WORKERS UNITED CANADA COUNCIL, Applicant v. AMENITY HEALTH CARE LP AND/OR 7169320 MANITOBA LTD. OPERATING AS TIM HORTONS, Respondent

LRB File Nos. 128-17, 129-17 & 130-17; February 5, 2018

Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: Maurice Werezak and Joan White

For the Applicant: Heather M. Jensen
For the Respondent: Leah Schatz, Q.C. and Brent M. Matkowski

Certification – Union commences certification application to represent all non-managerial employees at Tim Hortons restaurant in Canora, Saskatchewan – Employer objects on basis that this is not an unit appropriate for collective bargaining purposes under *The Saskatchewan Employment Act* – Board reviews its jurisprudence and concludes this group of employees qualifies as a unit appropriate for collective bargaining purposes set out in section 6-11 of *The Saskatchewan Employment Act*.

Certification – Supervisory Employees – Board interprets section 6-1(1)(o) of *The Saskatchewan Employment Act* for the first time and sets out the applicable interpretive principles – Board applies those principles to the functions performed by the shift supervisors at the Canora Tim Hortons restaurant and concludes they do not qualify as supervisory employees for purposes of *The Saskatchewan Employment Act*.

Certification – Board approves an all-employee bargaining unit and issues Order to Tabulate Vote.

REASONS FOR DECISION

OVERVIEW

[1] Graeme G. Mitchell, Q.C., Vice-Chairperson: Workers United Canada Council [Union] brings three (3) applications pursuant to section 6-9 of *The Saskatchewan Employment Act*, SS 2013, c S 15-1 [*SEA*] seeking certification as the exclusive bargaining agent for various combinations of workers employed by Amenity Health Care LP and/or 7169320 Manitoba Ltd. [Amenity] at a Tim Hortons restaurant located in Canora, Saskatchewan. The Union filed all three (3) of these applications with this Board on June 26, 2017.

[2] The first application – LRB File No. 128-17 – seeks certification for a proposed bargaining unit comprised of six (6) employees. The description of this proposed unit reads as follows:

> *All employees, excluding supervisory employees employed by Amenity Health Care LP and/or 7169320 Manitoba Ltd. operating as Tim Hortons in Canora, Saskatchewan, except those at the rank of manager and above the rank of manager.*

[3] The second application – LRB File No. 129-17 – seeks certification for a proposed bargaining unit comprised of two (2) employees. The description of this unit reads as follows:

> *All supervisory employees employed by Amenity Health Care LP and/or 7169320 Manitoba Ltd. operating as Tim Hortons in Canora, Saskatchewan, except those at the rank of manager and above the rank and manager.*

[4] The third application – LRB File No. 130-17 – seeks certification for an all employee bargaining unit comprising eight (8) employees. The description of this unit reads as follows:

> *All employees including supervisory employees employed by Amenity Health Care LP and/or 7169320 Manitoba Ltd. operating as Tim Hortons in Canora, Saskatchewan, except those at the rank of manager and above the rank of manager.*

[5] On July 10, 2017, Amenity filed formal Replies to these three (3) applications opposing all of these applications for various reasons. First, it challenges the appropriateness of the proposed bargaining units described in LRB File Nos. 128-17 and 129-17, on the basis that neither of them is viable for collective bargaining purposes. Second, Amenity contests the proposed bargaining unit described in LRB File No. 130-17 for the reason, it submits, that it is off-side subsections 6-11(3) and (4) of the *SEA*. Together, these provisions prohibit this Board from certifying as appropriate, a bargaining unit which includes "supervisory employees" as defined in clause 6-1(1)(o), absent the filing of an irrevocable election pursuant to clause 6-11(4)(a). No irrevocable election has been filed in this case.

[6] On June 30, 2017, this Board issued a Direction for a Vote. It directed that a vote by secret ballot should take place in which all eligible employees employed at the Canora Tim Hortons as of June 26, 2017 would be able to cast a ballot. That vote concluded on July 14, 2017. The ballots received at the Board's Office in Regina by that time remain sealed.

[7] The hearing of these applications took place on September 22, 2017. Final argument took place by telephone conference call on October 3, 2017. At the conclusion of that call, the Board reserved its decision.

[8] These Reasons for Decision explain why the Board has concluded the Union's application for certification of an all employee unit designated as LRB File No. 130-17 should be allowed. This unit shall be described as follows:

> *All employees (including shift supervisors) employed by Amenity Health Care LP and/or 7169320 Manitoba Ltd. operating as Tim Hortons in Canora, Saskatchewan, except supervisory employees as defined in clause 6-1(1)(o) of The Saskatchewan Employment Act or those who exercise managerial responsibilities.*

[9] As a consequence, the Union's applications designated LRB 128-17 and LRB File No. 129-17 are dismissed.

FACTUAL BACKGROUND

[10] Three (3) witnesses testified at the hearing on behalf of the Union: Ms. Tanya Parkman; Ms. April (Gwen) Britton, and Mr. Vas Gunaratna. Amenity called only one (1) witness: Mr. Shaban Tariq.

A. Union's Evidence

1. Testimony of Tanya Parkman

[11] Ms. Parkman began working for Tim Hortons in Canora at the end of November 2016, shortly after that outlet had opened. At the time of these certification applications she was still employed at Tim Hortons; however, she has since left its employment.

[12] She was hired as a shift supervisor; although at no time did she receive a job description for that particular position. Throughout her employment she worked as shift supervisor, except for a few weeks between April 11, 2017 and the beginning of June 2017 when she served as the Acting Manager.

[13] Ms. Parkman described an "average shift" as one in which she did a variety of tasks, including running the till, making coffee and sandwiches, doing baking when needed, bussing tables, and cleaning the restaurant and washrooms. She testified that as a supervisor she did not hire employees or do formal work appraisals of her co-workers. Nor was she responsible for scheduling employees' shifts or approving over-time.

[14] Rather, as a supervisor, Ms. Parkman stated she essentially did what the Manager at the time told her to do. She summarized her daily activities as trying “to keep staff members on track”, “making sure all the stations were covered”, and generally “keep[ing] the operation organized”. Simply put, she described the role of a shift supervisor at the Canora Tim Hortons as floating among various positions that needed covering.

[15] Ms. Parkman advised that the Manager disciplined employees when necessary. She stated further that any employee could speak to the Manager about concerns they had about a co-worker. Such information did not have to be communicated through a supervisor, however.

[16] Ms. Parkman testified that the “on-hands” training she received was minimal. She stated that Tim Hortons had a basic training process designated as “TAPP”, apparently an on-line training module that she did complete.

[17] Ms. Parkman advised that at all relevant times there are two (2) employees at the Canora Tim Hortons designated as shift supervisors: Connie Pidscalny and herself. At the beginning, each of them was paid $12.00 an hour. However, when Ms. Parkman was Acting Manager, her hourly wage was increased to $14.00 an hour. She indicated that when she returned to her previous position of supervisor, she was able to retain that hourly rate. She testified that Amenity was amenable to this arrangement as, in its opinion, “she was worth it”.

[18] In the course of her testimony, Ms. Parkman stated that when she was Acting Manager of the Canora Tim Hortons, she performed many tasks she did not perform as a shift supervisor. These tasks included: (i) scheduling employees’ shifts; (ii) dealing with over-time requests; (iii) reviewing resumes and applications for employment; (iv) hiring new staff members; (iv) disciplining employees when necessary; (v) ordering supplies for the restaurant as required, and (vi) addressing performance issues with employees as they arose. She also indicated that occasionally she did travel to the nearest Tim Hortons outlet located in Esterhazy, Saskatchewan to pick up supplies. Esterhazy is approximately one (1) hour away from Canora.

[19] On cross-examination, Ms. Parkman testified that as a shift supervisor she could not unilaterally ask an employee to cover the shift of another employer who called in sick or failed to appear for work. Rather, she would seek the input of the Manager prior to doing this. She indicated further that she was authorized to require employees to stay “late”, *i.e.* after the

completion of their shift; however, she could ask them to stay for a period of time, typically not exceeding 30 extra minutes.

[20] Ms. Parkman stated that when a manager was not in the store, she, as a shift supervisor, was in charge. She estimated that this happened approximately 50% of the time. She testified that even when she was in charge, she lacked the authority to discipline employees. Rather, she had to bring these issues to the attention of the Manager when he or she was on-site. She indicated that she had done this on a number of occasions, for example when an employee was rude to a customer.

[21] She reiterated her evidence on Examination-in-Chief that her job was to ensure the work got done. She quickly learned what had to be done in the restaurant and would "pitch in" if she saw that it was not being done correctly, or at all. She also addressed customer complaints and attempted to defuse difficult situations.

[22] Respecting the hiring of new employees, Ms. Parkman testified that she played no formal role in the process, and did not review applications. She stated further that she did not assist in employee retention.

[23] In the course of her cross-examination, counsel for Amenity showed Ms. Parkman a formal document entitled "Role Description: Shift Supervisor"[1]. This document purported to be a job description for this role prepared by Tim Hortons, and reads as follows:

> ***ROLE DESCRIPTION: SHIFT SUPERVISOR***
>
> *The Tim Hortons Shift Supervisor position is operational in nature and involves the supervision of team member activities on shift to ensure that standards around people, product, cleanliness, and Exceptional Guest Experience are fulfilled.*
>
> ***People Management***
> - *Leads by example and demonstrates the importance of treating every team member and guest with respect*
> - *Assists the Restaurant Manager in recruitment and retention strategies*
> - *Reacts immediately to issues requiring attention during the shift*
> - *Provides ongoing, specific direction to team members*
> - *Encourages an exciting and fun work environment while motivating team members to meet goals*
> - *Trains, orients and monitors new team members, using PTS and feedback binder*
> - *Reports to Restaurant Owner, General Manager and/or Assistant Manager on team member performance (positive and negative)*

[1] Exhibit E-4 – "Role Description: Shift Supervisor".

- *Assists in ensuring optimal team member coverage at all times and works various positions during busy periods to maintain optimal service levels through demonstrated floor leadership*

Hospitality Management

- *Leads by example to demonstrate that the guest is top priority and reinforces positive hospitality behaviour with team members*
- *Responds to guest in a friendly manner while maintaining an appropriate sense of urgency*
- *Responds to guest service complaints in a timely manner, resolving problems and turning potentially negative situations into positive situations*
- *Assists in the running of company-wide incentive programs*

Operations Management

- *Displays knowledge of and works in compliance with applicable legislation*
- *Complies with and enforces all Tim Hortons operating standards*
- *Ensures that all product and packaging is properly merchandised and stocked*
- *Responsible for shift cash procedures*
- *Maintains operation efficiency through use of positioning charts*
- *Supervises team members to ensure primary and secondary duties are completed*
- *Ensures all restaurant policies are followed during the shift (e.g. cash policies, meal and breach policies, food safety policies)*

Health & Safety

- *Works in compliance with the occupational health and safety legislation*
- *Knows, understands an follows safe work practices and procedures*
- *Uses or wears personal protective equipment or clothing as required*
- *Reports all injuries/illness, accidents unsafe conditions, security incidents and any contravention of health and safety legislation, policies and procedures to the Restaurant Manager or Owner*
- *Does not operate any equipment, machine, device of thing, or otherwise work in a manner that will endanger anyone*
- *Ensures health and safety policies are followed during the shift including documentation and reporting of any work related injuries or accidents.*

[24] In response, Ms. Parkman stated that she first saw this document only recently, and not when she initially commenced employment at Tim Hortons. After reviewing it briefly, she indicated that in her opinion this document did not accurately describe what she did at the Canora Tim Hortons.

2. Testimony of April (Gwen) Britton

[25] Ms. Britton was one of the first employees the Canora Tim Hortons hired in November 2016. From the very beginning she worked at the front counter. She also helped prepare breakfast sandwiches, make beverages, and assisted in removing garbage and cleaning washrooms. She indicated that if she wasn't certain about what she should do, she would ask one of the supervisors, either Tanya Parkman or Connie Pidscalny.

[26] Ms. Britton described her initial orientation as “shot gun training”. She indicated that she had a two (2) hour walk through of the restaurant prior to it opening to the public. There were also training modules available to employees and she took advantage of them. She testified, for example, that she logged into a TH App to obtain instructions on how to make specialty drinks as well as sandwiches “the Tim Hortons way”.

[27] Ms. Britton testified that she did not receive a written job description when she commenced her employment at the Canora Tim Hortons. She stated that she first saw a job description for her position when she attended an organizing meeting in early June 2017.

[28] Ms. Britton stated that when Tanya Parkman was hired, she initially trained Ms. Parkman on how to do the work at the counter, as well as the front of the restaurant. She indicated that she has done the same with other new employees and described herself as a “hands on trainer”.

[29] Ms. Britton also explained that she could report inappropriate or illegal actions taken by other staff members directly to the Manager, and, in fact, did so at least on one occasion. She stated that she advised the Manager of what she believed was workplace theft by another employee. She did not speak to a shift supervisor about her concerns prior to communicating with the Manager.

[30] On cross-examination, Ms. Britton testified that following her report of possible workplace malfeasance at the Canora Tim Hortons, her hours were drastically reduced to the point that she was required to get another job.

[31] She stated that typically she now works an average of three (3) night shifts during the week. During those shifts a shift supervisor is the highest ranked individual in the restaurant. Occasionally, the shift supervisor may ask Ms. Britton to stay longer after the conclusion of her regular shift. She indicated, however, that it would be for no more than one (1) hour.

3. Testimony of Vas Gunaratna

[32] Mr. Gunaratna is a representative for the Union, a position he has held for approximately 40 years.

[33] He testified that the Union was the exclusive bargaining agent for many small bargaining units not only in Saskatchewan but also British Columbia. In his testimony he referenced the Winners store in Saskatoon, a number of hotels, as well as a company in British Columbia with a bargaining unit comprised of between three (3) to six (6) employees. He stated that most of these units had been associated with the Union for 20 years or more.

[34] Mr. Gunaratna concluded his testimony by advising the Board that if the Canora Tim Hortons was certified, the Union planned to have the President of the Saskatoon Winners Store local train the workers in Canora, and serve as the Union's service representative. He stated that this individual would visit the Canora Tim Hortons on a weekly basis until a collective agreement was negotiated, and all employees understood its terms.

B. Amenity's Evidence

1. Testimony of Shaban Tariq

[35] Mr. Tariq is a senior manager with Amenity, a position he has held for approximately one (1) year. Prior to joining Amenity, he had been employed by Tim Hortons for 15 years, the last eight (8) of which he had been with corporate Tim Hortons.

[36] Amenity's business plan is to purchase pharmacies in under-serviced communities in Western Canada. Operating a Tim Hortons restaurant in those communities is an important aspect of Amenity's operations. Mr. Tariq referred to it as a "secondary business" for Amenity. He stated that currently Amenity operates four (4) Tim Hortons outlets in Manitoba; four (4) in Saskatchewan, and one (1) in Alberta. The Canora Tim Hortons is located next to the pharmacy.

[37] Mr. Tariq explained that his responsibilities at Amenity were to oversee its various Tim Horton restaurants and, in particular, provide human resources support to them. He explained that all Amenity's Tim Hortons restaurants were franchises. Amenity was only responsible for the human resources aspects of the business. To that end, Amenity had prepared a set of policies which would govern how the various outlets were to operate.

[38] He indicated that he reported directly to Amenity's CEO, Mr. Dalbir Bains. The following diagram shows Amenity's organizational structure in relation to its various Tim Hortons outlets:

Amenity CEO
↑
Shaban Tariq
↑
Regional Managers
↑
Managers
↑
Shift Supervisors
↑
Team Members

[39] The Canora Tim Hortons opened on or about November 17, 2016. This particular restaurant has a Manager, two (2) shift supervisors, and a fluctuating number of team members. For purposes of this application, he confirmed that Tanya Parkman and Connie Pidscalny occupied the two (2) shift supervisor positions at all relevant times.

[40] Its' operating hours are slightly different from other Tim Hortons restaurants. It is opened from 7 a.m. to 7 p.m. Monday through Saturday, and 9 a.m. to 5 p.m. on Sunday. However, some employees begin work as early as 4:30 a.m. in order to prepare baked goods; while other employees stay for approximately one (1) hour after closing to complete the clean-up and to attend to other closing duties.

[41] The Manager is on-site for approximately 40 hours per week, typically the morning shift (7 a.m. to 3 p.m.), Monday through Friday. As a result during the evening shifts and on weekends, the most senior employees on-site are the shift supervisors. He stated that the primary job of a shift supervisor is to assist team members.

[42] The Role Description for a team member was introduced into evidence.[2] Mr. Tariq testified this document was adapted by Amenity from Tim Hortons original document. The "Role Description: Restaurant Front Team Member" reads as follows:

> *The Restaurant Front Team Member is the front line in providing the Exceptional guest Experience through the delivery of exceptional products and service.*
>
> ***Hospitality & Guest Service***
> - *Provides important visual cues for guests that make a positive first impression E.g. wearing proper career wear that is clean and neatly pressed, maintaining a clean parking lot/exterior and a clean and inviting dining room*

[2] See: Exhibit E-3.

- *Follows the guaranteed Always Fresh procedure to ensure coffee and products are always fresh and always accurate*
- *Delivers consistent and outstanding guest service through friendly attitude, attentive behavior and strong product knowledge*
- *Enhances the guest experience by following the S.E.T. Principles: Smile, Eye Contact, Thank You*
- *Using proper procedures to ensure the accuracy of every order for every guest E.g. repeating guest's order when it is presented to them, using H.O.T.R.O.D.S. at drive-thru and marking hot beverage lids*
- *Ensures every guest receives a prompt and warm greeting within 5 seconds at front counter and drive-thru*
- *Maintains speed of service targets by working efficiently with a sense of urgency to fill orders and meets guests' needs*
- *Promptly executes service recovery for any guest concerns or complaints by making it right with the guest, regardless of involvement in the issue*
- *Listens carefully to guests and apologies for the experience in the case of a complaint*

Restaurant Operations

- *Follows all Operations standards and guideline for preparation of products according to training and instructional materials provided*
- *Prepares all products as required, following the order monitor to ensure the accuracy of every order*
- *Communicates showcase and product needs to ensure proper product availability for guests*
- *Regularly takes temperatures of the required products and records in the Time & Temperature Log*

Policies & Procedures

- *Follows all restaurant policies, procedures and standards*
- *Maintains the front counter and drive thru area by keeping it clean, organized stocked and ready for rush periods in the restaurant*
- *Follows proper handwashing techniques and all sanitation guidelines; completes all sanitation tasks as outlined by the Restaurant Manager or Restaurant Owner*

Health & Safety

- *Works in compliance with occupational health and safety legislation*
- *Knows, understands and follows safe work practices and procedures*
- *Uses or wears personal protective equipment or clothing as required*
- *Reports all injuries/illnesses, accidents unsafe conditions, security incidents and any contravention of health and safety legislation, policies and procedures to the Restaurant Manager or Restaurant Owner*
- *Does not operate any equipment, machine, device or thing, or otherwise work in a manner that will endanger anyone.*

[43] Mr. Tariq stated that the "Role Description: Shift Supervisor"[3] differed from the "Role Description: Restaurant Front Team Member" in significant ways, mostly notably because it included a section on 'People Management'. He described this section as a very important component of the "Role Description: Shift Supervisor" because this aspect of the role is central to building a very strong and well-functioning team in every restaurant. These Individuals assist the Manager in achieving the goals he or she has set for the restaurant.

[3] Exhibit E-4

[44] He further indicated that every outlet also has access to the document entitled "Role Description: Shift Supervisor". Indeed, it was his belief that a copy of the document had been provided to the Manager of the Canora Tim Hortons around the time this restaurant opened in November 2016. On cross-examination, he admitted he did not know if the Manager had shared this document with either Ms. Parkman or Ms. Pidscalny

[45] Mr. Tariq testified that when the Manager was not on duty, a shift supervisor enjoyed enhanced responsibilities. He described them as "managers in training". They set the tone for how the shift will go as they "take the baton from the manager to ensure the success of the shift".

[46] That said, Mr. Tariq explained that a shift supervisor holds "a cross-functioning job". There is a tight communication relationship among staff members. Shift supervisors monitor team members, and serve as the "eyes and ears' of the Manager when he or she is not at work. This, Mr. Tariq estimated, was approximately 50% of the time at the Canora Tim Hortons.

[47] Mr. Tariq testified that when the Manager was not on the premises, the shift supervisor could discipline an employer should a serious situation arise. In extreme circumstances, a shift supervisor could even terminate an employee.

[48] Mr. Tariq advised that Tim Hortons does have a formal Team Member Performance Evaluation process. A copy of the form utilized in this process was entered into evidence.[4] This process has not been formally instituted at the Canora Tim Hortons, however, because it has not yet been opened for one (1) year. He testified that these evaluations are prepared by the Manager who would seek input from the shift supervisors respecting the performance of employees.

[49] On cross-examination, Mr. Tariq explained that when Amenity opened the Canora Tim Hortons, they started out with "an unrealistic budget" contemplating approximately 18 employees. Over the months, Amenity arrived at a more reasonable business plan and budget. He acknowledged that Tim Hortons had experienced a significant turn-over rate, approximately 200%. However, he stated this was not unusual for in the first couple of years there is a significant turn-over in the food and beverage industry.

[4] Exhibit E-5, "Team Member Performance Evaluation Form".

[50] Mr. Tariq testified that Amenity currently has four (4) Tim Hortons restaurants in Saskatchewan, one (1) restaurant in each of Esterhazy, Kipling, Fort Qu'Appelle and Canora. He stated that he had personally attended at the Canora Tim Hortons between eight (8) and ten (10) times since it opened in November 2016. The purpose of these visits was to ensure that the restaurant complied fully with Tim Hortons operational standards. While there, he also "pitched in" and did a variety of jobs which, he stated, was in accordance with model adopted by Tim Hortons for its senior management.

[51] He stated that the Canora Tim Hortons had access to a website operated by Tim Hortons on which could be accessed all Tim Hortons policy documents. However, only the Manager of that restaurant was authorized to use this website. Shift supervisors did not have access to it.

[52] Mr. Tariq testified that in extreme cases, a shift supervisor had the authority to hire or terminate an employee; however, he conceded that this authority was not expressly set out in the "Role Description: Shift Supervisor" document. He acknowledged further that although shift supervisors may provide input regarding a particular team members' performance, nowhere on the Team Members Performance Evaluation Form was there space for a shift supervisor to write his or her comments.

[53] On re-examination, Mr. Tariq acknowledged that business at the Canora Tim Hortons restaurant fluctuated. This was not surprising, as it was a start-up business and it is always difficult to predict with any certainty how such a business will perform. He reiterated that when it opened the Canora Tim Hortons had 18 employees; however, over time this dwindled to a low of approximately six (6) or seven (7) employees. He opined that 10 employees would likely be the optimal staffing level for that particular restaurant.

ISSUES

[54] There is one (1) principal issue on this application, namely:

1. Which one (1) of the three (3) bargaining units proposed by the Union, if any, is an appropriate bargaining unit for purposes of section 6-11 of the *SEA*?

RELEVANT STATUTORY PROVISIONS

[55] The provisions of the *SEA* most relevant on this application read as follows:

6-1*(1) In this Part:*

(a) ***"bargaining unit"*** *means:*

(i) a unit that is determined by the board as a unit appropriate for collective bargaining; or

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

(b) ***"certification order"*** *means a board order issued pursuant to section 6-13 or clause 6-18(4)(e) that certifies a union as the bargaining agent for a bargaining unit[.]*

. . . . . .

(d) ***"collective bargaining"*** *means:*

(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;

(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;

(iii) executing a collective agreement by or on behalf of the parties; and

(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union[.]

. . . . . .

(h) ***"employee"*** *means:*

(i) a person employed by an employer other than:

(A) a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character; or

(B) a person whose primary duties include activities that are of a confidential nature in relation to any of the following and that have a direct impact on the bargaining unit the person would be included in as a n employee but for this paragraph:

(I) labour relations;
(II) business strategic planning;
(III) policy advice;
(IV) budget implementation or planning;

(ii) a person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining; and

(iii) any person designated by the board as an employee for the purposes of this Part not withstanding that, for purposes of

determining whether or not the person to whom he or she provides services is vicariously liable for his or her acts or omissions, he or she may be held to be an independent contractor;

and includes:

(iv) a person on strike or locked out in a current labour-management dispute who has not secured permanent employment elsewhere; and
(v) a person dismissed from his or her employment whose dismissal is the subject of any proceedings before the board or subject to grievance or arbitration in accordance with Subdivision 3 of Division 9.

. . . . . .

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

(i) independently assigning work ot employees and monitoring the quality of work produced by employees;
(ii) assigning hours of work and overtime;
(iii) providing an assessment to be used for work appraisals or merit increases for employees;
(iv) recommending disciplining employees

but does not include an employee who:

(v) is a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs;
(vi) acts as a supervisor on a temporary basis; or
(vii) is in a prescribed occupation.

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

. . . . . .

***6-11**(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of the one bargaining unit to another bargaining unit, the board shall determine:*

(a) if the unit of employees is appropriate for collective bargaining; or
(b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.

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

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

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

(a) the employer and union make an irrevocable election to allow the supervisory employees to be in the bargaining unit; or
(b) the bargaining unit determined by the board is a bargaining unit comprised of supervisory employees.

> *(5) An employee who is or may become a supervisory employee:*
>
> *(a) continues to be a member of a bargaining unit until excluded by the board or an agreement between the employer and the union; and*
> *(b) is entitled to all the rights and shall fulfill all of the responsibilities of a member of the bargaining unit.*
>
> *(6) Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.*
>
> *. . . . . .*
>
> ***6-15****(1) An application may be made to the board to cancel a certification order by an employee within the bargaining unit or the employer named in the certification order on the grounds that the union or any person acting on behalf of the union engaged in an unfair labour practice or otherwise contravened this Part before the certification order was issued.*
>
> *(2) If the board is satisfied that the certification order would not have been granted but for the unfair labour practice or other contravention of this Part, the board shall direct that a vote be taken of the employees in the bargaining unit.*
>
> *(3) If a majority of the votes cast in a vote directed in accordance with subsection (2) favour cancelling the certification order, the board shall cancel the certification order.*

[56] The powers given to this Board by the *SEA* that are most relevant to this application read as follows:

> ***6-103****(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*
>
> *(2) Without limiting the generality of the subsection (1), the board may do all or any of the following:*
>
> *. . . . . .*
>
> *(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act[.]*
>
> *. . . . .*
>
> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *. . . . . .*
>
> *(k) to adjourn or postpone the hearing of the proceeding [.]*

ANALYSIS

A. Onus and Burden of Proof

[57] The parties disagreed as to which of them bore the onus in this application. Amenity asserted, relying on *Ontario (Human Rights Commission) v Simpson-Sears Ltd.*[5] [*Simpson-Sears*], that the Union had to prove each and every element necessary to establish certification.

[58] The Union argued that while it must present sufficient evidence to establish that the proposed bargaining unit was an appropriate one for purposes of section 6-11 of the *SEA*, the evidentiary burden shifts to Amenity to demonstrate why the two (2) shift supervisors should be excluded from an all employee bargaining unit. In support of its position, counsel for the Union relied upon this Board's decision in *Saskatchewan Government and General Employees Union v Wheatland Regional Centre Inc.*[6] [*Wheatland Regional Centre*]. In that case, the issue was whether certain employees should be excluded from the proposed bargaining unit because they were more appropriately classified as managerial employees. The Board discussed the applicable onus in a certification application as follows:

> ***[59]*** *In the case of certification applications, the responsibility for the determination of the bargaining unit falls to the Board under section 6-11. As a part of this responsibility is the requirement to insure that persons included in the bargaining unit fall within the definition of employee. The Board will require that the parties to the application bring forward all necessary evidence to satisfy it that the unit for which it ultimately grants representational rights is an appropriate unit.*
>
> *. . . . .*
>
> ***[61]*** *In the case of amendments, it falls upon the person seeking the inclusion or exclusion of an employee to provide evidence to support its position. However, a certification is quite different. The Union makes application for the inclusion of a number of employees including some which the Employer says should not be included. Should the onus then fall upon the Union because they initially sought to include those employees, or should it fall upon the Employer who says that should be excluded?*
>
> ***[62]*** *That conundrum was captured by the Board in its decision in University of Saskatchewan Faculty Association v University of Saskatchewan [[1995] SLRD No. 6, LRB File No. 127-94]. There is a shifting onus, as suggested by the Employer here. It is necessary for the union to first establish "that the applicant is a trade union; that the proposed bargaining unit is appropriate for collective bargaining". Furthermore, the Union must provide the Board with sufficient evidence of support from those persons in the proposed unit.*

[5] [1985] 2 SCR 536, at para. 28.
[6] 2015 CanLII 80544, LRB File No. 142-15 (SK LRB)

> ***[63]*** *Once this initial onus has been satisfied by the Union, then the Employer must provide evidence that justified the exclusion of the positions which it seeks to exclude. [Emphasis added.]*

[59] This Board concurs with the Board's analysis in *Wheatland Regional Centre*. It is important to clarify the difference between the burden of proof and the onus. It cannot be denied, as asserted by Amenity, that the Union bears the legal burden of proof to establish on a balance of probabilities the proposed unit is an appropriate one for collective bargaining purposes. However, if an employer contests the composition of a proposed unit on the basis for example, that some individuals function as managers or, as in this case, qualify as supervisory employees, then the evidential burden or onus, as opposed to the legal burden of proof, shifts to the employer to present evidence supporting its argument for exclusion. Notwithstanding this shift in the evidentiary onus, the over-arching burden of proof in a certification application remains upon the union.

[60] Furthermore, in order to satisfy its burden of proof on a balance of probabilities the Union must present evidence that is "sufficiently clear, convincing and cogent"[7].

B. Is the Unit Requested by the Applicant An Appropriate Bargaining Unit?

1. Introductory Comments

[61] Determining what qualifies as an appropriate unit for collective bargaining purposes is one of the most important tasks assigned by the Saskatchewan Legislature to this Board. In *Saskatchewan Federation of Labour et al. v Saskatchewan (Attorney General)*[8], Ball J., a former Chairperson of this Board, emphasized the significance of the Board's authority set out in then section 5 of *The Trade Union Act* which has now been superseded by section 6-11 of the *SEA*. He stated:

> *The SLRB is created by The Trade Union Act. Its powers are, and have always been, described in general terms. Unlike labour legislation in some other jurisdictions, The Trade Union Act is not and does not purport to be a code. The manner in which SLRB carries out its duties and responsibilities is very much dependent upon how its members exercise their discretion and implement what they perceive to be the policy goals of the statute.*
>
> . . . . . .

[7] *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, at para. 46. See also: *North Battleford Community Safety Officers Police Association v City of North Battleford*, LRB File No. 007-17, at paras. 38-39.
[8] 2010 SKQB 390, 192 CLRBR (2d) 47. See further: *Noranda Mines Limited v Her Majesty the Queen and Saskatchewan Labour Relations Board*, [1969] SCR 898, at 903-4.

> *Pursuant to s. 5 of The Trade Union Act, the SLRB has an absolute discretion to determine appropriate bargaining units. Section 5(a) of The Trade Union Act states:*
>
> > *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;*
>
> *[T]here is little, if any, guidance in The Trade Union Act with respect to the rather elastic term "appropriate". Section 5(a) does not obligate the SLRB to identify the most appropriate unit; the SLRB certified any unit it deems appropriate for the purpose of bargaining collectively.*
>
> *The Board's determination of the size and shape of an appropriate bargaining unit has significant public policy implications. It establishes the line between "employees" who will, in the event of certification, be represented by the union, and "managers" who will represent the employer. In a less than all employee unit, it establishes the line between employees who will, and employees who will not be, represented by the union. Thus, its determination is critical to the union's capacity to secure certification as the employees' bargaining representative, the employer's continuing ability to manage the business, the relative strengths of the parties during the collective bargaining process, the eventual content of a collective agreement and whether or not the bargaining process will result in a strike or lockout. Its determinations affect not only the immediate concerns of the parties to the dispute; in some cases, particularly those involving larger bargaining units or workers providing essential services, they can affect the collective good of the community as a whole.*[9] *[Emphasis added.]*

[62] This discretion of the Board is not constrained in any way even in cases where the parties are agreed as to the description and scope of the bargaining unit in question which, it should be noted, is not the situation here.[10]

2. Summary of General Legal Principles Relevant to this Application

[63] This section offers a brief summary of relevant legal principles this Board should take into account when determining what qualifies as an appropriate bargaining unit in a particular case. In *North Battleford Community Safety Officers Police Association v City of North Battleford*[11][*North Battleford Community Safety Officers*]), the Board identified the following four (4) principles that should inform this inquiry:

> *[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*

[9] *Ibid*., at paras. 55, 59-61.
[10] See *e.g.*: *Canada Post Corporation v Canadian Union of Postal Workers*, 2009 CIRB 438, at paras. 20 -21, and *Re Laurentian Bank of Canada*, 2004CIRB 295, at para. 18.
[11] 2017 CanLII 68783, LRB File No. 007-17.

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. 6422 [[1996] SLRBD No. 7, [1996] SLRBR 115, LRB File No. 332-95 2017 CanLII 68783 (SK LRB) 17] [Northern Lakes School Division], the Board framed this inquiry as follows [at paras. 116-117]:

> *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 employees 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.*

[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.) 24 [[1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89] [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 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. [[1998] Sask. LRBR 770, [1998] SLRBD No. 65, LRB File No. 174-98] [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. [[1992] 4th Quarter Sask. Labour Rep. 71, LRB File No. 123-92], and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Saskatchewan Centre of the Arts [[1992] 4th Quarter Sask. Labour Rep. 71, LRB File No. 123-92]. 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.*

[64] These four (4) general principles set out the legal parameters for the discussion and analysis that follows.

3. Position of the Parties

3.1 The Union's Position

[65] The Union relied upon the following authorities: *5984417 Manitoba Ltd (c.o.b. Tim Horton's Store #3950)*[12] [*Tim Horton's Store #3950*]*, Canadian Union of Public Employees, Local 5004 v Saskatoon Housing Authority*[13]; *J.P. Murphy Inc.*[14]; *Lynn Management Ltd. (c.o.b. Tim Hortons)*[15] *UFCW, Local 1400 v Plainsview Credit Union*[16] [*Plainsview Credit Union*]; *Wheatland Regional Centre*[17]; *Saskatoon Public Library Board v Canadian Union of Public Employees, Local 2669 et al.*[18] [*Saskatoon Public Library*], and *Re Pelmorex Communications Inc., Division of MétéoMédia*[19][*Pelmorex Communications*].

[66] As mentioned at the outset of these Reasons for Decision, the Union had filed three (3) separate certification applications for various combinations of workers. However, at the

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[12] [2017] MLBD No. 29.
[13] 2010 CanLII 42667, LRB File No. 048-10 (SK LRB)
[14] [1995] OLRD No. 3996
[15] [1999] OLRD No. 3686
[16] 2011 CanLII 40107, LRB File Nos. 010-11 to 016-11 (SK LRB)
[17] *Supra* n. 6.
[18] 2017 CanLII 6026, LRB File No. 135-16 (SK LRB)
[19] [2003] CIRBD No. 30.

hearing itself, and in her oral submissions, Ms. Jensen argued in support of an all employee unit. At the date of the certification applications – June 26, 2017 – the number of employees at the Canora Tim Hortons Restaurant included five (5) front counter personnel; two (2) shift supervisors, and one (1) manager. The parties agreed that the individual filling the managerial position must be excluded from any bargaining unit certified by this Board by virtue of sub-clause 6-1(1)(h)(i)(A) of the *SEA*. This sub-clause excludes from the definition of "employee", a person employed by the employer "whose primary responsibility is to exercise authority and perform functions that are of a managerial character". As a consequence, an all-employee bargaining unit would be comprised of seven (7) employees.

[67] The Union asserted that a unit of this size is not an impediment to certification since the *SEA*, itself, contemplates exceedingly small bargaining units comprised of "two or more employees". See *e.g.*: clause 6-1(1)(q), and sub-section 6-22(2) of the *SEA*. It pointed to two (2) recent decisions of this Board in which certification orders were issued for bargaining units comprised of one (1) or two (2) employees (*Plainsview Credit Union*[20]), and six (6) employees (*North Battleford Community Safety Officers*[21]).

[68] The Union further directed the Board's attention to the evidence of Mr. Gunaratna, a Union Representative who had testified that the Union represented many small bargaining units of five (5) to eight (8) employees in Manitoba and British Columbia. According to Mr. Gunaratna, these units had maintained stable and productive collective bargaining relationships with their employers, some for more than 20 years.

[69] The Union submitted that the individuals in the proposed all employee bargaining unit share a clear and identifiable "community of interest". They work in the same restaurant, and perform many of the same jobs over the period of a single shift. Furthermore, there is no other Tim Hortons restaurant in close proximity. The nearest Tim Hortons restaurant is in Esterhazy which Ms. Parkman testified was more than an hour away from Canora, and with which the Canora Tim Hortons restaurant had only minimal contact. The Union submitted that the circumstances in this case were more compelling than were the facts in *Tim Horton's Store #3950*, for example, where the Manitoba Board certified a stand-alone Tim Hortons restaurant in the City of Winnipeg, even though there were a number of other Tim Hortons restaurants in close proximity to it, all of which were owned by the same individual.

[20] *Supra* n. 16.
[21] *Supra* n. 11.

[70] The Union submits finally that the geographic isolation of the Canora Tim Hortons restaurant from any other Tim Hortons owned by Amenity in Saskatchewan supports its position that certifying an all-employee unit for that restaurant would not cause any serious labour relations instability for Amenity. In the unlikely event of a strike or lockout at the Canora Tim Hortons, no other Tim Hortons restaurant would be affected. As this Board acknowledged in *Communications, Energy and Paperworkers Union of Canada v Arch Transco Ltd.*[22] at paragraph 17:

> *Promotion of industrial stability is the overarching factor in considering the shape of a bargaining unit on an initial, as opposed to a second or subsequent certification. The design of the bargaining unit must ensure the viability of collective bargaining: see, Saskatoon Civic Middle Management Association v City of Saskatoon and Canadian Union of Public Employees, Local 59, [1998] Sask. L.R.B.R. 341, LRB File Nos. 354-97 & 010-98, at 348-49.*

[71] The Union disputed Amenity's submissions that the two (2) shift supervisors fell within the definition of "supervisory employee" set out in clause 6-1(1)(o) of the *SEA* and, as a consequence could not be included in an all employee bargaining unit by virtue of subsection 6-13(3)[23], for essentially three (3) reasons.

[72] First, the Union contends that the primary function of the shift supervisors is not the supervision of their fellow employees, an essential element of the statutory definition in question.

[73] Second, the Union points to Ms. Parkman's testimony which it asserts shows that, for the most part, she carried out the same duties and responsibilities as her fellow employees at the Canora Tim Hortons restaurant. It submits that her evidence on this point was corroborated by Ms. Gwen Britton who further testified that she would directly report any concerns she had to the Manager without first communicating with the shift supervisor on duty. This, the Union, submits further demonstrates that a primary function of a shift supervisor was not to supervise other employees.

[74] Third, the Union asserts that the job description for a shift supervisor does not accurately describe the functions performed by the employees so designated at the Canora Tim Hortons restaurant. It argued that in her testimony, Ms. Parkman stated that she had not seen

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[22] [2000] SLRBD No. 63, LRB File No. 060-00

this job description until fairly recent, and identified a number of responsibilities listed in this job description that she had never performed while she was employed as a shift supervisor. In effect, the Union urged the Board to rely on what actually happened "on the ground" in the Canora Tim Horton's restaurant, and not on a job description prepared in Amenity's corporate offices.

3.2 Amenity's Position

[75] Amenity relied principally on the following authorities: *RWDSU v Regina Exhibition Association*[24]; *Re Canadian Safeway Ltd.*[25]; *GCIU, Local 75M v Sterling Newspapers Group*[26]; *H.E.R.E.I.U., Local 47 v Boomtown Casino Ltd.*[27] [*Boomtown Casino*], a decision of the Alberta Board, and *North Battleford Community Safety Officers*[28].

[76] Amenity took the position that none of the bargaining units proposed by the Union was either appropriate or viable. It did so principally because these various units were too small to ensure industrial stability at the Canora Tim Hortons restaurant. Amenity argued that in the food service industry there is constantly a turn over in employees which would significantly erode the viability of any bargaining unit in that location. Relying upon *Boomtown Casino*, Amenity submitted that the combination of a small bargaining unit and a high fluctuation in the workforce would render any bargaining unit very fragile, indeed. In *Boomtown Casino*, the Alberta Board stated particularly at paragraphs 29 and 30:

> *It is not enough to say that the employees in the unit have the potential to set up a picket line and therefore have the potential to impact the employer's operation. The viability of a bargaining unit includes the ability to prepare for and engage in meaningful collective bargaining, the ability to represent the employees in the unit and the ability to administer a collective agreement. A large union organization, outside the workplace and enough employees with the confidence and stability to make it work. This group of employees is highly dependent on the Employer for their shifts. They work part-time and rely on their tips for their livelihoods. Their duties are the ones most easily performed by someone else in their absence. This means that they likely lack the leverage to make collective bargaining a viable process for setting terms and conditions of employment. We are not satisfied, based on the evidence before us, that this unit would be a viable unit for collective bargaining.*

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[23] Clause 6-13(4)(a) of the *SEA* permits supervisory employees to be included in the same bargaining unit as employees those individuals supervise, provided the parties "make an irrevocable election to allow the supervisory employees to be in the bargaining unit". No such irrevocable election has been made in this case.
[24] [1992] SLRBD No. 35, LRB File No. 182-92.
[25] [1991] SLRBD No. 25.
[26] [1998] SLRBD No. 65, LRB File No. 174-98.
[27] 2002 CarswellAlta 1025, [2002] ALRBR 55
[28] *Supra* n. 11.

> *The turn-over rate for employees, particularly in the lounge, is high in this city with a high cost of living. There were 13 employees in the unit on the date of the application. As of the date of the hearing there were nine employees in the unit applied for. Normally, the Board would place little weight on turnover rates as it impacts viability…In this case, we see the turnover rate as an additional aggravation to an otherwise very fragile unit.*

[77] Amenity also argued that the two (2) shift supervisors qualified as "supervisory employees" and, for that reason, could not be included in a bargaining unit with employees for whom they had supervisory responsibilities.

[78] It maintained that because for approximately half the time during which Canora's Tim Horton restaurant was open to the public, one or the other shift supervisor was the senior employee on-site. This was particularly so for the evening shifts and on weekends. In effect, they serve as the "eyes and ears" for management. In this capacity they would report to the restaurant manager about what happened on a particular shift, a report which might include the Shift Supervisor's assessment of particular employee or employees' job performance.

[79] At paragraph 35 of its Written Argument, Amenity asserts that the two (2) shift supervisors satisfy the definition of "supervisory employee" found in clause 6-1(1)(o) of the *SEA* because their primary duties include:

> *i. independently assigning work to employees and monitoring the quality of work produced by employees;*
> *ii. assigning hours of work and overtime;*
> *iii. providing an assessment to be used for work appraisals or merit increases for employees;*
> *iv. recommending disciplining employees.*

[80] At paragraph 37 of its Written Argument, Amenity concluded its' submissions on the "supervisory employee" issue as follows:

> *If the shift supervisors are placed within the bargaining unit, for 50% of the time the store operates there would be no one outside the bargaining unit in the store. This would be an absurd outcome for both operational reasons and labour relations reasons.*

4. Analysis and Decision

[81] As already mentioned, the Union seeks an order from this Board certifying an all employee unit at the Canora Tim Hortons restaurant. Amenity resists such an order. It asserts: (1) that an all employee unit comprising seven (7) employees would include two (2) employees who are supervisory employees, and as no irrevocable election has been filed in this matter,

subsection 6-11(3) of the *SEA* precludes their inclusion in such a bargaining unit, and (2) a unit comprised of only six (6) or seven (7), employees was not viable and, as a consequence, is not an appropriate unit under the *SEA*.

[82] In accordance with *Westland Regional Centre*[29], we begin by considering the more general question of whether a proposed all-employee unit at the Canora Tim Horton's Restaurant is an appropriate one for collective bargaining purposes. Only if the Union persuades us that it is, will the evidentiary burden then shift to Amenity to demonstrate why the two (2) shift supervisors in question should not be included in the proposed all-employee unit because they qualify as "supervisory employees" as defined in clause 6-1(1)(o) of the *SEA*.

[83] To summarize, our conclusions respecting the Union's application are as follows:

- The Union has met its burden to demonstrate on a balance of probabilities that the proposed all employee unit is an appropriate unit for collective bargaining purposes pursuant to sub-clause 6-1(1)(a) of the *SEA*.

- The two (2) individuals employed as shift supervisors at Canora's Tim Hortons Restaurant are not "supervisory employees" but rather are team leaders whose supervisory duties "are ancillary to the work" they otherwise perform.

4.1 Is the Proposed All-Employee Unit Appropriate for Collective Bargaining Purposes?

4.1.1 Opening Comments

[84] When assessing this issue, it is important to underscore that a central objective of the *SEA* as set out in subsection 6-4(1) is to ensure that all employees "have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing".

[85] This statutory statement of public policy is reinforced by the constitutional guarantee of freedom of association found in section 2(*d*) of the *Canadian Charter of Rights and Freedoms*[30] [*Charter*]. In *Mounted Police Association of Ontario v Canada (Attorney General)*[31] [*MPAO*], relying on its prior jurisprudence, most notably *Health Services and Support —*

[29] *Supra* n. 6, at paras. 62-63.
[30] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.
[31] 2015 SCC 1, [2015] 1 SCR 3

Facilities Subsector Bargaining Assn. v. British Columbia[32], a majority of the Supreme Court of Canada stated[33]:

> *[66] In summary, s. 2(d), viewed purposively, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.*
>
> *C. The Right to a Meaningful Collective Bargaining Process*
>
> *[67] Applying the purposive approach just discussed to the domain of labour relations, we conclude that s. 2(d) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals. This guarantee includes a right to collective bargaining. However, that right is one that guarantees a process rather than an outcome or access to a particular model of labour relations. [Emphasis added.]*

[86] These important public and constitutional values must inform this Board's analysis of the issues presented on this application, most notably whether the proposed unit which the Union seeks to have certified under the *SEA* is an appropriate one for purposes of collective bargaining.

4.1.2 Analysis

[87] On balance, the Board finds that the Union has persuaded us that the proposed all-employee unit at Canora's Tim Hortons restaurant is an appropriate unit for collective bargaining purposes. As outlined above, this Board's Decisions have employed a variety of factors when making this determination. On this application, the Board has determined that the principal considerations should be: (1) community of interest, and (2) viability.

4.1.2.1 Community of Interest

[88] The Board finds that employees in the proposed unit share a "community of interest" sufficient to merit certification. For example, we heard evidence from two (2) Union witnesses that all employees at the Canora Tim Hortons restaurant perform similar duties and responsibilities during the course of their various shifts. In other words, these employees utlilize similar, if not the same, skills as needed in order to carry out their workplace obligations. This is

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[32] 2007 SCC 27, [2007] 2 SCR 391
[33] *Supra* n. 31, at paras. 66-67.

one of the indicia which this Board has considered to ascertain whether employees in a proposed bargaining unit enjoy a community of interest.[34]

[89] Furthermore, the evidence clearly establishes that the Canora Tim Hortons restaurant is a discrete workplace with little, if any, real connection to other Tim Hortons restaurants which Amenity owns in Saskatchewan, the closest one being located in Esterhazy, approximately one (1) hour away from Canora. In our view, the fact that this is an isolated outlet falling within a clearly defined municipal boundary also demonstrates that "a rational and defensible boundary can be drawn around the proposed bargaining unit", to quote from this Board's decision in *United Food and Commercial Workers Union, Local 1400 v Ranch Ehrlo Society and Ehrlo Community Services Inc.*[35]

[90] The Union placed considerable reliance on *Tim Horton's Store #3950*[36], a decision of the Manitoba Board. In that case, the Manitoba Board certified all staff at one (1) Tim Hortons restaurant – the "Lombard Place location" – in Winnipeg, Manitoba "except those above the rank of Supervisor, those excluded by the [Manitoba *Labour Relations Act*]". In that case, the owner/employer argued against certifying only the Lombard Place location. It maintained that because staff regularly intermingle with staff in other nearby Tim Hortons restaurants in Winnipeg, to certify it would effectively create a "'silo around the Lombard Place location", "make it difficult for the business to accomplish its goals", and, as a consequence, "cause serious labour relations problems".[37]

[91] The Manitoba Board rejected these arguments, and certified the proposed unit. It reasoned as follows:

> *In the present case, the Board is satisfied that the bargaining unit, which the Union seeks to represent, encompasses a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer. The evidence regarding the limited interchange and intermingling of employees is not of such a nature and degree to sustain the conclusion that the applied for bargaining unit is not appropriate. In so holding, the Board considered the Employer's submissions with respect to proliferation of bargaining units and fragmentation, however, we are not satisfied that its concerns in this regard, in the*

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[34] See, for example: *Canadian Union of Public Employees, Local 5004 v Saskatoon Housing Authority*, 2010 CanLII 42667 [*Saskatoon Housing Authority*], at para. 32.
[35] 2008 CanLII 65787, 161 CLRBR (2d) 165, LRB File No. 108-07, at para. 103. See further: *Saskatoon Housing Authority*, *ibid*., at para. 33.
[36] *Supra* n. 12.
[37] *Ibid.*, at para. 7.

> *context of the present circumstances are sufficient to conclude that the applied for bargaining unit is not appropriate for collective bargaining.*[38]

[92] The Board agrees with the Union that the facts in this case support a finding that employees at the Canora Tim Hortons restaurant share a stronger community of interest than did those employees in *Tim Horton's Store #3950*. However, in fairness to Amenity, it should be said that it did not strenuously argue its employees in Canora lacked a community of interest. Rather, Amenity's principal objection to the Union's proposed bargaining units was that they were not viable, and lacked industrial relations stability because of their size and the transient workforce. The Board turns to consider these objections now.

4.1.2.2 Viability

[93] Amenity submitted that none of the various proposed units, even an all-employees unit, was viable because of its size. As well, relying principally on *Boomtown Casino*, it asserted that the transient nature of the workforce in the food service industry generally would undermine the level of bargaining strength the workers could exert upon Amenity. It was noted that, as Mr. Tariq, testified there had already been a diminution in the number of employees at the Canora outlet. However, he also indicated that it was likely that more employees would be hired and accepted that an optimal staffing level would be approximately 10 employees.

[94] The Board acknowledges that an all-employee unit of between seven (7) and ten (10) employees proposed by the Union is a small one. Yet we have stated in a number of our prior Decisions that the relatively small size of a proposed bargaining unit does not, in and of itself, disqualify it from being an appropriate unit for certification purposes.[39] Indeed, in *North Battleford Community Safety Officers*[40], when confronted with a proposed unit comprised of only six (6) employees, this Board asserted:

> *[84] While the Board accepts that the success of this proposed unit remains unknown, it cannot be presumed it will fail because of its size. The SEA contemplates in sub-clause 6-1(1)(a)(ii) that a bargaining unit may be comprised of as few as two (2) employees. On the facts before us in this case, there is not sufficient evidence to show that the proposed unit is likely to fail in its objective to represent the collective bargaining interests of its members.*

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[38] *Ibid*., at para. 31(e).
[39] See for example, *O.K. Economy*, *supra* n. 29, at 66; *Plainsview Credit Union*, *supra* n. 16, and *North Battleford Community Safety Officers*, *supra* n. 11.
[40] *Ibid*.

[95] That said, the Board is of the view that in this case there are three (3) reasons which persuade us that the proposed unit is likely viable. First, the Canora Tim Hortons restaurant is a geographically isolated workplace, and for that reason the proposed unit is likely cohesive and stable enough to exert considerable bargaining strength on Amenity. For example, should the employees go on strike or take other forms of industrial action it would, indeed, be difficult for Amenity to rely on the on-site Manager or employees drawn from other Tim Hortons owned by Amenity to maintain regular business operations in Canora.

[96] Second, this isolation also suggests that any concerns respecting the intermingling of Amenity's employees in Canora with other Tim Hortons restaurants are not well-founded. Indeed, Ms. Packman's evidence indicates that there is virtually no intermingling of employees from various Tim Hortons restaurants owned by Amenity taking place.

[97] Third, as attested to by Mr. Gunaratna, the Union has had extensive experience representing the interests of small bargaining units throughout Western Canada over many years. He assured the Board that the Union will take all steps necessary to ensure the viability of the proposed all-employee unit at the Canora Tim Hortons.

[98] Fourth, this case is distinguishable from *Boomtown Casino*, a decision of the Alberta Board, and similar cases emanating from this Board such as *Re Cavalier Enterprises Ltd. (c.o.b. Sheraton Cavalier)*[41]. While those cases involved certification applications in the service industry, each of them pertained to under-inclusive units within the employers' enterprise. In *Boomtown Casino*, for example, the union in question proposed a unit of 13 employees within an enterprise that employed an additional 70 individuals who at the time of its certification application remained unorganized. Likewise in *Sheraton Cavalier*, the union applied to certify a bargaining unit composed of housekeeping and laundry department workers at that hotel, a unit that "would comprise approximately 15% of the Employer's employees"[42] out of a workforce of 248 individuals.

[99] The factual circumstances of the application before us are quite different, however. The Union is proposing a unit comprised of most, if not all, employees at the Canora Tim Hortons. There can be no concern about a unit effectively functioning as an "island" within the context of a much larger workforce.

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[41] 2002 CanLII 52902, LRB File No. 123-02 upheld on reconsideration 2004 CanLII 65626 (SK LRB).
[42] *Ibid*., at para.12.

[100] In conclusion, the Board acknowledges that as with all small units, it is extremely difficult to assess with any degree of certainty whether the proposed unit will be viable in the longer term. However, no evidence was lead before us which might suggest this proposed all-employee unit was inappropriate.

4.1.3. Conclusion

[101] Accordingly, for these reasons, the Board concludes that the proposed unit requested by the Union is an appropriate one for collective bargaining purposes.

4.2 Are the Shift Supervisors "Supervisory Employers" For the Purposes of the *SEA*?

4.2.1 Introduction

[102] At the hearing Amenity also contested the inclusion of the two (2) shift supervisors in an all-employee bargaining unit. It was Amenity's position that these individuals fell within the definition of "supervisory employees" set out in clause 6-1(1)(o) of the *SEA*. As clarified in *Wheatland Regional Centre*, Amenity bears the evidentiary onus on this aspect of the application.

[103] For ease of reference, clause 6-1(1)(o) is reproduced here:

> *(o) **"supervisory employee"** means an employee whose primary function is to supervise employees and who exercises one or more of the following duties:*
>
> *(i) independently assigning work ot employees and monitoring the quality of work produced by employees;*
> *(ii) assigning hours of work and overtime;*
> *(iii) providing an assessment to be used for work appraisals or merit increases for employees;*
> *(iv) recommending disciplining employees*
>
> *but does not include an employee who:*
>
> *(v) is a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs;*
> *(vi) acts as a supervisor on a temporary basis; or*
> *(vii) is in a prescribed occupation.*

4.2.2 Relevant Legal Principles

[104] The definition of "supervisory employee" found in clause 6-1(1)(o), together with the statutory prohibition on including supervisory employees in the same bargaining unit as employees whom they supervise absent an irrevocable election located in sub-section 6-11(3), are very recent innovations in Saskatchewan. These changes to our labour relations regime first came into force with the proclamation of the *SEA* on April 29, 2014. Prior to that, *The Trade Union Act* was only concerned with whether an employee held a position which was managerial in nature and, for that reason, must be excluded from any proposed bargaining unit.[43]

[105] To date, the Board has considered the effect of clause 6-1(1)(o) in only one case: *Saskatoon Public Library Board v Canadian Union of Public Employees, Local No. 2669 et al.*[44] [*Saskatoon Public Library*]. The issue in that case was narrow, namely can employees that now qualify as "supervisory employees" as defined in the *SEA* be removed from an existing bargaining unit certified under *The Trade Union Act* which included employees whom they supervised. The Board concluded as a matter of statutory interpretation the *SEA* did not permit such applications and, as a result, it lacked jurisdiction to adjudicate them.[45]

[106] In the course of his Decision, Chairperson Love commented upon the interpretation of clause 6-1(1)(o). For present purposes, two (2) principles emerge from his analysis. First, the modern rule of statutory interpretation applies. This rule, most recently restated by the Supreme Court of Canada in *Tran v Canada (Public Safety and Emergency Preparedness)*[46] holds that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament"[47].

[107] As the Board in *Saskatoon Public Library* concluded this approach to statutory interpretation is also consistent with section 10 of *The Interpretation Act, 1995*[48] which states that "[e]very enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects".

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[43] See for example: *Wheatland Regional Centre Inc.*, *supra* n. 6, and *University of Saskatchewan Faculty Association v University of Saskatchewan*, [1995] SLRDB No. 6, LRB File No. 127-94.
[44] *Supra* n. 18.
[45] *Ibid*., at para. 50.
[46] 2017 SCC 50.
[47] *Ibid*., at para. 23 *per* Côté J. for the Court. See further: *Rizzo & Rizzo Shores Ltd. (Re)*, 1998 CanLII 837, [1998] 1 SCR 27, at para. 21, quoting E.A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87.
[48] SS 1995, c I-11.2

[108] Second, the Board made the very important point that section 6-11 does not deprive "supervisory employees" from unionizing. As Chairperson Love stated in *Saskatoon Public Library*[49]:

> *[46] "Supervisory employees", as described in section 6-1(o) are still "employees" under the SEA and are entitled to the benefit of section 6-4. Those employees are not excluded from a bargaining unit, but rather cannot be included within the same bargaining unit with employees whom they supervise. This creates a situation where additional bargaining units may result because of this requirement.*
>
> *[47] The application before this Board suffers from the same confusion which persisted in the Human Services Committee [of the Saskatchewan Legislative Assembly]. Supervisory employees are not, by definition, "excluded" from the bargaining unit. The definition of "employee" in section 6-1(h) continues to include, what are not defined as supervisory employees, within that definition. . .*
>
> *[48] Had the legislature wished to exclude supervisory employees from any bargaining unit they would have, in our opinion, amended section 6-1(h) to include supervisory employees among those persons who are excluded from the definition of "employee". If excluded, those persons would not be employees under the Act and therefore would have not access to the scheme of collective bargaining established under the SEA. The legislature did not do that. Rather, they expressly provided for access to the SEA by supervisory employees and for the continuation of their rights and obligations under any certification in section 6-11(5) for the entering into of an irrevocable election by an employer and an union, and for the establishment of a bargaining unit comprised of supervisory employees in section 6-11(4).*

[109] This holding has implications for the interpretive approach to these particular provisions. Counsel for the Union submits that these provisions should be interpreted as narrowly as possible, in the same way this Board, and others, has interpreted the managerial exclusion. In her Written Submissions, counsel stated that this "Board's longstanding policy in favour of more inclusive bargaining units supports interpreting the supervisory employee language in a restrained (rather than a liberal or large) manner".[50]

[110] It is true that labour relations boards across the country including this Board give managerial exclusions a narrow construction. A recent example may be found in the Canadian Industrial Relations Board's decision in *General Teamsters, Local Union 979 v Garda Security Screening Inc.*[51] [*Garda*]. The Canada Board explained why it interprets the managerial exclusion found in the *Canadian Labour Code* narrowly as follows:

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[49] *Supra* n. 18, at paras. 46-48.
[50] Written Submissions on behalf of the Union, at p. 8, para. 37.
[51] 2017 CIRB 856

> *[44] The Board's analysis for determining whether certain positions perform management functions must be understood in the overall context of labour relations purposes and principles. The statutory exclusion contained in the Code for those performing managerial functions has always been premised on the need to avoid a conflict of interest arising between one's duty to his/her employer and one's loyalty to his/her union. This potential conflict is greater when the authority of the manager extends to having actual authority over the employment conditions of other employees and ultimately, their continued employment. This is the context in which the Board considers whether an employee has the requisite level of decision-making authority to justify an exclusion; it relates to both the employment relationship and its interplay with collective bargaining.*
>
> *[45] The Board has adopted a narrow interpretation of the managerial exclusion in order to give greater effect to the principles of freedom of association and access to collective bargaining, which continue to serve as the foundation to fundamental labour relations rights under the Code. The Board will not want to deny access to collective bargaining to any more employees than is necessary. The Board is further supported in its approach by the recent decision of the Supreme Court of Canada in which it determined that the exclusion of the Royal Canadian Mounted Police members from the collective bargaining regime was unconstitutional.*[52]

[111] Since "supervisory employees", unlike employees in a managerial capacity, are not deprived of protections under the *SEA*, including the right to organize and to seek certification, the Board's interpretive approach to these provisions need not be unduly narrow. This is consistent with this Board's holding in *Saskatoon Public Library*[53] in relation to supervisory employees, generally. While it is true that the purpose underlying subsection 6-11(3) is to avoid conflicts of interest or divided loyalties in the workplace, which is the same as that underlying the managerial exemption, it does not follow that the narrow interpretive approach for determining whether an employee qualifies as a manager should operate when assessing if a disputed employee exercises supervisory functions. The concerns identified in *Garda*[54], for example, do not arise with the same stringency. As a consequence, clause 6-1(1)(o) should be construed in its "grammatical and ordinary sense harmoniously with the scheme of the [*SEA*]", to quote from *Tran*[55].

[112] Admittedly, clause 6-1(1)(o) of the *SEA* is curiously drafted. That said, applying the interpretive principles identified above, it is necessary to begin by considering this provision as a whole. It opens by stating that a "supervisory employee" is one whose *primary* or principal employment function is to supervise other employees, and goes on to identify four (4) "duties" which are functions traditionally performed by supervisors. The *SEA* definition only requires that

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[52] *Ibid.*, at paras. 44-45.
[53] *Supra* n. 18.
[54] *Supra* n. 51.
[55] Supra n. 46.

the employee in question fulfills one (1) of these four (4) duties in order to qualify as a *prima facie* "supervisory employee".

[113] That does not end the matter, however. The provision goes on to exclude three (3) groups of employees. These are employees who but for this statutory exclusion would otherwise qualify as supervisory employees, namely: "a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs"; "a supervisor on a temporary basis", or employees who fall within a prescribed occupation[56]. For present purposes, it is the exclusion found in sub-clause 6-1(1)(o)(v) that is relevant – "a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs" (emphasis added).

[114] How, one may ask, can an employee whose "primary function" it is to supervise employees, at the same time claim those duties are "ancillary to the work he or she performs"? While this inquiry appears illogical on its face, it is the inquiry upon which the *SEA* requires all counsel and this Board to embark?

[115] As is apparent such an inquiry involves two (2) stages. The first stage asks whether the primary function of the employee in question is to supervise fellow employees. Second, if the answer to this question is "yes", then it is necessary to determine whether those supervisory duties performed by a team leader are "ancillary" to "the work he or she performs"? The Board undertakes this inquiry below.

4.2.3 Does the Primary Function of Shift Supervisors at the Canora Tim Hortons Restaurant Qualify as "Supervisory" for Purposes of the SEA?

[116] The first stage of the inquiry asks whether a shift supervisor's primary function qualifies as supervisory. It will be recalled that in order to make this assessment, it is necessary to determine if this primary function involved at least one (1) of the following responsibilities:

> *(i) independently assigning work ot employees and monitoring the quality of work produced by employees;*
>
> *(ii) assigning hours of work and overtime;*
>
> *(iii) providing an assessment to be used for work appraisals or merit increases for employees;*
>
> *(iv) recommending disciplining employees*

[56] See: *The Labour Relations (Supervisory Employees) Regulations*, cS-15.1 Reg 4, s 3.

[117] Counsel for the Union submitted that the Board may obtain helpful guidance from the decision of the Canada Board in *Pelmorex Communications*[57] on how to assess whether an employee qualifies as a supervisory employee. In that case, the Canada Board reviewed its prior case law respecting whether supervisors should be included within the same bargaining unit as their fellow employees. It should be noted that unlike the *SEA*, the *Canada Labour Code* does not statutorily define a supervisory employee, *i.e.* "employees whose duties include the supervision of other employees". Rather, this interpretive task has to be undertaken on a case by case basis.

[118] In *Pelmorex Communications*, the Board took stock of its previous decisions, and at paragraphs 86 - 88 set out the fruits of that review as follows:

> *86 The conclusion to be drawn from the above analysis is that there is no simple method for the determination of appropriate bargaining units and the positions that should be included or excluded. In some cases, supervisors are excluded from the unit of employees under their supervision because of conflicts of interest, while in others they are included. The decision must be based entirely on particular facts of each matter before the Board. Nevertheless, certain facts may lead the Board in one direction or another, depending on circumstances.*
>
> *87. A number of criteria that may influence the Board can be drawn from the above decisions:*
>
> - *The size of the bargaining unit. The viability of a bargaining unit (its chances of survival) increases with its number of employees. The Board is thus more likely to find a separate unit of supervisors appropriate if it includes a large number of supervisors. A unit with 100 employees will have better chances of survival through its numeric strength than a unit with only ten employees.*
>
> - *The number of subordinate employees. A supervisor with many subordinates will be seen more as a real supervisor, while one who supervises few employees will be seen as a team leader and therefore included in the same unit as his/her subordinates.*
>
> - *The type of supervisory functions. A person with supervisory functions that make up most of the core of his/her responsibilities will be seen differently than someone whose supervisory duties towards subordinates are basically limited to their orientation and training, straightforward coordination of their work, or advice, guidance or help. This difference could be defined as staff supervision as opposed to work supervision, or as administrative supervision as opposed to professional or technical supervision.*
>
> - *Decision making authority. The difference between a team leader and a "real" supervisor can be compared to that between a supervisor and a manager. A person who acts as a conduit between his/her subordinate employees and his/her line supervisor, who must work closely with the latter and has little latitude for his own decision on certain situations such as granting leave, approving overtime, evaluating performance independently, authorizing*

[57] *Supra* n. 19.

> *expenditures based on a pre-determined or salary increases within a pre-determined pay scale, etc., can only be considered a team leader.*
>
> - *The nature of the work. A person whose duties partly include the same work as his/her subordinate employees and who works with them in a term is more likely to be seen as a team leader who is doing the work of the bargaining unit within this same unit rather than in a separate unit of supervisors, even if this work accounts for only part of his/her duties.*
>
> *88 It should be noted that none of the above criteria is singly determinative. If, in a given case, the circumstances are such that most of these criteria apply, such that the reasonable finding is that a group of persons is mostly made up of team leaders and not "real" supervisors, the Board is more likely to include them in the all-employee unit with the employees working under their supervision rather than create a separate unit.*

[119] The Board acknowledges that these comments are useful; however, the *SEA* lays down quite specific criteria which must be interpreted and applied to the facts of the particular case before us. These are the considerations then that must guide our assessment.

[120] At the hearing and in its written submissions, Amenity referred to the shift supervisors as the "eyes and ears" of management. This was because the Manager of the Canora Tim Hortons did not work evening shifts or on weekends. As a consequence, management must rely upon reports – either oral or written – from the shift supervisors as to what took place on those particular shifts or when the Manager was not on the premises. However, the fact that shift supervisors serve as conduits of information to management about the restaurant is hardly determinative of their supervisory functions.

[121] Neither, in the Board's view, is the shift supervisor's Role Description, a copy of which was entered into evidence at the hearing. It enumerates various duties and responsibilities given to that position. However, the Board must make its assessment at this stage of the inquiry on the job duties shift supervisors actually perform at the Canora Tim Hortons restaurant. When we review the evidence and measure it against the criteria set out in sub-clauses 6-1(1)(o) (i) – (iv), it is our considered view that none of the primary functions performed by these shift supervisors fall within those sub-clauses. We make this finding for four (4) reasons.

[122] First, the evidence shows that "independently assigning work to employees" and monitoring their work was not a shift supervisor's primary job function. Ms. Parkman testified that occasionally she would ask employees to perform certain duties during a shift; however, in her words this was to ensure all stations were covered and "to keep [staff] members on track". She made such decisions while she was performing many of the same jobs as other staff members,

and recognized that some employees needed to be redirected to ensure the efficient operation of the restaurant.

[123] Second, a shift supervisor, at least at the Canora Tim Hortons restaurant did not independently assign hours of work and overtime. Rather, it was necessary for the shift supervisor to seek authorization from the store manager before she could ask another employee to cover the shift of an employee who called in sick or otherwise failed to appear for work on a particular day. Ms. Parkman testified that management had authorized shift supervisors to require an employee to stay "late" following the completion of a shift, a fact corroborated by Ms. Britton. However, in such circumstances a shift supervisor was only authorized to ask an employee to stay for an extra half-hour or, at most, one (1) hour, in accordance with company policy.

[124] Third, a shift supervisor at the Canora Tim Hortons did not have any formal input into performance reviews of her fellow employees for purposes of work appraisals or merit increases. Ms. Parkman testified that on occasion she offered to the Manager her observations respecting the performance of a particular employee; however, this was done on an *ad hoc* and irregular basis.

[125] It is true that Mr. Tariq testified that Tim Hortons has an established Team Member Performance Evaluation process in place. Indeed, an example of the Team Member Performance Evaluation (Restaurant Front) form was introduced into evidence.[58] He candidly acknowledged, however, that this process had not been implemented at the Canora Tim Hortons restaurant. This was because the restaurant had not yet been operational for one (1) year.

[126] Furthermore, once this form is completed it should provide a manager with a wide-ranging evaluation of a particular employee's performance. Yet, there is no space provided on this form for a shift supervisor to write his or her comments. In the Board's opinion, this underscores the fact that even if manager canvasses the views of a shift supervisor respecting a particular employee, this is an informal process, at best, and is most certainly not a primary function performed by a shift supervisor at the Canora Tim Hortons restaurant.

[127] Fourth, respecting the ability of a shift supervisor to recommend disciplining a particular employee, the evidence is somewhat conflicted. Mr. Tariq testified that Amenity accepted that a shift supervisor was authorized to discipline an employee in serious situations,

[58] Exhibit "E-4.

and could even terminate an employer in extreme circumstances. However, in her testimony, Ms. Parkman said she did not have the ability to do so at the Canora Tim Hortons restaurant. It appears that at this restaurant, employees could go directly to management about concerns respecting the actions of a particular employee, something which Ms. Britton testified she had done, apparently to her detriment.

[128] While the Board accepts that Amenity believed that some shift supervisors had the power to discipline, and even terminate, another employer, the evidence before us demonstrated this did not happen at the Canora Tim Hortons restaurant. Ms. Parkman was unequivocal in her testimony that she was not authorized to discipline or terminate any employee. She acknowledged that on occasion she might speak to her manager about problem employees; however, what was done in relation to those employees was left wholly to the discretion of the manager.

[129] It is apparent that although a shift supervisor at the Canora Tim Hortons restaurant may occasionally carry out some of the duties enumerated in sub-clauses 6-1(1)(o)(i) to (iv), none of them could be described as a primary function of their job. As a consequence, the shift supervisors cannot qualify as "supervisory employees" for purpose of the *SEA*.

[130] While this conclusion disposes of this application, the Board has decided it should briefly embark upon a consideration of the second aspect of the inquiry, namely would shift supervisors fall within the exemption found in sub-clause 6-1(1)(o)(v). We do this for two (2) reasons. First, out of an abundance of caution in case we are wrong on our initial conclusion. Second, as this case represents the first attempt by this Board to flesh out the meaning of clause 6-1(1)(o) of the *SEA*, it is useful for us to do so.

4.2.4. Do Shift Supervisors At the Canora Tim Hortons Restaurant Qualify as Team Leaders "Whose Duties Are Ancillary" To the Work They Perform?

[131] At this point in the analysis, the Board must consider whether an employee who is found to be a "supervisory employee" may yet avoid such a characterization because they serve as a team leader, *i.e.* an employee whose primary duties are "ancillary to the work he or she performs". On the evidence before us, had we determined that the shift supervisors at the Canora Tim Hortons restaurant qualified as "supervisory employees", we would have exempted them from such a characterization because they are team leaders within that workplace.

[132] From the evidence presented to the Board at the hearing, it is apparent to us that the shift supervisors spend the majority of their shift performing what may be described as bargaining unit work, and have little, if any, effective control or authority over their fellow employees. They may more accurately be described as conduits carrying out directions and instructions from management or, in some circumstances, forwarding employees' concerns or complaints to management. In our view, any work which could characterize them as a "supervisory employee" is plainly "ancillary" to the bulk of the duties they perform in any given shift.[59]

[133] Accordingly, the Board concludes that shift supervisors at the Canora Tim Hortons restaurant function as a team leader, and, as a consequence, do not qualify as a "supervisory employee" for purposes of the *SEA*.

ORDERS OF THE BOARD

[134] The Board makes the follow Orders pursuant to sections 6-1(1)(o); 6-9; 6-11; 6-12, and 6-103(2)(c) of the *SEA*:

1. **That** the Union's application for certification designated as LRB File No. 130-17 is granted and the following unit qualifies as an appropriate bargaining unit:

   > *All employees (including shift supervisors) employed by Amenity Health Care LP and/or 7169320 Manitoba Ltd. operating as Tim Hortons in Canora, Saskatchewan, except supervisory employees as defined in clause 6-1(1)(o) of The Saskatchewan Employment Act or those who exercise managerial responsibilities.*

2. **That** the Union's applications for certification designated as LRB File Nos. 128-17, and 129-130 be dismissed.

3. **That** the ballots held in the possession of the Board Registrar pursuant to the Direction for Vote issued on June 30, 2017, in the within proceedings be unsealed and the ballots contained therein tabulated in accordance with *The Saskatchewan Employment (Labour Relations Board) Regulations*.

4. **That** the results of the vote be placed into Form 21, and that form be advanced to a panel of the Board for its review and consideration.

[135] An appropriate Board Order will accompany these Reasons for Decision.

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[59] See especially: *Tim Hortons Store #3950*, *supra* n. 12; *Pelmorex Communications*, *supra* n. 19, at para. 87, and *891110 Ontario Inc. and Seafarers' Entertainment & Allied Trade Union* (2017), 298 CLRBR (2d) 196 (ON LRB)

[136] The Board extends its gratitude to counsel for their excellent written and oral submissions. They were very helpful to us in our deliberations.

[137] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **5th** day of **February, 2018.**

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson