Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0126-20-U**

Family Options Inc., Applicant v Service Employees International Union, Local 1 Canada, Kathy Gingras, Landis Saunders, Kylie McWilliams and Angela Tarrant-Kennedy, Responding Parties

OLRB Case No: **0171-20-U**

Service Employees International Union, Local 1 Canada, Applicant v **Family Options Inc.**, Responding Party

Appearances: Meg Atkinson, Patrick Enright, Richard Saladziak, Tali Zrehen, Landis Saunders, Kylie McWilliam, Katherine Gingras, Angela Tarrant-Kennedy appearing for the Service Employees International Union, Local 1 Canada and the individual responding parties; Carla Black, Daina Search, Megan Fenyves, Lori McIntyre, Alex Keung and Lynda Parsons appearing for Family Options Inc.

BEFORE: Adam Beatty, Vice-Chair

DECISION OF THE BOARD: June 3, 2020

1. Board File No. 0126-20-U is an application regarding an unlawful strike pursuant to section 100 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, (the "Act") (the "unlawful strike application"). Family Options Inc. ("Family Options") is the applicant in the unlawful strike application.

2. Family Options is a service agency that provides services and supports to adults with intellectual and physical disabilities. It operates a number of residential care and support programs across Ontario, including the Grey Owl facility located in Elmira, Ontario (the "Grey Owl facility").

3. The Service Employees International Union, Local 1 Canada, (the "SEIU") is a responding party. Mses. Saunders, Gingras McWilliam and Tarrant-Kennedy are also named as individual responding parties in the unlawful strike application ("the individual responding parties").

4. Three of the individual responding parties worked full time (Mses. Saunders, Gingras and Tarrant-Kennedy). The fourth, Ms. McWilliam, was a casual employee.

5. Board File 0171-20-U is an application regarding an unlawful lock-out pursuant to section 101 of the Act (the "unlawful lock-out application"). The SEIU is the applicant in this matter and Family Options is the responding party.

6. Family Options and the SEIU are parties to a collective agreement. That collective agreement expired on March 31, 2020 but continues to be in effect. The parties have not yet met to bargain a new collective agreement due to the Covid-19 pandemic.

7. By way of decision dated May 20, 2020, I determined that this matter would proceed by way of consultation. In that decision I advised the parties that they could proceed based on documents provided to the Board but that *viva voce* evidence would not be necessary.

Summary of Matters in Dispute and Position of Parties

8. The material background facts to these applications are not particularly in dispute. What to make of those facts is. At its core, these applications stem from Family Options' decision to implement a new work schedule. Specifically, Family Options alleges in its application that the SEIU and the individual responding parties' responses to the implementation of a new 12-hour shift schedule amounted to an unlawful strike. Conversely, the SEIU alleges that Family Options' implementation of a new 12-hour shift schedule, and its subsequent actions, constituted an unlawful lock-out.

9. For the reasons set out below, I have concluded, based on the material before me that the individual responding parties engaged in an unlawful strike when they refused to work the hours they were scheduled to work. I have also concluded that Family Options did not engage in an unlawful lock-out.

10. The actions of the parties, and the positions they took in their applications and in their submissions must be viewed against the backdrop of the Covid-19 pandemic. As set out above, the Grey Owl facility is a residential facility that provides supports and services to adults with significant physical and intellectual challenges. The individuals living at the Grey Owl facility are extremely vulnerable, both in general and specifically with reference to Covid-19, and require constant care and supervision.

11. In its application, subsequent submissions, and at the consultation, Family Options emphasized that the changes it made to the schedule were made in response to the Covid-19 pandemic. Specifically, Family Options indicated that as part of its effort to protect the residents and staff of the Grey Owl facility from potential exposure to Covid-19, it sought to reduce the number, and frequency, of people entering and departing the facility. One part of that effort was the schedule change. It should be noted that the schedule change applied to all of Family Options operations, not just the Grey Owl facility.

12. Not surprisingly, the SEIU did not accept the *bona fides* of Family Options' assertion. Rather, according the SEIU, Family Options was taking advantage of the Covid-19 pandemic to attempt to undermine the Union and its relationship with its members by locking out the bargaining unit members and replacing them with temporary service agency employees.

13. These competing perspectives will be addressed in greater detail below. I raise them here simply to highlight the centrality of the Covid-19 pandemic to subsequent events relevant to these applications.

Board's approach to unlawful strikes

14. The Act defines a strike at section 1 as follows:

> "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert, or in accordance with a common understanding, or a slow-down, or other concerted activity on the part of employees designed to restrict or limit output

15. In *Canadian Waste Services Inc. v. I.U.O.E., Local 115*, 2001 CarswellBC 3392 Arbitrator Glass commented on different aspects of

the definition of a strike in the *Labour Relations Code* then in force in British Columbia. Arbitrator Glass' comments have subsequently been endorsed by the Board (see of example *Unilux Boiler Corp. and Unilux V.F.C. Corp.*, 2005 CanLII 20765 (ON LRB)) where the Board noted that it agreed with the following passage from Arbitrator Glass:

> … The next qualifying words are: "in combination or in concert or in accordance with a common understanding". The words "in combination" or "in concert" carry with them the idea of a positive joint action, in ceasing to work. … What of a "common understanding"? … I believe that this phrase should be read in the context of the previous words "in combination or in concert". All of these qualify the act of jointly stopping work. … "Common understanding" refers to the formation and implementation of a joint purpose, namely to stop work.

16. For the reasons set out below, I have no hesitation in concluding that the individual responding parties engaged in an unlawful strike.

Facts relevant to unlawful strike

17. As mentioned, all of the relevant facts need to be viewed within the context of the Covid-19 pandemic. Against that backdrop, below is a summary of the relevant background facts. The summary below is based on documents provided by the parties and, where appropriate, the parties' submissions.

18. In the lead up to the events at issue, Family Options had seen a reduction of between 35 – 40 per cent of its workforce. The Board heard that in this sector it is common for employees to work for more than one service agency. As part of its efforts to protect the residents and employees of the Grey Owl facility (or other facilities), and to limit the spread of Covid-19, Family Options had directed all of its employees to limit their employment to one place of employment. At least partially as a result of this directive, Family Options had seen a significant decrease in the number of employees available for shifts.

19. The first time Family Options raised the idea of implementing a 12-hour schedule as part of its response to the Covid-19 pandemic was in a March 19, 2020 email from Ms. Lynda Parsons, the CEO of Family Options, responding to Ms. Lori McIntyre, the Executive Director of Family Options. Ms. Parsons' email is part of a back and

forth conversation regarding certain challenges being faced by Family Options as a result of the Covid-19 pandemic. In her email, Ms. Parsons states that Family Options should move to an "extended schedule" with "10-12 hour shifts" in order to "eliminate [the] amount of people in and out" of the Grey Owl facility.

20. The next time the issue of a new schedule was raised, again according to the documents provided to the Board, was in a March 23 email from Ms. Parsons to Ms. McIntyre (and possibly others). In that email Ms. Parsons states that Family Options needs to move to a rotating schedule because it would be "more predictable and easier to fill spots". Neither the March 19, nor the March 23 emails were distributed to any of the individual responding parties prior to the hearing in these matters.

21. On April 17, 2020, the new schedule was distributed to the employees at the Grey Owl facilities. Family Options advised that in the weeks prior to April 17th, it had contacted all of its employees to advise them of the impending changes to the schedule. The SEIU and the individual responding parties dispute that claim. The SEIU and the individual responding parties claim that they were not advised of the new schedule until April 17, 2020. The parties agree the new schedule was set to take effect as of April 26, 2020.

22. The new schedule marked a significant departure from previous schedules. Previously, Family Options regularly set work schedules two months in advance. Over time, and in light of the specific needs or limitations faced by the individual responding parties, the schedule had developed within certain parameters in order to minimize (if not eliminate) any conflicts with those needs or limitations. The specific parameters are not particularly significant. It is sufficient to note that the previous schedule made allowances for the personal circumstances of the individual responding parties. The new schedule did not.

23. The individual responding parties all responded to the new schedule on the same day. They all indicated that they could not agree to the new schedule. They also each gave different, compelling, personal reasons why they could not work the new schedule. The three full-time individual responding parties all stated that they would work their shifts up to and including April 25th, the day before the new schedule took effect.

24. Also on April 17, 2020, the Union filed a policy grievance challenging the implementation of the new schedule by Family Options. At the time, the SEIU did not know the circumstances of the individual responding parties.

25. Between April 20 and 22, 2020, Family Options appears to have made a number of efforts to contact the staff at the Grey Owl facility to confirm their schedules. Emails and phone calls appear to have gone largely unanswered. One staff member responded to Ms. Rose Doyle, the team lead (and a member of management) by way of text message indicating that the staff at the Grey Owl facility had filed a group grievance and that they didn't want Ms. Doyle to be in the middle.

26. On April 20, 2020, Ms. Gingras reached out to Mr. Elvis Idiakeua the Union steward for the Grey Owl facility. This in turn lead to Ms. Gingras contacting Mr. Saladziak, the SEIU representative, by way of email dated April 22, 2020. This was the first time Mr. Saladziak was contacted by any of the individual responding parties with respect to the new schedule at the Grey Owl facility. In her email, Ms. Gingras indicated that, along with her co-workers, she wanted to file a group grievance with respect to the new schedule. In the April 22, 2020 email, Ms. Gingras also stated the following: "We have all rejected the new schedule as they did not ask any of us our availability". It was during this correspondence that the SEIU first learned of the circumstances of the individual responding parties.

27. The Board was also provided with a series of text messages from a "group chat" between the individual responding parties. The first text message provided to the Board is undated. It appears to have been written by Ms. Gingras. She advises the other individual responding parties that she is waiting to hear back from the Union with respect to her grievances around the new schedule. She also wrote: "I added that we all declined the new schedule. If any of you can work with schedule they have provided do what you have to do".

28. On April 22, 2020, Ms. Gingras texted the other individual responding parties with an update with respect to her communication with the Associate Director of Services, Ms. Megan Fenyves and with the SEIU. In her April 22nd text, Ms. Gingras wrote: "I have forwarded all the emails to and from Megan [Fenyves] to Elvis [Idiakeua] our rep. I also forwarded the email where we all declined the new schedule". Later in that email, referring to a conversation with Mr. Idiakeua, Ms. Gingras states that Mr. Idiakeua "agreed we should continue to work

but the schedule we confirmed not the mandated one. That way we are not abandoning the clients or striking".

29. I am satisfied that the individual responding parties' conduct between April 20 – 22 shows that they had come to a decision, either in combination or in concert, and in accordance with a common understanding, to cease working as of April 26, 2020 when the new schedule took effect. This concerted decision is reflected in the emails and texts messages the individual responding parties exchanged amongst themselves, with the SEIU and with Family Options.

30. The potentially concerted nature of their decision to reject the new schedule was also identified by the SEIU. On April 22, 2020, Mr. Saladziak emailed Ms. McIntyre asking for a date, as soon as possible, to hear the Union's policy grievance over the new schedule. In that email, Mr. Saladziak wrote the following: "Also the staff at Elmira [the Grey Owl facility] may not be adhering to these new hours of work and maintaining there [sic] previous hours".

31. According to the Union, Mr. Saladziak's email to Ms. McIntyre amounted to a good faith effort to advise Family Options about his concerns regarding the impact of the schedule change and an attempt to initiate a conversation about finding a solution. Family Options viewed his comments as endorsing the individual responding parties' proposed actions.

32. It appears to me that Mr. Saladziak's comment reveals that by April 22, 2020 he understood that the individual responding parties had reached a decision that they would not accept the new schedule and would not work the shifts they were assigned. It does not appear that he is endorsing this decision, and when viewed in light of his subsequent communication, such an interpretation does not withstand scrutiny.

33. Mr. Saladziak followed up with an email to Ms. Parsons, Ms. McIntyre, and others, shortly thereafter, indicating that the schedule change would make it difficult for the individual responding parties to work their new shifts. Mr. Saladziak asked Ms. Parsons to look into the matter and get back to him.

34. Later that day, Ms. Black, writing on behalf of Family Options, advised Mr. Saladziak that she had been informed that certain employees were refusing to work the new schedule and were not responding to phone calls about their schedule. In this email, Ms.

Black also noted that Mr. Saladziak appears to make reference to the work refusal in his email to Ms. McIntyre earlier that day. Ms. Black concluded her email by advising that Family Options reserved its right to file an unlawful strike application should the employees continue to refuse to work the new schedule.

35. After receiving a response from Mr. Saladziak disputing the allegations raised by Ms. Black in her April 22, 2020 email, Ms. Black responded by way of email dated April 23, 2020, stating that Family Options now had further confirmation that members of the bargaining unit were acting in concert by refusing the new work schedule. Ms. Black concluded by advising Mr. Saladziak that Family Options would be filing an unlawful strike application with the Board the next day unless she heard from him.

36. In a further email dated April 23, 2020, Ms. Black advised Ms. Zrehen, the Director of Home and Community Care Sector SEIU, Healthcare Local 1, Mr. Saladziak and others, that Family Options would be filling an unlawful strike application on April 24th unless the Union confirmed that they would tell their members that engaging in a concerted work refusal was unlawful, that they had to provide the employer with their availability and work their scheduled shifts, amongst other things. Finally, Ms. Black indicated that, as a result of the members' refusal to confirm their schedules, Family Options had engaged temporary employees to provide coverage at the Grey Owl facility starting April 26, 2020.

37. On April 24, 2020, writing on behalf of all of the "frontline staff" at the Grey Owl facility, Ms. Gingras wrote to Ms. Fenyves, advising that they had filed a group grievance "rejecting the new schedule". Ms. Gingras advised that "all the staff are prepared to work their original schedules". Ms. Gingras stated that they "were not striking or abandoning" their positions but that they would "continue to work to ensure our clients are supported and to allow this grievance to be acknowledged and resolved". Finally Ms. Gingras concluded that out of respect for Ms. Doyle, "we are giving as much notice as we are able too [sic] so necessary arrangements and adjustments can be made." The email is signed "The Grey Owl Team".

38. On April 24, 2020, Ms. Gingras also sent a text to the other individual responding parties. In that text Ms. Gingras wrote as follows: "Email sent be prepared everyone. Remember if you are approached and pushed about schedule redirect them to speak with union. If told not to report to work get the reason in writing and ask if

is a layoff or termination. Do no sign any paperwork they give you either if termination. Cross our fingers".

39. Later on April 24th, Ms. Tarrant-Kennedy responded to Ms. Gingras. She asked Ms. Gingras if they were "still not accepting phone calls"? Ms. Gingras told Ms. Tarrant-Kennedy that she could answer calls but that she should "follow direction stated above", in reference to the text message set out at paragraph 38 above.

40. The communication on April 24, 2020 is further confirmation of the concerted nature of the individual responding parties' conduct. The communication reveals a common intention to reject the new schedule. The email to Ms. Fenyves was sent on behalf of the "frontline staff". It revealed that they had all rejected the new schedule but that they would work their old schedules.

41. The text messages between the individual responding parties further reveal a common strategy with respect to the manner they would communicate with Family Options and what they would say.

42. Family Options filed an unlawful strike application with the Board on April 24, 2020, naming the SEIU as the responding party.

43. Following receipt of the unlawful strike application, Mr. Saladziak sent an email, dated April 24, 2020, to a number of individuals including the individual responding parties. In the email, Mr. Saladziak notes that the SEIU cannot support a work refusal unless there are lawful reasons outside the collective agreement. Mr. Saladziak also indicates that he has been provided with an email written by Ms. Gingras suggesting that the individual responding parties were refusing to work the shifts in the new schedule until the grievance over the new schedule was resolved. Mr. Saladziak advises the individual responding parties that refusing to work a scheduled shift without a lawful reason is not permitted under the Act and that they could be disciplined for doing so. Finally, Mr. Saladziak states: "SEIU cannot support your action with respect to a work refusal. The Labour Relations Act precludes the Union from supporting a concerted work stoppage in the course of the collective agreement".

44. Shortly after Mr. Saladziak's email, Ms. Gingras texted the other individual responding parties. In that text she noted that the Union had advised they would support its members if any of them were disciplined or terminated as a result of their decision to only agree to work their original schedule.

45. On April 25th, Ms. Gingras again texted the other individual responding parties. In that text she wrote that if they didn't hear from the Union or management "everyone" would have "to decide if they are going to work their original schedule and keep coming to work until they tell us to leave". In that text, Ms. Gingras reminds the other individual responding parties that "we said we were not striking or abandoning our posts".

46. This text was followed up by a series of texts between the individual responding parties coordinating how they should advise the employer (again) of why they could not work the new schedule. The texts also discuss who these emails should be sent to.

47. At some point on April 25, all of the individual responding parties' schedules were removed from the scheduling app used by Family Options.

48. Later on April 25, 2020, the individual responding parties all emailed Ms. Fenyves (amongst others) reiterating the reasons why they were unable to work the new schedule. These emails effectively either repeated the reasons provided in their April 17 emails or expanded upon those reasons.

49. Ms. Gingras went to the Grey Owl facility the morning of April 26, 2020. On both the old and new schedules, Ms. Gingras had been scheduled to work beginning at 7 a.m. When Ms. Gingras arrived to work that shift, Ms. Doyle told her that her shift was being covered by a temporary service worker and that she should go home.

50. Later on April 26, 2020, Ms. Saunders went to the Grey Owl facility to work the shift she would have been scheduled to work under the old schedule. When she entered the facility she was greeted by Ms. Doyle who asked her why she was there before telling her she was not permitted on Family Options' property. Ms. Saunders then left.

51. On April 27, Ms. Tarrant-Kennedy reported for a shift that she was scheduled to work on the new schedule. She too was turned away when she arrived because her shift was being covered by a temporary agency worker. The same thing happened to Ms. McWilliam on April 28th. All shifts since April 26, 2020 have been performed by temporary agency workers.

52. On April 27th, Ms. Gingras texted again to the other responding parties. In the text, Ms. Gingras wrote that at this point she was "stepping back as go between with union and us. It is now individual so I have given your numbers to Richard [Saladziak] from SEIU". Ms. Saunders replied by thanking Ms. Gingras for getting them this far.

53. On April 28, Family Options filed an amended unlawful strike application naming the individual responding parties as responding parties ("the amended application"). In its submissions, the SEIU submitted that prior to filing the amended application Family Options had not put the individual responding parties on notice that their conduct amounted to an unlawful strike; had not clarified its expectations around attending scheduled shifts; and had not provided them with updated schedules or informed them that they would be removed from the schedule.

54. I do not agree with the SEIU's submissions. There can be no doubt that by no later than April 20 or 21, 2020, the individual responding parties knew that they were expected to work the new schedule. Similarly, by April 22nd the SEIU had been advised that Family Options considered the individual responding parties to be engaged in an unlawful strike. That message was conveyed to the individual responding parties by no later than April 24, 2020 when Mr. Saladziak emailed them directly.

55. As set out above, the material before the Board, particularly the emails sent by the individual responding parties and the text messages between them, clearly demonstrate that the individual responding parties were acting in concert, in accordance with a common understanding. They decided, as a group, to reject the new schedule in an effort to continue working the shifts they had previously been assigned under the old schedule.

56. Their protestations that they were not striking or that they wanted to continue to work do not help their case. The individual responding parties may not have believed that they were striking, however as this Board has held previously, an employee's belief about whether or not they are in fact striking is of little assistance to the Board in determining if an unlawful strike has occurred.

57. In addition, their claims that they wanted to continue working must be understood the specific context of this case. While I do not

doubt that the individual responding parties wanted to work, they were only willing to do so if it was on the terms of their previous schedule.

58. Finally, a note on the fact that each of the individual responding parties had a different reason for rejecting the new schedule. There is no doubt that each of the individuals at issue had deeply personal, significant, and unique reasons, for not working the new schedule. However, the fact that they had individual reasons does not undermine the conclusion that they acted in concert or in accordance with a common understanding. At its core, the individual responding parties concluded, in concert, and in accordance with a common understanding, that their own unique circumstances justified their joint decision to not work. In so doing, once they ceased working the shifts they were assigned, they engaged in an unlawful strike.

59. Their conclusion, in accordance with a common understanding, is sufficient to distinguish this case from some of the cases relied upon by the Union including *Unilux Boiler Corp. (supra)*. Moreover, this is not a case where it can be concluded that the work refusal by the individual responding parties was "coincidental, as opposed to concerted". To the contrary, and as set out in *Nelson Crushed Stone v. C.L.G.W., Local 494*, [1978] O.L.R.B. Rep. 713, in this case there is sufficient evidence for the Board to draw the inference that the individual responding parties acted together and not simply as individuals.

60. As of April 17, 2020 the individual responding parties had been provided with their new schedules. They knew when they were expected to work. They chose not to and advised Family Options that they would not do so.

61. The SEIU argued that the individual responding parties never ceased working because they were taken off the schedule on April 25th, the day before the new schedule took effect. As such they could not have engaged in an unlawful strike.

62. I do not agree. The applicants indicated, repeatedly, in words and then in conduct, that they did not intend to work their new schedules. In so doing they refused to continue to work. In the circumstances, Family Options was not required to wait until the first shift of the new schedule had come and gone before making alternate arrangements. The decision to remove the individual responding parties from the schedule the day before the new schedule was to take

effect does not have the effect of vitiating all of the individual responding parties' conduct that preceded that decision.

63. Finally, there is insufficient material before the Board to support such the conclusion that the Union supported, encouraged, or otherwise endorsed the unlawful strike in violation of section 81 of the Act. Certainly, Ms. Gingras indicated that Mr. Idiakeua, the SEIU steward for the Grey Owl facility, told her that the individual responding parties should only work their old schedules. However, the Board was not provided with any documents that supported that assertion.

64. More importantly, on April 24, 2020, Mr. Saladziak sent the individual responding parties a clearly worded email advising that the Union could not support an unlawful work stoppage. This email was sent to the individual responding parties only two days after first being contacted by the individual responding parties and only one day after being advised by Family Options that it would be filing an unlawful strike application unless the SEIU took specific actions. I am satisfied that up until April 24, 2020, Mr. Saladziak was still learning about the circumstances of the individual responding parties. In the circumstances, given the uncertainty and the speed at which events were unfolding, the passage of time between learning of the events at issue and the SEIU's April 24 email to the individual responding parties was not unreasonable.

65. I also do not accept the submissions of Family Options that Mr. Saladziak's text to Ms. Gingras on April 24th, where he indicated that the Union would support its members, amounts to support of the unlawful strike. Mr. Saladziak's text is in response to a specific question. Ms. Gingras asked if, despite the fact that she understood the Union could not support the individual responding parties' efforts to work their old schedules, whether it would support them in the event they were terminated or otherwise disciplined. It is in response to this specific question that Mr. Saladziak indicated that the SEIU would support them.

66. The SEIU argued that in the event I determined that an unlawful strike had taken place I should not issue a declaration to that effect. The SEIU noted that the Board does not generally grant a declaration where the unlawful strike is over.

67. While I agree with the general principles relied upon by the SEIU, I am not convinced they apply in the circumstances. In

particular, as the Board noted in *Ontario (Management Board of Cabinet) v. O.P.S.E.U.*, [2002] O.L.R.D. No. 921 there has been no settlement here. The dispute between the parties with respect to the propriety of the new schedule, and (as detailed further below) the removal of the individual responding parties from the schedule remains unresolved.

68. Family Options argued that this case falls within one of the recognized exceptions to the Board's practice of refusing to issue a declaration or any ancillary relief where the unlawful strike has come to end. Specifically, Family Options argues that where, as is the case here, the unlawful strike has implications extending beyond the immediate parties, the Board will make a declaration of illegality or issue a direction.

69. In *Ontario (Management Board of Cabinet), supra,* the Board found there was a public interest in ensuring the service of the attendants at a maximum security mental health hospital continued without interruption. While (obviously) factually distinct, I am satisfied that there is also a public interest in the unique circumstances of this case. Specifically, there is a public interest in ensuring that the service of health care providers continues uninterruptedly at group homes during the Covid-19 pandemic. As such the Board hereby:

1. Declares that the individual responding parties have engaged in an unlawful strike;
2. Orders the individual responding parties to cease and desist their unlawful strike activity;
3. Directs the SEIU to post copies of this decision in prominent places at the Grey Owl facility; and
4. Directs the SEIU to provide a copy of this decision to the members of the bargaining unit.

The unlawful lock-out application

70. On April 29, the SEIU filed the unlawful lock-out application. It also filed a policy grievance, as well as individual grievances on behalf of the individual responding parties.

71. Unlawful lock-outs are defined as follows in the Act:

> "lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an

> employer to continue to employ a number of employees, with a view to compel or induce the employees, or to aid another employer to compel or induce that employer's employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union or the employees.

72. The Board has held, repeatedly, that the definition of a lock-out contains an objective and a subjective element. The objective element requires a suspension of work or a refusal by an employer to continue to employ a number of employees.

73. For the reasons set out below I am satisfied that the SEIU has established that the first element of a lock-out is present. On April 25th, Family Options removed the individual responding parties from the schedule. The shifts that the individual responding parties would have worked have been assigned to temporary agency employees.

74. Family Options argued that there had not been a refusal to continue to employ the individual responding parties. It noted that it continued to operate all of its residences, and that it had offered all of the individual responding parties the opportunity to work. It was their decision, not Family Options, that resulted in the shifts being worked by temporary agency employees.

75. I do not agree with the submissions of Family Options on this point. Since April 25th, Family Options has refused to continue to employ the individual responding parties, despite the fact that, following their removal from the schedule, they have all indicated, to varying degrees, an ability to work some portions of the new schedule. Family Options has not allowed them to do so and, despite making minor changes to the new schedule, has taken an "all or nothing" attitude in response. Their "all or nothing" response has resulted in Family Options' ongoing refusal to continue to employ the individual responding parties.

76. When advised, most recently, by the individual responding parties that they could not work the schedules proposed by Family Options, Family Options responded by advising that they would be placed on a leave of absence. The decisions, first to remove the individual responding parties from the schedule and replace them with temporary agency employees and then to place the individual

responding parties on a leave of absence, satisfies the first portion of the definition of a lock-out.

77. As set out above, the individual responding parties were removed from the schedule on April 25th, effective April 26. Those shifts are now being carried out by temporary service agency employees.

78. Between April 27-29, 2020, all of the individual responding parties wrote to Ms. Fenyves reiterating their concerns with respect to the new schedule. All of the emails set out the individual responding parties' desire to work, albeit to work a schedule that fit within their personal circumstances. Certain individual responding parties indicated that they could work some of the shifts on the new schedule. In every case, the individual responding parties sought further clarification from Family Options.

79. The individual responding parties were provided with the June schedule on May 7, 2020. They responded to that schedule between May 12 and May 15. All of the individual responding parties noted that they were still unable to work some (or most) of the shifts they were scheduled to work in June. Each of the individual responding parties also indicated the shifts they could work in June.

80. On May 20, 2020, Ms. Fenyves emailed Ms. Gingras acknowledging the difficult circumstances Ms. Gingras finds herself in and offering her a fixed 8 p.m. to 8 a.m. weekday shift schedule. Ms. Fenyves also responded to the other individual responding parties on May 20th. Mses. Saunders and Tarrant-Kennedy were also offered amended schedules.

81. Mses. Gingras, Saunders and Tarrant-Kennedy all responded to Ms. Fenyves on May 26, 2020 indicating that the amended schedules they were offered were still, mainly, incompatible with their individual circumstances and that as such they were unable to work most of the shifts they were assigned in June. In response, Ms. Fenyves advised the individual responding parties that Family Options could not make further modifications to the schedule and that unless their availability changed they would be placed on a leave of absence so that they could access the Canada Emergency Relief Benefit offered as part of the Government of Canada's response to the Covid-19 pandemic. Based on all of the foregoing, the first element of a lock-out has been established.

82. The second issue in determining whether Family Options has engaged in an unlawful lock-out of the individual responding parties requires an assessment of whether Family Options' conduct satisfies the subjective element of the definition of a lock-out. As this Board has stated previously, the second element of a lock-out goes to the motive behind the conduct.

83. In this case, the subjective element of a lock-out requires Family Options to have refused to continue to employ the individual responding parties with a view to compel or induce the individual responding parties to refrain from exercising any rights under the Act, with a view to penalizing the individual responding parties for exercising any rights under the Act or with a view to compel or induce the individual responding parties to agree to new terms and conditions of employment. I am not satisfied that this element of a lock-out has been established.

84. In making its arguments, the SEIU noted that the motivation to compel or induce employees need not be the sole or exclusive reason for refusing to continue the individual responding parties. As long as it is a part of the reason, it will satisfy the subjective component of the definition of a lock-out (see for example *Aristokraft Vinyl Inc.* [1985] OLRB Rep. June 799 at paragraph 28).

85. The Union argued that Family Options' decision to refuse to continue to employ the individual responding parties occurred with a view to compel or induce the individual responding parties to accept (a) changes to the terms and conditions of employment; and (b) changes to the rights, privileges and duties of the Union and the individual responding parties.

86. According to the SEIU, Family Option's insistence that the individual responding parties either accept the entire schedule or not work at all, amounts to a change in the employees' terms and conditions of employment. This is not how scheduling had been organized previously. It is an attempt by Family Options to unilaterally force this change on them.

87. The SEIU argued that the Board should reject any claim by Family Options that the schedule change, and its insistence that the individual responding parties accept the new schedule in its totality, was justified by the Covid-19 pandemic. The SEIU argued that there was no evidence to support the conclusion that the new schedule was required as part of efforts to contain the spread of the pandemic. For

example, the Ministry Guidelines for group homes do not recommend 12-hour shifts.

88. In addition, according to the SEIU, the decision to remove the individual responding parties from the schedule and have temporary agency employees work their shifts in fact increased the risk to the residents of the Grey Owl facility. By bringing new employees into contact with the residents, the residents were at an increased risk of exposure. Finally, relying on temporary agency employees undermined the significance and importance of continuity of care to these residents.

89. As noted above, the second element of a lock-out requires the purpose of the employer's conduct to be to compel the employees to either refrain from exercising rights or privileges under the Act or to agree to new terms and conditions of employment, or to changes to those terms and conditions. In that context, it is worth noting that Family Options is clearly of the view that it has the unilateral right to amend the schedule in the manner it sees fit. Throughout its response and its subsequent submissions, Family Options argued repeatedly that it had the right, either pursuant to legislation or based on the collective agreement, to unilaterally amend the schedule. As such, it did not need to compel or induce the individual responding parties to agree to the changes to the terms or conditions of employment. It was going to implement the changes regardless.

90. The SEIU also argued that Family Options' conduct was part of an effort to compel or induce the Union and the individual responding parties to refrain from exercising rights under the Act. Specifically, the Union argued that Family Options' intransigence over the schedule coincides, not coincidentally, with Ms. Gingras reaching out the Union for assistance for the first time.

91. Family Options, according to the SEIU, is also not responding to the Union over the grievances that have been filed and is rebuffing the Union's efforts at every turn. Its conduct, taken as a whole, is an attempt to teach the individual responding parties a lesson in response to the individual responding parties' efforts to be represented by the Union.

92. The SEIU also alleges that Family Options' conduct is an attempt to undermine the individual responding parties' rights under the *Human Rights Code* (the "Code") and the *Occupational Health and*

Safety Act. The SEIU argues that the Code is an implied term of employment.

93. Similarly, according to the SEIU, the requirements of the new schedule, in particular the requirement to work five 12-hour shifts back-to-back, engages the rights of the individual responding parties under the OHSA.

94. The SEIU noted that it was not asking the Board to find that Family Options had actually violated the Code or the OHSA (or the Employment Standards Act for that matter). Rather, the SEIU argued that the Board should find that Family Options, through its conduct, is attempting to compel or induce the individual responding parties not to enforce their rights under the Code and the OHSA.

95. At its highest, the SEIU alleges that Family Options' insistence on a new schedule, that the individual responding parties accept and work the entirety of that new schedule, its removal of the individual responding parties from the new schedule and their replacement by temporary agency employees, is a veiled attempt to destroy the Union's bargaining rights. The SEIU characterized Family Options conduct as part of an effort to undermine the individual responding parties' right to Union representation. And, as set out above, according to the SEIU, it is using the Covid-19 pandemic as cover for its efforts.

96. The collective bargaining relationship between the parties is still relatively new. The parties are beginning to prepare for a second round of collective bargaining. According to the SEIU, Family Options' conduct in locking-out the individual responding parties needs to be understood in that context.

97. Conversely, Family Options took the position that the subjective aspect of the definition of a lock-out had not been established. It argued that the schedule change applied to all of its facilities, not just the Grey Owl facility. To suggest, as the SEIU did, that Family Options revamped its schedule, on an operations-wide basis, simply in order to undermine the bargaining rights at the relatively small Grey Owl facility simply does not make sense.

98. Family Options noted that many of its employees at other facilities also could not work the new schedule. Those employees accessed the income replacement benefits offered by the Government

of Canada, and Family Options then used temporary agency employees.

99. In addition, Family Options noted that because of clientele it serves, it cannot accept any reduction in the amount or quality of services provided at its group home residences. Its clientele are vulnerable in general and specifically to Covid-19. It cannot permit a situation to develop where the proper amount, and quality, of care are not provided to its clients.

100. To the extent that the SEIU argued that Family Options is effectively using Covid-19 as a trojan horse to implement more profound changes to the collective bargaining relationship (and not just to the schedule), Family Options responded by noting that there was no evidence to support that conclusion. It also emphasized that the implementation of the new schedule was just one part of its response to the Covid-19 pandemic. For example, all family members have been prevented from entering residences to minimize contact.

101. Family Options also noted that the use of temporary agency employees is not new to the Grey Owl facility. To the contrary, Family Options have always used temporary employees in order to maintain the required level of care. For example, Ms. McWilliam, one of the individual responding parties, who is a casual employee and therefore can accept or turn down shifts, had no availability for March or April, 2020. Her shifts were covered by temporary agency employees. Further to this point, Family Options noted that many of the temporary agency employees currently working at the Grey Owl facility had worked there previously.

102. In the unique circumstances of this case, specifically with respect to the ongoing Covid-19 pandemic, I have concluded that Family Options' conduct did not amount to an unlawful lock-out. I agree with Family Options that the SEIU did not provide any documents or other material in support of its theory that Family Options was using Covid-19 to mask a more nefarious attempt to alter the terms and conditions of employment, to compel or induce the individual responding parties' from exercising a right under the Act (or any other Act) or, more generally, to undermine the collective bargaining relationship between the parties. Nor did the SEIU's submissions support such an inference.

103. While the SEIU argued, vociferously, that Family Options' conduct amounted to an attempt to compel the individual responding

parties to give rights under the Act, the Code and the OHSA, I am not convinced that this is the case. Clearly, Family Options disagreed with the position of the SEIU that the changes to the schedule, and the subsequent removal of the individual responding parties from the schedule, violated the Act, the Code or the OHSA. However, a disagreement over the implications of implementing a new schedule, even if the disagreement was profound, does not necessarily equate to an attempt by Family Options to compel the individual responding parties to give up their rights. Furthermore, the SEIU's position is premised on the assumption that they were entitled to work the previous schedule.

104. In addition, I accept the submissions of Family Options that they have made good faith efforts to protect their clients in the face of uncertain conditions, namely the Covid-19 pandemic. Family Options has taken steps it believes to be in the best interests of its clientele. Whether or not those beliefs turn out to be accurate is not the issue. The SEIU has not convinced me, based on the material provided, that the *bona fides* of Family Options' decision making has been tainted by a desire to induce or compel any employees from doing anything at all.

105. For all of the foregoing reasons, the unlawful lock-out application is dismissed.

106. By way of conclusion, the Board hereby:

1. Declares that the individual responding parties have engaged in an unlawful strike;
2. Orders the individual responding parties to cease and desist their unlawful strike activity;
3. Directs the SEIU to post copies of this decision in prominent places at the Grey Owl facility;
4. Directs the SEIU to provide a copy of this decision to the members of the bargaining unit; and
5. Dismisses the unlawful lock-out application.

107. Finally, nothing in this decision should be construed as a comment on the merits of any of the grievances filed by the SEIU. Those grievances were not before me and I make no comment in respect of them.

"Adam Beatty"
for the Board