

BRITISH COLUMBIA LABOUR RELATIONS BOARD

VANE LAWN & GARDEN SERVICES (1981) LTD.

(the “Employer”)

-and-

CONSTRUCTION AND SPECIALIZED WORKERS’ UNION
LOCAL 1611

(the “Union”)

PANEL: Jonathan Hanvelt, Vice-Chair

APPEARANCES: Mike Hamata and Brittany Therrien, for
the Employer
Kevin Blakely, for the Union

CASE NO.: 2025-000128

DATE OF DECISION: March 7, 2025

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Union applies pursuant to Section 18 of the *Labour Relations Code* (the “Code) to be certified to represent a bargaining unit of employees described as “all employees at and from 7455 256 Street in Langley, BC except office staff” (the “Proposed Bargaining Unit”).

2 The Employer opposed the application; it says it is imminently going to conduct its seasonal hiring of individuals who would make up more than 50% of the Proposed Bargaining Unit and asks the Board to apply the build-up principle to dismiss the application. For the purposes of these reasons, I have accepted the facts as asserted by the Employer.

II. BACKGROUND

3 The Employer is a landscape construction and maintenance company.

4 The Employer says landscape maintenance is seasonal work that is primarily performed in spring and summer; it says it only performs some minor maintenance over the winter. As a result, the Employer terminated the employment of those employees whose services it no longer required at the end of the summer of 2024. The Employer does not suggest this was anything other than its normal practice, consistent with the seasonal nature of its business. The Employer further says it is now entering its spring hiring process to ensure it has an adequate number of workers for the busy season.

5 On February 3, 2025, the Union applied to represent the Proposed Bargaining Unit.

6 The Employer says that, at the time of the application, there were 21 employees in the Proposed Bargaining Unit, but that it has plans to imminently hire a minimum of 22 additional employees. It says it will hire 15 of them before March 1, 2025 and attaches live online employment ads for four such positions. It says it will hire the other 7 employees by April 2025.

7 The Employer says it must hire these individuals to reduce the amount of overtime hours worked in the 2024 season, to address some quality concerns that arose last year as a result of having too few employees available, and because it has successfully bid on a number of new contracts that will require the Employer to have a larger workforce. The Employer also says it has bid on a number of additional contracts and that, if successful, it would have to hire an additional 8-10 employees.

III. ANALYSIS AND DECISION

8 British Columbia's labour relations model is built on the principle of majoritarianism; where a majority of workers in a bargaining unit chooses to be represented by a union, all workers are represented by that union. This simple formula is complicated where the employer will imminently hire a significant number of workers who would be included in the proposed bargaining unit.

9 The build-up principle addresses such circumstances and provides an analytical framework for determining whether an application for certification should be accepted as filed or whether it should be dismissed as being premature.

10 In *P. Sun's Enterprise (Vancouver) Ltd. (Clarion Hotel Grand Pacific)* , BCLRB No. B432/2000 (Leave for reconsideration denied, BCLRB No. B169/2001) ("P. Sun's"), the Board explained the rationale for the build-up principle is avoiding the disenfranchisement of workers who have yet to be hired by determining the question of representation prior to their employment and, thus, prior to them having the capacity to voice their preference:

The mischief the build-up doctrine is designed to avoid is disenfranchisement of employees. The premise of the build-up doctrine is that it would be undemocratic to permit the smaller group of current employees to determine the representational rights of the future larger group. One of the policy concerns underlying the build-up doctrine is the desire not to impose a union on a group of employees who may not favour that choice; that rationale is founded in the basic majoritarian principle of the Code that the choice of a bargaining agent should be the decision of the majority. To certify a unit prematurely may exclude employees who are hired later from having a say on the representational choice. However, one countervailing factor weighing against adoption of the build-up principle is that its application would at the very least delay collective bargaining rights to an existing work force. The build-up principle may also in some circumstances deny existing employees the opportunity to obtain collective representation and deprive them of the benefits of collective bargaining.

As that restatement of the principles suggests, the Board must in its application of the build-up doctrine balance the rights of present and future employees to decide upon collective representation. Which factor is given predominance depends on the relative force of the length of delay, the representative character of the current employees, and the certainty and imminence in the plan for expansion. Where a significant build-up is imminent and certain, the Board may be more inclined to side with delaying the exercise of collective bargaining rights by the present employees so as not to discount the rights of future employees. However, the Board is less inclined to delay certification and deprive existing employees of their bargaining

rights when there is no firm plan for expansion and the build-up will not happen until some distant time.

(paras. 108 and 109)

11 The build-up principle should be applied flexibly in order to balance the competing interests at stake (*P. Sun's*, para. 111) and the decision whether to apply the principle is discretionary in nature (*P. Sun's*, para. 34).

12 The Board considers a number of factors where the build-up principle is at issue: 1) the nature of the employer's organization, 2) the nature and degree of build-up, 3) its imminence and certainty, and 4) the representativeness of the existing employee complement (*Kingfisher Sales Inc.*, BCLRB No. 73/86 ("Kingfisher Sales"); *P. Sun's*).

13 In assessing the second and fourth of these factors, the Board applies the "50% Rule", which was recently discussed in *Richmond Elevator Maintenance Ltd.*, 2024 BCLRB 129 (Application for reconsideration dismissed, 2024 BCLRB 171) ("Richmond Elevator"):

The 50% Rule involves the Board determining whether the employee complement before the proposed buildup (e.g., the Current Employees) "is more than one-half of what it will be when the build-up occurs" (e.g., the Current Employees and the Future Employees) (*Sky-Hi Scaffolding Ltd.*, BCLRB No. B36/2010 ("Sky-Hi"), para. 12).

In terms of the *P. Sun's* Factors, the 50% Rule helps the Board assess whether the nature and degree of the build-up is significant or overwhelming. Where the current employees represent more than one-half of the ultimate workforce following the build-up, the "build-up will not be [typically] considered 'overwhelming' or 'significant'" (*Sky-Hi*, para. 12), and thus, not favour applying the build-up principle.

The 50% Rule also helps to assess the representative character of the existing employee complement. This *P. Sun's* Factor has both a qualitative and quantitative aspect. Qualitatively, the Board assesses whether "the classifications represented are sufficiently representative of those to be found among the expanded workforce" (*P. Sun's*, para. 134). If so, that does not favour applying the build-up principle. Quantitatively, the Board applies the 50% Rule such that a circumstance where, "the employees present number less than half of the full anticipated complement and most of the classifications are not represented", will typically favour applying the build-up principle (*P. Sun's*, para. 136).

(paras. 45-47)

14 It is unclear from past decisions that the build-up principle is applicable to cases of regular seasonal workforce fluctuations and the Board has repeatedly identified difficulties with applying it in such circumstances (see, for example: *P. Sun's*, para. 130; *Sears Canada Inc.*, BCLRB No. B500/98, para.31; *Kingfisher Sales*). At the very least, where the size of an operation's workforce is subject to normal seasonal fluctuations, it will not favour the application of the build-up principle (*Sky-Hi Scaffolding Ltd.*, BCLRB No. B36/2010, para. 11 ("Sky-Hi")). In *Kingfisher Sales*, where the Board declined to dismiss the application for certification, it only accepted the proposition that the build-up principle might apply to seasonal fluctuations for the purposes of that case (p. 6); the Board specifically declined to accept that proposition generally.

15 I further note the Employer provided no supporting caselaw where the Board has applied the build-up principle in the context of a seasonal pattern of hiring and layoffs; nor am I aware of any such case

16 While the Board has not closed the door on the possibility, I am quite skeptical that the build-up principle would ever be appropriate in the case of seasonal fluctuations; such circumstances are fundamentally different than either a new project, where only a small unrepresentative portion of the workforces has been hired, or an application for certification immediately before a permanent expansion of the workforce at an existing operation.

17 However, I need not determine whether the build-up principle is generally applicable to cases of seasonal fluctuations; even if it is, and I make no finding in that regard, I do not find this is an appropriate case to apply it and I decline to exercise my discretion to do so.

18 I find that the fact the coming increase in staffing is seasonal weighs very heavily against applying the build-up principle.

19 In *Kingfisher Sales*, the Board rejected the employer's arguments for applying the build-up principle noting that the complement of employees would more than double for the purposes of the sockeye fishing season, but that there would be a corresponding reduction in the number of employees at the end of the season (p. 6).

20 Here, the Employer operates a landscaping business where the majority of the work is performed in the spring and summer months; it says, there is only "some minor maintenance" during the winter. Accordingly, the Employer says that it reduces its workforce at the end of the season to meet the lower demands of the winter months. It says it will require more employees this season to meet its new contractual obligations but does not say if any of those additional employees will be required in the winter. Even if I were to speculate that the winter workforce may be larger next year than it was this year, the Employer has not argued, nor provided a factual basis that would allow me to infer, that it will avoid significant layoffs at the end of the summer. In other terms, as in *Kingfisher Sales*, the increase in staffing in the spring is offset by a significant decrease in staffing in the fall.

21 With respect to the degree of the build-up, the Employer says there are currently 21 employees in the bargaining unit, that it will require a total of 43 employees by April 2025, and that the number would grow by a minimum of eight additional employees – to a total of 51 – if it successfully bids on several more contracts. Due to the lack of certainty regarding the outstanding contract bids, I find it is appropriate to accept there will be a total employee complement of 43 in the Proposed Bargaining Unit; the current employees therefore equal 49% of the total number.

22 The 50% Rule is not a rule that is applied rigidly. An increase in the workforce that is “overwhelming” or “significant” will favour the application of the build-up principle (*P. Sun’s*, para. 110); where the future complement of employees equals less than 50% of the total anticipated workforce, the build-up will not typically be characterized as such (*Sky-Hi*, para. 12; *Richmond Elevator*, para. 46). This does not mean that a build-up is automatically considered to be “overwhelming” once it is established that the future complement of employees is greater than 50% of the total anticipated workforce; rather, 50% is the point at which the question is typically triggered for consideration.

23 In this case, I find the build-up is not overwhelming or significant. Here, the future complement of employees outnumbers the current complement by only one person. Moreover, even though the future employees in this case will make up 51% of the Proposed Bargaining Unit, the increase in staffing is temporary. In such circumstances, I am of the view that I would be applying the 50% Rule rigidly were I to find that the number of employees being hired supports applying the build-up principle.

24 I am also of the view the current employees are likely representative of the workforce that will be in place by April 2025. The Employer says it will hire: seven mowing maintenance employees; two planting/enhancement employees; five garden maintenance employees; one employee to assist with deliveries and around the shop; one employee to work in the greenhouse on plant maintenance; three employees to assist with the increased weeding and watering requirements in the warmer months; and three landscape maintenance employees. The Employer does not argue that these are fundamentally different positions than those filled by the current complement of employees, who are “landscape foremen”, “mow assistants”, and “gardeners”, or that the current complement of employees is not representative of the Proposed Bargaining Unit. Nor is there any reason to believe the current complement is unrepresentative. I find this factor weighs against applying the build-up principle.

25 Finally, “certainty” with respect to hiring 22 additional employees is the only one of the *P. Sun’s* factors that I find supports applying the build-up principle. For the purposes of these reasons, I accept it is certain the Employer will imminently hire 22 new employees (by April 2025). The Employer has obtained new contracts and, in any event, needs to hire new employees every year in order to accommodate the increased workload in the spring and summer. However, I do not accept there is any certainty any additional hiring will be required as there is no certainty the Employer will secure any of the outstanding contracts it has bid on; while it may even be likely, I do not accept that “likelihood” equals “certainty” for the purposes of this analysis.

Summary

26 Even if I accept the 51% increase in employees is certain and imminent, the fact remains that the increase in the workforce is a seasonal one, which will be followed by a significant reduction in the workforce come the end of the summer. In light of this and my finding that the current complement of employees is representative of the summertime workforce, I find this is not an appropriate case to exercise my discretion to apply the build-up principle.

IV. CONCLUSION

27 The Employer's objection to the application based on the build-up principle is dismissed.

28 The parties also disagreed about whether the Operations Managers ought to be included in the bargaining unit. I have reviewed the membership evidence and find the Union has threshold support for automatic certification regardless of whether these individuals are included. As a result, I need not address that question and I grant the certification.

29 To the extent the parties are unable to agree on the status of the Operations Managers in bargaining, they may apply to the Board under Section 139.

LABOUR RELATIONS BOARD

“JONATHAN HANVELT”

JONATHAN HANVELT
VICE-CHAIR