

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v PHOENIX RESIDENTIAL SOCIETY, Respondent

LRB File No. 029-23; August 10, 2023

Chairperson, Michael J. Morris, K.C.; Board Members: Hugh Wagner and Allan Parenteau

Counsel for Canadian Union of Public Employees: Dawid Werminski and
Andrew Restall

Counsel for Phoenix Residential Society: Calen Nixon and Alyssa Phen

Application for bargaining rights – Union applies to represent employees working in two of Employer’s seven programs – Employer objects to application on the basis that proposed bargaining unit inappropriately under-inclusive – Employer suggests “all employee” unit appropriate – Board determines that Union’s proposed bargaining unit is appropriate.

REASONS FOR DECISION

Background:

[1] Michael J. Morris, K.C., Chairperson: These are the Board’s reasons regarding an application by the Canadian Union of Public Employees [Union] for bargaining rights on behalf of certain employees of the Phoenix Residential Society [Employer].

[2] The Employer is a Regina-based charitable non-profit organization that provides services to individuals with diagnosed mental illnesses, individuals with acquired brain injuries, and individuals who are chronically homeless. It aims to provide recovery-oriented services that foster empowerment, promote hope, and build connectedness in the community.

[3] The Employer’s operations consist of seven key departments or programs, none of which have ever been unionized. Five of the programs require individuals, known as clients, to have a diagnosed mental illness. The other two programs do not, and these are the programs to which the Union’s certification application relates. They are known as the Phoenix Housing and Other (case) Management & Engagement Services [HOMES] program, and the Acquired Brain Injury [ABI] program.

[4] The key issue before the Board is whether the Union’s proposed bargaining unit is inappropriately under-inclusive. The Employer submits that an “all employee” unit containing

employees from all seven of its programs is appropriate. The parties agree upon management positions which must be excluded if the Board determines that the Union's proposed bargaining unit is appropriate.¹

Evidence:

[5] The Union called three witnesses: (1) Maxton Eckstein, a full-time employee working in the HOMES program; (2) Laura Guibault, a part-time employee working in the HOMES program and the ABI program; (3) Aimee Nadon, an employee of the Union and its organizer with respect to this application.

[6] The Employer called Sheila Wignes-Paton, its executive director, and entered several documents into evidence. These included its organizational charts from November 30, 2022² and May 31, 2023,³ and descriptions for positions in the ABI program,⁴ the HOMES program,⁵ and its other programs.⁶

[7] In general, there was little conflict in the evidence tendered by the parties. Counsel's questioning focused on matters they considered relevant to their clients' respective positions.

[8] The Employer's seven programs can be described as follows:

- i. Eaton Intensive program: This program provides intensive supports on a 24 hour basis to clients with a diagnosed mental illness in a residence located on the fourth floor of 1914 Halifax Street.
- ii. Oak program: This program provides intensive supports on a 24 hour basis to clients with a diagnosed mental illness in a residence located at 2152 Hamilton Street. In general, this program is less intensive than the Eaton Intensive program.
- iii. McEwen Manor: This program provides intensive supports on a 24 hour basis to clients with a diagnosed mental illness in a residence located at 2035A Osler Street. It is identified as a long-term program for clients.
- iv. Phoenix Intensive Program Services [PIPS]: PIPS supports clients with a diagnosed mental illness who are living in the community and who tend to present with more

¹ The agreed-upon exclusions include the Executive Director, Director of Program Development, Director of Staff Development, Manager of Homelessness Initiatives, HOMES Supervisor and ABI Program Coordinator.

² Exhibit E-1.

³ Exhibit E-2.

⁴ Exhibit E-3.

⁵ Exhibit E-4.

⁶ Exhibit E-5.

complex needs, such as active addictions. It is not a facility-based program (unlike the preceding three programs), though some PIPS clients reside on the third floor of 1914 Halifax Street. PIPS' offices are located on the first and fourth floors of 1914 Halifax Street.

- v. Phoenix Apartment Living Services [PALS] program: Similar to PIPS, the PALS program supports clients with a diagnosed mental illness who are living in the community. It is not a facility-based program, though some PALS clients reside on the second and third floors of 1914 Halifax Street. In general, the PALS program is less intensive than PIPS.
- vi. ABI program: The ABI program includes a 24-hour staffed facility-based program on the second floor of 1914 Halifax Street known as the Pearl program, and a supported living program for clients residing in the community. As its name implies, ABI clients must have a diagnosed acquired brain injury.
- vii. HOMES program: The HOMES program uses a "housing first" model which aims to provide immediate access to housing for individuals who are chronically homeless. Clients may participate in the HOMES program if they are referred by Coordinated Access Regina [CAR], an external agency that triages housing placements based on certain criteria. The HOMES program includes a 24-hour staffed townhouse complex in the 1100 block of Wascana Street, and a second component which assists clients living in rented premises in the community. The HOMES program's offices for staff working with clients in the community are located at 2035C Osler Street.

[9] Apart from the locations identified above, the Employer's general administrative office is located at 2035B Osler Street. There is a boardroom which connects 2035B and 2035C Osler Street, as well as a janitorial closet which can be used as a pass-through between them.

[10] The programs are funded differently, by one or more distinct funding sources.

[11] The HOMES program receives approximately two thirds of its funding from the federal government, via the Namerind Housing Corporation [Namerind]. It receives approximately one third of its funding from the Saskatchewan Health Authority [SHA]. It also receives some smaller amounts from other sources. For example, the City of Regina funds a harm reduction support worker through a yearly grant.

[12] The ABI program is funded by Saskatchewan Government Insurance [SGI].⁷

⁷ Unlike the Employer's other programs, clients who live outside of the Regina area (in fact, province-wide) may be referred into its ABI program.

[13] The five programs which require a diagnosed mental illness for admittance⁸ are funded by the SHA.

[14] The Employer is required to execute an agreement for services for each program with the entity that provides funding for the program. These agreements contain provisions relating to accounting and auditing. Continued funding is obviously critical to the Employer continuing to operate each program.

[15] Each program is designed to be self-contained, in terms of its required staffing. Employees are hired for a full-time or part-time position within a specific program.⁹ This is the case even though there may be job responsibilities that are similar in positions in different programs (e.g., assisting clients with medication management). Employees, particularly part-time employees, may work in more than one program if they are trained to do so.

[16] The Employer has approximately 180 employees, exclusive of management (which comprises approximately 10 positions). Of these, fewer than 8 are trained to work in more than one program. The indigenous cultural liaison was identified as a position that serves all programs, but which primarily serves the HOMES program and reports to the HOMES Supervisor.

[17] An employee working in one program may have contact with an employee working in another program during a shift. For example, employees working night shifts in different programs may check in with each other, and employees from different programs may participate in various committees, such as the truth and reconciliation and trauma-informed care committees.

[18] Training for specific programs is heavily reliant on job shadowing. Programs may have occupational health and safety risks which are more prevalent in their particular working environments. For example, alcohol and illicit drugs cannot be consumed in clients' suites at McEwen Manor, but HOMES program clients can consume same wherever they reside. Certain ongoing training is specific to a program (e.g., "housing first" training for the HOMES program), while some (e.g., mental health first aid) is applicable to all programs.

⁸ These are the Eaton Intensive program, the Oak program, McEwen Manor, PIPS and PALS.

⁹ The Employer filed two job descriptions as part of Exhibit E-5 which described positions serving both the Oak and PALS programs, in one instance, and the PIPS and Eaton Intensive programs, in the other. The employer also filed a job description as part of Exhibit E-3 which described a position serving the HOMES program and the CHIP program. The Board heard no evidence about the CHIP program, other than it no longer exists. All other job descriptions filed as part of Exhibits E-3, E-4 and E-5 were for positions in a single program.

[19] Employees are able to apply for jobs in different programs as vacancies arise, but they do so in the context of a competition for a job that is advertised both internally and externally. The Employer has posted approximately 15 to 20 job positions in the past year. Ms. Wignes-Paton is involved in hiring full-time employees. Direct supervisors are responsible for disciplining employees, if required.

[20] The HOMES program employs approximately 24 full-time and 24 part-time employees, amounting to approximately 25 per cent of the Employer's total workforce. The ABI program employs approximately 4 full-time and 15 part-time employees, amounting to approximately 10 per cent of the Employer's total workforce.

[21] Program supervisors schedule shifts for their respective programs. Employees are only able to see and (when applicable) bid on shifts within the program(s) in which they work. In rare circumstances, a manager may send out a general request to all staff requesting coverage for a particular shift. Ms. Guibault indicated that she would only respond to such a request if she was trained for the particular program. She indicated that this was based on her level of comfort but also her understanding of who the target audience was for such requests (i.e., only employees who had been trained in the program requiring coverage).

[22] The Employer's general administrative office is responsible for payroll and benefit administration for all programs. It is also responsible for trusteeship of clients' funds.

[23] The evidence with respect to the Union's organizing drive came from Ms. Nadon. Ms. Nadon has been a national servicing representative for the Union since 2011. She has been in a temporary organizing role since October of 2022. After commencing that role, she followed up on an inquiry the Union had received through its website about unionizing the Employer's workforce. Ms. Nadon met with an organizing committee consisting of some of the Employer's employees. Over the course of several meetings, they developed a strategy to reach out to all of the Employer's employees, with the objective being to apply for an "all employee" bargaining unit.

[24] The organizing committee obtained a list of all staff employed by the Employer and made use of this list for its organizing drive. The committee identified all non-managerial employees for the purposes of communicating with them. The list contained both personal and work email addresses. Ms. Nadon was responsible for sending emails on behalf of the committee. The committee also set up a website for the organizing drive, and its email and other communications to employees (e.g., leaflets) directed them to this site.

[25] The organizing drive occurred over December and January. Ms. Nadon sent two or three emails in December, with the first being sent in early December. Other members of the organizing committee were tasked with reaching out to employees in different ways (e.g., text messages, providing leaflets, having face-to-face discussions). On January 4th or 5th, Ms. Nadon sent an email advising of two information meetings the organizing committee was holding in mid-January. These meetings were held during the same work week (i.e., not on the weekend), with one being held earlier in the week and one later in the week, and one being held during the day and one in the evening. Ms. Nadon explained that this was to attempt to facilitate anyone interested in attending being able to do so.

[26] The turnout for the information meetings was relatively low, described by Ms. Nadon as being “around 10 or 11” people. Ms. Nadon stated that not everyone who attended supported unionization, and that the turnout included employees from programs other than the HOMES and ABI programs. Ms. Nadon stated that she sent several emails on behalf of the organizing committee after the information meetings.

[27] Ms. Nadon testified that it became clear to the organizing committee that the Union would not be able to obtain the support necessary (45%) to file an application for bargaining rights for an “all employee” bargaining unit. However, based on the support cards it was able to obtain, the Union had sufficient support in the HOMES and ABI programs to file an application with respect to those programs. The organizing committee therefore determined that such an application should be filed.

[28] Ms. Nadon was asked about her experience working with bargaining units which are not “all employee” units. She mentioned her labour relations experience in the education sector, which has included working with a school division where some schools were unionized and others were not, and where some classifications within a school were unionized and some were not. Ms. Nadon indicated that the Union and relevant employer were able to operate effectively in these environments.

Argument on behalf of the Union:

[29] The Union acknowledges that the onus is on it to establish, on a balance of probabilities, that the proposed bargaining unit is appropriate for collective bargaining. The Union highlights that it need not establish that the proposed unit is the most appropriate bargaining unit, that s. 6-

4 of *The Saskatchewan Employment Act* [Act]¹⁰ acknowledges employees' rights to join unions of their choosing and to collective bargain through them, and that employees' freedom of association is guaranteed by s. 2(d) of the *Charter*.

[30] The Union submits that it has not proposed an inappropriately under-inclusive bargaining unit. It acknowledges that the factors identified in *Sterling Newspapers*¹¹ remain relevant to assessing whether a bargaining unit is inappropriately under-inclusive, but submits that consideration of the factors does not suggest its proposed unit is inappropriate.

[31] The Union submits that there are clear boundaries separating employees working in the HOMES and ABI programs from the Employer's other employees. These include the locations at which the employees work,¹² how the programs are funded and staffed, their administrative structure within the Employer's organizational chart, the programs' specific intake requirements for clients, their specific objectives, and their particular training and working conditions.

[32] With respect to intermingling between bargaining unit employees and other employees, the Union notes that the hiring and shift scheduling of employees for the Employer's programs are on a program-specific basis. The Employer does not draw from a general labour pool of employees to disperse employees to different programs. Programs function very independently and have their own shift, team and staff meetings. The Union points to the small number of employees trained to work in more than one program, about 5% of the workforce, and submits that any employee transferring from one program to another effectively competes with any other internal and external applicants for a vacant position. On the basis of the foregoing, there is no problematic intermingling.

[33] The Union submits that the Board should have no reason to doubt the bargaining strength of the proposed unit, which would comprise approximately 66 employees (and nearly all staff working in the HOMES and ABI programs). Job action by the bargaining unit could exert pressure on the Employer, if necessary, subject to any requirements that might apply under Part VII (Essential Services) of the Act.

¹⁰ *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act], s 6-4.

¹¹ *GCIU, Local 75M v Sterling Newspapers Group*, 1998 CarswellSask 926 (SK LRB) [*Sterling Newspapers*].

¹² In this regard, the Union notes the Board delineated a bargaining unit based on the location where certain maintenance employees worked out of in *Canadian Union of Public Employees, Local 5004 v Saskatoon Housing Authority*, 2010 CanLII 42667 (SK LRB) [*Saskatoon Housing Authority*].

[34] Finally, the Union argues that it has applied for as broad a bargaining unit as it could, based on the support it was able to obtain. It submits that its organizing efforts were reasonable and extensive, and cautions against the Board imposing a specific standard which must be met for such efforts (e.g., a minimum number of emails). If the Union could have obtained the support to apply for an “all employee” bargaining unit, it would have.

Argument on behalf of the Employer:

[35] The Employer submits that the proposed bargaining unit is inappropriately under-inclusive, based on the factors from *Sterling Newspapers*. Amongst other cases, it relies heavily on the Board’s decision in *Turning Leaf*,¹³ and commends it to the Board as a persuasive precedent.¹⁴

[36] The Employer argues that there is no clear boundary separating employees in the proposed bargaining unit from its other employees, particularly because employees in all seven of the Employer’s programs provide many similar services for clients. Amongst others, these include assistance with medication management, attending appointments and developing skills for daily living.

[37] The Employer also notes that employees may be trained in more than one program to be able to work in multiple programs. This could impact the proposed bargaining unit’s ability to conduct effective job action. It likens its employees to those in *Centre of the Arts*,¹⁵ where the Board held that excluding employees of any of the seven departments from the bargaining unit would be essentially arbitrary.

[38] The Employer submits that its organizational structure is not suited to the proposed bargaining unit. It points to its administration department providing payroll and benefits as well as trusteeship services for all seven of its programs, and Ms. Wignes-Paton having overarching input into the hiring of full-time staff for any program.

[39] The Employer submits that there isn’t an effective physical or geographical boundary that will separate bargaining unit employees from non-bargaining unit employees. For example, employees from the ABI program work out of the same building, 1914 Halifax Street, as employees in programs which are proposed to be excluded from the bargaining unit.

¹³ *Canadian Union of Public Employees, Applicant v Turning Leaf Services Inc.*, 2017 CanLII 85455 (SK LRB) [*Turning Leaf*].

¹⁴ The Board has reviewed all of the authorities filed by the parties, though it has not referenced all of them in its reasons. It has referenced those which it considers the most relevant.

¹⁵ *SJBRWDSU v Saskatchewan Centre of the Arts*, LRB File No. 175-95, reasons for decision dated October 4, 1995 [*Centre of the Arts*].

[40] The Employer argues that there is significant intermingling of employees. It notes that 1914 Halifax Street contains clients from multiple programs (ABI program, Eaton Intensive program, PIPS and PALS) and that offices for staff for multiple programs (McEwen Manor, HOMES program, PALS, as well as the administration department) are located at 2035 Osler Street (in 2035A, 2035B and 2035C). The Employer points to some training being conducted in the boardroom at 2035 Osler Street that has application to/attendance by employees from all programs. It notes employees from all programs attend its annual general meeting and social events. It also notes that employees in different programs (e.g., HOMES program and Eaton Intensive program) have safety protocols involving each other (e.g, checking in with each other when working overnight).

[41] In addition to its concerns about intermingling and a lack of a clear boundary surrounding the proposed bargaining unit, the Employer submits that the Union made abbreviated and minimal organizing efforts in December 2022 and January 2023. It likens the Union’s efforts to those which were commented upon in *Turning Leaf* and *Centre of the Arts*.

[42] In oral argument, the Employer put the thrust of its submissions this way: (1) The proposed bargaining unit is arbitrary; and (2) the Board should not be satisfied that a more inclusive bargaining unit could not be organized.

Relevant Statutory Provisions:

[43] The following provisions of the Act are relevant:

Interpretation of Part

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

(a) *“bargaining unit” means:*

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

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

...

Right to form and join a union and to be a member of a union

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.*

...

Acquisition of bargaining rights

6-9(1) *A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.*

(2) *When applying pursuant to subsection (1), a union shall:*

(a) *establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and*

(b) *file with the board evidence of each employee's support that meets the prescribed requirements.*

...

Determination of bargaining unit

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; ...*

...

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

...

Representation vote

6-12(1) *Before issuing a certification order on an application made in accordance with section 6-9 or amending an existing certification order on an application made in accordance with section 6-10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.*

...

Certification order

6-13(1) *If, after a vote is taken in accordance with section 6-12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:*

(a) *certifying the union as the bargaining agent for that unit; ...*

...

(2) *If a union is certified as the bargaining agent for a bargaining unit:*

(a) the union has exclusive authority to engage in collective bargaining for the employees in the bargaining unit and to bind it by a collective agreement until the order certifying the union is cancelled; ...

Analysis and Decision:

[44] The Union bears the onus on this application. It must establish on the civil standard of proof (more likely than not) that its proposed bargaining unit is appropriate.

[45] The Union is not required to establish that its proposed bargaining unit is the *most* appropriate bargaining unit for engaging in collective bargaining with the Employer. However, it must establish that it is *an* appropriate unit for such purposes.¹⁶

[46] The Board has a general preference for larger, broadly-based units in workplaces because they tend to promote administrative efficiency and convenience in bargaining, enhance lateral mobility among employees, facilitate common terms and conditions of employment, eliminate jurisdictional disputes between bargaining units and promote industrial stability.¹⁷ However, the size of a unit is only one factor amongst many that the Board may consider when determining whether it is appropriate. Others include whether the proposed unit of employees will be able to carry on a viable collective bargaining relationship with the employer, the community of interest shared by the employees in the proposed unit, organizational difficulties in particular industries, the promotion of industrial stability, the wishes or agreement of the parties, the organizational structure of the employer and the effect that the proposed unit will have upon the employer's operations, and the historical patterns of organization in the industry.¹⁸

[47] In considering whether a proposed unit is appropriate, the Board is mindful of s. 6-4 of the Act, which acknowledges employees' rights to engage in collective bargaining through a union of their own choosing. It is also mindful of employees' rights under s. 2(d) of the *Charter* to engage in meaningful collective bargaining.¹⁹ A proposed unit that will not permit employees to engage in meaningful collective bargaining will not be appropriate.

[48] Here, the parties agree, as does the Board, that an "all employee" unit would be an appropriate bargaining unit. On this basis, there is no dispute that employees in the smaller

¹⁶ *North Battleford Community Safety Officers Police Association v City of North Battleford*, 2017 CanLII 68783 (SK LRB) [*North Battleford Community Safety Officers*], at para 55.

¹⁷ *North Battleford Community Safety Officers*, at para 56, quoting from *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v O.K. Economy Stores (A Division of Westfair Foods Ltd.)*, [1990] Fall Sask Labour Rep 64 at p 66, 1990 CarswellSask 688, at paras 12-13 [*O.K. Economy*].

¹⁸ *O.K. Economy*, at para 13.

¹⁹ *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3.

proposed bargaining unit share a community of interest with each other. The parties have framed their positions and arguments around the issue of whether the proposed bargaining unit is inappropriately under-inclusive, in light of the considerations noted in *Sterling Newspapers*. The Board has found this appropriate and helpful.

[49] *Sterling Newspapers* is a 1998 decision of the Board. In it, the panel's majority determined that a small bargaining unit of employees who worked in the Regina Leader Post's printing department (22 out of the business' 370 employees)²⁰ was appropriate. The dissenting member suggested this rewarded "what appear[ed] to be the insufficient organizing efforts of the applicant",²¹ and expressed concern that empowering those in the printing department to withdraw their services in the pursuit of collective bargaining goals "expose[d] the majority of employees to the tyranny of a small minority."²² The majority acknowledged the competing interests of employees' rights to organize and the promotion of industrial stability through stable collective bargaining structures.²³ After canvassing previous Board jurisprudence, it summarized circumstances in which the Board had found under-inclusive (i.e., not "all employee") bargaining units to be inappropriate:

34 From this review of cases, it would appear to the Board that under-inclusive bargaining units will not be considered to be appropriate in the following circumstances:

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

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

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

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

(5) there exists a more inclusive choice of bargaining units.²⁴

[50] The majority then concluded that no such circumstances existed with respect to the printing department employees:

35 Overall, the Board is satisfied in this application that the press room employees are a sufficiently skilled and discrete craft group to justify their separate certification. There is no

²⁰ *Sterling Newspapers*, at para 46.

²¹ *Sterling Newspapers*, at para 47.

²² *Sterling Newspapers*, at para 47.

²³ *Sterling Newspapers*, at para 26.

²⁴ *Sterling Newspapers*, at para 34.

evidence that the press room employees are regularly interchanged with employees in other departments. They obviously have a sufficient ability to bring the work of the newspaper to a halt and possess sufficient bargaining power to render them a viable collective bargaining unit. In addition, there is recent history establishing the difficulty of organizing on a more inclusive basis and a past history of lack of success in organizing in this sector in Saskatchewan. Finally, there is no existing bargaining unit that would be more suitable for the employees in question. For these reasons, and the reasons stated above, although the unit proposed is not the most appropriate bargaining unit, the Board is convinced that the proposed unit is, nevertheless, appropriate for collective bargaining.²⁵

[51] More recently, in *Saskatoon Housing Authority*, the Board described the considerations listed at paragraph 34 of *Sterling Newspapers* as neither exhaustive nor definitive, but as a helpful lens through which to view the appropriateness of an under-inclusive bargaining unit.²⁶ It also noted that a rational and defensible boundary around a proposed bargaining unit can be based on a discrete skill, but that it can also be based on other circumstances.²⁷ In *Saskatoon Housing Authority*, the Board concluded that where the employees in the proposed bargaining unit worked out of (they were dispatched from a maintenance shop) provided a sufficiently rational and defensible boundary.²⁸

[52] Perhaps unsurprisingly, the *Sterling Newspapers* considerations address factors which the Board considers relevant in any application for bargaining rights. For example, whether there is a realistic ability to organize a larger unit reflects the Board's general preference for larger units while recognizing organizational difficulties which may exist. A lack of bargaining strength in the proposed unit will affect its ability to carry on a viable collective bargaining relationship. A lack of a rational and defensible boundary around the proposed unit (whether based on the employees' discrete skills or other circumstances) will take into account the employer's organizational structure and potential effects on its operations. Significant intermingling with employees outside of the proposed unit may affect the unit's ability to conduct effective job action.

[53] The parties agree that the fifth consideration from *Sterling Newspapers* is inapplicable because there is no existing certified bargaining unit, but that the first four considerations are relevant. The Board agrees with the parties, and will conduct its analysis accordingly.

[54] The first consideration is whether employees in the proposed bargaining unit have a discrete skill or other rational and defensible boundary separating them from employees outside the unit.

²⁵ *Sterling Newspapers*, at para 35.

²⁶ *Saskatoon Housing Authority*, at para 31.

²⁷ *Saskatoon Housing Authority*, at para 33.

²⁸ *Saskatoon Housing Authority*, at paras 15 and 33.

[55] The Employer highlights that similar general support services are offered by employees in different programs. This submission is made in support of its argument that the proposed bargaining unit does not contain employees with discrete skills. It suggests the circumstances are analogous to those in *Turning Leaf*, which involved a charitable non-profit organization that provided crisis and treatment services to intellectually challenged individuals.

[56] In *Turning Leaf*, the organization was funded by the Ministry of Social Services and served clients in two streams, a facility-based stream (residential support) and a community-based stream (community support), with both streams offered in both Regina and Moose Jaw. The bargaining unit sought included only community support workers in Regina. The Board concluded that the only difference in the duties of workers in the two streams was where they assisted clients, and possibly the level of assistance provided to clients in the different streams.²⁹ No special skills distinguished community support workers from residential support workers, and there was no impediment to workers in one stream routinely working in the other, which in fact occurred.³⁰

[57] The Union distinguishes *Turning Leaf* on the basis that employees in the HOMES and ABI programs have distinct training to work in their respective programs, which is different from the training in the Employer's other programs. One example is the "housing first" training which must be completed by HOMES program employees to work in the program. The Union notes the Employer's acknowledgment that its programs are designed to be self-contained, in terms of staffing, and that employees are not expected to pick up a shift in the HOMES program or ABI program without having been trained in the respective program. Employees are hired into a specific program which has (a) specific funding source(s) and specific criteria for admission of clients. The Employer's organizational chart recognizes the distinctiveness of the HOMES and ABI programs, with each reporting up separately from the Employer's other programs. There is also physical separation, generally, between where HOMES program and ABI program employees work, and where other employees work.

[58] On balance, the Board concludes that there is a rational and defensible boundary between the proposed bargaining unit and other employees based on:

- (1) the training and skills required to work in the programs within the proposed bargaining unit;

²⁹ *Turning Leaf*, at para 31.

³⁰ *Turning Leaf*, at paras 32-33.

(2) the funding sources for the programs in the bargaining unit, which are independent from those for other programs and which have their own accounting and auditing requirements;³¹

(3) the working conditions for employees in the bargaining unit, including those arising from the types of clients enrolled in the particular programs³² and where the work occurs;³³

(4) the reporting structure in the Employer's organizational chart, which has clear and distinct reporting for each of the HOMES and ABI programs, separate and apart from the other programs. The Board notes that the Employer's organizational chart³⁴ shows certain programs having a common supervisor prior to reporting up to a director level position.³⁵ This is not the case for the HOMES and ABI programs.

[59] The second consideration is whether there is a significant intermingling between employees within the proposed bargaining unit and those outside of it.

[60] In *Turning Leaf*, the Board noted the evidence did not establish a large degree of intermingling between staff in the residential support and community support streams in Regina, but it expressed concern about employees' ability to take on different job opportunities if workers in the latter stream were unionized and those in the former were not.³⁶

[61] *Centre of the Arts* is a case which predated *Sterling Newspapers* and which was referred to therein, in which the Board expressed similar but greater concerns about the effects of intermingling on the appropriateness of the proposed unit:

In this case, we have concluded that any line drawn on the basis proposed by the Union would be essentially arbitrary. Though the departmental divisions have been made for certain purposes, the employees in the seven departments really constitute a pool of casual labour which is used without strict regard to these divisions. The inclusion of some of the departments and the exclusion of others could only, in our opinion, have a negative effect on the employees in terms of their ability to obtain more hours by working across departments, and create anomalies in terms and conditions as the cumulative impact of

³¹ This impacts how the programs are staffed, with both the HOMES and ABI programs each designed to be self-contained, in terms of their staffing requirements.

³² Recall that clients for the HOMES and ABI programs are admitted based on different criteria than those for the Employer's other five programs, which require a diagnosed mental illness for admittance.

³³ Both the HOMES and ABI programs have dedicated facility space.

³⁴ Exhibit E-2.

³⁵ E.g., PALS & OAK Supervisor for the PALS and Oak programs reporting to the Director of Program Development; Intensive Mental Health/Nurse Supervisor reporting to the Director of Staff Development, seemingly for the Eaton Intensive and PIPS programs.

³⁶ *Turning Leaf*, at para 36.

*distinctions between those represented by the Union and those without representation began to make itself felt.*³⁷

[62] The Employer asserts that the circumstances before the Board are analogous to those in *Centre of the Arts* and that certification of the proposed bargaining unit could adversely impact employees' mobility and the Employer's operations.

[63] The Union's position is that the circumstances are easily distinguishable from those in *Centre of the Arts*. The Employer does not draw from a pool of casual labour which is used without strict regard for administrative divisions. Hiring, training and scheduling are program-specific. Very few employees are trained to work in more than one program. There are no "transfers", insofar as that term could connote something less than competing against all comers (internal and external) for a posted job vacancy in a particular program.

[64] On balance, intermingling does not appear to be problematic for the proposed bargaining unit. It is not clear to the Board how the Employer's operations would be adversely affected if the HOMES and ABI programs were unionized while the others remained out-of-scope. While bargaining unit work may not be able to be carried out by out-of-scope employees, this does not mean that the Employer's procedures involving in-scope and out-of-scope programs would be more arduous (e.g., overnight shift check in, cooperation on committees, coordination of applicable training amongst multiple programs). For employees, unionization would impose an additional requirement on those wanting to work in the in-scope programs, but this occurs in all unionized workplaces.

[65] The third consideration is whether the proposed bargaining unit will have sufficient bargaining strength. The parties did not focus much of their written arguments on this consideration. During oral argument, the Board raised whether it should have any concerns about the Employer back-filling bargaining unit work with employees from other programs in the event of a strike. The Union pointed to the specific training required for the HOMES and ABI programs being an obstacle to this occurring, but indicated that Part VII (Essential Services) might apply in the event of a strike. The Employer - without conceding the point - agreed that Part VII might be argued to apply bargaining unit work.

³⁷ *Centre of the Arts*, p 10.

[66] Overall, the Board is not concerned about a lack of bargaining strength in the proposed bargaining unit. It includes nearly all of those who work in the HOMES and ABI programs,³⁸ amounting to about a third of the Employer's entire workforce.

[67] The fourth consideration from *Sterling Newspapers* is whether there is a realistic ability on the part of the Union to organize a more inclusive unit.

[68] The Employer characterizes the Union's organizing efforts as abbreviated and minimal, and submits that the Union has provided "thin" evidence with respect to them. It suggests further and greater efforts could have been taken to organize an "all employee" unit (without specifying what those should have been), and that the Union has arbitrarily excluded employees who share a community of interest with the proposed bargaining unit. The Employer suggests that the organizing efforts in this case are analogous to those described (with disapproval) in *Turning Leaf* and *Centre of the Arts*.

[69] The Union characterizes its organizing efforts as a reasonable and extensive approach in trying to organize an "all employee" unit. It was unable to muster the support necessary to apply for such a unit (being 45 per cent of the proposed unit, per s. 6-9(2)(a) of the Act), so it applied for a unit comprising the HOMES and ABI programs because it had sufficient support from those programs to do so.

[70] In the Board's view, the Union's organizing efforts are not analogous to those described in *Turning Leaf* or *Centre of the Arts*.

[71] In *Turning Leaf*, the Board heard no evidence about any attempt to organize an "all employee" unit:

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

[43] Generally, the Board will take note of any efforts made to organize a more inclusive unit, recognizing that often such efforts will present difficulties. However, in this case nothing appears to have been done in that respect.³⁹

³⁸ Certain managerial positions are specifically excluded (e.g., Manager of Homelessness Initiatives, Homes Supervisor, ABI Coordinator).

³⁹ *Turning Leaf*, at paras 42-43.

[72] In *Centre of the Arts*, the organizing campaign concentrated on four of seven departments:

*A trade union always faces difficulties in trying to organize large numbers of casual employees, and one must give credit to the Union for the efforts they have made in this case. It is hard to see, however, why it would be more difficult to organize one section of a pool of casual employees than another. The Union conceded that they had a similar amount of information about the employees in all seven departments, and could give no convincing explanation of why they chose to concentrate their efforts in four of the departments and to leave the other three.*⁴⁰

[73] Here, the Board accepts that the Union made a bona fide effort to organize an “all employee” unit. The Employer has not suggested anything that should have been done differently, other than more, and the Board has no evidence before it to suggest that anything should have been done differently that could have affected the level of support the Union was able to obtain. Whether to join or support a union is a personal choice and employees, for entirely legitimate reasons, may decline to do so regardless of the most determined organizing efforts.

[74] Consequently, the Board declines to find the proposed bargaining unit inappropriate on the basis of the Union’s organizing efforts.

[75] Based on all of the foregoing, the Board concludes that the proposed bargaining unit is appropriate.

[76] The parties disagree on how the proposed bargaining unit should be described.

[77] More particularly, the Employer submits that the Union’s description should include additional wording excluding “all other managers and those above the rank of manager, and those employees employed in a confidential capacity pursuant to section 6-1(1)(h)(i)(B) of *The Saskatchewan Employment Act*.” The Employer notes that it and the Union requested such language in a joint amendment application involving a senior living complex in LRB File No. 204-22, and that the Board issued an order reflecting this language.⁴¹ The original certification order for the complex contained similar language, apparently at the Employer’s request and without objection from the Union, based on the Board’s review of the file.⁴²

[78] The Employer submits that its additional wording simply restates who is excluded by law under the Act, which is a benefit to parties reading the certification order.

⁴⁰ *Centre of the Arts*, p 10.

⁴¹ *Brightwater Senior Living Capital Crossing v Canadian Union of Public Employees*, order issued January 10, 2023.

⁴² LRB File No. 058-22.

[79] The Union opposes the additional wording suggested by the Employer and submits that the example cited by the Employer is not indicative of common practice (though it did not object to the language in that case). It suggests that the Board should examine other certification orders involving the Union, for confirmation.

[80] The Board does not consider the Employer's additional wording to be necessary. If the purpose is simply to identify that individuals who are subject to the managerial or confidentiality exclusions must be out-of-scope, this is accomplished by the bargaining unit only containing employees, who pursuant to the definition of "employee" in s. 6-1(1)(h) cannot be subject to either the managerial or confidentiality exclusions. The parties will need to agree upon which individuals are subject to these exclusions; if they cannot, they can apply to the Board for any required determination(s).

[81] Accordingly, pursuant to s. 6-11 the Board determines that the following is an appropriate bargaining unit:

All employees of Phoenix Residential Society working in the Phoenix HOMES Program and ABI Program located in Regina, Saskatchewan, except the Executive Director, Director of Program Development, Director of Staff Development, Manager of Homelessness Initiatives, HOMES Supervisor and ABI Program Coordinator.

[82] The Board's agent is directed to tabulate the vote in accordance with s. 27 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021*, to place the results of the vote in Form 24, and to provide that form to a panel of the Board for its review and consideration.

[83] This is a unanimous decision of the Board. An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this **10th** day of **August, 2023**.

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson