SASKATCHEWAN HEALTH AUTHORITY, Applicant v HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN, Respondent, SEIU-WEST, Respondent, SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Intervenor and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5430, Intervenor

LRB File No. 165-19; May 29, 2020
Vice-Chairperson, Barbara Mysko; Board Members: Gary Mearns and Maurice Werezak

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Application for Determination of Employee – Subclause 6-104(2)(i) of *The Saskatchewan Employment Act* – Position Posted with Union Affiliation to Be Determined – Board Proceeds to Consider Appropriate Placement of Position.

Health Sector Bargaining – *The Health Labour Relations Reorganization (Commissioner) Regulations* – Jim Pattison Children's Hospital – Child Life Therapist – Child Life Department.

Multi-unit Workplace – Health Support Practitioner or Health Services Provider – Criteria for Placement of Position – One-on-One Assessment of Patients – *Sunrise Health Region* not Applicable – Five Factors for Assessing Placement in Bargaining Unit – Placement in HSAS.

REASONS FOR DECISION

Introduction:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application for an Order determining whether the position of Child Life Therapist, located within the Jim Pattison Children's Hospital ["JPCH"] in Saskatoon, Saskatchewan ["CLT"]

is in-scope of the Health Sciences Association of Saskatchewan ["HSAS"]. The Saskatchewan Health Authority ["SHA"] is the Applicant. The Application was filed on July 12, 2019. The Respondent, SEIU-West alleges that the CLT is not properly placed within the scope of HSAS but instead should be placed in SEIU-West's bargaining unit. For the following reasons, the Board has determined that the CLT should be placed within the scope of the HSAS bargaining unit.

[2] This Application came before the Board as an application for Determination of Employee pursuant to sub-clause 6-104(2)(i) of *The Saskatchewan Employment Act* ["SEA"]. There was no dispute about whether the CLT is an employee as defined by the Act. Nor was there evidence that the CLT should be excluded from the definition of an employee, having managerial responsibilities or confidential duties. The only issue was whether the CLT is within the scope of the HSAS bargaining unit or the SEIU-West bargaining unit.

[3] Subsection 112(3) of the Act allows the Board to amend any defect in any proceedings, and all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings. Pursuant to section 6-110, the Board may determine a dispute on consent. The CLT position was posted by consent with union affiliation to be determined. The Board is satisfied that all parties were aware of the question raised with the Board and that the Board heard full argument on the central, and narrow, issue before it, being whether the CLT is within the scope of HSAS or SEIU-West. The Board will therefore proceed to determine the appropriate placement of the CLT pursuant to section 6-110, and will give leave to the parties to apply for an amendment of the relevant certification order(s), if necessary.

[4] This matter was heard on February 19, 20, and 21, 2020. Prior to the hearing of this matter, the Board considered a written application for intervention, brought on behalf of SGEU and CUPE, Local 5430. On February 6, 2020, the Board issued an order pursuant to section 6-103 of the Act granting those applicants standing as a Direct Interest Intervenor and an Exceptional Intervenor, respectively, "to provide evidence and argument, including the ability to call its own witnesses and cross-examine the witnesses of other parties, but not so as to duplicate the evidence submitted by other parties". These Intervenors and their counsel attended and participated in the hearing, and will be referred to as SGEU and CUPE throughout these Reasons.

[5] The Board is indebted to the parties for their exceptionally helpful submissions, all of which have been reviewed in the course of the Board's deliberations. The Board is especially grateful for the manner in which all counsel skillfully and vigorously advocated on behalf of their clients in

a civil, respectful and courteous manner during this hearing. The Board has reviewed all of the evidence in these proceedings, even if not referred to in these Reasons.

[6] By way of summary, the Board will rely on the following acronyms throughout these Reasons:

- CLW – Child Life Worker
- CLS – Child Life Specialist
- CLT – Child Life Therapist
- CCLS – Certified Child Life Therapist
- ACLP – Association of Child Life Professionals
- CLC – Child Life Council
- JJE – Joint Job Evaluation
- JJEMC – Joint Job Evaluation Management Committee
- RUH – Royal University Hospital (Saskatoon)
- RGH – Regina General Hospital (Regina)
- SAHO – Saskatchewan Association of Health Organizations
- HSAS, SHA, SEIU-West, SGEU, CUPE – Parties

Background:

[7] To understand the background to this case, it is necessary to review the history of the reorganization of health sector labour relations in the 1990s. In July 1996, the Government of Saskatchewan, through the enactment of *The Health Labour Relations Reorganization Act* ["HLRR Act"], established a commission to examine the organization of labour relations between health sector employers and employees in Saskatchewan ["Dorsey Commission"]. The HLRR Act gave power to the commissioner to make regulations reorganizing labour relations between health sector employers and employees and resolving issues arising from that reorganization, to be approved by the Lieutenant Governor in Council.[1] For that purpose, the commissioner was empowered make regulations defining appropriate units for the purposes of Part II of the Act and establishing the composition of those appropriate units.

[8] In conducting the examination, the commissioner was to consider four specific factors set out at subsection 5(6) of the HLRR Act. On January 15, 1997, the Dorsey Commission issued its recommendations via the Dorsey Report. *The Health Labour Relations Reorganization*

[1] See, section 5 of *The Health Labour Relations Reorganization Act*.

(Commissioner) Regulations ["HLRRC Regulations"] came into force thereafter. The HLRRC Regulations set out three types of bargaining units in the health sector: those representing nurses, those representing health support practitioners, and those representing health support providers.

[9] The definitions of health services provider and health support practitioner are set out in the HLRRC Regulations:

> *(g) "health services provider" means an employee of a health sector employer, but does not include a health support practitioner, a nurse, a chiropodist, a chiropractor, a dentist, a duly qualified medical practitioner or an optometrist;*
>
> *(h) "health support practitioner" means an employee of a health sector employer who:*
>
> *(i) is functioning in one of the occupations listed in Table C; or*
>
> *(ii) is in a position that requires, as a minimum, registration pursuant to an Act giving the exclusive right to use a title or description of an occupation listed in Table C;*
>
> *but does not include a student of one of the occupations listed in Table C, or an intern or an assistant to an employee described in subclause (i) or (ii);*

[10] Table C of the HLRRC Regulations lists specific classifications.

[11] On July 22, 1997, the Board granted an order certifying HSAS as the representative for health support practitioners employed by certain district health boards and certain health sector employers[2]; that order was amended by joint application on September 10, 1999[3] and on August 8, 2000[4], maintaining HSAS' certification as the representative of health support practitioners, as defined in the HLRRC Regulations. The most recent amendment, dated January 30, 2013, departed from those previous orders, by adding the Midwife classification to the bargaining unit. Midwives are not included in Table C.[5]

[12] SEIU-West is the certified bargaining agent for a group of health services providers in Saskatoon pursuant to the certification order in LRB File No 204-02. That order defines health services provider as follows:

> *d) "health services provider" means an employee, but does not include a health support practitioner or a nurse, as both terms are defined in s.2(h), (i), (j) and (k) of The Health Labour Relations Reorganization (Commissioner) Regulations, a chiropodist, a chiropractor, a dentist, a duly qualified medical practitioner or an optometrist, or those management classifications excluded by Memorandum of Agreement between the parties or as directed by an Order of the Board.*

[2] LRB File No. 114-97.
[3] LRB File Nos. 084-98 and 108-98.
[4] LRB File No. 212-20.
[5] LRB File No. 027-11.

[13] The HLRR Act was repealed by Chapter S-15.1 of the *Statutes of Saskatchewan, 2013*, effective April 29, 2014. The time limited statutory freezes imposed by that Act have expired. However, the Regulations were not repealed but are continued under the SEA. Section 6-127 of the SEA, which applies to the HLRR Act, includes the following relevant subsections:

> *(3) Every order, declaration, approval and decision of the board made pursuant to the former Acts continues in force as if made by the board pursuant to this Part and may be enforced and otherwise dealt with as if made pursuant to this Part.*
> *…*
>
> *(6) All agreements, instruments and other documents that were filed with the board or the minister pursuant to the former Acts are deemed to have been filed pursuant to this Part and may be dealt with pursuant to this Part as if filed pursuant to this Part.*

[14] Subsection 2-8(8) of *The Legislation Act* states,

> *(8) A statutory instrument enacted pursuant to a former enactment remains in force and is deemed to have been enacted pursuant to the new enactment insofar as it is authorized by and not inconsistent with the new enactment.*

[15] "Statutory instrument" is defined as follows:

> ***1-2** In this Act:*
> *…*
>
> *"statutory instrument" means a regulation, order, rule, rule of court, form, tariff of costs or fees, proclamation, letter patent, bylaw or resolution enacted in the execution of a power conferred by or pursuant to the authority of an Act, but does not include:*
>
> *(a) an order of a court made in the course of an action; or*
>
> *(b) an order made by a public officer or administrative tribunal in a*
>
> *dispute between two or more persons. (« texte d'application »)*

[16] The certification orders made pursuant to the HLRR Act continue in force as if made by the Board pursuant to Part VI of the SEA. Furthermore, the HLRRC Regulations continue to have the force of law.

[17] None of the parties in this matter suggested that the HLRRC Regulations strip the Board of its authority to determine into which bargaining unit the CLT falls. However, sections 4 and 5 of the HLRRC Regulations prescribe the appropriate unit for bargaining collectively between health sector employers and health support practitioners, and the appropriate units for bargaining collectively between health sector employers and health services providers, respectively. The

definition of health support practitioners in the HLRRC Regulations consists of a list of occupations (Table C) and consists of those positions that require, as a minimum, registration pursuant to an Act giving the exclusive right to use a title or description of an occupation that is on that list (Table C).

[18] By contrast, according to the definition of health services provider in the HLRRC Regulations, health services providers are all employees of a health sector employer but those listed. Therefore, health services provider units, pursuant to the HLRRC Regulations, are wall-to-wall units subject to listed exclusions from those units.

[19] The HLRRC Regulations also provide:

> ***14****(1) In this section, "affiliate" means an affiliate within the meaning of The Health Districts Act.*
>
> *(2) Subject to subsection (3), the board shall issue any orders amending or varying the relevant appropriate units that it considers necessary if:*
>
> *(a) health districts amalgamate;*
>
> *(b) services are transferred between district health boards;*
>
> *(c) new health districts are created;*
>
> *(d) the boundaries of health districts are amended;*
>
> *(e) employees of an affiliate not represented by a trade union choose to be represented by a trade union; or*
>
> *(f) there are any unanticipated circumstances, including any applications before the board which were adjourned pursuant to section 9 of the Act and were not resolved by these regulations.*
>
> *(3) The orders of the board issued pursuant to subsection (2) must be consistent with these regulations.*
>
> *(4) The board shall decide all questions concerning who is an employee that are not resolved by a health sector employer and a trade union that represents health sector employees.*
>
> *(5) The board shall decide all questions pursuant to clause 5(l) of The Trade Union Act.*

[20] According to section 14 of the HLRRC Regulations, the Board shall issue any orders amending or varying the relevant appropriate units that it considers necessary if there are any unanticipated circumstances. The orders of the Board issued pursuant to this requirement must be consistent with the HLRRC Regulations. While the Board continues to have the power,

pursuant to section 6-11 of the SEA to determine if a unit of employees is appropriate for collective bargaining, this power is constrained by the HLRRC Regulations.

[21] The parties in this matter quoted and relied on the Dorsey Report extensively. Mr. Dorsey provided a prescient warning to litigants in the prologue of his report:

> *This publication is not designed to interpret the legislation. It is not intended to be used in court. Please use the original legislation whenever you wish to interpret or apply the law.*

[22] Around the time of the Dorsey Commission, there was also a need to streamline the approximately 1700 positions comprising the bargaining units belonging to SEIU-West, SGEU, and CUPE ["provider unions"]. In the late 1990s, a steering committee was developed for this purpose and approximately 300 positions were created and then rolled out on October 3, 2003. Pursuant to a Memorandum of Agreement, dated October 3, 2003, the provider unions negotiated a Joint Job Evaluation Maintenance Committee ["JJEMC"] with SAHO for the purpose of creating common job descriptions for the bargaining units represented by those unions. The JJEMC would also be responsible for creating the jobs that fell within those units and for evaluating, or maintaining those jobs on an ongoing basis. The JJEMC remains in operation to the present date. HSAS is not involved in this process.

[23] In 2019, the SHA opened the first and only dedicated children's hospital in the province - JPCH. JPCH has a Child Life Department with a multi-disciplinary team including two CLTs and a number of HSAS employees.

[24] There is a position entitled Child Life Specialist ["CLS"], of which there is one working in the Province, at the Regina General Hospital ["RGH"]. This CLS is represented by CUPE. Currently, SEIU-West does not represent any CLSs, but it does represent Child Care Workers and Child Life Workers ["CLWs"]. All of these positions belong to the Child Life field.

[25] In May 2019, the SHA notified HSAS that it had created the CLT and proposed to include this position in the HSAS bargaining unit. Due to the objections to including the CLT in the HSAS bargaining unit, the position was posted (and filled) with union affiliation to be determined.

Argument on Behalf of the Parties:

Saskatchewan Health Authority ["SHA"]:

[26] The SHA says that the CLT should be placed within the HSAS bargaining unit. It disagrees with what it characterizes as the argument of SEIU-West, SGEU, and CUPE ["provider unions"], that the CLT is properly placed within SEIU-West because that is where the CLS is placed. It says that, because it was not a new position, there was no consideration of whether the CLS properly belonged within HSAS. To the extent that the CLS has been performing direct patient care and assessments, it has been performing HSAS work.

[27] The CLT will work within the multi-disciplinary team on the Child Life Department, and will provide oversight of provider union positions, including of the CLS and the CLW. The core duty is to develop and implement programming and assess and provide direct patient care in preparing children and families for diagnostic and treatment procedures. This accords with the Dorsey criteria for a health support practitioner. The SHA requires that all CLTs obtain the CCLS designation through the ACLP within one year of starting employment with the SHA. Job postings across Canada require this credential for Child Life workers (generally). In stark contrast with HSAS, the provider unions have few positions that require a degree. The provider unions are standing in the way of the SHA implementing a best patient care model and uniform practice standards. The CCLS credential cannot be included in a provider union job position as it is not a mandatory certification within Saskatchewan.

[28] Community of interest militates in favour of the HSAS bargaining unit, and there is a potential for conflict if the CLT and the CLWs co-exist within the same bargaining unit.

HSAS:

[29] The CLT is properly placed in the HSAS bargaining unit. The Board has the power to amend the HSAS certification order to include new positions. There is no longer any freeze on any revisions to orders made by the Board pursuant to the HLRRC Regulations. Nor are the Dorsey recommendations cast in stone. The Board has made consequential amendments to the certification order on three separate occasions.

[30] HSAS says that the CLT shares a community of interest with its bargaining unit. In this respect the Board should focus on duties rather than titles (which are liable to misuse and abuse). In assessing community of interest, the Board is guided by factors that include educational

qualifications, the general nature of duties performed, lateral mobility, and the similarity of the position to those in the competing bargaining units.

[31] HSAS describes the composition of its bargaining unit. There are a number of therapist occupational classifications within the HSAS bargaining unit. Each of these positions provide direct patient care and follow particular modes of therapy. Like these positions, the CLT is a practitioner rather than a provider. A CLT performs assessments, as contemplated by the Dorsey Commission's vision of health support practitioners. The CLS does not perform assessments, and if it does, then it is in the wrong bargaining unit. The CLT requires a Bachelor's Degree and certification as a CCLS. This is in alignment with the HSAS collective agreement, which is an education-based collective agreement. The issue is not the extent of training but whether the CLT is a practitioner providing direct patient care and performing assessments.

[32] The following factors militate in favour of a community of interest – the general nature of the duties performed; the educational qualifications; therapeutic duties performed pursuant to a set of provincial or national clinical practice standards; and options for mobility within the bargaining unit. The CLT will be working in a multi-disciplinary team of practitioners. Lastly, the CLT plays a role in assigning work and supervising staff, and placing it in a different bargaining unit may alleviate associated concerns.

SEIU-West:

[33] According to SEIU-West, the CLT belongs in the provider unions' bargaining units. SEIU-West relies for this argument on the five factors identified in *Saskatchewan Polytechnic v Saskatchewan Institute of Applied Science and Technology Faculty Association and Saskatchewan Government and General Employees' Union*, 2015 CanLII 43770 ["*Sask Polytechnic 2015*"].

[34] The first factor is the similarity of the positions in the competing bargaining units. SEIU-West says that there is a similarity between the CLT and other positions in the SEIU-West bargaining unit. Furthermore, HSAS and the SHA's reliance on "assessments" as determinative of similarity is misguided for the following reasons.

[35] First, the ability to perform assessments is found in positions in all health sector bargaining units (for example, Registered Nurses, Licensed Practice Nurses). This characteristic does not assist the Board in determining which bargaining unit is most similar in terms of duties and responsibilities of positions. Second, HSAS and the SHA mistakenly rely on the holding in *Health*

Sciences Association of Saskatchewan v Sunrise Health Region, 2008 CanLII 87263 ["*Sunrise Health Region*"], which does not have the broad application suggested by HSAS and the SHA.

[36] Second, in *Sunrise Health Region*, the parties had entered into a memorandum of agreement ["MOA"] with criteria for determining whether a position was a Recreational Therapist, and this mutually accepted criteria included the primary function to "work on a one-on-one basis with clients doing individual assessments to determine client needs and outcome objectives for each client".[6] It was "incumbent on the Board to determine, based on the criteria identified by the parties in their MOA where the two disputed positions should be placed".[7]

[37] Moving to the second factor, there is a community of interest with the SEIU-West bargaining unit. The provider union bargaining units contain numerous classifications with high educational requirements, registration requirements, and professional membership requirements. The JJE process allows for the creation of new classifications with professional distinctions and education accomplishments. Finally, the CLT, if placed in the SEIU-West bargaining unit, benefits from lateral mobility with the large number of classifications in the SEIU-West unit and a clear path for career progression. When an individual moves from a provider union bargaining unit to the HSAS bargaining unit, seniority is lost.

[38] Third, the history and origins of the CLT strongly support inclusion in the SEIU-West bargaining unit. Evidence that the work was carved out of a particular bargaining unit supports a rebuttable presumption that the position ought to be assigned to that bargaining unit. The CLT is historically intertwined with the other Child Life classifications, thereby creating said rebuttable presumption. HSAS and the SHA have not rebutted the presumption.

[39] The CLS was in existence in the 1980s and 1990s, prior to the work of the Dorsey Commission. If it was the type of position meant to be included in the HSAS unit, it would have been included in Schedule C of the HLRRC Regulations at that time. The Employer unilaterally created the CLT three years after it was determined, by agreement with the Employer, that the newly created CLS would not require certain qualifications that had been requested. Those same qualifications are now required of the CLT.

[40] Fourth, inclusion in the SEIU-West bargaining unit promotes industrial stability and viability of the bargaining relationship. According to the Dorsey Report, the provider union bargaining units

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[6] At para 9.
[7] At para 42.

are all-employee units, which means that they are default units, in relation to which only well-defined exceptions are excluded. The SEIU-West certification order, applicable to what was then the Saskatoon Regional Health Authority, is an all-employee unit.

[41] Fifth, the Board's preference for broader, more inclusive bargaining units supports including the CLT in the SEIU-West bargaining unit. In multi-bargaining unit settings, applicants who propose small craft or occupational units must rebut this presumption by establishing that members to be placed in those units would be in a labour relations conflict with members of the larger bargaining unit. The necessary conflict has not been established.

SGEU:

[42] While SGEU takes no issue with the SHA striving for excellence in health care, these goals do not decide the issue. There may have been a bright line between the bargaining units immediately after the HLRRC Regulations came into force, but that is no longer the case. That line has faded. The classifications, not the educational requirements, should be used as the dividing line. The Board should rely on the five factors outlined in *Sask Polytechnic 2015*. As per *Sask Polytechnic 2017*, the additional factors of safety and "economy and efficiency" are not in play, and there is no relevant evidence anyway.

[43] Ms. Breit's role and responsibilities as a CLS are either very close to or exactly the same as those of the newly created CLT position. The only difference is the requirement of a CCLS. There is a clear path for promotion within the Child Life roles. If a CLW wishes to achieve a degree and become a CLT, then he or she may do so. There is no clear path of promotion in the HSAS bargaining unit. There was no evidence about how the skills of a CCLS working as a CLT are transferable to any other member of the HSAS bargaining unit, other than as a supervisor or in another CLT role. The only commonalities between the CLT and the other positions of HSAS are that the CLT performs assessments, requires a Bachelor's degree, and is regulated as a profession.

[44] The provider units also have positions that require university degrees and professional regulatory registration and are equally able to anticipate associated collective bargaining needs; they also represent other positions that do Child Life work. At the present time, the provider unions are able to advance the needs of the whole group as this field continues to quickly evolve. At the time of the Dorsey Report, the CLS position existed. It was after this that the position was

removed. There was no evidence that the position was missed by the Dorsey Commission, and it would undermine the report by assuming the CLS flew under the Commission's radar.

[45] With the exception of the CCLS requirement, the CLT is essentially an evolution or replacement of the CLS. The SHA and HSAS have not overcome the rebuttable presumption that arises from carving the CLT out of another bargaining unit. The Employer should not be permitted to create new jobs for the purpose of moving a position between units and letting the older positions die out. Since the release of the Dorsey Report, the parties have twice come to the Board for a determination on scope. Before 2021, there will have been two scope hearings. If the Board permits the SHA to replace the CLS position with another position simply by changing the name and certification requirements in an industry where evolution is constant, the Board is opening the provider unions up to a raid. For this reason, the Board should disregard the employer's preference for a particular unit.

[46] The provider units are wall-to-wall units and this is where the CLT belongs. This case is different from *Health Sciences Association of Saskatchewan v Saskatchewan Association of Health Organizations*, 2011 CanLII 64023 (SK LRB) ["Midwives case"]. Unlike the Midwives case, the current case is not about creating a new community of interest; it is about disrupting a pre-existing community of interest.

CUPE:

[47] CUPE adopts the positions of SEIU-West and SGEU, subject to the following comments. The Midwives case is distinguishable for four main reasons. First, the Midwife was a new position that did not exist at the time of the Dorsey Commission. Second, the existence of *The Midwifery Act* means that Midwives are treated differently than Child Life workers. Third, the unions agreed that the Midwife should be included in the HSAS bargaining unit. Fourth, there is no analysis of the factors from *Sask Polytechnic 2015* in the Midwives case. The Board must adopt a cautious approach in applying the additional factors from *Sask Polytechnic 2017* outside of a construction setting.

[48] Only the SHA uses the term "therapist" for this position. Just because the SHA decided to use the term "therapist" does not make the CLT analogous to Occupational Therapists and other therapy positions. If understood as a CCLS, the connection to the existing CLS (the Child Life Specialist) is even clearer.

[49] CUPE is concerned that if this Employer is able to designate a position as being within the HSAS, the parties will revert to a pre-Dorsey environment in which many other positions could be moved. This could occur without any legislation or protected designation; it could occur with a position that is substantially similar to one that has existed for decades.

[50] The Dorsey Report states that "acceptance that employee choice is a determinate could encourage unit [hopping] and perpetuate trade union rivalry and representation disputes".[8] Further, the five factors do not contemplate employee choice. Granted, employees have a constitutional right to a union of their own choosing. That right is limited through the legislation. Limiting choice at this stage does not mean that employee preference is being disregarded in the system overall. The Employer has no right to a guarantee that the CCLS be a mandatory requirement of the CLT position. By agreeing to JJE process, the Employer has given up some of its management control.

[51] Finally, there is no evidence of potential bargaining unit conflict, especially not insoluble conflict.

Evidence:

[52] The following witnesses were called to testify on behalf of the parties. Maryanne Didowycz and Carrie Dornstauder testified for the SHA; Kevin Glass testified for HSAS; Russell Doell testified for SEIU-West; and Wendy Breit testified for CUPE. SGEU called no witnesses. None of the parties called a current CLT to testify.

[53] The Board will now proceed to summarize the evidence.

Maryanne Didowycz

[54] Ms. Didowycz was a very detailed and careful witness. Ms. Didowycz is employed by SAHO as the consultant for job classification and job evaluation. SAHO works in conjunction with all health employers and unions to ensure consistent implementation of job classifications and evaluations and to maintain the integrity of related programs.

[55] According to Ms. Didowycz, the relationship between the Recreation Coordinator and Recreation Therapist are analogous to the relationship between the CLS and CLT. The Recreation Coordinator coordinates the program and performs hands-on duties, whereas the

[8] At 70.

Recreation Therapist performs hands-on patient care, assessments and care plans for the patient. The therapist positions within HSAS are registered (but not certified) with a provincial and national body.

[56] Ms. Didowycz described the Joint Job Evaluation ["JJE"] process, which is operated through the Joint Job Evaluation Management Committee ["JJEMC"]. The parties to the JJEMC are CUPE, SGEU, SEIU-West, and SAHO. HSAS is not involved. Ms. Didowycz is jointly selected by the union and employer groups.

[57] The JJE Manual describes the purpose of job evaluation, at page 1:

> *…to establish the relative ranking of jobs for pay and pay equity purposes within an organizational group by means of a systematic and detailed analysis and valuing of the job content. Job evaluation does not measure nor reflect the performance, gender, or qualifications of the individual in the job.*

[58] The JJEMC finalizes provincial job descriptions for the provider group and makes reclassification decisions on "maintenance" files. If there is consensus at the initial tripartite level, then the decision is implemented and sent to the JJEMC. If there is no agreement at that level, the JJEMC makes a decision. If there is no consensus at the JJEMC, then the dispute is forwarded to the Committee of Parties ["COPS"]. COPS forms a subcommittee and reviews the dispute for decision, or forwards to a third party for review and decision. The JJE process is not set up to resolve issues of scope.

[59] In 2010, a maintenance file came forward for a new job at Royal University Hospital ["RUH"], a Certified CLS. A three-party meeting was convened. There were concerns raised about whether the key work activities justified the level of education required, including whether it was appropriate as a provider job. Ms. Didowycz was concerned that the new job did not fit into the provider union scope. Greater clarification was needed with respect to the nature of the assessments the position would be conducting. In the end, the employer withdrew the file in 2011 due to a lack of knowledge about what would be needed once the JPCH was operating. The position was not created.

[60] The CLS position was created in 2000 in the original job evaluation process. It was later reviewed through the provincial review process. There is one CLS working in the province, in Regina. The job description is provincial, and so CLSs may be hired at JPCH. The same is true of the CLW position.

[61] The JJEMC determines the minimum qualifications to do the job. The provider plan will apply licenses and certifications only if they are mandatory in that profession. In Saskatchewan, a CLS is not a protected title. Therefore, the JJEMC did not apply the CCLS to the provincial job description, and the applicants for the position are not required to have that credential. Nor is the CLT a protected title.

[62] Late 2015, a maintenance request was submitted in relation to a CLW, requesting a reclassification to a CLS. The request went to the JJEMC, which reviewed the information and agreed that it was a new provider job, despite Ms. Didowycz' initial reservations. The employee, Tegan Webber, had additional knowledge through a specific degree and was able to provide a higher level of care to the patients. There was additional program coordination involved. The acuity level of the patients had increased over the years, and the degree was more appropriate for caring for the patients.

[63] Ms. Didowycz determined that Ms. Webber was providing some day to day functional guidance to the volunteers and the CLW, but not full supervision. Ms. Webber was working with Social Workers and Psychologists, who belong in the HSAS bargaining unit. There was a question around the extent to which Ms. Webber worked with vendors, suppliers, and contractors, but Ms. Didowicz was not involved in questions about budgetary decisions impacting labour relations, nor does the JJEMC discuss labour relations issues. It is not usual to have a provider job description with budget responsibilities, but individuals in these job descriptions may work within a budget, and make decisions within an allocated budget for a program area.

[64] By March 2016, the JJEMC agreed to create a new position if it was deemed a provider group job. Despite her initial concerns, Ms. Didowicz observed that the finalized provincial job description did not reflect the duties of assessment, implementation and evaluation duties, as referenced in LRB File No. 036-08. Ultimately the CLW position was reclassified as a CLS and a new job description was developed.

[65] Ms. Didowycz described the rating process for positions within the provider group. Education is only one factor in the assessment of a potential pay rate. While the majority of HSAS positions require a degree, only a small proportion of the SEIU-West positions do.

Carrie Dornstauder

[66] Ms. Dornstauder is employed with the SHA as the Executive Director of Maternal and Children's Provincial Programs. Through her evidence, Ms. Dornstauder demonstrated a strong

interest in maintaining a high level of care at the JCHP. At times Ms. Dornstauder spoke to matters about which she did not have first-hand information, which raised issues with the reliability of some of her evidence.

[67] Ms. Dornstauder provided the background for the development of Saskatchewan's first and only designated children's hospital. She explained that the health outcomes for children in Saskatchewan, including the maternal mortality rate, are some of the worst in Canada. Children are not little adults; they have unique needs. The JPCH was developed to focus on those needs, to care for the sickest children in the province, expand research in associated areas, and operate as a "hub and spoke" to develop expertise throughout the province and increase capacity for higher acuity cases at JCPH. Through the JPCH, the hope is that children will return to the province for their care.

[68] JPCH is home to the "Zone". The Zone is a therapeutic environment operating within the hospital and housing the Child Life specialty programs. The Zone is a part of Teammates for Kids, an organization that supports only CCLSs. Through the Zone, children learn how to master their health experiences, including by preventing and managing trauma. It is a place for parents and siblings to talk about their feelings, prepare for the transition to home, or be a part of the care plan.

[69] Ms. Dornstauder described the Child Life team. It is small, consisting of only two CLTs and one manager, and it works within the Zone. There are also some Recreation and Music Therapists that belong to the HSAS bargaining unit. The Zone provides services to nurses, specialists and sub-specialists, teachers and educators working on the in-patient unit. The team develops programs and is currently focused on the pediatric hemotology and oncology programs, which serve higher risk populations. A national environmental scan revealed that it was the norm for a CCLS to work with this patient population. The scan was not entered into evidence.

[70] A five-year progression plan takes the CLT into almost every aspect of the JCHP. The longer term goal is to develop a team under the CLTs that would carry out an active plan for children. Currently, the CLTs' work is collaborative. CLTs work in a manner that is continuous and supportive. CLTs are involved almost exclusively in direct patient care.

[71] Ms. Dornstauder described an MRI program developed by a CLT(s). Most MRIs with children require sedation, which has resulted in significant wait lists due to a shortage of anesthetists. A team led by the CLT has come up with an algorithm to determine what tests can

be run through MRI without sedation. The team helps to prepare children for an MRI on a sample MRI table in advance of the test, to ensure that the children can remain still.

[72] HSAS and SEIU-West reviewed the posting in advance, and were on board with the process of hiring prior to the determination of scope. The candidates were advised that scope was under review. Successful applicants were required to successfully obtain the CCLS within one year of being hired. Two people were hired into the role. Both workers currently possess the CCLS. Neither were from Saskatchewan. According to Ms. Dornstauder, the only potential Saskatchewan candidate, currently working as a Recreation Therapist, was not willing to take the risk, due to uncertainty and a wage cut.

[73] Recruitment for an earlier position under the provider union became a major problem and delayed programming considerably. After posting the position, the Employer received feedback from Saskatchewan-trained staff indicating a preference for the HSAS unit. A position was offered to Jill Woods, who provided a letter indicating that the "Child Life profession is better suited" to HSAS. She also noted that the cost of living is substantially higher in Saskatchewan compared to Winnipeg. This was not Ms. Dornstauder's first conversation with the same messaging about the professionalism of the position. Ms. Woods did not testify at the hearing.

[74] Wages were an issue in the earlier recruitment process; they were not an issue in the recent recruitment process.

[75] To achieve the CCLS, a candidate must complete a specialized degree, including ten specific credit units. The ACLP decides whether the degree meets the requirements for a practicum. That practicum now consists of 600 unpaid hours under the supervision of another CCLS. The JCHP would like to be able to provide this training program on site, and allow the CLT to supervise the practicum students.

[76] There are no CLWs remaining in Saskatchewan. There are no CLSs working in JCPH; so far, there are only CLTs.

[77] Ms. Dornstauder explained that the "Association of Child Life Specialists" (which the Board takes to mean the ACLP), "would say [the CCLS] is protected", and that it sets out professional standards of practice. The Board notes that the standards of practice as set out by the ACLP apply to all "Child Life professionals", not to a specific position referred to as a CLT and the materials filed by the SHA suggest that it is the position of the Child Life Council ["CLC"] that Child Life "services" should be provided by CCLSs. It is likely that a representative of ACLP or CLC

could have provided more precise testimony around title protection and standards of practice. In fairness to Ms. Dornstauder, she did not claim to testify on the ACLP's behalf.

[78] Many children at JPCH have had experiences with a CCLS outside of the province and would expect the same level of care inside the province. The required CCLS also allows for a set of principles that can be clearly articulated so that expectations are clear when referrals are made; it provides the reassurance of a standard of practice. There is an expectation that similar programs are operating similarly, and the CCLS provides that consistency. CCLSs advocate for children. The Code of Ethics allows them to articulate their advocacy role; the relatively recent shift toward a child oriented culture is simplified and facilitated by the Code of Ethics.

[79] It is necessary that the CLT working at JPCH have the CCLS designation. The CLT job description provides other key requirements for assessment, building of programming, interpersonal relationships, trauma informed care, and research - components that are missing from the CLS job description. The qualifications were developed through a national scan. The CLT job description responds to the complex needs of the children who come to JPCH, and is intended to better support the family system. If there was a CLS at JCHP, then that position would take direction from the CLT. With the CLS, there is no guiding framework, no comparison documentation, no measure of competency, and no supervision by a clinical specialty.

[80] In 2018, amidst her recruitment difficulties, Ms. Dornstauder had a chance encounter with Ms. Wolgemuth, President of the Canadian Child Life Association (CACLL) and a Board Director of the ACLP, at a conference. Apparently, Ms. Wolgemuth voiced some concerns about Saskatchewan's approach to the Child Life role. Ms. Wolgemuth authored a letter, dated January 30, 2019, which was entered into evidence. In the letter, Ms. Wolgemuth wrote,

> *….In order for the Jim Pattison Children's Hospital to have representation in the CACLL, the Child Life member must hold the CCLS credential and be a member of the ACLP. The program at the hospital could also attract students and provide Child Life internships if CCLSs were employed. Providing opportunities for children, youth and families to learn, grow and flourish when faced with hospitalization is what CCLSs, through the lens of child development and play theory provide.*

[81] Ms. Wolgemuth did not testify. It is clear that Ms. Dornstauder received the letter and reviewed its contents. Testimony from Ms. Wolgemuth would have provided greater clarity around the foundation for and significance of the contents of the letter, including the meaning of the phrase "the Child Life member".

[82] According to Ms. Dornstauder, the stability of the Child Life program is dependent on the outcome of this hearing. The key is the CCLS. Her understanding is that in most jurisdictions the CCLS is required for the use of the CLS title, and that a protected title is under development. Ms. Dornstauder also spoke to postings from other jurisdictions in which CLSs were required to have or obtain the CCLS.

Kevin Glass

[83] Mr. Glass works as a Labour Relations Officer with HSAS. HSAS has about 50 classifications. Most of HSAS' members are required to maintain standards of practice. The minority of positions have statutory title protection or governing legislation. Where certification is required of a profession, a higher wage rate is assigned. There is no professional legislation or formal licensing process for Recreation Therapists in Saskatchewan. They are encouraged to be certified by a national organization.

[84] Since 1998, the HSAS CBA has consisted of an education-based compensation scheme. The majority of HSAS classifications are degree based. Market adjustments (MA) are negotiated at the provincial table based on a comparison of wages across the Western provinces. Market supplements (MS) are provided in cases where there are relevant vacancy and recruitment issues. New employees within HSAS obtain either the MA or the MS rate, whichever is higher. Opportunities for advancement include senior designated positions and supervisors. There are some similar classifications that allow for lateral movement such as Addictions Counsellors and Social Workers. HSAS classifications commonly work as interdisciplinary teams. The CBA includes provisions related to professional regulation.

[85] A member who possesses the CCLS would be in line for a salary increase. If a CLS in a provider unit wants to become a CLT in HSAS, that individual would lose acquired seniority and would be applying for the position without bargaining unit preference.

[86] Mr. Glass believes that the CLT is an HSAS position. Therapists are typical of HSAS positions such as the Mental Health Therapist, Occupational Therapist, Social Worker, Psychologist, Recreation Therapist, and Genetics Counsellor. The CLT-CLS relationship is comparable to the relationship between the Genetics Counsellor and the Clinical Genetics Technologist. The Genetics Counsellor, an HSAS position, is involved in direct patient care and assessments, and is required to have a Masters of Arts or Science from an accredited program and be eligible for board certification. The Clinical Genetics Technologist is a provider group

position. HSAS therapists tend to create the plan; whereas provider group positions tend to implement the plan.

[87] There are no provincial job descriptions in HSAS. The Employer notifies HSAS of new job descriptions or of requests for amendments to existing job descriptions.

[88] There is no formal process through which the HSAS is to be notified of new provider group jobs. HSAS was not notified when the CLS position was created.

Russell Doell

[89] Mr. Doell is Deputy Director of Contract Bargaining and Enforcement for SEIU-West. He supervises a number of classifications within the organization, and is involved when necessary in classification and JJE issues. He was on the steering committee that developed the JJE process and the JJE plan in the late 1990s.

[90] During that time, there was a major push to streamline the positions in the provider unions' units. Initially, approximately 1700 positions were reduced to about 300 positions. The first 200 jobs were developed in or around 2000 or 2001, and the official roll-out of the new positions occurred on October 3, 2003. As of 2003, the only classification in the Child Life area was the CLW, which was later reviewed.

[91] According to Mr. Doell, Ms. Didowycz' testimony about the potential to make the CCLS a requirement of the position was overly simplistic. He acknowledged that the JJE process determines whether the CCLS is the appropriate credential. Therefore, he cannot guarantee whether the CCLS would be made a requirement of the position at the conclusion of that process. When asked, Mr. Doell was not immediately aware of any provider group classifications that include non-mandatory certifications.

[92] Mr. Doell spoke to the rating process through the JJE. If there is no applicable educational program available locally, a search is extended outwards to find suitable programs, and to assess the normal course to obtain the skills. According to Mr. Doell, if most people need to take a particular educational course, then that course becomes a requirement of the position. Through the JJE process, a pay band is finalized by compiling the information in the rating rationale according to ten factors.

[93] He acknowledged the following wording in the JJE Manual at page four, referring to the education sub factor:

> *This sub factor refers to the **minimum** training and/or formalized knowledge (versus practical experience) necessary to prepare an individual to satisfactorily fill a job **based on today's** educational levels and standards. Such knowledge is most commonly acquired as the result of time spent in schools, trades, colleges, universities or other formal instruction programs or equivalent.*
>
> [emphasis included]

[94] The SAHO-SEIU-West Letter of Understanding (re Implementation Issues – Provider Group Joint Job Evaluation) states that "[t]he Parties recognize that the qualifications on the Provincial Job Descriptions were established for rating purposes and reflect the required educational training…". Still, Mr. Doell suggested that the JJE process "would allow for the requested credentials", given the context. However, the JJE Job Fact Sheet for the CLS gathers information on the "minimum level of completed formal education required for the job" and asks whether the certification is mandatory.

[95] The Job Fact Sheet for the CLS indicates that the certification is not mandatory. He admitted that there was an attempt to have the CCLS listed as a credential for the proposed Certified Child Life Specialist job in 2010. It did not go anywhere, but it is not necessarily the case that it cannot in any situation. As an aside, the Board notes that this request was withdrawn by the Employer. Mr. Doell testified that each request is adjudicated on its own merits. In the CLW reclassification request in 2016, there was no indication that the CCLS was needed. The JJE process looks at what is needed to do the duties, not what is preferred.

[96] In November, 2011, Mr. Doell first became aware that classification changes could arise in relation to the eventual JPCH. Via letter dated May 16, 2019, Mr. Doell first learned that the CLT position was being created. If it had been run through the JJE process the job description would have been significantly different. Through the JJE, the key work activities determine the qualifications. The JJE assistant reviews the relevant information, and that information is forwarded to the JJEMC to determine the appropriate education for the position. For a job to be finalized, there has to be consent at the JJMEC. At times, both employees and employers have motivations to inflate qualifications or to fail to provide an objective assessment of required qualifications.

[97] Mr. Doell spoke about seniority and portability. Currently a worker cannot bid on a position outside of the previous health region jurisdictions but this restriction is in the process of changing. SEIU-West's goal is to eventually offer portability across the province.

[98] Mr. Doell explained that the starting pay rate for the CLT is equivalent to that of the CLS in SEIU-West's pay band 15, and is an interim rate. The pay rate would be finalized through the JJE process. SEIU-West does not bargain higher wages unless there is a market issue at play, specifically one that falls outside of those anticipated by the existing market supplements and market adjustments.

[99] As of February, 2020, the Full Time Equivalent ["FTE"] count at JPCH was 224.12 (over three years). SEIU-West has about 2000 members who call RUH, to which JPCH is connected, "home". About 3000 part-time and casual SIEU-West members work through RUH (but not through their home position).

[100] Finally, Mr. Doell compared the following positions to the CLT, acknowledging that he has not worked in any of them: Electroneurophysiology Technologist positions, Cardiopulmonary Function Technologist, Clinical Genetics Technologist, and Operating Room Technician/LPN.

Wendy Breit

[101] Ms. Breit is passionate about and committed to providing quality care for children. She is the only CLS working at the RGH. She is currently covering a permanent position owned by Tegan Webber, and is working on the acute pediatric unit. There are CLWs on the adolescent unit, but there are none on pediatrics. She has no oversight over the adolescent unit. (The Board notes that the CLW at one time reported to the CLS until the CLW position became vacant.)

[102] As a CLS, Ms. Breit meets the psychosocial and emotional needs of children and families in hospital, including by preparing children for procedures and educating them on coping with medical challenges. She uses many different coping techniques and works with children of all ages, relying on theories of growth and development relative to those ages. When a new child is admitted to hospital, Ms. Breit generally becomes involved through a consult performed by a nurse or physician. She may act as the support person with the child during a procedure, and when she does, the staff work around her. It has not always been that way.

[103] Ms. Breit has a two-year diploma specializing in children's recreational programing and a Bachelor's Degree from the School of Child and Youth Care in Victoria. She graduated from

university in 1987 and a few months later started working as a CLS on the pediatrics unit at RGH. She was hired as a member of CUPE. At the time, there were no other CLSs working at RGH but there were some Child Life positions in North Battleford and Saskatoon.

[104] Two job descriptions were entered into evidence: Ms. Breit's first job description and a CLW job description from 1990. Although it was not a requirement, Ms. Breit obtained her certification in 1991 (while a member of CUPE). At that time, the certification process required proof of specific university credits, documentation of work hours, and professional development hours.

[105] Ms. Breit was certified from 1991 to 2004 with the CLC, back when there was no exam. She worked as a CLS until 2003, when her position was "downgraded" to a CLW. After that, Ms. Breit worked as a CLW until a maternity leave in 2017, and then became a CLS again, after the CLW was reclassified as a CLS. Ms. Breit did not have to take any training to move back into the CLS role.

[106] After learning of the downgrade in 2003, Ms. Breit and two colleagues wrote a letter to the Nursing Manager at RGH, expressing concern over the direction taken by then Regina Qu'Appelle Health Region to Child Life services. They were concerned that the downgrade indicated a regression in the delivery of these services.

[107] Ms. Breit is no longer certified. After she took a maternity leave, the certification requirements changed and a written exam was introduced. Ms. Breit returned to work as a casual, did not have support to recertify and so she did not. Since 2016, the requirement for 600 unpaid hours under clinical supervision has made it "impossible" to obtain certification mid-career. In cross, Ms. Breit acknowledged that she has no reason to suspect that the employer would not have paid for the training.

[108] She characterized the provincial CLS job description as "somewhat accurate", stating that it should include a requirement for previous experience in a hospital setting. On the other hand, she declared that the CLT job description "explains what [she does]".

[109] Ms. Breit provided detailed examples of how her work aligns with the HSAS job description. She performs assessments similar to those performed by Recreation Therapists. She provides direct patient care. She guides and supports her coworkers, and has supervised students in early childhood education. She educates coworkers about the children that they are

working with. She has been involved in creating a program for families of children who die, called Lasting Legacy, and provides education to the pediatricians about this program.

[110] In cross, she agreed that her role involves continual care, that she performs assessments that involve professional judgment, and that she works alongside Occupational Therapists, Physiotherapists, and Social Workers. She agreed that her position has more in common with the foregoing jobs than the jobs in CUPE. She has been trying to part ways with CUPE for years, as she believes that the CLS is a professional position.

[111] According to Ms. Breit, the only requirement for maintaining membership in the ACLP is a membership fee. To work in any children's hospital, certification within a year is a minimum requirement. This is in contrast with the CLS job description, which does not require certification.

[112] Ms. Breit has a departmental budget allocation through which she can purchase therapeutic equipment. She suggested her budgetary decisions could affect the employment of the other CLWs. When asked to provide examples, she explained that she receives (in the form of gift cards) grant funding from the Jim Pattison Hospital Foundation and some money for the playroom budget, annually, which she shares with the CLWs on the adolescent unit. She does not hire or fire anyone in her position.

Applicable Statutory Provisions:

[113] The following provisions of the *SEA* are applicable:

> ***6-4****(1) 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.*
>
> *(2) No employee shall unreasonably be denied membership in a union.*
>
> *. . .*
>
> ***6-11****(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:*
>
> > *(a) if the unit of employees is appropriate for collective bargaining; or*
> >
> > *(b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.*
>
> *(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.*
>
> *(3) Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.*

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

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

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

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

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

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

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

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

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

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

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

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

…

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 subsection (1), the board may do all or any of the following:

(a) conduct any investigation, inquiry or hearing that the board considers appropriate;

(b) make orders requiring compliance with: (i) this Part; (ii) any regulations made pursuant to this Part; or (iii) any board decision respecting any matter before the board;

(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;

(d) make an interim order or decision pending the making of a final order or decision

6-104*(1) In this section:*

…

(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:

…

(g) amending a board order if: (i) the employer and the union agree to the amendment; or (ii) in the opinion of the board, the amendment is necessary;

. . .

(i) subject to section 6-105, determining for the purposes of this Part whether any person is or may become an employee or a supervisory employee;

. . .

6-112*(3) At any time and on any terms that the board considers just, the board may amend any defect or error in any proceedings, and all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*

…

6-127*(1) In this section, "former Acts" means:*

(a) The Construction Industry Labour Relations Act, 1992 as that Act existed on the day before the coming into force of this section;

(b) The Trade Union Act as that Act existed on the day before the coming into force of this section;

(c) The Health Labour Relations Reorganization Act as that Act existed on the day before the coming into force of this section;

(d) The Fire Departments Platoon Act as that Act existed on the day before the coming into force of this section.

…

(3) Every order, declaration, approval and decision of the board made pursuant to the former Acts continues in force as if made by the board pursuant to this Part and may be enforced and otherwise dealt with as if made pursuant to this Part.

…

(6) All agreements, instruments and other documents that were filed with the board or the minister pursuant to the former Acts are deemed to have been filed pursuant to this Part and may be dealt with pursuant to this Part as if filed pursuant to this Part.
…

[114] The following provisions of the HLRRC Regulations are applicable:

2 *In these regulations:*

…

(g) "health services provider" means an employee of a health sector employer, but does not include a health support practitioner, a nurse, a chiropodist, a chiropractor, a dentist, a duly qualified medical practitioner or an optometrist;

(h) "health support practitioner" means an employee of a health sector employer who:

(i) is functioning in one of the occupations listed in Table C; or

(ii) is in a position that requires, as a minimum, registration pursuant to an Act giving the exclusive right to use a title or description of an occupation listed in Table C;

but does not include a student of one of the occupations listed in Table C, or an intern or an assistant to an employee described in subclause (i) or (ii);

. . .

***4**(1) The appropriate unit prescribed in this section is prescribed as the appropriate unit for bargaining collectively between health sector employers and health support practitioners.*

(2) There is to be one multi-employer appropriate unit respecting health support practitioners composed of:

(a) all health support practitioners who are employed by a district health board or by a health sector employer listed in Table B; and

(b) all health support practitioners who:

(i) are employed by a health sector employer listed in Table A; and

(ii) on the day these regulations come into force, are represented by a trade union for the purposes of bargaining collectively.

. . .

***14**(1) In this section, "affiliate" means an affiliate within the meaning of The Health Districts Act.*

(2) Subject to subsection (3), the board shall issue any orders amending or varying the relevant appropriate units that it considers necessary if:

(a) health districts amalgamate;

(b) services are transferred between district health boards;

(c) new health districts are created;

d) the boundaries of health districts are amended;

(e) employees of an affiliate not represented by a trade union choose to be represented by a trade union; or

(f) there are any unanticipated circumstances, including any applications before the board which were adjourned pursuant to section 9 of the Act and were not resolved by these regulations.

(3) The orders of the board issued pursuant to subsection (2) must be consistent with these regulations.

(4) The board shall decide all questions concerning who is an employee that are not resolved by a health sector employer and a trade union that represents health sector employees.

(5) The board shall decide all questions pursuant to clause 5(l) of The Trade Union Act.

…

TABLE C
[Clause 2(h)]

Addiction Counsellor/Therapist
Adjunctive Therapist
Assessor/Coordinator
Audiologist
Certified Prosthetist
Certified Orthotist
Dental Hygienest
Dental Therapist
Dietitian
Emergency Medical Technician
Exercise/Conditioning Therapist
Health Educator
Infection Control Officer
Mental Health Therapist
Music Therapist
Nutritionist
Occupational Therapist
Ophthalmic Dispenser
Orthoptist
Paramedic
Perfusionist
Pharmacist
Physical Therapist
Psychologist
Psychometrician
Public Health Inspector
Recreation Therapist
Respiratory Therapist
Social Worker
Speech Language Pathologist

[115] Although the HLRR Act has been repealed, these Regulations continue in force under the Act.

[116] The following provisions of *The Legislation Act* are applicable:

1-2 *In this Act:*
…
*"**statutory instrument**" means a regulation, order, rule, rule of court, form, tariff of costs or fees, proclamation, letter patent, bylaw or resolution enacted in the execution of a power conferred by or pursuant to the authority of an Act, but does not include:*

(a) an order of a court made in the course of an action; or

(b) an order made by a public officer or administrative tribunal in a dispute between two or more persons. (« texte d'application »)

2-8
…
(8) A statutory instrument enacted pursuant to a former enactment remains in force and is deemed to have been enacted pursuant to the new enactment insofar as it is authorized by and not inconsistent with the new enactment.

Analysis:

[117] In *Health Sciences Association of Saskatchewan v Unifor, Local 609*, 2015 CanLII 43776 (SK LRB), the Board set out the process to be followed by an employer who creates a new position, at paragraph 22:

The required steps were clearly set out by the Board in its decision in Donovel (Re:)[2]. At paragraph 28, the Board outlined those steps as follows:

1. *Notify the certified union of the proposed new position;*

2. *If there is agreement on the assignment of the new position, then no further action is required unless the parties wish to update the certification order to include or exclude the positions in question;*

3. *If agreement is not reached on the proper placement of the position, the employer must apply to the Board to have the matter determined…; and*

4. *If the position must be filled on an urgent basis, the employer may seek an interim or provisional ruling from the Board or agreement from the union on the interim assignment of the position.*

[118] Here, the parties agreed that the CLT could be posted and filled pending a scope determination of this Board. The Employer notified HSAS and SEIU-West of the newly created position, and then negotiated with HSAS and SEIU-West to determine the appropriate conditions under which the position would be posted. Two CLT positions have been filled with the consent of the parties. Therefore, no party took issue with whether the Employer complied with the required steps.

[119] *Sask Polytechnic 2015* provides helpful guidance to the Board in determining the placement of a new position between competing bargaining units:

[22] From a review of the previous decisions of the Board, it appears that the following factors/considerations can provide helpful guidance to the Board in determining the proper assignment of a newly created or additional position in a multi-bargaining unit workplace:

> *1. Similarities of the disputed position and other positions in the competing bargaining units. Under this factor, the Board examines the role to be performed by the incumbent in the workplace, together with the work, duties and responsibilities of the position, as well as the potential for career advancement; all in an effort to determine whether the disputed position bears more similarities to the member of one unit or another. See: SEIU West v. St. Paul's Hospital & HAS, supra. See also: CUPE, Local 1975 v. University of Saskatchewan & ASPA, supra. This is a pragmatic analysis intended to promote homogeneity and functional coherence in bargaining units. To a certain extent, the Board has also considered which bargaining unit would present the best career option for the incumbent. See: Regina Professional Firefighters Association v. City of Regina & RCMMA, supra.*
>
> *2. Community of interest. Under this factor, the Board examines the educational qualifications, competencies and skills expected of the incumbent, together with the conditions of employment and avenues for lateral mobility for the incumbent. While this factor also examines similarities in positions, it tries to focus that examination on the anticipated collective bargaining interests of the disputed position relative to the interests of the members of the competing bargaining units. See: CUPE, Local 21 v. City of Regina & RCMMA, supra. See also: SEIU West v. St. Paul's Hospital & HAS, supra.*
>
> *3. The history or origins of the disputed position. Under this factor, the Board examines whether the duties or responsibilities of a newly created position can be traced back to a particular bargaining unit. Evidence that the work to be performed by a disputed position was carved out of a particular bargaining unit supports a rebuttable presumption that the position ought to be assigned to that bargaining unit. See: CUPE, Local 1975 v. University of Saskatchewan & ASPA, supra.*
>
> *4. Industrial stability and viability of the bargaining relationship. Under this factor, the Board considers whether the inclusion or exclusion of a disputed position will jeopardize the strength and effectiveness of either bargaining unit or otherwise endanger the equilibrium of the bargaining relationships. See: Regina Professional Firefighters Association v. City of Regina & RCMMA, supra.*
>
> *5. Broader, More Inclusive Bargaining Units: In the case of multi-bargaining unit workplace involving a middle management unit, there is a rebuttable presumption that new or additional positions belong in the broader, more inclusive bargaining unit. See: CUPE, Local 21 v. City of Regina & RCMMA, supra; and CUPE, Local 47 v. City of Saskatoon & SCMMA, supra.*

[23] Finally, it should be noted that in evaluating a disputed position for either assignment between competing bargaining units or its eligibility for an exclusion (i.e.: management and/or confidentiality), the Board tries to look beyond titles and position descriptions in an effort to ascertain the true role which that position will play in an organization. See: Saskatchewan Institute for Applied Science and Technology v. Saskatchewan Government and General Employees' Union, (2009) 173 C.L.R.B.R. (2d) 1, 2009 CanLII 72366 (SK LRB), LRB File No. 079-06.

[120] The foregoing factors are "touchstones or reference points in [the Board's] decision-making process", rather than "exhaustive or conclusive" requirements.[9] During the hearing, the Board also brought to the parties' attention a decision dated May 16, 1997, in LRB File No. 114-97. Upon review of that decision and the parties' submissions, the Board has concluded that LRB File No. 114-97 is an early case that interprets the parameters of the existing classifications in Table C, rather than the potential for additions to the existing classifications. The phrase "occupational groupings rather than professional affiliation or educational qualification" refers to the existing titles in Table C. It is does not provide assistance in assessing new classifications. The Board should be guided by the existing touchstones or reference points, in the context of the HLRRC Regulations.

[121] In *Sask Polytechnic 2017*, the Board expanded its analysis to include a combination of the following seven factors, considered by the Ontario Labour Relations Board in *Toronto Community Housing Corp. v CUPE, Local 79*, 2015 CarswellOnt 6809 (Ont LRB):

a. collective bargaining relationships;
b. skill and training;
c. safety;
d. economy and efficiency;
e. employer past practice;
f. area or industry practice;
g. employer preference.

[122] The parties disagreed about the value of the seven factors. The Ontario Board developed these factors in the context of "jurisdictional disputes primarily within the construction sector";[10] therefore, "a cautious approach must be used in applying [them] in a non-construction setting".[11] In line with this cautious approach, the Board will proceed to consider whether, and to what extent, the seven factors should be included in its analysis in this case.

[123] To start, factors "a", "b", "d", "e", and "f" do not add great value to the Board's analysis. Each of these factors overlaps considerably with one or more of the five factors from *Sask Polytechnic 2015*. This overlap is revealed through the Board's reasoning in *Sask Polytechnic 2017*.

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[9] At para 21.
[10] At para 37.
[11] At para 30.

[124] Of all of the aforementioned factors, factor "d" - economy and efficiency - merits additional explanation. The Board in *Sask Polytechnic 2017* acknowledged that this factor is similar to the community of interest analysis but added that it "looks at how the position will interact with other employees and from whom the employees will take direction."[12] The Board has received some evidence with respect to the interactions among employees and existing or potential lines of authority. This is relevant context for assessing the community of interest in this case, and it will be considered as such.

[125] The two remaining factors are "c" (safety) and "g" (employer preference). The Board will assess the relevance of each of these factors, in turn.

[126] First, factor "c" pertains to safety. This factor arose out of the specific concerns associated with the safety of employees working within the construction industry. Perhaps in part for this reason, the parties in this case presented no evidence in relation to this factor. It is therefore unnecessary for the Board to assess its relevance any further.

[127] Second, factor "g" considers the employer's preference for a given bargaining unit. The provider unions argue that the SHA's preference is not a relevant consideration in this case. The SHA makes the opposite argument, suggesting that employer preference is a relevant factor supporting the placement of the CLT in the HSAS bargaining unit:

> *While the Position clearly falls within HSAS, the SHA wanting to incorporate the recognized gold standard CCLS credential toward best patient care, and not losing the funding source (all other foundation hospitals require child life professionals to have the CCLS credential), and also toward maintaining membership in the CACLL, but being unable through the provider unions, is an important factor.*
>
> *Further, the SHA preference to have the position within HSAS is a very relevant factor within the scope analysis.*[13]

[128] The SHA relies on *Sask Polytechnic 2017* for the proposition that employer preference is a relevant consideration. Upon careful review of that case, it is apparent that the Board did not consider the employer's preference as a factor in deciding where to place the disputed position(s), but instead warned the Board against doing so:

> *70 … The determination of an appropriate unit of employees for collective bargaining has always been one of the primary responsibilities of this Board. That responsibility cannot be delegated to employers to choose what unit a particular employee or group of employees is to be represented.*

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[12] At para 50.
[13] *SHA Brief* at paras 32 and 33.

[129] The SHA has cited no cases in which the Board has relied on an employer's preference in assessing the placement of a position in a multi-bargaining unit workplace. The Board has the responsibility for determining the appropriate placement of the CLT. In line with the Board's warning in *Sask Polytechnic 2017*, it does not intend to defer to the Employer's preference, or to take the Employer's preference into account, in this case. The SHA has provided no labour relations reasons for doing so.

[130] In summary, the additional factors from *Sask Polytechnic 2017* do not assist the Board in determining the appropriate placement of the CLT, subject to the qualification provided in relation to factor "d". Therefore, the Board now will proceed to assess the CLT position against the five factors from *Sask Polytechnic 2015.*

Similarities of the disputed position and other positions in the competing bargaining units

[131] The first factor consists of the similarities of the disputed position and other positions in the competing bargaining units. By applying this factor, the Board examines the role to be performed by the CLT in terms of work, duties, and responsibilities, as well as the potential for career advancement. The purpose is to promote homogeneity and functional coherence within the bargaining unit.

[132] As outlined by SEIU-West, the job descriptions for the CLW, the CLS, and the CLT disclose certain, comparable duties:

> *CLW: Provides preoperative teaching, play therapy, cognitive distraction and preparation for diagnostic tests. Provides psychosocial, recreational and emotional support before, during and after procedures. Advocates on behalf of pediatric and adolescent patients and their families.*
>
> *CLS: Develops and implements a comprehensive Child Life Program to assist children with adjusting to the hospital environment and to prepare them for diagnostic or treatment procedures. Acts as an advocate for patients and families and provides psychosocial, recreational and emotional support.*
>
> *CLT: …strives to reduce the impact of stressful or traumatic life events and situations which affect the development, health and well-being of infants, children, youth and families. […] assesses, develops and implements evidence-based, developmentally and psychologically appropriate programming and interventions to prepare clients and families for any diagnostic or treatment procedures. As a member of multidisciplinary pediatric teams, the incumbent shall advocate for and represent Child Life on committees, rounds, conferences….*

[133] The CLS and the CLT positions are very similar. Ms. Breit's description of her day-to-day work as a CLS was compelling, and it closely tracked the functions of the CLT. Although Ms. Breit is exceptionally committed to her work, her performance alone does not explain these similarities. The materials filed in support of the CLW reclassification confirm that the positions function in a similar manner.

[134] The CLS and the CLT both develop and implement programming for children in a hospital setting. Both provide direct patient care, in a continual rather than episodic manner, taking into account the developmental stages of children. Both work with others to educate and to lead in relation to best health care practices for child patients. Both advocate for their patients.

[135] The SHA and HSAS insist that the CLT's assessment function distinguishes it from the CLS. However, the CLS job description includes among its key activities the creation of "individualized plans of care based on patient assessment". Ms. Breit testified that she leads and performs assessments of the kind expected of the CLT. Granted, at times, the Physiotherapist or the Occupational Therapist leads the assessment.

[136] Further, *Sunrise Health Region* does not stand for the proposition that a position that is involved in performing assessments is more likely to be an HSAS position. There, HSAS had claimed that the incumbents of the disputed positions were functioning as Recreation Therapists, which was, and is, a position listed in Table C of the HLRRC Regulations. The Board was tasked with interpreting an MOA that had set the criteria for whether a position was to be treated as a Recreation Therapist. The criteria included the performance of assessments.

[137] The Board concluded that the two individuals "meet the criteria set out in the MOA and should be placed within the HSAS bargaining unit". The Board did not conclude, generally, that the performance of assessments determines or factors into whether a position falls into the HSAS bargaining unit in the absence of an agreement between the parties. There is no similar MOA in the current case. Therefore, the Board's conclusion in *Sunrise Health Region* does not apply.

[138] Although the holding in *Sunrise Health Region* is inapplicable here, a comparison of the Recreation Therapist and the CLT positions is helpful. The Recreation Therapist was included in Table C to the HLRRC Regulations, and is therefore an "original" HSAS position. It is not a licensed or self-governed profession, however, registration with the Saskatchewan Association of Recreation Therapists (SARP) is required. The Recreation Therapist works within the standards and competencies as outlined by the Canadian Therapeutic Recreation Association Standards of

Practice and Code of Ethics. The Recreation Therapist is one of many professionals working in the multi-disciplinary team in the specialized Child Life department at the JPCH. The type of assessments performed by the CLT are similar to those included in the Standards of Practice applicable to Recreation Therapists.

[139] There is a number of therapist classifications in HSAS (including Music Therapists, Occupational Therapists, Physical Therapists, Respiratory Therapists, and Recreation Therapists). These positions generally provide one-on-one patient care in a continual rather than episodic manner. It is typical that these positions comply with standards of practice. Some of the therapist positions, such as the Recreation Therapists and the Genetics Counsellors, are supported by jobs in the provider union units. Although, in other jurisdictions, the CLT equivalent is referred to as a “specialist”, the Board is persuaded of its therapeutic role, and is persuaded that it is functionally similar to the therapist classifications in HSAS.

[140] Other than the Child Life positions, there is greater similarity overall between the CLT and the HSAS positions, than there is between the CLT and the positions presented by SEIU-West. The key distinction is the nature of the relationship between the position and the patient. The positions presented by SEIU-West are primarily involved in supporting specific episodes or procedures, rather than continual care, or in providing support to positions that are involved in continual care. For example, the Electroneurophysiology Technologist provides assessments but they are specific to the patient’s procedure. The key work activities of the Operating Room Technician/LPN are specific to pre-operative, operative and post-operative periods. By contrast, there are many positions within HSAS that develop care plans by performing assessments of their patients, and then implement those plans through continual, direct patient care.

[141] Furthermore, there are important differences between the CLT and the CLS. The first difference pertains to the CCLS qualification. The CLT job description includes the CCLS designation as a required qualification. Neither the CLW nor the CLS are required to obtain or maintain a CCLS designation. The second difference pertains to standards of practice and scope of practice. The CLT is expected to work to the standards of practice established by the CLC and to demonstrate an understanding of the scope of practice, including what is needed to manage overlap with other professions within the health care team and department. Neither the CLW nor the CLS job descriptions refer to scope of practice. The “generally accepted practice”, referred to in the CLS Job Evaluation Rating Document, does not carry the same weight or consequence.

[142] The CCLS and scope of practice requirements equate to a professional role. The professionalization of the CLT sets it apart from the other Child Life positions, and brings the CLT into alignment with the other professional positions in the HSAS bargaining unit.

[143] Having compared the relevant positions in the competing bargaining units, the Board will now consider the potential for career advancement. First, there is a logical path of promotion within the Child Life positions. While Ms. Breit testified that it is "impossible" to achieve certification mid-career, Ms. Dornstauder testified that part-time work could be made available to facilitate the completion of unpaid hours and that a future JCPH-based training program is a possibility. However, there is no direct seniority portability between the former health regions in SEIU-West's jurisdiction, or from a CUPE jurisdiction to an SEIU-West jurisdiction. The lack of direct seniority portability is qualified by Article 20 of SEIU-West's CBA which allows those eligible to access indirect portability.

[144] Although there is a logical path of promotion for the CLW and the CLS, there is no similar path of promotion for the CLT within the provider union bargaining units.

[145] Mr. Doell indicated that the interim wage assigned in the job description is the starting rate for the CLS; with increased qualifications, a CLT could be placed in a higher bracket or receive more through market adjustments if placed in SEIU-West's unit. The CLT has not been assessed through the JJE process, and so the final wage rate has not been established. On the other hand, even if the CCLS qualification is maintained, it is uncertain whether the position would receive credit for that qualification.

[146] In summary, the purpose of the assessment pursuant to the first factor is to promote homogeneity and functional coherence within the bargaining unit. The Board has considered the similarity of the CLT against positions within the competing bargaining units, and has considered the potential for career advancement within those units. The CLT is similar to the CLS and the CLW, but it is a professionalized evolution of those roles. It is not comparable to the other SEIU-West positions in evidence. As a professional therapeutic position, it is in alignment with HSAS positions. As for career advancement considerations, the CLW and the CLS could benefit from the CLT's placement within SEIU-West; the CLT likely less so. On the balance, the assessment of the first factor weighs in favour of placement in the HSAS bargaining unit.

Community of Interest

[147] The second factor is community of interest. Through this factor, the Board examines the educational qualifications, competencies and skills expected of the position, as well as the conditions of employment and avenues for lateral mobility. With respect to similarity of positions, it focuses on anticipated collective bargaining interests.

[148] As for educational qualifications, the CLT requires a Bachelor's Degree and a CCLS certification. The HSAS CBA consists of an education-based classification system. Employees are placed at the applicable wage scale based on the requirements of the position. While there are positions in the provider unions that require a postsecondary education, a Bachelor's level degree is more typical of HSAS positions.

[149] The next question relates to the competencies and skills expected of the position. It is typical of HSAS positions to require membership or certification with an associated organization, and to perform duties in accordance with standards of practice. Some positions in the provider unions have similar requirements, but not consistently and not in conjunction with comparable therapeutic roles. These requirements raise potential collective bargaining issues around performance, discipline, and professionalism. A commitment to perform in accordance with standards of practice does not raise the same collective bargaining issues as does a requirement.

[150] The next issue relates to the conditions of employment. Here, the Board may review the interactions among employees and the existing or potential lines of authority, as previously outlined. The CLT's role on the team of multidisciplinary professionals, comprised predominately of HSAS positions, supports its placement with the HSAS. It is expected that the team members work together on the care plans for children, and that they do so in similar ways, focusing on continual, direct patient care. To the extent that there may be some overlap in Child Life duties across bargaining units, that overlap could be compared to that which exists between the Recreation positions.

[151] The professionals working within the Zone provide services to nurses, specialists and sub-specialists, and educators working on the in-patient unit. At JPCH, the longer term goal is to develop a team under the CLTs that would carry out an active plan for children. In this respect, the CLT will have a leadership role within the hospital. The exact parameters of the leadership role remain under development. The Board notes that the CLS also, at one time, had a reporting relationship with CLWs.

[152] Lateral mobility within HSAS is limited by the requirements for entry into each professional position. This is the nature of a professional bargaining unit. Opportunities for lateral mobility across geographical locations is conditional upon expanding the CLT position to other areas of the province. Within the provider union bargaining units, lateral mobility is available through the Child Life roles but is limited by entry requirements, lack of alignment, and jurisdiction.

[153] Lastly, the Board will consider experience in collective bargaining. HSAS has significant experience in addressing collective bargaining issues related to degree-based positions. Review of the respective CBAs discloses some differences in respect of professional items. HSAS' CBA includes a provision on reporting to professional associations, not included in the SEIU-West CBA. HSAS' CBA also includes a provision requiring employers to provide a working environment consistent with professional standards, practices, procedures, and professional codes of ethics.

[154] For SEIU-West's part, this latter provision is similar to Letter of Understanding #13 for Licensed Practical Nurses. The provider unions, generally, have experience negotiating on behalf of the Child Life positions, including through the JJE process.

[155] In summary, the second factor assesses the qualifications, competencies and skills expected of the position, as well as the conditions of employment and avenues for lateral mobility. On the balance, this factor weighs in favour of placing the CLT in the HSAS bargaining unit.

History or origins of the disputed position

[156] Here, the Board examines whether the duties or responsibilities of the CLT can be traced to a particular bargaining unit. Evidence that the work was carved out of a particular bargaining unit supports a rebuttable presumption that it ought to be assigned to that bargaining unit. As outlined in *CUPE, Local 1975 v University of Saskatchewan*, [1990] Summer Sask Labour Rep 97, the Board must be careful not to erode the strength of a bargaining unit by transferring work from one bargaining unit to another.

[157] The CLT is the next evolution of the Child Life positions, which existed prior to the Dorsey Commission. There was a CLS position in CUPE in 1987. The CLS was later "downgraded" to a CLW in 2003, and then reclassified to a CLS as recently as 2016, following a detailed assessment of the related job duties. Although there are no CLSs in SEIU-West, the provider unions negotiated the JJE process for the purpose of creating common job descriptions for the bargaining units represented by those unions. Other than the CLT, all of the Child Life positions have historically been treated as "health services providers", defined by the HLRRC Regulations.

[158] The CLS and the CLT are similar positions with a shared history. This supports a rebuttable presumption that the CLT should be placed within SEIU-West's bargaining unit. Therefore, the Board will consider whether the SHA and HSAS have rebut the presumption by disclosing a compelling labour relations rationale for placing the position in the HSAS bargaining unit.

[159] To determine whether the presumption has been rebutted, the Board must consider the rationale that has been put forward. The Employer has created a position that allows it to provide patient care to a standard assured through the CCLS designation. Ms. Dornstauder testified in a compelling manner about her concerns with the reputation of the JCHP. The Child Life Department is a central feature of the hospital's operations, and the professionalism of the position is important to maintain the integrity of its programs.

[160] Although the JCHP's reputation is not a labour relations consideration, community of interest is. As the Board has outlined in detail, the CLT is a professional therapeutic position that fits within the community of interest in HSAS. The professionalization of the position sets it apart from the other Child Life roles. The bargaining unit relationships within the Child Life, Recreation, and Genetics fields are comparable, if not identical.

[161] Furthermore, the SHA's representatives seem to have concluded that the CCLS will not or cannot be made a requirement of a provider group job. Ms. Didowycz' testimony on this point was compelling and detailed. Ms. Didowycz was a careful witness with extensive first-hand experience with the JJE process.

[162] Although the SHA's conclusion is consistent with Ms. Didowycz' testimony, the reclassification materials are inconclusive on this point. The Certified Child Life Specialist draft job description included the CCLS as a qualification, but then the Employer withdrew the request. The draft job description for the CLW reclassification did not include the CCLS; the related Job Fact Sheet noted only that the CCLS was "preferred". This makes sense given that the incumbent, Ms. Webber, was not certified. For these reasons, in neither of these cases did the JJEMC have the opportunity to consider a draft job description identifying the CCLS as a necessary qualification.

[163] Furthermore, Mr. Doell insisted that the CCLS could be made a qualification, relying on the JJE Manual's rating rationale for job descriptions. It states at page 4:

> *This sub factor refers to the minimum training…necessary to prepare an individual to satisfactorily fill a job based on today's education levels and standards. Such knowledge is most commonly acquired as the result of time spent in schools, trades, colleges universities or other formal instruction programs or equivalent.*

[164] The second rating note indicates that,

> *2. If the minimum requirements of the job specify the need for provincial or national certification beyond technical/college/university graduation or completion of specific courses set out by regulatory bodies and such certification is obtained through formal examination, add one half sub factor degree beyond the minimum prerequisite sub factor degree level determined, for each certification required to perform the job.*

[165] This rating note does not provide perfect clarity. However, Ms. Didowycz has provided clear and confident testimony about the JJEMC's limitations as a tripartite committee working under a negotiated process. According to Ms. Didowycz, the JJEMC will remove a qualification if it is not appropriate, and a certification is appropriate only if it is a requirement of the profession. While Mr. Doell has extensive experience with SEIU-West and its predecessors, including on the JJE steering committee, he did not demonstrate the same detailed, recent understanding of the implementation of the JJE process.

[166] CUPE makes the point that the SHA gave up certain management rights by agreeing to the tripartite JJE process. This Board has considered this point carefully. Unfortunately, it is not realistic to *expect* the parties to renegotiate the JJE process. Furthermore, the JJE process does not deal with scope issues, at least not directly. Although the SHA was aware that the CLS position existed with the provider union units, the development of the JPCH has resulted in a significant shift in health care and a greater emphasis on professionalism in the Child Life field. The CLT position has been developed in response to that shift.

[167] Lastly, recruitment for an earlier incarnation of the position was a major challenge. At least one candidate strongly advocated in favor of the position being placed within HSAS. Another cited concerns with "risk". Although two candidates were recruited for the current position (which was posted with union affiliation to be determined), the history suggests that recruitment would be more difficult for an SEIU-West, rather than an HSAS, position.

[168] Although the foregoing analysis discloses a compelling labour relations rationale for rebutting the presumption, the Board will review the fourth, interrelated, factor before reaching its conclusions on this point.

Industrial stability and viability of the bargaining relationship

[169] Here, the Board considers whether the inclusion or exclusion of the CLT will jeopardize the strength and effectiveness of either bargaining unit or the equilibrium of the bargaining relationships.

[170] The relevant bargaining units remain organized largely along the lines set out in the Dorsey Report and in the HLRRC Regulations. SEIU-West is an all-employee bargaining unit, subject to specific exceptions. That does not mean that the HSAS bargaining unit cannot be amended to include new positions. The Board may make orders that are consistent with the HLRRC Regulations if there are "any unanticipated circumstances". The needs arising from the development of the province's first children's hospital approximately twenty years after the enactment of the Regulations is an unanticipated circumstance. The question of industrial stability must be evaluated with this in mind.

[171] Granted, the CLW reclassification occurred after the JPCH was already under development. However, the Child Life Department was a work in progress, resulting in a steep learning curve, and a few false starts, including in 2010/2011. A professional Child Life role will serve a purpose that a non-professional Child Life role will not.

[172] The Board is very attuned to the concerns with long-term labour relations stability in the health care sector. The Board does not want to provide an incentive to the SHA to create new positions to circumvent the JJE process. The Board is aware that it could be faced with a similar application to place the CLS in the HSAS bargaining unit.

[173] However, this is a rare circumstance that supports adding a classification to the HSAS list. The development of the JPCH marks a significant shift for health care in the province. The CLT fills a professionalism gap that exists in the Child Life roles. As a professional therapeutic position, the CLT is clearly most aligned with the HSAS bargaining unit.

[174] Furthermore, the Child Life field is numerically small in comparison to the whole of the provider union bargaining units. If assigned to the HSAS unit, the immediate impact on the provider group would be small. Any potential, additional impact on the Child Life roles would have to be justified and consistent with these Reasons. The impact to the strength and viability of the provider group unions should be minimal.

Broader, more inclusive bargaining units

[175] In a multi-bargaining unit setting, the Board is primarily concerned with ensuring that the multiplicity of bargaining units does not result in industrial instability. The Board favours larger units over smaller specialized units and will take a restrictive approach to defining the scope of the specialized unit. New positions belong in the broader, more inclusive bargaining unit unless there is a compelling labour relations reason to place them elsewhere. The HSAS is a specialized unit defined by the HLRRC Regulations. Additions to the unit are infrequent and should be permitted only when clearly appropriate.

[176] In a multi-bargaining unit workplace involving a middle management unit, there is a rebuttable presumption that new positions belong in the broader, more inclusive unit. There is no middle management unit in this case. As noted by the Board in in *Sask Polytechnic 2015*, at paragraph 21, the middle management cases are not directly applicable:

> *…Middle management bargaining units are primarily composed of individuals who are excluded from the broader bargaining unit because of their management responsibility and/or because of the confidential nature of the work they perform. Because of the Board's narrow application of these exclusions, the Board has adopted a slightly different approach to the assignment of newly created positions to competing bargaining units if one of those bargaining units is a middle management association. Simply put, there is a rebuttable presumption that new or additional positions belong in the broader, more inclusive bargaining unit.*

[177] It is therefore not necessary to show that there is a conflict of interest requiring placement in a smaller unit. To be sure, the Board is not persuaded that the CLT is or will be in conflict with other members of the provider union bargaining units. The CLT provides guidance and support to other professionals. To the extent that it performs or will perform some supervisory duties in relation to Child Life intern students, this does not place it in a conflict of interest with the bargaining unit. Although the CLT makes some budgetary decisions, there is no clear evidence that those decisions could result in technological changes and resulting layoffs.

[178] However, nor is this a case, such as *SGEU v Sask Liquor and Gaming Authority*, [1998] Sask LRBR 512, in which a small group of employees is seeking to select its own union. This is a case about placement in one of two potential units. The Board is primarily concerned, at this stage, with ensuring that the multiplicity of bargaining units does not result in industrial instability. The Board is less concerned with placing a position in an existing unit, if appropriate, than with creating a new unit for a group of employees. Here, the Board is not contributing to multiplicity of bargaining units. Although the SEIU-West unit is an all-employee unit, this case involves a multi-

unit workplace, and the community of interest justifies placement of the CLT in the HSAS unit. The Board has performed its assessment cautiously to ensure that any placement is appropriate.

[179] The Board has addressed the remaining concerns with industrial stability in the earlier sections. On the balance, the Board's assessment weighs in favour of placing the CLT in the HSAS bargaining unit. There is a compelling labour relations rationale for doing so.

Conclusion:

[180] Although this case revolves around one position, the history of the Child Life roles and the provider group's principled concerns about industrial stability add layers of complexity to the analysis. The Board has benefited from excellent advocacy and thorough submissions by all counsel. This matter should be treated as a unique case based on unusual circumstances. It should not be treated as an invitation to the SHA to reformulate job descriptions to circumvent the JJE process.

[181] For the preceding reasons, the Board makes the following Order:

a. The Child Life Therapist is within the scope of the bargaining unit of Health Sciences Association of Saskatchewan;
b. Health Sciences Association of Saskatchewan has leave to apply to amend the certification order in LRB File No. 027-11, accordingly.

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

DATED at Regina, Saskatchewan, this **29th** day of **May, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson