Case Name:

Floralia Plant Growers Ltd. (Re)

Certain Employees of Floralia Plant Growers Limited ("Certain Employees"), and United Food and Commercial Workers International Union, Local 1518 (the "Union"), and Floralia Plant Growers Limited (the "Employer"), and S&G Fresh Produce Limited ("S&G")

[2015] B.C.L.R.B.D. No. 248

BCLRB No. B248/2015

Case Nos.: 68534, 68603 and 68763

British Columbia Labour Relations Board

Panel: Jitesh Mistry, Vice-Chair

Decision: December 30, 2015.

(91 paras.)

Appearances:

Honorio Corona Martinez, for Certain Employees.

Brett Matthews, for the Union.

Parveen Sandhu, for the Employer.

Gary Singh Sandhu, for S&G.

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 This decision addresses a number of issues arising out of Certain Employees' application for

decertification under Section 33 of the *Labour Relations Code* (the "*Code*").

II. FACTS

2 This section sets out general background facts. Specific factual details regarding the numerous allegations in this matter are discussed in the subsequent sections.

The Employer and Union

3 The Employer operates a farm located at 2191 Interprovincial Highway in Abbotsford B.C.

4 The Union is a trade union as defined in the *Code*.

Certification

5 The Union was certified on October 20, 2008 to represent employees employed by the Employer except office staff and supervisors.

Employer's Operation

6 The Employer's farming operation is seasonal and cyclical, requiring workers during the summer months for harvest and requiring few, if any, employees during the winter months.

SAWP Program

7 The Employer has, since 2005 made use of the Seasonal Agricultural Worker Program. The Seasonal Agricultural Worker Program ("SAWP") is a program under which Canada allows temporary foreign workers to work in Canada for a set period of time.

8 The SAWP was described by the Board in *Sidhu & Sons Nursery Ltd.*, BCLRB No. B63/2009 (Leave for Reconsideration of BCLRB No. B159/2008), 176 C.L.R.B.R. (2d) 84:

> SAWP is a federal government program to allow seasonal agricultural workers from Mexico and certain Caribbean countries to work in Canada on a temporary basis. [...] In order to recruit foreign farm workers through SAWP, the Employer had to obtain a labour market opinion from Human Resources and Social Development Canada confirming that it is unable to hire sufficient farm workers locally. [...] (para. 8)

The application for a labour market opinion discussed in the immediately preceding passage will hereinafter be referred to as "ALMO".

9 In *Floralia Plant Growers Limited*, BCLRB No. B157/2008, 160 C.L.R.B.R. (2d) 115, the Board set out further background with respect to this specific Employer's employee complement:

> Since 2005, the Employer has participated in the Seasonal Agricultural Workers Program (the "SAWP"). The SAWP is a Federal Government program, and is based on an agreement between the Government of Canada and the Government of Mexico to allow seasonal agricultural workers from Mexico to work in Canada on a temporary basis. In order to qualify to recruit foreign workers through the SAWP,

> the Employer is required to obtain a Labour Market opinion from Human Resources and Social Development Canada confirming that the Employer is unable to hire sufficient farm workers locally.
>
> The Employer arranges through the Mexican Consulate to hire farm workers who have enrolled in the SAWP. An agreement is then entered into between the Employer and the foreign worker.
>
> [...]
>
> In 2008, the Employer had 30 employees, all but one from SAWP. Sixteen of these employees had worked for the Employer previously and fourteen came to the Employer in 2008 for the first time. (paras. 8-9 and 12)

Collective Agreements

10 In 2009, the Employer and the Union entered into a collective agreement with a term from September 22, 2009 to September 22, 2012.

11 On October 21, 2013 the parties entered into a new agreement which remains in force with a term of September 23, 2012 to September 22, 2016 (the "Collective Agreement").

12 Pursuant to Article 1.01 of the Collective Agreement:

> The Employer recognizes the Union as the sole and exclusive bargaining agent for all employees of the Employer in the province of British Columbia save and except office workers and supervisors and as excluded by the *Labour Relations Code*.

13 Article 1.02 reads, in part, as follows:

> The term 'employee' in this Collective Agreement applies to all persons in the bargaining unit, and includes foreign workers.

14 Pursuant to Article 3.04 the Employer agrees to:

> [...] advise a Union Steward and the duly authorized Union Representative of the hire of new employees and/or, in the case of Foreign Workers, of the recall of Foreign Workers from layoff pursuant to this Collective Agreement, no later than the first day of work for such employees.

15 These provisions are substantially similar to the provisions which existed in earlier terms of the Collective Agreement.

III. ANALYSIS AND DECISION

16 Section 33 of the *Code* addresses decertification:

> **Revocation of bargaining rights**

33 (1) If at any time after a trade union has been certified for a unit the board is satisfied, after the investigation it considers necessary or advisable, that the trade union has ceased to be a trade union, or that the employer has ceased to be the employer of the employees in the unit, it may cancel the certification.

(2) If a trade union is certified as the bargaining agent for a unit and not less than 45% of the employees in the unit sign an application for cancellation of the certification, the board must order that a representation vote be conducted within 10 days of the date of the application or, if the vote is to be conducted by mail, within a longer period the board orders.

(3) An application referred to in subsection (2) may not be made

(a) during the 10 months immediately following the certification of the trade union as the bargaining agent for the unit,

(b) during the 10 months immediately following a refusal under subsection (6) to cancel the certification of that trade union, or

(c) during a period designated by the board under section 30 following a refusal under subsection (4) (b) of this section to cancel the certification of that trade union.

(4) After a representation vote ordered under subsection (2) is held the board must,

(a) if the majority of the votes included in the count are against having the trade union represent the unit as the bargaining agent, cancel the certification of the trade union as the bargaining agent for that unit, or

(b) if the majority of votes included in the count favour having the trade union represent the unit as bargaining agent, refuse the application.

(5) The board may direct that another representation vote be taken if

(a) a representation vote was taken under subsection (2), and

(b) less than 55% of eligible employees cast ballots.

(6) If an application is made under subsection (2), the board may, despite subsections (2) and (4), cancel or refuse to cancel the certification of a trade union as bargaining agent for a unit without a representation vote being held, or without regard to the result of a representation vote, in any case where

(a) any employees in the unit are affected by an order under section 14, or

(b) the board considers that because of improper interference by any person a

representation vote is unlikely to disclose the true wishes of the employees.

[...]

(8) Subject to subsection (9), if the certification of a trade union as the bargaining agent is cancelled under any provision of this Code, a collective agreement between the trade union and the employer of the employees in the unit for which the certification is cancelled is void with respect to that unit.

[...]

(10) If the certification of a trade union as the bargaining agent for a unit is cancelled under any provision of this Code, no other trade union may apply for certification as bargaining agent for the employees within that unit until a period of 10 months or a shorter period specified by the board has elapsed. [...]

17 The Union has made a number of objections and applications in response to Certain Employees' application to decertify. These objections and applications have resulted in many hundreds of pages of written submissions and supporting documents being put before the Board by the Union, Employer and Certain Employees. Setting out detailed review of the parties' submissions of fact and law would not be proportionate to this dispute or a proper use of scarce public resources: Section 2(e) of the *Code*. As such, I have addressed each of the Union's applications and objections in a streamlined manner below.

Unaccounted Domestic Employees

18 A number of the Union's objections and applications revolve around alleged domestic employees that have not been included in the bargaining unit.

19 These allegations largely arise out of the representations made by the Employer in the ALMOs it has submitted to the federal government over the past several years in order to access the SAWP program. These ALMOs included repeated representations by the Employer that it had employed domestic workers. For example:

a. On July 7, 2010, the Employer represented to the federal government that it "[c]urrently [has] recruited and [employs] 95 Canadian workers".

b. In its January 25, 2011 ALMO, the Employer stated that it is "[t]rying to recruit more local labour as well as rehire local workers that worked last year".

c. In a memo entitled "Response to Advertisements" appended to the May 18, 2011 ALMO the Employer expressly confirms that it hired and employed 20 Canadian workers after they had shown up for interviews, and that it separately had arranged for additional work to be performed by subcontractors:

- received overwhelming response to our job ads and have been calling and interviewing applicants prior to LMO application. However very

few of the applicants have returned calls and only a few a [sic] shown up for booked interviews. As such, we have confirmed employment for 20 local workers to start in [the] month of June.

- also confirmed with labour contractor his willingness to provide local labour for 2011 season. He is offering minimal crews because as the weather improves all the farmers want workers at the same time.

d. In the ALMO submitted for the present, 2015, season, the Employer asserted unequivocally that it intended to "employ" local Canadian workers this year, and implied that it had employed Canadian workers in 2014:

All [sic] this is our first application for 2015, the total number of foreign workers requested will be affected by the number of Canadian workers we employ. If Canadian workers do not apply or return for the next season, then we will increase the number of foreign workers at that time.

20 The Union submits that the Employer's explanations for these various representations to the federal government are not believable. The Union describes the Employer's position that the domestic workers referred to in its various representations to the federal government were, in fact, contract labour, as a "feeble assertion". Similarly, the Union says the Employer's explanation that these domestic persons were simply those who were offered an interview is contrary to the plain meaning of the words used on the ALMO, which requests the number of domestic applicants who were "offered a position". The Union further says that it defies credulity for the Employer to say that not one domestic person over the course of six years showed up for an interview and/or work.

21 The Union submits that there are only two possible conclusions to be drawn from the Employer's past representations to the federal government and its current position before the Board:

1. The Employer has been lying to the federal government; or

2. The Employer is now lying to the Board.

The Union says that, either way, the Employer is demonstrably not credible.

22 The Union submits that its position is supported by the Employer's failure to disclose numerous documents and particulars that were ordered to be produced by the Board, including:

a. Documents relating to visas for its non-Canadian workers over the past several years;

b. Any communication (other than the ALMOs themselves) between the Employer and federal government agencies;

c. The various documents that must be submitted along with the Employer's application for non-Canadian workers;

d. The SAWP employment agreements for the non-Canadian workers;

e. The identities of the numerous Canadian employees referred to in the ALMOs that the Employer says it hired.

The Union says that an adverse inference should be drawn against the Employer for its failure to produce these documents and particulars.

23 The Union says the Employer hid the employment of numerous domestic employees from the Union and, as a result, those employees were never afforded the protection of the Collective Agreement. The Union submits that this manipulation of the employee complement means that the results of the representation vote taken in these proceedings is unlikely to represent the true wishes of the employees who ought to have been afforded the protection of the Collective Agreement. The Union says that such conduct establishes an unfair labour practice and/or improper interference by the Employer in contravention of Section 33(6) of the *Code*, which is set out below:

> (6) If an application is made under subsection (2), the board may, despite subsections (2) and (4), cancel or refuse to cancel the certification of a trade union as bargaining agent for a unit without a representation vote being held, or without regard to the result of a representation vote, in any case where
>
> (a) any employees in the unit are affected by an order under Section 14 [i.e., an unfair labour practice order], or
>
> (b) the board considers that because of improper interference by any person a representation vote is unlikely to disclose the true wishes of the employees.

24 The Union also submits that the Employer's manipulation of the employee complement by hiding numerous domestic employees not only contravenes the Collective Agreement but, by extension, the *Code*, pursuant to Sections 49(1) and (2) of the *Code*:

> **49** (1) A person bound by a collective agreement, whether entered into before or after the coming into force of this Code, must
>
> (a) do everything the person is required to do, and
>
> (b) refrain from doing anything the person is required to refrain from doing
>
> by the provisions of the collective agreement.
>
> (2) **A failure to meet a requirement of subsection (1) is a contravention of this Code.** (emphasis added)

25 The Union submits this breach of the Collective Agreement also constitutes interference with the formation, selection and administration of the Union, contrary to the unfair labour practice provision at Section 6(1) of the *Code*:

> **6** (1) Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

26 The difficulty with the Union's argument is not that it has failed to damage the Employer's credibility. It is quite apparent that the Employer's past representations to the federal government and its current position before the Board are largely incompatible with each other. The problem with the Union's case is that the Employer's lack of credibility and any adverse inferences that might be drawn against it, are not sufficient, in and of themselves, to establish any of the objections and applications put forward by the Union without *actual evidence* of hidden domestic workers.

27 The Union is essentially asking the Board to infer from the Employer's contradictory statements a factual conclusion that there have, in fact, been numerous domestic workers employed by the Employer over the years that have been hidden from the Union. On the balance of probabilities, I find that it is more likely the Employer was simply persisting in being untruthful with the federal government in order to obtain the services of foreign workers. I find that it is most probable that the domestic workers the Employer represented to the federal government that it had hired or offered jobs to, simply never existed. In light of these conclusions, I am unable to find that the Employer has breached Sections 6(1) and 49 of the *Code* and, by extension violated Sections 33(6)(a) and (b) of the *Code*.

28 In any case, the objections and applications filed by the Union in these proceedings have resulted in a sufficient passage of time that we are now at the end of the farming season as of the date of this decision. There was no "build-up" of the employee complement subsequent to the representation vote, as the Union also asserted earlier in these proceedings. It is apparent that the 24 foreign workers who were afforded an opportunity to cast ballots at the representation vote for this decertification application constitute the entire employee complement entitled to cast ballots.

29 For the same reason, the Union's assertion that Certain Employees failed to meet the requisite threshold under Section 33(2) ("not less than 45% of the employees in the unit sign an application for cancellation of the certification") is without merit. The decertification application was supported by revocation forms from not less than 45% of the 24 workers in the bargaining unit.

30 I also note that, in any case, the Union's allegations with respect to unaccounted domestic employees prior to 2015 would be dismissed on the basis of delay.

The Three Missing Employees

31 The Union submits that the Board must find that the Employer breached Section 6(1) of the *Code* by secretly employing the SAWP employees of a related company to perform its work -- in violation of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 -- in order to keep its complement of employees sufficiently low that it would assist a decertification application.

32 In support of this submission, the Union makes a number of factual assertions. In essence, the Union says that after its late-2014 and early-2015 ALMOs, the Employer, without explanation, decided to accept fewer foreign workers than it had previously requested in those ALMOs. In particular, three requested and named foreign workers did not arrive in Canada and the Employer, contrary to standard procedure, did not request replacements for these three absent foreign workers.

33 The Union notes that, based on the other parties' submissions, the absence of these three foreign workers allowed Certain Employees to meet the threshold set out in Section 33(2) of the Code that not less than 45% of employees in the unit sign an application for cancellation of the certification in order for the Board to order a decertification vote.

34 The Employer responds by noting that its required complement of foreign workers decreased for legitimate business reasons. Specifically, the sale of 93 acres of land that was rented by the Employer in 2014 reduced the amount of work available. The Employer submits that no other foreign worker was due to arrive and that all the foreign workers have been accounted for in the group of 24 workers employed by the Employer for the 2015 season.

35 The Employer further notes that the three absent workers referenced by the Union all signed contracts with other employers and, as such, they have no continuing interest with the Employer or the Union's bargaining unit. (The Employer provided records of employment for these three workers with its written submission.)

36 In final reply on this point, the Union submits, in part:

> At some point there must have been 15 identifiable individuals who were scheduled to travel to Canada to work at Floralia. We have asserted, and it was not disputed by the Employer, that this list would be finalized at least a month prior to their travel. The Employer has disputed that it receives a copy of this list "from Mexico", but that is neither here nor there. The point is that a list is compiled. Once that list is compiled, whether or not the Employer receives a copy, those individuals identified have a legitimate expectation that they will commence work for the Employer and they will have sufficient continuing interest to be included in the bargaining unit.
>
> [...]
>
> [...] the Board has been provided no evidence, and the Employer has made no allegation, which would suggest that the Employer cancelled 3 of the 15 employees requested prior to the decertification application.
>
> As a result, even if the Board were to accept all of the facts alleged by the Employer -- and the Employer has had ample opportunity to provide relevant facts -- the Board can still not be certain of the number of bargaining unit employees (i.e. those with sufficient continuing interest) as of the date of the application.
>
> Since the section 33 application is Certain Employees' application, it is Certain Employees who bear the onus of establishing the facts necessary to support the application.
>
> [...]
>
> We respectfully submit that, based on the facts which have been alleged, the Board cannot be satisfied that Certain Employees' application -- which we now know contained 12 signatures -- met the 45% threshold. (emphasis in original)

37 The Employer has provided uncontradicted evidence that the three named foreign workers are actually employed by another company in Canada. It is not apparent on the evidence exactly what names could be added to the employee list for the purposes of threshold. For these reasons, and those set out in the preceding section of this decision, I continue to find that the employee complement for the purposes of the 45% threshold under Section 33 consists of 24 employees.

38 With respect to the actual Section 6(1) complaint, I find the Union has not made out a case of sufficient merit under Section 133(4) of the *Code*. The Union is essentially requesting the Board engage in an open-ended process *entirely* on the basis of inference. Such an investigatory exercise would not be in keeping with the Board's role as a quasi-judicial body. I am not prepared to make the serious and sweeping inferences sought by the Union on the basis of what are largely speculative allegations.

The Common Employer Application

39 The Union says that in late-July 2015, it "observed at least two Mexican workers performing work for the Employer". The Union states that "[o]ne of these workers advised that they come there to 'help out'". The Union says that these two workers are SAWP employees of S&G.

40 The Union says that it has become common practice for S&G employees to perform work for the Employer on at least a weekly basis.

41 The Union says that S&G's Chairperson, Amarjit Singh Sandhu (who also serves as a director of that company) shares the same address as the Amarjit Sandhu that is the father of the Employer's owner and "Head Grower" for the Employer.

42 The Union submits that S&G and the Employer should be found to be common employers pursuant to Section 38 of the *Code*. As a part of its position, the Union submits:

> The Employer has thus knowingly and illegally used the SAWP workers of a related company to perform its work rather than performing the work on its own using its own employees in order to artificially keep numbers down. As such it was able to keep its employee [complement] low enough that it could maintain threshold support for the decertification application filed.
>
> Both S&G Fresh Produce Limited and Floralia are generally engaged in farm work.
>
> To the Union's knowledge, S&G Fresh Produce Limited is not subject to a Board certification nor subject to a collective agreement. The Union is unaware of the number of employees employed by S&G Fresh Produce Limited except that the Union knows it presently has at least 2 SAWP workers.
>
> [...]
>
> The Union applies under section 38 of the *Code* for a declaration that the Employer and S&G Fresh Produce Limited be treated as one employer for the purposes of the *Code*.
>
> Further the Union seeks a declaration that employees of S& G Fresh Produce Limited must be retroactively included in the Union's bargaining unit for the purpose

> of determining threshold support for the decertification application.
>
> Moreover, given that the Union is aware of at least 2 employees who work for S&G Fresh Produce Limited, the application made on behalf of Certain Employees (which we now understand purports to be signed by 12 employees) will not demonstrate threshold support and must be dismissed.

43 In response, S&G submits that Amarjit Sandhu's relationship with it is narrow and limited:

> When I approached Amarjit from whom I had been estranged for the last 15 years, he agreed to help me set up a new company and show me the ropes. I know that Amarjit is one of the most knowledgeable growers in the valley, so I appreciated his help.
>
> Out of respect for his assistance and in order to obtain financing for the company, my family and I decided to give Amarjit a directorship in our company. Financiers need to see an experienced member of the farm with someone new like me in order to be approved for financial help.
>
> A major hurdle to running the farm was that I did not have [an] operating processing building, therefore, lacked cooling facilities which are critical in the vegetable industry. Amarjit suggested that we ask Floralia for assistance in getting some cooler space on rent. In the spring of 2014, Amarjit went into meeting with Parveen and Ramji Sandhu to broker negotiations with Floralia to rent cooler and packing space. This allowed me to pack and store product in Floralia's building on a weekly basis and allowed my workers to pick up and drop off product from Floralia's cooler. When my workers are on Floralia's property, they are strictly doing S&G work only such as packing product and storing it in the coolers. However this is a temporary arrangement, until I get my father's building back.

44 S&G submits that it is not aware of any foreign workers who work regularly at the Employer's farm. S&G says that the two S&G workers observed by the Union were simply picking up product for S&G. S&G says that while its employees do attend at the Employer's building on a weekly basis, they do not perform any work for the Employer.

45 S&G submits that it does not provide any labour to the Employer and does not provide any services of a labour contractor to any other business as well.

46 S&G says it has many directors, with Amarjit Sandhu being just one of them. S&G adds that Amarjit Sandhu is not empowered to make any decisions on his own for S&G.

47 S&G further submits that:

> All in all in the end S&G Fresh Produce Limited objects to having its workers included in Floralia's decertification of the union and being treated as a single employer. S&G should not ever be considered a single employer, because it is completely separate from Floralia and has its own separate office, phone number, email, WCB account, CRA account, and payroll. S&G has different accounts and lawyers separate from those of Floralia's. Floralia does not exercise any control over

> S&G's employees. In the end I submit that it would be fair if S&G is not included in such an argument as it is a new company starting off and completely separate.
>
> S&G employee[s] are not helping Floralia to fulfill the labour needs. S&G has no control over Floralia operations and they do not exercise any interest in the decertification application. S&G was not even aware of the decertification application until this complaint was filed by [the] union. S&G is still not aware of the voting date for this particular application.

48 The Employer also disputes that it is a common employer with S&G. In particular, the Employer submits:

> It cannot be stressed enough that it is not "common practice" for S & G Fresh Produce Limited employees to perform work for the Employer." The only reason that S&G Fresh Produce employees are coming to the farm is to access the coolers for their products and load or unload their vehicles. S & G has an arrangement for the provision of cooler space to store their vegetable products. This is the very same product for which Elias and the second worker came to pickup on Friday July 24th.
>
> It is Amarjit's free will to have a directorship in another company especially when he obtained his directorship prior to serving as Floralia's head grower. As noted in my earlier 2012 response to a union complaint, Amarjit had ceased to work as an employee in Floralia and soon thereafter became ill. As far as Floralia is concerned, Amarjit does not have a conflict of interest because he is only advising on how to grow and maintain crops.
>
> Only when Parveen's brother, Ramji Sandhu, made a decision in late 2014, then he no longer wanted to farm was when Parveen asked her father to step in as head grower for the 2015 season.
>
> Amarjit was never a director or shareholder in Floralia and currently does not hold any position other than that of head grower; a situation that only arose when Parveen realized that Ramji was no longer working for the company.
>
> Parveen currently retains control of all company operations and assets. She is the only managing director and currently holds 100% of directional control and signing authority.

49 In reply, the Union provided what it alleges to be photographic evidence that the S&G employees on the Employer's site were neither accessing a cooler nor loading or unloading vehicles; rather, they were packing into boxes that were clearly labelled "Floralia". The Union also provided what it says is video evidence refuting the Employer's and S&G's account of the facts.

50 The four factors that the Board will consider in determining whether to exercise its discretion to make a common employer declaration are well known:

a) There must be more than one entity carrying on business.

b) The two entities must be under common control or direction.

c) The two entities must be engaged in associated or related activities or businesses.

d) There must be a labour relations purpose to be served by making the declaration. There is no exhaustive list of labour relations purposes with respect to common employer declarations: *Park Place Seniors Living Inc.*, BCLRB No. B215/2014, 252 C.L.R.B.R. (2d) 237 ("*Park Place*").

These four criteria are discussed in detail in a number of Board decisions, including *Park Place, Mackie Bros. Sand & Gravel Ltd. (1976)*, BCLRB No. L107/81 and *Wilson Place Management Ltd.*, BCLRB No. B159/98.

51 I find that the Union's common employer application does not satisfy the second criterion of "common control or direction". Even if I accept the Union's position that Amarjit Sandhu is a shareholder in S&G, there is no evidence particularized to suggest that he exerts any control or direction over the Employer's operations. It is not apparent that Amarjit Sandhu is an owner or shareholder in the Employer. No particulars have been provided as to what precisely a "Head Grower" is, let alone any facts to suggest the position exercises "control or direction".

52 As well, even if I were to accept the Union's account of the facts, I do not find it has established, as it suggests it has, that the Employer and S&G are "closely related businesses, sharing work, products and employees". At best, there is an undefined overlap in work between the companies that occurs once a week. A common employer declaration would significantly overcorrect this overlap (assuming one exists). Such a declaration would not simply prevent an erosion of bargaining rights, but would more likely constitute an expansion of the Union's bargaining rights. As such, I do not find a valid labour relations purpose in the declaration sought by the Union.

53 I decline to issue a common employer declaration in this matter.

Access to New Workers

54 On the date of the May 25, 2015 decertification application that is the subject of this decision, 12 foreign workers employed by the Employer were in Canada.

55 On June 10, 2015, the 12 remaining foreign workers employed by the Employer arrived in Canada, one day in advance of the June 11, 2015 representation vote for this decertification application.

56 At or around 4:00 p.m., June 10, 2015, Felix Martinez, a representative of the Union attended at the Abbotsford Superstore where newly arrived foreign workers employed by the Employer are ordinarily dropped off by the travel agent. When the 12 foreign workers arrived, Felix Martinez spoke to them very briefly, identified himself, provided them with the Collective Agreement and his business card, and advised that the Board had scheduled a vote the following day.

57 Shortly thereafter, the Representative of Certain Employees in filing this decertification application, Honorio Corona Martinez, arrived to pick up the workers.

58 The Union states that the following events then ensued:

> At that point Honorio Corona-Martinez arrived to pick up the workers and drove them to the bank. Felix Martinez assisted the workers at the bank with translation in order for them to open accounts. At the bank, Honorio Corona-Martinez heard Felix Martinez tell the newly arrived workers that Felix Martinez would stop by their residence that evening to explain the context of the vote, explain the Union's role and provide more detail.
>
> At around 7 pm Felix Martinez attended at the Employer's farm with Claudia Stoehr, another union representative, as he had promised in order to provide employees with information regarding the decertification vote.
>
> Martinez was told by other employees that the 12 newly arrived workers were not present but that they had been taken grocery shopping and should return "any minute".
>
> By 10:30pm (three and a half hours later) the 12 employees had still not returned.
>
> Honorio Corona-Martinez, acting on behalf of the Employer, deliberately kept the newly arrived workers away from the farm and thus away from the Union.
>
> Corona-Martinez took the newly arrived workers first to a buffet -- something that the Employer never does for its SAWP employees.
>
> [...]
>
> Corona-Martinez, thereafter, uncharacteristically took requests from employees as to where they wanted [to] go -- driving around aimlessly at some points notwithstanding complaints by some of the workers who were exhausted having spent days traveling from their home towns in Mexico.

59 The Union submits Corona Martinez and the Employer violated Section 6(1) of the *Code* by deliberately keeping employees away from the farm in order to deprive the Union an opportunity to talk to them prior to the vote.

60 Corona Martinez submits that he "waited patiently" until Felix Martinez was finished with the workers. After the 12 foreign workers went to the bank, received their money and updated their accounts, he asked them if they wanted to eat. Corona Martinez says he offered the 12 foreign workers the option of pizza, burgers or a buffet. The workers chose the buffet. Corona Martinez denies that he heard Felix Martinez saying that he wanted to meet with the workers later in the evening and was not aware of this request.

61 Corona Martinez says he took the workers everywhere that was necessary and "[n]o time was left idle". Corona Martinez states that the approximate time to attend at the bank, eat food, shop for groceries, shop for clothes and waterproof outerwear was seven hours. Corona Martinez provided particulars of the amount of time spent at each of these activities.

62 The Employer corroborates Corona Martinez's version of these facts. The Employer also says that its owner, Parveen Sandhu, waited for the 12 new foreign workers to arrive, which was approximately 10:30 p.m. The Employer states that Parveen Sandhu met with the workers for "no more than 5 minutes". The

Employer further states that Parveen Sandhu did not ever speak of the vote or anything to do with the decertification process.

63 The Employer states that after Parveen Sandhu's "brief introductions, Parveen got in her car to drive off and noticed that Felix [Martinez] was still circling around the block and as she left she thought he would be speaking to the workers as he was still in the area and the workers were home".

64 I am not prepared to delve into the microscopic details of Corona Martinez's activities with the foreign workers, as the Union appears to request. It was not unreasonable for the recently arrived foreign workers to spend their first day engaging in banking, purchasing supplies and eating a meal. I am not prepared to find an unfair labour practice from the fact that on June 10, 2015 they ate an appreciably longer and more expensive meal in a buffet-style restaurant as opposed to the fast food and pizza meals provided to the earlier-arrived foreign workers. Indeed, it is apparent from the Union's submission that there is no standard practice from which Corona Martinez and the Employer deviated on June 10, 2015: arrival meals have varied from McDonald's to pizza to no meal at all.

65 While Corona Martinez may have been more efficient in his time management that day, I am unable to find that the perhaps leisurely pace taken by Corona Martinez meets the threshold of an unfair labour practice. As the Employer notes (and the Union does not refute):

* the union security clause in the Collective Agreement allows the Union to meet with workers upon providing advance notice to the Employer;

* there is unlimited access provided to the Union in the Collective Agreement to the employee residences;

* the Employer was not made aware by the Union that Felix Martinez was attending at the worksite and wished to meet with the foreign workers for a second time that day;

* Felix Martinez could have approached the workers at any time, even at 10:30 p.m. at night after they had finished their shopping; and

* Felix Martinez also could have visited the workers on the morning prior to the vote.

66 On the entirety of the facts relied upon by the Union and those facts asserted by the respondents and unchallenged by the Union, I find the Union has not established an unfair labour practice by Corona Martinez and/or the Employer.

The Withdrawal Application

67 In the Union's most recent final reply submission, it advised that a majority of the 12 applicant Certain Employees and a substantial majority of the entirety of the bargaining unit had signed a form (the "New Form") which: (a) withdraws their support for decertification; (b) requests to withdraw the decertification application; and (c) authorizes the Union to be their representative in the decertification proceeding. The text from the aforementioned forms is set out below (translated into English):

(Names of employees will be kept confidential and not disclosed to the employer)

WITHDRAWAL OF APPLICATION FOR REVOCATION OF BARGAINING RIGHTS

I hereby withdraw my support and my application for cancellation/revocation of bargaining rights held by the union:

United Food and Commercial Workers Union, Local 1518

at

Floralia Plant Growers Ltd.

I WANT THE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1518 TO CONTINUE TO BE MY EXCLUSIVE BARGAINING AGENT AND TO CONTINUE TO REPRESENT ME IN COLLECTIVE BARGAINING.

I HEREBY AUTHORIZE THE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1518 TO BE MY REPRESENTATIVE IN THE PROCEEDINS [SIC] BEFORE THE LABOUR RELATIONS BOARD.

_____ Clearly print your first and last name

_____ Signature

Date: _____ _____ _____

Day Month Year

(the date must be completed by you at the time of your signature and must be entered clearly to be accepted)

Print your complete address

Street: _____ City: _____

(emphasis in original)

68 The Union says that the New Forms confirm that it, the Union, is now the litigation representative of Certain Employees.

69 The Union further says that, as the litigation representative of Certain Employees and supported by the New Forms, it applies to withdraw the decertification application, with the result that the vote will not be counted.

70 The Employer disputes the legitimacy of the Union as the litigation representative of Certain Employees and also opposes the withdrawal application.

71 The Union, in its own right, does not oppose the withdrawal.

72 Corona Martinez, the Representative of Certain Employees who filed the decertification, submits that he continues to be the legitimate Representative of Certain Employees. Corona Martinez submits the Union has interfered with the decertification application and pressured employees to withdraw the decertification application and sign the New Forms. (No unfair labour practice complaint or Section 33(6)(b) improper interference complaint has been filed by Corona Martinez.) Corona Martinez submits this matter should proceed and the ballots cast at the representation vote should be counted.

73 In final reply, the Union submits Corona Martinez is no longer the representative in any event, as a result of the New Forms signed by the majority of the applicant Certain Employees.

74 The issue is whether, in these circumstances, the Board should allow a withdrawal of the decertification application.

75 As noted, the New Forms submitted by the Union capture three concepts:

a. Withdrawal of support for decertification;

b. Replacing Corona Martinez as Representative of Certain Employees with the Union; and

c. Request to withdraw the decertification application.

76 The withdrawal of support for the decertification is of no consequence. In general, the Board does not accept employee revocations of support for a certification or decertification application after the application is filed.

77 The Union says this is a different situation because a majority (50% plus 1) of Certain Employees (i.e., the group of employees who initially applied for decertification) and the vast majority of all employees in the bargaining unit have appointed a different representative (the Union) who is withdrawing the application.

78 This leads to the next issue: whether the Board should allow the Union to represent Certain Employees in a decertification application (and, by extension, allow the Union to request a withdrawal on behalf of Certain Employees in those circumstances). The spokesperson for certain employees is not required to be one of the certain employees: *V.Y. Drugs Ltd*., BCLRB No. B307/97, para. 5. However, withdrawal applications are discretionary, and the question remains whether the Board should allow Certain Employees' decertification application to be withdrawn by the Union as the representative of Certain Employees in the decertification proceeding.

79 I have serious doubts about the appropriateness of allowing a union to act both in its own right, but also as the litigation representative of a party adverse in interest, particularly applicant-employees in a decertification matter. Such a scenario suggests a conflict of interest on the part of the Union in this case: the Union's interest is in preserving its certification; the purpose of Certain Employees' application is to extinguish that certification. I note that the Union, in its own right and as the purported representative of Certain Employees, is represented on both fronts by the same legal counsel. There is no necessity to the Union acting as Certain Employees' litigation representative. Arguably, *any* person or party other than the Union and its legal counsel (or the Employer, obviously) would have been a more appropriate representative. That said, in light of my conclusions below, it is not necessary to unequivocally answer the question of

whether the Board should allow the Union to represent Certain Employees in a decertification application.

80 The third issue, regardless of whether the Union may represent Certain Employees, is: should the Board exercise its discretion to allow an application for decertification to be withdrawn, such that the vote will not be counted, because a bare majority of the applicant certain employees wish to revoke their support and have expressly requested to withdraw the decertification application. I find the answer is "no".

81 The Union relies upon a prior decision of the Board: *Certain Employees of Silver Egg Enterprises Ltd.*, BCLRB No. B419/98 ("*Silver Egg*"). The relevant facts underlying *Silver Egg* are set out in the following passages from that decision:

> Certain Employees of Silver Egg Enterprises applied to revoke their bargaining rights under Section 33(2) of the *Labour Relations Code* on August 6, 1998. Pursuant to that same section of the Code, a representation vote was held on August 13. [...]
>
> At the time of the Union's withdrawal and continuing up to the rescheduled hearing, the majority of employees who had signed revocation applications submitted a form letter to the Board stating that they wished to continue to have the Union represent them and wanted their applications withdrawn. On the date of the rescheduled hearing, September 29, the Representative of Certain Employees requested that the original application for revocation of bargaining rights be withdrawn. The Employer opposed the withdrawal. [...] (paras. 1-2)

Vice-Chair Holden held that the withdrawal application by a majority of certain employees was comparable to a union withdrawing a certification application and granted the withdrawal, such that the vote was not counted.

82 However, in *Silver Egg* the withdrawal application was brought forward by a "Representative of Certain Employees" (i.e., not the union or its legal counsel, but a member of the group of employees who initially applied for decertification) because of certain employees' mistaken perceptions in bringing the initial application for decertification:

> The Representative of Certain Employees requested the withdrawal be granted and that the Board not count the representation vote because she felt the vote would not be indicative of the true wishes of the employees. She stated that a number of employees somehow felt that she was representing the Employer and so they signed the applications to revoke their bargaining rights because of their perceptions of her as an Employer representative. (para. 3)

83 No such circumstances exist here. This is not a case where the Representative of Certain Employees asks to withdraw on the basis that they were under a mistaken apprehension.

84 In *Silver Egg*, there was no dispute from any of the certain employees as to the identity of who represented the interests of certain employees. Nor was there any doubt that the withdrawal application had broad support among certain employees. As the Board noted, "all but a couple of the original applicants requested a withdrawal": *Silver Egg*, para. 19.

85 In contrast, in this case, Corona Martinez vigorously disputes the Union's legitimacy as the

representative of Certain Employees. Corona Martinez submits that he continues to be so and, on behalf of Certain Employees, rejects any request for withdrawal. Only a bare majority of Certain Employees (literally 50% plus one employee) completed New Forms authorizing the Union to act as their representative and requesting a withdrawal. This means there is a significant minority who, presumably, wish to proceed with decertification and have Corona Martinez act as their representative.

86 What this leaves the Board with is an unclear evidentiary picture of who actually represents the entity that is Certain Employees and whether Certain Employees truly wish to withdraw their application. An evidentiary hearing to resolve these issues would run the danger of exposing the anonymity of Certain Employees and may not provide a clear answer to these questions.

87 The only other option available to provide at least a clearer picture of, not only Certain Employees' wishes but the entire bargaining unit's wishes, is to count the ballots cast at the representation vote in this matter. Counting the ballots is the only way to identify the true wishes of the bargaining unit in a manner that respects the employees' anonymity. This option also avoids the above-discussed problematic scenario of the Union purporting to represent a party adverse in interest, which the Board is not inclined to allow.

88 For these reasons, I exercise my discretion to deny the Union's request on behalf of Certain Employees to withdraw this application.

IV. CONCLUSION

89 The Union's various objections, applications and complaints associated with this matter are dismissed.

90 The Union's request on behalf of Certain Employees to withdraw this application is denied.

91 I order the ballot box from the representation vote in this matter unsealed and the ballots counted.

LABOUR RELATIONS BOARD

JITESH MISTRY
VICE-CHAIR