little to distinguish caseworkers from many others in the proposed bargaining unit.

[106] The Union suggested that it is seeking a unit of "front line" workers, those that work directly with the youth. The proposed bargaining unit description, however, does not bear this out. The evidence led at the hearing focused on the youth care workers/leaders and to some extent, the housemothers. However, the Union also applied to include educational assistants, day care workers, the coordinator of the sport venture

program, the site manager (for the housing area of operations), and the employees teaching at Shaller College and the Avant-Garde school (although the Board was later notified that the Union no longer sought to include the employees of Schaller College). Although these other positions are under the ECS umbrella and the parties reached an agreement concerning their inclusion in “an appropriate unit,” their inclusion cannot be divorced from our consideration of the nature of the unit sought by the Union.

[107] The difficulty with the Union’s position is that there are employees that it seeks to include that do not appear to be the “front line” workers dealing with youth. We have little or no evidence as to whether the site manager (under the director of housing) and the coordinator of the sport venture program are “front line” employees working with the youth, however, we do have some evidence concerning the general duties of the other employees included in the proposed unit. The day care workers work with the children of the staff of the Employer and to some extent, the children of people in the community or those accessing services from the Employer. There was no evidence that these employees had any connection to the youth residents. Furthermore, the employees at Avant-Garde are not necessarily working with the youth at the Ranch. Avant -Garde is a vocational school and members of the public may pay for courses and take classes taught by these employees. Although there may be some connection to the youth residents in that the older ones may be able to attend the school with funding assistance, there was virtually no evidence on this point. Lastly, the employees of Schaller College who appear to have contact with the youth residents, are now not included in the proposed unit. This was the subject of an agreement between the parties and therefore the Board does not know the reasons for now excluding them. The fact remains, however, that they are employees who work with the youth and have been excluded from the proposed unit. Therefore, when we consider all of the evidence, we cannot agree with the Union that the unit it has sought includes just the “front-line” workers, specifically, those dealing directly with the youth. Furthermore, while the Union is seeking to include a number of “front-line” workers (whether involved with youth or not), it does not seek to represent all such workers.

[108] As previously stated, based on the case law, we think it relevant to consider whether other groups of employees, in this case, caseworkers, are disadvantaged by the proposed description. We believe that caseworkers are

disadvantaged and that leaving them out of the unit creates a tag-end group. In addition, it appears to us that the caseworkers have far more in common with the youth care workers/leaders than do some of the other employees the Union has sought to represent in its proposed unit.

[109] The Union suggested that the caseworkers did not share similar skills and qualifications such that they did not share the same community of interest as those in the positions included in the proposed bargaining unit. In particular, the Union pointed to the differing educational qualifications of the caseworkers. The job description says that the caseworkers require a master's degree, which is a higher educational qualification than any required by the positions it seeks to represent. In our view, this factor is of little significance, for two reasons. Firstly, not all caseworkers have a master's degree (the Employer's wage grid has separate pay levels for caseworkers with and without master's degrees) and although those that do not have such a degree are working toward one, some youth care workers/leaders have such a degree or are also working towards one. Therefore, in practice, there may be little to distinguish the educational qualifications of some of the caseworkers and those of youth care workers/leaders. Secondly, if we look at the community of interest within the unit applied for, we find that the educational qualifications vary widely. As such, we find that the educational qualifications of both the group of employees in the group homes as well as elsewhere in ECS and the Ranch are not a distinguishing factor in assessing community of interest. In summary, the educational qualifications of the positions included in the proposed unit are not similar and the fact that the qualifications, in theory, are higher for caseworkers, is not sufficiently significant to conclude that the caseworkers do not share the same community of interest with others in the proposed unit.

[110] We also note that there are few differences between caseworkers and the included employees in terms of their working conditions, benefits and remuneration. The Union attempted to distinguish the caseworkers on the basis that the youth care workers/leaders worked shift work covering 24 hours of each day, had little flexibility in their working hours and were paid over-time pay. We note however, that others in the proposed bargaining unit have similar terms and conditions as the caseworkers. Both housemothers working for the Ranch as well as educational assistants would, like caseworkers, work Monday to Friday during the day time hours. The evidence also

indicated that all employees of the Ranch and ECS have the same group benefit plan. With respect to the issue of pay, it is apparent that there are, with respect to at least 7 caseworkers who do not have master's degrees, no significant differences in pay between the caseworkers and the youth care leaders. When employees in both those positions hold a degree, they make virtually the same amount of money. It is only once a caseworker obtains a master's degree that there is an opportunity to make significantly more money.

[111] While it is true that therapists at ECS and caseworkers at the Ranch are on the same wage scale, this is but only one factor which could lead us to the conclusion that caseworkers and therapists have a community of interest not shared by those in the proposed unit. The Union urges the Board to accept that because caseworkers have so much in common with the therapists, and because the Employer has agreed that therapists are properly not part of the bargaining unit, that caseworkers should also not be in the proposed bargaining unit. The difficulty with this argument is that we do not know why the parties agreed to exclude the therapists. If the Union is seeking "front-line" workers, perhaps the therapists should be included in the unit in order for it to be an appropriate one. Having said this, we anticipate that the Union would respond by taking the position that in terms of "front line" workers, it was not seeking to include professionals. However, as stated by the Board in its decision in *City of Saskatoon*, *supra*, (although considered in a different context) the professional status of a position should not be determinative as to which bargaining unit a position should be placed.

[112] The similarities between the caseworkers and therapists bring us to a consideration of the work environment and the basis of the Employer's argument that the unit applied for is not appropriate without the inclusion of caseworkers. The Employer argued that it is not appropriate to draw a line through the group home in terms of who is included in the bargaining unit and who is not. The Employer argued that the nature of the Employer's operation, unique as it is, mandates against such a line being drawn because of the integration of the clinical and residential aspects of the treatment programs. While the nature of the Employer's structure and the effect of the proposed

unit on its efficient operation,[2] as well as the administrative convenience to the Employer, are but two factors for the Board to consider in a whole range of factors, we see these as particularly relevant in this case. While many employers might suggest their employees work as a team (in a whole variety of contexts), it is our view that the employees in the group homes truly do operate as a "team" in each home. We do think there is a risk to the successful integration of these services and the Employers' efficient operations if the caseworkers are excluded from the bargaining unit. While we are mindful of the Board's comments in *Prairie Micro-Tech, supra*, that the fact that some of the employer's employees being in a bargaining unit does not mean that the employer cannot continue to foster teamwork and harmony between the two groups of employees, the facts of that case bear little resemblance to those before us. That case involved an application for certification of the production employees of a company that manufacturers specialty animal feed. In that case there were, unlike the case before us, two very distinct groups of employees (production and non-production) that were having some trouble working with each other. Here we have one group of employees who, by necessity, must work in a very integrated fashion, and who rely on each others' expertise on a daily basis to do their own job and do it well. That the unit manager is excluded from this team is of no consequence because that exclusion is based on the unit manager's status as management and the resulting conflict of interest that would be present if the unit manager were placed in the bargaining unit.

[113] The case before us is much more similar to *Highline Manufacturing, supra*, than it is to *Prairie Micro-Tech, supra*. In that case, the union sought a bargaining unit of all employees of a manufacturer of agriculture machinery, except team leaders and managers. On a less than ideal evidentiary basis, the Board concluded, despite the employees' wishes to exclude team leaders because they saw them as "bosses," that the team leaders were employees who should be included in the bargaining unit. The Board found that the functions of the team leaders and production workers were too intertwined to separate into two units and that given that the team leaders have little effective control, any conflict of interest that might arise is an insufficient reason to exclude them from the bargaining unit.

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[2] In *Saskatchewan Centre of the Arts, supra*, the Board stated that it must take into account any "significantly disruptive effect" that the proposed unit might have "on the employer's ability to carry on

[114] We have not set out the above similarities between the caseworker and those in the proposed unit simply for the purpose of establishing that the caseworkers share a community of interest with those included in the bargaining unit, although we believe that to be the case. The primary purpose for making these comparisons is to demonstrate that no rational and defensible line can be drawn around the group of employees in the unit proposed by the Union. In considering all of the different employees in the proposed bargaining unit, it is our view that they have no discrete skill set and there is no other basis upon which to draw a boundary around them, particularly considering our conclusions that this is not a unit aimed only at "front line" staff. It is our view that the boundary line drawn by the Union in this case is an arbitrary one.

[115] The Union also argued that the caseworkers cannot be in the bargaining unit because there is a conflict of interest between them and the youth care workers/leaders in that a caseworker is often charged with the responsibility for advocating for the youth in the event of a formal complaint being made by the youth. We do not see this as a labour relations conflict of the type about which the Board is concerned under the community of interest factor. In *St. Thomas More College, supra*, the Board observed that in order to accept a conflict of interest as indicative of the employees having a lack of a community of interest, the parties must be so significantly at odds and that they cannot be represented by the same union or that their differences are so significant that their representation cannot be accommodated in the same bargaining unit. It is our view that formal grievances where the youth requires an advocate are so few in number as to warrant the caseworkers being excluded on this basis. Furthermore, from the evidence, it appeared that the advocacy role was played by all the employees in the home on any number of occasions and that the term "advocacy" is not used in the sense of being adversarial or oppositional; only that a person assists the youth in presenting his/her position.

[116] The case before us is more similar in nature to the decision in *Centre of the Arts, supra*, than it is to the *Regina Exhibition* cases. In *Centre of the Arts*, the Board refused to draw a line through a workplace by certifying four of seven similar work departments, finding that there was little to differentiate the employees in the different departments, unlike the rational and defensible boundary that could be drawn around

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business efficiently."

"wheeler and dealers" or those in "concessions," at issue in the *Regina Exhibition* cases, *supra*. In the case before us, much of the Employer's operation which the Union seeks to certify is organized around the delivery of services through a "group home." While not a "department" *per se*, there are some analogies. Even though each of the positions the Union seeks to include in the bargaining unit that work in the many group homes all have different skills, the focus of the their jobs is to develop, revise, carry out and reassess a treatment plan for each youth under their care. In our view, a defensible and rational boundary is not a line that runs through the middle of that group home. The Union submitted that to conclude that caseworkers should be included in the unit because all employees in the group home should be included, ignores the fact that the unit managers are already excluded by agreement. The difficulty with this argument is that there is a basis under the *Act* for the exclusion of unit managers– the evidence indicates that they exercise managerial duties and responsibilities such that they are not "employees" within the meaning of the *Act*. The evidence was clear that caseworkers do not have any managerial functions. Therefore, it is not appropriate to compare the caseworkers and unit managers on this basis.

[117] The case before us also bears a striking similarity to the situation before the Board in *Canadian Union of Public Employees, Local 3370 v. Nipawin & District Services to the Handicapped Inc.,* [1989] Winter Sask. Labour Rep. 38, LRB File No. 054-89. In that case, the union applied to represent eight employees in two group homes operated by the employer. The employer took the position that an appropriate unit would be an "all-employee" unit and would therefore include two full-time an two part-time employees in a sheltered workshop as well as two supervisors and three labourers in the two re-cycling depots operated by the employer. After the Board heard the employer's evidence on what would constitute an appropriate unit, the Board indicated to the union that it may wish to amend its proposed unit to a larger, more inclusive unit. The union decided to do so and, following an adjournment of the hearing, the union and employer returned an agreed-upon proposed bargaining unit description that included the employees the union initially sought to represent, along with the employees of the sheltered workshop. In determining that the amended bargaining unit was an appropriate one, the Board stated at 39:

> *The Board agrees that the above-described unit of employees is appropriate for the purpose of bargaining collectively. The evidence is that all handicapped residents of the group homes participate in the sheltered workshop program and that all employees in the proposed unit share responsibility for their care and training. On the other hand, the employees and trainees at the recycling depots, which operate on a relatively commercial basis, are more independent from the rest of the employer's operation.*
>
> *The Board has historically favoured larger bargaining units. In this case,* ***the duties and responsibilities of the employees in the group homes and sheltered workshop are so interrelated that they share an obvious community of interest. To include only the group home employees in a bargaining unit would create the future potential for a multiplicity of bargaining units, which would not be conducive to the employer's industrial stability or in the best interests of the handicapped patients.***
>
> [**emphasis added**]

[118] We are aware that there are two caseworkers who are not tied to one particular group home. Although the evidence was not entirely clear on this point, it appears that one works as an additional caseworker on a half-time basis at either one or more group homes (the evidence led on this point was contradictory) and the other works in the cognitive disability program. These facts do not change our view that all caseworkers should belong to the bargaining unit. The Employer and Union agreed that all caseworkers would rise or fall together. Our conclusion that caseworkers must be in the bargaining unit in order for it to be an appropriate one, does not depend solely on the fact that they work in a group home as part of a team, although that is one of the reasons, it is our view that these two caseworkers should also be in the bargaining unit as well. In our view, it makes more sense to keep the caseworkers, as part one classification, together.

(2) There is intermingling between the proposed unit and other employees

[119] This factor is concerned with intermingling, interchangeability of personnel, issues of lateral mobility and to some extent, the effect of the proposed unit on the employer's operations.

[120] In the present case, there is intermingling of employees in the proposed unit with other employees to the extent that the under-inclusive unit applied for is not

appropriate. The intermingling is present in a variety of ways. There is intermingling between the caseworkers and the youth care workers/leaders and, to some extent, the housemothers, in the sense that many of these employees' duties in the group homes are integrated. The employees are, at times, performing very similar duties and are often performing them together, whether that be the giving of input into the treatment plan, the development of the treatment plan, or the carrying out of the treatment plan in an integrated way. In our view, the evidence establishes that while caseworkers are primarily responsible for developing the treatment plan, given the ongoing nature of the treatment and the requirement to assess, reassess and revise the plan, this could not practically be done without the participation of the others in the house. It was also apparent that all are involved in carrying out various aspects of the treatment plan. In our view, the positions are intermingled to such an extent (as discussed here and above, under factor (1)) that we do not believe that a unit that excludes caseworkers is an appropriate one.

[121] In the *University of Saskatchewan Students' Union* decision, *supra*, the Board referred to a decision of the British Columbia Board which considered the importance of the functional integration of employees:

> *[24] In Okanagan College Council, supra, the British Columbia Board made the following observation regarding the employer's structure and the functional integration of employees as those factors bear on the issue at 17:*
>
> > *…the structure of the employer physically, administratively and operationally is really the evidentiary basis upon which the appropriateness of the bargaining unit is determined. Functional integration of employees focuses on the interchange and the integration of job duties.*

[122] The other employees in the group home are also intermingled with caseworkers in the sense that there is some movement of employees from one position to another. While we appreciate that the four caseworkers who went back to the youth care leader/worker positions following the caseworkers' return from a temporary leave, such as a maternity leave, this only serves to further establish that the positions are closely related and are not so different in terms of necessary experience and

qualifications. Furthermore, the fact that many of the caseworkers had previously been youth care workers/leaders for this Employer underscores their similarity and suggests that the experiences gained in these positions uniquely qualifies one to do the work of a caseworker.

[123] We do not see the same extent of intermingling between the caseworkers and the out of scope unit managers, both in terms of their job duties and any movement between the positions. While the evidence indicated that the unit managers are "responsible" for the treatment plan, we believe this to be more in terms of being responsible as a manager of a group that develops, implements and assesses that plan, not just in terms of actually drawing up the treatment plan with the caseworker. The unit manager is responsible for the team preparing the plan, carrying it out and having success with it. It appears that the unit manager is also responsible for the treatment plan in terms of properly budgeting for its costs. In addition, there is no movement between the caseworker and unit manager positions. The caseworkers do not cover for unit managers in their absence or vice versa. No one covers for a unit manager except possibly a youth care leader, who it is agreed is appropriately within the bargaining unit.

[124] One of the factors to consider when assessing whether any unit is appropriate is whether there is an "interchangeability of personnel." While the therapist and caseworker position descriptions are very similar, as stated previously, we find that the nature of their jobs is very different. There was some suggestion that there has been intermingling of the caseworkers of the Ranch and the therapists working for ECS, however, there was no evidence that any therapist has come over to work in a group home and there is otherwise insufficient evidence of intermingling between these employees to warrant the caseworkers remaining outside what we have determined to be "an appropriate unit." That a caseworker has, on occasion, accepted contract work to act as a therapist for ECS is insufficient to alter our conclusions on this point.

(3) There is a lack of bargaining strength in the proposed unit

[125] This factor is also concerned with the viability of the proposed unit and its contribution to industrial stability. The Employer did not argue that there was a lack of bargaining strength in the unit proposed. As such, we will not comment on this factor

except to say that by sheer numbers, it would appear that the bargaining unit would have sufficient strength, particularly if there was a withdrawal of labour during a strike, such that this would not be a factor that would preclude certification of an under-inclusive unit.

[126] What does concern the Board to some extent however, is the lack of bargaining strength of the caseworkers should they wish to form their own unit, which could occur if they were determined not to be in the proposed unit. In *Saskatchewan Centre of the Arts, supra,* the Board held that evidence that a group of employees who remain outside the certified bargaining unit might be inappropriate as a separate unit, was relevant. The caseworkers would have a difficult time forming a union on their own given their apparent lack of bargaining strength on their own. Not only are their numbers very low in comparison with the larger bargaining unit that would be certified in this case, but based on the evidence before us, it appears that in the short term, the group homes could likely continue to operate without a caseworker at all, or by having a youth care leader/worker perform the caseworkers' duties.

(4) There is a realistic ability on the part of the Union to organize a more inclusive unit

[127] This factor is also concerned with issues of viability, the promotion of industrial stability, the pattern of bargaining in the industry and organizational difficulties.

[128] There was no evidence in this case that a larger and more-inclusive unit was beyond the organizational reach of the Union. There have been no previous attempts by this or any other union to certify a group of employees of this Employer. There was also no evidence of any difficulties organizing in this industry, generally. While the organization itself is quite unique, there was no evidence that the industry or this employer is difficult to organize; it is simply a large organization. The only argument offered by the Union was that this Employer was somewhat difficult to organize given the geographically dispersed work force and the fact that a number of the employees take the youth on summer camping trips. We do not find this as a sufficient basis to conclude that this is a difficult to organize employer or industry, such that we should certify just any bargaining unit because unionization is struggling to establish itself. The Union's organizing camping was conducted over the course of a few months and only intensively

for a one month period when Ms. Tracksell said that most of the cards were signed. Neither these facts nor the fact that the Union chose to conduct its organizing drive in the summer camping months, provides a basis for us to conclude that organizing difficulties caused the Union to be unable to organize a more inclusive unit.

[129] The Union suggested that it only wanted a unit of "front-line" staff – meaning those who worked directly with the youth. For the reasons previously stated, we find that the Union has sought a unit that goes beyond "front-line" staff working with youth and further, that the caseworkers do work directly with the youth, both in terms of developing a treatment plan and occasionally performing counseling in a manner very similar to that done by the youth care leaders/workers. As previously stated, we do not understand why the Union and Employer have made the agreements that they have concerning what is "an appropriate unit," by agreeing to the inclusion of some groups of employees and not others. We merely have to accept those agreements at face value. At the same time, we cannot help but reach the conclusion that the Union seeks a bargaining unit that excludes caseworkers based merely on the extent of its organizing drive. It seemed that the Union did not have a full appreciation of the nature and scope of the Employer's organization or its method of operations. While that is not uncommon when organizing a large organization such as this, it can and did in this case, lead to the Union's exclusion of an important group of front line staff whose work is inextricably linked to those it seeks to represent.

(5) There exists a more inclusive choice of bargaining units

[130] In our view, the requirement that there exists a more inclusive choice of bargaining unit is not to be interpreted to mean that another more inclusive bargaining unit is possible. Factor (4) above has the Board consider whether the Union could have organized a more inclusive unit in the workplace and it is therefore our view that factor (5) requires consideration only if there is an actual "choice" of bargaining units and not merely an illusory choice – there must be an actual choice available to the employees as that which would exist in a "carve-out" application or a situation where there were competing certification applications (see *Sterling Newspapers, supra*). In this case, the only other bargaining unit that exists is the teachers' bargaining unit and it is not open to

the employees of the proposed unit to join that bargaining unit. There is therefore no choice of bargaining units and this factor is not helpful to our determination.

[131] In conclusion, on the basis of each of factors (1), (2) and (4) above, or a combination of those factors, we find that the unit sought is not an appropriate one. An appropriate unit in the circumstances of this case must include the caseworkers.

[132] The Board wishes to make one final comment concerning the wishes of employees, a factor that can be relevant to the Board's consideration of whether a proposed unit is an appropriate one. While the Board accepts that the support evidence filed indicates that those who signed support cards do wish to have this Union as their bargaining agent, we really have no reliable evidence of the wishes of the caseworkers. There was limited evidence put forward by the Union that five or six caseworkers were approached by the Union and the Union's representative testified that two told her they did not wish to belong to the Union. There was no reliable evidence with respect to the views of the other three or four. The Union suggested though, that other employees in the proposed unit did not want the caseworkers included in their unit, for a variety of reasons. In our view, there was no reliable, first-hand evidence from any witness concerning the wishes of employees as to the inclusion/exclusion of the caseworkers, as a group, in the proposed bargaining unit. We do not know how many employees held the opinion that the caseworker classification should be excluded. The evidence was hearsay (or double-hearsay) in nature. As such, is inadequate and too unreliable for the Board to given any weight to it as a factor in the determination of an appropriate unit. In any event, the wishes of employees are not an over-riding factor when determining whether a bargaining unit is an appropriate one. Their relevance is elevated in circumstances where there is a choice in bargaining agents, such as in the situation of a "carve-out" application or competing certification applications (see *YWCA, supra*, where the Board stated that where there is a choice as to which unit is more appropriate, employee wishes are considered), neither of which situation is before us.

Final Note:

[133] Immediately prior to the issuance of these Reasons for Decision, the Board received correspondence from the Employer, dated October 29, 2008. In that

correspondence, the Employer advised the Board of certain changes in circumstances since the date of the hearing, namely, that there had been a significant turn over of the employee complement of the Employer since the filing of the application for certification. The Employer stated that of the 418 employees that the parties' had agreed were in the proposed bargaining unit (if the caseworkers were included), some 116 employees, or nearly 28%, have terminated their employment or been promoted to positions outside the proposed bargaining unit. The numbers change to 110 of 395, or 28%, if the caseworkers are excluded from the proposed bargaining unit. In closing, the Employer suggested that the support cards signed by the employees in August 2007 may not accurately reflect the wishes of the current employees. We note that the Employer did not advise of the names of the employees who were no longer with the Employer or had been promoted to positions outside the proposed bargaining unit.

[134] On October 31, 2008, the Union responded to the Employer's letter, taking the position that "the information contained therein is not appropriately before the Board, is irrelevant to the application and ought to be disregarded."

[135] We have come to the conclusion that the change in circumstances identified by the Employer has no effect on our decision. In reaching this conclusion, we have relied on the decision of the Saskatchewan Court of Appeal in *United Food and Commercial Workers, Local 1400 v. Tora Regina (Tower) Limited operating as Giant Tiger, Regina, and Saskatchewan Labour Relations Board*, (2008) 307 Sask. L.R.B.R. 309 and in particular, the fact that the Court of Appeal noted that there were compelling reasons, as explained in *U.S.W.A. Local 5917 v. Doepker Industries Ltd.*, [2000] Sask. L.R.B.R. 258, LRB File No. 016-00, for not considering evidence of changes in employee support for a union after the date a certification application is filed. We see no reason to depart from this approach in the circumstances before us. That portion of *Doepker Industries, supra,* to which the Court of Appeal referred in *Giant Tiger, supra,* as providing compelling reasons for this approach, are stated at 274 and 275 of the Board's decision in that case:

> *[47] Pursuant to s. 10 of the Act, the long-standing policy of the Board on certification applications is that the relevant date for determining the level of support for the application is the date that the application is filed; that is, other than in exceptional circumstances, the Board does not consider evidence of additional*

> *support, or evidence of withdrawal of support, for the application, that is received by the Board after the date the application is filed. This general policy has been established by decisions of the Board that are too numerous too list here, including the Congregation of Sisters of Notre Dame de Sion, supra, cited above by counsel for the Employer. The underlying rationale for this policy was explained by the Board in Construction and General Workers Union, Local 180 v. Gunner Industries Ltd., [1997] Sask. L.R.B.R. 318, LRB File No. 333-96, at 321-22, as follows: [Emphasis Added]*
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> *[48] In keeping with this provision [s. 10 of the Act], the Board has consistently refused to consider evidence of support or of revocation of support which originates after the date the application is filed. In Hotel Employees & Restaurant Employees Union v. Chi Chi's Restaurant Enterprises Ltd., [1986] June Sask. Labour Rep. 31, LRB File No. 035-86, the Board summarized this well-entrenched policy in these terms, at 34:*
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> > *The Board has always required an applicant for certification to establish majority support as of the date on which the application is filed, and only if there is a cloud over the union's organizing campaign in the form of coercion, undue influence, or misrepresentation, will the Board order a vote by secret ballot rather than rely on support cards. That policy facilitates the employees' choice of collective bargaining, renders pointless the imposition of sanctions on the employees once the application has been filed, and protects as much as possible the future relationship between the union and employer from the acrimony that often arises during a pre-vote contest between the union and anti-union forces. In this case there are no reasons why the Board should depart from its normal practice by ordering a vote.*

[136] We also take note of the Board's recent decision in *Bethany Pioneer Village Inc., operating as Birch Manor v. Service Employees International Union, Local 333*, [2007] Sask. L.R.B.R. 25, LRB File No. 036-06, where the Board applied the principles in *Giant Tiger, supra*, in circumstances where the delay by the Board in rendering its decision was 19 months and the turnover was such that two of 19 employees had left their employment but seven additional employees had been hired. The Board determined that the evidence of the turn-over in staff was not unusual and there were therefore no "exceptional circumstances" to justify departing from the principle

in *Deopker Industries* that the Board will only consider the evidence of support filed as of the date of the application. In all of the circumstances, the case before us is much more similar to that before the Board in *Birch Hills, supra*, than the circumstances that existed in *Giant Tiger, supra*, and we find that the turn-over we were alerted to is not unusual and that there are no exceptional circumstances to justify a consideration of any changes in the level of support or employee complement subsequent to the date the application was filed.

Conclusion:

[137] As previously stated, counsel for the Employer delivered correspondence to the Board on March 10, 2008, setting out the parties latest agreed-to bargaining unit description. The Board, having concluded that the unit sought is not an appropriate bargaining unit without the inclusion of caseworkers, finds that an appropriate unit for the purpose of bargaining collectively pursuant to s. 5(a) of the *Act*, shall read as follows:

> *All employees employed by Ranch Ehrlo Society and Ehrlo Community Services Inc., including all employees working in Avant Garde College and or any other program undertaken by Ranch Ehrlo Society and Ehrlo Community Services Inc., in Saskatchewan, except President, Vice-President(s), Directors, Program Managers, Unit Managers, Quality Improvement Assistant, Supervisor of Ehrlo Day Care, Administration and Information Technology Employees, persons employed as Teachers who must as a condition of employment be members of the Saskatchewan Teachers' Federation, employees working in Schaller College, persons employed in the Pre-trade Construction Programs, employees of Ehrlo Counseling Services and Therapists who provide therapeutic services outside of the group home setting, are an appropriate unit of employees for the purposes of bargaining collectively.*

[138] As the Union did not file evidence of majority support in the appropriate unit, but did file in excess of 25%, the Board will direct a vote in accordance with the *Act*, of those employees listed in the agreed to statement of employment who are still employed by the Employer on the date of the vote. If the employees vote in favour of representation by the Union, the Board will issue a certification order designating the Union as the employee's bargaining agent under s. 5(b) of the *Act* and that the Employer

shall be obligated to bargain with the Union in relation to those employees, as required by s. 5(c) of the *Act.*

DATED at Regina, Saskatchewan, this **21st** day of **November, 2008**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson