

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

FLORALIA PLANT GROWERS LIMITED

(the "Employer" or "Floralia")

-and-

S&G FRESH PRODUCE LIMITED

("S&G")

-and-

UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL: Jennifer Glougie, Vice-Chair

APPEARANCES: Parveen Sandhu, for Floralia  
Gary Singh Sandhu, for S&G  
Brett Matthews, for the Union

CASE NO.: 69861

DATES OF HEARING: November 7-10, and December 11-14,  
2016

DATE OF DECISION: January 20, 2017

**DECISION OF THE BOARD**

**I. NATURE OF APPLICATION**

1           The Union applies under Sections 6(1) and 6(3)(a) of the *Labour Relations Code* (the "Code") alleging the Employer committed an unfair labour practice by failing to properly recall its complement of temporary foreign workers employed under the terms of the Seasonal Agricultural Worker Program ("SAWP"). The Union says that Floralia failed to properly recall the workers it recruits under the SAWP program ("SAWP Workers") and who have recall rights under the Collective Agreement for the 2016 Season. Specifically, the Union says Floralia delayed recalling its SAWP Workers and, when it finally did recall them, recalled fewer than normal. The Union says Floralia's failure to properly recall the SAWP Workers was motivated by anti-union animus. It says Floralia became aware of which workers supported the Union during a failed decertification drive in 2015, and sought to limit the recall to ensure that the majority of its workers did not support the Union.

2           The Union also applies under Section 38 of the Code for a declaration that Floralia and S&G are common employers. The Union says S&G employees have been performing work on Floralia's behalf since at least 2015.

3           Floralia says it had legitimate, *bona fide* business reasons for delaying the recall of its SAWP Workers and reducing the number of SAWP Workers recalled. It denies acting with anti-union animus and denies committing an unfair labour practice in that regard.

4           Both Floralia and S&G dispute the Union's claim that Floralia used S&G employees to perform work on Floralia's behalf while SAWP Workers with recall rights remained in Mexico.

5           Floralia bore the onus of proving that it did not contravene Section 6(3)(a) of the Code and the Union bore the onus of proving its allegations under Sections 6(1) and 38. At a case management conference call on October 17, 2016, Floralia agreed to proceed first and put its entire case with respect to both the unfair labour practice complaint and the common employer application. S&G agreed to proceed second and put in its entire case with respect to the common employer application. The Union agreed to proceed last but agreed that, after it closed its case, Floralia and S&G would have an opportunity to call reply evidence with respect to any unexpected issues arising out of its case.

6           The parties' practice in their written submissions and at the hearing was to refer to the SAWP Workers by their first names. Similarly, the parties referred to the various people involved in the operation and control of both Floralia and S&G by their first names, due primarily to the fact that many of them share a common last name. For the

purposes of this decision, I adopt the parties' practice in this regard and use first names where it is necessary to identify individuals.

7 I have set out the parties' evidence and arguments only to the extent necessary to make a determination on the issues in dispute.

## 8 II. BACKGROUND

8 Floralia operates a farm located at 2191 Interprovincial Highway in Abbotsford, BC (Floralia's "Primary Premises"). It also leases property in the Fraser Valley which it farms. Floralia sells its produce to wholesalers and at various farmers markets in the Lower Mainland. Floralia has participated in the SAWP program, through which Citizenship and Immigration Canada allows Floralia to use temporary foreign workers, for approximately 12 years.

9 Until recently, Floralia was jointly owned by Parveen Sandhu and her brother, Ramji Sandhu. Ramji exercised significant control over the farm's operation, particularly in 2012, when Parveen developed a medical condition that prevented her from doing so. In late 2014, with Parveen's health improved, Ramji stepped away from the operational side of the business and, in September 2015, entered into a verbal agreement with Parveen to remove himself from Floralia. Ramji officially resigned his position on February 15, 2016, after Floralia obtained the necessary financial restructuring. Parveen's mother, Gurmit Sandhu, purchased Ramji's shares and now co-owns Floralia with Parveen. Parveen is the sole Director of Floralia.

10 The Union was certified on October 20, 2008, to represent the employees of Floralia, other than office staff and supervisors. The Union and Floralia are party to a collective agreement with a term running from September 23, 2012 to September 22, 2016 (the "Collective Agreement"). The Collective Agreement provides for recall rights for both the SAWP Workers as well as any domestic workers employed by Floralia. The process by which SAWP Workers are recalled at the beginning of the season is complicated by requirements of the SAWP program.

11 In order to request SAWP Workers generally, an employer must submit an Application for a Labour Market Impact Assessment ("ALMIA"). On the ALMIA, the employer must indicate, among other things: what type of work will be performed; the locations where that work will be performed; and what efforts the employer has made to recruit domestic workers. The employer must also indicate how many SAWP employees it needs and when it expects them to arrive.

12 The SAWP program requires that employees be offered a minimum of four months' work and that employees leave Canada by December 15 of any given year. The terms of the program, therefore, require that all employees arrive on or before August 15 to comply with the program requirements. However, since the purpose of requesting employees under the SAWP program is to perform agricultural work, they are generally requested to arrive earlier in the season, usually in spring or early summer.

13 The ALMIA allows employers to either request specific SAWP workers by name or to request unnamed workers. Where an employer requests unnamed workers, the Mexican Ministry of Labour determines who will be assigned if the ALMIA is successful. Where an employer chooses to name its workers, it can indicate whether or not it will accept substitutions if the named workers are unavailable. The substitute workers can themselves be named, in which case the employer attaches a list of acceptable substitutes to its ALMIA, or the employer can indicate it will accept unnamed substitutes.

14 Floralia recalls its SAWP Workers by way of ALMIAs as described above. However, unlike most other employees in the SAWP program, the SAWP Workers have a right to be recalled under Article 20.05 of the Collective Agreement. Article 20.05 is tailored to provide a method for ensuring the SAWP Workers' recall rights are realized within the SAWP's administrative process:

20.05 Recall

The procedure for recall shall be as follows:

- (a) To be eligible for recall, all employees intending to be recalled for the following season shall have the responsibility of advising the Employer by signing the Recall List during the current season or within thirty (30) days of layoff notice and shall provide all contact information if it has changed from the current season.

...

- (c) Employees shall be entitled to submit their preference for either a "Delayed Recall" or an "Early Recall" for the subsequent season. If the Employer is able to grant the preference, it shall be granted based on seniority and ability. Employees must inform the Employer of this preference in writing during the current season and by no later than the date of their repatriation and/or layoff.

For the purposes of this Article, the following definitions shall apply:

"Delayed Recall" shall mean an employee prefers to be recalled at any time after the month of March for the subsequent season.

"Early Recall" shall mean an employee prefers to be recalled at any time before the month of June for the subsequent season.

- (d) The Employer shall submit, as per the terms of any Foreign Worker agreement (i.e. the SAWP agreement), to Human Resources and Skills Development Canada a recall request list. The list is to be in order of seniority (subject to ability and availability) of SAWP employees requesting return employment. The Union shall receive a copy of all

requests. Where a substitution is made beyond the control of the Employer, the Employer will not be held in violation of the Agreement. If a requested employee is substituted in this manner, the Employer shall resubmit the missing named workers on subsequent recalls unless the Employer receives confirmation or information of termination as otherwise set out in this Agreement. An employee who declines recall shall be considered to have been permanently laid off for the remainder of the season.

15 Article 20.05 of the Collective Agreement imposes restrictions on how Floralia can request SAWP Workers on its ALMIAs. Specifically, Article 20.05(d) requires Floralia to request by name the SAWP Workers who have recall rights under the Collective Agreement. The exception to this is where a SAWP Worker with recall rights makes an official election at the end of one season not to be recalled by Floralia for the following year. Unless such an election is made, Floralia is required by Article 20.05(d) to name-request the SAWP Workers on its seniority list. The evidence shows Floralia generally does this by attaching the seniority list to its ALMIA to indicate which workers it is requesting.

16 Floralia generally requests anywhere from 18 to 28 SAWP Workers per year. The ALMIA evidence submitted shows that the total number of SAWP Workers Floralia has requested since 2011 are as follows:

2011	18 SAWP Workers
2012	19 SAWP Workers
2013	16 SAWP Workers
2014	28 SAWP Workers
2015	24 SAWP Workers

17 While the numbers above reflect Floralia's total complement of SAWP Workers in a given season, these workers are not all requested at the same time nor are they requested to start work at the same time. Rather, Floralia usually submits two ALMIAs in any one season requesting workers for periods corresponding roughly with Early Recall and Delayed Recall as defined in Article 20.05(c).

18 The documents introduced in evidence at the hearing show that Floralia generally submits its first ALMIA for Early Recall in December or early January for the upcoming season. By March, Floralia will ordinarily have requested the bulk of its SAWP Workers. Generally, the more senior SAWP Workers are requested for Early Recall (unless those workers opt for Delayed Recall) and the less senior SAWP Workers are requested for later in the season.

19 As of March 9, 2016, Floralia's seniority list was as follows (although the numbers next to individual names are not referenced in the original document):

Employee name	Hire Date
1. Edegardo Angeles-Resendiz	Record unavailable*; rehire date March 3, 2010
2. Honorio Corona-Martinez	Record unavailable*
3. Genaro Ramirez-Hernandez	Record unavailable*
4. Luis Alberto Lopez-Ornelas	Record unavailable*
5. Abimael Solis-Segovia	Record unavailable*
6. Luis Alonso Salazar-Lizarraga	June 16, 2012
7. Donaciano Ricardez	May 22, 2014
8. Jose Bladimir Garcia-Astorga	May 22, 2014
9. Luis Martin Reyes-Rivera	May 22, 2014
10. Amancio Hernandez-Hernandez	May 22, 2014
11. Juan Carlos Montenegro-Audelo	May 22, 2014
12. Joaquin Torres-Hernandez	May 22, 2014
13. Francisco-Victoriano-Ramos	June 14, 2014
14. Hector Mauel Cambero-Anzaldo	June 11, 2016
15. Juan Sanchez-Silva	June 11, 2016
16. Ruben Puc-Cabanas	June 11, 2016
17. Sergio Cruz-Lopez	June 11, 2016
18. Adan Nava-Arellano	June 11, 2016
19. Fredi Alanis-Puebla	June 11, 2016
20. Juan Miguel Perez-Garcia	June 11, 2016

\*Records not kept for more than six years, therefore records of original hire date for the first five employees are unavailable

Printed March 9, 2016

It is common ground between the parties that no SAWP Workers had resumed work for Floralia by March 9, 2016, the date on which the seniority list was printed. Rather, the seniority list represents the SAWP Workers from the 2015 season, all of whom would

have a right of recall (the "Seniority List"). Twenty workers signed Floralia's recall form at the end of 2015, preserving their right to be recalled for the 2016 season.

20 There is no dispute that Floralia departed from its usual practice for recalling its SAWP Workers for the 2016 season. It departed from its usual practice in two ways. First, Floralia recalled its SAWP Workers later in the season than it normally does. Second, Floralia recalled fewer of its SAWP Workers than normal.

21 The Union says Floralia's departure from its usual practice was intended to decimate the bargaining unit and succeeded in doing so. Specifically, the Union says, Floralia delayed the SAWP Workers' recall and then limited the number of workers recalled in order to avoid recalling the majority of the employees it knew supported the Union. The Union says Floralia knew the Union supporters would be forced to accept work with other farms if they were not recalled in a timely way or at all. As a result, it says, Floralia's departure from its usual practice was motivated by anti-union animus and amounts to an unfair labour practice. Moreover, the Union says, Floralia would not have been able to manipulate the recall processes if S&G were not willing and able to perform work on its behalf. Therefore, the Union says, Floralia and S&G should be declared a common employer for the purposes of the Code.

22 Floralia agrees it departed from its usual recall practice in 2016 but denies it was motivated by anti-union animus. Rather, it says it had a number of legitimate, *bona fide* business reasons for delaying recall and then recalling fewer workers. It says it has committed no unfair labour practices in that regard.

23 Both Floralia and S&G deny that S&G performed work on Floralia's behalf and resist the Union's application for a common employer declaration.

#### THE UNFAIR LABOUR PRACTICE COMPLAINT

24 In order to put the Union's argument into context, it is necessary to set out in some detail the particulars of a previous unfair labour practice complaint and common employer application filed by the Union against Floralia and S&G. Those applications resulted in three decisions of the Board which are relevant to the present dispute with respect to both the Board's determinations and the timeline in which the decisions were published: *Certain Employees of Floralia Plant Growers Limited*, BCLRB No. B248/2015, 272 C.L.R.B.R. (2d) 32 (the "2015 Original Decision"); *Floralia Plant Growers Limited*, BCLRB No. B17/2016, 272 C.L.R.B.R. (2d) 56 (the "Stay Decision"); and *Certain Employees of Floralia Plant Growers Limited*, BCLRB No. B34/2016 (Leave for Reconsideration of BCLRB No. B248/2015) (the "2015 Reconsideration Decision").

25 On May 25, 2015, certain of Floralia's employees filed an application to decertify the Union. That application was initiated and spearheaded by one of Floralia's most senior SAWP Workers, Honorio (#2 on the Seniority List). The decertification application was filed after the initial, more senior group of SAWP Workers had begun work in the 2015 season, but before the remaining complement of SAWP Workers had

arrived. The representation vote was scheduled for June 11, 2015, the day after the remaining SAWP Workers were scheduled to arrive in Canada.

26

The remaining SAWP Workers arrived on June 10, 2015, and were dropped off by the travel agent at the Abbotsford Superstore around 4:00 p.m. Felix Martinez, a representative of the Union met them at the Superstore and spoke with them briefly. He identified himself, distributed copies of his business card and the Collective Agreement and briefly explained the vote scheduled for the following day. The Union's description of what occurred next is cited in the 2015 Original Decision as follows:

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.



In any event, the representation vote proceeded as scheduled on June 11, 2015, and the ballot box was sealed pending adjudication of the Union's unfair labour practice complaint and common employer application.

27 In the course of the 2015 applications, the Union introduced membership cards signed by all but five of Floralia's SAWP Workers, indicating they wished to remain certified to the Union. The only SAWP Workers who did not sign cards supporting the Union were: Edegardo (#1 on the Seniority List), Honorio (#2), Luis Alonso (#6), Jose Bladimir (#8), and Luis Martin (#9). In other words, as a result of the evidence the Union led before the Board, Floralia became aware that the Union did not enjoy the support of five SAWP Workers, all of whom were among its nine most senior employees.

28 The Board heard the Union's applications in the fall of 2015, during the time Floralia would start to contemplate its staffing needs for the following season. While waiting for the Board to render its decision, Floralia submitted an ALMIA requesting one named worker, Edegardo (#1 on the Seniority List) to start on March 4, 2016. That ALMIA was dated December 28, 2015 although the evidence suggests it was not submitted until December 30, 2015 (the "December ALMIA"). Floralia indicated on the December ALMIA that it would be willing to accept a substitute if Edegardo were unavailable and attached the Seniority List setting out the acceptable named substitutes. However, Floralia purchased a restricted ticket in Edegardo's name, meaning that, if Edegardo was unable to fly on March 4, 2016, the ticket could not be transferred to one of the named substitutes.

29 While it was not unusual for Floralia to submit its first ALMIA of the season in December, it had never before submitted a first ALMIA for a single worker. The ALMIA form provides a space for employers to explain if their current application is different from those filed in the previous year. Floralia explained it was only requesting a single SAWP employee because it was the "[f]irst application so have not determined how many people are available for work in Canada and willing to work in 2016". The December ALMIA was approved on January 13, 2016.

30 On December 30, 2015, the Board issued the 2015 Original Decision. The Board dismissed both the Union's unfair labour practice complaint and its application for a common employer declaration and ordered that the ballot box be unsealed. The ballots were counted on January 6, 2016, and the majority of ballots favoured decertification. As a result, the Union's certification was cancelled effective January 7, 2016.

31 On January 12, 2016, Floralia submitted its second ALMIA for the 2016 season, requesting eight named SAWP Workers, one to arrive on March 11, 2016, and the remaining seven to arrive on April 8, 2016 (the "January 12 ALMIA"). Floralia named Genaro, Honorio, Luis Alberto, Luis Alonso, Donaciano, Jose Bladimir, Luis Martin, and Amancio in the January 12 ALMIA. In other words, between the December ALMIA (when it name-requested Edegardo) and the January 12 ALMIA, Floralia requested its nine most senior SAWP Workers. There was one hiccup, however. Abimael (#5 on the Seniority List) was left off the January 12 ALMIA and Amancio (#10 on the Seniority

List) was named instead. Parveen's evidence was that this was an error on her part; she testified she must have accidentally skipped Abimael's name when filling out the form. Parveen also testified she requested employees from the Seniority List even though Floralia was no longer bound by Article 20.05 of the Collective Agreement because she was happy with her crew and wanted them back. In any event, on the January 12 ALMIA, Floralia indicated the number of workers "will most likely be similar to last year once the final application is filed".

32 The following day, on January 13, 2016, Floralia submitted its third ALMIA for the 2016 season, requesting an additional 15 workers to arrive on June 7, 2016 (the "January 13 ALMIA"). Rather than requesting the remaining employees on the Seniority List, Floralia requested 13 unnamed workers and two named workers, neither of whom had recall rights. The two named workers were Carlos Enrique Chan-Cauich and Ruberto Marcelino-Patricio, neither of whom had worked for Floralia before. Parveen's evidence was that Amancio gave her those names and asked her to request them by name to fast-track them into the SAWP program. Floralia indicated on the January 13 ALMIA that it did not expect to require more than the 24 workers requested in the three ALMIAs.

33 The Union filed its application for reconsideration of the 2015 Original Decision and a partial stay of proceedings on January 14, 2016, the day after Floralia submitted its third and final ALMIA. The Union delivered a copy of its application to Floralia by email on January 14, 2016 and the Board sent a notice letter to the parties on January 15, 2016.

34 On January 15, 2016, the day after the Union filed the application for reconsideration, Floralia cancelled the January 12 ALMIA and the January 13 ALMIA. In her testimony, Parveen offered a number of reasons why those ALMIAs had to be cancelled. I will set those reasons out in greater detail later in the decision. For present purposes, it is sufficient to note the January 12 ALMIA and January 13 ALMIA were not processed or approved.

35 Also on January 15, 2016, Parveen had a telephone conversation with Edegardo on her personal cell phone lasting approximately 11 minutes. Her phone records show that Edegardo called her at 3:45 p.m. Parveen testified the conversation with Edegardo was unrelated to the Union's application for reconsideration. Rather, she said they discussed back problems that Edegardo was having. She said he assured her that he would be returning to work at Floralia despite his back problems.

36 Parveen's phone records show that she called Honorio (#2 on the Seniority List) on January 20, 2016 and they spoke for approximately nine minutes. She testified that, like with Edegardo, the conversation with Honorio was unrelated to the Union's application for reconsideration.

37 The following day, on January 21, 2016, Floralia submitted a new ALMIA requesting Honorio as a single named worker to arrive on April 4, 2016 (the "January 21 ALMIA"). Floralia indicated that substitute workers would not be accepted if Honorio

was unavailable. It also indicated this was an "early application" and it would "assess labour requirements at a later date". The January 21 ALMIA was approved on January 28, 2016.

38 The Board issued the Stay Decision on January 22, 2016. The Board granted a partial stay of proceedings with respect to the 2015 Original Decision pending a determination of the Union's application for reconsideration. The Board found the Union demonstrated a serious case for reconsideration and would be irretrievably prejudiced if the stay were not granted.

39 Parveen testified that, in early February 2016, Edegardo contacted her to ask if he could delay his arrival in Canada by a couple of weeks so he could attend a medical appointment in Mexico. Floralia requested that his arrival date be postponed to March 18, 2016 in order to allow him to attend that appointment. Parveen testified that she made the necessary arrangements to modify Edegardo's travel date.

40 It would come to pass that Edegardo did not arrive in Canada on March 18, 2016, as scheduled. Parveen testified that he arrived at the airport on March 18, 2016, but was not permitted to board the flight because he was sick. As a result, she had to further rebook his airfare and he ultimately arrived in Canada on April 8, 2016. Martinez testified that, under the normal rules of the SAWP program, the missed flight would have caused the Mexican Ministry of Labour to block Edegardo from further participating in the program unless Floralia intervened on his behalf. Parveen testified that Martinez was wrong and that all she had to do was rebook Edegardo's travel arrangements.

41 The Board issued the 2015 Reconsideration Decision on March 1, 2016. The Reconsideration Panel overturned the 2015 Original Decision, declaring it a nullity as a whole. The Reconsideration Panel refused to cancel the Union's certification and dismissed the application for certification. As a result of the 2015 Reconsideration Decision, the Union's certification and the Collective Agreement were restored.

42 Parveen's cell phone records show that Edegardo phoned her personal cell on the evening of March 1, 2016, the day the 2015 Reconsideration Decision was published. They spoke for approximately 39 minutes. On March 3, 2016, Parveen had a 17-minute conversation with the Mexican Consulate.

43 Parveen testified that a number of the SAWP Workers called her in early 2016 to inquire about their recall and travel dates. Specifically, she said she spoke with Edegardo, Honorio, Bladimir, and Juan Carlos. She testified that Juan Carlos both phoned and texted her to ask if he would be flying on March 18, 2016 and she told him no. She said he was upset because he wanted to come early.

44 Felix Martinez is a Staff Representative with UFCW National. Martinez testified that, he also started receiving telephone calls from the SAWP Workers who were concerned about their recall in early March 2016. He testified that the SAWP Workers come from different regions in Mexico and do not all maintain contact with each other

during the off-season. Nonetheless, he testified a number of the SAWP Workers told him they had been contacted by the Mexican Ministry of Labour and were advised they were to fly on March 4, 2016 but that their employer had not forwarded the necessary airline tickets. Martinez testified those workers were then told that their travel date had been postponed to March 18, 2016. In response, Martinez emailed Parveen on March 14, 2016, saying, in part:

...we are hearing from Mexico significant confusion regarding recall dates for the 2016 season. Mexico's Ministry of Labour has contacted many of our members informing them that their date of travel is March 18, 2016, just 4 days from now. Yet that information is not confirmed. Furthermore, for our part, we have not received anything from you indicating a firm date of recall for any workers. If the Ministry of Labour information is accurate, can you please advise who will be travelling on that date?

As you are aware, confusion in communicating accurate information to workers in Mexico can lead to unnecessary expenses, especially for those workers who must travel to Mexico City before departing to Canada. ...

Parveen responded by email the same day saying "Edegardo Angeles-Resendiz is confirmed to arrive on March 18th and Honorio Corona-Martinez has been requested to arrive April 4th". Parveen testified that, at that point, she did not know whether she would request any more workers for the 2016 season.

45 Prior to working for the National Union, Martinez was a SAWP Officer at the Mexican Consulate in Vancouver. He gave evidence at the hearing about how the SAWP program is administered. He explained that participants in the SAWP program can elect to change farms when they submit their employer evaluations at the end of the season. Other than that, SAWP employees have no opportunity to request a farm change. Moreover, Martinez testified, it is rare for a worker to request a farm change because, if they do, they are placed into a reserve pool. There is no guarantee they will be reassigned from the reserve pool to another farm for the next season and could lose the opportunity to participate in the SAWP program at all.

46 Parveen and Martinez both gave evidence about the SIMOL system, which is the computer program used to monitor labour movement under the SAWP program. Each employee who has been approved for and is participating in the SAWP has a file which can be accessed on the SIMOL system. Employers, workers, and Consulate employees all have access to SIMOL, although not everyone has access to the same information or the same editing privileges. The documents introduced at the hearing show that the following information is available on SIMOL for each SAWP participant for the current season: their personal information (including their current status), the status of their visa applications, their requisition and assignment, and their flight information. Martinez testified that the information on SIMOL is updated in real time, although it is subject to human error. For the most part, he said, the employee information on SIMOL is up-to-date.

47            Martinez testified that, in March 2016, he would have expected the worker status on the SIMOL page for each of Floralia's SAWP Workers to be "*nominal, mismo empleador*" ("named, same employer"), which indicates that both the employer and the worker want the worker to return the following season. That status would have been consistent with the SAWP Workers' recall rights under Article 20.05. However, the evidence at the hearing showed that, with the exception of Edegardo, all of the SAWP Workers' SIMOL files showed a status of "*reserva seleccion, no pedido por su empleador*" meaning that they had been reassigned to the reserve pool. Martinez testified a worker would have this status for one of two reasons: either the employer has refused to accept the worker back or the employer has said it is not accepting any more workers at all. Parveen testified that she never refused to accept the SAWP Workers back and never told the Mexican Ministry of Labour or the Consulate that she did not intend to recall any more workers in 2016. She says the SAWP Workers' statuses were changed without her knowledge or input.

48            The evidence showed that, starting at 5:52 a.m. local time on March 30, 2016, Floralia's SAWP Workers began to be reassigned to different farms for the 2016 season. With the exception of Edegardo and Honorio, who Floralia had already requested by name in the December ALMIA and the January 21 ALMIA, the remaining eight senior SAWP Workers were assigned, within a 22-minute window, to new farms across Canada. The SAWP Workers were expected to travel on April 4, 2016, if they accepted the reassignments.

49            Parveen's phone records show a series of telephone calls to various numbers in Mexico shortly after the senior SAWP Workers were reassigned and began accepting their reassignments. Parveen testified that she spoke with Bladimir, Edegardo, and Honorio. Through them, she learned that Luis Alonso and others had accepted work with other farms.

50            On April 1, 2016, Floralia submitted an ALMIA requesting seven named workers (Genaro, Luis Alberto, Abimael, Luis Alonso, Donaciano, Jose Bladimir, and Luis Martin) to arrive on June 8, 2016 (the "April ALMIA"). These were the same seven employees that were requested on the January 12 ALMIA except that, this time, Abimael was properly included on the list. The less senior SAWP Workers were named as possible substitutes. By this time, however, the named workers and substitutes had accepted positions with other farms and were no longer available to be assigned to Floralia.

51            The Union introduced documents obtained from the Mexican Consulate, which were provided in Spanish and which Martinez translated at the hearing. Neither Floralia nor S&G challenged Martinez's translation of those documents. Those documents record a request from Floralia that, if its named workers were unavailable, it wanted to be assigned employees that were new to the SAWP program. Parveen testified that she never made such a request. In any event, all seven of the workers the Mexican Consulate ultimately assigned to Floralia were new to the SAWP program and five of them were related to each other.

52 In the result, nine workers were assigned to Floralia under the SAWP program for the 2016 season. Of those, only two were on the Seniority List. The remaining 18 SAWP Workers who preserved their right to be recalled to Floralia were reassigned to other farms.

53 Parveen testified that she did not conspire with the Mexican Consulate or manipulate the recall process to avoid recalling the Union supporters. She said she was disappointed that, with the exception of Edegardo and Honorio, none of the SAWP Workers returned to Floralia for the 2016 season. She testified that she was happy with her crew and wanted them to return to Floralia for 2016. She said her usual recall practice changed because she was faced with a number of uncertainties heading into the 2016 season. As a result, she testified, she could not commit to the SAWP Workers or recall as many of them as she normally would.

54 Parveen testified that she cancelled the January 12 ALMIA and the January 13 ALMIA when she realized Abimael had been inadvertently left off the list. She said she needed Abimael in order to run the ice injector for the farm. Other than Ramji, Abimael was the only one trained to use it. She further testified that the ice injector was a crucial piece of machinery so it was important that Abimael be recalled to operate it. Without the ice injector, she said, Floralia would have to use hand ice, which they had previously learned did not work well on their farm.

55 Having cancelled the January 12 ALMIA and the January 13 ALMIA, Parveen testified that she delayed resubmitting an application until April 1, 2016, for a number of reasons. First, she said, by that time the stay application had been filed and she was concerned about running afoul of whatever order the Board might make. She testified she felt she would be safer if she waited to see what the Board decided before making any commitments.

56 Second, Parveen testified there was simply less work to do in the spring of 2016 than there had been in previous years. She said proper farming methods require that berry crops be properly maintained before the winter. When Ramji exercised operational control of the farm, he would lay the crew off shortly after the Thanksgiving push and before the proper maintenance could be done. Once she resumed control at the end of 2015, however, Parveen decided to keep the crew working later into the fall in order to perform the proper maintenance. As a result, she said, there was less work for the crew to perform in the spring of 2016 than there had been when Ramji was in charge. Therefore, she said, she would need fewer SAWP Workers early in the season.

57 Third, Parveen testified she was concerned about financing. Floralia's financing was secured, in part, on the basis of Ramji's personal guarantee and his farming expertise. When he opted to leave the farm, Parveen had to qualify for financing on her own. She said she and Ramji reached an initial, oral agreement about his departure in September 2015 and she initially sought to refinance through the Toronto Dominion Bank ("TD Bank"), with which Floralia had an existing financing arrangement. She contacted TD Bank in early December 2015 and the paperwork for the refinancing was drawn up and submitted for approval.

58 On January 11, 2016, Parveen's lawyer emailed to inform her that Ramji's lawyers were starting to put pressure on her to finalize the restructuring and to ask whether Parveen had a response from TD Bank. Parveen replied the same day indicating she had spoken with her contact at TD Bank. Her contact said the application was delayed because of the holidays and that he would follow up with the necessary people. Parveen testified that she had a follow-up telephone conversation with her lawyer on January 14, 2016, to discuss alternative options in case the TD Bank financing did not come through. She said, as a result of the telephone call with her lawyer, she contacted Farm Credit Canada on January 14, 2016 to discuss the possibility of arranging financing through them. In any event, she was ultimately able to get Floralia's financing issues resolved and the final documents were signed on February 12, 2016, and Ramji officially resigned his position on February 15, 2016.

59 Parveen testified that Ramji was very antagonistic throughout the negotiations. This was particularly concerning to her because she had hoped to rent some land from him on which to plant a new raspberry crop. Parveen testified that Floralia's raspberry field was 10 years old and nearing the end of its lifecycle. She said, in order to plant a new raspberry crop, she would need to have a 10-year lease for the land corresponding with the life of the new crop. She said the original plan was that Ramji would lease some of the land next door to the Primary Premises, which he owned. Ramji decided instead to sell the land to another farmer without warning Parveen in advance. The sale completed on or about February 24, 2016. As a result, Floralia was unable to secure land on which to plant a new raspberry crop.

60 Parveen testified that raspberry work requires a 12-person crew. She said that the raspberry work lasts the whole season because Floralia grows multiple varieties. Early in the season, the crop has to be planted, pruned, tied, and maintained. Throughout the season, it needs regular weeding and maintenance. By September or October in any given year, it needs to be de-caned and tied for the following season. Without a new raspberry crop in 2016, that work was no longer required to be performed.

61 Parveen testified that she not only lost the land for the new raspberry crop, but she discovered in March 2016 that her strawberry crop failed. Without the strawberry crop, she testified, she would not need as many workers for the 2016 season.

62 Parveen also testified that Floralia's greenhouse suffered significant damage during a windstorm in March 2016. Floralia uses its greenhouse to propagate seedling plants early in the season. Parveen testified that seeds will not germinate in wet fields so the seeds are started in the greenhouse, usually in March, and then transplanted when the fields are dry enough. Without a functional greenhouse, the seed propagating work could not be performed. She testified the greenhouse repair was not completed until April 1, 2016.

63 Finally, Parveen testified that she was engaged in a dispute with the City of Abbotsford with respect to the housing in which the SAWP Workers lived. Under the terms of the SAWP program, Floralia is required to provide housing to workers. For a

number of years, it has housed the SAWP Workers in a building located on the Primary Premises. The residence is 357 square metres in size and is comprised of a common living area and kitchen, a mudroom, a large bathroom, and 16 bedrooms. In the summer of 2015, Floralia was advised that its residence exceeded the maximum size allowable by the City of Abbotsford, which was 200 square metres. Floralia applied to vary the maximum permitted size on August 14, 2015. Parveen signed the variance application as one of Floralia's owners, but, since Ramji was the landowner at the time, his signature was also required. He did not sign the variance application until November 19, 2015. Parveen testified that Ramji told her, in February 2016, the variance application had still not been approved by the City of Abbotsford and, if the application did not pass, then a large portion of the residence would have to be shut down or demolished. Parveen testified she calculated that, if the workers were willing to share rooms, she could house eight SAWP Workers within the permitted 200 square metres of space. If she needed to, she could convert the mudroom to a bedroom in order to house an additional worker, meaning she could house nine workers, even if part of the house was shut down or demolished. However, until the issue was resolved, she was hesitant to bring in more than the nine workers she knew she could house.

64 Parveen's evidence was she was unable to commit to recalling the SAWP Workers until the dust cleared with respect to the financing issues, the greenhouse repairs, the raspberry fields, and the strawberry crop, which did not happen until March or April 2016. At that time, she calculated she would need a 12-person crew for the rest of the 2016 season. By then, Edegardo and Honorio were approved to arrive in early April 2016 and three domestic workers had been hired, leaving a need for seven additional SAWP employees. She testified that she applied for the seven additional workers in the April ALMIA based on her staffing needs and her housing limitations.

#### THE COMMON EMPLOYER APPLICATION

65 The Union says Floralia was only able to delay submitting its ALMIA for the majority of its workers until April 1, 2016 and to recall only half of its regular complement of workers because S&G was performing work on its behalf. Floralia and S&G both deny that S&G has performed work on Floralia's behalf.

66 As noted above, Floralia is owned jointly by Parveen and her mother, Gurmit. Both own equal shares in Floralia since Gurmit bought out Ramji's shares. Parveen is Floralia's sole Director. Parveen's parents, Gurmit and Amarjit Sandhu, bought the land at 2191 Interprovincial Highway, on which Floralia's Primary Premises are located, from Ramji in February 2016. The Primary Premises include a packing facility and cooler, greenhouse, and residence. There is also a personal residence on the property where Parveen and her parents live. Floralia's credit line is secured by the 2191 Interprovincial Highway property owned by Parveen's parents.

67 Parveen's father, Amarjit Sandhu, is also a farmer. In 1999, when Floralia was incorporated, Amarjit was working at Sandhu Farms Ltd., which he owned with his siblings. Parveen testified that, in 2004 or 2005, Amarjit started acting as an advisor to Floralia. Parveen testified that Amarjit has a wealth of experience as a farmer and his



input with respect to crop diagnosis is invaluable, although his knowledge about chemicals and pesticides is outdated. She says he has helped Floralia over the years in an advisory capacity but he has no control or direction over the company. He has never used SAWP employees on his own farms and does not generally interact with Floralia's SAWP Workers because he speaks no Spanish. Nonetheless, both Parveen and Amarjit refer to Amarjit as a "manager" with Floralia on various documents submitted in evidence, including farmers market applications and communications, communications with the City of Abbotsford (with respect to the rezoning application) and for the purpose of the CanadaGAP program, which oversees food safety.

68 Both Amarjit and Gurmit help Parveen by working at various farmers markets on Floralia's behalf. Parveen testified that, because farmers markets operate on a cash basis and have no surveillance or security, it is important to have someone she trusts in charge of the cash box.

69 Gary Singh Sandhu is the principal of S&G and is Parveen's cousin. Gary learned farming under his father and uncle, Avtar, who operated Sandhu Produce Growers Ltd. ("SPGL"). When Gary's father passed away in 2013, Avtar became the sole shareholder of SPGL and terminated Gary's employment along with that of his mother, Jagjit, and his brother, Swarn. As a result, Gary and Swarn chose to incorporate their own farm, S&G, in January 2014 with Gary as President and his brother Swarn as Secretary.

70 At the time S&G was incorporated, Gary was 19 years old and Swarn was 20. Parveen's father, Amarjit, agreed to become a shareholder in order to help S&G obtain financing. Gary testified that a bank was unlikely to lend him the money necessary to get S&G up and running without an experienced farmer on board. However, Gary testified that, despite his role on paper, Amarjit had no control over S&G. Like Parveen, Gary testified that Amarjit's knowledge was out-of-date and Gary preferred to rely on the farming methods his own father taught him. He described Amarjit's role at S&G as "peripheral". Gary conceded on cross-examination that Amarjit described himself as a farming mentor to both Gary and Parveen in affidavits he swore in support of Gary and Jagjit's civil claim against Avtar. Gary said that affidavit was just something that the lawyers drafted but that it did not accurately describe his relationship with Amarjit.

71 Until part way through the present hearing, Amarjit held 36% of S&G's shares and was its largest single shareholder. He was also Chairman of S&G's Board, a Director in the company, and a signing authority on S&G's bank accounts. On November 25, 2016, Amarjit sold his shares to Gary and Swarn at the price of \$1 per share and resigned as a Director of S&G, effective immediately. Gary testified that he did not discuss the restructuring with Amarjit in advance; he simply had his lawyer draw up the necessary paperwork and presented it to Amarjit for his signature. He testified that Amarjit was willing to sell his shares for a total of \$36 and resign his position in order to avoid this type of dispute.

72 Both Gary and Parveen testified that their families have long been estranged but, in recent years, the two of them have reconciled. They both testified that they rely on

each other for support in their personal and professional lives. Parveen testified that she finds Gary a useful sounding board with respect to family issues. Her cell phone records show that they talk on the phone at least once, if not multiple times a day, often for long periods of time, at all hours of the day and night.

73 Parveen testified that she mentored Gary when he first applied for workers under the SAWP program. It is clear that, from time to time, Gary has submitted his ALMIAs from Floralia's fax machine and certain typographical errors occur on both S&G's ALMIAs and Floralia's ALMIA. For example, both S&G's December 4, 2014 ALMIA and Floralia's December 4, 2014 ALMIA record the date as "December 4, 2015" and both were faxed from Floralia's fax machine. Gary testified, however, that he corrected the date on his ALMIA and faxed the corrected version from Staples.

74 Parveen's cell phone records indicate that, while she and Gary speak on the phone regularly, those phone calls increase in both length and frequency when labour issues arise. For example, Parveen and Gary's telephone communication increased when the Union filed its application for reconsideration, when the Board's decisions were published, and when Edegardo missed his flight. Parveen and Gary both testified that, while they discuss work, most of those telephone conversations are personal in nature.

75 Martinez testified about a number of incidents in which he documented S&G workers performing work that would historically have been performed by the Floralia bargaining unit. On July 21, 2016, Martinez observed and recorded two S&G SAWP employees working alongside Gary's mother, Jagjit, selling Floralia's product at a Floralia stall at the Port Coquitlam farmers market. Parveen testified that she was attempting to reference in S&G her stall at the Port Coquitlam farmers market. She explained that "referencing in" is when you allow another farmer to operate your stall at a market to test whether they would be interested in taking it over. Parveen testified that Jagjit was testing the market for S&G on that day but ultimately decided not to reference in at Floralia's stall. Parveen testified "referencing in" is standard practice among farmers.

76 Martinez testified that, on May 28, 2016, he observed and recorded an S&G SAWP employee working alongside Amarjit at a Floralia stall at the River District farmers market. Parveen testified that her father was working the River District market alone that day, on behalf of Floralia, and fell ill. Gary's mother, Jagjit, brought Amarjit's medication to him at the River District. Parveen and Gary both testified Jagjit had an S&G worker with her that day and she left him behind to assist Amarjit while she went to close down her own stall at her own market.

77 Martinez testified that, on June 22, 2016, he observed and recorded a team of S&G workers picking in Floralia's field at 2383 Interprovincial Highway. Both Parveen and Gary testified that Floralia sold S&G the afterpick on that field. The "afterpick" is the leftover crop once the premium product has been harvested. Both Parveen and Gary testified that the Floralia crew harvested the premium product in that field and sold the afterpick to S&G. What Martinez observed, they said, was S&G performing the

afterpick it purchased from Floralia. Parveen testified that selling the afterpick is standard farming practice.

78            Martinez testified that, on September 22, 2015, he observed and recorded a team of S&G workers working at one of Floralia's fields on Dixon Road alongside Edegardo, who was driving a tractor, and another Floralia supervisor. Parveen testified that Edegardo was there to perform a count on the product. She said it is standard farming practice to sell product directly from the field and, where that is the case, the customer picks the product out of the field itself. Edegardo was there to oversee the pick and count how much product the customer's crew took. Although she testified she could not identify the crew as an S&G crew from the photographs, she recognized one of S&G's vans parked nearby. She also testified that her supervisor was likely just there taking a break, since she believed a Floralia crew was working on the other side of the field, out of view of the camera.

79            Martinez testified that, on July 24, 2015, he and another Union representative attended the Primary Premises and observed and recorded S&G SAWP employees working alongside Floralia workers. Martinez recognized one of the workers as Elias, a SAWP worker who had previously been assigned to Floralia. Martinez testified that he saw Parveen working alongside the S&G workers and directing their work before they became aware of him. Once they saw him, Martinez said, the S&G workers attempted to leave in the other direction. Martinez confronted Parveen and asked what Elias was doing at the Floralia operation. That confrontation was captured in video recordings made by both Martinez and another Union representative who accompanied him to the Primary Premises. The recording shows that Parveen responded to the question about Elias first by saying he was probably picking something up. When Martinez tells her that Elias said he was working, she responds saying he was just there to visit some of his friends from the Floralia crew and she had to tell him to stop interrupting their work.

80            At the hearing, both Parveen and Gary testified that the S&G crew regularly performs packing work on behalf of S&G at the Primary Premises. Amarjit arranged for S&G to have access to Floralia's cooler and packaging facility until the litigation with his uncle over SPGL is resolved. Gary's evidence was that Elias was working for S&G at Floralia's operation on July 24, 2015 doing the work of another S&G SAWP worker, Edgar, who had a dental emergency. Gary testified the S&G workers did not try to leave when Martinez arrived. He said they were following his mother, Jagjit, to her truck on the far side of the property.

81            Gary was also present at the Primary Premises on July 24, 2015. He testified that four of his workers were performing S&G work at Floralia's operation that day and that he was there to bring them pizza for lunch. The video evidence shows five pizza boxes on a table near where the workers are working. Gary explained that the pizzas were not for all of the workers at the Primary Premises that day, but only for the S&G workers. When asked why there were so many pizzas for four workers, Gary explained they were to be shared with the S&G workers out in the field. When asked why Jagjit and the S&G workers would go to her truck without the pizzas, he explained they were going to drive back in the truck and pick up the pizzas on their way to the fields.

III. THE POSITIONS OF THE PARTIES

82 The Union says Floralia manipulated the recall process under the SAWP program in order to avoid recalling its supporters after the attempt to decertify the Union in 2015 failed. It says, during that process, Floralia learned that the Union enjoyed the support of all but five of the SAWP Workers. Of its SAWP Workers, only Edegardo, Honorio, Luis Alonso, Bladimir and Luis Martin refused to support the Union during the decertification proceedings. Those five are all among the most senior nine employees on the Seniority List. Thus, the Union says, if Floralia managed to recall only the nine most senior workers, then the majority of its employees could be counted on to support its interests. It says Floralia made two attempts to recall those nine workers twice: first by naming them in the January 12 ALMIA and then by naming them in the April 1 ALMIA. In the January 12 ALMIA, the rest of the SAWP Workers, all of whom supported the Union during the unsuccessful decertification application, would be replaced. In the April 1 ALMIA, no additional workers would be requested at all.

83 The Union says Floralia's intention to recall only the most senior nine SAWP Workers was obvious. When it submitted the January 12 ALMIA and January 13 ALMIA, the Union was no longer certified to represent the SAWP Workers and Floralia was no longer bound to recall on the basis of seniority. Floralia nonetheless recalled its nine most senior employees, with the exception of Abimael. After that, it requested only unnamed workers and two others with whom it had no prior history. Therefore, as of January 13, 2016, Floralia indicated it would need 24 SAWP employees: the nine most senior employees from the Seniority List, two named workers with whom it had no previous relationship, and 13 unnamed workers to be determined by the Mexican Ministry of Labour.

84 Floralia's plans were compromised, the Union says, when it filed its application for reconsideration and a stay of proceedings. Almost as soon as it received a copy of the Union's application, Floralia cancelled the January 12 ALMIA and January 13 ALMIA. Overnight, it went from anticipating a 24 worker crew for the 2016 season to being unsure of its labour needs. This, the Union says, is highly suspicious.

85 Floralia offered a number of excuses as to why it cancelled the January 12 ALMIA and the January 13 ALMIA none of which, the Union says, are credible. For example, Parveen testified she cancelled the ALMIAs when she realized she had inadvertently left Abimael off the list of named workers, since he was needed to operate the ice injector. However, Parveen could not explain why, if the ice injector was a crucial piece of equipment, as she testified it was, she did not immediately submit a new ALMIA to recall Abimael. Instead, she recalled Honorio, who was not trained to operate the ice injector, and did not attempt to recall Abimael until April 1, 2016.

86 With respect to Floralia's uncertainty about financing, restructuring, the land for the new raspberry crop, and housing, the Union says Floralia was aware of all of those issues before January 13, 2016, when it submitted its final ALMIA bringing the total number of workers requested for the 2016 season to 24. In the same vein, Parveen testified that there was less work to perform in the early spring because the crew had

performed proper maintenance on the berry crop at the end of the 2015 season. However, regardless of whether or not that is true, on January 13, 2016 she believed she needed 24 SAWP employees for the 2016 season. At that time, she knew that the crew had performed the necessary berry crop maintenance in 2015. Nothing changed in that regard between January 13, 2016, when she believed she needed 24 workers, and January 15, 2016, when she claimed to be unsure of her labour needs. With respect to the strawberry crop failure and the greenhouse repair, Floralia was not aware of either of those issues on January 14, 2016 when it cancelled the ALMIAs. Parveen testified that she did not discover the strawberry crop had failed until March 2016. She also testified that the windstorm that damaged the greenhouse occurred in March 2016. Therefore, neither of those issues could have motivated her to cancel the ALMIAs on January 15, 2016.

87 The Union says that only one thing changed between January 13, 2016, when Floralia needed 24 workers for the 2016 season, and January 14, 2016, when it was no longer sure of its labour needs; the Union's application for reconsideration of the 2015 Original Decision and a stay of proceedings. The Union says the only reason Floralia cancelled its ALMIAs on January 15, 2016, was the fact the Union filed its application for reconsideration with the Board.

88 Further, the Union says, Floralia cannot explain why it waited until April 1, 2016 to resubmit its ALMIA. Even if Floralia's decision to cancel the ALMIAs on January 15, 2016 was motivated by the concerns about financing, restructuring, and the land for the new raspberry crop, which the Union strenuously denied, then it would have expected Floralia to resubmit its ALMIAs once those issues were resolved. Parveen's evidence was that the financing issues resolved on February 12, 2016, when the new financing documents were finalized and the restructuring issues resolved on February 15, 2016 when Ramji resigned. She knew by February 24, 2016, that Ramji sold the property next door and she would no longer be able to use that land for her new raspberry crop. Nonetheless, Floralia waited more than a month after all of these issues had resolved before submitting its ALMIA for the rest of the workers it would need for the 2016 season. Moreover, the decision to resubmit on April 1, 2016, cannot be explained in the context of the housing issue because, at that point, the variance application remained outstanding as of that date. None of these excuses, the Union says, explain Floralia's decision to file a new ALMIA on April 1, 2016.

89 The Union says two things happened at the end of March 2016 that *can* explain Floralia's decision to submit an ALMIA on April 1, 2016. First, the Board issued the 2015 Reconsideration Decision restoring the Union's certification. Second, Floralia's most senior employees started being reassigned to new farms and started accepting those reassignments. That is, at the same time the Union's certification was restored, Floralia was losing the senior SAWP Workers it knew it could count on to support its interest against the Union.

90 The Union says, when Floralia became aware that its senior workers were being reassigned, Parveen started calling them in Mexico. Parveen submitted the April 1, 2016 ALMIA to request them by name but, by then, it was too late. The senior SAWP

Workers were already concerned about getting work for the year and had accepted their reassignments and were scheduled to travel to their new farms on April 4, 2016.

91 The Union says that, since she could no longer recall the SAWP Workers she knew would support Floralia's interests, Parveen did the next best thing, which was to request workers that were new to the SAWP program. The Union says such new workers are less likely to support the Union. More shockingly, the Union says, of the seven new workers assigned to Floralia, five were related. This was not only remarkably unlikely to occur by chance, but was also inconsistent with SAWP policies, which Martinez testified were designed to prevent family members from being assigned to the same employer. The fact that Floralia was assigned such workers, the Union says, suggests that Floralia was colluding with Mexican officials.

92 The Union says that, by all reckonings, what occurred at Floralia in 2016 is extremely odd. Indeed, the Union says, it is inexplicable unless one accepts that Floralia was actively seeking to avoid having some or all of its 2015 employees return for the 2016 season. The Union says Floralia's excuses were designed to explain its behaviour after the fact and are not a credible explanation for the departure from its recall practices in the 2016 season. As a result, the Union says, the Board must conclude that Floralia has committed unfair labour practices in violation of Section 6 of the Code.

93 The Union says that, while Floralia delayed recalling its employees and reduced its complement of SAWP Workers, S&G employees were performing work on its behalf. There is no dispute on the evidence that Floralia and S&G are separate corporate entities that carry on related businesses. It says the evidence shows that Floralia and S&G are functionally integrated in such a way as to amount to common control and direction. Amarjit is Parveen's father. He and Parveen's mother own the land on which the Primary Premises are situated. Parveen lives with her parents in the personal residence on that property and that property is used as security for Floralia's financing. Both Amarjit and Parveen describe Amarjit as a manager of Floralia with various agencies, including the various farmers markets and the City of Abbotsford.

94 Until part way through the hearing, Amarjit was also a Director of S&G, the Chair of S&G's Board of Directors, and its single largest shareholder. Amarjit continued to have signing authority on S&G's bank accounts at the conclusion of the hearing. Moreover, the Union says the fact that Gary bought Amarjit's shares for \$1 each in the middle of the hearing goes to show that these are not parties that operate at arms' length. Rather, the relationship between Parveen, Gary, and Amarjit, and the resulting relationship between Floralia and S&G, is highly fluid. The Union says, on these facts, Floralia and S&G are under common control and direction as that phrase has been interpreted by the Board.

95 The Union further says a labour relations purpose exists to justify a common employer declaration. The evidence shows that S&G workers are performing work on behalf of Floralia. That work is most obvious at the farmers markets, where S&G employees have been observed working under a Floralia banner selling Floralia

produce. The Union says Parveen's explanations for how the S&G employees came to perform this work are simply not credible. The Union says the evidence shows S&G crews working alongside Floralia crews at the Primary Premises and S&G crews working under the direction of Floralia supervisors and senior employees in the fields. Even if "afterpick" work, "referencing in" at farmers markets, and selling product out of the field are standard farming practices, and the Union denies they are, it says that is irrelevant. As long as the Board is satisfied that work has been diverted to a separate corporate entity in order to avoid collective bargaining rights, then the Board will find a labour relations purpose exists to justify a common employer declaration. That has clearly happened in the present case, the Union says.

96 Floralia denies it has committed an unfair labour practice. It agrees it departed from its usual practice of recalling SAWP Workers in 2016 but says that departure is explained by the various complicating factors that arose in late 2015 and early 2016. Specifically, it says the restructuring of the company to enable Ramji's departure, the financing issues, the concern over the new raspberry crop, the failed strawberry crop, the greenhouse repair, and the housing issue all prevented it from recalling as many employees as it normally would, and justified its delay in recalling everyone but Edegardo and Honorio. Floralia says it did not want to lose its senior employees to other farms, but it had no choice but to delay its applications for 2016 for the reasons given above. It says it did not act with anti-union animus and its actions did not run afoul of Sections 6(1) or 6(3)(a) of the Code.

97 Both Floralia and S&G say they are not common employers. They say S&G workers do not perform work on behalf of Floralia. Rather, they say, what the Union witnessed in the fields off Dixon Road and Interprovincial Highway are standard farming practices; namely, a customer purchasing product out of the field and a customer performing an afterpick. The fact that Parveen and Gary are cousins is not sufficient to establish common control and direction, and Amarjit is only involved on paper with both companies.

98 S&G argues Amarjit is no longer involved in S&G since he resigned his position on November 25, 2016. Finally, S&G argues it would be unfair to its workers to add them to the end of Floralia's seniority list.

#### IV. ANALYSIS AND DECISION

##### UNFAIR LABOUR PRACTICE

99 Section 6(1) of the Code provides:

Except as otherwise provided in section 8, an employer or person acting on behalf of an employer must not...interfere with the...administration of a trade union...

100

Section 6(3)(a) says:

- (3) An employer or a person acting on behalf of an employer must not
  - (a) discharge, suspend, transfer, lay off or otherwise discipline an employee, refuse to employ or to continue to employ a person or discriminate against a person in regard to employment or a condition of employment because the person
    - (i) is or proposes to become or seeks to induce another person to become a member or officer of a trade union, or
    - (ii) participates in the promotion, formation or administration of a trade union...

101

The Board has long recognized that employers do not ordinarily advertise their unfair labour practices: *Forano Limited*, BCLRB No. 2/74, [1974] 1 Canadian LRBR 13. In order to establish that its conduct does not amount to an unfair labour practice, an employer must positively establish *bona fide* reasons for its conduct. If an employer does establish *bona fide* reasons for its conduct, the onus shifts to the union to establish on the evidence that the employer's conduct was tainted by anti-union animus: *Thrupp Manor Association*, BCLRB No. B425/99 (Leave for Reconsideration of BCLRB No. B173/99), 54 C.L.R.B.R. (2d) 298, at para. 24.

102

In the present case, the question is whether Floralia had a *bona fide* business reason to depart from its usual recall practices in 2016 both with respect to the timing of its recall and the number of employees recalled. A determination on this issue must account for the fact that, by January 14, 2016, Floralia submitted ALMIAs for its usual complement of 24 workers and then cancelled those ALMIAs on January 15, 2016.

103

Floralia offered a number of reasons why it was compelled to cancel the January 12 ALMIA and January 13 ALMIA, including: the error in leaving Abimael off the list as well as concerns over restructuring, financing, the ability to procure land for a new raspberry crop, the failure of the strawberry crop, the greenhouse repair, and the housing issue. I agree with the Union that if Floralia was concerned about leaving Abimael off the recall list, it would have recalled him, and not Honorio, on the January 21 ALMIA. In any event, I agree with the Union that, if Abimael was crucial to Floralia's operation, it would have recalled him before April 1, 2016. I similarly find on the evidence that Floralia was aware of the restructuring, financing, and raspberry crop issues before it submitted the January 12 ALMIA and January 13 ALMIA. I am not satisfied, with respect to any of these concerns, that anything changed between January 13, 2016, when Floralia needed 24 workers, and January 15, 2016, when it reassessed its labour needs.



104 With respect to its concerns about financing in particular, Floralia says it decided to cancel the ALMIAs after Parveen spoke with her lawyer on January 14, 2016. Parveen said, in that telephone call, the lawyer raised concerns about her ability to obtain appropriate financing. Although there was no evidence of a telephone call between Parveen and her lawyer on that day, Parveen did contact Farm Credit Canada on January 14, 2016, and I accept her evidence that she did so in an attempt to secure alternate financing. However, the evidence demonstrated that Parveen's lawyer first raised the concern about financial restructuring on January 11, 2016, prior to Floralia submitting the January 12 ALMIA and the January 13 ALMIA. The evidence did not demonstrate that any greater cause for concern about financing arose between January 11, 2016, and January 15, 2016. Therefore, I am not persuaded on the evidence that Floralia cancelled its ALMIAs because of concerns about financing.

105 On the evidence, the only thing that changed for Floralia between January 12, 2016, and January 15, 2016, was the filing of the Union's application for reconsideration of the 2015 Original Decision. I find, on the evidence, that the Union's application motivated Floralia to cancel its ALMIAs in January 2016.

106 I accept the Union's argument that if, having cancelled the January 12 ALMIA and the January 13 ALMIA, Floralia's delay in submitting new ALMIAs was caused by concern over the issues listed above, then it would have resubmitted its applications when those issues resolved. I find on the evidence that Floralia did not do that. Rather, it waited until April 1, 2016 to submit a new ALMIA, after it learned its employees started being reassigned to other farms.

107 When the Union's certification was cancelled as a result of the 2015 Original Decision, Floralia attempted to recall its nine most senior workers, the majority of which it knew did not support the Union, but not the remaining crew. At the time, it was satisfied it would need 24 workers for the 2016 season. When Floralia learned that the Union filed an application for reconsideration, it immediately cancelled its ALMIAs and claimed it would reassess its labour needs in the future. I find Floralia then delayed recalling its workers, other than Edegardo and Honorio, while it waited to find out if the Union's certification would be restored. When the Union's certification was restored in the 2015 Reconsideration Decision, Floralia limited its recall to only the most senior nine employees, the majority of whom Floralia knew would support its interests. I find Floralia's motivation for doing so was to avoid recalling the majority of the SAWP Workers who continued to support the Union. I find Floralia's actions amount to an unfair labour practice in this regard.

108 I am not persuaded, in the present case, that Floralia had a *bona fide* reason to delay its recall of SAWP Workers for the 2016 season or to recall only half its usual complement. I find Floralia committed an unfair labour practice by manipulating the recall process under the SAWP program in order to avoid recalling Union supporters. I allow the Union's application under Section 6(1) and Section 6(3)(a) of the Code.

COMMON EMPLOYER

109 Section 38 of the Code provides:

If in the board's opinion associated or related activities or businesses are carried on by or through more than one corporation, individual, firm, syndicate or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Code and grant such relief, by way of declaration or otherwise, as the board considers appropriate.

110 The purpose of Section 38 is to prevent employers from using the direction and control exerted over two distinct entities to defeat bargaining rights: *Concerned Contractors Action Group*, BCLRB No. 32/86, 13 CLRBR (NS) 121. Where the Board is satisfied that there are two or more corporate entities engaged in related activities under a common control or direction, the Board has the discretion to declare that the two entities be treated as a common employer for the purposes of the Code. That discretion will only be exercised where the Board is satisfied there is a valid labour relations purpose for doing so.

111 In the present case, the parties agree there are two corporate entities, Floralia and S&G, which both carry out farming activities. At issue is whether the two companies are under a common control and direction and, if so, whether a valid labour relations purpose exists such that the Board should exercise its discretion to make a common employer declaration.

112 I am satisfied on the evidence that Floralia and S&G are under common control and direction. I find that, notwithstanding his recent departure from S&G, Amarjit is a mentor and advisor to both Floralia and S&G. He owns and lives on the property where Floralia's Primary Premises are located and offered that property as security for Floralia's financing. While he purports to be "manager" of Floralia for the purpose of communicating with various agencies, he was, until recently, the Chair of S&G's Board of Directors and its single largest shareholder. I accept the Union's argument that the manner of his departure from S&G highlights the fact that these operations are not at arms' length.

113 I further find that Floralia and S&G's principals, Parveen and Gary, have an exceptionally close relationship and speak on the phone multiple times a day. The evidence shows those communications increase when labour relations and staffing issues arise. From time to time, they share office equipment, including Floralia's fax machine, and both perform work, at least to some extent, at Floralia's Primary Premises. I am satisfied on the evidence that Floralia and S&G are under common control and direction.

114 Finally, I find there is a labour relations purpose to the Union's application for a common employer declaration. I note that monitoring the work performed by Floralia and by S&G is a challenging task. The crews work in one of many of the fields that

Floralia and S&G lease, often at the same time and often a significant distance from the road where they can be observed. The evidence about the farmers markets, however, is clear. I am satisfied on the basis of Martinez's testimony, which was supported by video and photographic evidence, that S&G employees performed work at farmers markets on behalf of Floralia. That work was performed by S&G employees in a season when Floralia failed to recall half of its usual complement of SAWP Workers. Having found that Floralia uses S&G employees to perform work on its behalf at farmers markets, I am prepared to find that, where S&G employees are performing work alongside Floralia supervisors, those S&G employees are performing work on behalf of Floralia. I find the fact Floralia is using a non-union company to perform bargaining unit work is sufficient to establish a labour relations purpose for a common employer declaration.

115 I am satisfied that the requirements for a common employer declaration have been met. Floralia and S&G are two distinct corporate entities performing related activities under common control and direction. I am further satisfied that, without a common employer declaration, the Union's bargaining rights would be prejudiced. I allow the Union's application under Section 38 of the Code.

#### V. REMEDY

116 The Union says the Board must fashion a remedy designed to ensure that the parties are placed in the position they would have been in, but for the breach of the Code. Ensuring an adequate remedy in the present case, it says, is complicated by the SAWP program. Even if the Board fashions an order to ensure the SAWP Workers are returned to Floralia, it is unlikely they can be reassigned to Floralia before the 2018 season. As Martinez testified, SAWP employees have only one opportunity per year to request a farm change, and, for the 2017 season, that opportunity has passed. Therefore, even if Floralia requests them by name in its 2017 ALMIAs, there is no guarantee they will be reassigned to Floralia until the following year. As a result, the remedy the Union seeks extends to the 2018 season to ensure that any remedial order is not defeated because of SAWP's administrative processes.

117 Finally, the Union seeks a number of remedies directed to ensuring that the Common Employer does not breach the Code again in a similar way. Deterrence is particularly important in this case, the Union says, because Floralia managed to achieve through the manipulation of the recall process exactly what the Board's Stay Decision was intended to prevent; it decimated the bargaining unit. The Union admits that the remedies it seeks in the present case are extraordinary, but says it is justified in the circumstances, particularly given that Floralia's present unfair labour practice followed so quickly on the heels of the 2015 unfair labour practice. To prevent similar mischief and to give the parties an opportunity to re-establish their bargaining relationship, the Union seeks the following:

1. a declaration that the Board will henceforth treat S&G and Floralia as constituting one employer for the purpose of the Code;

2. an order that S&G be bound by the Floralia Collective Agreement, and that as of the date of the Board's decision in this matter, any reference to the Employer in the Collective Agreement applies to both S&G and Floralia who together are the employer for the purpose of the Collective Agreement;
3. an order that any employees who worked for S&G in 2016 be added to the seniority list with seniority beginning to accrue as of the date of the Board's decision in this matter;
4. a declaration that Floralia has breached Section 6(1) and Section 6(3)(a) of the Code;
5. an order that the Common Employer cease and desist further breaches of the Code;
6. an order that the Common Employer immediately cancel any ALMIAs which have already been made for the 2017 season whether by Floralia or by S&G;
7. an order that the Common Employer return to the seniority list each of the employees on Floralia's March 9, 2016 seniority list;
8. an order that, notwithstanding Article 7 of the Collective Agreement, the SAWP Workers' seniority shall be treated as unbroken provided they return to work at the Common Employer before the end of the 2018 season;
9. an order that the 10-month Section 33(3) time-bar which existed as a result of the 2015 Reconsideration Decision be extended until the earlier of:
  - a. 10 months from the date upon which the last of the SAWP Workers returns to work at the Common Employer; or
  - b. 10 months from the date the first SAWP Worker begins work for the Common Employer in 2018;
10. an order that, notwithstanding Article 26 of the Collective Agreement, the terms of the Collective Agreement will be extended until the earlier of:
  - a. 10 months from the date upon which the last of the SAWP Workers returns to work at the Common Employer; or
  - b. 10 months from the date the first SAWP Worker begins work for the Common Employer in 2018;
11. an order that the Common Employer, or any of them, request workers by name and in order of seniority in compliance with Article 20 of the Collective Agreement on any future ALMIAs;

12. an order that the Common Employer, or any of them, submit to the responsible agency with each ALMIA a clearly marked list of alternate workers, in order of seniority, with a note providing that if any of the named workers in any given ALMIA cannot travel, those named workers are to be substituted with workers from the alternate list, in order of seniority;
13. an order that the Common Employer, or any of them, copy the Union on any correspondence (including ALMIAs and cover sheets) to Service Canada (and immediately forward to the Union any correspondence from Service Canada) regarding the request for SAWP employees for the life of the current Collective Agreement;
14. an order that the Common Employer, or any of them, immediately forward to the Union a copy of any new flight confirmations for workers who have or will work in the bargaining unit issued to the Common Employer or any of them from Mi Tierra or by any other entity;
15. an order that the Common Employer reimburse the Union's reasonable expense to translate the Board's decision in this matter into Spanish, and to send a copy to each of the affected workers; and
16. an order that the Common Employer reimburse the Union's reasonable expense to send a copy of the Board's decision in this matter to the Vancouver Mexican Consulate, and to Service Canada.

118 I am satisfied that the remedies sought by the Union are both appropriate and necessary in the circumstances, particularly given the history between Floralia and the Union and the findings in the 2015 Reconsideration Decision. I order the remedies sought by the Union and set out above.

VI. CONCLUSION

119 For the reasons set out above, the Union's application under Sections 6 and 38 of the Code is allowed.

LABOUR RELATIONS BOARD

  
JENNIFER GLOUGIE  
VICE-CHAIR