BRITISH COLUMBIA

LABOUR RELATIONS BOARD

MULTIPLE FAX TRANSMITTAL SHEET

Re: Best Service Pros Ltd. -and- Service Employees' International Union Local 2, Brewery, General & Professional Workers' Union **(1st Alternative Application - Variance of Certification - Case No. 71478/18L)**

DATE: June 15, 2018

SENDER: **LABOUR RELATIONS BOARD**

OPERATOR SENDING: Susan Noble, Senior Executive Assistant to Bruce R. Wilkins, Associate Chair, Adjudication

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INTENDED RECEIVER:	**FAX NUMBER:**
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To: Sheen Arnold McNeil LLP **Attention: Susan Arnold**	**604.770.3848**

NUMBER OF PAGES: 22 (Including this page)

SPECIAL INSTRUCTIONS:

Board Decision (BCLRB No. B80/2018) dated June 15, 2018. A hard copy will follow by mail.

*NOTE: FACSIMILE OPERATOR, PLEASE CONTACT THE ABOVE INTENDED RECEIVER AS SOON AS POSSIBLE. THANK-YOU

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BRITISH COLUMBIA

LABOUR RELATIONS BOARD

June 15, 2018

To Interested Parties

Dear Sirs/Mesdames:

Re: Best Service Pros Ltd. -and- Service Employees' International Union Local 2, Brewery, General & Professional Workers' Union **(1st Alternative Application - Variance of Certification - Case No. 71478/18L)**

Enclosed is a copy of the Reasons for the Board's Decision (BCLRB No. B80/2018) rendered in connection with the above-noted matter.

Yours truly,

LABOUR RELATIONS BOARD

Susan Noble, Senior Executive Assistant to
Bruce R. Wilkins, Associate Chair, Adjudication

Enclosure(s)

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0BCLRB No. B80/2018

BRITISH COLUMBIA LABOUR RELATIONS BOARD

BEST SERVICE PROS LTD.

(the "Employer" or "BEST")

-and-

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 2

(the "SEIU")

-and-

SERVICE, HEALTH, MANUFACTURING AND ALLIED WORKERS UNION, CLAC LOCAL 501

("CLAC")

PANEL:	Bruce R. Wilkins, Associate Chair, Adjudication
APPEARANCES:	Gradin D. Tyler, for the Employer Patricia A. Deol and Robert Logue, for the Union Timothy G. Charron, for CLAC
CASE NO.:	71478
DATE OF HEARING:	February 1-2; March 7, 14, 27-29, 2018
DATE OF DECISION:	June 15, 2018

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The SEIU applies under Section 142 of the *Labour Relations Code* (the "Code") to add employees working at the British Columbia Institute of Technology ("BCIT") to its existing bargaining unit at Capilano University.

2 The Employer and CLAC object to the application, claiming they have a collective agreement reached through a valid voluntary recognition agreement ("VRA"). The Employer and CLAC claim that the employees at Langara, BCIT, University of British Columbia Okanagan ("UBCO") and Vancouver Community College Broadway and Pender Campuses ("VCC") have ratified a collective agreement which was reached between the Employer and CLAC through a reasonable ratification process. They say this collective agreement acts as a bar to SEIU's application and says the Union's Section 142 application is an inappropriate partial raid which is attempting to carve out a portion of the CLAC bargaining unit.

3 The SEIU takes the position that there is no collective agreement which can be held up as a bar to its certification application under the Code. It says the ratification process followed was not reasonable, and its Section 142 application should proceed. The SEIU also claims the actions of the Employer interfered with its organizing campaign contrary to Section 6(1) of the Code.

II. BACKGROUND FACTS

4 The Employer obtained the contract to provide cleaning and janitorial services at Langara in April 2016. Work commenced on the Langara contract on April 16, 2016.

5 In May of 2016 counsel for the Employer approached CLAC and proposed that the Employer and CLAC enter into a voluntary recognition agreement. On June 1, 2016 the Employer and CLAC executed a ten year agreement with a term of June 1, 2016 to July 31, 2026 (the "Agreement"). A ratification vote was held for workers at Langara College on June 21, 2016. The Employer and CLAC agreed to hold the ratification vote on this day because they determined that the maximum number of employees would be present. CLAC provided the Employer with a notice of poll which was posted by the Employer on April 19, 2016. The time given for the meeting on the notice was 3:30 p.m. to 4:30 p.m.; the location noted was the employee lunchroom. The notice was signed by CLAC representatives Mark Phillips ("Phillips") and Ryan Cameron ("Cameron"), and said the following:

> The Service, Health, Manufacturing and Allied Workers' Union, CLAC Local 501 has reached terms and conditions for a Collective Agreement with BEST Service Pros Ltd. Ryan Cameron and I will

> be hosting a meeting on Monday, June 20, (details below) where you will have the opportunity to vote and to ratify the Agreement and recognize Local 501 as your bargaining agent.
>
> We will review the Agreement in full and answer any questions that you may have. Should you have any questions, please do not hesitate to contact us using the information provided below. We look forward to meeting with you.
>
> Also if you are unable to attend the meeting, please inform us ASAP so that we can make alternative arrangements for your vote and provide the required information.

6 At the beginning of the meeting at Langara the Chief Executive Officer of the Employer, Kevin McCrum ("McCrum") and Chief Operating Officer, Bruce Taylor ("Taylor") were present. McCrum testified that attendance at the meeting was not mandatory but that employees had been "strongly encouraged" to attend. He also testified that he wanted them to attend and that the meeting was not mandatory, but "it was an important matter and they needed to participate". The meeting room was changed by the Employer because it deemed the room too small and not appropriate for voting purposes. McCrum and Taylor introduced CLAC representatives to the employees. They explained the relationship between the Employer and CLAC, and that they had reached the Agreement together. They said the Employer had a good relationship with CLAC. They explained that CLAC would be going through the Agreement with them and they would be voting on the Agreement. They encouraged the employees to ask questions. They then left the room so that only CLAC representatives and the employees were present.

7 CLAC Representative Phillips testified that he handed out copies of the Agreement to the employees present and went through the entire Agreement clause by clause. The employees had not seen the Agreement previously, nor had they previously met any CLAC representatives. Phillips says he then asked for questions from those present. Some questions were asked and answered. Phillips then told the employees they had the right to vote and that a vote "yes" was a vote for CLAC. The employees voted in the room. Phillips told the employees to respect the privacy of the votes of other employees. He testified that there was space at the back of the room for those who wanted to vote in privacy. There was no private voting screen. The ballots were placed in a locked ballot box and two employees in attendance were asked to help count the ballots. Eleven employees attended the meeting. The result was eleven employees in favour and none opposed. Nineteen (19) employees had been hired at that time. Phillips testified that the meeting lasted 1-1½ hours and was "quick" according to his experience and that he had had previously been present at ratification meetings lasting 3½ hours.

8 After the Langara ratification vote the Employer added more employees to the employee complement. The Employer hired more employees to meet the original contractual obligation and hired still more employees to service a new building that was added to the cleaning contract between the Employer and Langara. Langara had been

planning to complete the new building and it was completed sooner than expected. The parties to the cleaning contract had anticipated that the new building would be added to the contract. By September 2016 there were 34 employees working for the Employer at Langara.

9 In August - September of 2016 the Employer completed the final negotiations for the janitorial contract for BCIT. Work began on the contract on November 11, 2016. On November 14, 2016, CLAC provided the Employer with a notice of a meeting to be posted for BCIT employees of the Employer. Notice was e-mailed to employees as well. It did not give a specific time for a vote but said as follows:

> Date/Time: As per scheduled orientation date/time.

10 The Employer ran orientation sessions for the employees at the Delta Hotel and allowed CLAC to have time to meet with the employees and to conduct ratification votes in conjunction with the orientation sessions. There were 7 ratification meetings in all for the employees working at BCIT. McCrum and Taylor introduced the CLAC representatives to the employees in each case. The Employer had told employees they were not required to attend but encouraged them to stay and attend the meeting. The format followed in the ratification meetings at BCIT followed the same format at Langara, but the ballots from the meetings were put into an envelope and counted after the last meeting. The employees voted in favour of the CLAC Agreement with 96 total ballots cast, 82 in favour and 14 opposed. There were 103 employees on the payroll at the time.

11 SEIU filed an application at the Board for certification of employees at Capilano University on February 10, 2017. On February 20, 2017 a vote was ordered. SEIU won the vote and was granted a certification to represent the employees in a bargaining unit at Capilano University. SEIU began a larger campaign to organize the Employer's employees at non-union sites and sites where the Employer had voluntarily recognized CLAC. Preparation for this campaign began when SEIU organizer Megang Sule ("Sule") flew into Vancouver from Ontario on February 21, 2017. Organizer Christine Bro ("Bro") testified that the SEIU campaign was "city wide and province wide" and was run under the "Justice for Janitors" message that had been developed. Bro testified that the campaign had lots of momentum but that in mid-March the campaign "hit a wall" around the time CLAC moved to get benefits in place for the employees at sites where the Employer and CLAC had a VRA. Sule testified that she had accidentally spoken to an excluded manager employed by the Employer, called "Betty Sue", about union organizing on February 27, 2017.

12 On February 15, 2017, counsel for the Employer e-mailed CLAC representatives Tony van Hengel and Mark Phillips proposing to meet on February 22, 2017 to discuss the potential for expansion of the voluntary recognition agreement. On February 28, 2017, CLAC and the Employer met to expand their VRA to the VCC and UBCO. McCrum testified that the Employer expanded the VRA with CLAC because Langara's and BCIT's experience with CLAC was good and they wanted to expand the

relationship to other post-secondary locations. McCrum testified that this had been the plan from the start of the relationship with CLAC if the relationship with CLAC went well.

13 On March 3, 2017 the Employer wrote to SEIU and complained about SEIU's organizing tactics at Langara and BCIT, and, among other things, threatened to file an unfair labour practice against SEIU.

14 CLAC and the Employer concluded their negotiations for VCC on March 8, 2017. On March 8, 2017 the Employer posted a notice it had been provided by CLAC to inform employees at VCC Broadway Campus that there would be a vote on Friday, March 10, 2017. The times posted on the notice were for morning shift, 10:00 a.m. to 11:30 a.m. and afternoon shift, 6:00 p.m. - 7:30pm. A similar notice was posted the same day for the VCC Pender Campus. That notice set the time for 12:00 p.m. to 1:30 p.m. and 4:15p.m. to 5:45 p.m. The format for the ratification meetings was the same as that at Langara. Twenty-two (22) voters cast ballots, with 18 voting yes, 3 voting against and one spoiled ballot. At the time of the vote there were 41 employees on the Employer's payroll.

15 CLAC and the Employer concluded their negotiations for UBCO on March 16, 2017. On March 20, 2017 a notice was posted for employees of UBCO by the Employer which was provided by CLAC that there would be a vote on March 22, 2017; the times were stated as 10:00 a.m. and 4:00 pm. Thirty-one (31) employees cast ballots with 29 voting yes, 1 vote against, and 1 spoiled ballot. At the time there were 48 employees on the Employer's payroll. The format for the meetings was the same as that at Langara.

16 On March 27, 2017 Nicole Veitch ("Veitch") sent a letter to the Employer informing them that it was actively organizing employees "province wide" and specifically at VCC. SEIU demanded, among other things, equal access to VCC as it claimed CLAC had received from the Employer. Veitch did this pursuant to a request by Christine Bro, who said in her testimony that at the time of the letter the SEIU campaign was "city wide and province wide".

17 The term of the Agreement runs from June 1, 2016 to July 31, 2026. Schedules containing pay rates and job classifications for each location are contained within the Agreement. McCrum testified that the 10 year term of the Agreement between it and CLAC was to ensure price and labour stability over the term of the Agreement. The Agreement contained Letter of Understanding #2 that CLAC and the Employer would agree to a wage/benefit review. It says the following:

> The Employer and the Union agree to meet in August two thousand and nineteen (2019) and August of two thousand twenty two (2022) to review the wages and other monetary items contained in the Collective Agreement in good faith, and to consider the potential for further increases and/or the introduction of an employee benefit plan.

18 McCrum testified in cross-examination the Employer did not introduce benefits early because of the SEIU organizing campaign. He testified that that it had ongoing discussions regarding benefits with CLAC from the time of ratification of the Agreement from "day one" with CLAC. Alida Oegema ("Oegema") testified that the original Agreement did not include benefits but that CLAC was working on benefits at the time of ratification. Oegema testified in cross-examination that in March 2017 she attended at BCIT and announced that CLAC was working on negotiating benefits for the employees. The Employer and CLAC initially agreed on a benefits plan and that the cost would be split 50/50. CLAC voted the plan among the employees. The benefits package was voted down by the employees. A modified package with a 60/40 split was later passed by a vote of employees in November of 2017. Letter of Understanding #5 is appended to the Agreement was executed on December 22, 2017 and sets out the benefits program which became effective November 2, 2017.

19 The Employer did its orientation in English and conducted its job interviews in English. McCrum testified that a working knowledge of English is a requirement for employees. The Employer introduced CLAC representatives and explained why they were there in English. CLAC conducted the ratification meetings in English. During its campaign against SEIU, which occurred after the ratification votes, CLAC had its handouts for BEST employees produced in English but also produced handouts that were translated into Tagalog, Punjabi and another language. When it was conducting votes on the benefits plan to be added to the Agreement, CLAC published flyers in English, Tagalog, and Punjabi to communicate its position on the vote to the employees.

20 SEIU organizer Bro testified, according to her experience in organizing the employees, that a majority spoke English as a second language, with the majority of those speaking Tagalog and Punjabi. SEIU organizer Sule also participated in the organizing campaign. Her testimony was that the majority of employees were immigrants to Canada who had very basic English language understanding. She testified that when she got into the "meat and potatoes" of her organizing message she often had problems with people understanding what she was saying, and that she had encountered a large number of Tagalog and Punjabi speakers for whom she would have to return with Tagalog and Punjabi speakers to get the SEIU's message across.

21 The Union called witnesses who were employees of the Employer: Yolanda Florendo ("Florendo") and Roxanne Montgomery, who both work at BCIT; An Long Nguyen ("Nguyen"), who works at VCC Pender; Roshaun Nicholson ("Nicholson"), who works at UBC Okanagan; and, Anita Galano ("Galano") who works at VCC Broadway. All of the witnesses spoke English as a second language, with the exception of Nicholson who testified that he was from Jamaica and spoke English Creole. Nguyen and Galano testified with the use of Vietnamese and Tagolog interpreters respectively. All of the witnesses testified that many of their co-workers spoke English as a second language.

22 Galano came away from the ratification meeting she attended with the conviction she would be paid at a higher rate than she was actually paid; her recollection of the

meeting was that most of the time was spent on the wage grid and what the employees would be paid. She insisted the presentation was not a line-by-line presentation of the Agreement. Nicholson testified that he could not remember the length of the Agreement being referenced in the ratification meeting he was in, and that he was surprised by the length of the Agreement when he later found out its term. Florendo testified that the presentation of the Agreement was "really fast" and that the CLAC presenters passed over some of it. Florendo testified that she was surprised when she later learned, 6 or 7 months after the ratification meeting she attended, that the Agreement was for ten years, that there were no benefits, that they could not strike, and was disappointed by the pay rates. Montgomery felt that the meeting was a mandatory part of the job and hiring process, and testified that she did not remember the term of the Agreement being discussed, and that some parts of the Agreement were skipped. She testified that she is sometimes asked by her co-workers about the meaning of words which she attributed to their not knowing English very well. She said that there are posters in her workplace which contain information about the products the employees use in cleaning that were translated into different languages. Nguyen and Nicholson both testified that they had been told by managers prior to the ratification vote how important it was to attend the meetings. Nguyen testified that he rarely speaks to co-workers because of the difficulty in speaking in English.

23 Oegema, a CLAC representative, conducted ratification meetings at the Pender and Broadway campuses on March 10, 2017 with another CLAC representative, Ryan Cameron. Oegema testified that CLAC relied upon the Employer when it decided to conduct the ratification meetings in English. She said that CLAC had asked the Employer if there was a need for translation and had been told by the Employer that doing the meetings in English would be fine. In cross-examination Oegema was asked where an employee group spoke English as a second language whether it might be appropriate to give employees the Agreement ahead of time. She agreed, and said that she had heard employees speaking in different languages at the meetings she attended. She also testified under cross-examination that CLAC had considered giving the Agreement to the employees ahead of time but that they did not do so because of tight timelines.

24 Each of the ratification meetings lasted from one hour to an hour and a half. There was no exact record of the length of any of the meetings.

III. POSITIONS OF THE PARTIES

I. The Employer

25 The Employer says the relevant evidence overwhelmingly demonstrates the ratification process followed meets the Board's well established test relating to voluntary recognition. The Employer say there are two equally legitimate and lawful ways in which a trade union may acquire collective bargaining rights. The first is through the

certification process under Section 18 of the Code. The second is through a voluntary arrangement with an employer.

26 The Employer argues that the Board's assessment of a ratification procedure in a voluntary recognition scenario is not measured by a standard of perfection. It is measured on whether the process that was followed allowed the affected "reasonable employee" to express their true wishes as to whether or not they wish to be presented by the voluntarily recognized union and accept the collective agreement.

27 The Employer says the ratification process followed in the instant case was very similar to other cases whether the Board has found that the ratification process was reasonable: *Bilfinger Berger (Canada) Inc.*, BCLRB No. B168/2005 ("*Bilfinger*"). It says the facts are highly analogous to those followed in *Compass Group Canada (Health Services) Ltd.*, BCLRB No. B100/2005 ("*Compass*"), *Bilfinger*, and *Halton Recycling Ltd.*, BCLRB No. B18/2017 ("*Halton*"). It says in those cases where the Board has deemed ratification processes unreasonable there were numerous glaring flaws in the process: *Marriot Management Services*, BCLRB No. B239/94. It says there is no checklist of factors but that the Board looks at all the facts to see if a ratification process was reasonable.

28 The Employer argues that reasonable notice was given to the employees and that notice was either posted in a conspicuous place or was e-mailed to the employees. It says that this was done two days prior to the ratification meetings and that a reasonable employee would have known and understood the purpose of the meetings. It says the fact that some individual employees may not have received notice is not important, but rather what is important is that notice was reasonable.

29 The Employer says it does not dispute that there are varying levels of English comprehension amongst the employees at the worksites. It says the evidence before the Board was that all affected employees have a working understanding of English. It says employees complete job applications, participate in interviews, complete hiring paperwork, receive training, obtain instructions from supervisors and management, and receive notices and bulletin board postings at the worksite, all in English. It says there is no evidence before the Board that the employees did not understand the notice provided to them. It says the Code does not presume that immigrant or ESL employees are less able than others to inform themselves and assert their rights: *Federated Building Maintenance Company Limited*, 1979 CanLii 981.

30 The Employer says there was no obligation to provide employees with a copy of the Agreement in advance of the ratification meeting. It says the Agreement was reviewed in full, line by line, in each meeting, and says there was no evidence that any employee was unaware of the contents of the Agreement. It says evidence that the SEIU called concerning the language abilities of other employees was hearsay evidence which should not be relied upon. It says the employees were given the opportunity to ask questions and did so. It says the employee's choice was clear: to accept or reject the Agreement. It says that the standard to be used is that of the "reasonable employee". The Employer says that it is not required to demonstrate the

employees were left with a complex understanding of the intricacies and inner workings of the Agreement

31 The Employer asserts that a representative complement of employees was present at the vote at each of the sites in question and had the opportunity to participate. It says the majority of the increase in employees at Langara at a later date was unanticipated. It says a new building was brought into the Employer's cleaning contract which necessitated the hiring of 6 new employees, and other employees were hired to meet contractual requirements. It says there was no overwhelming or significant expansion of the workforce.

32 The Employer says the employees were provided with an opportunity to cast a ballot in favour or against the VRA in a manner that preserved voter confidentiality. It says there was no evidence called that suggests employees saw how others had voted, nor is it suggested any employees voted in a particular way because they believed their vote could be identified. It says that there is no requirement that a voting screen is used but rather that a "practical common sense judgment" about the circumstances should be made, and that "workplace votes take place in less than ideal conditions": *Compass*.

33 The Employer says the fact that the Employer sought to gain a competitive business advantage in their industry by achieving price and labour stability through the Agreement has no bearing on the validity of the Agreement. It says there is nothing unusual about an employer introducing union officials at the outset of a ratification meeting. It says this is commonplace in Board cases. It further says the fact that the Employer told the employees it had a good relationship with CLAC is unremarkable and that such a statement falls within the Employer's Section 8 rights. It say the Employer has the "freedom to express... views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided the person does not use intimidation or coercion".

34 It says the meetings were not mandatory and that there was no suggestion that jobs were tied to a yes vote. It says the duration of the Agreement has no bearing on the assessment of whether a valid VRA exists, and that 10 year agreements have been negotiated between many other employers and unions. It says the fact a wage increase was due on signing is unremarkable. It says the fact the employees were on shift and being paid does not undermine the validity of the VRA. It says that as of the date of ratification at each of the worksites there was a valid collective agreement in force.

35 The Employer argues that no case of Employer interference under Section 6(1) of the Code is made out because there was no evidence that SEIU was even organizing at those sites at the time the Employer and CLAC took steps to expand the scope of their VRA to include VCC and UBCO on February 15, 2017. It says the Employer was unaware of any organizing at these sites and that witness Bro testified that the SEIU did not start organizing until February 27, 2017.

36 The Employer argues the Agreement acts as a bar to SEIU's application. It says the Union's Section 142 application is actually an inappropriate partial raid which is attempting to carve out a portion of the CLAC bargaining unit.

II. CLAC

37 CLAC says that the law on voluntary recognition agreements has been long established and has served the labour relations community for 40 years. It says the standard that has been set calls for a reasonable ratification process, and that precision or perfection has never been the standard. It says there are many sound bases for maintaining that policy.

38 CLAC says that it is difficult to organize unions in any jurisdiction and that the unionization rate has been collapsing precipitously in BC. It says employees should have access to unionization as a first principle.

39 CLAC says that there are many building sites where it is a requirement to be a member of a union in order to work on the site. It says on those sites workers must join or they cannot work, which is a far bigger issue than in this case where there was no threat of job loss. CLAC says there is no violation of the Code where an employer prefers one union over another.

40 CLAC submits that cost certainty is a reality of doing business today, because doing business is very expensive. It says many unions agree to sign non-standard agreements on large projects where no employees will vote on the agreement and large numbers of employees will go to work. It says unions are doing so to accommodate cost certainty. It says any policy that eliminates cost certainty will dampen economic activity.

41 CLAC argues that the Board has made a good decision to support the voluntary recognition process so long as the employees get a free vote and know what they are voting for. It says that employees can get rid of a union by organizing a decertification under the Code, and if they wish, can get another union to organize them. It says another union can organize the employees and apply during raid season.

42 CLAC says that votes are not perfect and there is no requirement that employees know and understand everything. It says that if there is a free vote it is up to the voter to decide what is important before they cast their vote and that it is not for the Board to be involved in every aspect of a vote. It says every voter votes for a different motive.

43 CLAC says it was reasonable to run the meetings in English and to assume that the voters spoke English. It says no one said they do not care if the employees did not understand. It says in 40 years of jurisprudence no agreement has been struck down because of a lack of translators.

44 CLAC argues that sufficient notice was provided. It says there will always be people who say they did not see or receive notice. It says the evidence showed that adequate notice was provided. It says if they did send out the Agreement prior to the meeting that it has to be asked whether anyone would have read it. It says this has not been a requirement in the past and that the Board should not make it a requirement.

45 CLAC argues that there is no prohibition on the Employer endorsing the Agreement to the employees or saying it has a good relationship with CLAC. It says there was no evidence that the meeting was mandatory and that employees appearing as witnesses were simply asked in the hearing what their impression was.

46 CLAC asserts that the evidence of CLAC representative Phillips was clear that the process was identical for each meeting and that CLAC representatives went through the Agreement in its entirety in each meeting. It says that the recollection of the witnesses was just surrounding money and benefits because that is what they want to remember 1 - 1½ years later at the hearing. It says the witnesses remember what was of significance to them.

47 CLAC says that no witness said they were uncomfortable because others could see their vote. It says the voters voted the way they wanted.

48 CLAC says the fact that the Agreement is for 10 years and makes it unattractive to raiding unions is not of consequence to the Board. It says there is no requirement for CLAC to make matters easy for a raiding union. It says there is no evidence of an SEIU organizing drive and no evidence of how many cards were signed. It says the only evidence was of a blank union card.

49 CLAC argues that its process for ratification was as good as any of the cases that can be found and better than the process in *Bilfinger*, and that the Board should not override those cases for the policy reasons it has offered.

III. SEIU

50 The SEIU says the Employer selected an employer-friendly Union and duped its employees into accepting a 10 year agreement with poverty level wages in order to ensure price stability for its clients.

51 The SEIU argues that the Employer and CLAC did not use a reasonable ratification process. It says that context is important in making this determination. It says the employee group in this case is a particularly vulnerable group of employees; a majority speak English as a second language and a large number are immigrants and racialized minorities. It says the ratification process fails on the grounds of adequate notice, employee awareness, and the secrecy of the ballot. It says the Langara and VCC votes also fail on the basis that a representative group of employees did not participate.

52 The SEIU argues the ratification process was inconsistent with the *Human Rights Code* because there was no accommodation for employees whose first language was not English, and, CLAC knew or reasonably ought to have known that language barriers existed for employees and it did not fulfill its duty to inquire. SEIU argues the Board is required to develop its policy consistently with the *Human Rights Code*.

53 The SEIU argues the expansion of the VRA to VCC and UBCO was a violation of Section 6(1) of the Code because CLAC and the Employer acted to head off the SEIU organizing campaign and the Employer interfered by providing support to CLAC in the context of an organizing campaign by SEIU.

54 With respect to the issue of English as a second language, SEIU says that at least a majority of the workforce do not speak English as a second language. It says while some knowledge of English is necessary to do the job, there is a difference between that and the ability to understand a legal document like the Agreement. It says the fact that CLAC did not meet or consult with the employees of the Employer prior to the ratification vote means they did not comprehend the problem with understanding English prior to the meetings. It says CLAC did not adjust its process as it went along doing the same process for all of the sites and should have known to adjust its process to accommodate the language difficulties. It says when it later mattered to CLAC that the employees understand their messages they conducted many meetings with the employees and translated their materials in to multiple languages to provide to the employees. SEIU says the test is whether a reasonable member of the workforce in question would understand the Agreement they were voting for.

55 The SEIU says the number of employees at the Langara campus changed from 16 to 34 between June and September of 2016, and the group of employees who voted at Langara was not a representative group. It says notice of the ratification vote at VCC was deficient because it was posted mid-week and the weekend employees did not have an opportunity to get notice prior to the vote.

56 The SEIU says the expansion of the VRA to VCC and UBCO was in response to the SEIU organizing campaign and arose out of a wish to interfere with the SEIU campaign. It says the motivation was to avoid the price instability that SEIU represented. It says the contracts at VCC and UBCO were in place since 2013 and that the Employer did not move to recognize CLAC until SEIU filed for certification at Capilano University. It says the Employer learned about the SEIU organizing drive when its organizer Sule approached a manager by mistake to discuss organizing. It says the evidence demonstrates that the Employer and CLAC rushed into an expansion of their VRA. It points out that the ratification for VCC was just one month after SEIU applied for certification at Capilano University. It says the Employer agreed with CLAC to provide benefits ahead of their contractual obligation to do so. It says this was done in response to the SEIU's organizing campaign and in order to frustrate that campaign.

57 The SEIU says the Employer and CLAC failed to call CLAC representatives Ryan Cameron and Tony van Hengel, and counsel from the Employer, whose testimony would have demonstrated that the expansion to VCC and UBCO was motivated by the

desire to head off the SEIU organizing drive. It says I should draw an adverse inference against them and find that they were motivated by a desire to interfere with the SEIU organizing drive.

58 The SEIU says the employees are a vulnerable group and that the scrutiny of the ratification process should be heightened given the length of the Agreement because the employees will not be able to exercise their right to strike for a decade. It says notice was deficient; the employees were not fully apprised of the relevant terms and conditions of the Agreement; there was not a representative complement of employees at Langara and VCC; and, voting confidentiality was not preserved.

59 The SEIU asks for a declaration that the Agreement is not a collective agreement under the Code; a declaration that CLAC is not a valid representative of employees in the unit; a declaration that the Employer interfered in the selection of a trade union contrary to Section 6(1) of the Code; an order that CLAC repay union dues; an order that CLAC be barred from entering onto another VRA or applying for certification for any of the Employer's employees for a period of 10 months; and, an order that the vote on SEIU's variance application be counted.

IV. ANALYSIS AND DECISION

60 The law on voluntary recognition agreements is well established in British Columbia. The case of *Delta Hospital,* BCLRB #76/77 ("*Delta Hospital*"), contains the following passages:

> The immediate and pressing issue in this case is not whether the Hospital or the Operating Engineers committed unfair labour practices in the past. Rather, it is whether the Board may now entertain and proceed with the H.E.U.'s application for certification. That is an issue because the agreement which was finally executed on September 8 is raised by the Hospital and the Operating Engineers as a contract bar under Section 39(2) (b) of the Code. Generally speaking, that Section provides that where a collective agreement is in force an application for certification for the unit covered thereby can be made only during the seventh and eight months in each year of its term. A judgement is required, then, as to whether the document in question is a collective agreement within the meaning of the Code so as to foreclose for the time being the H.E.U.'s application under Section 39(1) of the Code. That judgement must be made following a careful examination of all circumstances to see whether the agreement meshes with the definition of collective agreement within the overall framework of the Code.
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> *****
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> Voluntary recognition, then, has a place in British Columbia labour relations. It has its own distinct advantages. But it is also true that there are risks to voluntary recognition which are not present, or

> are less likely to be present, where the relationship is initiated by a certificate of bargaining authority issued by a labour board, following the full paraphernalia of certification proceedings. For example, there is a danger that a "sweetheart" deal may be struck, one which favours the trade-union and management but which is to the distinct disadvantage of the employees. (We hasten to say that there was no suggestion of such an arrangement here.) Alternatively, an employer may, for no readily apparent reason invite a trade-union to enter into a collective agreement, but later examination reveals that the employer's objective was to influence his employees against another trade-union which had been experiencing some organizational success. Finally, even in the absence of such clear improprieties, it is entirely possible that voluntary recognition will result in the employees having foisted on them a bargaining agent which they have never wanted and still do not want.
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> ...The issue of whether an uncertified trade-union is representative of employees more often arises in the industrial setting where the work force is already there and where the trade-union, without consulting the employees at all, persuades the employer for one reason or another to enter into a collective agreement. In those circumstances, if a dispute arises as to whether the agreement really is a collective agreement, the trade-union should be prepared to offer evidence that it is representative of a majority of the employees affected. There is no set way in which this will have to be done. The trade-union can meet this requirement by showing that a majority of the employees are members, or by establishing that a reasonable ratification procedure was followed and the employees elected to be bound by agreement, or by any other means adequate in the circumstances.

61 The Board has said that there is no "set way" of conducting a reasonable ratification process. Instead, the Board applies a flexible approach and the facts considered will vary from case to case, depending on the surrounding circumstances: *Compass*. CLAC and the Employer claim that their VRA is a bar to the Union's Section 142 application. The issue before me is whether there was a reasonable ratification process for the Agreement such that it can be held up as a bar to the SEIU's section 142 application.

62 The parties dispute whether the linguistic abilities of employees may have affected their ability to understand what was happening during the meeting. The SEIU says that the employees are a vulnerable and disadvantaged group because of the fact that the majority are recent immigrants to Canada who speak English as a second language. The Employer says the employees have a working knowledge of English and that training, interviews and work are done using English.

63 I find there was a real concern with respect to language at the meetings. There was no exact figure established in the evidence as to how many of the employees

spoke English as a second language. The majority of employee witnesses who appeared in front of me spoke English as a second language and two of them required a translator to understand questions fully and to give full answers during the hearing. The testimony of organizers Sule and Bro, and the testimony of the employees, leads me to find on a balance of probabilities that a majority of the employees speak English as a second language.

64 The testimony of the employees I heard concerning the ratification meetings demonstrated a wide divergence in understanding of what was going on and what was being voted on. There were large gaps in their knowledge concerning such fundamental points as their rates of pay or how long the term of the Agreement was. Given the widely divergent understandings with respect to what was being voted on that their testimony illustrated, I conclude that the ratification process employed did not afford them with the opportunity to make an informed choice.

65 Phillips testified that the ratification process was "quick" and that other ratification processes he had been involved in lasted three and a half hours. Witness Florendo said that the review of the Agreement was "really fast". Oegema agreed in her testimony that where English was a second language it might be appropriate to give employees the Agreement ahead of time. She also testified that she had heard employees speaking in different languages at the meetings she attended.

66 When I consider that the Agreement was provided in English, that the employees did not have the opportunity to read it prior to the ratification meeting, and the ratification meeting was conducted in English, I find that this resulted in the inability of a significant numbers of employees to fully understand the Agreement and its significance in the time provided prior to the vote. CLAC's witnesses insisted they went through the entire Agreement "line-by-line" and "clause by clause". The Agreement is 42 pages long. When this is considered with the fact that the meetings were 1 to 1½ hours long and included the process of voting, I find that it is unreasonable to expect that the employees in question had a real grasp and understanding of what they were voting on and what the consequences of the vote were. CLAC representatives relied on the Employer's word that English would be appropriate for the ratification meetings. The evidence demonstrated that after the ratification meetings CLAC began to publish their own materials to communicate with the employees in multiple languages. In its campaign against SEIU and in its materials concerning benefits produced after the ratification meetings, CLAC published flyers in English and three other languages. This demonstrates to me that CLAC itself came to the understanding that communicating in English only was not adequate to communicate the meaning of messages it wished the employees to fully understand.

67 I accept, based on the evidence before me, that a majority of the employee group is one that, because of their linguistic limitations with respect to the English language, was a vulnerable employee group: *Peter Ross 2008 Ltd.*, BCLRB No. B59/2012 (Leave for Reconsideration of BCLRB No. B187/2008).

68 While I accept that the Employer did not make the meetings strictly mandatory, the Employer strongly encouraged its employees to attend because they considered it to be very important. Two of the witnesses gave testimony that they felt it was mandatory to attend the meetings, and had been spoken to by managers about the importance of attending the ratification meetings.

69 I find the fact that McCrum and Taylor introduced the CLAC representatives to the employees at the beginning of the ratification meetings is significant. McCrum and Taylor are the Chief Executive Officer and the Chief Operating Officer of the Employer. I find that this would tend to have a very strong impact upon the employees, and that the employees would give what they said a great deal of weight. Given that the employees had not had any discussions with CLAC at all prior to the meetings, I find that the employees would see CLAC was being put forward as an organization that was endorsed by their Employer. I also find the introductory remarks of the Employer's senior executives cannot be severed from the CLAC presentation. I find that they were in fact effectively making a joint presentation to the employees, even if the Employer representatives left the room. McCrum agreed in cross-examination that he said to the employees there was a good relationship between the Employer and CLAC. I find that rather than creating the appearance of neutrality, the appearance and actions of the Employer's top executives provided an endorsement of CLAC and a strong incentive to vote for CLAC.

70 There was no secret ballot employed in the ratification meetings. Employees had to sign in to get a ballot, but there was no voting screen and no real safeguard to ensure confidentiality. I do not accept that telling people to "go to the back of the room" if they wanted privacy or that an admonition to respect other's voter's privacy in voting were sufficient to safeguard the confidentiality of the polls in this case. I find that the testimony I heard establishes that if a person wanted to, they could easily observe the manner in which others were voting and their identity. In my view, the Code does not permit such a cavalier attitude towards voter confidentiality. Section 39 of the Code is framed in mandatory language with respect to confidentiality. It says the following:

a) Voting requirements

> **39** (1) All voting directed by the board or by the minister under this Code and other votes held by a trade union or employers' organization of their respective members on a question of whether to strike or lock out, or whether to accept or ratify a proposed collective agreement, must be by secret ballot cast in such a manner that the person expressing a choice cannot be identified with the choice expressed.

71 Section 2(a) of the Code recognizes the "rights and obligations of employees" and Section 2(c) of the Code references trade union being "freely chosen" by

employees. I find the votes at the ratification meetings did not respect the employees and their right to choose freely, which is compromised when there is effectively no confidentiality in the vote. The fact that employees were able to vote next to one another with no voting screen is another factor which demonstrates to me that the ratification process was done in a hurried manner. There was no confidential voting process which respected the right of the employees to freely choose and the importance of the decision they were making.

72 The Employer argues that the Employer's statement that it had a good relationship with CLAC was a statement that was within its Section 8 rights. In the case of *Simpe 'Q' Care Inc.*, BCLRB No. B161/2007 (Leave for Reconsideration of BCLRB No. B171/2006) ("*Simpe 'Q'*") the reconsideration panel of the Board said the following:

> It is thus now a duty of the Board to consider the rights and obligations of the employees involved in any matter before the Board. In turn, the obligation to recognize the employees' rights requires that those rights be respected. The rights to be recognized and respected include the opportunity for a reasonable employee to "make inquiries and assess ... views" expressed under Section 8 of the Code: *Ibid.* (para. 74)

73 The Board also commented concerning employee choice in the case of *Certain Employees of Floralia Plant Growers Ltd.*, BCLRB No. B34/2016 ("*Floralia*"):

> Having reviewed and considered the submissions of the parties, we find that the most critical concern before us is the circumstances involving the twelve (12) new SAWP employees from Mexico in relation to the representative vote which was held. We find both the context of those circumstances and what is at issue to be of importance.
>
> What is at issue is the choice of these employees as to whether they wish to be represented by the Union or not. From the outset of what is often referred to as the modern Code, that right of employee choice has been recognized as the fundamental premise of the Code: *Forano Limited*, BCLRB No. 2/74, [1974] 1 Canadian LRBR 13, p. 17. That is as true today as it was then.
>
> It is recognized, for instance, in the Section 2(a) addition to the Code. That provision makes it an express duty of the Board to consider the rights and obligations of the employees, as well as the rights and obligations of the union and the employer.
>
> How that fundamental premise of the Code, the right of the employees to choose, is given effect in any particular context is thus of great importance. Accordingly, the Board has recognized that for the right to be given proper effect, the employees must have a proper opportunity to make inquiries and assess the views which are presented to them on this issue: see, for instance, *Simpe*

> *'Q' Care Inc.*, BCLRB No. B161/2007 (Leave for Reconsideration of BCLRB No. B171/2006), paras. 54-89 ("*Simpe 'Q'*").
>
> > That is only fair and respectful of the employees in the circumstance. The Board has explained this on a common sense and non-technical, non-legalistic basis: have the employees been treated "respectfully, including allowing them the proper opportunity to make inquiries, review what they have heard, and make up their minds in regard to what is being put before them?" (*Simpe 'Q'*, paras. 87-89). (paras. 8-12)

74 The panel in *Floralia* emphasized that the right of employees to choose is important and how that right is given effect under the Code is of "great importance". In the case before me the vote took place immediately after an endorsement of the relationship between CLAC and the Employer by the Employer and a rushed presentation of the Agreement with no real opportunity for this group of employees, the majority of whom spoke English as a second language, to assess, consider, discuss, or make enquiries about the choice being made and whether this was what the employees really wanted. I have considered evidence that the employees were given the opportunity to ask questions and that questions were answered by CLAC representatives just before the vote. Given the overall circumstances and the rushed manner of the ratification process I do not consider that this was enough to say with confidence that this group of employees were given the opportunity to make inquiries or to assess what had been presented to them.

75 The ratification meetings achieved the objectives of the Employer and CLAC in formalizing their VRA, but the format of the meetings did not factor into the process the importance of the decision to the employees and their right to freely choose. The decision made by employees in this case was of great importance for the employees. The decision concerned their fundamental employment rights and their terms and conditions of employment for a period of ten years. At a minimum, the employees in this case should have been given the chance to make inquiries and to assess the complex information that was presented to them. I find they were not given that opportunity in this case.

76 For the reasons given above, I find that the ratification process was unreasonable and the ratification votes cannot be relied upon to reflect the true wishes of the employees. I find the Agreement is not a collective agreement under the Code and is not a bar to SEIU's Section 142 application. I dismiss the Employer's argument that SEIU's Section 142 application is an inappropriate partial raid under Section 19 of the Code. Consequently, SEIU's Section 142 application may proceed.

77 Because of the decision above it is not necessary for me to deal with the issue of whether there was a representative complement of employees at the Langara and VCC meetings. I add that I have found that given the number of employees that showed up for the ratification meetings that notice was not a problem with the process.

78 The SEIU asked me to find that CLAC and the Employer interfered under Section 6(1) of the Code with its organizing campaign. The evidence in this case was that when the Employer and CLAC began their relationship with Langara and expanded it to BCIT they had no knowledge of SEIU's intentions to organize. While I accept the Employer and CLAC knew about SEIU's Capilano University organizing campaign at the time they expanded their VRA to VCC and UBCO, I find the fact they expanded their relationship after coming to this knowledge is not an unfair labour practice. While witness Bro testified the SEIU campaign was city and province wide and had "lots of momentum", there was no evidence that SEIU was having any organizing success at VCC or UBCO at the time in question. There was no evidence that employees of VCC or UBCO had signed SEIU membership cards at the time of the CLAC ratification votes at those sites. These facts do not fit into the policy concern that was expressed in *Delta Hospital* as follows:

> Alternatively, an employer may, for no readily apparent reason invite a trade-union to enter into a collective agreement, but later examination reveals that the employer's objective was to influence his employees against another trade-union which had been experiencing some organizational success.

79 There was some evidence from witnesses Sule and Bro that the Employer must have known about the SEIU organizing campaign through Sule's discussion with "Betty Sue", an alleged manager of the employer, on February 27, 2017. The identity of "Betty Sue" was never established. Her existence not put to the Employer's witnesses to establish if she worked for the Employer, where she worked, or in what position. I found this evidence to be too indistinct to rely on.

80 The letter the SEIU sent on March 27, 2017 to give notice to the Employer of its organizing campaign at VCC postdated the ratification votes at both VCC and UBCO. The testimony of McCrum was that expanding the VRA was contemplated from the outset and was not done to prevent or in response to SEIU organizing. That testimony was not shaken under cross-examination nor was there evidence to the contrary. The SEIU asked me to make an adverse inference because the Employer did not call counsel for the Employer or Cameron from CLAC to testify as to why the Employer and CLAC expanded their VRA to VCC and UBCO. McCrum, the CEO of the Employer, and CLAC representatives Oegema and Phillips were called by the Employer and CLAC and had extensive first-hand knowledge of the events around the voluntary recognition and its expansion, and were made available for cross-examination. In my view, it would not be appropriate to make an adverse inference given the witnesses that were called. The fact that the negotiations at VCC and UBCO were quicker than previous negotiations at Langara and BCIT is not surprising given that the Employer and CLAC were only negotiating pay schedules and job classifications at those two sites rather than an entire agreement on terms and conditions of employment. I also find the fact that at each of the sites in question employees received a pay increase is unremarkable. Where unions and employers are negotiating for the first time under the Code pay increases are very common, and cases where there is no pay increase are in the distinct minority.

81 I add that during the proceedings the Union submitted a summons for counsel for the Employer. The parties all gave submissions concerning whether I should issue the summons. I found that counsel for the Employer was, at all relevant times, acting as counsel for the Employer under instructions from the Employer and had no other relationship to the Employer other than that of counsel. I followed those cases that said that signing a summons for counsel should be avoided if at all possible, and I decided it was not appropriate to issue the summons in the circumstances of this case.

82 The SEIU argued that the introduction of benefits prior to the wage/benefit review in Letter of Understanding #2 was in response to the SEIU organizing campaign and constituted interference with that campaign. I do not find this to be the case. While I recognize there was no contractual obligation to put benefits in place, the evidence of Oegema and McCrum was that at the time of ratification efforts to introduce benefits coverage for the employees had already begun well before SEIU organizing efforts. The evidence of timing was that CLAC and the Employer were well into their relationship before the SEIU campaign had begun and that introducing benefits was being worked on from the outset of their relationship before any knowledge of SEIU organizing. I did not hear any evidence to contradict these assertions nor was the testimony of these witnesses shaken in cross-examination. Furthermore, the agreement to formalize benefits was not concrete and signed until December of 2017, well after SEIU announced to the Employer in Veitch's letter that it was organizing province wide in late March of 2017. This evidence demonstrates that there was not a rush to introduce benefits by the Employer and CLAC. Given the specific information provided by key witnesses, and the surrounding circumstances, I do not find that the introduction of benefits for employees of the Employer and CLAC was in violation of Section 6(1).

V. CONCLUSION

83 I declare the Agreement was not subject to a reasonable ratification process and is not a collective agreement under the Code. The Agreement is not a bar to SEIU's variance application under Section 142 of the Code. The SEIU's Section 142 application may proceed. The votes have been sealed pending this decision and the SEIU and the Employer have both challenged ballots. Because there are challenged ballots that need to be resolved I am not making an order that the ballots be counted at this time.

84 The SEIU's Section 6(1) application is dismissed.

LABOUR RELATIONS BOARD

BRUCE R. WILKINS
ASSOCIATE CHAIR, ADJUDICATION