ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 0518-18-U
Unfair Labour Practice
Unifor, et al., Applicants v Unite Here Local 75, and Fairmont Royal York Hotel, Responding Parties

OLRB Case No: 1004-18-U
Unfair Labour Practice
Unifor, et al., Applicants v UNITE HERE Local 75, and Fairmont Royal York Hotel, Responding Parties

OLRB Case No: 1801-18-U
Duty of Fair Representation
Grace Guanzon, et al., Applicants v Unite Here Local 75, Responding Party v Fairmont Royal York Hotel, Intervenor

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - March 09, 2021
DATED: March 09, 2021

Catherine Gilbert
Registrar

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Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0518-18-U**

Unifor, Applicant v Unite Here Local 75, and **Fairmont Royal York Hotel**, Responding Parties

OLRB Case No: **1004-18-U**

Unifor, Michelle Williams, Grace Guanzon, Gee Manalastas, Myleen Piansay, Jorge Junio, and Carol Tulod, Applicants v UNITE HERE Local 75, and **Fairmont Royal York Hotel**, Responding Parties

OLRB Case No: **1801-18-U**

Grace Guanzon, Mary Ann De Castro, Josephine Linatoc, Joelina Maluto, John Timoteo, Neil Rousseau, Angelito Remigio, Shigeri Izumi, Shovgui Agayev, Rizalino Viloria, Myleen Piansay, Fermin Melgar, Alicia Nening, Gee Manalastas, Marites Honorio, Carmen Austria, Emyrma Maala, Jorge Costales Junio, Ronald Acido Lopez, Rowena Refol, Demetrios Christakis, Jennifer Hefferman, Marissa Tavas, Cita Ramirez, Elvira Bella, Hydia Bagood, Clarita Suralta, Donna Badua, Elvira Perez, and Cristita Cabrera Pink, Applicants v Unite Here Local 75, Responding Party v. Fairmont Royal York Hotel, Intervenor

BEFORE: Paula Turtle, Vice-Chair

APPEARANCES: Tim Gleason and Brett Hughes and others appearing on behalf of Unifor; Adrienne Lei appearing on behalf of Grace Guanzon et al. in Board File No. 1801-18-U; Ryan D White, Michael McDonough and others appearing on behalf of Unite Here Local 75; Trevor Lawson and others appearing on behalf of Fairmont Royal York Hotel

DECISION OF THE BOARD: March 9, 2021

1. These applications arise from events at the Fairmont Royal York Hotel ("Fairmont" or "the Hotel") beginning in January 2018 and ending with the ratification of a collective agreement between Fairmont and Unite Here Local 75 ("Local 75") on June 15, 2018. During this six-month period, about 947 employees of Fairmont (represented by Local 75) were the subject of an organizing campaign by Unifor.

2. In the context of the events described above (Unifor's organizing campaign and negotiation and ratification of a collective agreement by Local 75), Unifor and some employees (supporters of Unifor) allege Fairmont violated the Act by punishing Unifor and its supporters and rewarding Local 75 and its supporters. In addition, they allege that Fairmont and Local 75 colluded to punish Unifor and its supporters and to ensure Fairmont and Local 75 concluded a collective agreement, which deprived Unifor of the opportunity to file a timely application for certification (in Board File Nos. 0518-18-U (dated May 14, 2018) and 1004-18-U (dated June 25, 2018)). Some employees ("the DFR applicants") have filed an application alleging Local 75 violated the duty of fair representation in Board File No. 1801-18-U (dated September 6, 2018). Unifor and the DFR applicants seek (among others) the following remedies: an order that the collective agreement ratified on June 15, 2018 is not a collective agreement, because it was obtained with unlawful employer support and findings, declarations and orders arising from Fairmont's violations of sections 44, 70, 72, 74, 76 and 79 of the Act.

3. Fairmont and Local 75 deny they violated the Act, either separately or together.

4. Attached as Schedules "A" and "B" to this decision is a list of the authorities filed by each party a copy of the sections of the Act that the applicants filed with their submissions.

Part 1 – Overview of facts and summary of the proceedings

5. Local 75 and Fairmont have a mature and longstanding relationship and were parties to a collective agreement that expired on July 16, 2017. Until December 2017 Lis Pimentel, the President of Local 75 until that time, led negotiations to renew that collective agreement.

6. In January 2018 Unifor began organizing campaigns to displace Local 75 as bargaining agent in several Greater Toronto Area hotels, including at the Fairmont, and Local 75's international parent placed Local 75 in trusteeship, removed Pimentel from office and terminated her employment and the employment of several other officers and representatives of Local 75 and the International. At the same time, Pimentel and hundreds of other employees at Fairmont joined Unifor. The transition from the imposition of the trusteeship to the new Local 75 administration responsible for servicing the collective bargaining relationship with Fairmont was not orderly or cooperative. While Pimentel says she left relevant documents behind, Local 75 says it did not find the documents she says she left (and, because Local 75 was not communicating with Pimentel, it did not follow up with her).

7. Collective bargaining between Fairmont and Local 75 ended on December 11, 2017 and resumed (with different representatives for Local 75) on March 18, 2018. Collective bargaining for a large bargaining unit comprised of employees from many different departments whose objectives are not always the same is complex at the best of times especially where, as here, the collective agreement sets the pattern for the industry. This was evident from Pimentel's testimony. For example, she testified the Hotel's several hundred unionized employees work in many different departments and do not share the same collective bargaining priorities: for example, banquet servers often work at several different hotels, so scheduling is an issue for them, as is the location of their work on the banquet floor. Room attendants, while paid by the hour, are assigned rooms to clean and the right to "give back" rooms is important to them. The evidence from all the parties established that the employees' loyalties were divided, and Mike Casey (Unite Here Local 2 Organizer who led bargaining for Local 75 after Pimentel's departure) testified the workforce was so divided Local 75 was unable to take a strike vote because of the harm it would do to bargaining. Despite these obstacles, Fairmont and Local 75 executed a proposed collective agreement on April 29, 2018 consisting of a three-page signed Memorandum of Settlement, a two-page Schedule A, and approximately 35 pages of signed-off language changes ("the Tentative Agreement"). Both parties agreed to recommend acceptance of the Tentative Agreement to their principals and to speak publicly in support of ratification.

8. The removal from office of Pimentel and others, the organizing efforts by Unifor (which included opposing ratification of the Tentative Agreement), and Local 75's and Fairmont's efforts to conclude a

collective agreement meant that employees' loyalties were divided between the two unions at a critical time. Fairmont employees who had previously been friends were no longer on friendly terms, and tension at the Hotel was high. Both Unifor and Local 75 are sophisticated and well-resourced parties, and each one criticized the other in seeking the support of bargaining unit employees.

9. On April 30, 2018 Unifor filed an application for certification to displace Local 75 as bargaining agent at Fairmont (Board File No: 0349-18-R). A ratification vote was conducted on May 1, 2018 and employees rejected the agreement by a narrow margin (332 votes for, 340 votes against).

10. By decision dated May 18, 2018, the Board dismissed Unifor's application for certification as untimely. The Board held there would not be an open period where Unifor could file an application for certification until a No Board Report issued (which never happened) or until 15 months passed since the appointment of a conciliation officer, i.e. July 26, 2018.

11. After the agreement was rejected, Fairmont and Local 75 returned to the bargaining table on May 30, 2018 and again (briefly) on June 7, 2018. Fairmont refused to change its final offer. Local 75 continued to campaign in support of the Tentative Agreement, which was ratified on June 15, 2018.

12. Between January and June of 2018, Unifor continued its campaign and publicized detailed analyses of the Tentative Agreement, including on a website dedicated to its campaign. Unifor's criticisms of Local 75 were informed by former Local 75 officials (now Unifor supporters) including some who had been on Local 75's bargaining committee until December 2017. Unifor issued tweets, mass text messages (including supporting documents), and hard copy leaflets urging employees to reject the Tentative Agreement and join Unifor. Unifor established a headquarters of its organizing efforts at a Tim Horton's immediately adjacent to the Hotel, where a team of Unifor organizers was present and available to meet with employees every day.

13. Local 75 issued leaflets, social media posts, phone calls (including messages), and summaries of the Tentative Agreement to highlight the improvements and to urge its members to ratify it.

14. Local 75 had available in the room where the ratification vote took place a copy of the Tentative Agreement, although it did not publicize this fact. Fairmont issued notices in bargaining that purported to terminate past practices and Local 75 admits it did not disclose them to bargaining unit employees.

15. During the same six-month period in 2018, Fairmont issued four letters to employees, as follows:

a) a letter from Fairmont's General Manager Edwin Frizzell, urging employees to report strangers in work areas of the hotel and advising employees they had a right not to engage with representatives of other unions, including a right not to be pressured to sign a card;

b) a second letter from Frizzell dated April 30, 2018 advising employees of improvements to the collective agreement in the proposed agreement. This letter included a statement that wage increases would be effective May 1, 2018 but employees would be paid a lump sum payment of 3% of their wages between the expiry of the previous agreement and April 30, 2018;

c) a third letter from Frizzell dated May 1, 2018 that repeated the description of the wage and bonus structure under the new agreement; and

d) a fourth letter from Frizzell dated June 14, 2018 that advised employees of the dates and times of the second ratification vote and that encouraged employees to review the tentative agreement.

16. Fairmont disciplined some Unifor supporters. Grace Guanzon was suspended for three days on February 2, 2018. Local 75 filed a grievance for Guanzon dated February 22, 2018. Michelle Williams and Belgin Euperio were suspended for 3 days on February 23, 2018 and February 21, 2018, respectively. Local 75 filed grievances for them on March 5, 2018 and March 13, 2018, respectively. John Timoteo was suspended for one day on March 2, 2018 and Local 75 filed a grievance for him dated March 5, 2018. Finally, Gee Manalastas was suspended for 30 days on April 25, 2018 after she had a physical altercation with Marcil Stoll (a Local 75 supporter, who was also suspended 30 days). A grievance was filed for Manalastas and Stoll and it was heard at

arbitration where the discipline was upheld although the penalty was reduced. All of the disciplined employees testified they continued their activities in support of Unifor after they were disciplined.

17. Local 75 members were entitled to wear a Local 75 pin as part of their uniform in accordance with the collective agreement. The collective agreement required Fairmont to permit Local 75 representatives to access the property for purposes related to the collective agreement.

18. Three Unifor supporters were told by Fairmont management employees they were not permitted to sign employees to membership cards on Hotel property. Fairmont policies prevented all employees (regardless of their support for Unifor or Local 75) from wearing hats, wristbands and buttons (other than a Local 75 pin) when on shift and/or in uniform. In accordance with the policy, Unifor supporters were not restricted or disciplined for wearing wristbands and hats (i.e. when off shift and out of uniform).

19. Fairmont authorized and did not interfere with Unifor and its supporters expressing support for Unifor during breaks in the staff cafeteria, including circulating leaflets, discussing issues, and even bringing in a catered lunch, courtesy of Unifor.

20. Of the ballots counted in the second (successful) ratification vote on June 14 and 15, 2018, (eight were segregated and not counted) 410 were in favour of ratification and 345 were against. Because the collective agreement had a term of May 1, 2018 to April 30, 2022, an open period would not occur until the last three months of the third year, i.e. February 1, 2021 to April 30, 2021.

21. Unifor filed a second application for certification dated September 4, 2018 (Board File No. 1785-18-R). The Board found Unifor had filed enough membership evidence to entitle it to a vote. However, the Board directed the ballot box be sealed because the timeliness of the application for certification depended on Unifor's success in these applications.

Part 2 – Some general considerations about this case

The evidence

22. The applications considered by this panel of the Board have been the subject of many earlier rulings. There are have been (and/or remain outstanding) other applications between the parties that are not before this panel, including two requests for interim relief (Board File Nos. 0730-18-IO and 1006-18-IO) and the application for certification referred to in paragraph 21, above.

23. In preliminary rulings, the Board dismissed some of Unifor's allegations for failure to make out a prima facie case. Despite this, the hearings took an unusual length of time: Board began hearing evidence on April 24, 2019 and the parties finished final argument on November 17, 2020. Over 28 hearing dates, the Board heard from more than 40 witnesses.

24. Even before COVID-19 made it necessary, the Board directed that the declarations filed in the interim relief proceedings should form the basis for evidence in chief of the parties' witnesses wherever possible. And beginning with the hearing date of July 6, 2020 the hearings were conducted by video, in accordance with COVID-19 restrictions. The witnesses adopted their declarations (sometimes supplemented or amended) and were cross-examined (often extensively) on their declarations.

25. I refer to evidence in chief that was admitted by way of a witness adopting their written statement as evidence in chief without identifying it as written evidence.

26. I have carefully reviewed the oral and written evidence, my notes and the admitted documents in determining the issues raised before me.

Duty of Fair Representation allegations

27. The duty of fair representation (section 74 of the Act) was the subject of allegations in all three applications. The DFR applicants relied on the evidence as summarized by Unifor's counsel in its final argument. Although the DFR applicants focused on complaints about collective bargaining and the ratification process in their final submissions, counsel to Unifor and the applicant employees in Board File Nos. 0518-18-U and 1004-18-U alleged and argued violations of section 74 (including, for example, raising issues about Local 75's representation of employees in the grievance procedure). Local 75 did not object to this. Accordingly, I have considered the violations of section 74 raised in all three

applications. Because of the considerable overlap between the evidence and arguments, I do not refer separately to the allegations made by the DFR applicants.

Issues not argued by Unifor

28. Unifor pleaded that the closure of Epic Restaurant; Local 75 and Fairmont's handling of arbitrations of valet grievances; and electoral misconduct in the second ratification vote by Local 75 (ineligible voters being permitted to vote, Local 75's failure to give proper notice) violated the Act. The parties led evidence about these allegations.

29. Unifor did not raise these allegations in its final argument. Having not raised them in argument, I find the Unifor has abandoned them.

30. In the alternative, having heard the parties' evidence on these issues, I am satisfied that neither Fairmont nor Local 75 violated the Act as alleged by Unifor, in connection with the issues described in paragraph 28 above, for the following reasons:

a) Given the timing of the Epic Restaurant closure and the scope of work associated with the renovations that caused the closure, I am satisfied the decision was not made as a response to Unifor's efforts to organize the workplace;

b) Local 75's evidence about the valet grievances explained the grievances had been referred to arbitration and several days' hearing had occurred and further explained the text messages that the grievors' spouses testified about;

c) Local 75 evidence about the ratification process (including that some of the individuals who were believed by Unifor not to be employees) and Fairmont also gave evidence about the employment status of some of the individuals whose employment status was questioned by Unifor. I am satisfied that Local 75 made reasonable efforts to ensure the accuracy of the voters' lists at the ratification and to ensure the fairness of the vote. In any event, Unifor's allegations, even if true, would not have had a material effect on the outcome of the second vote.

Fairmont's and Local 75's response to production requests and directions

31. The parties disclosed many documents to each other in this proceeding. Unifor asked the Board to direct production from Fairmont and Local 75 both before and during the hearing (see, for example, the Board's decisions dated August 7, 2018, January 31, 2019, April 17, 2019, and July 7, 2020).

32. Unifor argues that Fairmont withheld documents from production if they believed such production would assist Unifor and/or harm their cases. Some documents were produced late, and some requested disclosure was not produced by Fairmont (the Williams video, for example, was not produced by Fairmont, although it was produced by Unifor). Some documents involving both Fairmont and Local 75 were not produced by Fairmont, but were produced by Local 75 (for example, e-mails to Anna Chartres, Regional Director, Talent and Culture, Central Canada for Accor Hotels, who has overall responsibility for human resources at Fairmont showing Local 75 organizers were in the Hotel without authorization) and others were produced by Fairmont and not by Local 75. In other cases, Unifor argues that it is not credible that there were no notes taken (for example, Josee Tremblay - at that time Assistant Director of Talent and Culture at Fairmont - did not take notes of her meeting when employees complained to her that their images had been used without permission in Unifor campaign material).

33. Unifor argues Fairmont destroyed documents after the Board rejected its request for an order preserving documents (see decision in Board File No. 1006-18-IO, dated August 7, 2018) and that the Board should reject Fairmont's explanation that the documents were destroyed in the course of business. Unifor asks the Board to infer the evidence not produced was destroyed because it would have been unfavourable to Fairmont.

34. Chartres was questioned at length about Fairmont's policies and steps she took to obtain the documents requested.

35. She (and other Fairmont witnesses) described the process of searching for documents (including searching for electronic records and attempting to restore e-mails of employees no longer employed by Fairmont whose records were not on the server when they were searched). She also explained Fairmont's policies of regularly deleting e-mails, based on the cost of keeping them on the server. This evidence

was confirmed by other Fairmont witnesses (Nathan Pearce (Executive Director of Banquets and Special Projects); Frank Guerrero (Director of Banquet Operations) and Nicole Stewart (Director of Housekeeping), for example).

36. Fairmont did not produce of all of the documents requested immediately (although many documents were produced by all the parties before the hearing, some of which Unifor relied on to make its case). Chartres did not request all the individuals who eventually produced documents to do so right away (she referred to a "second wave" of production requests). And it appears that some searches were not done when requested. For example, Guerrero and Stewart (who were not major witnesses) testified they did not search for documents until well after the hearings had begun. Based on the evidence of routine destruction of communications like e-mails and texts, and the timing of delayed response to some of the production requests, it is possible some documents were destroyed after Unifor requested production. However, the evidence does not suggest any of these issues were deliberate efforts to destroy evidence.

37. Unifor states Local 75 was "more forthcoming" with documents but argues there were obvious omissions from its productions. Campaign leaders and organizers, for example, did not produce any text messages during the campaign and those who testified said they deleted their text messages. Shelli Sareen, who at all times relevant to this application was a Research Coordinator with the International gave evidence about her involvement in collecting documents for production beginning in October 2018. Casey testified he searched for documents and produced what he could find. His efforts included locating an old cell phone (from which some messages were produced) and a notebook which was similarly produced late. Mario Santos (also a Unite Here Local 2 Organizer) gave evidence that he avoided making phone calls or sending texts since he was responsible for the cost, and that his practice was to delete e-mails and text messages promptly. He produced what he had and even contacted his service provider to see if deleted texts could be retrieved (and was told they could not). Other witnesses testified they had changed phones and it was possible data was not transferred.

38. Both Fairmont and Local 75 deny they deliberately withheld or destroyed evidence.

39. Unifor relies on *Emmanuel St. Louis (Suppliant), Appellant and Her Majesty the Queen (Respondent), Respondent* 1896 CarswellNat 23, 25 S.C.R. 649 to argue that Fairmont did not rebut the presumption that documents it did not produce would have been unfavourable to it. In *St Louis*, a contractor destroyed source documents used to calculate the wages it claimed to be owing under a contract and the contracting party disputed the amount claimed. The contractor denied fraudulently claiming wages for hours not worked, explained the process by which claims were made and explained that the original source documents were destroyed in the ordinary course of business. This was sufficient to rebut the presumption.

40. After considering all of the evidence I heard about production of documents, including evidence of Fairmont and Local 75 explaining their responses to requests and directions, and considering the scope of documents provided and the large number of people affected by the scope of disclosure, I do not find the failure to produce documents or delay in producing documents to be so significant that I should draw an adverse inference against Fairmont or Local 75 as a result. Both Fairmont and Local 75 have rebutted the presumption described in *Emmanuel St. Louis*.

41. Furthermore, it defies reason to suggest that either Fairmont or Local 75 deliberately withheld evidence, including e-mails (for example) to which the other was a party, knowing the other party to the e-mail may produce them, as it did in some cases.

42. Finally, during the proceedings Unifor reserved its right to recall witnesses. Unifor was entitled to seek to recall witnesses if it believed it was prejudiced by late production of documents.

<u>Unifor's argument that Fairmont is not entitled to make out its case by cross-examination of Unifor's witnesses</u>

43. Fairmont bears the onus of establishing discipline it issued to Unifor supporters was not tainted by anti-union animus.

44. Unifor bears the onus on most of the key allegations made and it agreed to call all its evidence first, without prejudice to its right to argue that Fairmont had not discharged its onus. Unifor argues Fairmont's evidence, standing alone, is insufficient to discharge the onus it bears on whether the discipline was tainted by anti-union animus, and that Fairmont is not entitled to make out its case based on cross

examination of Unifor's witnesses. Unifor cites no authority in favour of its argument that the Board should consider whether Fairmont has discharged the onus on its evidence alone (and presumably, disregarding evidence of Unifor witnesses who were called first in chief and in cross-examination). Unifor suggests it is possible, had it not proceeded first, that it may not have called these witnesses and that Fairmont would not have been able to make out its case.

45. The Board has long held in mixed onus cases that it makes procedural sense for one party to proceed first and call all its evidence, even if that party does not bear the legal onus on all the issues raised. Where the parties disagree about who should proceed first, the Board often directs the party with the onus on the key issues to proceed first. In this case, it was not necessary for the Board to make this determination (although it is likely had the Board done so, it would have directed Unifor to proceed first because the discipline allegations are not the most significant element of Unifor's case). To ask the Board to consider if Fairmont's evidence would have been sufficient to enable it to discharge the onus is artificial and is inconsistent with this common-sense approach.

46. I reject Unifor's argument that I should give no weight to Chartres' evidence in the discipline cases because she lacked direct knowledge of the incidents of discipline. While hearsay evidence may not be sufficient in a just cause case, in considering whether a discipline decision is tainted by anti-union animus, a senior management official (like Chartres) is entitled to rely on facts reported to her by others in participating in discipline decisions. In fact, it would be unusual if this were not the case.

47. Furthermore, other individuals (most notably Tremblay) testified about their direct knowledge of the events that led to discipline and explained the decisions to discipline, including that Tremblay and others at times included Chartres in their discussions about the discipline that issued. Although Chartres in some cases did not have direct knowledge of the events leading to discipline, I heard evidence from other Fairmont witnesses who did. I have considered all the evidence I heard about the discipline in its totality in deciding whether Fairmont discharged the onus.

Witness credibility

48. Unifor asks me to find Fairmont's evidence was not credible and its witnesses are not to be believed because managers destroyed evidence, it delayed production of some evidence (like the video of Timoteo allegedly spitting in the staff cafeteria), its main witness Chartres did not acknowledge she knew or suspected Local 75 used its access to the Hotel to campaign against Unifor, and in her testimony she was more focused on advancing Fairmont's theory of the case, rather that providing her honest recollection. Unifor states the remaining witnesses called by Fairmont (other than Stewart) generally appeared to be truthful.

49. Unifor argued that some of Local 75's witnesses (notably Cicely Phillips, a Fairmont employee and Mahen Krishnamoorthy, a Unite Here organizer) were not credible, and other witnesses were selective in their recollections to avoid testifying about things that could reflect badly on Local 75.

50. Issues of credibility affected the evidence of all the parties, including Unifor. Krishnamoorthy's evidence about the handling of Timoteo's grievance lacked credibility and Chartres' failure to acknowledge the possibility that Local 75 representatives may have used their access to the hotel to campaign against Unifor suggested that she was skewing that evidence to favour Fairmont's interest. However, Unifor's evidence from time to time suffered from similar defects. Manalastas's explanation for her contemporaneous reports of her incident with Stoll did not ring true. I find that at least occasionally, witnesses for all of Unifor, Local 75 and Fairmont found it difficult to resist the tug of self interest.

51. Generally speaking, it was clear the witnesses felt strongly about the position of the party they were allied with and occasionally had difficulty resisting the urge to align their evidence to favour that party. However, I found the witnesses generally to be conscientious. To the extent they disagreed with each other or contradicted themselves the discrepancies often appeared to arise because they were recalling details of events that occurred, in some cases, more than two years before they testified.

52. I have applied the usual factors, including those set out in *Faryna v. Chorny* [1952] 2 D.L.R. 354 (BCCA) in considering the credibility of the witnesses, and where it was necessary to resolve specific disputes of credibility on key issues, I have set that out below.

Local 75's argument that Unifor had no right to access the bargaining unit and the applicants had no right to campaign during working hours because the activity complained about did not take place during an open period

53. Local 75 argues that Unifor's activity took place during a "closed period" (i.e. when Unifor had no right to file an application for certification). Because Unifor had no right to file an application for certification, its activities were not covered by the (protected) right to select a trade union under section 70 of the Act. Local 75 bases this submission on the argument that the legislature has not made "competition over bargaining rights" a central purpose of the Act and has limited the time when rights exercised for that purpose are protected.

54. Local 75 further argues that Fairmont was permitted to limit the rights of Unifor and its supporters (wearing apparel and accessing the Hotel to campaign) during the closed period because Local 75 was entitled to represent the bargaining unit without outside threats by another union. In effect, Local 75 argues, Unifor was seeking to expand the period of time in which it was entitled to contest Local 75's bargaining rights.

55. Local 75 also argues by contrast it had collective agreement rights, including rights of access and for its members to wear union pins, rights which Unifor does not have. Local 75 argues Fairmont would have violated the Act had it permitted Unifor and its supporters to actively campaign against Local 75 or the proposed collective agreement, because these activities would have interfered with the administration of a collective agreement and with Local 75's exclusive bargaining agency status.

56. The Act imposes time limits on applications for certification, and in doing so it limits the workplace disruption associated with displacement applications. The Act also provides (in section 5) that employees have a right to join trade unions and participate in their lawful activities. Section 5 does not limit the time for this protected activity, which may occur before or after an open period. Union

membership cards are valid for twelve months before an application for certification, and unions often begin displacement organizing campaigns long before the open period occurs. If they could not do so, it would be difficult to successfully organize large workplaces within the three-month open period. As set out in more detail below, employers are entitled to limit the disruption associated with organizing or other activity.

57. I reject Local 75's argument that Unifor and its supporters did not have rights under the Act because there was no open period when the alleged violations occurred. If the Act intended to have the broad effect Local 75 argues, it would say so explicitly. To find otherwise is contrary to the scheme of the Act which does not limit when a person can join a union and participate in its lawful activities. However, I also do not accept Unifor's argument that a displacing union and its supporters have all the rights Unifor argues for in this case, as further discussed below.

Importance of a context-based evaluation of the allegations of employer support and unfair labour practice allegations

58. The central theme of Unifor's allegations was that Fairmont provided improper support to Local 75 contrary to sections 15, 53 and 70 of the Act (while conceding that section 15 is not engaged in this case, Unifor took the position I should consider and apply principles arising in the section 15 cases).

59. Unifor argued Fairmont's support for Local 75 undermined employees' free choice and led to the ratification of the Tentative Agreement which meant the open period did not occur (as it might have if no agreement was ratified before July 26, 2018). Unifor argued employer support can take a variety of forms, and that by preferring Local 75 by its words and conduct and punishing Unifor and its supporters and restricting their rights, Fairmont enabled Local 75 to ratify the Tentative Agreement and protect its bargaining rights.

60. Unifor further argued that Fairmont's violations of the Act (discipline of Unifor supporters, limiting Unifor's access to the workplace and interfering with its right to organize, while simultaneously permitting Local 75 to access the workplace) were free-standing violations of the Act in their own right as well as constituting employer support.

61. Fairmont and Local 75 argued the rights of Unifor and its supporters must be interpreted purposively, considering the unique context of this case. The context includes that Fairmont and Local 75 have an arms-length (and sometimes acrimonious) relationship (as discussed in cases like *Continuous Mining Systems Limited*, 1990 CanLII 5791 and *Ontario Hydro*, 1989 CanLII 3081). The mischief to which the "employer support" provisions of the Act is directed (preventing a union from representing bargaining unit employees because it is beholden to an employer) is absent where an arms-length relationship exists.

62. Local 75 and its members have collective agreement and other rights incidental to Local 75's status as bargaining agent. Fairmont argued much of the conduct Unifor complained of arose from its compliance with the collective agreement and that Local 75 as bargaining agent benefits from the presumption of majority status in accordance with *Retail, Wholesale and Department Store Union v. Cuddy Food Products Ltd.*, 1988 CanLII 7048 and *IBEW Local 1687 and Crowle Electric* [1982] OLRB Rep 1458. It argues it treated all employees equally in accordance with the collective agreement. Fairmont further argued that in deciding the issues before it, the Board must not consider whether only misconduct occurred, but the reasonable effect of misconduct on employees, arguing that unless the conduct complained of deprived the employees of their ability to freely express their wishes, it could not violate the Act (*The International Union of Painters and Allied Trades, Local Union 1891 v Real Stucco Inc.*, 2016 CanLII 11508 (ON LRB), citing *Kensington Place Retirement Residence* [2011] O.L.R.D. No. 4771).

63. Local 75 argued employee choice must be balanced with the provisions of the Act that ensure stability in collective bargaining. Local 75 also argues the application of the collective agreement does not constitute improper support and that the Act permits an employer to prefer one union over another: (*Capelas Homes Ltd.*, [1998] OLRD No. 3121). Therefore, Fairmont would have been entitled to make statements in favour of Local 75 and ratification (quite apart from the fact that the Hotel agreed to speak out in support of the Tentative Agreement) as legitimate expressions of support.

64. Unifor has fairly stated the test for employer support for a trade union in cases like *Henry Heyink Construction Ltd. v. Construction Workers Loc 53*, 2011 CarswellOnt 18710; *UE v. Square D Canada Electrical Equipment Inc.*, 1980 CarswellOnt 1056; *Edwards and Edwards Ltd*. 52 CLLC para 17,027 and *Superior Boiler Works & Welding*

Ltd. v CNFIU 2010 CarswellOnt 18491 and *Mount Nemo Truckers Assn v. Canada Crushed Stone*, 1977 CarswellOnt 964, but the context for those cases was markedly different from this one, starting with the fact that they involved non-union workplaces where the Board was considering if an employer provided support to a union such that the union should not be certified, not a case where it was argued (as Unifor did here) that improper support was extended to a long-standing bargaining agent whose rights under a collective agreement were directly implicated. There were other differences as well: *Superior Boiler* for example, turned on whether unsolicited employer support could violate the Act.

65. Most of the authorities relied on by Unifor that define prohibited employer support arise in non-union operations and are not directly applicable to this case, which involves two well-resourced and sophisticated unions, where one union has well-established bargaining rights and specific collective agreement rights. Furthermore, many of the events complained of in this case occurred long before the ratification vote that Unifor says was successful because Fairmont and Local 75 violated the Act.

66. The Board has been reluctant to police campaign speech in the context of a displacement campaign (see, for example, *Stratford Shakespearean Festival Foundation of Canada* 2000 CanLII 11899 and *Crock & Block Restaurant* 1984 CanLII 948) A persistent theme in the Board's comments is that where parties to a displacement application have had ample opportunity to respond to the others' allegations, the Board will not interfere. During the same time Unifor alleges Fairmont and Local 75 were violating the Act, it communicated comprehensively with bargaining unit employees, often challenging and criticizing Local 75 and its collective bargaining strategies and outcomes.

67. The Board's comments in *Junard Estrella v Unite Here Local 75*, 2019 CanLII 76962 (ON LRB) (Events at One King West) are also instructive:

> 21. Where there is a raid and intense electioneering between two unions, the Board is loath to interfere with the choice made by employees. This does not mean that intimidation or coercion or misrepresentation which offends the Act is acceptable no matter the circumstances. It certainly does not mean that the Board will not intervene in appropriate cases. However, the party which was

> unsuccessful at the ballot box clearly has the onus to convince the Board that it is entitled to another vote because the actions of the other union undermined the critical faculties of the employees in making their choice or that it did not have an opportunity to respond to the false or misleading statements made by the other union. In this case, I do not see that Unifor can reach the threshold that would cause the Board to order another vote, assuming Local 75 made the statements it is alleged to have made and engaged in the alleged conduct. Unifor' s allegations fail to show that the statements and conduct of Local 75 were so serious and so pervasive that they render the outcome of the vote unreliable.
>
> 22. This approach by the Board has been in place for decades and goes back at least as far as *Stauffer-Dobbie Manufacturing Co. Ltd.,* 59 CLLC ¶18,147 where the Board said that in these cases it gives considerable leeway to the parties:
>
> > 20. ... In the main, however a considerable amount of leeway is permitted in electioneering. The Board does not undertake to police election campaigns *or to consider the truth or falsity of campaign literature and speeches unless the ability of the employees to evaluate such literature or speeches is impaired*, e.g., by the use of campaign trickery, to such an extent that the free desires of the employees cannot be determined in a secret vote.
> >
> > (emphasis added)

68. Unifor relies on *CAW-Canada v. Coca-Cola Bottling Co*., 2004 CarswellOnt 2174, which involved a displacement application for certification. In *Coca-Cola*, the employer allowed the raiding union (CAW) to organize in workplace and the incumbent UFCW alleged this was improper support, arguing the employer must be impartial and not support one over the other. The Board dismissed the UFCW's application for failure to make out a *prima facie* case. Unifor relies on the Board's comment that an employer who permits access to its employees by a raiding union *could be* providing "other support" contrary to the Act to that union. However, the Board also held that context matters, and there were many notable differences between that case and this one including that in *Coca-Cola* there was no issue of compliance with

collective agreement rights related to the incumbent union. An argument that equal treatment means a raiding union is entitled to the same rights as an incumbent does not satisfactorily account for the fact that the incumbent union has secured these rights gained through the give and take of collective bargaining.

69. Unifor's expression of the test for employer support does not fairly consider the context of this case. Generally speaking, the test for what activity crosses the line to become prohibited "employer support" is different in a first-time organizing campaign than in a well-established bargaining relationship especially where that relationship includes obligations under a collective agreement, which is the case here. Furthermore, in *Coca Cola*, the Board observed that workers who have long been unionized (as is the case before me) are less likely to be influenced by employer preference. For that reason, I agree with Local 75 that the Board is (and should continue to be) reluctant to interfere unless employees' critical faculties have been undermined or a party did not have the opportunity to respond to false or misleading statements.

70. Accordingly, in considering the issues raised by Unifor, I approach the issues with the context of this application in mind and in particular, the importance of an arms-length relationship to allegations of employer support.

71. Unifor urges me to consider the cumulative effect of the unfair labour practice allegations and whether they have had the effect of undermining the rule of law (see for example *Southern Ontario Newspaper Guild Local 87 v. Globe and Mail*, 1982 CanLII 841). I agree with Unifor that this is an appropriate way to consider the effect of any misconduct I find, subject to the context.

Part 3 – the Unfair Labour Practice allegations

Discipline of Unifor supporters – background

72. Fairmont denies it disciplined Unifor supporters to punish them for supporting Unifor. Fairmont must prove the decisions to discipline were not tainted by anti-union animus. Unifor argued that the omissions in Fairmont's evidence fatally undermined Fairmont's denial of anti-union animus, including its failure to produce some documents, to call some witnesses and to call direct evidence. Unifor challenged Fairmont's position by carefully scrutinizing its evidence. As with the other issues argued before me, context matters. Unifor relied on *United Steelworkers*

of America v. Drillex International of Canada Inc., 1991 CanLII 6111 (ON LRB) to support its position, but *Drillex,* like many of the other authorities specifically invites the Board to consider the context of the discipline in making its decision.

73. Unifor also argued that Local 75 solicited discipline of its own members and that Fairmont conducted inadequate investigations of the issues that led to discipline of its supporters. The duty of fair representation requires that a union represent the employees in the bargaining unit it represents in a way that is not arbitrary or in bad faith. Arbitrariness includes capricious or grossly negligent conduct. Bad faith is behaviour motivated by ill-will, malice or dishonesty. If a grievance is processed differently than it normally would be, or in a way that leads to a significant delay in enforcing a member's rights, in the absence of an explanation from the union, the Board may infer arbitrariness or bad faith.

74. Fairmont is a large employer with human resource specialists experienced in administering a collective agreement. That suggests a more consistent discipline process should be followed than appeared to be the case here. But I should not infer anti-union animus just because detailed scrutiny of the disciplines reveals some shortcomings in the process - that is not an appropriate standard by which to review the evidence. In addition, although evidence of cause is not determinative, it is appropriate for me to consider whether the evidence indicates misconduct occurred (see for example, *Hydon Holdings Ltd*. [1990] OLRB Rep February 163.).

75. Finally, in considering whether Fairmont disciplined Unifor supporters to punish them for their union activity, I consider the nature and timing of the discipline (one-to three-day suspensions for four of the employees and a thirty day suspension for the fifth, of a total of at least a few hundred Unifor supporters, early in the campaign) and its likely effect in a workplace where there is a union that can (and did) file grievances against the discipline, and in at least one case, referred the grievance to arbitration. Furthermore, I also consider that all the disciplined employees acknowledged the discipline did not affect their ongoing activities in support of Unifor's campaign.

76. The evidence of Fairmont's imposition of discipline revealed some defects in the procedures followed by Fairmont (as acknowledged by Chartres in her testimony). However, the defects are outweighed by other factors – including that these were (mostly) very short

suspensions and that the alleged failures to investigate involved issues where there could be little uncertainty about the facts. Taken as a whole, the evidence does not support an inference that Fairmont violated the Act. Fairmont has discharged its onus to prove the disciplines were not tainted by anti-union animus.

77. Finally, even if some or all of the disciplines were contrary to the Act, they occurred long before the ratification and did not limit activity in support of Unifor after the employees were disciplined. Therefore, there is no evidence they affected the outcome of the vote and I would decline to order a remedy, aside from a declaration.

Grace Guanzon

78. Guanzon was a visible Unifor supporter with 24 years of service. She posted a composite image of co workers on Facebook in mid-January supporting a "no to trusteeship" message. The composite image was also published in a pro-Unifor ad in the Metro newspaper on January 30, 2018.

79. Employees Mary Ann Graboso and Cristina Dalupang (and possibly a third person) complained to Tremblay on January 30, 2018. They showed Tremblay the Facebook page and the Metro ad, and they told her Guanzon did not have permission to publish their pictures.

80. In her evidence, Guanzon admitted two employees (Graboso and a different employee) initially agreed several weeks earlier she could take their photos and use them for the campaign and that almost immediately after she took their pictures, they withdrew their consent.

81. Tremblay and Jessica Santantonio (Assistant Director, Housekeeping) together determined a 3-day suspension was appropriate. Tremblay concluded Guanzon's conduct breached Fairmont's Social Media Policy and Code of Ethics, which require employees to respect each others' privacy and denied the discipline had anything to do with her support for Unifor. Santantonio did not testify. Neither Santantonio nor Tremblay spoke with Guanzon before deciding to discipline her. Guanzon admitted to being aware of Fairmont's Social Media Policy and Code of Ethics.

82. Guanzon was disciplined on February 2, 2018.A grievance was filed on February 22, 2018. She acknowledged that Amarjeet Chhabra (a senior Unite Here International official) aggressively argued on her

behalf that this suspension was not warranted. The grievance was eventually referred to arbitration.

83. After the step 1 meeting for her grievance was held in February 2018, Guanzon did not contact Krishnamoorthy, so he did not refer it to step 2 until she followed up with him in September. Krishnamoorthy agreed step 2 meetings normally happen within a few days of step 1. This delay between steps 1 and 2 is significant, and contrary to the Local's practice.

84. After the discipline issued, by letter dated February 12, 2018, five employees (including the two original complainants) complained in writing that Guanzon had used their images without their consent.

85. Unifor argued Local 75 solicited the discipline and that the discipline even if not solicited was motivated by anti-union animus. There is no evidence the reports that led to Guanzon's discipline were solicited by Local 75. Even assuming the written February 12 complaint was solicited by Local 75, it could not have affected Fairmont's decision to discipline because that decision was made before February 12.

86. Unifor relied on the fact that managers did not speak to Guanzon before the deciding to discipline her. However, two (or possibly three) employees went to Tremblay, showed her a Facebook posting and a newspaper ad that contained their pictures, and told her they had not consented to the use of their images. While interviewing an employee subject to discipline may be normal procedure, I do not find the absence of an investigation in this case (given the evidence Tremblay had seen) to be so significant that it suggests anti-union animus.

87. I reject Unifor's arguments that I should infer anti-union animus because Fairmont had not previously disciplined someone for making social media posts about labour relations matters and that Fairmont did not typically police off-duty speech or employees' opinions. This publication is of a different magnitude than disclosing whether an employee prefers Pepsi or Coke (to use Unifor's example). Furthermore, I will not draw an adverse inference against Fairmont because Tremblay did not take notes of her unscheduled meeting with the employees that led to the discipline.

88. Chartres acknowledged that in a normal investigation, the misconduct would have been differently recorded and documented. She testified that she has since revised human resources procedures to ensure notes were better taken and retained.

89. Krishnamoorthy's explanation that he did not know Guanzon wanted her grievance to proceed to step 2 (and therefore, it was not moved to step 2 for several months contrary to the Local's practice) is not credible.

90. Fairmont's discipline of Guanzon did not violate the Act.

91. Krishnamoorthy did not adequately explain why Guanzon's grievance was not advanced to step 2 in accordance with practice. The evidence suggested grievances were normally moved more quickly than Guanzon's grievance was advanced. Certainly, it is possible that before the collective agreement was ratified, Local 75 representatives were preoccupied with the ratification process, but that does not explain why the grievance was not advanced until Guanzon contacted Krishnamoorthy in September. Given that Guanzon was a visible supporter of Unifor, absent an explanation I infer that the grievance was delayed because Guanzon supported Unifor, and I find Local 75 breached the duty of fair representation by not advancing her grievance through the grievance procedure more quickly.

Belgin Euperio and Michelle Williams

92. Euperio and Williams were Fairmont employees and visible Unifor supporters. In late January, 2018 Euperio posted a video of Williams on her publicly accessible Facebook page. In the video Williams identifies herself as an employee of the Hotel and complains about her treatment by Local 75 organizers and employee supporters. Among other things she describes divisions within the workplace and accuses Phillips of misleading her and misappropriating funds (in 2013 or 2014), using strong and critical language. Williams made the video because she and Philips (who at one time were very close) had an interpersonal dispute that was exacerbated by the divisions at the Fairmont in early 2018. Williams was upset when she recorded the video and felt it was important that she publicize "her side of the story".

93. The video was filmed in part of the hotel that was closed for renovations (but was visible behind her as a hallway of the Fairmont) and Williams and Euperio had no permission to be there.

94. Phillips is a Local 75 steward. She reported the posting of the video to Fairmont at the urging of her daughter and her husband. After Phillips reported it, Tremblay reviewed the video with Chartres and Stewart.

95. Tremblay testified Williams was suspended because she recorded the video in an unauthorized location, she identified herself as a Fairmont employee, and she did not accept responsibility for her conduct, which violated Fairmont's policies. Stewart testified Williams defended her statements as being truthful, but in her view, that did not matter because the video was filmed in an area she should not have been in.

96. Euperio and Williams were not interviewed before their discipline meetings.

97. Both Euperio and Williams were suspended for three days. Euperio's discipline form (issued by managers Christina Antonio and Rishi Kapur, who did not testify) stated she was disciplined for filming Williams in the hotel without prior permission and for posting a defamatory video on her Facebook page. Williams' discipline form (issued by Stewart and Santantonio) contained similar reasons for discipline. Williams, a former steward for Local 75, challenged the word "defamatory" at her discipline meeting and in response, Stewart changed the discipline form to say she posted a video that "spoke ill" of a fellow employee.

98. Despite the suspensions, both Williams and Euperio continued to act in support of Unifor.

99. Chartres acknowledged that normally before an employee is disciplined Fairmont would investigate. She testified that, although Kapur and Antonio did not testify, Tremblay as a senior human resources person would have been involved in discussions. She further testified she saw the video and discussed the discipline with Tremblay. In this case, Chartres said the fact that the video showed the employees were in an area of the hotel they should not have been in was a major concern. She was also concerned about the effect on Fairmont's reputation of a video that refers to another Fairmont employee in derogatory terms.

100. As with Guanzon's discipline, there were defects in the disciplinary process. However, the Hotel's failure to meet with Williams and Euperio before deciding to discipline them are not so significant or egregious as to lead to an inference of anti-union animus. Fairmont's concerns (identified in the discipline reports and further explained at the hearing) were that the video was filmed in part of the hotel the employees were not supposed to be in, that their conduct violated Fairmont's policies, and that the videos were posted on a public forum and could therefore harm Fairmont's brand. These issues are apparent on the face of the videos.

101. The fact that Fairmont did not investigate whether the content of the video was defamatory or not does not suggest its decision to discipline was tainted by anti union animus. The video used strong language and Fairmont explained why it did not want to be publicly associated with the sentiments Williams expressed. Whether they were defamatory or not is beside the point.

102. Unifor asked me to reject Phillips' evidence that she reported Wiliams at the urging of her family. I find her explanation credible and reasonable in the circumstances. Despite her status as a steward, I do not find that her reporting of the video means Local 75 colluded with Fairmont to have Williams (or Euperio) disciplined.

103. Local 75 filed a grievance for Williams on March 5, 2018 and it was advanced to step 2 on April 6, 2018. Williams complained that Krishnamoorthy did not represent her aggressively enough at the step 2 meeting. She heard nothing after the step 2 meeting until she contacted Krishnamoorthy in late June of 2018 and he told her the grievance had been referred to arbitration and he had sought an opinion from counsel.

104. Local 75 filed a grievance for Euperio on March 7. Euperio suggested in her evidence the grievance was still alive and that something (possibly arbitration) was scheduled for May 2020.

105. Krishnamoorthy did not explain why he did not tell Williams that her grievance had been turned down at the step 2 meeting or advise her of its status until she contacted him in June and then again in September, 2018. His unexplained failure to do so, especially since she was a Unifor supporter, violates the duty of fair representation. I find Local 75 delayed her grievance because she was a Unifor supporter.

John Timoteo

106. Timoteo had 31 years' service at Fairmont. On February 22, 2018 he had a heated exchange that included some inappropriate and harassing comments with four Local 75 organizers (not Fairmont employees) who were sitting in the staff cafeteria. He testified that the exchange ended with him telling the organizers to "fuck off". He acknowledged that his role in the exchange was provocative. At the end of the exchange, Timoteo either (according to some of the witnesses who were present) spat on the floor or (according to Timoteo) feigned spitting on the floor.

107. Timoteo agreed that he may have "seemed belligerent" to the Local 75 organizers, and therefore they may have believed he did spit on the floor (as opposed to pretending to do so). Timoteo had a verbal warning on his record when he was disciplined. He was issued a one-day suspension on March 2, 2018.

108. He was disciplined for having a heated exchange with union representatives which was not in accordance with Fairmont's values. Both Chartres and Tremblay testified he was disciplined because he spat on the floor of the cafeteria.

109. Unifor argues that the organizers involved in the exchange with Timoteo goaded him. Furthermore, Unifor argues the Local 75 representatives complained to Chartres, which was contrary to Local 75's practice of resolving disputes internally where possible, rather than involving the employer.

110. Santos, Chhabra, Vemelyn Feliciano (an organizer with Local 75) and Phillips complained about Timoteo. Santos and Chhabra provided statements to Local 75 officials and Phillips reported Timoteo to Chartres. They provided written statements. Fairmont investigated the allegations. Tremblay reviewed video of the exchange and interviewed Timoteo (with Patrick Lernihan - Director of Food and Beverage) but not the Local 75 organizers. According to Tremblay's notes, Timoteo acknowledged making the motion of spitting, but said he did not remember actually spitting. He did not deny spitting.

111. As with the other incidents of discipline, the discipline did not stop Timoteo from continuing his visible support for Unifor.

112. The discipline form issued to Timoteo does not mention spitting. Tremblay investigated by reviewing the video, the statements and speaking to Timoteo, who admitted his inappropriate conduct. The fact that the discipline form refers only to the exchange and not the spitting does not suggest anti-union animus.

113. Local 75 filed a grievance on behalf of Timoteo. Krishnamoorthy asked Phillips to represent him at the first step meeting but assigned someone different when Lernihan questioned the appropriateness of Philips as a representative since she was involved in reporting Timoteo. Krishnamoorthy assigned a different steward, Gary Ng.

114. As with some of the other grievances, several months after Fairmont denied the grievance on April 25, 2018 Timoteo asked Krishnamoorthy for an update. On September 26, 2018 Krishnamoorthy told him it had been referred to arbitration.

115. Unifor argues Local 75 did not investigate Timoteo's grievance before the step 2 meeting, contrary to its practice. Timoteo heard nothing from Local 75 about the grievance until he asked Krishnamoorthy for an update in September and Krishnamoorthy told him it had been referred to arbitration.

116. Unifor argues Local 75 reported Timoteo and therefore Local 75 was complicit in his discipline, relying on the fact that reporting Timoteo was contrary to Local 75's practice of handling such matters internally. This incident occurred during a highly polarized time within the bargaining unit. It is not reasonable to expect they would have worked it out this time, which explains Local 75's failure to try to do so. The fact that Timoteo was reported for an inappropriate exchange is not evidence of collusion. Local 75 representatives were entitled to refer Timoteo's admittedly inappropriate behaviour to the employer and Local 75 did not improperly procure his discipline by reporting him.

117. Krishnamoorthy explained he was busy at that time between Fairmont and bargaining with other hotels. His assignment of Phillips was inadvertent and when Lernihan raised concern with Phillips representing the union at the grievance meeting, Krishnamoorthy corrected it by appointing Ng.

118. However, Krishnamoorthy did not explain the failure by Local 75 to update Timoteo about his grievance. Because he was a Unifor supporter, absent an explanation I find Local 75's management of the grievance to have been in bad faith and therefore a violation of the Act.

Gee Manalastas

119. Manalastas and Stoll were room attendants who were both suspended for 30 days after a physical altercation in the hallway on a guest floor. Manalastas was a Unifor supporter and Stoll did not support Unifor.

120. On April 20, 2018 Manalastas complained to her supervisor that Stoll had hit her. Fairmont investigated the incident (while holding both employees out of service) and suspended both Manalastas and Stoll for 30 days. Local 75 filed a grievance alleging Fairmont failed to provide a harassment free workplace to both employees. The grievance was referred to arbitration where the arbitrator found Fairmont had just cause to discipline both Manalastas and Stoll but reduced their suspensions to 20 days.

121. Unifor alleges Manalastas was punished because she was a Unifor supporter. It argues Fairmont's investigation was inadequate and unfair and contrary to its practices and policies, the 30-day suspension was disproportionate and draconian, and Local 75 did not fairly represent her in the grievance procedure and at arbitration.

122. Fairmont denies Manalastas' discipline was influenced by her support for Unifor. Fairmont argues it investigated Manalastas' report about the incident with Stoll by speaking with Stoll, Manalastas and a witness (Euperio). It says the level of discipline was appropriate because room attendants work independently, the incident occurred in public, and violated Fairmont's policies. Local 75 says it handled the grievance and arbitration procedures in accordance with its practices.

123. Manalastas testified that she and Stoll had not spoken for a few months before the incident because Manalastas earlier confronted Stoll and accused her of taking linen from her cart.

124. Manalastas reported the April 20 incident to her supervisor Sarah Hamel, who told her to go to security. Reports from both Hamel and security (prepared within 15 minutes of the event) stated

Manalastas said Stoll hit her on the shoulder. The security report is more detailed, and it indicates the following:

a) Manalastas called Stoll's name three times and Stoll did not respond, so Manalastas (thinking she was being deliberately ignored) touched Stoll on the shoulder;

b) Stoll responded by hitting Manalastas on the shoulder;

c) Manalastas, in response, hit Stoll back (on the shoulder, as well).

125. Manalastas testified Stoll hit her twice and she deflected the second hit with her arm. What she described as a deflection in her evidence before the Board, she had previously described as "hitting" Stoll. Manalastas asserted it may not be reflected in the report because English was not her first language. This is despite the fact that Manalastas completed all her schooling including a university degree in English, had lived and worked in Canada (speaking English) since 2008 and in Israel before that, also speaking English since 2003. After being challenged on her explanation, Manalastas said she may have not given an accurate statement because she was in shock.

126. Tremblay's evidence explained that both Manalastas and Stoll were disciplined because they were involved in a physical altercation that violated Fairmont's policies and Fairmont wished to deter such behaviour in the future.

127. At arbitration, Local 75 took the position that the discipline for both Manalastas and Stoll should be removed. At her request, Manalastas was represented by separate counsel at arbitration.

128. Unifor takes issue with the fact that Manalastas was sent to security first to give a statement and that Stoll was interviewed by Tremblay and Santantonio before Manalastas was and because managers did not, when they interviewed Manalastas, tell her that Stoll told them Manalastas hit her. Unifor also criticizes Fairmont's investigation for not closely questioning what Manalastas meant when she told Tremblay and Santantonio she hit Stoll and it relies on contradictory statements (such as a witness statement from Euperio that suggests Manalastas may have been deflecting a hit from Stoll). Manalastas' explanation was completely discredited in my view and accordingly, I give it no weight.

129. As with the other incidents of discipline, careful scrutiny of Fairmont's response reveals things that could have been done differently, or even more fairly. But these factors are more relevant to a just cause test than they are to consideration of whether Manalastas was disciplined because of anti-union animus. It is worth noting that the disciplines of both Manalastas and Stoll were subject to a just cause analysis at arbitration, and both were reduced, but not reversed.

130. When two employees (one of whom is not a Unifor supporter) are issued identical discipline for the same altercation which does not on its face bear any relationship to the Unifor Local 75 dispute and where it is reasonable to conclude they both participated in it, the discipline has the appearance of being even handed and not tainted by a desire to punish Unifor and its supporters.

131. Unifor argues that Local 75 delayed the processing of Manalastas' grievance. In particular, Fairmont proposed to schedule the step 2 meeting for May 11, 2018 (while Manalastas and Stoll were serving their suspensions). It was not clear from the evidence whether Fairmont's practice is that employees are required to wait until their suspensions are served before a step 2 meeting occurs, or if the practice is different for short suspensions than longer ones. What was clear was that Krishnamoorthy was offered an opportunity to hold the step 2 meeting before Manalastas and Stoll had finished serving their suspensions and he turned it down. He did not coherently explain why he turned down an opportunity to advance Manalastas' interests by advancing the grievance more quickly. Absent an explanation, I find he delayed the grievance in order to keep Manalastas, a Unifor supporter, out of the workplace.

132. I am satisfied that Local 75 represented Manalastas fairly in ensuring she was separately represented at the arbitration hearing of her grievance.

<u>Declaration is the appropriate remedy</u>

133. Although I have found Local 75 violated the duty of fair representation as set forth above, there was no evidence that the individuals themselves, or Unifor, was adversely affected by the violations. Accordingly, beyond declaring Local 75 violated the Act, I do not award any further remedy.

False Board decision

134. In May 2018, Unifor alleges a "fabricated Board notice" was posted on Local 75's bulletin board and was distributed in the staff cafeteria. Agayev says he saw Santos placing it on a table in the cafeteria, which Santos denies. Unifor argues the posting of an altered decision violates section 88 of the Act and was improper support to Local 75.

135. The document consists of paragraphs taken from the Board's May 18, 2018 decision that found Unifor's April 30, 2018 application for certification to be untimely. The actual decision was posted by Fairmont in accordance with the Board's direction. The document alleged to have been posted by Local 75 consists of excerpts from the decision (parts of paragraphs 25 and 26 and all of paragraphs 27 and 28). Parts of it have been bolded. It confirms Unifor's application for certification was untimely and was dismissed. Aside from having the Board's logo on the top, it lacks the format and style of a Board decision. It is unlikely to have been mistaken for an actual Board decision, especially since the actual Board decision was posted at the same time.

136. Unifor has not established that Local 75 posted the notice. In any event, the posting and distribution of excerpts of a Board decision does not violate the Act.

Fairmont Prohibited Unifor from signing cards on Hotel property

137. Unifor alleges Fairmont prohibited its supporters from signing Unifor cards on hotel property, arguing this is an unfair labour practice (interfering with Unifor's and its members' rights under sections 70 and 72 of the Act) and is also prohibited employer support to Local 75, contrary to sections 53 and 70.

138. Fairmont does not deny Tremblay told Guanzon in early February, 2018 she was not permitted to solicit employees to sign union cards on hotel property. Fairmont argues this direction was reasonable and that it, like other restrictions on organizing activity at the Hotel was necessary, given the tension in the workplace between competing groups of supporters.

139. Timoteo and Jorge Junio testified Chartres told them on March 9, 2018 they were not permitted to sign Unifor cards on hotel property. Chartres denied this, saying she told them employees were permitted to express support for Unifor at the hotel during breaks.

140. The only Unifor witnesses who testified they were told they could not sign cards on hotel property were Junio, Timoteo and Guanzon.

141. I find that both Chartres and Tremblay told Unifor supporters they were not permitted to sign cards on Hotel property (to Junio and Timoteo on March 9, 2018 and to Guanzon in February 2018). Chartres admitted she spoke to Junio and Timoteo but denied stating such a broad prohibition. I accept Junio's and Timoteo's evidence over hers on this point, because an absolute prohibition is consistent with the gist of Frizzell's February 8, 2018 letter and with what Tremblay – a member of Chartres' department who worked closely with her - admitted she told Guanzon.

142. Fairmont agrees that no-solicitation rules that restrict activity on employer property in non-working hours are presumptively invalid unless the employer can demonstrate a sound business rationale for the restriction (*USWA v. Adams Mine, Cliffs of Canada Ltd.*, 1982 CarswellOnt 1200). Fairmont argues it balanced employee rights with its business interests by permitting employees to express support for Unifor during break times in the staff cafeteria (and it was not disputed that Unifor supporters did so). Fairmont argued the restrictions on union activity were necessary to ensure the tension between the two groups did not interfere with the customer experience Fairmont offers, particularly in its publicly accessible work areas.

143. Unifor supporters admitted they were not restricted in their pro-Unifor activity in the cafeteria (including having lunches brought in and paid for by Unifor and distributing flyers and pamphlets). Stefan Sandhu, a kitchen employee, testified he was provided a boardroom near the cafeteria so that he could meet with other kitchen staff who supported Unifor.

144. Fairmont's interest in ensuring the campaign between Local 75 and Unifor did not interfere with its customers' luxury hotel experience is legitimate. However, a blanket prohibition on signing cards anywhere at the Hotel outside of the cafeteria is broader than is necessary to achieve this purpose. Fairmont itself acknowledged that many parts of

the Hotel are not accessible to the public. Therefore, the public is not affected by activity (including signing cards) in non-public areas.

145. Fairmont's evidence persuades me that Fairmont believed a blanket prohibition was necessary to protect its business interest and its image. Nothing in the evidence causes me to find that Fairmont imposed this restriction to confer an advantage on Local 75 or that it otherwise did so to support Local 75's position. It was not prohibited employer support.

146. I find that a blanket prohibition on signing cards on Fairmont property violates sections 70 and 72 of the Act. However, I do not find this violation of the Act was sufficiently connected to the ratification vote to affect the vote result. Furthermore, it appears the direction was only given to three Unifor supporters, therefore it was limited in its effect. Unifor is entitled to a declaration that Fairmont violated the Act by telling three employees they could not sign cards on Fairmont property.

Restrictions on wearing buttons wristbands and hats

147. As part of its campaign, Unifor provided supporters with pro-Unifor wristbands and hats (sometimes referred to as "Unifor apparel") to publicize their support for Unifor and encourage others to do the same. Wearing union apparel is a well-established means of generating support in organizing and is a protected form of union activity under the Act (*Mississauga Hydro*, 1994 CarswellOnt 1531).

148. On March 9, 2018, Chartres told Timoteo and Junio that employees were not permitted to wear Unifor apparel but could do so in the staff cafeteria when they were off shift and out of uniform. Fairmont says this prohibition on hats, wristbands and buttons (other than the Local 75 pin) is consistent with long-standing policy and practice.

149. Unifor says Fairmont's grooming policy did not prohibit wearing bracelets, suggesting Chartres' description and application of the policy was inaccurate and punitive towards Unifor and its supporters.

150. The policy was applied in the past generally as Chartres described it. For example, Williams testified the only exception to Fairmont's uniform policy was wearing a Local 75 pin. Some Unifor witnesses asserted that employees in the past were permitted to wear hats while off shift but still in uniform in the cafeteria, although few details of this practice were provided. Unifor witnesses also testified

that employees occasionally wore wristbands as well, although the only specific example provided was Livestrong cancer wristbands. Employee Jennifer Heffernan recalled seeing such wristbands being worn four or five times in total, but not in circumstances where management would have known. The evidence did not establish the practice was widespread or known to management.

151. Several Local 75 supporters in campaign photos are wearing watches and bracelets while in uniform, and Tremblay and Phillips testified this was permitted. The evidence did not establish that these practices were widespread, either before or during the times material to these applications, or that Fairmont management knew about them. In any event, the grooming policy expressly permitted "conservative and professional" jewellery, therefore it was not inconsistent with the language of the policy (or the Hotel's practice) for wristbands to be treated differently from watches and bracelets.

152. Both the agreed facts and many witnesses (including those called by Unifor) confirmed employees wore Unifor apparel without restriction while off duty in the cafeteria and that Local 75 supporters did not wear any Local 75 branded apparel (aside from the pin) when on shift and in uniform.

153. Junio and Timoteo did not object when Chartres described the prohibition, which suggests what Chartres described was consistent with the Hotel's policy.

154. Unifor agrees Local 75 members have a collective agreement right to wear a Local 75 pin and admits it did not seek permission for its members to wear a similar pin. Fairmont permitted Local 75 members to wear pins because it is required by under the collective agreement to do so. But – as discussed earlier - the existence of this right does not confer a right on Unifor to demand equal treatment (or to demand that Fairmont violate the collective agreement by preventing Local 75 members from wearing a Local 75 pin) (*Grand River Hospital Corporation* 1997 CanLII 15490).

155. Fairmont did not change its policy on wearing hats, wristbands or pins or apply it against Unifor and its supporters to punish them or to confer an advantage on Local 75. Fairmont did not apply the policy against Unifor supporters only and not against Local 75 supporters.

156. Wearing union apparel during an organizing campaign is a protected activity. The *Adams Mine* analysis applies to any policy prohibiting such activity.

157. Unifor argues Fairmont provided no business justification for restricting the wearing of wristbands and hats (except for one employee who testified that bans on wristbands of any kind were required for kitchen staff to maintain sanitation standards). Unifor further argues Local 75 sought out and reported violations of the policy and that this enforcement had a disproportionate impact on Unifor. Unifor further argues Fairmont's limitation on the wearing of apparel unfairly restricted Unifor's organizing activity and communicated a preference for Local 75.

158. Unifor argues the enforcement by Fairmont of restrictions on Unifor supporters' rights to wear Unifor apparel violated sections 70 and 72 of the Act and constitutes prohibited employer support for Local 75.

159. In applying *Adams Mine*, I am satisfied that Fairmont has justified its policy. The very fact that a policy exists (especially in a unionized workplace where it can be challenged as unreasonable) is a significant factor in establishing justification. Fairmont's interest in maintaining the professional appearance of its employees (who wear uniforms) by requiring that they not wear hats or wristbands while in uniform is self-evident. Some employees may not work in public areas of the Hotel and it is possible some apparel may not interfere with the look of the uniform. But Chartres explained it would be very difficult to police and apply the policy on a case by case basis and I am satisfied that the fact that possible exceptions may exist does not justify an argument that the Hotel could have and should have applied the policy on a case by case basis.

160. Fairmont was entitled to restrict the wearing of Unifor apparel to when employees are off shift and out of uniform and in doing so was not violating the Act or extending prohibited support to Local 75.

<u>Prohibition on distributing flyers</u>

161. Unifor argues Fairmont prohibited the distribution of Unifor flyers on hotel property. It relies on one instance where Fairmont Benefits Manager Nancy Silviera went to the cafeteria after Krishnamoorthy reported to Human Resources that Heffernan was handing out leaflets in the cafeteria.

162. Heffernan testified that Krishnamoorthy told her she was not allowed to distribute Unifor literature in the cafeteria. She also acknowledged Krishnamoorthy did not decide or enforce Fairmont's policies, and that Fairmont did not prevent her from giving out flyers, and that she and others supported and wore Unifor apparel in the cafeteria while off duty. Heffernan testified that Silviera did not discipline her.

163. On December 16, 2018 Manalastas was disciplined for handing out flyers. Unifor argues that although this happened after the these applications were filed, it supports its argument that the policy must have remained unchanged and in place from April.

164. The incident involving Heffernan in the cafeteria is an isolated event. Several witnesses including Manalastas, Ronald Lopez and Myleen Piansay (all Fairmont employees) agreed they handed out Unifor flyers in the cafeteria during times relevant to these applications.

165. Unifor argues Fairmont's prohibition constitutes improper interference in its campaign and that it constituted improper support for one union over another.

166. Silviera responded to a call from Krishnamoorthy but she did not purport to enforce such a rule or to discipline Heffernan and therefore, Fairmont did not violate the Act.

Complaints about differential access for Local 75 and Unifor

a) The context

167. Frizzell issued a letter to employees dated February 8, 2018. The letter came after Pimentel and some other former Local 75 officials were in the hotel in mid January without authorization and were engaging in organizing activities and Sareen complained to Fairmont about it, asking if Fairmont's lawyers could send a letter. Frizzell's letter updates employees on bargaining and includes the following paragraph:

> Over that last few weeks, we have been advised that there have been instances of representatives of other unions who have attempted to enter the Hotel and our workplace to have conversations or meetings with our colleagues. It is imperative that we advise you, this behaviour is strictly prohibited under the Ontario *Labour Relations Act* and is

> contrary to our Fairmont policies. In this light, I would advise you that if you see strangers of any kind in the heart of the house or feel that there is unauthorized union activity happening in your work area, please contact your Manager or Security immediately so that we may ensure this behaviour does not take place on Fairmont Royal York property. You are under no obligation to speak to any representative of any other union, or to provide them with your name, telephone number, email address or any other personal information. It is unlawful for a representative of any other' union to pressure you to sign a union card. These activities are not sanctioned by the Fairmont Royal York, contravene our current Collective Agreement and are unlawful.

168. Fairmont says the content of the letter is permitted employer free speech. The letter prohibits outside Unifor organizers from accessing the Hotel, which they have no right to do in any event. Absent any evidence from Frizzell to the contrary, I am prepared draw the inference that Frizzell sent the letter in response to Sareen's request. However, his sending the letter is not improper support because Unifor organizers had no right of access to the Hotel.

169. Local 75 is the bargaining agent at the Hotel, and article 24.1 of the collective agreement provides as follows:

> **24.1** (2005) Authorized representatives of the Union may visit the Employer's premises for the purpose of discussing or investigating any matter covered by this Agreement. It is understood there will be no interruption of work caused by such visitation. The authorized representatives of the Union shall, upon each visit, contact the Director, Human Resources before pursuing such visitation; upon arriving in a department eh/she shall, whenever practicable notify the Department head or in his/her absence the supervisor on duty. Furthermore, any authorized representative of the Union shall, upon each visit, receive from the Employer a union identification card and wear said card, in a visible manner, at all time while on the Employer's property.

Authorized representatives of Local 75 may access the Hotel to discuss or investigate any matter covered by the agreement. The collective agreement does not limit the number of representatives who may attend at the property.

170. It is an understatement to say January 2018 and the months following were a time of significant activity at the Hotel: Pimentel and many of Local 75's staff were removed from office and Local 75 was attempting to conclude a collective agreement. This was an unprecedented situation: experienced representatives who had previously serviced the bargaining unit were suddenly gone, and collective bargaining was ongoing. Bargaining notes and information were not shared by the outgoing regime, and key members of the former executive and staff were campaigning aggressively against ratification of the collective agreement.

171. Chartres testified the collective agreement does not permit access to Local 75 representatives to campaign for representation rights. There is no evidence Fairmont had reason to believe Local 75 was accessing the workplace for other purposes than those set out in the collective agreement. On the other hand, it does authorize access by Local 75 for bargaining and ratification-related functions.

172. Local 75's evidence established a history of increased access by its representatives during bargaining and ratification of previous collective agreements. This explanation is borne out by the evidence: the numbers of Local 75's representatives seeking access increased around the dates of the first and second ratification vote.

173. Some Local 75 witnesses (Casey, Sareen, Feliciano and Monica Scarlett, an organizer with Local 75) testified they were at the Hotel in part to respond to Unifor's organizing campaign. Other Local 75 witnesses agreed part of Local 75's campaign involved comparing Local 75 favourably to Unifor. Local 75 organizers took photos of employees wearing Fairmont uniforms and expressing pro Local 75 messages, handing out flyers that promised Local 75 would negotiate a better collective agreement than Unifor and speaking to members in support of ratification. Unifor argued this activity took Local 75's actions outside of the activity protected by the collective agreement.

174. Unifor was organizing in support of an application for certification and against ratification (to persuade Fairmont employees to reject the agreement so there might be an open period in late July 2018). In urging employees to ratify the Tentative Agreement while Unifor was urging employees to reject it, Local 75 responded to Unifor's arguments and materials. Unifor is not entitled to rely on its own strategy that included attacking Local 75's collective agreement to argue

that Local 75's response to it was "representational activity" not covered by the collective agreement.

175. The list of names provided to Fairmont of representatives who may access the hotel (consisting of 72 names on one letter) and the number of recorded visits to the Hotel (845 between mid-January and mid-June, 2018) was much larger than in the past. Sareen testified that more representatives were required because Local 75 was "scrambling" to meet its obligations in the wake of the departure of so many senior officials and trying to ratify the Tentative Agreement.

176. Local 75's access was not without limits: Fairmont warned Local 75 when its representatives did not comply with the collective agreement, e.g. when they were in work areas without prior authorization. Chartres' evidence also established that, consistent with past practice, Fairmont asked that Local 75 not assign Fairmont employees on leave who were working for Local 75 to work on Local 75's campaign at the Hotel, and Local 75 obliged.

177. Fairmont argued it would have violated the collective agreement if it questioned why representatives sought access or sought to police what they were saying, and that its compliance with the collective agreement cannot constitute improper support for Local 75. Furthermore, the evidence does not establish that anyone reported to Fairmont that Local 75 representatives were on site for purposes beyond what is authorized by the collective agreement or that the presence of large numbers of Local 75 representatives should have caused Fairmont to believe Local 75 was not accessing the Hotel for the purposes in the collective agreement.

178. Although Unifor external representatives were not on-site, its employee supporters openly campaigned for Unifor on-site in accordance with Fairmont's policies (mostly, but not exclusively, in the cafeteria). Unifor also had a regular presence at the Tim Hortons close to the Fairmont.

b) Fairmont is not required to grant Unifor access

179. Unifor takes the position the access granted to Local 75 enabled Local 75 to ratify the collective agreement and thus interfered with Unifor's organizing efforts. Therefore, granting access to Local 75 was employer-provided support that benefited Local 75 and communicated to employees a preference for Local 75 and therefore violated the Act.

Unifor argues employers must act "impartially", and Fairmont could have granted it access or prohibited "all unions" from campaigning for or against representation rights on hotel property.

180. Fairmont argues it had a reasonable business justification for not granting access to Unifor and points out that the Board denied such a request for access in the interim application (Board File No. 1006-18-IO), citing disruption and labour relations harm.

181. *Coca Cola* does not mean that an employer that fails to extend "equal treatment" to an incumbent and a raiding union by granting the raiding union access has provided improper support. Notably, the Board dismissed the argument that such a right existed in that case (while acknowledging it could exist in other cases). And, as the Board held in *Grand River* (decided before *Coca-Cola*), collective agreement rights do not extend to a union seeking to displace an incumbent.

182. Unifor had access to employees despite its representatives not being permitted on the site. Employee supporters supported Unifor at the Hotel in accordance with Fairmont's policies, and Unifor had a regular and established presence close to the Hotel. Unifor is a strong and well-resourced union and it communicated often, and it communicated effectively with Fairmont's employees.

183. Context matters. Local 75 was trying to ratify the a collective agreement. Fairmont was required to permit Local 75 representatives to access the Hotel to build support for ratification of the Tentative Agreement. But Unifor did not have a collective agreement right of access and it was not entitled to such a right.

184. If Fairmont's failure to allow Unifor representatives access to the site violated the Act, the remedy is not to rescind or void the ratification vote, for reasons given by the Board in *Conseil Scolaire de district des ecoles catholiques du sud-ouest*, 2000 CanLII 12267, where the Board held as follows in connection with a complaint about unequal access to campaign in a PSLRTA vote. As in *Conseil Scolaire*, given the context of this case which included Unifor's open and aggressive campaign, I cannot find Fairmont's decision not to allow Unifor officals to access the workplace contributed to the failure to ratify the Tentative Agreement:

> 33. I agree with counsel for the employer that the OSSTF is really complaining about its loss of opportunity to campaign, and greater opportunities for CUPE. The Board in *The Northwest GTA Hospital Corporation* said that a loss of a potential to influence did not amount to a conclusion that employees lost the opportunity to express their true wishes in a secret ballot vote. Again, while the denials of the leave may be found to be unfair labour practices, I cannot conclude that the result of the unfair labour practice was a vote that did not reflect the true wishes of the employees.

c) Other alleged violations of equal access

185. Unifor argues Fairmont permitted Local 75 representatives to intimidate employees who supported Unifor (all between April 28, 2018 and May 1, 2018) as follows:

a) Krishnamoorthy shouted at Heffernan in the cafeteria that she was "illegal" and not permitted to hand out Unifor flyers;

b) A Local 75 representative told Heffernan if Unifor became the bargaining agent, employees would "lose everything";

c) Krishnamoorthy threatened to report Heffernan for wearing a Unifor hat;

d) Phillips called Stefan a bastard in the voting room; and

e) Scarlett told Williams if some Unifor supporters were in Jamaica, they would be dead.

186. Unifor argues Fairmont's failure to investigate these allegations and this violates section 76 of the Act and constitutes improper support for Local 75. Local 75 denied the allegations. Even if true (and the allegations concerning Krishnamoorthy and Heffernan are), the only one that on its face could be a violation of the Act is the last one. The others clearly fall within the boundaries of campaign speech, as they are not threats to job security or physical security, and the Board has repeatedly refused to regulate such speech (see for example *McMaster University* [1979] OLRB Reb July 685). Williams testified Scarlett threatened her but admitted she did not report the threat. Scarlett denied making the alleged threat – she and Williams had not met before that date.

Scarlett's denial of the threat was more credible than Williams' evidence. Her evidence was clear and straightforward. It is unlikely that a person would make such a statement to someone they have never met before, even in the tense environment at the Hotel at the time.

187. Even if the statement was made, it does not appear to have been taken seriously by Williams who was well aware of Fairmont's mechanisms for reporting such things. This further undermines her credibility and suggests the statement, if made, could not have reasonably been interpreted as a threat.

188. Unifor further argues Fairmont began enforcing a policy (according to Unifor's evidence, not previously enforced) that employees could not be on Hotel property for more than 30 minutes before or after their shifts. This had an adverse effect on Unifor because it limited the time its employee supporters could be on site, while Local 75 representatives had access to the Hotel under the collective agreement.

189. The evidence established this policy was not previously enforced. Fairmont did not justify its decision to enforce the policy during the campaign. Given that the policy was not previously enforced, Fairmont is not permitted to enforce it to prohibit Unifor supporters from remaining on the property as they may have done before. However, their conduct is subject to restrictions of reasonable policies including those that the Board has upheld in this decision.

Complaints about ratification of the collective agreement

190. Unifor argues the ratification vote was not effective (and the collective agreement is void) because Local 75 did not disclose important changes to the collective agreement.

191. Unifor argues Local 75 did not properly disclose material changes to employees' terms of employment that would result from ratifying the Tentative Agreement. Unifor relies on *Myles v. AEU*, 2012 CarswellOnt 10786 to argue that a union must tell employees if an employer has issued notices ("the Notices") to terminate estoppels in bargaining. Pimentel testified that Fairmont issued notices related to conditions of employment in bargaining and that many of the issues covered by the notices were "strike issues".

192. Much of Unifor's evidence about the past practices was incomplete, self-serving and general – even evidence given by Unifor witnesses who were until December of 2017, representatives of Local 75 (and therefore presumably knew details about the practices) like Pimentel, for example.

193. Unifor argued in accordance with *Zorzi v. Diamond "Z" Association*, 1975 CarswellOnt 763, language changes and monetary terms negotiated must be truthfully disclosed, submitting that Local 75 misled employees about important issues. While acknowledging not every amendment to a proposed collective agreement must be disclosed at ratification, Unifor argued the bargaining agent should "… provide enough information to allow for informed debate and decision-making, especially with respect to matters which may be of significance to the job security of members" *Tovey v CAW, Local 222*, 1998 CarswellOnt 3528. Unifor argued that Local 75's references to a retroactive bonus were misleading because retroactivity is commonly understood to refer to a wage increase, while a bonus not rolled into wages is usually referred to as a signing bonus.

194. Unifor argued that Local 75 never disclosed the full Tentative Agreement that contained all the signed-off language changes and monetary terms ("the Changes") to employees. Instead, it only had copies of a five-page document available at the ratification votes, and that five-page document was not visible or publicized and was only provided to one of Unifor's witnesses.

195. Unifor argued Local 75 made last-minute concessions in bargaining in exchange for Fairmont's support in order to ratify the Tentative Agreement and close the open period. Unifor argued that Local 75's explanations for accepting the collective agreement terms are not credible and that Fairmont's explanation – that it took a risk in its final offer – is also not credible.

196. Unifor urged the Board to set aside the agreement based on Local 75's intentional deception of bargaining unit employees alone. But it further argued that because Fairmont was complicit in unfair labour practices that influenced the vote result, the Board should set aside the collective agreement (*RWDSU v Cuddy Food Products Ltd.*, 1988 CanLII 3776).

197. Unifor further argued that but for the additional improper employer support of Fairmont, including granting Local 75 and its agents unlimited access to the workplace to campaign for ratification, disciplining supporters, outlawing support for Unifor, the Tentative Agreement would not have been ratified. Most of those allegations are not made out. The allegations that have been proven are not sufficiently connected to the ratification vote to be.

198. Local 75 and Fairmont argue that Unifor campaigned aggressively against ratification of the Tentative Agreement. They submit this context is important for considering Unifor's allegations including its remedial requests, and in evaluating whether the information provided by Local 75 permitted informed decision-making.

199. Local 75 argues that unions are entitled to provide summaries of collective agreement changes for ratification and may engage in salesmanship in the ratification process. The Board will approach statements made in the ratification process like campaign speech, drawing the line at "fundamental misrepresentation", which did not occur here.

200. Local 75 argues a stack of the complete Tentative Agreement was available at the ratification vote. To the extent that the evidence of employee Shovgui Agayev (as it emerged in cross-examination) supports Unifor's allegations that the Tentative Agreement was not there, I should reject it.

201. Local 75 denies it misled employees about the Changes including the retroactive bonus, and that employees had an opportunity to ask questions at the ratification meetings. For example, Guanzon questioned Casey about the bonus and about the right to give back rooms.

202. Local 75 admits it did not tell employees about the Notices because it was not required to do so. It argues *Myles* is wrongly decided, and in the alternative, that the Notices did not require disclosure.

203. Even if the Notices had the effect of terminating estoppels, Local 75 argues the employment conditions that were the subject of the notices were not sufficiently material to entitle Unifor to a remedy. Furthermore, Local 75 argues Unifor publicized the Notices during its opposition to ratification. The fact that the deal was ratified despite

Unifor's aggressive campaign against it suggests the issues raised by the notice are not material.

204. Fairmont argues that even if Local 75 did not disclose all the Changes and Notices, Unifor campaigned aggressively about them in website and social media postings, and in leaflets. Furthermore, Fairmont argues even if the Board finds Local 75 violated the Act, it would be unfair to Fairmont and the employees to set aside the agreement.

205. Fairmont denies it conspired with Local 75 to close the open period by securing a collective agreement or that Local 75 made concessions in exchange for its support. Fairmont wanted to finalize a collective agreement as quickly as possible, to ensure stability during major renovations to the Hotel. As a result of the trusteeship and the events that followed, bargaining was interrupted. By the time it resumed, Unifor was engaged in a sophisticated and highly personal and divisive campaign to represent the bargaining unit.

206. Fairmont has existing bargaining relationships with Unifor workers at ten Fairmont hotels in Canada are represented by Unifor. It argues the Tentative Agreement contained many improvements, disputing Unifor's description of the agreement as "light". For example, the significant 3.75% wage increases in years 3 and 4 of the collective agreement imposed risk for Fairmont if hotel occupancy unexpectedly declined.

207. In response to the collusion allegations, Fairmont argued if its objective were to collude with Local 75 to close the open period, it would had acceded to Local 75's demands and made the agreement easier to ratify. Consistent with that scenario, it would have improved its final offer between its rejection on May 1, 2018 and the second ratification vote on June 14 and 15, 2018. Chartres' evidence established Fairmont had gone as far as it could at the end of April, and it did not improve the terms to ensure ratification. Fairmont says the bargaining evidence reveals its objective was to finalize a collective agreement to ensure stability, but on terms acceptable to Fairmont.

208. Fairmont also argues that even if Local 75's communication was unclear, its own communications unambiguously stated the Tentative Agreement did not include a retroactive wage increase.

209. The parties' submissions raise several issues about ratification, as follows:

1) Did Local 75 mislead employees or not tell employees about the Changes?

2) Did Local 75 improperly fail to disclose the Notices?

3) Did Fairmont extend prohibited support to Local 75 to enable ratification of the Tentative Agreement? and

4) If Local 75 and/or Fairmont violated the Act, what is the appropriate remedy?

As with the other issues in this matter, context is important.

210. For the reasons given below, I find Local 75 did not mislead employees about the Changes. I further find that the summaries issued by Local 75 included sufficient information whether the Tentative Agreement was in the ratification room or was properly publicized (because the significant language changes were included in the summaries) I find it was available to employees.

211. Local 75 was not required to disclose all the Notices. Notice of one issue (the right to give back rooms) should have been given in accordance with *Myles*. However, the issue was highly publicized, and I am satisfied no remedy aside from a declaration is appropriate. In any event, Fairmont was not complicit in the failure to disclose.

212. Fairmont did not collude with Local 75 and provide improper support to Local 75 to secure a collective agreement.

213. Even taking into account the violations of the Act I have found, rescission of the collective agreement is not appropriate remedy.

a) *Local 75's description of the language changes did not violate the Act*

214. The Changes were included in summaries issued by Local 75 (except as noted below). The Tentative Agreement, which was available in the ratification room contained all the Changes, and in addition they were the subject of Unifor communication

Wage increases over the course of the collective agreement and bonus

215. The Tentative Agreement did not include a retroactive wage increase. The first wage increases took effect May 1, 2018 and for the period between July 17, 2017 (expiry of the last agreement) and April 30, 2018, employees would receive a lump sum payment based on hours worked during that time.

216. A flyer circulated by Local 75 on or about April 26 states Fairmont agreed to a 13.25% wage increase "retroactive to July of 2017" and a script of Local 75's suggests a wage increase retroactive to July of 2017 was negotiated. However, other documents and social media posts, including the bargaining documents, described the 3% payment as a retroactive bonus. Furthermore, the tentative agreement and the widely-circulated summary clearly distinguish the 3% payment from the first "wage increase" on May 1, 2018. Most of the communication from Local 75 makes it clear that the wage increase did not take effect until May of 2018 and the retroactive payment was a bonus.

217. Using the word retroactive in connection with the bonus is not misleading, as it did cover an earlier period.

218. This issue was the subject of Unifor's campaign which made the distinction between retro pay and a bonus very clear. Fairmont's communication also made it clear there was no retroactive wage increase, describing the bonus as a "lump sum payment".

219. Unifor argues the wages negotiated were substandard. Fairmont and Local 75 strongly dispute this. Whether the wages are or are not substandard, they were disclosed and discussed in Unifor's and Local 75's materials, including with graphs showing the effect of wage increases by classification over the course of the collective agreement.

The transit subsidy

220. While the parties were bargaining, the TTC was considering eliminating a system of reduced-price employer-provided transit passes. Fairmont had participated in this system by subsidizing the price of bulk-purchased passes for employees and the subsidy was worth about $150.00 per year to each participating employee.

221. Because the TTC's plans were not final when bargaining occurred, Fairmont and Local 75 agreed that Fairmont would contribute the amount Fairmont would have contributed to the TTC program to the Union's Pension Plan, if replacement of the TTC pass system was not feasible.

222. Casey explained this issue was left out of the summaries because it was not clear when the agreement was ratified what would be the status of the program. It was included in the Tentative Agreement.

223. As with the wage/retroactivity issue, Unifor publicized this issue. For example, Agayev's statement indicates he was aware of the changes.

Creation of floating bartender/assistant server positions

224. The Tentative Agreement permitted Fairmont to create five new floating bartender positions and five new floating assistant server positions (subject to Local 75's right to grieve the terms and conditions in the newly-created classifications). Food outlets retained their own designated positions. The evidence did not establish how this change would affect existing employees or that it was a matter of concern to the bargaining unit.

225. This language was also not included in Local 75's summaries but was included in the Tentative Agreement.

226. The issue was also discussed in Unifor's materials.

Benefits during prolonged closures

227. This issue was correctly described in the Tentative Agreement and was also included in Local 75's summaries, although the summaries contained an error. The Tentative Agreement changed the level of employer benefit contributions necessary to achieve a balance of up to 120 hours during prolonged closures. This was revised down from 128 hours in the previous agreement but was misstated in the summary as increasing the contributions from 80 to 120.

228. The error, which appears to arise from ambiguity in the typed Memorandum of Settlement was minor and inadvertent.

Training premium

229. The old agreement contained a training premium of $0.75. That amount was increased to $1.00 in the Tentative Agreement. Unifor argues Local 75 misrepresented the change by stating Fairmont would pay "an extra $1.00/hour when you are training another worker". One of the summaries produced by Local 75 makes it clear the payment is an increase from $0.75 per hour to $1.00 per hour, as does the Tentative Agreement.

230. In *Diamond Z* (relied on by Unifor to argue Local 75 violated the Act) there were 13 differences between what was in the proposed collective agreement and what employees were told, including that there would be a retroactive wage increase, when there was not. In *Diamond Z*, what employees were told departed significantly from what was negotiated. The evidence does not bear out Unifor's argument that Local 75 misled employees.

231. The purpose of disclosure requirements in ratification is so that employees can have "… informed debate and decision-making, especially with respect to matters which may be of significance to the job security of members" (*Tovey*). In *Tovey*, many temporary agency employees worked for the employer, including several who had worked there for a long time and were not on the seniority list. The CAW negotiated language that placed temporary agency employees on the seniority list based on the duration of their work for the employer and it did not tell employees. The collective agreement was ratified and shortly after that, several employees on the seniority list were displaced by former temporary agency employees. They had ratified terms that affected their job security, without being told.

232. Evidence about disclosure must be considered in the context of the highly contested ratification process in this case: all of the issues Unifor complains about – where it alleges Local 75 either misled employees or did not disclose the Changes – were the subject of extensive communication and detailed criticisms by Unifor. This fact does not eliminate Local 75's duty to disclose, but it affects the scope of Local 75's obligation and what remedy is appropriate if a violation is found. Unifor promoted its view on all the Changes, including the two that were not in Local 75's summaries.

233. Local 75 did not mislead employees or misrepresent the Changes included in the summaries. Regarding the two Changes that were not in the summaries (TTC pass and floating positions), I accept Local 75's explanation for not including the TTC pass and I do not find Local 75's failure to have included the creation of the floater positions would have affected the vote. Furthermore, both of these issues were discussed in Unifor's leaflets so Local 75's failure to disclose them in the summaries likely had little or no effect on the employees' right to an "informed debate".

234. In any event, as discussed below, both these issues were included in the Tentative Agreement which was available to employees.

b) The Tentative Agreement was available in the ratification room

235. All the Changes were included in the Tentative Agreement which was in the ratification room.

236. Local 75 did not publicize that the Tentative Agreement was in the room and it was not highly visible, but Local 75 circulated summaries that included the significant Changes. But for this fact, I might be more concerned about the fact that Local 75 did not do more to make the Tentative Agreement available. However, as discussed below, in the context of this case, Local 75's failure to publicize the Tentative Agreement is not a violation of the Act.

237. Several of Unifor's witnesses testified they did not see the Tentative Agreement in the ratification room and were not offered it.

238. Agayev testified in cross examination for the first time (without it having been pleaded) that he asked for and received an incomplete document in the ratification room, and he was permitted to take it from the room. Agayev's evidence in chief about the May 1 ratification vote and the June 14 and 15 ratification votes stated that there were no signs in the voting room indicating the "memorandum of settlement" was available, and that Local 75 did not offer the "memorandum of settlement" to Unifor supporters.

239. Agayev testified he saw a document circulating in the kitchen around May 1 which showed changes to the collective agreement, and this document included the employer's final offer.

240. In cross-examination, a typed statement prepared by Agayev on June 14, 2018 was put to him for the first time. The statement says Agayev saw a stack of documents on a bench near the registration desk (but "out of sight") during the second ratification vote. In cross-examination, he clarified that they had a purse and tote bag on top of them. Despite being concerned about Local 75's secrecy, Agayev did not mention the purse and tote bag in his contemporaneous typed statement.

241. Agayev asked for and was given the document. He acknowledged in cross-examination that it looked like a document he had seen on Unifor's website, it was identified as a Memorandum of Settlement, and it had many pages. Unifor's website posted several documents related to bargaining, including Fairmont's offer from December, 2017; Fairmont's final offer dated May 1, 2018; leaflets and summaries of the final offer by Local 75; and a detailed criticism of the Tentative Agreement by former Local 75 officials.

242. According to his statement, after Agayev left the voting room, he reviewed the document more carefully and felt the Schedule A attached to it was "considerably shorter" than what he saw around the first ratification vote. Agayev's statement says the Schedule A he was given at the second vote did not include a statement that the employer was maintaining notices and did not disclose changes to the TTC program and sous-chefs doing culinary work. Agayev suspected Local 75 left out information that would reduce support for the collective agreement.

243. Agayev then went to the cafeteria and spoke with some representatives of Local 75, asking at least two of them if the document he had just received was missing a page, and another one if the document was missing "pages". He asked Casey if the notices given by Fairmont were missing and Casey told him the document Agayev had was the same document he had seen in May. According to Agayev's statement, Casey then reviewed the document and told him it was complete but did not include the "letters of understanding" and that it could probably be arranged for him to get the letters.

244. He said as a result of his discussion with Casey he was left wondering why "three points" in the May document (which moments later he referred to as "three paragraphs") were not in the document he was given in June.

245. Agayev gave the document and his written statement to Unifor.

246. In re-examination, Agayev said he thought the document given to him in the room was a five-page memorandum of settlement including a Schedule A did not refer to the notices, the TTC pass or the sous chefs and did not include the signed-off language changes. He also said in re examination that he had to "leaf through the document" to get to the schedule A and confirmed he told Local 75 representatives it was "missing a page".

247. Casey and Sareen testified the Tentative Agreements stacked in the ratification room were about 30 pages long. They agreed the notices were not included. Casey testified that the Tentative Agreement was in the room and about "a dozen" employees reviewed it with him.

248. Casey was not cross-examined about what documents were available in the ratification room, or about Agayev's evidence about their conversation on June 14.

249. Sareen testified the Tentative Agreements were available in two different places in the ratification room and that she saw Casey reviewing copies of them with employees.

250. According to Sareen and Casey, the Tentative Agreement was available in the ratification room (and therefore, presumably what was given to Agayev). It included all the agreed upon language changes.

251. Agayev's evidence is significant in evaluating the credibility of the competing evidence about what document was available in the ratification room. It is troubling that Agayev's will-say statements about ratification do not acknowledge he was given a document on June 14, especially since he was in touch with Unifor during the campaign.

252. Agayev had been recording people by cell phone but did not take a picture of the document he was given.

253. Agayev's evidence about what document he saw in May and what he was given on June 14 was unclear. In re-examination, he suggested the document he got in June was 5 pages long. In cross examination, he agreed the document was "many pages" long and he repeated more than once that the June document was missing three "points", "paragraphs" or items. There is a significant difference between a 30-page document (which Local 75 says was in the room)

and a five-page document, and that difference certainly suggests more than a few pages are missing. Agayev's evidence is too internally inconsistent to be reliable.

254. As between Agayev's evidence that the document in the ratification room was not the Tentative Agreement and Casey and Sareen's evidence that it was there, I prefer Casey and Sareen's evidence. Accordingly, I find the complete Tentative Agreement containing all the language changes was available in the ratification room.

255. Unifor argues even if the Tentative Agreement was in the ratification room, it was not publicized. This is true, but context matters. Employees had enough information that they could have asked for the complete agreement and, based on Agayev's experience, had they done so, they would have been given one. Although Agayev was the only one of Unifor's witnesses who requested and obtained the Tentative Agreement, Casey and Sareen testified that Casey reviewed the agreement with some other employees.

256. I find the Tentative Agreement was in the ratification room and was available to employees.

c) *The Notices*

257. I reject Local 75's argument that unions are not required to disclose any "extratextual changes" to terms of employment that arise in bargaining. But a careful review of *Myles* (and a purposive consideration of the duty to disclose in the ratification process) does not require all notices given in bargaining to be disclosed by a union.

258. The collective agreement in *Myles* required employees to obtain permission if they wished to work from home and provided that working from home would not become "normal". Despite this language, "for a number of years", employees worked from home almost as a matter of course without obtaining permission. In bargaining, the employer told the union it would begin to strictly enforce the language of the collective agreement. The union did not respond.

259. Notices to terminate estoppels, unlike other notifications that may be given in bargaining, entitle an employer to revert to collective agreement language and effectively end what has become a term of employment inconsistent with the collective agreement.

260. The Board rejected the Union's argument in *Myles* that the notice did not have to be disclosed, holding as follows:

> 58. …The question in this case is whether that obligation applies equally to the termination of a longstanding practice which is contrary to the strict language of the collective agreement.
> …
>
> 60. The duty to consult must at least be consistent with the statutory purpose of the ratification process which is to provide those who will be governed by the collective agreement a meaningful opportunity to express their views in a democratic vote. This must include advising employees how their terms and conditions of employment will be changed whether by way of changes in the language of the collective agreement or the elimination of a long-standing practice.
> …
>
> 64. The terms and conditions under which employees must work for the life of the collective agreement are of fundamental importance to them. The failure of the responding party to advise employees that the intervenor was going to eliminate a term and condition of employment that they had enjoyed for a number of years reflects a complete disregard for the critical consequences to employees and undermines the statutory purpose of requiring ratification votes. Therefore, the Board declares that the failure of the responding party to advise bargaining unit employees during the ratification process of the intervenor's position on Article 39 was arbitrary and a violation of section 74.

The Board held the applicant was entitled to damages for the opportunity she lost, i.e. that she could have discussed the issue with her fellow employees.

261. Unifor argues Fairmont's notices were effective and they concerned material terms of employment. From these facts, it follows, said Unifor, that they should have been disclosed.

262. Local 75 argues the notices did not pertain to past practices or were not relevant to arguable estoppels, or that the hotel did not provide enough information to end any estoppels that may have existed. And it further argues it is not the case that any "past practice" gives rise to an estoppel.

263. Pimentel testified the notice about giving back rooms would make it harder to give back rooms and could lead to discipline. She agreed in cross-examination that while the notices could affect working conditions, they were not all estoppel notices.

264. Casey's evidence was that "… at bargaining session (sic) that I participated in, Local 75 took the position that the notices were insufficient to terminate pre-existing practices, which were long-standing". He summarized Local 75's position to Fairmont again after bargaining ended. In cross-examination, he testified that he told Fairmont the union would grieve and organize workers in response to any reliance on the notices. In re-examination, Casey confirmed he told Fairmont at least once by phone that Fairmont was not entitled to strip workers' rights away and Local 75 would oppose any attempt to do so. In short, he explained why Local 75 did not include the notices in its communications. Local 75 argues it was entitled to evaluate the notices and decide (as Local 75 did) to respond to them by filing grievances and organizing workers to oppose them.

265. Casey was cross-examined about his understanding of some, but not all, of the notices. He agreed it would be a "big deal" if Fairmont interfered with the collective agreement right to give back rooms and that, if the employer tried to abridge rights to give back rooms, the union would organize and file grievances.

266. *Myles* involved a classic estoppel where, on giving notice, an employer is entitled to discontinue the favourable practice and apply the strict language of the collective agreement. As Local 75 argued, arbitrators apply the doctrine of estoppel cautiously. Not every notice in bargaining terminates an estoppel and unions may assess the effect of a notice before deciding whether to disclose it. Myles does not require disclosure of a notice if a union decides that the notice is not effective to terminate an estoppel or that its members' rights can be enforced in another way, and that is what Local 75 says it did here.

267. Unifor's communication to employees stated that the Notices would affect terms of employment, including the right to give back rooms.

268. The evidence did not establish that practices changed after the agreement was ratified. Evidence about the most significant claimed changes established that no change had occurred at all. The fact that Fairmont did not act to enforce its apparent rights under the Notices is consistent with Local 75's position that not all of the Notices were effective to terminate estoppels and had the immediate and decisive effect suggested by Unifor.

269. Several of the Notices were not notices to terminate estoppels like those in *Myles*, and Local 75 was entitled to respond to them as described by Casey's evidence. These Notices are as follows:

a) Fairmont gave notice under articles 6.3 and 6.4 of the collective agreement that it intended to move certain work to two single classifications, rather than it being shared by employees in many classifications. The collective agreement confirms management's right to determine work assignments and how employees perform their work. Article 6.3 provides that the employer must notify the Union if it intends to modify tasks and article 6.4 requires the employer to "review" changed workload with the union and entitles the union to grieve. This is not a notice to terminate a practice that is contrary to the strict language of the agreement. Furthermore, Local 75 has a right to review the changed workload with Fairmont and grieve;

b) Fairmont gave notice that the current practice of scheduling employees for breakfast, lunch and dinner in one workday ("triples") would end, to comply with the Employment Standards Act. Unifor said this would reduce employees' opportunities to earn gratuities by reducing the number of functions they could work, and that the ESA permits parties to agree to shifts longer than 8 hours. Chartres testified this notice affected about 36 employees. Unifor's evidence did not explain

how reducing the number of functions an employee can work in a day reduces their earning opportunities over a work week (for example). But in any event, scheduling employees falls within Fairmont's management's rights powers, and Unifor did not identify a collective agreement term that is contradicted by the practice of scheduling triples, nor did it lead evidence about of how widespread or consistent is the practice;

c) The collective agreement provides that banquet servers who refuse two or more assignments in a two-week period without authorization will be demoted. Pimentel testified authorized absences for reasons other than sickness, vacation and other leave days (known as "good circles") do not count as refusals. Fairmont gave notice that it was eliminating the current practice of "authorized absences/good circles", and that absences would only be authorized for specified reasons (including where approved). Unifor says this reduces flexibility among banquet employees. However, Unifor did not provide evidence about how material this practice was. In any event, this is not an estoppel. It is a warning about how Fairmont will exercise its discretion to authorize absences in accordance with the collective agreement and management's rights, and not a notice that strict language that contradicts the practice will be reverted to;

d) Fairmont's call-in practice was that employees had 30 minutes to respond to a call-in opportunity (if they were called and did not pick up) before manager would call the next senior person on the list. Fairmont advised its managers would now leave a message for employees who did not answer, advising them to call back as there may be a shift available for them. The employee would not be scheduled for the shift if it has been filled by the time they call back. In bargaining both Pimentel and Casey acknowledged the current method should be reviewed. In any event, there

was no evidence before me about the value of this provision, the frequency of the practice or its duration, or a clause in the collective agreement that is contradicted by Fairmont's practice;

e) The collective agreement does not prescribe how, on a function by function basis, start times, sections, end time or room location are assigned to individual employees who are working a function. Unifor says senior employees could choose their start and end times and could choose their work location at a function (for example, closer to the kitchen). There was no evidence before me about the frequency of the practice or its duration, or a clause in the collective agreement that is contradicted by Fairmont's practice.

270. Because they are not notices to terminate estoppels, the Notices above did not have to be disclosed to employees.

271. Three of the Notices, set out below, related to practices that contradicted collective agreement language and therefore they were potentially notices to terminate estoppels similar to the notice given in *Myles*.

a) Article 9.1 provides that all employees will be scheduled for 8 hours excluding a 30-minute paid lunch break. Chartres testified about 25 members received 8 hours pay for working an 8-hour shift that included a 30-minute lunch break and reversion to the collective agreement language would require them to work an 8.5 hour shift for 8 hours pay. The practice applying to 25 employees appears to contradict the strict language of the collective agreement;

b) Article 9.9 requires employees on shifts of five or more hours to take an unpaid meal break. Previously, Fairmont permitted employees to work straight through a five-hour shift without taking an unpaid break. Unifor says this is a material change for employees because it reduces their earnings or increases working hours. Pimentel testified that

"some" employees worked through their breaks. Unifor did not establish how many employees the practice affected or whether the practice was consistently applied;

c) Fairmont gave notice that the "[c]urrent practice of giving back rooms each day will cease and Employer will strictly construe Art. 29.9 of the CBA". The right to give back rooms is significant. Article 29.9 establishes a procedure when a room attendant believes they will not be able to clean their assigned rooms in a day: they tell their supervisor, who assesses the situation and may reduce the number of rooms an employee has to clean or arrange for assistance in cleaning the assigned rooms. Pimentel, Guanzon and Williams testified employees gave back rooms without the employer invoking the assessment process and without employees being disciplined. Both Fairmont's notice and the language of article 29.9 are silent about discipline and Chartres testified the purpose of the notice was not to discipline but to restore consistency to the process of giving back rooms, i.e. to ensure all managers would assess and discuss with an employee before a room was given back.

272. Unifor argued the change to the practice of giving back rooms was akin to the notice about working from home in *Myles*, i.e. that the practice had become an absolute right.

273. The collective agreement still permits employees to give back rooms, but the notice provides that the process for doing so may change (to comply with the language of the collective agreement).

274. The issue was the subject of discussion and was raised repeatedly by Unifor in its communication with employees, including its leaflets. Based on the language of article 29.9 and Chartres' evidence, the issue raised by Fairmont's notice is about the procedure to be followed when the right is invoked, i.e., that a supervisor will investigate before a room is given back. The notice did not relate to discipline and there was no evidence that any employee was disciplined.

275. All of these Notices involved the Employer saying it would revert to the collective agreement language. The notice related to article 9.1 affected 25 employees out of a potential bargaining unit of close to 1000 and the evidence did not establish how many employees would be affected by the notice related to article 9.9. Accordingly, I cannot find these changes to be significant.

276. However, the evidence established that the notice related to giving back rooms was a representation that the Hotel would begin to apply the language of the collective agreement (regarding the process to be followed in giving back rooms) and this affects a significant proportion of the bargaining unit (room attendants). Witnesses for both parties agreed the right to give back rooms is important, although Pimentel's evidence overstated the effect of the notice.

277. Local 75 should have disclosed this notice. However, to rescind the collective agreement for Local 75's failure to disclose it would not be an appropriate remedy and would be unfair, especially since Fairmont was not involved in Local 75's decision not to disclose the notices. I do not find it is appropriate to award damages for a loss of opportunity to discuss this issue (as was the case in *Myles*), since there was evidence the issue was raised by Unifor and was discussed.

278. The parties relied on several decisions where a trade union violated its duty to communicate properly in the ratification process and in none of those cases did the Board order the collective agreement be rescinded: *Mackie Automotive Systems (*sometimes cited as *Tovey)* 1998 CanLII 2776; *Norfolk General Hospital* 2002 CanLII 40665; *Zorzi*; *Cuddy*; and *Myles*.

Allegations of collusion to finalize the Tentative Agreement

279. Unifor argued that Fairmont and Local 75 colluded to defeat and deny its members and supporters their rights under the Act, asserting that Local 75 made last minute concessions late at night on April 29, 2018 when the memorandum to finalize the proposed collective agreement was signed. Unifor emphasizes that Fairmont's negotiator told Local 75 that Fairmont would "move heaven and earth" to assist Local 75 to close the open period. Both Fairmont and Local 75 denied collusion.

280. Unifor asked me to find that Local 75's last-minute agreement to a collective agreement term of May 1, 2018 to April 30, 2022 eliminated a retroactive pay increase that was on the table hours before the agreement was settled, which saved Fairmont (on its estimate) about $3,000.00 per room attendant over the life of the agreement, or more than $2 million across its entire payroll. Unifor further argued that the effect of the new term of the collective agreement would save pension and benefit costs and delay the commencement of the first open period (as compared to when it would be if the effective date of the new agreement were July 16, 2017). Unifor argues Local 75 bought Fairmont's support for its ratification of the Tentative Agreement.

281. Local 75 argues it accepted an agreement that was not retroactive in exchange for pension improvements and to enable the expiry date of the Fairmont agreement to line up with collective agreement expiry dates at other hotels. Although a retroactive term and wage increases were on the table until Fairmont's last offer, Casey testified he had had earlier sidebar discussions with Fairmont that considered a collective agreement with no retroactivity: the final position did not come "out of the blue". Chartres says Fairmont took a risk in offering a four-year term with significant wage increases in years three and four of the collective agreement (which exceed wages at its other operations in Canada) and Fairmont disputes Unifor's costing of the wage increase. Chartres candidly admitted that Fairmont's final offer mitigated some of that risk by proposing a lump sum rather than retroactivity, but Fairmont denies it saved millions and further notes that other monetary and non-monetary improvements were made in the 2018 – 2022 agreement which were not accounted for in Unifor's costing of the foregone retroactive pay.

282. Fairmont argues it said it would move heaven and earth to ensure employees understood this was the best deal they would get from Fairmont, not to close the open period. The full context of the remarks made at the time makes this clear. In fact, Fairmont's negotiator acknowledged in the lead-up to those comments that Unifor was looking to displace Local 75, but that the employer had gone as far as it could. He went on to express frustration with Local 75's negotiator that the union was looking for more.

283. A significant weakness in Unifor's argument that Local 75 made a last-minute concession to secure Fairmont's support in getting the Tentative Agreement ratified is that many of the things Unifor complains about to support its argument that Fairmont and Local 75 colluded to

get it ratified had already occurred before late April, 2018, i.e. the imposition of allegedly restrictive policies and discipline of its supporters. If, as Unifor says, these things were done to support Local 75 and help it conclude a collective agreement, there is no reason for Local 75 to have "paid for them" by a last-minute concession.

284. Furthermore, as Fairmont has argued, if Fairmont's objective was to ensure the Tentative Agreement was ratified, it was risking (by not agreeing to Local 75's demands) that the agreement might be rejected – especially in view of Unifor's aggressive campaigning against the agreement and a divided bargaining unit.

285. Finally, Unifor argues that the last-minute deal was part of a scheme of collusion between Fairmont and Local 75 to mislead employees about the Tentative Agreement. However, I have rejected most of Unifor's arguments that Local 75 violated the Act in communicating to employees about the Tentative Agreement. Fairmont's communication with employees after April 29, 2018 was limited, and with respect to the points that Unifor claims were part of a last minute concession (term, wages, pension), I have found neither Fairmont nor Local 75 misled employees.

286. Finally, the late-night agreement Unifor relies on to support its claim of collusion occurred on April 29, 2018. The open period would not occur for another two and a half months. Therefore, if the objective were to close the open period, there was no urgency in late April 2018 because it was not imminent.

287. Even if I accepted Unifor's arguments that Fairmont saved money on the final terms of the collective agreement, the evidence does not support a finding of collusion. Both Fairmont and Local 75 have explained their position on the terms of the Tentative Agreement and the terms (particularly the financial terms and the effect of retroactivity) were explained to employees by both parties to the agreement. Fairmont wanted a deal and it is not unusual for an employer to agree to support a proposed collective agreement.

288. Because the Tentative Agreement was ratified several weeks before the open period would have begun, Local 75 may have closed the open period during the intervening several weeks. Therefore, to declare the agreement void would give Unifor a remedy it may not have otherwise had access to.

Part 4 – Conclusions and disposition

289. I summarize the findings above, as follows. Most of the allegations made by Unifor and the DFR applicants have not been made out. Fairmont and Local 75 did not conspire to conclude a collective agreement to foreclose the open period. Local 75 did not mislead bargaining unit employees in the ratification process, subject to my finding below. The discipline issued to Unifor supporters was not tainted by anti-union animus. While I acknowledge some shortcomings in Fairmont's processes, the defects are not so significant to draw the inference that Fairmont was punishing employees for their support for Unifor.

290. Regarding the restrictions imposed by Fairmont on the right of Unifor representatives to access Hotel property and supporters to wear Unifor apparel, I am satisfied that those restrictions do not violate the Act. Unifor has not persuaded me that the existence of collective agreement rights that apply to Local 75 and its supporters entitles Unifor to similar rights or that Fairmont's failure to extend those rights amounts to improper support for Local 75.

291. Even if I had found violations of the Act as alleged by Unifor including the alleged violations regarding discipline, access to the workplace or rights to wear apparel, the violations are too remote from the ratification of the Tentative Agreement to grant the remedy requested of rescinding the agreement.

292. Fairmont and Local 75 have an arms-length and longstanding collective bargaining relationship. They are parties to a collective agreement that extends rights to Local 75 that both Local 75 and its supporters exercised in this case. Fairmont did not deny Unifor supporters the right to express their support for Unifor at the workplace in accordance with reasonable limitations. In considering allegations of improper employer support, this context is important. I find that, to the extent Local 75 and its supporters were treated differently than Unifor, it was not because Fairmont was providing prohibited employer support to Local 75.

293. I have found some violations of the Act and for all the foregoing reasons, I find and declare as follows:

a) that Local 75 violated section 74 of the Act by failing to communicate with Guanzon, Williams, and Timoteo about the status of their grievances and as a result, their processing was delayed. In Manalastas' case, Local 75 violated section 74 when it did not permit her step 2 meeting to be scheduled while she was serving her suspension. I declare that Local 75 violated the Act. I decline to order any other remedy because the applicants' grievances were otherwise processed in accordance with the Act;

b) that Fairmont violated sections 70 and 72 of the Act by prohibiting the signing of cards on Hotel property. Because I found this violation of the Act did not affect the ratification vote result and was only given to three Unifor supporters, it was limited in its effect and no further remedy is warranted;

c) that Fairmont violated sections 70 and 72 of the Act by enforcing a policy that was not previously enforced, i.e. that employees were not permitted to be on the property more than 30 minutes before or 30 minutes after their shift ended. Absent evidence (or a basis to infer) that this restriction affected the ratification vote or Unifor's campaign, no further remedy is warranted; and

d) that Local 75 violated section 74 of the Act by failing to disclose the Notice related to giving back rooms during the ratification process. Unifor raised this issue in its communications and therefore employees had ample opportunity for discussion about this issue in the ratification process. Furthermore, as noted above, the evidence did not establish consequences to employees arising from the notice. Accordingly, beyond a declaration, no further remedy is warranted.

"Paula Turtle"
for the Board

Ontario

ONTARIO LABOUR RELATIONS BOARD

Schedule A – Authorities

Applicants (Unifor and Duty of Fair Representation)

1. *St. Louis v. R*, 1896 CarswellNat 23 (SCC)

2. George Adams, *Canadian Labour Law*, 2nd ed

3. *Henry Heyink Construction Ltd. v Construction Workers Loc 53*, 2011 CarswellOnt 18710, (McKee) (Ont LRB)

4. *Mount Nemo Truckers Assn. v. Canada Crushed Stone*, 1977 CarswellOnt 964 (Burkett) (Ont LRB)

5. *UE v Square D Canada Electrical Equipment Inc.*, 1980 CarswellOnt 1056 (Franks) (Ont LRB)

6. *CAW-Canada v Coca-Cola Bottling Co.*, 2004 CarswellOnt 2174 (Albertyn) (Ont LRB)

7. *USWA v Adams Mine, Cliffs of Canada Ltd.*, 1982 CarswellOnt 1200 (Adams) (Ont LRB)

8. *USWA v Drillex International of Canada Inc.*, 1991 CarswellOnt 1129 (Nairn) (Ont LRB)

9. *Southern Ontario Newspaper Guild, Local 87 v Globe and Mail,* 1982 CanLII 841 (Burkett) (Ont LRB)

10. *IBEW, Local 636 v Mississauga Hydro Electric Co.,* 1994 CarswellOnt 1531 (Surdykowski) (Ont LRB)

11. *Southern Ontario News Guild v Metroland Printing,* 1994 CanLII 9946 (Nairn) (Ont LRB)

12. *Canada Post Corp. v CUPW,* 1986 CarswellNat 880 (Outhouse) (Can Arb)

13. *IWA Canadian Regional Council No. 1 v Great Lakes Forest Products Ltd.*, 1987 CarswellOnt 1318 (McCormack) (Ont LRB)

14. *Myles v AEU*, 2012 CarswellOnt 10786 (Steinberg) (Ont LRB)

15. *Tovey v CAW, Local 222*, 1998 CarswellOnt 3528 (Misra) (Ont LRB)

16. *Zorzi v Diamond "Z" Assn.*, 1975 CarswellOnt 763 (Kates) (Ont LRB)

17. *RWDSU v Cuddy Food Products Ltd.*, 1988 CanLII 3776 (Gray) (Ont LRB)

18. *IOUE, Local 793 v Traugott Ltd.*, 1984 CarswellOnt 780 (Ont Div Ct)

19. *Quesnel v. Ontario Public Service Employees Union*, 2004 CanLII 25607 (ON LRB)

20. *Sarnia Construction Assn. v. Operating Engineers Employer Bargaining Agency*, 2004 CarswellOnt 1952

21. *Petti et al., v. United Steelworkers of America*, 1983 CanLII 974 (ON LRB)

22. *Zorzi v Diamond "Z" Assn.*, 1975 CarswellOnt 763 (Kates) (Ont LRB)

23. *Ahokas v. C.U.P.E., Local 87*, 1983 CarswellOnt 1032

24. *Blasdell v. U.F.C.W., Local 1000A*, 2003 CarswellOnt 5799

25. *Employees of Manor Cleaners Ltd. v. Textile Processors, Service Trade, Health Care, Professional and Technical Employees International Union, Local 351*, 1983 CanLII 875 (ON LRB)

26. *RWDSU v Cuddy Food Products Ltd.*, 1988 CarswellOnt 1297

27. *Abramowitz et al. v. The Ontario Public Service Employees Union et al.*, 1987 CanLII 3247 (ON LRB)

28. *Tovey v CAW, Local 222*, 1998 CanLII 18424 (ON LRB)

29. *Myles v AEU*, 2012 CanLII 49256 (ON LRB)

30. *United Steelworkers of America v. Radio Shack*, 1979 CanLII 817 (ON LRB)

31. *International Union of Operating Engineers, Local 793 and Trugott Construction*, 1984 CanLII 2011 (ON SC)

32. *Superior Boiler Works & Welding Ltd. v CNFIU,* 2010 CarswellOnt 18491 (Ont LRB) (Shouldice)

33. *USWA v Hemlo Gold Mines Inc.*, 1993 CarswellOnt 1340 (Ont LRB) (Howe) (affirmed 1993 CarswellOnt 1379 (Ont Div Ct)

34. *Continental Group of Canada Ltd. v USWA*, 1980 CarswellOnt 1065 (Ont LRB) (Springate)

35. *National Cash Register Co. of Canada Ltd. v Canadian Business Machines Workers' Union*, 1967 CarswellOnt 282 (Ont LRB) (Weatherill)

36. *Unifor v UNITE HERE Local 75*, 2018 CanLII 118714 (Ont LRB) (Turtle)

37. *HREU Local 299 v Skyline Hotels Ltd.*, 1980 CarswellOnt 1127 (Ont LRB) (Mitchnick)

Responding Party – Unite Here Local 75

1. *Events at One King West Ltd.*, 2019 CanLII 76962 (ON LRB)

2. *The Northwest GTA Hospital Corporation*, 1999 CanLIII 20130 (ON LRB)

3. *Conseil scolaire de district des écoles catholiques du sud-ouest*, 2000 CanLII 12267 (ON LRB)

4. *Grand River Hospital Corporation*, 1997 CanLII 15490 (ON LRB)

5. *Hydon Holdings Ltd.* (Hy's Steak House), 1990 CanLII 5646 (ON LRB)

6. *Stratford Shakespearean Festival Foundation of Canada*, 2000 CanLII 11899 (ON LRB)

7. *Kraft Canada Inc.*, [1997] OLRB Rep. March/April 239

8. *McMaster University*, [1979] OLRB Rep. July 685

9. *Crock & Block Restaurant*, 1984 CanLII 948 (ON LRB)

10. *Amhil Enterprises Ltd.*, 2010 CanLII 72390 (ON LRB)

11. *Dubnury Homes (Holly) Ltd.*, 1998 CanLII 18299 (ON LRB)

12. *Student Transportation Canada Inc., c.o.b. as Leuschen Transportation*, 2017 CanLII 40210 (ON LRB)

13. *Indusmin Limited*, 1982 CanLII 993 (ON LRB)

14. *Mews Chevrolet Ltd.*, 2006 CanLII 7751 (ON LRB)

15. *Armatec Survivability*, 2018 CanLII 62801 (ON LRB)

16. *2233049 Ontario Corp.*, 2018 CanLII 66964 (ON LRB)

17. *Atlas Speciality Steels (Sammi Atlas Inc.)*, 1991 CanLII 6181 (ON LRB)

18. *The Corporation of the County of Grey operating as Grey Gables County Home for the Aged*, 2007 CanLII 22565 (ON LRB)

19. *Chris-Ann Bradshaw*, 2012 CanLII 67518 (ON LRB)

20. *Parkwood Hospital and Canadian Health Care Workers*, (1999) 77 L.A.C. (4^{th}) 192

21. *Inter-Bake Foods Ltd.*, 1981 CanLII 909 (ON LRB)

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Schedule "B" – Statutes

Labour Relations Act, 1995, SO 1995, c.1 Sched A

Purposes

2 The following are the purposes of the Act:

(1) To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.

[…]

What unions not to be certified

15 The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms.*

Mandatory ratification vote

44 (1) A proposed collective agreement that is entered into or memorandum of settlement that is concluded on or after the day on which this section comes into force has no effect until it is ratified as described in subsection (3).

Exceptions

(2) Subsection (1) does not apply with respect to a collective agreement,

(a) imposed by order of the Board or settled by arbitration;

(b) that reflects an offer accepted by a vote held under section 41 or subsection 42 (1);

(c) that applies to employees in the construction industry; or

(d) that applies to employees performing maintenance who are represented by a trade union that, according to trade union

practice, pertains to the construction industry if any of the employees were referred to their employment by the trade union.

Vote

(3) Subject to section 79.1, a proposed collective agreement or memorandum of settlement is ratified if a vote is taken in accordance with subsections 79 (7) to (9) and more than 50 per cent of those voting vote in favour of ratifying the agreement or memorandum.

Certain agreements not to be treated as collective agreements

53 An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act if an employer or employers' organization participated in the formation or administration of the trade union or contributed financial or other support to the trade union.

Employers, etc., not to interfere with unions

70 No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

Employers not to interfere with employees' rights

72 No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment

from becoming a member of a trade union or exercising any other rights under this Act; or

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

Duty of fair representation by trade union, etc.

74 A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Persuasion during working hours

77 Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade the employee during the employee's working hours to become or refrain from becoming or continuing to be a member of a trade union.

Inquiry, alleged contravention

96 (1) The Board may authorize a labour relations officer to inquire into any complaint alleging a contravention of this Act.

Duties

(2) The labour relations officer shall forthwith inquire into the complaint and endeavour to effect a settlement of the matter complained of.

Report

(3) The labour relations officer shall report the results of his or her inquiry and endeavours to the Board.

Remedy for discrimination

(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

(a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;

(b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or

(c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

Burden of proof

(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

Filing in court

(6) A trade union, council of trade unions, employer, employers' organization or person affected by the determination may file the determination, excluding the reasons, in the prescribed form in the Superior Court of Justice and it shall be entered in the same way as an order of that court and is enforceable as such.

Effect of settlement

(7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

No certification

(8) The Board shall not, under this section, certify a trade union as the bargaining agent of employees in a bargaining unit.

APPENDIX A

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