THE CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. TURNING LEAF SERVICES INC., Respondent

LRB File No. 113-17; December 11, 2017

Chairperson, Kenneth G. Love, Q.C.; Members: Ken Ahl and Maurice Werezak

For the Applicant: Sachia Longo
For the Respondent: Paul Clemens

Certification – Union applies for certification of bargaining unit of employees working at one location of the Employer – Employer, in reply, says that unit applied for is under-inclusive and not appropriate for collective bargaining.

Appropriate Unit – Board considers prior jurisprudence regarding establishment of an appropriate unit for collective bargaining. On analysis of factors to be considered, Board finds that proposed unit is not appropriate for collective bargaining.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** The Canadian Union of Public Employees ("the "Union") made an application to the Board to certify a group of eleven (11) employees of Turning Leaf Services Ltd. ("Turning Leaf") in Regina, Saskatchewan. The bargaining unit description which was proposed by the Union was: "all Community Support Workers at the workplace located at 1060 Dorothy Street, Regina, Saskatchewan except for the Case Manager, Supervisor and Team Lead" (the "Proposed Bargaining Unit").

[2] Turning Leaf responded to the application, taking the position that the proposed bargaining unit was "under inclusive" as there were approximately fifty (50) employees of Turning Leaf working in Regina and Moose Jaw that could potentially be included in a larger bargaining unit.

[3] For the reasons that follow, the application is dismissed on the basis that the unit applied for is not an appropriate unit.

Facts:

[4] "Turning Leaf is a non-profit charitable organization, which originated in Manitoba, dedicated to providing crisis and treatment services to those experiencing intellectual challenge"[1]. Community services are provided through contract with the Saskatchewan Ministry of Social Services. Services provided are divided into two (2) streams. The first is a residential support team who provide "in facility, person-centered treatment and support to adults (or individuals transitioning to adulthood) who are living with intellectual challenge and/or mental illness".[2]

[5] The second stream is a community support program which supports individuals in the community. Support is provided through the community via a program tailored to the needs, risks, strengths and challenges faced by each individual.[3]

[6] Community support is provided in Regina at an apartment complex owned by a third party. The apartment complex contains over 100 individual units. Turning Leaf leases four (4) apartments at 1060 Dorothy Street, Regina for the use of individuals in the community support program. At the time of the certification application, three (3) of the units were client occupied and one (1) was utilized by the community support workers as an "on-site" office. A fourth client was moved to the Dorothy Street property which caused the community support office to be relocated to an existing office facility of Turning Leaf at 845 Broad Street, Regina. As a result of this move in office location, the Union applied to the Board to modify its proposed bargaining unit to be "all Community Support Workers in Regina, Saskatchewan except for the Case Manager, Supervisor and Team Lead" (the "Final Bargaining Unit").

[7] At the time of application, there were approximately eleven (11) Community Support Workers working at Dorothy Street. Those employees transitioned to the new office location on Broad Street. In addition to the clients on Dorothy Street, the Community Support

[1] SeeTurning Leaf Employee Handbook, Mission Statement
[2] See Turning Leaf Employee Handbook at p. 7
[3] See Turning Leaf Employee Handbook at p. 4

Workers also provide services to an individual who does not live at Dorothy Street, but who resides with her family elsewhere in the City of Regina.

[8] The Board heard evidence from Jennifer Biggs, the Director of Supported Independent Living for Turning Leaf. She testified that, in addition to the Community Support Workers for whom the Union sought representational rights, there were additional workers in Regina who provided services to four (4) residential clients at a property on Habkirk Drive, Regina. In addition, residential and community support was provided by Turning Leaf to additional clients in Moose Jaw, Saskatchewan. Employee lists provided showed the following number of employees in both Regina and Moose Jaw:

Location	***Number of Employees***
Regina, Community Support	*10*
Regina, Residential Support	*13*
Moose Jaw, Community Support	*8*
Moose Jaw, Residential Support	*13*

[9] In Moose Jaw, but not in Regina, three (3) employees[4] were included in both categories because they worked in both the Community Support stream and the Residential Support stream. Depending where these employees were placed, the net employee count for Moose Jaw would be eighteen (18) after the double counting was eliminated. The net employee count in Regina would remain at twenty three (23).

[10] The Board was provided Job Descriptions for both the Residential Support Worker[5] and the Community Support Worker[6]. Those job descriptions provided the following overview of the positions:

> *<u>Residential Support Worker:</u>*
>
> *Reporting to the Residential Supervisors, the Residential Support Worker will provide our service to participants who live in our Residential Support homes. Residential support workers will work closely with our participants in helping set goals and making healthy live choices. Residential Support Workers work closely with Residential Supervisor to observe, plan and implement activities to facilitate learning and development in daily living, social and life skills. Residential Support*

[4] These employees were B. N., C. H., and J. B.
[5] Full job description attached as Appendix "A"
[6] Full job description attached as Appendix "B"

> *Workers will also assist and work with the Residential Supervisors to ensure the smooth running of the home.*
>
> *Community Support Worker:*
>
> *A Community Support Worker will provide our service to participants who require support in the community. Community Support Workers work closely with Case Management to observe, plan, and implement activities to facilitate learning and development in daily living, social and life skills specific to the participant's individual needs.*

[11] The Board heard evidence that, as noted above, employees in Moose Jaw routinely worked within both streams, whereas employees in Regina did not. Ms. Biggs, in her testimony, noted that one employee, M. O. had worked with a client in Regina and transferred to Moose Jaw when that client was moved there. She noted that employees from Winnipeg came to support clients and Regina staff members during periods of staff training or, in one case, where there was a death in an employee's family. She testified that there was no impediment to employees working on either stream apart from some indoctrination training. She noted that there were no additional licensing requirements for employees working on the residential stream, but rather that the facilities in which the residents were housed required additional licensing.

[12] Witnesses for the Union highlighted the differences between the job requirements for a Community Support Worker and a Residential Support Worker. One of those employees, however, had applied to work as a Residential Support Worker, but was hired and employed as a Community Support Worker.

[13] Additional evidence was also adduced which will be referenced as necessary during the Analysis portion of this decision.

Relevant statutory provision:

[14] Relevant statutory provisions are as follows

> ***Acquisition of bargaining rights***
>
> ***6-9****(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.*
>
> *(2) When applying pursuant to subsection (1), a union shall:*
>
> *(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the*

> *applicant union is their choice of bargaining agent; and*
>
> *(b) file with the board evidence of each employee's support that meets the prescribed requirements.*

Union's arguments:

[15] The Union provided the Board with a written Brief which we have reviewed and found helpful. In that Brief, the Union identified the sole issue to be determined by the Board which was: "[I]s the proposed bargaining unit appropriate".

[16] The Union acknowledged that the onus of proving, on a balance of probabilities, that the proposed unit was appropriate fell to it. It argued that the Board should follow its decision in *Canadian Union of Public Employees v. The Board of Education of the Northern Lakes School Division No. 646*[7] wherein the Board pointed out the distinction between an "appropriate unit" vs. "the most appropriate unit". Furthermore, it argued that the Board should maintain its practice of defining bargaining units in the non-construction area by reference to municipal boundaries.[8]

[17] The Union agreed with Turning Leaf that the governing decision of the Board with respect to the test for determining the appropriate unit of employees was set down by the Board in its decision in *Graphic Communication International Union, Local 75M v. Sterling Newspapers Group, A Division of Hollinger Inc.*[9]

[18] The Union argued that the application of the criteria set out in *Sterling Newspapers* should lead the Board to conclude the unit of employees applied for was an appropriate unit for collective bargaining.

Employer's arguments:

[19] Turning Leaf also provided the Board with a written Brief which we have reviewed and found helpful. It too identified the only issue to be determined to be the appropriateness of the unit of employees which the Union sought to represent.

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[7] [1996] SLRBD No. 7, [1996] SLRBR 115, LRB File No. 332-95
[8] *United Foodand Commercial Workers Union, Local 1400 v. Atco Structures and Logistics Ltd* [2015] CanLII 80541 (SKLRB)
[9] [1998] SLRBD No. 65

[20] Turning Leaf argued that the Board should maintain its preference for larger bargaining units, citing *Health Sciences Association of Saskatchewan v. St. Paul's Hospital, Saskatoon and Saskatoon and Service Employee's International Union, Local 333*[10]*.*

[21] Turning Leaf also argued that the proposed unit would give rise to fragmentation of the workplace into smaller units based upon job descriptions, citing *University of Saskatchewan Faculty Association v. University of Saskatchewan*[11] and *University of Saskatchewan Faculty Association v. University of Saskatchewan*[12]. Turning Leaf further argued that the certification of the proposed bargaining unit could lead to multiple unions within the City of Regina, and potentially as between Regina and Moose Jaw should other employees seek representation.

[22] Turning Leaf reiterated that the proposed unit was "under inclusive" and relied upon the Board's analysis and the factors identified in *Sterling Newspapers.*

Analysis:

[23] One of the primary roles of Labour Relations Boards is the determination of whether a unit of employees is "appropriate" for collective bargaining. As early as 1969, the Supreme Court of Canada recognized this role as being the exclusive jurisdiction of the Board. In *Labour Relations Board of Saskatchewan v. The Queen et al*[13] ("Noranda Mines") the Court says at pp 902-903:

> *Section 3 is the primary section of the Act, giving to employees the right to organize and to bargain collectively, through representatives of their own choosing, "in a unit appropriate for that purpose." Whether or not a unit is appropriate for the purposes of collective bargaining is a matter which requires determination, and, while s. 5(a) is not as clearly worded, in this connection, as it might be, it is my view that, reading ss. 3, 5(a) and 5(b) together, the Act obviously contemplates that the determination of that question is for the Board. By virtue of s. 20, the jurisdiction of the Board in this matter is made exclusive. Therefore, as is pointed out in the judgment of the Court of Appeal, if the order in question here is within that jurisdiction, it is not open to judicial review because of error, whether of law or fact: Farrell et al. v. Workmen's Compensation Board, supra, at p. 51.*

[10] [1994] S.L.R.B.D. No. 11, 1994 CarswellSask 691, at paragraph 7
[11] [1995] S.L.R.B.D. No. 6, LRB File No. 127-94
[12] LRB File No. 070-85
[13] [1969] SCR 898, 1969 CanLII 104 at p. 102-103 (SCR)

[24] This decision dealt with the former *Trade Union Act*, which has since been repealed and replaced with *The Saskatchewan Employment Act* (the *"SEA"*). However, section 6-9(1) contains the same authority for the Board to determine the appropriateness of a bargaining unit.

[25] In Noranda Mines, the Court, at p. 103 continues as follows:

> *The Court of Appeal was of the view that the Board's order was not made within its jurisdiction, because, in the opinion of the Court, it did not thereby determine that the proposed unit of employees was not appropriate for collective bargaining, or that the Union did not represent a majority of the employees in the unit. In the view of the Court, "what the Board in fact did was to dismiss the application because, in its opinion, the time for making the same was not appropriate". In so doing, it was said, it failed to give effect to the legal rights of the employees conferred by the statute, which it was under a legal obligation to do.*
>
> *With respect, I do not share this view. In my opinion, the Board has jurisdiction under the Act to determine whether or not it considers a proposed unit of employees to be appropriate for collective bargaining. In determining that issue the Board is not subject to any directions contained in the Act and it can, therefore, consider any factors which may be relevant. The application to the Board asked it, inter alia, to determine that the unit described in the application was an appropriate one. The application was dismissed, thereby demonstrating that the Board was not prepared to make that determination in the Union's favour. The Board ruled on a matter over which it had exclusive jurisdiction.*

[26] The Supreme Court, in that case was dealing with the employer's argument that the group of employees for which certification had been sought was "under inclusive" insofar as the group of employees was only a small group which was anticipated would increase substantially in number. In that case, the Board held that it was inappropriate to certify based upon the wishes of the smaller group because the smaller group did not "constitute a substantial and representative segment of the working force to be employed by Noranda in the future."[14]

[27] The issue decided in *Noranda Mines* is not before us in this case, however, the principle established in *Noranda Mines* flow through to the *SEA* in that there are no constraints on the Board in its consideration of what might constitute an appropriate unit and the Board may "consider any factors which may be relevant".

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[14] Ibid at p. 104

[28] The Board recently reviewed its jurisprudence regarding the appropriateness of a bargaining unit in its decision in *North Battleford Community Safety Officers Police Association v. City of North Battleford*[15]. In that case, the Board identified four (4) general principles which set the legal parameters for the discussion and analysis of what the Board would consider in respect to the question of what constituted an "appropriate unit" of employees for collective bargaining. Beginning at paragraph {54} *et seq*, the Board provided the following reasoning:

> ***[54]*** *Not surprisingly, the Board has considered this issue in numerous cases, many of which were cited by both the Applicant and the City. The brief review which is undertaken here is not intended to be exhaustive. Rather, it will provide a general over-view of the relevant considerations this Board should take into account when determining what qualifies as an appropriate bargaining unit in a particular situation. For present purposes, the Board has identified four (4) relevant legal principles.*
>
> ***[55]*** *First, the Board should scrutinize the bargaining unit that has been proposed by the union in question from the perspective of whether it is appropriate for purposes of future collective bargaining with an employer. The central question is whether it is an appropriate unit, not the optimal one. In Canadian Union of Public Employees v Northern Lakes School Division No. 64 [Northern Lakes School Division], the Board framed this inquiry as follows:*
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> > *The basic question which arises for determination in this context is, in our view, the issue of whether an appropriate bargaining unit would be created if the application of the Union were to be granted. As we have often pointed out, this issue must be distinguished from the question of what would be distinguished from the question of what would be the most appropriate bargaining unit.*
> >
> > *The Board has always been reluctant to deny groups of employee's access to collective bargaining on the grounds that there are bargaining units which might be created, other than the one which is proposed, which would be more ideal from the point of view of collective bargaining policy. The Board has generally been more interested in assessing whether the bargaining unit which is proposed stands a good chance of forming a sound basis for a collective bargaining relationship than in speculating about what might be an ideal configuration.*
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> ***[56]*** *Second, generally speaking the Board's preference is for larger, broadly based units so as to avoid issues of certifying an under-inclusive unit. In Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v O.K. Economy Stores (A Division of Westfair Foods Ltd.) [O.K. Economy] a case cited by both the Applicant and the City, former Vice-Chairperson Hobbs explained this preference as follows at page 66:*
>
> > *In Saskatchewan, the Board has frequently expressed a preference for larger and few bargaining units as a matter of general policy because they tend to promote administrative efficiency and convenience in bargaining, enhance lateral mobility among employees, facilitate common terms and*

[15] 2017 CanLII 68783 (SKLRB)

> *conditions of employment, eliminate jurisdictional disputes between bargaining units and promote industrial stability by reducing incidences of work stoppages at any place of work (see [United Steel Workers of America v Industrial Welding (1975) Limited, 1986 Feb. Sask. Labour Rep. 45]). . . .*
>
> *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 arise.*

[57] *Third, this Board has identified, and regularly applied, a number of relevant factors, of which size of the proposed unit is but one, to determine whether the proposed unit is an appropriate unit for purposes of bargaining collectively with the employer. Those factors were helpfully enumerated in O.K. Economy as follows, again at page 66:*

> *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.*
>
> *The Board recognizes that there may be a number of different units of employees which are appropriate for collective bargaining in any particular industry.*

[58] *Fourth, units that may be characterized as "under-inclusive" may be certified as appropriate in certain circumstances. The leading case on this issue appears to be Graphic Communications International Union, Local 75M v Sterling Newspapers Group, a Division of Hollinger Inc. [Sterling Newspapers Co.]. In this decision, former Chairperson Gray on behalf of the majority of the Board (Member Carr dissenting), reviewed the Board's prior jurisprudence on under-inclusive units, including authorities cited by counsel in this matter such as Canadian Union of Public Employees, Local 1902-08 v Young Women's Christian Association et al. , and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Saskatchewan Centre of the Arts. She summarized her analysis as follows at para. 34:*

> *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 exist a more inclusive choice of bargaining units.*

[29] In *North Battleford Community Safety Officers Police Association*, the Board then went on to analyze the appropriateness of the proposed bargaining unit under the headings of

(a) onus of proof; (b) community of interest; (c) intermingling of employees; and (d) whether the unit proposed was under inclusive, primarily whether or not the unit would be viable for collective bargaining purposes. We proposed to follow that same template with an additional consideration respecting fragmentation of collective bargaining.

Onus of Proof:

[30] The Union acknowledges, and Turning Leaf agrees, that the onus of showing that the unit of employees proposed for certification by this Board falls to the Union. For the reasons that follow, we find that the Union has failed to meet this onus.

Community of Interest:

[31] On the evidence provided to the Board, we do not believe that the Community Service Workers and the Residential Service Workers are sufficiently discrete and do not share a community of interest with the other. Based upon the evidence from Ms. Biggs, the union witnesses and the job descriptions, the job duties and responsibilities of the Community Service Workers and the Residential Service Workers are very similar. Each group is responsible to assist participants in "daily living, social and life skills". The only difference between the two (2) groups is the location where they assist participants and perhaps the independence level between those participants able to live in the community and those who live in a residential setting. In their essential character, the jobs performed by the Community Service Workers and the Residential Service Workers are the same.

[32] Both groups of employees assist participants in similar ways. There are no special skills that distinguish either group from the other as was the case in *Sterling Newspapers*. They have the same skill sets as was shown by the evidence that one of the Union's witnesses had applied to work as a residential support worker, but was hired and employed as a community support worker. Additionally, three (3) employees in Moose Jaw routinely work in either area as either a residential support worker or as a community support worker.

[33] The job description for a Community Support Worker does not contain any required attributes as does the job description for the Residential Support Worker. However, the evidence of Ms. Biggs was that candidates were interviewed and evaluated on similar

criteria and assigned to a job classification based on the organizations current needs. Furthermore, she testified that there was no impediment to a Residential Support Worker working as a Community Support Worker as was done in Moose Jaw.

Intermingling of Employees:

[34] This was the major issue between the parties. Turning Leaf's evidence was that there was routine intermingling of employees at social functions and when the needs of a participant[16] required a cross over of function. Additionally, Turning Leaf provided evidence that employees from outside the Province assisted when needed.

[35] The Union's evidence was to the contrary in that the Community Workers in Regina rarely interacted with the Residential Workers in Regina and that each operated out of separate and discrete office locations.

[36] The evidence did not, in our opinion, establish a large degree of intermingling between the two Regina staffs. However, as noted by Turning Leaf, the witnesses who testified for the Union were relatively new employees whose perspective would be narrowed by their limited time exposure to the organization. Additionally, having a small group of represented employees within a larger group of unrepresented employees has the potential to prevent employee movement to other job opportunities within the organization. Employees outside the bargaining unit may have difficulty moving to a position within the bargaining unit and conversely, employees within the bargaining unit may have difficulty moving outside the bargaining unit.

[37] Intermingling of employees was more apparent in Moose Jaw as noted by the utilization of the three (3) employees in dual roles. There was no evidence to suggest that this type of intermingling was unusual.

[38] With such a small represented group of employees, there is, we believe, concern that creation of the smaller bargaining unit would not be appropriate.

[16] For example when a participant transitioned from a residential setting to the community, or when there was a transfer of a participant between Regina and Moose Jaw.

Is the Proposed Unit "Under Inclusive":

[39] In its determination of whether or not a proposed bargaining unit should be considered to be "under inclusive", the Board routinely looks at five (5) factors identified in *Sterling Newspapers.* At page 12 of its decision, the Board identified those factors as:

> *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.*

The first two of these criteria have been dealt with above and need not be further examined.

Is there a lack of Bargaining Strength in the Proposed Unit?

[40] The Board does not think that there can be a realistic suggestion that the proposed unit will lack bargaining strength given the fact that it is to be represented by the Union, which is one of the more significant Unions representing workers in Saskatchewan. However, there is an issue with respect to its ability to conduct job action as necessary because of the relatively small size of the unit when compared to the number of other employees, both in Regina and Moose Jaw who would not be included.

[41] It is this factor which normally brings the Board to cite its preference for larger vs smaller bargaining units of employees. Ideally, the larger group can assert greater economic pressure should job action be required. From this perspective, the proposed unit is not ideal. However, that is not the governing principle.

Is there a realistic ability to organize a more inclusive unit?

[42] Again, the parties are at variance in respect to this issue. Turning Leaf says a larger unit could be organized. The Union says it has done what it can. In the circumstances, the Board agrees with the Employer. The Union provided no evidence to suggest that it had, in any way, attempted to organize a more inclusive unit of employees in Regina, let alone in both

municipalities. Given this lack of demonstrated effort, the Board must conclude that there may have been a realistic ability to organize a more inclusive unit.

[43] Generally, the Board will take note of any efforts made to organize a more inclusive unit, recognizing that often such efforts will present difficulties. However, in this case nothing appears to have been done in that respect.

Does a more inclusive bargaining unit exist?

[44] The answer to this question usually will be yes. However, the Board will, as noted in *Sterling Newspapers,* often certify less inclusive units when the above criteria are met. Here, a broader, more inclusive unit could be an all employee unit in Regina, or an all employee unit in Saskatchewan.

Fragmentation:

[45] Of concern in this case, is potential fragmentation of representation in the workplace if this proposed unit is certified. It follows logically from the Board's concerns related to the ability to organize a more inclusive unit. If the proposed unit is certified for collective bargaining, a group or employees in Regina is excluded. Those employees may then seek representation either by the Union or by another union of their choice which could result in the creation of multiple bargaining units.

[46] In this case, the Union seeks to represent only about 25% of the employees of Turning Leaf. Other unions routinely represent employees in both the health care or non-Governmental organization sectors. Since employee choice is the touchstone of representational rights, it is certainly possible that another union could seek to represent employees who have chosen that union as their representational choice. If that occurred then we could be faced with a situation where two unions represented different, but not differently skilled employees, or were employees that had a discrete boundary which separated them from the other employees represented by the other Union.

Summary:

[47] In summary, the Board finds that the Union has failed to establish, on a balance of convenience, that the proposed unit is appropriate. We find that there is a community of interest among all of the employees which is similar and that there is no discrete skill or boundary between the employees for whom certification is sought and the other employees for whom certification has not be sought.

[48] The Board also finds that there is limited intermingling at present in Regina, but such intermingling routinely occurs in Moose Jaw, where the employee groups are similar. Additionally, certification of the small group or residential support workers in Regina could create a potential bar to transfer between the two units.

[49] The proposed unit is "under inclusive" and a larger more inclusive unit could have been organized, but no efforts were made to do so.

[50] Finally, the Board finds that the certification of this smaller unit could lead to fragmentation of the bargaining unit without discrete skill or other boundaries.

[51] This is a unanimous decision of the Board. For these Reasons, the application for certification of the proposed unit is denied. An appropriate Order will accompany these reasons.

DATED at Regina, Saskatchewan, this **11th** day of **December, 2017.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson