Citation: *Vane Lawn & Garden Services (1981) Ltd.,* 2025 BCLRB 213
(Leave for Reconsideration of 2025 BCLRB 57)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

VANE LAWN & GARDEN SERVICES (1981) LTD.

(the "Employer")

-and-

CONSTRUCTION AND SPECIALIZED WORKERS' UNION
LOCAL 1611

(the "Union")

PANEL:	Stephanie Drake, Vice-Chair and Registrar Andres Barker, Associate Chair Carmen Hamilton, Vice-Chair
APPEARANCES:	Mike Hamata and Brittany Therrien, for the Employer Kevin Blakely, for the Union
CASE NO.:	2025-000376
DATE OF DECISION:	November 4, 2025

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Employer operates a landscape construction and maintenance business. On February 3, 2025, the Union applied under Section 18 of the *Labour Relations Code* (the "Code") to represent a bargaining unit of employees of the Employer and the Employer raised two objections. First, the Employer argued the application for certification was premature based on the build-up principle. Second, the Employer argued that Operations Managers should be excluded from the Union's proposed bargaining unit.

2 In 2025 BCLRB 57 (the "Original Decision"), the original panel dismissed the Employer's build-up objection and declined to address the status of the Operations Managers, having concluded this issue did not need to be resolved to dispose of the application. Accordingly, the Original Decision granted the Union's application.

3 The Employer applies under Section 141 of the Code for leave and reconsideration of the Original Decision. It argues that the Original Decision is inconsistent with Code principles and that it has been denied a fair hearing.

4 Before turning to the Original Decision, it is necessary to set out briefly the procedural history of this matter before the original panel.

5 On February 7, 2025, the original panel issued a notice of hearing to inquire into the Employer's objections to the Union's certification application. Hearing dates were scheduled for February 20, 21, 26, and 27, 2025. By separate letter on February 7, 2025, the original panel requested a submission from the Employer.

6 On February 14, 2025, the Employer filed its submission on its objections. On February 18, 2025, the Employer wrote to the original panel stating that, notwithstanding the hearing dates the parties were holding "as a backup if needed", the Employer's preference was to have the union file a response to the Employer's submission, followed by a written reply from the Employer. The Employer suggested the original panel could then review the submissions and determine whether it was necessary to hold an oral hearing.

7 Also on February 18, 2025, the original panel wrote to the parties to state that he had reviewed the Employer's submission and had determined that he could decide the matter without further submissions and without a hearing. He accordingly cancelled the scheduled hearing dates and told the parties his decision and reasons would be forthcoming.

8 The Original Decision was issued on March 7, 2025.

II. ORIGINAL DECISION

9 In addressing the Employer's build-up objection, the original panel considered the four factors from the leading case on the build-up principle, *P. Sun's Enterprises (Vancouver) Ltd. (Clarion Hotel Grand Pacific),* BCLRB No. B432/2000 (Leave for reconsideration denied, BCLRB No. B169/2001) ("*P. Sun's*"). Those factors are (a) the nature of the Employer's organization; (b) the nature and degree of the build-up; (c) the imminence and certainty of the build-up; and (d) the representativeness of the existing employee complement.

10 It was not in dispute that the Employer's business is subject to seasonal fluctuations in available work because landscape maintenance is primarily done in the spring and summer. Accordingly, the original panel found that the Employer requires more employees in the spring and summer months and has a practice of laying off some of those employees outside of the busy season.

11 At the time of the Union's application, there were 21 employees in the proposed bargaining unit. The original panel concluded there would be a total increase of 22 employees by April 2025, meaning that 49% of the total number of these employees were working as of the date of the application.

12 The original panel considered the "50% rule" that the Board applies when assessing build-up. Pursuant to this approach, where the complement of employees on the date of application is less than 50% of the total anticipated employee complement, the extent of the build-up will not be considered overwhelming or significant. A build-up of over 50% may be considered overwhelming or significant: *P. Sun's*.

13 The Original Decision holds that, while the build-up is both imminent and certain, the temporary nature of the build-up, consistent with the seasonal nature of the Employer's business, weighs heavily against applying the build-up principle. The Original Decision further finds that the build-up is not overwhelming or significant, because the future complement of employees outnumbers the current group by only one person, and the staffing increase is temporary. Finally, the Original Decision concludes that the existing employee complement is sufficiently representative of the future complement, and that the Employer did not argue otherwise.

14 With respect to the Employer's second objection, having found the Union has support for automatic certification, the Original Decision directs the parties to attempt to resolve the status of the Operations Managers and notes they can file an application under Section 139 of the Code if the matter remains resolved.

15 As a result, the Original Decision dismisses the Employer's objection and grants the Union's application for certification.

III. RECONSIDERATION APPLICATION

16 The Employer raises three grounds for reconsideration. First, it argues the Original Decision is inconsistent with express or implied Code principles because the original panel misapplied the build-up principle.

17 The Employer says the original panel erred when it found the build-up was not "overwhelming or significant", despite finding that the Employer was going to imminently more than double its complement of employees. The Employer argues this conclusion is inconsistent with Code principles, because it disenfranchises more than half of the Employer's employees. It says there is no compelling reason to depart from the build-up principle in this case, citing *Sears Canada Inc.*, BCLRB No. B500/98 ("*Sears*").

18 The Employer notes the original panel considered whether the build-up principle should apply to seasonal workers, stating that "while the Board has not closed the door on the possibility", he was skeptical this doctrine could apply to seasonal workers. The Employer argues the build-up principle should apply to seasonal workers to ensure the majoritarian principle is respected and a minority of workers cannot dictate the representational rights of the larger workforce. It says an example of this approach found in the Code is that construction employees can only change their bargaining agent in the summer months when the workforce is at its peak under Section 19(2).

19 The Employer also cites *Rocky Mountain Ski Inc.*, [1994] Alta. L.R.B.R. 475, ("*Rocky Mountain*") as an example of a case where a labour board applied the build-up principle to a seasonal workforce. In that case, the union's certification application was rejected because only 16 employees who worked at the ski resort year-round were working, out of a total seasonal complement of about 200 workers.

20 The Employer argues the original panel further erred when it concluded the current employee complement was qualitatively representative of all the future group of the Employer's employees. It says a majority (14 out of 21) of the employees at the time of the certification application were supervisors who have more skill and accordingly a higher wage rate than the group of employees to be hired, who primarily consist of entry level labourers. In addition, the Employer submits the existing employees as of the date of application did not include a delivery driver or a greenhouse worker, two new classifications the Employer planned to hire imminently.

21 Second, the Employer alleges the Original Decision is contrary to the principles of procedural fairness and natural justice because the original panel did not determine whether the Operations Managers were included in the bargaining unit. The Employer submits it was necessary for the Original Decision to include a reasoned analysis on this issue, which it does not. It further argues the original panel denied it a fair hearing by not seeking submissions from the Union on the status of the contested Operations Managers, so that the panel could reach a decision about them.

22 Finally, the Employer alleges a further breach of principles of natural justice and procedural fairness because the original panel initially scheduled an oral hearing and then unilaterally cancelled it. The Employer submits it was also denied a fair hearing when the original panel made the decision on the application without seeking a response submission from the Union and a final reply from the Employer.

23 The Employer says the Original Decision should be set aside as contrary to the build-up principle or alternatively on the basis that the Employer was denied a fair hearing. In the further alternative, if this panel upholds the original panel's application of the build-up principle, the Employer says the reconsideration panel should decide whether the Operations Managers are included in the bargaining unit based on the Employer's submissions to the original panel.

IV. ANALYSIS AND DECISION

24 Under Section 141 of the Code, an applicant must establish a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration set out in *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93) ("*Brinco*"). For leave to be granted, an application for reconsideration must raise a serious question as to the correctness or fairness of the original decision (*Brinco*).

25 The build-up principle is an aspect of the Board's approach to bargaining unit appropriateness that "arises where an application for certification for a group of existing employees may determine the representational rights of a future, larger group of employees": *P. Sun's*, paras. 107-8; *Horizon North at HNL Crossroads Lodge*, 2020 BCLRB 32 (Leave for Reconsideration of BCLRB No. B166/2019) ("*Horizon North*"), para. 16. As noted above, the *P. Sun's* factors are to be applied flexibly, and on a case-by-case: *P. Sun's*, para. 111; *Horizon North*, para. 20.

26 The Employer does not challenge the original panel's conclusions about the first or third *P. Sun's* factors. It challenges the conclusion about the fourth factor. However, the Original Decision finds, and the Employer does not dispute, that the Employer did not argue before the original panel that the existing employee complement was not representative of the future group. Reconsideration is not an opportunity to advance arguments that a party could have made before the original panel: *Brinco*, p. 10. The Employer's arguments about the fourth *P. Sun's* factor are dismissed on that basis.

27 The Employer says the original panel misapplied the second *P. Sun's* factor, the nature and degree of the build-up, by not following the 50% rule, and by relying on the fact that the build-up would be temporary because the work is seasonal.

28 With respect to the Employer's arguments about the second *P. Sun's* factor, like the panel in *Horizon North*, "[w]e are not persuaded that this factor is as absolute as the Employer suggests": *Horizon North*, para. 23. As *P. Sun's* sets out, the 50% "'rule of thumb' is a guidepost, not an invariable rule": *P. Sun's*, para. 136.

29 We further note the panel in *Horizon North* was not persuaded that *Sears*, which was decided before *P. Sun's*, stands for the proposition that there must be a compelling reason not to apply the build up principle when less than half of the employees are employed on the date of the application. Neither does *Sears* establish "that one factor prevails over the others absent compelling circumstances": *Horizon North*, para. 25.

30 In summary with respect to the original panel's application of the *P. Sun's* factors, we are not persuaded it was inconsistent with Code principles for the original panel to consider the fact that the build up would be temporary, as part of his conclusion that the build-up was not overwhelming or significant. The original panel was engaged in a discretionary exercise of labour relations judgment, in which he also considered that the future complement of employees outnumbered the group on the date of application by only one person. We note that the original panel's comment that he was skeptical the build-up principle could apply to seasonal workers at all was *obiter dicta* and was not the basis for the decision.

31 With respect to the Employer's argument about the Operations Managers, we are unable to conclude it was a denial of a fair hearing for the original panel to defer that issue to the parties and invite them to reapply under Section 139 of the Code if they were unable to reach agreement in bargaining. While it was the Employer's preference that the original panel address the issue, the Employer has not lost its opportunity to show those individuals are excluded from the Union's bargaining unit because it can apply under Section 139 of the Code if the matter remains unresolved.

32 Finally, we turn to the Employer's argument about the original panel's decision not to convene an oral hearing. While an oral hearing may be required if material facts are in dispute, the fact that an original panel decides an application in a different way than the parties expect or advocate for does not in itself establish a breach of procedural fairness: *Certain Employees of Art Lam Drugs Ltd. (Shoppers Drug Mart No. 220)*, BCLRB No. B199/2003 (Leave for Reconsideration of BCLRB No. B52/2003) ("*Art Lam*"); *Sobeys Capital Incorporated*, 2021 BCLRB 78 (Leave for Reconsideration of 2020 BCLRB 97), para. 79 ("*Sobeys*").

33 To show a breach of procedural fairness arising from a legitimate expectation that an original panel would hold an oral hearing, a party must establish that their expectation was reasonable because the original panel made a "clear and unequivocal 'promise'" that an oral hearing would take place, by words or conduct: *Sobeys*, para 79. In rare cases where this can be established, fairness requires the original panel to give notice to the parties and an opportunity to respond, before deciding the matter without an oral hearing: *Sobeys*, para. 79; *Art Lam*, para. 19.

34 We are not persuaded that the original panel made a clear and unequivocal promise to hold an oral hearing in this case. As stated by the Employer in correspondence to the Board, the hearing dates were being held as a "backup". The Employer had also itself raised that the decision could potentially be made based off submissions of the parties and without a hearing. It expected the original panel to seek full submissions before doing so, but that was not a requirement of procedural fairness.

In addition, the original panel notified the parties that he was going to decide the file based on the Employer's submissions over two weeks before the decision was issued and the Employer did not object to that approach.

V. CONCLUSION

35 The application is dismissed for the reasons given.

LABOUR RELATIONS BOARD

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